

Appendix A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 15-70008

United States Court of Appeals
Fifth Circuit

FILED

May 20, 2019

Lyle W. Cayce
Clerk

EDWARD LEE BUSBY,

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 EN BANC

Before OWEN, GRAVES,* and HIGGINSON, Circuit Judges.

PRISCILLA OWEN, Circuit Judge.

We treat Edward Lee Busby’s petition for rehearing en banc as a petition for panel rehearing pursuant to Fifth Circuit Internal Operating Procedures under Federal Rule of Appellate Procedure 35. Busby’s petition for rehearing is DENIED. The opinion in No. 15-70008, issued June 13, 2018, and reported at 892 F.3d 735, is hereby WITHDRAWN, and the following opinion is ISSUED in its place.

* Concurring in the judgment only.

No. 15-70008

Edward Lee Busby seeks federal habeas corpus relief, asserting three claims: that (1) he is intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia*,¹ (2) he received ineffective assistance of counsel on direct appeal, and (3) his trial counsel was ineffective by failing to conduct an adequate sentencing investigation or by failing to present an adequate mitigation case during the penalty phase of trial. The district court denied relief. We affirm the district court's judgment.

I

Edward Lee Busby was arrested and charged for the January 2004 kidnapping, robbery, and murder of a seventy-eight-year-old woman, Laura Crane.² Evidence at trial reflected that Busby and a female accomplice, Kathleen “Kitty” Latimer, abducted Crane from a grocery store parking lot in Texas, placed her in the trunk of her vehicle, and drove to Oklahoma.³ Busby admitted to authorities that he wrapped twenty-three feet of duct tape around Crane's face. Crane's death was caused by asphyxiation.⁴ According to a medical examiner, Crane was bound with such force that her nose deviated from its normal position.⁵ Though Busby admitted his involvement in the crime, he denied that he intended to kill Crane.⁶ At trial, Busby's counsel twice attempted to introduce statements attributed to Latimer that potentially

¹ 536 U.S. 304, 321 (2002) (“Construing and applying the Eighth Amendment in the light of our ‘evolving standards of decency,’ we . . . conclude that [the death penalty] is excessive and that the Constitution ‘places a substantive restriction on the State's power to take the life’ of a mentally retarded offender.”).

² *Busby v. State*, 253 S.W.3d 661, 663-64 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1050 (2008).

³ *Id.* at 664-65.

⁴ *Id.* at 663-64.

⁵ *Id.* at 664.

⁶ *Id.*

No. 15-70008

supported Busby's contention that he did not intend to kill his victim, but these statements were excluded by the trial court.⁷ The jury found Busby guilty.⁸

During the penalty phase of the trial, the jury determined that Busby posed a future risk of dangerousness to society and that no mitigating factors warranted a life sentence.⁹ These findings required the trial court to sentence Busby to death.¹⁰ Busby appealed, but his appellate counsel did not challenge the exclusion of Latimer's potentially exculpatory statements.¹¹ The Texas Court of Criminal Appeals (TCCA) affirmed,¹² and the Supreme Court denied Busby's petition for certiorari.¹³

In Busby's first state habeas petition,¹⁴ his appointed state habeas counsel initially asserted an ineffective-assistance-of-trial-counsel (IATC) claim regarding the adequacy of trial counsel's mitigation investigation.¹⁵ The TCCA granted state habeas counsel funding to perform an independent mitigation investigation.¹⁶ Invoices indicate that state habeas counsel's mitigation investigator conducted interviews of several people, including Busby's two sisters and mother.¹⁷

Six months after the filing of Busby's petition, his state habeas counsel withdrew the IATC claim, informing the TCCA that he was "convinced that

⁷ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *11-13 (N.D. Tex. Mar. 10, 2015).

⁸ *Busby*, 253 S.W.3d at 663.

⁹ *Id.*; ROA.867-68.

¹⁰ *Busby*, 253 S.W.3d at 663.

¹¹ *See generally id.*

¹² *Id.* at 673.

¹³ *Busby v. Texas*, 555 U.S. 1050 (2008).

¹⁴ *See Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009) (per curiam) (unpublished).

¹⁵ ROA.2165.

¹⁶ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *14 (N.D. Tex. Mar. 10, 2015).

¹⁷ *See* ROA.3232-33.

No. 15-70008

adequate pretrial mitigation was conducted because no significant additional mitigating evidence would have been discovered.”¹⁸ The TCCA dismissed the petition.¹⁹

Busby then filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254.²⁰ This petition alleged seven claims, including for the first time claims that: (1) Busby’s death sentence violates the Eighth Amendment because he suffers from an intellectual disability (the term more recently used by the Supreme Court in describing the condition that *Atkins* denominated “mental retardation”),²¹ (2) Busby received ineffective assistance from direct appeal counsel due to the failure to challenge the trial court’s exclusion of Latimer’s statements, and (3) Busby received ineffective assistance of trial counsel because of counsel’s alleged failure to conduct a reasonable mitigation investigation.²²

The district court stayed Busby’s federal habeas petition to permit exhaustion of claims that had not previously been presented in state court.²³ Busby filed a subsequent state habeas petition, which the TCCA dismissed as an abuse-of-the-writ.²⁴ Busby then returned to federal court.²⁵

The district court afforded Busby the opportunity to present mitigation and other evidence at a hearing, but Busby did not identify any witnesses and

¹⁸ ROA.1551.

¹⁹ *Ex parte Busby*, 2009 WL 483096, at *1.

²⁰ ROA.696-1369, 2343-3092.

²¹ *See, e.g., Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (“Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon.”).

²² ROA.696-858; 2343-2524.

²³ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *2 (N.D. Tex. Mar. 10, 2015); ROA.1877.

²⁴ *Ex Parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished); ROA.2323-24.

²⁵ *See Busby*, 2015 WL 1037460, at *2.

No. 15-70008

offered only arguments of counsel.²⁶ The district court denied relief.²⁷ The court concluded that Busby's *Atkins* claim was procedurally defaulted and did not satisfy the federal miscarriage-of-justice or actual-innocence exceptions to procedural default.²⁸ The district court further declined to excuse Busby's procedural default of the claim that he received ineffective assistance of counsel in his direct appeal.²⁹ The federal district court also concluded that some of the mitigation evidence presented in Busby's habeas petition was duplicative of evidence presented to the jury during his trial, and that, on balance, had the jury heard all of the mitigation evidence and weighed it against the aggravating evidence, there was no reasonable probability that at least one juror would have struck a different balance and would have answered the special issues submitted in the sentencing phase differently.³⁰ We granted a certificate of appealability on all three claims.³¹

II

We first consider Busby's *Atkins* claim and begin with an overarching summary of our conclusions regarding that claim. Busby was convicted in November 2005, three years after the Supreme Court's seminal decision in *Atkins*.³² He had retained a psychologist and mental health expert, Timothy Proctor, Ph.D., who was a defense witness at his state-court trial. Proctor administered two IQ tests, on which Busby scored 77 and 81, respectively. Proctor testified that the score of 77 placed Busby in approximately the bottom sixth percentile, meaning that 94% of the population had a higher IQ than

²⁶ See ROA.3366-3400.

²⁷ *Busby*, 2015 WL 1037460, at *28; ROA.3358.

²⁸ *Busby*, 2015 WL 1037460, at *18-21.

²⁹ *Id.* at *16-18.

³⁰ *Id.* at *12-14.

³¹ *Busby v. Davis*, 677 F. App'x 884, 893 (5th Cir. 2017) (per curiam) (unpublished).

³² *Atkins v. Virginia*, 536 U.S. 304 (2002).

No. 15-70008

Busby,³³ but that Busby was not intellectually disabled.³⁴ Busby made no claim before or during that trial, on direct appeal, or in his first state habeas corpus application that he is intellectually disabled or that any of his counsel had been ineffective in failing to investigate or pursue such a claim.

The *Atkins* claim was first presented in Busby's federal habeas petition. Busby argued that the evidence presented in that petition "proves by a preponderance of the evidence that he has mild mental retardation."³⁵ The federal district court stayed proceedings to permit Busby to present the claim to a state court.³⁶ Because the *Atkins* claim was raised in state court in a second habeas petition and could have been presented in the first state habeas proceeding, Texas law required the TCCA to treat the claim as a successive habeas petition.³⁷ Busby asserted that he was actually innocent of the death penalty under article 11.071, section 5(a)(3) of the Texas Code of Criminal Procedure,³⁸ which essentially embodies the elements of the federal actual-innocence standard as set forth in *Sawyer v. Whitley*.³⁹ The TCCA denied the *Atkins* claim without an evidentiary hearing,⁴⁰ and Busby has not challenged the lack of a hearing.

After the TCCA rejected his *Atkins* claim, Busby relied on the evidence attached to his federal habeas petition. It largely, but not entirely, mirrored the evidence presented to the TCCA. In his second amended petition for

³³ 36 RR 55-56.

³⁴ 36 RR 64; *Busby*, 2015 WL 1037460, at *10.

³⁵ ROA.820.

³⁶ ROA.1877.

³⁷ See *Ex parte Blue*, 230 S.W.3d 151, 156 (Tex. Crim. App. 2007); TEX. CODE CRIM. PRO. ANN. Art. 11.071, § 5(a) (West Supp. 2018).

³⁸ TEX. CODE CRIM. PRO. ANN. Art. 11.071, § 5(a)(3) (West Supp. 2018).

³⁹ 505 U.S. 333, 336 (1992).

⁴⁰ See *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished).

No. 15-70008

habeas relief in federal district court following the TCCA's denial of relief, Busby addressed only the factual underpinnings of his *Atkins* claim.⁴¹ He affirmatively relied upon the TCCA's decision in *Ex parte Briseño*,⁴² citing it as authoritative throughout his briefing on the *Atkins* claim.⁴³ Though he asserted that the TCCA had ruled on the merits in denying the *Atkins* claim,⁴⁴ Busby did not argue in his briefing in the federal district court that the TCCA's decision was based on an "unreasonable application of clearly established Federal law."⁴⁵ Although he has forfeited such a claim by failing to raise it in the federal district court, we review the TCCA's decision under § 2254(d)(1), out of an abundance of caution.

Busby has retained at least four mental health experts during the course of his trial and post-conviction proceedings. None of them has diagnosed Busby as intellectually disabled or opined that he is intellectually disabled. Only counsel has offered that opinion. His expert witness at the trial resulting in his conviction and sentencing testified that Busby is not intellectually disabled. Busby's second state habeas petition and his federal habeas petition attach reports from three other experts, mental health literature, and affidavits or declarations containing information about Busby's childhood and life. The record reflects several IQ scores, one of which resulted in a full-scale IQ score of 81.⁴⁶ The TCCA's decision was not "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."⁴⁷

Clearly established federal law is not violated or misapplied when a state

⁴¹ ROA.2462-2493.

⁴² 135 S.W.3d 1 (Tex. Crim. App. 2004).

⁴³ ROA.2462-2477.

⁴⁴ ROA.2492.

⁴⁵ 28 U.S.C. § 2254(d)(1).

⁴⁶ ROA.2453.

⁴⁷ 28 U.S.C. § 2254(d)(2).

No. 15-70008

court requires an inmate, convicted after *Atkins*, who presents an *Atkins* claim in a second, successive state habeas petition to show by clear and convincing evidence that “no reasonable juror [or factfinder] would have found him eligible for the death penalty.”⁴⁸ Stated another way, when a reasonable factfinder could conclude from the evidence Busby presented that he is not intellectually disabled, a state court has not violated clearly established federal law. Under federal law, if an actual-innocence claim were presented in a successive federal habeas petition, a clear-and-convincing-evidence standard would be applied.⁴⁹ Federal law does not require states to apply a less demanding standard in a successive state habeas proceeding. Alternatively, applying a preponderance-of-the-evidence standard, the TCCA’s decision was not based on an unreasonable determination of the facts in light of the evidence presented to it. No expert has ever opined that Busby is intellectually disabled.

The TCCA’s disposition of the *Atkins* claim withstands scrutiny under AEDPA.⁵⁰

A

The only state court to have considered Busby’s *Atkins* claim was the TCCA. The claim was presented to that court in a second application for habeas relief, and the Texas court denied relief in a brief written order. The Supreme Court has held that “[a] federal habeas court will not review a claim rejected by a state court ‘if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the

⁴⁸ See *Sawyer v. Whitley*, 505 U.S. 333, 349 (1992) (holding that to establish actual innocence, a petitioner must show “by clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty”); TEX. CODE CRIM. PRO. ANN. Art. 11.071, § 5.03(a)(3) (West Supp. 2018).

⁴⁹ See 28 U.S.C. § 2244(b)(2)(B)(ii); *McQuiggin v. Perkins*, 569 U.S. 383, 395-96 (2013).

⁵⁰ 28 U.S.C. § 2254(d)(1), (2).

No. 15-70008

judgment.”⁵¹ The federal district court concluded that Busby’s *Atkins* claim was procedurally defaulted. Busby takes issue with this conclusion, contending that the TCCA’s ruling was a merits decision. We agree. The state court’s decision regarding the *Atkins* claim was not independent of the federal question, and it necessarily entailed an assessment of the facts presented in support of the *Atkins* claim. It was a decision on the merits within the meaning of AEDPA.

