

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

No. 15-70008

United States Court of Appeals
Fifth Circuit

FILED

June 13, 2018

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

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

PRISCILLA OWEN, Circuit Judge:

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

* Concurring in the judgment only.

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.”).

No. 15-70008

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 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

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.*

⁷ *Busby v. Stephens*, 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.

No. 15-70008

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 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

¹¹ *See generally id.*

¹² *Id.* at 673.

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

¹⁴ *See Ex parte Busby*, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009) (per curiam) (unpublished).

¹⁵ ROA.2165.

¹⁶ *Busby v. Stephens*, 2015 WL 1037460, at *14 (N.D. Tex. Mar. 10, 2015).

¹⁷ *See* ROA.3232-33.

¹⁸ ROA.1551.

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

²⁰ ROA.696-1369; 2343-3092.

No. 15-70008

“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 successive 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 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

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*, 2015 WL 1037460, at *2 (N.D. Tex. Mar. 10, 2015); ROA.1877.

²⁴ *Ex Parte Busby*, 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.

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.

No. 15-70008

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 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 to a state court, the TCCA, in a second, successive habeas petition. Busby asserted that he was actually innocent of the death penalty under Article 11.071, section 5.03(a)(3) of the Texas Code of Criminal Procedure. This claim largely mirrored the *Atkins* claim in his federal habeas petition, though he asserts in federal court that he

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).

³³ 36 RR 55-56.

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

No. 15-70008

is entitled to habeas relief based on the miscarriage of justice exception under federal common law, which includes the *Sawyer v. Whitley* actual-innocence-of-the-death-penalty standard.³⁵ The federal district court afforded Busby the opportunity to have an evidentiary hearing. Busby declined such a hearing and relied on the evidence attached to his federal habeas petition.

In the course of the state-court trial that resulted in Busby's conviction and in his pursuit of state and federal habeas relief, Busby has retained at least four mental health experts. None of them 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, successive 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. The fact that Busby has retained at least four mental health experts over the course of his prosecution and post-conviction proceedings, and none of them has opined that Busby is intellectually disabled, is compelling evidence. Busby has failed to show by clear and convincing evidence that "no reasonable juror [or factfinder] would have found him eligible for the death penalty."³⁶ Stated another way, a reasonable factfinder could conclude from

³⁵ 505 U.S. 333 (1992).

³⁶ *Id.* at 350; *see also id.* at 336 ("[T]o 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."); *id.* at 347 ("[T]he 'actual innocence' requirement must focus on those elements that render a defendant eligible for the death penalty."); *id.* at 350 (concluding that "it cannot be said that no reasonable juror would have found, in light of all the evidence, that petitioner was guilty of the aggravated arson for his participation under the Louisiana law of principals").

No. 15-70008

the evidence Busby presented that he is not intellectually disabled.

The TCCA's disposition of the *Atkins* claim withstands scrutiny under AEDPA.³⁷ Busby's contention that, based on *Sawyer v. Whitley*, he is actually innocent of the death penalty, likewise fails.

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, successive 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 judgment.'"³⁸ 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, successive habeas application said, "we dismiss the application as an abuse of the writ without considering the merits of the claims."³⁹ 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

³⁷ 28 U.S.C. § 2254(d)(1), (2).

³⁸ *Walker v. Martin*, 562 U.S. 307, 315 (2011) (quoting *Beard v. Kindler*, 558 U.S. 53, 55 (2009) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991))).

³⁹ *Ex Parte Busby*, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (unpublished).

No. 15-70008

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.”⁴⁰ “The presumption may be overcome when there is reason to think some other explanation for the state court's decision is more likely.”⁴¹

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 counsel failed to discover. Busby submitted three broad claims to the TCCA in his second, successive 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 successive state habeas application. It is highly probable that the TCCA denied relief on the ineffective-assistance-of-counsel claims on the ground that

⁴⁰ *Johnson v. Williams*, 568 U.S. 289, 293 (2013) (citing *Harrington v. Richter*, 562 U.S. 86, 99 (2011)).

