IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
June 26, 2019
Lyle W. Cayce
Clerk

No. 19-70004

JOHN H. RAMIREZ,

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 Southern District of Texas
USDC No. 2:12-CV-410

Before KING, DENNIS, and OWEN, Circuit Judges.

KING, Circuit Judge:*

John Ramirez, a Texas death-row inmate, applies for a certificate of appealability to challenge the district court's order rejecting his motion to reopen the judgment denying his 28 U.S.C. § 2254 application. We DENY Ramirez's application for a certificate of appealability. To the extent Ramirez seeks to assert a new substantive claim to relief, we interpret his application

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

for a certificate of appealability as a motion for authorization to file a second § 2254 application, and we DENY that motion.

I.

A.

A Texas jury convicted John Ramirez in 2008 of capital murder for killing Pablo Castro. The evidence at trial showed that Ramirez confronted Castro outside a convenience store in Corpus Christi, stabbed him 29 times, and robbed him of $1.25, apparently to purchase drugs. *See generally Ramirez v. Stephens*, 641 F. App'x 312, 314 (5th Cir. 2016) (unpublished). At the sentencing phase of Ramirez's trial, defense counsel made an opening statement and presented Ramirez's father as a mitigation witness. But after Ramirez's father testified, Ramirez instructed counsel not to present any further mitigation evidence and not to argue against the death penalty in summation.

Defense counsel informed the trial court of Ramirez's request. Lead counsel said he fruitlessly tried to persuade Ramirez otherwise but was ultimately "inclined" to follow Ramirez's instructions. The court questioned Ramirez, who confirmed that it was his own decision not to present further mitigation evidence and that he had reached this decision "a long time ago." Dr. Troy Martinez, a clinical psychologist who had worked on Ramirez's mitigation case, testified that he met with Ramirez and concluded Ramirez reached this decision voluntarily and intelligently. The defense accordingly rested without calling further mitigation witnesses or presenting further mitigation evidence. At Ramirez's request, counsel read a Bible verse in lieu of a closing argument. The jury answered the Texas special questions in favor of death, and the trial court accordingly entered a judgment sentencing Ramirez to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Ramirez's conviction and sentence on direct appeal. *Ramirez v. State*, No. AP-76100, 2011 WL 1196886 (Tex. Crim. App. Mar. 16, 2011) (not designated for publication). Ramirez, through attorney Michael Gross, filed an application for habeas corpus in state court alleging five constitutional violations, including ineffective assistance of trial counsel. Ramirez argued that his trial counsel were ineffective for six separate reasons, including counsel's "failure to present mitigating evidence" in violation of *Wiggins v. Smith*, 539 U.S. 510 (2003). In making this argument, Ramirez first faulted trial counsel for failing to sufficiently investigate his social history. Ramirez noted that prior to trial, counsel spoke only to his mother and two grandmothers. And trial counsel spoke to Ramirez's father for only about ten minutes outside the courtroom before his testimony. Ramirez asserted that trial counsel should have spoken to his aunt, sister, and half-brother, and he recounted a litany of potentially mitigating information from his past that trial counsel might have learned had they conducted a fuller mitigation investigation. Next, Ramirez faulted trial counsel for failing to recognize that he was "unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of the trial."

In its findings of fact and conclusions of law, the trial court framed Ramirez's mitigation claim as limited to an argument that trial counsel were ineffective in failing to recognize Ramirez was incapable of directing counsel to rest his mitigation case. Nevertheless, the trial court made findings of fact on trial counsel's mitigation investigation and concluded that Ramirez failed to prove that trial counsel's "investigation and development of mitigation evidence was deficient in any way." It alternatively concluded that any error in investigating Ramirez's mitigation case did not prejudice Ramirez "both in light of the mitigation evidence that was already available to the defense and

in light of Ramirez's own decision not to present a mitigation defense at trial." The court accordingly concluded that trial counsel were not constitutionally ineffective for any of the reasons Ramirez alleged; alternatively, it concluded that Ramirez affirmatively waived any error bearing on the punishment phase by choosing not to present a mitigation case. It concluded his other claims for relief failed as well. The TCCA adopted the trial court's findings and conclusions in full and thus denied Ramirez relief. *Ex parte Ramirez*, No. WR-72,735-03, 2012 WL 4834115 (Tex. Crim. App. Oct. 10, 2012) (not designated for publication).

