No. 17–70016

IN THE
United States Court of Appeals for the Fifth Circuit

ABEL REVILL OCHOA,
Petitioner–Appellant,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent–Appellee.

On Appeal from the United States District Court
for the Northern District of Texas, Dallas Division

RESPONSE IN OPPOSITION TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(2)(C), oral argument should be denied because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided thereby.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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RESPONSE IN OPPOSITION

Petitioner–Appellant Abel Revill Ochoa[1] (Ochoa) was convicted and sentenced to death after slaughtering five members of his family—his wife, his sister-in-law, his father-in-law, and his two young daughters—after his wife refused to give him money to buy crack-cocaine. Following unsuccessful direct appeal and state habeas proceedings, Ochoa sought federal habeas relief in district court. He also requested funding for a mitigation specialist to investigate the substantive merits of a procedurally defaulted ineffective-assistance-of-trial-counsel (IATC) claim and establish cause for his default by showing that state habeas counsel ineffectively failed to litigate the claim. But the district court denied funding, habeas relief, and any certificate of appealability (COA).

Ochoa now requests a COA from this Court and appeals the lower court's funding denial. Ochoa is not entitled to a COA, however, because reasonable jurists would not debate the district court's decision denying relief. The district court correctly found that all claims at issue in this appeal are unexhausted and procedurally defaulted as well as meritless. Additionally, the district court did not abuse its discretion by denying

[1] Respondent Lorie Davis will be referred to as "the Director."

funding because a mitigation specialist was not reasonably necessary to investigate Ochoa's defaulted and meritless IATC claim. This Court should therefore deny Ochoa's COA request, uphold the district court's rejection of Ochoa's funding motion, and affirm the district court's denial of relief.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. §§ 1291, 2253(c)(1)(A), & 2253(c)(2).

STATEMENT OF THE ISSUES

The lower court, United States District Court Judge Ed Kinkeade presiding, denied habeas relief and a COA. ROA.891.[2] Ochoa now seeks a COA from this Court, alleging that:

(1) the trial court violated his due-process rights when he was purportedly shackled in view of the jury; and

[2] The Director uses the following citation conventions: "ROA" refers to the record on appeal. "CR" refers to the clerk's record of trial documents. "RR" refers to the court reporter's trial transcript. "SX" refers to the State's trial exhibits. "SHCR–01, 02" refers to the clerk's record of documents filed in Ochoa's first and second state habeas proceedings, respectively. Since the Court of Criminal Appeals (CCA) did not label Ochoa's writs chronologically, Ochoa's initial writ package bears the cause number WR–67,495–02 (referred to herein as SHCR–02), while Ochoa's subsequent writ package bears the cause number WR–67,495–01 (referred to herein as SHCR–01). All references are preceded by volume number and followed by page number where applicable.

(2) his rights to a fair and impartial jury and the effective assistance of counsel were violated when the trial court limited his ability to question potential jurors on voir dire about whether they would be biased based on the number of victims.

See generally Application for a COA (Appl.). Ochoa relatedly argues that his counsel was ineffective for failing to object to the purported visible shackling and not adequately objecting to the trial court's limitation on voir dire questioning.

Finally, Ochoa also requests a COA on the district court's decision denying him funding to investigate his defaulted *Wiggins*[3] IATC claim[4] and the possibility of excusing his default by showing state habeas counsel's ineffectiveness. However, funding denials are reviewed for abuse of discretion and are not subject to the COA requirement. *Ayestas v. Stephens*, 817 F.3d 888, 895 (5th Cir. 2016).

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[3] *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel in a capital case must investigate mitigating evidence).

[4] Ochoa does not request a COA to appeal his *Wiggins* claim.

STATEMENT OF THE CASE

I. Facts of the Crime

In describing the facts of the crime, the district court adopted the following findings[5] of the state habeas court:

> 1. [. . .][T]hirty-year-old Ochoa shot several family members after smoking crack cocaine on Sunday, August 4, 2002. [38.RR.112.] The record reflects that, twenty minutes after smoking a ten-dollar rock of crack, Ochoa entered his living room and systematically shot his wife Cecilia, their nine-month-old[6] daughter (Anahi), Cecilia's father (Bartolo), and Cecilia's sisters (Alma and Jackie). [33.RR.32–36.] Ochoa reloaded his .9mm Ruger and chased his 7–year-old daughter, Crystal, into the kitchen where he shot her four times. [SX.2A; RR-Examining Trial: 14]. Of the six victims, only Alma survived. [33.RR.40–41.]
>
> 2. The record reflects that, minutes after the shooting, the police stopped Ochoa while driving his wife's Toyota 4Runner. [33.RR.97–98.] Ochoa told the arresting officer that the gun he used was at his house on the table, that he could not handle the stress anymore, and that he had gotten tired of his life. [33.RR.105–06.] In a search conducted after arrest, the police found a crack pipe, steel wool, and an empty clear baggie on Ochoa's person. [33.RR.109–10.] Ochoa gave the police a detailed written statement recounting his actions in the shootings. [34.RR.35–46; SX.2A.]

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[5] State court findings are presumed correct on federal habeas review. 28 U.S.C. § 2254(e)(1).

[6] Anahi's age at the time of her death is inconsistently listed in the record as both nine and eighteen months. [footnote added]

ROA.827; *Ochoa v. Davis*, 3:09–CV–2277–K, 2016 WL 5122107, at *1–2 (N.D. Tex. Sept. 21, 2016) (citing SHCR–02.349); *see also Ochoa v. State*, AP–74,663, 2005 WL 8153976, at *1–4 (Tex. Crim. App. Jan. 26, 2005) (unpublished). Ochoa did not present any witnesses at guilt-innocence. 34.RR.83.

II. Punishment Facts

At punishment, the State introduced firearm and autopsy evidence concerning the killings of Ochoa's daughter Anahi, sister-in-law Jackie, and father-in-law. 35.RR.29–33, 42, 50, 57. The State also recalled Ochoa's other sister-in-law Alma Alvizo, who explained that she lost a kidney and was in the hospital for three months after Ochoa shot her. 35.RR.58. Alviso stated that Ochoa had become aggressive towards Cecilia after finding out that Cecilia had previously had a son by another man and concealed the fact from him. 35.RR.58–60. In 1997, he threatened to shoot his wife. 35.RR.60. Alviso also once witnessed Ochoa grab Cecilia by the hand and pull her toward him when she was trying to leave Alvizo's house. 35.RR.65–66. Alviso suspected that Ochoa was the cause of bruising that she saw on Cecilia. 35.RR.88–89. Ochoa also

pointed a gun at Cecilia three weeks before the murder. 35.RR.90. The State rested after Alviso's testimony. 35.RR.96.

The state habeas court made the following factual findings relevant to the defense case at punishment:

> 56. [. . .]Ochoa's defensive theory was that Ochoa committed this offense in a cocaine-induced delirium and had brain damage in his frontal lobes from cocaine abuse which affected his impulse control and made him more susceptible to a state of delirium. [36.RR.40–103; 39.RR.10–34].
>
> 57. [. . .][T]he jury knew, from Ochoa's confession and testimony, that he had a long-standing addiction to crack, that he financed his crack habit with an illegal small-loan scheme, and that the offense was drug-related. [34.RR.43–46; 38.RR.69–135]. The jury heard additional evidence of his crack addiction through the testimony of his brothers, Gabriel and Javier [35.RR.139, 145–47, 151; 36.RR.175–77], his brother-in-law, Victor [(37.RR.166–68)], and the director of a drug rehabilitation center he once attended. [37.RR.102–11]. The jury heard Ochoa's father testify that he was an alcoholic and abusive toward Ochoa's mother in front of the children. [35.RR.113–15, 128–29].
>
> 58. [. . .][T]he defense presented sixteen witnesses at the punishment phase, including relatives, neighbors, coworkers, church acquaintances, and law enforcement personnel, to discuss Ochoa's difficult childhood, his relatively crime-free life prior to his addiction to crack, his mild brain damage from crack abuse, his work ethic, his lack of disciplinary problems in jail, and the conditions under which he would live if given a life sentence at TDCJ-ID.