⁴¹ *Harrington*, 562 U.S. at 99-100.

No. 15-70008

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.⁴² That determination is necessarily dependent on a substantive analysis of the federal question in light of 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-of-the-writ statute, the TCCA is required to dismiss successive habeas petitions⁴³ 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

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

⁴³ See TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(c).

No. 15-70008

(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 trial⁴⁴

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 successive application was resolved under section 5(a)(1). The State cites this court's decision in *Rocha v. Thaler*⁴⁵ 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*. The *Rocha* decision expressly recognized that as to *Atkins* claims that had been resolved by the TCCA under section 5(a)(1), the TCCA "steps beyond a procedural determination to examine the merits of an *Atkins* claim."⁴⁶ 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."⁴⁷ Accordingly, even had the TCCA resolved the *Atkins* claim under section 5(a)(1), our court has concluded that the denial of an *Atkins* claim under 5(a)(1) is a merits decision. Our decision in *Rocha* predated the TCCA's decision in *Blue*, and it is now clear that the TCCA no longer resolves

⁴⁴ *Id.* § 5(a).

⁴⁵ 626 F.3d 815, 838 (5th Cir. 2010).

⁴⁶ *Id.* at 832 (quoting *Rivera v. Quarterman*, 505 F.3d 349, 359-60 (5th Cir. 2007)).

⁴⁷ *Id.* at 832-33.

No. 15-70008

Atkins claims like Busby's under section 5(a)(1). The TCCA's *Blue* decision explains that *Atkins* claims like the one Busby has presented are instead resolved under section 5(a)(3). The dismissal of an *Atkins* claim would, however, continue to be a merits decisions.

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."⁴⁸ 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."⁴⁹ No one contends that section 5(a)(2) is applicable. Unquestionably, Busby's petition 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 successive habeas petition, the TCCA ruled on 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.⁵⁰ 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."⁵¹ In *Blue*, the TCCA "construe[d] . . . Section 5(a)(3) to require a *threshold* showing of evidence that

⁴⁸ *Ex parte Blue*, 230 S.W.3d 151, 156 (Tex. Crim. App. 2007).

⁴⁹ *Id.*

⁵⁰ *Id.* at 154.

⁵¹ *Id.*

No. 15-70008

would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find mental retardation.”⁵²

The TCCA’s decision in *Blue* examined at length the evidence supporting the claim that Blue came within *Atkins*’s prohibition.⁵³ The Texas court concluded that the evidence did not meet section 5(a)(3)’s threshold,⁵⁴ and the court dismissed the “subsequent writ application as an abuse of the writ.”⁵⁵ 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.”⁵⁶

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.”⁵⁷ The TCCA deduced that “the Legislature apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley*.”⁵⁸ 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

⁵² *Id.* at 163 (emphasis in original).

⁵³ *Id.* at 164-66.

⁵⁴ *Id.* at 166.

⁵⁵ *Id.* at 168.

⁵⁶ *Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011).

⁵⁷ *Blue*, 230 S.W.3d at 160.

⁵⁸ *Id.* (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992)).

No. 15-70008

of the claim” in a successive federal habeas petition.⁵⁹ 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.”⁶⁰ 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.”⁶¹

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.⁶² 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*.⁶³

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. Since Busby first raised an *Atkins*

⁵⁹ 505 U.S. at 335.

⁶⁰ *Id.* at 336.

⁶¹ *Blue*, 230 S.W.3d at 161.

⁶² *Id.* at 163.

⁶³ 562 U.S. 307, 315-16 (2011).

