

No. 19-5653

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

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

THIS IS A CAPITAL CASE

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Introduction

Petitioner Edward Lee Busby filed his Petition for a Writ of Certiorari (“Petition”) on August 19, 2019. Respondent filed her Brief in Opposition (“BIO”) on November 14, 2019. Petitioner now files this Reply to Respondent’s Brief in Opposition.¹

¹ In this Reply, Petitioner responds only to those arguments made by Respondent he deems merit a reply.

- I. The state court’s decision was a decision pertaining to the merits of Busby’s claim. It was not (and Busby has never argued it was) an adjudication of the merits of his claim.**

Respondent’s argument confuses a state court decision concerning the merits of a federal constitutional claim with a state court decision adjudicating the merits of that claim. But these two types of decisions are not the same, and they differ critically for purposes of federal jurisdiction to address the merits of a claim.

In order to have the merits of his *Atkins* claim adjudicated by the federal district court, Busby had to convince that court that his claim was either exhausted or that the state court process was absent or ineffective to protect his rights. 28 U.S.C. § 2254(b). The decision of the Texas Court of Criminal Appeals (“CCA”) to dismiss Busby’s claim purported to be independent of the merits of his claim; it was therefore not clear, under a long line of this Court’s precedents, whether Busby’s claim was exhausted. *See Harris v. Reed*, 489 U.S. 255, 263 (1989) (explaining that a clear and express statement from a state court that its decision rests on a state procedural ground ordinarily bars review of the claim in federal habeas proceedings). Busby, therefore, consistent with precedent from the court of appeals, argued that the CCA’s decision actually involved a consideration of the merits of his claim, notwithstanding the CCA’s boilerplate statement to the contrary. *See Rivera v. Quarterman*, 505 F.3d 349, 355 (5th Cir. 2007) (explaining that a decision from the CCA dismissing a claim raised in a successive habeas application as an abuse of the writ involves a decision on the merits of the claim); *see also Garcia v. Stephens*,

757 F.3d 220, 225 (5th Cir. 2014); *Ladd v. Stephens*, 748 F.3d 637, 641 n.10 (5th Cir. 2014). In short, although Busby repeatedly argued the state court's decision concerned the merits of his *Atkins* claim, he did not argue that court's decision constituted an adjudication of the merits of his claim pursuant to 28 U.S.C. section 2254(d).

Respondent's argument repeatedly overlooks how a state court decision can involve the merits of a federal claim yet not constitute an adjudication of the merits of that claim for purposes of section 2254(d). *See generally* BIO at 7-9. Several decisions from the court below likewise suggest the court of appeals also gives § 2254(d) deference to any state court decision involving the merits of a constitutional claim, even if that decision does not adjudicate the merits of the claim. *See Rivera*, 505 F.3d at 355.

To be sure, this Court has explained that when a state court denies relief on a federal claim and does not indicate that its decision was based on some state procedural rule, there is an assumption that decision constitutes an adjudication of the merits of the claim. *Harrington v. Richter*, 562 U.S. 86, 99 (2011). However, notwithstanding this *Richter* presumption, this Court has expressly recognized what Respondent and the court below ignore: namely, not every state court decision involving the merits of a federal claim constitutes an adjudication of the merits of that claim.

The distinction between decisions that involve the merits and decisions that adjudicate the merits has not drawn a great deal of attention from this Court.

Justice Scalia did appear to believe every state court decision on the merits of a federal claim also constituted an adjudication of the merits of that claim and was therefore entitled to 2254(d) deference. *See, e.g., Johnson v. Williams*, 568 U.S. 289, 309-10 (2013) (Scalia, J., concurring) (“Given this background, there is no reason to believe that AEDPA established a new and peculiar regime in which the federal habeas court must make one assessment of whether the federal question has been decided ‘on the merits’ for purposes of determining its authority to review the question . . . ; and then must proceed to a different assessment of ‘on the merits’ . . . for purposes of determining whether the state-court judgment is required.”). But no other members of the *Williams* Court joined Scalia’s opinion. Instead, eight justices (including seven members of the current Court) joined Justice Alito’s majority opinion, which flatly rejected Justice Scalia’s belief. Justice Alito’s majority opinion expressly recognized the *Richter* presumption is rebuttable. *Williams*, 568 U.S. at 302 (“Thus, while the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable.”). After *Williams*, there can be no doubt but that there is a salient distinction between state court decisions that adjudicate the merits of a constitutional claim, and are therefore entitled to § 2254(d) deference, and state court decisions that merely concern a constitutional claim, and are therefore not. *See id.* at 301-02.