> 59. [. . .] [T]he defense had a well-presented theory of long-term crack addiction and rehabilitation attempts by an otherwise law-abiding person to offer in mitigation of punishment.

SHCR–02.360–61. In rebuttal, the State presented Dr. Richard Coons[7], who "provided testimony from which a jury could infer that [Ochoa] would be a continuing threat to society. Coons also attributed the murders to [Ochoa]'s frustration and anger and not to a 'cocaine-induced delirium.'" *Ochoa v. State*, 2005 WL 8153976, at *5. Countering Dr. Coons's testimony, the defense recalled its expert, Dr. Edgar Nace, who disputed Dr. Coons's opinions concerning drug-induced delirium, Ochoa's lack of a conscience, and the possibility that Ochoa's brain damage would render him more violence prone. 39.RR.11–12, 19, 22.

III. Conviction and Postconviction Proceedings

A Texas jury convicted Ochoa of capital murder for killing his wife and one of his daughters. CR.2, 390. Pursuant to the jury's answers to Texas's punishment-phase special issues, the trial court sentenced Ochoa

[7] Ochoa calls Dr. Coons a charlatan, in large part because his testimony was found unreliable in *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010). However, this Court has recognized that the CCA's decision in *Coble* was limited to *Coble*'s particular facts. *Devoe v. Davis*, No. 16–70026, 2018 WL 341755, at *7 (5th Cir. Jan. 9, 2018) (unpublished).

to death. *Id*. The CCA upheld Ochoa's conviction and sentence on automatic direct appeal. *See generally Ochoa v. State*, 2005 WL 8153976; Tex. Code Crim. Proc. art. 37.071, § 2(h). Ochoa did not file a petition for certiorari with the Supreme Court. Appl.14.

Ochoa sought state habeas review of his conviction, filing an initial habeas application, to which he added a pro se supplement. SHCR–02.2–55, 158–62. Ochoa also filed a subsequent pro se application. SHCR–01.2–13. With respect to Ochoa's initial application, the CCA adopted the trial court's findings and conclusions and denied relief. *Ex parte Ochoa*, No. WR–67,495–01, –02, slip op. at 2, 2009 WL 2525740 (Tex. Crim. App. Aug. 19, 2009) (per curiam) (unpublished). With respect to Ochoa's subsequent pro se application, the CCA denied it as an abuse of the writ under Texas Code of Criminal Procedure Article 11.071, Section 5. *Id*.

Ochoa then filed a federal habeas petition. ROA.24. The Director answered (ROA.272), and Ochoa replied (ROA.418). On Ochoa's motion, the lower court stayed proceedings pending the Supreme Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013). ROA.566, 617. Following the decision in *Trevino*, the lower court reopened proceedings and ordered supplemental briefing, which the parties supplied. ROA.624, 631, 649.

In conjunction with his federal habeas petition, Ochoa filed a motion under 18 U.S.C. § 3599 seeking funding to further investigate his *Wiggins* IATC claim. ROA.783, 804. The district court denied funding (ROA.819) and later habeas relief in a memorandum opinion and order. ROA.825. The district court also denied a COA. ROA.891. The instant COA application followed.

SUMMARY OF THE ARGUMENT

Ochoa appeals the district court's denial of investigatory funding under 18 U.S.C. § 3599(f) to develop his defaulted *Wiggins* IATC claim and show that state habeas counsel ineffectively failed to litigate it. Ochoa asserts that his proposed investigation would have helped demonstrate his entitlement to relief on the merits and provided an excuse for his default under *Martinez*[8] and *Trevino*. Appl.28–35. Contrary to Ochoa's argument, however, the district court's decision to deny funding is not subject to the COA requirement. *Id*. at 35. Rather, this decision is only evaluated for abuse of discretion. *Ayestas*, 817 F.3d at 895.

[8] *Martinez v. Ryan*, 566 U.S. 1 (2012).

Ochoa largely bases his argument on the recent Supreme Court certiorari grant in *Ayestas v. Davis*, 137 S. Ct. 1433 (2017). Ochoa correctly notes that the district court employed the "substantial need" language at issue in *Ayestas*. ROA.823. However, the "substantial need" standard remains the law of the Circuit until the Supreme Court rules otherwise. Ochoa also does not demonstrate that he contested the application of this language in the court below, thereby waiving the instant argument on appeal. Indeed, his argument in the court below was that he had demonstrated a substantial need. ROA.795.

Nevertheless, funding was not reasonably necessary regardless of the eventual outcome in *Ayestas*. The district court found that Ochoa's underlying *Wiggins* IATC claim was both procedurally defaulted and meritless. ROA.830, 846–53, 958–62. Concerning *Martinez*, the district court found that state habeas counsel was not ineffective, and, further, the claim that habeas counsel omitted was meritless. ROA.850. Concerning the merits, the district court found that Ochoa failed to show either deficiency or prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). ROA.850–53, 958–62. This Circuit has held that *Martinez*

itself does not mandate funding. *Allen v. Stephens*, 805 F.3d 617, 638 (5th Cir. 2015).

Ochoa's application also maintains that reasonable jurists could debate the district court's decision rejecting his claims that: (1) his right to due process was violated when he was visibly shackled during the punishment phase of his capital murder trial; and (2) his trial counsel was ineffective for failing to object to his visible shackles. Appl.35–43. The district court held that these claims were unexhausted, procedurally defaulted, and meritless. ROA.846–50, 869–72, 874–75. The district court found that Ochoa did not object to the purported visible shackling, no mention of shackling was made in the record, and the evidence of visible shackling submitted by Ochoa during federal habeas review was conclusory and speculative. *Id*. The court also found that Ochoa failed to show that the shackling—if it occurred—was unjustified under the permissible circumstances set forth in *Deck v. Missouri*, 544 U.S. 622, 633 (2005). ROA.872. Consequently, the court found that Ochoa could not show that either the trial court erred or that an objection would have been sustained. ROA.872, 874–75. Reasonable jurists could not debate the district court's procedural or merits determinations regarding

Ochoa's shackling claims, and Ochoa must show both the procedural determination and the merits determination are debatable to obtain a COA.

Finally, Ochoa contends that reasonable jurists would debate that Ochoa's rights to a fair and impartial jury and the effective assistance of counsel were violated when the trial court limited his ability to question jurors about whether they would be biased because of the number of victims. Appl.43–47. He relatedly claims that his trial counsel was ineffective for not making an adequate objection to the court's limitation or ensuring that the objection and ruling were in the record. *Id*. But the district court found that Ochoa's voir dire claims were procedurally defaulted and alternatively meritless. ROA.846–50, 853–56, 874–75. The district court found that Ochoa had failed to show that any juror was actually biased against him and thus could not show prejudice. *Id*. The district court also noted the wide latitude given to trial courts to regulate voir dire and found that Ochoa's proposed questioning was not constitutionally compelled. *Id*. Neither the district court's procedural nor substantive conclusions concerning Ochoa's voir dire claims are debatable.

In sum, the district court properly denied relief under the plain facts in the record and controlling Supreme Court and Circuit precedent. Reasonable jurists could not debate the district court's decision, and Ochoa fails to demonstrate that he deserves encouragement to proceed further. Nor did the district court abuse its discretion with respect to Ochoa's ancillary funding motion. Accordingly, any COA should be denied, and the district court's decision should be affirmed.

