APPENDIX

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APPENDIX A

Order of the United States Court of Appeals for the Fifth Circuit,
Runnels v. Davis, No. 17-70031 (5th Cir. 2018)

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
August 14, 2018
Lyle W. Cayce
Clerk

No. 17-70031

TRAVIS TREVINO RUNNELS,

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 Northern District of Texas
USDC No. 2:12-CV-74

Before GRAVES, HIGGINSON, and COSTA, Circuit Judges.

JAMES E. GRAVES, JR., Circuit Judge: *

Petitioner Travis Trevino Runnels was convicted of the capital murder of Stanley Wiley and sentenced to death. His direct appeal and state collateral proceedings were unsuccessful, as were his 28 U.S.C. § 2254 petition for writ of habeas corpus in federal district court and his attempt to appeal the district court's denial of his petition to this court. In lieu of filing a petition for rehearing of this court's decision denying him a certificate of appealability (COA) on

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

the denial of the petition, Runnels filed a motion in the district court under Federal Rule of Civil Procedure 60(b), seeking to vacate the denial. The district court ruled that the motion was, in reality, a second-or-successive habeas petition, and, in the alternative, that Runnels failed to make the requisite showing to justify Rule 60(b) relief. Runnels now applies for a COA to appeal that denial. For the reasons below, we deny the application.

I

A

The following recitation of facts is drawn from this panel's 2016 decision denying Runnel's COA application arising from the district court's denial of his habeas petition:

> Runnels was charged with the 2003 murder of Stanley Wiley, a civilian supervisor at the Texas Department of Criminal Justice's (TDCJ) Clements Unit boot factory. During his work shift as a janitor at the boot factory, Runnels approached Wiley from behind, pulled his head back, and slit his throat. Wiley later died from the injury. The Texas Court of Criminal Appeals ("CCA") summarizes the facts of the case:
>
> > Appellant did not enjoy working as a janitor at the prison boot factory. On the morning of the day of the murder, he expressed anger at the fact that he had not been transferred to being a barber as he had requested. He told fellow inmate Bud Williams that he was going to be "shipped one way or another" and that "he was going to kill someone." Appellant said that he would kill Wiley if Wiley said anything to him that morning. Appellant told another inmate, William Gilchrist, that he planned to hold the boot-factory plant manager hostage in the office after the other correctional officers had left. Finally, after appellant had arrived at the boot factory, he told fellow inmate Phillip Yow that he was going to do something.
> >
> > During the first shift at the boot factory, Appellant approached Wiley, raised a knife, tilted Wiley's head back, and cut his throat. Appellant then wiped the knife with

> a white rag and walked back toward the trimming tables. When Yow later asked appellant why he had attacked Wiley, appellant said, "It could have been any offender or inmate, you know, as long as they was white." In response to Yow's explanation that appellant could get the death penalty if Wiley died, appellant responded, "[a] dead man can't talk."
>
> Wiley did die from the injury. It was later determined that the cut was a twenty-three centimeter long neck wound that transected the external carotid artery and the internal jugular vein and extended in depth to the spine. A medical examiner found that the force required to inflict the wound was "moderate to severe." Appellant was twenty-six years old when he committed the offense.

Runnels v. State, 2007 WL 2655682, at *1 (Tex. Crim. App. Sept. 12, 2007).

The record shows that Runnels had been convicted of three other felonies before murdering Wiley. In 1993, he had been convicted of second-degree felony burglary. After being placed on probation, he committed (and was convicted for) another burglary resulting in the revocation of his probation. In 1997, he was convicted of first-degree felony aggravated robbery committed with a firearm. In prison, Runnels committed numerous acts of misconduct including: (1) hitting a guard in the jaw; (2) throwing urine at a guard; (3) and throwing feces at a guard.

Though the State Counsel for Offenders was initially appointed to represent Runnels for murdering Wiley, the trial judge granted their motion to withdraw on grounds that they lacked experience and training in death penalty litigation. On May 17, 2004, Jim Durham and Laura Hamilton were appointed as Runnels' defense counsel. In addition, the court appointed defense investigator, Kathy Garrison; psychiatrist, Lisa Clayton; neuro-psychologist, Richard Fulbright; and attorney, Warren Clark, who acted as capital jury selection consultant. Attorney Robert Hirschhorn helped to prepare the defense's juror questionnaire.

At trial, Runnels entered a guilty plea. He also provided the trial judge with an affidavit stating that he had discussed the strategic and tactical aspects of his guilty plea with counsel and that he voluntarily entered into his guilty plea. On the day of trial, potential defense witnesses including Runnels' mother, father, grandmother;

and brother Darmonica did not make themselves available to testify. Darmonica refused to make the trip to Amarillo. Runnels' mother, grandmother, and father made the trip, but Runnels' father remained in the courtroom, thus making himself unavailable to testify. Runnels' mother and grandmother left the courthouse and drove home before they could testify. When Garrison called the family members who had left, they told her that they could do nothing for Runnels now and hung up the telephone.

With no defense witnesses present, defense counsel James Durham attempted to show that Runnels did not constitute a future danger by eliciting testimony from seven prosecution witnesses who had been in contact with Runnels on the day of the murder. These inmates testified that Runnels was a good and peaceable prisoner who had cooperated with officers after the attack. After the state rested, Durham informed the court that he had a witness who was teaching a class and who could not arrive until later that day. He had a witness whom he wanted to confer with counsel about. He also had subpoenaed additional out-of-town witnesses for the next day. When the judge asked if Durham could convince his witness who was teaching a class to come sooner, Durham said that he would inquire. After a short break, Durham rested without calling any defense witnesses. The next day, he moved for an instructed verdict on the issue of future dangerousness. The motion was denied.

During closing arguments, the prosecution stated that Runnels' actions demonstrated his future dangerousness despite testimony by the seven inmate witnesses to the contrary. The prosecution also emphasized Runnels' prior convictions, prison misconduct, and the brutal nature of the attack on Wiley. During his closing argument, defense counsel Durham stated that Runnels' decision to plead guilty was his "first act of contrition . . . ." He also reemphasized that the State had not carried its burden of proof of future dangerousness. In particular, he argued that the State had not put on any experts regarding Runnels' future dangerousness and that seven inmates had testified that Runnels was peaceful and non-violent. Finally, he pointed out that Runnels had had no major incidents in prison, and that he had never hurt or hit anyone before the murder. On rebuttal, the prosecution argued against the need to present an expert on Runnels' future dangerousness.

After sentencing, Runnels filed a motion for a new trial. After an evidentiary hearing at which, inter alia, Mr. Durham testified, it

> was denied. His conviction was automatically appealed to the CCA, which unanimously confirmed his conviction and death sentence. Runnels' new counsel, Joe Marr Wilson, filed an application for habeas relief in state court. Runnels, through counsel Wilson, alleged that Durham had rendered ineffective assistance at trial for failing to present punishment-phase evidence and failing to conduct an adequate mitigation investigation. Runnels supported his application with affidavits from Runnels, his brother Darmonica, his mother, his grandmother, and two cousins. The affidavits stated, among other things, that: (1) Runnels mother and grandmother drove to Amarillo with Runnels' father for the trial, waited at the courthouse thinking they would testify, but were told either by defense investigator Kathy Garrison or Durham that they would not be needed, and went home; (2) Runnels' brother Darmonica was never served with a subpoena; (3) no one had ever interviewed Runnels' cousins before trial, but they would have cooperated if asked; (4) Durham had recommended Runnels plead guilty and told him that the "real fight would be in showing a jury at the punishment phase that [he] had a good side and that [he] could be rehabilitated;" and (5) Runnels had provided Garrison with the names of at least thirty family members and ten friends to serve as character witnesses and offer information about his upbringing and family history.
>
> After making findings of fact, which summarized the defense's mitigation investigation and strategy, and conclusions of law, the trial judge recommended the denial of habeas relief, determining that Durham's decision not to present testimony was a sound strategy. The CCA held the application in abeyance and ordered the trial court to conduct an evidentiary hearing on Runnels' ineffective-assistance of counsel claim and on a claim that his guilty plea was involuntarily. After a hearing during which the trial judge made supplemental findings of fact and conclusions of law, the judge once again recommended that habeas relief be denied. The CCA adopted the trial judge's recommendation including the initial and supplemental findings of fact and conclusions of law.

