No. 19-5653

IN THE

Supreme Court of the United States

EDWARD BUSBY,
Petitioner,

v.

LORIE DAVIS, DIRECTOR, TDCJ-CID,
Respondent.

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

PROOF OF SERVICE

I hereby certify that on the 14th day of November, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: David R. Dow, University of Houston Law Center, 4604 Calhoun Road, Houston, Texas 77204-6060, ddow@central.uh.edu. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Edward Busby was convicted and sentenced to death for the murder of seventy-eight-year-old Laura Crane. At his trial in 2005, Busby's mental-health expert testified that Busby is not intellectually disabled. Busby first raised a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), in state court in a subsequent habeas application. In rejecting the claim, the state court applied a threshold, intermediate burden of proof. That burden of proof is congruent with, and less burdensome than, the analogous federal successiveness bar.

The Fifth Circuit held that the state court's decision was an adjudication of the claim's merits and applied deference under 28 U.S.C. § 2254(d) to that decision. Busby now seeks to strip the Texas Court of Criminal Appeals's (CCA) adjudications of subsequent *Atkins* claims of deference and to create a new rule of constitutional law, but he did not raise the issues in his petition in state court or the courts below. These facts raise the following question:

> Should the Court grant certiorari where Busby waived the issues on which he seeks review, his habeas claim is unexhausted and barred by principles of non-retroactivity, the rules Busby seeks are inapplicable to the facts of his case because the state court did not apply a clear-and-convincing-evidence burden of proof to his *Atkins* claim, there is no circuit split that requires this Court's intervention, and he identifies no precedent from this Court that supports the conclusion that a state court may not apply an intermediate gateway burden of proof to an *Atkins* claim raised in a subsequent application?

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BRIEF IN OPPOSITION

"No expert has ever opined that Busby is intellectually disabled." Pet'r's App. at a009. Busby's 2005 capital murder trial occurred after this Court issued its opinion in *Atkins*, but Busby did not raise a claim at trial, on direct appeal, or in his initial state habeas application alleging that he is exempt from capital punishment due to intellectual disability. Pet'r's App. at a007. Busby did not raise such a claim until he filed his federal habeas petition in 2010. Pet., *Busby v. Thaler*, No. 4:09-CV-160 (N.D. Tex. Feb. 25, 2010). He then obtained a stay to file a subsequent state habeas application in which he raised an *Atkins* claim. Order, *Id.* (N.D. Tex. Aug. 17, 2012). The CCA dismissed the application. *Ex parte Busby*, 2013 WL 831550, at *1 (Tex. Crim. App. 2013).

In rejecting Busby's *Atkins* claim, the CCA applied an intermediate gateway burden of proof and determined that Busby did not make "a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find [intellectual disability]."[1] *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (emphasis in original). Busby was not required at that threshold stage to convince the state court by clear and convincing evidence that he is intellectually disabled. *Id.* at 162–63.

[1] For the sake of brevity, the Director will refer to this burden of proof throughout this brief as an "intermediate gateway" burden.

The Fifth Circuit rejected Busby's *Atkins* claim, explaining that the CCA's dismissal of the claim constituted an adjudication on the merits. Pet'r's App. at a006–16. Consequently, Busby was required in federal court to show that the CCA's decision was an unreasonable application of this Court's precedent or was based on an unreasonable determination of the facts. Pet'r's App. at a024–25; 28 U.S.C. § 2254(d)(1), (2). The Fifth Circuit held that Busby failed to make such a showing. Pet'r's App. at a032.

Busby argues the Fifth Circuit incorrectly concluded that the CCA's adjudication of his claim was entitled to deference under § 2254(d). *See generally* Pet. Cert. He argues the CCA applied a clear-and-convincing-evidence burden of proof to his subsequent claim, which is a higher and less protective burden of proof than is required by federal law such that his claim was not adjudicated on the merits. Pet. Cert. at 13–15. He also argues that the application of a clear-and-convincing-evidence standard was an unreasonable application of this Court's precedent, violated his constitutional rights, and deprived him of an effective state corrective process. Pet. Cert. at 15–19. But Busby does not present a compelling reason justifying certiorari review, and his case is a particularly inapt vehicle for the questions he presents.

First, Busby waived the issues in his petition by not raising them in the courts below. Busby has also failed to exhaust his claim alleging that the denial of his *Atkins* claim violated his constitutional rights, a claim that is also barred by principles of non-retroactivity. Second, the questions Busby presents—all of which are premised on the CCA rejecting his *Atkins* claim under a clear-and-convincing-evidence burden of proof—do not apply to the facts of his case because the CCA did not apply such a burden to his claim. *See Ex parte Blue*, 230 S.W.3d at 162–63. Third, there is no split among the federal courts that requires this Court's intervention. Lastly, Busby's challenge to the state court's adjudication of his claim is based on the faulty premise that there exists a federally-mandated evidentiary burden of proof for *Atkins* claims, and his argument is contrary to well-settled law approving the application of gatekeeping standards for claims raised in subsequent or successive postconviction proceedings. Consequently, Busby's petition does not present a compelling reason justifying this Court's attention, and it should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts from Trial

A. The capital murder

The CCA summarized the facts of Laura Crane's murder:

> The evidence shows that on or about January 30, 2004, [Busby] and a female accomplice [Latimer] abducted a seventy-eight-year-old woman in Fort Worth, then robbed and murdered her. The elderly victim suffocated from having multiple layers of duct tape wrapped tightly over her entire face that covered her nose and

> mouth. According to the medical examiner's testimony, approximately 23.1 feet of duct tape was wrapped around the victim's face with such force that her nose deviated from its natural position.
>
> On February 1, 2004, an Oklahoma City police officer (Padgett) arrested [Busby] in Oklahoma City. . . . [Busby] made various statements to the FBI, Oklahoma police, and Fort Worth detectives between February 1st and February 3rd. . . . On February 20th, [Busby] gave a written statement to the police and again admitted that he and [Latimer] abducted, robbed, and killed the victim. [Busby]'s February 3rd tape-recorded statement and his February 20th written statement portrayed [Latimer] as the leader of their criminal enterprise, with [Busby] following her instructions. However, [Busby] admitted in both of these statements that he wrapped the duct tape over the victim's face while also stating several times that he did not mean to kill her.

