No. _____

In the Supreme Court of the United States

RAMIRO RUBI IBARRA,
Petitioner,
vs.

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

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI

RUSSELL D. HUNT, JR.
Attorney at Law
Texas State Bar No. 00790937
310 South Austin Avenue
Georgetown, Texas 78626
TEL: (512) 930-0860
r2@rhjrlaw.com

NAOMI E. TERR *
Attorney at Law
Texas State Bar No. 24033379
P.O. Box 19252
Houston, Texas 77224
TEL: (713) 471-3943
naomiterr@kuykendall-law.com

** Counsel of Record*
Counsel for Petitioner

INDEX OF APPENDICES

APPENDIX

1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70014

United States Court of Appeals
Fifth Circuit
FILED
June 19, 2018
Lyle W. Cayce
Clerk

RAMIRO RUBI IBARRA,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas
USDC No. 6:02-CV-52

Before JONES, HAYNES, and GRAVES, Circuit Judges.

PER CURIAM:*

Ramiro Rubi Ibarra was convicted of capital murder and sentenced to death. He is seeking a certificate of appealability ("COA") under 28 U.S.C. § 2254 from the district court's denial of relief on his *Martinez*/*Trevino* claims. For the reasons given below, we grant a COA on his ineffective assistance of counsel claim and deny his petition for a COA on his *Atkins* claim.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background

The facts about the crime need not be recited again. This court summarized the procedural history as follows:

> Petitioner's sentence and conviction were affirmed on direct appeal. *See Ibarra v. State of Texas*, 11 S.W.3d 189 (Tex.Crim.App.1999), *reh'g denied* (Dec. 8, 1999), *cert. denied*, *Rubi Ibarra v. Texas*, 531 U.S. 828, 121 S.Ct. 79, 148 L.Ed.2d 41 (2000). His first state habeas corpus petition was denied. *Ex parte Ibarra*, No. WR–48832–01 (Tex.Crim.App. Apr. 4, 2001). Petitioner then submitted his federal habeas petition, which was stayed while he exhausted additional state court claims pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which banned the execution of the mentally retarded. His petition was stayed further while he pursued state court claims following President Bush's announcement that the United States would have state courts give effect to an International Court of Justice opinion declaring that Mexican nationals were entitled to review and reconsideration of their convictions due to states' failure to comply with the Vienna Convention on Consular Relations ("VCCR"). *See The Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.) ("Avena")*, 2004 I.C.J. 12 (Judgment of Mar. 31). See also *Medellin v. Texas*, 552 U.S. 491, 128 S. Ct. 1346, 170 L.Ed.2d 190 (2008).
>
> The Texas Court of Criminal Appeals remanded Petitioner's *Atkins* claim to the trial court for an evidentiary hearing. The trial court determined that Petitioner was not mentally retarded, and this holding was adopted on appeal by the Court of Criminal Appeals ("CCA"). In the same order, the CCA dismissed his separate petition for relief under *Avena* as a subsequent writ under Article 11.071, Section 5 of the Texas Code of Criminal Procedure. *Ex parte Ibarra*, Nos. WR–48832–02 and WR–48832–03, 2007 WL 2790587, (Tex.Crim.App. Sept. 26, 2007). Petitioner's application for certiorari on his *Avena* claim was denied. *Ibarra v. Texas*, 553 U.S. 1055, 128 S.Ct. 2475, 171 L.Ed.2d 770 (2008). A fourth state habeas petition, raising a claim under *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), was also dismissed by the CCA as a subsequent writ. *Ex parte Ibarra*, No. WR–48832–04, 2008 WL 4417283 (Tex.Crim.App. Oct. 1, 2008).

Ibarra v. Thaler, 691 F.3d 677, 680 (5th Cir. 2012) *vacated in part sub nom. Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013).

After Ibarra had finally exhausted his claims in the Texas courts, he argued eleven grounds for relief in the federal district court, all of which were rejected, and then sought a COA from this court on only three claims: *Atkins*, VCCR, and *Wiggins*.

Most pertinent to the instant motion, Ibarra contended that "his trial counsel was ineffective in his investigation, development, and presentation of mitigation evidence, as well as the development of rebuttal evidence for the state's aggravating factors at sentencing" in violation of the Sixth Amendment and *Wiggins*, 539 U.S. at 522-23, 123 S. Ct. at 2536. As noted above, the TCCA dismissed this petition as a subsequent writ. The district court rejected this claim for two independent reasons: (1) procedural default under then-governing precedent, and (2) alternatively, meritlessness, because Ibarra could not demonstrate prejudice. *Ibarra*, 691 F.3d at 683. This court held that reasonable jurists "could not disagree with the district court's conclusion that Petitioner's *Wiggins* claim was procedurally defaulted" and denied a COA. *Id.* at 685.

As to the *Atkins* claim, this court denied a COA on alternative grounds of procedural bar, non-exhaustion and meritlessness. The evidence Ibarra offered in state court included an unsworn, inadmissible expert witness statement concerning Ibarra's IQ; an investigative report about his alleged adaptive deficits; and the opinion of Dr. Mark, who after two examinations of Ibarra had found no evidence of mental handicap. The TCCA had rejected this claim on the merits. Ibarra consequently offered material new evidence in federal court, rendering his claim unexhausted and procedurally barred. Finally, reviewing the state court record, this court found it not debatable that

the state courts' rejection of the *Atkins* claim on the merits did not violate 28 U.S.C. § 2254(d)(1). *Ibarra,* 691 F.3d at 681-83.[1]

The Supreme Court then decided *Trevino v. Thaler*, 569 U.S. 413, 133 S. Ct. 1911 (2013). On a motion for rehearing, this court granted rehearing in part and vacated our initial decision "only to the extent inconsistent with *Trevino* and grant[ed] a COA only to that extent; in all other respects, the majority and dissenting opinions [of the prior opinion] remain[ed] in effect." *Ibarra*, 723 F.3d at 600. Judge Graves concurred in part and dissented in part.

Back in the district court, Ibarra moved to stay and remand so that he could pursue his ineffective assistance of counsel ("IATC") claim in state court. The district court denied this motion. The case was reassigned to Judge Pitman when Judge Smith retired. Ruling on a motion for rehearing of that order, Judge Pitman affirmed the denial and *sua sponte* held that a COA should not issue because Ibarra's IATC claim was not "substantial."

II. Standard of Review and Controlling Law

This court must first issue a COA, 28 U.S.C. § 2253(c)(1), a jurisdictional prerequisite to reviewing the district court's denial of habeas relief. *Miller-El v. Cockrell*, 537 U.S. 322, 323, 123 S. Ct. 1029, 1032 (2003). A COA may only be granted when the petitioner "has made a substantial showing of the denial of a constitutional right." *Id.* at 336, 123 S. Ct. at 1039 (internal quotation marks omitted). This standard means that the "petitioner must show that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues

[1] This court also denied COA on the VCCR claim, a holding that has not been challenged.

presented were adequate to deserve encouragement to proceed further." *Id.* (internal quotation marks omitted).

Martinez v. Ryan held that "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." 566 U.S. 1, 17, 132 S. Ct. 1309, 1320 (2013). This principle was extended to Texas in *Trevino*. 569 U.S. at 429, 133 S. Ct. at 1921. Such a "substantial claim" constitutes "cause" for the procedural default, but, in line with traditional precedent, the petitioner must also prove that he suffered "prejudice" from counsel's errors. *Martinez,* 566 U.S. at 10, 132 S.Ct. at 1316 (citing *Coleman v. Thompson,* 501 U.S. 722, 750, 111 S.Ct. 2546 (1991)). A "substantial" claim is one that has "some merit." *Martinez*, 566 U.S. at 14, 132 S. Ct. at 1318. An insubstantial claim is one which "does not have any merit" or "is wholly without factual support." *Id.* at 15-16, 132 S. Ct. at 1319. The standard for evaluating an ineffective assistance of counsel claim is given in *Strickland*, which states the petitioner must show "that counsel's performance was deficient" and "that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. 2064. The State succeeds in establishing procedural default if the IATC claim is insubstantial, or the initial habeas attorney was not constitutionally ineffective, or Ibarra has not proved sufficient prejudice to overcome his procedural default. *Martinez*, 566 U.S. at 15-16, 18, 132 S. Ct. at 1319, 1321.

III. Analysis

Ibarra's motion for COA asserts that reasonable jurists could debate the district court's conclusions that his IATC claim lacked merit, his initial state

habeas counsel was constitutionally deficient for not raising that claim, and his *Atkins* claim may also be re-reviewed by this court.

A.

Ibarra argues trial counsel were ineffective for failing to investigate and present additional mitigating evidence about Ibarra's background. He argues that a "thorough background investigation" would have uncovered:

> (1) Ibarra's extreme childhood impoverishment to the point of malnourishment and living conditions far more dire than "humble;" (2) extreme physical and emotional abuse perpetrated against Ibarra as a child by his father; (3) Ibarra's witnessing extreme physical and emotional abuse perpetrated against loved ones by his father as a child; (4) Ibarra's attempts to care for and protect his siblings from their poverty and from their father's abuse; (5) Ibarra's significantly subaverage intellectual functioning; (6) Ibarra's developmental intellectual disability; and (7) Ibarra's development of severe post-traumatic stress disorder as a result of his experiencing and witnessing the extreme violence perpetrated by his father throughout his childhood and experiencing the near deaths and deaths of family members due to their extreme poverty.[2]

Ibarra argues that trial counsels' failure to present this evidence prejudiced him at the sentencing stage.

In *Buck v. Davis*, the Supreme Court cautioned this court that a COA determination "is not coextensive with a merits analysis." 127 S. Ct. 759, 773 (2017). At this stage, we only consider whether Ibarra's claim is debatable. *See id.* at 774. We find that it is. Because Ibarra's original IATC claim is debatable, we also find that it is debatable whether his initial habeas counsel

[2] Ibarra contends that the district court was obliged to hold an evidentiary hearing on his *Martinez* claim, but circuit precedent does not support such a requirement. *Segundo v. Davis*, 831 F.3d 345, 351 (5th Cir. 2016).

was ineffective for not pursuing this claim. Therefore, we grant a COA on this issue.

B.

Ibarra argues that he is entitled to a COA on his *Atkins* claim consistent with our COA on rehearing. Reasonable jurists could not debate the district court's rejection of this argument. This court denied a COA on the *Atkins* claim, *see Ibarra,* 691 F.3d at 682-83, and made clear that the order granting COA in light of *Trevino* did not affect this portion of our ruling. *See, e.g., Ayestas v. Stephens,* 817 F.3d 888, 889 (5th Cir. 2016) (remand order after *Trevino* did not leave open any matter other than the defaulted IATC claim).[3] Nothing in that order suggests that the *Atkins* claim was within the scope of remand.

