

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

EDWARD LEE BUSBY,
Petitioner,

v.

LORIE DAVIS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Capital Case

Questions Presented

1. When a state habeas court denies a petitioner relief on a federal constitutional claim his claim by imposing a higher burden than is required by federal law, should a federal court conduct de novo review on the grounds that the state court's decision is not an "adjudicat[ion] on the merits" within the meaning of 28 U.S.C. § 2254(d)?
2. When a state habeas court denies a petitioner relief on a federal constitutional claim his claim by imposing a higher burden than is required by federal law, is the state court's decision an "unreasonable application of[] clearly established Federal law" within the meaning of 28 U.S.C. § 2254(d)(1)?
3. When a death row inmate raises a successive claim in state court that he is ineligible for execution pursuant to this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, is a state court's decision denying relief on the basis the inmate has not presented "clear and convincing evidence" of intellectual disability a violation of either the Eighth Amendment or the Fourteenth Amendment's Due Process Clause?
4. When state requires that death-sentenced inmates who seek relief on *Atkins* claims in successive petitions demonstrate intellectual disability by "clear and convincing evidence," is there "an absence of available State corrective process" within the meaning of 28 U.S.C. 2254(b)(1)(B)(1)?

**List of Parties and
Corporate Disclosure Statement**

All parties to the proceeding in the court of appeals are listed in the caption.

Petitioner is not a corporate entity.

**List of All Directly Related
Proceedings in State and Federal Courts**

Trial:

State v. Edward Lee Busby, Jr., No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant County, Tex. Nov. 17, 2005)

Direct appeal:

Edward Lee Busby, Jr. v. State, No. AP-75,300, 253 S.W.3d 661 (Tex. Crim. App. 2008)

State habeas proceeding:

Ex parte Edward Lee Busby, Jr., No. WR-70,747-01 (Tex. Crim. App. Feb. 25, 2009)

Subsequent state habeas proceeding:

Ex parte Edward Lee Busby, Jr., No. WR-70,747-02 (Tex. Crim. App. Mar. 6, 2013)

Federal habeas proceeding in district court:

Edward Lee Busby v. William Stephens, No. 4:09-cv-160-O (N.D. Tex. Mar. 10, 2015)

Federal habeas proceeding in court of appeals:

Edward Lee Busby v. Lorie Davis, No. 15-70008, 925 F.3d 699 (5th Cir. 2019)

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Introduction

Petitioner Edward Lee Busby is intellectually disabled, having a full-scale IQ of 74 and significant evidence of adaptive deficits. Undersigned counsel discovered the evidence of this disability while preparing Busby’s *initial* federal habeas petition. Accordingly, Counsel raised a claim pursuant to this Court’s opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), in Busby’s federal habeas petition. The claim was unexhausted, so, after being ordered to do so by the district court, Counsel presented Busby’s claim to the Texas Court of Criminal Appeals (“CCA”) in what was Busby’s *second* state habeas application.

Under state law, the CCA must find that a state habeas petitioner raising an *Atkins* claim in a successive application has demonstrated by *clear and convincing evidence* he is intellectually disabled before it will authorize the state habeas trial court to take any action (including granting necessary funds to develop the claim, holding an evidentiary hearing, or making factual findings) on the claim. After considering the merits of Busby's claim, the state court found Busby's had not satisfied this high burden and dismissed his habeas application.

Having exhausted Busby's claim, Counsel returned to the district court, where Busby should only have had to prove by a preponderance of the evidence that he is intellectually disabled to be entitled to relief. That court erroneously found Busby's claim was procedurally defaulted. On appeal to the United States Court of Appeals for the Fifth Circuit, Counsel argued Busby's claim was viable in the federal courts, having been exhausted in Busby's subsequent state habeas proceeding. On rehearing, following the Fifth Circuit's issuance of an opinion denying relief, Counsel further argued that review on Busby's claim by the federal courts should be de novo because the state court did not answer the question that is relevant in the federal court: whether Busby had demonstrated by a *preponderance* of the evidence that he is intellectually disabled.