Busby v. State, 253 S.W.3d 661, 663–64 (Tex. Crim. App. 2008).

B. Punishment-phase evidence

1. The State's case

The Fifth Circuit summarized the State's punishment-phase evidence:

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

Pet'r's App. at a040–41.

2. The defense's case

The Fifth Circuit summarized the defense's punishment-phase evidence:

> At Busby's trial, custodians of his school records testified that he had a mixed academic record, was required to repeat two grades, was frequently absent from school, and ultimately dropped out of school. They also noted that he was enrolled in special education classes for students with IQ's lower than average, but above 70. His special education teacher spoke to Busby's lack of support at home, his life as a "follower" in a segregated neighborhood, and her observation that he was a difficult student. The fact that Busby attempted to commit suicide on four occasions and was hospitalized on each occasion was presented to the jury. Busby's expert witness advised the jury that he had found "documented evidence of long-standing chronic alcohol abuse" and "longstanding and chronic" abuse of "essentially illegal drugs," meaning "[s]treet drugs."

Pet'r's App. at a039–40.

II. Procedural History

Busby was convicted and sentenced to death for the murder of seventy-eight-year-old Laura Crane. 1 CR 2; 2 CR 364–66.[2] The CCA upheld Busby's conviction and death sentence on direct appeal. *Busby v. State*, 253 S.W.3d at 663–73, *cert. denied*, 129 S. Ct. 625 (2008).

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[2] "CR" refers to the Clerk's Record and is preceded by volume number and followed by page numbers. "RR" refers to the Reporter's Record of transcribed trial proceedings and is preceded by volume number and followed by page numbers.

Busby filed a state habeas application during the pendency of the direct appeal. *Ex parte Busby,* No. 70,747-01; SHCR-01 at 2–200.[3] The trial court entered findings of fact and conclusions of law recommending that relief be denied. SHCR-01 at 366, 386–404; Supp. SHCR-01 at 2–4. The CCA denied the application based on the trial court's findings and conclusions. Order, *Ex parte Busby*, No. 70,747-01 (Tex. Crim. App., Feb. 25, 2009).

Busby next filed a federal habeas petition, which he later amended. Amended Pet., *Busby v. Thaler*, No. 4:09-CV-160 (N.D. Tex. May 24, 2010). The district court issued an order staying the proceedings to allow Busby the opportunity to exhaust his unexhausted claims. Order, *Id*. (Aug. 17, 2012). Busby then filed a subsequent state habeas application, which was dismissed as an abuse of the writ. *Ex parte Busby*, 2013 WL 831550, at *1. Thereafter, Busby filed a second amended petition, which the district court denied. *Busby v. Stephens*, 2015 WL 1037460, at *28 (N.D. Tex. March 10, 2015).

Busby next filed an application for a certificate of appealability, which the Fifth Circuit granted. Pet'r's App. at a047–61. Following briefing, the Fifth Circuit affirmed the district court's judgment denying relief. *Busby v. Davis*, 892 F.3d 735 (5th Cir. 2018). Busby filed a petition for rehearing, which the

[3] "SHCR-01" refers to the state habeas clerk's record, the transcript of pleadings and documents filed with the court during Busby's first state habeas proceedings and is preceded by volume number and followed by page numbers. "Supp. SHCR" refers to the supplemental state habeas clerk's record and is followed by page numbers.

Fifth Circuit denied; however, the Fifth Circuit withdrew its initial opinion and issued a new opinion. Pet'r's App. at 002–45.

Busby then filed in this Court a petition for a writ of certiorari. The instant Brief in Opposition follows.

ARGUMENT

I. Busby Waived the Issues He Presents by Not Raising them in the Courts Below, and His Habeas Claim Is Unexhausted and Barred by Principles of Non-Retroactivity.

Busby seeks review in this Court of four related issues, each of which rest on his assertion that the CCA's adjudication of his *Atkins* claim is not entitled to deference under § 2254(d) because the court rejected the claim by finding that he failed to present clear and convincing evidence of intellectual disability, a burden of proof he asserts is higher than what federal law requires. *See generally* Pet. Cert. Specifically, Busby argues the CCA's decision is not entitled to deference because its application of a clear-and-convincing-evidence burden of proof (1) held him to a higher, and less protective, burden than is required by federal law, (2) was an unreasonable application of this Court's precedent, (3) violated his constitutional rights, and (4) deprived him of an effective state corrective process. Pet. Cert. at 13–19.

Busby did not argue in the courts below that the CCA's adjudication was not entitled to deference for the reasons he now raises. Indeed, he argued on multiple occasions that his *Atkins* claim *was* denied on the merits by the state court. Busby's failure to raise the issues presented in his petition in the courts below renders them waived. His failure to raise a claim in state court that requiring clear and convincing evidence of intellectual disability violated his constitutional rights renders such a claim unexhausted and procedurally defaulted. And because that claim seeks the creation of a new rule of constitutional law, it is barred by principles of non-retroactivity. Consequently, his petition should be denied.

A. Busby's issues are waived.

Busby argued in the district court and Fifth Circuit that the CCA denied his *Atkins* claim on the merits.[4] Pet'r's Br. at 18, *Busby v. Davis*, No. 15-70008 (5th Cir. Mar. 13, 2017) ("The state court's dismissal of this [*Atkins*] claim was a decision on the merits and an unreasonable application of clearly established federal law and the district court erred in finding this claim procedurally defaulted and meritless."); Appl. for COA at 18, *Busby v. Stephens*, No. 15-70008 (5th Cir. July 13, 2015) ("[T]he CCA's action was necessarily a decision on the merits of Busby's [*Atkins*] claim."); *id.* at 17 ("The state court's rejection of Busby's *Atkins* claim was a decision on the merits and was objectively

