No. _____

IN THE

Supreme Court of the United States

ERIC GUERRERO, Director, Texas Department of Criminal Justice
Correctional Institutions Division,
Petitioner,

v.

EDWARD LEE BUSBY,
Respondent.

EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

(EXECUTION IS SCHEDULED FOR MAY 14, 2026)

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LIST OF PROCEEDINGS

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

Edward Lee Busby, Jr. v. State, 253 S.W.3d 661 (Tex. Crim. App. 2008) (affirming judgment on direct appeal)

Busby v. Texas, 555 U.S. 1050 (2008) (denying certiorari on direct appeal)

Ex parte Busby, No. WR-70,747-01, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009) (denying first state habeas application)

Ex parte Busby, No. WR-70,747-02, 2013 WL 831550 (Tex. Crim. App. Mar. 6, 2013) (dismissing subsequent state habeas application)

Busby v. Stephens, No. 4:09-CV-160, 2015 WL 1037460 (N.D. Tex. Mar. 10, 2015) (denying federal habeas petition)

Busby v. Davis, 677 F. App'x 884 (5th Cir. Jan. 27, 2017) (granting a certificate of appealability)

Busby v. Davis, 892 F.3d 735 (5th Cir. 2018) (affirming denial of federal habeas petition)

Busby v. Davis, 925 F.3d 699 (5th Cir. 2019) (withdrawing and superseding opinion and affirming denial of federal habeas petition)

Busby v. Davis, 140 S. Ct. 897 (2020) (denying certiorari on federal habeas)

In re Busby, No. WR-70,747-03 (Tex. Crim. App. Apr. 27, 2020) (granting stay of execution)

Busby v. Texas, No. WR-70,747-04 (Tex. Crim. App. Jan. 8, 2021) (denying motion for a stay of execution)

Busby v. Texas, No. WR-70,747-05 (Tex. Crim. App. Jan. 8, 2021) (denying motion for a stay of execution)

Ex parte Busby, No. WR-70,747-06, 2021 WL 369737 (Tex. Crim. App. Feb. 3, 2021) (remanding subsequent state habeas application)
Gutierrez v. Saenz, No. 1:19-CV-185 (S.D. Tex. Jan. 29, 2021) (order denying motions to intervene and for a stay of execution)

Busby v. Collier, et al., No. 4:21-CV-297 (S.D. Tex. Sept. 16, 2021) (order dismissing civil rights complaint)

Ex parte Busby, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021) (order staying execution and remanding subsequent state habeas application)

Ex parte Busby, No. WR-70,747-06, 2025 WL 702111 (Tex. Crim. App. Mar. 5, 2025) (order denying subsequent state habeas application)

Busby v. Guerrero, No. 4:09-CV-160 (N.D. Tex. Apr. 15, 2026) (memorandum opinion and order denying Rule 60(b) motion and transferring motion to the Fifth Circuit)

Busby v. Guerrero, Nos. 26-70004, 26-10354 (5th Cir. May 8, 2026) (per curiam order granting a temporary stay of execution)

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INTRODUCTION

Respondent Edward Lee Busby was convicted of capital murder and sentenced to death twenty years ago for the murder of Laura Crane. He is scheduled to be executed after **6:00 p.m., May 14, 2026**. Three days ago, a divided panel of the Fifth Circuit issued a temporary stay of execution in a late-night opinion bereft of reasoning and with absolutely no agreement on the basis for a stay. Appendix (App.) 324. And there is no basis.

These proceedings began when Busby filed a Rule 60(b) motion raising an *Atkins* claim. The district court first found Busby's motion was actually a successive habeas petition because it attacked a previous merits decision denying his claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). App. 101. Second, the court found the motion untimely. App. 101–102. Third, the court found an absence of an extraordinary circumstance warranting relief from judgment. App. 102. The district court denied a certificate of appealability (COA) and transferred the case to the Fifth Circuit to determine whether Busby was entitled to authorization to file a successive habeas petition. App. 102–104.