The CCA’s decision involved the merits of Busby’s *Atkins* claim. However, by requiring Busby satisfy a higher standard than is required by federal law to warrant relief, the state court’s decision involved a standard that was less

protective of Busby's rights than federal law. *Williams* suggests this approach by the CCA is therefore not an adjudication of merits of Busby's *Atkins* claim. *See id.* at 301. This Court should grant certiorari to address directly the issue implicit in *Williams* and determine whether such a decision like the CCA's in this case constitutes an adjudication of the merits of his claim for purposes of 28 U.S.C. § 2254(d).²

II. Busby has not waived his issues.

Busby argued in his amended habeas petition filed in the federal district court that he should only have to satisfy *Sawyer*'s miscarriage of justice exception if the district court believed his claim was procedurally defaulted. ROA.2492-93. Busby did not argue this was the correct standard to be used if the court believed his claim was exhausted, and subsequent pleadings made clear he believed his claim should have been reviewed *de novo*. Of course, the district court denied Busby relief because it believed his claim was defaulted and that there was no cause to excuse that default because Busby had not satisfied *Sawyer*. ROA.3341-43. The issue before the court of appeals was therefore whether the claim was procedurally viable. There was no reason to believe the court of appeals would find both that Busby's claim was exhausted and that he must nevertheless satisfy the *Sawyer* exception to be entitled to relief until the court of appeals held as much in its

² Of course, if this Court were to determine, contrary to the implication of *Williams*, that such a decision does constitute an adjudication of the merits for purposes of § 2254(d), it would presumably also have to address whether an adjudication applying a different substantive standard than is required by federal law is an unreasonable application of federal law for purposes of § 2254(d)(1).

perplexing and subsequently withdrawn opinion. Busby appropriately addressed this matter in his petition for rehearing. In that petition (his first opportunity to address the now-withdrawn opinion), Busby squarely raised the issue contained in the first question presented in his Petition to this Court: whether the state court decision was entitled to deference when it held him to a higher standard than required by federal law. Respondent's argument that Busby has waived this issue, BIO at 9-10, is unpersuasive.

Similarly unpersuasive are Respondent's arguments that Busby has waived the issues of whether the state court's decision was an unreasonable application of federal law or that the state court process was ineffective or absent. BIO at 10-12. The court below squarely held the state court's decision did not involve an unreasonable application of federal law even though it held Busby to a higher standard than required by federal law. Petition at a008-09. Busby has waived none of the issues presented in his Petition.

III. This Court's decision on any of the questions presented in Busby's Petition would not constitute an advisory opinion.

Respondent's Brief in Opposition does not explain how Respondent believes requiring a petitioner to 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]," BIO at 16, differs from requiring that petitioner to demonstrate by clear and convincing evidence that he is intellectually disabled. Caselaw from the CCA and the court of appeals also fails to explain the difference. Whatever that difference is, it is clear

that requiring a petitioner to make this threshold showing requires him to do more than demonstrate by a preponderance of the evidence that he is intellectually disabled, which is the standard required by federal law. (It is the standard required by federal law in cases arising from the state courts of Texas because this Court left that decision to the states, and the CCA announced that to be the Texas standard in *Ex parte Briseño*. See *infra* Part V.) It is the fact that the state court required more of Busby than was required by federal law and not the degree of difference between the standard required by federal law and that employed by the CCA in denying Busby relief, that is the crux of Busby's claims. Respondent's argument that this Court's decision would constitute an advisory opinion is unpersuasive.

IV. Busby's *Atkins* claim was presented in his *initial* federal habeas petition. Both this Court's opinion in *McQuiggin v. Perkins* and section 2244 are inapplicable to his claim.

Just as the court of appeals did in its opinion denying rehearing, Petition at a019-23, citing section 2244 and this Court's opinion in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), Respondent devotes several pages of her Brief in Opposition arguing that the CCA's decision was not unreasonable because the standard it employed is similar to the one employed by federal courts when a petitioner presents his claim in a successive federal habeas petition. See BIO at 22-25. It bears repeating: Busby's claim was presented in his *initial* federal habeas petition. Neither section 2244 nor *Perkins* has any bearing on Busby's claim. While Respondent argues Busby's petition ignores the procedural posture of his claim, BIO at 26, it is Respondent and the court of appeals that have ignored that Busby's

claim was presented in his *initial* federal petition. As such, to be entitled to relief on his claim in the federal district court, Busby should only have been required to demonstrate by a preponderance of the evidence that he is intellectually disabled. *Ex parte Briseño*, 135 S.W.3d 1, 12 (Tex. Crim. App. 2004), *overruled on other grounds by Moore v. Texas*, 137 S. Ct. 1039 (2017). Texas decided that is the standard of proof petitioners claiming they are ineligible for execution because they are intellectually disabled must satisfy in 2004. Before Busby's conviction and sentence became final, the court of appeals recognized this to be the standard in Texas. *Lewis v. Quarterman*, 541 F.3d 280, 283 (5th Cir. 2008).³ It was that Court's perplexing decision to deviate from the preponderance standard that has given rise to this proceeding.

³ To the extent it can be argued any matter left to the states by this Court can be clearly established, the standard of proof a Texas defendant must satisfy to be entitled to relief on his *Atkins* claim is clearly established law in Busby's case. Moreover, Busby's Petition simply asks this Court to clarify what is required under *Atkins*, which is unquestionably clearly established law in Busby's case. For those reasons, Respondent's argument that Busby's issues – all of which involve the court of appeals' decision to hold Busby to a higher standard – are barred by *Teague*, see BIO at 14-16, is unpersuasive.

Conclusion and Prayer for Relief

Petitioner requests this Court grant certiorari and either summarily reverse the decision of the court below on the authority of *Williams* or, alternatively, schedule the case for briefing and oral argument.

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Respectfully submitted,

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