4 The Director argued below that Busby's *Atkins* claim was procedurally defaulted because the CCA dismissed the claim based on an independent and adequate procedural bar. Resp't's Br. at 18–22, *Busby v. Davis*, No. 15-70008 (5th Cir. May 12, 2017). The Fifth Circuit rejected the argument. Pet'r's App. at a012–16. The Director argued that if Busby's *Atkins* claim was not procedurally defaulted, deference under AEDPA applied to the CCA's adjudication of Busby's claim. Resp't's Br. at 23, *Busby v. Davis*, No. 15-70008 (5th Cir. May 12, 2017).

unreasonable.”); Reply at 33–34, *Busby v. Stephens*, No. 4:09-CV-160 (N.D. Tex. June 13, 2014) (“Because the CCA’s dismissal constituted a ruling on the merits of the claim, this Court should find that Mr. Busby exhausted his claim and that no procedural bar impedes review of Mr. Busby’s claim.”). Busby now argues that deference should not be afforded to the CCA’s adjudication of his *Atkins* claim because it was *not* adjudicated on the merits. Pet. Cert. at 15 (“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.”). Busby does not acknowledge his failure to appropriately and timely raise the questions he now presents, which prevented the lower courts from addressing those issues in the first instance. Consequently, Busby has waived them.

Busby did argue in his petition for rehearing in the Fifth Circuit that the court should review his *Atkins* claim de novo because the CCA did not base its rejection of that claim on a preponderance-of-the-evidence standard. Pet. Rehear. at 14–15, *Busby v. Davis*, No. 15-0008 (5th Cir. June 27, 2018) (citing *Rocha v. Thaler*, 626 F.3d 815 (5th Cir. 2010)). In so arguing, Busby asserted the Fifth Circuit’s holding in *Rocha* dictated that a decision by the CCA that an inmate’s claim that he was actually innocent of the death penalty is reviewed de novo by a federal court. *See Rocha*, 626 F.3d at 827. The Fifth Circuit’s opinion in this case shows that it understood Busby’s argument to incorrectly conflate claims of *suitability* for the death penalty with claims of *ineligibility* for the death penalty, the former being reviewed de novo by a federal court because Texas's abuse-of-the-writ statute—Texas Code of Criminal Procedure article 11.071 § 5(a)—does not provide for review in a subsequent application of a claim that does not implicate, *inter alia*, "categorical ineligibility for the death penalty." Pet'r's App. at a017–18; *Rocha*, 626 F.3d at 826–27.

Nonetheless, Busby did not rely in the courts below on this Court's opinion in *Johnson v. Williams*, 568 U.S. 289 (2013), to argue that he rebutted the presumption that his *Atkins* claim was adjudicated on the merits because the CCA held him to a higher burden of proof than is required by federal law. His first question presented rests almost entirely on the *Williams* opinion. Indeed, he asks this Court to "resolve the matters left unresolved by *Williams*." Pet. Cert. at 13–16.

Busby also did not argue below that the CCA's purported application of a clear-and-convincing-evidence burden was an unreasonable application of this Court's precedent.[5] Pet. Cert. at 15–16. Instead, he argued below that the

[5] The Fifth Circuit did determine that the CCA's application of the intermediate gateway burden to Busby's *Atkins* claim was not an unreasonable application of clearly established federal law. Pet'r's App. at a018–23. But Busby did not argue—and the Fifth Circuit did not consider—whether the CCA unreasonably applied a burden of proof more onerous than the burden, he says, *Atkins* dictates. Pet. Cert. at 15–16. Rather, the Fifth Circuit determined that the CCA's application of the statutory bar was not an unreasonable application of clearly established federal law

CCA's presumed application of the "*Briseno* factors"[6] was an unreasonable application of this Court's holdings in *Moore* and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015).[7] Pet. Rehear. at 15–16, No. 15-70008 (5th Cir. June 27, 2018). Nor did Busby argue below that the state court's purported application of a clear-and-convincing-evidence burden of proof was unconstitutional; he neither cited to nor relied on this Court's holding in *Cooper v. Oklahoma*, 517 U.S. 348 (1996). Pet. Cert. at 17–18; *see* Pet'r's App. at a022 ("Busby does not contend that the gateway clear-and-convincing-evidence standard in Texas Code of Criminal Procedure article 11.071, section 5(a)(3) is unconstitutional."). Busby also did not argue that the intermediate gateway burden of proof deprived him of an effective state corrective process. Pet. Cert. at 18–19 (citing 28 U.S.C. § 2254(b)(1)(B)(ii)). Consequently, he has waived each of the issues he raises in this Court by depriving the lower courts of the opportunity to pass upon them.

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because the bar is congruent with AEDPA's successiveness bar and pre-AEDPA precedent regarding abuse of the writ. Pet'r's App. at a018–22.

6 *See Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004), *abrogated by Moore v. Texas*, 137 S. Ct. 1039, 1044 (2017).

7 Busby asserts that the Fifth Circuit "ignor[ed]" this Court's decision in *Moore*. Pet. Cert. at 10. Although Busby does not seek review on that ground, it is worth noting that this Court has held that, under AEDPA, *Atkins*—not *Moore*—is the relevant "clearly established federal law" where, as here, the state court adjudicated an *Atkins* claim before *Moore*. *Shoop v. Hill*, 139 S. Ct. 504, 509 (2019).

As this Court has explained, "[o]rdinarily an appellate court does not give consideration to issues not raised below." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)). But the rule in this Court is "prudential only" in cases arising from federal courts. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 533 (1992). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Prudential concerns compel the conclusion that litigants should be required to properly and timely raise the issues at the earliest opportunity and not be incentivized to lay behind the log until the opposing party has little or no ability to respond to a newly-formed claim, especially where the basis on which the litigant seeks review in this Court is contrary to the arguments raised below. Moreover, there is nothing exceptional about Busby's case—a case in which no expert has diagnosed the *Atkins* claimant as intellectually disabled—that justifies reaching an issue that was not appropriately raised in either the district or circuit court. Therefore, Busby's petition should be denied.

B. Busby's claim that the state court's denial of his *Atkins* claim violated his Eighth and Fourteenth Amendment rights is unexhausted and barred by principles of non-retroactivity.