The court of appeals agreed that Busby's claim is viable (i.e., that the claim was not defaulted) because the state court's decision was a decision about the merits of his claim. However, the Fifth Circuit also found that the state court's decision did not involve an unreasonable application of Federal law. The court of appeals arrived

at that decision by relying two decisions from this Court, which the court below believed to control Busby's claim; both of those decisions address a federal habeas petitioner's burden in a successive federal proceeding. Busby's claim, however, was not presented in a successive federal petition. Busby's claim was raised in his initial (and only) federal habeas petition.

State court decisions are not entitled to deference unless those decisions constitute adjudications on the merits of the petitioner's federal claim. In *Johnson v. Williams*, 568 U.S. 289 (2013), this Court analyzed the question of what constitutes an adjudication on the merits of a federal habeas claim; in its opinion, this Court expressly identified a state court decision holding a petitioner to a higher burden than he would have to carry in the federal courts as being one that might well not be entitled to AEDPA deference. Granting review in Busby's case would give this Court an opportunity to resolve this important question left unanswered by *Williams* because the CCA held Busby to a higher burden than required by the federal courts.

Requiring a petitioner to demonstrate that he is intellectually disabled by clear and convincing evidence, as the CCA did in this case, makes it more likely than not that a person who is intellectually disabled will be executed. Granting review in Busby's case would give this Court an opportunity to decide whether its due process jurisprudence will allow a state to require a habeas applicant to demonstrate he is intellectually disabled by clear and convincing evidence.

Finally, there exists no state court process through which Busby could obtain a full and fair adjudication on the merits of his *Atkins* claim. Granting review in this case will allow this Court to address whether the exception to the exhaustion doctrine codified at 28 U.S.C. § 2254 (b)(1)(B)(ii) should operate to allow a federal court to review a claim de novo when the state court made a decision relevant to the merits of the petitioner's federal claim but where there exists no state court process by which that court will fully adjudicate the merits of that federal claim.

Opinions and Orders Below

The decision of the United States Court of Appeals for the Fifth Circuit was issued on May 20, 2019. The opinion, which denied Busby's petition for en banc rehearing and withdrew the previously-issued panel opinion, is attached as Appendix A. The court below granted Busby a certificate of appealability on January 27, 2017. The order is attached as Appendix B. The district court's order was issued on March 10, 2015. ROA.3309.¹ The state habeas court dismissed Busby's subsequent habeas application on March 6, 2013. ROA.2135.

Statement of Jurisdiction

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

¹ Citations to the Record on Appeal in the court of appeals are cited in this Petition as ROA.[page number], pursuant to that court's rule.

Constitutional Provisions and Statutes Involved

The Eighth Amendment to the United States Constitution provides:

“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1.

28 U.S.C. § 2254: Appendix C

28 U.S.C. § 2244: Appendix D

Statement of the Case

Edward Lee Busby was arrested, charged, and convicted of the kidnapping and killing of Laura Lee Crane in January 2004. *State v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Co., Tex. Nov. 17, 2005). The guilt/innocence phase of Mr. Busby’s trial commenced on November 9, 2005. Mr. Busby was convicted of capital murder on November 11, 2005 and was sentenced to death six days later. The Texas Court of Criminal Appeals (“CCA”) affirmed Mr. Busby’s conviction and sentence on May 14, 2008. *Busby v. State*, 253 S.W.3d 661 (Tex. Crim. App. 2008). The conviction became final on December 1, 2008, when this Court denied Mr. Busby’s petition for writ of certiorari. *Busby v. Texas*, 555 U.S. 1050 (2008). On February 25, 2009, the CCA denied Busby relief in his initial state habeas proceedings – during which his then-attorney did not raise a claim pursuant to

Atkins v. Virginia, 536 U.S. 304 (2002). *Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009).

The district court appointed undersigned Counsel to represent Busby on April 13, 2009. ROA.15. Counsel filed Busby's initial federal petition for a writ of habeas corpus in the district court on February 25, 2010. ROA.74. The petition contained an unexhausted claim pursuant to *Atkins v. Virginia* alleging Busby is ineligible for execution because he is intellectually disabled. ROA.173. The claim was also raised in Busby's first amended petition filed on May 24, 2010. ROA.809. Respondent filed her initial answer on October 1, 2010. ROA.1388. Respondent argued that Busby's *Atkins* claim was unexhausted and procedurally defaulted. ROA.1389-90.