No. 15-70008

claim in a successive habeas petition, section 5(a)(3) requires that Busby must ultimately prove by “clear and convincing evidence, that no rational factfinder would fail to find mental retardation.”⁶⁴

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.”⁶⁵

B

Our review of the state court’s disposition of Busby’s *Atkins* claim is governed by AEDPA.⁶⁶ To the extent that our decision in *Rocha v. Thaler* could be read as concluding that the TCCA’s denial of an *Atkins* claim under Texas Code of Criminal Procedure article 11.071, section 5(a)(3) would not be subject to review under AEDPA,⁶⁷ *Rocha* would be contrary to the Supreme Court’s conclusion in *Brumfield v. Cain* that “[p]ursuant to [AEDPA], Brumfield could secure relief only if the state court’s rejection of his [*Atkins*] 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.’”⁶⁸ Though the substance of Texas Code of Criminal Procedure article 11.071, section 5(a)(3) may model federal

⁶⁴ *Blue*, 230 S.W.3d at 163.

⁶⁵ *Id.* at 154.

⁶⁶ *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2275 (2015).

⁶⁷ *Rocha v. Thaler*, 626 F.3d 815, 827 (5th Cir. 2010) (“[I]t follows that this Court reviews de novo the [T]CCA’s determination that Rocha cannot establish that he is actually innocent of the death penalty. A gateway claim of actual innocence is not a basis for relief under AEDPA. Such a claim stands outside of AEDPA and offers to open a door into the statute that the petitioner’s lack of diligence otherwise would have closed. Gateway claims of innocence are part of the federal common law of procedural default. De novo review is the norm in this area.”).

⁶⁸ *Brumfield*, 135 S. Ct. at 2275 (quoting 28 U.S.C. § 2254(d)(1), (2)).

No. 15-70008

common law, it is nevertheless a state law under which the TCCA reached the merits of Busby's *Atkins* claim. The TCCA's ruling is subject to AEDPA, even though the review under AEDPA may not differ in any material respect from a federal court's application of the federal common-law actual-innocence exception set forth in *Sawyer v. Whitley*.⁶⁹

We therefore review the TCCA's denial of Busby's *Atkins* claim under AEDPA. We must ascertain what established federal law, as determined by the Supreme Court of the United States, provides with regard to an *Atkins* claim that is first raised in a successive habeas petition.

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.⁷⁰ 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 state habeas petition.

As discussed above, the pre-AEDPA decision in *Sawyer* established that federal courts could employ the miscarriage of justice exception even if claims were first raised in successive federal habeas petitions.⁷¹ However, in *McQuiggin v. Perkins*, the Supreme Court explained that in enacting AEDPA, Congress "constrained the application of the [miscarriage-of-justice] exception" by the inclusion of § 2244(b)(2)(B).⁷² That section of AEDPA "limits the

⁶⁹ 505 U.S. 333, 336 (1992).

⁷⁰ See 28 U.S.C. § 2244(b)(2)(B); *McQuiggin v. Perkins*, 569 U.S. 383, 395-96 (2013).

⁷¹ 505 U.S. at 335-36.

⁷² 569 U.S. at 395.

No. 15-70008

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.’”⁷³ 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.”⁷⁴

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.”⁷⁵ 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.”⁷⁶

The Supreme Court’s holdings regarding *Ford*⁷⁷ 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 application.⁷⁸ A *Ford* claim can be raised in multiple proceedings and not be

⁷³ *Id.* at 396.

⁷⁴ *Id.*

⁷⁵ TEX. CODE CRIM. PROC. ANN. art. 11.071 § 5(a)(3).

⁷⁶ 28 U.S.C. § 2254(d)(1).

⁷⁷ *Ford v. Wainwright*, 477 U.S. 399 (1986).

⁷⁸ 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

No. 15-70008

“successive.”⁷⁹ That is because mental incompetence to be executed is not categorically a permanent condition.⁸⁰ 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.⁸¹ By contrast, intellectual disability is by definition a permanent condition that must have manifested before the age of 18. A person who is found to be intellectually disabled is permanently ineligible to be executed, and the sentence of death is vacated.

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”).

⁷⁹ 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.”).

⁸⁰ 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”).