Busby first sought a COA with respect to the district court's determinations that his Rule 60(b) motion was a successive petition, untimely, and meritless. App. 105–138. He later requested authorization to file a

successive federal habeas petition re-raising his *Atkins* claim even though it had been raised and rejected before. App. 217–274. Busby did not move in the Fifth Circuit for a stay of execution; rather, he included a conclusory request for a stay without even articulating the basis of his entitlement to it. App. 136

A fractured panel of the Fifth Circuit granted a temporary stay of execution but could not agree on the reasoning. App. 323–357. Judge Higginson's sole reason for a temporary stay was to await this Court's pending decision in *Hamm v. Smith*, 145 S. Ct. 2776 (June 6, 2025). App. 325–326. Judge Graves would have gone farther and granted a stay of execution *and* habeas relief on the merits of the *Atkins* claim. App. 350–356. Neither judge, however, paused to consider—much less explain—whether Busby overcame numerous antecedent barriers to consideration of the merits of his successive *Atkins* claim or whether *Hamm* would even apply to such a review under 28 U.S.C. § 2254(d). Nor did either judge cite the factors that must be analyzed in evaluating a request for a stay of execution.

Judge Higginson erred in voting to stay the execution to await this Court's decision in *Hamm* because, as it has not been decided, it does not apply retroactively.[1] 28 U.S.C. § 2244(b)(2)(A). Judge Higginson also erred because

[1] The question presented in *Hamm* does not implicate retroactivity, nor did any party raise such an argument.

Busby did not ask for a stay to await the *Hamm* opinion, and *Hamm* is inapposite to the adjudication of Busby's Rule 60(b) motion, which itself was predicated entirely on *Ayestas v. Davis*, 584 U.S. 28 (2018). Moreover, the opinion would not apply to review under 28 U.S.C. § 2254(d) of the state court's denial of Busby's *Atkins* claim because the state court's decision preceded *Hamm*. *See Nken v. Holder*, 556 U.S. 418, 434 (2009) (the ability to prevail on the merits is a "critical" consideration); *Crutsinger v. Davis*, 930 F.3d 705, 707 (5th Cir. 2019) (the "inability to establish a likelihood of success on the merits is, effectively, dispositive of the motion for stay").

Judge Graves erred in voting to stay the execution because he failed to explain how Busby's Rule 60(b) motion was not a successive petition. Treating Busby's Rule 60(b) motion as a successive petition, as it should be, the petition is indisputably barred under § 2244(b)(1) because the *Atkins* claim was raised and denied before. But even if it had not been raised before, the claim is barred under § 2244(b)(2) because the claim does not implicate Busby's guilt and it was plainly available to Busby during his initial federal habeas proceedings. Moreover, Judge Graves's effort to adjudicate the merits of Busby's successive *Atkins* claim raised in the Rule 60(b) motion is a tacit concession that the motion *was* a successive petition. And even assuming Busby's Rule 60(b) motion was not a successive petition, Judge Graves failed to address either the

motion's untimeliness or the absence of extraordinary circumstances necessary to warrant reopening judgment.

Any one of these errors would warrant vacatur of the Fifth Circuit's order. The court's serial errors in failing to address the numerous antecedent barriers that should have precluded a review of the merits of Busby's *Atkins* claim, and the court's subsequent failure to appreciate § 2254(d)'s limitations on a merits review of the claim, indisputably warrant this application.

STATEMENT OF THE CASE

Busby was convicted and sentenced to death in 2005, for the murder of seventy-eight-year-old Laura Crane. *See Busby v. State*, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1050 (2008). Busby and an accomplice abducted and robbed Ms. Crane. *Id.* Busby tightly wrapped more than twenty feet of duct tape around Ms. Crane's entire face, causing her to suffocate. *Id.* at 663–64. The conviction and sentence were affirmed on direct appeal in 2008. *Id.* at 663. Busby's initial state habeas application was denied in 2009. *Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096, at *1 (Tex. Crim. App. Feb. 25, 2009).