Runnels v. Davis, 664 F. App'x 371, 372–74 (5th Cir. 2016) (per curiam).

B

In December 2012, Runnels filed a federal habeas petition in district court through then-appointed counsel, Donald Vernay. He raised ineffective assistance of counsel claims against Durham, the state trial counsel, and Wilson, the state

habeas counsel. Vernay contemporaneously filed a motion to suspend the proceedings pending the Supreme Court's decision in *Trevino v. Thaler*, 569 U.S. 413 (2013), but the district court denied the motion because the parties had not identified any procedurally defaulted claims in the petition. After the Respondent filed an Answer alleging that a portion of Runnels's IATC claim was defaulted, the district court asked for supplemental briefing on *Trevino* and *Martinez v. Ryan*, 566 U.S. 1 (2012).

Upon review, the court held that the IATC claim was entirely exhausted. The allegedly unexhausted portion of the IATC claim—based on the failure to obtain more psychological testing—did not fall under the *Martinez* exception because the supporting affidavit was insufficient to show state habeas counsel should have pursued psychological testing, and the court declined to extend *Martinez* to allow relitigation of a claim that had been denied on the merits in state court. The court alternatively held that Wilson was not ineffective for failing to obtain a psychological examination and failing to present live testimony. The court deferred to the state court ruling, denied the habeas petition, and denied a COA. *See Runnels v. Stephens*, No. 12-0074, 2016 WL 1275654 (N.D. Tex. Mar. 31, 2016). Runnels timely filed an application for a COA in this court, which we denied. *See generally Runnels*, 664 F. App'x 371.

After the COA application was filed but before it was adjudicated, Vernay filed a motion to withdraw as counsel, which the panel granted. *See* Order, *Runnels v. Davis*, No. 16-70012 (5th Cir. Nov. 17, 2016). The court appointed Janet Gilger-VanderZanden and Mark Pickett as counsel in Vernay's place. These counsel, who currently represent Runnels, obtained an extension of time for filing a petition for rehearing, but later filed a motion to stay the proceedings to allow Runnels to file a motion in district court for relief from judgment. The panel granted the motion.

C

Runnels filed the instant Rule 60(b) motion seeking relief from judgment in June 2017. The motion raises two principal arguments. The first is based on a neuropsychological evaluation administered at the request of counsel by Dr. John Fabian, which revealed that Runnels suffers from ADHD, PTSD, frontal lobe damage, and a language-based learning disability. Runnels claims that the mental illness diagnoses are "intertwined with severe personal, financial, and familial hardships [he] faced during his childhood, all providing a significant case in mitigation that was unknown to the jury as well as every subsequent appellate court." He argued that this evidence "places his claim in a 'significantly different legal posture' from what was presented in state court," *i.e.*, that the claim is unexhausted.

The second ground involves a claim that Vernay's performance as federal habeas counsel constituted abandonment—that Vernay, in response to the district court's request for *Martinez* briefing, allegedly filed a sparse brief which mostly recounted procedural history and the decision in *Martinez*, and that, instead of presenting a new claim for relief, he allegedly rehashed an ineffective assistance claim that he had already presented as a non-defaulted claim in his original habeas petition. Runnels alleges that Vernay did not request funding from the district court for an investigator, mitigation specialist, or mental health expert. Furthermore, according to Runnels, Vernay's poor performance continued after the district court denied the initial habeas petition: Vernay's brief accompanying the first application for COA, Runnels claims, contained boilerplate language and incomplete arguments.

Runnels also cites as proof of abandonment the fact that this court eventually removed Vernay from the Criminal Justice Act attorney roster. In October 2016, the court issued an Order to Show Cause to Vernay, stating that his "recent performance in cases to which he has been appointed raises concerns about

his fitness to represent indigent defendants under the CJA." The Order to Show Cause specifically referenced Runnels's case, stating that "the poor quality of the briefing submitted cast serious doubt upon his suitability to continue to represent indigent defendants in capital cases." Vernay did not respond to the Order, and he was removed from the roster.

On the basis of these facts, Runnels requested that the district court grant him relief from judgment that would allow him to reopen habeas proceedings and investigate and present claims for relief under the exception supplied by *Martinez*. The magistrate judge recommended that the district court find that the Rule 60(b) motion is, in reality, a second-or-successive habeas petition, and that Vernay's representation did not create structural error. The district court adopted the magistrate judge's report. It rejected as belied by the record Runnels's argument that Vernay "failed to perform at all" with respect to the IATC claim, noting that, while at the time the petition was filed, *Martinez* did not apply to Texas inmates, Vernay "correctly anticipated the favorable outcome in *Trevino* . . . and raised a colorable IATC claim using the *Martinez* exception to procedural bar" and supporting it with new evidence. The court explained that he had also moved for leave to amend or supplement the petition once *Trevino* issued. The court next found that if Runnels was correct that the presentation of Dr. Fabian's report was sufficient to fundamentally alter the claim previously presented, "then by his own admission, he is raising a new claim that was not presented in a prior application." In short, the court concluded that Runnels's motion raised either (1) a new, unexhausted claim of ineffective assistance of trial counsel, or (2) the same claim that was deemed exhausted and decided against him on the merits under § 2254(d). The court ruled that the motion was a second or successive petition and transferred it to this court. In the alternative, the court denied the motion, concluding that Runnels did not present evidence justifying equitable relief under Rule 60(b).

Runnels now applies for a certificate of appealability, seeking to appeal the district court's ruling on the Rule 60(b) motion.

II

Federal habeas proceedings are subject to the rules prescribed by the Anti-terrorism and Effective Death Penalty Act (AEDPA). *Matamoros v. Stephens*, 783 F.3d 212, 215 (5th Cir. 2015); *see* 28 U.S.C. § 2254. Under AEDPA, a certificate of appealability is a jurisdictional prerequisite to appealing the denial of habeas relief. *See* 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003). A COA may issue upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). At the COA stage, we limit our examination "to a threshold inquiry into the underlying merits of the claims, and ask only if the District Court's decision was debatable." *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017); *see also Buck v. Davis*, 580 U.S. —, —, 137 S. Ct. 759, 773 (2017) ("[T]he 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.'" (quoting *Miller-El*, 537 U.S. at 327)). "When . . . the district court denies relief on procedural grounds, the petitioner seeking a COA must show both 'that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" *Gonzalez v. Thaler*, 565 U.S. 134, 140–41 (2012) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). Whatever the basis for the denial, the court must bear in mind that "[w]here the petitioner faces the death penalty, 'any doubts as to whether a COA should issue must be resolved' in the petitioner's favor.'" *Allen v. Stephens*, 805 F.3d 617, 625 (5th Cir. 2015) (quoting *Medellin v. Dretke*, 371 F.3d 270, 275 (5th Cir. 2004)), *abrogated on other grounds by Ayestas v. Davis*, 584 U.S. —, 138 S. Ct. 1080 (2018).

III

We need not concern ourselves with Runnels's claim of abandonment by his previous habeas counsel, because we conclude that it is beyond debate that Runnels's Rule 60(b) motion is, in fact, a second-or-successive habeas petition.

Federal Rule of Civil Procedure 60(b)(6) allows a district court to grant relief "from a final judgment, order or proceeding" for "any . . . reason that justifies relief." Fed. R. Civ. P. 60(b). To succeed on a Rule 60(b) motion, the movant must show (1) that the motion was made within a reasonable time, and (2) extraordinary circumstances exist that justify the reopening of a final judgment. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). We review de novo the district court's construction of the Rule 60(b) motion as a successive habeas petition. *Coleman v. Stephens* (*In re Coleman*), 768 F.3d 367, 371 (5th Cir. 2014).