Ibarra alternatively contends that *Martinez* and *Trevino* should be extended to cover *Atkins* claims. He states that *Davila v. Davis*, 137 S. Ct. 2058 (2017) supports his assertion. He also argues that he should be able to pursue this claim because *Moore v. Texas*, 137 S. Ct. 1039 (2017), is retroactive and provides an exception to the Section 28 U.S.C. 2254(d)(1) relitigation bar and law of the case. We need not consider the debatability of these issues because reasonable jurists could not debate that Ibarra's underlying *Atkins* claim, as presented to the state courts, has no merit. Even if *Moore* applied to this case, it would not benefit Ibarra because, although explicitly given a fair opportunity to present an *Atkins* claim, his counsel, who continue to represent

[3] The dissenting opinion appears to argue that the *Martinez/Trevino* holdings may be extended to Ibarra's second state postconviction proceeding, which explicitly considered his *Atkins* claim on the merits. Thus, are we to infer that Ibarra's counsel must have been ineffective in that proceeding, and they, the same attorneys, can relitigate de novo their *Atkins* claim in federal court? This would be a significant extension of *Martinez/Trevino*. Together, those cases hold only that a claim of ineffective assistance of state trial counsel is not procedurally defaulted (or the default can be overcome) if the state habeas counsel was ineffective for failing to raise trial counsel's ineffectiveness in the state habeas court.

him to this day, failed to offer admissible evidence of intellectual disability in the state court. Ibarra argues that this court should consider evidence that he did not present in state court. Under *Cullen v. Pinholster*, 563 U.S. 170, 181-82, 131 S. Ct. 1388, 1398 (2011), this is impermissible.[4] As this court previously held, Ibarra presented "essentially no supporting evidence" of intellectual disability in state court. *Ibarra*, 691 F.3d at 681-82. Accordingly, a COA on this claim must be denied.

We **GRANT** a COA on Ibarra's post-*Trevino* defaulted IATC claim. Counsel will proceed to file briefs as instructed by the clerk's office. However, in light of the substantial briefing we have already received concerning the COA, counsel are authorized to supplement the COA briefing as appropriate and may cross reference their COA briefs. We also hold that reasonable jurists could not debate the district court's refusal on remand to consider Ibarra's *Atkins* claim. We therefore **DENY** his application for a COA on his *Atkins* claim.

---

[4] To allow such relitigation with counsel's newly proffered evidence would effect a complete end run around the state court system and would violate AEDPA specifically. 28 U.S.C. § 2254(e)(2). Although the dissenting opinion quotes this provision, Ibarra never attempted to show that this provision's stringent test for de novo review in federal court has been met. To begin, the *Atkins* issue was well known (not "previously unavailable") to these counsel when they represented Ibarra in the state court system. The factual predicate for his *Atkins* claim could have been timely prepared for the state habeas hearing on the merits. And counsel have never attempted to demonstrate that the facts underlying Ibarra's alleged mental disability can be established by clear and convincing evidence, as that provision requires. Holding that reasonable jurists could debate a potential extension of *Martinez/Trevino* under these circumstances is plainly at odds with AEDPA as well as *Cullen v. Pinholster*, *supra*.

JAMES E. GRAVES, JR., Circuit Judge, dissenting in part:

I concur with the majority in granting a certificate of appealability (COA) on Ramiro Rubi Ibarra's ineffective assistance of counsel claims. However, because I would also grant a COA on Ibarra's claim under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), I respectfully dissent in part.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a COA should issue when a petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To meet this standard, Ibarra must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). Further, "any doubt as to whether a COA should issue in a death-penalty case must be resolved in favor of the petitioner." *Pippin v. Dretke*, 434 F.3d 782 (2005).

Ibarra was originally sentenced prior to *Atkins*. He later had an *Atkins* hearing. This court previously considered Ibarra's claims based on what was presented by counsel who was arguably ineffective, noting that "[a]t the state court evidentiary hearing regarding his *Atkins* claim, he presented essentially no supporting evidence." *Ibarra v. Thaler*, 691 F.3d 677, 681 (5th Cir. 2012). Although Ibarra's counsel attempted to introduce an expert affidavit in state court, it was found to be inadmissible because it was not notarized. *Id.* at 682. Counsel then attempted to introduce a notarized affidavit in federal court, but the district court found that it was procedurally barred under 28 U.S.C. § 2254(b) for failure to exhaust in state court. This court later acknowledged that the disallowed evidence was "essential to his claim of mental retardation." *Id.* The majority then agreed that the district court "properly disregarded this newly proffered evidence" as procedurally barred. The majority also purported to find, in the alternative, that the district court properly found that Ibarra's

claim had no merit based on the state court record, despite acknowledging that "[c]ritically, the record before the state court hearing Ibarra's claim of mental retardation did not include the expert affidavit that could have served as some evidence of his sufficiently low IQ." *Id*. The record also did not include mitigation evidence that would have provided additional insight into both Ibarra's intellectual disability and his adaptive skills deficits. If trial counsel was ineffective in failing to present evidence of intellectual disability or adaptive skills deficits for purposes of mitigation at sentencing, then that necessarily affected the outcome of Ibarra's *Atkins* claim.[1]

Ibarra has evidence that his full scale IQ is 65, well within the intellectually disabled range, that he suffered intellectual deficits throughout his childhood, and of his adaptive skills deficits. Ibarra has an expert affidavit from Dr. Carol Romey concluding that he is intellectually disabled. Ibarra asserts that Dr. Stephen Mark was not even hired until after voir dire in his trial had already begun. Further, Mark was not provided relevant social history information, failed to do necessary intellectual functioning testing of Ibarra, and did not speak Spanish, Ibarra's only language. Ibarra argued in his application for a COA that his trial counsel was ineffective for failing to investigate and present mitigation evidence relevant to his *Atkins* claim and that the state court process was blatantly unfair for various reasons, including the denial of adequate funding. To the extent that any failure to perform necessary investigation or to present adequate evidence in state court was the result of ineffective assistance of counsel, Ibarra is entitled to present his *Atkins* claim.

---

[1] This is not an argument about Ibarra's second state post-conviction proceeding. But even if that were the case, the majority explicitly ignores the relevant authority that would allow Ibarra to overcome any procedural default, as well as the application of the fundamental miscarriage of justice provision.

As the majority acknowledges, under *Buck v. Davis*, 137 S.Ct. 759 (2017), Ibarra is not required to prove his claims on the merits. "At the COA stage, the only question is whether the applicant has shown that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id*. at 773.

The majority faults Ibarra's counsel "who continue to represent him to this day" for failing to offer admissible evidence of intellectual disability in state court. However, Ibarra's current counsel did not represent him at trial, on appeal, or in his "initial-review collateral proceedings." *Martinez*, 566 U.S. at 9. Moreover, the arguable ineffectiveness of Ibarra's previous counsel is the reason he benefits from the equitable ruling in *Martinez*. The majority cites *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011), for the proposition that evidence of intellectual disability may not be considered unless it was presented in state court. While that typically may be the rule, *Pinholster* is distinguishable because the court concluded that the defendant was unable to demonstrate either prong of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 686-92 (1984). *Pinholster*, 563 U.S. at 194-201. Significantly, the court also acknowledged that "state prisoners may sometimes submit new evidence in federal court," although AEDPA discourages it. *Id.* at 186.

AEDPA includes a provision for the introduction of new evidence in federal court. 28 U.S.C. § 2254(e)(2) states:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--

> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) 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).

Additionally, binding precedent allows a petitioner to overcome procedural defaults and introduce new evidence in certain instances. *See Morris v. Dretke*, 379 F.3d 199, 205 (5th Cir. 2004) (Exhaustion may be excused.); *see also Martinez v. Johnson*, 255 F.3d 229, 239 (5th Cir. 2001) (Petitioner may overcome a procedural default and "obtain federal habeas corpus review of his barred claims on the merits, if he can demonstrate cause for the defaults and actual prejudice."); and *Barrientes v. Johnson*, 221 F.3d 741, 758 (5th Cir. 2000) (Petitioner can overcome procedural default if "failure to consider the claims will result in a fundamental miscarriage of justice"). These cases rely on *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), where the United States Supreme Court said:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 750.

Under this relevant authority, Ibarra is arguably able to overcome the procedural default for failure to exhaust and obtain federal habeas review of his barred claims. Ibarra can arguably demonstrate cause for the defaults and actual prejudice. More importantly, failure to consider the claim would result in a fundamental miscarriage of justice if an intellectually disabled man were to be unconstitutionally executed.

However, on remand after the United States Supreme Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013)[2], the district court did not discuss Ibarra's *Atkins* claim, finding that it was not within the scope of this court's remand order. That finding was the result of the majority's inclusion of language on remand limiting Ibarra's claims of ineffective assistance of counsel with regard to issues on which the majority had previously denied his COA. *Ibarra v. Stephens*, 723 F.3d 599, 600 (5th Cir. 2013). I dissented to the inclusion of any such language on the basis that Ibarra was not foreclosed from raising his ineffective assistance of counsel claims on those issues. *Id.* (Graves, J., dissenting in part) ("Simply put, the trial court is free to determine whether or not evidence related to these issues is relevant to any claim of ineffective assistance of counsel, and is likewise free to determine if any ineffective assistance affects the merits of these issues or any procedural default."). I continue to conclude that Ibarra is not foreclosed from presenting his *Atkins* claim to the extent that it is encompassed within *Trevino/Martinez*.

For the reasons stated herein, jurists of reason could find debatable the disposition of Ibarra's *Atkins* claim. Because I would grant a COA on Ibarra's *Atkins* claim to the extent that it is encompassed within *Trevino/Martinez*, I respectfully dissent in part.

---

[2] In Trevino, the Supreme Court vacated this court's judgment that Martinez v. Ryan, 566 U.S. 1 (2012), did not apply to Texas. In Ibarra's case, the majority likewise concluded that Martinez did not apply to Texas, thus, necessitating remand.

APPENDIX

2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

RAMIRO RUBI IBARRA, **Petitioner,**	§	
v.	§	**CIVIL ACTION NO. W-02-CA-052-RP**
LORIE DAVIS,[1] Director, Texas Department of Criminal Justice, Correctional Institutions Division, **Respondent.**	§	

MEMORANDUM OPINION AND ORDER

After being convicted of capital murder in the brutal rape and slaying of 16-year-old Maria De La Paz in 1996,[2] Petitioner Ramiro Rubi Ibarra ("Ibarra"), has sought review of his conviction and sentence through direct appeal and post-conviction relief in both state and federal court. The Fifth Circuit has remanded Ibarra's federal habeas application in light of the Supreme Court's opinion in *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911 (2013). *Trevino* extended to Texas the effect of *Martinez v. Ryan*, — U.S.—, 132 S.Ct. 1309 (2012), in which the Supreme Court held for the first time that ineffective assistance of counsel could establish the cause required to overcome a procedural default.