Busby initiated federal habeas proceedings in 2009. *See* ROA.22-23. In 2011, Busby requested funding from the district court for the purpose of obtaining an expert opinion about whether he was intellectually disabled.

ROA.1633. The court denied the motion. ROA.1871. In doing so, the court described the extensive evidence developed prior to Busby's trial and during his state habeas proceedings, which Busby litigated with the benefit of funding from the state habeas court, ROA.1873. The district court noted that Busby failed to explain why his already-developed evidence was insufficient for purposes of his intellectual disability claim. ROA.1875-76.

The district court later stayed its proceedings to allow Busby the opportunity to exhaust claims. ROA.1884. Busby then filed a subsequent state habeas application raising an *Atkins* claim, which the Texas Court of Criminal Appeals (TCCA) dismissed as an abuse of the writ. ROA.4468-69. The district court reopened its proceedings and denied habeas relief. ROA.3366.

The Fifth Circuit granted Busby a COA after which it affirmed the district court's denial of the *Atkins* claim, *Busby v. Davis*, 892 F.3d 735 (5th Cir. 2018), in an opinion that was withdrawn and superseded following Busby's filing of a petition for rehearing, *Busby v. Davis*, 925 F.3d 699, 702 (5th Cir. 2019), *cert. denied*, 589 U.S. 1141 (2020).

Busby's execution was then scheduled for May 6, 2020, but later stayed. Ord., *In re Busby*, No. WR-70,747-03 (Tex. Crim. App. Apr. 27, 2020). Busby's execution was later scheduled for February 10, 2021. Ord., *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Oct. 15, 2020). Prior to

that date, Busby filed a motion for a stay of execution and a subsequent state habeas application again raising an *Atkins* claim. ROA.4960-5020. The TCCA granted the motion for a stay and remanded Busby's claim for review on the merits. ROA.5525-27. On remand, the trial court entered findings and conclusions recommending that Busby's claim be denied. App. 358–402. The TCCA adopted most of the trial court's findings and conclusions, and it denied Busby's claim based on the adopted findings and conclusions and the TCCA's own review. ROA.5432-34. Busby filed a petition for a writ of certiorari, which this Court denied. *Busby v. Texas*, 146 S. Ct. 371 (Nov. 10, 2025). The state trial court later entered an order setting Busby's execution for May 14, 2026. Ord. Setting Execution Date, *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Dec. 10, 2025).

Months later, on April 2, 2026, Busby filed in the federal district court a motion for relief from judgment under Rule 60(b). App. 1–43. The court denied the motion and a COA because the motion constituted a successive habeas petition, was untimely, and failed to demonstrate any extraordinary circumstance. App. 101–104. The court transferred the case to the Fifth Circuit for a determination as to whether Busby was authorized to file a successive habeas petition. App. 104. Busby first sought a COA as to the district court's disposition of the Rule 60(b) motion. App. 105–138. He later filed a motion for

authorization to file a successive federal habeas petition re-raising his *Atkins* claim. App. 212–274. He did not move for a stay of execution. The Fifth Circuit temporarily stayed Busby's execution, but the two judges who voted to grant the stay could not agree on the reasoning. App. 324–26, 350–57. Petitioner, the Director, now requests that this Court vacate the Fifth Circuit's order.

ARGUMENT

I. The Stay Standard

A stay of execution "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough,* 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). Rather, the inmate must satisfy all the requirements for a stay, including a showing of a significant possibility of success on the merits. *Id*. (citing *Barefoot v. Estelle*, 463 U.S. 880, 895–96 (1983)). When the requested relief is a stay of execution, a court must consider:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). A court must consider "the State's strong interest in proceeding with its

judgment" and "attempt[s] at manipulation." *Nelson*, 541 U.S. at 649–50 (citing *Gomez v. U.S. Dist. Court for Northern Dist of California,* 503 U.S. 653, 654 (1992)). "Last-minute stays [of execution] should be the extreme exception, not the norm[.]" *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019).