⁸¹ 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

Busby’s *Atkins* claim is successive. He is not entitled under federal law to de novo review of that claim in state or federal court. 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*,⁸² when an actual innocence-of-the-death-penalty claim is first asserted in a successive habeas application.

C

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.”⁸³ The Supreme Court has held that “[s]ection 2254(d) applies even where there has been a summary denial” of habeas relief.⁸⁴ The clearly established federal law to be applied to the facts in the present case is embodied in *Atkins* and its progeny, and more generally, in *McQuiggin v. Perkins*.

Whether Busby is intellectually disabled is a question of fact,⁸⁵ and the Supreme Court has said that states have some flexibility, within limits, to define intellectual disability.⁸⁶ Though Texas defines intellectual disability by statute or regulation for some purposes,⁸⁷ it has not done so with regard to

⁸² 569 U.S. 383, 396 (2013).

⁸³ 28 U.S.C. § 2254(d)(2).

⁸⁴ *Cullen v. Pinholster*, 563 U.S. 170, 187 (2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011)).

⁸⁵ See, e.g., *Brumfield v. Cain*, 808 F.3d 1041, 1057 (5th Cir. 2015).

⁸⁶ *Moore v. Texas*, 137 S. Ct 1039, 1052-53 (2017).

⁸⁷ See, e.g., TEX. HEALTH & SAFETY CODE ANN. §§ 591.002, 591.003(7a), (15-a), (20); 19 TEX. ADMIN. CODE § 89.1040(c)(5) (2015).

No. 15-70008

Atkins proceedings.⁸⁸ The TCCA undertook to define intellectual disability in *Ex parte Briseño*.⁸⁹ However, the Supreme Court held in *Moore v. Texas* that the TCCA’s definition of intellectual disability is infirm, in part.⁹⁰ For purposes of our review today, we will 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 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 1993–1994.⁹¹

In addition, we will hew to the Supreme Court’s decisions regarding *Atkins* claims that post-date the TCCA’s 2013 denial of Busby’s *Atkins* claim.⁹² The State contends that the TCCA’s decision should be assessed under Supreme Court precedent as it existed as of the date the TCCA’s decision issued. We do not resolve that question because it is not outcome-determinative in this case.

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.”⁹³ The standard of review that the TCCA applied is not

⁸⁸ See *Moore*, 137 S. Ct. at 1052.

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

⁹⁰ 137 S. Ct. at 1044, 1051–52.

⁹¹ *Id.* at 1045.

⁹² See, e.g., *id.*; *Brumfield v. Cain*, 135 S. Ct. 2269 (2015); *Hall v. Florida*, 134 S. Ct. 1986 (2014).

⁹³ *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).

No. 15-70008

contrary to federal law, for the reasons discussed above. Accordingly, we must 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.

We begin with Busby’s IQ scores. Busby was administered five separate IQ tests between 2001 and 2010.⁹⁴ He scored 96 on an unknown IQ test in 2001,⁹⁵ and the State offered to “forget about” that test, acknowledging that it was unreliable.⁹⁶ We do not consider that test in our analysis of the evidence. 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.⁹⁷ The standard error of measurement (SEM)⁹⁸ for the WAIS-III is approximately “plus or minus five,” according to Dr. Proctor’s trial testimony.⁹⁹ Busby’s IQ was therefore in a range of 72-82, as measured by the WAIS-III. Busby asserted in his successive 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 79.¹⁰⁰ 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 81.¹⁰¹ Proctor testified that this score “correlates fairly well” with Busby’s WAIS-III score.¹⁰² The SEM for the Beta-

⁹⁴ *Busby v. Stephens*, 2015 WL 1037460, at *20 (N.D. Tex. Mar. 10, 2015).

⁹⁵ *Id.*

⁹⁶ *Id.*; 36 RR 64.

⁹⁷ *Busby*, 2015 WL 1037460, at *20; 36 RR 40, 53.

⁹⁸ *See generally Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014).

⁹⁹ 36 RR 57.

¹⁰⁰ *Busby*, 2015 WL 1037460, at *20.

