

IN THE
Supreme Court of the United States

TRAVIS TREVINO RUNNELS,
Petitioner,

v.

LORIE DAVIS, DIRECTOR TDCJ–CID,
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 10th day of May, 2018, a copy of **Respondent’s Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: Mark Pickett, The Center for Death Penalty Litigation, Inc., 123 West Main St., Suite 700, Durham, North Carolina 85007, mpickett@cdpl.org. All parties required to be served have been served. I am a member of the Bar of this Court.

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**RESPONDENT’S BRIEF IN OPPOSITION TO PETITION FOR A
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QUESTION PRESENTED

While serving a seventy-year sentence for aggravated robbery, Petitioner Travis Runnels murdered Stanley Wiley, Runnels's supervisor in the Texas Department of Criminal Justice (TDCJ) Clements Unit boot factory. Runnels filed a federal habeas petition alleging he received ineffective assistance of trial counsel (IATC) because counsel failed to present mitigating evidence. Evidence developed in state court showed that trial counsel thoroughly investigated existing mitigating evidence and were prepared to present it to the jury through the testimony of several of Runnels's family members. Before the defense's punishment-phase presentation, however, Runnels's family members left the trial and refused to testify.

The district court denied Runnels's petition and the Fifth Circuit denied his application for a certificate of appealability (COA). In denying Runnels's application for a COA, the Fifth Circuit focused its analysis on the district court's rejection of the IATC claim. Runnels asks this Court to grant certiorari for the purpose of "warning" the Fifth Circuit regarding the proper COA standard.

These facts raise the following question:

Should the Court grant certiorari where the Fifth Circuit properly focused its COA review on the district court's adjudication of Runnels's IATC claim and the district court's rejection of the claim was indisputably appropriate?

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BRIEF IN OPPOSITION

In his federal habeas petition, Runnels claimed that his trial counsel were ineffective for failing to adequately present mitigating evidence. The district court denied Runnels's petition and the Fifth Circuit denied a COA. Runnels now seeks certiorari review of the Fifth Circuit's denial of a COA. Runnels's IATC claim is not worthy of this Court's attention because the Fifth Circuit properly focused its analysis on the debatability of the district court's adjudication of Runnels's claim. Further, the Fifth Circuit's denial of a COA was compelled by the facts and controlling law. Therefore, the Court should deny Runnels's petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

A. The capital murder

The Court of Criminal Appeals (CCA) summarized the facts of the capital murder as follows:

[Runnels] 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." [Runnels] said that he would kill [Stanley] Wiley if Wiley said anything to him that morning. [Runnels] 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 [Runnels] 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, [Runnels] approached Wiley, raised a knife, tilted Wiley’s head back, and cut his throat. [Runnels] then wiped the knife with a white rag and walked back toward the trimming tables. When Yow later asked [Runnels] why he had attacked Wiley, [Runnels] said, “It could have been any offender or inmate, you know, as long as they was white.” In response to Yow’s explanation that [Runnels] could get the death penalty if Wiley died, [Runnels] 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.” [Runnels] was twenty–six years old when he committed the offense.

Runnels v. State, No. 75,318, slip op. at 1 (Tex. Crim. App. Sept. 12, 2007) (unpublished opinion).

B. The State’s punishment case

The CCA summarized on direct appeal the State’s case for future dangerousness:

In addition to the crime before [the court], the record shows that [Runnels] has been convicted of three other felonies. In 1993, he was convicted of the second–degree felony of burglary of a building. He was placed on probation for that felony, but later that year he committed another burglary of a building. As a result, he received a second conviction and his probation on the first conviction was revoked. In 1997, [Runnels] was convicted of aggravated robbery,

a first-degree felony. That conviction carried a deadly weapon finding, specifying the deadly weapon as a “firearm.”

[Runnels] also committed several acts of misconduct in prison. On January[] 19, 1999, he hit a guard in the jaw. On May 3, 2003, he threw urine at a guard. On November 18, 2003, he threw a light bulb at a guard. And on June 25, 2004, he threw feces at a guard.

Id. at 2.

C. The defense’s case

The defense developed testimony showing that, prior to the murder, Runnels felt that Wiley had harassed him. William Gilchrist testified that Wiley had harassed Runnels the day prior to the murder. 15 RR 115.¹ Jimmy Jordan testified to the same effect. 15 RR 145. Jordan and Bud Williams, Jr., testified that Wiley had scolded Runnels for not working and Runnels said that he was tired of Wiley “messaging with him.” 15 RR 67, 146.

Witnesses who had known Runnels for a significant period of time in prison testified that they had not seen Runnels exhibit any violent behavior. 15 RR 78, 80, 113–14. Williams had known Runnels for eight years. He testified that he had never seen Runnels fight and that Runnels had walked away from

¹ “RR” refers to the “Reporter’s Record,” the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). “CR” refers to the “Clerk’s Record,” the transcript of pleadings and documents filed in the trial court, followed by the internal page number(s). “SHCR” refers to the Clerk’s Record of pleadings and documents filed with the state habeas court. *See generally Ex parte Runnels*, No. 46,226–02. “Supp. SHCR” refers to the Clerk’s Record of pleadings and documents filed with the state habeas court following the CCA’s June 8, 2011, remand to the trial court. The transcript of the state habeas court’s evidentiary hearing is contained in Petitioner’s Appendix E.

trouble. 15 RR 78, 81–82. Gilchrist testified that Runnels never engaged in violence or threatened others. 15 RR 114. Jimmy Jordan and Phillip Yow also testified that they had not seen Runnels involved in any fights. 15 RR 157, 243.