Neither Judge Higginson nor Judge Graves cited any of the factors a court *must* apply in deciding whether to grant a stay of execution. App. 325–326, 350–357. That error, on its own, warrants vacatur of the Fifth Circuit's stay. As discussed below, the error is compounded by the court's failure to address the many barriers that should have precluded consideration of the merits of Busby's *Atkins* claim.

II. The Fifth Circuit Erred Because Busby's Rule 60(b) Motion Was a Poorly Disguised Successive Federal Habeas Petition that Should Have Been Dismissed Under § 2244(b).

Neither Judge Higginson nor Judge Graves explained how the court could reach the merits of Busby's *Atkins* claim by way of his Rule 60(b) motion. App. 325–326, 350–357. Worse, Judge Graves used Busby's Rule 60(b) motion as a vehicle to review and, in his view, grant a successive habeas claim. App. 350–357. Granting a stay without acknowledging or engaging with the barriers to a merits adjudication was legal error.

The barriers to merits review are numerous. To begin, the Rule 60(b) motion was undoubtedly a successive petition. This Court has clearly explained

that a Rule 60(b) motion is a successive petition "if it attacks the federal court's previous resolution of a claim *on the merits*, since alleging that the court erred in denying habeas relief on the merits is effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) (footnote omitted). This Court defined "on the merits" as including "a determination that there exist or do not exist grounds entitling a petitioner to habeas corpus relief under 28 U.S.C. §§ 2254(a) and (d)." *Id.* at 532 n.4. "When a movant asserts one of those grounds . . . he is making a habeas corpus claim." *Id.*

As Judge Richman explained, and as found by the district court, Busby's Rule 60(b) motion reasserted his *Atkins* claim with new evidence. App. 101, 336–337. Although Judge Richman assumed *arguendo* the motion was not a successive petition, App. 338, the district court's conclusion was indisputably correct under *Gonzalez*, 535 U.S. at 531 (a Rule 60(b) motion presents a claim for relief if it seeks to present new evidence "in support of a claim previously denied").

Busby had no rejoinder to that proposition in the court below, App. 202–211, and neither Judge Higginson nor Judge Graves explained how the Rule 60(b) motion managed to avoid classification as a successive petition, App. 325–326, 350–357. Not only that, but Judge Graves also used the Rule 60(b)

motion as a vehicle to explicitly engage in a merits analysis, and concluded that Busby is entitled to habeas relief. App. 350–357. This can be nothing less than a tacit admission that Busby's Rule 60(b) presented a claim for habeas relief. But that is prohibited under *Gonzalez*. 545 U.S. at 532. Judge Graves thus improperly voted to stay Busby's execution by using the Rule 60(b) motion as a vehicle for re-adjudicating the merits of Busby's *Atkins* claim. *See id.* at 532 n.4.

Because the Rule 60(b) motion was a successive petition, § 2244(b) should have resulted in its dismissal because Busby's *Atkins* claim indisputably failed under either provision of the statute.[2] First, the claim was previously raised and denied on the merits. *Busby*, 925 F.3d at 716–20. Dismissal was *mandatory*. § 2244(b)(1) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."); *see* App. 303–306.[3] Second, an *Atkins* claim, which goes to eligibility for the death penalty, cannot show Busby was innocent of his crime of conviction, and *Atkins* was available to him during his

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[2] Busby has not argued he is entitled to authorization under § 2244(b)(2)(A).

[3] Busby attempted in the courts below to avoid the plain language of § 2244(b)(1) by relying on a defunct doctrine of factual exhaustion that has no place under the successiveness analysis. App. 127–128. The Director demonstrated Busby's argument was baseless. App. 174–178 (discussing *In re Young*, 789 F.3d 518, 526 n.2 (5th Cir. 2015), *Franklin v. Johnson*, 839 F.3d 465, 475 (6th Cir. 2016), and *In re Hill*, 715 F.3d 284, 295 (11th Cir. 2013)).

initial federal habeas proceedings because he raised the claim at that time. § 2244(b)(2)(B); *see* App. 306–308. Both Judges Higginson and Graves erred by failing to analyze these procedural barriers to relief.