"[T]o bring a proper Rule 60(b) claim" in a habeas proceeding, "a movant must show 'a non-merits-based defect in the district court's earlier decision on the federal habeas petition.'" *Edwards v. Davis* (*In re Edwards*), 865 F.3d 197, 204 (5th Cir.) (per curiam) (quoting *Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010)), *cert. denied*, 580 U.S. —, 137 S. Ct. 909 (2017). "Because of the comparative leniency of Rule 60(b), petitioners sometimes attempt to file what are in fact second-or-successive habeas applications under the guise of Rule 60(b) motions." *Id.* at 203. Given that tendency, we must determine whether such a motion either: "(1) presents a new habeas ***claim*** (an 'asserted basis for relief from a state court's judgment of conviction'), or (2) 'attacks the federal court's previous resolution of a claim ***on the merits***.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 530). If the motion does either, then it must be treated as a successive habeas petition and subjected to AEDPA's limitation on those petitions. *Id.* A federal court resolves a claim on the merits by determining that the petitioner is not entitled to habeas relief on the claim under §§ 2254(a) and (d), "as opposed to

when a petitioner alleges 'that a previous ruling which precluded a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar.'" *Id.* (quoting *Gonzalez*, 545 U.S. at 532 n.4). A Rule 60(b) motion that alleges omissions on the part of federal habeas counsel "ordinarily does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Id.* (citation omitted).

Our decision in *In re Coleman* guides us here. There, the petitioner filed a Rule 60(b) motion, arguing in favor of finding a defect in the integrity of her original habeas petition because additional evidence from several witnesses on a particular claim had recently been discovered—evidence which was unavailable to the court when it decided the claim previously. The petitioner argued that her counsel's failure to discover and present this evidence rose to a level of constitutionally ineffective assistance that would justify relief from judgment. *In re Coleman*, 768 F.3d at 371–72. We found that such a claim "is fundamentally substantive—she argues that the presence of new facts would have changed this court's original result." *Id.* at 372. An argument that the petitioner's own counsel was ineffective in failing to present that evidence, we held, "sounds in substance, not procedure." *Id.*; *see also id.* at 372 n.17 ("A motion that asks the district court for an opportunity to offer facts that (in the petitioner's view) will prove that his conviction was constitutionally infirm raises a paradigmatic habeas claim." (citation, internal quotation marks, and alterations omitted)). Thus, we affirmed the district court's decision treating the Rule 60(b) motion as a second or subsequent habeas application.

Runnels not only fails to distinguish *In re Coleman*, he also fails to mention the district court's holding on this issue; indeed, he does not devote a single word of his briefing to addressing that holding. His claim that trial counsel was ineffective for failing to present more thorough psychological testing evidence is

fundamentally a substantive claim. And under *Gonzalez*, a motion that seeks leave to present newly discovered evidence in support of a claim previously denied "is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be inconsistent with the statute." 545 U.S. at 531 (citation and internal quotation marks omitted); *see also In re Edwards*, 865 F.3d at 203 (explaining that a Rule 60(b) motion that attacks a federal court's previous resolution of a claim on the merits must be treated as a successive habeas application). Using Rule 60(b) to present new evidence in support of a claim already litigated impermissibly "circumvents" AEDPA's requirements: "Even assuming that reliance on a new factual predicate causes that motion to escape § 2244(b)(1)'s prohibition of claims 'presented in a prior application," § 2244(b)(2)(B) requires a more convincing factual showing than does Rule 60(b)."[1] *Gonzalez*, 545 U.S. at 531; *see also Williams v. Kelley*, 858 F.3d 464, 471 (8th Cir. 2017) ("Although an assertion of ineffective assistance of [federal] habeas counsel may be characterized as a defect in the integrity of the habeas proceeding, it ultimately seeks to assert or reassert substantive claims with the assistance of new counsel." (quoting *Ward v. Norris*, 577 F.3d 925, 932 (8th Cir. 2009)).

The magistrate judge's report, adopted by the district court, effectively strips away the Rule 60(b) sheep's clothing to reveal the successive-habeas wolf underneath. The report explains that Runnels already presented, in his federal habeas petition, an ineffectiveness claim challenging his trial counsel's mitigation investigation, including counsel's failure to seek additional psychological

[1] *See* 28 U.S.C. § 2244(b)(2)(B) ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.").

testing. The district court found the claim exhausted, analyzed it on the merits, and rejected it.[2] We then declined to grant a COA on the claim. *See Runnels*, 664 F. App'x at 374–77. Runnels now presents Dr. Fabian's report in an attempt to strengthen his previously rejected argument that trial counsel's mitigation investigation was constitutionally ineffective. This is the precise course of action *Gonzalez* forbids. We will not grant Runnels what is, at bottom, a "second chance to have the merits determined favorably." *In re Edwards*, 865 F.3d at 203.

Accordingly, we conclude that it is beyond debate that Runnels's Rule 60(b) motion is a second-or-successive habeas petition. In ordinary circumstances, we would then analyze whether the petition meets the statutory requirements governing such petitions, provided the petitioner timely moved for authorization to file one. *See, e.g.*, *In re Coleman*, 768 F.3d at 373–74. But Runnels did not do so. The district court transferred the Rule 60(b) motion to this court as a second-or-successive petition, and Runnels failed to comply with this court's directive to file a motion for authorization under 28 U.S.C. § 2244(b)(3), resulting in dismissal of the authorization action. *See* Order, *In re Runnels*, No. 17-11294 (5th Cir. Dec. 5, 2017).

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[2] It is for this reason that the *Martinez* exception is not available to Runnels. In *Martinez*, the Supreme Court "held that a petitioner may establish cause to excuse a procedural default as to an ineffective-assistance-of-trial-counsel claim by showing that (1) his state habeas counsel was constitutionally deficient in failing to include the claim in his first state habeas application; and (2) the underlying ineffective-assistance-of-trial-counsel claim is 'substantial.'" *Reed v. Stephens*, 739 F.3d 753, 774 (5th Cir. 2014) (quoting *Martinez*, 566 U.S. at 13–14). The district court found there was no procedural default on Runnels's IATC claim; thus, there is nothing that any invocation of *Martinez* could excuse. *See Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014) ("*Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted."). We have explained that we will not permit the use of *Martinez* "to bootstrap factual development in federal court in search for unexhausted claims," as "this 'approach encourages state defendants to concoct "new" IAC claims that are nothing more than fleshed-out versions of their old claims supplemented with "new" evidence.'" *Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) (citation omitted) (quoting *Dickens v. Ryan*, 740 F.3d 1302, 1328 (9th Cir. 2014) (en banc) (Callahan, J., concurring in part and dissenting in part)), *abrogated on other grounds by Ayestas*, 138 S. Ct. 1080.

No. 17-70031

* * *

Petitioner's application for a certificate of appealability is **DENIED**.

Certified as a true copy and issued as the mandate on Aug 14, 2018

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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August 14, 2018

Ms. Karen S. Mitchell
Northern District of Texas, Amarillo
United States District Court
205 E. 5th Street
Room F-13240
Amarillo, TX 79101

No. 17-70031 Travis Runnels v. Lorie Davis, Director
USDC No. 2:12-CV-74

Dear Ms. Mitchell,

Enclosed is a certified copy of an opinion-order entered on August 14, 2018. We have closed the case in this court.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Nancy F. Dolly, Deputy Clerk
504-310-7683

Enclosure(s)

cc: Mr. Jefferson David Clendenin
Ms. Janet Gilger-VanderZanden
Mr. Mark Jason Pickett

APPENDIX B

Order of the United States District Court for the Northern District of Texas, *Runnels v. Davis*, No. 2:12-cv-0074-J (N. Dist. Tex. October 31, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

TRAVIS TREVINO RUNNELS,	§	
	§	
Petitioner,	§	
	§	
v.	§	
	§	2:12-CV-0074-J
LORIE DAVIS, Director,	§	(death-penalty case)
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER OVERRULING OBJECTIONS, ADOPTING REPORT AND RECOMMENDATION and TRANSFERRING CASE TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On October 13, 2017, Travis Trevino Runnels filed his objections to the Magistrate Judge's Report and Recommendation on Rule 60(b) Motion for Relief from Judgment (Doc. 73, "R&R"). *See* Docs. 74 and 75 ("Objections"). This matter having come before this Court on consideration of said objections, and following a *de novo* review of Runnels's Motion for Relief from Judgment under Rule 60(b) and related papers filed in this cause, it is the opinion of the Court that such objections be denied in all respects. The Court further finds the findings and conclusions of the Magistrate Judge are correct and adopts them as the findings and conclusions of the Court.