Ramirez thereafter filed a motion in the federal district court to have Gross appointed as federal habeas counsel pursuant to 18 U.S.C. § 3599(a)(2). The district court granted the motion. Ramirez then filed a 28 U.S.C. § 2254 application, again through Gross. Substantially repeating the argument that he made in his state-court application, Ramirez argued that trial counsel provided constitutionally ineffective assistance by failing to conduct a sufficient mitigation investigation and by failing to recognize that Ramirez was not mentally competent to waive his mitigation defense.

The district court denied Ramirez's application. In addressing his ineffective assistance of counsel claim, it deferred to the state court's finding that Ramirez was competent when he asked trial counsel to cease his mitigation defense. It also deferred to the state court's conclusion that trial counsel conducted an adequate mitigation investigation, observing that in his opening argument in the penalty phase of Ramirez's trial, "counsel provided broad outlines of what evidence the defense wanted to present," which "correspond[ed] with the details found in the habeas affidavits." Moreover, citing to our decision in *Sonnier v. Quarterman*, 476 F.3d 349, 362 (5th Cir. 2007), the district court held that Ramirez's competently made instruction to counsel to terminate his mitigation defense prevented him from arguing

counsel was ineffective for not presenting further mitigation evidence. We denied Ramirez's request for a certificate of appealability, *Ramirez v. Stephens*, 641 F. App'x 312 (5th Cir. 2016) (unpublished), and the Supreme Court denied certiorari, *Ramirez v. Davis*, 137 S. Ct. 279 (2016).

B.

Not long before Ramirez filed his § 2254 application, the Supreme Court issued its decisions in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), which introduced a notable change to federal habeas procedure. As elaborated upon further below, these cases held that under certain circumstances, if a § 2254 applicant defaults on a meritorious ineffective assistance of trial counsel claim by not raising it in his initial application for postconviction relief in state court, then state postconviction counsel's ineffective assistance in not raising that argument in state court can constitute cause to overcome the default in federal court. A successful *Martinez–Trevino* argument allows the applicant to bring the defaulted claim for the first time in federal court. *See Trevino*, 569 U.S. at 416-17.

In January 2017, about a week before he was scheduled to be executed, Ramirez filed motions to substitute counsel and to stay his execution. Through new counsel, Ramirez argued that Gross labored under a conflict of interest during Ramirez's federal habeas proceedings because *Martinez* and *Trevino* put Gross's duty to represent Ramirez at odds with Gross's interest in protecting his professional reputation. If Gross had failed to raise a meritorious ineffective assistance of counsel claim in Ramirez's state-court habeas application, then Gross's duty to Ramirez during the federal proceedings would have required Gross to argue that he provided Ramirez with ineffective assistance during the state-court habeas proceeding. The district court granted both motions. We denied the State's subsequent motion to vacate the stay. *Ramirez v. Davis*, 675 F. App'x 478 (5th Cir. 2017) (unpublished) (per curiam).

More than a year and a half later, Ramirez filed in the district court the present motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6), in which he urges the court to vacate its judgment denying his § 2254 application. He also argues that Gross's conflict of interest entitled him to bring a new claim that trial counsel failed to uncover certain mitigating evidence. Specifically, Ramirez says that trial counsel failed to discover that Castro's son did not support Ramirez's death sentence and that when Ramirez was nine-years old, he witnessed his mother's boyfriend stab his mother. He insists that trial counsel were ineffective for failing to discover and present this evidence at trial, and that Gross was ineffective for failing to discover and present it in his state and federal habeas applications.

The district court denied Ramirez's motion. It held that he did not meet the two requirements to bring a Rule 60(b)(6) motion: he failed to bring the motion "within a reasonable time" and he failed to show "extraordinary circumstances" warranting relief from judgment. Alternatively, the district court concluded that Ramirez's motion was an unauthorized second § 2254 application. It accordingly denied the motion and declined to grant Ramirez a certificate of appealability ("COA"). Ramirez now asks us for a COA.

II.