In the present federal habeas application, Judge Walter S. Smith, Jr., who has since retired, originally denied all of Ibarra's claims and declined to issue a certificate of appealability (COA). One of the claims presented by Ibarra, and the subject of the Fifth Circuit's remand, was that his trial counsel was ineffective for failing to investigate, develop and present available mitigation evidence--a claim under *Wiggins v. Smith*, 539 U.S. 510 (2003) (the failure of petitioner's attorney to investigate and present

---

[1] The previous named respondent in this action was William Stephens. On May 1, 2016, Lorie Davis succeeded Stephens as Director of the Texas Department of Criminal Justice, Correctional Institutions Division. Under Rule 25(d) of the Federal Rules of Civil Procedure, Davis is automatically substituted as a party.

[2] The murder was committed in 1987.

mitigating evidence during his capital murder trial constituted ineffective assistance of counsel). Judge Smith determined the claim was procedurally defaulted as it was first presented to the state court in Ibarra's fourth writ of habeas corpus, which was dismissed by the Texas Court of Criminal Appeals as an abuse of the writ under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure.

After appeal, the Fifth Circuit issued an opinion affirming Judge Smith's opinion and holding that *Martinez* did not apply to Texas cases as there were procedures in place to raise ineffective assistance of trial counsel (IATC) claims on direct appeal. *Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012); *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012). After the Supreme Court determined in *Trevino* that *Martinez* did apply in Texas, the Fifth Circuit granted rehearing and vacated its opinion to the extent it conflicted with *Trevino*. The Fifth Circuit then granted a rehearing and vacated its previous decision, but only to the extent it was inconsistent with *Trevino*. The Fifth Circuit then vacated Judge Smith's opinion, also only to the extent the opinion was inconsistent with *Trevino*, and remanded the case for further proceedings. *Ibarra v. Stephens*, 723 F.3d 599 (5th Cir. 2013). Judge Smith's opinion was affirmed in all other aspects. Judge Smith set a briefing schedule for the parties and denied Ibarra's request for a stay and a remand to state court to pursue his IATC claim. Ibarra now requests reconsideration of that denial.[3]

Initially, the Court notes that Ibarra's request for a stay should be denied as *Martinez* and *Trevino* are inapplicable. Judge Smith determined that Ibarra's IATC claim was not just procedurally barred, but that it lacked merit. This opinion was affirmed by the Fifth Circuit, despite Ibarra's reliance upon Judge Graves' dissent. *Ibarra*, 723 F.3d. at 600 (Graves, J., dissenting) ("I disagree with the majority's inclusion of the language that 'in all other respects, the majority and dissenting opinions remain in effect'"). As

[3] Petitioner also asks that this case be remanded to state court to allow him to pursue a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). However, that claim is beyond the scope of the Fifth Circuit's remand.

the majority opinion remanded the case only in regard to the procedural default issue, the opinion did not effect the denial of Ibarra's IATC claim on the merits.

Even if the Fifth Circuit's opinion does not bar re-analysis of Ibarra's IATC claim, his request for a stay is unwarranted. Generally, stay and abeyance is "available only in limited circumstances." *Rhines v. Weber*, 544 U.S. 269, 277 (2005). It is appropriate when "the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court." *Id.* However, even if good cause is demonstrated, "the district court would abuse its discretion if it were to grant [the petitioner] a stay when his unexhausted claims are plainly meritless." *Id.* It would also be an abuse of discretion to grant a petitioner a stay when he has engaged in "abusive litigation tactics or intentional delay. . . ." *Id.* at 278. Additionally, "a stay is not generally warranted when a petitioner raises only record-based claims subject to 28 U.S.C. § 2254(d)." *Ryan v. Gonzales*, — U.S. —, 133 S.Ct. 696, 708 (2013). In the present case, while Ibarra argues additional investigation and evidence is required to fully develop his IATC claim, the record in this case is sufficient to evaluate the validity of his claim.

"Federal courts lack jurisdiction to review a habeas claim 'if the last state court to consider that claim expressly relied on a state ground for denial of relief that is both independent of the merits of the federal claim and an adequate basis for the court's decision.'" *Canales v. Stephens*, 765 F.3d 551, 562 (5th Cir. 2014) (quoting *Roberts v. Thaler*, 681 F.3d 597, 603 (5th Cir.), *cert. denied*, — U.S. —, 133 S.Ct. 529 (2012)). Article 11.071, which was applied to Ibarra's IATC claim, is a procedural default rule which serves as an independent and adequate state law ground for the state court's dismissal of a petitioner's claim. *Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001). A federal court may consider the merits of a procedurally defaulted claim if the petitioner shows both cause and actual prejudice. *Martinez*, 132 S.Ct. at 1321. Federal review is barred if a petitioner cannot establish both. *Hernandez v. Stephens*, 537 F.App'x 531 542 (5th Cir. 2013).

Prior to *Martinez*, an attorney's negligence in a postconviction proceeding could not serve as "cause." *Martinez*, 132 S.Ct. at 1319. *Martinez*, extended to Texas by *Trevino*, carved out a "narrow" exception to the "cause" element. *Trevino*, 133 S.Ct. at 1917. A petitioner may now meet the cause element by showing "(1) that his claim of ineffective assistance of counsel at trial is substantial–i.e., has some merit–and (2) that habeas counsel was ineffective in failing to present those claims in his first state habeas proceeding." *Garza v. Stephens*, 738 F.3d 669, 676 (5th Cir. 2013), *cert. denied*, — U.S. —, 134 S.Ct. 2876 (2014)). "For a claim to be 'substantial,' a petitioner 'must demonstrate that the claim has some merit.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir.), *cert. denied*, — U.S. —, 135 S.Ct. 435(2014) (quoting *Martinez*, — U.S. —, 132 S.Ct. at 1318). "Conversely, an 'insubstantial' ineffective assistance claim is one that 'does not have any merit' or that is 'wholly without factual support.'" *Reed*, 739 F.3d at 774 (quoting *Martinez*, 132 S.Ct. at 1319).

In order to prove that his IATC claim has some merit, a petitioner must satisfy the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense so as to deprive him of a fair trial. *Id.* at 687. The proper standard for evaluating counsel's performance is that of reasonably effective assistance, considering all of the circumstances existing as of the time of counsel's conduct. *Hill v. Lockhart*, 474 U.S. 52 (1985). Scrutiny of counsel's performance is "extremely deferential;" *Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); and counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Counsel's advice need not be perfect -- it need only be reasonably competent within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Ibarra's trial counsel did present mitigating evidence at trial. The fact that he might have

presented additional mitigating evidence is insufficient in and of itself to establish ineffective assistance of counsel.

The second prong of *Strickland* mirrors the second prong of *Martinez* – the petitioner must show prejudice. Under *Strickland*, this requires a showing that but for counsel's ineffective performance, there is a reasonable probability that a different outcome would have been reached. *Strickland*, 466 U.S. at 694. A reasonable probability is one that is sufficient to undermine the outcome of the case. *Id.* "[T]he mere possibility of a different outcome is not sufficient to prevail on the prejudice prong." *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir.), *cert. denied*, 528 U.S. 947 (1999). "The likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86 (2011) (citation omitted). The defendant must demonstrate that the prejudice rendered his case "fundamentally unfair or unreliable." *Crane*, 178 F.3d at 312. Ibarra's habeas application falls short of establishing prejudice to either excuse his default or to establish his IATC claim.

The evidence supporting Ibarra's conviction was compelling. Ibarra's DNA matched the semen recovered from Maria's body and underwear, as well as material from under her fingernails. Witnesses identified Ibarra and his car leaving Maria's residence at the time of the murder. Ibarra's car was distinctive–a late-model Camaro, which was red in color from primer or oxidation, with mismatched rims, a bent antenna, dual exhaust pipes, and a fan mounted on the dashboard. Maria's family Ibarra, a family acquaintance, as matching the witnesses' descriptions. When questioned by police, Ibarra had scratches on his face, and additional scratches on his chest were noted after his arrest.

After Ibarra's conviction, the only issue raised by his first habeas counsel was that the lengthy delay between the commission of the offense and Ibarra's trial constituted cruel and unusual punishment.

Ibarra contends that the case should be stayed and remanded to state court to allow him to investigate and conduct discovery related to mitigation and in rebuttal of the State's case in aggravation.[4] However, it is unclear what further investigation would reveal. In his habeas petition, Ibarra indicated that further investigation by either trial counsel or his first state habeas counsel would have "established numerous problems with his background, including desperate poverty, inadequate nutrition, disruptive family life, experience of an exposure to family violence, poor childhood development both mentally and physically, poor performance at school," and that he suffered a head injury as a child. *Ibarra v. Thaler*, No. W-02-CA-052, p. 32 (W.D.Tex. Mar. 31, 2011). However, as Judge Smith found, the state court records reflect that counsel filed motions for investigative funding and assistance, including an evaluation by Dr. Stephen Mark, a psychiatrist. *Id.* at 33. "Many of the facts identified by Petitioner were in fact presented to the jury through the testimony of Petitioner's sister and his wife, who testified that Petitioner came to the United States to find work to help support his family, that their family was poor, and that they lived in 'humble' circumstances, working on the land, and the circumstances of his family situation in the United States." *Id.* There is, therefore, nothing to support Ibarra's claim that counsel failed to investigate and present evidence in mitigation during the punishment phase, or that Ibarra's first habeas counsel was ineffective for failing to raise the IATC issue as it related to mitigation.