Neither Busby's original petition nor his first amended petition discussed whether his *Atkins* claim was exhausted or procedurally defaulted, so in a reply filed on March 16, 2011, Counsel acknowledged the claim was, at that time, unexhausted. Busby therefore asked the district court to issue an interim order resolving procedural questions related to exhaustion; Busby also asked the district court to address whether cause and prejudice excuse alleged procedural default so that, if that court determined Busby's claims required exhaustion, he could move for a stay and abeyance of proceedings. ROA.1506; ROA.1542. On August 17, 2012, the district court entered such an order. ROA.1877. The district court held that a stay and abeyance was necessary for Busby to exhaust his ineffective assistance of counsel claim and, for that reason, it was unnecessary for the court to address

whether a stay and abeyance would be necessary for any of Busby's other unexhausted claims, including his *Atkins* claim. ROA.1888-89. The court ordered Counsel to file a state habeas application within forty-five days and strongly encouraged Counsel to exhaust any potential issue that could be raised in the state court. ROA.1889.

In adherence to the district court's order, Counsel filed Busby's subsequent state habeas application in the Texas CCA on October 1, 2012. ROA.3438. For the CCA to authorize any claim raised in Busby's subsequent state application, that court had to find that Busby's claim satisfied one (or more) of the three criteria contained in section 5 of article 11.071 of the Texas Code of Criminal Procedure. *See* Tex. Code Crim. Proc. art. 11.071 § 5(a). With respect to Busby's *Atkins* claim, Counsel argued the claim satisfied section 5(a)(3), which is based upon the federal fundamental miscarriage of justice doctrine contained in *Sawyer v. Whitley*, 505 U.S. 333 (1992). ROA.3455. (Because *Atkins* had already been decided by the time Busby filed his initial state application, section 5(a)(3) was the only one of the section 5 criteria through which, pursuant to state law, Busby's claim could be authorized. *Ex parte Blue*, 230 S.W.3d 151, 159 (Tex. Crim. App. 2007).) The CCA dismissed Busby's application on March 6, 2013, holding that none of his claims has satisfied section 5 and claiming the court did so without considering the merits of his claims. ROA.2135. By dismissing Busby's claim, the CCA prevented the state habeas trial court from being able to take any action on the claim, meaning no state

court made any factual findings regarding whether Busby is intellectually disabled. *See* Tex. Code Crim. Proc. art. 11.071, § 5(a).

The district court reopened Busby's federal habeas proceedings on August 8, 2013 and ordered the parties to file briefing on the issue of whether this Court's opinion in *Trevino v. Thaler*, 569 U.S. 413 (2013), had any impact on Busby's otherwise arguably defaulted claims. ROA.2144. After the parties filed briefing related to *Trevino*, the district court, on February 27, 2014, ordered Counsel to file Busby's second amended petition within thirty days. ROA.2331. Pursuant to the February 27 order, Counsel filed Busby's second amended petition on March 27, 2014. ROA.2343. By that date, the Fifth Circuit had held, in a different case, that a state court dismissal of an *Atkins* claim pursuant to section 5(a)(3) involves a consideration of the merits of the federal constitutional question. *Rivera v. Quarterman*, 505 F.3d 349, 359 (5th Cir. 2007); *see also Blue v. Thaler*, 665 F.3d 647, 653-54 (5th Cir. 2011); Appendix A at a010-11. Counsel accordingly argued in the district court that Busby's *Atkins* claim was exhausted. ROA.2492. Before issuing a decision on the merits of Busby's claim, the district court convened an evidentiary hearing, the sole purpose of which was to determine whether Busby's ineffective of trial counsel claim was viable pursuant to this Court's opinion in *Trevino v. Thaler*. ROA.3290.