ARGUMENT

I. Standard of Review

A COA is necessary to appeal the denial of federal habeas relief, 28 U.S.C. § 2253(c)(1), and the requirement is jurisdictional. *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003) (*Miller-El I*). For claims denied on the merits, an inmate must make "a substantial showing of the denial of a constitutional right," § 2253(c)(2), which requires that "reasonable jurists could debate whether (or, for that matter, agree that)" the court below should have resolved the claims in a different manner, or that the claims "deserve encouragement to proceed further." *Miller-El I*, 537 U.S. at 336. For claims disposed of on procedural grounds the inmate must show "that jurists of reason would find it debatable whether the petition

states a valid claim of a denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). This "requires an overview of the claims in the habeas petition and a general assessment of their merits" but not "full consideration of the factual or legal bases adduced in support of the claims." *Miller-El I*, 537 U.S. at 336. "In a habeas corpus appeal, [this Court] review[s] the district court's findings of fact for clear error and reviews its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Thompson v. Cain*, 161 F.3d 802, 805 (5th Cir. 1998).

As noted above, Ochoa's challenge to the district court's denial of investigatory funding is reviewed under the abuse-of-discretion standard. *Ayestas*, 817 F.3d at 895. Under this standard, "[i]t is not enough that the granting of relief might have been permissible, or even warranted. . . . [The] denial of relief must have been so unwarranted as to constitute an abuse of discretion." *Diaz v. Stephens*, 731 F.3d 370, 374 (5th Cir. 2013) (citation omitted). "A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly

erroneous assessment of the evidence." *Hesling v. CSX Trans., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (citation omitted).

Here, even a threshold assessment of Ochoa's claims reveals that the district court's denial of relief is not debatable among reasonable jurists, and a COA should be denied. Likewise, Ochoa fails to show that the district court erroneously construed the law or the facts in denying funding. Consequently, Ochoa fails to show any abuse of discretion, and the district court's opinion should be affirmed.

II. The District Court Did Not Abuse Its Discretion by Denying Funding.

In conjunction with his petition, Ochoa filed a motion seeking funding under 18 U.S.C. § 3599. ROA.783, 804. The district court denied Ochoa's funding request. ROA.819, 960–61. The court held that Ochoa's underlying *Wiggins* claim was unexhausted and procedurally defaulted as well as meritless. ROA.830, 846–53, 958–62. The court further noted that the *Martinez* exception to Ochoa's procedural default was not applicable because state habeas counsel was not ineffective and the underlying claim was not substantial. ROA.850. The court further noted that Ochoa's proposed investigation would only supplement prior adduced evidence. ROA.960–61.

Ochoa now requests relief based on the Supreme Court's pending decision in *Ayestas*. Appl.iii, 32–33, 35. But a grant of certiorari does not alter the application of this Court's precedent. Ochoa also has not shown that he pressed an *Ayestas*-type argument in district court and has thus waived his challenge to this Circuit's substantial need standard. *Johnson v. Puckett*, 930 F.2d 445, 448 (5th Cir. 1991).

Furthermore, contrary to the assertion in Ochoa's application (Appl.33–34), this Circuit has also held that *Martinez* does not mandate funding. *Allen*, 805 F.3d at 638; *Crutsinger v. Stephens*, 576 F. App'x 422, 431 (5th Cir. 2014) (unpublished) ("*Martinez* . . . does not mandate pre-petition funding, nor does it alter our rule that a prisoner cannot show a substantial need for funds when his claim is procedurally barred from review."); *cf. Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016) (declining to hold that *Martinez* mandates an opportunity for additional fact-finding in support of excusing procedural default because reading such a right to an evidentiary hearing in federal court "would effectively guarantee a hearing for every petitioner who raises an unexhausted IATC claim and argues that *Martinez* applies"). And even if the *Martinez* exception applied to Ochoa's defaulted *Wiggins* IATC claim, the

governing statute precludes a federal court, in adjudicating a state prisoner's procedurally defaulted IATC claim, from considering evidence regarding trial counsel's performance that is outside the state court record. 28 U.S.C. § 2254(e)(2).

Finally, Ochoa is not entitled to funding regardless of the outcome in *Ayestas* because his proposed investigation is not reasonably necessary. Ochoa's investigation would have only bolstered a procedurally defaulted and meritless IATC claim and supplemented existing evidence. ROA.960–61 (citing *Smith v. Dretke*, 422 F.3d 269, 288–89 (5th Cir. 2005); *Ward v. Stephens*, 777 F.3d 250, 266 (5th Cir.), cert. denied, 136 S. Ct. 86 (2015); *Jackson v. Dretke*, 181 F. App'x 400, 414 (5th Cir. 2006) (unpublished)); *see also Brown v. Stephens*, 762 F.3d 454, 459 (5th Cir. 2014). Funding investigation is pointless if the facts uncovered cannot ultimately be considered. *See*, *e.g.*, *Mamou v. Stephens*, CIV. H–14–403, 2014 WL 4274088, at *2 (S.D. Tex. Aug. 28, 2014). The district court thus did not abuse its discretion by denying Ochoa's

attempt to supplement his well-documented but still defaulted and meritless *Wiggins* IATC claim.[9] *Ayestas*, 817 F.3d at 895.

A. A certiorari grant is not binding precedent.

A grant of certiorari is not binding precedent. *Neville v. Johnson*, 440 F.3d 221, 223 (5th Cir. 2006) (per curiam) ("Although the Supreme Court has granted a writ of certiorari [. . .] our precedent . . . remains binding until the Supreme Court provides contrary guidance"); *Cantu v. Collins*, 967 F.3d 1006, 1012 n.10 (5th Cir. 1992) (citing *Johnson v. McCotter*, 804 F.2d 300, 301 (5th Cir. 1986)); *Bridge v. Collins*, 963 F.2d 767, 770 n.5 (5th Cir. 1992); *Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir. 1992). This Court should apply "the settled law of our circuit until it is changed by the Court or the Supreme Court has plainly signaled a change." *Selvage v. Lynaugh*, 842 F.2d 89, 95 (5th Cir. 1988), *vacated sub nom.*, *Selvage v. Collins*, 494 U.S. 108 (1990). Here, the settled law of the Circuit is the "substantial need" standard, and the Court should continue

[9] The Director argued in *Ayestas* that the circuit courts lack jurisdiction to review a district judge's denial of a petitioner's request for investigative funding because the denial is an administrative function. The Director reurges this argument here in the event that the Supreme Court adopts it.

to apply it unless and until it is modified by the Supreme Court or the en banc court.

B. Ochoa has waived any *Ayestas*-type funding challenge.

Ochoa argues that the Supreme Court may use *Ayestas* as a vehicle to strike down Circuit precedent holding that a habeas petitioner cannot demonstrate an entitlement to investigative funding without showing a "substantial need" for resources. *See*, *e.g.*, *Brown*, 762 F.3d at 459. But Ochoa fails to show where in district court he argued that the Circuit's substantial need language is unlawful and therefore he waived the argument on appeal. *See generally* Appl.28–35; *Johnson*, 930 F.2d at 448 ("We have repeatedly held that a contention not raised by a habeas petitioner in the district court cannot be considered for the first time on appeal from that court's denial of habeas relief.").