As a threshold matter, we must consider whether Ramirez's motion is a so-called true Rule 60(b) motion or a successive § 2254 application. In the alternative to rejecting Ramirez's motion on the merits, the district court concluded it was an unauthorized successive § 2254 application. The district court erred by considering this as an alternative matter. The Antiterrorism and Effective Death Penalty Act divests the district court of jurisdiction to hear successive unauthorized § 2254 applications; thus, to the extent the district court concluded Ramirez's motion was a successive § 2254 application, the district court should have dismissed the motion or transferred it to this court

for authorization. *See* 28 U.S.C. § 2244(b)(4); *Burton v. Stewart*, 549 U.S. 147, 152 (2007).

Nevertheless, we conclude Ramirez's motion, at least in part, was a true Rule 60(b) motion. "[T]here are two circumstances in which a district court may properly consider a Rule 60(b) motion in a § 2254 proceeding: (1) the motion attacks a 'defect in the integrity of the federal habeas proceeding,' or (2) the motion attacks a procedural ruling which precluded a merits determination." *Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018) (quoting *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005)). A § 2254 applicant need not satisfy § 2244(b)'s authorization requirement for the district court to consider such a motion. *See id.* at 343. By contrast, a motion that "seeks to add a new ground for relief" or "attacks the federal court's previous resolution of a claim *on the merits*" is the "functional equivalent of [an] unauthorized successive § 2254 petition[]," so the applicant must comply with § 2244(b) before the district court can review the motion. *Id.* (quoting *Gonzalez*, 545 U.S. at 532).

In *Clark v. Davis*, 850 F.3d 770 (5th Cir. 2017), we considered a § 2254 applicant's Rule 60(b) motion with a premise identical to Ramirez's Rule 60(b) motion: i.e., that counsel filed his § 2254 application while under a conflict of interest because counsel also represented the applicant in his state-court postconviction proceedings. *See id.* at 773. We concluded that to the extent the motion alleged that counsel's conflict of interest created a defect in the integrity of the § 2254 proceedings, it was a true Rule 60(b) motion. *See id.* at 779-80. Therefore, the district court had jurisdiction to consider at least part of Ramirez's Rule 60(b) motion, so we will consider Ramirez's COA application to the extent it is premised on his argument that he was denied conflict-free counsel during his federal habeas proceedings.

In addition to arguing that Gross's alleged conflict of interest provides grounds for relief from judgment, Ramirez also appears to assert that Gross's

conflict of interest entitles him to file a new claim for relief without vacating the district court's prior judgment. In his motion, Ramirez argues that "[e]ven if Ramirez does not qualify for relief under Rule 60, . . . Gross's conflict in the prior federal proceedings in [the district court] triggers an equitable exception in favor of allowing claims to be heard when presented by counsel who are not conflicted." Ramirez cites no authority supporting such an exception to § 2244, and the plain text of § 2244 and its jurisdictional character are incompatible with Ramirez's equitable argument. *Cf. United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015) (explaining jurisdictional bars are not subject to equitable exceptions).

As we see it, Ramirez has two options at this stage in the litigation: Rule 60 or § 2244. He cites no authority, and we know of none, suggesting a third, equitable path. Accordingly, the district court did not have jurisdiction to entertain Ramirez's motion to the extent it asserts substantive claims without seeking to vacate the district court's judgment. We will nevertheless construe the portion of Ramirez's COA application repeating these arguments as a motion for authorization to file a second § 2254 application. *See United States v. Ennis*, 559 F. App'x 337, 338 (5th Cir. 2014) (unpublished) (per curiam) (construing COA application in the alternative as motion to file successive 28 U.S.C. § 2255 motion).

III.

We turn first to Ramirez's application for a COA to challenge the denial of his true Rule 60(b) motion. A § 2254 applicant may not appeal a district court's ruling without first obtaining a COA. *See Buck v. Davis*, 137 S. Ct. 759, 773 (2017). This includes appeals from orders denying true Rule 60(b) motions. *See Hernandez v. Thaler*, 630 F.3d 420, 428 & n.37 (5th Cir. 2011). "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional

claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). When the district court based its ruling on procedural grounds, the COA applicant must additionally show "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). On a merits appeal, we review a district court's order denying a Rule 60(b) motion for abuse of discretion; thus, the question at the COA stage is "whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment." *Buck*, 137 S. Ct. at 777.