Two weeks after the evidentiary hearing, the district court entered an order denying Busby relief on all of his claims. ROA.3309. With respect to the *Atkins* claim, the district court held Busby's claim was procedurally barred, finding the

CCA's dismissal did not constitute a decision on the merits. ROA.3342. Having made that finding, the court then addressed Busby's alternative argument that any procedural default should be excused under the miscarriage of justice exception. The Court found that Busby had failed to show the exception applies to his *Atkins* claim. ROA.3345. The Court denied Busby a COA on all of his claims. ROA.3358.

Busby appealed the district court's decision and asked the court of appeals to grant him a COA on three claims, including his *Atkins* claim. On January 27, 2017, the panel issued an order granting a COA on all three issues. Appendix B at a048. With respect to the *Atkins* claim, the panel wrote that reasonable jurists would disagree with the district court's decision that Busby's claim was procedurally barred because an order from the CCA dismissing an *Atkins* claim pursuant to section 5(a)(3) involves a consideration of the claim's merits. Appendix B at a052-53 & n.18 (citing *Garcia v. Stephens*, 757 F.3d 220, 225 (5th Cir. 2014); *Ladd v. Stephens*, 748 F.3d 637, 641 n.10 (5th Cir. 2014); *Rivera*, 505 F.3d at 359-360). The court held reasonable jurists would debate the merits of Busby's claim. Appendix B at a055.

On June 13, 2018, the panel issued its now-withdrawn opinion denying Busby relief on all of his claims. Perplexingly, even though the *Atkins* claim was raised in Busby's initial federal habeas proceedings, the panel wrote that Busby's claim is successive. Of course, given that the claim was presented in Busby's initial federal habeas application, it is not successive, either as that term is used in ordinary English or as it is used in 28 U.S.C. § 2244(b). In any event, proceeding

under the mistaken premise that Busby's claim was either successive or viable only through the fundamental miscarriage of justice exception, the panel then found that the inquiry decided by the state court – i.e., whether Busby's claim satisfied the miscarriage of justice exception – was determinative to Busby's claim and that AEDPA requires the federal courts defer to this decision. Once it elected to review Busby's claim through the lens of AEDPA deference (rather than de novo), the Panel reached the conclusion that the state court's decision was not objectively unreasonable only by ignoring this Court's recent decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017). In *Moore*, this Court soundly rejected the CCA's use of the so-called *Briseño* factors to evaluate *Atkins* claims – the very factors the CCA would have used in assessing Busby's claim.

On June 27, 2018, Counsel filed a petition for rehearing en banc in the court of appeals. On May 20, 2019, the court denied the petition for rehearing en banc; however, at the same time, the Fifth Circuit withdrew its prior opinion and issued a new opinion in its place. Appendix A at a002. The new opinion differed only slightly from the court's prior opinion. The court held that the district court erred in finding Busby's *Atkins* claim to be procedurally defaulted because the CCA, despite that court's statement to the contrary, considered the merits of Busby's *Atkins* claim. Appendix A at a010.

In his motion for rehearing, Counsel argued that because the CCA imposed a higher burden on Busby than he would have been required to meet to be entitled to relief in federal court, the district court's review of Busby's claim should have been

de novo. In rejecting Busby's argument, the Fifth Circuit held that reviewing the *Atkins* claim de novo would be contrary to this Court's opinions in *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), and *Shoop v. Hill*, 139 S. Ct. 504 (2019). Appendix A at a017-18. Of course, in neither of those opinions did this Court address an *Atkins* claim in which the state court had imposed a higher burden than that required by the federal courts. It is therefore unclear why the Fifth Circuit cited them or concluded they dictate denial of Busby's invitation to review the *Atkins* claim de novo.