Busby's third question presented—that the state court's purported application of a clear-and-convincing-evidence burden of proof to his *Atkins* claim violated his rights under the Eighth and Fourteenth Amendments—raises a claim for habeas relief. Pet. Cert. at 17–18. The claim is unexhausted and procedurally defaulted because he did not raise it in state court. Moreover, Busby's claim seeks the creation on collateral review of a new rule of constitutional law and is, therefore, barred by *Teague v. Lane*, 489 U.S. 288 (1989).

1. Busby's claim is unexhausted.

The federal courts' exercise of authority in habeas corpus cases arising from state court convictions is limited by comity and statute. *See Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991) ("This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the first opportunity to address and correct alleged violations of state prisoner's federal rights."); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983); 28 U.S.C. § 2254(b)(1)(A). To exhaust a federal constitutional claim, a "petitioner must provide the state courts with a fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (internal quotation marks omitted). Further, a petitioner must have "fairly presented" the "substance" of the claim to the state courts. *Id.*

Busby did not raise a claim in state court alleging that requiring him to show clear and convincing evidence of intellectual disability to satisfy the state's abuse-of-the-writ bar was unconstitutional. Consequently, Busby's Eighth and Fourteenth Amendment claim is unexhausted and procedurally defaulted, and he does not present a compelling reason warranting this Court's attention. *See Hill v. Humphrey*, 662 F.3d 1335, 1361 (11th Cir. 2011) ("If the standard of proof Georgia has adopted for claims of [intellectual disability] is to be declared unconstitutional, it must be done by the Supreme Court in a direct appeal, in an appeal from the decision of a state habeas court, or in an original proceeding filed in the Supreme Court."), *cert. denied*, 132 S. Ct. 2727 (2012); *cf. Yee*, 503 U.S. at 533 ("Even if the [waiver] rule were prudential, we would adhere to it in this case. Because petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here."). His petition should be denied.

2. Busby's claim is *Teague*-barred.

Busby's Eighth and Fourteenth Amendment claim is also barred by principles of non-retroactivity. Busby's petition asks this Court to extend for the first time its holding in *Cooper*—that a state may not try a criminal defendant after the defendant has demonstrated he or she is more likely than not incompetent—to *Atkins* claims. Pet. Cert. at 17–18 (citing *Cooper*, 517 U.S. at 363). But Busby's conviction is long final, and he did not seek direct review in this Court of the CCA's rejection of his *Atkins* claim. Consequently, he seeks the retroactive application of a new rule of constitutional law, which is flatly prohibited. *Teague*, 489 U.S. at 310.

Busby's conviction became final in 2008, when this Court denied his petition for a writ of certiorari on direct appeal. *See Lambrix v. Singletary*, 520 U.S. 518, 527 (1997). He clearly seeks the creation of a new constitutional rule, as he identifies no rule clearly establishing that a state court's application of a clear-and-convincing-evidence burden of proof to a subsequent *Atkins* claim violates either the Eighth or Fourteenth Amendment. *See Teague*, 489 U.S. at 301 ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."). Busby seems to concede that no precedent existed at the time his conviction became final—or when the CCA rejected his *Atkins* claim in 2013—that dictated the rule he seeks. Pet. Cert. at 18 ("Granting review in Busby's case will afford this Court the opportunity to address whether its holding in *Cooper* is applicable to *Atkins* claims.").

Further, the new rule Busby seeks does not prohibit the imposition of capital punishment on a class of persons, nor does it seek the creation of a watershed rule of criminal procedure. *See Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (stating that to qualify as a watershed rule of criminal procedure, the rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction and "alter our understanding of the bedrock elements essential to the fairness of a proceeding"); *Saffle v. Parks*, 494 U.S. 484, 495 (1990). Therefore, Busby seeks the creation of a new retroactive rule in violation of *Teague*. *See Tyler v. Cain*, 533 U.S. 656, 666 (2001); *cf. Hill*, 662 F.3d at 1361. His petition should be denied.

II. Busby's Petition Calls on the Court to Issue an Advisory Opinion.

Each of the questions Busby presents is founded on the proposition that the CCA rejected his *Atkins* claim by applying a clear-and-convincing-evidence burden of proof. Pet. Cert. at 13–19. But the CCA's precedent makes clear that when it reviews an *Atkins* claim raised for the first time in a subsequent application where the initial application was filed after *Atkins*, it decides only whether the "subsequent applicant" has made "a *threshold* showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find [intellectual disability]."[8] *Ex parte Blue*, 230 S.W.3d at 163 (emphasis in original). That

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[8] The CCA has explained the three burdens of proof it applies to *Atkins* claims, depending on the stage at which the applicant first raises the claim:

(1) The CCA applies a preponderance-of-the-evidence burden to an *Atkins* claim raised at trial or in an initial state habeas application. *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007); *Ex parte Blue*, 230 S.W.3d at 162;

(2) The CCA applies a prima-facie burden to an *Atkins* claim raised in a subsequent state habeas application if the applicant's initial application was filed before *Atkins*. *Ex parte Blue*, 230 S.W.3d at 162. If granted leave, the applicant must then establish intellectual disability by a preponderance of the evidence. *Id.*; and

burden of proof requires the applicant to show "more than that the evidence preponderates in favor of a finding of [intellectual disability]," but it does not require the applicant to "convince [the CCA] by clear and convincing evidence" at that threshold stage. *Id.* at 162–63.

Busby's petition falters at the starting gate by proffering questions that are inapplicable to the facts of his case. The questions Busby's petition presents call on this Court to issue an advisory opinion regarding the effect of the application of a clear-and-convincing-evidence burden that the CCA did not apply to his *Atkins* claim. Therefore, Busby's petition should be denied. *See Chafin v. Chafin*, 568 U.S. 165, 172 (2013) ("Federal courts may not decide questions that cannot affect the rights of litigants in the case before them or give opinions advising what the law would be upon a hypothetical set of facts.") (quotation marks and citation omitted); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (no justiciable controversy is presented "when the parties are asking for an advisory opinion").