Gilchrist testified that Runnels was in minimum custody and was a good prisoner. 15 RR 114. William Elkins testified that Runnels was good-natured. 15 RR 183. The defense also showed that Runnels did not attempt escape or resist arrest when officers responded to the scene of the attack. 15 RR 213, 229–30.

II. Procedural History

Runnels pled guilty to, and was convicted and sentenced to death for, the murder of Stanley Wiley. CR 20, 334, 342–45, 390–94; 21 RR 3; 15 RR 8; 17 RR 41. The CCA upheld Runnels’s conviction and death sentence on direct appeal. *Runnels v. State*, No. 75,318 (unpublished opinion). Following a remand to the trial court and an evidentiary hearing regarding Runnels’s IATC claim, the CCA denied Runnels’s state habeas application based on the trial court’s findings of fact and conclusions of law and based on its own review. *Ex parte Runnels*, No. 46,226–02 (Tex. Crim. App. March 7, 2012) (unpublished order); SHCR–02 at 298–306; Supp. SHCR–02 at 7–14.

Runnels then filed a federal habeas petition. The district court denied habeas corpus relief and denied a COA. *Runnels v. Stephens*, 2016 WL 1275454, at *1–2 (N.D. Tex. March 31, 2016) (order adopting Report and

Recommendation); *Runnels v. Stephens*, 2016 WL 1274132, at *1–28 (N.D. Tex. March 15, 2016) (magistrate judge’s Report and Recommendation). Runnels then filed an Application for a COA, which the Fifth Circuit denied. *Runnels v. Davis*, 664 F. App’x 371, 372–78 (5th Cir. 2016).

Runnels later obtained a stay of the proceedings in the Fifth Circuit to file in the district court a motion for relief from judgment. *Runnels v. Davis*, No. 16–70012, Order (5th Cir. June 5, 2017). Runnels then filed a motion for relief from judgment, which the district court dismissed as a successive petition and denied in the alternative.² *Runnels v. Davis*, 2017 WL 5028243, at *5 (N.D. Tex. Oct. 31, 2017). Runnels has filed an application for a COA following the district court’s denial of his motion for relief from judgment. *Runnels v. Davis*, No. 17–70031 (5th Cir.). The application remains pending.

Runnels also filed a petition for rehearing and a petition for rehearing en banc following the Fifth Circuit’s denial of a COA. The Fifth Circuit denied each petition. *Runnels v. Davis*, No. 16–70012, Order (5th Cir. Dec. 11, 2017). Runnels then filed a petition for a writ of certiorari. The instant Brief in Opposition follows Runnels’s petition.

² Runnels did not file in the Fifth Circuit a motion for authorization to file a successive habeas petition. Therefore, the Fifth Circuit dismissed such an action for failure to comply with the court’s scheduling order. *In re Runnels*, 17–11294, Order (5th Cir. Dec. 5, 2017).

ARGUMENT

I. The Court Should Deny Runnels’s Petition Because He Does Not Identify a Compelling Reason that Warrants this Court’s Attention.

Runnels first argues the Fifth Circuit applied an incorrect standard when it denied his application for a COA. Pet’r’s Br. at 17–23. He argues this Court should grant certiorari to “warn the Fifth Circuit again” not to deny a COA based on a merits review of a petitioner’s claims. Pet’r’s Br. at 3–4. He also complains that the Fifth Circuit has “refus[ed]” to apply the appropriate COA standard despite this Court’s holding in *Buck v. Davis*, 137 S. Ct. 759, 773–75 (2017). Pet’r’s Br. at 17. But Runnels misconstrues the Fifth Circuit’s opinion and his complaint does not warrant this Court’s attention. Consequently, Runnels’s petition should be denied.

A. The COA standard

A court of appeal reviewing a petitioner’s application for a COA considers only “whether the application 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.” *Buck*, 137 S. Ct. at 773 (internal quotation marks and citation omitted). This review does not constitute a coextensive evaluation of the merits of the petitioner’s claim but instead a “threshold inquiry into the underlying merit” of the claim. *Miller–El v. Cockrell*, 537 U.S. 322, 327 (2003). A court of

appeal “look[s] to the [d]istrict [c]ourt’s application of AEDPA to petitioner’s constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason.” *Id.* at 336; *see id.* at 341.

B. The Fifth Circuit’s opinion properly focused on the district court’s adjudication of Runnels’s IATC claim.

Runnels argues that the Fifth Circuit erred in denying his application for a COA because it effectively decided the case on the merits. Pet’r’s Br. at 19–22. Further, Runnels asserts the Fifth Circuit improperly required him to satisfy the requirements of 28 U.S.C § 2254, i.e., to overcome the presumption of correctness afforded to one of the state court’s factual findings. Pet’r’s Br. at 19 (citing Pet’r’s App’x A at 11–12). Runnels also points to language in the Fifth Circuit’s opinion that he argues shows the court applied an incorrect standard to his application for a COA. For example, the Fifth Circuit’s opinion incorrectly stated that for Runnels’s COA “application to be granted, [he] must demonstrate that it was unreasonable for the state court to conclude that he did not overcome the strong presumption of defense counsel’s competence and that he failed to undermine confidence in the outcome” and “must also demonstrate that the state court’s decision was contrary to or involved an unreasonable application of *Strickland*.”³ Pet’r’s Br. at 21–22.