Although the Supreme Court granted certiorari in *Ayestas* after the district court's decision in Ochoa's case, nothing prevented Ochoa from arguing—much like Ayestas did—that this Circuit's substantial need standard failed to track the statutory language. *Cf. Rayford v. Stephens*, 622 F. App'x 315, 333 (5th Cir. 2015) (unpublished) (finding district court did not abuse its discretion in refusing to allow a new claim relying on

Martinez/*Trevino* because petitioner's "counsel made the conscious decision not to assert the claim in the federal habeas petition—unlike, notably, the federal habeas counsel in *Martinez*, who asserted the otherwise procedurally defaulted claim in the federal habeas petition and ultimately got the law changed"). The Court's substantial need standard has existed in case law for some time, and Ochoa could have challenged it in the district court if he believed that it was erroneous. *See*, *e.g.*, *Riley v. Dretke*, 362 F.3d 302, 307 (5th Cir. 2004); *Clark v. Johnson*, 202 F.3d 760, 768 (5th Cir. 2000); *Fuller v. Johnson*, 114 F.3d 491, 501–02 (5th Cir. 1997).

C. Section 2254(e)(2) precludes the consideration of new evidence in this case, rendering funding unnecessary.

Section 2254(e)(2) "restricts the discretion of federal courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court." *Cullen v. Pinholster*, 563 U.S. 170, 186 (2011); *Williams v. Taylor*, 529 U.S. 420, 427–29 (2000) (applying § 2254(e)(2) to the introduction of evidence that would support an unexhausted *Brady*[10] claim); *see also Holland v. Jackson*, 542 U.S. 649,

[10] *Brady v. Maryland*, 373 U.S. 83 (1963).

653 (2004) (applying this restriction whether petitioner seeks to introduce new evidence through either a live evidentiary hearing or through written submission). Section 2254(e)(2)'s limitations should not be disregarded; doing so would encourage petitioners to sandbag and decline to raise IATC claims in state court so that they may get more favorable treatment—like more funding for factual development—in federal court. *Cf. Ward*, 777 F.3d at 257 n.3.

Section 2254(e)(2)'s general bar is subject to exception—for example, when "the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court." *Williams*, 529 U.S. at 435. The bar also does not apply where the claim relies on a new, retroactive, and previously unavailable rule of constitutional law or when the factual predicate could not have been previously discovered through the exercise of due diligence. 28 U.S.C. § 2254(e)(2)(A)(i), (ii).

However, none of these exclusions apply in the instant case, and § 2254(e)(2)'s bar on new evidence means that requests for funding cannot be reasonably necessary. Ochoa's argument that state habeas counsel was deficient for not conducting a thorough investigation to

uncover the pieces of evidence he now alleges state habeas counsel *should* have found, necessarily means that state habeas counsel was not diligent in developing the factual basis for his *Wiggins* IATC claim.[11] *Williams*, 529 U.S. at 432; 28 U.S.C. § 2254(e)(2). Nor is *Wiggins* a new rule of constitutional law unavailable at the time the state court reviewed Ochoa's habeas application. *Wiggins*, 539 U.S. at 510 (decided June 2003); SHCR–02.2 (application filed Feb. 11, 2005). Additionally, for trial counsel to be ineffective for failing to investigate several areas of mitigation, the factual predicate must have been available—and was thus discoverable—at the time of trial. 28 U.S.C. § 2254(e)(2)(A)(i), (ii).

Lastly, to circumvent the statute, Ochoa has the difficult burden of showing that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Ochoa's *Wiggins* claim concerns punishment and not guilt-innocence, but to the extent that

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[11] The Director maintains below that state habeas counsel was effective, thereby negating *Martinez*'s application and leaving Ochoa's IATC claim procedurally defaulted. However, if state habeas counsel was not effective and *Martinez* applies—as claimed by Ochoa—then Ochoa cannot circumvent § 2254(e)(2). Either way, Ochoa is not entitled to funding.

§ 2254(e)(2)(B) is still applicable, Ochoa—who slaughtered five people and shot another—cannot show that no reasonable factfinder would have sentenced him to death even if more mitigating evidence could have been presented.

D. Funding is not reasonably necessary regardless of *Ayestas*'s outcome.

The district court reviewed Ochoa's *Wiggins* IATC claim and found it was procedurally defaulted and that the default could not be evaded under *Martinez*. ROA.830, 846–53, 958–62. In the alternative, the district court also found that Ochoa's *Wiggins* IATC claim was meritless. Based on this, the district court did not abuse its discretion in denying Ochoa's request for funding under § 3599.

Section 3599 provides that a district court *may* authorize appointed counsel to obtain investigative or expert services upon a showing that such services are "*reasonably necessary* for the representation of the defendant." 18 U.S.C. § 3599(f) (emphasis added). This Court has upheld the denial of such funding when a petitioner has: (a) failed to supplement his funding request with a viable constitutional claim that is not procedurally barred; (b) when the sought-after assistance would only support a meritless claim; or (c) when the sought-after assistance would

only supplement prior evidence. *Smith*, 422 F.3d at 288 (citations omitted). Here, Ochoa meets all three criteria for denial—his claim is procedurally barred, it is meritless, and his investigation would have only supplemented the evidence adduced by trial counsel and instant federal counsel.[12] Consequently, the district court held that Ochoa was not entitled to funding to further investigate his claim because it was not necessary, *Martinez* did not require it, further evidence would have merely supplemented existing evidence, and Ochoa's existing allegations, even if true, did not demonstrate IATC. ROA.819–24, 960–62

Ochoa's *Wiggins* IATC claim is unquestionably unexhausted and procedurally defaulted. ROA.846–53. Ochoa asserts that he can evade his default under *Martinez*/*Trevino*, but the district court correctly found that "Ochoa has not shown a lack of diligence by his original state habeas counsel in those proceedings, but even if he had, such counsel could not be found ineffective for the purpose of the *Martinez* exception for failing to present a meritless claim." Appl.15–16; ROA.850 (citing *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013); *Beatty v. Stephens*, 759 F.3d

[12] The district court also noted that the statute of limitations had run on new claims. ROA.819.

455, 466 (5th Cir. 2014)). An appellate attorney's effectiveness is measured by the same standard applied to trial counsel: whether the performance was objectively reasonable and whether any deficient performance prejudiced the proceeding. *Sharp v. Puckett*, 930 F.2d 450, 452 (5th Cir. 1991). State habeas counsel, if required by the facts, also has an obligation under *Strickland* to perform "some minimum investigation prior to bringing the initial state habeas petition." *Trevino v. Davis*, 829 F.3d 328, 347–49 (5th Cir. 2016). However, appellate counsel is not ineffective for failing to raise every possible point on appeal. *Smith v. Robbins*, 528 U.S. 259, 288 (2000). Rather, appellate counsel is obliged to raise and brief only those issues that he believes have the best chance of success. *Id.* at 285. Only "[s]olid, meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention." *United States v. Williamson*, 183 F.3d 458, 462–63 (5th Cir. 1999).

Here, Ochoa's habeas counsel filed a fifty-three-page petition raising nine points of error—just not the points of error that Ochoa now urges in his federal habeas petition. SHCR–02.2–55. This application included several ineffectiveness claims—in particular, claims against

both trial counsel and appellate counsel. *Id.* The application is supported by exhibits and affidavits, including an affidavit from Ochoa discussing his interaction with trial counsel. SHCR–02.67–68. The exhibits totaled 101 pages. SHCR–02.56–157.

In district court, Ochoa submitted state habeas counsel's billing records from Dallas County. ROA.516–21. Without conceding the completeness or validity of these records, the Director observes that they refute the very point that Ochoa is trying to make. *Id.* They show counsel did 244 hours of work on the state writ application. *Id.* To put this number in perspective, 244 hours is over a month-and-a-half of forty-hour workweeks spent on Ochoa's case. *Id.* This number also includes thirty-one hours of travel and meetings with either Ochoa or other witnesses and attorneys, as well as additional hours of legal research and the review of the record and the court files. *Id.*

Based on this, it is evident that state habeas counsel performed sufficient extra-record investigation and presented a competent writ application. Simply because counsel did not raise an allegation that Ochoa now contends he should have raised does not render counsel's

assistance ineffective under *Strickland*.[13] *Cf. Jones v. Barnes*, 463 U.S. 745, 751–53 (1983) (holding appellate counsel is only constitutionally obligated to raise and brief those issues that are believed to have the best chance of success). As such, even with the benefit of *Martinez*, Ochoa cannot establish the cause that would excuse his unexhausted claim from being procedurally defaulted.