The court of appeals then addressed the question of what constitutes clearly established Federal law with respect to Busby's claim. The court found that this Court's opinions in *Sawyer v. Whitley*, 505 U.S. 333 (1992), and *McQuiggin v. Perkins*, 569 U.S. 383 (2013), constitute the clearly established Federal law that governs Busby's claim. Appendix A at 8, a018-20. This holding, too, is perplexing because *Sawyer* and *McQuiggin* address under what conditions a federal habeas petitioner may raise a claim in a *successive* federal petition. Yet as this Court specifically recognized, this stricter standard is inapplicable to claims raised in a petitioner's initial federal habeas petition. *McQuiggin*, 569 U.S. at 396 n.1. Specifically, both *Sawyer* and *McQuiggin* address whether a federal petitioner can raise a new and different claim in a successive petition if he first establishes by clear and convincing evidence that he is actually innocent. Neither of these opinions addresses whether a state may impose a higher burden when considering the merits of an *Atkins* claim than petitioners are required to carry in the federal courts.

Relying on *Sawyer* and *McQuiggin*, however, the court below held that the state's use of the clear and convincing standard when addressing the merits of Busby's Atkins claim "was not an unreasonable application of clearly established federal law."

The court then addressed whether the CCA's decision constituted an unreasonable determination of the facts under section 2254(d)(2). Focusing largely on two intelligence tests from Busby's trial which reported his IQ to be 77 and 79, the court found that the CCA's decision was not based on an unreasonable determination of the facts. Importantly, however, had federal review of Busby's Atkins claim been de novo, the Fifth Circuit would almost certainly have arrived at the conclusion Busby is in fact intellectually disabled. Thus, in both *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), and *In re Johnson*, No. 19-20052, 2019 WL 3814384 (5th Cir. Aug. 14, 2019), the court of appeals found Atkins claims to be meritorious in cases involving petitioners whose IQ scores were similar to Busby's. *Cathey*, 857 F.3d at 230 (authorizing a petitioner whose IQ had been reported to be 77 to file a successive petition); *In re Johnson*, 2019 WL 3814384, at *9 (authorizing Johnson's successive petition); Resp't's Answer at 23, *Ex parte Johnson*, No. WR-73,600-03 (Tex. Crim. App. Aug. 9, 2019), *available at* <http://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=c9960d26-323a-4672-95f8-08b74570cbf5&coa=coscca&DT=BRIEF&MediaID=c4560dc3-d80b-4b49-ab40-b634e33e118a> (stating Johnson's trial expert had measured his IQ at 88 and 78).

Reasons for Granting the Writ

- I. This Court should grant certiorari to determine whether a state court’s decision is entitled to deference under section 2254(d) when it imposes a higher burden for establishing an *Atkins* claim than is required by federal law.**

If an exhausted claim presented in a federal habeas petition has been “adjudicated on the merits in State court proceedings,” a federal court cannot grant habeas relief on the claim unless the state court proceedings “resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law” or “resulted in a decision that was based on an unreasonable determination of the facts.” 28 U.S.C. § 2254(d). In *Johnson v. Williams*, 568 U.S. 289 (2013), this Court addressed the question of whether a federal claim should be considered to have been adjudicated on the merits when the claim was presented to the state court, but the state court “does not expressly address the federal claim in question.” *Williams*, 568 U.S. at 292. The Court concluded that in such circumstances, “a federal habeas court must presume that the federal claim was adjudicated on the merits—but that presumption can in some limited circumstances be rebutted.” *Id.* at 301. Justice Alito, writing for himself and seven other justices (with only Justice Scalia not joining), then listed examples of when the presumption might be rebutted, and the first example this Court gave is precisely the first question presented in this Petition: “what if ... the state standard is *less* protective?” *Id.*

In *Atkins v. Virginia*, this Court left it to the States to “develop[] appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”

Atkins, 536 U.S. at 317. With respect to *Atkins* claims presented in initial habeas petitions, Texas has decided that habeas petitioners alleging their death sentences are unconstitutional because they are intellectually disabled must demonstrate by a *preponderance of the evidence* that they are, in fact, intellectually disabled. *Ex parte Briseño*, 135 S.W.3d at 12 (Tex. Crim. App. 2004), *overruled on other grounds by Moore v. Texas*, 137 S. Ct. 1039 (2017); *see also Lewis v. Quarterman*, 541 F.3d 280, 283 (5th Cir. 2008); *Moore v. Quarterman*, 342 F. App'x 65, 67 (5th Cir. 2009) (unpublished) (“To succeed on an *Atkins* claim, a defendant must prove by a preponderance of the evidence that he is” intellectually disabled).