I.

The objections reassert the argument that prior federal habeas counsel, Mr. Don Vernay, should have obtained a complete neuropsychological evaluation of Runnels in an effort to "unexhaust" the

ineffective-assistance-of-trial-counsel-claim ("IATC" claim) presented in the original federal petition. The objections conclude that Mr. Vernay's failure to do so amounted to abandonment and structural error justifying 60(b) relief.[1] *See* Fed. R. Civ. P. 60(b). This conclusion, he asserts, is supported by the subsequent actions taken by the Court of Appeals, as well as by the Court of Appeals's decision to stay rehearing proceedings and *sua sponte* inform the parties of the actions it took.

A. Alleged structural error due to abandonment by Mr. Vernay

Runnels's contention that Mr. Vernay "failed to perform at all" with respect to the IATC claim is not supported by the record. While it is true that he did not have Runnels evaluated by a neuro-psychologist, it is also true that, at the time the petition was filed, the holding in *Martinez v. Ryan*, 566 U.S. 1 (2012) did not apply to Texas inmates. *See Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012). Exhausted claims were (and are) reviewed on the record that was before the state court, effectively foreclosing the use of any new evidence. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011) (holding that evidence introduced in federal court has no bearing on habeas review of claims decided on the merits in state court).

Mr. Vernay nevertheless correctly anticipated the favorable outcome in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) and raised a colorable IATC claim using the *Martinez* exception to procedural bar and supporting it with new evidence in the form of the state habeas investigator's affidavit. He simultaneously moved for leave to amend or supplement the petition once the *Trevino* opinion issued, and he anticipated further factual development. *See* Doc. 18 ("Motion for Leave to File Preliminary Petition for Post-Conviction Writ of Habeas Corpus, Subject to Subsequent Amendment and/or

[1]Although the brief supporting the objections on page 2 misidentifies Mr. Vernay as state habeas counsel and misquotes the R&R in that respect, this appears to be a typographical error, and Runnels does not otherwise dispute that Mr. Vernay was his *federal* habeas counsel.

Supplementation").

The barrier faced by Mr. Vernay (and, incidentally, by current appointed counsel) is that this Court found that the IATC claim was exhausted, not procedurally barred, and therefore not amenable to relitigation and factual development under *Martinez*. The claim was therefore subject to review under 28 U.S.C. 2254(d), which is limited to the state-court record alone. *See Pinholster*, 563 U.S. at 182.

Runnels asserts, however, that the Magistrate Judge erred in finding that the IATC claim raised in the 60(b) motion is the same IATC claim that was presented to the state court and found by this Court to have been exhausted. Objections at 5. He contends that Dr. John Fabian's 2017 neuropsychological report contains material and significant factual allegations that serve to fundamentally alter the claim, thereby rendering it "unexhausted." *See Anderson v. Johnson*, 338 F.3d 382, 386 (5th Cir. 2003) (holding, prior to *Martinez*, that dismissal for non-exhaustion is not required when evidence presented for the first time in a habeas proceeding "supplements" but does not "fundamentally alter" the claim presented to the state courts); *Graham v. Johnson*, 94 F.3d 958, 968 (5th Cir. 1996) (recognizing that a petitioner fails to exhaust state remedies when he presents material additional evidentiary support to the federal court that was not presented to the state court).

This argument does not avail Runnels in his efforts for Rule 60(b) relief. If Runnels is correct that the presentation of Dr. Fabian's report is sufficient to fundamentally alter the claim previously presented (which this Court does not hold), then by his own admission, he is raising a new claim that was not presented in a prior application. Under these circumstances, the 60(b) motion is a second-or-successive petition subject to the limitations in 28 U.S.C. § 2244(b)(2). *See Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005) (holding that a Rule 60(b) motion that contains a claim previously omitted due

to excusable neglect or that presents newly discovered evidence in support of a claim previously denied is a successive habeas petition and should be treated accordingly). Because the Court of Appeals has not authorized the successive habeas proceeding under section 2244(b), this Court does not have jurisdiction to consider the claim.

B. Dr. Fabian's report does not support equitable relief

Assuming for the sake of argument that Runnels's motion for Rule 60(b) relief is *not* a successive habeas application and that this Court has jurisdiction over the claim, the Court holds in the alternative that Runnels has not made a case for equitable relief. He presents a 33-page affidavit based on a neuropsychological evaluation conducted by Dr. Fabian in April and May of 2017. *See* Doc. 53-1, p. 115. Dr. Fabian concluded that Runnels suffers from Attention Deficit Hyperactivity Disorder (ADHD), Language-Based Learning Disorder (LBLD), and Post-Traumatic Stress Disorder (PTSD) (due in part to years of incarceration). He also found evidence of addiction and dependence to alcohol and cannabis prior to his incarceration (because he is not using drugs in prison). Dr. Fabian opined that Runnels would have benefitted from treatment for these conditions in the nature of special education for ADHD and LBLD, medication for ADHD, counseling for PTSD, and drug treatment. He also believed the ADHD and LBLD could be treated in a prison environment and that such treatment would have an impact on Runnels's impulsivity and cognitive functioning. Doc. 53-1, p. 141-43. The report is based on historical facts contained in the very same affidavits filed by Mr. Vernay in support of the federal petition, which were originally obtained by state habeas counsel from Runnels's grandmother, mother, brother, and two cousins. Doc. 53-1, p. 116; *see* Doc. 17 (Petition and Exhibits). Other historical data considered by Dr. Fabian is, by all appearances, the same information gathered by trial counsel's investigator, Kathy Garrison; Runnels identifies nothing new. Doc. 53-1, p. 116.

Dr. Fabian's report is proffered to support the interrelated arguments that (1) trial counsel was ineffective under the Sixth Amendment, (2) state habeas counsel was therefore ineffective under *Martinez*, and (3) Mr. Vernay therefore abandoned Runnels in federal court, causing structural error. The report does not, however, support the underlying substantive claim advanced by Runnels of ineffective trial counsel.

Trial counsel had obtained a 1993 psychological report from Runnels's juvenile probation file stating that: Runnels had basically raised himself, lacked coping skills, has difficulty controlling his behavior and may be aggressive under stress, has no family support, has communications problems, lacks overall verbal skills for conversation, is uncooperative, has a hostile demeanor, is one-sided and non-reciprocal in relationships, and has inflexible thinking and values, which makes him a difficult candidate for therapeutic change. 4 SHRR 115-16. Trial counsel also retained psychiatrist Lisa Clayton and neuropsychologist Richard Fulbright to examine Runnels. 1 CR 68, 69. Dr. Clayton did not provide helpful information and her report, if any, is not in the record. 4 SHRR 166, 184, 202. Dr. Fulbright submitted a report, but was unable to complete the full testing due to jail restrictions on his physical access to Runnels.

