****CAPITAL CASE****

No. 24-6798

IN THE
Supreme Court of the United States

KARL DOUGLAS ROBERTS,

Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Karl Roberts seeks review of the Eighth Circuit's ruling imposing 28 U.S.C. § 2254(d), based on the notion that Arkansas courts "decided the merits of Roberts's intellectual disability claim when they determined he was not intellectually disabled under Arkansas law, even if that determination occurred prior to the *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] decision." Pet.App.11a. Respondent contends that the relevant state-court decision was not in 1999, when the trial court found Roberts death-eligible under state law, but in 2003, when the Arkansas Supreme Court affirmed Roberts's conviction on mandatory review, and when his death eligibility was neither raised nor discussed. Respondent misunderstands the function of Arkansas's mandatory review procedure and misrepresents the basis for the Eighth Circuit's holding and its perversion of this Court's § 2254(d) law.

Roberts's petition presents an important, pathbreaking and—as of last month—recurring question for certiorari review. The Court should grant review and decide if and how § 2254(d) applies to state-law issues. It should conclude that there is no adjudication on the merits of a federal claim when a state court issues a purely state-law ruling, particularly when no party even alluded to federal law and when no federal-law analog existed.

I. The Arkansas Supreme Court did not adjudicate any intellectual disability claim on the merits in 2003—or ever.

Respondent first opposes certiorari by asserting that § 2254(d) deference was appropriate because the Arkansas Supreme Court actually adjudicated an intellectual disability ("ID") claim in 2003, after the *Atkins* ruling. This argument

mischaracterizes both the function and purpose of Arkansas's mandatory review procedure in capital cases, as well as the record of what was raised to and considered by the Arkansas Supreme Court.

First, Respondent is wrong that an *Atkins* claim—or any ID claim—was presented to (or considered by) the Arkansas Supreme Court. Roberts waived appellate and collateral proceedings immediately after his conviction. *See Roberts v. State*, 488 S.W.3d 524, 526 (2016). Therefore, the Arkansas Supreme Court engaged in mandatory procedures set out in *State v. Robbins*, 5 S.W.3d 51 (Ark. 1999) and Ark. R. App. P. Crim. 10. But a "*Robbins* review" is not a magic wand that constructively decides the merits of all conceivable issues. Instead—to "accomplish this [*Robbins* review] task," the Arkansas Supreme Court "appoint[s] an amicus counsel to review the record and assist th[e] court in its review." *Engram v. State*, 200 S.W.3d 367, 370 (Ark. 2004) (describing the procedure). Even though the rule instructs the court to "consider and determine" a variety of enumerated issues, "counsel is still responsible for abstracting the record and briefing the issues required to be reviewed." *Noel v. Norris*, 194 F.Supp.2d 893, 929 (E.D. Ark. 2002) (citing *Robbins*, 5 S.W. 3d at 55–57). The court simply is not required to, nor does it, scour the record and constructively adjudicate every unraised issue.

Here, the court's amicus did not alert the court to a potential ID issue—state, federal, or otherwise. Amicus's was tasked to "provide a service to the court" by briefing potential issues, and amicus did that as to other issues. Pet.App.218a, 221a. Because no intellectual-disability argument was made to the court—neither

by Roberts nor by court amicus—and because the Arkansas Supreme Court's opinion makes no mention of the issue, *see* Pet.App.128a–144, there was no adjudication for purposes of § 2254(d). *Cf. Dansby v. Payne,* 47 F.4th 647, 655 (8th Cir. 2022) (whether the Arkansas Supreme Court "adjudicated" a claim under § 2254(d) is a question of fact informed by the content of the opinion and in the defendant's briefing). There exists **one** order in the annals of this case that purports to speak to Roberts's intellectual disability—the 1999 pretrial state-law ruling. Any suggestion of a later *Atkins* adjudication is wrong multiple times over.

What is more, neither the rule nor *Robbins* opinion mentions the federal constitution, let alone requires the Arkansas Supreme Court to look for federal error. The Eighth Circuit holds as much: "[a] petitioner's federal constitutional claims are . . . *not* implicitly considered by the state court under *Robbins* in a manner sufficient to preserve them for federal habeas review." *Williams v. Norris*, 576 F.3d 850, 865 (8th Cir. 2009); *see also O'Neal v. Norris*, 2008 WL 3070656, at *7 (E.D. Ark. 2008) ("[B]ecause the Arkansas Supreme Court did not expressly mention this claim in conducting its review, this Court cannot say with certainty that the claim was adjudicated"); *cf. Gardner v. Norris*, 949 F. Supp. 1359, 1383 (E.D. Ark.1996) ("There is no requirement that the Arkansas court ever *consider* errors not raised[.] . . . Even in capital cases, the Arkansas Supreme Court does not read every page of a trial record in search of errors prejudicial to the appellant.").