The TCCA’s order denying relief on the claims set forth in Busby’s second state habeas application said, “we dismiss the application as an abuse of the writ without considering the merits of the claims.”⁵² Generally, “when a state court issues an order that summarily rejects without discussion all the claims raised by a defendant, including a federal claim that the defendant subsequently presses in a federal habeas proceeding, the federal habeas court must presume (subject to rebuttal) that the federal claim was adjudicated on the merits.”⁵³ “The presumption may be overcome when there is reason to think some other explanation for the state court’s decision is more likely.”⁵⁴

On its face, the TCCA’s order states that it has denied the application as an abuse of the writ without considering the merits of the claims. This would appear to be sufficient to rebut the presumption that Busby’s federal claims were adjudicated on the merits, with at least one exception—his *Atkins* claim. His *Atkins* claim in the TCCA was just one of his claims. His lead contentions in the TCCA were arguments concerning mitigation evidence that his trial

⁵¹ *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009)).

⁵² *Ex Parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished).

⁵³ *Johnson v. Williams*, 568 U.S. 289, 293 (2013) (citing *Harrington v. Richter*, 562 U.S. 86, 99 (2011)).

⁵⁴ *Harrington*, 562 U.S. at 99-100.

No. 15-70008

counsel failed to discover. Busby submitted three broad claims to the TCCA in his second habeas application: (1) ineffective assistance of trial counsel during the sentencing phase in failing to conduct a reasonable sentencing investigation and failing to seek admittance of Latimer's hearsay statements, (2) Busby's sentence violates the Eighth Amendment because he is intellectually disabled, and (3) his sentence violates the Eighth and Fourteenth Amendments because he is severely mentally ill. His ineffective-assistance-of-trial-counsel claim regarding mitigation evidence (unrelated to intellectual disability) subsumed large portions (the first 76 pages) of his second state habeas application. It is highly probable that the TCCA denied relief on the ineffective-assistance-of-trial-counsel claims on the ground that they were procedurally barred since they were not raised in the initial state habeas petition. But the same cannot be said of the *Atkins* claim.

The TCCA's seminal decision in *Ex parte Blue* makes clear that when a defendant who was convicted post-*Atkins* raises an *Atkins* claim for the first time in a successive habeas application, the Texas court must determine whether the defendant has asserted facts, which if true, would sufficiently state an *Atkins* claim to permit consideration of the successive petition.⁵⁵ That determination is necessarily dependent on a substantive analysis of the Eighth and Fourteenth Amendments as applied to the factual allegations.

As noted, Busby first raised his *Atkins* claim in his federal habeas petition, and the district court stayed that proceeding to permit exhaustion of the claim by the state courts. His *Atkins* claim was accordingly presented in a second state habeas petition to the TCCA. Under section 5 of Texas's abuse-

⁵⁵ 230 S.W.3d 151, 162-63 (Tex. Crim. App. 2007).

No. 15-70008

of-the-writ statute, the TCCA is required to dismiss subsequent habeas petitions⁵⁶ unless sufficient specific facts are set forth:

Sec. 5. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

- (1) the current claims and issues have not been and could not have been presented previously . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;
- (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
- (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial⁵⁷

The State contends that because intellectual disability, by definition, must exist during childhood, and because the Supreme Court's decision in *Atkins* had issued well before Busby filed his first state habeas application, Busby's second application was resolved under section 5(a)(1). The State cites this court's decision in *Rocha v. Thaler*⁵⁸ for the proposition that the TCCA's dismissal did not involve the merits of Busby's *Atkins* claim, arguing that Busby's claim was dismissed under section 5(a)(1), rather than section 5(a)(3). The State's argument is not well-taken. It badly misreads this court's decision in *Rocha* as well as the TCCA's decision in *Ex parte Blue*.⁵⁹

⁵⁶ See TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(c) (West Supp. 2018).

⁵⁷ *Id.* § 5(a).

⁵⁸ 626 F.3d 815, 838 (5th Cir. 2010).

⁵⁹ 230 S.W.3d 151.

No. 15-70008

The *Rocha* opinion discussed cases that predated the TCCA’s decision in *Blue*, and *Rocha* recognized that, though the TCCA addressed *Atkins* claims under section 5(a)(1) for a period of time, by the time *Rocha* was decided, the TCCA had begun resolving *Atkins* claims like Busby’s under section 5(a)(3).⁶⁰ Moreover, the opinion in *Rocha* expressly recognized that, during the bygone era in which the TCCA considered *Atkins* claims under section 5(a)(1), the TCCA “step[ped] beyond a procedural determination to examine the merits of an *Atkins* claim.”⁶¹ The *Rocha* opinion said,

This prima-facie review meant that CCA decisions dismissing *Atkins* claims for failure to satisfy § 5(a)(1) rested on the merits of those claims. Consequently, the federal courts were not procedurally barred from considering federal habeas petitions advancing *Atkins* claims that had been dismissed as abuses of the writ for failure to satisfy § 5(a)(1). We first recognized that this new, *Atkins*-specific screening function had robbed § 5(a)(1) dismissals of their independent, state-law character in our 2005 decision in *Morris v. Dretke*.⁶²

The *Rocha* opinion concluded that “[t]he new prima-facie-showing requirement the [T]CCA had engrafted onto § 5(a)(1) was specific to *Atkins* claims,” and that “even as we were reaching the merits of *Atkins* claims that had been dismissed under § 5(a)(1), we continued to treat other kinds of petitions that had been dismissed under § 5(a)(1) as having been dismissed on an independent and adequate state-law ground.”⁶³ Accordingly, even had the TCCA resolved Busby’s *Atkins* claim under section 5(a)(1), our court has concluded that the denial of an *Atkins* claim under section 5(a)(1) meant that

⁶⁰ *Rocha*, 626 F.3d at 822, 829-841.

⁶¹ *Id.* at 832 (quoting *Rivera v. Quartermann*, 505 F.3d 349, 359-60 (5th Cir. 2007)).

⁶² *Id.* at 831.

⁶³ *Id.* at 832-33.

No. 15-70008

the merits of the claim were considered by the TCCA, and the claim was not procedurally defaulted.

In *Blue*, the TCCA held that section 5(a)(1) does not govern when a petitioner files “his initial writ application after *Atkins* and nevertheless failed to invoke the absolute constitutional prohibition against executing the mentally retarded in that initial writ.”⁶⁴ Instead, “the decision whether to permit him to proceed will be purely a function of whether he can meet one of the other criteria of Article 11.071, Section 5.”⁶⁵ The TCCA expressly held that such *Atkins* claims are reviewed under section 5(a)(3).⁶⁶ Unquestionably then, Busby’s *Atkins* claim was resolved under section 5(a)(3).

The TCCA’s decision in *Blue* also compels the conclusion that when the TCCA dismissed Busby’s *Atkins* claim in his second habeas proceeding, the TCCA considered the merits of his claim. The TCCA’s decision in *Blue* explains that “through Article 11.071, Section 5(a)(3), the [Texas] Legislature has provided a mechanism whereby a subsequent habeas applicant may proceed with an *Atkins* claim,” even if the petitioner’s conviction was post-*Atkins*, and therefore his first state habeas petition could have raised an *Atkins* claim but did not do so.⁶⁷ The *Atkins* claim may be pursued “if [the defendant] is able to demonstrate to [the TCCA] that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded.”⁶⁸ In *Blue*, the TCCA “construe[d] . . . Section 5(a)(3) to require a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and

⁶⁴ *Ex parte Blue*, 230 S.W.3d 151, 156 (Tex. Crim. App. 2007).

⁶⁵ *Id.*

⁶⁶ *Id.* at 162.

⁶⁷ *Id.* at 154, 162.

⁶⁸ *Id.* at 154.

No. 15-70008

convincing evidence, that no rational factfinder would fail to find mental retardation.”⁶⁹

The TCCA’s decision in *Blue* examined at length the evidence supporting the claim that Blue came within *Atkins*’s prohibition.⁷⁰ The Texas court concluded that the evidence did not meet section 5(a)(3)’s threshold,⁷¹ and the court dismissed the “subsequent writ application as an abuse of the writ.”⁷² This was not a denial of relief on purely state-law procedural grounds, independent of federal law, because in addressing the *Atkins* claim, the TCCA necessarily considered federal law in assessing the sufficiency of the facts supporting the claim. When Blue subsequently sought habeas relief in the federal courts, our court noted that “the state accepts that the [T]CCA decided the merits of Blue’s *Atkins* claim.”⁷³

The TCCA has described section 5(a)(3) as “represent[ing] the [Texas] Legislature’s attempt to codify something very much like [the] doctrine of ‘actual innocence of the death penalty’ for purposes of subsequent state writs.”⁷⁴ The TCCA deduced that “the Legislature apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*.”⁷⁵ In *Sawyer*, a pre-AEDPA decision, the United States Supreme Court resolved the “standard for determining whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is ‘actually innocent’ of the death penalty to which he has been sentenced so that the court may reach the merits

⁶⁹ *Id.* at 163.

⁷⁰ *Id.* at 164-66.

⁷¹ *Id.* at 166.

⁷² *Id.* at 168.

⁷³ *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011).

⁷⁴ *Ex parte Blue*, 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

⁷⁵ *Id.* (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992)).

No. 15-70008

of the claim” in a successive federal habeas petition.⁷⁶ The Supreme Court held that “to show ‘actual innocence’ one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”⁷⁷ In *Blue*, the TCCA reasoned that because a person who is intellectually disabled is constitutionally ineligible for the death penalty, “no rational juror would answer any of the special issues in the State’s favor, if only for the simple reason that the statutory special issues would not be submitted to the jurors in the first place.”⁷⁸

Texas Code of Criminal Procedure article 11.071, section 5(a)(3) provides a state-law actual innocence gateway through which a defendant may present an *Atkins* claim that would otherwise be procedurally defaulted under state law. The TCCA’s denial of Busby’s *Atkins* claim under section 5(a)(3) is best understood, therefore, as a determination that Busby did not make a threshold showing of evidence that would be sufficient to support, by clear and convincing evidence, an ultimate conclusion that no rational factfinder would fail to find him intellectually disabled.⁷⁹ Because that determination necessarily considers the merits of a federal constitutional claim based on *Atkins*, it is not procedurally defaulted, as that concept has been expressed in federal decisions such as *Walker v. Martin*.⁸⁰

⁷⁶ 505 U.S. at 335.

⁷⁷ *Id.* at 336.

⁷⁸ *Ex parte Blue*, 230 S.W.3d at 161.

⁷⁹ *Id.* at 163.

⁸⁰ 562 U.S. 307, 315-16 (2011).

No. 15-70008

B

Our review of the state court's disposition of Busby's *Atkins* claim is governed by AEDPA.⁸¹ The Supreme Court applied AEDPA in *Brumfield v. Cain* to an *Atkins* claim that was first raised in a state habeas proceeding and then pursued in a federal habeas petition.⁸² More recently, the Supreme Court emphasized that AEDPA demands deference to state court dispositions of *Atkins* claims.⁸³ We reject Busby's contention that the TCCA's decision denying his *Atkins* claim is not entitled to deference under AEDPA and his assertion that we must review his *Atkins* claim de novo.⁸⁴

Busby argues in his petition for rehearing that this court's decision in *Rocha* held that the TCCA's denial of an *Atkins* claim under section 5(a)(3) would not be subject to review under AEDPA but must be reviewed de novo. This is erroneous. The decision in *Rocha* involved a *Wiggins*⁸⁵ claim, which is an assertion that trial counsel failed to investigate adequately for mitigating evidence.⁸⁶ The *Rocha* decision expressly drew a distinction between *Atkins* and *Wiggins* claims.⁸⁷ In any event, had *Rocha* implied that we do not review

⁸¹ See, e.g., *Brumfield v. Cain*, 135 S. Ct. 2269, 2275 (2015).

⁸² *Id.* (quoting 28 U.S.C. §§ 2254(d)(1)) ("After the Louisiana Supreme Court summarily denied his application for a supervisory writ to review the trial court's ruling, Brumfield filed a petition for habeas corpus in federal court, again pressing his *Atkins* claim. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Brumfield could secure relief only if the state court's rejection of his claim was either 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' or was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'").

⁸³ See *Shoop v. Hill*, 139 S. Ct. 504, 506-07 (2019).

⁸⁴ Petition for Rehearing at iv, 10-11, 12, 15.

⁸⁵ *Wiggins v. Smith*, 539 U.S. 510 (2003).

⁸⁶ See *Rocha v. Thaler*, 626 F.3d 815, 820 (5th Cir. 2010).

⁸⁷ *Id.* at 826-27 ("There may well be some exceptions to the rule that a decision on the gateway innocence claim does not constitute a decision on the underlying constitutional claim. As Judge Dennis has previously recognized, an *Atkins* claim is a claim that the petitioner is ineligible for the death penalty. So too is a claim that the petitioner was under eighteen at the time of his crime, is insane, or has some other characteristic that the Supreme

No. 15-70008

an *Atkins* claim like Busby's under AEDPA, that would have been dicta and would be contrary to the Supreme Court's subsequent decisions in *Brumfield* and *Shoop*. The *Rocha* decision would therefore not be binding precedent on this issue.