Alternatively, if Busby's Rule 60(b) motion was not a successive habeas petition, he was required to demonstrate he was entitled to relief from judgment under Rule 60(b). To make such a showing, Busby was required to show extraordinary circumstances existed to warrant relief from judgment and that his Rule 60(b) motion was timely filed, *see Gonzalez*, 545 U.S. at 535, which the district court properly found Busby failed to do, App. 101–02. Judge Higginson and Judge Graves failed to determine how another adjudication of the merits of Busby's *Atkins* claim was available to the court by way of Busby's Rule 60(b) motion.[4] App. 325–326, a350–a357. It was error for the Fifth Circuit to stay Busby's execution without even engaging in that analysis.

First, as the district court correctly found, App. 101–102, the Rule 60(b) motion was predicated entirely on this Court's opinion in *Ayestas*. App. 1–43. Busby argued *Ayestas* rendered the district court's denial of funding in 2011 erroneous. App. 19–21. However, this Court explained in *Gonzalez* that a change in decisional law is not an extraordinary circumstance. 545 U.S. at

[4] Neither Judge Higginson nor Judge Graves purported to find Busby was or even may be entitled to authorization to file a successive federal habeas petition.

536–37. Moreover, *Ayestas* "is all the less extraordinary" in Busby's case because the district court did not rely on the Fifth Circuit's funding standard this Court abrogated in *Ayestas*,[5] and because of Busby's "lack of diligence in pursuing" relief from the funding denial during the decade following that denial. *Id.* at 537.

Second, the Rule 60(b) motion was untimely, as the district court found. App. 101–102; Fed. R. Civ. P. 60(c) (a motion under Rule 60(b)(6) must be filed "within a reasonable time"). Busby indisputably had grounds to bring his motion when this Court issued its opinion in *Ayestas* in 2018. Busby's failure to attempt to rectify what he perceived was error for eight years rendered his motion indisputably untimely. *See* App. 69–71.

III. Judge Higginson Improperly Voted to Stay the Execution on a Basis Busby Did Not Raise and on Which Busby Cannot Prevail.

Judge Higginson voted to stay Busby's execution to await this Court's opinion in *Hamm*. App. 325–326. But *Hamm* was irrelevant to Busby's request for authorization under § 2244(b). *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (under § 2244(b)(2)(A), an applicant must rely on a new rule of constitutional law that has been "made retroactive" by this Court and was previously unavailable). *Hamm* has neither been decided nor made retroactive by this

[5] Indeed, Busby has never articulated how the district court's denial of funding was erroneous under *Ayestas*. *See* App. 184–186.

Court. The statute does not provide for authorization based on a rule that might in the future be made retroactive. § 2244(b)(2)(A). It was error to vote to stay Busby's execution to await this Court's opinion in *Hamm*.

Additionally, Busby neither cited nor relied on *Hamm* anywhere in his pleadings in the district court or the Fifth Circuit. Consequently, the stay is a plain violation of the principle of party presentation. *See United States v. Sineneng-Smith*, 590 U.S. 371, 375 (2020); *Clark v. Sweeney*, 607 U.S. 7, 9 (2025) ("To put it plainly, courts 'call balls and strikes'; they don't get a turn at bat."). Even if Busby had raised *Hamm* as a basis for a stay, it would not have entitled him to one. Judge Higginson voted to stay Busby's execution to await this Court's decision in *Hamm*,[6] which Judge Higginson believed will clarify the rule to be applied in Busby's case. App. 325–326. But *Hamm* can have no application in Busby's case because the TCCA's most recent adjudication of Busby's *Atkins* claim preceded a decision in *Hamm*.[7] *Cullen v. Pinholster*, 563

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[6] Under long-standing and controlling Circuit precedent, the Fifth Circuit could not have granted a stay based on the *Hamm* certiorari grant. *Neville v. Johnson*, 440 F.3d 221, 222 (5th Cir. 2006); *Cantu v. Collins*, 967 F.2d 1006, 1012 n.10 (5th Cir. 1992); *Johnson v. McCotter*, 804 F.2d 300, 301 (5th Cir. 1986); *Bridge v. Collins*, 963 F.2d 767, 770 n.5 (5th Cir. 1992); *Ellis v. Collins*, 956 F.2d 76, 79 (5th Cir. 1992). The Director would have apprised the Fifth Circuit of this fact if Busby had raised *Hamm* below.