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

While Runnels correctly identifies misstatements in the Fifth Circuit’s opinion, Runnels’s characterization of the Fifth Circuit’s opinion is overly constrained. First, the Fifth Circuit’s discussion of Runnels’s IATC claim properly focused on the debatability of the district court’s decision. At its outset, the Fifth Circuit’s opinion states, “[h]ere, Runnels fails to show an unreasonable application of *Strickland*. The Magistrate Judge’s [sixty-four] page recommendation thoroughly analyzes Runnels[’s] arguments and finds the following.” Pet’r’s App’x A at 9. The court then identified the reasons given by the district court for rejecting Runnels’s claim. Pet’r’s App’x A at 9 (“First, defense counsel conducted an extensive mitigation investigation. . . . Second, defense counsel formulated an adequate mitigation strategy. . . . Third, defense counsel was justified in not calling witnesses. . . . Furthermore, defense counsel had ample reason to rest without calling witnesses once Runnels’s family members made themselves unavailable to testify.”).

The court spent the balance of its opinion recounting Runnels’s arguments and the district court’s reasons for rejecting them. Pet’r’s App’x A at 9 (“As the district court noted, ‘[the mitigation investigator] has significant experience in death penalty cases . . .’ As the district court stated, after ‘receiving unhelpful reports from his experts,’” trial counsel intended to present of Runnels’s troubled upbringing). Although the Fifth Circuit’s statement that Runnels was required to demonstrate the state court’s decision

was unreasonable in order to obtain a COA was incorrect, the substance of the court's discussion of Runnels's IATC claim shows that the court properly focused its analysis on the debatability of the district court's decision. *See* Pet'r's App'x A at 12 ("Consequently, reasonable jurists would not find the district court's assessment of his ineffective assistance of counsel claims to be debatable or wrong.").

Second, the Fifth Circuit's opinion shows that it did not engage in a probing analysis of the merits of Runnels's claim. The lower court's discussion of Runnels's IATC claim required scarcely more than three pages. Pet'r's App'x A at 9–12. Runnels's application for a COA amounted to approximately twenty pages. Brief for Petitioner, *Runnels v. Davis*, No. 16–70012 (5th Cir. June 30, 2016). The bulk of the Director's sixty-four-page response simply described the voluminous record of trial counsels' mitigation investigation. Brief for Respondent at 16–35, *Runnels v. Davis*, No. 16–70012 (5th Cir. Aug. 1, 2016). The lower court did not require hundreds of pages of briefing and oral argument to merely determine the debatability of the district court's decision. *See Buck*, 137 S. Ct. at 774.

This Court in *Buck* and *Miller–El* reversed the Fifth Circuit's judgments denying COA where the court plainly decided the cases on the merits. *Miller–El v. Johnson*, 261 F.3d 445, 452 (5th Cir. 2001) ("Having determined that the state court's adjudication neither resulted in a decision that was unreasonable

in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason.”); *Buck v. Stephens*, 623 F. App’x 668, 669 (5th Cir. 2015) (“Because [Buck] has not shown extraordinary circumstances . . . , we deny the application for a COA.”). The Fifth Circuit in this case did not rest its denial of a COA on a coextensive merits analysis. Rather, as discussed above, the Fifth Circuit’s analysis was properly focused on the district court’s opinion and the reasons that court gave for rejecting Runnels’s IATC claim. Pet’r’s App’x A at 9–11. Therefore, Runnels’s request that this Court grant certiorari for the purpose of “warn[ing]” the lower court regarding the appropriate COA inquiry is unjustified.

C. Certiorari review is unwarranted because the Fifth Circuit has, in the wake of *Buck*, repeatedly acknowledged the limited nature of COA review.

Runnels also asks the Court to grant certiorari in order to stave off the Fifth Circuit’s “blatant defiance” of this Court’s precedent. Pet’r’s Br. at 23. But as discussed above, the Fifth Circuit’s denial of a COA in this case, at worst, included an incorrect statement regarding the COA standard. Pet’r’s App’x A at 8 (“[F]or his application to be granted, Runnels must demonstrate that . . . the state court’s decision was contrary to or involved an unreasonable application of *Strickland*.”). The balance of the Fifth Circuit’s opinion shows that it properly focused on the district court’s decision and concluded Runnels

failed to demonstrate debatability. Pet’r’s App’x A at 9–11. Certiorari review or a grant, vacate, remand order is unnecessary in light of the fact that the substance of the Fifth Circuit’s opinion shows that it has already conducted the appropriate COA inquiry, albeit accompanied by errant statements regarding the COA standard.