C

Under 28 U.S.C. § 2254(d)(1), we must ascertain the clearly established federal law, as determined by the Supreme Court of the United States, with regard to an *Atkins* claim that was first raised in state court in a second habeas petition.⁸⁸ Under *state* law, this case is in a different procedural posture than one in which a defendant first raises a claim that he is intellectually disabled at his murder trial or in his first state habeas application. At trial or in an initial habeas proceeding, a defendant in Texas state court has the burden of establishing an *Atkins* claim by a preponderance of the evidence.⁸⁹ Since Busby first raised an *Atkins* claim in state court in a subsequent habeas petition, Texas Code of Criminal Procedure article 11.071, section 5(a)(3) requires that Busby must prove by "clear and convincing evidence, that no rational factfinder would fail to find mental retardation."⁹⁰ In ruling upon

Court has held categorically justifies exemption from the death penalty. In such cases, the inquiry into the gateway innocence claim will substantially overlap with the inquiry into the merits of the underlying constitutional claim. Our panel opinion's holding does not implicate this limited class of cases, as Rocha's *Wiggins* claim is not a claim of categorical ineligibility for the death penalty.").

⁸⁸ 28 U.S.C. § 2254(d)(1).

⁸⁹ See *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007) ("[I]n a habeas action, a defendant has the burden to prove mental retardation by a preponderance of the evidence. Similarly, we now hold that when the issue is presented at trial, a defendant bears the burden of proof, by a preponderance of the evidence, to establish that he is mentally retarded.").

⁹⁰ *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007); see also *id.* at 154 ("We conclude that through Article 11.071, Section 5(a)(3), the Legislature has provided a mechanism whereby a subsequent habeas applicant may proceed with an *Atkins* claim if he is able to demonstrate to this Court that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail

No. 15-70008

Busby’s *Atkins* claim, the TCCA necessarily held that Busby failed to present “evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded.”⁹¹ The TCCA foreclosed Busby from establishing his claim under the less-demanding preponderance-of-the-evidence standard. Accordingly, an initial question is whether the TCCA unreasonably applied clearly established federal law in doing so.

Supreme Court decisions construing AEDPA indicate that the federal constitution permits *federal* courts to deny, as an abuse of the writ, a claim that a defendant is innocent of the death penalty, if the actual-innocence claim is brought in a successive application under 28 U.S.C. § 2244, and the factual predicate for the claim could have been discovered previously through the exercise of due diligence.⁹² There is no basis for concluding that the federal constitution prohibits the States from similarly denying, as an abuse of the writ, claims of actual innocence of the death penalty first asserted in a second, successive or, to use the language of the Texas statute, “subsequent” state habeas petition.

As discussed above, the Supreme Court’s pre-AEDPA decision in *Sawyer v. Whitley* established that federal courts could employ the miscarriage of justice exception even if claims were first raised in successive federal habeas petitions.⁹³ However, in *McQuiggin v. Perkins*, the Supreme Court explained that in enacting AEDPA, Congress “constrained the application of the

to find he is mentally retarded. However, because we find that the applicant in this case has failed to satisfy this heightened-threshold burden, we deny him leave to proceed.”).

⁹¹ *Id.* at 154.

⁹² See 28 U.S.C. § 2244(b)(2)(B); see also *McQuiggin v. Perkins*, 569 U.S. 383, 395-96 (2013).

⁹³ See 505 U.S. 333, 335-36, 339 (1992).

No. 15-70008

[miscarriage-of-justice] exception” by the inclusion of § 2244(b)(2)(B).⁹⁴ That section of AEDPA “limits the exception to cases in which ‘the factual predicate for the claim could not have been discovered previously through the exercise of due diligence,’ and the petitioner can establish that no reasonable factfinder ‘would have found [her] guilty of the underlying offense’ by ‘clear and convincing evidence.’”⁹⁵ The Supreme Court reasoned that “Congress thus required second-or-successive habeas petitioners attempting to benefit from the miscarriage of justice exception to meet a higher level of proof (‘clear and convincing evidence’) and to satisfy a diligence requirement that did not exist prior to AEDPA’s passage.”⁹⁶

Texas law is less demanding than federal law in this regard. A defendant asserting an *Atkins* claim post-*Atkins* is not required to satisfy a diligence requirement but only to establish “by clear and convincing evidence” that “no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury.”⁹⁷ The application of this Texas-law standard to *Atkins* claims by persons convicted post-*Atkins* is not “contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States.”⁹⁸

The Supreme Court’s holdings regarding *Ford*⁹⁹ incompetence-to-be-executed claims cannot be imported, wholesale, into the law governing *Atkins* claims. First and foremost, a *Ford* incompetency-to-be-executed claim is not necessarily “successive” even if raised in a second or subsequent habeas

⁹⁴ 569 U.S. at 395.

⁹⁵ *Id.* at 396.

⁹⁶ *Id.*

⁹⁷ TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West Supp. 2018).

⁹⁸ 28 U.S.C. § 2254(d)(1).

⁹⁹ *Ford v. Wainwright*, 477 U.S. 399 (1986).

No. 15-70008

application.¹⁰⁰ A *Ford* claim can be raised in multiple proceedings and not be “successive.”¹⁰¹ That is because mental incompetence to be executed is not categorically a permanent condition.¹⁰² Incompetence may occur at various points after conviction, and it may recede and later reoccur. A finding that an inmate is incompetent to be executed does not foreclose the possibility that she may become competent in the future and would no longer be constitutionally ineligible for the death penalty.¹⁰³ By contrast, intellectual disability is by definition a permanent condition that must have manifested before the age of

¹⁰⁰ See *Panetti v. Quarterman*, 551 U.S. 930, 947 (2007) (noting that in *Ford* the Court “remand[ed] the case to the District Court to resolve Ford’s incompetency claim, even though Ford had brought that claim in a second federal habeas petition”); *id.* (“The statutory bar on ‘second or successive’ applications does not apply to a *Ford* claim brought in an application filed when the claim is first ripe. Petitioner’s habeas application was properly filed, and the District Court had jurisdiction to adjudicate his claim.”); *id.* (citing *Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994) for our court’s observation that “our research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner’s competency-to-be-executed claim on grounds of abuse of the writ”).

¹⁰¹ See *id.*; see also *Green v. Thaler*, 699 F.3d 404, 421 (5th Cir. 2012) (OWEN, J., concurring) (“[A] defendant subject to a sentence of death could initiate more than one competency proceeding in a state court over time, and habeas petitions separately challenging each state-court competency proceeding would not necessarily be considered successive under AEDPA. Each proceeding might depend on the facts that obtained at the time of the competency hearing, particularly when relatively long periods of time had passed between adjudications of competency.”).

¹⁰² See *Ford*, 477 U.S. at 429 (O’CONNOR, J., concurring in the result in part and dissenting in part) (“Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary.”); *id.* at 435 (REHNQUIST, J., dissenting) (“A claim of insanity may be made at any time before sentence and, once rejected, may be raised again; a prisoner found sane two days before execution might claim to have lost his sanity the next day, thus necessitating another judicial determination of his sanity and presumably another stay of his execution” (citing *Nobles v. Georgia*, 168 U.S. 398, 405-06 (1897))); *Nobles*, 168 U.S. at 405 (observing that “a finding that insanity did not exist at one time would not be the thing adjudged as to its nonexistence at another”).

¹⁰³ See *Green*, 699 F.3d at 421 (OWEN, J., concurring) (reasoning that “a determination that a defendant was incompetent to be executed would not vacate the sentence of death. The sentence would remain, but, as a constitutional matter, it could not be enforced unless and until the defendant became competent to be executed”).

No. 15-70008

18. A person who is found to be intellectually disabled is permanently ineligible to be executed, and the sentence of death is vacated.

Busby's *Atkins* claim was presented in a successive state application.¹⁰⁴ A defendant convicted by a federal court who presents an *Atkins* claim in a successive federal application would not be entitled under federal law to de novo review of that claim in federal court, or to review under a preponderance-of-the-evidence standard.¹⁰⁵ Busby does not contend that the gateway clear-and-convincing-evidence standard in Texas Code of Criminal Procedure article 11.071, section 5(a)(3) is unconstitutional. The clear-and-convincing-evidence component of that standard is congruent with federal law, as set forth in 28 U.S.C. § 2244(b)(2)(B)(ii) and in *McQuiggin v. Perkins*,¹⁰⁶ when an actual innocence-of-the-death-penalty claim is first asserted in a successive habeas application. Accordingly, Texas's application of the clear-and-convincing standard was not an unreasonable application of clearly established federal law.

In his petition for rehearing, Busby asserts that the standard of review was not briefed, suggesting that our court should not or could not consider the proper standard of review absent briefing. Busby cannot avoid application of the correct standard of review by failing to mention or brief it. By the same token, even if an opposing party, in this case a state, does not address the proper standard of review in its briefing, or failed to file a brief at all, it is incumbent on courts to apply AEDPA.¹⁰⁷ We cannot grant habeas relief unless

¹⁰⁴ *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished).

¹⁰⁵ See 28 U.S.C. § 2244(b)(2)(B)(ii).

¹⁰⁶ 569 U.S. 383, 396 (2013).

¹⁰⁷ See, e.g., *Winfield v. Dorethy*, 871 F.3d 555, 560-63 (7th Cir. 2017) (citing *Worth v. Tyer*, 276 F.3d 249, 262 n.4 (7th Cir. 2001)) (explaining "the general principle that waiver does not apply to arguments regarding the applicable standard of review"); *Gardner v.*

No. 15-70008

AEDPA's requirements have been met.¹⁰⁸ We are obliged to discern how AEDPA applies when an *Atkins* claim is first presented to a state court in a successive state habeas proceeding.

In his petition for rehearing, Busby also argues that we misconstrued his federal application as successive in our initial (now-withdrawn) opinion.¹⁰⁹ Busby misreads that opinion. It is clear that all references to Busby's "successive petition" were to his second Texas state court habeas application, which is subsequent or successive under state law. We did not refer to or treat his federal habeas petition as "successive."

D

Only Supreme Court holdings qualify as clearly established federal law under AEDPA.¹¹⁰ "[C]learly established Federal law' . . . is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."¹¹¹ The TCCA issued its decision denying relief on Busby's *Atkins* claim on March 6, 2013.¹¹² The Supreme Court has recently indicated that two of its decisions, *Moore v. Texas*,¹¹³ decided in 2017, and *Hall*

Galetka, 568 F.3d 862, 879 (10th Cir. 2009) ("[T]he correct standard of review under AEDPA is not waivable. It is, unlike exhaustion, an unavoidable legal question we must ask, and answer, in every case."); *Worth*, 276 F.3d at 262 n.4. (explaining in the context of a Title VII challenge that "the court, not the parties, must determine the standard of review, and therefore, it cannot be waived").

¹⁰⁸ 28 U.S.C. § 2254(b).

¹⁰⁹ See *Busby v. Davis*, 892 F.3d 735, 746-47 (5th Cir. 2018).

¹¹⁰ See *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004).

¹¹¹ *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); see also *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011)) (stating that federal courts "measure state-court decisions 'against [Supreme Court] precedents as of 'the time the state court renders its decision.'").

¹¹² *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished).

¹¹³ 137 S. Ct. 1039 (2017).

No. 15-70008

v. Florida,¹¹⁴ decided in 2014, did not become clearly established federal law regarding certain aspects of an *Atkins* claim until the respective dates of their issuance.¹¹⁵ To the extent that *Moore* and *Hall* expanded *Atkins*, they were not clearly established federal law when the TCCA denied relief on Busby's *Atkins* claims.

The TCCA's decision was a succinct denial of relief.¹¹⁶ It did not identify the law that it applied. The Supreme Court has held that "[s]ection 2254(d) applies even where there has been a summary denial" of habeas relief.¹¹⁷ Busby "can satisfy the 'unreasonable application' prong of § 2254(d)(1) only by showing that 'there was no reasonable basis' for the [TCCA's] decision."¹¹⁸ Because application of the currently prevailing law regarding intellectual disability to the facts of this case would not require the grant of habeas relief, we will not parse the precise contours of clearly established federal law as of March 6, 2013. For the same reason, the argument in Busby's petition for rehearing that *Moore* invalidated the *Briseño* factors, and that the TCCA must have applied those factors, is unavailing.

For purposes of our review, we use the definition that the Supreme Court said in *Moore* is the "generally accepted, uncontroversial intellectual-disability diagnostic definition" that the Texas state trial court in *Moore* had applied:

(1) intellectual-functioning deficits (indicated by an IQ score "approximately two standard deviations below the mean"—*i.e.*, a score of roughly 70—adjusted for "the standard error of measurement," AAIDD–11, at 27); (2) adaptive deficits ("the inability to learn basic skills and adjust behavior to changing

¹¹⁴ 572 U.S. 701 (2014).

¹¹⁵ *Shoop v. Hill*, 139 S. Ct. 504, 507-508 (2019).

¹¹⁶ *Ex parte Busby*, 2013 WL 831550, at *1.

¹¹⁷ *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011)).

¹¹⁸ *Id.* at 188.