¹⁰¹ *Id.*

¹⁰² 36 RR 48.

No. 15-70008

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, to be subject to a higher Flynn Effect rate than the Wechsler scales, and to be less reliable overall than the Wechsler Scales.”¹⁰³ 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.¹⁰⁴ 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.”¹⁰⁵

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 78.7.¹⁰⁶ He did not point to any expert testimony or other evidence in the record that supports these arguments. Nor is there evidence

¹⁰³ ROA.3525.

¹⁰⁴ 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.”).

¹⁰⁵ *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015).

¹⁰⁶ ROA.2478.

No. 15-70008

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 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 74.¹⁰⁷ 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."¹⁰⁸

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.¹⁰⁹ Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.¹¹⁰

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 agree that we cannot assume that the TCCA considered only Busby's IQ scores and ignored other evidence in Busby's state habeas application. It

¹⁰⁷ ROA.4092-96.

¹⁰⁸ ROA.4092.

¹⁰⁹ *Busby v. Stephens*, 2015 WL 1037460, at *10 (N.D. Tex. Mar. 10, 2015).

¹¹⁰ *Id.*

No. 15-70008

follows that we cannot 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 were three reports from mental health experts appended to Busby's successive 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, 2008.¹¹¹ 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, successive 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.¹¹² 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."¹¹³ 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

¹¹¹ ROA.4103-08.

¹¹² ROA.4106.

¹¹³ ROA.4106.

No. 15-70008

the year after the test is normed.”¹¹⁴ Importantly, Kessner concluded that the 77 score on the WAIS-III “does not rule out a diagnosis of mental retardation,” and that “a thorough investigation into Mr. Busby’s adaptive behavior history is necessary to make a proper determination.”¹¹⁵ The report continued, “[a]t this time, I do not believe that has been accomplished.”¹¹⁶ 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.”¹¹⁷ 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.”¹¹⁸ 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.”¹¹⁹ 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, successive 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.”¹²⁰ The report is relatively brief and offers no opinion as to whether Busby is intellectually disabled. It reflects

¹¹⁴ ROA.4106.

¹¹⁵ ROA.4107.

¹¹⁶ ROA.4107.

¹¹⁷ ROA.4107.

¹¹⁸ ROA.4106.

¹¹⁹ ROA.4107.

¹²⁰ ROA.4091.

No. 15-70008

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 70-79.¹²¹ Under a column in this chart labelled "Qualitative Description," the word "Borderline" appears with regard to Busby's full scale IQ score.¹²² The report also reflects that Martinez administered a Test of Memory Malingering, and "[t]here was no evidence of misrepresentation of cognitive or intellectual functioning."¹²³

Federal habeas counsel also retained Bekh Bradley-Davino, Ph.D., who is a licensed clinical psychologist.¹²⁴ Bradley-Davino spent ten hours evaluating Busby in person and reviewed a substantial amount of written material and records.¹²⁵ 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."¹²⁶ 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."¹²⁷ The

¹²¹ ROA.4092.

¹²² ROA.4092.

¹²³ ROA.4091.

¹²⁴ ROA.1283.

¹²⁵ ROA.1283-84.

¹²⁶ ROA.1289.

¹²⁷ ROA.1289.

No. 15-70008

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 plays during high school football practice.¹²⁸ 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.”¹²⁹ 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 conclude that Busby’s successive petition in state court falls short of presenting clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled. We cannot say that the TCCA’s denial of

¹²⁸ ROA.1289-90.

¹²⁹ ROA.1302.

No. 15-70008

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"¹³⁰ or an unreasonable application of clearly established federal law to those facts.