Even if Respondent were correct that it was incumbent upon the court to comb the entire record for unbriefed federal objections, Roberts's trial record would not

have alerted to any preserved prejudicial error concerning intellectual disability. The state-law issue was flagged in a *pro forma* motion and decided in an omnibus hearing on dozens of issues. Trial counsel only asked the court "*to determine whether* Roberts suffers from mental retardation." Pet.App.148a (emphasis added). Counsel never argued—neither orally nor in any papers—what the "determination" should show. The only evidence came from the prosecution witness, Dr. Mallory. Counsel always declined to state a position on the issue before the court—even when the trial court solicited it. Pet.App.194a ("I can't do anything but say the Court has the necessary information to make a ruling on that."). Counsel unsurprisingly did not object after the trial court entered its ruling. Pet.App.198a. Because *Robbins* review concerns only the "adverse rulings *objected to* by Roberts and his counsel," Pet.App.46a, 138a, the record here lacks any pretense of objection. The record thus shows that even if mandatory review functioned as Respondent contends, the pretrial ruling would not be subject to *Robbins* review at all.

Respondent's contention that an *Atkins* claim was decided by the Arkansas Supreme Court in 2003 is belied by state law, Eighth Circuit law, and by the record.

II. The Eighth Circuit's recent decision in *Rankin v. Payne* doubles down on its novel rule that a pure state-law order can subject a later-raised federal claim to § 2254(d).

Last month, the Eighth Circuit again applied § 2254(d) deference to a purely state-law intellectual disability ruling that rendered prior to *Atkins* when no corollary federal right existed. *See Rankin v. Payne*, No. 23-3526, 2025 WL 1718224, at *5 (8th Cir. June 20, 2025). The timing of the state-court ruling in that case

undercuts any suggestion that the Eighth Circuit's decision in Roberts's case deferred to a 2003 post-*Atkins* appeal, rather than the trial court's order.

Rankin's direct appeal was decided five years before *Atkins*. *See id.* at *5 (citing *Rankin v. State*, 948 S.W.2d 397, 403-04 (Ark. 1997)). Yet the Eighth Circuit cited the *Roberts* opinion below and applied "AEDPA deference to the state court's conclusion that Rankin was not intellectually disabled." *Id.* at *5 (citing *Roberts v. Payne,* 113 F.4th 801, 808 (8th Cir. 2024)). The *Rankin* panel also *cited* Roberts to explain that the reason for applying § 2254(d) was that the state-law standard has been later deemed to be coterminous with the later-announced *Atkins* right. *Id.* at 4 n.5 (citing *Roberts*, 113 F.4th at 808.)

Rankin confirms that the Eighth Circuit did not apply § 2254(d) due to a belief that the Arkansas Supreme Court applied *Atkins* on mandatory review. The Eighth Circuit rule is that indisputably state-law rulings are subject to federal deference. *Rankin* reinforces the need for this Court's review of this practice.

III. The Question Presented is important and warrants intervention.

The Eighth Circuit's approach for triggering § 2254(d) is doctrinally incoherent and anomalous. Roberts's 1999 state-law ruling on death eligibility had no basis in federal law, and it therefore cannot be deemed to have adjudicated a "claim" for purposes of § 2254(d). A "claim" in federal habeas must be based on a *federal* grounds. 28 U.S.C. § 2254(a). For that reason, four circuits hold that a "claim" within the meaning of § 2254(d) means an "asserted federal basis for relief" that was made to a state court. Pet.13–15 (collecting authorities). The crux of the

Question Presented is the Eighth Circuit's subjugation of pure state-law decisions to § 2254(d) deference.

Respondent's argument reinforces the need for review. The Brief in Opposition ("BIO") helpfully takes no issue with Roberts's view—and the view of the other four circuits—that a "claim" in § 2254(d) is a *federal* claim, in line with *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). BIO at 13 (describing this position as "uncontroversial"). Respondent's instead says that when a petitioner makes a *state-law* argument that might of itself count as an "asserted federal basis for relief"—at least when the "state-law claims [are] closely related to federal claims." BIO at 2, 14–15. When that is the case, says Respondent, an express assertion of state-law grounds amounts to a constructive assertion of a federal basis for relief. BIO at 14–17. Respondent acknowledges that this Court has twice "reserved" deciding that question, and notes that lower courts all hold that asserting a state-law claim, if the state-law elements are identical to a federal analog, is enough for purposes of exhaustion. BIO at 16–17 (collecting lower court cases).