No. 15-70008

circumstances,” *Hall v. Florida*, 572 U.S. ___, ___, 134 S.Ct. 1986, 1994, 188 L.Ed.2d 1007 (2014)); and (3) the onset of these deficits while still a minor. See App. to Pet. for Cert. 150a (citing AAIDD–11, at 1). See also *Hall*, 572 U.S., at ___, 134 S.Ct., at 1993–1994.¹¹⁹

We will also hew to the Supreme Court’s decisions regarding *Atkins* claims that post-date the TCCA’s 2013 denial of Busby’s *Atkins* claim.¹²⁰

E

A federal court cannot grant habeas relief under 28 U.S.C. § 2254(d)(2) “unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”¹²¹ In denying Busby’s *Atkins* claim, the TCCA necessarily held that he failed to present “evidence that, if true, would be sufficient to show by clear and convincing evidence that no rational factfinder would fail to find him mentally retarded.”¹²² The standard of review that the TCCA applied is not contrary to federal law, for the reasons discussed above. Accordingly, we assess whether the TCCA unreasonably determined that the facts set forth in Busby’s petition, if true, would not establish by clear and convincing evidence that no rational factfinder would fail to find Busby intellectually disabled. Alternatively, we also assess whether, applying a preponderance-of-the-evidence burden of proof, the TCCA’s decision was based on an unreasonable determination of the facts. We conclude that applying either burden of proof, § 2254(d)(2)’s requirement has not been met, and habeas relief is not warranted.

¹¹⁹ *Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017).

¹²⁰ See, e.g., *id.*; *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

¹²¹ 28 U.S.C. § 2254(d)(2).

¹²² *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).

No. 15-70008

We begin with Busby's IQ scores. Busby was administered five separate IQ tests between 2001 and 2010.¹²³ He scored 96 on an unknown IQ test in 2001,¹²⁴ and the State offered to "forget about" that test, acknowledging that it was unreliable.¹²⁵ Because it does not impact our analysis, we do not consider that test. Prior to his criminal trial, three more IQ tests were administered to Busby. He received a full scale IQ of 77 on the WAIS-III, administered in 2005 by his expert witness at trial, Dr. Proctor.¹²⁶ The standard error of measurement (SEM)¹²⁷ for the WAIS-III is approximately "plus or minus five," according to Dr. Proctor's trial testimony.¹²⁸ Busby's IQ was therefore in a range of 72-82, as measured by the WAIS-III. Busby asserted in his second state habeas petition that due to the "Flynn Effect," the score of 77 should be adjusted to 73.7. Weeks after Dr. Proctor's assessment, the State's psychologist re-administered the WAIS-III, and Busby scored 79.¹²⁹ The IQ range would be 74-84, based on that test and its SEM.

Dr. Proctor administered a third IQ test on the eve of trial—the Beta-III—on which Busby scored 81.¹³⁰ Proctor testified that this score "correlates fairly well" with Busby's WAIS-III score.¹³¹ The SEM for the Beta-III is not in the record. Busby argued to the TCCA that "[a] mental retardation expert would opine, however, that the Beta IQ test, because of its less comprehensive nature, is widely acknowledged to inflate IQ scores generally,

¹²³ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *20 (N.D. Tex. Mar. 10, 2015).

¹²⁴ *Id.*

¹²⁵ *Id.*; 36 RR 64.

¹²⁶ *Busby*, 2015 WL 1037460, at *20; 36 RR 40, 53.

¹²⁷ *See generally Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

¹²⁸ 36 RR 57.

¹²⁹ *Busby*, 2015 WL 1037460, at *20.

¹³⁰ *Id.*

¹³¹ 36 RR 48.

No. 15-70008

to be subject to a higher Flynn Effect rate than the Wechsler scales, and to be less reliable overall than the Wechsler Scales.”¹³² However, no expert did so opine in the state-court proceedings, and there was no evidence provided to the TCCA as to what the IQ range would be if the SEM were considered or if the Flynn Effect were accepted and applied. All that the TCCA had before it regarding the Beta-III test was the fact that Busby had scored 81 and the arguments of counsel attempting to discredit or explain that score. Even assuming that the SEM for the Beta-III test is similar to that for the WAIS-III, the IQ range would be 76-86. Such a range would be above the range of 75 or below that the Supreme Court has applied in its recent opinions regarding IQ scores in the context of an *Atkins* claim.¹³³ The Supreme Court said in *Brumfield* that evidence of an IQ score whose range, adjusted by the SEM, was above 75 “could render the state court’s determination reasonable.”¹³⁴

Busby provided arguments in his federal habeas petition regarding the Beta-III test and his score of 81 that were not presented to the TCCA. He asserted in federal court that the Beta-III had been “normed” seven years before it was administered to Busby, and that if adjusted for the Flynn Effect, the score would be 78.7.¹³⁵ He did not point to any expert testimony or other evidence in the record that supports these arguments. Nor is there evidence as to the SEM of this test or the range of the score when the SEM is considered. Again, there was only argument of counsel. Busby was provided the

¹³² ROA.3525.

¹³³ *See Hall v. Florida*, 134 S. Ct. 1986, 1996 (2014) (“For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual’s IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing.”).

¹³⁴ *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015).

¹³⁵ ROA.2478.

No. 15-70008

opportunity to present whatever expert testimony he deemed necessary in the federal district court proceedings, and he did not present any additional evidence regarding this test. The only evidence that the TCCA and federal district court had was that Busby's full score IQ as measured by the Beta-III test was 81.

In 2010, immediately prior to filing his federal habeas petition, Busby was administered the WAIS-IV and scored a 74.¹³⁶ The report of the clinician who administered this test reflects that, adjusted based on a 95% confidence interval for the WAIS-IV, Busby's full scale IQ range is 70-79, which the report characterizes as "Borderline."¹³⁷

Before the trial at which Busby was convicted, Proctor also administered the Wide Range Achievement Test, Third Edition, which measured Busby's educational abilities in reading, spelling and math.¹³⁸ Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.¹³⁹

Busby argues that because the federal district court's analysis of the merits of the *Atkins* claim was based only on IQ scores, it follows that the district court also concluded that "the [T]CCA's analysis must have stopped at that point as well." First, it appears that the federal district court did consider Busby's achievement test scores, which were not IQ test scores. But in any event, we cannot assume that the TCCA considered only Busby's IQ scores and ignored other evidence in Busby's state habeas application. Nor can we assume that the TCCA ignored the *lack* of evidence in Busby's state habeas application. Not a single clinician opined that Busby is intellectually disabled, though there

¹³⁶ ROA.4092-96.

¹³⁷ ROA.4092.

¹³⁸ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *10 (N.D. Tex. Mar. 10, 2015).

¹³⁹ *Id.*

No. 15-70008

were three reports from mental health experts appended to Busby's second state habeas application. Based on the record presented to the TCCA, no clinician examined Busby's IQ scores, evidence of whether Busby has "adaptive deficits (the inability to learn basic skills and adjust behavior to changing circumstances)", or whether there was an onset of adaptive deficits while Busby was a minor, and then reached the conclusion that Busby is intellectually disabled.

Busby retained Gilda Kessner, a Doctor of Psychology, and she submitted a report dated March 21, 2008.¹⁴⁰ Though Busby did not claim in his first state habeas petition that he was intellectually disabled, he filed this report as part of the evidence in his first state habeas proceeding. The same report was an exhibit to his second state habeas application. Kessner's report reflects that she reviewed an array of Busby's records and the testimony of Dr. Proctor, who was an expert witness for Busby in his murder trial. Kessner's report concludes that the WAIS-III that Proctor administered to Busby was the current test at the time.¹⁴¹ Her report reflects that Proctor testified at trial that Busby scored 77 on that test, and that Proctor testified that Busby was not mentally retarded because "the DSM-IV diagnosis of mental retardation would be a score below 70."¹⁴² However, Kessner opined that Proctor had not accounted for a phenomenon known as the Flynn Effect, which posits that there is a rise or gain in IQ scores over time and that "[r]esearch literature has suggested that this figure is .3 per year beginning the year after the test is normed."¹⁴³ Importantly, Kessner concluded that the 77 score on the WAIS-III "does not rule out a diagnosis of mental retardation," and that "a thorough

¹⁴⁰ ROA.4103-08.

¹⁴¹ ROA.4106.

¹⁴² ROA.4106.

¹⁴³ ROA.4106.

No. 15-70008

investigation into Mr. Busby's adaptive behavior history is necessary to make a proper determination.”¹⁴⁴ The report continued, “[a]t this time, I do not believe that has been accomplished.”¹⁴⁵ Her report said, “I am concerned that that the apparent perfunctory reliance on the obtained score truncated the investigation into the possibility of the presence of mental retardation in Mr. Busby.”¹⁴⁶ Kessner's report had explained that “the next version of the Wechsler series (WAIS-IV) will be available to clinicians in the fall of 2008.”¹⁴⁷ Her report concluded with this recommendation: “I would recommend a new evaluation with the WAIS-IV when it is available this fall so that the issue of the Flynn Effect and questions about the validity of the score can be avoided.”¹⁴⁸ Kessner's report addresses only one of the three broad criteria for diagnosing intellectual disability. As to that criteria, the most she said was that the WAIS-III score of 77 did not “rule out” intellectual disability.

After Busby filed his federal habeas petition, he retained two other experts regarding his mental capacities, and their reports were also appended to Busby's second state habeas petition. The report of Gilbert Martinez reflects that he is a Ph.D., licensed psychologist, and clinical neuropsychologist, and that Busby “underwent standardized assessment of his intellectual functioning on February 11, 2010.”¹⁴⁹ The report is relatively brief and offers no opinion as to whether Busby is intellectually disabled. It reflects in a chart that Martinez administered the WAIS-IV, that Busby's full scale IQ score was 74, and that within a 95% confidence interval, his IQ score was 70-79.¹⁵⁰ Under

¹⁴⁴ ROA.4107.

¹⁴⁵ ROA.4107.

¹⁴⁶ ROA.4107.

¹⁴⁷ ROA.4106.

¹⁴⁸ ROA.4107.

¹⁴⁹ ROA.4091.

¹⁵⁰ ROA.4092.

No. 15-70008

a column in this chart labelled “Qualitative Description,” the word “Borderline” appears with regard to Busby’s full scale IQ score.¹⁵¹ The report also reflects that Martinez administered a Test of Memory Malinger, and “[t]here was no evidence of misrepresentation of cognitive or intellectual functioning.”¹⁵²

Federal habeas counsel also retained Bekh Bradley-Davino, Ph.D., who is a licensed clinical psychologist.¹⁵³ Bradley-Davino spent ten hours evaluating Busby in person and reviewed a substantial amount of written material and records.¹⁵⁴ Bradley-Davino prepared a 20-page report, most of which does not pertain to whether Busby is intellectually disabled. But in a section titled “Limited Intellectual Abilities and Academic Problems Became Apparent in Mr. Busby’s Childhood and Continued into Adulthood,” the report states that “[a] number of sources of data including school records, behavioral descriptions provided by Mr. Busby as well as his family, teachers, and peers, and results of standardized tests, indicate that at a young age Mr. Busby demonstrated significant signs of impaired/limited academic and intellectual/mental abilities.”¹⁵⁵ The report also recounts the results of the WAIS-IV IQ test administered by Martinez and its full scale IQ score of 74, and concludes that “[t]his score reflects significant limitations in intellectual functioning, approximately two standard deviations below the mean.”¹⁵⁶ The report reflects that Busby was placed in special education by at least the seventh grade, that he had “significant problems in academic functioning beginning early,” and that he could not understand some of the more complex

¹⁵¹ ROA.4092.

¹⁵² ROA.4091.

¹⁵³ ROA.1283.

¹⁵⁴ ROA.1283-84.

¹⁵⁵ ROA.1289.

¹⁵⁶ ROA.1289.

No. 15-70008

plays during high school football practice.¹⁵⁷ But there is no conclusion drawn from all of the facts in Bradley-Davino’s report that Busby is intellectually disabled. Instead, the report closes with this recommendation: “I additionally strongly recommend further evaluation of Mr. Busby by an expert in mental retardation in light of his clear history of extensive intellectual and adaptive functioning limitations.”¹⁵⁸ From this, a reasonable person could certainly conclude that Busby should be further evaluated. But this is not a conclusion that Busby is intellectually disabled. To the contrary, it underscores this expert’s opinion that further evaluation would be necessary to determine whether Busby is intellectually disabled. A reasonable juror or factfinder could fail to conclude from this evidence, even “in light of [Busby’s] clear history of extensive intellectual and adaptive functioning limitations,” that Busby was intellectually disabled.

If Busby was in fact evaluated by an expert in intellectual disability, as Kessner and Bradley-Davino recommended, Busby has not disclosed the results of such an evaluation. The district court noted that the entire report prepared by Martinez was not included as part of Busby’s evidence. We do not know, therefore, what conclusions, if any, Martinez may have drawn in that report as to whether Busby is intellectually disabled.

We cannot say that the TCCA’s denial of the *Atkins* claim in Busby’s successive habeas application “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding”¹⁵⁹ or an unreasonable application of clearly established federal law to those facts.

¹⁵⁷ ROA.1289-90.

¹⁵⁸ ROA.1302.

¹⁵⁹ 28 U.S.C. § 2254(d)(2).

No. 15-70008

F

In our initial opinion in this case (now withdrawn), we construed Busby's invocation of the federal actual-innocence doctrine as the assertion of an independent ground for relief.¹⁶⁰ In his petition for rehearing, Busby insists that he raised this claim in the alternative, as an exception to procedural default should we have found his *Atkins* claim procedurally defaulted. We accordingly express no opinion as to the viability of a federal actual-innocence claim as an independent ground for relief.