D

As an independent basis for habeas relief, Busby contends that, as a matter of federal common law, he is actually innocent of the death penalty and ineligible for execution because he is intellectually disabled. He does not base this claim on AEDPA, but instead, on a pre-AEDPA decision, *Sawyer v. Whitley*.¹³¹

The Supreme Court held in *House v. Bell* that AEDPA does not address the circumstances that another federal common-law actual-innocence standard, the *Schlup* standard,¹³² was crafted by the federal courts to address and therefore that the *Schlup* standard of review, rather than AEDPA, governed the claim of actual innocence in *House*.¹³³ The *Sawyer* actual-innocence standard of review is similar, though not identical to, the *Schlup* actual-innocence standard, and they are both part of the miscarriage-of-justice standard defined by the Supreme Court's habeas corpus jurisprudence.¹³⁴ The Supreme Court explained that the *Schlup* standard applies when a "petitioner asserts his actual innocence of the underlying crime," and it requires that "he must show 'it is more likely than not that no reasonable juror would have convicted him in light of the new evidence' presented in his habeas petition."¹³⁵

¹³⁰ 28 U.S.C. § 2254(d)(2).

¹³¹ 505 U.S. 333 (1992).

¹³² See *Schlup v. Delo*, 513 U.S. 298, 319-322 (1995).

¹³³ *House v. Bell*, 547 U.S. 518, 539 (2006).

¹³⁴ See *Calderon v. Thompson*, 523 U.S. 538, 558-60 (1998).

¹³⁵ *Id.* at 559.

No. 15-70008

The *Sawyer* standard applies when “a capital petitioner challenges his death sentence, in particular,” and then, “he must show ‘by clear and convincing evidence’ that no reasonable juror would have found him eligible for the death penalty in light of the new evidence.”¹³⁶

Subsequently, the Supreme Court held in *McQuiggin v. Perkins* that although AEDPA, specifically 28 U.S.C. §§ 2244(b)(2)(B) and 2254(e)(2), “constrained the application of the [miscarriage of justice] exception,” those provisions “reflect Congress’ will to *modify* the miscarriage of justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court.”¹³⁷ However, with respect to “a first petition for federal habeas relief, the miscarriage of justice exception survived AEDPA’s passage intact and unrestricted.”¹³⁸ Busby’s actual-innocence-of-the-death-penalty claim was first raised in his first federal habeas petition.

The question, therefore, is whether Busby has shown by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the evidence set forth in his federal habeas petition. The evidence in Busby’s federal petition was very similar to that presented in his state petition. Busby is not contending in our court that the federal district court should have held an evidentiary hearing on his *Atkins* claim or erred in failing to do so. In fact, Busby was given the opportunity to present evidence at an evidentiary hearing, but he did not identify any witnesses that he wished to call at such a hearing. He relied on the evidence set forth in his habeas petition in the federal district court. We reach the same

¹³⁶ *Id.* at 559-60.

¹³⁷ 569 U.S. 383, 395-96 (2013) (emphasis in original).

¹³⁸ *Id.* at 397.

No. 15-70008

conclusion that the federal district reached, which is that “Busby has not shown by clear and convincing evidence that he is mentally retarded.”¹³⁹

The district court’s factual findings primarily considered Busby’s IQ scores. However, we have considered all of the evidence presented by Busby, and he failed to establish by clear and convincing evidence that he is intellectually disabled, for the same reasons that we reached that conclusion in part II-C above. Our review in part II-C was conducted under AEDPA, but the outcome is the same applying the actual-innocence standard in *Sawyer v. Whitley*, rather than AEDPA.

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.

¹³⁹ *Busby v. Stephens*, 2015 WL 1037460, at *21 (N.D. Tex. Mar. 10, 2015).

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*¹⁴⁰ and *Trevino v. Thaler*.¹⁴¹ However, in *Davila v. Davis*,¹⁴² 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.¹⁴³ “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.”¹⁴⁴

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,¹⁴⁵ reasoning that “the Court in *Martinez* was principally concerned about *trial errors*—in particular, claims of ineffective assistance of *trial* counsel.”¹⁴⁶ 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,”¹⁴⁷ and the Court “declin[ed] to expand the *Martinez* exception to the distinct context of ineffective assistance of appellate counsel.”¹⁴⁸

¹⁴⁰ 566 U.S. 1 (2012).