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(3) The CCA requires a "subsequent applicant who did not avail himself of" *Atkins* at trial or in his initial application to make a threshold showing of evidence that would be sufficient to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find intellectual disability." *Id.* at 163. If the subsequent applicant makes that threshold showing, he may obtain relief on his *Atkins* claim only if he convinces the state court by clear and convincing evidence that no rational factfinder would fail to find him intellectually disabled. *Id.*

III. Busby Does Not Identify a Circuit Split that Requires this Court's Intervention.

Busby's petition also fails to warrant this Court's attention because he does not identify a circuit split on any of the questions he presents. Sup. Ct. R. 10(a). Busby may argue that no such split could exist because his petition challenges only Texas's abuse-of-the-writ bar. But the Eleventh Circuit has addressed similar challenges to Georgia state courts' application of the more stringent reasonable-doubt burden of proof to *Atkins* claims, challenges the Eleventh Circuit rejected. *Raulerson v. Warden*, 928 F.3d 987, 1000–04 (11th Cir. 2019), *appl. for ext. of time to file cert. pet. filed*, No. 19A512; *Hill*, 662 F.3d at 1347–59. Consequently, Busby does not identify a split that warrants this Court's intervention, and his petition should be denied.

IV. Application of a Heightened Burden of Proof to Claims Raised in Subsequent or Successive Postconviction Proceedings Is Appropriate and Well-Settled.

Busby's petition rests on two flawed premises. First, Busby incorrectly asserts that Texas's burden of proof applicable to *Atkins* claims raised for the first time in a subsequent application is higher than the federal burden of proof dictated by *Atkins*. But there is no such federally-mandated burden of proof. Second, Busby's petition largely elides the fact that his *Atkins* claim was raised in a subsequent state habeas application many years after *Atkins* was decided and despite the availability of *Atkins* at his trial and his initial postconviction proceedings. By doing so, his petition conflates the burdens of proof applicable to *Atkins* claims raised in an initial state or federal habeas petition and claims raised in subsequent or successive petitions. Those burdens are as comparable as apples and oranges. Yet Busby seeks to strip the CCA's adjudications of subsequent *Atkins* claims of deference in federal court, despite the congruence between Texas's statutory abuse-of-the-writ bar, AEDPA, and this Court's precedent. None of Busby's challenges to Texas's abuse-of-the-writ bar is supported by precedent. Consequently, his petition should be denied.

A. No federally-mandated burden of proof for *Atkins* claims exists.

Busby first argues that the lower courts should have reviewed his *Atkins* claim de novo because the CCA purportedly applied a clear-and-convincing-evidence burden of proof to the claim. Pet. Cert. at 13–16. He argues that clear-and-convincing-evidence is a higher and less protective burden than federal law requires and, consequently, the state court did not adjudicate the claim on its merits. Pet. Cert. 13–15. For the same reason, Busby argues, the state court's decision was an unreasonable application of clearly established federal law. Pet. Cert. at 15–16. Busby is incorrect.

This Court has never mandated that states apply a particular burden of proof to *Atkins* claims. *See Bobby v. Bies*, 556 U.S. 825, 831 (2009) ("Our opinion [in *Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability] will be so impaired as to fall within *Atkins*' compass.") (cleaned up); *Raulerson*, 928 F.3d at 1001 ("[*Atkins*] did not address the burden of proof to prove intellectual disability, much less clearly establish that a state may not require a defendant to prove his intellectual disability beyond a reasonable doubt."); *Hill*, 662 F.3d at 1360 ("*Atkins* established *only* a substantive Eighth Amendment right for the [intellectually disabled], *not* any minimum procedural due process requirements for bringing that Eighth Amendment claim.") (emphasis in original). Rather, the Court "le[ft] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Atkins*, 536 U.S. at 317.

Busby provides no contrary precedent, much less precedent that casts doubt on a state's ability to impose a gateway burden of proof to claims raised in subsequent proceedings. However, Busby relies on this Court's opinion in *Moore* for the proposition that states do not have unfettered discretion in enforcing *Atkins*' restriction on executing the intellectually disabled. Pet. Cert. at 16 (citing *Moore*, 137 S. Ct. at 1052–53). But *Moore* did not mandate any *procedure* in reviewing *Atkins* claims. Rather, it held that Texas's *substantive* definition of intellectual disability that disregarded current medical standards was contrary to the relevant consensus. *Moore*, 137 S. Ct. at 1053. As the Court explained, states do not have "complete autonomy to *define* intellectual disability as they wished." *Id.* (emphasis added) (quoting *Hall v. Florida*, 572 U.S. 701, 720–21 (2014)). The Court has never mandated any procedure that must be applied. *See Schriro v. Smith*, 546 U.S. 6, 7–8 (2005) (granting certiorari and vacating the circuit court's holding that the state court was required to conduct a jury trial to resolve the petitioner's *Atkins* claim).

Busby's petition is simply founded on the incorrect premise that federal law mandates application of a preponderance-of-the-evidence burden of proof to *Atkins* claims. That, alone, is reason enough to reject Busby's petition.

B. This Court's opinion in *Williams* does not avail Busby.

Busby argues that this Court's opinion in *Williams*, 568 U.S. at 301, supports his proposition that the lower courts should have reviewed his *Atkins* claim de novo because the state court did not adjudicate the merits of his claim. Pet. Cert. at 13–15. He argues that *Williams* indicates that a state court does not adjudicate the merits of a federal claim where, e.g., the state-law standard is less protective than the federal standard. Pet. Cert. at 13 (citing *Williams*, 568 U.S. at 301). But the Court's reference in *Williams* to such a scenario is plainly dicta and is, in any event, inapplicable to this case.

As discussed above, *no* federally mandated burden of proof applies to *Atkins* claims. The CCA's application of its intermediate gateway burden to Busby's *Atkins* claim cannot be less protective than a non-existent federal burden of proof. But even if the Court's statement in *Williams* that a claim might not be adjudicated on the merits where the state court applies a less protective standard than the federal standard was relevant, Busby's reliance on it would be futile because the relevant state standard is more protective than the analogous federal standard.