III

Busby asserts that he received ineffective assistance of counsel in his direct appeal. During the guilt phase of Busby's trial, the state trial court refused to admit a written statement from a technician who had administered a lie detector test to Kathleen "Kitty" Latimer, who was Busby's accomplice in the kidnapping and murder of Laura Crane. The technician had told Latimer that her responses regarding the details of the crime indicated evasion, and the technician's written statement reflects that Latimer then stated that she had not been truthful and that she told Busby to tie up Crane or to tape her down to keep her from making noise while in the trunk. Busby's direct appeal counsel, who also served as his trial counsel, did not raise the exclusion of this testimony as an issue in the direct appeal. Busby was appointed different counsel to pursue his initial state habeas application, and that attorney did not assert a claim that direct appeal counsel was ineffective in failing to raise the exclusion of Latimer's statements as an issue on direct appeal. Busby concedes that the claim is procedurally defaulted since it was not raised in his initial state habeas application.

¹⁶⁰ *Busby v. Davis*, 892 F.3d 735, 754-55 (5th Cir. 2018).

No. 15-70008

Busby contends that he has established cause for the default by demonstrating that his state habeas counsel was deficient in failing to raise the claim, relying upon the Supreme Court's decisions in *Martinez v. Ryan*¹⁶¹ and *Trevino v. Thaler*.¹⁶² However, in *Davila v. Davis*,¹⁶³ which issued while this case was pending in our court, the Supreme Court held that ineffective assistance of state habeas counsel is not sufficient cause to excuse the procedural default of a claim for ineffective assistance of direct appeal counsel.¹⁶⁴ "Because a prisoner does not have a constitutional right to counsel in state postconviction proceedings, ineffective assistance in those proceedings does not qualify as cause to excuse a procedural default."¹⁶⁵

Busby contends that his claim of ineffective assistance of appellate counsel will never be considered unless an exception is made. The *Davila* decision expressly rejected the same argument,¹⁶⁶ reasoning that "the Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel."¹⁶⁷ The Court explained that "[t]he criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not,"¹⁶⁸ and the Court "declin[ed] to expand the *Martinez* exception to the distinct context of ineffective assistance of appellate counsel."¹⁶⁹

¹⁶¹ 566 U.S. 1 (2012).

¹⁶² 569 U.S. 413 (2013).

¹⁶³ 137 S. Ct. 2058 (2017).

¹⁶⁴ *Id.* at 2065.

¹⁶⁵ *Id.* at 2062.

¹⁶⁶ *Id.* at 2066 (citing *Coleman v. Thompson*, 501 U.S. 722 (1991)) ("Petitioner's primary argument is that his claim of ineffective assistance of appellate counsel might never be reviewed by any court, state or federal, without expanding the exception to the rule in *Coleman*.").

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 2067.

No. 15-70008

We note that while Busby asserted in his second state habeas petition that trial counsel was ineffective for failing to offer additional grounds as to why the hearsay statements were admissible, Busby has abandoned that claim in this court. He has not included it in the issues he has raised, and he has not argued or briefed such a claim. He now argues that “[t]rial counsel preserved error for direct appeal” and that trial counsel’s “argument that Latimer’s statements were admissible hearsay is undoubtedly a ‘solid, meritorious argument’ that was supported by ‘controlling precedent’ and should have been raised.”

We further note that although Busby was represented by Strickland both at trial and on direct appeal, Busby does not contend that there was a conflict of interest because of this representation or that Strickland’s failure to contend on appeal that it was error to exclude Latimer’s statements was related to any conflict of interest arising out of the fact that Strickland also represented Busby at trial. Strickland would not have been in a position of arguing on direct appeal that he was ineffective in the trial court because he failed to assert additional grounds for admitting the hearsay evidence, since Busby now asserts that the trial court erred when it excluded the evidence in spite of Strickland’s “solid, meritorious” arguments in the trial court.

There is an additional reason that relief should be denied on this claim. There appears to have been an adequate, independent state-law procedural rule that supported the TCCA’s denial of this claim. Busby’s second habeas application in the TCCA did not adequately brief or argue the ineffective-assistance-of-direct-appeal-counsel claim. That claim is mentioned only in footnotes 27 and 28 of that application. Footnote 27 says “[d]irect appeal

No. 15-70008

counsel's failure to raise the denial of admittance of [Latimer's statements] under Texas evidentiary law is a separate claim for relief.”¹⁷⁰ Footnote 28 says:

Latimer's statement was also admissible under Texas law as a statement against interest. Counsel did seek admission on that basis, but the trial court erroneously sustained the State's objection. Although trial counsel preserved the error that the admission was not a statement against interest, counsel inexplicably did not raise the error as a ground of appeal. Counsel's failure to raise this error on direct appeal is the basis of a claim that Mr. Busby was deprived of the effective assistance of counsel on appeal.¹⁷¹

This issue was not otherwise designated as a claim for relief or otherwise briefed or supported by any argument. Under Texas law, it was forfeited.¹⁷²

Even were we not barred from reaching the merits of the defaulted or procedurally barred claim, it would fail because Busby cannot establish the prejudice prong of review for ineffective-assistance-of-counsel claims. The *Strickland* analysis requires the petitioner to show “that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”¹⁷³ Busby must show that “but for his counsel's” failure to raise the issue on appeal, “he would have prevailed on his appeal.”¹⁷⁴ The polygraph technician's written statement said:

Following the examination, Ms. Latimer was advised of the deceptive nature of her responses to the above noted relevant questions. She was asked for an explanation at which time she maintained that she did lie to me about encouraging or instructing Mr. Busby to tape up Ms. Crane. She stated that at one of the first stops where they got gas she could continue to hear Ms. Crane

¹⁷⁰ ROA.3496.

¹⁷¹ ROA.3497.

¹⁷² See *Ex parte Garcia*, No. WR-40,214-02, 2008 WL 4573962, at *1 (Tex. Crim. App. 2008) (per curiam) (unpublished) (citing *Alvarado v. State*, 912 S.W.2d 199, 210 (Tex. Crim. App. 1995)); *Ex parte Schoolcraft*, 107 S.W.3d 674, 677 (Tex. App.—San Antonio 2003).

¹⁷³ *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¹⁷⁴ *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

No. 15-70008

banging in the trunk and she stated she realized the music was not going to stop the noise from being heard. She stated she told [Busby] “You are going to have to tie her up or tape her down because she is making too much noise.” She stated at the next truck stop where they stopped, she told him again “we need to do something.” She stated she told him “I said you need to tie her up or do something because she is making too much noise.” During the final portion of the post-test interview, she continued to deny that she actually saw Ms. Crane taped up in the trunk and denied Mr. Busby’s allegations that she helped or participated in tying up Ms. Crane in any way.¹⁷⁵

The federal district court recognized “it is not a defense to murder that someone told the defendant to do it,” and that “Latimer’s statement is not inconsistent with Busby’s guilt; it inculcates both of them.”¹⁷⁶ More importantly, as the federal district court explained, “[t]here is no question that Busby was the individual who taped the victim and ultimately caused her death. His fingerprint was lifted from the duct tape.”¹⁷⁷ “Busby admits he taped the victim while he was alone with her at Walmart and Latimer was at the LaQuinta hotel.”¹⁷⁸

Had Busby’s appellate counsel pursued on appeal the claim that the trial court erred in excluding Latimer’s statements, the TCCA would have applied Texas Rule of Appellate Procedure 44.2(b), and it would have examined the record as a whole.¹⁷⁹ If the court was fairly assured that the error did not influence the jury or had but a slight effect, it would conclude that the error

¹⁷⁵ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *11 (N.D. Tex. Mar. 10, 2015).

¹⁷⁶ *Id.* at *13.

¹⁷⁷ *Id.* at *14 n.10.

¹⁷⁸ *Id.*

¹⁷⁹ *See Ray v. State*, 178 S.W.3d 833, 836 (Tex. Crim. App. 2005) (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)).

No. 15-70008

was harmless.¹⁸⁰ There is no reasonable probability that the TCCA would have reversed and granted Busby a new trial because it is highly likely that the TCCA would have concluded that any error in excluding Latimer's statements was harmless. Latimer's statements would have had only a slight effect, if any, on the jury's finding of guilt and the jury's findings at the penalty phase. The evidence is clear that Busby wrapped 23 feet of tape around his victim's head and used such force that her nose was dislocated. He did this when alone, while Latimer was at a motel.

IV

Busby contends that his trial counsel, Strickland, was ineffective in failing "to uncover a wealth of readily available mitigating evidence that was necessary to both developing an accurate mental health diagnosis and presenting a persuasive mitigation case to the jury." The district court pretermitted the question of whether trial counsel was ineffective and proceeded directly to an analysis of whether, assuming trial counsel was ineffective, Busby was prejudiced.¹⁸¹ The district court carefully considered all of the evidence presented at trial, both mitigating and aggravating evidence. It then considered evidence that Busby says should have been presented, and concluded that Busby had failed to satisfy the prejudice prong of the ineffective-assistance-of trial-counsel claim.¹⁸²

To establish ineffective assistance of trial counsel under *Strickland*, a petitioner must show that "counsel's representation fell below an objective

¹⁸⁰ *Id.* ("When evaluating harm from non-constitutional error flowing from the exclusion of relevant evidence, we examine the record as a whole, and if we are fairly assured that the error did not influence the jury or had but a slight effect, we conclude that the error was harmless.").

¹⁸¹ *Busby*, 2015 WL 1037460, at *12.

¹⁸² *Id.* at *16.

No. 15-70008

standard of reasonableness”¹⁸³ and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”¹⁸⁴ When a *Strickland* claim is based on an allegedly deficient sentencing investigation, the petitioner may establish prejudice by showing that “the totality of the available mitigation evidence . . . reweigh[ed] . . . against the evidence in aggravation”¹⁸⁵ creates “a reasonable probability that at least one juror would have struck a different balance” and recommended a life sentence instead of death.¹⁸⁶ We agree with the district court that this latter standard has not been met.

With regard to the available mitigation evidence and the evidence in aggravation, we will not set forth that evidence in minute detail, because the district court has done so thoroughly and accurately.¹⁸⁷ We agree with the conclusions that the district court reached regarding the weight of the aggravating evidence as measured against the “new” mitigating evidence.¹⁸⁸

We will only briefly, and generally, recount the evidence. At Busby’s trial, custodians of his school records testified that he had a mixed academic record,¹⁸⁹ was required to repeat two grades,¹⁹⁰ was frequently absent from school, and ultimately dropped out of school.¹⁹¹ They also noted that he was enrolled in special education classes for students with IQ’s lower than average,

¹⁸³ *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¹⁸⁴ *Id.* at 694.

¹⁸⁵ *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (per curiam) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)).

¹⁸⁶ *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

¹⁸⁷ *See Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *4-12 (N.D. Tex. Mar. 10, 2015).

¹⁸⁸ *Id.* at *13.

¹⁸⁹ 35 RR 17-24.

¹⁹⁰ 35 RR 16, 24.

¹⁹¹ 35 RR 16.

No. 15-70008

but above 70.¹⁹² His special education teacher spoke to Busby's lack of support at home, his life as a "follower" in a segregated neighborhood,¹⁹³ and her observation that he was a difficult student.¹⁹⁴ The fact that Busby attempted to commit suicide on four occasions and was hospitalized on each occasion was presented to the jury.¹⁹⁵ Busby's expert witness advised the jury that he had found "documented evidence of long-standing chronic alcohol abuse" and "longstanding and chronic" abuse of "essentially illegal drugs," meaning "[s]treet drugs."¹⁹⁶

The state introduced aggravation evidence at trial showing that Busby had an extensive criminal history and a violent nature.¹⁹⁷ Busby previously pled guilty to a robbery in which he attacked the victim with a box cutter, causing the victim to be covered in blood from his waste up, then stole the victim's truck and other personal property¹⁹⁸ Busby pleaded guilty to stealing donations from the Salvation Army.¹⁹⁹ During his time in prison for these offenses, Busby was a violent and aggressive inmate.²⁰⁰ A Kmart employee testified that Busby once attempted to steal batteries and when he was confronted, he threatened the employee and his family.²⁰¹ The State also showed that Busby committed acts of violence while acting as a "pimp" for Latimer and others, that he was a long-standing gang member,²⁰² that he had violently assaulted and injured Latimer, and that he had been arrested

¹⁹² 35 RR 27.

¹⁹³ 35 RR 36-38.

¹⁹⁴ 35 RR 47.

¹⁹⁵ *See, e.g.*, 36 RR 58.

¹⁹⁶ 36 RR 57.

¹⁹⁷ *See generally* 33-34 RR.

¹⁹⁸ 33 RR 13-19, 192.

¹⁹⁹ 33 RR 72-80.

²⁰⁰ 33 RR 86-89, 142-150, 154-58, 164-68, 174-78.

²⁰¹ 34 RR 35-38.

²⁰² 34 RR 5-143.