The problem with Respondent's argument is that *all* cases in the BIO deal with state-law rulings with an *already existing* federal-law analog. Raising a nominally state-law claim, therefore, will put the state-court on notice about federal claim. [1]

[1] The BIO cites *Sanders v. Ryder*, 342 F.3d 991 (9th Cir. 2003) (state law on ineffective-assistance is sufficient to exhaust the existing *Strickland* right); *Scarpa v. Ryder*, 38 F.3d 1 (1st Cir. 1994) (same); *Evans v. Ct of Common Pleas*, 959 F.2d 1227 (3d Cir. 1992) (state-law insufficiency of evidence standard same as the then-existing federal standard); *Jackson v. Edwards*, 404 F.3d 612 (2d Cir. 2005) (state law on accurate jury instruction was virtually identical to then-existing federal due-process precedent); *Falconer v. Lane*, 905 F.2d 1129 (7th Cir. 1990) (similar).

But here there was no Eighth Amendment ban on executing persons with intellectual disability in 1999, let alone a federal right with identical elements to state law. Respondent cannot cite any case where the no corollary federal right existed until *after* the state-law ruling, yet that ruling was deemed to preemptively exhaust a nonexistent federal question. Here, the trial court was never on notice of any federal dimension to its death-eligibility decision. Even under Respondent's clever formulation, the trial court did not "adjudicate[]," § 2254(d), a federal claim.[2]

The error below, as the Petition highlights, is explainable by the Eighth Circuit's exclusively purpose-oriented construction of § 2254(d). The panel's first-impression take on the reach of § 2254(d)'s was animated strictly by a need to "stay true to AEDPA's intent." Pet.App. 11a. That included "the essential need to promote the finality of state convictions," *id.* (quoting the non-statutory section of *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022))—or to "prioritize Arkansas's interest in [promptly] adjudicating this habeas litigation." *Id.*

This Court does not have to countenance such an exclusively intent-oriented way to interpret a statute. The Eighth Circuit decision reads as if it came from the bygone era that championed "the elevation of judge-supposed legislative intent over clear statutory text." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 108

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[2] The only thing Respondent's merits defense establishes is that if a *present-day* defendant invokes the state-law procedure death eligibility, that may be enough to implicitly exhaust an Eighth Amendment claim. Doing so now would give the state court fair notice and opportunity to protect a federal right. But contrary to the open question the BIO notes to be reserved about identical-claim exhaustion, the trial judge was given no asserted federal basis to preclude a death sentence.

(2007) (Scalia, J., dissenting) (examining the statutory anticanon of *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)). The Court is not powerless to correct this approach. It can grant certiorari to directly address the permissible ways that purpose may inform § 2254(d)'s sweep. It can also hold the petition pending the decision in *Bowe v. United States*, No. 24-5438, where the parties' (and significant *amici*) briefing is underway and the crux of the case concerns the weight of text and conflicting AEDPA purposes in construing § 2244(b)(1).

The Court should grant review to decide if § 2254(d) sweeps so broadly as to bar relief based on state-law rulings issued with no pretense of applying federal law.

IV. Roberts's case is a good vehicle for the Question Presented.

Respondent lastly asserts a vehicle problem by pointing to defenses it may assert if this Court were to reverse the Eighth Circuit. Respondent says that Roberts will be subject to a potential procedural default and will have to grapple with § 2254(e)(1) deference to factual findings. These objections are meritless and are not vehicle problems in any event.

A. There is no procedural default problem.

If this Court reverses and holds that Roberts did not assert a federal argument in the pretrial state-law hearing, there will be no procedural default problem. Existing circuit precedent (which is favorable to Roberts and the panel embraced) already speaks to purported defaults of *Atkins* claims in Arkansas, and that law would govern on remand. *See Simpson v. Norris*, 490 F.3d 1029, 1034–35 (8th Cir. 2007) (reversing district court's finding that petitioner "defaulted an eighth amendment claim under *Atkins*," because *Atkins* provided a new and "previously

unavailable federal claim [that] is separate and distinct [from then-existing state law criteria]"), *cert. denied,* 552 U.S. 1224 (2008);[3] *see also Sasser v. Norris*, 553 F.3d 1121, 1124–25 (8th Cir. 2009) (reversing procedural default for same reasons), *cert. denied*, 558 U.S. 965 (2009); *Jackson v. Norris*, 256 Fed.Appx. 12 (8th Cir. 2007) (same), *cert. denied*, 553 U.S. 1096 (2008). If this Court holds § 2254(d) does not apply, then Roberts's failure to get a merits ruling will not be a default of the *Atkins* claim. *Simpson*, 490 F.3d at 1034–35.