Rule 60(b) provides six grounds on which the district court can vacate a judgment. Ramirez seeks relief under Rule 60(b)(6) specifically, which is a catchall provision that authorizes vacatur for "any other reason that justifies relief." To reopen judgment via Rule 60(b)(6), a movant must clear two hurdles. First, "[a] motion under Rule 60(b)(6) must be made 'within a reasonable time,' 'unless good cause can be shown for the delay.'" *Clark*, 850 F.3d at 780 (footnotes omitted) (first quoting Fed. R. Civ. P. 60(c)(1); then quoting *In re Osborne*, 379 F.3d 277, 283 (5th Cir. 2004)). Second, "relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck*, 137 S. Ct. at 777 (quoting *Gonzalez*, 545 U.S. at 353).

The district court concluded that Ramirez met neither requirement. We consider in turn whether each conclusion was debatably an abuse of discretion.

A.

Rule 60(c)(1) does not provide a fixed time limit for filing a Rule 60(b)(6) motion. Rather, it prescribes a reasonableness standard, which requires the court to consider "the 'particular facts and circumstances of the case.'" *Clark*, 850 F.3d at 780 (quoting *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994)). In weighing reasonableness, "[w]e consider

'whether the party opposing the motion has been prejudiced by the delay in seeking relief and . . . whether the moving party had some good reason for his failure to take appropriate action sooner.'" *Id.* (omission in original) (quoting *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976)); *see also* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2866 (3d ed. 2012) ("What constitutes reasonable time necessarily depends on the facts in each individual case. The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and whether the moving party had some good reason for the failure to take appropriate action sooner." (footnotes omitted)).

The district court determined that Ramirez's motion was untimely because he filed it 5 years after *Trevino* was decided and 18 months after the district court appointed conflict-free counsel. Relying on our decisions in *Clark*, *Pruett v. Stephens*, 608 F. App'x 182 (5th Cir. 2015) (unpublished) (per curiam), and *In re Paredes*, 587 F. App'x 805 (5th Cir. 2014) (unpublished) (per curiam), the district court concluded this was an unreasonable amount of time for Ramirez to wait to file his motion. We held in each of those cases that a § 2254 applicant untimely filed a Rule 60(b)(6) motion challenging counsel's *Trevino* conflict. In *Clark*, the applicant waited 16 months after *Trevino* was decided and 12 months after conflict-free counsel was appointed, 850 F.3d at 782; in *Pruett*, the applicant waited 19 months after *Trevino* was decided and 21 months after conflict-free counsel was appointed, 608 F. App'x at 185-86; and in *Paredes*, the applicant waited 17 months after *Trevino* was decided and 13 months after conflict-free counsel was appointed, 587 F. App'x at 825.

Ramirez argues that these cases do not represent a "bright line in the sand." He insists that his delay is excusable up until January 31, 2017, because he was represented by Gross during that time, who did not alert Ramirez to his potential conflict. Beyond January 31, 2017, Ramirez says his delay was

excusable because the State consented to his timeline for filing the present motion after the district court stayed his execution.

On first blush, *Clark* appears to foreclose Ramirez's argument that his delay should be excused for the period he was represented by Gross. The § 2254 applicant in *Clark* raised a similar argument, which we rejected. *See* 850 F.3d at 782. But *Clark* is distinguishable from the case at hand. The applicant in *Clark* was actively represented by state-appointed conflict-free counsel in state court during the same period that conflicted counsel was representing him in federal court. *Id.* at 783. And although the applicant's state-appointed counsel could not represent the applicant in federal court, we explained that state-appointed counsel could have advised the applicant to seek new federal counsel. *Id.* Moreover, we noted that the applicant was "physically present in August 2013 when the state trial court considered whether a conflict of interest had arisen in the wake of *Trevino*." *Id.* Therefore, the applicant in *Clark* could not claim ignorance of the potential conflict.