Furthermore, prejudice cannot be shown in the absence of a reasonable probability that, but for counsel's omitting a particular argument, the case would have been reversed on appeal. *Smith*, 528 U.S. at 285. As shown below, Ochoa's underlying claim is plainly without merit. Because Ochoa's underlying claim is meritless, there is no way that Ochoa can make the "substantial" showing required by *Martinez* that he was prejudiced by state habeas counsel's alleged deficiencies. 566 U.S. at 14; ROA.850. Similarly, even assuming he has successfully shown

[13] In comparison, Martinez's counsel filed a statement that she could find no colorable claim for post-conviction relief. *Martinez*, 566 U.S. at 6–8. The state court gave Martinez the option of filing a pro se petition, but Martinez alleged that his counsel failed to inform him that he needed to do so. *Id*. After the time to file a petition expired, the trial court dismissed the collateral action. *Id*. Later, represented by new counsel, Martinez filed a new notice of post-conviction relief in state court and alleged that Martinez's trial counsel had been unconstitutionally ineffective. *Id*. But Martinez's petition was dismissed since he did not present the claim in the first proceeding. *Id*. In federal habeas proceedings, the district court denied Martinez's claims as procedurally barred. *Id*.

cause under *Martinez*—Ochoa cannot show accompanying actual prejudice. *Hernandez v. Stephens*, 537 F. App'x 531, 542 (5th Cir. 2013) (unpublished), *cert. denied*, 134 S. Ct. 1760 (2014); *see*, *e.g.*, *Martinez*, 566 U.S. at 18 (remanding to address prejudice).

Indeed, the lower correctly set forth the governing standard for IATC claims and found that Ochoa's underlying claim failed to meet either prong of *Strickland*'s test. ROA.837–38; *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010) ("Surmounting *Strickland*'s high bar is never an easy task."). Concerning Ochoa's particularized allegations that trial counsel had failed to adequately investigate and present mitigating evidence, the district court accurately noted that this Circuit has cautioned: "'We must be particularly wary of arguments that essentially come down to a matter of degrees. Did counsel investigate enough? Did counsel present enough mitigating evidence? Those questions are even less susceptible to judicial second-guessing.'" ROA.846–53 (quoting *Carty v. Thaler*, 583 F.3d 244, 258 (5th Cir. 2009); *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000); *Ward*, 777 F.3d at 265)).

In fact, the district court found that the mitigation presented in this case was "extensive" and Ochoa failed to show that counsel did not make

strategic decisions regarding the investigation and presentation of evidence. ROA.851–52. As ably explained by the lower court:

> In the instant case, even if the claim comes within the exception to procedural bar, the alternative merits analysis is correct. Ochoa does not complain that trial counsel did not present evidence of his background, but merely that he did not present enough of it. But this was not a case where an abusive background could help to explain a long criminal history or other pattern of misbehavior that inexorably led to the crime. This was a case where the defendant was a hard-working, family man who did not have as much as a traffic ticket before the afternoon when he murdered five people, including his wife, her family members and their children. Trial counsel chose to focus on the power of Ochoa's cocaine addiction to explain this sudden anomaly that occurred after his wife refused to buy him more drugs. [39.RR.55–65.]
>
> At trial, counsel presented evidence from multiple expert and lay witnesses touching on Ochoa's life, background, character, culpability, potential for rehabilitation, and projected conditions of confinement if sentenced to life. [ROA.850–53.] Ochoa's complaint does not identify an area or subject that was not generally covered by the evidence trial counsel presented to the jury. Instead, he points to additional evidence of Ochoa's background that may have been cumulative of what was already presented or less relevant than the evidence actually presented. For example, he argues that additional evidence should have been presented regarding his early life in Mexico. [ROA.110–11.] Ochoa's father testified about their poor living conditions there [35 RR.106–10], but Ochoa testified at trial that his earliest memories were living on a farm in Texas. [38.RR.5–6.] Ochoa also now argues that additional testimony should have been provided regarding Ochoa's father, specifically regarding his alcoholism and abuse of Ochoa's family. [ROA.110–11.] But Ochoa and his brother testified that their

> father was an alcoholic that would beat their mother, requiring the assistance of Ochoa and his brothers to get their father off of her, and that this upset Ochoa greatly. [38.RR.8–9; 36.RR.159–60.] Ochoa's father also testified about the history of alcohol abuse in their family, and that he used to get drunk and beat his family, but that he stopped after he had an accident while driving intoxicated. [35.RR.113–16.] Defense expert Dr. Edward Nace also testified about the addiction problem in Ochoa's family, including his father's alcoholism and its impact on Ochoa. [36.RR.64–65.]
>
> Not only is this allegation insufficient to warrant habeas relief, it would be insufficient to grant investigative funding.

ROA.959–60.

Ochoa claims that this testimony was inadequate, but the record clearly shows that the witnesses related all pertinent facts concerning Ochoa's childhood. Further testimony by Ochoa's father or brothers—or by his uncalled mother, maternal uncles, and aunt—would have been redundant/cumulative. *Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984) (counsel's decision not to present cumulative and redundant testimony does not constitute ineffective assistance). And by failing to produce any affidavit from counsel[14] explaining the defense's reasoning,

[14] A task easily accomplished without funding for a mitigation specialist.

Ochoa has not overcome the strong presumption that his counsel's decision in not calling[15] any particular witness was a strategic one.[16] *Id.*

Furthermore, even if Ochoa could show the lower court erred in finding no deficiency, he almost certainly cannot show error in the district court's finding that there was no prejudice. *Ramirez v. Dretke*, 398 F.3d 691, 698 (5th Cir. 2005) (reiterating that both prongs of the *Strickland* test must be satisfied for relief). With respect to errors at the sentencing phase of a death penalty trial, the relevant inquiry is "whether there is a reasonable probability that, absent the errors, the sentencer [] would have concluded that the balance of aggravating and

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15 "This Court has repeatedly held that complaints of uncalled witnesses are not favored in federal habeas corpus review because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have stated are largely speculative." *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009).

16 Based largely on affidavit testimony from mitigation specialist Tena Francis, Ochoa alleges that counsel delayed the mitigation investigation and failed to timely request a continuance. Appl.4–14. However, Ochoa acknowledges counsel requested a continuance to further pursue the mitigation investigation and that continuance was denied. *Id.* at 12–13. Counsel also apparently (and rightfully, based on the treatment of the actually-filed motion) believed continuances were unlikely to be granted in his venue. *Id.* at 8, 12. As for counsel's alleged delay in conducting the mitigation investigation, Francis states that she had three months from when she was initially contacted by Ochoa's attorneys and then an additional sixty-eight days from when she was formally appointed to complete her investigation—not an unreasonable amount of time. ROA.199. Ochoa's allegations also do not take into account any mitigation investigation done by the attorneys themselves, their expert (ROA.195), or the defense's other investigators (ROA.190, 194–95).

mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Riley*, 339 F.3d at 315 ("If the petitioner brings a claim of ineffective assistance with regard to the sentencing phase, he has the difficult burden of showing a reasonable probability that the jury would not have imposed the death sentence in the absence of errors by counsel." (internal quotation marks and citation omitted)).