Such an action is also unnecessary in light of the Fifth Circuit’s repeated acknowledgements of this Court’s holding in *Buck*. See *Ruiz v. Davis*, 850 F.3d 225, 230 (5th Cir. 2017) (“We are keenly aware of the admonitions of *Buck v. Davis*.”); *Saldano v. Davis*, 701 F. App’x 302, 308 (5th Cir. 2017) (recognizing that this Court “recently cautioned” courts of appeal not to engage in a merits analysis at the COA stage); *Freeney v. Davis*, --- F. App’x ---, 2018 WL 1278124, at *4 (5th Cir. 2018) (same). Indeed, the Fifth Circuit has recently granted COA on numerous occasions in cases arising out of Texas convictions following this Court’s admonition in *Buck*.⁴ These six COA grants by the Fifth Circuit in

⁴ These COA grants include six cases involving death-sentenced petitioners. *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017); *Murphy v. Davis*, --- F. App’x ---, 2018 WL 1906000, at *4 (5th Cir. Apr. 20, 2018); *Washington v. Davis*, 715 F. App’x 380, 384 (5th Cir. 2017) (“[W]e are mindful of *Buck*’s warning against a probing review of the merits. . . . In light of that deferential standard, we are inclined to grant [a COA].”); *King v. Davis*, 703 F. App’x 320, 325 (5th Cir. 2017); *Saldano*, 701 F. App’x at 316; *Coble v. Davis*, 682 F. App’x 261, 274 (5th Cir. 2017). The Fifth Circuit has in the same time-period granted a COA in at least nine non-capital cases arising from Texas convictions. *Sanchez v. Davis*, No. 17–10652, Order (5th Cir. Apr. 25, 2018); *Meyer v. Davis*, No. 16–51454, Order (5th Cir. March 14, 2018); *Schillereff v. Davis*, No. 17–20039, Order (5th Cir. Feb. 2, 2018); *Loynachan v. Davis*, No. 17–10628, Order (5th Cir. Jan. 26, 2018); *Parker v. Davis*, No. 15–20451, Order (5th Cir. Aug. 7, 2017); *Cueva v. Davis*, No. 16–41211, Order (5th Cir. Aug. 4, 2017); *Kirkland v. Davis*, No.

cases involving death-sentenced petitioners in the fourteen months following *Buck* stands in contrast to the seventeen COA grants in such cases (including two arising from Mississippi convictions) identified by the petitioner in *Buck* in the *five years* preceding the petitioner’s briefing in that case.⁵ Brief for Petitioner, *Buck v. Davis*, No. 15–8049, Pet’r’s App’x 5a–19a (July 18, 2016). This represents approximately twice as many COA grants per year following the *Buck* opinion. Thus no “warning” is warranted and, as discussed below, Runnels’s IATC claim provides a particularly inapt vehicle for such an action.

Runnels also complains that the Fifth Circuit denied his petitions for rehearing, which were filed after this Court issued its opinion in *Buck*. But the Fifth Circuit was not required to grant Runnels’s petitions. Fed. R. App. P. 35 (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless . . . the proceeding involves a question of exceptional importance.”); Fed. R. App. P. 40 (a petition for panel rehearing must identify a point of law or fact the court “overlooked or misapprehended”). Indeed, the fact that the Fifth Circuit denied Runnels’s petitions for rehearing after *Buck* cuts against his argument that certiorari review should be granted to chastise

16–20366, Order (5th Cir. Aug. 3, 2017); *Flores v. Davis*, No. 16–20672, Order (5th Cir. June 27, 2017); *Black v. Davis*, No. 16–10159, Order (5th Cir. Apr. 5, 2017).

⁵ This accounting includes only COA grants by the Fifth Circuit, not a district court.

the lower court. As discussed above, the Fifth Circuit has plainly shown it has taken heed of *Buck*. And the lower court’s denial of Runnels’s petitions for rehearing likely reflect the fact that the court’s denial of a COA did not contravene *Buck* and that the (at most) errant phrasing in its opinion did not require an exceptional remedy where the court’s analysis properly focused on the district court’s decision.⁶

Lastly, Runnels frames as incorrect parts of the Fifth Circuit’s analysis that are entirely appropriate. For example, Runnels suggests that 28 U.S.C. § 2254 plays no part in the COA analysis. Pet’r’s Br. at 19, 21–22. On the contrary, this Court has stated the COA inquiry includes a “general assessment” of a claim’s merit, which involves “look[ing] to the [d]istrict [c]ourt’s application of AEDPA to [the] petitioner’s constitutional claims and ask[ing] whether that resolution was debatable amongst jurists of reason.” *Miller–El*, 537 U.S. at 336, 341. As discussed above, the Fifth Circuit’s analysis in this case properly focused on the reasons given by the district court for rejecting Runnels’s IATC claim, which included the district court’s finding

⁶ Runnels refers to an illusory circuit split he argues was created by the Fifth Circuit’s denial of his application for a COA and his petitions for rehearing. Pet’r’s Br. at 17–18. No such split exists. As discussed above, the Fifth Circuit is well-aware of the standard governing applications for a COA and the Fifth Circuit’s denial of a COA does not demonstrate any circuit split. Runnels’s assertion of a circuit split is more properly understood to simply allege that the Fifth Circuit misapplied the standard governing applications for a COA, which is insufficient to warrant certiorari review. Sup. Ct. R. 10.

(discussed further below) that Runnels failed to present clear and convincing evidence to rebut the state court's finding that his family members were unwilling to testify at trial. Pet'r's App'x A at 11–12; Pet'r's App'x D at 44 (the magistrate judge's finding that Runnels presented “no record evidence to overcome the state court's credibility finding” regarding his family members' willingness to testify). Runnels has not shown any impropriety in the Fifth Circuit's reference to AEDPA as a part of its COA analysis.