The Magistrate Judge concluded that Dr. Fulbright's incomplete evaluation and the 1993 psychological evaluation, along with Dr. Clayton's results and other information known to the trial team together support trial counsel's strategic decision not to present a mental-health based defense. Runnels argues that trial counsel could not have reasonably reached this strategic conclusion without a complete evaluation from Dr. Fulbright, and he seems to assert that trial counsel abandoned a mental-health defense *because* the testing could not be completed. These assertions are inconsistent with the facts in the record and the deference required by law. In situations where counsel's investigation is less than

complete, *Strickland* holds, "Strategic choices made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on the investigation." *Strickland v. Washington*, 466 U.S. 668, 691 (1984). "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.*

Where, as here, the incomplete report of Dr. Fulbright *assumed* Runnels had ADHD and related executive-functioning deficits, and these assumptions were ultimately confirmed by Runnels's current expert, Dr. Fabian, the reasonableness of trial counsel's chosen strategy is not undermined. Despite Runnels's earlier assertion that Dr. Fabian's report is so materially different from prior evidence that it fundamentally alters the claim for relief, he later concedes, correctly, that Dr. Fabian *corroborates* Dr. Fulbright's suspicion that Runnels suffers from ADHD and related deficits in executive functioning. Objections at 6-7, 8. In fact, Dr. Fabian corroborates other information known to trial counsel: Fabian, like Fulbright, found fault in the education, juvenile justice, and prison systems for failing to provide the psychological services Runnels obviously needed. And Dr. Fabian's diagnosis of LBLD, with its attendant weaknesses in language and communication skills, is corroborated by findings in the 1993 evaluation that Runnels had communications problems and lacked overall verbal skills for conversation.

Runnels argues that, nevertheless, trial counsel was obligated to complete Dr. Fulbright's evaluation and introduce evidence of ADHD and executive functioning deficits because it impacts "an individual's ability to regulate behavior, control impulses, and process information." He asserts this evidence would have had mitigating effect and aided the jury's understanding of the circumstances surrounding the victim's death, and he points out that these conditions are treatable with medication and psychological services. Objections at 7-8. Runnels cannot, however, pick and chose the evidence to

support his claim of ineffective trial counsel and ignore evidence and consequences to the contrary. The same evidence could be used by the prosecution to argue how dangerous Runnels would be if he chose not to take his medication or receive the necessary services. This aggravating effect would be enhanced by these facts in Dr. Fulbright's report:

- Runnels had become increasingly angry about his treatment at TDCJ.
- Runnels stated that he planned to kill the victim.
- Runnels reported that he had an argument with the victim the day before and planned to kill the individual.
- Runnels did not care about the consequences prior to assaulting the victim.
- Runnels had tried to avoid altercations in prison during this time, and he stated, "So if I had to do anything, I know it's justified, because I didn't do anything."
- At the time, Runnels was serving a 70-year sentence for robberies and felt the sentence was unfair because of his limited involvement in the crimes.
- Runnels told his brother that he "can't stand" the police and correctional officers and said, "I ain't going back to jail alive."
- Runnels told his brother he felt he could not complete his sentence and that "there has to be another way out."
- Regarding the prison guards, Runnels told his brother that "these young white guys can play with your life because you are locked up."
- Runnels attempted suicide by overdose because he was "tired of prison"
- Runnels reported that he becomes increasingly frustrated when left alone with nothing to do, such as when he is in segregation, and that sometimes the only way to entertain himself is with negative behaviors.

4 SHRR 167-72.

The above information, showing that Runnels planned the murder as an act of retaliation and was strategically avoiding altercations so he could feel justified when they occur, flies in the face of a

mental-health defense based on an inability to plan and control his impulses. This information, which trial counsel could reasonably expect the State to use in rebuttal, is strong evidence that Runnels is not a good candidate for a sentence of life imprisonment. The report makes clear his resistance to institutionalization, which was already well-known to trial counsel. *See* 3 SHRR 164 (Runnels just came to the point where he could take no more disrespect), 335 (Runnels would like a hung jury or death, he is not institutionalized or has an extreme problem with authority); 4 SHRR 50 (letter describing Runnels's intolerance of the jail conditions he experienced while awaiting trial and stating, "I'm letting you know this current situation will burn out and lead to trouble for me."), 101 (Runnels's future will not include living in prison and he does not want a life sentence). This aspect of Runnels's mental state would have shed new light on the disciplinary violations against guards that were introduced at trial and could have opened the door to other information kept from the jury, including his efforts to organize inmates to enact changes through violence and bloodshed. 2 SHRR 14, 34; 3 SHRR 66, 101 (identifying Runnels's interest in organizing inmates), 134 (identifying an "abundance of stuff" to contend with in the TDCJ files about Runnels being "very anti-TDCJ" and organizing inmates to resist, use aggression and violence and bloodshed").

Dr. Fabian's 2017 report confirms the information upon which trial counsel's strategy was based, and Runnels's does not take into consideration the very negative information trial counsel would have risked exposing to the jury with a mental-health based defense. The Court, having weighed the facts and circumstances of this case, determines that the claim lacks merit, the prior findings of the Court are correct, the Magistrate Judge's recommendation is correct, and the demands of justice do not justify the relief requested.

C. The record in the Court of Appeals does not dictate a different result

Finally, Runnels contends the Magistrate Judge improperly ignored the relevance of the actions taken by the Court of Appeals in 2016 regarding Mr. Vernay. The Magistrate Judge gave due consideration to these actions and correctly determined that they did not constitute a finding that Mr. Vernay had abandoned Runnels during the earlier proceedings before this Court. As it stands, the record before this Court is far from showing that Mr. Vernay "abandoned" Runnels during the original federal habeas proceedings or that his representation amounted to "structural error." Beyond the determinations of no abandonment and no structural error, it is not the function of the Court to assess in hindsight the ways in which federal habeas counsel's representation could have been better. *See generally Pinholster*, 563 U.S. at 189 (clarifying that the purpose of the Sixth Amendment effective assistance guarantee is not to improve the quality of legal representation but to ensure that criminal defendants receive a fair trial). The Court will not infer abandonment by Mr. Vernay from the Court of Appeals's order, when Mr. Vernay's actions in this Court plainly refute that allegation.

II.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. Runnels has failed to show that reasonable jurists (l) would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). If Runnels files a notice of appeal, he may proceed in forma pauperis on appeal. 18 U.S.C. § 3006A(d)(7).

III.

Runnels is either (1) raising a new, unexhausted claim of ineffective trial counsel, as he now asserts, or (2) raising the same claim that was deemed exhausted and decided against him on the merits under § 2254(d), as held in the R&R. Either way, the Rule 60(b) motion is a second-or-successive petition subject to the limitations in § 2244(b)(1) or (b)(2). The Court therefore OVERRULES the objections filed by Runnels, ADOPTS the findings and conclusions of the Magistrate Judge, and TRANSFERS the Motion to the United States Court of Appeals for the Fifth Circuit as a second-or-successive petition.

In the alternative, the Court concludes Runnels has not presented evidence justifying equitable relief and DENIES the Motion for Relief from Judgment under Rule 60(b). (Doc. 52.)

IT IS SO ORDERED.

ENTERED this 31st day of October, 2017.