¹⁴¹ 569 U.S. 413 (2013).

¹⁴² 137 S. Ct. 2058 (2017).

¹⁴³ *Id.* at 2065.

¹⁴⁴ *Id.* at 2062.

¹⁴⁵ *Id.* at 2066 (“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*.” (citing *Coleman v. Thompson*, 501 U.S. 722 (1991))).

¹⁴⁶ *Id.* (emphasis in original).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2067.

No. 15-70008

We note that while Busby asserted in his successive 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 successive 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."¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹

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."¹⁵² Busby must show that "but for his counsel's" failure to raise the issue on appeal, "he would have prevailed on his appeal."¹⁵³ 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

¹⁴⁹ ROA.3496.

¹⁵⁰ ROA.3497.

¹⁵¹ See *Ex parte Garcia*, 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).

¹⁵² *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

¹⁵³ *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.¹⁵⁴

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.”¹⁵⁵ 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.”¹⁵⁶ “Busby admits he taped the victim while he was alone with her at Walmart and Latimer was at the LaQuinta hotel.”¹⁵⁷

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.¹⁵⁸ 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 was harmless.¹⁵⁹ There is no reasonable probability that the TCCA would have

¹⁵⁴ *Busby v. Stephens*, 2015 WL 1037460, at *11 (N.D. Tex. Mar. 10, 2015).

¹⁵⁵ *Id.* at *13.

¹⁵⁶ *Id.* at 14 n.10.

¹⁵⁷ *Id.*

¹⁵⁸ 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)).

¹⁵⁹ *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

No. 15-70008

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.¹⁶⁰ 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.¹⁶¹

To establish ineffective assistance of trial counsel under *Strickland*, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness"¹⁶² and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

that the error did not influence the jury or had but a slight effect, we conclude that the error was harmless.").

¹⁶⁰ *Busby*, 2015 WL 1037460, at *12.

¹⁶¹ *Id.* at *16.

¹⁶² *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

No. 15-70008

been different.”¹⁶³ 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”¹⁶⁴ creates “a reasonable probability that at least one juror would have struck a different balance” and recommended a life sentence instead of death.¹⁶⁵ 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.¹⁶⁶ We agree with the conclusions that the district court reached regarding the weight of the aggravating evidence as measured against the “new” mitigating evidence.¹⁶⁷

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,¹⁶⁸ was required to repeat two grades,¹⁶⁹ was frequently absent from school, and ultimately dropped out of school.¹⁷⁰ They also noted that he was enrolled in special education classes for students with IQ’s lower than average, but above 70.¹⁷¹ His special education teacher spoke to Busby’s lack of support at home, his life as a “follower” in a segregated neighborhood,¹⁷² and her

¹⁶³ *Id.* at 694.

¹⁶⁴ *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (per curiam) (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per curiam)).

¹⁶⁵ *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

¹⁶⁶ *See Busby v. Stephens*, 2015 WL 1037460, at *4-*12 (N.D. Tex. Mar. 10, 2015).

¹⁶⁷ *Id.* at *13.

¹⁶⁸ 35 RR 17-24.

¹⁶⁹ 35 RR 16, 24.

¹⁷⁰ 35 RR 16.

¹⁷¹ 35 RR 27.

¹⁷² 35 RR 36-38.

No. 15-70008

observation that he was a difficult student.¹⁷³ The fact that Busby attempted to commit suicide on four occasions and was hospitalized on each occasion was presented to the jury.¹⁷⁴ 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."¹⁷⁵

The state introduced aggravation evidence at trial showing that Busby had an extensive criminal history and a violent nature.¹⁷⁶ 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 property¹⁷⁷ Busby pleaded guilty to stealing donations from the Salvation Army.¹⁷⁸ During his time in prison for these offenses, Busby was a violent and aggressive inmate.¹⁷⁹ A Kmart employee testified that Busby once attempted to steal batteries and when he was confronted, he threatened the employee and his family.¹⁸⁰ 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,¹⁸¹ that he had violently assaulted and injured Latimer, and that he had been arrested multiple times on drug and weapons charges.¹⁸² The jury found that Busby

¹⁷³ 35 RR 47.