Runnels is not entitled to certiorari review. The Fifth Circuit properly analyzed the district court's rejection of Runnels's IATC claim in determining he was not entitled to a COA. Exercising this Court's discretionary authority to chastise the Fifth Circuit is unwarranted and unnecessary as demonstrated by the lower court's repeated acknowledgments of this Court's opinion in *Buck*. Further, as discussed below, the Fifth Circuit's denial of a COA in this case was indisputably appropriate. Therefore, Runnels's petition should be denied.

II. The Court Should Deny Runnels's Petition Because His IATC Claim Is Unworthy of this Court's Attention.

Runnels raised one IATC claim in his application for a COA asserting that trial counsel failed to adequately present mitigating evidence. Specifically, Runnels claimed that his trial counsel, James Durham and Laura Hamilton, failed to present evidence of Runnels's chaotic childhood. Runnels now argues that the fact that trial counsel did not present witnesses at the

punishment phase of trial, by itself, is an extraordinary circumstance warranting this Court's attention and demonstrates the district court's rejection of his IATC claim is debatable. Pet'r's Br. at 23–31. But as discussed below, the record conclusively demonstrated that trial counsel were aware of the evidence Runnels complains went undiscovered and trial counsel made the reasonable strategic decision not to present witnesses during the punishment phase of trial. Therefore, Runnels fails to identify any compelling reason warranting this Court's review.

A. Trial counsel conducted an extensive mitigation investigation.

Mr. Durham and Ms. Hamilton represented Runnels at trial. Kathy Garrison was retained as an investigator. Pet'r's App'x E at 4. "Ms. Garrison had significant experience in death penalty cases" and "investigated all aspects of the case, including Runnels's extended family and ancestors, their migration to Texas, their criminal history, their substance abuse history, and their history of mental illness." Pet'r's App'x D at 37. She also obtained Runnels's education records and medical records and arranged for him to be examined by a psychiatrist and a psychologist. Pet'r's App'x E at 16.

As part of her mitigation investigation, Ms. Garrison interviewed Runnels on several occasions. Pet'r's App'x E at 15–16. Ms. Garrison learned that Runnels had disciplinary problems in school as well as arrests for theft,

drug possession, and burglary when he was a juvenile. Pet'r's App'x D at 38. Runnels and some of his family members used drugs, and his mother abused alcohol. Pet'r's App'x D at 38. Runnels also told Ms. Garrison that his mother was the victim of domestic abuse. Pet'r's App'x D at 38. Ms. Garrison learned that Runnels was sent to live with his Uncle Ricky in Japan when he was sixteen years old but the experience became a "nightmare" for the uncle and Runnels was sent back to Texas. Pet'r's App'x D at 39. During their meetings, Runnels indicated to Ms. Garrison that he did not want his childhood used as an excuse for Wiley's murder but, rather, he indicated he murdered Wiley because his "manhood was being trampled." Pet'r's App'x D at 38.

Ms. Garrison reviewed a psychological evaluation of Runnels that was conducted in 1993 when he was seventeen years old. Pet'r's App'x D at 38. The psychologist found Runnels was a "challenging candidate for therapeutic change" due to his inflexible thinking and values and diagnosed Runnels with conduct disorder. Pet'r's App'x D at 42.

Ms. Garrison also investigated Runnels's family background by meeting and speaking with Runnels's family on several occasions, including a five-hour meeting with his family members. Pet'r's App'x E at 4, 16. She was able to meet with Runnels's family members several times, despite their often being difficult to contact and meet with in person. Pet'r's App'x E at 15–16. The investigation into Runnels's family background focused on his mother (Nancy),

father (Noel), brother (Darmonica), and grandmother (Lillie Mae), because the defense team determined that those were the only potential witnesses who were familiar with Runnels's background and whose testimony could have been beneficial to the defense.⁵ Pet'r's App'x at 17.

Two months prior to trial, Ms. Garrison summarized in an email to the defense team the mitigation themes that had been developed through the investigation. Resp't's Answer, Ex. A at 255–56, Civ. Act. No. 2:12–CV–74 (N.D. Tex. May 9, 2013). Specifically, she indicated that the defense was investigating incidents of violence directed at Runnels's family (involving his uncle and great–great grandfather) as well as evidence that his mother's family was poor and suffered from substance abuse. *Id.*; Pet'r's App'x D at 37; see Pet'r's App'x F at 1, 6. She also stated that Runnels seemed to have had significant learning or developmental problems in school. As a result of the investigation into Runnels's family background, the defense developed a strategy to show through the testimony of Runnels's family members

⁵ Ms. Garrison also spoke with Runnels's uncle Ricky and a family friend, Janet Levells. Pet'r's App'x E at 6, 17. The defense concluded that those witnesses would not have been beneficial to the defense. As noted above, Runnels's uncle had taken sixteen–year–old Runnels to live with him in Japan to help Runnels “get out of trouble,” but sent Runnels back to his mother because of misconduct Runnels engaged in while in Japan. Pet'r's App'x E at 6; Pet'r's App'x F at 2. Ricky also described Runnels as a manipulator and an instigator. Pet'r's App'x D at 39; Pet'r's App'x F at 2. Janet Levells indicated that she would not testify on Runnels's behalf if she believed he was guilty of murder. Pet'r's App'x at 17. Other potential witnesses would not have been beneficial because they were in prison, had a criminal history, or were involved with Runnels in his previous criminal activity. Pet'r's App'x E at 16.