Also, as Judge Smith noted, Ibarra is unable to establish prejudice even if either counsel were determined to be ineffective. The aggravating factors presented by the State were more than sufficient to outweigh any additional potentially mitigating evidence, "particularly considering the 'brutal and senseless nature of the crime.'" *Id.*, p. 33 (quoting *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006),

[4] Ibarra's argument that he should also be allowed to investigate trial counsel's allegedly deficient performance at the guilt phase goes beyond the parameters of his IATC claim in his habeas corpus application. Even if the Court were to determine that trial counsel was somehow ineffective at the guilt phase as a result of a failure to investigate, Ibarra would be unable to establish *Strickland's* prejudice prong due to the strong evidence of his guilt.

cert. denied, 550 U.S. 939 (2007)). The evidence presented at the punishment phase consisted of the following:

> . . . Petitioner anally sodomized his eight-year-old nephew on two occasions, and threatened to kill him if he told. On another occasion, Petitioner had his nephew "masturbate" him in the shower, and he tried to force the nephew on a subsequent occasion to grab his penis. Petitioner's sister-in-law testified that Petitioner had a bad reputation for truth and veracity, as well as a bad reputation for sexually inappropriate behavior. She also testified that there was some indication Petitioner had sexually abused her son. Maria Luna Diaz, with whom Petitioner had a relationship, testified that Petitioner beat her and sexually assaulted her. On one occasion he forced her to undress at knife point and threatened to kill her if she ever failed to do as she was told. Petitioner also threatened to strangle her, and wrapped a wire tightly around her neck and pushed her down. He released her when she begged for her life. Maria Luna's daughter testified that Petitioner touched her breast inappropriately when she was 11 years old. She immediately told her mother of the incident. When Maria Luna confronted Petitioner, he beat her.
>
> The jury also heard that Petitioner had prior convictions for unlawfully carrying a weapon and driving while intoxicated. There was also testimony regarding an arrest for misdemeanor theft, when Petitioner was spotted taking rope from the back of a pickup truck and placing it in his own vehicle. Upon his arrest, police found the rope in Petitioner's car, along with several college-level criminal justice textbooks in English.
>
> Other witnesses testified to Petitioner's misbehavior while incarcerated. He got into a fistfight with another inmate, and he was observed by a Deputy Sheriff masturbating in front of a window where he could be seen by passers by. There was also testimony regarding Petitioner's alleged suicide attempt, wherein he cut his neck. Jail and hospital personnel testified about his uncooperativeness and feigned unconsciousness.
>
> While Petitioner's wife, Maria Gandera Ibarra, testified on his behalf, the State elicited testimony from her on cross-examination that Petitioner had beaten her on several occasions, even while she was pregnant. She also testified that Petitioner had brought an 18-year-old girl from Mexico to live with them. Although Petitioner said she was his daughter, he treated her like a wife – kissing her on the mouth and spending hours with her alone in a bedroom behind closed doors.
>
> The State also presented the testimony of Dr. Richard Coons, a psychiatrist, who gave his opinion that an offender with Petitioner's history and sexual proclivities would constitute a continuing threat to society.

Id. at 5 (footnote omitted, which indicated that Ibarra was convicted of aggravated sexual assault as a result of the sexual assault of his eight-year-old nephew). This is in addition to the particularly violent nature of Maria's murder–she was sexually assaulted, including both vaginal and anal penetration; her

clothing was ripped and her underwear torn from her body; she was severely beaten in the face and the rest of her body, leaving her covered with numerous bruises and contusions, and causing significant blood loss; and she was strangled with a yellow-coated wire. *Id.* at 2. Ibarra does not identify what mitigating evidence might be uncovered which would come close to outweighing the aggravating factors introduced in this case. In light of the foregoing, the Court determines that Ibarra has failed to establish the actual prejudice necessary to overcome his procedural default or to establish ineffective assistance of counsel. It is, therefore,

ORDERED that Ibarra's Opposed Motion to Reconsider is **DENIED**. It is further

ORDERED that this case be returned to the Fifth Circuit Court of Appeals.

Additionally, having considered the findings and conclusions set forth above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Ibarra has failed to make a substantial showing of the denial of a constitutional right.

SIGNED on September 28, 2016.

ROBERT PITMAN
UNITED STATES DISTRICT JUDGE

APPENDIX

3

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
July 17, 2013
Lyle W. Cayce
Clerk

No. 11-70031

RAMIRO RUBI IBARRA,

Petitioner - Appellant

v.

WILLIAM STEPHENS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Western District of Texas

Before JONES, HAYNES, and GRAVES, Circuit Judges.

O R D E R

Treating the Appellant's motion for en banc rehearing as a motion for panel rehearing, and given the Supreme Court's recent decision in *Trevino v. Thaler*,133 S. Ct. 1911 (2013), the court GRANTS the motion for rehearing in part.[1] We hereby VACATE our prior panel decision only to the extent inconsistent with *Trevino* and grant a COA only to that extent; in all other respects, the majority and dissenting opinions remain in effect. In light of this new authority, we VACATE the district court's order to the extent inconsistent with *Trevino* and REMAND to the district court for proceedings consistent herewith.

[1] The effect of this ruling is to moot the Petition for Rehearing En Banc.

GRAVES, Circuit Judge, concurring in part and dissenting in part:

I agree that the Supreme Court's recent decision in *Trevino v. Thaler*, 133 S.Ct. 1191 (2013), requires us to vacate our prior decision, grant Ibarra's certificate of appealability (COA), and remand to the district court for the appropriate application of *Martinez v. Ryan*, 132 S.Ct. 1309 (2012).[2] The trial court should, in the first instance, be allowed to apply *Martinez* in accordance with *Trevino*. *See Cantu v. Thaler*, 682 F.3d 1053 (5th Cir. 2012)

However, I disagree with the majority's inclusion of the language that "in all other respects, the majority and dissenting opinions remain in effect." The inclusion of this language is an unwarranted and unnecessary potential limiter on the consideration of Ibarra's claims of ineffective assistance of trial counsel with regard to issues on which the majority previously denied his COA. Ibarra is clearly not foreclosed from raising his ineffective assistance of counsel claims on these issues. Simply put, the trial court is free to determine whether or not evidence related to these issues is relevant to any claim of ineffective assistance of counsel, and is likewise free to determine if any ineffective assistance affects the merits of these issues or any procedural default. *Id.* Thus, I disagree with any language which may be construed to the contrary.

[2] This is entirely consistent with my previous separate opinions in this case wherein I disagreed with the panel majority's rejection of the application of *Martinez*. *See Ibarra v. Thaler*, 687 F.3d 222 (2012) (Graves, J., concurring in part and dissenting in part), and *Ibarra v. Thaler*, 691 F.3d 677 (2012) (Graves, J., dissenting).

APPENDIX

4

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

RAMIRO RUBI IBARRA,	§	
Petitioner,	§	
	§	
v.	§	**CIVIL ACTION NO. W-02-CA-052**
	§	
RICK THALER, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

Petitioner Ramiro Rubi Ibarra, an illegal alien, was convicted of capital murder in the brutal rape and strangulation of 16-year-old Maria De La Paz Zuniga, an acquaintance. He was sentenced to death. Petitioner asserts that his capital murder conviction and sentence are unconstitutional and should be vacated under the provisions of Title 28, United States Code, Section 2254 ("§ 2254"). Respondent, having been ordered to respond to Petitioner's application, has filed an answer and Motion for Summary Judgment requesting that Petitioner's application be denied. Having reviewed Petitioner's application, Respondent's answer and Motion for Summary Judgment, the parties' amended pleadings, as well as the entire record in this case, the Court has determined Petitioner's application for habeas relief should be denied.

I. Background

The facts as established from the trial reflect that 16-year-old Maria De La Paz Zuniga ("the Victim" or "Maria") was brutally raped, sodomized, and murdered on the morning of March 6, 1987. She was discovered by her brother, who found her lying on a bed in the one of the bedrooms in her house. She was bloody, beaten and partially nude, with a yellow-coated wire wrapped around her neck and shoulder. Subsequent examination revealed that she had been sexually assaulted, including both vaginal and anal penetration. Her clothing was ripped, and her underwear had been torn from her body. Maria was beaten so severely in the face and the rest of her body, she was covered with numerous bruises and contusions, and she was also covered in and surrounded by significant amounts of blood. There was blood under her fingernails, indicating she had scratched her attacker while trying to fight him off. Further testing found sperm in Maria's body and on her underwear. A number of facial, head and pubic hairs were also found on and around her body.[1]

The police discovered three witnesses at a business across the road from Maria's home -- RPM Manufacturing. The witnesses told police that they had noticed a man leaving Maria's house at the approximate time of the murder. They described a Hispanic male, approximately 30 years of age, with a medium, stocky build. He had black, mussed hair, and a moustache. They were unable to see much

[1] Hairs found on the victim's clothes and bedding were not recovered the first time these items were examined by the Dallas County Sheriff's Department Physical Evidence Section. They were recovered when the evidence was re-examined in 1996.

of his face as he mostly kept his head down. Two of the witnesses were subsequently able to pick Petitioner out of a line-up. The witnesses observed Petitioner walking to a car, which was a late-model Chevrolet Camaro with mismatched rims, a bent antenna, dual exhaust pipes, and a fan mounted on the dashboard. The car was red in color from primer or oxidization. All three witnesses were able to identify the car. When police provided the description to Maria's family, they named Petitioner, a family acquaintance, as a possible suspect.

The investigator assigned to the case, Ramon Salinas ("Salinas"), discovered Petitioner's address and went to his home to question him at approximately 6 p.m. on the day of the murder. The Camaro identified by the witnesses and registered to Petitioner was parked on the street nearby. Salinas noticed that Petitioner had scratches on his face and was wearing clothing fitting the description given by the witnesses. Petitioner was placed under arrest and consented to a search of his home and car. Found in Petitioner's car was yellow wire similar to that used to strangle Maria.[2] Salinas also discovered that Petitioner had additional scratches on his chest under his shirt.

The police obtained a search warrant on March 10, 1987 to obtain blood and hair samples from Petitioner to compare to the hair and bodily fluids found at the crime scene. An indictment for murder was issued against Petitioner on May 27,

[2] The yellow wire found in Petitioner's trunk was not of the same thickness as that used to strangle Maria. However, testimony at trial revealed that Petitioner had access to the exact type of wire used to strangle her at his place of employment.

1987. Subsequently, Petitioner filed a motion to suppress, which was granted because the search warrant was not issued by the appropriate court. At that time, Texas law precluded the police from obtaining a second search warrant.[3] Because it believed there was insufficient evidence without the blood and hair comparisons, the State dismissed the indictment on July 19, 1998, and Petitioner was released from custody.

Texas law changed in 1995,[4] allowing police to obtain the issuance of more than one evidentiary search warrant in a case. The police obtained a second warrant for hair and blood samples from Petitioner on July 2, 1996 and were able to secure such evidence from Petitioner. Examination of the evidence revealed that the facial and pubic hairs found on and around Maria were similar to those of Petitioner, and his DNA matched the semen recovered from her body and underwear, as well as the material under her fingernails.[5] Petitioner was then reindicted for Maria's murder on September 18, 1996. He was tried, found guilty, and sentenced to death.

---

[3] In 1987, Tex. Code Crim. Proc. Article 18.01(d) provided, in relevant part, "Subsequent search warrants may not be issued . . .to search the same person, place or thing subjected to a prior search. . . ."

[4] The amendment to Article 18.02(d) provided, in relevant part, "A subsequent search warrant may be issued . . . to search the same person, place or thing subjected to a prior search . . . only if the subsequent warrant is issued by a judge of a district court, a court of appeals, the court of criminal appeals, or the supreme court."