Mary Lou Robinson

MARY LOU ROBINSON
UNITED STATES SENIOR DISTRICT JUDGE

APPENDIX C

Order of the United States Court of Appeals for the Fifth Circuit,
Runnels v. Davis, No. 17-70031 (5th Cir. 2018)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-70031

TRAVIS TREVINO RUNNELS,

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 Northern District of Texas

ON PETITION FOR REHEARING

Before GRAVES, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

James E. Graves

UNITED STATES CIRCUIT JUDGE

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

September 18, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 17-70031 Travis Runnels v. Lorie Davis, Director
USDC No. 2:12-CV-74

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Mary Frances Yeager, Deputy Clerk
504-310-7686

Mr. Jefferson David Clendenin
Ms. Janet Gilger-VanderZanden
Mr. Mark Jason Pickett

APPENDIX D

Magistrate's Report and Recommendation on Rule 60(b) Motion for Relief from Judgment, *Runnels v. Davis*, No. 2:12-cv-0074-J-BB (N. Dist. Tex. Sept. 29, 2017)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

TRAVIS TREVINO RUNNELS,	§	
	§	
Petitioner,	§	
	§	
V.	§	
	§	No. 2:12-CV-0074-J-BB
LORIE DAVIS, Director,	§	(death-penalty case)
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

REPORT AND RECOMMENDATION
ON RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

Before the Court is Runnels's Motion for Relief from Judgment and supporting brief, filed under Federal Rule of Civil Procedure 60(b) on June 1, 2017. ("Motion," doc. 52 and "Brief," doc. 53.) The Court previously denied Runnels's petition for habeas corpus relief. *See Runnels v. Stephens*, No. 2:12-CV-74-J-BB, 2016 WL 1274132 (N.D. Tex. Mar. 15, 2016) (Averitte, Mag. J.), *adopted by*, 2016 WL 1275654 (Mar. 31, 2016) (Robinson, J.). The Fifth Circuit Court of Appeals affirmed the judgment on November 3, 2016, but appointed new counsel to represent Runnels on a petition for rehearing. *See Runnels v. Davis*, No. 16-70012, 664 F. App'x 371 (5th Cir. Nov. 3, 2016); *Runnels v. Davis*, No. 16-70012 (5th Cir. Nov. 17, 2016) (order substituting counsel). No petition for rehearing has been filed. Instead, new counsel filed the instant Motion in this Court and moved the Court of Appeals for a stay pending its disposition. The Court of Appeals granted a stay on June 5, 2017. The Rule 60(b) Motion is a second-or-successive petition for habeas relief, and it should be transferred to the Court of Appeals.

I. BACKGROUND

In 2003, while serving a seventy-year sentence for aggravated robbery, Runnels murdered a civilian prison employee, Stanley Wiley, in the presence of inmates and others working in a prison boot factory. Runnels approached Wiley from behind, pulled his head back, and deeply cut his neck to the spine with a trimming knife. Runnels then sat down and waited for the authorities.

James Durham, now deceased, represented Runnels at his 2005 trial. Mr. Durham was assisted by co-counsel Laura Hamilton, as well as a capital jury-selection consultant named Warren Clark, and a third attorney, Robert Hirschhorn, who helped prepare the juror questionnaire. The defense investigator, Kathy Garrison, conducted an expansive investigation that is reflected in more than 600 pages of notes and emails from her file. Her notes indicate a psychiatrist, Lisa Clayton, and a neuropsychologist, Richard Fulbright, were both retained to examine Runnels for purposes of trial. (3 SHRR 83-88, 126, 194, 278; 4 SHRR 167, 202.) The notes also reflect a 1993 evaluation conducted by psychologist Saleem S. Ateeh when Runnels was 17 years old. (4 SHRR 115-16.)

Mr. Durham had developed a trial strategy whereby Runnels would plead guilty, and counsel would offer mitigating evidence from family members showing Runnels had a rough childhood, was poor, was shuffled between family members, had trouble in school, and suffered disabilities that made it difficult to function, but could serve a life sentence in prison. On the morning of trial, Runnels's unanticipated guilty plea resulted in the State removing ten witnesses from its trial witness list. Mr. Durham cross-examined the remaining State's witnesses, as they were called, about Runnels's reputation for being truthful, peaceable, and trustworthy, and about the training and safety measures in place for prison employees. When the State concluded its presentation and it was time

to present the defense mitigation case, however, Runnels's family members had either failed to appear (his brother), disqualified themselves from testifying by watching the trial in violation of the "Rule" (his father), or left the courthouse and refused to return (his mother, father, and grandmother). At that point, Mr. Durham decided not to call any witnesses at punishment. Before he rested, Mr. Durham discussed his intentions with the trial judge, who was satisfied the decision was sound strategy. (1 SHCR 301, ¶ 11.) In closing argument, Mr. Durham asserted, among other things, that the State did not prove future dangerousness beyond a reasonable doubt and that Runnels's guilty plea was his first act of contrition and a factor warranting consideration of a life sentence by the jury.

State habeas counsel, Mr. Joe Marr Wilson, filed an application for habeas relief, alleging Mr. Durham's strategy was based on an inadequate investigation that left no options when the prepared strategy fell apart. Mr. Wilson received investigative assistance from a law school graduate, Alma Lagarda, who worked for the Texas Defender Service. In the habeas application, Mr. Wilson alleged that Dr. Fulbright's report, indicating the conditions in the jail had prevented testing in three areas of executive functioning and for Attention Deficit Disorder, should have prompted further investigation by trial counsel. Mr. Wilson presented affidavits from Runnels, his brother, his mother, his grandmother, and two cousins, which contained information about his childhood that was substantively similar to the information gathered by Garrison for trial. Runnels's mother and grandmother also asserted they had left the courthouse during trial because someone told them they could leave. The habeas court held an evidentiary hearing in which Garrison and Hamilton testified to the facts in the preceding paragraph, specifically, that the subpoenaed family members left the courthouse of their own accord and refused to return. Garrison testified Runnels was not "particularly surprised" by his family's lack of support and when advised they had left, replied, "That

figures." (2 SHRR 69.) The state habeas judge–the same trial judge who had conferred with Mr. Durham in chambers before he rested–found that Mr. Durham was not ineffective. The Texas Court of Criminal Appeals denied habeas relief. *Ex parte Runnels*, No. WR-46,226-02, 2012 WL 739257 (Tex. Crim. App. Mar. 12, 2012).

In December of 2012, Mr. Don Vernay filed the original federal habeas petition raising the ineffective-assistance-of-trial-counsel ("IATC") claim against Mr. Durham as "claim 1." Mr. Vernay also argued state habeas counsel, Joe Marr Wilson, provided ineffective assistance as "claim 2." (Doc. 17.) This issue was supported by an affidavit from Alma Lagarda. (Ex. G.) With the petition, Mr. Vernay filed a motion to suspend the proceedings and for leave to amend the petition after the Supreme Court issued an opinion in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). (Doc. 18.) The Court denied the motion because the parties did not identify any procedurally defaulted claim in the petition. (Doc. 27). But when Respondent filed an answer alleging for the first time that a portion of Runnels's IATC claim was defaulted, the Court asked for supplemental briefing on *Trevino* and *Martinez v. Ryan*, 566 U.S. 1, 17, 132 S. Ct. 1309, 182 L. Ed.2d 272 (2012). (Doc. 31.)

Ultimately, the Court held that the IATC claim (claim 1) was exhausted in its entirety and declined to expand the application of *Martinez* to allow the relitigation of a claim that had been denied on the merits in state court. *Runnels*, 2016 WL 1274132 , at *3, *13-14. The Court in the alternative held that state habeas counsel was not ineffective for failing to obtain a psychological examination and failing to present live testimony (claim 2). *Id.* at *15. The Court also concluded that the allegedly unexhausted portion of the IATC claim (based on the failure to obtain more psychological testing) was not "substantial" under *Martinez* because Alma Lagarda's affidavit was

conclusory in nature and otherwise insufficient to show state habeas counsel should have pursued psychological testing. *Id.* at *15-16.

Having determined that the IATC claim was exhausted, the Court then analyzed the state court's ruling under the deferential standard in the Anti-terrorism and Effective Death Penalty Act ("AEDPA"). *See* 28 U.S.C. § 2254(d). The Court addressed the sufficiency of the mitigation investigation including the mental health investigation, the reasonableness of Mr. Durham's prepared strategy and the strategy he ultimately carried out, the efficacy of Mr. Durham's cross-examination, the absence of live defense witnesses in state habeas court, and the effect of Mr. Durham's death on Runnels's ability to litigate the claim. The Court addressed the harm that could have resulted from (1) a mental health defense that would have exposed Runnels's resistance to institutionalization and his statement that he was not going back to jail alive, and (2) a mitigation theme that could have triggered the State to present damaging information known to the defense, but kept from the jury, that Runnels had a history of organizing prisoners to use aggression and bloodshed to enact change. This Court upheld and/or deferred to the state court's ruling under both prongs of *Strickland*, finding it was not unreasonable under the AEDPA. *Runnels*, 2016 WL 1274132, at *16-24.