The standard at issue here is Texas's abuse-of-the-writ bar. Tex. Code Crim. Proc. art. 11.071 § 5(a). Texas's bar permits both claims asserting an applicant's innocence of the crime *and* ineligibility for capital punishment, and it does not require a showing of diligence. Tex. Code Crim. Proc. art. 11.071 § 5(a)(2), (3). The comparable federal successiveness bar requires clear and convincing evidence and—where the movant does not rely on a new, retroactive rule of constitutional law that was previously unavailable—*only* permits successive claims that demonstrate the petitioner's innocence, which the petitioner pursued with diligence. 28 U.S.C. § 2244(b)(2)(A), (B); 28 U.S.C § 2255(h)(1); *see* Pet'r's App. at a020; *McQuiggin v. Perkins*, 569 U.S. 383, 396 (2013); *In re Hill*, 715 F.3d 284, 296 (11th Cir. 2013) (holding that movant's *Atkins* claim could not satisfy § 2244(b)(2)(B) because the claim was a "pure sentencing claim" and could not "possibly establish" his innocence of the crime); *In re Webster*, 605 F.3d 256, 258 (5th Cir. 2010) ("[Congress] elected to couch § 2255(h)(1), as well as § 2244(b)(2)(B)(ii), in the markedly different, unmistakable terms of *guilt of the offense*.") (emphasis in original).

Consequently, Texas's abuse-of-the-writ bar is more protective than the analogous federal successiveness bar.

Texas's bar is also more protective than the federal bar in the *Atkins* context because Texas's intermediate gateway burden at issue here—i.e., higher than a preponderance of the evidence, but less than clear and convincing evidence—is more protective than the clear-and-convincing-evidence burden of § 2244.[9] *See Ex parte Blue*, 230 S.W.3d at 162. Consequently, assuming *Williams* is relevant, it does not support Busby's assertion that his *Atkins* claim must be reviewed de novo by a federal court.

Moreover, the Fifth Circuit held the CCA addresses the merits of a subsequent *Atkins* claim when it determines the claim fails to satisfy Texas's abuse-of-the-writ bar. Pet'r's App. at a011 (citing *Ex parte Blue*, 230 S.W.3d at 162–63). This is because Texas's statutory gateway requires a subsequent *Atkins* claimant to make a threshold showing sufficient to support an ultimate

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[9] The standards under Texas's abuse-of-the-writ bar and AEDPA are also similar for subsequent or successive *Atkins* claims raised in cases where *Atkins* was unavailable at the time the initial state habeas application or federal petition were filed. *Ex parte Blue*, 230 S.W.3d at 156 (stating that "habeas applicants who filed their initial writs before *Atkins* was decided" must "establish a prima facie case for" intellectual disability); *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (holding that movant was required to make a prima facie showing of intellectual disability to be entitled to raise an *Atkins* claim in a successive federal habeas petition); 28 U.S.C. § 2244(b)(3)(C) ("The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection."); *see In re Holladay*, 331 F.3d 1169, 1173–74 (11th Cir. 2003); *but see Ochoa v. Sirmons*, 485 F.3d 538, 544 (10th Cir. 2007).

conclusion, by clear and convincing evidence, that no reasonable factfinder would fail to find him or her intellectually disabled. Pet'r's App. at a014; *see* Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). Consequently, this is not a case, like *Williams*, where the state court arguably "overlooked" a federal claim. 568 U.S. at 297. As the Fifth Circuit explained, the CCA's gateway determination regarding a subsequent *Atkins* claim "necessarily considers the merits of a federal constitutional claim based on *Atkins*." Pet'r's App. at 016. Therefore, even if the portion of *Williams* on which Busby relies was not dicta, it is not helpful to him because it is simply inapplicable.[10]

Critically, Texas's abuse-of-the-writ bar is congruent with AEDPA and this Court's procedural-default doctrine. Pet'r's App. at 007 (recognizing that "article 11.071, section 5(a)(3) of the Texas Code of Criminal Procedure. . . essentially embodies the elements of the federal actual-innocence standard") (citing *Sawyer v. Whitley*, 505 U.S. 303, 336 (1992)). Thus, to the extent there is a comparison to be made between the burdens of proof applicable to a

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[10] For the same reason, Busby's reliance on the Fifth Circuit's opinion in *Lucio v. Davis*, 2019 WL 3425186, at *6 (5th Cir. July 29, 2019), is unavailing. Pet. Cert. at 15. The standards applicable to subsequent or successive *Atkins* claims are not "quite different," as the standards at issue in *Lucio* were. *Id*. Moreover, in *Lucio*, the state habeas court's findings addressed only the petitioner's state-law claim. *Id*. Thus, the Fifth Circuit held that the petitioner had rebutted the presumption that the state court had adjudicated the merits of her federal claim. *Id*. Here, the merits of Busby's *Atkins* claim did not rest on state law.

subsequent or successive *Atkins* claim, there is little difference between the burdens Texas courts and federal courts apply.

As with AEDPA's limits on successive federal habeas petitions, Texas's gatekeeping standards are appropriate and are intended to respect the interest in finality of criminal convictions by ferreting out plainly meritless, dilatory claims.[11] *See McQuiggin*, 569 U.S. at 401; *Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that AEDPA's purpose is to "further the principles of comity, finality, and federalism"); *In re Hill*, 715 F.3d at 290; *Rocha v. Thaler*, 619 F.3d 387, 403 (5th Cir. 2010) (recognizing that many states impose procedural default rules with "safety valves" that weed out facially implausible or frivolous claims) (citing *Campbell v. Burns*, 515 F.3d 172, 178 (3d Cir. 2008)). Therefore, Busby cannot avoid AEDPA deference where the state court applied a burden of proof substantially the same—and somewhat more lenient—as federal courts apply to successive claims. *See Ex parte Blue*, 230 S.W.3d at 159 (noting that the Texas legislature "quite obviously" intended § 5(a)(3) to "mimic" the federal miscarriage-of-justice standard); *Rocha*, 619 F.3d

11 Contrary to what Busby might argue, Texas's intermediate gateway burden for subsequent *Atkins* claims does not render *Atkins* a nullity. *See, e.g.,* Order, *Ex parte Weathers*, No. 64,302-02 (Tex. Crim. App. Apr. 18, 2012) (finding that subsequent *Atkins* claim satisfied the intermediate gateway burden and remanding the claim to the trial court).

at 403 (recognizing that "[t]he practical result in nearly all cases will be that the federal and state standards are identical"). His petition should be denied.