However, because Busby’s *Atkins* claim was presented to the CCA in his second state habeas application, Texas law required the CCA to determine whether he had demonstrated by *clear and convincing* evidence that he is intellectually disabled. Tex. Code Crim. Proc. art. 11.071, § 5(a)(3). Precisely because the CCA imposed a higher burden than is required by federal law, the state court process was less protective of Busby’s Eighth Amendment rights than the Constitution requires; it follows, therefore, that whatever claim the CCA was addressing, it was *not* adjudicating the merits of Busby’s federal claim, because an adjudication of that federal claim would have triggered a different burden of proof.

Justice Alito’s opinion in *Williams* is instructive. He suggested that where the state court imposes a different (and higher) standard that is appropriate under federal law, the state court’s decision may well fail to constitute an adjudication on the merits within the meaning of § 2254(d). In such a scenario, the federal court

would be required to review the claim de novo. Notably, the court below, in an opinion handed down two months after it issued its opinion in Busby's case, acknowledged this idea from *Williams* and held that a decision from the CCA did not constitute an adjudication on the merits of a habeas petitioner's federal claim because the standards for the federal and state claims were "quite different," and the federal court therefore applied de novo review. *Lucio v. Davis*, No. 16-70027, 2019 WL 3425186, at *6-7 (5th Cir. July 29, 2019) (unpublished). Busby's case should be decided under the same standard.

A state court decision that applies the wrong burden of proof to a habeas applicant's assertion of a federal claim is not a decision that, within the meaning of 2254(d), adjudicates the federal claim.

The issue of "whether a federal claim was 'adjudicated on the merits in State court'" is an important one, and granting certiorari in Busby's case would give the Court an opportunity to resolve the matters left unresolved by *Williams*. *Williams*, 568 U.S. at 292.

Moreover, even if a state court decision imposing a heavier burden on a habeas petitioner is somehow deemed to be an adjudication of the merits of the federal claim, that decision would perforce involve an unreasonable application of federal law. In *Fernandez v. Roe*, 286 F.3d 1073 (9th Cir. 2002). for example, the Court of Appeals for the Ninth Circuit addressed a *Batson* claim. While this Court's opinion in *Batson* requires an inference that race was a factor in a prosecutor's decision to strike a potential juror, under California law, a defendant

must show a *strong likelihood* of discrimination in order to prevail on a *Batson* claim. *E.g., Fernandez*, 286 F.3d at 1077; *cf. Batson v. Kentucky*, 476 U.S. 79, 96 (1986) (“the defendant must show that these facts and any other relevant circumstances raise an *inference* that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race”) (emphasis added). Because the state court in *Fernandez* followed the less protective state rule, the Ninth Circuit held the state court “applied an incorrect legal standard, contrary to federal law as pronounced in *Batson*” and held the claim should be reviewed *de novo*. *Fernandez*, 286 F.3d at 1077.

Of course, *Atkins* claims differ in certain respects from *Batson* claims, including in that this Court left it to the states to determine how to implement this Court’s holding in *Atkins*. *Atkins*, 536 U.S. at 317. Nevertheless, as this Court recently reaffirmed in *Moore*, the leeway allowed to the states for implementing *Atkins* is not a license to eviscerate that holding. *Moore v. Texas*, 137 S. Ct. 1039, 1052-53 (2017) (“States have some flexibility, but not ‘unfettered discretion,’ in enforcing *Atkins*’ holding”). Demanding a habeas applicant satisfy an especially demanding burden of proof is yet another attempt by the State of Texas to avoid the command of *Atkins*. By requiring Busby to satisfy a higher burden than the one established in the federal courts for claims arising from Texas, the CCA’s decision involves an unreasonable application of federal law.

II. This Court should grant certiorari to resolve whether it violates the Eighth Amendment or the Fourteenth Amendment's due process clause when a state requires a habeas applicant to demonstrate he is intellectually disabled by clear and convincing evidence.