Paredes is more analogous. The § 2254 applicant in *Paredes* also argued that his delay should be excused for the period during which he was represented by conflicted counsel because counsel did not raise the possibility that *Trevino* created a conflict of interest. We rejected this argument, explaining that the applicant's "unawareness of the *Trevino* decision could be described, at best, as mistake, inadvertence, or excusable neglect in keeping apprised of the law that pertained to his state conviction." 587 F. App'x at 824. But *Paredes*—an unpublished opinion—is not precedential. And although we find it well reasoned and persuasive, it does not resolve the question beyond reasonable debate.

Reasonable jurists could also debate whether Ramirez's 18-month delay in filing his Rule 60(b)(6) motion after conflict-free counsel was appointed was unreasonable. On February 10, 2018, about a year after the district court

stayed Ramirez's execution, Ramirez and the State filed a joint motion for a scheduling order, under which Ramirez would file a "supplemental brief" by July 16, 2018. The district court granted the motion. Ramirez thereafter filed an unopposed motion to extend that deadline to August 20, 2018, which the district court also granted.

We concluded in *Clark*, *Pruett*, and *Paredes* that the district courts acted within their discretion in finding Rule 60(b)(6) motions untimely when similar amounts of time elapsed between the point at which the § 2254 applicants were appointed conflict-free counsel and the point at which they filed their motions. Nevertheless, the Rule 60(c)(1) timeliness inquiry requires fact-specific, case-by-case inquiry. And here, that the State agreed to the post-stay schedule—albeit after an unexplained one-year delay—suggests that the delay did not significantly prejudice the State, which is one of the key factors in the Rule 60(c)(1) analysis.[1] Reasonable jurists could conclude that the district court abused its discretion in ruling that Ramirez's Rule 60(b)(6) motion was untimely.

B.

We hold, however, that no reasonable jurists could conclude that the district court abused its discretion in ruling that Ramirez failed to show extraordinary circumstances justifying Rule 60(b)(6) relief. Courts are free to "consider a wide range of factors" in determining whether extraordinary circumstances exist. *Buck*, 137 S. Ct. at 778. "These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of

[1] The scheduling order specifically contemplated Ramirez filing a "supplemental brief." It is not entirely clear what the parties meant by that. But the State previously represented to us that it believed Ramirez's only potential route to attack Gross's conflict of interest would be through a Rule 60(b) motion. It is therefore apparent that the State expected Ramirez to file a Rule 60(b) motion, so we attach no significance to the joint scheduling motion's reference to supplemental briefing instead.

undermining the public's confidence in the judicial process.'" *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 874, 863-64 (1988)). Moreover, a Rule 60(b)(6) movant must show that he can assert "a good claim or defense" if his case is reopened. *Id.* at 780 (quoting Wright et al., *supra*, § 2857). Extraordinary circumstances justifying Rule 60(b)(6) relief "will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535.

As we understand his argument, Ramirez asserts that extraordinary circumstances exist because *Trevino* created a conflict of interest that prevented Gross from adequately representing him in his federal habeas proceeding and non-conflicted counsel would have asserted a meritorious *Trevino* claim. We agree with Ramirez's opening premise—*Trevino* created a potential conflict of interest in Gross's representation of Ramirez during his federal habeas proceedings. *Cf. Christeson v. Roper*, 135 S. Ct. 891, 893-94, 896 (2015) (finding counsel was conflicted and needed to be substituted because § 2254 applicant's equitable-tolling argument required asserting counsel committed serious misconduct). But no reasonable jurist would conclude that conflict-free counsel could have asserted a meritorious *Trevino* claim or, for that matter, that Ramirez could now assert a meritorious *Trevino* claim if his case were reopened with conflict-free counsel.