C. The CCA's application of an intermediate gateway burden of proof was not an unreasonable application of clearly established federal law.

Busby also argues that the CCA's application of a burden of proof higher than a preponderance of the evidence to his *Atkins* claim was an unreasonable application of clearly established law. Pet. Cert. at 15–16. For the same reasons discussed above, Section IV(A)–(B), the state court's application of Texas's abuse-of-the-writ bar to Busby's *Atkins* claim was not an unreasonable application of clearly established federal law.[12] *See Raulerson*, 928 F.3d at 1001–04; *Hill*, 662 F.3d at 1360 (holding that state court's application of a reasonable-doubt burden of proof to petitioner's *Atkins* claim was not an unreasonable application of clearly established federal law because *Atkins* did not impose any burden of proof). Therefore, Busby's petition should be denied.

V. Busby's Reliance on *Cooper* Ignores the Procedural Posture of His *Atkins* Claim.

Busby next argues that the Court should grant review to determine whether its holding in *Cooper* applies to *Atkins* claims. Pet. Cert. at 17–18. Specifically, Busby asks this Court to grant review to hold that Texas's

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[12] Busby's reliance on the Ninth Circuit's holding in *Fernandez v. Roe*, 286 F.3d 1073 (9th Cir. 2002), fails for the same reasons, namely that federal law imposes no burden of proof for *Atkins* claims.

application of it abuse-of-the-writ bar to *Atkins* claims violates the Eighth and Fourteenth Amendments. Pet. Cert. at 17–18. But Busby's reliance on *Cooper* elides the fact that his *Atkins* claim was first raised in a subsequent state habeas application. Moreover, *Cooper* does not dictate that a state cannot apply a burden of proof higher than a preponderance of the evidence but lower than clear and convincing evidence to an *Atkins* claim as the CCA did in this case. Therefore, Busby's petition should be denied.

First, it bears repeating that certiorari review from the denial of federal habeas relief is an inapt vehicle for the question Busby presents. Instead, Busby should have challenged Texas's purported application of a clear-and-convincing-evidence burden of proof to his subsequent *Atkins* claim directly to this Court following the CCA's denial of the claim. *See Hill*, 662 F.3d at 1361. Nonetheless, Busby fails to present a compelling reason for this Court to consider an extension of *Cooper*.

In *Cooper*, this Court held that a state law requiring a defendant to establish his incompetence to stand trial by clear and convincing evidence violated the Due Process Clause. 517 U.S. at 366–69. The Court reached that conclusion by looking to the historical and contemporary treatment of incompetence claims to determine that the state's application of a heightened burden of proof offended "a principle of justice deeply 'rooted in the traditions and conscience of our people.'" *Id.* at 362 (quoting *Medina v. California*, 505

U.S. 437, 445 (1992)). The Court also concluded that the state's application of a heightened burden of proof increased the risk that an incompetent defendant would be forced to stand trial. *Id*. at 363.

Importantly, *Cooper* did not address the issue here, i.e., whether states may impose a heightened burden of proof on *Atkins* claims raised in a subsequent application. As discussed above, application of a heightened burden to subsequent claims is widespread and congruent with federal courts' treatment of successive claims. *See, e.g., Sawyer*, 505 U.S. at 336. In fact, Texas's abuse-of-the-writ bar is more lenient than the bar applicable to a successive federal habeas petitioner. *Supra*, Section IV(B). *Cooper* does not cast doubt on states' ability to perform gatekeeping functions. Nor does it cast doubt on Texas's abuse-of-the-writ bar as it applies to *Atkins* claims. Consequently, Busby's case does not present an appropriate vehicle to consider extending *Cooper* to *Atkins*.

Busby also conflates the standard Texas courts apply to an *Atkins* claim raised in an initial habeas application with the standard Texas courts apply to an *Atkins* claim raised in a subsequent habeas application. Pet. Cert. at 18. As discussed above, Texas courts apply a preponderance-of-the-evidence standard to *Atkins* claims raised at trial or in an initial application. *Gallo*, 239 S.W.3d at 770; *Ex parte Blue*, 230 S.W.3d at 162. This is entirely consistent with *Cooper*.

Moreover, Busby has not attempted to show that Texas's abuse-of-the-writ bar is more onerous than other states' bars. Indeed, Busby asserts that five states require an *Atkins* claimant to demonstrate intellectual disability "by something greater than a preponderance of the evidence in *all cases*." Pet. Cert. at 18 (emphasis added). If that is the case, then Busby cannot show that there is something anomalous with Texas's intermediate threshold burden of proof applicable only to *subsequent Atkins* claims. And again, Texas's bar—§ 5(a)(3)—is congruent with AEDPA and this Court's precedent. Consequently, Busby does not present a vehicle to consider extending *Cooper* because his petition ignores the procedural posture of his *Atkins* claim.

Even if the Court could consider extending *Cooper* to an entirely new procedural context, Busby fails to justify its extension to claims of intellectual disability. Unlike the right not to stand trial while incompetent, which was at issue in *Cooper*, the Eighth Amendment right of the intellectually disabled to be exempt from capital punishment is not historically rooted. *See Hill*, 662 F.3d at 1350. Indeed, this Court decided *Atkins* only seventeen years ago after refusing only thirteen years earlier to exempt the intellectually disabled from execution. *See id.* Consequently, on its own terms, *Cooper* does not apply to *Atkins*.[13]

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[13] Notably, this Court upheld a state's application of a reasonable-doubt standard to insanity claims. *Leland v. Oregon*, 343 U.S. 790, 798–99 (1952).

Similarly, Busby fails to show that there is a risk of error associated with applying a heightened burden of proof to an *Atkins* claim. *See Hill*, 662 F.3d at 1354–56 (explaining that *Cooper*'s risk-of-error did not apply to *Atkins* claims). And Busby doubtlessly cannot show that a state court's application of a heightened burden of proof when conducting a gateway review of a subsequent *Atkins* claim carries an intolerable risk of error. Busby's case is emblematic of why the risk of error in such a case is negligible.