In *Atkins*, this Court established that the Eighth Amendment will not permit the execution of a defendant who is intellectually disabled. As it had done for *Ford* claims, the Court left it to the states to determine how to implement the decision. *Atkins*, 536 U.S. at 317; *Ford v. Wainwright*, 477 U.S. 399, 416-17 (1986). However, as this Court made clear in *Ford*, the procedures developed by the state courts must comport with the dictates of due process. *Ford*, 477 U.S. at 413-17.

This Court's analysis of the question of competency to stand trial is instructive. In *Cooper v. Oklahoma*, 517 U.S. 348 (1996), this Court confronted Oklahoma's requirement that a defendant demonstrate he was not competent to stand trial by clear and convincing evidence. This Court held that the burden of proof demanded by Oklahoma law failed to adequately protect the fundamental constitutional right to be tried only if competent. The Court arrived at this conclusion after employing a three-step inquiry. First, the Court looked to history and found there to be no historical support for the heightened requirement. *Cooper*, 517 U.S. at 356. The Court then looked to how other states considered the issue and found only four states employed the clear and convincing standard. *Id.* at 360-61. Finally, the Court determined Oklahoma's rule did not operate fairly because it imposed a significant risk that an incompetent defendant would be forced to stand trial. *Id.* at 363.

This same analysis should lead to a finding that requiring a habeas petitioner raising an *Atkins* claim to prove he is intellectually disabled by clear and convincing evidence runs afoul of the due process clause. Regarding historical support, as this Court found in *Cooper*, courts have consistently used the standard of preponderance of the evidence when determining the mental capacity or fitness of a criminal defendant beginning in the late 18th century. *Id.* at 356-60. Similarly, of the twenty-nine states that have not abolished capital punishment, only five require a petitioner to demonstrate he is intellectually disabled by something greater than a preponderance of the evidence in all cases. (These states include Arizona, Colorado, Florida, North Carolina, and Georgia.) Counsel is unaware of any states besides Texas that impose a preponderance standard if the claim is presented in an initial habeas application but impose a higher standard for claims raised in subsequent applications. Finally, there can be no doubt that employing a standard greater than preponderance increases the risk that a person who is intellectually disabled will be executed.

Granting review in Busby's case will afford this Court the opportunity to address whether its holding in *Cooper* is applicable to *Atkins* claims.

III. This Court should grant certiorari to resolve whether there is an absence of state corrective process when a state court requires a habeas petitioner to demonstrate intellectual disability by clear and convincing evidence.

Pursuant to 28 U.S.C. § 2254(b)(1)(B)(ii), a federal court can consider an unexhausted claim if “circumstances exist that render [the state court] process ineffective to protect the rights of the applicant.” 28 U.S.C. § 2254(b)(1)(B)(ii). If, as

the court below found (and Busby believes to be correct), Busby's claim was exhausted in state court; and if the state court decision denying that claim will trigger AEDPA deference even though it imposes a more onerous burden of proof than is dictated by federal law (or that is triggered when the issue is addressed de novo in federal court), there exists no state court process available to Busby which will result in a decision that constitutes an adjudication of the merits of his federal claim. In other words, if the state can impose a heavier burden than is required under federal law, and if that heavier burden will then preclude a federal court from granting relief on the claim, there is no process – federal, state, or otherwise – that adequately protects the right of an intellectually disabled individual from being executed. Under this scenario, the exception to the exhaustion doctrine codified in 28 U.S.C. § 2254(b)(1)(B)(ii) should permit a federal court to engage in de novo review. *See Young v. Ragen*, 337 U.S. 235, 239 (1949); *see also Rose v. Lundy*, 455 U.S. 509, 516 n.7 (1982) (“the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to ‘afford a full and fair adjudication of the federal contentions raised’”). This very provision of federal law which would entitle Busby to de novo review had the state court not made a decision relevant to the merits of his claim should afford him no less protection simply because the state court's decision did involve the merits of his federal claim when that decision did not afford him a full and fair adjudication of the federal claim.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and schedule the case for briefing and oral argument.

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Respectfully submitted,

/s/ David R. Dow

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