[5] DNA analysis was unsuccessful in 1988 and 1990, but was matched to Petitioner in 1996.

At the punishment phase, the jury heard evidence that Petitioner anally sodomized his eight-year-old nephew on two occasions, and threatened to kill him if he told.[6] On another occasion, Petitioner had his nephew "masturbate" him in the shower, and he tried to force the nephew on a subsequent occasion to grab his penis. Petitioner's sister-in-law testified that Petitioner had a bad reputation for truth and veracity, as well as a bad reputation for sexually inappropriate behavior. She also testified that there was some indication Petitioner had sexually abused her son. Maria Luna Diaz, with whom Petitioner had a relationship, testified that Petitioner beat her and sexually assaulted her. On one occasion he forced her to undress at knife point and threatened to kill her if she ever failed to do as she was told. Petitioner also threatened to strangle her, and wrapped a wire tightly around her neck and pushed her down. He released her when she begged for her life. Maria Luna's daughter testified that Petitioner touched her breast inappropriately when she was 11 years old. She immediately told her mother of the incident. When Maria Luna confronted Petitioner, he beat her.

The jury also heard that Petitioner had prior convictions for unlawfully carrying a weapon and driving while intoxicated. There was also testimony regarding an arrest for misdemeanor theft, when Petitioner was spotted taking rope from the back of a pickup truck and placing it in his own vehicle. Upon his arrest, police found the

---

[6] Petitioner was convicted of aggravated sexual assault as a result of these acts and was sentenced to life in prison.

rope in Petitioner's car, along with several college-level criminal justice textbooks in English.

Other witnesses testified to Petitioner's misbehavior while incarcerated. He got into a fistfight with another inmate, and he was observed by a Deputy Sheriff masturbating in front of a window where he could be seen by passers by. There was also testimony regarding Petitioner's alleged suicide attempt, wherein he cut his neck. Jail and hospital personnel testified about his uncooperativeness and feigned unconsciousness.

While Petitioner's wife, Maria Gandera Ibarra, testified on his behalf, the State elicited testimony from her on cross-examination that Petitioner had beaten her on several occasions, even while she was pregnant. She also testified that Petitioner had brought an 18-year-old girl from Mexico to live with them. Although Petitioner said she was his daughter, he treated her like a wife – kissing her on the mouth and spending hours with her alone in a bedroom behind closed doors.

The State also presented the testimony of Dr. Richard Coons, a psychiatrist, who gave his opinion that an offender with Petitioner's history and sexual proclivities would constitute a continuing threat to society.

II. PROCEDURAL HISTORY

Petitioner's sentence and conviction were affirmed on appeal. *See Ibarra v. State of Texas*, 11 S.W.3d 189 (Tex. Crim. App., October 20, 1999), rehearing denied (Dec. 8, 1999). His petition for *writ of certiorari* was denied. *Rubi Ibarra v.*

U.S., 531 U.S. 828 (2000). Petitioner's first state writ of habeas corpus was denied. *Ex parte Ibarra*, No. 48,832-01 (Tex. Crim. App., April 4, 2001). Petitioner then submitted the present application for federal habeas relief. He requested a stay while he pursued additional claims in the State court as a result of the Supreme Court opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibited the execution of mentally retarded criminals. While that petition was pending, Petitioner's present application was further abated while Petitioner pursued another petition in state court arising out of a Memorandum to the United States Attorney General by President George W. Bush which announcing that the United States would discharge its international obligations by having state courts give effect to an International Court of Justice opinion. The *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Judgment of March 31) held that Mexican nationals were entitled to review and reconsideration of their convictions due to the states' failure to abide by the Vienna convention requiring them to advise these defendants of their right to contact the Mexican consulate. *See Medellin v. Texas*, 552 U.S. 491 (2008).

The Court of Criminal Appeals remanded Petitioner's *Atkins* claim to the trial court. After a hearing, the trial court determined that Petitioner was not mentally retarded, which holding was adopted by the Court of Criminal Appeals. *Ex parte Ibarra*, 2007 WL 2790587, Nos. WR-48832-02 and WR-48832-03 (Tex. Crim. App. September 26, 2007). His third writ, considered at the same time, was dismissed

as a subsequent writ under Article 11.071, Section 5. Petitioner's application for a *writ of certiorari* as to the *Avena* claim was denied. *See Ibarra v. Texas*, 553 U.S. 1055 (2008). A fourth state habeas action, raising an issue under *Wiggins v. Smith*, 539 U.S. 510 (2003), was also dismissed as a subsequent writ under Article 11.071, Section 5. *Ex parte Ibarra*, 2007 WL 4417283, No. WR-48832-04 (Tex. Crim. App. October 1, 2008).

III. GROUNDS OF ERROR

Petitioner asserts the following claims for relief:

1) The amendment to the Texas statute permitting a second search warrant constituted an ex post facto and retroactive law in violation of Article I, § 9 of the constitution and the due process clause of the Fourteenth Amendment.

2) Petitioner's right to a speedy trial and effective assistance of counsel was violated due to the large amount of time between the original indictment and his trial in violation of the Sixth Amendment's right to a speedy trial, the Eighth Amendment prohibition of cruel and unusual punishment, and the Fourteenth Amendment right to due process.

3) Petitioner's initial arrest and subsequent consent to search were in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures.

4) Petitioner's Sixth Amendment confrontation clause Fourteenth Amendment due process rights were violated by the improper identification procedures used by the police.

5) Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the admission of testimony regarding the Victim's fear of Petitioner.

6) Petitioner's Sixth, Eighth and Fourteenth Amendment rights were violated by the admission of testimony regarding Petitioner's sexually inappropriate behavior as it was based on only a single incident.

7) The Texas capital sentencing scheme is in violation of the Eighth and Fourteenth Amendments in that there is no appellate review of the jury's ultimate decision to impose the death penalty.

8) Petitioner received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments as a result of counsel's failure to investigate, develop and present available mitigation evidence, and evidence rebutting portion's of the State's case in aggravation.

9) Petitioner's execution would violate the Eighth Amendment's prohibition against execution of individuals with mental retardation.

10) The Texas capital sentencing scheme violates the Sixth Amendment in that the State is not required to prove that the Petitioner is not mentally retarded and the jury is not required to find that the Petitioner is not mentally retarded.

11) Petitioner's conviction was in violation of the Vienna Convention on Consular Relations as Petitioner was never advised of his right to consult with the Mexican consul.

IV. DISCUSSION

A. Standard for Habeas Review. Title 28, United States Code, Section 2254 ("§ 2254") provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Federal courts must defer to a state court's adjudication of a claim if the claim has been adjudicated on the merits in the state court proceeding unless the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). *Woodfox v. Cain*, 609 F.3d 774, 789 (5th Cir. 2010).

A decision is "contrary to federal law" if it is contradicts a decision of the Supreme Court on a question of law or if it "resolves a case differently from the way

the Supreme Court has on a set of materially indistinguishable facts." *Reed v. Quarterman*, 504 F.3d 465, 471 (5th Cir. 2007), *quoting Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). *See also Woodfox v. Cain*, 609 F.3d at 789. "Clearly established" under § 2254(d)(1) is "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). "Clearly established" is limited to determinations by the Supreme Court and refers to actual holdings of the Supreme Court as opposed to dicta. *Williams v. Taylor*, 529 U.S. at 381.

A state court "unreasonably" applies federal law when it identifies the correct governing principle established by the Supreme Court, but unreasonably applies it to the facts of the case. *Williams v. Taylor*, 529 U.S. at 407; *Woodfox v. Cain*, 609 F.3d at 789. *See also Woodward v. Epps*, 580 F.3d 318, 325 (5th Cir. 2009); *Rogers v. Quarterman*, 555 F.3d 483, 488-89 (5th Cir. 2009). Unreasonableness is evaluated objectively rather than subjectively. *Williams v. Taylor*, 529 U.S. at 409-10. An unreasonable application of federal law is distinguished from a state court decision that is merely incorrect or erroneous. *Woodfox v. Cain*, 609 F.3d at 789. "The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable – a substantially higher threshold." *Schirro v. Landrigan*, 550 U.S. 465, 473 (2007). Habeas relief is merited only when the state court decision is both incorrect and objectively unreasonable. *Williams v. Taylor*, 529 U.S. at 411.

It is the state court's ultimate decision that is to be tested for unreasonableness. *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (*en banc*), *cert. denied*, 537 U.S. 1104 (2003) (focus should be "on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence"). Even in cases where the state court fails to cite applicable Supreme Court precedent, or is even unaware of such precedent, the state court decision is still entitled to deference "so long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]." *Early v. Packer*, 537 U.S. 3, 8 (2002).

When evaluating an unreasonable determination of the facts, the state court's findings of fact are entitled to a presumption of correctness which a petitioner may overcome only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Leal v. Dretke*, 428 F.3d 543, 548 (5th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006). Relief may be granted only if "a factual determination is unreasonable based on the evidence presented to the state court." *Busby v. Dretke*, 359 F.3d 708, 713 (5th Cir. 2004), *cert. denied*, 541 U.S. 1087 (2004).

In addition to the foregoing, the amendments to § 2254 contained in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") did not overrule prior precedent which forecloses habeas relief in the following instances: (1) claims which are procedurally barred as a consequence of a failure to comply with state

procedural rules;[7] (2) claims for which the petitioner seeks retroactive application of a new rule of law on a conviction that was final before the rule was announced;[8] or (3) claims for which the petitioner asserts trial error that, although of constitutional magnitude, did not have a "substantial and injurious effect or influence in determining the jury's verdict."[9]

B. Exhaustion of State Remedies. Under 28 U.S.C. § 2254(b)(1)(A), a federal court may not grant habeas relief unless the petitioner has exhausted his available state court remedies, which means having the issues addressed by the highest court in the state. *Woodfox v. Cain*, 609 F.3d at 789-90. Once failure to exhaust has been raised, the court must compare the petitioner's state and federal claims to determine whether the substance of those claims were presented to the state court, which is a "case- and fact-specific inquiry." *Id*., *quoting Moore v. Quarterman*, 533 F.3d 338, 341 (5th Cir. 2008) (*en banc*).

> "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982) (internal citations omitted). "Rather, the petitioner must afford the state court a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004) (*quoting Anderson*, 459 U.S. at 6, 103 S.Ct. 276).

---

7 *Coleman v. Thompson*, 501 U.S. 722 (1991).

8 *Teague v. Lane*, 489 U.S. 288 (1989).