(specifically Nancy, Noel, Darmonica, and Lillie Mae) that Runnels had a difficult and disruptive upbringing, that his family was poor and moved often, and that violence had been directed at his family. Pet'r's App'x E at 17–18.

In the weeks preceding trial, the defense team discussed having subpoenas issued for Lillie Mae, Nancy, Noel, and Darmonica. Ms. Garrison noted that arrangements were made for Runnels's family members to be present at trial. Pet'r's App'x D at 15, 23–24. However, Darmonica did not travel to Amarillo, Texas for the trial. Pet'r's App'x E at 4–5, 7, 12, 16. Nonetheless, the defense team met with Nancy, Noel, and Lillie Mae in Mr. Durham's office on the day prior to trial. Pet'r's App'x E at 6. But Lillie Mae indicated Runnels may not have been aware that one of his uncles had been killed by Dallas police or that his great–great grandfather had been lynched. Pet'r's App'x E at 4. Lillie Mae also indicated that she was reluctant to testify regarding their family's history. Pet'r's App'x E at 4.

In addition to Ms. Garrison's investigation, the defense team arranged for Runnels to be evaluated by a psychiatrist, Dr. Lisa Clayton, and a psychologist, Dr. Richard Fulbright. Pet'r's App'x E at 4–5, 16. Following Dr. Clayton's evaluation of Runnels, Ms. Garrison indicated that Dr. Clayton would be unable to assist the defense “because of her findings.” Pet'r's App'x D at 41. Dr. Fulbright evaluated Runnels over two days and provided the defense team with his final psychological report. Pet'r's App'x F at 8–19.

Dr. Fulbright found that Runnels demonstrated intact neurocognitive functioning and average intellectual abilities. Pet'r's App'x F at 18. Dr. Fulbright stated that he could not administer tests to identify attention deficit hyperactivity disorder (ADHD), but he concluded that it was likely Runnels had the disorder. Pet'r's App'x F at 18. Nonetheless, Dr. Fulbright concluded that ADHD would not explain Runnels's murder of Wiley. Pet'r's App'x F at 19. Dr. Fulbright noted Runnels's pronounced defiant behavior in school and the apparent lack of "psychological counseling and behavioral intervention" in school or the juvenile detention system. Pet'r's App'x F at 18–19. In prison, Runnels exhibited "obvious problems with inappropriate and aggressive behavior." Pet'r's App'x F at 19. Dr. Fulbright stated that "[o]ne cannot assume that [] Runnels would not have attacked the guard if he had been given appropriate psychological services," but the likelihood of violent behavior would have been reduced with psychological intervention. Pet'r's App'x F at 19. Dr. Fulbright also obtained a social history of Runnels. Pet'r's App'x F at 9–13.

B. Runnels's trial counsel made a reasonable strategic decision not to present witnesses during the punishment phase of trial.

Trial counsel concluded that of the potential witnesses, Lillie Mae, Nancy, Noel, and Darmonica were the only witnesses that could have potentially benefitted Runnels. Pet'r's App'x E at 4, 17. Trial counsel intended for those witnesses to testify regarding, *inter alia*, Runnels's disruptive

childhood. Pet'r's App'x at 18. Accordingly, trial counsel arranged for Lillie Mae, Nancy, Noel, and Darmonica to be available to testify at trial. Pet'r's App'x at 6, 9. But through no fault of trial counsel, those witnesses rendered themselves unavailable to testify by not traveling to Amarillo for trial, remaining in the courtroom during trial testimony, or leaving the courthouse before the defense presented evidence and refusing to return to court to testify. Moreover, the testimony that those witnesses could have presented would have been double-edged and its mitigating potential was minimal. Consequently, trial counsel made the strategic decision to not seek a writ of attachment and present the testimony of those witnesses.

After trial began, Noel violated the rule excluding witnesses from hearing the testimony of other witnesses by remaining in the courtroom during trial despite having been told by the defense that doing so would render him unavailable to testify. Pet'r's App'x E at 17; Tex. R. Evid. 614. At the conclusion of the State's case, Ms. Garrison stepped outside of the courtroom to speak with Lillie Mae, Nancy, and Noel. Ms. Garrison was unable to find them because they had left the courthouse and began driving back to Dallas, Texas. Pet'r's App'x E at 4–6, 10, 17–18. Ms. Garrison called the family members on the telephone but they told Ms. Garrison that they “[couldn’t] do nothing for [Runnels] now” and hung up. Pet'r's App'x E at 18. Lillie Mae, Nancy, and Noel were not told that they could leave the courthouse. Pet'r's App'x E at 18. Upon

learning that Runnels’s family members had left the courthouse and were unwilling to testify on Runnels’s behalf, trial counsel spoke with the trial judge in chambers. SHCR–02 at 302. Trial counsel indicated to the judge that there were no available witnesses that could benefit Runnels. *Id.* Accordingly, trial counsel chose not to present testimony, and the defense rested. 16 RR 145–46.