[7] Notably, underscoring Busby's manifest lack of diligence, he sought review in this Court of the TCCA's decision following the grant of certiorari in *Hamm*, but he failed to acknowledge *Hamm* even after the respondent addressed it. Br. in Opp. 18–

U.S. 170, 182 (2011) ("State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003))). Even if a federal court could reach the merits of Busby's *Atkins* claim despite the numerous antecedent barriers the Fifth Circuit failed to address, *Hamm* would have no bearing on the Antiterrorism and Effective Death Penalty Act's (AEDPA) backward-looking analysis. This Court has "granted summary relief when the lower courts have departed from the role AEDPA assigns." *Klein v. Martin*, 607 U.S. ---, 146 S. Ct. 589, 593 (2026) (per curiam). The Court should do so here.

Additionally, Judge Higginson failed to explain *Hamm*'s relevance to the adjudication of Busby's Rule 60(b) motion. App. 325–326. That motion was predicated entirely on this Court's decision—almost a decade ago—in *Ayestas*. App. 1–43. A proper Rule 60(b) motion could not have sought to litigate the merits of Busby's *Atkins* claim, and *Hamm* would go to the merits, not an issue that precluded merits review. *See Gonzalez*, 545 U.S. at 532 n.4. Judge Higginson erred in voting to stay Busby's execution without articulating how the court could either address the merits of the *Atkins* claim or how *Hamm* would have any relevance to the disposition of the Rule 60(b) motion.

19, *Busby v. Texas*, No. 25-5056 (Oct. 7, 2025); *see generally* Reply, *Busby v. Texas*, No. 25-5056 (Oct. 7, 2025).

Worse, in relying solely on this Court's grant of review in *Hamm*, Judge Higginson ignored the requirement that Busby make an affirmative showing that, among other things, he is likely to succeed on the merits. App. 325–326. It was error to grant a stay of execution based on *Hamm* without determining both that it would apply in Busby's case and that he could benefit from it. *See Hill,* 547 U.S. at 584.

The Fifth Circuit strayed from its role as neutral arbiter to stay Busby's execution—twenty years after he was sentenced to death—on a basis he neither raised nor can benefit from. This Court should vacate the Fifth Circuit's stay.

IV. The Fifth Circuit Erred in Granting a Stay of Execution Based on a Meritless and Time Barred Claim.

Even if all the antecedent barriers to the merits of Busby's *Atkins* claim were overcome, the claim would be meritless, as Judge Richman thoroughly explained. App. 327–349. Additionally, the claim is time barred. The Fifth Circuit erred in granting a stay of execution based on a claim on which Busby cannot prevail.

A. Busby's claim is meritless.

To demonstrate he is intellectually disabled, Busby must show (1) he has deficits in intellectual functioning, (2) he has deficits in adaptive functioning, and (3) the onset of these deficits occurred during childhood or adolescence.

Moore v. Texas, 581 U.S. 1, 7 (2017). Additionally, Busby must show the TCCA's denial of the claim was unreasonable. § 2254(d)(1)–(2). Judge Richman faithfully applied the deference required under § 2254(d). App. 327–349. On the other hand, Judge Graves's "readiness to attribute error" to the state court "despite the court's correct citation and synthesis of" this Court's precedent is "incompatible with § 2254(d)'s highly deferential standard for evaluating state-court rulings." *Martin*, 146 S. Ct. at 597 (internal quotation marks omitted); *see Brumfield v. Cain*, 576 U.S. 305, 314 (2015).

As to significantly subaverage intellectual functioning, Busby's claim depends critically on application of the Flynn Effect, which is not required under this Court's precedent. Not only that, this Court has called the Flynn Effect "controversial." *Dunn v. Reeves*, 594 U.S. 731, 736 (2021) (discussing the "controversial theory involving the inflation of IQ scores over time").