II. THE ISSUES BEFORE THE COURT

Five years ago, the United States Supreme Court declined to create a constitutional right to counsel in initial state-habeas proceedings. Instead, the Court created an equitable exception to the procedural bar that occurs in federal court when state habeas counsel renders constitutionally ineffective assistance in failing to exhaust a claim of ineffective trial counsel. *See Martinez*, 566 U.S at 17. In his dissent, Justice Scalia perceived no practical difference between the two. *Id.* at 18-19 (Scalia, J., dissenting). He characterized the holding as a repudiation of the longstanding principle

governing procedural default. *Id.* at 23. He predicted, "the States will *always* be forced to litigate in federal habeas, for *all* DEFAULTED INEFFECTIVE-ASSISTANCE-of-trial-counsel claims," either the validity of the defaulted claim or the effectiveness of state habeas counsel. *See id.* at 21-22 (emphasis in original). The effect in capital cases would be more than just a squandering of resources, he warned, but a reduction of the sentence, "giving the defendant as many more years to live, beyond the lives of the innocent victims whose life he snuffed out, as the process of federal habeas may consume." *Id.* at 23.

The procedural-bar exception in *Martinez* was intended to protect defendants from otherwise unreviewable claims of ineffective trial counsel. *See Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017). In death penalty cases, however, *Martinez* has become a common tool for delay. Judicial resources are consumed reviewing recycled IATC claims with "new" evidence that is strategically presented in an effort to render the claim unexhausted to obtain federal review. And, because the application of the *Martinez* exception depends on the merit of the allegedly unexhausted claim, the practical effect is that no claim escapes review. The 60(b) Motion before this Court, which is in reality a successive habeas petition, aptly demonstrates how *Martinez* is used in this way. But this case even goes beyond the scenario Justice Scalia outlined in that it seeks to reopen the proceedings on the ground that *federal habeas counsel* was ineffective when he failed to use *Martinez* to adequately pursue such tactics.

Runnels seeks to reopen these proceedings on the ground that (1) federal habeas counsel was ineffective for failing to adequately litigate (2) state habeas counsel's ineffectiveness in connection with (3) an allegedly defaulted claim of ineffective trial counsel. Runnels argues Mr. Vernay virtually abandoned him because he filed a "*Martinez* claim" in name only and did not investigate

or provide new evidence or allegations of any kind. Brief, p. 5. The affidavit of Alma Lagarda, presented in support of the federal petition, refutes this assertion. *See* Ex. G. Nevertheless, Runnels presents a newly-obtained neuropsychological evaluation by Dr. John Fabian, who diagnosed Runnels with ADHD, a language-based learning disability, frontal lobe damage, and post-traumatic stress disorder. Brief, p. 8. Runnels contends these diagnoses are "intertwined with severe personal, financial, and familial hardships Mr. Runnels faced during his childhood and adolescence, all providing a significant case in mitigation that was unknown to the jury as well as every subsequent appellate court." Brief, p. 8. Without acknowledgment of the fact that his subpoenaed mitigation witnesses walked out of his trial, Runnels concludes that this evidence, which is essentially the same evidence trial counsel was prepared to present, "places his claim in a 'significantly different legal posture' from what was presented in state court." In other words, he contends the claim is now unexhausted. Reply, p. 7. While further failing to acknowledge the evaluations of Dr. Clayton, Dr. Fulbright, and Dr. Ateeh, Runnels asserts he has "never received a complete mental health evaluation in any proceeding prior to the evaluation by Dr. Fabian." Reply, p. 6. He concludes Dr. Fabian's report is proof that state habeas counsel's failure to hire a mental health expert amounted to ineffective assistance and a powerful *"Martinez* claim" therefore exists. Brief, p. 13.

Runnels equates the alleged failure to develop "a defaulted claim under *Martinez*" as the equivalent of structural error justifying Rule 60(b) relief. Reply, p. 3. He also asserts that certain actions taken by the Court of Appeals in 2016 are powerful evidence of Mr. Vernay's "functional abandonment" in this Court four years earlier and are corroborated by the fact that Mr. Vernay needed two extensions of time to file the petition in this Court. Reply, p. 4; *see also* Supplement, p. 4 (Doc. 65); Supplemental Reply (Doc. 70-1). Respondent argues the Motion is a successive

petition, the Motion presents no extraordinary circumstances justifying relief under Rule 60(b), the IATC claim is exhausted, insubstantial, and not subject to the *Martinez* exception, and the Motion is untimely. *See* Response (Doc. 55); Supplemental Response (Doc. 68.)

Before addressing the parties' arguments, it is necessary to clarify that an assertion of ineffective state habeas counsel is not a "*Martinez* claim," as the Motion suggests. State habeas counsel's ineffectiveness may be, under the current framework, adequate cause to excuse a failure-to-exhaust procedural bar, but it is not an independent claim for relief because the Supreme Court in *Martinez* declined to create a constitutional right to state habeas counsel. For clarification purposes in the following discussion, the word "claim" refers only to the IATC claim (claim 1). The Court will identify the alleged ineffectiveness of state habeas counsel ("claim 2") as an exception to procedural bar when necessary. With this clarification, the Court turns to the arguments of the parties.

III. THE MOTION IS A SECOND-OR-SUCCESSIVE PETITION

Federal Rule of Civil Procedure 60(b)(6) allows a district court to grant relief "from a final judgment, order, or proceeding" for "any . . . reason that justifies relief." To succeed on a Rule 60(b) motion, the movant must show: (1) that the motion is made within a reasonable time; and (2) extraordinary circumstances exist that justify the reopening of a final judgment. *See Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Clark v. Davis*, 850 F.3d. 770, 778 (5th Cir. 2017).

Petitioners "sometimes attempt to file what are in fact second-or-successive habeas petitions under the guise of Rule 60(b) motions." *In re Edwards*, 676 F. App'x 298, 303 (5th Cir.), *cert. denied sub nom. Edwards v. Davis*, 137 S. Ct. 909 (2017) (citing *Gonzalez*, 545 U.S. at 531–32). Any claim presented in a second-or-successive habeas petition that was presented in a prior application must be dismissed under the AEDPA. *See* 28 U.S.C. § 2244(b)(1). A claim that was *not*

545 U.S. at 531 (recognizing that a Rule 60(b) motion presenting new evidence in support of a claim already litigated is subject to habeas rules).

Runnels, however, asserts he is not attacking the merits of the Court's denial of relief but is instead raising structural error in the form of extreme attorney negligence and abandonment by Mr. Vernay. Yet, *Martinez* did not create a constitutional right to federal habeas counsel, and such procedural defects are narrowly construed. They include fraud on the habeas court as well as erroneous previous rulings that preclude a merits determination, such as failure to exhaust, procedural default, or statute-of-limitations bar. *Coleman*, 768 F.3d at 371. A claim that federal counsel labored under a conflict of interest is one type of attorney error that has been held to affect the integrity of the proceedings. *See Clark*, 850 F.3d at 779-80. Ordinarily, however, an omission by habeas counsel "does not go to the integrity of the proceedings, but in effect asks for a second chance to have the merits determined favorably." *Gonzalez*, 545 U.S. at 532 n.5. This Motion is one such example; it does not challenge a procedural defect that prevented a merits ruling because, as recited above, the Court ruled on the merits.