Second, the state bar in this case would be inadequate to bar federal review. The Arkansas Supreme Court gave Roberts a new collateral proceeding in 2016 upon finding that the trial court was clearly erroneous in deeming him competent to waive review. Both the State's and Roberts's expert witnesses testified about his psychosis and schizophrenia and its effect on his ability to make a rational decision about further review. *See* App. 60a; *Roberts v. State*, 488 S.W.3d 524, 528–29 (2016). Roberts then presented unrebutted testimony that he was intellectually disabled in an *Atkins* claim. Yet the state courts refused to consider the "argu[ment] that he is categorically ineligible for the death penalty . . . [under] *Atkins* . . .," Pet.App.116a, solely because "the issue of Roberts's *competency* at the time of the offense had been settled on direct appeal and could not be reargued in postconviction proceedings." *Id.* (emphasis added). That reasoning makes no sense. The question of *competency*—which was raised through amicus counsel on direct appeal and examined—is legally

[3] The panel below faithfully recognized precedent without doubting its validity, but distinguished it in the context of Roberts's claim because Roberts obtained a state-law ruling. *See* Pet.App.10a–11a (opinion below distinguishing *Simpson*).

and factually distinct from the question of intellectual disability—which was never presented to or considered on direct appeal. The Arkansas Supreme Court's error in 2020 in deeming the claim as previously adjudicated renders the procedural bar inadequate in federal court. *See Cone v. Bell*, 556 U.S. 449, 467–68 (2009) (state court's finding that "it had previously determined" the merits of the claim on direct appeal was not adequate because it was factually wrong); *id.* at 476 (Roberts, C.J., concurring in judgment) (agreeing that there is no procedural default because the federal claim was never "decided in the state system," contrary to the state court's assertion); *id.* at 478 –79 (Alito, J., concurring in part) ("Petitioner is quite correct that his *Brady* claim was not decided on direct appeal, and the Court in the present case is clearly correct in holding that a second attempt to litigate a claim in state court does not necessarily bar subsequent federal habeas review.")[4]

B. Any § 2254(e)(1) hurdle is not a vehicle problem.

Respondent also posits that Roberts's claim will face the hurdle of factfinding deference under § 2254(e)(1). But that has no bearing on the Question Presented. The Eighth Circuit's decision did not rely on § 2254(e)(1)—and the scope of findings subject to § 2254(e)(1) is a matter to be determined on remand. As Roberts briefed below (and what the panel did not reach), § 2254(e)(1) does not foreclose his *Atkins*

[4] Moreover, a default is excused because the underlying claim establishes innocence of the death penalty. If Roberts proves his entitlement to relief under *Atkins*, that would mean that he is not death eligible, which provides cause to excuse any procedural default. *See House v. Bell*, 547 U.S. 518 (2006); *Sawyer v. Whitley*, 505 U.S. 333 (1992).

claim. If the Eighth Circuit believed that § 2254(e)(1) foreclosed relief, it could have rendered that as an alternate defensible holding.

The state-court rulings accept certain historical facts, such as Roberts's measured IQ score of 76, his high school graduation, or employment history. But these discrete facts, accepted as correct, do not foreclose *Atkins* relief—indeed Roberts's expert fully embraced each of these facts. *E.g.,* Pet.App.250a–261a.

Nothing in the Arkansas Supreme Court's opinion following direct review says anything about intellectual disability as a factual finding. Respondent argues that the court's intellectual disability determination, "as a factual matter[,] would still receive deference" under (e)(1). BIO at 25. But again, there was *no intellectual disability claim raised on direct appeal* and no discrete factual findings to defer to. Additionally, § 2254(e)(1) is rebuttable that possibility is also subject to review on remand.[5] The Arkansas Supreme Court opinions contain various assertions in the context of other claims, but none of them make a determination that Roberts was not a person with intellectual disability, nor preclude such a determination. Instead, the court incorrectly found that his *Atkins* claim was procedurally barred because his "competency" had already been determined on direct appeal. App. 441a.

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[5] When last considering how pre-*Atkins* factual findings impacted a post-*Atkins* intellectual disability ruling, the Court ruled re-litigation was not barred by the doctrine of issue preclusion primarily because *Atkins* changed the legal landscape of raising and litigating intellectual disability. *Bobby v. Bies*, 556 U.S. 825 (2009). Whether raising the issue as a state-law mitigator (as in *Bies*) or raising it as a state-law exemption (as here), any pre-*Atkins* factual findings are not preclusive.

Thus, on Roberts's actual *Atkins* claim—the claim he raised in state postconviction—there is no factual determination that (e)(1) would apply to.