Nonetheless, the state court appropriately explained that the Flynn Effect may affect test scores but that courts should not change an individual score.[8] App. 368. The court also discussed the need to consider the standard error of measurement (SEM) for an IQ test,[9] App. 368 (citing *Moore*, 581 U.S.

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[8] The trial court also noted that neither Dr. Martinez nor Dr. McGarrahan quantified an appropriate adjustment of Busby's IQ scores to account for the practice effect. App. 384.

[9] The trial court explained that the parties' experts failed to adequately explain the test-specific SEMs that apply to each of Busby's IQ scores. App. 384–85.

at 13), App. 384–85, as well as the current diagnostic standards, App. 368. Indeed, the court considered Busby's full-scale IQ score of 74 with an SEM of 70–79. App. 386–87.

Because the state court considered all the scores Busby proffered, as well as their SEMs, App. 384–85, he cannot show any error in the court's conclusion based on "a holistic review," App. 399, that he failed to satisfy the intellectual-functioning prong of the diagnostic criteria, much less that the state court's decision was unreasonable. This is particularly true considering that Busby was "able to present"—and the state court considered—"additional evidence of intellectual disability, including" evidence regarding adaptive deficits. *Hall v. Florida*, 572 U.S. 701, 723 (2014); *see Moore*, 581 U.S. at 14.

As to adaptive behavior, Busby also failed to identify any error in the state court's decision, let alone show that the court's rejection of his *Atkins* claim was unreasonable. First, the state court did not rely on evidence of Busby's adaptive strengths. Nowhere in its findings did the state court find that Busby's adaptive deficits were rendered irrelevant or otherwise outweighed by his adaptive strengths. Indeed, the court explicitly stated it was not focusing on Busby's strengths. App. 394. Instead, the court resolved

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Nonetheless, the court considered the SEMs that were supported "by at least some evidence or that were previously used by the federal habeas courts." App. 385.

conflicts in the evidence of Busby's asserted deficits. App. 394. This was appropriate in this case because there was conflicting evidence and therefore "the issue came down to resolving those conflicts and inconsistencies based on credibility and weight determinations." *Petetan v. State*, 622 S.W.3d 321, 349 (Tex. Crim. App. 2021); *see Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014) ("Both experts and those answering questions about a person's adaptive functioning may exhibit significant conscious or unconscious bias in addressing [the adaptive behavior] issue.").

For instance, the state court explained that Busby's trial expert, psychologist Dr. Timothy Proctor, administered an academic assessment to Busby in 2005, which showed he had a fourth grade reading level and sixth-grade skills in math. App. 389. Busby scored similarly on the academic assessment that his postconviction expert, Dr. Gilbert Martinez, administered in 2022. App. 389. Busby also admitted having pen pals with whom he corresponded. App. 390. Yet several of the individuals who provided information regarding Busby's purported adaptive deficits stated Busby could not count money or order fast food and that he could not read or write—plainly inconsistent with Busby's achievement scores. App. 390 ("Several also noted that [Busby] was not good with numbers, even unable to count money or order fast food, which contradicts his [Wide Range Achievement Test] score showing

he performed at a sixth-grade math level."), 393–94. The court's assessment of the credibility of the evidence was especially appropriate given the sources and context of the evidence, i.e., individuals who would be highly motivated to exaggerate their recollection of Busby's adaptive behavior from many years earlier. *See Ex parte Cathey*, 451 S.W.3d at 21 (noting "issues of potential bias in giving the Vineland test to applicant's family members who had a motive to underestimate his abilities and activities"). Busby fails to identify any error in the state court performing its essential function as a factfinder.

Similarly, the State's postconviction expert, Dr. Antoinette McGarrahan, found that Dr. Martinez's scores were "highly consistent" with the testing administered by Dr. Proctor. ROA.3513. And although Busby had a learning disability, ROA.10987, 10994–96, Dr. Proctor testified there was no evidence Busby was intellectually disabled, ROA.11124.