C. The district court’s rejection of Runnels’s IATC claim is not debatable.

Based on these facts, the district court concluded that trial counsel were effective. Pet’r’s App’x D at 37–57. The district court found that trial counsel “conducted a reasonable mitigation investigation and formulated a strategy that was derailed when Runnels’s family walked out or otherwise made themselves unavailable to testify.” Pet’r’s App’x D at 56. Further, trial counsel made reasonable, difficult decisions regarding “how to defend a [remorseless] man who murdered a prison employee,” who “could not be institutionalized, and “who had actively sought to enact changes in prison through violence.” Pet’r’s App’x D at 56, 63. Additionally, some of the mitigation themes trial counsel developed through the investigation were “wrecked” when Runnels’s grandmother “changed her story entirely” by indicating Runnels may not have been aware of a “lynching in the family history.” Pet’r’s App’x at 63.

Regarding Runnels’s argument that his family members were told by a member of the defense team they could leave trial without testifying, the

district court found “no record evidence to overcome the state court’s credibility finding.” Pet’r’s App’x D at 44. Indeed, the district court found the record supported the conclusion that Runnels’s family members absented themselves from trial on their own. Pet’r’s App’x D at 44. Runnels frames the state court’s finding that Runnels’s family members left trial on their own accord as “highly–contested.” Pet’r’s Br. at 26. But as the district court found, Runnels’s grandmother’s postconviction affidavit was flatly contradicted by the record and the remaining family members’ postconviction assertions that they were told they could leave trial before testifying are not believable. Pet’r’s App’x D at 44–46.

Nonetheless, trial counsel were not ineffective for failing to present testimony of Runnels’s family members. Trial counsel were aware of the family members’ potential testimony and knew that its benefit would be minimal. Pet’r’s App’x E at 10. For example, testimony regarding Runnels’s family background may have been damaging because the State would likely demonstrate that Darmonica had grown up in the same environment as Runnels, but did not commit violent crimes as Runnels had. Pet’r’s App’x D at 54; Pet’r’s App’x E at 10.⁷ As the district court summarized, trial counsel

⁷ Runnels asserts that Ms. Hamilton “never explained” the harm the defense team believed could come from the family members’ testimony. Pet’r’s Br. at 27–28. On the contrary, Ms. Hamilton testified during the state habeas hearing that “there was a lot of harm that could have come from their testimony, too. Because what they

during the middle of trial and faced with having to make a tough trial decision, weighed the alternatives of trying to compel testimony of uncertain usefulness from the family who should not have left, and elected to rely on the guilty plea and the testimony he had elicited during cross-examination, in the hope the jury would agree that the State did not prove future dangerousness.

Pet'r's App'x D at 47.

Runnels also complains that trial counsel did not learn of the potential testimony of his cousins LaQueena Garcia and Joel Runnels. Pet'r's Br. at 28. He asserts the failure to discover their potential testimony, by itself, demonstrates that trial counsel were ineffective. Pet'r's Br. at 28. But as the district court found, their testimony would have been cumulative to the testimony trial counsel planned to present through Runnels's grandmother, mother, father, and brother. Pet'r's App'x D at 44. Counsel could not be deficient for not having the prescience to know that Runnels's closest family members would abandon him immediately before they were to testify. Pet'r's App'x D at 44

The district court's rejection of Runnels's IATC claim is not debatable. First, Lillie Mae, Nancy, Noel, and Darmonica, through their own actions, rendered themselves unavailable to testify. That being the case, Runnels cannot demonstrate that trial counsel were ineffective for failing to present the

could say for [Runnels], they could say, but these other family members, Darmonica, haven't turned out that way." Pet'r's App'x E at 10.

testimony of those witnesses because the evidence shows those witnesses were not willing and available to testify on Runnels's behalf. Pet'r's App'x D at 51.

Moreover, it is axiomatic that trial counsel is not ineffective for choosing not to present testimony that would be "double-edged." *Burger v. Kemp*, 483 U.S. 776, 795 (1987). In this case, trial counsel made the reasonable strategic decision not to present testimony from the experts who examined Runnels but who could not offer helpful information. While Dr. Fulbright noted in his report that Runnels experienced a disrupted childhood, had not received appropriate psychological treatment, and likely had ADHD, Dr. Fulbright concluded that "[o]ne cannot assume Mr. Runnels would not have attacked [Wiley] if he had been given appropriate psychological services." Pet'r's App'x F at 19. Consequently, Dr. Fulbright's testimony would have offered "no creditable explanation for [Runnels's] commission of the brutal capital murder offense." SHCR-02 at 303. And, what would have been more damning to Runnels's punishment case, Dr. Fulbright described Runnels as remorseless for having killed Mr. Wiley and as having "obvious problems with inappropriate and aggressive behavior." Pet'r's App'x F at 19. Runnels cannot show that trial counsel were deficient for choosing not to present such aggravating expert testimony.

Further, trial counsel reasonably decided not to present testimony from Runnels's family members who could have presented, at best, marginally

beneficial evidence. The testimony may have demonstrated that Runnels had experienced a troubled childhood, but the value of that evidence would have been undermined by evidence that Darmonica had grown up in the same family but had not gone on to commit violent crime. Moreover, much of the proffered testimony Runnels suggested should have been presented through his family members consists of testimony regarding Runnels's incorrigible behavior when he was young. Such testimony would have merely been consistent with a conclusion that Runnels indeed had serious behavioral difficulties and obvious problems with inappropriate and aggressive behavior.