9 *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

Woodfox v. Cain, 609 F.3d at 792 (footnote omitted). "A petitioner fulfills the exhaustion requirement if 'all crucial factual allegations were before the state courts at the time they ruled on the merits" of the habeas petition.'" *Smith v. Quarterman*, 515 F.3d 392, 400 (5th Cir. 2008), *quoting Dowthitt v. Johnson*, 230 F.3d 733, 746 (5th Cir. 2000). The exhaustion requirement applies even if a petitioner's claims are now procedurally barred under state law. *Gray v. Netherland*, 518 U.S. 152, 161 (1996). In the present case, Petitioner's first, fifth, and sixth claims have not been presented to the State court for review and are unexhausted and procedurally defaulted.

C. Independent and Adequate State Grounds. Federal habeas review of a state court opinion is also precluded when the state court's decision was based upon an independent and adequate state law ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *Rosales v. Dretke*, 444 F.3d 703 (5th Cir. 2006). "This rule is grounded in concerns of comity and federalism. It is designed to prevent federal courts from deciding cases on federal constitutional grounds regarding a petitioner's confinement that would be advisory because the confinement can be upheld on an independent and adequate state law basis." *Rosales v. Dretke*, 444 at 707. One of these grounds is procedural default, where dismissal is based upon a petitioner's failure to abide by state procedural rules. The procedural default rule prevents a habeas petitioner from avoiding exhaustion requirements by defaulting federal claims in state court. *Id*. "A state court expressly and unambiguously bases its

denial of relief on a state procedural default even if it alternatively reaches the merits of a defendant's claim." *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999). A claim should be construed as one involving federal law when "the state court decision rests 'primarily on federal law' or the state and federal law are 'interwoven,' and if 'the adequacy and independence of any possible state law ground is not clear from the face of the opinion. . . .'" *Id., quoting Ruiz v. Quarterman*, 504 F.3d 523, 527 (5th Cir. 2007).

In order to be "adequate" to support the judgment, the state law ground must be both "firmly established and regularly followed." *Ford v. Georgia*, 498 411, 424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). "If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may go to the merits of the claim." *Rosales v. Dretke*, 444 at 707, citing *Barr v. Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 12 L.Ed.2d 766 (1964). The Fifth Circuit has held that Texas's abuse-of-the-writ doctrine has "provided an adequate state ground for the purpose of imposing a procedural bar." *Barrientes v. Johnson*, 221 F.3d 741, 759 (5th Cir. 2000). *See also Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998); *Rocha v. Thaler*, 626 F.3d 815, 829-30 (5th Cir. 2010).

A petitioner may be excused from a procedural default only if he can demonstrate cause and prejudice for the default, or show that the failure to consider the claim will result in a miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at

750. Petitioner's eighth, tenth and eleventhS claims, which were dismissed in relevant part as abuses of the writ, were procedurally defaulted because they were decided on adequate and independent state grounds, and he has presented nothing to excuse the procedural default.

D. Specific Claims.

1. Second Search Warrant. Petitioner argues that his rights were violated when the trial court did not grant his second motion to suppress after his re-indictment. He asserts that the amendment to Article 18.02(d) is in violation of the Ex Post Facto clause and is an impermissible retroactive enforcement of a new law. As previously noted, Petitioner has failed to exhaust his available state court remedies by not having this issue addressed by the highest court in the state. He would also be procedurally barred from presenting this issue in a successive state habeas application under Article 11.071, Section 5(a) of the Texas Code of Criminal Procedure precluding successive writs. This is an adequate state procedural bar which forecloses federal habeas review, unless the petitioner shows cause and prejudice for his failure, or show that failure to consider the claims will result in a fundamental miscarriage of justice. *Nobles v. Johnson*, 127 F.3d 409, 422 (5th Cir. 1997), *cert. denied*, 523 U.S. 1139 (1998). "A claim of miscarriage of justice is limited to a claim of 'actual innocence,' which requires the prisoner to establish through new and reliable evidence 'that it was "more likely than not that no reasonable juror would have convicted him in the light of the new evidence."'"

Woodfox v. Cain, 609 F.3d at 793-95, *quoting Fairman v. Anderson*, 188 F.3d 635, 644 (5th Cir. 1999). In the death penalty context, he must establish actual innocence by showing by clear and convincing evidence that, "but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

Petitioner argues that this claim was presented to the state courts on direct appeal and was addressed on the merits by the Court of Criminal Appeals. However, Petitioner's claim was framed in terms of violations of state law, not federal constitutional law. A petitioner has not exhausted his state remedies when he relies on a legal theory different from that raised in the state court or when the same claim in federal court is supported by factual allegations not raised in the state court. *Ogan v. Cockrell*, 297 F.3d 349, 358 (5th Cir.), *cert. denied*, 537 U.S. 1040 (2002); *Dispensa v. Lynaugh*, 847 F.2d 211, 217-18 (5th Cir. 1988). As Petitioner's claims in the state court were not based upon violations of the federal constitution, they are barred.

Even if not barred, Petitioner's claim would be without merit. The ex post facto clause[10] prohibits implementation of a law to a defendant if it creates a crime that did not previously exist, if it makes the punishment for a crime greater than existed when the act was committed, or deprives "one charged with crime of any defense available

---

[10] There are actually two ex post facto clauses in the constitution. Art. I, § 9, cl. 3 applies to the Federal government, while Art. I, § 10, cl. 1 applies to the States. *Stogner v. California*, 539 U.S. 607 (2003).

according to law at the time when the act was committed."[11] *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). A law that alters legal rules of evidence, requiring less proof to obtain a conviction, also implicates the ex post facto clause. *Carmell v. Texas*, 529 U.S. 513 (2000). A statute does not run afoul of the ex post facto clause if it merely alters a procedural rule. *Id*. A procedural change is a change "in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes." *Collins v. Youngblood*, 497 U.S. at 42. The statute in this case clearly falls within the procedural category. The elimination of the prohibition against a second search warrant did not eliminate a defense to the charges Petitioner faced, nor did it alter the quantum of proof necessary to convict him.

Petitioner's argument that the amended statute implicates his substantive right to be free from search and seizure is not supported. The Constitution protects against *unreasonable* searches and seizures, not all searches and seizures. There was, therefore, no due process or ex post facto violation in this case.

2. Speedy Trial Violation. Petitioner argues that his rights to a speedy trial and the effective assistance of counsel were violated due to the lapse of time which occurred between the first and second indictment. Petitioner asserts that the

---

[11] While the Ex Post Facto Clause limits the powers of legislatures, the Supreme Court "has acknowledged a similar limitation on the power of the judiciary to render decisions that retroactively criminalize previously legal conduct." *Janecka v. Cockrell*, 301 F.3d 316, 322 n. 9 (5th Cir. 2002), *citing Marks v. United States*, 430 U.S. 188, 191 (1977) and *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

circumstances violated his Sixth and Eighth Amendment rights were violated, as well as his Fourteenth Amendment right to due process.

The Sixth Amendment provides the accused in a criminal prosecution the right to a speedy and public trial. "This protection attaches when 'the defendant has been formally indicted or actually restrained accompanying arrest.'" *United States v. Jackson*, 549 F.3d 963, 971 (5th Cir. 2008), *quoting Dickerson v. Guste*, 932 F.2d 1142, 1144 (5th Cir. 1991). *See also United States v. Marion*, 404 U.S. 307, 313 (1971). When no indictment is outstanding, only the "actual restraints imposed by arrest and holding to answer a criminal charge . . . engage the particular protections of the speedy trial provision of the Sixth Amendment. *Id*. at 320. *See also United States v. Loud Hawk*, 474 U.S. 302, 310 (1986). "Similarly, the Speedy Trial Clause has no application after the Government, acting in good faith, formally drops charges." *United States v. MacDonald*, 456 U.S. 1, 7 (1982). This is because the speedy trial guarantee "is designed to minimize the possibility of lengthy incarceration prior to trial, to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused by arrest and the presence of unresolved criminal charges." *Id*. at 8. The appropriate means of protection for a defendant who alleges inordinate delay between arrest and trial is the applicable statute of limitations and the Due Process Clause. *United States v. Marion*, 404 U.S. at 322; *United States*

v. MacDonald, 456 U.S. at 8. As there is no statute of limitations for murder in Texas, Petitioner's basis for relief is under the Due Process Clause.

Any delay prior to charges being filed is scrutinized under the Due Process Clause, not the Speedy Trial Clause. *United States v. MacDonald*, 456 U.S. at 7. The burden of proving a due process violation due to pre-indictment delay is upon the defendant, "who must prove that (1) the prosecutor intentionally delayed the indictment to gain a tactical advantage, and (2) the defendant incurred actual prejudice as a result of the delay." *United States v. Beszborn*, 21 F.3d 62, 65, 66 (5th Cir.), *cert. denied sub nom Westmoreland v. United States*, 513 U.S. 934 (1994). *See also United States v. Marion*, 404 U.S. at 324 (the Due Process Clause could require dismissal of an indictment if a defendant established that pre-indictment delay "caused substantial prejudice to [his] rights to a fair trial and that the delay was an intentional device to gain tactical advantage"); *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 1076 (1997) ("[F]or preindictment delay to violate the due process clause it must not only cause the accused substantial, actual prejudice, but the delay must also have been intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused in the contemplated prosecution or for some other impermissible, bad faith purpose"). In order to demonstrate prejudice, "the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have

aided the defense and that cannot be obtained from other sources." *United States v. Gulley*, 526 F.3d 809, 819-20 (5th Cir.), *cert. denied*, ___ U.S. ___, 129 S.Ct. 159 (2008). Petitioner has shown neither prejudice nor government misconduct.

Nor is there anything to indicate that the delay between the commission of the offense and Petitioner's conviction implicates the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner points to no clearly established Supreme Court authority that holds a lengthy delay between commission of an offense and date of execution constitutes cruel and unusual punishment.

Petitioner has failed to establish that the Court of Criminal Appeals' decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

3. Search and Seizure in Violation of the Fourth Amendment. Petitioner asserts that the consent to search he gave to police should be disregarded as it was elicited as a result of his illegal arrest. Petitioner argues that there was insufficient probable cause to arrest him. As the State notes, a state habeas petitioner may not obtain relief based upon a Fourth Amendment claim where the state has provided an opportunity for full and fair litigation of the claim. *Stone v. Powell*, 428 U.S. 465 (1976). *Stone* forecloses review "in the absence of allegations that the processes provided by a state to fully and fairly litigate fourth amendment claims are routinely

or systematically applied in such a way as to prevent the actual litigation of fourth amendment claims on their merits." *Williams v. Brown*, 609 F.2d 216, 220 (5th Cir. 1980). "[E]rrors in adjudicating Fourth Amendment claims are not an exception to *Stone's* bar." *Moreno v. Dretke*, 450 F.3d 158, 167 (5th Cir. 2006), *cert. denied*, 549 U.S. 1120 (2007). Petitioner presents no argument that Texas courts systematically and erroneously apply the state procedural bar rule to prevent adjudication of Fourth Amendment claims.