No. 15-70008

multiple times on drug and weapons charges.²⁰³ The jury found that Busby posed a future risk of dangerousness to society and that no mitigating factors warranted a life sentence.²⁰⁴

Busby alleges that his new mitigation evidence generally tends to show that (1) Busby was abandoned by his mother the first two years of his life and instead lived with his grandmother; (2) Busby and his sisters were abused by their mother and father and grew up in a violent household; (3) Busby's hometown was segregated and racially-biased; (4) Busby grew up in extreme poverty; (5) Busby was "slow" and suffered from intellectual disability and mental illness; (6) Busby was easily manipulated by women; and (7) Busby was addicted to crack, marijuana, and alcohol.²⁰⁵

Busby asserted that his mother did not obtain prenatal healthcare when pregnant with him.²⁰⁶ According to Busby's sisters, Busby's mother was physically violent with her children. She would "whoop" them with a "belt, switch, shoe or extension cord." His mother also physically attacked Busby's father and another male with whom she lived after Busby's father left. Her children often witnessed the altercations. In one incident, Busby's mother attempted to run over the man with whom she lived while Busby was in the vehicle with her.²⁰⁷ Busby's mother also stabbed a man with whom she lived in his hands with a butcher knife when he was attempting to deflect her attacks.²⁰⁸ One sister claimed that Busby's mother did not love Busby and would tell him that he was "just like [his] sorry-ass daddy."²⁰⁹ They also

²⁰³ 34 RR 21-30, 48-60, 156-58.

²⁰⁴ *Busby v. State*, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008).

²⁰⁵ *See* ROA.2451-58.

²⁰⁶ ROA.2236.

²⁰⁷ ROA.2566-67, 2575-76.

²⁰⁸ ROA.2567.

²⁰⁹ ROA.2566.

No. 15-70008

described Busby's father as a "drunk" and stated that Busby's "dad would hit him with anything" when he was inebriated.²¹⁰ One sister said that they were poor, Busby and his siblings were "hungry sometimes," and the water was once "cut off for about a week."²¹¹ Both sisters described Busby as slow, irresponsible, and unhygienic.²¹²

Other declarations said that Busby exhibited low intelligence, his family's income was low, his mother neglected him, and noted the absence of a father figure.²¹³ They also commented upon Busby's "mood swings" and mental health issues, including his attempt to commit suicide in his teenage years.²¹⁴ Several noted that Busby was a follower when it came to women, especially Latimer, who was described as his girlfriend.²¹⁵

A declaration from a clinical psychologist opined that Busby experienced "repeated physical and emotional abuse and neglect," when he was a child and also "witnessed violent actions committed by his mother."²¹⁶ His declaration noted that while much of the "described emotional and behavioral problems are consistent" with post-traumatic stress disorder (PTSD), "it is impossible to determine if Mr. Busby would have met the criteria for [PTSD] in adolescence."²¹⁷ He did, however, diagnose Busby with bipolar disorder, anxiety disorder, and polysubstance dependence in remission.²¹⁸

²¹⁰ ROA.2567, 2574.

²¹¹ ROA.2576-77.

²¹² ROA.2568-70, 2578.

²¹³ ROA.2581-83, 2584-85, 2586, 2588-89, 2945-46, 2947-48, 2949, 2950-51.

²¹⁴ ROA.2582, 2585-86, 2946, 2947.

²¹⁵ ROA.2946-51.

²¹⁶ ROA.2953.

²¹⁷ ROA.2961.

²¹⁸ ROA.2963.

No. 15-70008

Some of Busby’s “new” evidence is not in fact new. It is cumulative of the evidence adduced at trial, as the federal district court found.²¹⁹ We concluded in *Parr v. Quarterman*²²⁰ that though mitigation evidence may not have been presented “as effectively as it might have been,” a petitioner could not show prejudice when the jury heard evidence regarding an unstable childhood and the “State’s case on punishment was strong.”²²¹ Similarly, Busby repeats much of the testimony elicited at trial regarding his childhood, intellectual acuity, and predispositions towards women and substance abuse. His sisters testified at trial, and while the additional, post-conviction statements from his sisters “undoubtedly provide[d] more details” of Busby’s childhood, we held in *Newbury v. Stephens*²²² that evidence “of the same genre as that presented to the jury at trial” could not outweigh the state’s “overwhelming” evidence of future dangerousness.²²³ Indeed, when “the evidence of [] future dangerousness was overwhelming . . . it is virtually impossible to establish prejudice.”²²⁴

Busby’s new mitigation evidence, considered with that adduced at trial, does not outweigh the State’s aggravation evidence such that “there is a reasonable probability that at least one juror” would have recommended a life

²¹⁹ *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *12 (N.D. Tex. Mar. 10, 2015).

²²⁰ 472 F.3d 245 (5th Cir. 2006).

²²¹ *Id.* at 258.

²²² 756 F.3d 850 (5th Cir. 2014) (per curiam).

²²³ *Id.* at 873-74.

²²⁴ *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

No. 15-70008

sentence.²²⁵ He was therefore not prejudiced by his trial counsel's allegedly deficient mitigation investigation, and his IATC claim fails.²²⁶

The district court did not directly address Busby's contention that trial counsel was ineffective in discovering and presenting evidence that Busby is intellectually disabled. However, trial counsel retained an expert to evaluate Busby. It was that expert's opinion that the two IQ tests that he administered to Busby reflected that he was not intellectually disabled. Trial counsel did not have the benefit of the Supreme Court's decisions, issued long after the trial, regarding IQ evidence.²²⁷ Busby has not offered any evidence that trial "counsel's representation fell below an objective standard of reasonableness" with regard to his investigation of Busby's intellectual functioning or presentation of evidence of Busby's intellectual functioning based on the standards of professionalism prevailing at the time.²²⁸ Additionally, even with the benefit of the assistance of three additional mental health experts during habeas proceedings, Busby has not been diagnosed as intellectually disabled. Accordingly, assuming, without deciding, that Busby raised and adequately briefed in our court and in the federal district court a claim that trial counsel was ineffective in failing to contend before or during the state trial court conviction proceedings that Busby is intellectually disabled, the claim fails for lack of evidence that trial counsel should have disregarded the retained expert's opinion that Busby was not intellectually disabled.

* * *

²²⁵ *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

²²⁶ *Strickland*, 466 U.S. at 697 ("[Courts] need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.").

²²⁷ *See, e.g., Moore v. Texas*, 137 S. Ct. 1039 (2017); *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

²²⁸ *Strickland*, 466 U.S. at 687-88.

No. 15-70008

For the foregoing reasons, we AFFIRM the judgment of the district court.

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-70008

United States Court of Appeals
Fifth Circuit

FILED

January 27, 2017

Lyle W. Cayce
Clerk

EDWARD LEE BUSBY,

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. 4:09-CV-160

Before PRADO, OWEN, and GRAVES, Circuit Judges.

PER CURIAM:*

Petitioner Edward Lee Busby requests a certificate of appealability (COA) authorizing him to appeal the district court’s denial of federal habeas relief on three separate claims: (1) that he is intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia*,¹ (2) that he received ineffective assistance of direct appeal counsel, and (3) that his trial counsel was

* 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.

¹ 536 U.S. 304 (2002).

No. 15-70008

ineffective by failing to conduct an adequate sentencing investigation or to present an adequate mitigation case during the penalty phase of trial. We grant Busby's request for a COA on all three claims.

I

Edward Busby was convicted of capital murder in Texas state court and sentenced to death for the kidnapping, robbery, and murder of an elderly woman.² The district court's opinion recounts the factual and procedural history of Busby's case.³ We briefly set forth the matters relevant to the present motion.

The Texas trial court appointed Jack Strickland to represent Busby at trial. Busby contends that Strickland waited approximately nineteen months to assemble a mitigation investigation team and hired a mitigation specialist days before voir dire. He further contends that Strickland hired Dr. Timothy Proctor, a psychologist and mental health expert, a week after voir dire commenced.

Busby's trial began in early November 2005. Relevant to this appeal, Strickland attempted to introduce statements made by Busby's co-defendant, Kathleen Latimer, purportedly to introduce doubt as to Busby's intent or culpability. The trial court excluded the statements as inadmissible hearsay. The jury found Busby guilty.

During the punishment phase, Strickland introduced testimony from five lay witnesses—Busby's two sisters, Busby's special education teacher, and two school administrators. An expert, Dr. Proctor, testified, and a video containing images of Texas maximum security prisons was shown to the jury.

² *Busby v. State*, 253 S.W.3d 661, 663-64 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1050 (2008).

³ *See generally Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460 (N.D. Tex. Mar. 10, 2015).

No. 15-70008

Dr. Proctor testified that Busby had a severe antisocial personality disorder, and that Busby posed a high risk of future dangerousness to society. The jury answered the issues submitted to them in a way that mandated the death penalty under Texas law, and Busby was sentenced to death.

Busby, still represented by Strickland, appealed. Strickland did not appeal the exclusion of Latimer's statements, and Busby's conviction and sentence were affirmed on direct appeal.

Represented by new counsel, David Richards, Busby sought state habeas relief. Richards initially asserted an ineffective-assistance-of-trial-counsel (IATC) claim regarding the adequacy of Strickland's mitigation investigation. Richards alleged that "disputed questions of material fact" existed as to the claim and sought (and received) funding to investigate. Richards later withdrew the IATC claim, stating that he was "convinced that adequate pretrial mitigation was conducted because no significant additional mitigating evidence would have been discovered." The state habeas trial court entered supplemental findings that Richards's withdrawal of the claim was "in keeping with the highest standards of ethical conduct." The Texas Court of Criminal Appeals (TCCA) adopted the findings and dismissed Busby's petition as to the remaining grounds.

Represented by new counsel, Busby then filed a federal habeas petition pursuant to 28 U.S.C. § 2254. This petition alleged seven claims, including the three relevant here. Determining that several of Busby's claims were unexhausted, the district court stayed proceedings to permit Busby to exhaust the claims in state court. The TCCA dismissed Busby's subsequent application as an abuse of the writ, and Busby returned to federal court.

No. 15-70008

During the abeyance period, the Supreme Court issued *Trevino v. Thaler*.⁴ The Supreme Court had previously held in *Martinez v. Ryan*:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.⁵

In *Trevino*, the Court held that the rationale of *Martinez* applied to Texas convictions when ineffective-assistance-of-counsel claims may first be effectively raised in state habeas review.⁶ After supplemental briefing and an evidentiary hearing pertaining to the import of *Martinez* and *Trevino*, the district court denied relief and further denied Busby's request for a COA. Busby now seeks a COA from this court.

II

The standards of review in a federal habeas proceeding are governed by the Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996. A COA should issue only when the petitioner makes "a substantial showing of the denial of a constitutional right."⁷ "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong."⁸ When a district court denies a habeas claim as procedurally defaulted, a prisoner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a

⁴ 133 S. Ct. 1911 (2013).

⁵ 132 S. Ct. 1309, 1320 (2012).

⁶ *Trevino*, 133 S. Ct. at 1919-21.

⁷ 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

⁸ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

No. 15-70008

constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.”⁹ In either case, “[a] prisoner seeking a COA must prove something more than the absence of frivolity,” though he need not prove that he will ultimately prevail on appeal.¹⁰ The Supreme Court has explained that a petitioner must “sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’”¹¹ In death penalty cases, “any doubt as to whether a COA should issue . . . must be resolved in favor of the petitioner.”¹²

III

Busby first contends that he is entitled to a COA on his claim under *Atkins v. Virginia* that he is ineligible for the death penalty by reason of intellectual disability. The district court rejected Busby’s *Atkins* claim, holding that it was procedurally barred because the TCCA rejected the claim on an “independent and adequate state procedural ground”¹³—as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071 § 5(c)—and that Busby failed to show “by clear and convincing evidence that he is mentally retarded” so as to meet the “actual innocence” exception to procedural default.

In denying Busby’s application, the TCCA stated:

We have reviewed this subsequent application and find that the allegations fail to satisfy the requirements of Article 11.071,

⁹ *Id.*

¹⁰ *Miller-El*, 537 U.S. at 338 (internal quotation marks omitted).

¹¹ *Slack*, 529 U.S. at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

¹² *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005).

¹³ *Maples v. Thomas*, 132 S. Ct. 912, 922 (2012); *see also Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Rocha v. Thaler*, 626 F.3d 815, 820-21 (5th Cir. 2010).

No. 15-70008

§ 5(a). Accordingly, we dismiss the application as an abuse of the writ without considering the merits of the claims.¹⁴

The State argues, and the district court agreed, that the plain language of the TCCA’s dismissal—“without considering the merits of the claims”—indicates that the TCCA did not reach the merits of Busby’s *Atkins* claim. The State further notes that we have “consistently held that Texas’ abuse-of-writ rule is ordinarily an adequate and independent procedural ground on which to base a procedural default ruling.”¹⁵

Busby responds that the TCCA’s dismissal was merely boilerplate and that the TCCA actually reviews *Atkins* claims raised in successive petitions on the merits pursuant to Article 11.071 § 5(a)(3),¹⁶ which requires an applicant to demonstrate

by clear and convincing evidence, *but for* a violation of the United States Constitution no rational juror would have answered in the state’s favor one or more of the special issues that were submitted to the jury in the applicant’s trial under Article 37.071, 37.0711, or 37.072.¹⁷

We have previously explained that Texas’s abuse-of-the-writ doctrine does not preclude federal jurisdiction in the *Atkins* context because, in denying an *Atkins* claim as an abuse of the writ under § 5(a)(3), the TCCA necessarily

¹⁴ *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, *1 (Tex. Crim. App. Mar. 6, 2013).

¹⁵ *Aguilar v. Dretke*, 428 F.3d 526, 533 (5th Cir. 2005) (internal quotation marks omitted).