¹⁷⁴ *See, e.g.*, 36 RR 58.

¹⁷⁵ 36 RR 57.

¹⁷⁶ *See generally* 33-34 RR.

¹⁷⁷ 33 RR 13-19, 192.

¹⁷⁸ 33 RR 72-80.

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

¹⁸⁰ 34 RR 35-38.

¹⁸¹ 34 RR 5-143.

¹⁸² 34 RR 21-30, 48-60, 156-58.

No. 15-70008

posed a future risk of dangerousness to society and that no mitigating factors warranted a life sentence.¹⁸³

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.¹⁸⁴

Busby asserted that his mother did not obtain prenatal healthcare when pregnant with him.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ One sister claimed that Busby's mother did not love Busby and would tell him that he was "just like [his] sorry-ass daddy."¹⁸⁸ They also described Busby's father as a "drunk" and stated that Busby's "dad would hit

¹⁸³ *Busby v. State*, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008).

¹⁸⁴ *See* ROA.2451-58.

¹⁸⁵ ROA.2236.

¹⁸⁶ ROA.2566-67, 2575-76.

¹⁸⁷ ROA.2567.

¹⁸⁸ ROA.2566.

No. 15-70008

him with anything” when he was inebriated.¹⁸⁹ 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.”¹⁹⁰ Both sisters described Busby as slow, irresponsible, and unhygienic.¹⁹¹

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.¹⁹² They also commented upon Busby’s “mood swings” and mental health issues, including his attempt to commit suicide in his teenage years.¹⁹³ Several noted that Busby was a follower when it came to women, especially Latimer, who was described as his girlfriend.¹⁹⁴

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.”¹⁹⁵ 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.”¹⁹⁶ He did, however, diagnose Busby with bipolar disorder, anxiety disorder, and polysubstance dependence in remission.¹⁹⁷

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.¹⁹⁸ We

¹⁸⁹ ROA.2567, 2574.

¹⁹⁰ ROA.2576-77.

¹⁹¹ ROA.2568-70, 2578.

¹⁹² ROA.2581-83; ROA.2584-85; ROA.2586; ROA.2588-89; ROA.2945-46; ROA.2947-48; ROA.2949; ROA.2950-51.

¹⁹³ ROA.2582, 2585-86, 2946, 2947.

¹⁹⁴ ROA.2946-51.

¹⁹⁵ ROA.2953.

¹⁹⁶ ROA.2961.

¹⁹⁷ ROA.2963.

¹⁹⁸ *Busby v. Stephens*, 2015 WL 1037460, at *12 (N.D. Tex. Mar. 10, 2015).

No. 15-70008

concluded in *Parr v. Quarterman*¹⁹⁹ 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.”²⁰⁰ 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*²⁰¹ 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.²⁰² Indeed, when “the evidence of [] future dangerousness was overwhelming . . . it is virtually impossible to establish prejudice.”²⁰³

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 sentence.²⁰⁴ He was therefore not prejudiced by his trial counsel’s allegedly deficient mitigation investigation, and his IATC claim fails.²⁰⁵

The district court did not directly address Busby’s contention that trial counsel was ineffective in discovering and presenting evidence that Busby is

¹⁹⁹ 472 F.3d 245 (5th Cir. 2006).

²⁰⁰ *Id.* at 258.

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

²⁰² *Id.* at 873-74.

²⁰³ *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 698 (1984)).

²⁰⁴ *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

²⁰⁵ *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.”).

No. 15-70008

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.²⁰⁶ 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.²⁰⁷ 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.

* * *

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

²⁰⁶ 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).

²⁰⁷ *Strickland*, 466 U.S. at 687-88.