Typically, if a § 2254 applicant's claim would be procedurally defaulted in state court, then the federal habeas court may not consider the defaulted claim absent a showing of cause and prejudice. *See Coleman v. Goodwin*, 833 F.3d 537, 540 (5th Cir. 2016). Prior to *Martinez*, the Supreme Court's longstanding rule held that state postconviction counsel's ineffective assistance did not constitute cause to excuse a procedural default in federal court. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). But in *Martinez*, the Court carved out a narrow exception to this rule. It held that if state law requires an ineffective assistance of counsel claim to be brought for the first

time in a collateral proceeding, then state postconviction counsel's ineffective assistance in failing to raise a substantial ineffective assistance of trial counsel claim excuses that claim's default. *See Martinez*, 566 U.S. at 17. In *Trevino*, the Court expanded *Martinez* ever so slightly to situations, as is the case in Texas, in which state law formally allows ineffective assistance of trial counsel claims to be brought on direct appeal but procedural rules deny prisoners a meaningful opportunity to do so. *See Trevino*, 569 U.S. at 429. The Court has repeatedly emphasized that *Martinez* and *Trevino* create only a narrow rule, *see Trevino*, 569 U.S. at 428; *Martinez*, 566 U.S. at 9, and it has since declined to extend the rule to excuse defaulted claims of ineffective assistance of appellate counsel, *see Davila v. Davis*, 137 S. Ct. 2058, 2062-63 (2017).

It is beyond debate that Ramirez cannot claim the benefit of *Trevino*. As an initial stumbling point, he does not identify a defaulted claim that conflict-free counsel could have raised. Ramirez argues that Gross failed to present a claim in state court that trial counsel were ineffective in conducting a deficient mitigation investigation. But Gross indeed raised such claim. True, the state court characterized Ramirez's mitigation claim as arguing only "that, 'counsel were ineffective in failing to recognize that [Ramirez] was unable and incompetent to direct counsel to not call any further witnesses during the punishment phase of the trial,' and that '[d]efense counsel's performance was deficient in failing to present this mitigation testimony'" instead of arguing "that his trial attorneys were ineffective for failing to investigate mitigation evidence." This characterization is baffling when read against Ramirez's state-court habeas application, which spends nine pages discussing the mitigation evidence that trial counsel should have, but did not, discover—and even more so when read against the state court's own findings and conclusions rejecting the proposition that trial counsel conducted a constitutionally ineffective mitigation investigation.

But whether the state court believed that Ramirez defaulted on his deficient-investigation claim makes no difference here because the federal district court did not treat this claim as defaulted. The district court characterized Ramirez's argument in his § 2254 application as "contend[ing] that trial counsel made inadequate efforts to *investigate and prepare* evidence to militate for a life sentence." (emphasis added). And it concluded:

> Ramirez has not shown that the state habeas court's decision was contrary to, or an unreasonable application of, federal law. The defense team investigated mitigating evidence for the punishment phase. In his opening argument, trial counsel provided broad outlines of what evidence the defense wanted to present. The substance of the road map trial counsel placed before the jury corresponds with the details found in the habeas affidavits. Ramirez has not identified any witness other than family members who could provide testimony exceeding trial counsel's opening argument.

Thus, even if Gross did err in not presenting a deficient-investigation claim in state court, his failure to raise a *Trevino* argument in federal court made no difference; the district court considered this claim regardless of default.

What Ramirez really argues is that Gross rendered ineffective assistance in preparing his state habeas application by failing to discover certain additional evidence that might have convinced the state court that trial counsel's mitigation investigation was constitutionally deficient. *Martinez* and *Trevino* do not provide a vehicle for Ramirez to raise such an argument. When a state court considers a claim on the merits, a federal habeas court's review is limited to the state-court record. *See Cullen v. Pinholster*, 563 U.S. 170, 185 (2011). Thus, even if Ramirez had conflict-free counsel file his § 2254 application, conflict-free counsel would have been bound to the record Gross developed in state court. There may be an argument in favor of creating a *Martinez*-type exception to *Pinholster* to allow introduction of evidence in a

federal habeas court that, but for counsel's ineffective assistance, would have been introduced in state court. But we have no power to create an exception to *Pinholster*, and given the Court's reluctance to extend *Martinez* and *Trevino* further than it has, we doubt the Court would create such an exception either.[2]