Busby had expert assistance at his post-*Atkins* trial in 2005. His mental-health expert reviewed a significant amount of records and evaluated Busby by administering several psychological tests. *Busby v. Stephens*, 2015 WL 1037460, at *9–10 (summarizing the expert's evaluation of Busby). The expert determined that Busby was not intellectually disabled. 36 RR 64. Busby then did not raise an *Atkins* claim in his initial state habeas application. Busby first raised the claim in his federal habeas petition and, later, in his subsequent state habeas application. Yet, "[n]o expert has ever opined that Busby is intellectually disabled." Pet'r's App. at a009.

The reasonable deduction in this case is that Busby did not claim intellectual disability despite the availability of *Atkins* because he is not intellectually disabled, and no expert had diagnosed him as such. For capital defendants who stood trial after *Atkins* but did not assert at trial or in an initial state habeas application that intellectual disability was a bar to his or her execution, such a failure surely casts doubt on the validity of any later *Atkins* claim. As discussed above, application of a heightened burden of proof is an acceptable and common method for ferreting-out plainly meritless and dilatory claims.[14] Busby simply cannot show that there is an intolerable risk that an intellectually-disabled defendant's condition will go unsuspected and undiagnosed despite the availability of *Atkins*, that the state court will then erroneously determine on postconviction review that he or she is not intellectually disabled only because it applied a burden higher than a preponderance of the evidence, and a federal court will erroneously determine that the state court's decision was not unreasonable. *See Cooper*, 517 U.S. at 363.

Busby's petition presents an inapt vehicle for the question he presents, and he fails to support the extension of *Cooper*. Therefore, his petition should be denied.

[14] *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (holding that AEDPA's restrictions on successive petitions did not constitute a suspension of the writ because the restrictions were "well within" the equitable principles of the abuse-of-the-writ doctrine); *Medina*, 505 U.S. at 445 (stating that a procedural limitation "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Graham v. Johnson*, 168 F.3d 762, 787–88 (5th Cir. 1999) (holding that AEDPA's restrictions on successive petitions were not unconstitutional); *cf. Delaney v. Matesanz*, 264 F.3d 7, 12–13 (1st Cir. 2001) ("That [AEDPA's one-year limitations period] is not as generous as the petitioner might like does not undermine the reasonableness of the framework that Congress chose to erect.").

VI. Busby's Failure to Avail Himself of *Atkins* at Trial or in His Initial State Habeas Application Did Not Render the State Corrective Process Ineffective.

Lastly, Busby argues that the state court's purported application of a clear-and-convincing-evidence burden of proof to his subsequent *Atkins* claim deprived him of an effective state corrective process. Pet. Cert. at 18–19 (citing 28 U.S.C § 2254(b)(1)(B)(ii)).[15] But it was Busby's failure to timely raise an *Atkins* claim at trial or in his initial state habeas application—not the failure of Texas's corrective process—that prevented him from obtaining review of his *Atkins* claim under a preponderance-of-the-evidence burden of proof. Busby cannot rely on his own omission to circumvent AEDPA deference.

First, Busby's premise incorrectly assumes that the burden of proof the CCA applied to his *Atkins* claim was higher than what federal law dictates. Pet. Cert. at 19. He then extrapolates that mistaken conclusion to assert that, because the CCA applied an incorrect burden of proof, he was deprived of an effective state corrective process. Pet. Cert. at 19. But, as discussed above, Section IV(A)–(B), the CCA did not apply an incorrect burden of proof. Consequently, he was not deprived of an effective state corrective process.

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15 This exception to the exhaustion requirement has been applied in "rare cases where exceptional circumstances of peculiar urgency mandate federal court interference," e.g., where the state postconviction system inordinately delays review. *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993); *see, e.g., Phillips v. White*, 851 F.3d 567, 575–76 (6th Cir. 2017); *Jackson v. Duckworth*, 112 F.3d 878, 881 (7th Cir. 1997). It goes without saying that this case does not implicate any such circumstance.

Second, the gravamen of Busby's argument is that the CCA's application of an intermediate gateway burden of proof to his subsequent *Atkins* claim, rather than a preponderance-of-the-evidence burden, rendered the state corrective process ineffective. Pet. Cert. at 19. But Busby had a process available to him in which to raise an *Atkins* claim at trial or during his initial state habeas proceedings during which the state courts would have applied a preponderance-of-the-evidence standard. *Gallo*, 239 S.W.3d at 770; *Ex parte Blue*, 230 S.W.3d at 162–63. That he failed to utilize those proceedings does not mean that the process was not available to him or that it was ineffective. 28 U.S.C. § 2254(b)(1)(B)(i), (ii). He simply did not utilize that process, likely because no expert opined that he is intellectually disabled.

Busby provides no support for the proposition that the state court's application of an intermediate gateway burden of proof to his claim—a claim that was unsupported by *any* expert opinion that Busby is intellectually disabled—rendered the state corrective process ineffective or prevented a full and fair adjudication of his *Atkins* claim, especially in the absence of any requirement under federal law that a preponderance-of-the-evidence burden of proof be applied to an *Atkins* claim. *See Rose v. Lundy*, 455 U.S. 509, 516 n.7 (1982). Consequently, he cannot meet the exception in § 2254(b)(1)(B)(ii).[16] For

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16 Busby asserts that the CCA's application of an intermediate gateway burden of proof "preclude[s]" a federal court from granting relief on a subsequent *Atkins*

the same reason, Busby cannot show that he had no opportunity to seek relief on his *Atkins* claim in state court or that the state corrective process rendered any effort to seek such relief futile. *See Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam).

Nonetheless, as discussed at length above, the CCA adjudicated Busby's *Atkins* claim and did so by applying an appropriate burden of proof. Therefore, the claim is exhausted, and § 2254(b)(1)(B)(ii) is inapplicable. His petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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claim. Pet. Cert. at 19. That is not so. As the Fifth Circuit explained, the CCA's adjudication of the merits of a subsequent *Atkins* claim simply triggers deference under AEDPA. Pet'r's App. at a017–23.

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