This Court has indicated that, in assessing new mitigating evidence, it will look to see if the petitioner's new evidence will "lessen the impact of the other evidence against him[,]" *Conner v. Quarterman*, 477 F.3d 287, 294 (5th Cir. 2007). Similarly, "overwhelming aggravating factors" can outweigh unpresented mitigating evidence.[17] *Sonnier v. Quarterman*, 476 F.3d 349, 360 (5th Cir. 2007). For instance, the "brutal

[17] Ochoa's omitted mitigating evidence simply does not compare to the mitigating evidence the Supreme Court has found to be prejudicially omitted in other cases. *See*, *e.g.*, *Wiggins*, 539 U.S. at 516–17, 525–26, 534–35 ("Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care."); *Rompilla v. Beard*, 545 U.S. 374, 378, 390–95 (2005) (evidence established that Rompilla was reared in a slum, quit school at sixteen, had a series of incarcerations, his mother drank during pregnancy, his father had a "vicious temper," Rompilla and his siblings "lived in terror," he and a brother were locked "in a small wire mesh dog pen that was filthy and excrement filled," their home had no indoor plumbing, and they slept in an attic with no heat); *Williams v. Taylor*, 529 U.S. 362, 395 (2000) (counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.").

and senseless nature of the crime" and "evidence of violent conduct," *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006), or the "cruel manner in which he killed," *Miniel v. Cockrell*, 339 F.3d 331, 347 (5th Cir. 2003), may weigh heavily against a finding of *Strickland* prejudice. *Strickland*, 466 U.S. at 700; *Knight v. Quarterman*, 186 F. App'x 518, 535 (5th Cir. 2006) (unpublished); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002). Here, there is no reasonable probability that the verdict would have been any different if Ochoa's additional, allegedly omitted evidence had been before the jury. *See Parr v. Quarterman*, 472 F.3d 245, 256–58 (5th Cir. 2006); *Ransom v. Johnson*, 126 F.3d 716, 723–24 (5th Cir. 2007).

Even by the standards of capital cases, Ochoa's crime is appalling. The record reflects that Ochoa—angry because his wife refused to give him money to indulge his crack-cocaine habit—went on a rampage and shot six members of his family, killing five. The victims included Ochoa's tragically young daughters. As noted by Ochoa's trial counsel concerning another allegation, "I believe that the jury could not get past the fact that five people died in the same criminal transaction. SHCR–02.263. Counsel's analysis is doubtlessly correct—the pointless slaughter of five people, including helpless children, rendered Ochoa's sentence a foregone

conclusion. When any allegedly missing evidence, coupled with the evidence that was actually offered by the defense, is weighed against the aggravating evidence, including the circumstances of the crime, there is simply no reasonable probability that the outcome of the sentencing proceeding would have been any different in this case.

Finally, it is worth noting that, despite not receiving investigatory funding, Ochoa still filed a 164–page amended petition supported by sixteen exhibits. ROA.24–187 (petition), 69–70 (list of exhibits), 167–262 (exhibits); Appl.17–18 (partially describing efforts). Ochoa acknowledges that he received assistance from the Texas Defender Service in conducting his investigation, including use of a Spanish-speaking mitigation investigator. ROA.797; Appl.23. Additional funding for investigation would have only served to supplement this evidence (as well as the already ample mitigation introduced at trial). Ochoa complains that the district court's funding decision improperly limited him to the arguments filed in the pleading stage (Appl.33–35)[18] and he was entitled to further factual development, but the district court explained that "*Martinez* does not confer such a right" and "because Ochoa's existing

[18] Ochoa makes a similar argument regarding his shackling claim. Appl.41–42.

allegations, even if true, would not establish that he was deprived of the effective assistance of counsel, the Court correctly denied the claim without an evidentiary hearing." ROA.960–61 (citing *Segundo*, 831 F.3d at 351; *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007)). Indeed, the decision of the district court to deny funding was plainly not an abuse of discretion, and this Court should decline Ochoa's request to hold otherwise regardless of the outcome in *Ayestas*.

III. Reasonable Jurists Could Not Debate that the District Court Correctly Held that Ochoa's Shackling Claims Are Procedurally Defaulted and Meritless.

In his first COA request, Ochoa argues that he was denied due process because he was allegedly shackled during the punishment phase of trial. Appl.35–43. Relatedly, Ochoa argues that he received IATC because his attorneys failed to object to the alleged shackling. *Id*. But the district court denied these claims because they are unexhausted and procedurally defaulted. ROA.846–50, 869–72, 874–76. Alternatively, the district court denied the claims because they are meritless. *Id*. The court held that the record and the evidence submitted by Ochoa failed to establish Ochoa was visibly shackled, and—even if he was visibly shackled—the record and evidence did not establish that the shackling

was constitutionally impermissible. *Id*. Ochoa fails to demonstrate that either of these determinations are debatable, and he must show both to receive a COA on these claims.

A. Reasonable jurists would not debate the district court's holding that these claims are unexhausted and procedurally defaulted.

Ochoa did not present his shackling claim or his related IATC claim[19] in either of his state habeas applications or in his brief on direct appeal. *See generally* SHCR–01; SHCR–02; Appellant's Brief. Thus, the district court correctly found that these claims are unexhausted and procedurally defaulted. *See* 28 U.S.C. § 2254(b) (precluding federal habeas corpus relief when applicant has not exhausted state court remedies); *Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997); *Elizalde v. Dretke*, 362 F.3d 323, 328–29 (5th Cir. 2004); ROA.846–50, 874–76; Appl.36, 42 n.5 (acknowledging default). And, for the same reasons set forth in relation to Ochoa's *Wiggins* IATC claim, *supra*, the *Martinez* exception (Appl.36) does not excuse the default of Ochoa's shackling IATC claim. ROA.850.

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[19] Unexhausted IATC claims cannot furnish the basis for cause and prejudice enabling federal review of the underlying unexhausted habeas claims. *Hatten v. Quarterman*, 570 F.3d 595, 605 (5th Cir. 2009).

B. Reasonable jurists would not debate the district court's holding that that Ochoa's free-standing shackling claim is without merit.[20]

In *Deck*, the Supreme Court held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." 544 U.S. at 624, 629. The Court explained that visible shackling of a criminal defendant during trial "undermines the presumption of innocence and the related fairness of the fact[-]finding process," "can interfere with a defendant's ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf," and "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Id*. at 630–31 (alteration in original) (quoting *Illinois v. Allen*, 397 U.S. 337, 344 (1970)). A trial court may, however, require a defendant to wear restraints if the trial court deems it necessary to protect the court and the courtroom. *Id*. at 632. The trial court must take into account the circumstances of the particular case. *Id*.

[20] Because Ochoa has defaulted this claim (and his related IATC claim) any review would necessarily be de novo.

The Supreme Court recognizes that "[t]here will be cases . . . where these perils of shackling are unavoidable." *Id*. When determining whether a violation occurred, this Court also considers any "steps to mitigate any prejudicial influence on the jury." *Chavez v. Cockrell*, 310 F.3d 805, 809 (5th Cir. 2002).

On collateral review of a state conviction, a federal court will grant habeas relief only when the use of restraints "had a substantial and injurious effect or influence in determining the jury's verdict." *Hatten*, 570 F.3d at 604 (citations and internal quotation marks omitted). Overwhelming evidence of a defendant's guilt may be sufficient to render harmless any error in shackling a defendant. *Id*.