Respondent also takes the added step of suggesting that Roberts's 76 IQ alone is fatal to the *Atkins* claim. That is wrong, as the unrebutted expert testimony on this record shows. Pet.App.242a–243a; *accord e.g., Sasser v. Hobbs*, 735 F.3d 833, 850 (8th Cir. 2013) (holding a defendant with a nominal 79 IQ score may be intellectually disabled where a showing of adaptive deficits was made). Roberts's petition and the certiorari amici have thoroughly discussed the myriad reasons why this assertion, and the strict focus on IQ scores is not the sole means of assessing intellectual functioning, or of foreclosing inquiry into adaptive functioning, particularly when that approach comports with the clinical standards. *See* Pet. at 7, Br. of *Amici Curiae* at 10–12. Respondent's attempt to quibble with this factual premise now, at the certiorari stage, is too late. The State never challenged the 76 score as categorically foreclosing *Atkins* review, not even in their posthearing briefing in the postconviction court right after Roberts's case-in-chief.

In all events, because the Eighth Circuit did not weigh in on § 2254(e)(1), so that concern does not affect this Court's review of the § 2254(d) question. The Question Presented is clean. The sole reason for denying relief below was the conclusion that § 2254(d) applies. The Court can review this case and leave any § 2254(e)(1) issue for remand where it belongs. *Cf. Ayestas v. Davis,* 584 U.S. 28, 48 (2018) (declining to decide a looming § 2254(e)(2) issue while noting that it is available to be decided on remand).

V. The Brief in Opposition presents an additional potential question for certiorari review.

Respondent also agrees with Roberts that the Eighth Circuit, by its own terms, erred if it subjected the 1999 pre-*Atkins* ruling to review under § 2254(d)(1) for legal reasonableness under the later *Atkins* precedent. BIO at 20 (positing that "if the relevant state-court decision here truly predated *Atkins*, the Eighth Circuit would [need to] review it under . . . *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989)," whereby "nothing the state court did could possibly be an unreasonable application of the law") (cleaned up). That concession is reason enough to show why the antecedent reasoning—that § 2254(d) applies in the first place—is wrong. *Penry* did not provide any federal right, and Roberts never suggested otherwise or tried to extend *Penry* in 1999. This Court has repeatedly made clear that § 2254(d) deference is rebuttable, but if *Penry* is made the operative law, then deference is conclusive.

In making this point, however, Respondent points out another reason to grant review—namely, to answer another question this Court has "reserved" previously, BIO at 19—"[w]hether § 2254(d)(1) [bars] a federal habeas petitioner from relying on a decision that came after the last state-court adjudication on the merits, but fell within one of the exceptions recognized in *Teague* [*v. Lane,* 489 U.S. 288 (1989)]" BIO at 21–22 (citing *Greene v. Fisher*, 565 U.S. 34, 39 n.* (2011)). After all, as Respondent correctly notes, *Atkins* is the kind of "subsequent decision[] that [is] retroactive under *Teague*." BIO at 19, 22 (citing *Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002)).

Granting certiorari to resolve the *Greene* question about how intervening substantive rules (*e.g.*, like *Atkins*) is not necessary. Had Roberts attempted to federalize an Eighth Amendment claim in 1999—and lost due to the *Penry* precedent—then the significance of the intervening retroactive *Atkins* right would be cert-worthy in its own regard. *Cf.* BIO at 19 (noting that "this Court has reserved whether § 2254(d)(1) bars reviewing state-court decisions under subsequent decisions that are retroactive under *Teague*, which *Atkins* is.").

To the extent the Court believes that the intellectual-disability issue might have been implicitly federalized in the state courts, it can grant the petition along with the reserved *Greene* question flagged by Respondent. But the case is more simply resolvable on grounds discussed in Part III, *supra*—the state court did not adjudicate any federal ground under *Penry* because the state-law hearing only considered state law and no corollary federal right existed.

The Court can answer the Question Presented and remand for the Eighth Circuit to decide the case without the § 2254(d) error. Indeed, because the § 2254(d) error is clean and straightforward, the Court may consider doing so summarily. *See Andrew v. White*, 145 S. Ct. 75 (2025) (summarily vacating and remanding erroneous decision about the sweep of "clearly established federal law" within § 2254(d)(1)); *Shoop v. Hill*, 586 U.S. 45 (2019) (same, when the *Atkins* claim was decided by the Sixth Circuit using a standard that did not exist at the time of the state-court ruling).

CONCLUSION

This Court should grant Roberts's petition for a writ of certiorari.

Dated July 3, 2025

Respectfully submitted,

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