¹⁶ See *Ex parte Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007) (“We hold that a state habeas applicant alleging mental retardation for the first time in a subsequent writ application will be allowed to proceed to the merits of his application under the terms of Section 5(a)(3)—at least so long as he alleges and presents, as a part of his subsequent pleading, evidence of a sufficiently clear and convincing character that we could ultimately conclude, to that level of confidence, that no rational factfinder would fail to find he is in fact mentally retarded.”).

¹⁷ TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3) (West) (emphasis added).

No. 15-70008

conducts a merits review.¹⁸ Accordingly, reasonable jurists could disagree with the district court's conclusion that Busby's claim was procedurally barred.

Busby must still, however, show that reasonable jurists could debate whether he has presented a "valid claim of the denial of a constitutional right"¹⁹—here, imposition of the death penalty on an intellectually disabled prisoner in violation of *Atkins*. In *Atkins*, the Supreme Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences."²⁰ Texas developed its *Atkins* framework in *Ex parte Briseno*.²¹ There, the TCCA explained that Texas adopts the American Association of Mental Retardation (AAMR) definition of intellectual disability, which requires "(1) significantly subaverage general intellectual functioning, defined as an IQ of about 70 or below; (2) accompanied by related limitations in adaptive functioning; (3) the onset of which occurs prior to the age of 18."²² "A failure of proof on any one of these three elements will defeat an *Atkins* claim."²³ With respect to prong one, the TCCA recognizes that IQ testing instruments have a measurement error of approximately five points and acknowledges that "any score could actually represent a score that is five points higher or five points lower than the actual IQ."²⁴

Busby argues that his most recent IQ score of 74 on the Weschler Adult Intelligence Scales—Fourth Edition (WAIS-IV) satisfies the first *Briseno* prong. He argues that this score is the most reliable because it was

¹⁸ *Garcia v. Stephens*, 757 F.3d 220, 225 (5th Cir. 2014); *Ladd v. Stephens*, 748 F.3d 637, 641 n.10 (5th Cir. 2014); *Rivera v. Quarterman*, 505 F.3d 349, 359-60 (5th Cir. 2007).

¹⁹ *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

²⁰ *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (alteration in original).

²¹ 135 S.W.3d 1 (Tex. Crim. App. 2004).

²² *Blue v. Thaler*, 665 F.3d 647, 657-58 (5th Cir. 2011) (internal quotation marks omitted) (citing *Briseno*, 135 S.W.3d at 7).

²³ *Id.* at 658.

²⁴ *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App. 2010).

No. 15-70008

administered close to the test’s development date, and because the defense expert detected no malingering, i.e., intentional efforts to misrepresent his intellectual ability. Busby claims that his prior IQ scores—77, 79, and 81²⁵—bolster his claim of intellectual disability once adjusted downward to account for various structural testing flaws, including the practice effect and non-verbal nature of the tests. Primarily, Busby argues for downward adjustment to account for a phenomenon known as the “Flynn effect,” in which IQ scores for a given test rise over time as the testing instrument becomes outdated. Busby contends that in denying relief, the TCCA and district court essentially applied the type of “bright-line IQ cutoff” condemned by the Supreme Court in *Hall v. Florida*.²⁶ As to the second and third *Briseno* factors, Busby provided evidence of his adaptive functioning, including grade school records and affidavits from teachers, family, and friends, each intended to indicate that Busby lacked the adaptive functioning skills contemplated in *Briseno*.

The State counters that the Flynn Effect has not been accepted as scientifically valid in this circuit or by the TCCA and thus provides no basis for downward adjustment. The State further argues that Busby’s recent score of 74 is not reliable, given its deviation from his previous higher IQ scores and Busby’s potential incentive to perform poorly. The State notes that the Texas scheme is distinguishable from the Florida scheme at issue in *Hall*, which required a petitioner to demonstrate an unadjusted score of 70 before

²⁵ Busby’s prison records show that he was administered an “unknown” IQ test in 2001, on which he scored a 96. However, while cross-examining Dr. Proctor, the State offered to “forget about the 96 IQ” and stated that there was “probably . . . something wrong with the results.”

²⁶ 134 S. Ct. 1986, 2001 (2014).

No. 15-70008

additional evidence of intellectual disability could be considered.²⁷ Finally, the State produces conflicting evidence of Busby's adaptive functioning skills, and argues that Busby's evidence is "self-serving" and "anecdotal" and not indicative of Busby's abilities prior to the age of 18.

We conclude that reasonable jurists could debate whether Busby has subaverage intellectual functioning. We therefore conclude that reasonable jurists could debate whether Busby has presented a viable *Atkins* claim, and grant Busby a COA on this issue.

IV

Busby next contends that he is entitled to a COA on his claim that his direct appeal counsel, Jack Strickland, the same attorney who represented him at trial, was ineffective for failing to challenge the trial court's exclusion of Kathleen Latimer's statements. He argues that his initial state habeas counsel, David Richards, had a conflict of interest based on his personal and professional relationship with Strickland. Finding the claim unexhausted, the district court stayed the case so that Busby could present his claims to the state court. Busby's federal habeas counsel filed a subsequent application with the TCCA, which was dismissed as an abuse of the writ without consideration on the merits. The district court subsequently concluded that this claim was procedurally defaulted, rejecting Busby's argument that the limited exception to procedural default set forth in *Martinez v. Ryan*²⁸ and *Trevino v. Thaler*²⁹ extends to ineffective-assistance-of-appellate-counsel (IAAC) claims. Alternatively, the district court concluded the claim lacked merit.

²⁷ *Id.* at 1994. After the conclusion of briefing in this case, we held that *Briseno* remains a constitutionally permissible interpretation and application of *Atkins*. *Henderson v. Stephens*, 791 F.3d 567, 585-86 (5th Cir. 2015), *petition for cert. filed*, (U.S. Jan. 28, 2016) (No. 15-7974).

²⁸ 132 S. Ct. 1309 (2012).

²⁹ 133 S. Ct. 1911 (2013).

No. 15-70008

The district court relied on this court’s decision in *Reed v. Stephens*,³⁰ in which we denied a COA on an IAAC claim that was procedurally defaulted, stating that “[t]o the extent Reed suggests that his ineffective-assistance-of-appellate-counsel claims also should be considered under *Martinez*, we decline to do so.”³¹ Busby essentially argues that our decision in *Reed* was dicta and not binding.

We note that there is a split among the Circuits as to whether the rationale of *Martinez/Trevino* extends to ineffective assistance of direct appeal counsel. Post-*Trevino*, in a case that did not involve a potential conflict of interest between collateral review and direct appeal counsel, the Sixth Circuit held that “ineffective assistance of post-conviction counsel cannot supply cause for procedural default of a claim of ineffective assistance of *appellate* counsel.”³² The Eighth Circuit has also refused to extend the *Martinez/Trevino* rationale to excuse procedural default of a claim of ineffective assistance of direct appeal counsel where the only potential conflict of interest was a tenuous claim that state habeas counsel’s “titular boss” had “helped” on the petitioner’s case at trial.³³ The Tenth Circuit has likewise read the exception narrowly.³⁴ The

³⁰ 739 F.3d 753 (5th Cir. 2014).

³¹ *Id.* at 778 n.16.

³² *Hodges v. Colson*, 727 F.3d 517, 531 (6th Cir. 2013) (emphasis added).

³³ *Dansby v. Hobbs*, 766 F.3d 809, 827-28 (8th Cir. 2014). Though the court considered the conflict issue primarily under *Maples v. Thomas*, 132 S. Ct. 912 (2012), it also expressly declined to extend *Martinez/Trevino* to claims of IAAC, noting that “[m]ost circuits to address the point have declined to extend *Martinez* to claims alleging ineffective appellate counsel, and we agree.” *Id.* at 833.

³⁴ *See Banks v. Workman*, 692 F.3d 1133, 1148 (10th Cir. 2012) (noting that the court understood *Martinez* to apply only to claims of ineffective assistance of trial counsel, and not of appellate counsel, though noting that the exception would not apply in any event because Oklahoma law permitted the assertion of an ineffectiveness claim on direct appeal); *see also Fairchild v. Trammell*, 784 F.3d 702, 722-23 (10th Cir. 2015) (declining to apply *Trevino* to Oklahoma’s procedural framework, which allows ineffective-assistance-of-trial-counsel claims to be fully developed); *Decker v. Roberts*, 530 F. App’x 844, 845 (10th Cir. 2013) (unpublished) (noting that *Martinez* and *Trevino* “hold that the ineffectiveness of post-

No. 15-70008

Ninth Circuit has reached the opposite conclusion, extending *Martinez* and *Trevino* to claims of ineffective assistance of direct appeal counsel as well.³⁵ We note also that some of the language in *Martinez* may support Busby's contention that the case's logic should be extended because the same sort of double ineffectiveness would "deprive the defendant of any opportunity at all for review" of certain issues.³⁶ Further, the Supreme Court recently granted certiorari on the issue of whether the rule established in *Martinez* and *Trevino* also applies to procedurally defaulted, but substantial, ineffective-assistance-of-appellate-counsel claims.³⁷

Reasonable jurists could debate the district court's conclusion that Busby's ineffective-assistance-of-appellate-counsel claim was procedurally defaulted. The district court concluded, in the alternative, that Busby's ineffective-assistance-of-appellate-counsel claim was not substantial and that Busby's initial state habeas counsel, David Richards, was not ineffective in failing to raise an ineffective-assistance-of-counsel claim. Reasonable jurists would find the district court's alternative holdings debatable. We grant Busby's request for a COA on his IAAC claim.

V

Busby also seeks a COA on the district court's denial of his ineffective-assistance-of-trial-counsel (IATC) claim. Busby argues that his

conviction counsel may not be used to excuse a procedural default when the underlying claim is for something other than the ineffective assistance of *trial* counsel").

³⁵ See *Ha Van Nguyen v. Curry*, 736 F.3d 1287, 1296 (9th Cir. 2013) (holding that *Martinez* extends to Sixth Amendment ineffective-assistance-of-appellate-counsel claims).

³⁶ See *Trevino v. Thaler*, 133 S. Ct. 1911, 1921 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (likening the initial-review collateral proceeding to a direct appeal and noting that "an attorney's errors during an appeal on direct review may provide cause to excuse a procedural default; for if the attorney appointed by the State to pursue the direct appeal is ineffective, the prisoner has been denied fair process and the opportunity to comply with the State's procedures and obtain an adjudication on the merits of his claims").

³⁷ *Davila v. Davis*, 650 F. App'x. 860 (5th Cir. 2016) (per curiam) (unpublished), *cert. granted*, 2017 WL 125677 (U.S. Jan. 13, 2017) (No. 16-6219).

No. 15-70008

trial counsel, Jack Strickland, provided ineffective assistance in failing to conduct a timely sentencing investigation, which led to Strickland's alleged failure to present an adequate mitigation case at punishment. Busby concedes that his claim is procedurally barred as it was not presented in his initial state habeas petition, but argues that the default is excused under *Martinez v. Ryan*³⁸ and *Trevino v. Thaler*.³⁹

The Supreme Court held in *Martinez* that a habeas petitioner may establish cause for procedural default of an IATC claim “where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*.”⁴⁰ To overcome the default, “a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.”⁴¹

The district court held both that Busby failed to establish that his initial state habeas counsel—David Richards—was deficient under *Strickland* and further, that Busby failed to show that his underlying IATC claim was substantial. Specifically, the district court determined that trial counsel's alleged ineffectiveness did not prejudice Busby, reasoning that Busby's additional evidence was largely cumulative of that presented to the jury. The district court observed that the declarations from multiple individuals regarding Busby's mental state were “weakened” because the declarations were “untested, unsworn, and in some cases, undated.”

³⁸ 132 S. Ct. 1309 (2012).

³⁹ 133 S. Ct. 1911 (2013).

⁴⁰ 132 S. Ct. at 1318 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

⁴¹ *Id.* (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003)) (describing standards for certificates of appealability to issue).

No. 15-70008

Busby contends that the district court improperly discredited the declarations, which he contends were submitted in their proper form for purposes of federal litigation, and that the new mitigation evidence is not merely cumulative, but “paints an entirely different picture of Busby from the one presented to the jury.” Busby argues that “substantial additional mitigation evidence” was easily discoverable, but “apparently unknown to both trial counsel and state habeas counsel,” and that “[a]fter a very limited investigation, state habeas counsel” filed a state habeas petition that failed to raise an IATC claim.

The State responds that Busby has failed to show, or rebut the district court’s conclusion, that Busby was not prejudiced. The State further asserts that Busby’s IATC claim is meritless, and thus, not “substantial” as required by *Martinez*.

Reasonable jurists could debate whether Busby’s state habeas counsel, Richards, was ineffective in failing to present an IATC claim regarding Strickland’s allegedly deficient mitigation investigation. As the district court noted, Richards initially acknowledged that fact disputes existed regarding the adequacy of Strickland’s mitigation investigation. He filed affidavits with the state court, including one from Linda Sanders, the mitigation expert hired in Busby’s case, which opined that Strickland’s inquiry into mitigation was untimely and could not have allowed for an adequate investigation.

Reasonable jurists could further debate whether Busby’s underlying IATC claim is substantial, “which is to say that . . . the claim has some merit.”⁴² IATC claims are governed by the *Strickland* two-step, which requires Busby to

⁴² *Id.* While we recognize that the district court did not decide whether trial counsel was ineffective, instead concluding that Busby’s IATC claim was not substantial due to lack of prejudice, as it was entitled to do, we discuss the ineffectiveness issue because Busby still bears the burden to “state a valid claim of the denial of a constitutional right” should we conclude that reasonable jurists could debate the district court’s procedural ruling.