In applying federal constitutional law to the facts of the instant case, it is worth emphasizing that *Deck*'s concern is with *visible* restraints. *Bell v. State*, 415 S.W.3d 278, 282 (Tex. Crim. App. 2013) ("The *Deck* Court was clear that it is not the mere shackling alone, but rather the jury's perception of the shackles, that undermines a defendant's presumption of innocence."). Ochoa has provided no record cites indicating that Ochoa was shackled in view of the jury. Instead, he offers mitigation investigator Tena Francis's affidavit, where she describes

Ochoa walking to the witness stand for his punishment-phase testimony. ROA.199 ("He passed by the jurors, who were sitting in the jury box, shuffling his feet due to the restraint the leg chains imposed."). But Francis's affidavit is conclusory and speculative. Francis obviously cannot attest to what the jurors actually saw[21], and she does not even specifically state that the jury could have seen Ochoa's purported restraints from their vantage point. *Id*. She simply says that Ochoa shuffled his feet when he walked to the stand. *Id*. Consequently, the district court held that:

> The record does not reflect that Ochoa was even shackled, much less a reasonable probability that the jury was aware of it. In fact, both parties point to the lack of any mention of this in the record. [. . .] To show that he had been shackled before the jury at the punishment phase of his trial, Ochoa relies upon a second affidavit from his trial mitigation investigator, Tena Francis. This affidavit could be read to assert merely her conclusion that Ochoa must have been shackled because of the way he was walking. [ROA.199.] Assuming that this affidavit is capable of showing that Ochoa was shackled, however, it does not provide any indication of the reasons for placing him in shackles or whether it was part of any routine.

[21] While Federal Rule of Evidence 606 precludes jurors from testifying as to their deliberations, presumably it would not preclude a juror affidavit that simply stated that the juror saw shackles.

ROA.871. The district court's factual determination that Ochoa had not demonstrated that he was shackled, let alone shackled in view of the jury is reviewed for clear error. *Thompson*, 161 F.3d at 805. Moreover, as noted, shackling is not categorically impermissible. Ochoa—who has the burden on federal habeas of demonstrating his entitlement to relief—has not submitted evidence that shows how he was shackled, whether it was concealed from the jury in some way, whether he was consistently shackled throughout the proceedings, or the absence of any allowable rationale for shackling him (such as a danger to the court, outbursts, or a flight risk) and what other mitigating effects were taken, if any. *See Allen*, 397 U.S. at 343–44 (opining that trial judges "must be given sufficient discretion" to ensure the "dignity, order, and decorum . . . of all court proceedings" and concluding that binding and gagging an obstreperous defendant is constitutionally acceptable in some situations). Given the absence of a record on the issue, Ochoa cannot possibly show that the trial court erred even if Francis's affidavit was sufficient to show that Ochoa was visibly shackled. The Court ought not simply presume that no rationale existed for shackling when it is Ochoa who bears the burden of showing his entitlement to relief. Ochoa, of course, faults trial

counsel for the lack of a record (and thus raises an IATC claim), but this argument ignores that Ochoa had the burden of fleshing out the record in his federal petition as well.

Nevertheless, even assuming *arguendo* that Ochoa was visibly shackled, it is undisputed that Ochoa was convicted for killing two members of his family. He was further shown to have killed three additional family members and shot another. Any error by the state trial court in having Ochoa shackled during punishment was harmless. In light of the strength of the evidence against Ochoa and the fact that Francis only describes the jury viewing the shackles (if they did view them) for a brief instant, Ochoa "shuffling" by the jury would not have substantially influenced the verdict. *See Hatten*, 570 F.3d at 604; *cf. United States v. Diecidue*, 603 F.2d 535, 549 (5th Cir. 1979) ("brief and inadvertent exposure to jurors of defendants in handcuffs is not so inherently prejudicial as to require a mistrial"). Accordingly, Ochoa is not entitled to federal habeas corpus relief on his underlying shackling claim.

C. Reasonable jurists would not debate that Ochoa's shackling IATC claim is likewise without merit.

The petitioner has the burden of proof in a habeas proceeding attacking the effectiveness of counsel. *Carter v. Johnson*, 131 F.3d 452,

463 (5th Cir. 1997). Thus, the burden is on Ochoa to allege specific facts which show his trial counsel not objecting fell outside the wide range of presumptively reasonable professional performance. However, Ochoa's factual support is limited to Francis's affidavit, which the district court found inadequate proof of visible shackling. If Ochoa fails to demonstrate that he was shackled (or that the shackling was visible to the jury), then he concurrently fails to demonstrate that trial counsel had adequate basis for an objection under state law that could have resulted in a successful appeal. *See*, *e.g.*, *Bell*, 415 S.W.3d at 283–84 (finding unjustified non-visible shackling harmless). "This Court has made clear that counsel is not required to make futile motions or objections." *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). Likewise, failure to object to "[a]n error that is harmless as a matter of Texas law is insufficient to satisfy the prejudice prong of [*Strickland*]." *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009). Thus, the district court correctly held that:

> Ochoa has not provided the information needed on federal habeas review to show that any shackling, if it indeed occurred, would have been unjustified under *Deck*, that an objection at trial would have prevailed, or that a point of error on appeal would have been sustained. Ochoa has not established that the due process complaint made the basis of his twelfth claim has merit, much less that his counsel was ineffective for failing to assert it in an objection. "Unsupported

> allegations and pleas for presumptive prejudice are not the stuff that *Strickland* is made of." *Sawyer v. Butler*, 848 F.2d 582, 589 (5th Cir. 1988), *on reh'g*, 881 F.2d 1273 (5th Cir. 1989), *aff'd sub nom. Sawyer v. Smith*, 497 U.S. 227 (1990).

ROA.872.

Indeed, even assuming a deficient failure to object, there is no reasonable probability that Ochoa—having shot six members of his family and killed five—would have obtained a different sentence had the jury not seen him "shuffling," even assuming that the "shuffling" occurred. *Tamez v. Thaler*, 344 F. App'x 897, 899–90 (5th Cir. 2009) (unpublished) (finding no prejudice by counsel's alleged failure to object to the defendant being tried in restraints where the evidence against him was overwhelming). Accordingly, even if Ochoa's shackling IATC claim were not procedurally defaulted, it would still fail on the merits.

IV. Reasonable Jurists Would Not Debate that the District Court Correctly Held that Ochoa's Voir-Dire Claims Are Both Procedurally Defaulted and Meritless.

In his second request for COA, Ochoa argues that he received IATC during voir dire and was deprived of a fair and impartial jury. Appl.43–47. Specifically, Ochoa complains that the trial court at voir dire forbade certain lines of questioning about the number of victims and his attorneys

failed to object properly to the trial court's ruling.[22] *Id*. The district court found that these claims were unexhausted and procedurally defaulted. ROA.846–50, 853–56, 874–76. The district court noted the wide latitude given to trial courts to regulate voir dire and found that Ochoa's proposed questioning was not constitutionally compelled. *Id*. The district court also found that Ochoa had failed to show that any juror was actually biased against him and therefore could not show any prejudice attendant to the trial court's limitation. *Id*. These conclusions are not debatable among reasonable jurists, and any COA should be denied.

A. Reasonable jurists would not debate the district court's holding that these claims are unexhausted and procedurally defaulted.

Ochoa did not present these claims in either of his state habeas applications or in his brief on direct appeal. *See generally* SHCR–01; SHCR–02; Appellant's Brief. Thus, these claims are unexhausted and procedurally defaulted. 28 U.S.C. § 2254(b); *Nobles*, 127 F.3d at 420;

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[22] Ochoa also argues that he received IATC during voir dire because counsel's failure to investigate mitigating evidence, in turn, led him to inadequately question potential jurors. Appl.43. However, he says this claim is subsumed by his *Wiggins* IATC claim. *Id*. In that case, he presents nothing for this Court to review, as he does not request a COA on his *Wiggins* IATC claim. In any event, the claim would also fail for the same reason that the *Wiggins* IATC claim would fail—his attorneys were not deficient in their mitigation investigation, and, even if they were, no prejudice accrued. *See* Section II, *supra*.