The problems with Ramirez's *Trevino* argument do not end with his failure to identify a procedural default. Even if reasonable jurists would debate whether *Trevino* provides some vehicle for Ramirez to bring his current argument—either because he defaulted on his deficient-investigation claim or because *Trevino* creates an exception to *Pinholster*—no reasonable jurist could conclude that Ramirez has "a substantial claim of ineffective assistance at trial." *Martinez*, 566 U.S. at 17. A "substantial" ineffective assistance of trial counsel claim is one that "has some merit." *Id.* at 14. Judging the substantiality of Ramirez's underlying claim thus requires us to apply the familiar standard from *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a prisoner claiming ineffective assistance of counsel must make two showings: (1) "that counsel's representation fell below an objective standard of reasonableness," *id.* at 687-88; and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Here, assuming reasonable jurists would debate whether Ramirez's new evidence provides some merit to Ramirez's deficient-performance argument, no reasonable jurist would find any merit in Ramirez's prejudice argument. As the state court, the district court, and this court have all previously found, Ramirez's knowing and intelligent decision to cut short his mitigation defense renders irrelevant the quality of trial counsel's mitigation investigation.

[2] Ramirez acknowledges the problem *Pinholster* poses for his argument, but he does not suggest a solution.

Moreover, our caselaw makes clear "that when a defendant blocks his attorney's efforts to defend him . . . he cannot later claim ineffective assistance of counsel." *Roberts v. Dretke*, 356 F.3d 632, 638 (5th Cir. 2004).

In his present motion, Ramirez does not seek to relitigate whether he was competent when he ordered his attorneys to cease their mitigation defense. The only argument he makes in favor of *Strickland* prejudice is that "[h]ad trial counsel taken steps to secure [Ramirez's mother's] attendance, Ramirez would not have discontinued the presentation of mitigating evidence and [his] mother's vital testimony would have been considered by the jury militating against the imposition of the death penalty." Ramirez provides no evidentiary support for his assertion that he would have continued with his mitigation defense if his mother were there to testify. In fact, this proposition is at odds with the state court's findings about Ramirez's reasons for waiving his mitigation defense: "to avoid putting his family through the process of pleading for his life and to avoid a life sentence in prison."

In sum, even if we were to reopen the district court's judgment and allow Ramirez to relitigate his § 2254 application with conflict-free counsel, Ramirez has failed to identify a meritorious claim he could bring. *See Buck*, 137 S. Ct. at 779-80. Accordingly, no reasonable jurist would debate the district court's conclusion that Ramirez has failed to show extraordinary circumstances warranting Rule 60(b)(6) relief. We accordingly deny Ramirez's application for a COA.

IV.

We now turn to the part of Ramirez's COA application that we construe as a motion for authorization to file a second § 2254 application. Section 2244(b)(1) prohibits a § 2254 applicant from relitigating any claim in a second or successive habeas application that the applicant raised in a prior § 2254 application. *See Williams v. Thaler*, 602 F.3d 291, 301 (5th Cir. 2010). As

discussed above, Ramirez raised his deficient-investigation claim in his original § 2254 application, and the district court rejected it on the merits. Accordingly, he may not raise it anew in a second § 2254 application.

Alternatively, interpreting Ramirez's deficient-investigation claim as a new claim, Ramirez fails to make the showing required to bring a new claim in a second § 2254 application. Section 2244(b)(2) states:

> 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.

Ramirez's deficient-investigation claim would fail on either ground. Capital defendants have had a right to a sufficient mitigation investigation since at least 2003 when the Court decided *Wiggins*. *See* 539 U.S. at 534. Further, although Ramirez relies on newly discovered evidence, he asserts that trial counsel and Gross should have discovered this evidence sooner. And even to the extent that any of Ramirez's new evidence could not have been discovered sooner, this evidence relates only to Ramirez's mitigation defense, not to his innocence of Castro's murder or his ineligibility for the death penalty. It thus does not provide Ramirez with a basis for relief via § 2244(b)(2)(B). *See In re*

Rodriguez, 885 F.3d 915, 918 (5th Cir. 2018) (comparing § 2244(b)(2)(B) to manifest miscarriage of justice doctrine); *see also Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (holding that "existence of additional mitigating evidence" is not manifest miscarriage of justice). Therefore, Ramirez fails to make the prima facie showing needed for authorization to file a second § 2254 application.

V.

We DENY Ramirez's application for a certificate of appealability. To the extent Ramirez's Rule 60(b) motion seeks to assert a new substantive claim, we interpret it as a motion for authorization to file a second § 2254 application and DENY that motion.