No. 15-70008

show that his trial counsel’s representation “fell below an objective standard of reasonableness,”⁴³ and that “he was prejudiced by the deficient performance.”⁴⁴ A showing of prejudice requires a petitioner to demonstrate “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”⁴⁵ To make this determination, federal habeas courts must weigh the evidence adduced in the habeas proceeding and that adduced at trial against the aggravating evidence.⁴⁶

The district court relied in part on the State’s aggravating evidence and the circumstances of the instant offense to conclude that Busby was not prejudiced. Given the facts of this case, we cannot conclude that Busby’s criminal history, coupled with the instant offense, would indisputably lead reasonable jurists to find this new mitigation evidence irrelevant as it pertains to the imposition of the death penalty.⁴⁷

At this stage, we simply conclude that reasonable jurists could debate whether Busby has presented a substantial, or viable, IATC claim sufficient to excuse the procedural default and to merit a COA. Accordingly, we GRANT a COA on Busby’s IATC claim.

* * *

⁴³ See *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

⁴⁴ *Newbury v. Stephens*, 756 F.3d 850, 872 (5th Cir. 2014) (per curiam) (citing *Strickland*, 466 U.S. at 687).

⁴⁵ *Escamilla v. Stephens*, 749 F.3d 380, 388 (5th Cir. 2014) (quoting *Strickland*, 466 U.S. at 694).

⁴⁶ *Sears v. Upton*, 561 U.S. 945, 955-56 (2010).

⁴⁷ Compare *Escamilla*, 749 F.3d at 393 (granting a COA on the defendant’s IATC claim premised on an inadequate mitigation investigation notwithstanding the “disturbing facts of the crime alone”), with *Newbury*, 756 F.3d at 874 (denying a COA on the defendant’s claim that trial counsel conducted an inadequate mitigation investigation where the “State’s evidence of [the defendant’s] future dangerousness and moral culpability was overwhelming”).

No. 15-70008

For the reasons expressed herein, we GRANT a COA authorizing Busby to appeal the district court's denial of habeas relief on his *Atkins* claim, his claim for ineffective assistance of trial counsel, and his claim alleging ineffective assistance of appellate counsel.

Appendix C

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, §113, 63 Stat. 105; Oct. 31, 1951, ch. 655, §52, 65 Stat. 727; Pub. L. 104-132, title I, §102, Apr. 24, 1996, 110 Stat. 1217.)

HISTORICAL AND REVISION NOTES

1948 ACT

Based on title 28, U.S.C., 1940 ed., §§463(a) and 466 (Mar. 10, 1908, ch. 76, 36 [35] Stat. 40; Feb. 13, 1925, ch. 229, §§6, 13, 43 Stat. 940, 942; June 29, 1938, ch. 806, 52 Stat. 1232).

This section consolidates paragraph (a) of section 463, and section 466 of title 28, U.S.C., 1940 ed.

The last two sentences of section 463(a) of title 28, U.S.C., 1940 ed., were omitted. They were repeated in section 452 of title 28, U.S.C., 1940 ed. (See reviser's note under section 2241 of this title.)

Changes were made in phraseology.

1949 ACT

This section corrects a typographical error in the second paragraph of section 2253 of title 28.

AMENDMENTS

1996—Pub. L. 104-132 reenacted section catchline without change and amended text generally. Prior to amendment, text read as follows:

“In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

“There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

“An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.”

1951—Act Oct. 31, 1951, substituted “to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his” for “of removal issued pursuant to section 3042 of Title 18 or the” in second par.

1949—Act May 24, 1949, substituted “3042” for “3041” in second par.

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such deter-

mination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

(June 25, 1948, ch. 646, 62 Stat. 967; Pub. L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub. L. 104-132, title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

HISTORICAL AND REVISION NOTES

This new section is declaratory of existing law as affirmed by the Supreme Court. (See *Ex parte Hawk*, 1944, 64 S. Ct. 448, 321, U.S. 114, 88L. Ed. 572.)

SENATE REVISION AMENDMENTS

Senate amendment to this section, Senate Report No. 1559, amendment No. 47, has three declared purposes, set forth as follows:

"The first is to eliminate from the prohibition of the section applications in behalf of prisoners in custody under authority of a State officer but whose custody has not been directed by the judgment of a State court. If the section were applied to applications by persons detained solely under authority of a State officer it would unduly hamper Federal courts in the protection of Federal officers prosecuted for acts committed in the course of official duty.

"The second purpose is to eliminate, as a ground of Federal jurisdiction to review by habeas corpus judgments of State courts, the proposition that the State court has denied a prisoner a 'fair adjudication of the legality of his detention under the Constitution and laws of the United States.' The Judicial Conference believes that this would be an undesirable ground for Federal jurisdiction in addition to exhaustion of State remedies or lack of adequate remedy in the State courts because it would permit proceedings in the Federal court on this ground before the petitioner had exhausted his State remedies. This ground would, of course, always be open to a petitioner to assert in the Federal court after he had exhausted his State remedies or if he had no adequate State remedy.

"The third purpose is to substitute detailed and specific language for the phrase 'no adequate remedy available.' That phrase is not sufficiently specific and precise, and its meaning should, therefore, be spelled out in more detail in the section as is done by the amendment."

REFERENCES IN TEXT

Section 408 of the Controlled Substances Act, referred to in subsec. (h), is classified to section 848 of Title 21, Food and Drugs.

AMENDMENTS

1996—Subsec. (b). Pub. L. 104-132, §104(1), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

Subsec. (d). Pub. L. 104-132, §104(3), added subsec. (d). Former subsec. (d) redesignated (e).

Subsec. (e). Pub. L. 104-132, §104(4), amended subsec. (e) generally, substituting present provisions for provisions which stated that presumption of correctness existed unless applicant were to establish or it otherwise appeared or respondent were to admit that any of several enumerated factors applied to invalidate State determination or else that factual determination by State court was clearly erroneous.

Pub. L. 104-132, §104(2), redesignated subsec. (d) as (e). Former subsec. (e) redesignated (f).

Subsecs. (f), (g). Pub. L. 104-132, §104(2), redesignated subsecs. (e) and (f) as (f) and (g), respectively.

Subsecs. (h), (i). Pub. L. 104-132, §104(5), added subsecs. (h) and (i).

1966—Pub. L. 89-711 substituted "Federal courts" for "State Courts" in section catchline, added subsec. (a), designated existing paragraphs as subsecs. (b) and (c), and added subsecs. (d) to (f).

APPROVAL AND EFFECTIVE DATE OF RULES GOVERNING SECTION 2254 CASES AND SECTION 2255 PROCEEDINGS FOR UNITED STATES DISTRICT COURTS

For approval and effective date of rules governing petitions under section 2254 and motions under section 2255 of this title filed on or after Feb. 1, 1977, see section 1 of Pub. L. 94-426, set out as a note under section 2074 of this title.

POSTPONEMENT OF EFFECTIVE DATE OF PROPOSED RULES GOVERNING PROCEEDINGS UNDER SECTIONS 2254 AND 2255 OF THIS TITLE

Rules and forms governing proceedings under sections 2254 and 2255 of this title proposed by Supreme Court order of Apr. 26, 1976, effective 30 days after adjournment sine die of 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier, see section 2 of Pub. L. 94-349, set out as a note under section 2074 of this title.

RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS

(Effective Feb. 1, 1977, as amended to Jan. 3, 2012)

Rule

1. Scope.
2. The Petition.
3. Filing the Petition; Inmate Filing.
4. Preliminary Review; Serving the Petition and Order.
5. The Answer and the Reply.
6. Discovery.
7. Expanding the Record.
8. Evidentiary Hearing.
9. Second or Successive Petitions.
10. Powers of a Magistrate Judge.
11. Certificate of Appealability; Time to Appeal.
12. Applicability of the Federal Rules of Civil Procedure.

APPENDIX OF FORMS

Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus By a Person in State Custody.

Appendix D

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., § 454 (R.S. § 754).

Words “or by someone acting in his behalf” were added. This follows the actual practice of the courts, as set forth in *United States ex rel. Funaro v. Watchorn*, C.C. 1908, 164 F. 152; *Collins v. Traeger*, C.C.A. 1928, 27 F.2d 842, and cases cited.

The third paragraph is new. It was added to conform to existing practice as approved by judicial decisions. See *Dorsey v. Gill* (App.D.C.) 148 F.2d 857, 865, 866. See also *Holiday v. Johnston*, 61 S.Ct. 1015, 313 U.S. 342, 85 L.Ed. 1392.

Changes were made in phraseology.

§ 2243. Issuance of writ; return; hearing; decision

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

(June 25, 1948, ch. 646, 62 Stat. 965.)

HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §§ 455, 456, 457, 458, 459, 460, and 461 (R.S. §§ 755-761).

Section consolidates sections 455-461 of title 28, U.S.C., 1940 ed.

The requirement for return within 3 days “unless for good cause additional time, not exceeding 20 days is allowed” in the second paragraph, was substituted for the provision of such section 455 which allowed 3 days for return if within 20 miles, 10 days if more than 20 but not more than 100 miles, and 20 days if more than 100 miles distant.

Words “unless for good cause additional time is allowed” in the fourth paragraph, were substituted for words “unless the party petitioning requests a longer time” in section 459 of title 28, U.S.C., 1940 ed.

The fifth paragraph providing for production of the body of the detained person at the hearing is in conformity with *Walker v. Johnston*, 1941, 61 S.Ct. 574, 312 U.S. 275, 85 L.Ed. 830.

Changes were made in phraseology.

§ 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of

habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) 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—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(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 constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein,

unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

(June 25, 1948, ch. 646, 62 Stat. 965; Pub. L. 89-711, §1, Nov. 2, 1966, 80 Stat. 1104; Pub. L. 104-132, title I, §§101, 106, Apr. 24, 1996, 110 Stat. 1217, 1220.)

HISTORICAL AND REVISION NOTES

This section makes no material change in existing practice. Notwithstanding the opportunity open to litigants to abuse the writ, the courts have consistently refused to entertain successive “nuisance” applications for habeas corpus. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Hatton Sumners of the Committee on the Judiciary and referred to that Committee.

The practice of suing out successive, repetitious, and unfounded writs of habeas corpus imposes an unnecessary burden on the courts. See *Dorsey v. Gill*, 1945, 148 F.2d 857, 862, in which Miller, J., notes that “petitions for the writ are used not only as they should be to protect unfortunate persons against miscarriages of justice, but also as a device for harassing court, custodial, and enforcement officers with a multiplicity of repetitious, meritless requests for relief. The most extreme example is that of a person who, between July 1, 1939, and April 1944 presented in the District Court 50 petitions for writs of habeas corpus; another person has presented 27 petitions; a third, 24; a fourth, 22; a fifth, 20. One hundred nineteen persons have presented 597 petitions—an average of 5.”

SENATE REVISION AMENDMENTS

Section amended to modify original language which denied Federal judges power to entertain application for writ where legality of detention had been determined on prior application and later application pre-

sented no new grounds, and to omit reference to rehearing in section catch line and original provision authorizing hearing judge to grant rehearing. 80th Congress, Senate Report No. 1559, Amendment No. 45.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-132, §106(a), substituted “, except as provided in section 2255,” for “and the petition presents no new ground not heretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.”

Subsec. (b). Pub. L. 104-132, §106(b), amended subsec. (b) generally. Prior to amendment, subsec. (b) read as follows: “When after an evidentiary hearing on the merits of a material factual issue, or after a hearing on the merits of an issue of law, a person in custody pursuant to the judgment of a State court has been denied by a court of the United States or a justice or judge of the United States release from custody or other remedy on an application for a writ of habeas corpus, a subsequent application for a writ of habeas corpus in behalf of such person need not be entertained by a court of the United States or a justice or judge of the United States unless the application alleges and is predicated on a factual or other ground not adjudicated on the hearing of the earlier application for the writ, and unless the court, justice, or judge is satisfied that the applicant has not on the earlier application deliberately withheld the newly asserted ground or otherwise abused the writ.”

Subsec. (d). Pub. L. 104-132, §101, added subsec. (d).

1966—Pub. L. 89-711 designated existing provisions as subsec. (a), struck out provision making the subsection’s terms applicable to applications seeking inquiry into detention of persons detained pursuant to judgments of State courts, and added subsecs. (b) and (c).

§ 2245. Certificate of trial judge admissible in evidence

On the hearing of an application for a writ of habeas corpus to inquire into the legality of the detention of a person pursuant to a judgment the certificate of the judge who presided at the trial resulting in the judgment, setting forth the facts occurring at the trial, shall be admissible in evidence. Copies of the certificate shall be filed with the court in which the application is pending and in the court in which the trial took place.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section makes no substantive change in existing law. It is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing law and promotes uniform procedure.

§ 2246. Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

(June 25, 1948, ch. 646, 62 Stat. 966.)

HISTORICAL AND REVISION NOTES

This section is derived from H.R. 4232 introduced in the first session of the Seventy-ninth Congress by Chairman Sumners of the House Committee on the Judiciary. It clarifies existing practice without substantial change.