ROA.846–50, 874–76. As noted in relation to Ochoa's *Wiggins* and shackling IATC claims, the *Martinez* exception is not applicable here because state habeas counsel was not ineffective and Ochoa's underlying voir dire IATC claim is without any merit. ROA.850.

B. Reasonable jurists would not debate the district court's holding Ochoa has failed to demonstrate that the trial court rendered counsel ineffective or deprived him of a fair or impartial jury.[23]

Ochoa asserts that the trial court rendered counsel ineffective and deprived him of a fair and impartial jury by limiting counsel from informing the venire that the case involved five homicides that happened at the same time. The district court held that:

> The trial court has wide discretion in determining the scope and content of the voir dire. To show a violation of due process from the trial court's limits on a voir dire examination, a complaint must show the deprivation of a question that was constitutionally compelled. To make this showing "it is not enough that requested voir dire questions might be helpful. Rather, the trial court's failure to ask (or permit counsel to ask) the questions must render the defendant's trial fundamentally unfair." *Sells v. Thaler*, Civ. No. SA–08–CA–465–OG, 2012 WL 2562666, at *18 (W.D. Tex. June 28, 2012) (citing *Morgan v. Illinois*, 504 U.S. 719, 730 n.5 (1992); *Mu'Min v. Virginia*, 500 U.S. 415, 425–26 (1991)). Only two specific inquiries of voir dire have been found by the Supreme Court to be constitutionally compelled: inquiries into a juror's racial prejudice, *Mu'Min*, 500 U.S. at 424, and whether a juror

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[23] Again, merits review of an unexhausted claim would necessarily be de novo.

> in a capital case had "general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[24] *Morgan*, 504 U.S. at 732 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)); *see Perez v. Prunty*, 139 F.3d 907, at *1 (9th Cir. 1998). Ochoa has not shown that the questions he sought were constitutionally compelled. Therefore, he has not shown that his underlying fourth claim for relief would have merit.

ROA.856–57.

Fundamental fairness requires that a criminal defendant be guaranteed a jury panel composed of impartial, indifferent jurors. *See Murphy v. Florida*, 421 U.S. 794, 799–800 (1975); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). The purpose of voir dire is to allow the selection of an impartial jury and to assist counsel in effectively exercising peremptory challenges. *Mu'Min*, 500 U.S. at 431. But the trial court is granted broad

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24 While *Morgan* acknowledges that the State should be allowed to question jurors about whether they would automatically vote against the death penalty, *Morgan* more accurately stands for the reverse proposition that a defendant should be allowed to ask jurors if they would automatically vote for death upon a finding of guilty. Hence, *Perez*'s description of this second category as "inquiries into a juror's views on capital punishment." However, neither question is relevant to the instant case. Ochoa is not complaining that he was not able to question the jurors regarding their reflexive views on capital punishment vis-à-vis the facts of the crime (i.e., the murder of his wife and daughter) —he is complaining that he was not able to question the jurors regarding their views on extraneous offenses (i.e., the additional murders of Ochoa's sister-in-law, father-in-law, and other daughter). Ochoa's reliance on *Morgan* and *Wainwright v. Witt*, 469 U.S. 412, 423 (1985), thus misses the mark. These cases do not serve to provide a constitutional basis for his claim. Furthermore, any attempt to extend these rationales to cover the instant situation would be barred by anti-retroactivity principles. *Teague v. Lan*e, 489 U.S. 288 (1989). [footnote added]

discretion in conducting voir dire, with the limitation that the defendant be afforded due process. *Mu'Min*, 500 U.S. at 423, 427; *see also Turner v. Murray*, 476 U.S. 28, 38 n.12 (1986) (scope and conduct of voir dire left to "the sound discretion of state trial judges"). As the district court correctly noted, Ochoa has not shown that his proposed line of questioning is not constitutionally mandated. ROA.856–57.

Moreover, Ochoa has not presented evidence that any juror was actually biased against him. ROA.854–55; *Uranga v. Davis*, 879 F.3d 646, 652–53 (5th Cir. 2018) (actual bias required except in "extreme situations," such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction"). Absent such a showing, Ochoa cannot demonstrate that he was denied his Sixth-Amendment right to a fair and impartial jury or that the trial court's limitation denied him due process by rendering his trial fundamentally unfair.[25] Ochoa does note that juror Polk was struck from the jury, but

[25] By failing to show actual prejudice, Ochoa also fails to satisfy *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993), which precludes habeas relief unless the error had a substantial and injurious effect on the verdict.

Polk was struck because after she was selected for service, an acquaintance reminded her of pretrial publicity regarding the case, and she admitted she no longer felt that she could be impartial. 27.RR.116–26. In any event, Polk was removed from the jury before trial began. Hence, the district court correctly noted that "[t]his may have been a sufficient showing of prejudice if the juror had not been excused" but to transitively impute prejudice to the other jurors was speculative. ROA.855. Accordingly, reasonable jurists would not debate that the district court correctly rejected Ochoa's argument that the trial court deprived him of a fair or impartial jury or the effective assistance of counsel.

C. Ochoa has not demonstrated that counsel failed to preserve trial-court error for review.

Ochoa also claims that his attorneys rendered ineffective assistance by failing to preserve trial court error for review. Appl.46–47. Specifically, Ochoa argues that counsel inadequately preserved the trial court's alleged ruling prohibiting counsel from telling the venire that the case involved the murder of five people. *Id*. To preserve a complaint for appeal, a party must have presented to the trial court a timely request,

objection, or motion that states the specific grounds for the desired ruling and obtained a ruling from the court. Tex. R. App. P. 33.1(a).

In the case-at-bar, trial counsel objected at length following the incident with juror Polk. 27.RR.122–25. Indeed, in his petition, Ochoa calls this objection "lengthy" and "well-reasoned." ROA.119. Counsel's objection appears to have been more than ample to preserve the issue for review had appellate counsel decided to raise it, and thus trial counsel could not be deficient for failure to object.

Ochoa asserts that the objection made after the Polk incident was an untimely objection, and counsel failed to place an earlier, timelier objection on the record. Appl.44, 46. But Ochoa has not shown that the objection in the record was denied because it was untimely and offers no case law indicating that the timing of this objection was inadequate. Indeed, Ochoa's citation to *Fuller v. State*, 253 S.W.3d 220, 232 (Tex. Crim. App. 2008), seems only viable for the proposition that motions in limine do not preserve appellate error. To the extent that Ochoa asserts that counsel's objection would have been rejected as untimely on appeal, that assertion appears speculative.

But to whatever extent that the objection itself was insufficient, Ochoa has not shown that any limitation on questioning was not permitted by the wide latitude allowed to trial courts to govern voir dire. Nor has Ochoa shown that any prospective juror who made it onto the jury was actually biased against him. ROA.854–55 (citing *Neville v. Dretke*, 423 F.3d 474, 482 (5th Cir. 2005); *United States v. Fisher*, 480 F. App'x 781, 782 (5th Cir. 2012) (unpublished); *Garza*, 738 F.3d at 675–76)); *see also Miller v. Francis*, 269 F.3d 609, 616 (6th Cir. 2001); *Goeders v. Hundley*, 59 F.3d 73, 75 (8th Cir. 1995). Absent an actually prejudiced juror, Ochoa cannot demonstrate that he was denied his Sixth-Amendment right to a fair and impartial jury. Consequently, no appeal of this alleged error would have been successful (which is presumably why appellate counsel did not raise it). Accordingly, even if Ochoa's counsel is found deficient for failing to object, Ochoa's IATC claim should still be denied for lack of prejudice.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the Court deny any COA and affirm the denial of Ochoa's funding motions.

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This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(b)(i) in that it contains 11,037 words, Microsoft Word 2016, Century Schoolbook, 14 points.

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