Nevertheless, Runnels relies on *Mann v. Lynaugh*, which granted 60(b) relief to a petitioner in the form of extra time to perfect an appeal. *Mann v. Lynaugh*, 690 F. Supp. 562, 565-68 (1988) (Buchmeyer, J.). Runnels asserts this case is analogous to *Mann* in that Mr. Vernay effectively abandoned him by failing to file a cognizable "*Martinez* claim" and failing to ask for funding to hire an investigator or mental health expert. Brief, p. 14. The circumstances in *Mann* are distinguishable. The court in *Mann* granted relief to remedy counsel's untimely notice of appeal in a case in which

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179 L.Ed.2d 557 (2011).

the district court had granted a certificate of appealability. *See Mann*, 690 F. Supp. at 564 n.2. The error was procedural in the sense that it had prevented the appeal from going forward.[2]

Here, Runnels is attempting to relitigate the IATC claim with additional evidence not previously presented to the state courts, namely Dr. Fabian's report. Runnels asserts, however, that the report is new evidence of *state habeas counsel's* ineffectiveness, which he mischaracterizes as a cognizable "*Martinez* claim." But, as previously clarified, the "claim" in this case is the claim against *trial counsel.* That claim was not procedurally defaulted. The new evidence is an attempt to *create* procedural default through the presentation of new, unexhausted evidence. It does not challenge any procedural bar applied by the Court. It therefore sounds in substance, not procedure.

IV. FEDERAL COUNSEL'S REPRESENTATION DID NOT CREATE STRUCTURAL ERROR

To the extent Runnels contends Mr. Vernay's representation was structural error because he failed to recast an exhausted claim as an unexhausted claim subject to default, the Court disagrees. First, Runnels demonstrates no relevance between actions taken by the Court of Appeals in 2016 and Mr. Vernay's representation of Runnels in this Court four years earlier. While there is nothing in the record suggesting what the Court of Appeals may have considered before ruling, the Court of Appeals *affirmed* the decision of this Court denying relief before granting Mr. Vernay's motion to withdraw. That chronology may suggest the Court of Appeals was not concerned about the constitutionality of the representation provided by Mr. Vernay, but in any event it does show the appellate court did not sua ponte find Mr. Vernay's representation deficient. Second, the Court does not perceive the filing of extension motions by Mr. Vernay as indicative of ineffectiveness. This is

[2] Mann was also granted relief to raise claims made newly available by Supreme Court case law. Runnels's motion does not rely on newly available law, so *Mann* does not avail him.

especially true where, as here, the Court set a deadline for scheduling purposes that preceded by several months the due date under the statute of limitations, and Mr. Vernay's efforts were hindered by Runnels informing the Court of his desire to abandon his appeals. (Doc. 13.) Third, Mr. Vernay did not overlook the benefits of *Martinez*. On the contrary, he anticipated that *Trevino* would be decided in petitioner's favor and moved for leave to amend the petition in anticipation of that happening. The petition alleged in "claim 2" that state habeas counsel was ineffective and relied on new evidence in the form of an affidavit from Alma Lagarda. Runnels presents no authority that federal counsel abandons his client by failing to do more to "unexhaust" an IATC claim that was litigated in state court. The very suggestion distorts the holding in *Martinez* and its chief concern that a claim of ineffective trial counsel might escape review in state court. *See Davila,* 137 S. Ct. at 2066 (noting that chief concern addressed by *Martinez* was to ensure that meritorious claims of ineffective assistance of trial counsel receive review by at least one state or federal court). Here, the very same challenge to trial counsel's investigation and strategy that is raised in this Motion did *not* escape state court review, or federal review, for that matter.

A strategic concession that an IATC claim is unexhausted, commonly made to obtain *de novo* review after *Martinez*, merely "encourages state defendants to concoct 'new' IAC claims that are nothing more than fleshed-out versions of their old claims supplemented with 'new' evidence." *See Ward v. Stephens*, 777 F.3d 250, 257 n.3 (5th Cir. 2015) (citing *Dickens v. Ryan*, 740 F.3d 1302, 1328 (9th Cir. 2014) (en banc) (Callahan, J., concurring in part and dissenting in part), *cert denied*, 136 S. Ct. 86 (2015). The Motion before the Court does just that; it presents a "fleshed out" version of the old IATC claim with new evidence in the form of an expert report.

The selection of an expert witness, however, "is a paradigmatic example of the type of strategic choice that, when made after a thorough investigation of the law and facts, is virtually unchallengeable." *See Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014) (quotations omitted). Here, trial counsel hired two mental health experts to evaluate Runnels, and neither expert provided information useful to the defense. Lisa Clayton apparently did not provide a written report of her unhelpful findings. (4 SHRR 202.) Dr. Fulbright's report (although based on testing less thorough than Fulbright wished) concluded that Runnels likely *has* ADHD and the associated deficits in executive functioning. (4 SHRR 177.) Fulbright's report also contains damaging information about Runnels's mental state, however, such as his planning of the murder, his lack of remorse and belief that the murder was justified, his dislike of correctional officers, and his assertion that he was not going back to jail alive. Counsel's rejection of a mental health-based defense is further supported by the 1993 evaluation describing Runnels's "cold resistant attitude," his difficulty dealing with stress that may lead to aggression, and his inflexible thinking and values that make him a challenging candidate for therapeutic change. (4 SHRR 115.) The totality of this information combined would cause reasonable counsel to reject a strategy based on mental health. (4 SHRR 168, 171); *see Runnels*, 2016 WL 1274132, at *23 (citing *Brown v. Thaler*, 684 F.3d 482 (5th Cir. 2012) for the principle that a decision not to offer evidence of a disadvantaged background can be reasonable if the evidence suggests the defendant is a dangerous product of his environment and not likely to change). Upon receiving such information, trial counsel is not obligated to pursue more testing "until it bears fruit or all conceivable hope withers." *See Chanthakoummane v. Stephens*, 816 F.3d 62, 70 (5th Cir. 2016). Counsel is not ineffective for failing to canvass the field to find a more favorable expert. *See Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000).

It follows that Mr. Vernay did not create structural error by failing pursue more testing. The mere fact that, twelve years after trial, habeas counsel located a new expert with a different opinion does not demonstrate abandonment by Mr. Vernay, nor does it make trial counsel ineffective or the trial experts wrong. Furthermore, the Motion does not refute the abandonment by Runnels's family members that was found to have occurred in this case. Any present contention that the family members could have contributed to a significant mitigation defense is in direct conflict with the fact that the family was unwilling to do so at the time of trial. Therefore, the present assertions of new evidence, even if true, cannot demonstrate structural error in the original proceedings in this Court.

V. CONCLUSION

For the reasons set out, this is not a case for Rule 60(b) relief. The motion is based on federal habeas counsel's failure to locate additional mitigation evidence that was not obtained by trial counsel. Runnels argues the evidence he has developed, Dr. Fabian's neuropsychological evaluation, was the type of evidence federal habeas counsel should have developed and that it should allow him to reopen this federal habeas case.

The Court does not minimize Dr. Fabian's report, but if all that is required to set aside a final judgment pursuant to Rule 60(b) is to present additional mitigation evidence by one or more experts, then Rule 60(b) relief becomes the rule rather than the exception. Secondly, since no procedural bar for failure to exhaust was imposed, no *Martinez/Trevino* issue is presented.

VI. RECOMMENDATION

The Motion constitutes a second-or-successive habeas petition that requires authorization by the Court of Appeals under 28 U.S.C. § 2244(b)(3). This Court may either dismiss the motion for lack of jurisdiction or transfer it to the Court of Appeals. *See In re Hartzog*, 444 F. App'x 63, 64 (5th Cir. 2011) (citing *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000)). "Normally, transfer

will be in the interest of justice because normally dismissal of an action that could be brought elsewhere is time consuming and justice-defeating." *Miller v. Hambrick*, 905 F.2d 259, 262 (9th Cir. 1990). The undersigned finds that it is in the interest of justice to transfer the motion to the Court of Appeals rather than dismiss. Runnels motion for relief under Rule 60(b) should be **TRANSFERRED** to the United States Court of Appeals for the Fifth Circuit as a second-or-successive petition.

ENTERED this 29th day of September, 2017.

CLINTON E. AVERITTE
UNITED STATES MAGISTRATE JUDGE

NOTICE OF RIGHT TO APPEAL/OBJECT

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). **Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed** as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the Report and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79F.3d 1415, 1428-29(5thCir. 1996);*Rodriguezv. Bowen*, 857F.2d275,276-77(5th Cir. 1988).

Additional material from this filing is available in the Clerk's Office.