Busby failed to identify any error in the state court's conclusion that the credible evidence did not support a finding that Busby suffers significant limitations in adaptive behavior. He cannot show the state court erred in crediting Dr. Proctor's opinion that Busby's achievement scores and school records did not demonstrate intellectual disability. ROA.11110–12, 11124.

Second, Busby fails to show the state court erred in discounting the results of a measure of adaptive behavior, the Adaptive Behavior Assessment

System (ABAS) III, that was administered by Dr. Martinez. The court's skepticism of retrospective assessments by motivated informants of an individual's adaptive behavior decades earlier was well supported. *See Petetan*, 622 S.W.3d at 356 (concluding that a jury could reasonably reject ABAS-II results because it was not normed for retrospective assessments and the informants were relatives of the appellant); *Ex parte Cathey*, 451 S.W.3d at 19–21, 21 n.64 (collecting cases). Busby therefore cannot show any error in the state court's assessment of the "conflicting" evidence regarding his adaptive behavior or that the state court's decision was unreasonable. App. 395.

B. Busby's claim is time barred.

Busby's *Atkins* claim is also plainly time barred. *See* 28 U.S.C. § 2244(d)(1). Even assuming his limitations period commenced when the state court dismissed his subsequent application raising an *Atkins* claim in 2013, the limitations period expired over a decade ago. *See Duncan v. Walker*, 533 U.S. 167, 172–73 (2001). Indeed, Busby admitted in the court below that his claim is time barred. App. 240. His indisputable lack of diligence—including failing to file his second subsequent state habeas application until a year after his federal habeas proceedings concluded—disentitles him to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010).

Busby was not entitled to a stay to litigate a meritless and time barred claim. The Fifth Circuit erred in granting such a stay twenty years after Busby was sentenced to death and following a manifest lack of diligence.

V. The Fifth Circuit Erroneously Gave Little Consideration to the Public's and Victims' Interest in Enforcement of Busby's Sentence.

The State and crime victims have a "powerful and legitimate interest in punishing the guilty." *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (citation omitted). And "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence." *Bucklew*, 587 U.S. at 149 (quotation omitted); *see Nelson*, 541 U.S. at 648 ("a State retains a significant interest in meting out a sentence of death in a timely fashion"); *Gomez*, 503 U.S. at 654 ("Equity must take into consideration the State's strong interest in proceeding with its judgment[.]"). Once post-conviction proceedings "have run their course . . . finality acquires an added moral dimension. Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Calderon*, 523 U.S. at 556.

As this Court has explained, "capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of

a sentence of death." *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). "[L]ast-minute claims arising from long-known facts, and other 'attempt[s] at manipulation' can provide a sound basis for denying equitable relief in capital cases." *Ramirez v. Collier*, 595 U.S. 411, 434 (2022) (quoting *Gomez*, 503 U.S. at 654). Indeed, Busby's dilatory Rule 60(b) motion, his decade-long failure to litigate his complaint about *Ayestas*, and his efforts to re-litigate his *Atkins* claim even though it has been repeatedly rejected constitute these kinds of tactics.

As discussed above, the Fifth Circuit's stay ignored numerous antecedent barriers that should have prevented an adjudication of the merits of Busby's *Atkins* claim. The court proceeded to grant a stay despite those barriers. In doing so, the court paid inadequate consideration to the public's interest in seeing a long-final state court judgment carried out. Allowing such a legally baseless injunction to further delay Busby's lawful execution "would serve no meaningful purpose and would frustrate the State's legitimate interest in carrying out a sentence of death in a timely manner." *Baze v. Rees*, 553 U.S. 35, 61 (2008) (plurality op.).

The victims of Busby's crime "deserve better." *Bucklew*, 587 U.S. at 149. Busby has litigated his *Atkins* claim many times over. He was not entitled to

another bite at the apple. The Fifth Circuit erred in finding otherwise. This Court should vacate the Fifth Circuit's stay.

CONCLUSION

This Court should vacate the Fifth Circuit's order staying Busby's execution.

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