Runnels also cannot show that trial counsel were deficient for making the strategic decision not to present testimony of witnesses who had over the weeks and months preceding trial often been uncooperative, expressed doubt as to the value of their testimony, and expressed an outright unwillingness to testify in support of their son/grandson/brother who was on trial for capital murder. Pet'r's App'x D at 43 ("[I]t would not have been unreasonable for Mr. Durham to conclude [the family members'] usefulness as potential mitigation witnesses had been seriously diminished by their patent lack of desire to assist Runnels, a fact which would have likely been brought up on cross-examination."). Indeed, if recalled to testify, the fact that Runnels's family members had left trial without testifying would likely have led to the jury learning, as uncle Ricky told Ms. Garrison, that Runnels "had become

unwelcome” with and “alienated” his family through his manipulative behavior. Pet’r’s App’x D at 45; Pet’r’s App’x F at 2. Consequently, Runnels cannot show that trial counsel were ineffective for deciding not to present the testimony of Lillie Mae, Nancy, Noel, and Darmonica or that the district court’s conclusion in this regard is debatable.

Relatedly, the district court properly deferred to the state court’s credibility determination that neither trial counsel nor Ms. Garrison told Runnels’s family members they could leave trial before testifying. Ms. Hamilton and Ms. Garrison both testified about the incident. Pet’r’s App’x E at 9–10, 18, 22. The state habeas court addressed the conflict between that testimony and the affidavits of Runnels’s family members, and the court credited Ms. Hamilton’s and Ms. Garrison’s testimony. SHCR–02 at 12. The district court went on to reiterate the deference due:

[t]he state court found that Mr. Durham had secured the presence of Runnels’s mother, father, and grandmother at the courthouse for trial and had intended to present testimony from the grandmother, at least. The state court further found that when [Ms.] Garrison went to retrieve them from the courthouse hallway, the family could not be found. Garrison then called the family and learned they had left the city by motor vehicle and refused to return to trial, telling her there was nothing they could do to help Runnels. These findings are supported by the testimony of [Ms.] Garrison and [Ms.] Hamilton at the state habeas hearing.

Pet’r’s App’x B at 2; *see* Pet’r’s App’x D at 45 (the magistrate judge’s finding that “[t]he state court could have reasonably found that the affidavits of Nancy

and Lillie Mae lacked credibility”). The district court’s application of AEDPA in this regard is not debatable.

The district court “extensively” reviewed the 600 pages of the mitigation investigator’s notes and concluded that Runnels failed to show that trial counsel were deficient. Pet’r’s App’x D at 37. The court aptly summarized the reasons Runnels’s IATC claim failed:

At the time this case was tried, counsel was presented with a particularly cold-blooded murder. Runnels had killed a prison employee who was defenseless and was attacked from behind. The evidence was that the “motive” for taking Mr. Wiley’s life was either trivial or non-existent. The evidence reflected Runnels showed no remorse. Mr. Durham formulated a strategy for Runnels to plead guilty, which could be argued as remorse and/or acceptance of some responsibility.

The mitigation investigation, however, resulted in evidence that was as detrimental as it was beneficial, and which would have been an evidentiary minefield. The defense’s plan to personalize the defendant with the grandmother’s testimony was wrecked, and counsel elected to proceed with the evidence he had developed. Even in hindsight, it cannot be said that counsel was ineffective.

Pet’r’s App’x D at 63. Runnels cannot show that the district court’s conclusion that trial counsel were not deficient is debatable.

Similarly, Runnels cannot show that the district court’s conclusion regarding a lack of prejudice is debatable. *Bobby v. Van Hook*, 558 U.S. 4, 12–13 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 480–81 (2007) (holding that petitioner was not prejudiced by trial counsel’s decision to not present mitigating evidence that petitioner’s mother used drugs and alcohol and

petitioner had a history of violence in his family because the evidence would have made “no difference” at sentencing). None of the testimony from the defense’s experts or Runnels’s family members would have altered the jury’s perception of his moral culpability. The potentially mitigating value of the testimony of Lillie Mae, Nancy, Noel, Darmonica, Dr. Clayton, and Dr. Fulbright would have been minimal, and their testimony would likely have been harmful (e.g., Dr. Fulbright’s finding that Runnels lacked remorse and was not likely to be rehabilitated and the fact that Darmonica experienced the same upbringing as Runnels but did not engage in violent crime). Therefore, Runnels cannot demonstrate that he was prejudiced by trial counsels’ decision not to present testimony at the punishment phase of trial. As the district court stated, “nothing has been presented to meet [the] significant burden of showing” prejudice. Pet’r’s App’x D at 55.

For these reasons, the Fifth Circuit’s denial of a COA was entirely proper even under a limited, threshold inquiry because the facts and controlling law compelled the conclusion that the district court’s rejection of Runnels’s IATC claim was not debatable. *Cf. Blount v. United States*, 860 F.3d 732, 736 (D.C. Cir. 2017) (“But the case is complicated, not close. . . . The answer is thus clear even under the ‘limited’ inquiry we conduct when considering a request for a COA.”). Therefore, Runnels does not present a compelling reason warranting this Court’s attention and his petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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