Even if Petitioner's Fourth Amendment claim were not barred, it would be without merit. There were sufficient circumstances known to the arresting officer to provide probable cause to arrest Petitioner. The descriptions of the suspect and his vehicle led police to Petitioner through Maria's brother, who was acquainted with Petitioner. A car fitting the description given by the witnesses was parked in front of Petitioner's residence, and a check revealed the car was registered to Petitioner. Petitioner matched the physical description given by the witnesses, including the clothes he was wearing. He also had scratches on his face, which the arresting officer knew could have come from the attack on Maria who had blood and skin under her fingernails. Additionally, Petitioner ducked his head when the arresting officer told him why he was there, indicating guilt to the officer.

Even if there were a Fourth Amendment violation, the evidence discovered during the search was, some yellow wire, could not have had only slight, if any, influence on the jury's decision, as the wire was not the same size as that used to

murder Maria. The evidence linking Petitioner to Maria's murder was more than sufficient absent that piece of evidence. Much more inculpatory was the evidence that Petitioner had access at his place of employment to wire that was the same size as that used in the murder. Accordingly, Petitioner has no ground for relief under the Fourth Amendment as the Court of Criminal Appeals' decision was not contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

4. Impermissibly Suggestive Identification Procedure. During the investigation, police discovered three witnesses who had observed an individual leaving Maria's house on the morning of the murder – Troy Wells, Lori Peterson, and Doreen Kennedy. All three witnesses identified Petitioner's Camaro as the car they had seen at Maria's house on the day of the murder. Kennedy was unable to identify Petitioner from a photo array or from a live line-up. Peterson was unable to identify Petitioner from the photo array, but did identify him at the live line-up. Wells was unable to identify Petitioner from the photo array, although he pointed to Petitioner's picture and said he "looked familiar." The individual Wells selected looked remarkably similar to Petitioner. Wells was then shown two photographs of Petitioner looking downward, which was the position all the witnesses had described. After looking at those photographs, Wells picked out Petitioner. At the live line-up

almost a month later, Wells again identified Petitioner. At the hearing on Petitioner's motion to suppress, Wells testified that he could identify Petitioner in court because he independently remembered him from the day of the murder, and that the photo line-up did not influence his decision in the live line-up.

Petitioner argues that the numerous photographs shown to Wells of Petitioner tainted his identification and constituted a violation of his Sixth Amendment right to confrontation and his Fourteenth Amendment due process rights.[12] An in-court identification is inadmissible when it has been tainted by an impermissibly suggestive pre-trial photographic identification. The test is whether, under the totality of the circumstances, "the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968). Non-exclusive factors to be considered are: (1) the opportunity the witness had to view the defendant at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the defendant; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the length of time which had elapsed between the commission of the crime and the identification. *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). Only the reliability of Wells'

[12] Although Petitioner appears to also question the identifications made by Peterson and Kennedy, there is nothing in the record to establish that either identified Petitioner after an impermissibly suggestive identification procedure.

identification at issue, as neither of the other witnesses was shown the additional photographs of Petitioner looking down.

The Court of Criminal Appeals noted the following when evaluating the Biggers factors:

> Wells, a reserve police officer at the time of the instant offense, stated he had one to two minutes in which to view [Petitioner]. He was dropping his wife off at work when they saw the primer-red Camaro and a man walking towards them from the direction of the victim's house. They felt the situation was unusual, so Wells waited with his wife until another employee arrived before she got out of their vehicle to open up the business. Viewing these deferentially, Wells' experience as a trained police officer and his concern for his wife could have heightened his ability to take in detail despite the fact that their infant sone was screaming in the car.
>
> Next, Wells' description of the suspect matched that of the other two witnesses who saw the suspect that morning, and matched [Petitioner's] general appearance. [Petitioner] points out that every witness was mistaken because, although they were correct about he height, hair, clothing, race, and weight, they did not notice he had a full beard instead of just a mustache. However, Wells noted that he saw a mustache that went past the corners of the suspect's mouth and the suspect had his head buried in his chest while he walked quickly toward the Camaro. It is conceivable that the positioning of the suspect's head prevented the witness from viewing the full extent of the suspect's facial hair.
>
> Wells' first confrontation with [Petitioner] was at the photo line-up, twenty-seven days following the crime. Wells indicated [Petitioner] looked familiar, but initially identified another individual – whose picture looked very similar to [Petitioner's] – because, he stated, of how the man was holding his eyes. Wells never changed his description of the suspect at any time. At both the live line-up and in court, Wells positively identified [Petitioner] and testified that the identification was based on what he observed the morning of the offense and not on any intervening photographs he may have viewed.

Ibarra v. State of Texas, 11 S.W.3d at 196. The totality of the circumstances supports the Court of Criminal Appeals determination there was no substantial likelihood of misidentification. Accordingly, Petitioner has no ground for relief under the Sixth and Fourteenth Amendments as the Court of Criminal Appeals' decision was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

5. Improper Introduction of Testimony Regarding Victim's Fear of Petitioner. As previously noted, Petitioner failed to exhaust his available state remedies as to this claim and it is barred from federal habeas review. While Petitioner raised the same factual basis in his appeal, he argued that the testimony was irrelevant hearsay because he did not raise self defense or the defense of sudden passion, a state evidentiary claim. The Court of Criminal Appeals' rejection of the claim was based solely on state law – he did not preserve the issue by failing to make a contemporaneous objection.

Even if the claim were not otherwise barred, it would be without merit. The Sixth Amendment protects a defendant's right to confront the witnesses against him. The Confrontation Clause "reflects a judgment, not only about the desirability of reliable evidence. . ., but about how reliability can best be determined." *Crawford v. Washington*, 514 U.S. 36, 61 (2004) (citation omitted). Testimonial evidence

regarding the statements of another are not in conflict with the Confrontation Clause and Sixth Amendment if the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. The *Crawford* case established a new rule regarding the introduction of such testimony. Prior authority permitted such testimony if the declarant was unavailable and if the statement bore adequate "indicia of reliability." *See Ohio v. Roberts*, 448 U.S. 56 (1980). As a new rule, application of *Crawford* retroactively would run afoul of *Teague v. Lane*, 489 U..S. 288 (1989).

Even under *Crawford*, the evidence could be deemed admissible if it fell within an exception to the hearsay rule, such as the existing mental, emotional, or physical condition codified in Rule 803(3) of the Federal Rules of Evidence. The rule is currently widely recognized in both federal and state courts and has been recognized for a long time, establishing it as a "firmly rooted" hearsay exception. *See White v. Illinois*, 502 U.S. 346, 356 n. 8 (1992). Finally, even if erroneously admitted, this testimony could have little influence on the jury's verdict considering the overwhelming physical evidence against Petitioner. Petitioner's fifth ground is without merit.

6. Improper Introduction of Reputation Evidence. As previously noted, Petitioner's claim in this regard was not exhausted in the state courts. Petitioner argued on appeal that this testimony was inadmissible as reputation testimony under state law because it was based solely on specific bad acts. The Court of Criminal

Appeals determined that the testimony was properly admitted as character testimony under Rule 405(a) of the Texas Rules of Criminal Evidence. Even if not procedurally barred, this claim would be without merit.

Evidentiary rulings in particular are not generally subject to federal habeas review unless they violate some particular constitutional right or if such rulings impacted a defendant's due process rights to such as degree as to render the trial as a whole "fundamentally unfair." *Cupit v. Whitley*, 28 F.3d 532, 536 (5th Cir. 1994); *Trussell v. Estelle*, 699 F.2d 256, 259 (5th Cir. 1983).

Petitioner argues about the testimony of his sister-in-law, who testified concerning a sexually inappropriate incident she had observed between Petitioner and her sister. The witness did not testify to just this incident, but also about the fact that Petitioner had molested her son. Also, as reputation testimony it would be admissible because it was based not only upon the witness's observation, but also upon what she had heard, not only from her father, but from other family members and other people. As a result, Petitioner's sixth ground is without merit.

7. Unavailability of Appellate Review of the Death Penalty. Petitioner argues that Article 37.071 of the Texas Code of Criminal Procedure prevents meaningful appellate review as the Court of Criminal Appeals has held that it cannot review the jury's decision to impose the death penalty. He asserts that appellate review is unavailable as to the jury's decision on mitigation in violation of the Eighth and Fourteenth Amendments. The Court of Criminal Appeals rejected Petitioner's

argument under both state and federal law. Petitioner's claim is foreclosed by federal law, which holds that the Eighth Amendment does not require a redetermination on appeal of the death sentence of one found to be death eligible. *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Pulley v. Harris*, 465 U.S. 37, 45-46 (1984). The Fifth Circuit has rejected Petitioner's argument, upholding the Court of Criminal Appeals' refusal to review the jurors' subjective determination on mitigation. *Moore v. Johnson*, 225 F.3d 495 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). The *Moore* court determined that this refusal meets Constitutional muster. Therefore, the Court of Criminal Appeals' decision was not contrary to, nor did it involve an unreasonable application of, clearly established Federal law as determined by the Supreme Court, nor was it based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

8. Ineffective Assistance of Counsel. Petitioner argues that his trial counsel was ineffective in failing to investigate, develop and present available mitigation evidence, as well as evidence which would rebut portions of the State's case in aggravation, relying upon the opinion in Wiggins v. Smith, 539 U.S. 510 (2003). As previously noted, this claim was procedurally defaulted because it was raised in his fourth state habeas application and was dismissed under the Texas abuse of the writ statute, an adequate and independent state ground. Petitioner responds that the

state dismissal was not clearly independent of federal law because the opinion required the incorporation and application of federal law.

The State court order in this case was a per curiam order which went through Petitioner's various filings and concluded, "[w]e have reviewed Applicant's claim for relief and find that it does not meet the requirements for consideration of subsequent claims under Article 11.071, Section 5. Therefore, we dismiss this subsequent application." *Ex parte Ibarra*,, 2008 WL 4417283, No. 48,832-04 (Tex. Crim. App. 2008). There is no indication in the order that the Court of Criminal Appeals relied upon anything other than abuse of the writ. In cases where a state court is silent about the basis for its decision, or where federal law was not expressly invoked in the opinion, does not create a presumption that the state judgment rested on federal grounds. *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). A perfunctory dismissal does not suggest that the state court considered or ruled on the merits. *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008). While noting the distinctions in the *Ruiz*[13] case upon which Petitioner relies, the Fifth Circuit has distinguished it because of the dissension among the Court of Appeals judges. *Balentine v. Thaler*, 626 F.3d 842 (5th Cir. 2010) ("We conclude that *Ruiz*, by relying on the fact that one of the state court judges clearly reached the merits, had a decision in which it did 'fairly appear' that the state court primarily relied on federal grounds"). *Balentine* specifically rejected the argument that a denial of relief under Section 5, without

[13] *Ruiz v. Quarterman*, 504 F.3d 523 *(5th Cir. 2007).

more, would justify a presumption that the Court of Criminal Appeals reached the federal merits of the application. *Id*. at 851, 854.

The facts in this case are more akin to *Hughes v. Quarterman*, 530 F.3d 336 (5th Cir. 2008), in which the Fifth Circuit applied Texas' abuse of the writ doctrine. In the *Hughes* case, the Fifth Circuit identified two factors that discourage reading uncertainty into the Court of Criminal Appeals' terse order. First, the factual basis for the barred claims was available well before the petitioner filed those claims. Second, there is nothing in the perfunctory dismissal that remotely suggests that the Court of Criminal Appeals "actually considered or ruled on the merits." *Id*. at 342. The same is true here. The facts Petitioner raises in support of his ineffective assistance claim were available to him during the course of his first habeas application. He has shown no cause and prejudice for failing to present them earlier, nor has he established that failure to consider this claim now would be a miscarriage of justice.

Even assuming that Petitioner's claim is not procedurally barred, it is without merit. The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution has the right to assistance of counsel for his defense. In evaluating whether counsel's performance is inadequate, the Supreme Court has developed a two-prong test. *Strickland v. Washington*, 466 U.S. 668 (1984). Under this test, the Petitioner must establish: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense so as to deprive him

of a fair trial. *Id*. The proper standard for evaluating counsel's performance is that of reasonably effective assistance, considering all of the circumstances existing as of the time of counsel's conduct. *Hill v. Lockhart*, 474 U.S. 52 (1985). Scrutiny of counsel's performance is "extremely deferential;" *Bell v. Lynaugh*, 828 F.2d 1085, 1088 (5th Cir. 1987); and counsel's conduct is "strongly presumed to fall within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690. Counsel's advice need not be perfect -- it need only be reasonably competent within the "range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). To establish prejudice, the defendant must show that his attorney's errors were so serious that they rendered "the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 362, 372 (1993).

Petitioner asserts that further investigation by counsel would have established numerous problems with his background, including desperate poverty, inadequate nutrition, disruptive family life, experience of and exposure to family violence, poor childhood development both mentally and physically, poor performance at school, and suffering a head injury as a child. Petitioner further asserts that he suffers from mental retardation and post-traumatic stress disorder. The facts, however, are one-sided. Because these matters were not presented to the state court in a procedurally correct manner, there was no hearing on the issues before the trial

court and no fact findings. Additionally, without the evidentiary hearing, there are no affidavits or statements from trial counsel which could explain strategic decisions.

Even assuming the foregoing deficiencies, the record establishes that there was at least some investigation made by counsel. The record reflects motions for investigative funding and assistance, including evaluations by Dr. Stephen Mark, a psychiatrist. Many of the facts identified by Petitioner were in fact presented to the jury through the testimony of Petitioner's sister and his wife, who testified that Petitioner came to the United States to find work to help support his family, that their family was poor, and that they lived in "humble" circumstances, working on the land, and the circumstances of his family situation in the United States. Since the information was provided to the jury, Petitioner has failed to establish that counsel was ineffective for failing to investigate or present such evidence.

Even if counsel were determined to be ineffective, Petitioner must still show prejudice before he may prevail, which entails showing a reasonable probability that the jury would not have imposed the death penalty in the absence of counsel's errors. In this case, the overwhelming aggravated factors, previously discussed, outweigh the possible mitigating evidence Petitioner could introduce, particularly considering the "brutal and senseless nature of the crime." *Smith v. Quarterman*, 471 F.3d 565, 576 (5th Cir. 2006). Petitioner's ineffective assistance claim is likewise without merit.

9. Mental Retardation. Petitioner asserts that he is mentally retarded and that his execution would be in violation of the Eighth Amendment ban on excessive and cruel and unusual punishment under the authority of *Atkins v. Virginia*, 536 U.S. 304 (2002). In support of this claim, Petitioner presents a number of affidavits. However, these were never presented to the state court. Such evidence is to be analyzed under § 2254(b), which requires exhaustion in the state courts. "The exhaustion requirement is not satisfied if the petitioner 'presents *material* additional evidentiary support to the federal court that was not presented to the state court.'" *Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008), *quoting Dowthitt v. Johnson*, 230 F.3d 733, 745 (5th Cir. 2000) (emphasis in original). "Evidence is material if it fundamentally alters, not merely supplements, the claim presented in state court. *Id*.

In state court, Petitioner presented no witnesses at all and submitted no affidavits from family. In order to establish that he falls under the protection of *Atkins*, Petitioner must show that he possess significantly subaverage intellectual functioning, which impacts two or more adaptive skill areas (communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work), which manifested before the age of 18. *Atkins* at 309 n.3, 317 n. 22. Without the testimony or affidavits from Petitioner's family and teacher, which he submits in this court for the first time, Petitioner fails to establish that any impairment he may have in his intellectual functioning occurred

before the age of 18. The affidavits are, therefore, material rather than merely supplementary and should have been presented to the state court for exhaustion prior to presentation in this Court. Petitioner's claim in this regard is procedurally defaulted for failure to exhaust the claim in the state court.

Petitioner argues that he was unable to fully investigate or present evidence because he was not given sufficient time and resources to do so. However, Atkins was decided in 2002. The evidentiary hearing was scheduled in September of 2006. There was more than sufficient time to gather whatever evidence was needed to present to the state court. Petitioner's argument that funds were not approved by the state court is without merit, as certain funds were approved. Additionally, as there is no right to counsel in a habeas proceeding, there is also no right to funding of state habeas counsel. *Roberts v. Dretke*, 356 F.3d 632, 640 (5th Cir. 2004). Finally, Petitioner presents nothing to establish why assistance was not requested from the Mexican consul, who was advised of Petitioner's case in September of 1997. As the affidavit of Agustin Rodriguez De La Gala indicates, the Mexican consulate was available to provide assistance in mitigation investigations, as well as funds for expert and investigative assistance, interpreters, psychologists, mitigation specialists, psychiatrists and travel expenses. There is, therefore, no excuse for Petitioner's procedural default.

Even if the Court were to consider the merits of this claim, the evidence that was presented to the state court would be insufficient to overcome the record in this

case. Dr. Stephen Mark evaluated Petitioner on two occasions, finding that he was competent to stand trial and that he was not mentally retarded. The expert opinion provided by Petitioner, which was completed in 2003 after *Atkins*, cannot carry as much weight as it was completed at a time when Petitioner had great incentive to appear as intellectually compromised as possible. This claim is without merit.

10. Jury Verdict as to Mental Retardation. Petitioner next argues that his Sixth Amendment rights were violated because the State was not required to prove beyond a reasonable doubt and the jury was not required to make a factual finding that he was mentally retarded. As previously noted, this claim was also procedurally defaulted as it was dismissed by the Court of Criminal Appeals as an abuse of the writ. Even if not barred, the claim would be without merit.

Petitioner relies upon the holdings in *Ring v. Arizona*, 536 U.S. 584 (2002), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as well as *Atkins*. However, the Fifth Circuit has recently held that "neither *Ring* and *Apprendi* nor *Atkins* render the absence of mental retardation the functional equivalent of an element of capital murder which the state must prove beyond a reasonable doubt." *In re Johnson*, 334 F.3d 403, 405 (5th Cir. 2003). *See also Woods v. Quarterman*, 498 F.3d 580, 585 n. 3 (5th Cir. 2007). Accordingly, Petitioner's tenth claim is without merit.

11. Violation of the Vienna Convention on Consular Relations. Petitioner asserts his rights under the Vienna Convention were violated because he was not advised of his right to consult with the Mexican consulate when arrested. This claim

is also barred be procedural default. The Court of Criminal Appeals dismissed this claim in Petitioner's direct appeal due to lack of a contemporaneous objection. As such, Petitioner's claim is barred.

Even if not procedurally barred, Petitioner's claim would be without merit. The history of this particular claim is outlined in the Supreme Court's opinion in *Medellin v. Texas*, 552 U.S. 491 (2008). Basically, the United States ratified the Vienna Convention on Consular Relations ("Vienna Convention" or "Convention") and the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention ("Optional Protocol" or "Protocol") in 1969. Article 36 of the Convention provides that if a person detained in a foreign country requests, that country should inform the consular post of the detained person's country of his detention and inform the detainee of the right to request assistance from his consulate. The Optional Protocol provides that disputes arising out of the Convention would be brought before the International Court of Justice ("ICJ"). A number of Mexican nationals filed a claim before the ICJ, claiming violations of the Convention. The ICJ held that the Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences in the United States. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Judgment of Mar. 31) (*Avena*). The Supreme Court then ruled, contrary to Avena, that the Vienna Convention did not preclude the application of state default rules. *Sanchez-Lamas v. Oregon*, 548 U.S. 331 (2006). President George W. Bush then determined, through a

Memorandum to the Attorney General (Feb. 28, 2005), that the United States would "'discharge its international obligations'" under Avena 'by having State courts give effect to the decision.'" *Medellin v. Texas*, 552 U.S. at 498. As Medellin filed his habeas action raising the Vienna Convention and the *Avena* case as a basis for relief, the Supreme Court determined that Avena was not binding federal law as ICJ judgments are not conclusive on American courts. *Id*. Nor was the President's Memorandum sufficient to bind *Avena* onto domestic courts. As a result, Petitioner's claim is subject to procedural bar. *See Leal Garcia v. Quarterman*, 5793 F.3d 214 (5th Cir. 2009).

Even if procedural default were somehow waived, to be successful Petitioner would need to show prejudice. No additional assistance could have diminished the power of the evidence against him. The DNA and witnesses that connected him to the murder, the brutality of the crime, and the continuing threat to society that he posed were of such weight that no reasonable jury would have made a different decision. Accordingly, Petitioner's eleventh ground is likewise without merit.

In light of the foregoing, it is

ORDERED that Respondent's Motion for Summary Judgment is **GRANTED**. It is further

ORDERED that Petitioner's application for federal writ of habeas corpus is **DENIED** and this case is **DISMISSED**. It is further

ORDERED that Petitioner's Motion for Evidentiary Hearing is **DENIED**. It is further

ORDERED that any motions not previously ruled upon by the Court are **DENIED**.

Additionally, having considered the findings and conclusions set forth above and the requirements of 28 U.S.C. § 2253, the Courts finds, *sua sponte*, that a certificate of appealability should not issue, as Petitioner has failed to make a substantial showing of the denial of a constitutional right.

SIGNED on this 31st day of March, 2011.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE