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.

APPENDIX TO EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

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-VS-	§	CIVIL NO. 4:09-cv-00160-O
	§	
	§	*CAPITAL CASE*
	§	
ERIC GUERRERO, Director,	§	
Texas Department of Criminal Justice,	§	
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MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

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MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. Introduction

Pursuant to Federal Rule of Civil Procedure 60(b)(6), Petitioner Edward Lee Busby, Jr.--who is currently scheduled to be executed on Thursday, May 14, 2026, after 6 o'clock p.m. --requests relief from this Court's March 10, 2015, Memorandum Opinion and Order and Final

Judgment denying him relief on his petition for writ of habeas corpus. *See* Final J., ECF No. 101; Mem. Op. & Order, ECF No. 100.

Previously, Busby was scheduled to be executed on February 10, 2021. The Texas Court of Criminal Appeals ("CCA") stayed Busby's execution in 2021 because it believed that he had made a threshold showing that he is intellectually disabled and therefore ineligible for execution. *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021). Pursuant to the resulting state-court remand proceeding (and pursuant to the state trial court's granting the request for funding this Court had previously denied), experts for both Busby and the State found that Busby is, in fact, intellectually disabled.[1] These are the only experts who have formed an opinion about whether Busby is intellectually disabled since his 2005 capital murder trial.

This Court previously found Busby's claim that he is ineligible for execution due to intellectual disability to be both procedurally defaulted and without merit, largely because Busby could not produce any report from any

[1] These reports, which include Dr. Gilbert Martinez's July 11, 2022, Report and Dr. Antoinette McGarrahan's April 21, 2023, Report are both discussed thoroughly below and are both attached as Exhibits 1 and 2, respectively, of this Motion. As Dr. McGarrahan's Report makes clear, she was retained by Counsel for the State. Exhibit 2 at 1.

expert opining that he is intellectually disabled. Mem. Op. & Order 33-34, 36-38, ECF No. 100. While the United States Court of Appeals for the Fifth Circuit disagreed with this Court regarding whether Busby's claim was exhausted, it agreed that the lack of a report from an expert was fatal to Busby's claim for relief. *Busby v. Davis*, 925 F.3d 699, 710, 716-20 (5th Cir. 2019).

The reason the record before this Court did not previously contain at least one report like the two generated during the recent state court remand proceeding (which are attached as Exhibits of this Motion) is that this Court denied Counsel's multiple requests for the funds that were reasonably necessary to obtain such a report. *See, e.g.*, Order Den. Appl. Funds, ECF No. 55. The Court denied funding in adherence to the then-controlling rule of the Court of Appeals that to be entitled to funds to develop a claim, a petitioner must demonstrate, *inter alia*, that his claim is procedurally viable. *Id.* at 1-2 (*quoting Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009)).

The Supreme Court has since expressly held that requested funds are reasonably necessary even if there is only a credible chance the claim which a petitioner is attempting to develop is procedurally viable. *Ayestas v. Davis*,

584 U.S. 28, 45-46 (2018). Under *Ayestas*, this Court's 2011 decision denying Busby the funds necessary to obtain an expert report opining that he is intellectually disabled was incorrect because it was based on this Court's belief that Busby could not conclusively demonstrate that the funds he requested would lead to a procedurally viable claim. ECF No. 55 at 1-2.

While a change in decisional law--like *Ayestas*--does not always constitute the extraordinary circumstances required to reopen a federal habeas proceeding pursuant to Rule 60(b)(6), this Court should find, for two reasons, that, in the present context, *Ayestas* does represent an extraordinary circumstance. First, as a general matter, *Ayestas* constitutes an extraordinary circumstance because its issuance has made clear that an eligibility claim was previously improperly reviewed (even if the Court of Appeals has found differently with respect to non-eligibility claims). Second, in this particular case, *Ayestas* represents an extraordinary circumstance because the State of Texas seeks to execute Busby even though every expert--i.e., experts for both Busby and the State--who has evaluated him since 2005 believes he is ineligible for execution. Indeed, the very office that asked the trial court to schedule Busby's execution also asked the trial court less than three years

ago to find Busby to be ineligible for execution because he is intellectual disabled.[2]

II. Relevant factual and procedural background

Busby was convicted in November 2005 of a capital murder committed in January 2004. *Busby v.* State, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008). He was sentenced to death by the trial court in 2005. *Id.* The CCA affirmed his conviction and sentence on direct appeal in 2008. *Id.* at 673. Busby then filed an application post-conviction writ of habeas corpus in the state habeas court, and the Court of Criminal Appeals denied him relief in February 2009. *Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096, at *1 (Tex. Crim. App. Feb. 25, 2009).

On April 13, 2009, this Court appointed undersigned Counsel Dow to represent Busby in this federal habeas proceeding. Order Appointing Counsel 1, ECF No. 3. Busby filed a Petition for Writ of Habeas Corpus in this Court on February 25, 2010, and an amended petition on May 24, 2010. Pet. Writ Habeas Corpus, ECF No. 23; Am. Pet. Writ Habeas Corpus, ECF No. 25. Busby raised several issues in his Amended Petition, including that

[2] A copy of the State's Proposed Findings of Fact and Conclusions of Law filed in the state habeas trial court on July 25, 2023, is attached to this Motion as Exhibit 3.

his death sentence violates the Eighth and Fourteenth Amendments pursuant to the Supreme Court's opinion issued in *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is intellectually disabled. ECF No. 25 at 114-43.

Counsel employed Gilbert Martinez in 2010 at Counsel's own expense to administer an intelligence test to Busby, believing Busby likely to be intellectually disabled. *See* Pet'r's Appl. Authorization Funds Pursuant § 3599 at 3-4, ECF No. 49. Dr. Martinez administered the WAIS-IV to Busby on Feb. 11, 2010, and found that Busby possesses a full-scale IQ score of 74. *Id*. On September 9, 2011, Busby filed a motion requesting this Court authorize funds to obtain the reasonably necessary services from a mental disability expert, pursuant to 18 U.S.C. § 3599. ECF No. 49. Busby sought the funds so that an expert, specifically, Dr. Stephen Greenspan, could determine whether Busby is intellectually, given that Dr. Martinez had found him to possess a full-scale IQ score indicative of significantly subaverage intellectual functioning. *Id*. at 20. This Court denied the requested funds, believing Busby could not show the funds were reasonably necessary because he could not conclusively demonstrate the claim he sought to develop was procedurally viable. ECF 55 at 2-3. The Court then opined that even if the

claim Busby sought to develop was not procedurally defaulted, the requested funds were not reasonably necessary because Busby could not show he possessed significantly subaverage intellectual functioning. *Id*. at 8.

The Court then ordered this proceeding be stayed and held in abeyance so that Busby could attempt to exhaust his claim in the state court. Am. Stay & Abeyance Order 1, ECF 62. The same day, the Court ordered Undersigned Counsel Dow to seek funding from the state court for his legal services, writing § 3599 was not intended to supplant any state procedure for appointing and paying attorneys. Order Directing Counsel Seek State Funding 1, ECF 61. Both to adhere to this Court's instruction to seek payment from the state court and to seek from the state court funds necessary to develop Busby's claim, which this Court had previously denied, Busby filed a motion in the state trial court that asked that court to appoint Undersigned Counsel to represent him in his subsequent state habeas proceeding. Ex Parte Mot. Appointment Counsel, *Ex parte Busby*, Cause No. 0920589A (Tarrant Cnty. Crim. Ct. No. 2, Aug. 17, 2012). On September 7, 2012, the trial court denied the motion for appointment of counsel because it lacked jurisdiction to rule on the motion. Order, *Ex parte Busby*, Cause No.

0920589A (Tarrant Cnty. Crim. Ct. No. 2, Sept. 7, 2012). A trial court cannot act on a subsequent application for writ of habeas corpus until after the Texas Court of Criminal Appeals authorizes it to do so. *Id.*; *see also* Tex. Code Crim. Proc. art 11.07, § 5(a). A trial court is similarly without authority to rule on related motions such as a motion to appoint counsel, or to authorize funds reasonably necessary to develop meritorious claims. *See In re Tex. Dep't Crim. Just.*, 710 S.W.3d 731, 737-38 (Tex. Crim. App. 2025).

Pursuant to this Court's Order, Busby filed a subsequent application for habeas corpus in the state habeas trial court in October 2012. Because neither this Court nor the state court had granted the funds necessary to obtain a report from an expert opining that Busby is intellectually disabled, his then-*Atkins* claim was supported only by the full-scale IQ score Dr. Martinez obtained in 2010 and was identical, in all relevant respects, to the claim contained in his amended petition filed in this Court. Months later, the CCA dismissed Busby's habeas application because it found that the claim failed to satisfy the dictates of section 5, purporting to do so without considering the merits of Busby's *Atkins* claim. *Ex parte Busby*, No. WR-70, 747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013).

After subsequently returning to this Court, Busby filed a Second Amended Petition for a Writ of Habeas Corpus on March 27, 2014. Second Amended Petition for a Writ of Habeas Corpus, ECF 79. On March 10, 2015, this Court entered its order denying Busby relief (the order from which he now seeks relief). ECF No. 100. As mentioned above, with respect to Busby's *Atkins* claim, this Court found that the claim was procedurally defaulted because Busby could not demonstrate it would be a miscarriage of justice to execute him because the Court believed that an individual must have an IQ of 70 or below to be intellectually disabled and the Court furthered believed Busby's actual IQ score to likely be "in the 70s." ECF No. 100 at 37.

On appeal, the Fifth Circuit granted a certificate of appealability, finding that reasonable jurists would debate both whether Busby possesses significantly subaverage intellectual functioning and whether his claim was procedurally defaulted. *Busby v. Davis*, 677 F. App'x 884, 888-89 (5th Cir. 2017). On May 20, 2019, the Fifth Circuit issued its opinion affirming this Court's decision denying Busby relief on his *Atkins* claim. *Busby v. Davis*, 925 F.3d 699, 702. In its opinion, the Court of Appeals noted that "no expert

has ever opined that Busby is intellectually disabled." *Id.* at 706. The Supreme Court denied certiorari on January 13, 2020. *Busby v. Davis*, 589 U.S. 1141 (2020).

Busby was initially scheduled to be executed in May 2020, but that execution was stayed due to the global pandemic. *In re Busby*, No. WR-70,747-03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020). After executions resumed following the pandemic-related pause, Busby was again scheduled to be executed on February 10, 2021. Ahead of that planned execution, Counsel presented Busby's *Atkins* claim to the CCA again, and the Court found that Busby's claim made a threshold showing that he is intellectually disabled pursuant to the Supreme Court's opinion issued in *Moore v. Texas*, 581 U.S. 1 (2017), and remanded the claim to the state habeas trial court for further proceedings. *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021).

Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled (funds Counsel had been seeking since 2009). Counsel utilized those funds to employ Dr. Gilbert Martinez. Dr. Martinez's

opinion, announced in his July 11, 2022, Report (attached as Exhibit 1) is that Busby is intellectually disabled.

III. Pursuant to *Ayestas*, this Court's 2011 decision denying Busby the funds needed to obtain an expert report was wrong.

This Court denied the funds which were necessary to obtain a report from an expert opining on whether Busby is intellectually disabled because it believed Busby could not show the *Atkins* claim he sought to develop was procedurally viable. ECF 55 at 2-3. This Court held, in the alternative, that even if the claim Busby sought to develop was not procedurally defaulted, the requested funds were not reasonably necessary because Busby could not show he possesses significantly subaverage intellectual functioning. *Id.* at 8. This Court's ruling was predicated on then-authoritative Fifth Circuit precedent.

However, in *Ayestas v. Davis*, 584 U.S. 28 (2018), the Supreme Court held that "the United States Court of Appeals for the Fifth Circuit's interpretation of § 3599(f) is not a permissible reading of the statute"; the Court struck down the Fifth Circuit's heightened "substantial need" standard. *Ayestas*, 584 U.S. at 48 (i.e., the standard this Court had relied upon). The Court ruled that the proper interpretation of the reasonably

necessary statutory standard does not require a petitioner to demonstrate a substantial need or to present a viable constitutional claim that is not procedurally barred. *Id.* at 45-46. Moreover, in cases where funding has a credible chance of enabling a petitioner to overcome procedural default, it may be an error for courts to refuse funding on the grounds that the request is not reasonably necessary. *See id.* at 46. The Court clarified that, when assessing funding requests, district courts should consider factors such as the potential merits of the claims, the likelihood that the services will generate useful evidence, and the relevance of any procedural hurdles to the merit determination. *Id.* at 46-47.

Ayestas makes clear this Court erred in denying Busby the funds necessary to obtain an expert report. But for this error, the record previously before the Court would have contained a report similar to Dr. Martinez's July 11, 2022, Report.

IV. Rule 60(b)(6) is an appropriate vehicle through which Busby can seek redress.

Federal Rule of Civil Procedure 60(b) allows a party seeking relief from a final judgment to request the reopening of their proceeding under a limited set of circumstances. *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). A

Rule 60(b)(6) motion is not a successive habeas petition when it addresses a defect in the integrity of an initial federal habeas proceeding, and not the legality of the petitioner's confinement or the district court's earlier resolution of his claims. In *Gonzalez v. Crosby*, the Supreme Court found that the petitioner's Rule 60(b)(6) motion was not a successive habeas petition, because it did not assert or reassert claims for relief from the petitioner's sentence, but rather only challenged the district court's ruling regarding whether AEDPA's statute of limitations barred him from obtaining federal habeas relief. *Gonzalez*, 545 U.S. at 535-36, 538. As the Court explained, when a Rule 60(b) Motion attacks a *defect in the integrity* of a federal habeas proceeding, rather than the substance of the federal court's resolution of a claim, the motion is not considered a successive habeas petition, and the district courts are thereby not procedurally barred from deciding the merits of any argument properly raised in the motion. *Id.* at 532.

Following the Supreme Court's decision in *Ayestas*, Counsel for Billy Jack Crutsinger filed a Rule 60(b)(6) motion, asking the federal district court to reopen his federal proceeding on the basis that there was a defect in the integrity of his initial proceeding because the district court had misapplied

the law when evaluating his request for funds under § 3599. *Crutsinger v. Davis*, 929 F.3d 259, 263-64 (5th Cir. 2019). The district court concluded that Crutsinger's Rule 60(b)(6) motion was a successive petition for habeas relief and therefore believed it lacked jurisdiction to issue a ruling on the merits of the motion. *Id.* at 268. The Fifth Circuit disagreed, holding that Crutsinger's Rule 60 motion was not a successive petition because it addressed a defect in the integrity of his initial federal habeas proceeding -- specifically the wrongful denial of funds pursuant to § 3599. *Id.* at 268. Because the Rule 60 motion was confined to challenging the district court's denial of funding in his first habeas proceeding, the court reasoned that Crutsinger's motion was analogous to the one presented in *Gonzalez*. *Id.* at 265-66.

The Court of Appeals' decision in *Crutsinger* dictates a finding by this Court that Busby's Motion does not constitute a successive habeas petition and can therefore proceed in a motion file pursuant to Rule 60.

V. Extraordinary circumstances necessitate the reopening of Busby's federal habeas proceeding.

To demonstrate "any other reason justifying relief" under Rule 60(b)(6)'s catch-all provision, a petitioner must demonstrate that

extraordinary circumstances exist to reopen the district court's final judgment. *Gonzalez*, 545 U.S. at 535. The Supreme Court has explained that extraordinary circumstances are rare in the habeas context and that a change in decisional law after entry of judgment alone does not justify relief from a final judgment. *Id.* at 535-36.

In the case of Billy Jack Crutsinger, mentioned above, the Court of Appeals found that the change in decisional law announced in *Ayestas* did not constitute the extraordinary circumstances necessary to reopen his federal habeas proceeding. *Crutsinger v. Davis*, 936 F.3d 265, 270-71 (5th Cir. 2019). This Court should find Busby's Motion is different from Crutsinger's Motion for at least two reasons.

First, Busby's motion alleges an error that affected this Court's resolution of a claim that asked this Court to determine whether he is eligible for a death sentence. The funding request at issue in *Crutsinger* sought to develop a claim that trial counsel provided Crutsinger ineffective assistance. *Crutsinger v. Davis*, No. 4:07-cv-00703-Y, 2019 WL 3749530, at *2 (N.D. Tex. Aug. 8, 2019). That Busby's funding motion sought to develop a claim that he is intellectually disabled--and thus constitutionally ineligible for

execution--makes his Motion fundamentally different from Crutsinger's. Moreover, we now know that the funds could have yielded (and have since yielded) precisely the item both this Court and the Court of Appeals faulted Busby for not previously possessing: an opinion from an expert opining that he is intellectually disabled.

Of course, now not one, but two, experts have now opined that Busby is intellectually disabled: both the expert Counsel employed, and the expert employed by Counsel for the State. This fact makes Busby's motion similar in at least one respect to the Rule 60(b) motion filed by Duane Buck.

In its opinion issued in *Buck v. Davis*, 580 U.S. 100 (2017), the Supreme Court found that Duane Buck's Rule 60(b)(6) motion satisfied *Gonzalez*'s extraordinary circumstances requirement. *Buck*, 580 U.S. at 124. A jury had convicted Buck of capital murder and sentenced him to death after affirmatively finding him to be a future danger, based on Dr. Walter Quijano's expert testimony that Buck's race was a pertinent factor in predicting future dangerousness. *Id.* at 104. Buck filed a Rule 60(b)(6) motion asking the federal district court to reopen his proceedings, grounded primarily in the extraordinary circumstances surrounding Dr. Quijano's

testimony, though he also cited a change in decisional law. *Id.* at 114 -15. The district court denied Buck's Rule 60(b)(6) motion, finding that Buck had failed to demonstrate extraordinary circumstances. *Id.* at 114. Agreeing with the district court, the Fifth Circuit denied his COA on the claim. *Id.* at 114-15. However, the Supreme Court reversed the Fifth Circuit's judgment, holding that Buck was entitled to relief under Rule 60(b)(6) and that the district court abused its discretion in denying his motion. *Id.* at 123, 128. The Court reasoned it is highly likely that Buck was sentenced to death in part because of his race, and relying on race in any way to impose a criminal sanction is a fundamental constitutional violation and poisons public confidence in the judicial process. *Id.* at 119, 123-24.

Moreover, "[t]he extraordinary nature of [Buck's] case is further confirmed by what the State did in response to Dr. Quijano's testimony." *Id.* at 124. In a prior case in which Dr. Quijano similarly testified that the petitioner's race weighed in favor of a finding of future dangerousness, the State confessed error in the introduction of race as a sentencing factor and consented to resentencing before the Supreme Court. *Id.* at 109, 124; *see also Saldano v. Texas*, 530 U.S. 1212 (2000). Additionally, the Texas Attorney

General issued a public statement addressing the cases in which Dr. Quijano testified, affirming that "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and identifying six similar cases in which Dr. Quijano's testimony injected race into capital sentencing proceedings. *Buck*, 580 U.S. at 109, 124 (reflecting the Attorney General's identification of Buck as one of the six defendants). The Court highlighted how remarkable the State's response of consenting to resentencing was, because "[i]t is not every day that a State seeks to vacate the sentence of five defendants found guilty of capital murder." *Id.* at 125. However, while Buck was initially identified by the Attorney General as one of the defendants whose capital sentencing was improperly affected by Dr. Quijano's testimony, the State refused to confess error and resentence Buck. *Id.* at 109-10, 125.

Dr. Antoinette McGarrahan was employed by Counsel for the State to determine whether Busby is intellectually disabled. She agreed with Dr. Martinez's opinion. *See* Exhibit 2. Accordingly, with its own expert agreeing that Busby is ineligible for execution, Counsel for the State filed Proposed Findings of Fact and Conclusions of Law, urging the state habeas trial court

to find that Busby is ineligible for execution because of intellectual disability. That the same office would seek to execute an offender it has acknowledged to be ineligible for execution is extraordinary in precisely the same way it was for the Attorney General's Office to concede error in Duane Buck's case but then refuse to retry him.

VI. When the Report obtained through the funds this Court previously (and incorrectly) withheld is considered, it is clear that Busby is ineligible for execution because of intellectual disability.

A. The intellectual disability standard

The execution of an intellectually disabled person violates the Eighth Amendment's proscription against cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Intellectual disability is characterized by (1) significantly subaverage intellectual functioning, (2) accompanied by significant limitations in adaptive behavior, (3) the onset of which occurs prior to the age of 18. *See* AAIDD, Intellectual Disability: Definition, Classification, and Systems of Supports 27 (11th ed. 2010) ("2010 AAIDD Manual"); APA, Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013) ("DSM-V"); *see also Moore*, 581 U.S. at 7.

Significantly subaverage intellectual functioning is defined as an IQ score that is approximately two standard deviations below the mean, adjusted for the standard error of measurement. 2010 AAIDD Manual at 27; DSM-V at 37. For IQ tests that have a standard deviation of 15 points, such as the Weschler Scales, an IQ score of 70 is two standard deviations below the mean, and the standard error of measurement is approximately 5 points. DSM-V at 37.

A court must account for an IQ test's standard error of measurement when assessing an *Atkins* claim, as is advanced by the APA and AAIDD. *Moore*, 581 U.S. at 13. For that reason, the Supreme Court has invalidated statutes that have a strict IQ test score cutoff. *Hall v. Florida*, 572 U.S. 701, 722 (2014). Furthermore, the AAIIDD recommends that clinicians take the Flynn Effect (discussed in greater detail below) into account when interpreting IQ scores and assessing intellectual functioning. *See* 2010 AAIDD Manual at 37.

The AAIDD Manual requires that there be "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills." 2010 AAIDD Manual at 5. "Significance" can be established if an

individual's adaptive skills fall two or more standard deviations below the mean in at least one of the three domains. *Id.* at 43; *see also Moore*, 581 U.S. at 15-16.

The AAIDD Manual provides examples of "representative skills" in each of the three domains. Representative conceptual skills are "language; reading and writing; and money, time, and number concepts." 2010 AAIDD at 44. Representative social skills are "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." *Id.* Representative practical skills are "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone." *Id.*

B. Busby is intellectually disabled.

Busby is intellectually disabled. The evidence shows that: (1) he possesses significantly subaverage intellectual functioning; (2) he has significant limitations in his adaptive functioning; and (3) he exhibited these diagnostic features before the age of eighteen.

1. Busby possesses significantly subaverage intellectual functioning.

When assessing an individual's level of intellectual functioning based on an IQ score, the accepted scientific phenomenon known as the "Flynn Effect"—in which the general population's average IQ score is observed to perform better on intelligence tests over time—should be taken into account. *See* 2010 AAIDD Manual at 37. Flynn's empirical research has demonstrated that the average IQ score obtained by any given group on the Wechsler scale has historically increased by approximately 0.33 points per year. *Id.*

In *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014), the CCA noted that the preferred solution to account for the Flynn Effect is to retest individuals with a recently normed version of an IQ test rather than adjusting an individual's score for the Flynn Effect. *Ex parte Cathey*, 451 S.W.3d 1, 16 (Tex. Crim. App. 2014). However, if it is not possible to retest an applicant with a recently normed test, the impact of the Flynn Effect on an individual's IQ score can be considered. *Id.* at 17. As more recently normed IQ tests are more reliable, Busby's IQ scores obtained from the WAIS-IV will be discussed first. The IQ scores Mr. Busby received from other IQ tests will be subsequently discussed in chronological order.

a. WAIS-IV (2010 and 2022)

As noted above, on February 11, 2010, Dr. Gilbert Martinez administered the Wechsler Adult Intelligence Scales—Fourth Edition ("WAIS-IV") to Mr. Busby. Exhibit 1 at 2-3. Busby obtained a full-scale IQ score of 74. Exhibit 1 at 2. Given the standard error of measurement, this means Busby's IQ was between 70 and 79. *Id.*

As part of the 2010 administration, Dr. Martinez administered validity testing—specifically, a standardized measure called the Test of memory malingering ("TOMM")—to determine whether Busby was performing to the best of his abilities. Exhibit 1 at 2. The results of the validity testing were "consistent with good effort" on Busby's part, meaning there is no reason to believe Busby malingered during the cognitive testing. *Id.*

On February 25, 2022, Dr. Martinez again administered the WAIS-IV to Busby. Exhibit 1 at 7. Busby obtained a full-scale IQ score of 81. *Id.* The report notes the seven-point increase was likely caused by both the Flynn Effect and the practice effect. Exhibit 1 at 25-26. Because the WAIS-IV was published in 2008 (fourteen years before the 2022 administration), Dr. Martinez believes that, to account for the Flynn Effect, Busby's 2022 score

should be adjusted by four points. *Id.* Accounting for this adjustment, Busby's Flynn-adjusted score is 77. *Id.*

Dr. Martinez believes the practice effect also had an impact on Busby's 2022 score. Exhibit 1 at 25-26. "Practice effects refer to gains in standardized test scores that result from a person being tested a second time using the same instrument." Exhibit 1 at 25; *see also* 2010 AAIDD Manual at 38. Despite a lack of universal agreement on quantitative score adjustments, the practice effect has shown increases of 2.5 points in verbal IQ and up to eight points in performance IQ. Exhibit 1 at 25.

Dr. Martinez believes that when both the Flynn and practice effects are taken into account, Busby's 2022 score of 81 is consistent with his 2010 score of 74. Exhibit 1 at 25-26.

b. Unknown test (2001)

The record reflects that an unidentified test administered by an unknown individual in uncertain testing conditions rendered an IQ score of 96. 36 R.R. 49.[3] The score was considered unreliable by the State at trial and was disregarded. 36 R.R. 64 (noting that there was "probably . . . something

[3] The Reporter's Record of Busby's 2005 capital murder trial is cited herein as [volume number] R.R. [page number].

wrong with the results"). Because neither the type of test nor the testing conditions—including whether Busby was even the individual who took the test—are known, the score should similarly be disregarded now.

c. WAIS-III (2005)

On October 14, 2005, psychologist Dr. Timothy Proctor administered the WAIS-III to Mr. Busby. 36 R.R 53. He obtained a FSIQ of 77. *Id.* The WAIS-III was normed in 1995, 10 years before the test was administered. *Id.* Thus, Busby's score of 77 on the WAIS-III in 2005 is equivalent to his having scored, rounding up, a 74 (77–3.3 = 73.7), where the mean is 100 after adjusting for the Flynn Effect. When the Flynn Effect is considered, Busby's performance on this test was identical to what he obtained on the WAIS-IV in 2010 and represents significantly sub-average intellectual functioning and is within the range at which a diagnosis of intellectual disability may be made.

d. Beta-III (2005)

On November 4, 2005, days before the trial on the merits began, psychologist Dr. Timothy Proctor administered the Beta-III to Busby. Dr. Proctor estimated that, based on this test, Busby's FSIQ was approximately 81. 36 R.R. 53. Despite their similarities, the Weschler Scales and the Beta-

III test differ greatly in their reliability. In Dr. Proctor's words, the Weschler Scales are the "gold standard of IQ tests," while the Beta-III is a "quick and dirty kind of intelligence test." 36 R.R. 40, 48. Accordingly, Busby's score on the Beta-III should not be regarded to be as reliable a score as the IQ score from the WAIS-IV, or even the WAIS-III.

e. WAIS-III (2005)

Just weeks after the Wechsler Adult Intelligence Scales—Third Edition ("WAIS-III") was administered to Busby by psychologist Dr. Timothy Proctor, Busby was tested with the WAIS-III by the State's psychologist, Dr. Sven Helge. 36 R.R. 61. Although never admitted into evidence, it appears from the transcript of the trial that the State's expert, Dr. Helge, obtained a full-scale IQ score of 79. 36 R.R. 77. The WAIS-III was normed in 1995, approximately ten years before Dr. Helge administered the test. Taking the Flynn Effect into account, Busby's WAIS-III score could be considered to be 76. Exhibit 2 at 3. Moreover, because Dr. Helge administered this test to Busby only weeks after Dr. Proctor administered the same measure, it is appropriate to take the practice effect into account when considering this test. On the Weschler Scales, there is a reported IQ

score increase between 2.0 and 3.2 points when individuals are retested at three- and six-month intervals. Michael R. Basso, et al., *Practice Effects on the WAIS-III Across 3-and 6-Month Intervals*, 16 Clinical Neuropsychologist 57, 58 (2002).

When the Flynn and practice effects are taken into account, Busby's score on this test is consistent with both the score he obtained on the WAIS-III administered by Dr. Proctor in 2005 and the score he obtained on the WAIS-IV administered by Dr. Martinez in 2010.

2. Evidence of significant limitations in adaptive behavior

Busby also meets the second prong of the definition of intellectual disability: he possesses significant limitations in adaptive behavior. Busby possesses significant limitations in his conceptual, social, and practical skills.

Dr. Gilbert Martinez conducted interviews and standardized tests to assess Busby's adaptive behavior. Dr. Martinez evaluated Busby's conceptual skills (literacy, self-direction, and the concepts of money, numbers, and time), practical skills (personal care, money, occupational skills, maintaining a schedule/routine, use of a telephone, and

transportation), and social skills (interpersonal skills, social responsibility, self-esteem, naivety, obeying laws, and following rules). Exhibit 1 at 24-25.

Dr. Martinez conducted in-depth interviews of Busby's sisters, Kimiko Coleman and Tarsharn Busby, who provided an account of his adaptive behaviors as a child and an adult. Exhibit 1 at 8-12. During her interview, Tarsharn Busby expressed that Busby had difficulty communicating. Exhibit 1 at 8. Ms. Busby recalled that Busby did not learn to count or how to perform basic mathematical tasks until the third grade. Exhibit 1 at 9. She also explained that while he eventually could read the numbers on an analog clock, he failed to comprehend their meaning in relation to time. *Id.* His inability to understand time impacted his ability to maintain a routine or schedule. *Id.*

Ms. Busby expressed that Busby lacked impulse control and the understanding of the consequences of his actions. Exhibit 1 at 9. Busby was dependent on others to help make decisions for him. *Id.* Ms. Busby remembered that, as a child, Busby did not engage in creative or imaginative play. Exhibit 1 at 9. According to Ms. Busby, Busby was an affectionate child but did not like to share. *Id.* As a child, Busby was bullied by other children

because he was in special education classes. *Id.* Ms. Busby reported that Busby did not help with chores around at home and had a limited understanding of what needed to be done around the house. Exhibit 1 at 9.

Ms. Busby recounted that Busby had difficulty managing his finances and making medical appointments. Exhibit 1 at 10. He did not understand budgeting and would make impulsive and unnecessary purchases if left alone to decide what to do with any money he had. *Id.*

Ms. Busby shared that Busby engaged in concerning behavior when he was younger, such as bringing snakes into the family home and overdosing on medication. Exhibit 1 at 10. Ms. Busby recalled that Busby held only one job in his lifetime, as a dishwasher at a steakhouse. *Id.* Although he did tell her why he was fired, she understood that he missed many shifts due to his inability to follow a schedule. *Id.*

Busby's other sister, Kimiko Coleman, provided similar insights into Busby's childhood and adaptive behavior. Ms. Coleman expressed that her brother's communication skills were below average: he slurred his speech and their mother tried to enroll him in speech therapy at his school when he

was eight. Exhibit 1 at 10. Ms. Coleman stated that Busby was in special education classes at school. Exhibit 1 at 11.

Ms. Coleman said that Busby had "zero" self-control. Exhibit 1 at 11. He started throwing tantrums from a young age and, throughout his life, his reactions and choices largely depended on his mood. *Id.* Ms. Coleman explained that while Busby could initiate tasks, he was not motivated to, and usually did not, complete them. Exhibit 1 at 11. She stated that Busby was unable to sit through an entire movie because of his limited attention span. *Id.* He was prone to quit or cheat during games because he did not understand the rules. *Id.*

Ms. Coleman described Busby as immature for his age and unable to express a normal range of emotions. Exhibit 1 at 11. Busby tended to emotionally respond in extremes; either very happy or very angry. *Id.* He did not seem interested in others' emotions or in helping others. Exhibit 1 at 11-12. Ms. Coleman indicated that Busby participated in unhealthy behaviors. At age 10, he stole from a pharmacy. Exhibit 1 at 12. At age 16, he attempted suicide by overdosing on a medication. *Id.*

Ms. Coleman explained that Busby was dependent on women to take care of him, by having them do tasks such as paying his bills, buying his clothes, making his appointments, cooking, cleaning, and making his travel plans. Exhibit 1 at 12.

Dr. Martinez reviewed the affidavits of eight other people who knew Busby across various stages of his life. From these affidavits, Dr. Martinez learned that:

- Busby was often the victim of bullying and manipulation. Exhibit 1 at 13-14.
- During school, Busby was in prevocational classes for students with IQs between 70 and 82. Exhibit 1 at 14. These classes taught basic life skills. *Id.*
- Busby could not read, write, or count money. He could not fill out a job application or read Bible verses. He was not able to understand complex instructions and football plays. Exhibit 1 at 14-15.
- Busby was afraid to be alone. Busby was considered a sad loner who desperately craved the attention and affection of women.

Even though Busby always had woman around that he claimed were prostitutes, people who knew him believed he lacked the organizational and accounting skills to be a pimp. Conversely, it was reported that women often manipulated Busby, stealing from him, and taking advantage of his gullibility. Exhibit 1 at 15-16.

- Multiple people recollected that Busby's hygiene was always lacking. He always wore dirty clothes that were in poor condition. Busby reportedly did not bathe for days and did not maintain proper dental hygiene. Exhibit 1 at 18.

Busby's sisters each independently completed an ABAS-3 standardized questionnaire, designed to quantify Busby's adaptive functioning. Exhibit 1 at 19. Busby's scores from the ABAS-3 indicate he is on the extremely low range of adaptive functioning. Tarsharn Busby reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (which summarizes performance across all skills areas): 53, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.

- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.
- Social: 58, indicating the extremely low range (lowest 0.3%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

Exhibit 1 at 19-21.

Kimiko Coleman reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (GAC): 52, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.
- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.

- Social: 56, indicating the extremely low range (lowest 0.2%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

Exhibit 1 at 22-24.

VII. Conclusion and Prayer for Relief

Only two experts have opined on whether Petitioner Edward Lee Busby is intellectually disabled since before his 2005 trial. Both experts--i.e., Busby's expert and the State's expert--agree Busby is intellectually disabled. This Court previously denied Busby relief on his *Atkins* claim largely because it did not then contain a report from any expert opining that Busby is intellectually disabled. The Record lacked such a report only because this Court previously adhered to the Fifth Circuit now-defunct standard for addressing § 3599 requests for funds. But for this defect in the integrity of Busby's federal habeas proceeding, the record then before the Court would have contained a report similar to the July 11, 2022, Report from Dr. Gilbert

Martinez, which establishes conclusively that Busby is intellectually disabled.

For the foregoing reasons, Petitioner Edward Busby requests that the Court grant his motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)(6).

Respectfully submitted,

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Counsel for Edward Lee Busby

CERTIFICATE OF SERVICE

On April 2, 2026, I served an electronic copy of this pleading on counsel for Respondent by filing the foregoing document with the Clerk of the Court for the U.S. District Court, Northern Division of Texas, using the electronic case filing system of the Court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDWARD LEE BUSBY, *Petitioner*,	§	
v.	§	Civil Action No. 4:09-CV-160-O
ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent*.	§	(Death Penalty Case)

OPPOSITION TO PETITIONER'S MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE WITH BRIEF IN SUPPORT

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDWARD LEE BUSBY, *Petitioner*,	§	
v.	§	
ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent*.	§	Civil Action No. 4:09-CV-160-O (Death Penalty Case)

OPPOSITION TO MOTION FOR RELIEF FROM JUDGMENT

Petitioner Edward Lee Busby has repeatedly and unsuccessfully challenged the constitutionality of his state court capital murder conviction and death sentence in both state and federal courts. He is currently scheduled to be executed after **6:00 p.m., May 14, 2026**. This Court denied Busby habeas relief more than a decade ago, *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *28 (N.D. Tex. Mar. 10, 2015), and his federal habeas proceedings concluded more than six years ago. *Busby v. Davis*, 589 U.S. 1141 (2020) (mem. op.). Now Busby has filed a motion pursuant to Federal Rule of Civil Procedure 60(b)(6) based on the Supreme Court's decision eight years ago in *Ayestas v. Davis*, 584 U.S. 28 (2018), seeking to reopen this Court's judgment and revisit this Court's 2011 denial of his request for funding. *See generally* Mot. for Relief from J., ECF No. 113 (Mot.). The motion must be rejected.

First, Busby's motion is an impermissible successive habeas petition. Second, the motion is excessively untimely, *see* Fed. R. Civ. P. 60(c), which Busby neither acknowledges nor explains. Third, assuming Busby's motion does not amount to an impermissible successive petition, binding circuit precedent compels the conclusion that he fails to identify any extraordinary circumstance that warrants relief from judgment. This Court should transfer Busby's Rule 60(b) motion to the Fifth Circuit as a successive petition.

STATEMENT OF THE CASE

I. Facts of the Crime

> The evidence shows that on or about January 30, 2004, [Busby] and a female accomplice [Kathleen 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).

II. Evidence Presented at the Punishment Phase of Trial

> 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."
>
> The [S]tate 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 [waist] 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.

Busby v. Davis, 925 F.3d 699, 724 (5th Cir. 2019) (footnotes omitted).

III. Evidence Regarding Busby's *Atkins*[1] Claim

The Fifth Circuit summarized the evidence Busby presented in state court and during his federal habeas proceedings regarding his *Atkins* claim:

> Busby was administered five separate IQ tests between 2001 and 2010. He scored 96 on an unknown IQ test in 2001, and the State offered to "forget about" that test, acknowledging that it was unreliable. . . . Prior to his criminal trial, three more IQ tests were administered to Busby. He received a full scale IQ of 77 on the WAIS-III, administered in 2005 by his expert witness at trial, Dr. Proctor. The standard error of measurement (SEM) for the WAIS-III is approximately "plus or minus five," according to Dr. Proctor's trial testimony. Busby's IQ was therefore in a range of 72–82, as measured by the WAIS-III. Busby asserted in his second state habeas petition that due to the "Flynn Effect," the score of 77 should be adjusted to 73.7. Weeks after Dr. Proctor's assessment, the State's psychologist re-administered the WAIS-III, and Busby scored 79. The IQ range would be 74–84, based on that test and its SEM.
>
> Dr. Proctor administered a third IQ test on the eve of trial—the Beta-III—on which Busby scored 81. Proctor testified that this score "correlates fairly well" with Busby's WAIS-III score. The SEM for the Beta-III is not in the record. Busby argued to the TCCA[2] that "[an intellectual disability] expert would opine, however, that the Beta IQ test, because of its less comprehensive nature, is widely acknowledged to inflate IQ scores generally, to be subject to a higher Flynn Effect rate than the Wechsler scales, and to be less reliable overall than the Wechsler Scales." However, no expert did so opine in the state-court proceedings, and there was no evidence provided to the TCCA as to what the IQ range would be if the SEM were considered or if the Flynn Effect were accepted and applied. All that the TCCA had before it regarding the Beta-III test was the fact that Busby had scored 81 and the arguments of counsel attempting to discredit or explain that score. Even

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1 *Atkins v. Virginia*, 536 U.S. 304 (2002).

2 The Texas Court of Criminal Appeals

assuming that the SEM for the Beta-III test is similar to that for the WAIS-III, the IQ range would be 76–86. Such a range would be above the range of 75 or below that the Supreme Court has applied in its recent opinions regarding IQ scores in the context of an *Atkins* claim. The Supreme Court said in *Brumfield*[3] that evidence of an IQ score whose range, adjusted by the SEM, was above 75 "could render the state court's determination reasonable."

Busby provided arguments in his federal habeas petition regarding the Beta-III test and his score of 81 that were not presented to the TCCA. He asserted in federal court that the Beta-III had been "normed" seven years before it was administered to Busby, and that if adjusted for the Flynn Effect, the score would be 78.7. He did not point to any expert testimony or other evidence in the record that supports these arguments. Nor is there evidence as to the SEM of this test or the range of the score when the SEM is considered. Again, there was only argument of counsel. Busby was provided the opportunity to present whatever expert testimony he deemed necessary in the federal district court proceedings, and he did not present any additional evidence regarding this test. The only evidence that the TCCA and federal district court had was that Busby's full score IQ as measured by the Beta-III test was 81.

In 2010, immediately prior to filing his federal habeas petition, Busby was administered the WAIS-IV and scored a 74. The report of the clinician who administered this test reflects that, adjusted based on a 95% confidence interval for the WAIS-IV, Busby's full scale IQ range is 70–79, which the report characterizes as "Borderline."

Before the trial at which Busby was convicted, Proctor also administered the Wide Range Achievement Test, Third Edition, which measured Busby's educational abilities in reading, spelling and math. Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.

Busby argues that because the federal district court's analysis of the merits of the *Atkins* claim was based only on IQ

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3 *Brumfield v. Cain*, 576 U.S. 305 (2015).

scores, it follows that the district court also concluded that "the [T]CCA's analysis must have stopped at that point as well." First, it appears that the federal district court did consider Busby's achievement test scores, which were not IQ test scores. But in any event, we cannot assume that the TCCA considered only Busby's IQ scores and ignored other evidence in Busby's state habeas application. Nor can we assume that the TCCA ignored the *lack* of evidence in Busby's state habeas application. Not a single clinician opined that Busby is intellectually disabled, though there were three reports from mental health experts appended to Busby's second state habeas application. Based on the record presented to the TCCA, no clinician examined Busby's IQ scores, evidence of whether Busby has "adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances')", or whether there was an onset of adaptive deficits while Busby was a minor, and then reached the conclusion that Busby is intellectually disabled.

Busby retained Gilda Kessner, a Doctor of Psychology, and she submitted a report dated March 21, 2008. Though Busby did not claim in his first state habeas petition that he was intellectually disabled, he filed this report as part of the evidence in his first state habeas proceeding. The same report was an exhibit to his second state habeas application. Kessner's report reflects that she reviewed an array of Busby's records and the testimony of Dr. Proctor, who was an expert witness for Busby in his murder trial. Kessner's report concludes that the WAIS-III that Proctor administered to Busby was the current test at the time. Her report reflects that Proctor testified at trial that Busby scored 77 on that test, and that Proctor testified that Busby was not [intellectually disabled] because "the DSM-IV diagnosis of [intellectual disability] would be a score below 70." However, Kessner opined that Proctor had not accounted for a phenomenon known as the Flynn Effect, which posits that there is a rise or gain in IQ scores over time and that "[r]esearch literature has suggested that this figure is .3 per year beginning the year after the test is normed." Importantly, Kessner concluded that the 77 score on the WAIS-III "does not rule out a diagnosis of [intellectual disability]," and that "a thorough investigation into Mr. Busby's adaptive behavior history is necessary to make a proper determination." The report continued, "[a]t this time, I do not believe that has been

accomplished." Her report said, "I am concerned that [ ] the apparent perfunctory reliance on the obtained score truncated the investigation into the possibility of the presence of [intellectual disability] in Mr. Busby." Kessner's report had explained that "the next version of the Wechsler series (WAIS-IV) will be available to clinicians in the fall of 2008." Her report concluded with this recommendation: "I would recommend a new evaluation with the WAIS-IV when it is available this fall so that the issue of the Flynn Effect and questions about the validity of the score can be avoided." Kessner's report addresses only one of the three broad criteria for diagnosing intellectual disability. As to that criteria, the most she said was that the WAIS-III score of 77 did not "rule out" intellectual disability.

After Busby filed his federal habeas petition, he retained two other experts regarding his mental capacities, and their reports were also appended to Busby's second state habeas petition. The report of Gilbert Martinez reflects that he is a Ph.D., licensed psychologist, and clinical neuropsychologist, and that Busby "underwent standardized assessment of his intellectual functioning on February 11, 2010." The report is relatively brief and offers no opinion as to whether Busby is intellectually disabled. It reflects in a chart that Martinez administered the WAIS-IV, that Busby's full scale IQ score was 74, and that within a 95% confidence interval, his IQ score was 70–79. Under a column in this chart labelled "Qualitative Description," the word "Borderline" appears with regard to Busby's full scale IQ score. The report also reflects that Martinez administered a Test of Memory Malingering, and "[t]here was no evidence of misrepresentation of cognitive or intellectual functioning."

Federal habeas counsel also retained Bekh Bradley-Davino, Ph.D., who is a licensed clinical psychologist. Bradley-Davino spent ten hours evaluating Busby in person and reviewed a substantial amount of written material and records. Bradley-Davino prepared a 20-page report, most of which does not pertain to whether Busby is intellectually disabled. But in a section titled "Limited Intellectual Abilities and Academic Problems Became Apparent in Mr. Busby's Childhood and Continued into Adulthood," the report states that "[a] number of sources of data including school records, behavioral descriptions provided by Mr.

> Busby as well as his family, teachers, and peers, and results of standardized tests, indicate that at a young age Mr. Busby demonstrated significant signs of impaired/limited academic and intellectual/mental abilities." The report also recounts the results of the WAIS-IV IQ test administered by Martinez and its full scale IQ score of 74, and concludes that "[t]his score reflects significant limitations in intellectual functioning, approximately two standard deviations below the mean." The report reflects that Busby was placed in special education by at least the seventh grade, that he had "significant problems in academic functioning beginning early," and that he could not understand some of the more complex plays during high school football practice. But there is no conclusion drawn from all of the facts in Bradley-Davino's report that Busby is intellectually disabled. Instead, the report closes with this recommendation: "I additionally strongly recommend further evaluation of Mr. Busby by an expert in [intellectual disability] in light of his clear history of extensive intellectual and adaptive functioning limitations."

Id. at 716–19 (footnotes omitted).

Following the TCCA's stay of Busby's execution in 2021, Dr. Martinez administered the WAIS-IV to Busby on which he obtained an FSIQ of 81, indicating "low average" intellectual functioning. Mot. Ex. 1 at 7. Dr. Martinez also administered the Wide Range Achievement Test-Fifth Edition (WRAT-5), which measured Busby's academic achievement and reflected low scores. Mot. Ex. 1 at 7. To assess Busby's adaptive functioning, Dr. Martinez interviewed Busby's sisters Tarsharn Busby and Kimiko Coleman, and he reviewed Busby's school records and declarations from family members and acquaintances of Busby. Mot. Ex. 1 at 8–19. Ms. Busby and Ms. Coleman also completed the Adaptive Behavior Assessment System-Third Edition (ABAS-III), which

indicated Busby's scores were for the most part in the bottom tenth of a percentile of individuals of Busby's age. Mot. Ex. 1 at 19–24. Dr. Martinez concluded that the discrepancy between Busby's IQ scores of 74 (in 2010) and 81 (in 2022) was likely due to the Flynn Effect and the practice effect, though he did not suggest a numerical adjustment to Busby's FSIQ of 81 to account for the practice effect. Mot. Ex. 1 at 25. He opined that the FSIQ of 81 was consistent with the previously obtained FSIQ of 74 and that Busby's adjusted scores fell within the range of intellectual disability in the context of Busby's adaptive deficits. Mot. Ex. 1 at 25–26. Dr. Martinez also concluded the records, interviews, declarations, and testing indicated deficits in adaptive functioning. Mot. Ex. 1 at 26.

The State's expert, Dr. Antoinette McGarrahan, reviewed the historical data and Dr. Martinez's new report. Mot. Ex. 2 at 1–6. Dr. McGarrahan decided not to administer additional testing to Busby in light of the numerous assessments he had been given. Mot. Ex. 2 at 5. Dr. McGarrahan concluded Busby demonstrated "reduced intellectual abilities" and significant deficits in adaptive behavior, and she found the deficits were present during his developmental period. Mot. Ex. 2 at 5. Therefore, she could not controvert Dr. Martinez's opinion that Busby met the diagnostic criteria for intellectual disability. Mot. Ex. 2 at 6.

IV. The State Court and Federal Appellate Proceedings

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 at 663, *cert. denied*, 555 U.S. 1050 (2008). The conviction and sentence were affirmed on direct appeal in 2008. *Id.* 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* Ord., ECF No. 3. In 2011, Busby requested funding from this Court for the purpose of obtaining an expert opinion about whether Busby was intellectually disabled. Pet'r's Appl. for Authorization of Funds 2, ECF No. 48. This Court denied the motion, assuming the claims raised in Busby's petition were procedurally viable. Ord. 3, ECF No. 55 (Funding Order). In doing so, this Court described the extensive evidence developed prior to Busby's trial (Dr. Timothy Proctor's psychological testing of Busby) and during his state habeas proceedings (Dr. Gilda Kessner's review of test data and testimony, Toni Knox's new mitigation investigation, Dr. Martinez's administration of the WAIS-IV, and Dr. Bekh Bradley-Davino's "comprehensive report" based on ten hours of clinical interviews, medical records, prior psychological reports, and several statements from individuals who knew Busby during his developmental period), *id.* at 4–7, which Busby litigated with the benefit of funding from the

state habeas court, *id.* at 5. This Court noted that Busby failed to explain why his already-developed evidence was insufficient for purposes of his intellectual disability claim. *Id.* at 7–8. Because the funding Busby requested would only have supplemented evidence he had already developed, this Court denied his request for funding. *Id.* at 8.

This Court later stayed its proceedings to allow Busby the opportunity to exhaust claims, Ord. 1, ECF No. 62, and directed Busby to "observe state requirements for the appointment of counsel and compensation of services before the state court." Ord. 1, ECF No. 61. Busby then filed a subsequent state habeas application, which the TCCA dismissed as an abuse of the writ. *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013). After this Court reopened the habeas proceedings, Ord., ECF No. 70, Busby again requested funding but only with respect to his ineffective-assistance claim, *see generally* Pet'r's Br., ECF No. 75. This Court later denied Busby's renewed funding request, Ord. 1, ECF No. 76, and denied Busby habeas relief, Mem. Op. & Ord. 50, ECF No. 100.

The Fifth Circuit granted Busby a certificate of appealability after which it affirmed this Court's denial of relief, *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 at 702, *cert. denied*, 140 S. Ct. 897 (2020).

Busby's execution was then scheduled for May 6, 2020. Ord., *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Jan. 28, 2020). The TCCA granted a sixty-day stay of Busby's execution during the then-emerging COVID-19 pandemic. 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 in the TCCA a motion for a stay of execution due to the COVID-19 pandemic, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-04 (Tex. Crim. App. Jan. 8, 2021), and a motion for a stay of execution asserting his desire to have his spiritual advisor accompany him in the execution room, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-05 (Tex. Crim. App. Jan. 15, 2021). The motions were denied.

Busby also filed a motion to intervene and a motion for a stay of execution in a civil rights action involving a claim challenging the Texas Department of Criminal Justice's (TDCJ) former policy regarding the presence of spiritual advisors during executions, which were denied. Ord., *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Jan. 29, 2021), ECF No. 132. Busby then filed in federal district court a complaint and a motion for a stay of execution regarding TDCJ's execution policy. Compl., *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Jan. 29, 2021), ECF No. 1. The motion for a stay of execution was dismissed after the TCCA stayed Busby's execution, Ord., *Busby*

v. Collier, et al., No. 4:21-CV-297 (S.D. Tex. Feb. 4, 2021), ECF No. 13, and Busby's complaint was ultimately dismissed as moot, Ord. on Dismissal, *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Sept. 26, 2021), ECF No. 54.

Busby also filed a motion for a stay of execution and a subsequent state habeas application raising an intellectual disability claim prior to his scheduled execution in 2021. *See Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021). The TCCA granted the motion for a stay and remanded Busby's claim for review on the merits. *Id.* On remand, the trial court entered findings and conclusions recommending that Busby's claim be denied.[4] Supp. SHCR-06 at 178–220. 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. *Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025). Busby filed a petition for a writ of certiorari, which was 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). Busby then filed in

[4] The Director is concurrently filing the state court records from Busby's most recent subsequent state habeas proceedings. The Director will cite to the state habeas record as "SHCR-06," and the supplemental record containing the trial court's findings and conclusions as "Supp. SHCR-06," followed by the relevant page numbers.

this Court a motion for relief from judgment on April 2, 2026. *See generally* Mot. The instant opposition follows.

ARGUMENT

I. Busby's Rule 60(b)(6) Motion Is a Successive Petition.

A Rule 60(b) motion can be a disguised second-or-successive habeas petition if, for example, an inmate seeks to attack a previous merits resolution of his claims. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) ("A motion can also be said to bring a 'claim' 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." (footnote omitted)). On the other hand, a court has jurisdiction to consider a Rule 60(b) motion so long as it does not attack the court's resolution of the merits of a claim but instead alleges a defect in the integrity of the court's prior proceedings or challenges a procedural ruling that precluded a merits determination.[5] *Id.* at 532 nn.4, 5; *Gamboa v. Davis*, 782 F. App'x 297, 300 (5th

[5] Busby does not allege this Court's order denying his request for funding precluded a merits determination with respect to his *Atkins* claim, nor could he. Although this Court found Busby's claim procedurally barred, it determined Busby failed to show he is intellectually disabled. Mem. Op. & Ord. 32–38, ECF No. 100. Moreover, the Fifth Circuit addressed the merits of Busby's claim at length. *Busby v. Davis*, 925 F.3d at 714–20; *see Will v. Lumpkin*, 978 F.3d 933, 939 (5th Cir. 2020) ("The court's merits determination was not precluded; it was merely layered below a procedural disposition.").

Cir. 2019). As discussed below, Busby's Rule 60(b) motion is a successive petition in the guise of a Rule 60(b) motion because it seeks to revisit the merits of his *Atkins* claim.

Busby's Rule 60(b) motion is ostensibly aimed at this Court's denial in 2011 of his request for funding to support a claim under *Atkins*. *See generally* Mot. But given that Busby has since obtained funding and a report from Dr. Gilbert Martinez opining that he is intellectually disabled, it is plainly evident that the true purpose of Busby's motion is to relitigate the merits of his *Atkins* claim with that new evidence. *See* Mot. 10 ("Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled[.]"); Mot. Ex. 1; *see also* Pet'r's Appl. for Authorization of Funds 2, ECF No. 48 (Busby's application for funding to retain an expert to form an opinion as to whether Busby is intellectually disabled). Indeed, a substantial portion of Busby's motion—more than half, when excluding its introduction and background summary—is a recitation of the purported merits of his *Atkins* claim. Mot. 19–34. If the purpose of Busby's Rule 60(b) motion was not to revisit the merits of his *Atkins* claim, then the motion would be for naught because there would be nothing left to do given that he has already obtained his sought-after funding and evidence. *See* Mot. 2, 10. Busby's complaint is moot. This fact lays bare the true purpose of Busby's Rule 60(b) motion—another determination of the

merits of his *Atkins* claim with the benefit of his newly obtained evidence. *See* Mot. 19–34.

In *Crutsinger v. Davis*, the Fifth Circuit held the petitioner's Rule 60(b) motion challenging the district court's denial of funding was not a successive petition even though it was "clear from his motion" that he "would seek to set aside" his conviction or sentence if he obtained substantial new evidence. 929 F.3d 259, 264–66 (5th Cir. 2019). This was so because the Rule 60(b) motion did "not present a revisitation of the merits" of the petitioner's claim but rather was "confined to the federal district court's denial of funding in the first federal habeas proceeding." *Id.* at 265–66. Busby relies on the fact that his Rule 60(b) motion nominally challenges this Court's denial of his request for funding and the Fifth Circuit's holding in *Crutsinger*. Mot. 14. As the Fifth Circuit has explained, however, "[t]he relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label." *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc) (quotation omitted). Busby's reliance on the Rule 60(b) label and his hollow argument that he challenges only this Court's denial of funding should not avail him because the substance of his motion belies the label.

In *In re Segundo*, the Fifth Circuit affirmed the district court's decision that a Rule 60(b) motion was a successive petition even though it challenged

the district court's "use of an erroneous legal standard to deny him" funding.[6] 757 F. App'x 333, 335–36 (5th Cir. 2018). The district court concluded the Rule 60(b) motion was a successive petition "because it raise[d] and extensively brief[ed] various substantive claims[.]" *Id.* at 335. The petitioner argued his Rule 60(b) motion identified a defect in the integrity of the habeas proceedings—the denial of funding—and only substantively addressed his claims to demonstrate the extraordinary circumstances that warranted relief from judgment. *Id.* The Fifth Circuit rejected this "clever argument" because doing otherwise would allow petitioners to "shoehorn" the merits of their claims into Rule 60(b) motions. *Id.* Likewise, Busby's Rule 60(b) motion is a clear attempt to shoehorn the merits of his *Atkins* claim under the guise of an attack on this Court's funding decision.

Similarly, in *Gamboa*, the Fifth Circuit denied the petitioner a certificate of appealability with respect to the district court's dismissal of his Rule 60(b) motion as a successive petition. 782 F. App'x at 300–01. The petitioner argued his Rule 60(b) motion was not a successive petition because it alleged federal habeas counsel's abandonment of him was a defect in the integrity of the habeas proceedings. *Id.* The district court explained that, if the petitioner's

[6] Like Busby, the petitioner in *In re Segundo* sought funding to support a showing that he was intellectually disabled. *See Segundo v. Davis*, No. 4:10-CV-970-Y, 2018 WL 4623106, at *2 (N.D. Tex. Sept. 26, 2018).

Rule 60(b) motion was successful, "the only result would be to give him an opportunity to present new claims through new counsel." *Id.* at 300. The Fifth Circuit acknowledged its holding in *Crutsinger* but found it undebatable that the petitioner's Rule 60(b) motion was a successive petition. *Id.* at 300–01.

Under *Crutsinger*, a Rule 60(b) motion is not a successive petition if it attacks *only* a court's earlier denial of funding. 929 F.3d at 265. But under the Fifth Circuit's other precedent, a Rule 60(b) motion is a successive petition if it—like Busby's—seeks to revisit the merits of a petitioner's claims or if that would be the necessary consequence of granting the motion. *See Will*, 978 F.3d at 937 ("So, we must ask, was Will's Rule 60(b) motion actually an impermissible successive habeas petition in disguise? The answer: yes, *if* his Rule 60(b) motion contains one or more previously presented habeas claims."); *id.* at 940 ("In sum, Will's Rule 60(b) motion—facially challenging a procedural ruling and implicitly challenging a merits determination—presents a habeas claim."); *Gonzales v. Davis*, 788 F. App'x 250, 252–53 (5th Cir. 2019) ("[T]his court has held that a Rule 60(b)(6) motion seeking reconsideration based on *Ayestas*'s change to the standard for funding requests, *so long as it does not also revisit the merits of other claims*, goes to a defect in the proceedings rather than the merits and therefore 'is not a successive habeas petition.'" (emphasis added, quoting *Crutsinger*, 929 F.3d at 264)); *In re Segundo*, 757 F. App'x at 335–36; *Gamboa*, 782 F. App'x at 300–01.

Despite Busby's assurance that the only purpose of his Rule 60(b) motion is to address this Court's denial of his request for funding, Mot. 12–14, his motion "also revisit[s] the merits of other claims," *Gonzales*, 788 F. App'x at 252. Mot. 19–34. Again, Busby has already obtained his sought-after funding and evidence, Mot. 10, so the purpose of his motion cannot only be to revisit this Court's funding decision. Like the petitioner's motion in *In re Segundo*, the focus of Busby's motion is his *Atkins* claim, "and reopening the proceedings to relitigate it is the clear objective of the filing[.]" 757 F. App'x at 336. And unlike the petitioner in *Crutsinger*, Busby's Rule 60(b) motion strays well beyond merely challenging the denial of funding. *Compare* Mot. 19–34 (discussing at length the purported merits of Busby's *Atkins* claim), *with* Opposed Mot. for Relief from J. Pursuant to Fed. R. Civ. P. 60(b)(6) 19–27, *Crutsinger v. Davis*, No. 4:07-CV-703-Y (N.D. Tex. May 9, 2018) (challenging the district court's denial of funding and addressing factors relevant under Rule 60(b)(6)). Therefore, this Court lacks jurisdiction over Busby's Rule 60(b) motion because it seeks to revisit the merits of his *Atkins* claim, and it should be transferred to the Fifth Circuit as a successive petition. *See* 28 U.S.C. § 1631

Nonetheless, in light of Busby's scheduled execution, this Court should alternatively address both the timeliness and merit of Busby's Rule 60(b) motion and deny it. *See Gonzales*, 788 F. App'x at 253 ("Because the district court's determination that the motion was a successive petition was incorrect,

it had jurisdiction to engage in what it called the 'alternative analysis'—whether Gonzales was entitled to relief under Rule 60(b)(6)."); *Ruiz v. Lumpkin*, 653 F. Supp. 3d 331, 340 (N.D. Tex. Jan. 27, 2023) ("To avoid the necessity of a remand in the unlikely event the Fifth Circuit reverses this court's conclusions regarding the nature of Ruiz's claims, and given the close proximity of Ruiz's execution, this court will explain why Ruiz is not entitled to relief under Rule 60(b)(6) even if this court were to examine the merits of his new claims.").

II. Busby's Rule 60(b)(6) Motion Is Untimely.

Busby seeks relief from judgment under Federal Rule of Civil Procedure 60(b)(6). Mot. 1. Such a motion must be filed within a reasonable time "'unless good cause can be shown for the delay.' Reasonableness turns on the 'particular facts and circumstances of the case.'" *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017) (footnotes omitted). Timeliness is "measured as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion[.]" *Id.* (footnote omitted). Busby's Rule 60(b) motion—challenging this Court's denial of funding *fifteen years ago* and premised entirely on an *eight-year-old* Supreme Court decision, Mot. 3–4—is untimely under controlling circuit precedent.

Busby neither acknowledges nor explains his failure to timely bring his motion. As noted above, the timeliness of a Rule 60(b) motion is measured by "the point in time when the moving party has grounds to make" his motion.

Clark, 850 F.3d at 780. Busby indisputably had grounds to bring his motion when the Supreme Court issued its opinion in *Ayestas* in 2018. *Ayestas* is the *sole* ground on which he challenges this Court's 2011 order denying his request for funding. Mot. 3–4. Busby's failure to attempt to rectify what he perceived was error for eight years renders his motion indisputably untimely.[7] This is particularly true considering that Busby's federal habeas proceedings were ongoing when *Ayestas* was announced yet he took no action on it. *See Runnels v. Davis*, 746 F. App'x 308, 312 (5th Cir. 2018) (addressing Rule 60(b) motion and explaining that the petitioner's substitute counsel moved for a stay of proceedings in the Fifth Circuit to file a Rule 60(b) motion in district court).

Even if the time Busby's federal habeas proceedings were pending was not counted against him, his Rule 60(b) motion would be untimely. Following the Supreme Court's denial of Busby's petition for a writ of certiorari in January 2020, *Busby v. Davis*, 140 S. Ct. 897, he did not return to this Court to seek relief from judgment, and he did not file a subsequent state habeas application until a year later, *Ex parte Busby*, 2021 WL 369737, at *1. *See*

[7] *See Clark*, 850 F.3d at 781–82 (Rule 60(b) motion filed either twelve or sixteen months after the operative date was untimely); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (per curiam) (holding that district court did not abuse its discretion in denying Rule 60(b) motion filed eight months after the relevant change in law); *Pruett v. Stephens*, 608 F. App'x 182, 185–86 (5th Cir. 2015) (petitioner waited nineteen months after relevant change in law to file a Rule 60(b)(6) motion); *Paredes v. Stephens*, 587 F. App'x 805, 825 (5th Cir. 2014) (petitioner waited thirteen months after relevant change in law to file a Rule 60(b)(6) motion); *Trottie v. Stephens*, 581 F. App'x 436, 438 (5th Cir. 2014) (three years).

Pruett, 608 F. App'x at 186 ("Yet Pruett waited fourteen months to present his [ ] claim in state court, and nineteen months to file his Rule 60(b)(6) motion in federal court."). Busby then failed to seek relief from judgment in this Court for another five months following the Supreme Court's denial of review in November 2025. No matter how Busby's delay is counted, it is unreasonable. *See* cases cited *supra* note 7. His motion should be denied as untimely.

III. Busby Is Not Entitled to Relief Under Rule 60(b)(6).

A final judgment may be lifted under Rule 60(b)(6) for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). However, the moving party must show "extraordinary circumstances," which the Supreme Court has "explained . . . 'will rarely occur in the habeas context.'" *Buck v. Davis*, 580 U.S. 100, 112–13 (2017) (citation omitted). A Rule 60(b)(6) motion is not a substitute for a timely appeal. *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). Busby fails to prove entitlement to post-judgment relief.

A. Changes in decisional law do not constitute extraordinary circumstances.

Busby's request for relief from judgment is based entirely on the notion that this Court's 2011 order denying his request for funding was rendered incorrect by *Ayestas*. Mot. 3–4. This is patently insufficient under Rule 60(b)(6) and is "effectively dispositive of the matter." *Crutsinger v. Davis*, 936 F.3d 265, 270 (5th Cir. 2019). *Ayestas* is undoubtedly not extraordinary in this case

considering Busby's failure to appeal the funding denial in the first instance and his subsequent failure to file his Rule 60(b) motion in a reasonable time. *See Gonzalez*, 545 U.S. at 537 ("The change in the law . . . is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue."). Binding precedent compels the conclusion that Busby's reliance on a change in decisional law does not warrant relief from judgment. *Crutsinger*, 936 F.3d at 270. His motion should be denied.

B. Busby fails to identify any extraordinary circumstance.

Even if the Supreme Court's decision in *Ayestas* could amount to an extraordinary circumstance, it does not do so in this case for a number of reasons. At the outset, it must be noted that while Busby asserts *Ayestas* renders this Court's 2011 order wrong, he fails to explain how. The Supreme Court explained in *Ayestas* that the Fifth Circuit's former requirement of a showing of "substantial need" for funding was "not a permissible reading of" 18 U.S.C. § 3599. 584 U.S. at 48. This Court's 2011 order did not reject Busby's funding request for failure to make a showing of a substantial need—the words do not even appear in this Court's order. *See generally* Funding Order.

Busby argues this Court improperly denied funding for an intellectual-disability expert because he failed to show he had significantly subaverage intellectual functioning and his claim was not procedurally viable. Mot. 3–4, 6–7. But this Court denied funding—under a "reasonable necessity" analysis—

"*assuming [Busby's] claims [were] procedurally viable[.]*" Funding Order at 3–9. This Court ultimately denied funding because Busby failed "to explain how the experts retained in this case to date have been insufficient to develop evidence of his adaptive functioning." *Id.* at 7. Busby provides no reason to conclude *Ayestas* has any bearing on this Court's decision in that respect. *See Ayestas*, 584 U.S. at 46 ("[T]he 'reasonably necessary' test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.").

Moreover, as discussed above, Busby has obtained the sought-after funding and expert report. Mot. 2, 10. "Extraordinary circumstances are particularly absent in this case because [Busby] has already received all the relief he has requested under [*Ayestas*]." *Ramirez v. Davis*, No. 2:12-CV-410, 2019 WL 13438456, at *6 (S.D. Tex. Jan. 3, 2019), *COA denied,* 780 F. App'x 110 (5th Cir. 2019).

Just as importantly, any new evidence Busby would have developed and presented for the first time to this Court would have been barred under 28 U.S.C. § 2254(d). *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). As the Fifth Circuit explained in this case, the state court adjudicated the merits of Busby's *Atkins* claim, and the reasonableness of the state court's decision is judged by the law and record that existed at the time of that decision. *Busby v.*

Davis, 925 F.3d at 714–16, 720. Newly developed evidence in this Court would have been irrelevant to that determination. *See Mamou v. Davis*, 742 F. App'x 820, 825 n.3 (5th Cir. 2018) (agreeing that funding was not reasonably necessary to develop claims that were denied in state court because review was limited to the existing record). Necessarily, then, the requested funds could not have generated useful and admissible evidence. *See Ayestas*, 584 U.S. at 46. Therefore, there was no reasonable necessity for the funds Busby requested, and there was nothing extraordinary about this Court's denial of the request for funding to support an already-developed *Atkins* claim.

Busby poses two circumstances he says render his case extraordinary.[8] The first is that his claim alleges ineligibility of the death penalty, which Busby posits is more important than a claim alleging ineffective assistance of counsel like was at issue in *Crutsinger*. Mot. 15–16. The second is that the prosecuting office urged the state court to grant him relief after its expert did not controvert Dr. Martinez's opinion. Mot. 18–19. Neither circumstance is extraordinary.

First, the nature of Busby's claim does not automatically open the door to Rule 60(b) relief. Nor does the purported merit of his claim. Busby provides no guiding principle for valuing "eligibility" claims over others. Mot. 4.

[8] Busby does not argue the equities of his case warrant relief from judgment under *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981). Any such argument is, therefore, forfeited.

Nonetheless, there is nothing extraordinary about *Atkins* claims generally or Busby's specifically. This is underscored by the fact that the state court denied the claim even with the benefit of the funds and expert opinion Busby sought in this Court. *See Diaz v. Stephens*, 731 F.3d 370, 377–78 (5th Cir. 2013) (rejecting the petitioner's argument that his case was extraordinary because he pleaded more compelling constitutional violations than other habeas petitioners).

Second, the fact that the State's expert could not "controvert the conclusion and opinion of Dr. Martinez," Mot. Ex. 3 at 6, does not render his case extraordinary. Nor does the prosecuting office's agreement to recommend that the state court grant relief render his case extraordinary. Busby analogizes his case to *Buck* to amplify the impact of the prosecuting office's agreement. Mot. 18–19. He argues that in *Buck*, the Attorney General's Office agreed to relief in several similarly situated cases but ultimately declined to agree in *Buck*. Mot. 18–19. *Buck* is clearly distinguishable because it was based in large part on the introduction of race into the petitioner's trial as an aggravating factor, a circumstance plainly absent here. *Buck*, 580 U.S. at 123–24. Consequently, *Buck* has little, if any, relevance. *See In re Segundo*, 757 F. App'x at 335–36; *Raby v. Davis*, 907 F.3d 880, 884–85 (5th Cir. 2018) (finding *Buck* "inapplicable" to Rule 60(b) analysis where the petitioner did not allege racial discrimination).

Nonetheless, there are obvious intervening circumstances in this case: the trial court's rejection of the parties' proposed findings of fact and conclusions of law, the trial court's own extensive findings and conclusions, the TCCA's adoption of the trial court's recommendation that Busby's *Atkins* claim be denied, and the Supreme Court's denial of Busby's petition for review. *See Ex parte Busby*, 2025 WL 702111, at *1. Unlike in *Buck* where the Attorney General's Office's agreement to grant relief in several cases "provide[d] every reason for originally including" the petitioner as a similarly situated defendant but "no reason for later taking him off," *Buck*, 580 U.S. at 126, the highest state court's denial of Busby's *Atkins* claim—a decision that was upheld by the Supreme Court—entirely justifies the prosecuting office's decision to seek to carry out Busby's sentence.

Indeed, even a confession of error by the State does not bind the state's highest court to agree. *Estrada v. State*, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010) ("While the State's confession of error in a criminal case is important and carries great weight, we are not bound by it."). As the Supreme Court has explained,

> For [the Court] to accept [the District Attorney's] view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution.

Sibron v. New York, 392 U.S. 40, 58–59 (1968). This is particularly apt in this case where Busby's *Atkins* claim has been presented many times over and has been rejected by every court that has reviewed it on the merits. There was nothing extraordinary about the prosecuting office's decision in this case, much less a reason for this Court to revisit the merits of Busby's repeatedly rejected *Atkins* claim. Busby's Rule 60(b) motion should be denied.

C. Busby's *Atkins* claim is meritless.

Busby argues at length in his Rule 60(b) motion that he is exempt from execution because he is intellectually disabled. Mot. 19–34. As every court that has reviewed his claim has concluded, however, he is wrong.[9]

1. Busby does not have significantly subaverage intellectual functioning.

None of the IQ scores—74, 77, 79, and 81 (twice)—Busby has proffered over the years reaches below 70 even when accounting for the tests' range of error. Mot. Ex. 2 at 2 (Dr. McGarrahan's chart of Busby's IQ scores). Likely because of this, Busby's claim depends critically on application of the Flynn Effect. Mot. 22, 27. But Busby's briefing is bereft of any precedent suggesting that such manipulation is required. Moreover, many courts have refused to

[9] Notably, the purported merits of Busby's claim are not relevant to the Rule 60(b) analysis because this Court's 2011 order denying funding did not preclude a merits review of his claim, and there has been extensive consideration of the claim's merits. *See Haynes v. Davis*, 733 F. App'x 766, 769–70 (5th Cir. 2018). Nonetheless, the Director addresses them in the interest of thoroughness.

require adjustment of IQ scores,[10] and the Supreme Court's precedent does not require it. *See Quince v. State*, 241 So. 3d 58, 61 (Fla. 2018) ("As many courts have recognized, *Hall* [*v. Florida*, 572 U.S. 701 (2014),] does not mention the Flynn [E]ffect and does not require its application to all IQ scores in *Atkins* cases."). Indeed, the state court's decision in this case is plainly in keeping with the Supreme Court's observation that the Flynn Effect is "controversial." *Dunn v. Reeves*, 594 U.S. 731, 736 (2021).

Nonetheless, the state court appropriately explained that the Flynn Effect may affect test scores but that courts should not change an individual score.[11] Supp. SHCR-06 at 188 (citing *Cathey*, 451 S.W.3d at 5). The court also

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[10] *E.g., White v. Lumpkin*, No. 24-70005, 2024 WL 4343615, at *3 (5th Cir. Sept. 29, 2024) ("[W]e are not required to adjust White's IQ scores downwards and do not choose to do so today."); *Commonwealth v. Flor*, 259 A.3d 891, 921 (Pa. 2021) ("The WAIS manual does not instruct such an adjustment [for the Flynn Effect], although it does advocate updating norms regularly. . . . [W]e agree that the record here supports the PCRA court's conclusion that consideration of the Flynn Effect may be pertinent to interpretation of a score in a particular case, but there is no generally accepted professional requirement or standard for adjusting a specific numerical score."); *Haliburton v. State*, 331 So. 3d 640, 647 (Fla. 2021); *Wright v. Sec'y, Dept. of Corr.*, No. 20-13966, 2021 WL 5293405, at *6 (11th Cir. Nov. 15, 2021); *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019) ("[T]here is no consensus about the Flynn [E]ffect among experts or among the courts."); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."); *Ex parte Cathey*, 451 S.W.3d 1, 14–19 (Tex. Crim. App. 2014) (finding a lack of evidence that clinical practitioners adjust IQ scores to account for the Flynn Effect); *Thorson v. State*, 76 So. 3d 667, 683 (Miss. 2011).

[11] 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. Supp. SHCR-06 at 204.

discussed the need to consider the SEM for an IQ test,[12] *Id.* (citing *Moore v. Texas*, 581 U.S. 1, 13 (2017)), *id.* at 204–05, as well as the current diagnostic standards, *id.* at 190. Indeed, the court considered Busby's FSIQ of 74 with an SEM of 70–79. *Id.* at 205–06.

Because the state court considered all the scores Busby proffered, as well as their SEMs, *id.*, he cannot show any error in the court's conclusion based on "a holistic review," *id.* at 219, 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*, 572 U.S. at 723; *see Moore*, 581 U.S. at 14.

2. Busby has not demonstrated he has significant deficits in adaptive behavior.

Busby argues he has demonstrated significant deficits in adaptive behavior. Mot. 27–34. As discussed below, Busby fails to identify any error in the state court's decision let alone show that its rejection of his *Atkins* claim was unreasonable.

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[12] 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. Supp. SHCR-06 at 204–05. Nonetheless, the court considered the SEMs that were supported "by at least some evidence or that were previously used by the federal habeas courts." *Id.* at 205.

First, the state court did not rely on evidence of Busby's adaptive strengths. Nowhere in its findings did the state court find evidence of 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. Supp. SHCR-06 at 214. Instead, the court resolved conflicts in the evidence of Busby's asserted deficits. *Id.* 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 at 19 ("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 Dr. Proctor administered the WRAT to Busby in 2005, which showed he had a fourth grade reading level and sixth-grade skills in math. Supp. SHCR-06 at 209. Busby scored similarly on the WRAT Dr. Martinez administered in 2022. *Id.* Busby also admitted having pen pals with whom he corresponded. *Id.* at 210. 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.[13] *Id.* at 210 ("Several also noted that [Busby] was not good with numbers, even unable to count money or order fast food, which contradicts his WRAT score showing he performed at a sixth-grade math level."), 213–14. 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, Dr. McGarrahan found that Dr. Martinez's scores were "highly consistent" with the testing administered by Dr. Proctor. Mot. Ex. 2 at 4. And although Busby had a learning disability, 35 RR 18, 25–27, Dr. Proctor testified there was no evidence Busby was intellectually disabled, 36 RR 64. Busby's school records showed he was placed in "LLD" classes for the learning disabled where he achieved average grades in junior high school and his

[13] At trial, Busby's sisters Kimiko Coleman and Tarsharn Busby testified they had not seen Busby in seven and six years, respectively. 35 Reporter's Record (RR) 61, 77–78.

freshman year of high school. Supp. SHCR-06 at 208; 35 RR 17–18, 25. Notably though, Busby's school records also indicated a significant number of days when he was absent. 35 RR 16; *see* Mot. Ex. 1 at 19.

Busby fails 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. 36 RR 50–52, 64.

Second, Busby fails to show the state court erred in discounting the results of the ABAS-III 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. Supp. SHCR-06 at 215. His Rule 60(b) motion should be denied.

CONCLUSION

For these reasons, the Director respectfully requests that this Court transfer Busby's Rule 60(b) motion to the Fifth Circuit as a successive petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, April 9, 2026, a true and correct copy of the above pleading was electronically served to the following counsel for Busby by filing the foregoing document with the Clerk of the Court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDWARD LEE BUSBY,	§	
	§	
Petitioner,	§	
	§	
	§	
-VS-	§	CIVIL NO. 4:09-cv-00160-O
	§	
	§	*CAPITAL CASE*
	§	
ERIC GUERRERO, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

PETITIONER'S REPLY TO REPSONDENT'S OPPOSITION TO HIS MOTION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 60 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Petitioner Edward Lee Busby filed his Motion for Relief from Judgment Pursuant to Rule 60 of the Federal Rules of Civil Procedure (ECF No. 113) on April 2, 2026. Respondent filed his Response in Opposition (ECF No. 118) on April 9, 2026. Busby now files this Reply, responding only to those arguments raised by Respondent he deems to merit a response. Specifically, Busby files this Reply to correct Respondent's characterization

of the record on two points: 1) Busby's current *Atkins* claim is fundamentally different from the claim this Court previously considered; and 2) he has diligently pursued relief on his current claim.

I. Busby's current *Atkins* claim (now supported by an expert opinion) is fundamentally different from the claim this Court previously considered.

While this Court's primary reason for denying the funds necessary to obtain the expert report which supports Busby's current *Atkins* claim was that the Court believed the claim was procedurally defaulted, the Court further opined that Busby could not prevail on the merits of his claim. ECF No. 55 at 7-8. The Court's belief was grounded in the fact that Busby's claim was not supported by a report from an expert opining that he is intellectually disabled. *Id.* While this Court's decision to deny Busby the requested funds was wrong, its recognition that an *Atkins* claim which is supported by an expert opinion is fundamentally different from one without such opinion was correct.

The United States Court of Appeals for the Fifth Circuit has affirmed as much in the case of Ruben Ibarra. Ibarra presented an *Atkins* claim to the state habeas court which was supported by no expert report and virtually no other evidence. *Ibarra v. Thaler*, 691 F.3d 677, 681-82 (5th Cir. 2012), *overruled on other grounds by Trevino v. Thaler*, 133 S. Ct. 1911 (2013). The Fifth Circuit found that the *Atkins* claim that Ibarra presented to the federal district court -- supported by the expert opinion ruled inadmissible in the state court proceeding -- was unexhausted because the addition of the expert report made the claim fundamentally different from the one presented to the state court. *Id.* at 682-83.

While *Ibarra* is concerned with procedural default and whether a claim presented to a federal court is different from one presented to the state court, its rule -- i.e., that the addition of an expert report can render an *Atkins* claim fundamentally different from previous iterations of the claim -- is nonetheless applicable here. Because it is now supported by the expert opinion of Dr. Gilbert Martinez (and also the expert opinion of the State's expert,

who agrees that Busby is intellectually disabled), the claim that Busby now raises in this Court is significantly stronger and should be considered a different claim from the one he previously presented to this Court.

It is true that this Court's error regarding Busby's funding decision did not preclude a ruling on the merits of Busby's claim as it then-existed, without any expert opinion; but this Court's error did prevent a ruling on the claim as it exists now, which is in a fundamentally different and better position because it now contains what both this Court and the Court of Appeals found to be lacking from the previous claim: an expert report. The "true purpose" of Busby's Motion is not to relitigate his previous claim, as Respondent has argued. *See* ECF No. 118 at 21. Its purpose is to litigate the claim that would have been previously litigated but for this Court's error. Because of that error, the claim raised now was not raised -- and could not have been raised -- previously.

The opinions cited by Respondent do not support Respondent's argument that Busby's current claim is the same

claim previously considered by this Court. First, there is a critical difference between Busby's Motion and Juan Segundo's Rule 60(b) motion, which Respondent fails to acknowledge. While it is correct that at some point Segundo asked for funds to develop an *Atkins* claim, his Rule 60(b) motion argued that the Court's error in denying him the funds necessary to develop an ineffective assistance of counsel claim constituted a defect in the integrity of the proceeding. Pet'r's Mot. Relief J. 1, *Segundo v. Davis*, No. 4:10-cv-00970-Y (N.D. Tex. May 18, 2018), ECF No. 86 ("[t]he Court denied funding to Mr. Segundo to investigate his unexhausted claim that trial counsel were ineffective for failing to investigate intellectual disability"). At most, the Fifth Circuit's opinion in *Segundo* stands for the proposition that additional evidence (apparently including even an expert report) did not alter Segundo's ineffective assistance of counsel (IAC) claim -- i.e., the additional evidence did not fundamentally change the IAC claim -- which meant that Segudo's motion constituted an attempt to relitigate his same, previously litigated, ineffective assistance of

counsel claim. *See In re Segundo*, 757 F. App'x 333, 336 (5th Cir. 2018). Segundo says nothing about what effect, if any, the addition of an expert report would have to an *Atkins* claim. Had the *Segundo* Court intended to overrule *Ibarra*'s holding that an expert report fundamentally changes an *Atkins* claim, the Court would have said so and likely would have done so in a published opinion.

The second unpublished opinion cited by Respondent in support of his argument, *Gamboa v. Davis*, 782 F. App'x 297 (5th Cir. 2019), is also irrelevant. The reason the Court of Appeals held that Gamboa's Rule 60(b) motion did not allege a defect in the integrity of the proceeding was that the motion was based on habeas counsel's omissions, and such challenges "'ordinarily do[] not go to the integrity of the proceedings, but in effect ask[] for second chance to have the merits determined favorably.'" *Gamboa*, 782 F. App'x 297, 300-01 (5th Cir. 2019). Gamboa had sought to raise new claims because his previous attorney had abandoned him, but being abandoned by one's attorney does not constitute a

defect in the integrity of a proceeding. Busby's Motion, of course, is not grounded in Counsel's omissions but in this Court's error in denying the funds necessary to obtain a report from an expert opining that Busby is intellectually disabled.

Respondent's primary argument -- i.e., that Busby's Motion constitutes an attempt at an end-run around § 2244 -- follows only from Respondent's mistaken belief that Busby's current claim is the same as the claim previously considered by this Court. As the Court of Appeals (and arguably also this Court in its decision to deny Busby the requested funds) has recognized, an expert opinion supporting an *Atkins* claim fundamentally changes a claim so that it is different from the claim that existed before there was an expert report.

II. Busby has diligently pursued relief on his claim.

This Court issued its order denying Busby relief on his *Atkins* claim on March 10, 2015. Proceedings in the Court of Appeals proceeded at a slower pace, and that court did not issue its opinion affirming this Court's decision until June 13, 2018, approximately three months after the Supreme Court

issued its opinion in *Ayestas v. Davis*, 584 U.S. 28 (2018). Respondent seems to suggest any argument related to *Ayestas* needed to be raised by Busby at that moment, and that Busby should have sought an immediate return to the district court to file his Rule 60(b) Motion rather than pursue his petition for rehearing en banc in the court of appeals. *See* ECF No. 118 at 27. There is simply nothing that requires Busby to have abandoned his meritorious petition for rehearing in the court of appeals to benefit from *Ayestas*.

The Court of Appeals denied Busby's Petition for Rehearing on May 20, 2019, and the Supreme Court denied his Petition for Writ of Certiorari on January 13, 2020. Only two weeks later, he was scheduled to be executed on May 6, 2020.

Counsel then began working on the claim they would present to the state court. As the global pandemic made it impossible to work on Busby's claim during March and April 2020, Counsel asked the CCA to stay Busby's execution, and the CCA obliged. Notwithstanding the pandemic, Counsel filed Busby's application in the state habeas court in January 2021.

Respondent appears to suggest that the one-year it took for Busby to file his application in the state court constituted an unreasonable delay. But

there, is of course, a critical difference between the period of time at issue in this case -- i.e., January 2020 to January 2021 -- and the periods of time at issue in the opinions cited by Respondent in note 7 of his Response: a global pandemic began in March 2020, and despite its coming to an arguable peak in January 2021, Counsel nonetheless filed Busby's application in the state court without any further delay. Moreover, the CCA, by issuing Busby a stay, recognized precisely the extenuating global circumstances the Respondent has ignored. Busby has diligently pursued relief on his *Atkins* claim since undersigned Counsel Dow was first appointed to represent him some seventeen years ago.

III. Conclusion and Prayer for Relief

Only two experts have opined on whether Petitioner Edward Lee Busby is intellectually disabled since before his 2005 trial. Both experts -- i.e., Busby's expert and the State's expert -- agree Busby is intellectually disabled. This Court previously denied Busby relief on his *Atkins* claim largely because it did not then contain a report from any expert opining that Busby is intellectually disabled. The Record lacked such a report only because this Court previously adhered to the Fifth Circuit now-defunct

standard for addressing § 3599 requests for funds. But for this defect in the integrity of Busby's federal habeas proceeding, the record then before the Court would have contained a report similar to the July 11, 2022 Report from Dr. Gilbert Martinez, which establishes conclusively that Busby is intellectually disabled.

The claim that now exists because of the addition of the report is fundamentally different from the claim this Court previously considered. Busby's Motion is not an attempt to relitigate that earlier version of his claim, but is instead an attempt to litigate whether this Court's error constituted a defect in the integrity of the proceeding which prevented a finding that Busby is ineligible for execution because of intellectual disability.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On April 10, 2026, I served an electronic copy of this pleading on counsel for Respondent by filing the foregoing document with the Clerk of the Court for the U.S. District Court, Northern Division of Texas, using the electronic case filing system of the Court.

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/s/ David R. Dow

David R. Dow

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDWARD LEE BUSBY	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil Action No. 4:09-CV-00160-O**
	§	
ERIC GUERRO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION	§	
	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

The matters before the Court are (1) Busby's motion for relief from judgment pursuant to Rule 60(b), FED. R. CIV. P., filed April 2, 2026 (ECF No. 113); (2) Respondent's response thereto, filed April 8, 2026 (ECF No. 118); and (3) Busby's reply brief, filed April 10, 2026 (ECF No. 120). For the reasons set forth below, the Court finds that Busby is not entitled to any relief, is not entitled to a Certificate of Appealability, and this case will be transferred immediately to the Fifth Circuit pursuant to 28 U.S.C. § 1631 to avoid any further delay in disposing of Busby's claims prior to Busby's scheduled May 14, 2026 execution.

I. BACKGROUND

In January 2004 Edward Lee Busby ("Busby") and a female accomplice abducted, robbed, and murdered an eighty-year-old woman. *Busby v. State*, 253 S.W.3d 661, 663-64 (Tex. Crim. App. 2008). The Texas Court of Criminal Appeals affirmed Busby's capital murder conviction and sentence of death. *Busby*, 253 S.W.3d at 673. The Texas Court of Criminal Appeals subsequently denied Busby's initial state habeas corpus application. *Ex parte Busby*, WR-70, 747-01, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009).

After Busby unsuccessfully litigated a subsequent state habeas application, *Ex parte Busby*, WR-70,747-02, 2013 WL 831550 (Tex. Crim. App. Mar. 6, 2013), this Court denied Busby's federal habeas corpus petition. *Busby v. Stephens*, 2015 WL 1037460 (N.D. Tex. Mar. 10, 2015). This Court rejected Busby's claim that he was ineligible for the death penalty due to his alleged intellectual disability as procedurally defaulted. It also found that he "failed to establish that his general intellectual functioning, as reflected in the multiple results of the IQ tests administered to him, is significantly subaverage." *Id.* at *21.

The Fifth Circuit granted Busby a Certificate of Appealability but ultimately affirmed this Court's denial of federal habeas relief. *Busby v. Davis*, 925 F.3d 699 (5th Cir. 2019), *cert. denied*, 589 U.S. 1141 (2020). The Fifth Circuit concluded that Busby had not procedurally defaulted on his intellectual disability claim because the Texas Court of Criminal Appeals rejected Busby's intellectual disability claim on the merits. *Busby*, 925 F.3d at 706-10. The Fifth Circuit nonetheless concluded Busby was not entitled to federal habeas corpus relief because the TCCA's rejection of Busby's intellectual disability claim on the merits was objectively reasonable under the standard of review in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Id.* at 710-20. Thus, the Fifth Circuit's opinion constituted a denial of Busby's intellectual disability claim on the merits.

II. LEGAL STANDARD

Rule 60(b) provides that a district court may grant relief from a final judgment, order, or proceeding for any of the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable, or

(6) any other reason that justifies relief.

Motions filed based upon reasons (1), (2), and (3) listed above must be filed within one year after entry of the judgment, order, or date of the proceeding. FED. R. CIV. P. 60(c)(1). Unlike a Rule 59(e) motion, a motion made under Rule 60 does not affect the judgment's finality or suspend its operation. FED. R. CIV. P. 60(c)(2). A Rule 60(b)(6) motion must (1) be made within a reasonable time and (2) establish extraordinary circumstances justifying the reopening of the final judgment. *Crutsinger v. Davis*, 936 F.3d 265, 267 (5th Cir. 2019); *In re Robinson*, 917 F.3d 856, 862 (5th Cir. 2019); *Clark v. Davis*, 850 F.3d 770, 779 (5th Cir. 2017).

When ruling on a Rule 60(b) motion, the court should consider the following factors: (1) that final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether, if the judgment was a default or a dismissal in which there was no consideration of the merits, the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether if the judgment was rendered after a trial on the merits where the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack. *Raby v. Davis*, 907

F.3d 880, 885 (5th Cir. 2018); *Diaz v. Stephens*, 731 F.3d 370, 377-78 (5th Cir. 2013); *In re Marinez*, 589 F.3d 772, 777 (5th Cir. 2009); *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981); *United States v. Gould*, 301 F.2d 353, 355-56 (5th Cir. 1962).

Rule 60(b)(6) applies only in extraordinary circumstances. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005); *Diaz*, 731 F.3d at 376; *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012); *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002). Such extraordinary circumstances will rarely occur in the habeas context. *See Gonzalez*, 545 U.S. at 535; *Crutsinger*, 936 F.3d at 267; *In re Johnson*, 935 F.3d 284, 289 (5th Cir. 2019); *In re Robinson*, 917 F.3d at 862; *Diaz*, 731 F.3d at 376; *Adams*, 679 F.3d at 319. Rule 60(b)(6) movant to show that he can assert a good claim or defense if his case is reopened. *In re Johnson*, 935 F.3d at 289-90. Changes in governing law do not constitute the extraordinary circumstances required for granting Rule 60(b)(6) relief. *Crutsinger*, 936 F.3d at 267, 270; *Priester v. JP Morgan Chase Bank, N.A.,* 927 F.3d 912, 913 (5th Cir. 2019); *Raby*, 907 F.3d at 884; *Clark*, 850 F.3d at 784; *Diaz*, 731 at 374; *Adams*, 679 F.3d at 319; *Hess*, 281 F.3d at 216. For example, the Fifth Circuit has repeatedly held that the Supreme Court's holdings in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), do not constitute extraordinary circumstances sufficient to warrant relief under Rule 60(b)(6). *See, e.g., In re Johnson*, 935 F.3d at 290; *Raby*, 907 F.3d at 884; *In re Edwards*, 865 F.3d 197, 208 (5th Cir. 2017); *Balentine v. Davis*, 692 F.3d 357, 357 (5th Cir. 2012).

A Rule 60(b) motion that presents habeas claims should be treated as a successive petition subject to the advance Circuit Court authorization requirement of 28 U.S.C. § 2244(b)(3). *Gonzalez*, 545 U.S. at 531; *Jackson v. Lumpkin*, 25 F.4th 339, 340 (5th Cir. 2022). Determining whether a motion presents successive habeas claims is a practical inquiry. *Will v. Lumpkin*, 970 F.3d 566, 571 (5th Cir. 2020). *Gonzalez* offers three illustrations of Rule 60(b) motions which

should be treated as successive petitions: (1) motions seeking leave to bring a new claim of constitutional error that was previously omitted due to excusable neglect; (2) motions seeking to present newly discovered evidence in support of claims previously argued; and (3) motions based on a subsequent change of substantive law. *Gonzalez*, 545 U.S. at 530-31; *Jackson*, 25 F.4th at 340-41.

By contrast, a Rule 60(b) motion does not require advance Circuit Court authorization where it challenges only a prior procedural ruling (*e.g.*, a ruling that a claim was foreclosed by a failure to exhaust state remedies, procedural default, or barred by the applicable statute of limitations). *Gonzalez*, 545 U.S. at 535; *Jackson*, 25 F.4th at 341; *In re Robinson*, 917 F.3d at 863-64; *Adams*, 679 F.3d at 319. However, if a district court undertakes a merits analysis in the alternative, that analysis constitutes a merits determination, and a Rule 60(b) motion must receive Circuit Court authorization even if the district court ultimately resolved the issue procedural grounds. *See Will*, 970 F.3d at 571 (concluding merits analysis qualified as an alternative merits determination even when the district court held the unexhausted ineffective assistance claim was procedurally defaulted but held in the alternative that the *Strickland* claim lacked merit).

When a Rule 60(b) motion is subject to 28 U.S.C. § 2244(b), the district court must: (1) dismiss any claim that has previously been adjudicated in a previous petition; (2) dismiss any claim that has not already been adjudicated unless it relies on either a new and retroactive rule of constitutional law or new facts that could not have been discovered previously through the exercise of due diligence and show a high probability of actual innocence; and (3) the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet § 2244(b)'s new rule or actual innocence provisions before the district court accepts the petition. *Clark*, 850 F.3d at 778-79.

III. ANALYSIS

In his Rule 60(b) motion, Busby argues that (1) this Court erroneously denied his request for expert mental health funding in 2011 during the pendency of his federal habeas petition (ECF No. 55); (2) the Supreme Court's decision in *Ayestas v. Davis*, 584 U.S. 28, 45-46 (2018), makes clear that this Court erred in denying Busby his request for expert funding; and (3) he is therefore now entitled to re-litigate the merits of his intellectual disability claim using new expert reports and findings which he developed in subsequent state habeas corpus proceedings after the Fifth Circuit rejected his intellectual disability claim on the merits. For several reasons, Busby is not entitled to relief from judgment under Rule 60(b).

First, Busby's Motion is a successive habeas petition requiring Circuit authorization because it attacks the Fifth Circuit's merits decision denying his intellectual disability claim.[1] *Gonzalez*, 545 U.S. at 535; *Jackson*, 25 F.4th at 341; *In re Robinson*, 917 F.3d at 863-64; *Adams*, 679 F.3d at 319. This Court's 2011 Order denying expert funding did not preclude Busby from obtaining a ruling on the merits of his intellectual disability claim. *Busby*, 925 F.3d at 710-20. The present motion thus challenges a merits determination, not just a procedural ruling, and so constitutes a successive habeas claim. Busby's claims are paradigmatic of habeas claims identified by the Supreme Court in *Gonzalez* which require advance Circuit Court authorization under Section 2244(b).

Second, Busby's challenge to this Court's 2011 denial of expert funding given *Ayestas* is untimely. *Crutsinger*, 936 F.3d at 267. The Supreme Court issued its decision in *Ayestas* in March 2018, while Busby's appeal from this Court's denial of federal habeas relief was still pending before the Fifth Circuit. The Fifth Circuit granted a Certificate of Appealability in January of 2017,

[1] Resp. 19-34, ECF No. 113.

issued its initial opinion in June 2018, and issued its opinion on rehearing in May 2019. *See Busby v. Davis*, 677 Fed. App'x 884 (5th Cir. Jan. 27, 2017) (granting Certificate of Appealability); *Busby v. Davis*, 892 F.3d 735 (5th Cir. 2018) (initial opinion); *Busby v. Davis*, 925 F.3d 699 (5th Cir. 2019) (opinion on rehearing). Therefore, Busby had the opportunity while his appeal was pending before the Fifth Circuit to raise a new legal argument premised upon the Supreme Court's March 2018 decision in *Ayestas*. He did not do so and attempts to raise it here for the first time. Waiting for over eight years, until April 2026, to first raise his *Ayestas* challenge to the efficacy of this Court's 2011 Order denying expert funding is the antithesis of timeliness. *Clark*, 850 F.3d at 780-83. Busby offers no rational explanation for his failure to assert his *Ayestas* argument in a timely manner. Thus, he fails to meet the timeliness requirement for a Rule 60(b) motion.

Third, the Fifth Circuit has held in similar contexts that the Supreme Court's decision in *Ayestas* does not constitute the type of extraordinary circumstances which warrant relief from judgment under Rule 60(b)(6). Changes in controlling law do not constitute the extraordinary circumstances required for granting Rule 60(b)(6) relief. *Crutsinger*, 936 F.3d at 267, 270; *Priester v. JP Morgan Chase Bank, N.A.,* 927 F.3d 912, 913 (5th Cir. 2019); *Raby*, 907 F.3d at 884; *Clark*, 850 F.3d at 784; *Diaz*, 731 at 374; *Adams*, 679 F.3d at 319; *Hess*, 281 F.3d at 216.

IV. CERTIFICATE OF APPEALABILITY

Under AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under § 2254, the petitioner must obtain a Certificate of Appealability ("CoA"). *Miller-El v. Johnson*, 537 U.S. 322, 335-36 (2003); 28 U.S.C. § 2253(c)(2). Likewise, under AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116

F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted. *Crutcher*, 301 F.3d at 658 n.10; 28 U.S.C. § 2253(c)(3).

A CoA will not be granted unless a petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). The petitioner need not show he will prevail on the merits; rather, he must demonstrate (1) a reasonable jurist could debate whether the petition should have been resolved in a different manner; or (2) that the issues presented are adequate to deserve encouragement to proceed further. *Tennard*, 542 U.S. at 282; *Miller-El*, 537 U.S. at 336. This Court is required to issue or deny a CoA when it enters a final Order that is adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*.

Reasonable jurists could not disagree with this Court's conclusions that (1) Busby's Rule 60(b) motion is untimely; (2) Busby has failed to establish the existence of extraordinary circumstances warranting relief under Rule 60(b); and (3) Busby's Rule 60(b) motion is a successive federal habeas corpus petition as described in *Gonzalez*. Thus, Busby is not entitled to a CoA.

V. CONCLUSIONS

1. For the reasons stated above, Busby's Rule 60(b) motion is in all respects **DENIED**.
2. Busby is **DENIED** a Certificate of Appealability on all his claims herein and the denial of his Rule 60(b) motion.

3. Pursuant to 28 U.S.C. Section 1631, the Clerk is directed immediately to **TRANSFER** this cause to the Fifth Circuit for a determination by that court as to whether Busby is entitled to authorization to file a successive federal habeas corpus petition under 28 U.S.C. Section 2244(b).

SO ORDERED this 15th day of April, 2026.

Reed O'Connor
CHIEF UNITED STATES DISTRICT JUDGE

No. 26-70004

In the United States Court of Appeals
for the Fifth Circuit

Edward Lee Busby,
Petitioner-Appellant

v.

Eric Guerrero, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action 4:09-cv-00160-O

APPLICATION FOR CERTIFICATE OF APPEALABILITY WITH BRIEF IN SUPPORT

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This is a capital case. Busby is scheduled to be executed on May 14, 2026.

Certificate of Interested Persons

Edward Lee Busby,

Petitioner-Appellant

v.

Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent-Appellee

The undersigned counsel of record certifies that the following listed persons and entities as described by Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Statement Regarding Oral Argument

Pursuant to Federal Rule of Appellate Procedure 34(a), Petitioner-Appellant does not request oral argument.

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No. 26-70004

In the United States Court of Appeals
for the Fifth Circuit

Edward Lee Busby,
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v.

Eric Guerrero, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent-Appellee

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, Civil Action 4:09-cv-00160-O

APPLICATION FOR CERTIFICATE OF APPEALABILITY WITH BRIEF IN SUPPORT

This is a death penalty case.
Mr. Busby is scheduled to be executed on May 14, 2026.

I. Introduction

Nearly seven years ago, on May 19, 2019, this Court issued a published opinion affirming the district court's decision denying Petitioner-Appellant Edward Lee Busby habeas relief on his then-existing *Atkins* claim. This

Court wrote that the state court decision to deny Busby relief was not an unreasonable determination of the facts, in part because Busby had failed to produce a report from any expert opining that he is intellectually disabled. *Busby v. Davis*, 925 F.3d 699, 720 (5th Cir. 2019).[1] This Court's observation was correct; the record at that time was devoid of any expert report. The reason for the absence of an expert report, however, was that the district court had wrongfully denied Busby the funds reasonably necessary to obtain such a report. In denying Busby funds needed to demonstrate that he is intellectually disabled -- and hence ineligible for execution -- the district court had relied on this Court's precedent. That very precedent was addressed by the Supreme Court in *Ayestas v. Davis*, 584 U.S. 28 (2018). In short, Busby was entitled to the funds he had requested from the district court. The denial of those funds -- which led to the absence of an expert report demonstrating Busby's ineligibility for execution -- was erroneous; and this Court's conclusion that Busby was not entitled to habeas relief in

[1] "If Busby was in fact evaluated by an expert in intellectual disability, . . . Busby has not disclosed the results of such an evaluation. . . . We do not know therefore, what conclusions, if any, Martinez may have drawn in that report as to whether Busby is intellectually disabled." *Busby v. Davis*, 925 F.3d 699, 720 (5th Cir. 2019).

part because of the absence of an expert report was therefore predicated on that error.

In the seven years since this Court last considered whether Busby is intellectually disabled, Busby has obtained the funds necessary to have an expert opine on whether he is intellectually disabled; consequently, the record now contains precisely the report from Dr. Martinez that this Court previously found to be lacking. After Dr. Martinez issued his report opining that Busby is intellectually disabled, the State hired an expert -- Dr. Antoinette McGarrahan -- who subsequently issued a report agreeing with Dr. Martinez. In short, both experts (Busby's as well as the expert hired by the State) agree Busby is intellectually disabled. He is therefore ineligible for execution. Crucially, Busby's current *Atkins* claim -- buttressed by these two expert reports -- is fundamentally different from the claim previously considered by this Court.

Busby asked the district court to reopen his federal habeas proceeding so that the district court could consider the *Atkins* claim that would have been before that court and this Court (i.e., Busby's current *Atkins* claim) but for the district court's wrongful denial of funds. That court construed

Busby's Motion as an attempt to complain about both its and this Court's opinions denying relief on Busby's previous *Atkins* claim. Reasonable jurists would disagree with this construction and would instead view Busby's Motion as an attempt to address a defect in the integrity of his federal habeas proceeding -- namely, the wrongful denial of necessary funds. Reasonable jurists would similarly disagree with the district court's conclusions that Busby's motion was untimely and did not present extraordinary circumstances. Reasonable jurists would agree with the unanimous opinion of the experts: Busby satisfies the criteria for intellectual disability.

II. Jurisdiction

The district court had jurisdiction pursuant to 28 U.S.C. § 2241(d) because Busby was convicted in the Criminal District Court Number Two of Tarrant County, Texas. Subject matter jurisdiction was conferred by 28 U.S.C. § 2254. Busby filed his Motion for Relief from Judgment Pursuant to Rule 60 of the Federal Rules of Civil Procedure on April 2, 2026. ROA.3441-3538. On April 15, 2026, the district court entered an order purporting to both deny the merits of (and a certificate of appealability to appeal the merits

of) Busby's Rule 60 motion and to transfer it to this Court as a successive habeas petition. ROA.3608-09.[2]

III. Statement of the legal issues

The issues presented here are:

(1) whether a motion that asks the district court to reopen a federal habeas proceeding to consider the *Atkins* claim that could have previously existed but for the district court's error in denying funding can proceed pursuant to Rule 60 of the Federal Rules of Civil Procedure;

[2] Counsel are unsure whether the district court had jurisdiction both to transfer Busby's Motion to this Court as a successive habeas petition and to issue a decision on the merits of the Rule 60(b) motion. Counsel would like to appeal all three conclusions of the district court (i.e., that Busby's Motion: 1. constitutes a successive habeas petition; 2. was not timely filed; and 3. fails to present extraordinary circumstances), and believe all three can be challenged in this single pleading so long as the district court had jurisdiction to both transfer and address the merits of Busby's motion. If, however, this Court believes that the district court lacked jurisdiction to address the merits of the Rule 60 Motion, having already concluded that Busby's Motion constituted a successive habeas petition, requiring that court to transfer the petition to this Court, Counsel believe it is appropriate for this Court to return the Motion to the district court with instructions for it to address the merits of the Rule 60 Motion. Moreover, because that court has already indicated its views on the merits of the Rule 60 Motion, it would be appropriate, when remanding the Motion to the district court, in the interest of judicial economy, for this Court to indicate both its belief that the Motion is timely and that it presents extraordinary circumstances justifying relief.

(2) whether such a motion is timely if the Movant has diligently pursued relief on his *Atkins* claim since federal habeas counsel was appointed to represent him; and

(3) whether a Rule 60 motion presents extraordinary circumstances when both Counsel for the State and Counsel for Movant have asked the state habeas trial court to find that the Movant is ineligible for execution.

IV. Statement of the case

Busby was convicted in November 2005 of a capital murder committed in January 2004. ROA.5396. He was sentenced to death by the trial court in 2005. ROA.5406. The CCA affirmed his conviction and sentence on direct appeal in 2008. ROA.5422. Busby then filed an application post-conviction writ of habeas corpus in the state habeas court, and the Court of Criminal Appeals denied him relief in February 2009. *Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096, at *1 (Tex. Crim. App. Feb. 25, 2009).

On April 13, 2009, the district court appointed undersigned Counsel Dow to represent Busby in this federal habeas proceeding. ROA.23. Busby filed a Petition for Writ of Habeas Corpus in this Court on February 25,

2010, and an amended petition on May 24, 2010. ROA.81; ROA.703. Busby raised several issues in his Amended Petition, including that his death sentence violates the Eighth and Fourteenth Amendments pursuant to the Supreme Court's opinion issued in *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is intellectually disabled. ROA.816-45.

Counsel employed Gilbert Martinez in 2010 at Counsel's own expense to administer an intelligence test to Busby, believing Busby likely to be intellectually disabled. ROA.1634-35. Dr. Martinez administered the WAIS-IV to Busby on Feb. 11, 2010, and found that Busby possesses a full-scale IQ score of 74. *Id.* On September 9, 2011, Busby filed a motion requesting this Court authorize funds to obtain the reasonably necessary services from a mental disability expert, pursuant to 18 U.S.C. § 3599. ROA.1632. Busby sought the funds so that an expert, specifically, Dr. Stephen Greenspan, could determine whether Busby is intellectually disabled, given that Dr. Martinez had found him to possess a full-scale IQ score indicative of significantly subaverage intellectual functioning. ROA.1651. The district court denied the requested funds, believing Busby could not show the funds were reasonably necessary because he could not

conclusively demonstrate the claim he sought to develop was procedurally viable. ROA.1870-71. The court then opined that even if the claim Busby sought to develop was not procedurally defaulted, the requested funds were not reasonably necessary because Busby could not show he possessed significantly subaverage intellectual functioning. ROA.1876.

The district court then ordered the proceeding be stayed and held in abeyance so that Busby could attempt to exhaust his claim in the state court. ROA.1884. The same day, the district court ordered Undersigned Counsel Dow to seek funding from the state court for his legal services, writing § 3599 was not intended to supplant any state procedure for appointing and paying attorneys. ROA.1881. Both to adhere to the court's instruction to seek payment from the state court and to seek from the state court funds necessary to develop Busby's claim, which the district court had previously denied, Busby filed a motion in the state trial court that asked that court to appoint Undersigned Counsel to represent him in his subsequent state habeas proceeding. Ex Parte Mot. Appointment Counsel, *Ex parte Busby*, Cause No. 0920589A (Tarrant Cnty. Crim. Ct. No. 2, Aug. 17, 2012). On September 7, 2012, the trial court denied the motion for appointment of

counsel because it lacked jurisdiction to rule on the motion. Order, *Ex parte Busby*, Cause No. 0920589A (Tarrant Cnty. Crim. Ct. No. 2, Sept. 7, 2012).[3]

Pursuant to the district court's Order, Busby filed a subsequent application for habeas corpus in the state habeas trial court in October 2012. ROA.3690. Because neither the district court nor the state court had granted the funds necessary to obtain a report from an expert opining that Busby is intellectually disabled, his then-*Atkins* claim was supported only by the full-scale IQ score Dr. Martinez obtained in 2010 and was identical, in all relevant respects, to the claim contained in his amended petition filed in the district court. Months later, the CCA dismissed Busby's habeas application because it found that the claim failed to satisfy the dictates of section 5, purporting to do so without considering the merits of Busby's *Atkins* claim. *Ex parte Busby*, No. WR-70, 747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013).

[3]The trial court's decision was not unsound. Under Texas law, a trial court cannot act on a subsequent application for writ of habeas corpus until after the Texas Court of Criminal Appeals authorizes it to do so. *See also* Tex. Code Crim. Proc. art 11.071, § 5(a). A trial court is similarly without authority to rule on related motions such as a motion to appoint counsel, or to authorize funds reasonably necessary to develop meritorious claims. *See In re Tex. Dep't Crim. Just.*, 710 S.W.3d 731, 737-38 (Tex. Crim. App. 2025).

After subsequently returning to the district court, Busby filed a Second Amended Petition for a Writ of Habeas Corpus on March 27, 2014. ROA.2350. On March 10, 2015, the district court entered its order denying Busby relief (the order from which he now seeks relief). ROA.3316. As mentioned above, with respect to Busby's *Atkins* claim, the court found that the claim was procedurally defaulted because Busby could not demonstrate it would be a miscarriage of justice to execute him because the Court believed that an individual must have an IQ of 70 or below to be intellectually disabled and the Court furthered believed Busby's actual IQ score to likely be "in the 70s." ROA.3352.

On appeal, this Court granted a certificate of appealability, finding that reasonable jurists would debate both whether Busby possesses significantly subaverage intellectual functioning and whether his claim was procedurally defaulted. *Busby v. Davis*, 677 F. App'x 884, 888-89 (5th Cir. 2017). On May 20, 2019, this Court issued its opinion affirming the district court's decision denying Busby relief on his *Atkins* claim. *Busby v. Davis*, 925 F.3d 699, 702 (5th Cir. 2019). In its opinion, this Court noted that "no expert has ever

opined that Busby is intellectually disabled." *Id*. at 706. The Supreme Court denied certiorari on January 13, 2020. *Busby v. Davis*, 589 U.S. 1141 (2020).

Busby was initially scheduled to be executed in May 2020, but that execution was stayed due to the global pandemic. *In re Busby*, No. WR-70,747-03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020). After executions resumed following the pandemic-related pause, Busby was again scheduled to be executed on February 10, 2021. Ahead of that planned execution, Counsel presented Busby's *Atkins* claim to the CCA again, and the Court found that Busby's claim made a threshold showing that he is intellectually disabled pursuant to the Supreme Court's opinion issued in *Moore v. Texas*, 581 U.S. 1 (2017), and remanded the claim to the state habeas trial court for further proceedings. ROA.5527.

Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled (funds Counsel had been seeking since 2009). Counsel utilized those funds to employ Dr. Gilbert Martinez. Dr. Martinez's opinion, announced in his July 11, 2022, Report (ROA.3484-3509) is that Busby is intellectually disabled.

V. Standard of review for issuing a COA

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a Certificate of Appealability ("COA") is necessary to appeal to this Court the district court's decision to deny relief on habeas claims. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This Court's jurisprudence suggests it believes a COA is also necessary to appeal an order denying a Rule 60(b) motion, if the 60(b) motion effectively challenges the merits of a denial of habeas relief. *Ochoa Canales v. Quarterman*, 507 F.3d 884, 888 (5th Cir. 2007).[4]

A COA should issue when the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El*, 537 U.S. at 336. To determine whether a COA should issue, this Court conducts only a "threshold inquiry," and it should issue a COA if

[4] Busby's principal challenge is to the district court's denial of funding. That denial is what constitutes the defect in the earlier habeas proceedings. To be sure, had the district court not wrongfully withheld funds, and had this Court not wrongfully affirmed that denial, Busby would have been able to obtain an expert report establishing that he is intellectually disabled and hence ineligible for execution. Yet the defect in the proceedings was the denial of funding, and it is that defect that undergirds the Rule 60(b) Motion. It is therefore not entirely certain that Busby requires a COA. Nevertheless, and out of an abundance of caution, and given the close proximity of the merits to the defect in the proceedings in the district court, Busby is hereby requesting from this Court a COA.

"reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Skinner v. Quarterman*, 528 F.3d 336, 340-41 (5th Cir. 2008) (quoting *Miller-El*, 537 U.S. at 336, 338); *see also Buck v. Davis,* 580 U.S. 100, 115-17 (2017); *Jordan v. Fisher*, 135 S. Ct. 2647, 2652 (2015) (Sotomayor, J., dissenting). A claim is "debatable" even if every reasonable jurist might agree, after fully considering the claim, that the "petitioner will not prevail." *Buck*, 580 U.S. at 117 (quoting *Miller-El*, 537 U.S. at 338). When a district court denies a habeas claim on procedural grounds, without reaching the underlying claim, a COA should issue when the petitioner shows "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In capital cases, all doubts as to the appropriateness of a COA are resolved in favor of the petitioner. *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005). In other words, a COA should be denied when a claim is frivolous but not as a means of short-circuiting appellate review.

VI. Summary of the argument

Reasonable jurists would find that Busby's Rule 60(b) Motion does not constitute a successive habeas petition because it addresses a defect in the integrity of the prior proceeding and not the court's previous ruling on the merits of his claim. Specifically, the Motion addresses the district court's wrongful denial of the funds that were reasonably necessary to obtain a report from an expert opining that Busby is intellectually disabled.

Reasonable jurists would agree that Busby's Motion was timely because he has diligently pursued relief on his Atkins claim since 2009.

Finally, reasonable jurists would agree that Busby's Motion presents extraordinary circumstances because both Undersigned Counsel and Counsel for the State have asked the trial court to find that Busby is ineligible for execution. The joint request is unusual, and a result of the fact that both the expert retained by Busby and the expert retained by the State agree that Busby is intellectually disabled.

VII. Argument

A. Reasonable jurists would agree that Busby's Motion addresses a defect in the integrity of the proceeding, not a prior habeas decision.

The district court's decision that Busby's Rule 60(b) Motion constitutes a successive habeas petition is grounded in its belief that the claim Busby presented in his Rule 60(b) Motion is the same claim this Court previously considered. *See* ROA.3606. Reasonable jurists would agree that this Court's opinion issued in *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012), requires finding that the claim Busby presents now is fundamentally different from his prior claim. Ibarra presented an *Atkins* claim to the state habeas court which was supported by no expert report and virtually no other evidence. *Ibarra v. Thaler*, 691 F.3d 677, 681-82 (5th Cir. 2012), *overruled on other grounds by Trevino v. Thaler*, 133 S. Ct. 1911 (2013). This Court found that the *Atkins* claim that Ibarra presented to the federal district court -- supported by the expert opinion ruled inadmissible in the state court proceeding -- was unexhausted because the addition of the expert report made the claim fundamentally different from the one presented to the state court. *Id.* at 682-83.

While *Ibarra* is concerned with procedural default and whether a claim presented to a federal court is different from one presented to the state court, its rule -- i.e., that the addition of an expert report can render an *Atkins* claim fundamentally different from previous iterations of the claim -- is nonetheless applicable here. Because it is now supported by the expert opinion of Dr. Gilbert Martinez (and also the expert opinion of the State's expert, who agrees that Busby is intellectually disabled), the claim that Busby now raises in this Court is a different claim from the one he previously presented to this Court.

It is true that the district court's error regarding Busby's funding decision did not preclude a ruling on the merits of Busby's claim as it then-existed, without any expert opinion; but the district court's error did prevent a ruling on the claim as it exists now, which is in a fundamentally different and better position because it now contains what both the district court and this Court found to be lacking from the previous claim: an expert report.

B. Reasonable jurists would agree that Busby's Motion was timely.

The district court issued its order denying Busby relief on his *Atkins* claim on March 10, 2015. Proceedings in this Court proceeded at a slower

pace, and this Court did not issue its opinion affirming this Court's decision until June 13, 2018, approximately three months after the Supreme Court issued its opinion in *Ayestas v. Davis*, 584 U.S. 28 (2018). The district court seems to suggest any argument related to *Ayestas* needed to be raised by Busby at that moment, and that Busby should have sought an immediate return to the district court to file his Rule 60(b) Motion rather than pursue his petition for rehearing en banc in this Court. There is simply nothing that requires Busby to have abandoned his meritorious petition for rehearing in the court of appeals to benefit from *Ayestas*.

This Court denied Busby's Petition for Rehearing on May 20, 2019, and the Supreme Court denied his Petition for Writ of Certiorari on January 13, 2020. Only two weeks later, he was scheduled to be executed on May 6, 2020.

Counsel then began working on the claim they would present to the state court. As the global pandemic made it impossible to work on Busby's claim during March and April 2020, Counsel asked the CCA to stay Busby's execution, and the CCA obliged. Notwithstanding the pandemic, Counsel filed Busby's application in the state habeas court in January 2021. Counsel

diligently pursued relief in the state court until through last year, when the CCA denied Busby habeas relief on March 5, 2025.

C. Reasonable jurists would agree that Busby's Motion presents the "extraordinary circumstances" necessary to reopen his proceeding pursuant to Rule 60(b)(6).

To demonstrate "any other reason justifying relief" under Rule 60(b)(6)'s catch-all provision, a petitioner must demonstrate that extraordinary circumstances exist to reopen the district court's final judgment. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005). The Supreme Court has explained that extraordinary circumstances are rare in the habeas context and that a change in decisional law after entry of judgment alone does not justify relief from a final judgment. *Id.* at 535-36.

In the case of Billy Jack Crutsinger, this Court found that the change in decisional law announced in *Ayestas* did not constitute the extraordinary circumstances necessary to reopen his federal habeas proceeding. *Crutsinger v. Davis*, 936 F.3d 265, 270-71 (5th Cir. 2019). This Court should find Busby's Motion is different from Crutsinger's Motion for at least two reasons.

First, Busby's motion alleges an error that affected the district court's resolution of a claim that asked the court to determine whether he is eligible for a death sentence. The funding request at issue in *Crutsinger* sought to develop a claim that trial counsel provided Crutsinger ineffective assistance. *Crutsinger v. Davis*, No. 4:07-cv-00703-Y, 2019 WL 3749530, at *2 (N.D. Tex. Aug. 8, 2019). That Busby's funding motion sought to develop a claim that he is intellectually disabled -- and thus constitutionally ineligible for execution -- makes his Motion fundamentally different from Crutsinger's. Moreover, we now know that the funds could have yielded (and have since yielded) precisely the item both the district court and this Court faulted Busby for not previously possessing: an opinion from an expert opining that he is intellectually disabled.

Of course, now not one, but two, experts have opined that Busby is intellectually disabled: both the expert Counsel employed, and the expert employed by Counsel for the State. This fact makes Busby's motion similar in at least one respect to the Rule 60(b) motion filed by Duane Buck.

In its opinion issued in *Buck v. Davis*, 580 U.S. 100 (2017), the Supreme Court found that Duane Buck's Rule 60(b)(6) motion satisfied

Gonzalez's extraordinary circumstances requirement. *Buck*, 580 U.S. at 124. A jury had convicted Buck of capital murder and sentenced him to death after affirmatively finding him to be a future danger, based on Dr. Walter Quijano's expert testimony that Buck's race was a pertinent factor in predicting future dangerousness. *Id.* at 104. Buck filed a Rule 60(b)(6) motion asking the federal district court to reopen his proceedings, grounded primarily in the extraordinary circumstances surrounding Dr. Quijano's testimony, though he also cited a change in decisional law. *Id.* at 114 -15. The district court denied Buck's Rule 60(b)(6) motion, finding that Buck had failed to demonstrate extraordinary circumstances. *Id.* at 114. Agreeing with the district court, this Court denied him a COA on the claim. *Id.* at 114-15. However, the Supreme Court reversed this Court's judgment, holding that Buck was entitled to relief under Rule 60(b)(6) and that the district court abused its discretion in denying his motion. *Id.* at 123, 128. The Court reasoned it is highly likely that Buck was sentenced to death in part because of his race, and relying on race in any way to impose a criminal sanction is a fundamental constitutional violation and poisons public confidence in the judicial process. *Id.* at 119, 123-24.

Moreover, "[t]he extraordinary nature of [Buck's] case is further confirmed by what the State did in response to Dr. Quijano's testimony." *Id.* at 124. In a prior case in which Dr. Quijano similarly testified that the petitioner's race weighed in favor of a finding of future dangerousness, the State confessed error in the introduction of race as a sentencing factor and consented to resentencing before the Supreme Court. *Id.* at 109, 124; *see also Saldano v. Texas*, 530 U.S. 1212 (2000). Additionally, the Texas Attorney General issued a public statement addressing the cases in which Dr. Quijano testified, affirming that "it is inappropriate to allow race to be considered as a factor in our criminal justice system," and identifying six similar cases in which Dr. Quijano's testimony injected race into capital sentencing proceedings. *Buck*, 580 U.S. at 109, 124 (reflecting the Attorney General's identification of Buck as one of the six defendants). The Court highlighted how remarkable the State's response of consenting to resentencing was, because "[i]t is not every day that a State seeks to vacate the sentence of five defendants found guilty of capital murder." *Id.* at 125. However, while Buck was initially identified by the Attorney General as one of the defendants whose capital sentencing was improperly affected by Dr. Quijano's

testimony, the State refused to confess error and resentence Buck. *Id.* at 109-10, 125.

Dr. Antoinette McGarrahan was employed by Counsel for the State to determine whether Busby is intellectually disabled. She agreed with Dr. Martinez's opinion. ROA.3510-15. Accordingly, with its own expert agreeing that Busby is ineligible for execution, Counsel for the State filed Proposed Findings of Fact and Conclusions of Law, urging the state habeas trial court to find that Busby is ineligible for execution because of intellectual disability. That the same office would seek to execute an offender it has acknowledged to be ineligible for execution is extraordinary in precisely the same way it was for the Attorney General's Office to concede error in Duane Buck's case but then refuse to retry him.

VIII. Conclusion and prayer for relief

Only two experts have opined on whether Petitioner Edward Lee Busby is intellectually disabled since before his 2005 trial. Both experts -- i.e., Busby's expert and the State's expert -- agree Busby is intellectually disabled. Indeed, in the proceedings in the state court, the government agreed that Busby is intellectually disabled and hence ineligible for execution.

Both the district court and this Court previously denied Busby relief on his *Atkins* claim largely because it did not then contain a report from any expert opining that Busby is intellectually disabled. The Record lacked such a report only because this Court adhered to an incorrect interpretation of federal law (i.e., an incorrect standard for addressing funding requests under § 3599). But for this defect in the integrity of Busby's federal habeas proceeding, the record then before the district court and before this Court would have contained a report similar to the July 11, 2022 Report from Dr. Gilbert Martinez, which establishes conclusively that Busby is intellectually disabled.

The claim that now exists because of the addition of the report is fundamentally different from the claim this Court previously considered. Busby's Motion is not an attempt to relitigate that earlier version of his claim, but is instead an attempt to litigate whether the district court's error constituted a defect in the integrity of the proceeding which prevented a finding that Busby is ineligible for execution because of intellectual disability.

Accordingly, Busby requests that this Court:

(1) find that his Motion under Rule 60(b) is not a successive habeas petition but is instead an appropriate Rule 60 challenge to the integrity of the prior habeas proceedings;

(2) determine his Motion to be timely;

(3) determine that his Motion presents extraordinary circumstances justifying relief;

(4) either remand to the district court to consider the merits of the new *Atkins* claim relying on the expert reports demonstrating Busby's intellectual disability, or determine that the record establishes that Busby is intellectually disabled and hence ineligible for execution;

(5) stay Busby's execution, currently scheduled for May 14, 2026;

(6) grant any other relief the Court deems appropriate.

Respectfully submitted,

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Certificates of Service and
Compliance with ECF Filing Standards

I certify that on April 27, 2026, this appeal and application with brief in support was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Jeffrey R. Newberry

_____
Jeffrey R. Newberry

Certificate of Compliance with Rule 32(a)

1. This application with brief in support complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,764 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This appeal and application with brief in support complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this application has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.108 in 14-point Equity A and 12-point Equity A for footnotes.

/s/ Jeffrey R. Newberry

_____

Jeffrey R. Newberry

No. 26-70004

IN THE
United States Court of Appeals for the Fifth Circuit

EDWARD LEE BUSBY,
Petitioner–Appellant,

v.

ERIC GUERRERO, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent–Appellee.

On Appeal from the United States District Court for the Northern District of Texas, Fort Worth Division, Cause No. 4:09-CV-160

OPPOSITION TO APPLICATION FOR A CERTIFICATE OF APPEALABILITY AND REQUEST FOR A STAY OF EXECUTION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(2)(C), oral argument should be denied because "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

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INTRODUCTION

Petitioner–Appellant Edward Lee Busby was convicted of capital murder and sentenced to death for the murder of Laura Crane. He is scheduled to be executed after **6:00 p.m., May 14, 2026**. Busby was denied federal habeas relief more than a decade ago, ROA.3316–66, and his federal habeas proceedings concluded more than six years ago, ROA.3439. Busby initiated subsequent state habeas proceedings a year later, ROA.4960, which concluded in November 2025, *Busby v. Texas*, 146 S. Ct. 371 (Nov. 10, 2025). He then waited six months to seek relief from the federal district court's 2015 judgment under Federal Rule of Civil Procedure 60(b), which request was predicated on the argument that the district court's denial of funding in 2011 was rendered incorrect by the Supreme Court's 2018 decision in *Ayestas v. Davis*, 584 U.S. 28 (2018). ROA.3441-82.

The lower court denied Busby's motion for relief from judgment. ROA.3601-09. The court first found Busby's motion was actually a successive habeas petition because it attacked the previous merits decision denying his claim of intellectual disability under *Atkins v. Virginia*, 536 U.S. 304 (2002). ROA.3606. Second, the court found the

motion untimely. ROA.3606-07. Third, the court found an absence of an extraordinary circumstance warranting relief from judgment. ROA.3607. The court denied a certificate of appealability (COA) and transferred the case to this Court to determine whether Busby was entitled to authorization to file a successive habeas petition. ROA.3608-09.

Busby failed to seek authorization in this Court to file a successive habeas petition. Instead, he sought a COA with respect to the lower court's determinations that his motion for relief from judgment was a successive petition, untimely, and meritless. *See generally* ECF No. 21 (Appl.). This Court should deny Busby's request for a COA because the district court's conclusions were undebatably correct. This Court should also deny Busby's terse request for a stay of execution.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 2253(c)(1)(A), (c)(2). To the extent Busby appeals the district court's transfer order, this Court also has jurisdiction. *See In re Pruett*, 784 F.3d 287, 290 (5th Cir. 2015).

STATEMENT OF THE ISSUES

1. Could reasonable jurists debate the district court's conclusion that Busby's motion for relief from judgment was a successive federal habeas petition?

2. Could reasonable jurists debate the district court's conclusion that Busby's motion for relief from judgment was untimely?

3. Could reasonable jurists debate the district court's conclusion that Busby's motion for relief from judgment did not present an extraordinary circumstance?

STATEMENT OF THE CASE

I. Procedural History

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). The conviction and sentence were affirmed on direct appeal in 2008. *Id.* 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 Busby was intellectually disabled. ROA.1633. The court denied the motion, assuming the claims raised in Busby's petition were "procedurally viable." ROA.1871. In doing so, the court described the extensive evidence developed prior to Busby's trial (Dr. Timothy Proctor's psychological testing of Busby) and during his state habeas proceedings (Dr. Gilda Kessner's review of test data and testimony, Toni Knox's new mitigation investigation, Dr. Gilbert Martinez's administration of the WAIS-IV, and Dr. Bekh Bradley-Davino's "comprehensive report" based on ten hours of clinical interviews, medical records, prior psychological reports, and several statements from individuals who knew Busby during his developmental period), ROA.1872-75, 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. Because the funding Busby requested would only have

supplemented evidence he had already developed, the court denied his request for funding. ROA.1876.

The district court later stayed its proceedings to allow Busby the opportunity to exhaust claims, ROA.1884, and directed him to "observe state requirements for the appointment of counsel and compensation of services before the state court." ROA.1881. Busby then filed a subsequent state habeas application, which the Texas Court of Criminal Appeals (TCCA) dismissed as an abuse of the writ. ROA.4468-69. After the district court reopened the habeas proceedings, ROA.2150-51, Busby again requested funding but only with respect to his ineffective-assistance claim, ROA.2169-79. The court later denied Busby's renewed funding request, ROA.2332-38, and denied Busby habeas relief, ROA.3366.

This Court granted Busby a COA after which it affirmed the district court's denial of relief, *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. Ord., *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Jan.

28, 2020). The TCCA granted a sixty-day stay of Busby's execution during the then-emerging COVID-19 pandemic. 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 in the TCCA a motion for a stay of execution due to the COVID-19 pandemic, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-04 (Tex. Crim. App. Jan. 8, 2021), and a motion for a stay of execution asserting his desire to have his spiritual advisor accompany him in the execution room, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-05 (Tex. Crim. App. Jan. 15, 2021). The motions were denied.

Busby also filed a motion to intervene and a motion for a stay of execution in a civil rights action involving a claim challenging the Texas Department of Criminal Justice's (TDCJ) former policy regarding the presence of spiritual advisors during executions, which were denied. Ord., *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Jan. 29, 2021), ECF No. 132. Busby then filed in federal district court a complaint and a motion for a stay of execution regarding TDCJ's execution policy. Compl., *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Jan. 29, 2021), ECF

No. 1. The motion for a stay of execution was dismissed after the TCCA stayed Busby's execution, Ord., *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Feb. 4, 2021), ECF No. 13, and Busby's complaint was ultimately dismissed as moot, Ord. on Dismissal, *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Sept. 16, 2021), ECF No. 54.

Busby also filed a motion for a stay of execution and a subsequent state habeas application raising an intellectual disability claim prior to his scheduled execution in 2021. 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. ROA.4906-48. 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 was 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).

Busby then filed in the lower court a motion for relief from judgment on April 2, 2026. ROA.3441-82. The court denied the motion and a COA because the motion was a successive habeas petition, was untimely, and failed to demonstrate any extraordinary circumstance. ROA.3608. The court transferred the case to this Court for a determination as to whether Busby was authorized to file a successive habeas petition. ROA.3609. Busby did not file a motion for authorization to file a successive habeas petition. *See In re Busby*, No. 26-10354 (5th Cir. Apr. 23, 2026), ECF No. 14-1 (order granting Busby an extension of time to April 27, 2026, to file a motion for authorization). Instead, Busby filed an Application for a COA. *See generally* Appl. The instant opposition follows.

II. Statement of Facts

A. Evidence at guilt-innocence

> The evidence shows that on or about January 30, 2004, [Busby] and a female accomplice [Kathleen 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 at 663–64.

B. Evidence at punishment

> 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."
>
> The [S]tate 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 [waist] 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.

Busby v. Davis, 925 F.3d at 724 (footnotes omitted).

C. Evidence regarding Busby's *Atkins* claim

This Court summarized the evidence Busby presented in state court and during his federal habeas proceedings regarding his *Atkins* claim:

> Busby was administered five separate IQ tests between 2001 and 2010. He scored 96 on an unknown IQ test in 2001, and the State offered to "forget about" that test, acknowledging that it was unreliable. . . . Prior to his criminal trial, three more IQ tests were administered to Busby. He received a full scale IQ of 77 on the WAIS-III, administered in 2005 by his expert witness at trial, Dr. Proctor. The standard error of measurement (SEM) for the WAIS-III is approximately "plus or minus five," according to Dr. Proctor's trial testimony. Busby's IQ was therefore in a range of 72–82, as measured by the WAIS-III. Busby asserted in his second state habeas petition that due to the "Flynn Effect," the score of 77 should be adjusted to 73.7. Weeks after Dr. Proctor's assessment, the State's psychologist re-administered the WAIS-III, and Busby scored 79. The IQ range would be 74–84, based on that test and its SEM.
>
> Dr. Proctor administered a third IQ test on the eve of trial—the Beta-III—on which Busby scored 81. Proctor

testified that this score "correlates fairly well" with Busby's WAIS-III score. The SEM for the Beta-III is not in the record. Busby argued to the TCCA that "[an intellectual disability] expert would opine, however, that the Beta IQ test, because of its less comprehensive nature, is widely acknowledged to inflate IQ scores generally, to be subject to a higher Flynn Effect rate than the Wechsler scales, and to be less reliable overall than the Wechsler Scales." However, no expert did so opine in the state-court proceedings, and there was no evidence provided to the TCCA as to what the IQ range would be if the SEM were considered or if the Flynn Effect were accepted and applied. All that the TCCA had before it regarding the Beta-III test was the fact that Busby had scored 81 and the arguments of counsel attempting to discredit or explain that score. Even assuming that the SEM for the Beta-III test is similar to that for the WAIS-III, the IQ range would be 76–86. Such a range would be above the range of 75 or below that the Supreme Court has applied in its recent opinions regarding IQ scores in the context of an *Atkins* claim. The Supreme Court said in *Brumfield*[1] that evidence of an IQ score whose range, adjusted by the SEM, was above 75 "could render the state court's determination reasonable."

Busby provided arguments in his federal habeas petition regarding the Beta-III test and his score of 81 that were not presented to the TCCA. He asserted in federal court that the Beta-III had been "normed" seven years before it was administered to Busby, and that if adjusted for the Flynn Effect, the score would be 78.7. He did not point to any expert testimony or other evidence in the record that supports these arguments. Nor is there evidence as to the SEM of this test or the range of the score when the SEM is considered. Again, there was only argument of counsel. Busby was provided the opportunity to present whatever expert testimony he deemed necessary in the federal district court proceedings, and he did not present any additional evidence regarding this test. The

1 *Brumfield v. Cain*, 576 U.S. 305 (2015).

only evidence that the TCCA and federal district court had was that Busby's full score IQ as measured by the Beta-III test was 81.

In 2010, immediately prior to filing his federal habeas petition, Busby was administered the WAIS-IV and scored a 74. The report of the clinician who administered this test reflects that, adjusted based on a 95% confidence interval for the WAIS-IV, Busby's full scale IQ range is 70–79, which the report characterizes as "Borderline."

Before the trial at which Busby was convicted, Proctor also administered the Wide Range Achievement Test, Third Edition, which measured Busby's educational abilities in reading, spelling and math. Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.

Busby argues that because the federal district court's analysis of the merits of the *Atkins* claim was based only on IQ scores, it follows that the district court also concluded that "the [T]CCA's analysis must have stopped at that point as well." First, it appears that the federal district court did consider Busby's achievement test scores, which were not IQ test scores. But in any event, we cannot assume that the TCCA considered only Busby's IQ scores and ignored other evidence in Busby's state habeas application. Nor can we assume that the TCCA ignored the *lack* of evidence in Busby's state habeas application. Not a single clinician opined that Busby is intellectually disabled, though there were three reports from mental health experts appended to Busby's second state habeas application. Based on the record presented to the TCCA, no clinician examined Busby's IQ scores, evidence of whether Busby has "adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances')", or whether there was an onset of adaptive deficits while Busby was a minor, and then reached the conclusion that Busby is intellectually disabled.

Busby retained Gilda Kessner, a Doctor of Psychology, and she submitted a report dated March 21, 2008. Though Busby did not claim in his first state habeas petition that he was intellectually disabled, he filed this report as part of the evidence in his first state habeas proceeding. The same report was an exhibit to his second state habeas application. Kessner's report reflects that she reviewed an array of Busby's records and the testimony of Dr. Proctor, who was an expert witness for Busby in his murder trial. Kessner's report concludes that the WAIS-III that Proctor administered to Busby was the current test at the time. Her report reflects that Proctor testified at trial that Busby scored 77 on that test, and that Proctor testified that Busby was not [intellectually disabled] because "the DSM-IV diagnosis of [intellectual disability] would be a score below 70." However, Kessner opined that Proctor had not accounted for a phenomenon known as the Flynn Effect, which posits that there is a rise or gain in IQ scores over time and that "[r]esearch literature has suggested that this figure is .3 per year beginning the year after the test is normed." Importantly, Kessner concluded that the 77 score on the WAIS-III "does not rule out a diagnosis of [intellectual disability]," and that "a thorough investigation into Mr. Busby's adaptive behavior history is necessary to make a proper determination." The report continued, "[a]t this time, I do not believe that has been accomplished." Her report said, "I am concerned that [ ] the apparent perfunctory reliance on the obtained score truncated the investigation into the possibility of the presence of [intellectual disability] in Mr. Busby." Kessner's report had explained that "the next version of the Wechsler series (WAIS-IV) will be available to clinicians in the fall of 2008." Her report concluded with this recommendation: "I would recommend a new evaluation with the WAIS-IV when it is available this fall so that the issue of the Flynn Effect and questions about the validity of the score can be avoided." Kessner's report addresses only one of the three broad criteria for diagnosing intellectual disability. As

to that criteria, the most she said was that the WAIS-III score of 77 did not "rule out" intellectual disability.

After Busby filed his federal habeas petition, he retained two other experts regarding his mental capacities, and their reports were also appended to Busby's second state habeas petition. The report of Gilbert Martinez reflects that he is a Ph.D., licensed psychologist, and clinical neuropsychologist, and that Busby "underwent standardized assessment of his intellectual functioning on February 11, 2010." The report is relatively brief and offers no opinion as to whether Busby is intellectually disabled. It reflects in a chart that Martinez administered the WAIS-IV, that Busby's full scale IQ score was 74, and that within a 95% confidence interval, his IQ score was 70–79. Under a column in this chart labelled "Qualitative Description," the word "Borderline" appears with regard to Busby's full scale IQ score. The report also reflects that Martinez administered a Test of Memory Malingering, and "[t]here was no evidence of misrepresentation of cognitive or intellectual functioning."

Federal habeas counsel also retained Bekh Bradley-Davino, Ph.D., who is a licensed clinical psychologist. Bradley-Davino spent ten hours evaluating Busby in person and reviewed a substantial amount of written material and records. Bradley-Davino prepared a 20-page report, most of which does not pertain to whether Busby is intellectually disabled. But in a section titled "Limited Intellectual Abilities and Academic Problems Became Apparent in Mr. Busby's Childhood and Continued into Adulthood," the report states that "[a] number of sources of data including school records, behavioral descriptions provided by Mr. Busby as well as his family, teachers, and peers, and results of standardized tests, indicate that at a young age Mr. Busby demonstrated significant signs of impaired/limited academic and intellectual/mental abilities." The report also recounts the results of the WAIS-IV IQ test administered by Martinez and its full scale IQ score of 74, and concludes that "[t]his score

> reflects significant limitations in intellectual functioning, approximately two standard deviations below the mean." The report reflects that Busby was placed in special education by at least the seventh grade, that he had "significant problems in academic functioning beginning early," and that he could not understand some of the more complex plays during high school football practice. But there is no conclusion drawn from all of the facts in Bradley-Davino's report that Busby is intellectually disabled. Instead, the report closes with this recommendation: "I additionally strongly recommend further evaluation of Mr. Busby by an expert in [intellectual disability] in light of his clear history of extensive intellectual and adaptive functioning limitations."

Id. at 716–19 (footnotes omitted).

Following the TCCA's stay of Busby's execution in 2021, Dr. Martinez administered the WAIS-IV to Busby on which he obtained an FSIQ of 81, indicating "low average" intellectual functioning. ROA.3490. Dr. Martinez also administered the Wide Range Achievement Test-Fifth Edition (WRAT-5), which measured Busby's academic achievement and reflected low scores. ROA.3490. To assess Busby's adaptive functioning, Dr. Martinez interviewed Busby's sisters Tarsharn Busby and Kimiko Coleman, and he reviewed Busby's school records and declarations from family members and acquaintances of Busby. ROA.3491-3502. Ms. Busby and Ms. Coleman also completed the Adaptive Behavior Assessment System-Third Edition (ABAS-III), which indicated Busby's scores were

for the most part in the bottom tenth of a percentile of individuals of Busby's age. ROA.3502-07. Dr. Martinez concluded that the discrepancy between Busby's IQ scores of 74 (in 2010) and 81 (in 2022) was likely due to the Flynn Effect and the practice effect, though he did not suggest a numerical adjustment to Busby's FSIQ of 81 to account for the practice effect. ROA.3508. He opined that the FSIQ of 81 was consistent with the previously obtained FSIQ of 74 and that Busby's adjusted scores fell within the range of intellectual disability in the context of Busby's adaptive deficits. ROA.3508-09. Dr. Martinez also concluded the records, interviews, declarations, and testing indicated deficits in adaptive functioning. ROA.3509.

The State's expert, Dr. Antoinette McGarrahan, reviewed the historical data and Dr. Martinez's new report. ROA.3510-15. Dr. McGarrahan decided not to administer additional testing to Busby in light of the numerous assessments he had been given. ROA.3514. Dr. McGarrahan concluded Busby demonstrated "reduced intellectual abilities" and significant deficits in adaptive behavior, and she found the deficits were present during his developmental period. ROA.3514.

Therefore, she could not controvert Dr. Martinez's opinion that Busby met the diagnostic criteria for intellectual disability. ROA.3515.

SUMMARY OF THE ARGUMENT

The district court properly concluded Busby's motion for relief from judgment was a successive habeas petition, was untimely, and failed to demonstrate any extraordinary circumstance. The motion was a successive petition because it challenged the earlier merits denial of Busby's *Atkins* claim, and it did not challenge any procedural ruling that precluded a merits ruling or allege a defect in the integrity of the initial proceedings. The motion was untimely because Busby took no action during his initial federal habeas proceedings to challenge the district court's denial of funding, he waited more than a year to file a subsequent state habeas application following the conclusion of his federal habeas proceedings, and he waited almost six months to file the motion for relief from judgment following the conclusion of the subsequent state habeas proceedings. Under this Court's precedent, the motion was indisputably untimely. The motion also did not identify any extraordinary circumstance, considering the state court appropriately considered all of

Busby's evidence and rejected the parties' recommendation to grant relief.

STANDARD OF REVIEW

A COA can only issue if Busby shows reasonable jurists could debate whether the court below should have resolved his claims in a different manner or that this Court should encourage him to further litigate his claims. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). This standard applies to both merits and procedural rulings. *Buck v. Davis*, 580 U.S. 100, 122 (2017). If the ruling was procedural, Busby must show both that the procedural ruling is debatable and that it is debatable he stated a valid claim. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

A federal habeas petitioner may appeal a district court's transfer order without a certificate of appealability. *Jackson v. Lumpkin*, 25 F.4th 339, 340 (5th Cir. 2022). Review of a transfer order is de novo, as is review of the determination that a Rule 60(b) motion constitutes a successive habeas petition. *Id.*; *In re Edwards*, 865 F.3d 197, 202–03 (5th Cir. 2017) (per curiam). However, Busby has not appealed the district court's transfer order. Nonetheless, a habeas petitioner must "obtain leave from the court of appeals before filing a second habeas petition in the district

court." *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012). Otherwise, the district court lacks jurisdiction over the petition. *See Adams*, 679 F.3d at 321. Under 28 U.S.C. § 1631, a "district court must have lacked jurisdiction over the action" to have the authority to transfer a petition to this Court. *Adams*, 679 F.3d at 321.

ARGUMENT

I. The District Court Properly Concluded that Busby's Rule 60(b)(6) Motion Was a Successive Petition.

A Rule 60(b) motion can be a disguised second-or-successive habeas petition if, for example, an inmate seeks to attack a previous merits resolution of his claims. *See Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005) ("A motion can also be said to bring a 'claim' 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." (footnote omitted)). On the other hand, a court has jurisdiction to consider a Rule 60(b) motion so long as it does not attack the court's resolution of the merits of a claim but instead alleges a defect in the integrity of the court's prior

proceedings or challenges a procedural ruling that precluded a merits determination.[2] *Id.* at 532 nn.4–5; *Gamboa v. Davis*, 782 F. App'x 297, 300 (5th Cir. 2019). The district court properly concluded Busby's Rule 60(b) motion was a successive petition in the guise of a Rule 60(b) motion because it sought to revisit the merits of his *Atkins* claim. ROA.3606.

Busby's Rule 60(b) motion was ostensibly aimed at the lower court's denial in 2011 of his request for funding to support a claim under *Atkins*. ROA.3441-82. But given that Busby later obtained funding and a report from Dr. Martinez opining that he is intellectually disabled, it was plainly evident that the true purpose of Busby's motion was to relitigate the merits of his *Atkins* claim with that new evidence. ROA.3457 ("Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled[.]"); *see also* ROA.1633 (Busby's

[2] Busby does not allege the lower court's order denying his request for funding precluded a merits determination with respect to his *Atkins* claim, nor could he. *See* Appl. 16 ("It is true that the district court's error regarding Busby's funding decision did not preclude a ruling on the merits of Busby's claim as it then-existed[.]"). Although the lower court found Busby's claim procedurally barred, it determined Busby failed to show he is intellectually disabled. ROA.3347-53. Moreover, this Court addressed the merits of Busby's claim at length. *Busby v. Davis*, 925 F.3d at 714–20; *see Will v. Lumpkin*, 978 F.3d 933, 939 (5th Cir. 2020) ("The court's merits determination was not precluded; it was merely layered below a procedural disposition.").

application for funding to retain an expert to form an opinion as to whether Busby is intellectually disabled). Indeed, a substantial portion of Busby's motion—more than half, when excluding its introduction and background summary—was a recitation of the purported merits of his *Atkins* claim. ROA.3466-81. If the purpose of Busby's Rule 60(b) motion was not to revisit the merits of his *Atkins* claim, then the motion would have been for naught because there would be nothing left to do given that he has already obtained his sought-after funding and evidence. Busby's funding complaint was simply moot. This fact laid bare the true purpose of Busby's Rule 60(b) motion—another determination of the merits of his *Atkins* claim with the benefit of his newly obtained evidence, which is flatly prohibited by *Gonzalez*, 545 U.S. at 531.

In *Crutsinger v. Davis*, this Court held the petitioner's Rule 60(b) motion challenging the district court's denial of funding was not a successive petition even though it was "clear from his motion" that he "would seek to set aside" his conviction or sentence if he obtained substantial new evidence. 929 F.3d 259, 264–66 (5th Cir. 2019). This was so because the Rule 60(b) motion did "not present a revisitation of the merits" of the petitioner's claim but rather was "confined to the federal

district court's denial of funding in the first federal habeas proceeding." *Id.* at 265–66.

In the court below, Busby relied on this Court's holding in *Crutsinger* and the fact that his Rule 60(b) motion nominally challenged the lower court's denial of his request for funding. ROA.3461. As this Court has explained, however, "[t]he relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label." *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc) (quotation omitted). Busby's reliance on the Rule 60(b) label and his hollow argument that he challenged only the lower court's denial of funding should not avail him because the substance of his motion belied the label. In any event, Busby does not now argue that the lower court's conclusion that his Rule 60(b) motion was a successive petition was contrary to *Crutsinger*. *See generally* Appl. Indeed, even Busby's reply brief in the lower court scarcely addressed the argument that his Rule 60(b) motion was a successive petition. ROA.3590-99. Busby has therefore waived any argument that the lower court's conclusion was contrary to this Court's holding in *Crutsinger*. *See Monteon-Camargo v. Barr*, 918 F.3d 423, 428 (5th Cir. 2019).

Moreover, the lower court's conclusion was consistent with this Court's other precedent. For example, in *In re Segundo*, this Court affirmed the district court's decision that a Rule 60(b) motion was a successive petition even though it challenged the district court's "use of an erroneous legal standard to deny him" funding.[3] 757 F. App'x 333, 335–36 (5th Cir. 2018). The district court concluded the Rule 60(b) motion was a successive petition "because it raise[d] and extensively brief[ed] various substantive claims[.]" *Id.* at 335. The petitioner argued his Rule 60(b) motion identified a defect in the integrity of the habeas proceedings—the denial of funding—and only substantively addressed his claims to demonstrate the extraordinary circumstances that warranted relief from judgment. *Id.* This Court rejected that "clever argument" because doing otherwise would allow petitioners to "shoehorn" the merits of their claims into Rule 60(b) motions. *Id.* Likewise, Busby's Rule 60(b) motion was a clear attempt to shoehorn the merits of his *Atkins* claim under the guise of an attack on the lower court's funding decision.

[3] Like Busby, the petitioner in *In re Segundo* sought funding to support a showing that he was intellectually disabled. *See Segundo v. Davis*, No. 4:10-CV-970-Y, 2018 WL 4623106, at *2 (N.D. Tex. Sept. 26, 2018).

Similarly, in *Gamboa*, this Court denied the petitioner a COA with respect to the district court's dismissal of his Rule 60(b) motion as a successive petition. 782 F. App'x at 300–01. The petitioner argued his Rule 60(b) motion was not a successive petition because it alleged federal habeas counsel's abandonment of him was a defect in the integrity of the habeas proceedings. *Id.* The district court explained that, if the petitioner's Rule 60(b) motion was successful, "the only result would be to give him an opportunity to present new claims through new counsel." *Id.* at 300. This Court acknowledged its holding in *Crutsinger* but found it undebatable that the petitioner's Rule 60(b) motion was a successive petition. *Id.* at 300–01.

Under *Crutsinger*, a Rule 60(b) motion is not a successive petition if it attacks *only* a court's earlier denial of funding. 929 F.3d at 265. But under *Gonzalez* and this Court's other precedent, a Rule 60(b) motion is a successive petition if it—like Busby's—seeks to revisit the merits of a petitioner's claims or if that would be the necessary consequence of granting the motion. *See Will*, 978 F.3d at 937 ("So, we must ask, was Will's Rule 60(b) motion actually an impermissible successive habeas petition in disguise? The answer: yes, *if* his Rule 60(b) motion contains

one or more previously presented habeas claims."); *id.* at 940 ("In sum, Will's Rule 60(b) motion—facially challenging a procedural ruling and implicitly challenging a merits determination—presents a habeas claim."); *Gonzales v. Davis*, 788 F. App'x 250, 252–53 (5th Cir. 2019) ("[T]his court has held that a Rule 60(b)(6) motion seeking reconsideration based on *Ayestas*'s change to the standard for funding requests, *so long as it does not also revisit the merits of other claims*, goes to a defect in the proceedings rather than the merits and therefore 'is not a successive habeas petition.'" (emphasis added, quoting *Crutsinger*, 929 F.3d at 264)); *In re Segundo*, 757 F. App'x at 335–36; *Gamboa*, 782 F. App'x at 300–01.

Despite Busby's assurance that the only purpose of his Rule 60(b) motion was to address this Court's denial of his request for funding, ROA.3459-61, his motion "also revisit[ed] the merits of other claims," *Gonzales*, 788 F. App'x at 252. Again, Busby has already obtained his sought-after funding and evidence, ROA.3457, so the purpose of his motion could not only have been to revisit the lower court's funding decision. Like the petitioner's motion in *In re Segundo*, the focus of Busby's motion was his *Atkins* claim, "and reopening the proceedings to

relitigate it [was] the clear objective of the filing[.]" 757 F. App'x at 336. And unlike the petitioner in *Crutsinger*, Busby's Rule 60(b) motion strayed far beyond merely challenging the denial of funding. *Compare* ROA.3466-81 (discussing at length the purported merits of Busby's *Atkins* claim), *with* Opposed Mot. for Relief from J. Pursuant to Fed. R. Civ. P. 60(b)(6) 19–27, *Crutsinger v. Davis*, No. 4:07-CV-703-Y (N.D. Tex. May 9, 2018) (challenging the district court's denial of funding and addressing factors relevant under Rule 60(b)(6)). Therefore, the district court properly concluded Busby's Rule 60(b) motion was a successive habeas petition because it sought to revisit the merits of his *Atkins* claim.[4] ROA.3606.

Busby's only retort is a spurious attempt to extend a defunct doctrine regarding exhaustion to the statutory provisions governing the filing of successive habeas petitions. Appl. 15–16. He argues that his Rule

[4] After determining that Busby's Rule 60(b) motion was a successive habeas petition, this Court ordinarily would consider whether Busby is entitled to authorization under § 2244(b) to file a successive petition. *See Runnels v. Davis*, 746 F. App'x 308, 317 (5th Cir. 2018). But Busby failed to request authorization. In any event, Busby would not be entitled to authorization because he seeks to raise his *Atkins* claim a second time despite the fact that it was raised and denied on the merits in his initial federal habeas proceedings. Denial of authorization in such a circumstance would be mandatory. 28 U.S.C. § 2244(b)(1).

60(b) motion did not raise the same *Atkins* claim as his initial federal habeas petition because the claim in the Rule 60(b) motion was supported by a report opining that Busby is intellectually disabled. Appl. 15. To begin, this is tantamount to a concession that the Rule 60(b) motion *did* amount to a successive habeas petition by presenting a claim for relief. *See* Appl. 16 (Busby's acknowledgement that the district court's denial of his funding request did not preclude a ruling on the merits of his *Atkins* claim). In light of that concession, Busby cannot show the district court's conclusion that his Rule 60(b) motion was a successive petition is debatable.

Moreover, Busby's argument that the addition of an expert report fundamentally alters his *Atkins* claim, Appl. 16, is simply beside the point. Section 2244 does not ask whether a petitioner's claim was exhausted or whether a claim has been fundamentally altered by the addition of new evidence. *See In re Young*, 789 F.3d 518, 526 n.2 (5th Cir. 2015) (rejecting argument that a claim raised in a successive petition was fundamentally altered because that doctrine "concern[ed] the issue of exhaustion, not whether a petition is successive"). Instead, the statute *requires* that "[a] claim presented in a second or successive habeas corpus

application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1); *see In re Young*, 789 F.3d at 526 ("This new gloss on a previous claim is insufficient to overcome § 2244(b)(1)."); *Franklin v. Johnson*, 839 F.3d 465, 475 (6th Cir. 2016) ("At the very least, then, if we are to avoid rendering 28 U.S.C. § 2244(b)(1) entirely nugatory, Franklin may not use Rule 60(b) as a vehicle for relitigating the same 'claim' that was already decided against him in a previous habeas petition."). As the Eleventh Circuit has explained,

> Permitting a second or successive petition to be filed whenever expert witnesses decide to change their earlier opinions would not "greatly restrict [ ] the power of federal courts" to entertain second or successive petitions, but instead would have exactly the opposite effect—permitting second or successive petitions where pre-AEDPA law would not have. That is why in § 2244(b)(1), "claim" means claim, not evidence or arguments supporting a claim. And that is why the Supreme Court has instructed us that "[i]f the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." "In all cases" means all cases.

In re Hill, 715 F.3d 284, 295 (11th Cir. 2013) (citations omitted).

Busby provides no support for his attempt to import the defunct fundamental-alteration doctrine into the successiveness statute. And more to the point, the presentation of additional evidence through a Rule

60(b) motion to support a previously rejected claim "is the precise course of action *Gonzalez* forbids." *Runnels*, 746 F. App'x at 316. Busby's attempt at a "second chance to have the merits determined favorably" is squarely foreclosed by *Gonzalez* and renders his Rule 60(b) motion an impermissible successive petition. *See In re Coleman*, 768 F.3d 367, 371 (5th Cir. 2014) (quoting *Gonzalez*, 545 U.S. at 532 n.5).

For the proposition that his *Atkins* claim has been fundamentally altered such that it is a different claim than the one he previously raised, Busby relies entirely on this Court's opinion in *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012), *overruled on other grounds by Trevino v. Thaler*, 569 U.S. 413 (2013). Appl. 15. But in *Ibarra*, this Court held that the petitioner's new evidence—an expert report and affidavits—that was not presented to the state court was properly excluded by the district court. *Ibarra*, 691 F.3d at 682. Indeed, after *Cullen v. Pinholster*, 563 U.S. 170 (2011), the factual-exhaustion rubric Busby relies upon serves no purpose with respect to a claim the state court adjudicated on the merits. *See Nelson v. Lumpkin*, 72 F.4th 649, 658 (5th Cir. 2023); *Lewis v. Thaler*, 701 F.3d 783, 790–91 (5th Cir. 2012). Nonetheless, this Court's pre-*Pinholster* precedent held that a petitioner's *Atkins* claim was not

rendered unexhausted where he presented no IQ data in state court but presented a full-scale score in federal court. *Morris v. Dretke*, 413 F.3d 484, 494–95 (5th Cir. 2005); *see also Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008). Consequently, the doctrine Busby relies on is not only inapposite in the successiveness inquiry but also would not avail him even in a procedural default inquiry. The "gravamen" of Busby's *Atkins* claim is the same as it has always been. *Franklin*, 839 F.3d at 474–75. This Court should deny a COA.

Relatedly, Busby suggests the district court may have lacked jurisdiction to both transfer his Rule 60(b) motion as a successive petition and determine the merits of the motion. Appl. 5 n.2. Busby is incorrect. *See In re Edwards*, No. 17-70003 (5th Cir. Jan. 26, 2017), ECF No. 31-1 ("In the district court and before this court, Edwards consistently maintained that his Rule 60(b) motion was not barred as a second or successive petition. . . . [W]here a party is requesting a stay of an impending execution, it is particularly appropriate that the court address all arguments presented by the parties."); *see also Gonzales*, 788 F. App'x at 253 ("Because the district court's determination that the motion was a successive petition was incorrect, it had jurisdiction to engage in what it

called the 'alternative analysis'—whether Gonzales was entitled to relief under Rule 60(b)(6)."); *Ruiz v. Lumpkin*, 653 F. Supp. 3d 331, 340 (N.D. Tex. Jan. 27, 2023) ("To avoid the necessity of a remand in the unlikely event the Fifth Circuit reverses this court's conclusions regarding the nature of Ruiz's claims, and given the close proximity of Ruiz's execution, this court will explain why Ruiz is not entitled to relief under Rule 60(b)(6) even if this court were to examine the merits of his new claims."). Busby provides no basis on which this Court should conclude the district court lacked authority to address the merits of his Rule 60(b) motion in the alternative, much less that a remand is appropriate where the district court has already addressed the merits of the motion and found them lacking for several reasons.

For the reasons discussed above, this Court should deny a COA with respect to the district court's conclusion that Busby's Rule 60(b) motion was a successive habeas petition. To the extent Busby appeals the district court's transfer order, this Court should affirm. *See In re Pruett*, 784 F.3d at 291.

II. The District Court Properly Concluded that Busby's Rule 60(b)(6) Motion Was Untimely.

A motion under Rule 60(b)(6), like Busby's, must be filed within a reasonable time "'unless good cause can be shown for the delay.' Reasonableness turns on the 'particular facts and circumstances of the case.'" *Clark v. Davis*, 850 F.3d 770, 780 (5th Cir. 2017) (footnotes omitted). Timeliness is "measured as of the point in time when the moving party has grounds to make [a Rule 60(b)] motion[.]" *Id.* (footnote omitted). Busby's Rule 60(b) motion—challenging this Court's denial of funding *fifteen years ago* and premised entirely on an *eight-year-old* Supreme Court decision, ROA.3450-51—is untimely under controlling circuit precedent.

As noted above, the timeliness of a Rule 60(b) motion is measured by "the point in time when the moving party has grounds to make" his motion. *Clark*, 850 F.3d at 780. Busby indisputably had grounds to bring his motion when the Supreme Court issued its opinion in *Ayestas* in 2018. *Ayestas* is the *sole* ground on which he challenged the lower court's 2011 order denying his request for funding (although he has still not articulated how the court's denial was erroneous under *Ayestas*). ROA.3450-51. Busby's failure to attempt to rectify what he perceived was

error for eight years renders his motion indisputably untimely.[5] This is particularly true considering that Busby's federal habeas proceedings were ongoing when *Ayestas* was announced yet he took no action on it. *See Runnels*, 746 F. App'x at 312 (addressing Rule 60(b) motion and explaining that the petitioner's substitute counsel moved for a stay of proceedings in this Court to file a Rule 60(b) motion in district court).

Indeed, Busby did not even appeal the district court's denial of his request for funding during his initial habeas proceedings.[6] Busby says he was not required to abandon a "meritorious" request for rehearing to immediately benefit from *Ayestas*, Appl. 17, but the request wasn't meritorious. This Court described the request as "erroneous," "unavailing," and based on a "misread[ing]" of the panel's opinion. *Busby*,

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[5] *See Clark*, 850 F.3d at 781–82 (Rule 60(b) motion filed either twelve or sixteen months after the operative date was untimely); *Tamayo v. Stephens*, 740 F.3d 986, 991 (5th Cir. 2014) (per curiam) (holding that district court did not abuse its discretion in denying Rule 60(b) motion filed eight months after the relevant change in law); *Pruett v. Stephens*, 608 F. App'x 182, 185–86 (5th Cir. 2015) (petitioner waited nineteen months after relevant change in law to file a Rule 60(b)(6) motion); *Paredes v. Stephens*, 587 F. App'x 805, 825 (5th Cir. 2014) (petitioner waited thirteen months after relevant change in law to file a Rule 60(b)(6) motion); *Trottie v. Stephens*, 581 F. App'x 436, 438 (5th Cir. 2014) (three years).

[6] Busby asserts this Court "wrongfully affirmed" the lower court's denial of his request for funding. Appl. 12 n.4. However, Busby does not point to where this Court did so or where he appealed the denial of funding.

925 F.3d at 711, 714–15. In any event, Busby's attempt to use Rule 60(b) as a substitute for an appeal is flatly contrary to this Court's precedent, *Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002), and does not render his motion timely.

Even if the time Busby's federal habeas proceedings were pending was not counted against him, his Rule 60(b) motion would have been untimely. Following the Supreme Court's denial of Busby's petition for a writ of certiorari in January 2020, *Busby v. Davis*, 589 U.S. 1141, he did not return to the district court to seek relief from judgment, and he did not file a subsequent state habeas application until a year later, ROA.4960. *See Pruett*, 608 F. App'x at 186 ("Yet Pruett waited fourteen months to present his [ ] claim in state court, and nineteen months to file his Rule 60(b)(6) motion in federal court."). Busby then failed to seek relief from judgment for another five months following the Supreme Court's denial of review in November 2025. No matter how Busby's delay is counted, it is unreasonable. *See* cases cited *supra* note 5. The lower court properly concluded Busby's Rule 60(b) motion was untimely, ROA.3606-07, and this Court should deny a COA.

III. The District Court Properly Determined that Busby Was Not Entitled to Relief Under Rule 60(b)(6).

A final judgment may be lifted under Rule 60(b)(6) for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). However, the moving party must show "extraordinary circumstances," which the Supreme Court has "explained . . . 'will rarely occur in the habeas context.'" *Buck*, 580 U.S. at 112–13 (citation omitted). A Rule 60(b)(6) motion is not a substitute for a timely appeal. *Hess*, 281 F.3d at 216. The lower court properly concluded Busby failed to prove entitlement to post-judgment relief.

A. Changes in decisional law do not constitute extraordinary circumstances.

Busby's request for relief from judgment was based entirely on the notion that the lower court's 2011 order denying his request for funding was rendered incorrect by *Ayestas*. ROA.3450-51. This was patently insufficient under Rule 60(b)(6) and is "effectively dispositive of the matter." *Crutsinger v. Davis*, 936 F.3d 265, 270 (5th Cir. 2019). *Ayestas* is undoubtedly not extraordinary in this case considering Busby's failure to appeal the funding denial in the first instance and his subsequent failure to file his Rule 60(b) motion in a reasonable time. *See Gonzalez*,

545 U.S. at 537 ("The change in the law . . . is all the less extraordinary in petitioner's case, because of his lack of diligence in pursuing review of the statute-of-limitations issue."). Binding precedent compels the conclusion that Busby's reliance on a change in decisional law does not warrant relief from judgment. *Crutsinger*, 936 F.3d at 270. The lower court's reliance on this Court's binding precedent was undebatably appropriate. ROA.3607.

B. Busby failed to identify any extraordinary circumstance.

Even if the Supreme Court's decision in *Ayestas* could amount to an extraordinary circumstance, it does not do so in this case for a number of reasons. At the outset, it must be noted that while Busby asserts *Ayestas* renders this Court's 2011 order wrong, he fails to explain how. The Supreme Court explained in *Ayestas* that this Court's former requirement of a showing of "substantial need" for funding was "not a permissible reading of" 18 U.S.C. § 3599. *Ayestas*, 584 U.S. at 48. But the lower court's 2011 order did not reject Busby's funding request for failure to make a showing of a substantial need—the words do not even appear in the court's order. ROA.1869-77.

Busby has argued the lower court improperly denied funding for an intellectual-disability expert because he failed to show he had significantly subaverage intellectual functioning and his claim was not procedurally viable. Appl. 8. But the lower court denied funding—under a "reasonable necessity" analysis—"assuming [Busby's] claims [were] procedurally viable[.]" ROA.1871-77. The court ultimately denied funding because Busby failed "to explain how the experts retained in this case to date have been insufficient to develop evidence of his adaptive functioning." ROA.1875. Busby provides no reason to conclude *Ayestas* has any bearing on the lower court's decision in that respect. *See Ayestas*, 584 U.S. at 47 ("[T]he 'reasonably necessary' test requires an assessment of the likely utility of the services requested, and § 3599(f) cannot be read to guarantee that an applicant will have enough money to turn over every stone.").

Moreover, as discussed above, Busby has obtained the sought-after funding and expert report. "Extraordinary circumstances are particularly absent in this case because [Busby] has already received all the relief he has requested under [*Ayestas*]." *Ramirez v. Davis*, No. 2:12-

CV-410, 2019 WL 13438456, at *6 (S.D. Tex. Jan. 3, 2019), *COA denied,* 780 F. App'x 110 (5th Cir. 2019).

Just as importantly, any new evidence Busby would have developed and presented for the first time in federal court would have been barred under 28 U.S.C. § 2254(d). *See Pinholster*, 563 U.S. at 182. As this Court has explained, the state court adjudicated the merits of Busby's *Atkins* claim, and the reasonableness of the state court's decision is judged by the law and record that existed at the time of that decision. *Busby v. Davis*, 925 F.3d at 714–16, 720. Newly developed evidence would have been irrelevant to that determination. *See Mamou v. Davis*, 742 F. App'x 820, 825 n.3 (5th Cir. 2018) (agreeing that funding was not reasonably necessary to develop claims that were denied in state court because review was limited to the existing record). Necessarily, then, the requested funds could not have generated useful and admissible evidence. *See Ayestas*, 584 U.S. at 46. Therefore, there was no reasonable necessity for the funds Busby requested, and there was nothing extraordinary about the lower court's denial of the request for funding to support an already-developed *Atkins* claim.

Busby poses two circumstances he says render his case extraordinary.[7] The first is that his claim alleges ineligibility of the death penalty, which Busby posits is more important than a claim alleging ineffective assistance of counsel like was at issue in *Crutsinger*. Appl. 19. The second is that the prosecuting office urged the state court to grant him relief after its expert did not controvert Dr. Martinez's opinion. Appl. 19. Neither circumstance is extraordinary.

First, the nature of Busby's claim does not automatically open the door to Rule 60(b) relief. Nor does the purported merit of his claim. Busby provides no guiding principle for valuing eligibility claims over others. Nonetheless, there is nothing extraordinary about *Atkins* claims generally or Busby's specifically. This is underscored by the fact that the state court denied the claim even with the benefit of the funds and expert opinion Busby sought in the lower court. *See Diaz v. Stephens*, 731 F.3d 370, 377–78 (5th Cir. 2013) (rejecting the petitioner's argument that his case was extraordinary because he pleaded more compelling constitutional violations than other habeas petitioners).

[7] Busby does not argue the equities of his case warrant relief from judgment under *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396 (5th Cir. 1981). Any such argument is, therefore, forfeited.

Second, the fact that the State's expert could not "controvert the conclusion and opinion of Dr. Martinez," ROA.3515, does not render his case extraordinary. Nor does the prosecuting office's agreement to recommend that the state court grant relief render his case extraordinary. Busby analogizes his case to *Buck* to amplify the impact of the prosecuting office's agreement. Appl. 19. He argues that in *Buck*, the Attorney General's Office agreed to relief in several similarly situated cases but ultimately declined to agree in *Buck*. Appl. 19. *Buck* is clearly distinguishable because it was based in large part on the introduction of race into the petitioner's trial as an aggravating factor, a circumstance plainly absent here. *Buck*, 580 U.S. at 123–24. Consequently, *Buck* has little, if any, relevance. *See In re Segundo*, 757 F. App'x at 335–36; *Raby v. Davis*, 907 F.3d 880, 884–85 (5th Cir. 2018) (finding *Buck* "inapplicable" to Rule 60(b) analysis where the petitioner did not allege racial discrimination).

Nonetheless, there are obvious intervening circumstances in this case: the trial court's rejection of the parties' proposed findings of fact and conclusions of law, the trial court's own extensive findings and conclusions, the TCCA's adoption of the trial court's recommendation

that Busby's *Atkins* claim be denied, and the Supreme Court's denial of Busby's petition for review. *See* ROA.5432-34. Unlike in *Buck* where the Attorney General's Office's agreement to grant relief in several cases "provide[d] every reason for originally including" the petitioner as a similarly situated defendant but "no reason for later taking him off," *Buck*, 580 U.S. at 126, the highest state court's denial of Busby's *Atkins* claim—a decision that was upheld by the Supreme Court—entirely justifies the prosecuting office's decision to seek to carry out Busby's sentence.

Indeed, even a confession of error by the State does not bind the state's highest court to agree. *Estrada v. State*, 313 S.W.3d 274, 286 (Tex. Crim. App. 2010) ("While the State's confession of error in a criminal case is important and carries great weight, we are not bound by it."). As the Supreme Court has explained,

> For [the Court] to accept [the District Attorney's] view blindly in the circumstances, when a majority of the Court of Appeals of New York has expressed the contrary view, would be a disservice to the State of New York and an abdication of our obligation to lower courts to decide cases upon proper constitutional grounds in a manner which permits them to conform their future behavior to the demands of the Constitution.

Sibron v. New York, 392 U.S. 40, 58–59 (1968). This is particularly apt in this case where Busby's *Atkins* claim has been presented many times over and has been rejected by every court that has reviewed it on the merits. There was nothing extraordinary about the prosecuting office's decision in this case. Busby fails to proffer a reason the lower court could have or should have revisited the merits of his repeatedly rejected *Atkins* claim. This Court should deny a COA with respect to the lower court's conclusion that Busby failed to demonstrate any extraordinary circumstance. ROA.3607.

C. Busby's *Atkins* claim is meritless.

Busby argued at length in his Rule 60(b) motion that he is exempt from execution because he is intellectually disabled. ROA.3466-81. As every court that has reviewed his claim has concluded, however, he is wrong.[8]

[8] Notably, the purported merits of Busby's claim are not relevant to the Rule 60(b) analysis because the lower court's 2011 order denying funding did not preclude a merits review of his claim, and there has been extensive consideration of the claim's merits. *See Haynes v. Davis*, 733 F. App'x 766, 769–70 (5th Cir. 2018). Nonetheless, the Director addresses them in the interest of thoroughness.

1. Busby does not have significantly subaverage intellectual functioning.

None of the IQ scores—74, 77, 79, and 81 (twice)—Busby has proffered over the years reaches below 70 even when accounting for the tests' range of error. ROA.3511 (Dr. McGarrahan's chart of Busby's IQ scores). Likely because of this, Busby's claim depends critically on application of the Flynn Effect. ROA.3469. But Busby's briefing is bereft of any precedent suggesting that such manipulation is required. Moreover, many courts have refused to require adjustment of IQ scores,[9] and the Supreme Court's precedent does not require it. *See Quince v.*

[9] *E.g., White v. Lumpkin*, No. 24-70005, 2024 WL 4343615, at *3 (5th Cir. Sept. 29, 2024) ("[W]e are not required to adjust White's IQ scores downwards and do not choose to do so today."); *Commonwealth v. Flor*, 259 A.3d 891, 921 (Pa. 2021) ("The WAIS manual does not instruct such an adjustment [for the Flynn Effect], although it does advocate updating norms regularly. . . . [W]e agree that the record here supports the PCRA court's conclusion that consideration of the Flynn Effect may be pertinent to interpretation of a score in a particular case, but there is no generally accepted professional requirement or standard for adjusting a specific numerical score."); *Haliburton v. State*, 331 So. 3d 640, 647 (Fla. 2021); *Wright v. Sec'y, Dept. of Corr.*, No. 20-13966, 2021 WL 5293405, at *6 (11th Cir. Nov. 15, 2021); *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019) ("[T]here is no consensus about the Flynn [E]ffect among experts or among the courts."); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."); *Ex parte Cathey*, 451 S.W.3d 1, 14–19 (Tex. Crim. App. 2014) (finding a lack of evidence that clinical practitioners adjust IQ scores to account for the Flynn Effect); *Thorson v. State*, 76 So. 3d 667, 683 (Miss. 2011).

State, 241 So. 3d 58, 61 (Fla. 2018) ("As many courts have recognized, *Hall* [*v. Florida*, 572 U.S. 701 (2014),] does not mention the Flynn [E]ffect and does not require its application to all IQ scores in *Atkins* cases."). Indeed, the state court's decision in this case is plainly in keeping with the Supreme Court's observation that the Flynn Effect is "controversial." *Dunn v. Reeves*, 594 U.S. 731, 736 (2021).

Nonetheless, the state court appropriately explained that the Flynn Effect may affect test scores but that courts should not change an individual score.[10] ROA.4916 (citing *Cathey*, 451 S.W.3d at 5). The court also discussed the need to consider the SEM for an IQ test,[11] ROA.4916 (citing *Moore v. Texas*, 581 U.S. 1, 13 (2017)), ROA.4932-33, as well as the current diagnostic standards, ROA.4916. Indeed, the court considered Busby's FSIQ of 74 with an SEM of 70–79. ROA.4933-34.

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[10] 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. ROA.4932.

[11] 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. ROA.4932-33. Nonetheless, the court considered the SEMs that were supported "by at least some evidence or that were previously used by the federal habeas courts." ROA.4933.

Because the state court considered all the scores Busby proffered, as well as their SEMs, ROA.4932-33, he cannot show any error in the court's conclusion based on "a holistic review," ROA.4947, 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*, 572 U.S. at 723; *see Moore*, 581 U.S. at 14.

2. Busby has not demonstrated he has significant deficits in adaptive behavior.

Busby also failed to identify any error in the state court's decision that he did not demonstrate significant deficits in adaptive behavior, 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 evidence of 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. ROA.4942. Instead, the court resolved conflicts in the evidence of Busby's asserted

deficits. ROA.4942. 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 at 19 ("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 Dr. Proctor administered the WRAT to Busby in 2005, which showed he had a fourth grade reading level and sixth-grade skills in math. ROA.4937. Busby scored similarly on the WRAT Dr. Martinez administered in 2022. ROA.4937. Busby also admitted having pen pals with whom he corresponded. ROA.4938. 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.[12]

[12] At trial, Busby's sisters Kimiko Coleman and Tarsharn Busby testified they had not seen Busby in seven and six years, respectively. 35 Reporter's Record (RR) 61, 77–78.

ROA.4938 ("Several also noted that [Busby] was not good with numbers, even unable to count money or order fast food, which contradicts his WRAT score showing he performed at a sixth-grade math level."), 4941-42. 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, Dr. 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, 35 RR 18, 25–27, Dr. Proctor testified there was no evidence Busby was intellectually disabled, 36 RR 64. Busby's school records showed he was placed in "LLD" classes for the learning disabled where he achieved average grades in junior high school and his freshman year of high school. ROA.4936; 35

RR 17–18, 25. Notably though, Busby's school records also indicated a significant number of days when he was absent. 35 RR 16; *see* ROA.3502.

Busby fails 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. 36 RR 50–52, 64.

Second, Busby fails to show the state court erred in discounting the results of the ABAS-III 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. ROA.4943.

IV. Busby Is Not Entitled to a Stay of Execution.

The Court should also deny Busby's request for a stay of execution. Appl. 24. 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 v. Holder, 556 U.S. 418, 434 (2009) (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)).

Busby's *Atkins* claim has been raised and rejected before. His attempt to re-raise the claim at the last minute after failing to pursue his claim—and his complaint regarding the denial of funding—with alacrity forecloses his appeal to equity. *See Bucklew v. Precythe*, 587 U.S. 119, 149–51 (2019). That delay, alone, requires a "strong equitable presumption" against a stay of execution. *Hill*, 547 U.S. at 584. Further, as demonstrated above, Busby is not entitled to a stay considering the district court's indisputably correct conclusions that the Rule 60(b) motion was a successive habeas petition, untimely, and meritless.

Moreover, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. The public has a strong interest in enforcement of Busby's sentence. His last-minute attempt to reraise a meritless claim is plainly a dilatory effort to delay his sentence. Such tactics underscore why the Court should deny his application for a stay. *See, e.g.*, *Bucklew*, 587 U.S. at 149–51. Busby presents no reason to delay his execution date any longer.

Lastly, Busby cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him

to a stay of execution. For the same reason, Busby fails to show that he would suffer irreparable harm if denied a stay of execution. *See Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008) (explaining that "the merits of [the movant's] case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue"). This Court should deny Busby's request for a stay of execution.

CONCLUSION

The Director requests that Busby's application for a COA be denied and that his request for a stay of execution be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I do hereby certify that this brief complies with Fed. R. App. Proc. 32(a)(7)(C) in that it contains 11,382 words, Microsoft Word 2010, Century Schoolbook, 14 points.

s/ Jefferson Clendenin
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH ECF FILING STANDARDS

I do hereby certify that: (1) all required privacy redactions have been made pursuant to Fifth Circuit Rule 25.2.13; (2) this electronic submission is an exact copy of the paper document; and (3) this document has been scanned using the most recent version of a commercial virus-scanning program and is free of viruses.

s/ Jefferson Clendenin
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2026, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the electronic case-filing (ECF) system of the Court. The ECF system sent a "Notice of Electronic Filing" (NEF) to Busby's counsel of record, who consented in writing to accept the NEF as service of this document by electronic means: David R. Dow and Jeffrey R. Newberry.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General

No. 26-70004

In the United States Court of Appeals for the Fifth Circuit

Edward Lee Busby, *Petitioner-Appellant*

v.

Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent-Appellee*

consolidated with

No. 26-10354

In re: Edward Lee Busby, *Movant*

REPLY TO RESPONDENT'S OPPOSITION TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

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No. 26-70004

In the United States Court of Appeals for the Fifth Circuit

Edward Lee Busby, *Petitioner-Appellant*

v.

Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division, *Respondent-Appellee*

consolidated with

No. 26-10354

In re: Edward Lee Busby, *Movant*

REPLY TO RESPONDENT'S OPPOSITION TO APPLICATION FOR CERTIFICATE OF APPEALABILITY

This is a death penalty case.
Mr. Busby is scheduled to be executed on May 14, 2026.

Petitioner-Appellant Edward Lee Busby filed his Application for Certificate of Appealability ("Appl.") on Monday, April 27, 2026. Respondent-Appellee filed his Response in Opposition ("Resp.") on

Thursday, April 30. Busby now files this Reply, responding only to those arguments made by Respondent which he deems to merit a response.

I. The unpublished opinions cited by Respondent provide no support for Respondent's argument that Busby's Motion constituted a successive habeas petition.

Respondent's assertion that Busby has waived any argument that the district court's finding that his Rule 60(b) Motion constitutes a successive habeas petition runs afoul of this Court's opinion in *Crutsinger* is belied by the record in the court below. *See* Resp. at 22. Busby's Motion relied heavily on *Crutsinger*. ROA.3460-62. The district court found that Busby's Motion was like Crutsinger's in that that court acknowledged that Busby's Motion challenged a procedural ruling. ROA.3606. However, the district court believed that Busby's Motion also challenged the district court's merits ruling of his prior *Atkins* claim. *Id.* ("The present motion thus challenges a merits determination, not just a procedural ruling, and so constitutes a successive habeas claim."). Arguing that reasonable jurists would debate the district court's conclusion therefore required Busby to argue in this Court precisely what he has argued, which is that reasonable jurists would disagree with the district court's conclusion that Busby's Motion challenges the

district court's earlier merits determination. Reasonable jurists would debate this conclusion because Busby's current claim is fundamentally different from the claim the district court (and this Court) previously considered because it is now buttressed by the expert report both the district court and this Court previously found to be lacking. Busby's current claim is the claim that could have been considered but for the district court's error in denying Busby the funds necessary to develop his claim.

The two unpublished opinions relied upon by Respondent in his Response in Opposition provide no support for the assertion that Busby's Motion constitutes a successive habeas petition. First, there is a critical difference between Busby's Motion and Juan Segundo's Rule 60(b) motion, which Respondent fails to acknowledge. While it is correct that at some point Segundo asked for funds to develop an *Atkins* claim, his Rule 60(b) motion argued that the district court's error in denying him the funds necessary to develop an ineffective assistance of counsel claim constituted a defect in the integrity of the proceeding. Pet'r's Mot. Relief J. 1, *Segundo v. Davis*, No. 4:10-cv-00970-Y (N.D. Tex. May 18, 2018), ECF No. 86 ("[t]he Court denied funding to Mr. Segundo to investigate his unexhausted claim that trial

counsel were ineffective for failing to investigate intellectual disability"). At most, this Court's opinion in *Segundo* stands for the proposition that additional evidence (apparently including even an expert report) did not alter Segundo's ineffective assistance of counsel (IAC) claim -- i.e., the additional evidence did not fundamentally change the IAC claim -- which meant that Segundo's motion constituted an attempt to relitigate his same, previously litigated, ineffective assistance of counsel claim. *See In re Segundo*, 757 F. App'x 333, 336 (5th Cir. 2018). *Segundo* says nothing about what effect, if any, the addition of an expert report would have to an *Atkins* claim.

The second unpublished opinion cited by Respondent in support of his argument, *Gamboa v. Davis*, 782 F. App'x 297 (5th Cir. 2019), is also irrelevant. The reason this Court appears to have held that Gamboa's Rule 60(b) motion did not allege a defect in the integrity of the proceeding was that the motion was based on habeas counsel's omissions, and such challenges "'ordinarily do[] not go to the integrity of the proceedings, but in effect ask[] for second chance to have the merits determined favorably.'" *Gamboa*, 782 F. App'x 297, 300-01 (5th Cir. 2019). Gamboa had sought to raise new claims because his previous attorney had abandoned him, but being

abandoned by one's attorney does not constitute a defect in the integrity of a proceeding. Busby's Motion, of course, is not grounded in Counsel's omissions but in this Court's error in denying the funds necessary to obtain a report from an expert opining that Busby is intellectually disabled.

The district court correctly observed that, like Crutsinger's, Busby's Motion challenged a procedural ruling. Reasonable jurists would debate the district court's further conclusion that the Motion also constituted an attempt to relitigate the merits of his *Atkins* claim because reasonable jurists would recognize his current *Atkins* claim is fundamentally different from his previous claim.

II. Because Busby requested funds before returning to the state court, had the district court not erred in denying Busby's request, the evidence would have been exhausted, and *Pinholster* would have not prevented the district court from then considering the evidence.

Respondent argues this Court should find reasonable jurists would not debate the district court's opinion because the error Busby's Motion sought to correct could not have yielded evidence that could have been considered by the district court. Resp. at 38. Specifically, Respondent argues that had the federal court granted the funds necessary to obtain an expert report when

Busby first asked for the funds, it would have then been prevented from considering the Report. However, Respondent's argument misunderstands when Busby asked the federal court for the necessary funds. Importantly, Busby asked for the necessary funds before he returned to the state court. ROA.1632. Had the district court granted the requested funds, Busby would have obtained the report before returning to state court so that the record presented to the state court would have contained the report and neither the Supreme Court's opinion in *Cullen v. Pinholster* nor 28 U.S.C. § 2254 would prevent the district court from considering it.

III. Conclusion

In post-conviction proceedings, only two experts have opined on whether Petitioner Edward Lee Busby is intellectually disabled. Both experts -- i.e., Busby's expert and the State's expert -- agree Busby is intellectually disabled. Both the district court and this Court previously denied Busby relief on his *Atkins* claim largely because it did not then contain a report from any expert opining that Busby is intellectually disabled. The Record lacked such a report only because this Court adhered to an incorrect interpretation of federal law (i.e., an incorrect standard for addressing funding requests

under § 3599). But for this defect in the integrity of Busby's federal habeas proceeding, the record then before the district court and before this Court would have contained a report similar to the July 11, 2022 Report from Dr. Gilbert Martinez, which establishes conclusively that Busby is intellectually disabled.

The claim that now exists because of the addition of the report is fundamentally different from the claim this Court previously considered. Busby's Motion is not an attempt to relitigate that earlier version of his claim, but is instead an attempt to litigate whether the district court's error constituted a defect in the integrity of the proceeding which prevented a finding that Busby is ineligible for execution because of intellectual disability.

Respectfully submitted,

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Certificates of Service and
Compliance with ECF Filing Standards

I certify that on May 4, 2026, this appeal and application with brief in support was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Jeffrey R. Newberry

_____
Jeffrey R. Newberry

Certificate of Compliance with Rule 32(a)

1. This reply complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 1,654 words.

2. This reply complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this application has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.108 in 14-point Equity A and 12-point Equity A for footnotes.

/s/ Jeffrey R. Newberry

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Jeffrey R. Newberry

No. _____

In the United States Court of Appeals for the Fifth Circuit

In re: Edward Lee Busby,

Movant

MOTION FOR ORDER AUTHORIZING CONSIDERATION OF SECOND PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2244

This is a death penalty case.
Mr. Busby is scheduled to be executed on Thursday, May 14, 2026.

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No. _____

In the United States Court of Appeals for the Fifth Circuit

In re: Edward Lee Busby,

Movant

MOTION FOR ORDER AUTHORIZING CONSIDERATION OF SECOND PETITION FOR WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2244

I. Introduction

Every clinician who has opined during post-conviction proceedings on whether Movant Edward Lee Busby meets the criteria for intellectual disability has determined that he satisfies those criteria. Almost seven years ago, this Court wrote that the state court decision to deny Busby relief on his *Atkins* claim was not an unreasonable determination of the facts, in part because Busby had failed to produce a report from any expert opining that he is intellectually disabled. *Busby v. Davis*, 925 F.3d 699, 720 (5th Cir. 2019).[1]

[1] "If Busby was in fact evaluated by an expert in intellectual disability, . . . Busby has not disclosed the results of such an evaluation. . . . We do not know therefore, what conclusions, if any, Martinez may have drawn in that report as to whether Busby is intellectually disabled." *Busby v. Davis*, 925 F.3d 699, 720 (5th Cir. 2019).

This Court's 2019 opinion makes clear that an expert report opining that a death-sentenced inmate is intellectually disabled is a necessary component of an *Atkins* claim. Put differently, an *Atkins* claim is not available until the inmate receives whatever funds he needs to obtain such a report.

As this Court is well-aware, the reason the record seven years ago was devoid of any expert report opining that Busby is intellectually disabled is because the federal district court denied Busby the funds necessary to obtain such a report. Not until June 2021 -- during an ongoing state habeas proceeding -- did Busby obtain the funds necessary to obtain an expert report. The expert report opining that he is intellectually disabled constitutes the factual predicate for Busby's claim, and it was not available until the state court, at last, authorized the necessary funds.

While Busby attempted to raise an *Atkins* claim in his previous federal habeas proceeding, this Court should nonetheless find that claim that he attempts to raise now is not the same because his current claim contains the necessary component he was previously denied: an expert report.

Busby respectfully moves, pursuant to 28 U.S.C. § 2244(b)(3)(C), for an order authorizing the filing and consideration of a second petition for writ of

habeas corpus, a copy of which is attached as an appendix to this motion, and for an order staying his execution, currently scheduled for May 14, 2026.

II. Jurisdiction

This Court has subject matter jurisdiction of this case pursuant to 28 U.S.C. § 2244(b). Busby is under a judgment and sentence of death entered in the Criminal District Court Number Two of Tarrant County, Texas. Busby seeks leave to challenge his sentence in the underlying successive petition for writ of habeas corpus.

III. Factual and procedural background

Busby was convicted in November 2005 of a capital murder committed in January 2004. ROA.5396.[2] He was sentenced to death by the trial court in 2005. ROA.5406. The Texas Court of Criminal Appeals ("CCA") affirmed his conviction and sentence on direct appeal in 2008. ROA.5422. Busby then filed an application post-conviction writ of habeas corpus in the state habeas court, and the Court of Criminal Appeals denied him relief in February 2009. *Ex parte Busby*, No. WR-70,747-01, 2009 WL

[2] To facilitate this Court's review, Counsel has cited the record in the district court according to the record on appeal in this Court in cause number 26-70004.

483096, at *1 (Tex. Crim. App. Feb. 25, 2009).

On April 13, 2009, the district court appointed undersigned Counsel Dow to represent Busby in his initial federal habeas proceeding. ROA.23. Busby filed a Petition for Writ of Habeas Corpus in the district court on February 25, 2010, and an amended petition on May 24, 2010. ROA.81; ROA.703. Busby raised several issues in his Amended Petition, including that his death sentence violates the Eighth and Fourteenth Amendments pursuant to the Supreme Court's opinion issued in *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is intellectually disabled. ROA.816-45.

Counsel employed Gilbert Martinez in 2010 at Counsel's own expense to administer an intelligence test to Busby, believing Busby likely to be intellectually disabled. ROA.1634-35. Dr. Martinez administered the WAIS-IV to Busby on Feb. 11, 2010, and found that Busby possesses a full-scale IQ score of 74. *Id*. On September 9, 2011, Busby filed a motion requesting that the district court authorize funds to obtain the reasonably necessary services from a mental disability expert, pursuant to 18 U.S.C. § 3599. ROA.1632. Busby sought the funds so that an expert, specifically, Dr. Stephen Greenspan, could determine whether Busby is intellectually

disabled, given that Dr. Martinez had found him to possess a full-scale IQ score indicative of significantly subaverage intellectual functioning. ROA.1651. The district court denied the requested funds, believing Busby could not show the funds were reasonably necessary because he could not conclusively demonstrate the claim he sought to develop was procedurally viable. ROA.1870-71. The court then opined that even if the claim Busby sought to develop was not procedurally defaulted, the requested funds were not reasonably necessary because Busby could not show he possessed significantly subaverage intellectual functioning. ROA.1876.

The district court then ordered the proceeding be stayed and held in abeyance so that Busby could attempt to exhaust his claim in the state court. ROA.1884. The same day, the district court ordered Undersigned Counsel Dow to seek funding from the state court for his legal services, writing § 3599 was not intended to supplant any state procedure for appointing and paying attorneys. ROA.1881. Both to adhere to the court's instruction to seek payment from the state court and to seek from the state court funds necessary to develop Busby's claim, which the district court had previously denied, Busby filed a motion in the state trial court that asked that court to

appoint Undersigned Counsel to represent him in his subsequent state habeas proceeding. Ex Parte Mot. Appointment Counsel, *Ex parte Busby*, Cause No. 0920589A (Tarrant Cnty. Crim. Ct. No. 2, Aug. 17, 2012). On September 7, 2012, the trial court denied the motion for appointment of counsel because it lacked jurisdiction to rule on the motion. Order, *Ex parte Busby*, Cause No. 0920589A (Tarrant Cnty. Crim. Ct. No. 2, Sept. 7, 2012).[3]

Pursuant to the district court's order, Busby filed a subsequent application for habeas corpus in the state habeas trial court in October 2012. ROA.3690. Because neither the district court nor the state court had granted the funds necessary to obtain a report from an expert opining that Busby is intellectually disabled, his then-*Atkins* claim was supported only by the full-scale IQ score Dr. Martinez obtained in 2010 and was identical, in all relevant respects, to the claim contained in his amended petition filed in the district court. Months later, the CCA dismissed Busby's habeas application because it found that the claim failed to satisfy the dictates of section 5,

[3]The trial court's decision was not unsound. Under Texas law, a trial court cannot act on a subsequent application for writ of habeas corpus until after the Texas Court of Criminal Appeals authorizes it to do so. *See also* Tex. Code Crim. Proc. art 11.071, § 5(a). A trial court is similarly without authority to rule on related motions such as a motion to appoint counsel, or to authorize funds reasonably necessary to develop meritorious claims. *See In re Tex. Dep't Crim. Just.*, 710 S.W.3d 731, 737-38 (Tex. Crim. App. 2025).

purporting to do so without considering the merits of Busby's *Atkins* claim. *Ex parte Busby*, No. WR-70, 747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013).

After subsequently returning to the district court, Busby filed a Second Amended Petition for a Writ of Habeas Corpus on March 27, 2014. ROA.2350. On March 10, 2015, the district court entered its order denying Busby relief. ROA.3316. As mentioned above, with respect to Busby's *Atkins* claim, the court found that the claim was procedurally defaulted because Busby could not demonstrate it would be a miscarriage of justice to execute him because the Court believed that an individual must have an IQ of 70 or below to be intellectually disabled and the Court furthered believed Busby's actual IQ score to likely be "in the 70s." ROA.3352.

On appeal, this Court granted a certificate of appealability, finding that reasonable jurists would debate both whether Busby possesses significantly subaverage intellectual functioning and whether his claim was procedurally defaulted. *Busby v. Davis*, 677 F. App'x 884, 888-89 (5th Cir. 2017). On May 20, 2019, this Court issued its opinion affirming the district court's decision denying Busby relief on his *Atkins* claim. *Busby v. Davis*, 925 F.3d 699, 702

(5th Cir. 2019). In its opinion, this Court noted that "no expert has ever opined that Busby is intellectually disabled." *Id*. at 706. The Supreme Court denied certiorari on January 13, 2020. *Busby v. Davis*, 589 U.S. 1141 (2020).

Busby was initially scheduled to be executed in May 2020, but that execution was stayed due to the global pandemic. *In re Busby*, No. WR-70,747-03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020). After executions resumed following the pandemic-related pause, Busby was again scheduled to be executed on February 10, 2021. Ahead of that planned execution, Counsel presented Busby's *Atkins* claim to the CCA again, and the Court found that Busby's claim made a threshold showing that he is intellectually disabled pursuant to the Supreme Court's opinion issued in *Moore v. Texas*, 581 U.S. 1 (2017), and remanded the claim to the state habeas trial court for further proceedings. ROA.5527.

Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled (funds Counsel had been seeking since 2009). Counsel utilized those funds -- secured more than twelve years after they were first requested -- to employ Dr. Gilbert Martinez. Dr. Martinez's

opinion, announced in his July 11, 2022, Report (ROA.3484-3509) is that Busby is intellectually disabled. The State subsequently hired an expert -- Dr. Antoinette McGarrahan -- who agreed with Dr. Martinez's conclusion. ROA.3510-15. The State and Busby both asked the trial court to find Busby is ineligible for execution. ROA.3516-37. Nevertheless, the CCA denied Busby habeas relief on March 5, 2025, and denied his Suggestion to Reconsider on April 25, 2025.

IV. Busby's claim satisfies the prima facie showing required by 28 U.S.C. § 2244(b)(3)(C).

Busby seeks authorization to raise a single claim in a successive federal habeas corpus petition. That claim is that he is ineligible for execution pursuant to the Eighth and Fourteenth Amendments because he is intellectually disabled.

A. The Court should find Busby's current *Atkins* claim is fundamentally different from his former claim and, for that reason, should not be dismissed pursuant to § 2244(b)(1).

As noted above, Counsel attempted to raise an *Atkins* claim in Busby's initial federal habeas petition. Had the district court granted Busby the funds necessary to obtain an expert report, the claim would have been available to Busby in that proceeding. Because the district court denied Busby the funds

necessary to obtain such a report, it was simply not possible to obtain relief on his claim.

Moreover, for purposes of considering whether Busby's claim was presented in a prior petition, the addition of two expert reports makes the claim fundamentally different from the claim previously presented. While in a slightly different context, there is precedent from this Court to support the idea that an expert report can render an *Atkins* claim different from previous versions of the claim. Ruben Ibarra presented an *Atkins* claim to the state habeas court which was supported by no expert report and virtually no other evidence. *Ibarra v. Thaler*, 691 F.3d 677, 681-82 (5th Cir. 2012), *overruled on other grounds by Trevino v. Thaler*, 133 S. Ct. 1911 (2013). This Court found that the *Atkins* claim that Ibarra presented to the federal district court -- supported by the expert opinion ruled inadmissible in the state court proceeding -- was unexhausted because the addition of the expert report made the claim fundamentally different from the one presented to the state court. *Id.* at 682-83.

While *Ibarra* is concerned with procedural default and whether a claim presented to a federal court is different from one presented to the state

court, its rule -- i.e., that the addition of an expert report can render an *Atkins* claim fundamentally different from previous iterations of the claim -- is nonetheless applicable here. Because it is now supported by the expert opinion of Dr. Gilbert Martinez (and also the expert opinion of the State's expert, who agrees that Busby is intellectually disabled), the claim that Busby now raises in this Court is significantly stronger and should be considered a different claim from the one he previously presented to this Court.

B. Busby is intellectually disabled.

Busby is intellectually disabled. The evidence shows that: (1) he possesses significantly subaverage intellectual functioning; (2) he has significant limitations in his adaptive functioning; and (3) he exhibited these diagnostic features before the age of eighteen.

1. Busby possesses significantly subaverage intellectual functioning.

When assessing an individual's level of intellectual functioning based on an IQ score, the accepted scientific phenomenon known as the "Flynn Effect"—in which the general population's average IQ score is observed to perform better on intelligence tests over time—should be taken into account. *See* 2010 AAIDD Manual at 37. Flynn's empirical research has demonstrated

that the average IQ score obtained by any given group on the Wechsler scale has historically increased by approximately 0.33 points per year. *Id.*

In *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014), the CCA noted that the preferred solution to account for the Flynn Effect is to retest individuals with a recently normed version of an IQ test rather than adjusting an individual's score for the Flynn Effect. *Ex parte Cathey*, 451 S.W.3d 1, 16 (Tex. Crim. App. 2014). However, if it is not possible to retest an applicant with a recently normed test, the impact of the Flynn Effect on an individual's IQ score can be considered. *Id.* at 17. As more recently normed IQ tests are more reliable, Busby's IQ scores obtained from the WAIS-IV will be discussed first. The IQ scores Mr. Busby received from other IQ tests will be subsequently discussed in chronological order.

a. WAIS-IV (2010 and 2022)

As noted above, on February 11, 2010, Dr. Gilbert Martinez administered the Wechsler Adult Intelligence Scales—Fourth Edition ("WAIS-IV") to Mr. Busby. ROA.3485-86. Busby obtained a full-scale IQ score of 74. ROA.3485. Given the standard error of measurement, this means Busby's IQ was between 70 and 79. *Id.*

As part of the 2010 administration, Dr. Martinez administered validity testing—specifically, a standardized measure called the Test of memory malingering ("TOMM")—to determine whether Busby was performing to the best of his abilities. *Id.* The results of the validity testing were "consistent with good effort" on Busby's part, meaning there is no reason to believe Busby malingered during the cognitive testing. *Id.*

On February 25, 2022, Dr. Martinez again administered the WAIS-IV to Busby. ROA.3490. Busby obtained a full-scale IQ score of 81. *Id.* The report notes the seven-point increase was likely caused by both the Flynn Effect and the practice effect. ROA.3508-09. Because the WAIS-IV was published in 2008 (fourteen years before the 2022 administration), Dr. Martinez believes that, to account for the Flynn Effect, Busby's 2022 score should be adjusted by four points. *Id.* Accounting for this adjustment, Busby's Flynn-adjusted score is 77. *Id.*

Dr. Martinez believes the practice effect also had an impact on Busby's 2022 score. *Id.* "Practice effects refer to gains in standardized test scores that result from a person being tested a second time using the same instrument." ROA.3508; *see also* 2010 AAIDD Manual at 38. Despite a lack

of universal agreement on quantitative score adjustments, the practice effect has shown increases of 2.5 points in verbal IQ and up to eight points in performance IQ. ROA.3508.

Dr. Martinez believes that when both the Flynn and practice effects are taken into account, Busby's 2022 score of 81 is consistent with his 2010 score of 74. ROA.3508-09.

b. Unknown test (2001)

The record reflects that an unidentified test administered by an unknown individual in uncertain testing conditions rendered an IQ score of 96. 36 R.R. 49.[4] The score was considered unreliable by the State at trial and was disregarded. 36 R.R. 64 (noting that there was "probably . . . something wrong with the results"). Because neither the type of test nor the testing conditions—including whether Busby was even the individual who took the test—are known, the score should similarly be disregarded now.

c. WAIS-III (2005)

On October 14, 2005, psychologist Dr. Timothy Proctor administered

[4] The Reporter's Record of Busby's 2005 capital murder trial is cited herein as [volume number] R.R. [page number].

the WAIS-III to Mr. Busby. 36 R.R 53. He obtained a FSIQ of 77. *Id.* The WAIS-III was normed in 1995, 10 years before the test was administered. *Id.* Thus, Busby's score of 77 on the WAIS-III in 2005 is equivalent to his having scored, rounding up, a 74 (77–3.3 = 73.7), where the mean is 100 after adjusting for the Flynn Effect. When the Flynn Effect is considered, Busby's performance on this test was identical to what he obtained on the WAIS-IV in 2010 and represents significantly sub-average intellectual functioning and is within the range at which a diagnosis of intellectual disability may be made.

d. Beta-III (2005)

On November 4, 2005, days before the trial on the merits began, psychologist Dr. Timothy Proctor administered the Beta-III to Busby. Dr. Proctor estimated that, based on this test, Busby's FSIQ was approximately 81. 36 R.R. 53. Despite their similarities, the Weschler Scales and the Beta-III test differ greatly in their reliability. In Dr. Proctor's words, the Weschler Scales are the "gold standard of IQ tests," while the Beta-III is a "quick and dirty kind of intelligence test." 36 R.R. 40, 48. Accordingly, Busby's score on the Beta-III should not be regarded to be as reliable a score as the IQ score from the WAIS-IV, or even the WAIS-III.

e. WAIS-III (2005)

Just weeks after the Wechsler Adult Intelligence Scales—Third Edition ("WAIS-III") was administered to Busby by psychologist Dr. Timothy Proctor, Busby was tested with the WAIS-III by the State's psychologist, Dr. Sven Helge. 36 R.R. 61. Although never admitted into evidence, it appears from the transcript of the trial that the State's expert, Dr. Helge, obtained a full-scale IQ score of 79. 36 R.R. 77. The WAIS-III was normed in 1995, approximately ten years before Dr. Helge administered the test. Taking the Flynn Effect into account, Busby's WAIS-III score could be considered to be 76. ROA.3511. Moreover, because Dr. Helge administered this test to Busby only weeks after Dr. Proctor administered the same measure, it is appropriate to take the practice effect into account when considering this test. On the Weschler Scales, there is a reported IQ score increase between 2.0 and 3.2 points when individuals are retested at three- and six-month intervals. Michael R. Basso, et al., *Practice Effects on the WAIS-III Across 3-and 6-Month Intervals*, 16 Clinical Neuropsychologist 57, 58 (2002).

When the Flynn and practice effects are taken into account, Busby's

score on this test is consistent with both the score he obtained on the WAIS-III administered by Dr. Proctor in 2005 and the score he obtained on the WAIS-IV administered by Dr. Martinez in 2010.

2. Evidence of significant limitations in adaptive behavior

Busby also meets the second prong of the definition of intellectual disability: he possesses significant limitations in adaptive behavior. Busby possesses significant limitations in his conceptual, social, and practical skills.

Dr. Gilbert Martinez conducted interviews and standardized tests to assess Busby's adaptive behavior. Dr. Martinez evaluated Busby's conceptual skills (literacy, self-direction, and the concepts of money, numbers, and time), practical skills (personal care, money, occupational skills, maintaining a schedule/routine, use of a telephone, and transportation), and social skills (interpersonal skills, social responsibility, self-esteem, naivety, obeying laws, and following rules). ROA.3507-08.

Dr. Martinez conducted in-depth interviews of Busby's sisters, Kimiko Coleman and Tarsharn Busby, who provided an account of his adaptive behaviors as a child and an adult. ROA.3491-95. During her interview, Tarsharn Busby expressed that Busby had difficulty

communicating. ROA.3491. Ms. Busby recalled that Busby did not learn to count or how to perform basic mathematical tasks until the third grade. ROA.3492. She also explained that while he eventually could read the numbers on an analog clock, he failed to comprehend their meaning in relation to time. *Id.* His inability to understand time impacted his ability to maintain a routine or schedule. *Id.*

Ms. Busby expressed that Busby lacked impulse control and the understanding of the consequences of his actions. ROA.3492. Busby was dependent on others to help make decisions for him. *Id.* Ms. Busby remembered that, as a child, Busby did not engage in creative or imaginative play. *Id.* According to Ms. Busby, Busby was an affectionate child but did not like to share. *Id.* As a child, Busby was bullied by other children because he was in special education classes. *Id.* Ms. Busby reported that Busby did not help with chores around at home and had a limited understanding of what needed to be done around the house. ROA.3492.

Ms. Busby recounted that Busby had difficulty managing his finances and making medical appointments. ROA.3493. He did not understand budgeting and would make impulsive and unnecessary purchases if left alone

to decide what to do with any money he had. *Id.*

Ms. Busby shared that Busby engaged in concerning behavior when he was younger, such as bringing snakes into the family home and overdosing on medication. *Id.* Ms. Busby recalled that Busby held only one job in his lifetime, as a dishwasher at a steakhouse. *Id.* Although he did tell her why he was fired, she understood that he missed many shifts due to his inability to follow a schedule. *Id.*

Busby's other sister, Kimiko Coleman, provided similar insights into Busby's childhood and adaptive behavior. Ms. Coleman expressed that her brother's communication skills were below average: he slurred his speech and their mother tried to enroll him in speech therapy at his school when he was eight. ROA.3493. Ms. Coleman stated that Busby was in special education classes at school. ROA.3494.

Ms. Coleman said that Busby had "zero" self-control. ROA.3494. He started throwing tantrums from a young age and, throughout his life, his reactions and choices largely depended on his mood. *Id.* Ms. Coleman explained that while Busby could initiate tasks, he was not motivated to, and usually did not, complete them. *Id.* She stated that Busby was unable to sit

through an entire movie because of his limited attention span. *Id.* He was prone to quit or cheat during games because he did not understand the rules. *Id.*

Ms. Coleman described Busby as immature for his age and unable to express a normal range of emotions. ROA.3494. Busby tended to emotionally respond in extremes; either very happy or very angry. *Id.* He did not seem interested in others' emotions or in helping others. ROA.3494-95. Ms. Coleman indicated that Busby participated in unhealthy behaviors. At age 10, he stole from a pharmacy. ROA.3495. At age 16, he attempted suicide by overdosing on a medication. *Id.*

Ms. Coleman explained that Busby was dependent on women to take care of him, by having them do tasks such as paying his bills, buying his clothes, making his appointments, cooking, cleaning, and making his travel plans. *Id.*

Dr. Martinez reviewed the affidavits of eight other people who knew Busby across various stages of his life. From these affidavits, Dr. Martinez learned that:

- Busby was often the victim of bullying and manipulation. ROA.3496-97.
- During school, Busby was in prevocational classes for students with IQs between 70 and 82. ROA.3497. These classes taught basic life skills. *Id.*
- Busby could not read, write, or count money. He could not fill out a job application or read Bible verses. He was not able to understand complex instructions and football plays. ROA.3497-98.
- Busby was afraid to be alone. Busby was considered a sad loner who desperately craved the attention and affection of women. Even though Busby always had woman around that he claimed were prostitutes, people who knew him believed he lacked the organizational and accounting skills to be a pimp. Conversely, it was reported that women often manipulated Busby, stealing from him, and taking advantage of his gullibility. ROA.3498-99.
- Multiple people recollected that Busby's hygiene was always lacking. He always wore dirty clothes that were in poor

condition. Busby reportedly did not bathe for days and did not maintain proper dental hygiene. ROA.3501.

Busby's sisters each independently completed an ABAS-3 standardized questionnaire, designed to quantify Busby's adaptive functioning. ROA.3502. Busby's scores from the ABAS-3 indicate he is on the extremely low range of adaptive functioning. Tarsharn Busby reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (which summarizes performance across all skills areas): 53, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.
- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.
- Social: 58, indicating the extremely low range (lowest 0.3%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

ROA.3502-04.

Kimiko Coleman reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (GAC): 52, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.
- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.
- Social: 56, indicating the extremely low range (lowest 0.2%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

ROA.3505-07.

C. Busby's claim was not available until he received the funds necessary to obtain an expert report.

Busby's application should also be found to make the required prima facie showing that it satisfies the requirement of 28 U.S.C. §

2244(b)(2)(B)(i). Busby did not receive the funds necessary to obtain an expert report until June 4, 2021. His claim was not available until he received those funds from the state court.

D. The Court should find that Busby is entitled to equitable tolling.

The state court, at last, granted Busby the funds necessary to obtain an expert report on June 4, 2021, during a subsequent state habeas proceeding initiated by the CCA's authorizing Busby's claim in February 2021. That habeas proceeding concluded when the CCA ultimately denied Busby relief on his claim on March 5, 2025, and then denied Counsel's Suggestion to Reconsider on April 25, 2025. Pursuant to § 2244(d), Busby's claim should have been filed by March 5, 2026.

Counsel urges this Court it is appropriate to find Busby is entitled to equitable tolling for the following reasons: First, because Counsel for the State, joining Counsel for Busby, had asked the trial court to find that Busby was ineligible for death (ROA.3516-37), Counsel had no reason to believe Counsel for the State would ask the trial court to schedule Busby's execution. Once the State asked the trial court to schedule Busby's execution, Counsel determined that a Motion pursuant to Fed. R. Civ. Proc.

Rule 60(b), filed in the district court on April 2, 2026, likely constituted Busby's best chance for relief and focused their efforts on that pleading. (As of this date, the appeal of that proceeding remains pending in this Court.) Second, the Court should find Busby is entitled to equitable tolling because every expert who has opined in post-conviction proceedings on whether Buwsby is intellectually disabled has determined he is; for that reason, putting Busby to death would represent the execution of an inmate who is constitutionally ineligible for execution.

V. Conclusion

For the reasons set forth above, this Court should authorize Busby to file his proposed petition for writ of habeas corpus in the United States District Court for the Northern District of Texas raising a claim that he is ineligible for execution because he is intellectually disabled.

Respectfully submitted,

/s/ David R. Dow

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Verification

I, Jeffrey R. Newberry, attorney for Movant in the above-entitled action, state that to the best of my knowledge and belief, the facts set forth in this Motion are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on Thursday, May 7, 2026.

/s/ Jeffrey R. Newberry

_____

Jeffrey R. Newberry

Certificates of Service and
Compliance with ECF Filing Standards

I certify that on May 7, 2026, this Motion was served, via the Court's CM/ECF Document Filing System, upon the following registered CM/ECF users:

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Counsel further certifies that (1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of a commercial virus scanning program and is free of viruses.

/s/ Jeffrey R. Newberry

_____

Jeffrey R. Newberry

Certificate of Compliance with Rule 32(a)

1. This Motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,764 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

2. This Motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this application has been prepared in a proportionally spaced typeface using Microsoft Word for Mac Version 16.108 in 14-point Equity A and 12-point Equity A for footnotes.

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EDWARD LEE BUSBY	§	
	§	
Petitioner,	§	
	§	
-VS-	§	CIVIL NO. _____
	§	
	§	DEATH PENALTY CASE
ERIC GUERRERO, Director,	§	
Texas Department of Criminal	§	
Justice, Correctional Institutions	§	
Division,	§	
	§	
Respondent.	§	

PETITION FOR A WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

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Counsel for Edward Lee Busby, Petitioner-Appellant

Table of Exhibit

IN THE UNITED STATES DISTRICT COURT
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	§	
	§	DEATH PENALTY CASE
ERIC GUERRERO, Director, Texas Department of Criminal Justice, Correctional Institutions Division,	§	
	§	
	§	
	§	
	§	
Respondent.	§	

PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Edward Lee Busby, is currently confined on death row at the Polunsky Unit in Livingston, Texas. Through undersigned counsel and pursuant to the Constitution of the United States and 28 U.S.C. § 2254, Busby petitions this Court to issue a Writ of Habeas Corpus and grant him relief from his unconstitutional sentence of death.

Jurisdiction

This Court has personal jurisdiction pursuant to 28 U.S.C. § 2241(d) because Busby was convicted in the Criminal District Court Number Two of Tarrant County, Texas. Subject matter jurisdiction is conferred by 28 U.S.C. § 2254.

Prior Proceedings

A. The homicide and subsequent arrest

On or about January 30, 2004, Busby and a female accomplice, Kathleen Latimer ("Kitty"), abducted seventy-eight-year-old Laura Crane in Fort Worth, Texas, then robbed and murdered her. *Busby v. State*, 253 S.W.3d 661, 663 (2008). Ms. Crane suffocated from having multiple layers of duct tape (approximately 23.1 feet) wrapped tightly over her entire face, covering her nose and mouth. *Id.* at 663-64. Busby was arrested on February 1, 2004, in Oklahoma City when he was stopped for committing traffic violations while driving the victim's car. *Id.*; 30 R.R. 122-123.[1]

Following his arrest, Busby made various statements to the FBI, Oklahoma police, and Fort Worth detectives between February 1 and

[1] The Record of Busby's 2005 capital murder trial is cited herein as [volume number] R.R. [page number].

February 3. Initially, Busby stated that he and Latimer obtained the victim's car (with Ms. Crane's body already in the trunk) from someone named "JD." *Busby*, 253 S.W.3d at 664. Subsequently, on February 3rd, Busby told the police that he and Latimer were responsible for the Ms. Crane's death. *Id.* On February 20th, Busby again reported that he and Latimer killed the victim. *Id.* In both his tape-recorded statement on February 3rd and his written statement on February 20th, Busby described Latimer "as the leader of their criminal enterprise." *Id.*

B. The sentencing case presented at trial

Busby was indicted for the capital murder of Laura Crane in the Criminal District Court Number Two of Tarrant County, Texas, Cause number 0920589A. Busby pleaded not guilty to the indictment, and the trial began on November 9, 2005. 30 R.R. 3-6. On November 11, the jury found Mr. Busby guilty of capital murder. 32 R.R. 75. The punishment phase began on November 14, 2005. 33 R.R. 3.

During the punishment phase, trial counsel presented five lay witnesses and a psychologist during the sentencing phase of Busby's capital murder trial. 35-36 R.R. The first two witnesses were teachers from Pampa,

Texas, and had never met Busby. 35 R.R 12-30. They testified about his school records and their content. The third, special education teacher Jeanette Miller, testified that she taught Busby job skills, that he was a follower, and that he once called her to tell her he intended to kill himself. 35 R.R. 33-45.

Busby's two sisters, Kimiko Coleman and Tarsharn Busby testified briefly. Ms. Coleman testified that Busby's father had a different personality when he drank, that he once stole from her, and that she was surprised that he would ever hurt a woman. 35 R.R. 50-66. Ms. Busby testified that Busby's father was an alcoholic, that Ms. Coleman generally cared for them as they were growing up, and that Busby was protective of his sisters. 35 R.R. 71-79.

The final witness presented to the jury by trial counsel, purportedly on Busby's behalf, was Dr. Timothy Proctor, a psychologist. 36 R.R. 6-7. Dr. Proctor testified that Mr. Busby's IQ was approximately 77. *Id.* at 53-54.

However, Dr. Proctor was hired in the middle of individual voir dire. At the time of his meetings with Mr. Busby, the mitigation investigation was still ongoing. As a result, no proper investigation into intellectual disability was conducted, nor were any further mental health professionals, qualified in

this area, hired to consult or to testify.

At the conclusion of the punishment hearing, the jury answered the first special issue under article 37.071, Tex. Code Crim. Proc., the "future dangerousness" question[2], affirmatively and answered the second special issue, the "mitigation" issue,[3] negatively. 36 R.R. 157-59. On November 17, 2005, the trial court sentenced Mr. Busby to death. 36 R.R. 161-62.

C. Direct appeal and initial state habeas proceeding

Mr. Busby's conviction and sentence were affirmed by the Texas Court of Criminal Appeals ("CCA") on May 14, 2008. *Busby*, 253 S.W.3d at 661. The conviction became final on December 1, 2008, when the United States Supreme Court denied Mr. Busby's petition for writ of certiorari. *Busby v. Texas*, 129 S. Ct. 625 (2008).

Mr. Busby filed an application for writ of habeas corpus in the state

[2] The "future dangerousness" question asks the jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. art. 37.071 § 2(b)(1).

[3] The "mitigation" issue asks the jury to determine "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." Tex. Code Crim. Proc. art. 37.071 § 2(e)(1).

habeas trial court on March 4, 2008. 2 S.H.R. at 386; Supp. S.H.R. at 2. Mr. Busby's initial application did not include an *Atkins* claim. *See id.* The trial court recommended that relief be denied, and the CCA accepted the recommendation, denying relief on February 25, 2009. *Ex parte Busby*, No. 70,747-01 (Tex. Crim. App. 2009).

D. Initial federal habeas proceeding

Mr. Busby timely filed his initial federal petition for writ of habeas corpus on February 25, 2010, and an amended petition on March 24, 2010, alleging seven grounds for relief from his conviction and death sentence. Because the claim was not exhausted, the federal proceeding was stayed to allow Busby to present his *Atkins* (and other) claim to the state court. Mr. Busby filed his subsequent application for writ of habeas corpus, containing an *Atkins* claim, on October 1, 2012. *Ex parte Busby*, No. WR-70,747-02 (Tex. Crim. App. Mar. 6, 2013). The CCA held that the subsequent application did not meet the requirements of Article 11.071, section 5(a) and dismissed the application. *Id.*

After subsequently returning to the federal district court, Busby filed a Second Amended Petition for a Writ of Habeas Corpus on March 27, 2014.

On March 10, 2015, the district court entered its order denying Busby relief. With respect to Busby's *Atkins* claim, the court found that the claim was procedurally defaulted because Busby could not demonstrate it would be a miscarriage of justice to execute him because the Court believed that an individual must have an IQ of 70 or below to be intellectually disabled and the Court furthered believed Busby's actual IQ score to likely be "in the 70s."

On appeal, the Court of Appeals for the Fifth Circuit granted a certificate of appealability, finding that reasonable jurists would debate both whether Busby possesses significantly subaverage intellectual functioning and whether his claim was procedurally defaulted. *Busby v. Davis*, 677 F. App'x 884, 888-89 (5th Cir. 2017). On May 20, 2019, the appellate court issued its opinion affirming the district court's decision denying Busby relief on his *Atkins* claim. *Busby v. Davis*, 925 F.3d 699, 702 (5th Cir. 2019). The Supreme Court denied certiorari on January 13, 2020. *Busby v. Davis*, 589 U.S. 1141 (2020).

E. Subsequent state habeas proceeding

Busby was initially scheduled to be executed in May 2020, but that execution was stayed due to the global pandemic. *In re Busby*, No. WR-70,747-03, 2020 WL 2029306, at *1 (Tex. Crim. App. Apr. 27, 2020). After executions resumed following the pandemic-related pause, Busby was again scheduled to be executed on February 10, 2021. Ahead of that planned execution, Counsel presented Busby's *Atkins* claim to the CCA again, and the Court found that Busby's claim made a threshold showing that he is intellectually disabled pursuant to the Supreme Court's opinion issued in *Moore v. Texas*, 581 U.S. 1 (2017), and remanded the claim to the state habeas trial court for further proceedings.

Following the remand, the state trial court at last granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled (funds Counsel had been seeking since 2009). Counsel utilized those funds -- secured more than twelve years after they were first requested -- to employ Dr. Gilbert Martinez. Dr. Martinez's opinion, announced in his Report of July 11, 2022 is that Busby is intellectually disabled. (Dr. Martinez's Report is included as Exhibit 1 of this Petition.) The State subsequently hired an expert -- Dr. Antoinette

McGarrahan -- who agreed with Dr. Martinez's conclusion. (Dr. McGarrahan's Report is included as Exhibit 2 of this Petition.) The State and Busby both asked the trial court to find Busby is ineligible for execution. Nevertheless, the CCA denied Busby habeas relief on March 5, 2025.

Claim for Relief

Busby's death sentence runs afoul of the Eighth and Fourteenth Amendments because he is intellectually disabled.

A. The legal standard

The execution of an intellectually disabled person violates the Eighth Amendment's proscription against cruel and unusual punishment. *Atkins v. Virgina*, 536 U.S. 304, 321 (2002).

Because the Texas Legislature has not yet provided a statutory definition of intellectual disability, it is appropriate for this Court to rely on the definitions set out by the American Association of Intellectual and Developmental Disabilities ("AAIDD") and the American Psychiatric Association ("APA") when assessing an *Atkins* claim arising from a Texas death sentence.[4] *See Moore v. Texas*, 137 S. Ct. 1039, 1045 (2017). Intellectual

[4] When *Atkins* was decided, the definition of intellectual disability was based on definitions from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition

disability is characterized by: "significantly subaverage" (APA) or "significant limitations" in (AAIDD) intellectual functioning, accompanied by "significant limitations" in adaptive behavior, the onset of which occurs prior to the age of 18. *See* AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 7 (11th ed. 2010) ("2010 AAIDD Manual"); APA, *Diagnostic and Statistical Manual of Mental Disorders* 37 (5th ed. 2013) ("DSM-V"); *see also Moore*, 137 S. Ct. at 1045.

Significantly subaverage intellectual functioning is defined by an IQ score that is approximately two standard deviations below the mean, adjusted for the standard error of measurement. 2010 AAIDD Manual at 27; DSM-V at 37. For IQ tests that have a standard deviation of 15 points, such as the Weschler Scales, an IQ score of 70 is two standard deviations below the mean and the standard error of measurement is approximately 5 points. DSM-V at 37. Thus, an IQ score of up to 75 would be included within the range of significant limitations in intellectual functioning. Courts must

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("DSM-IV") and the AAMR's definition in Mental Retardation: Definition, Classification, and Systems of Supports, 10th Edition ("2002 AAMR Manual"). *Atkins*, 536 U.S. at 309 n.3. Since *Atkins*, the medical community has updated these definitions, as reflected in the DSM-V and 2010 AAIDD Manual. The CCA has adopted the most recent definitions from the DSM-V and 2010 AAIDD Manual in assessing claims of intellectual disability within the capital-sentencing context. *See Brownlow v. State*, No. AP-77,068, 2020 WL 718026, at *11-12 (Tex. Crim. App. Feb. 12, 2020).

account for an IQ test's standard error of measurement and must consider all three prongs holistically when assessing an *Atkins* claim. *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017). For that reason, the Supreme Court has invalidated statutes that have a strict IQ test score cutoff at 70 points. *Hall v. Florida*, 572 U.S. 701, 718 (2014).

The AAIDD Manual also requires that there be "significant limitations . . . in adaptive behavior as expressed in conceptual, social, and practical skills." 2010 AAIDD Manual at 5. "Significance" can be established if the individual's adaptive skills fall two or more standard deviations below the mean in at least one of the three domains. *Id.* at 43; DSM-V at 38; *see also Moore*, 137 S. Ct. at 1046. The AAIDD Manual provides examples of "representative skills" in each of the three domains:

(1) Representative **conceptual skills** are "language, reading and writing, money, time, and number concepts." 2010 AAIDD Manual at 44.

(2) Representative **social skills** are "interpersonal skills, social responsibility, self-esteem, gullibility, naiveté (i.e., wariness), follows rules/obeys laws, avoids being victimized, and social problem solving." *Id.*

(3) Representative **practical skills** are "activities of daily living (personal care), occupational skills, use of money, safety, health care, travel/transportation, schedules/routines, and use of the telephone."

Id.

The APA definition requires that there be "significant limitations" in at least two of the following eleven domains:

(1) communication
(2) self-care
(3) home living
(4) social/interpersonal skills
(5) use of community resources
(6) self-direction
(7) health
(8) safety
(9) functional academics
(10) leisure
(11) work

DSM-V at 33.

The 2010 AAIDD Manual describes four categories of risk factors that may interact to cause mental retardation. The four categories of risk factors are:

(1) biomedical: factors that relate to biologic processes, such as genetic disorders or nutrition;

(2) social: factors that relate to social and family interaction, such as stimulation and adult responsiveness;

(3) behavioral: factors that relate to potentially causal behaviors, such as dangerous (injurious) activities or maternal substance abuse; and

(4) educational: factors that relate to the availability of educational supports that promote mental development and the development of adaptive skills.

2010 AAIDD Manual at 61. The 2010 AAIDD Manual emphasizes that "the impairment of functioning that is present when an individual meets the criteria for a diagnosis of mental retardation usually reflects the presence of several risk factors that interact over time." *Id.*

Prior to *Moore*, the CCA often considered an applicant's adaptive strengths when assessing *Atkins* claims. *Moore*, 137 S. Ct. at 1050. However, *Moore* established that a court's focus should not be on adaptive strengths, but instead on the individual's adaptive deficits. *Id.* It is now established an individual may possess adaptive strengths in one or more areas but still be limited in their adaptive functioning. *Id.*

B. Busby is intellectually disabled.

Busby is intellectually disabled. The evidence shows that he: possesses significantly subaverage intellectual functioning, has significant limitations in his adaptive functioning, and exhibited these diagnostic features before the age of eighteen.

1. Busby possesses significantly subaverage intellectual functioning.

When assessing an individual's level of intellectual functioning based on an IQ score, the accepted scientific phenomenon known as the "Flynn Effect"—in which the general population's average IQ score is observed to perform better on intelligence tests over time—should be taken into account. *See* 2010 AAIDD Manual at 37. Flynn's empirical research has demonstrated that the average IQ score obtained by any given group on the Wechsler scale has historically increased by approximately 0.33 points per year. *Id.*

In *Ex parte Cathey*, 451 S.W.3d 1 (Tex. Crim. App. 2014), the CCA noted that the preferred solution to account for the Flynn Effect is to retest individuals with a recently normed version of an IQ test rather than adjusting an individual's score for the Flynn Effect. *Ex parte Cathey*, 451 S.W.3d 1, 16 (Tex. Crim. App. 2014). However, if it is not possible to retest an applicant with a recently normed test, the impact of the Flynn Effect on an individual's IQ score can be considered. *Id.* at 17. As more recently normed IQ tests are more reliable, Busby's IQ scores obtained from the WAIS-IV will be discussed first. The IQ scores Mr. Busby received from other IQ tests will be subsequently discussed in chronological order.

a. WAIS-IV (2010 and 2022)

As noted above, on February 11, 2010, Dr. Gilbert Martinez administered the Wechsler Adult Intelligence Scales—Fourth Edition ("WAIS-IV") to Mr. Busby. Exhibit 1 at 2-3. Busby obtained a full-scale IQ score of 74. Exhibit 1 at 2. Given the standard error of measurement, this means Busby's IQ was between 70 and 79. *Id.*

As part of the 2010 administration, Dr. Martinez administered validity testing—specifically, a standardized measure called the Test of memory malingering ("TOMM")—to determine whether Busby was performing to the best of his abilities. Exhibit 1 at 2. The results of the validity testing were "consistent with good effort" on Busby's part, meaning there is no reason to believe Busby malingered during the cognitive testing. *Id.*

On February 25, 2022, Dr. Martinez again administered the WAIS-IV to Busby. Exhibit 1 at 7. Busby obtained a full-scale IQ score of 81. *Id.* The report notes the seven-point increase was likely caused by both the Flynn Effect and the practice effect. Exhibit 1 at 25-26. Because the WAIS-IV was published in 2008 (fourteen years before the 2022 administration), Dr. Martinez believes that, to account for the Flynn Effect, Busby's 2022 score

should be adjusted by four points. *Id.* Accounting for this adjustment, Busby's Flynn-adjusted score is 77. *Id.*

Dr. Martinez believes the practice effect also had an impact on Busby's 2022 score. Exhibit 1 at 25-26. "Practice effects refer to gains in standardized test scores that result from a person being tested a second time using the same instrument." Exhibit 1 at 25; *see also* 2010 AAIDD Manual at 38. Despite a lack of universal agreement on quantitative score adjustments, the practice effect has shown increases of 2.5 points in verbal IQ and up to eight points in performance IQ. Exhibit 1 at 25.

Dr. Martinez believes that when both the Flynn and practice effects are taken into account, Busby's 2022 score of 81 is consistent with his 2010 score of 74. Exhibit 1 at 25-26.

b. Unknown test (2001)

The record reflects that an unidentified test administered by an unknown individual in uncertain testing conditions rendered an IQ score of 96. 36 R.R. 49.[5] The score was considered unreliable by the State at trial and was disregarded. 36 R.R. 64 (noting that there was "probably . . . something

[5] The Reporter's Record of Busby's 2005 capital murder trial is cited herein as [volume number] R.R. [page number].

wrong with the results"). Because neither the type of test nor the testing conditions—including whether Busby was even the individual who took the test—are known, the score should similarly be disregarded now.

c. WAIS-III (2005)

On October 14, 2005, psychologist Dr. Timothy Proctor administered the WAIS-III to Mr. Busby. 36 R.R 53. He obtained a FSIQ of 77. *Id.* The WAIS-III was normed in 1995, 10 years before the test was administered. *Id.* Thus, Busby's score of 77 on the WAIS-III in 2005 is equivalent to his having scored, rounding up, a 74 (77–3.3 = 73.7), where the mean is 100 after adjusting for the Flynn Effect. When the Flynn Effect is considered, Busby's performance on this test was identical to what he obtained on the WAIS-IV in 2010 and represents significantly sub-average intellectual functioning and is within the range at which a diagnosis of intellectual disability may be made.

d. Beta-III (2005)

On November 4, 2005, days before the trial on the merits began, psychologist Dr. Timothy Proctor administered the Beta-III to Busby. Dr. Proctor estimated that, based on this test, Busby's FSIQ was approximately 81. 36 R.R. 53. Despite their similarities, the Weschler Scales and the Beta-

III test differ greatly in their reliability. In Dr. Proctor's words, the Weschler Scales are the "gold standard of IQ tests," while the Beta-III is a "quick and dirty kind of intelligence test." 36 R.R. 40, 48. Accordingly, Busby's score on the Beta-III should not be regarded to be as reliable a score as the IQ score from the WAIS-IV, or even the WAIS-III.

e. WAIS-III (2005)

Just weeks after the Wechsler Adult Intelligence Scales—Third Edition ("WAIS-III") was administered to Busby by psychologist Dr. Timothy Proctor, Busby was tested with the WAIS-III by the State's psychologist, Dr. Sven Helge. 36 R.R. 61. Although never admitted into evidence, it appears from the transcript of the trial that the State's expert, Dr. Helge, obtained a full-scale IQ score of 79. 36 R.R. 77. The WAIS-III was normed in 1995, approximately ten years before Dr. Helge administered the test. Taking the Flynn Effect into account, Busby's WAIS-III score could be considered to be 76. Exhibit 2 at 3. Moreover, because Dr. Helge administered this test to Busby only weeks after Dr. Proctor administered the same measure, it is appropriate to take the practice effect into account when considering this test. On the Weschler Scales, there is a reported IQ

score increase between 2.0 and 3.2 points when individuals are retested at three- and six-month intervals. Michael R. Basso, et al., *Practice Effects on the WAIS-III Across 3-and 6-Month Intervals*, 16 Clinical Neuropsychologist 57, 58 (2002).

When the Flynn and practice effects are taken into account, Busby's score on this test is consistent with both the score he obtained on the WAIS-III administered by Dr. Proctor in 2005 and the score he obtained on the WAIS-IV administered by Dr. Martinez in 2010.

2. Evidence of significant limitations in adaptive behavior

Busby also meets the second prong of the definition of intellectual disability: he possesses significant limitations in adaptive behavior. Busby possesses significant limitations in his conceptual, social, and practical skills.

Dr. Gilbert Martinez conducted interviews and standardized tests to assess Busby's adaptive behavior. Dr. Martinez evaluated Busby's conceptual skills (literacy, self-direction, and the concepts of money, numbers, and time), practical skills (personal care, money, occupational skills, maintaining a schedule/routine, use of a telephone, and

transportation), and social skills (interpersonal skills, social responsibility, self-esteem, naivety, obeying laws, and following rules). Exhibit 1 at 24-25.

Dr. Martinez conducted in-depth interviews of Busby's sisters, Kimiko Coleman and Tarsharn Busby, who provided an account of his adaptive behaviors as a child and an adult. Exhibit 1 at 8-12. During her interview, Tarsharn Busby expressed that Busby had difficulty communicating. Exhibit 1 at 8. Ms. Busby recalled that Busby did not learn to count or how to perform basic mathematical tasks until the third grade. Exhibit 1 at 9. She also explained that while he eventually could read the numbers on an analog clock, he failed to comprehend their meaning in relation to time. *Id.* His inability to understand time impacted his ability to maintain a routine or schedule. *Id.*

Ms. Busby expressed that Busby lacked impulse control and the understanding of the consequences of his actions. Exhibit 1 at 9. Busby was dependent on others to help make decisions for him. *Id.* Ms. Busby remembered that, as a child, Busby did not engage in creative or imaginative play. Exhibit 1 at 9. According to Ms. Busby, Busby was an affectionate child but did not like to share. *Id.* As a child, Busby was bullied by other children

because he was in special education classes. *Id.* Ms. Busby reported that Busby did not help with chores around at home and had a limited understanding of what needed to be done around the house. Exhibit 1 at 9.

Ms. Busby recounted that Busby had difficulty managing his finances and making medical appointments. Exhibit 1 at 10. He did not understand budgeting and would make impulsive and unnecessary purchases if left alone to decide what to do with any money he had. *Id.*

Ms. Busby shared that Busby engaged in concerning behavior when he was younger, such as bringing snakes into the family home and overdosing on medication. Exhibit 1 at 10. Ms. Busby recalled that Busby held only one job in his lifetime, as a dishwasher at a steakhouse. *Id.* Although he did tell her why he was fired, she understood that he missed many shifts due to his inability to follow a schedule. *Id.*

Busby's other sister, Kimiko Coleman, provided similar insights into Busby's childhood and adaptive behavior. Ms. Coleman expressed that her brother's communication skills were below average: he slurred his speech and their mother tried to enroll him in speech therapy at his school when he

was eight. Exhibit 1 at 10. Ms. Coleman stated that Busby was in special education classes at school. Exhibit 1 at 11.

Ms. Coleman said that Busby had "zero" self-control. Exhibit 1 at 11. He started throwing tantrums from a young age and, throughout his life, his reactions and choices largely depended on his mood. *Id.* Ms. Coleman explained that while Busby could initiate tasks, he was not motivated to, and usually did not, complete them. Exhibit 1 at 11. She stated that Busby was unable to sit through an entire movie because of his limited attention span. *Id.* He was prone to quit or cheat during games because he did not understand the rules. *Id.*

Ms. Coleman described Busby as immature for his age and unable to express a normal range of emotions. Exhibit 1 at 11. Busby tended to emotionally respond in extremes; either very happy or very angry. *Id.* He did not seem interested in others' emotions or in helping others. Exhibit 1 at 11-12. Ms. Coleman indicated that Busby participated in unhealthy behaviors. At age 10, he stole from a pharmacy. Exhibit 1 at 12. At age 16, he attempted suicide by overdosing on a medication. *Id.*

Ms. Coleman explained that Busby was dependent on women to take care of him, by having them do tasks such as paying his bills, buying his clothes, making his appointments, cooking, cleaning, and making his travel plans. Exhibit 1 at 12.

Dr. Martinez reviewed the affidavits of eight other people who knew Busby across various stages of his life. From these affidavits, Dr. Martinez learned that:

- Busby was often the victim of bullying and manipulation. Exhibit 1 at 13-14.
- During school, Busby was in prevocational classes for students with IQs between 70 and 82. Exhibit 1 at 14. These classes taught basic life skills. *Id.*
- Busby could not read, write, or count money. He could not fill out a job application or read Bible verses. He was not able to understand complex instructions and football plays. Exhibit 1 at 14-15.
- Busby was afraid to be alone. Busby was considered a sad loner who desperately craved the attention and affection of women.

Even though Busby always had woman around that he claimed were prostitutes, people who knew him believed he lacked the organizational and accounting skills to be a pimp. Conversely, it was reported that women often manipulated Busby, stealing from him, and taking advantage of his gullibility. Exhibit 1 at 15-16.

- Multiple people recollected that Busby's hygiene was always lacking. He always wore dirty clothes that were in poor condition. Busby reportedly did not bathe for days and did not maintain proper dental hygiene. Exhibit 1 at 18.

Busby's sisters each independently completed an ABAS-3 standardized questionnaire, designed to quantify Busby's adaptive functioning. Exhibit 1 at 19. Busby's scores from the ABAS-3 indicate he is on the extremely low range of adaptive functioning. Tarsharn Busby reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (which summarizes performance across all skills areas): 53, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.

- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.
- Social: 58, indicating the extremely low range (lowest 0.3%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

Exhibit 1 at 19-21.

Kimiko Coleman reported the following scores for Busby's adaptive domains:

- General Adaptive Composite (GAC): 52, indicating Busby is in the extremely low range (lowest 0.1%) of overall adaptive functioning.
- Conceptual: 54, indicating the extremely low range (lowest 0.1%) of adaptive skills in communication, self-direction, and functional academics.

- Social: 56, indicating the extremely low range (lowest 0.2%) of leisure and social skills.
- Practical: 54, indicating the extremely low range (lowest 0.1%) of adaptive performance in community use, home living, health and safety, self-care, and work.

Exhibit 1 at 22-24.

Prayer for Relief

WHEREFORE, Petitioner Edward Lee Busby prays that this Court:

1. Issue a writ of habeas corpus that he may be brought before it and relieved of his unconstitutional sentence of death.

2. Grant such other relief as law and justice require.

Respectfully submitted,

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Verification

I, Jeffrey R. Newberry, attorney for Petitioner in the above-entitled action state that to the best of my knowledge and belief, the facts set forth in this Third Amended Petition are true. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 7, 2026.

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

Certificate of Service

On Thursday, May 7, 2025, I electronically filed the forgoing pleading with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. A Notice of Electronic Filing was sent to Mr. Jefferson D. Clendenin, attorney of record for Respondent Guerrero, at his email address: jay.clendenin@oag.texas.gov.

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

Nos. 26-70004, 26-10354

IN THE
United States Court of Appeals for the Fifth Circuit

EDWARD LEE BUSBY,
Petitioner–Appellant

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent–Appellee

consolidated with

In re: EDWARD LEE BUSBY,
Movant.

OPPOSITION TO MOTION FOR AUTHORIZATION AND MOTION FOR A STAY OF EXECUTION

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent

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INTRODUCTION

Petitioner–Appellant Edward Lee Busby was properly convicted of capital murder and sentenced to death for the murder of Laura Crane. He is scheduled to be executed after **6:00 p.m., May 14, 2026**. Busby was denied federal habeas relief more than a decade ago, ROA.3316–66, and his federal habeas proceedings concluded more than six years ago, ROA.3439. During those proceedings, Busby raised a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), alleging ineligibility for execution due to intellectual disability. ROA.3316. The claim was denied on the merits. *Busby v. Davis*, 925 F.3d 699, 716–20 (5th Cir. 2019).

A year after his federal habeas proceedings concluded, Busby initiated subsequent state habeas proceedings, ROA.4960, which concluded in November 2025, *Busby v. Texas*, 146 S. Ct. 371 (Nov. 10, 2025). He then waited six months to seek relief from the federal district court's 2015 judgment under Federal Rule of Civil Procedure 60(b), which request was predicated on the argument that the district court's denial of funding in 2011 was rendered incorrect by the Supreme Court's 2018 decision in *Ayestas v. Davis*, 584 U.S. 28 (2018). ROA.3441-82.

The lower court denied Busby's motion for relief from judgment. ROA.3601-09. Among other things, the court found Busby's motion was actually a successive habeas petition because it attacked the previous merits decision denying his claim of intellectual disability under *Atkins*. ROA.3606. The court denied a certificate of appealability (COA) and transferred the case to this Court to determine whether Busby was entitled to authorization to file a successive habeas petition. ROA.3608-09.

This Court initially ordered Busby to file a motion for authorization by April 23, 2026. ECF No. 4-2. Busby was granted an extension of time to April 27, 2026. ECF No. 14-1. Instead of filing a motion for authorization by that deadline, Busby filed an application for a COA. Mot. for COA, *Busby v. Guerrero*, No. 26-70004 (5th Cir. Apr. 27, 2026), ECF No. 21. Ten days after his deadline expired—without even acknowledging this deadline, and at the latest possible time permitted under this Court's rules to file a challenge to a death sentence, Fifth Cir. R. 8.10—Busby filed a motion for authorization to file a successive habeas petition. *See generally* ECF No. 28 (Mot.). His motion seeks authorization to file a successive petition raising an *Atkins* claim. Mot. 2. Despite

having raised an *Atkins* claim in his initial federal habeas proceedings, ROA.3316, Busby argues the *Atkins* claim he seeks to raise now is not barred because it is fundamentally different from the *Atkins* claim he raised before. Mot. 9–10. He also argues the *Atkins* claim was previously unavailable to him because he lacked court funding to obtain an expert report. Mot. 23–24.

This Court should deny Busby's inexplicably tardy motion for authorization. First, dismissal of his *Atkins* claim is mandatory under 28 U.S.C. § 2244(b)(1). Second, Busby plainly fails to demonstrate prior unavailability of his *Atkins* claim under § 2244(b)(2)(B) because his claim does not concern his guilt of the underlying crime and because he previously raised an *Atkins* claim. Third, the *Atkins* claim is time-barred. And fourth, the claim is meritless. Lastly, this Court should deny Busby's conclusory request for a stay of execution.

STATEMENT OF JURISDICTION

This Court has jurisdiction over a motion for authorization to file a successive petition pursuant to 28 U.S.C. § 2244(b)(3)(A).

STATEMENT OF THE ISSUE

Should the Court grant Busby's untimely request for authorization to file a successive habeas petition in the federal district court pursuant to 28 U.S.C. § 2244(b) for a claim that was presented in a prior petition and is time barred and meritless?

STATEMENT OF THE CASE

I. Procedural History

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). The conviction and sentence were affirmed on direct appeal in 2008. *Id.* 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 Busby was intellectually disabled. ROA.1633. The court denied the motion, assuming the claims raised in Busby's petition were "procedurally

viable." ROA.1871. In doing so, the court described the extensive evidence developed prior to Busby's trial (Dr. Timothy Proctor's psychological testing of Busby) and during his state habeas proceedings (Dr. Gilda Kessner's review of test data and testimony, Toni Knox's new mitigation investigation, Dr. Gilbert Martinez's administration of the WAIS-IV, and Dr. Bekh Bradley-Davino's "comprehensive report" based on ten hours of clinical interviews, medical records, prior psychological reports, and several statements from individuals who knew Busby during his developmental period), ROA.1872-75, 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. Because the funding Busby requested would only have supplemented evidence he had already developed, the court denied his request for funding. ROA.1876.

The district court later stayed its proceedings to allow Busby the opportunity to exhaust claims, ROA.1884, and directed him to "observe state requirements for the appointment of counsel and compensation of services before the state court." ROA.1881. Busby then filed a subsequent

state habeas application, which the Texas Court of Criminal Appeals (TCCA) dismissed as an abuse of the writ. ROA.4468-69. After the district court reopened the habeas proceedings, ROA.2150-51, Busby again requested funding but only with respect to his ineffective-assistance claim, ROA.2169-79. The court later denied Busby's renewed funding request, ROA.2332-38, and denied Busby habeas relief, ROA.3366.

This Court granted Busby a COA after which it affirmed the district court's denial of relief, *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 at 702, *cert. denied*, 589 U.S. 1141 (2020).

Busby's execution was then scheduled for May 6, 2020. Ord., *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Jan. 28, 2020). The TCCA granted a sixty-day stay of Busby's execution during the then-emerging COVID-19 pandemic. 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 in the TCCA a motion for a stay of execution due to the

COVID-19 pandemic, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-04 (Tex. Crim. App. Jan. 8, 2021), and a motion for a stay of execution asserting his desire to have his spiritual advisor accompany him in the execution room, Mot. for Stay, *Busby v. Texas*, No. WR-70,747-05 (Tex. Crim. App. Jan. 15, 2021). The motions were denied.

Busby also filed a motion to intervene and a motion for a stay of execution in a civil rights action involving a claim challenging the Texas Department of Criminal Justice's (TDCJ) former policy regarding the presence of spiritual advisors during executions, which were denied. Ord., *Gutierrez v. Saenz, et al.*, No. 1:19-CV-185 (S.D. Tex. Jan. 29, 2021), ECF No. 132. Busby then filed in federal district court a complaint and a motion for a stay of execution regarding TDCJ's execution policy. Compl., *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Jan. 29, 2021), ECF No. 1. The motion for a stay of execution was dismissed after the TCCA stayed Busby's execution, Ord., *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Feb. 4, 2021), ECF No. 13, and Busby's complaint was ultimately dismissed as moot, Ord. on Dismissal, *Busby v. Collier, et al.*, No. 4:21-CV-297 (S.D. Tex. Sept. 16, 2021), ECF No. 54.

Busby also filed a motion for a stay of execution and a subsequent state habeas application raising an intellectual disability claim prior to his scheduled execution in 2021. 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. ROA.4906-48. 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 was 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). Busby then filed in the lower court a motion for relief from judgment on April 2, 2026. ROA.3441-82. The court denied the motion and a COA because the motion was a successive habeas petition, was untimely, and failed to demonstrate any extraordinary circumstance. ROA.3608. The

court transferred the case to this Court for a determination as to whether Busby was authorized to file a successive habeas petition. ROA.3609.

This Court ordered Busby to file a motion for authorization by April 23, 2026, ECF No. 4-2, and later granted Busby an extension of time until April 27, 2026, ECF No. 14-1. Busby filed an application for a COA, but he did not timely file a motion for authorization to file a successive habeas petition. Busby then filed a motion for authorization on May 7, 2026. ECF No. 28. The instant opposition follows.

II. Statement of Facts

A. Evidence at guilt-innocence

> The evidence shows that on or about January 30, 2004, [Busby] and a female accomplice [Kathleen 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 at 663–64.

B. Evidence at punishment

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."

> The [S]tate 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 [waist] 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.

Busby v. Davis, 925 F.3d at 724 (footnotes omitted).

C. Evidence regarding Busby's *Atkins* claim

This Court summarized the evidence Busby presented in state court and during his federal habeas proceedings regarding his *Atkins* claim:

> Busby was administered five separate IQ tests between 2001 and 2010. He scored 96 on an unknown IQ test in 2001, and the State offered to "forget about" that test, acknowledging that it was unreliable. . . . Prior to his criminal trial, three more IQ tests were administered to Busby. He received a full scale IQ of 77 on the WAIS-III, administered in 2005 by his expert witness at trial, Dr. Proctor. The standard error of measurement (SEM) for the WAIS-III is approximately "plus or minus five," according to Dr. Proctor's trial testimony. Busby's IQ was therefore in a range of 72–82, as measured by the WAIS-III. Busby asserted in his second state habeas petition that due to the "Flynn Effect," the score of 77 should be adjusted to 73.7. Weeks after Dr. Proctor's assessment, the State's psychologist re-administered the WAIS-III, and Busby scored 79. The IQ range would be 74–84, based on that test and its SEM.
>
> Dr. Proctor administered a third IQ test on the eve of trial—the Beta-III—on which Busby scored 81. Proctor testified that this score "correlates fairly well" with Busby's WAIS-III score. The SEM for the Beta-III is not in the record. Busby argued to the TCCA that "[an intellectual disability] expert would opine, however, that the Beta IQ test, because of its less comprehensive nature, is widely acknowledged to inflate IQ scores generally, to be subject to a higher Flynn

Effect rate than the Wechsler scales, and to be less reliable overall than the Wechsler Scales." However, no expert did so opine in the state-court proceedings, and there was no evidence provided to the TCCA as to what the IQ range would be if the SEM were considered or if the Flynn Effect were accepted and applied. All that the TCCA had before it regarding the Beta-III test was the fact that Busby had scored 81 and the arguments of counsel attempting to discredit or explain that score. Even assuming that the SEM for the Beta-III test is similar to that for the WAIS-III, the IQ range would be 76–86. Such a range would be above the range of 75 or below that the Supreme Court has applied in its recent opinions regarding IQ scores in the context of an *Atkins* claim. The Supreme Court said in *Brumfield*[1] that evidence of an IQ score whose range, adjusted by the SEM, was above 75 "could render the state court's determination reasonable."

Busby provided arguments in his federal habeas petition regarding the Beta-III test and his score of 81 that were not presented to the TCCA. He asserted in federal court that the Beta-III had been "normed" seven years before it was administered to Busby, and that if adjusted for the Flynn Effect, the score would be 78.7. He did not point to any expert testimony or other evidence in the record that supports these arguments. Nor is there evidence as to the SEM of this test or the range of the score when the SEM is considered. Again, there was only argument of counsel. Busby was provided the opportunity to present whatever expert testimony he deemed necessary in the federal district court proceedings, and he did not present any additional evidence regarding this test. The only evidence that the TCCA and federal district court had was that Busby's full score IQ as measured by the Beta-III test was 81.

In 2010, immediately prior to filing his federal habeas petition, Busby was administered the WAIS-IV and scored a

1 *Brumfield v. Cain*, 576 U.S. 305 (2015).

74. The report of the clinician who administered this test reflects that, adjusted based on a 95% confidence interval for the WAIS-IV, Busby's full scale IQ range is 70–79, which the report characterizes as "Borderline."

Before the trial at which Busby was convicted, Proctor also administered the Wide Range Achievement Test, Third Edition, which measured Busby's educational abilities in reading, spelling and math. Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.

Busby argues that because the federal district court's analysis of the merits of the *Atkins* claim was based only on IQ scores, it follows that the district court also concluded that "the [T]CCA's analysis must have stopped at that point as well." First, it appears that the federal district court did consider Busby's achievement test scores, which were not IQ test scores. But in any event, we cannot assume that the TCCA considered only Busby's IQ scores and ignored other evidence in Busby's state habeas application. Nor can we assume that the TCCA ignored the *lack* of evidence in Busby's state habeas application. Not a single clinician opined that Busby is intellectually disabled, though there were three reports from mental health experts appended to Busby's second state habeas application. Based on the record presented to the TCCA, no clinician examined Busby's IQ scores, evidence of whether Busby has "adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances')", or whether there was an onset of adaptive deficits while Busby was a minor, and then reached the conclusion that Busby is intellectually disabled.

Busby retained Gilda Kessner, a Doctor of Psychology, and she submitted a report dated March 21, 2008. Though Busby did not claim in his first state habeas petition that he was intellectually disabled, he filed this report as part of the evidence in his first state habeas proceeding. The same report

was an exhibit to his second state habeas application. Kessner's report reflects that she reviewed an array of Busby's records and the testimony of Dr. Proctor, who was an expert witness for Busby in his murder trial. Kessner's report concludes that the WAIS-III that Proctor administered to Busby was the current test at the time. Her report reflects that Proctor testified at trial that Busby scored 77 on that test, and that Proctor testified that Busby was not [intellectually disabled] because "the DSM-IV diagnosis of [intellectual disability] would be a score below 70." However, Kessner opined that Proctor had not accounted for a phenomenon known as the Flynn Effect, which posits that there is a rise or gain in IQ scores over time and that "[r]esearch literature has suggested that this figure is .3 per year beginning the year after the test is normed." Importantly, Kessner concluded that the 77 score on the WAIS-III "does not rule out a diagnosis of [intellectual disability]," and that "a thorough investigation into Mr. Busby's adaptive behavior history is necessary to make a proper determination." The report continued, "[a]t this time, I do not believe that has been accomplished." Her report said, "I am concerned that [ ] the apparent perfunctory reliance on the obtained score truncated the investigation into the possibility of the presence of [intellectual disability] in Mr. Busby." Kessner's report had explained that "the next version of the Wechsler series (WAIS-IV) will be available to clinicians in the fall of 2008." Her report concluded with this recommendation: "I would recommend a new evaluation with the WAIS-IV when it is available this fall so that the issue of the Flynn Effect and questions about the validity of the score can be avoided." Kessner's report addresses only one of the three broad criteria for diagnosing intellectual disability. As to that criteria, the most she said was that the WAIS-III score of 77 did not "rule out" intellectual disability.

After Busby filed his federal habeas petition, he retained two other experts regarding his mental capacities, and their reports were also appended to Busby's second state habeas

petition. The report of Gilbert Martinez reflects that he is a Ph.D., licensed psychologist, and clinical neuropsychologist, and that Busby "underwent standardized assessment of his intellectual functioning on February 11, 2010." The report is relatively brief and offers no opinion as to whether Busby is intellectually disabled. It reflects in a chart that Martinez administered the WAIS-IV, that Busby's full scale IQ score was 74, and that within a 95% confidence interval, his IQ score was 70–79. Under a column in this chart labelled "Qualitative Description," the word "Borderline" appears with regard to Busby's full scale IQ score. The report also reflects that Martinez administered a Test of Memory Malingering, and "[t]here was no evidence of misrepresentation of cognitive or intellectual functioning."

Federal habeas counsel also retained Bekh Bradley-Davino, Ph.D., who is a licensed clinical psychologist. Bradley-Davino spent ten hours evaluating Busby in person and reviewed a substantial amount of written material and records. Bradley-Davino prepared a 20-page report, most of which does not pertain to whether Busby is intellectually disabled. But in a section titled "Limited Intellectual Abilities and Academic Problems Became Apparent in Mr. Busby's Childhood and Continued into Adulthood," the report states that "[a] number of sources of data including school records, behavioral descriptions provided by Mr. Busby as well as his family, teachers, and peers, and results of standardized tests, indicate that at a young age Mr. Busby demonstrated significant signs of impaired/limited academic and intellectual/mental abilities." The report also recounts the results of the WAIS-IV IQ test administered by Martinez and its full scale IQ score of 74, and concludes that "[t]his score reflects significant limitations in intellectual functioning, approximately two standard deviations below the mean." The report reflects that Busby was placed in special education by at least the seventh grade, that he had "significant problems in academic functioning beginning early," and that he could not understand some of the more complex plays during high

> school football practice. But there is no conclusion drawn from all of the facts in Bradley-Davino's report that Busby is intellectually disabled. Instead, the report closes with this recommendation: "I additionally strongly recommend further evaluation of Mr. Busby by an expert in [intellectual disability] in light of his clear history of extensive intellectual and adaptive functioning limitations."

Id. at 716–19 (footnotes omitted).

Following the TCCA's stay of Busby's execution in 2021, Dr. Martinez administered the WAIS-IV to Busby on which he obtained an FSIQ of 81, indicating "low average" intellectual functioning. ROA.3490. Dr. Martinez also administered the Wide Range Achievement Test-Fifth Edition (WRAT-5), which measured Busby's academic achievement and reflected low scores. ROA.3490. To assess Busby's adaptive functioning, Dr. Martinez interviewed Busby's sisters Tarsharn Busby and Kimiko Coleman, and he reviewed Busby's school records and declarations from family members and acquaintances of Busby. ROA.3491-3502. Ms. Busby and Ms. Coleman also completed the Adaptive Behavior Assessment System-Third Edition (ABAS-III), which indicated Busby's scores were for the most part in the bottom tenth of a percentile of individuals of Busby's age. ROA.3502-07. Dr. Martinez concluded that the discrepancy between Busby's IQ scores of 74 (in 2010) and 81 (in 2022) was likely due

to the Flynn Effect and the practice effect, though he did not suggest a numerical adjustment to Busby's FSIQ of 81 to account for the practice effect. ROA.3508. He opined that the FSIQ of 81 was consistent with the previously obtained FSIQ of 74 and that Busby's adjusted scores fell within the range of intellectual disability in the context of Busby's adaptive deficits. ROA.3508-09. Dr. Martinez also concluded the records, interviews, declarations, and testing indicated deficits in adaptive functioning. ROA.3509.

The State's expert, Dr. Antoinette McGarrahan, reviewed the historical data and Dr. Martinez's new report. ROA.3510-15. Dr. McGarrahan decided not to administer additional testing to Busby in light of the numerous assessments he had been given. ROA.3514. Dr. McGarrahan concluded Busby demonstrated "reduced intellectual abilities" and significant deficits in adaptive behavior, and she found the deficits were present during his developmental period. ROA.3514. Therefore, she could not controvert Dr. Martinez's opinion that Busby met the diagnostic criteria for intellectual disability. ROA.3515.

SUMMARY OF THE ARGUMENT

Dismissal of Busby's *Atkins* claim is mandatory under 28 U.S.C. § 2244(b)(1) because he raised the claim in his previous petition, and it was denied on the merits. For the same reason, he is disentitled to authorization under § 2244(b)(2)(B) because the *Atkins* claim was not previously unavailable, and it does not allege innocence of his crime. Moreover, the *Atkins* claim is time-barred. Finally, the *Atkins* claim does not state a prima facie claim for relief. Accordingly, this Court should deny Busby's motion for authorization.

STANDARD OF REVIEW

A habeas petitioner must "obtain leave from the court of appeals before filing a second habeas petition in the district court." *Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012); *see Felker v. Turpin*, 518 U.S. 651, 664 (1996); 28 U.S.C. § 2244(b)(3)(A). Under § 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.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made

> retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the Applicant guilty of the underlying offense.

28 U.S.C. § 2244(b). As discussed below, Busby's Motion fails to make a prima facie showing that he satisfies the requirements of § 2244(b). *See* 28 U.S.C. § 2244(b)(3)(C).

ARGUMENT

I. Busby's Motion for Authorization Is Untimely.

The district court transferred Busby's Rule 60(b) motion to this Court on April 15, 2026. ROA.3609. This Court ordered Busby to file a motion for authorization by April 23, 2026, ECF No. 4-2, and later granted him an extension to April 27, 2026, ECF No. 14-1. Busby failed

to file a motion for authorization until ten days later. Not only that, Busby failed to proffer any explanation for failing to comply with this Court's scheduling order. The instant proceeding should be dismissed as a result. *See* ECF No. 4-2 ("If you fail to file a motion for authorization within this 7 day period, or properly request an extension of time, the clerk will enter an order dismissing your case without further notice."); Fed. R. App. P. 31(c) ("If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal."); Fifth Cir. R. 42.3.1.1. At a minimum, Busby's demonstrable lack of diligence in seeking authorization disentitles him to a stay of execution, as discussed further below.

II. Busby's Motion Does Not Meet the Standards under 28 U.S.C. § 2244 for Filing a Successive Habeas Corpus Petition.

Before authorizing a successive petition in the district court, this Court must determine that Busby satisfies the statutory prerequisites for a successive habeas petition. *In re Campbell*, 750 F.3d 523, 529–30 (5th Cir. 2014). If a claim has been previously raised, it must be dismissed—there are no exceptions. § 2244(b)(1); *Williams v. Thaler,* 602 F.3d 291, 301 (5th Cir. 2010). If a claim has not been previously raised, it also must be dismissed unless the movant makes a prima facie showing

that his claim: (A) "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable"; or (B) relies on facts that (i) could not have been discovered previously through the exercise of due diligence, and (ii) if proven would "establish by clear and convincing evidence that, but for Constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(A)–(B); *see In re Johnson,* 935 F.3d 284, 291 (5th Cir. 2019); *In re Cathey*, 857 F.3d 221, 226 (5th Cir. 2017). Busby falls far short of these standards.

A. Busby's *Atkins* claim was presented in his prior petition and denied on the merits.

As discussed above, Buby raised an *Atkins* claim in his initial federal habeas proceedings, and it was denied on the merits. *Busby v. Davis*, 925 F.3d at 716–20. Denial of authorization in this instance is mandatory. 28 U.S.C. § 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.").

To avoid the plain language of the statute, Busby employs a spurious attempt to extend a defunct doctrine regarding exhaustion to the statutory provisions governing the filing of successive habeas

petitions. Mot. 9–10. He argues that his proposed successive petition does not raise the same *Atkins* claim as his initial federal habeas petition because the successive claim is supported by a report opining that Busby is intellectually disabled. Mot. 9.

Busby's argument that the addition of an expert report fundamentally alters his *Atkins* claim is simply beside the point. Section 2244 does not ask whether a petitioner's claim was exhausted or whether a claim has been fundamentally altered by the addition of new evidence. *See In re Young*, 789 F.3d 518, 526 n.2 (5th Cir. 2015) (rejecting argument that a claim raised in a successive petition was fundamentally altered because that doctrine "concern[ed] the issue of exhaustion, not whether a petition is successive"). Instead, the statute *requires* that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." 28 U.S.C. § 2244(b)(1); *see In re Young*, 789 F.3d at 526 ("This new gloss on a previous claim is insufficient to overcome § 2244(b)(1)."); *Franklin v. Johnson*, 839 F.3d 465, 475 (6th Cir. 2016) ("At the very least, then, if we are to avoid rendering 28 U.S.C. § 2244(b)(1) entirely nugatory, Franklin may not use Rule 60(b) as a vehicle for relitigating

the same 'claim' that was already decided against him in a previous habeas petition."). As the Eleventh Circuit has explained,

> Permitting a second or successive petition to be filed whenever expert witnesses decide to change their earlier opinions would not "greatly restrict [ ] the power of federal courts" to entertain second or successive petitions, but instead would have exactly the opposite effect—permitting second or successive petitions where pre-AEDPA law would not have. That is why in § 2244(b)(1), "claim" means claim, not evidence or arguments supporting a claim. And that is why the Supreme Court has instructed us that "[i]f the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim must be dismissed in all cases." "In all cases" means all cases.

In re Hill, 715 F.3d 284, 295 (11th Cir. 2013) (citations omitted).

Busby provides no support for his attempt to import the defunct fundamental-alteration doctrine into the successiveness statute. For the proposition that his *Atkins* claim has been fundamentally altered such that it is a different claim than the one he previously raised, Busby relies entirely on this Court's opinion in *Ibarra v. Thaler*, 691 F.3d 677 (5th Cir. 2012), *overruled on other grounds by Trevino v. Thaler*, 569 U.S. 413 (2013). Mot. 10. But in *Ibarra*, this Court held that the petitioner's new evidence—an expert report and affidavits—that was not presented to the state court was properly excluded by the district court. *Ibarra*, 691 F.3d at 682. Indeed, after *Cullen v. Pinholster*, 563 U.S. 170 (2011), the

factual-exhaustion rubric Busby relies upon serves no purpose with respect to a claim the state court adjudicated on the merits. *See Ibarra*, 691 F.3d at 682 (". . . *Cullen* resolves the issue in favor of the state."); *Nelson v. Lumpkin*, 72 F.4th 649, 658 (5th Cir. 2023); *Lewis v. Thaler*, 701 F.3d 783, 790–91 (5th Cir. 2012). Nonetheless, this Court's pre-*Pinholster* precedent held that a petitioner's *Atkins* claim was not rendered unexhausted where he presented no IQ data in state court but presented a full-scale score in federal court. *Morris v. Dretke*, 413 F.3d 484, 494–95 (5th Cir. 2005); *see also Lewis v. Quarterman*, 541 F.3d 280, 285 (5th Cir. 2008).

Consequently, the doctrine Busby relies on is not only inapposite in the successiveness inquiry but also would not avail him even in a procedural default inquiry. The "gravamen" of Busby's *Atkins* claim is the same as it has always been. *Franklin*, 839 F.3d at 474–75. Therefore, Busby is disentitled to authorization under § 2244(b)(1). His motion should be denied.

B. Busby's *Atkins* claim was available—and was raised—during his previous federal habeas proceeding.

Busby makes a cursory and unsupported argument that his *Atkins* claim satisfies § 2244(b)(2)(B) because the claim was unavailable until he

obtained funds for an expert report.[2] Mot. 23–24. Busby's *Atkins* claim categorically fails under § 2244(b)(2)(B) because it does not allege innocence of his crime. *See White v. Lumpkin*, No. 24-70005, 2024 WL 4343615, at *2 (5th Cir. Sept. 29, 2024). Therefore, his motion should be denied.

Moreover, Busby's unavailability argument is self-evidently wrong in light of the fact that he raised an *Atkins* claim during his initial federal habeas proceeding. ROA.3316. Busby cites no precedent supporting his assertion that the denial of funding can excuse the failure to raise a claim when it could have been—and was—raised previously. Even if the denial of funding was relevant, the district court's order denying funding explained in no uncertain terms that Busby failed to explain why he needed additional funding to obtain another expert report:

> In this proceeding, he has retained Drs. Martinez and Bradley-Davino. Aside from stating generally that Dr. Bradley-Davino is not a[n intellectual disability] expert, [Busby] fails to adequately explain why Dr. Bradley-Davino's evaluation was inadequate, given that he reviewed information provided by the people that knew [Busby] best during his developmental period, opined on the existence of

[2] Busby does not rely on § 2244(b)(2)(A), but he is also not entitled to authorization under that provision because his *Atkins* claim does not rely on a new rule of constitutional law that has been made retroactive and was previously unavailable. *See White*, 2024 WL 4343615, at *3; *Tyler v. Cain,* 533 U.S. 656, 662 (2001).

> [Busby's] historical limitations in adaptive functioning, and diagnosed [Busby] with three separate psychiatric disorders. More significantly, [Busby] does not state why Dr. Martinez, who was retained specifically to evaluate [Busby] for [intellectual disability], was an inadequate expert on the subject.

ROA.1875–76. Therefore, Busby is not entitled to authorization under § 2244(b)(2)(B). His motion for authorization should be denied.

III. Busby's *Atkins* Claim Is Time Barred.

Busby's motion for authorization may also be denied because his proposed successive petition is time barred. *See In re Burton*, 111 F.4th 664, 666 (5th Cir. 2024). Section 2244(d)(1) applies a one-year limitations period to any application for writ of habeas corpus. In this case, the limitations period begins running from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> . . .
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *see In re Jones,* 998 F.3d 187, 189 (5th Cir. 2021).

Even if Busby's limitations period commenced when the state court dismissed his subsequent habeas application in 2013, ROA.4469, his limitations period expired over a decade ago. *See Duncan v. Walker*, 533 U.S. 167, 172–73 (2001) (the pendency of a federal habeas petition does not toll the limitations period). Busby provides no basis on which to restart his limitations period with his filing of another subsequent state habeas application. Mot. 24.

In any event, Busby admits his proposed petition is time-barred, Mot. 24, and he fails to justify application of equitable tolling. He asserts he had no reason to expect the prosecuting office to seek an execution date after his most recent state habeas proceedings, but he fails to explain the relevance of that decision. If anything, the argument suggests Busby would have waited to seek permission to file a successive habeas petition until an execution date was requested.[3] Moreover, the state

[3] Notably, Busby waited almost a year after he obtained a stay of execution in 2020 to file a subsequent state habeas application raising an *Atkins* claim and only did so after an execution date had been scheduled again. Ord. Setting Execution Date, *Texas v. Busby*, 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Oct. 15, 2020); ROA.4960 (subsequent application filed January 29, 2021). Further, Busby's assertion that he is entitled to equitable tolling because he is intellectually disabled is erroneous as a general matter, *see*

court's order scheduling Busby's execution was signed on December 10, 2025. Ord. Setting Execution Date, *Texas v. Busby*, No. 0920589A (Crim. Dist. Ct. No. 2, Tarrant Cnty., Texas Dec. 10, 2025). Busby then waited five months to file a Rule 60(b) motion in the district court. ROA.3448. He then flouted this Court's scheduling order and untimely filed his motion for authorization. His lack of diligence is manifest, and he is not entitled to equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 649 (2010). This Court should deny Busby's motion for authorization.

IV. Busby Fails to Make a Prima Facie Showing of Intellectual Disability.

To obtain authorization to raise a successive *Atkins* claim, Busby must also make a prima facie showing that he is intellectually disabled. *See In re Campbell,* 750 F.3d at 530. To demonstrate he is intellectually disabled and thus ineligible for execution, 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); *Petetan v. State*, 622

Henderson v. Thaler, 626 F.3d 773, 781 (5th Cir. 2010), and insufficient in this case because his claim has been rejected by every court to review it.

S.W.3d 321, 333 (Tex. Crim. App. 2021). As every court that has reviewed Busby's claim has found he is not intellectually disabled.

A. Busby does not have significantly subaverage intellectual functioning.

None of the IQ scores—74, 77, 79, and 81 (twice)—Busby has proffered over the years reaches below 70 even when accounting for the tests' range of error. ROA.3511 (Dr. McGarrahan's chart of Busby's IQ scores). Likely because of this, Busby's claim depends critically on application of the Flynn Effect. ROA.3469. But Busby's briefing is bereft of any precedent suggesting that such manipulation is required. Moreover, many courts have refused to require adjustment of IQ scores,[4]

[4] *E.g., White v. Lumpkin*, 2024 WL 4343615, at *3 ("[W]e are not required to adjust White's IQ scores downwards and do not choose to do so today."); *Commonwealth v. Flor*, 259 A.3d 891, 921 (Pa. 2021) ("The WAIS manual does not instruct such an adjustment [for the Flynn Effect], although it does advocate updating norms regularly. . . . [W]e agree that the record here supports the PCRA court's conclusion that consideration of the Flynn Effect may be pertinent to interpretation of a score in a particular case, but there is no generally accepted professional requirement or standard for adjusting a specific numerical score."); *Haliburton v. State*, 331 So. 3d 640, 647 (Fla. 2021); *Wright v. Sec'y, Dept. of Corr.*, No. 20-13966, 2021 WL 5293405, at *6 (11th Cir. Nov. 15, 2021); *Raulerson v. Warden*, 928 F.3d 987, 1008 (11th Cir. 2019) ("[T]here is no consensus about the Flynn [E]ffect among experts or among the courts."); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Hall* says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant's intellectual disability."); *Ex parte Cathey*, 451 S.W.3d 1, 14–19 (Tex. Crim. App. 2014) (finding a lack of evidence that clinical practitioners adjust IQ scores to account for the Flynn Effect); *Thorson v. State*, 76 So. 3d 667, 683 (Miss. 2011).

and the Supreme Court's precedent does not require it. *See Quince v. State*, 241 So. 3d 58, 61 (Fla. 2018) ("As many courts have recognized, *Hall* [*v. Florida*, 572 U.S. 701 (2014),] does not mention the Flynn [E]ffect and does not require its application to all IQ scores in *Atkins* cases."). Indeed, the state court's decision in this case is plainly in keeping with the Supreme Court's observation that the Flynn Effect is "controversial." *Dunn v. Reeves*, 594 U.S. 731, 736 (2021).

Nonetheless, the state court appropriately explained that the Flynn Effect may affect test scores but that courts should not change an individual score.[5] ROA.4916 (citing *Ex parte Cathey*, 451 S.W.3d at 5). The court also discussed the need to consider the SEM for an IQ test,[6] ROA.4916 (citing *Moore*, 581 U.S. at 13), ROA.4932-33, as well as the current diagnostic standards, ROA.4916. Indeed, the court considered Busby's FSIQ of 74 with an SEM of 70–79. ROA.4933-34.

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[5] 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. ROA.4932.

[6] 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. ROA.4932-33. Nonetheless, the court considered the SEMs that were supported "by at least some evidence or that were previously used by the federal habeas courts." ROA.4933.

Because the state court considered all the scores Busby proffered, as well as their SEMs, ROA.4932-33, he cannot show any error in the court's conclusion based on "a holistic review," ROA.4947, 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*, 572 U.S. at 723; *see Moore*, 581 U.S. at 14.

B. Busby has not demonstrated he has significant deficits in adaptive behavior.

Busby also failed to identify any error in the state court's decision that he did not demonstrate significant deficits in adaptive behavior, 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 evidence of 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. ROA.4942. Instead, the court resolved conflicts in the evidence of Busby's asserted

deficits. ROA.4942. 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*, 622 S.W.3d at 349; *see Ex parte Cathey*, 451 S.W.3d at 19 ("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 Dr. Proctor administered the WRAT to Busby in 2005, which showed he had a fourth grade reading level and sixth-grade skills in math. ROA.4937. Busby scored similarly on the WRAT Dr. Martinez administered in 2022. ROA.4937. Busby also admitted having pen pals with whom he corresponded. ROA.4938. 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.[7] ROA.4938 ("Several also noted that [Busby] was not good with numbers, even

[7] At trial, Busby's sisters Kimiko Coleman and Tarsharn Busby testified they had not seen Busby in seven and six years, respectively. ROA.11030, 11046-47.

unable to count money or order fast food, which contradicts his WRAT score showing he performed at a sixth-grade math level."), 4941-42. 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, Dr. 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, 35 RR 18, 25–27, Dr. Proctor testified there was no evidence Busby was intellectually disabled, 36 RR 64. Busby's school records showed he was placed in "LLD" classes for the learning disabled where he achieved average grades in junior high school and his freshman year of high school. ROA.4936; 35 RR 17–18, 25. Notably though, Busby's school records also indicated a significant number of days when he was absent. 35 RR 16; *see* ROA.3502.

Busby fails 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. 36 RR 50–52, 64.

Second, Busby fails to show the state court erred in discounting the results of the ABAS-III 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. ROA.4943.

V. Busby Is Not Entitled to a Stay of Execution.

The Court should also deny Busby's terse request for a stay of execution. Mot. 3. 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 v. Holder, 556 U.S. 418, 434 (2009) (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)).

As an initial matter, Busby has not even moved for a stay of execution, let alone made an affirmative showing that he satisfies all the requirements for a stay. He is therefore disentitled to a stay of execution. *See Hill,* 547 U.S. at 584.

In any event, Busby's *Atkins* claim has been raised and rejected before. His attempt to re-raise the claim at the last minute after failing to pursue his claim with alacrity forecloses his appeal to equity. *See Bucklew v. Precythe*, 587 U.S. 119, 149–51 (2019). Again, Busby failed to comply with this Court's scheduling order and filed his motion for authorization ten days late. *See* ECF No. 14-1. That delay, alone, requires a "strong equitable presumption" against a stay of execution. *Hill*, 547 U.S. at 584. Further, as demonstrated above, Busby is not entitled to a stay considering his manifest failure to show his proposed successive petition satisfies § 2244(b).

Moreover, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Hill*, 547 U.S. at 584. The public has a strong interest in enforcement of Busby's sentence. His last-minute attempt to reraise a meritless claim is plainly a dilatory effort to delay his sentence. Such tactics underscore why the

Court should deny his application for a stay. *See, e.g.*, *Bucklew*, 587 U.S. at 149–51. Busby presents no reason to delay his execution date any longer.

Lastly, Busby cannot overcome the strong presumption against granting a stay or demonstrate that the balance of equities entitles him to a stay of execution. For the same reason, Busby fails to show that he would suffer irreparable harm if denied a stay of execution. *See Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008) (explaining that "the merits of [the movant's] case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue"). This Court should deny Busby's request for a stay of execution.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that this Court deny Busby's motion for authorization to file a successive federal petition and his request for a stay of execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2026, I electronically filed the foregoing document with the clerk of the court for the United States Court of Appeals for the Fifth Circuit, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to counsel of record who has consented in writing to accept this Notice as service of this document by electronic means.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this Brief in Response complies with Federal Rule of Appellate Procedure 32(a) in that it contains 8,487 words. Microsoft Word, Century Schoolbook Font, 14 points.

s/ Jefferson Clendenin
JEFFERSON CLENDENIN
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ELECTRONIC CASE FILING CERTIFICATIONS

I do hereby certify that: (1) all required privacy redactions have been made; (2) this electronic submission is an exact copy of the paper document; and (3) this document has been scanned using the most recent version of a commercial virus scanning program and is free of viruses.

s/ Jefferson Clendenin
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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
May 8, 2026
Lyle W. Cayce
Clerk

No. 26-70004

EDWARD LEE BUSBY,

Petitioner—Appellant,

versus

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

Respondent—Appellee.

CONSOLIDATED WITH

No. 26-10354

IN RE EDWARD LEE BUSBY,

Movant.

Application for Certificate of Appealability
from the United States District Court for the Northern District of Texas
USDC No. 4:09-CV-160

Before RICHMAN, GRAVES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Edward Lee Busby has filed a motion to stay his execution, which is scheduled to occur on May 14, 2026. JUDGE GRAVES would grant habeas relief and therefore grant a stay of execution. JUDGE HIGGINSON would grant a temporary stay of execution until the United States Supreme Court issues a decision in *Hamm v. Smith*, No. 24-872, 145 S. Ct. 2776 (2025). JUDGE RICHMAN would deny a stay of execution and would deny habeas relief. Accordingly,

IT IS ORDERED that the execution scheduled for May 14, 2026, is temporarily STAYED pending further order of this court.

STEPHEN A. HIGGINSON, *Circuit Judge*:

I join the grant of a temporary stay of execution of Petitioner Edward Lee Busby's sentence of death pending the Supreme Court's forthcoming decision in *Hamm v. Smith*, No. 24-872, 145 S. Ct. 2776 (2025).

In *Hamm*, the Supreme Court granted certiorari as to this question: Whether and how courts may consider the cumulative effect of multiple intelligent quotient (IQ) scores in assessing a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). The United States, as well as many amici states, including Texas, further urge the Court to revisit its larger Eighth Amendment framework governing how courts must evaluate individuals who may be intellectually disabled. Broadly, therefore, *Hamm* is likely to confirm the constitutional rule we must apply in capital cases like this one to determinations of intellectual disability. Even narrowly, *Hamm* is likely to instruct how we must evaluate multiple IQ scores above 70 in conjunction with different assessments, by different experts, of a capital defendant's deficits in adaptive behavior. Busby's circumstance closely parallels the Petitioner's in *Hamm*, and perhaps even more starkly underscores the need for clarity regarding lower court review of such evidence, considering that both the state and Busby agreed in the state habeas court that he qualified as intellectually disabled. Argument in *Hamm* was heard last year and the decision is expected any day or, at most, in weeks, as we near the end of the Court's term.

For this reason, I join the temporary stay of Busby's execution.[1] In a matter of life and death, we must be certain that we apply the proper

[1] Because *Hamm* is pending, I do not reach the disagreement between my colleagues. However, I am mindful of AEDPA deference, as applied by Judge Richman to the state habeas court's factual determination that Busby is not intellectually disabled.

constitutional rule as to whether and how to determine intellectual disability before states may execute defendants for capital crimes, especially when it is a rule that the Supreme Court imminently will clarify. *See, e.g.*, *Mobley v. Head,* 306 F.3d 1096, 1097 (11th Cir. 2002); *Reid v. Johnson,* No. 03-7916 (4th Cir. Dec. 17, 2003) (order granting preliminary injunction), *aff'd mem.*, *Johnson v. Reid,* 540 U.S. 1097 (2003); *cf. United States v. Perdomo*, 914 F.3d 356, 357 (5th Cir. 2019); *Navarrete v. Bondi*, 170 F.4th 1214, 1219 (9th Cir. 2026).

PRISCILLA RICHMAN, *Circuit Judge*, concurring in part and dissenting in part:

Edward Lee Busby is scheduled to be executed by the State of Texas on May 14, 2026. His previous habeas petition in federal court included an *Atkins*[2] claim; our court denied relief in 2019.[3] Busby subsequently returned to state court to once again press the claim that he is intellectually disabled and therefore ineligible for the death penalty. In 2021, the Texas Court of Criminal Appeals (TCCA) remanded Busby's *Atkins* claim to the state trial court "for a review of the claim's merits."[4] Busby's expert administered another IQ test, the WAIS-IV, in 2022, on which Busby scored 81, with a range of 77-85, when the Standard Error Measurement (SEM) is considered.[5] Based on this and previous IQ test scores, evidence of Busby's adaptive skills, expert reports, and testimony, the state trial court concluded Busby did not show, by a preponderance of the evidence, that he is intellectually disabled.[6] The TCCA adopted those findings and conclusions and denied habeas relief on the *Atkins* claim.[7]

In 2025, Busby filed a Rule 60(b) motion for reconsideration of the federal district court's denial of his habeas claim in 2015.[8] The district court

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[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[3] *See Busby v. Davis*, 925 F.3d 699, 702 (5th Cir. 2019).

[4] *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021).

[5] ROA.3511.

[6] *Texas v. Busby*, No. W011911, at 40 (2d Crim. Dist. Ct., Tarrant County, Tex. Oct. 12, 2023); ROA.4945.

[7] *See Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025).

[8] *Busby v. Guerro*, ___ F. Supp. 3d. ___, 2026 WL 1018340, at *1 (N.D. Tex. 2026).

held the motion was a successive habeas petition, transferred it to this court, and alternatively denied the Rule 60(b) motion.

Busby seeks a stay of execution and a certificate of appealability (COA) from this court to challenge the district court's judgment. Busby also seeks authorization to file a successive habeas petition. We consolidated these cases and have expedited consideration of the merits.

I concur in the grant of a certificate of appealability, and I agree with Judge Graves's opinion to the extent it concludes we should proceed to consider the merits of the *Atkins* claim. However, I respectfully dissent from the order granting a stay of execution and from this court's failure to deny Busby's claim for habeas relief. I would deny Busby's motion for a stay of execution, affirm the district court's denial of the Rule 60(b) motion, and deny Busby's petition for habeas relief.

I

Busby was convicted at trial and sentenced to death for the kidnapping, robbery, and murder of a seventy-eight-year-old woman.[9] The TCCA affirmed on direct review,[10] and the Supreme Court denied Busby's petition for certiorari.[11]

In Busby's first state habeas petition,[12] he asserted ineffective assistance of counsel (IAC) regarding trial counsel's mitigation investigation,

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[9] *Busby v. State*, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008), *cert. denied*, 555 U.S. 1050 (2008).

[10] *Id.*

[11] *Busby v. Texas*, 555 U.S. 1050 (2008).

[12] *See Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096 (Tex. Crim. App. Feb. 25, 2009) (not designated for publication).

among other grounds for relief.[13] State habeas counsel was granted funding to perform an independent mitigation investigation.[14] Following the investigation, his state habeas counsel withdrew the IAC claim, and the TCCA dismissed the petition.[15]

Busby then filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254.[16] The petition asserted seven claims, including, as relevant here, that Busby's death sentence violates the Eighth Amendment under *Atkins v. Virginia*[17] because he is intellectually disabled.[18] The district court stayed Busby's petition to permit him to exhaust that and other claims that had not been previously presented in state court.[19]

Busby filed another state habeas petition.[20] In support of his *Atkins* claim, Busby presented several IQ tests, consisting of: (1) a full-scale IQ (FSIQ) of 77 on the Wechsler Adult Intelligence Scale—Third Edition (WAIS-III) administered by Busby's defense expert, Dr. Timothy Proctor, who testified at trial in 2005; (2) an estimated FSIQ of 81 on the Beta-III administered by Dr. Proctor in 2005; (3) an FSIQ of 79 on the WAIS-III

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[13] *Busby v. Davis*, 925 F.3d at 703 (5th Cir. 2019); *Ex parte Busby*, 2009 WL 483096, at *1.

[14] *Busby v. Davis*, 925 F.3d at 703; *see also Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *14 (N.D. Tex. Mar. 10, 2015); *Ex parte Busby*, 2009 WL 483096, at *1.

[15] *Busby v. Davis*, 925 F.3d at 703-04; *Ex parte Busby*, 2009 WL 483096, at *1.

[16] *Busby v. Davis*, 925 F.3d at 704.

[17] 536 U.S. 304 (2002).

[18] *Busby v. Davis*, 925 F.3d at 704.

[19] *Id*; *Busby v. Stephens*, 2015 WL 1037460, at *2.

[20] *See Ex parte Busby*, No. WR-70, 747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam) (not designated for publication).

administered by Dr. Sven Helge in 2005; and (4) an FSIQ of 74 on the Wechsler Adult Intelligence Scale—Fourth Edition (WAIS-IV) in 2010.[21] Busby argued his scores should be adjusted downward to account for the Flynn Effect.[22] Busby also presented evidence of limitations in adaptive behavior consisting of school records and retrospective information from friends and family.[23] Busby did not present any expert who reached the conclusion that he was intellectually disabled.[24]

Because the *Atkins* claim was raised in a second state habeas petition and could have been presented in the first proceeding, the TCCA treated it as a successive habeas petition.[25] The TCCA denied the claim as an abuse of the writ.[26]

Busby returned to federal court. The district court denied habeas relief in 2015, concluding that Busby's *Atkins* claim was procedurally defaulted.[27] The district court additionally denied Busby's requests for funding to obtain an expert report opining on whether he is intellectually

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[21] *See Busby v. Davis*, 925 F.3d at 716-17; *Busby v. Stephens*, 2015 WL 1037460, at *10, *20.

[22] *See Busby v. Davis*, 925 F.3d at 716-17; *In re Cathey*, 857 F.3d 221, 227 (5th Cir. 2017) (noting the Flynn Effect posits that "standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population" (quoting *Wiley v. Epps*, 625 F.3d 199, 203 n.1 (5th Cir. 2010), *as revised* (Nov. 17, 2010))).

[23] *Busby v. Davis*, 925 F.3d at 719, 724.

[24] *See id.* at 718.

[25] *Id.* at 705; *Ex parte Busby*, 2013 WL 831550, at *1; *see also Ex parte Blue*, 230 S.W.3d 151, 156 (Tex. Crim. App. 2007); TEX. CODE CRIM. PROC. art. 11.071, § 5(a).

[26] *See Ex parte Busby*, 2013 WL 831550, at *1.

[27] *Busby v. Stephens*, No. 4:09-CV-160-O, 2015 WL 1037460, at *18-21, *28 (N.D. Tex. Mar. 10, 2015).

disabled,[28] adhering to our then-controlling rule that a petitioner must demonstrate that his claim is procedurally viable to be entitled to funds to develop a claim.[29]

We granted a COA permitting Busby to challenge the district court's finding of procedural default.[30] Although we held the TCCA's ruling was a merits decision such that his *Atkins* claim was not procedurally defaulted, we also held the TCCA's disposition of the claim withstood scrutiny under the Antiterrorism and Effective Death Penalty Act (AEDPA).[31] The Supreme Court denied certiorari.[32]

Busby filed another state habeas application and again raised his *Atkins* claim, contending that it relied on a previously unavailable factual or legal basis.[33] This was the first proceeding at which Busby produced an expert report opining that he is intellectually disabled.[34] The TCCA stayed Busby's execution and remanded his claim to the trial court for review on the

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[28] ROA.1869-77.

[29] ROA.1869-71; *see Woodward v. Epps*, 580 F.3d 318, 334 (5th Cir. 2009) (noting that denial of funding for investigative or expert services "has been upheld 'when a petitioner has . . . failed to supplement his funding request with a viable constitutional claim that is not procedurally barred'" (quoting *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005))).

[30] *Busby v. Davis*, 677 F. App'x 884, 887-89, 893 (5th Cir. 2017) (unpublished).

[31] *Busby v. Davis*, 925 F.3d 699, 706-07, 710, 720 (5th Cir. 2019) (applying 28 U.S.C. § 2254).

[32] *Busby v. Davis*, 589 U.S. 1141 (2020).

[33] ROA.4960-5020; *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021); *see* TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1).

[34] *See Busby v. Davis*, 925 F.3d at 706 (2019 federal habeas opinion noting absence of expert report opining that Busby was intellectually disabled).

merits.[35] In the state trial court, Busby presented the same evidence discussed above as well as an FSIQ of 81 on the WAIS-IV, which was administered by Dr. Gilbert Martinez in 2022.[36] Dr. Martinez opined that Busby's adjusted IQ scores fell within the range of intellectual disability, and his deficits in adaptive functioning met the diagnostic criteria.[37] The State's expert, Dr. Antoinette McGarrahan, reviewed the historical data and Dr. Martinez's 2022 report and stated she could not "controvert the conclusion and opinion of Dr. Martinez that Mr. Busby [met] the full diagnostic criteria for intellectual disability according to current standards."[38]

The state submitted proposed findings of fact and conclusions of law that would have modified Busby's death sentence into a life sentence.[39] However, the state trial court did not adopt them. It declined to adjust Busby's IQ scores to account for the Flynn Effect and concluded that Busby's adaptive-behavior evidence did not establish that he was intellectually disabled.[40] The court concluded Busby failed to demonstrate significantly subaverage intellectual functioning or significantly subaverage deficits in adaptive functioning and recommended Busby's claim be denied.[41] The TCCA adopted the trial court's findings and conclusions in substantial

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[35] ROA.5525-27; *Ex parte Busby*, 2021 WL 369737, at *1.

[36] ROA.3490, 4925.

[37] ROA.3509, 4926, 4937.

[38] ROA.3510-15, 4926-28.

[39] ROA.3533.

[40] ROA.4930, 4941-45.

[41] ROA.4935, 4943, 4948.

part and denied Busby's claim.[42] The Supreme Court again denied certiorari.[43]

Busby then filed a Rule 60(b) motion for reconsideration in the federal district court, arguing that the Supreme Court's 2018 decision in *Ayestas v. Davis*[44] overruled this circuit's rule that required the district court to deny his request for funding, and that the denial of funding to obtain an expert report constituted a defect in the integrity of his federal habeas proceeding.[45] The district court held the motion was a successive habeas petition, transferred it to our court, and alternatively denied the Rule 60(b) motion as untimely and not presenting extraordinary circumstances.[46]

Busby now seeks a COA to appeal the district court's holding that his Rule 60(b) motion was a successive habeas petition and its alternative denial of his Rule 60(b) motion. Busby has also moved for authorization from our court to file a successive habeas petition. I concur in granting a COA, and in light of the pending execution date, I agree that we should proceed to the merits of his appeal.[47]

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[42] ROA.5432-34; *Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025) (not designated for publication).

[43] *Busby v. Texas*, 146 S. Ct. 371 (2025).

[44] 584 U.S. 28 (2018).

[45] ROA.3441-3483.

[46] ROA.3601-3609.

[47] *See United States v. Gobert*, 139 F.3d 436, 439 (5th Cir. 1998); *Mata v. Johnson*, 99 F.3d 1261, 1265 (5th Cir. 1996), *vacated in part on reh'g by Mata v. Johnson*, 105 F.3d 209 (5th Cir. 1997).

II

Busby presents three issues in support of his Rule 60(b) motion, and my conclusions are summarized beneath each of them:

(1) whether a motion that asks the district court to reopen a federal habeas proceeding to consider the *Atkins* claim that could have previously existed but for the district court's error in denying funding can proceed pursuant to Rule 60 of the Federal Rules of Civil Procedure;

Busby asserts in his briefing in our court that in the most recent state court proceedings, the state habeas trial court "granted Busby the funds necessary to obtain an opinion from an expert regarding whether Busby is intellectually disabled,"[48] and an expert has concluded that he is intellectually disabled. Since Busby has received funding and fully developed his *Atkins* claim in state court, I would hold there is no need to reopen his federal habeas proceeding on this ground.

(2) whether such a motion is timely if the Movant has diligently pursued relief on his *Atkins* claim since federal habeas counsel was appointed to represent him;

I submit that this issue is moot.

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[48] Busby Brief at 11; *see also id.* at 3 ("Busby has obtained the funds necessary to have an expert opine on whether he is intellectually disabled; consequently, the record now contains precisely the report from Dr. Martinez that this Court previously found to be lacking."); *id.* at 19 ("we now know that the funds could have yielded (and have since yielded) precisely the item both the district court and this Court faulted Busby for not previously possessing: an opinion from an expert opining that he is intellectually disabled").

(3) whether a Rule 60 motion presents extraordinary circumstances when both Counsel for the State and Counsel for Movant have asked the state habeas trial court to find that the Movant is ineligible for execution.

As discussed more fully below, in my view, Busby's Rule 60(b) motion seeks habeas relief. I therefore do not proceed under Rule 60(b), but instead apply AEDPA in considering Busby's *Atkins* claim.

In a footnote, Busby's brief asserts that his "principal challenge is to the district court's denial of funding," and that it is "not entirely certain that Busby requires a COA. Nevertheless, and out of an abundance of caution, and given the close proximity of the merits to the defect in the proceedings in the district court, Busby is hereby requesting from this Court a COA."[49] Just last night, on May 7, 2026, Busby submitted a brief arguing his petition for habeas is not successive or should not be treated as such. Though that submission was late, I consider it since a person's life is at issue. I agree that a certificate of appealability should be granted as to the district court's denial of habeas relief on the *Atkins* claim. In light of the nearness of the execution date, I proceed to the merits of that claim based on the briefing before us.

III

I begin with the district court's determination that Busby's Rule 60(b) motion was a successive habeas petition. The Supreme Court has explained that "[i]n some instances, a Rule 60(b) motion will contain one or more 'claims.'"[50] For example, "a motion might seek leave to present 'newly

[49] Busby's Brief at 12 n.4.

[50] *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005).

discovered evidence,' in support of a claim previously denied."[51] "A motion can also be said to bring a 'claim' 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."[52] "A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a 'habeas corpus application,' at least similar enough that failing to subject it to the same requirements would be 'inconsistent with' the statute."[53] Conversely, "[w]hen no 'claim' is presented, there is no basis for contending that the Rule 60(b) motion should be treated like a habeas corpus application."[54]

Busby's Rule 60(b) motion is "if not in substance 'a habeas corpus application,' at least similar enough" that it "should be treated accordingly."[55] Busby's motion is analogous to one "seek[ing] leave to present 'newly discovered evidence,' in support of a claim previously denied,"[56] which the Court has explained is a paradigm example of a pleading that is in substance a habeas petition. Busby's motion argues that "[w]hen the Report obtained through the funds th[e district c]ourt previously (and incorrectly) withheld is considered, it is clear that Busby is ineligible for execution because of intellectual disability."[57] His motion reasserts his

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[51] *Id.* at 531 (quoting FED. R. CIV. P. 60(b)(2)).

[52] *Id.* at 532 (footnote omitted).

[53] *Id.* at 531 (quoting 28 U.S.C. § 2254).

[54] *Id.* at 533.

[55] *Id.* at 531 (quoting 28 U.S.C. § 2254).

[56] *Id.* (quoting FED. R. CIV. P. 60(b)(2))

[57] ROA.3442.

Atkins claim in light of new evidence—the expert reports obtained after his federal habeas proceedings. Indeed, Busby's motion for reconsideration in the federal district court comes after he "filed in the convicting court his second subsequent habeas application," a reassertion of his *Atkins* claim on the basis of the newly obtained expert reports, and then litigated the claim on the merits in the TCCA.[58]

Busby argues his Rule 60(b) motion is not a habeas petition "because it addresses a defect in the integrity of the prior proceeding . . . . Specifically, the [m]otion addresses the district court's wrongful denial of the funds that were reasonably necessary to obtain a report from an expert opining that Busby is intellectually disabled."[59] Busby is correct that a Rule 60(b) motion is not a habeas petition when it "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings."[60] However, the denial of funding is only nominally at issue; as already noted, Busby has already obtained the expert reports he sought funding to obtain and has no further need for funds. Now that he has the reports, he seeks to re-assert his challenge to the denial of the *Atkins* claim.

A central issue is whether Busby's motion presents a *successive* habeas petition such that the district court was required to transfer it to our court and we would be required to apply the standards in 28 U.S.C. § 2244. Busby asserts that his *Atkins* claim, as now presented, is "new" because an expert has opined for the first time that Busby is intellectually disabled, and the

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[58] *Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025) (not designated for publication).

[59] Busby Br. at 14.

[60] *Crosby*, 545 U.S. at 532.

expert witness for the Tarrant County district attorney's office agrees with that assessment. However, I would assume without deciding that Busby's motion is "new" and not a successive habeas petition, because even if the stringent standards of 28 U.S.C. § 2244(b) are inapplicable,[61] Busby's *Atkins* claim fails on the merits under AEDPA, 28 U.S.C. § 2254(d)(2). I note that the TCCA concluded that Busby's most recent request for habeas relief in that court based on *Atkins* was not barred as successive under state law.[62]

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[61] 28 U.S.C. § 2244(b) provides:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless-
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> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

[62] *See Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021); TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(1), which provides:

> (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered

My review of the TCCA's denial of Busby's *Atkins* claim on the merits therefore proceeds on the assumption that AEDPA governs.[63] A federal court cannot grant habeas relief under 28 U.S.C. § 2254(d)

> unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[64]

The state trial court judge who presided over Busby's 2005 jury trial was the same judge who conducted the September 9, 2023 hearing on Busby's most recent *Atkins* submission in state court.[65] The state trial court's findings of fact and conclusions of law applied the definition of intellectual disability from *Atkins*, *Moore v. Texas,*[66] and *Petetan v. State*.[67]

> application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application. . . .

[63] *See also Brumfield v. Cain*, 576 U.S. 305, 310-11 (2015) (applying AEDPA to an *Atkins* claim first raised in state habeas proceedings then pursued in federal habeas petition); *Busby v. Davis*, 925 F.3d 699, 710 (5th Cir. 2019).

[64] 28 U.S.C. § 2254(d).

[65] *See Texas v. Busby*, No. W011911, at 1 (2d Crim. Dist. Ct., Tarrant County, Tex. Oct. 12, 2023) (Findings of Fact and Conclusions of Law on Second Subsequent Postconviction Habeas Corpus Application and Order) (reflecting that the court considered "the Court's personal recollections and credibility determinations" in ruling on the most recent state habeas submission); ROA.4906; *Texas v. Busby*, No. W011911, at 43 ("Based on this Court's review of the law, the presented evidence, the parties' arguments, and this Court's own recollections and credibility determinations, this Court RECOMMENDS that relief be denied."); ROA.4948.

[66] 586 U.S. 133, 135 (2019).

[67] 622 S.W.3d 321, 338 (Tex. Crim. App. 2021) (explaining "we apply contemporary clinical standards—the framework set forth in the DSM–5," citing

The state habeas trial court recognized that "intellectual disability consists of three core elements: (1) intellectual-functioning deficits, (2) adaptive deficits, (3) and the onset of these deficits while still a minor."[68] These standards are not contrary to or an unreasonable application of clearly established federal law.[69] The state habeas trial court further held "Busby must establish all elements of intellectual disability by a preponderance of the evidence."[70] I do not opine on whether that is the appropriate burden of proof or whether a more demanding standard is required. Applying the less demanding burden of proof to Busby's claim (preponderance of the evidence as opposed to clear and convincing evidence), I assess whether the TCCA *unreasonably* determined that, in light of the facts adduced in the state court proceedings, Busby failed to establish that he is intellectually disabled.[71]

The Supreme Court explained the standard of review under 28 U.S.C. § 2254(d)(2) in *Brumfield*, a case involving an *Atkins* claim:

We may not characterize these state-court factual determinations as unreasonable "merely because [we] would have reached a different conclusion in the first instance." *Wood v. Allen*, 558 U.S. 290, 301 (2010). Instead, § 2254(d)(2) requires that we accord the state trial court substantial deference. If "'[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Ibid.* (quoting *Rice v. Collins*,

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American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013)).

[68] *Texas v. Busby*, No. W011911, at 9; ROA.4914.

[69] *See Busby v. Davis*, 925 F.3d 699, 711-15 (5th Cir. 2019).

[70] *Texas v. Busby*, No. W011911, at 10; ROA.4915.

[71] *See* 28 U.S.C. § 2254(d)(2).

546 U.S. 333, 341–342 (2006)). As we have also observed, however, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review," and "does not by definition preclude relief." *Miller–El v. Cockrell*, 537 U.S. 322, 340 (2003).[72]

The state habeas trial court observed, "[e]xcept for Martinez's 2022 report and testing and McGarrahan's reviewing report, [Busby's evidence] appears to be substantially the same evidence considered by the federal courts."[73] As to one of the three factors that must considered in assessing intellectually disability, all agree that the onset of Busby's intellectual-functioning and adaptive deficits occurred when he was a minor. But there is disagreement among the experts as to the import of Busby's IQ scores and evidence of adaptive deficits.

There is considerable evidence regarding IQ tests administered to Busby. The first known IQ test was in 2001, and it resulted in a score of 96. All parties agree that this test should not be considered.

Prior to Busby's murder trial, Dr. Proctor, who was an expert witness for Busby at that trial, administered an IQ test to Busby in 2005.[74] Busby received a full scale IQ score of 77 on the WAIS-III.[75] Judge Graves's opinion asserts that Dr. Proctor was retained and testified only as a mitigation expert. Had Dr. Proctor concluded that Busby was intellectually disabled, that would have been the ultimate basis for "mitigation." But, in Dr. Proctor's expert opinion, Busby was not intellectually disabled, and therefore, Busby did not pursue an intellectual disability claim at that time. Busby received a full scale

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[72] *Brumfield v. Cain*, 576 U.S. 305, 313-14 (2015) (alterations in original).

[73] *Texas v. Busby*, No. W011911, at 17; ROA.4922.

[74] ROA.11000.

[75] ROA.11100, 11113.

IQ score of 77 on the WAIS-III that Dr. Proctor administered.[76] The SEM for the WAIS-III was approximately "plus or minus five," according to Dr. Proctor's trial testimony.[77] Using that SEM, Busby's IQ was in a range of 72-82. In 2022, the state's expert, Dr. McGarrahan, prepared a report in which she concluded that Busby's score of 77 on that WAIS-III administered by Dr. Proctor resulted in a range of 73-82.[78] Busby asserted in his second state habeas petition that due to the "Flynn Effect," the score of 77 should be adjusted to 73.7.[79] Dr. McGarrahan's report concluded that if the Flynn effect were considered, the score would be 74.[80]

Weeks after Dr. Proctor's assessment in 2005, the State's psychologist, Dr. Helge, re-administered the WAIS-III, and Busby scored 79.[81] The IQ range would be 74-84, based on that test and Dr. Proctor's understanding of its SEM. In 2022, the state's expert, Dr. McGarrahan, said in her report that after applying the SEM, the score of 79 on Dr. Helge's 2005 test would be 75-83, and if considering the Flynn effect, the score would be 76.[82]

Dr. Proctor administered another IQ test on the eve of trial in 2005—the Beta-III—on which Busby scored 81.[83] Dr. Proctor testified that this

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[76] ROA.11100, 11113.

[77] ROA.11117.

[78] ROA.3511.

[79] ROA.4993.

[80] ROA.3512.

[81] ROA.11137.

[82] ROA.3512.

[83] ROA.11101, 11113.

score was "very consistent" with Busby's 2005 WAIS-III score.[84] The SEM for the Beta-III is not in the trial court record. However, in 2022, Dr. McGarrahan's report concluded that after applying the SEM, the range would be 72-90,[85] and considering the Flynn effect, the score would be 78.6.[86]

In 2010, another expert for Busby, Dr. Martinez, administered the WAIS-IV, resulting in a score of 74 and a range of 70-79, after applying the SEM.[87] Dr. McGarrahan's 2023 report says that considering the Flynn effect, the score would be 73.1.[88]

Twelve years later, in 2022, Dr. Martinez repeated the WAIS-IV, and Busby's Full Scale IQ score was 81.[89] Dr. McGarrahan's 2023 report reflects that after applying the SEM, the range would be 77-85, and when considering the Flynn effect, the score would be 76.5.[90] This latter test resulted in an IQ score above 75, even after applying the SEM.

In *Brumfield v. Cain*,[91] the Supreme Court indicated that an IQ score higher than 75, after considering the SEM (meaning that the lowest value in the IQ range was above 75), "could render the state court's determination [that a defendant had failed to establish he was intellectually disabled]

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[84] ROA.11113.

[85] ROA.3512.

[86] ROA.3512.

[87] ROA.3512.

[88] ROA.3511.

[89] ROA.3508.

[90] ROA.3511.

[91] 576 U.S. 305 (2015).

reasonable."[92] The Supreme Court similarly indicated in *Hall v. Florida*[93] that if the only IQ score, once the SEM is applied, is above 75 at the lower end of the range, that would not indicate intellectual disability, and a court would not have to consider whether there were deficits in adaptive functioning.[94] The Court said, "For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing."[95] However, the Supreme Court also said in *Hall* that, "when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor."[96] Accordingly, I think it prudent to consider all that each of the experts have said about the IQ tests as well as deficits in adaptive functioning.

For ease of reference, and to summarize the various IQ scores and adjustments Dr. McGarrahan would apply, I include an insert with a table from Dr. McGarrahan's 2023 report:

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[92] *Id.* at 316.

[93] 572 U.S. 701 (2014).

[94] *Id.* at 714, 722.

[95] *Id.* at 714.

[96] *Id.*

Intellectual Deficits: IQ Testing of Mr. Busby (in chronological order):

Mr. Busby has undergone several intelligence tests. The following is a summary of those assessments.

Date & Examiner	Test Given & Year Normed	FSIQ	Percentile Rank	95% Confidence Interval	Considering Flynn Effect (.3 points per year)
1/1/2001 (Unknown examiner)	Unknown test in TDCJ	96	39th	Approximately 91-101	Unknown
10/14/2005 (Dr. Tim Proctor)	WAIS-III (1995)	77	6th	73-82	74 (.3 x 10 = 3)
11/4/2005 (Dr. Tim Proctor)	Beta-III (1997)	81	10th	72-90	78.6 (.3 x 8 = 2.4)
Unknown date but said was given "weeks" after Dr. Proctor's WAIS-III (Dr. Sven Helge)	WAIS-III (1995)	79	8th	75-83	76 (.3 x 10 = 3)
2/11/2010 (Dr. Gilbert Martinez)	WAIS-IV (2007)	74	4th	70-79	73.1 (.3 x 3 = .9)
2/25/2022 (Dr. Gilbert Martinez)	WAIS-IV (2007)	81	10th	77-85	76.5 (.3 x 15 = 4.5)

[97]

The state habeas trial court and the TCCA acknowledged that "[p]ractice effects and the 'Flynn Effect' may affect test scores," but noted "[t]hey do not operate to change an individual score."[98] The state court's decision not to adjust the scores for the Flynn effect was not an unreasonable determination of the facts. Neither this court nor the Supreme Court has recognized that the Flynn effect requires the adjustment of individual IQ

[97] ROA.3511.

[98] *See Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025) (adopting trial court's findings of fact, with exceptions); *Texas v. Busby*, No. W011911, at 11 (2d Crim. Dist. Ct., Tarrant County, Tex. Oct. 12, 2023) (trial court's discussion of Flynn effect); ROA.4916-17.

scores in an *Atkins* claim.[99] The Supreme Court has observed that the Flynn Effect is "controversial."[100]

As to the practice effect, Dr. Martinez used that concept to opine that Busby's score of 81 on the 2022 WAIS-IV should be lowered to approximately 74. Dr. McGarrahan said that the practice effect could affect IQ scores, but she did not adjust Busby's 81 score on the 2022 test in that regard. The state habeas trial court found that Dr. Martinez did not explain how he derived the practice effect to lower Busby's score from 81 to 74.[101] That court concluded that this adjustment was "arbitrary" and that "no guidelines, no quantitative measures, and no limits" had been shown."[102] The state habeas trial court concluded that "The evidence of the practice effect, such as there is, is not credible, and the Court will not attempt to apply an unspecified practice-effect number to Busby's scores."[103] This assessment of the evidence was not unreasonable. Even if there is general recognition among experts that there may be a practice effect when an IQ test is administered more than once within a year, there is no evidence in the record before us as to how the practice effect could be quantified, much less a scientifically sound explanation as to how a quantification of an adjustment

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[99] *See Brumfield v. Cain*, 808 F.3d 1041, 1060 n.27 (5th Cir. 2015) ("The State correctly points out that the Fifth Circuit has not recognized the Flynn effect."); *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016) ("*Atkins* does not mandate an adjustment for the Flynn Effect . . . and no decision of the Supreme Court squarely addresses the issue.") (citation modified); *Black v. Carpenter*, 866 F.3d 734, 745 (6th Cir. 2017) ("[N]either *Brumfield* nor *Hall* imposes any such requirement—indeed, neither case even mentions the Flynn Effect.").

[100] *Dunn v. Reeves*, 594 U.S. 731, 736 (2021).

[101] *Texas v. Busby*, No. W011911, at 26-27; ROA.4931-32.

[102] *Texas v. Busby*, No. W011911, at 27; ROA.4932.

[103] *Texas v. Busby*, No. W011911, at 27; ROA.4932.

could be quantified. Further, there is no generally accepted scientific evidence cited in this record that there is a practice effect when the same test is administered many years apart.

The state habeas trial court and TCCA considered the adaptive behavior evidence put forth by Dr. Martinez in his 2022 report[104] and discussed in Dr. McGarrahan's 2023 report.[105] At this point, the analysis boils down to a disagreement among the experts. Prior to the trial in which Busby was convicted of murder, Busby's expert Dr. Proctor administered the Wide Range Achievement Test (WRAT), Third Edition, which measured Busby's educational abilities in reading, spelling and math.[106] Busby tested at the fourth-grade level in reading, third-grade level in spelling, and sixth-grade level in math.[107] Dr. Proctor testified at trial that Busby was not intellectually disabled, and that the state's expert, Dr. Helge, agreed that Busby was not intellectually disabled.

In 2010, Dr. Martinez's report concluded that Busby's IQ was "borderline."[108] Dr. Martinez did not opine at that time that Busby was intellectually disabled. Twelve years later, in a subsequent report, Dr. Martinez relied on interviews and affidavits from individuals who knew Busby, as well as two ABAS-III standardized questionnaires completed by Busby's sisters after he was convicted and received a death sentence, and after he first asserted an *Atkins* claim.[109] The state habeas trial court

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[104] ROA.3484-3509.

[105] ROA.3510-3515.

[106] ROA.11101.

[107] ROA.11111-12.

[108] ROA.4344.

[109] ROA.3492-3508.

considered this evidence but found it to be "internally inconsistent."[110] The trial court weighed the credibility of this evidence in light of the sources and context of the evidence and concluded "that the preponderance of the adaptive-deficit evidence is, at best, conflicting and, at worst, suspect."[111] With respect to objective measures of Busby's adaptive deficits, the state habeas trial court observed in the remanded state court proceedings:

> Proctor administered a wide-range achievement test (WRAT) to Busby in 2005. [36 RR 42] That test showed his reading skill was at a fourth-grade level, spelling skill was at a third-grade level, and math skill was at a sixth-grade level. [36 RR 51-52] Martinez' s 2022 WRAT had similar results. [Busby Proposed FOF & COL Ex. A, at 7] Proctor testified that although these results showed a learning disability, Busby is not intellectually disabled. [36 RR 51, 64] Martinez concluded the opposite. [Busby FOF & COL Ex. A, at 26][112]

The state habeas trial court discussed conflicting evidence regarding Busby's adaptive deficits and concluded Busby had failed to establish that he was intellectually disabled by a preponderance of the evidence. The court based these findings not only on the full record, but also on its "own recollections and credibility determinations."[113] The TCCA adopted those findings and conclusions. Again, I cannot say this decision "was based on an

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[110] *Texas v. Busby*, No. W011911, at 36; ROA.4941; *see Ex parte Busby*, No. WR-70, 747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025) (adopting trial court's findings of fact, with exceptions).

[111] *Texas v. Busby*, No. W011911, at 38; ROA.4943.

[112] *Texas v. Busby*, No. W011911, at 32; ROA.4937.

[113] ROA.4948.

unreasonable determination of the facts in light of the evidence presented."[114]

* * *

For the foregoing reasons, I would grant the COA, affirm the district court's judgment, deny Busby's habeas petition, and deny the stay of execution.

[114] 28 U.S.C. § 2254(d).

JAMES E. GRAVES, JR., *Circuit Judge*, concurring in part, dissenting in part:

Edward Lee Busby filed a Rule 60(b) motion for relief from judgment in the district court seeking to reopen his federal habeas after he was denied necessary funding for an expert on his intellectual disability. *See* Fed. R. Civ. P. 60(b). The district court denied relief and transferred the motion to this court as a successive habeas petition. Busby appeals the district court's findings that the motion constitutes a successive habeas petition, that it was untimely, and that it does not present the extraordinary circumstances required for Rule 60(b) relief. Busby further seeks a Certificate of Appealability (COA) and a stay of execution. The state has filed opposition, asserting that the district court was correct. Separately, Busby has timely filed a Motion for Order Authorizing Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2244. Because I would also grant a stay, I concur in part. However, I disagree with footnote one, and I would also grant a COA and grant Busby's requested relief. Thus, I respectfully concur in part and dissent in part.

In 2011, the district court denied Edward Lee Busby's application for necessary funds to obtain an expert for purposes of pursuing his claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). *See* ECF NDTX 4:09-cv-00160, 55; *see also* 18 U.S.C. § 3599(f). Indeed, in affirming the district court's denial of relief, this court repeatedly pointed to the lack of expert testimony that Busby is intellectually disabled. *See Busby v. Davis*, 925 F.3d 699, 706, 717, 718, 720 (5th Cir. 2019).[115]

In 2018, the Supreme Court decided *Ayestas v. Davis*, 584 U.S. 28, 45-46 (2018), holding that this circuit's requirement that a movant show a

[115] That is the reason I concurred in the judgment only.

"substantial need" to demonstrate that funds were "reasonably necessary" was not supported by the text of 18 U.S.C. § 3599. Thereafter, the state court granted Busby the necessary funding to pursue his claim. However, the state court ultimately denied habeas relief. Busby then returned to district court with this Rule 60(b) motion to reopen his federal habeas and pursue the *Atkins* claim with the necessary evidentiary support. *See* Fed. R. Civ. P. 60(b). The district court denied Busby's relief and transferred the motion to this court as a successive habeas petition. Busby appeals the district court's findings.

Judge Richman's opinion grants a COA and says that it assumes without deciding that Busby's motion is not a successive habeas petition. I agree that a COA should be granted and that Busby's Rule 60(b) motion is not a successive habeas petition. *See Gonzalez v. Crosby,* 545 U.S. at 535-36, 538; *see also Crutsinger v.* Davis, 929 F.3d 259, 265-66, 268 (5th Cir. 2019); *Buck v. Davis*, 580 U.S. 100, 124 (2017). But she and I then part ways. To be clear, my writing is in no way intended to minimize the seriousness of the heinous crime for which Busby has been convicted or its impact on the family and loved ones of Laura Crane. *See Busby v. State*, 253 S.W.3d 661, 663 (Tex. Crim. App. 2008). I am simply applying established law in deciding whether he is eligible for execution under the Eighth Amendment.

Judge Richman then reviews the trial court's decision under 28 U.S.C. § 2254(d). As she states, intellectual disability must include (1) intellectual functioning deficits, (2) adaptive skills deficits, (3) the onset of which occurs prior to age 18. Further, as she acknowledges, both Busby's expert, Dr. Gilbert Martinez, and the state's expert, Dr. Antoinette McGarrahan, reached the conclusion that Busby's intellectual disability renders him ineligible for execution. As she also concedes, the state submitted proposed findings of fact and conclusions of law to find Busby intellectually disabled under *Atkins* and reform his sentence to life in prison.

But the state trial court did not adopt those findings and conclusions that were informed by the medical experts. Instead, the trial court relied on its own recollections and credibility determinations from a trial that did not consider intellectual disability.

Judge Richman states that "[t]he state trial court judge who presided over Busby's 2005 jury trial was the same judge who conducted the September 9, 2023 hearing on Busby's most recent *Atkins* submission in state court." In the footnote citation, she states:

> *See Texas v. Busby*, No. W011911, at 1 (2d Crim. Dist. Ct., Tarrant County, Tex. Oct. 12, 2023) (reflecting that the court considered "the Court's personal recollections and credibility determinations" in ruling on the most recent state habeas submission); *id* . at 43 ("Based on this Court's review of the law, the presented evidence, the parties' arguments, and this Court's own recollections and credibility determinations, this Court RECOMMENDS that relief be denied.").

Richman Op. n. 57.

In the very next footnote, she offers a citation for *Moore v. Texas*, 586 U.S. 133, 139 S.Ct. 666, 668 (2019) (*Moore II*). *See* n. 58. In an earlier opinion of that case, the United States Supreme Court granted certiorari in part and vacated the Texas Court of Criminal Appeals (TCCA) denial of habeas relief. *See Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*). In doing so, the Supreme Court reiterated: "As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'" *Id*. at 5 (quoting *Hall v. Florida*, 572 U.S. 701, 709, 721 (2014)). "That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus." *Id*. at 5, 6. Further, the Court held that the *Briseno* factors then-considered by Texas courts in evaluating *Atkins* claims were based on superseded medical standards that "create an unacceptable risk that a person with intellectual disabilities will be

executed." *Id.* at 6 (internal marks and citation omitted). While Texas no longer uses the *Briseno* factors, they were in effect during previous litigation of Busby's case. Further, the trial court and Judge Richman are "diminishing the force of the medical community's consensus" regarding Busby's intellectual disability and creating "an unacceptable risk that a person with intellectual disabilities will be executed" in violation of the Eighth Amendment by substituting their own opinions for those of the medical experts. *See Moore I*, 581 U.S. at 5, 6. The medical community's consensus here is that Busby is intellectually disabled and ineligible for execution. Every intellectual disability expert to have offered an opinion in this matter has concluded that Busby is intellectually disabled. This is not a situation where one expert says he is and one expert says he is not. Moreover, the state properly attempted to concede the issue in the state trial court based on the evidence. But the state trial judge refused to accept the medical community's consensus and chose to rely on his own "recollections." Judge Richman now attempts to go back through previous evidence that was not offered for the purpose of establishing whether Busby is intellectually disabled and somehow contradict the only medical experts to have offered reports on whether Busby is intellectually disabled. There is no support for such a proposition. She also offer no support to establish that a trial judge's "recollections" of a trial some 20 years ago somehow carry more weight than any actual expert offered by either the state or the defense. There was no *Atkins* issue at trial. The only evidence that remotely touches on the issue was offered for mitigation. Regardless, the medical experts have included all of that evidence in their comprehensive reviews which form the basis for their respective conclusions and the consensus of the medical community. All of which, she ignores.

For purposes of her report, McGarrahan reviewed: the raw psychological test data from Dr. Timothy Proctor's pre-trial examination on October 14 and November 4 of 2005; the affidavit of Dr. Gilda Kessner, dated

March 21, 2008; the reports, assessments and test results from Martinez from February 11, 2010, and July 11, 2022; the declaration of Dr. Bekh Bradley-Davino, dated May 19, 2010; various records, including school records and Texas Department of Criminal Justice records; and the 2021 habeas application and its exhibits. She also conducted clinical interviews or assessments with various other individuals. Martinez likewise considered all of that and more, along with assessing Busby in person.

In analyzing the applicable IQ scores, Judge Richman and the state court rely heavily on evidence not offered at the time for purposes of establishing intellectual disability. For example, Judge Richman discusses Proctor's assessment in 2005 and Busby's full scale IQ score of 77 on the WAIS-III. Proctor was hired as a mitigation expert, not an intellectual disability expert. Additionally, the definitions and factors to be considered have changed since then. Regardless, both of the intellectual disability experts considered the evidence from Proctor's assessment under the now-applicable law and offered expert opinions that Busby is intellectually disabled.

Regarding the above-referenced 2005 WAIS-III examination, Judge Richman is correct that the full scale score was 77, with a standard error of measurement (SEM) of approximately plus or minus five, and that using that SEM would result in a range of 72-82. She then says that that "McGarrahan's report concluded that if the Flynn effect were considered, the score would be 74." While that is what her report states, Judge Richman neglects to say that a 74 would result in a range of 69-77 based on the SEM. Further, McGarrahan's report also stated: "The confidence interval, at the lower end, is in the intellectual disability range referenced above (generally 65-75), even without adjusting for or considering the Flynn effect." It is unclear how she arrived at 73 after subtracting 5 from 77, though.

Regarding each score that is discussed, Judge Richman takes the full scale score and then states what it would be if *either* the SEM *or* the Flynn effect were considered. Even though Busby has sufficient scores in the intellectual disability range without considering the Flynn effect, if the Flynn effect were to apply, then the SEM would still be applied to that adjusted full scale score. For example, just weeks after Proctor's assessment, the state's psychologist readministered the same WAIS-III and Busby scored 79.129. While that is a textbook example of the Flynn effect, even without it, that score would put Busby in the intellectual disability range with 74-84. With the Flynn effect, as McGarrahan said, a 76 score would put Busby in the 71-81 range.

Busby scored 81.130 on the Beta-III in 2005. Judge Richman notes that Proctor correlated this with his 2005 WAIS-III score. Further, she states that "[t]he SEM for the Beta-III is not in the trial court record. However, in 2022, Dr. McGarrahan's report concluded that after applying the SEM, the range was 72-90, and considering the Flynn effect, the score would be 78.6." After applying the SEM, as we are required to do, this score is within the intellectual disability range without considering the Flynn effect.

As the Supreme Court has said, "IQ test scores should be read not as a single fixed number but as a range." *Hall,* 572 U.S. at 712. "A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself." *Id.* at 713. "The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score." *Id.* The Court has further said:

> Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor. . . . In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may

> result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.

Id. at 714 (internal citations omitted).

The Supreme Court reiterated:

> For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing.

Id. The Court also noted that a significant majority of states "implement the protections of *Atkins* by taking the SEM into account, thus acknowledging the error inherent in using a test score without necessary adjustment. This calculation provides 'objective indicia of society's standards' in the context of the Eighth Amendment." *Id.*

Busby has only one score that places him just barely outside the intellectual disability range—the WAIS-IV from 2022 with a full scale score of 81. After the SEM, the range would be 77-85. If the Flynn effect was considered, the full scale score would be 76.5. If we considered the Flynn effect, we would then apply the SEM to 76.5, resulting in a range of 72.5-80.5. Regardless, even if we do not consider the Flynn effect, the Supreme Court has made clear that one or even two scores outside the intellectual disability range are not sufficient to discount the lower ranges of other scores. *See Moore I*, 581 U.S. at 10.

Moreover, there are additional factors that must be considered. Judge Richman also largely discounts all of the evidence offered regarding Busby's adaptive skills deficits, contrary to the consensus of medical experts. The only experts to have evaluated Busby for such a determination both offered detailed explanations supported by evidence, records, and case law for their

determinations. Simply not believing it or claiming it seems "conflicting and, at worst, suspect," as the state court did, without establishing how or why does not overcome it. For these reasons, I respectfully concur in part, and dissent in part.

Case No. W011911
(Court of Criminal Appeals No. WR-70,747-06)

THE STATE OF TEXAS	§	IN CRIMINAL DISTRICT
	§	
V.	§	COURT NO. 2,
	§	
EDWARD LEE BUSBY	§	TARRANT COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON SECOND SUBSEQUENT POSTCONVICTION HABEAS CORPUS APPLICATION AND ORDER

As ordered by the Court of Criminal Appeals, this Court has reviewed applicant Edward Lee Busby's second subsequent postconviction habeas corpus application in which he asserts that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. In entering the ordered findings of fact and conclusions of law, this Court has considered the reporter's and clerk's records from the underlying trial, the second subsequent application, the attorney representing the state's response to the second subsequent application, Busby's reply to the response, the proposed findings of fact and conclusions of law filed by the attorneys representing the state and Busby, the evidence submitted by the attorneys representing the state and Busby regarding the intellectual-disability issue, the arguments made at the Court's September 9, 2023 hearing on the application, Busby's post-hearing briefing, the Court's personal recollections and credibility determinations, and the applicable law.

I. BUSBY'S TRIAL, DIRECT APPEAL, AND HABEAS CORPUS PROCEEDINGS

A. THE OFFENSE, TRIAL, AND DIRECT APPEAL

1. Although not conclusively determinative of Busby's constitutional claim, the facts of the capital offense Busby was convicted of and his criminal history are at least informative of the issue. *See generally Ex parte Cathey*, 451 S.W.3d 1, 6–7, 27 (Tex. Crim. App. 2014) [hereinafter *Cathey I*] (considering facts of the offense and defendant's criminal history in determining intellectual disability), *cert. denied*, 576 U.S. 1037 (2015).

2. Busby was a self-described high-ranking member of the Rolling 60s Crips criminal street gang. [1 CR HC-06 393; 34 RR 12, 120][1] His tattoos are consistent with that claim; he would use gang slang and abbreviations,[2] and symbolic gang drawings were found in his cell. [34 RR 120-32] Busby is familiar with the criminal-justice system; he has been convicted of delivery of a simulated controlled substance, evading arrest, robbery causing bodily injury, and burglary of a vehicle, all occurring between 1998 and 2003. [1 CR HC-06 392-94] And his history of aggression and violence has been recounted in detail by a United States District Court. *See Busby v. Stephens*, No. 4:09-CV-

[1] Citations to "CR HC-06" refer to the clerk's record of the instant state habeas corpus proceeding, which was delivered to the Court of Criminal Appeals on February 1, 2021. Citations to "RR" refer to the reporter's record from Busby's capital-murder trial.

[2] While he was in this Court's holding cell during his trial, Busby wrote gang abbreviations and slang on the wall. [34 RR 127-31]

160-O, 2015 WL 1037460, at *4–7 (N.D. Tex. Mar. 10, 2015) [hereinafter *Busby II*], *aff'd*, *Busby v. Davis*, 925 F.3d 699 (5th Cir. 2019) [hereinafter *Busby III*] (op. on reh'g), *cert. denied*, 140 S. Ct. 897 (2020).

3. Busby was also a pimp. [34 RR 12-13] Two of the prostitutes who worked for him were Kathleen Latimer and JoAnn Cooper. [34 RR 12-13] Busby would supply Latimer and Cooper with drugs. [34 RR 13] On August 3, 2003, Busby assaulted Latimer and Cooper. Busby hit Cooper in the mouth and took her purse after she fell to the ground. [34 RR 6-7, 11] Busby screamed at Latimer about money then hit Latimer with his fists and feet, breaking her arm and kicking her after she fell to the ground. [34 RR 7-8, 15] This was not the first or the last time Busby was violent with Cooper. [34 RR 11-12]

4. On January 30, 2004, Busby and Latimer abducted 78-year-old Laura Crane from a grocery store parking lot in Texas and robbed her. Busby tightly wrapped 23 feet of duct tape around Crane's face, covering her entire mouth and nose and deviating her nose from its normal position. Busby and Latimer then put Crane in the trunk of her own car. Crane died of suffocation. Busby and Latimer disposed of Crane's body in Oklahoma. On February 1, police officers arrested Busby in Oklahoma City after stopping him for committing several traffic violations while driving Crane's car. *See Busby III*, 925 F.3d at 703; *Busby v. State*, 253 S.W.3d 661, 663–64 (Tex. Crim. App.) [hereinafter *Busby I*], *cert. denied*, 555 U.S. 1050 (2008).

5. Busby gave statements to the police on February 1 and 3. He initially claimed that "JD"[3] had given Crane's car to him and Latimer with Crane's body already in the trunk. [37 RR State Exs. 7–8] Busby asserted that he and Latimer merely disposed of the body. On February 3, Busby showed the police where Crane's body had been left. At the scene, Busby admitted that he and Latimer had abducted, robbed, and killed Crane. [37 RR State Ex. 9] Busby again admitted to his involvement on February 20 in a written statement after initiating contact with the authorities. [37 RR State Ex. 11] However, Busby consistently portrayed Latimer as the leader and himself as a follower of her instructions. [37 RR State Exs. 11–12] Busby did admit that he alone wrapped the duct tape around Crane's mouth and nose but stated that he had not intended to kill her. [37 RR State Ex. 11]

6. While Busby was in the Tarrant County Jail awaiting trial, Busby was assaultive, aggressive, and threatening, requiring jail staff to move him to a maximum-security area of the jail. He attempted to establish himself as a "tank boss," who would be a leader of his jail area and prey on weaker inmates. [1 CR HC-06 394-95] Further, he submitted cogent "request for services" forms to jail staff. [37 RR State Ex. 132]

7. During a prior incarceration in 2001, intricate, detailed drawings related to Busby's gang membership had been found in his cell.[4] [34 RR 120-21; 37 RR State Exs.

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[3] Busby was known as "JB" as an adult. [1 CR HC-06 108]

[4] Busby posited at trial that there was no showing he had personally written the jail forms or created the drawings, perhaps having another inmate do so. [36 RR 81, 94-

170-80] Although not introduced at trial, the state proffered a four-page letter handwritten by Busby[5] to a similarly incarcerated friend, which also had been confiscated in 2001. [34 RR 92] While the letter contains gang slang, epithets, and expletives, it also contains pleas for the receiver to "just keep your cool and stay out of trouble" and anger at his situation—"these white people aint [sic] going to give you no good job, they want to see us get out and [expletive] up again so they can make more money off us by loccing [sic] us up, well not me no more." [37 RR State Ex. 119]

8. Before the November 2005 trial, Busby had been given three IQ tests.[6] Dr. Timothy Proctor, Busby's court-appointed psychologist, administered a Wechsler Adult Intelligence Scale-III test (WAIS-III) on October 14, 2005. Busby scored a 77. Busby scored an 81 on a second test, which was a Beta-III administered by Dr. Proctor on November 4, 2005. Shortly after that test, Dr. Sven Helge, the state's psychological trial expert, administered a WAIS-III. Busby scored a 79. *Busby II*, 2015 WL 1037460, at *10, *20.

95] While possibly true, there also was no showing that he had not drawn the pictures or written the letters.

[5] Again, Busby asserted there was no showing he had written the letter. [34 RR 107]

[6] A fourth test, given to Busby in 2001 under unknown circumstances, resulted in a score of 96. However, all courts to review the intellectual-disability issue have disregarded this test. *See, e.g.*, *Busby III*, 925 F.3d at 716.

9. A jury found Busby guilty of capital murder.[7] *See* Tex. Penal Code Ann. § 19.03(a)(2). Proctor testified at punishment that although Busby has a learning disability, he is not intellectually disabled. *Busby III*, 925 F.3d at 706; *see also Busby II*, 2015 WL 1037460, at *10. [36 RR 51, 64] Proctor also testified that Helge had reached the same conclusion. [36 RR 64]

10. After other mitigating and aggravating punishment evidence (including Busby's school records, grade-level academic skills, pretrial IQ tests, and family history) was presented, the jury's answers to the statutory special issues required this Court to sentence Busby to death. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g); *see Busby I*, 253 S.W.3d at 663; *Busby II*, 2015 WL 1037460, at *4–10. [38 RR Def. Ex. 21; 35 RR 12-83; 36 RR 6-87] The Court of Criminal Appeals affirmed his conviction and sentence, and the United States Supreme Court denied certiorari. *Busby I*, 253 S.W.3d at 663.

B. Habeas Corpus Proceedings

11. The Court of Criminal Appeals denied Busby's initial state habeas corpus application, which did not raise an intellectual-disability claim. *Ex parte Busby*, No. WR-70,747-01, 2009 WL 483096, at *1 (Tex. Crim. App. Feb. 25, 2009) (per curiam order) (not designated for publication).

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[7]Latimer had pleaded guilty to the lesser-included offense of murder and was sentenced to life confinement. *Latimer v. Quarterman*, No. 4:08-CV-072-A, 2009 WL 1074802, at *2 (N.D. Tex. Apr. 17, 2009).

12. In 2010, Busby filed a federal habeas corpus petition, raising several claims, including his current constitutional, intellectual-disability claim. *Busby II*, 2015 WL 1037460, at *2, *18. The United States District Court stayed the petition to allow Busby to exhaust his state remedies in a subsequent state habeas corpus application raising the intellectual-disability issue. *Busby III*, 925 F.3d at 704. The Court of Criminal Appeals dismissed the subsequent application as an abuse of the writ. *Ex parte Busby*, No. WR-70,747-02, 2013 WL 831550, at *1 (Tex. Crim. App. Mar. 6, 2013) (per curiam order) (not designated for publication) (citing Tex. Code Crim. Proc. Ann. art. 11.071, § 5).

13. After the stay was lifted, the District Court denied the petition, concluding that Busby had failed to "establish that his general intellectual functioning, as reflected in the multiple results of the IQ tests administered to him, is significantly subaverage." *Busby II*, 2015 WL 1037460, at *21. But the District Court noted that because the United States Court of Appeals for the Fifth Circuit had not accepted the "Flynn Effect" as scientifically valid, the District Court had not considered a score adjustment based on the effect.[8] *Id.*

14. The Fifth Circuit then reviewed most of the IQ evidence now before this Court as well as the Supreme Court's relatively recent precedent on intellectual-functioning deficits: *Moore v. Texas*, 581 U.S. 1 (2017) [hereinafter *Moore I*] (6–3 decision) and *Hall v. Florida*, 572 U.S. 701 (2014) (5–4 decision). *See Busby III*, 925 F.3d at 715–

[8]The Flynn Effect adjusts scores that are a result of out-of-date test norms and will be more fully addressed later.

20. The Fifth Circuit affirmed the District Court's denial, noting that even though Busby had been evaluated by four mental-health experts during his trial and postconviction proceedings, none had concluded that he was intellectually disabled. *Id.* at 706, 726–27. The Supreme Court denied certiorari in 2020.

15. On January 29, 2021, Busby filed a second subsequent state habeas corpus application, arguing in a sole issue that his death sentence violated the Eighth and Fourteenth Amendments based on his intellectual disability. [1 CR HC-06 25] He also filed a motion to stay his February 10, 2021 execution date, which the Court of Criminal Appeals granted. The state responded to the application, arguing that Busby's intellectual-disability claim should be dismissed because his claim had previously been rejected by the Fifth Circuit under the prevailing review standard. [1 CR HC-06 399-400]

16. On February 3, 2021, the Court of Criminal Appeals determined that Busby's second subsequent application contained sufficient specific facts establishing that his claim had not been and could not have been presented previously because the factual or legal basis for the claim was unavailable on the date Busby had filed his prior applications. Tex. Code Crim. Proc. Ann. art. 11.071, § 5(a)(1). Thus, the Court remanded the issue to this Court to review the merits of Busby's claim. *Ex parte Busby*, No. WR-70,747-06, 2021 WL 369737, at *1 (Tex. Crim. App. Feb. 3, 2021) (per curiam order) (not designated for publication).

17. The parties agreed that an expert should assess Busby's disability, if any. That expert—Dr. Gilbert Martinez—filed a report, which was reviewed by another psychologist—Dr. Antoinette R. McGarrahan—at the state's request. Both Busby and the state filed proposed findings and conclusions. These proposed findings and conclusions tracked the opinions of Martinez and McGarrahan that Busby is intellectually disabled based on the governing criteria. The specifics of these reports and the other submitted evidence will be discussed below.

II. INTELLECTUAL-DISABILITY FRAMEWORK

18. The execution of intellectually disabled criminals amounts to cruel and unusual punishment that is prohibited by the Eighth Amendment's evolving standards of decency, applicable to the states through the Fourteenth Amendment, because the criminal's diminished capacity lessens his moral culpability. *Atkins v. Virginia*, 536 U.S. 304, 306–07, 311–12 (2002) (6–3 decision). Intellectual disability encompasses not only subaverage intellectual functioning but also "significant limitations in adaptive skills such as communication, self-care, and self-direction" that manifest before 18. *Id.* at 318. However, not all those who claim intellectual disability will be so impaired to fall within the prohibition. *Id.* at 317.

19. In summary, intellectual disability consists of three core elements: (1) intellectual-functioning deficits, (2) adaptive deficits, (3) and the onset of these deficits while still a minor. *Id.* at 308 n.3; *see also Moore v. Texas*, 139 S. Ct. 666, 668 (2019)

[hereinafter *Moore II*] (per curiam) (6–3 decision); *Moore I*, 581 U.S. at 7; *Petetan v. State*, 622 S.W.3d 321, 333 (Tex. Crim. App. 2021) (op. on reh'g) (5–4 decision).

20. But medical experts' views based on the medical community's diagnostic framework do not dictate a court's intellectual-disability determination; they are merely informative. *Hall*, 572 U.S. at 721. Stated differently, while medical standards cannot be completely disregarded, they do not, on their own, conclusively determine intellectual disability. *Moore I*, 581 U.S. at 13.

21. Busby must establish all elements of intellectual disability by a preponderance of the evidence.[9] *Petetan*, 622 S.W.3d at 325 (citing *Franklin v. State*, 579 S.W.3d 382, 386 (Tex. Crim. App. 2019)); *Cathey I*, 451 S.W.3d at 5; *see also In re Salazar*, 443 F.3d 430, 432 (5th Cir. 2006) (citing *Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App. 2004)).

A. Intellectual Functioning

22. Deficits in intellectual functioning refer to "intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy." *Petetan*, 622 S.W.3d at 338 (quoting Am.

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[9] This Court notes the recent criticism of the application of the preponderance standard at this stage of the proceedings. *See, e.g.*, *Ex parte Jean*, 667 S.W.3d 768–69, 771–72 (Tex. Crim. App. 2023) (Yeary, J., dissenting); *Ex parte Segundo*, 663 S.W.3d 705, 707–08 (Tex. Crim. App. 2022) (Keller, P.J., dissenting). However, current precedent applies the preponderance standard, which this Court will follow.

Psychiatric Ass'n, *Diagnostic and Statistical Manual of Disorders* 37 (5th ed. 2013) [hereinafter DSM-5]). These functions are measured through IQ tests. *Id.*; *Moore II*, 139 S. Ct. at 668. A score falling approximately two standard deviations below the population mean, including a standard error of measurement (SEM) of "generally +5 points," indicates intellectual disability. *Petetan*, 622 S.W.3d at 338 (quoting DSM-5 at 37 and Am. Ass'n on Intell. & Dev. Disabilities, *Clinical Manual* 35 (11th ed. 2010) [hereinafter AAIDD-11]);[10] *see Hall*, 572 U.S. at 712–13 (holding SEM should be used to account for tests' inherent imprecision). But a strict IQ-test-score cutoff cannot be used. *Hall*, 572 U.S. at 704.

23. Practice effects and the "Flynn Effect" may affect test scores. *Petetan*, 622 S.W.3d at 338 (citing DSM-5 at 37). But those concepts should be considered "only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, and so forth"—as a "generalized consideration that could detract from the over-all validity of the score obtained." *Cathey I*, 451 S.W.3d at 5. They do not operate to change an individual score. *Id.* at 18. In any event, if an IQ score is "close to" 70, a court must account for the test's SEM. *Moore I*, 581 U.S. at 13.

24. The Flynn Effect has been categorized as "a controversial theory" that does not address individualized scores, only IQ test score averages. *Dunn v. Reeves*, 141 S. Ct.

[10] The 12th edition of the AAIDD Manual was published in early 2021. Neither Busby nor the state assert that the 12th edition should apply or that its provisions would result in a different analysis.

2405, 2408 (2021) (per curiam) (6–3 decision); *Cathey I*, 451 S.W.3d at 12. Its application has been described as discretionary, "challenging," and inapplicable when the most recent version of a test with the most current norms is administered. *See Ex parte Cathey*, No. WR-55,161-02, 2021 WL 1653233, at *1 (Tex. Crim. App. Apr. 28, 2021) [hereinafter *Cathey II*] (per curiam) (not designated for publication) (rejecting argument that 77 score should be reduced by the Flynn Effect); *Cathey I*, 451 S.W.3d at 15, 18 & n.53 (refusing to apply Flynn Effect to reduce 77 score to 71.6); 43A George E. Dix & John M. Schmolesky, *Texas Practice: Criminal Practice and Procedure* § 49:35 (3d ed. 2022) (recognizing Flynn Effect may be "more of a description of historical changes in IQ tests than any difference among generations of intellectually challenged persons"). [Busby Post-Hearing Briefing Ex. B] Further, its existence regarding WAIS-III and WAIS-IV tests is questionable. *Cathey I*, 451 S.W.3d at 12. Indeed, Professor James Flynn, the author of the theory, "has admitted exaggerating the effect to save more people from the death penalty in light of *Atkins*." 43A Dix & Schmolesky, *supra*, at § 49:35 (citing *Cathey II*, 2021 WL 1653233 at *1); *see also Cathey I*, 451 S.W.3d at 15 n.42.

25. For these reasons and others, the Court of Criminal Appeals has held that the Flynn Effect and its impact on an IQ score may be considered when "it is impossible to retest using the most current IQ test available." *Cathey I*, 451 S.W.3d at 18. The *Cathey I* Court, citing the AAIDD manual, further concluded that there is insufficient evidence that clinical practitioners outside the criminal-justice system normally use and apply the Flynn Effect to IQ test results. *Id.* at 14. But even if the effect is considered, it is merely

a factor in the "interpretive narrative" and may not result in a change in a specific IQ test score. *Id.* at 14, 18.

26. Although states have flexibility in defining intellectual disability, current medical standards, such as the DSM-5 and the AAIDD-11, cannot be disregarded. *Moore I*, 581 U.S. at 20. But, again, they do not dictate the result. *Id.* at 13. If an individual's IQ score, adjusted for SEM, falls within the clinically established range for intellectual-functioning deficits—the lower end of the SEM range falls at or below 70—the inquiry continues to the remaining two elements of intellectual disability. *Id.* at 13–15; *Hall*, 572 U.S. at 723. In other words, if the individual meets the first element of the intellectual-disability test, the second element must then be considered. *See Salazar*, 443 F.3d at 432 ("To state a successful claim, an applicant must satisfy all three prongs of this test.").

B. Adaptive Deficits

27. Adaptive deficits must be related to subaverage intellectual functioning, and not to other conditions such as a personality disorder, to satisfy the *Atkins* exception to the imposition of the death penalty. *Petetan*, 622 S.W.3d at 332–33 (relying on DSM-5 at 33).

28. These deficits require an evaluation of the individual's ability to function across a variety of dimensions—"how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." *Id.* at 339 (quoting DSM-5 at 37). This involves three

"domains" of adaptive reasoning: conceptual, social, and practical. *Id.* (quoting DSM-5 at 37). Adaptive deficits must be found in at least one domain to satisfy the adaptive-deficits element of intellectual disability. *Id.* (citing DSM-5 at 37–38).

29. The domains are measured through clinical evaluations and testing that use standardized measures "with knowledgeable informants and the individual to the extent possible." *Id.* Other sources are educational, developmental, medical, and mental-health evaluations—individualized measures. *Id.*; *Moore II*, 139 S. Ct. at 668. All information must be interpreted using clinical judgment. *Petetan*, 622 S.W.3d at 340 (quoting DSM-5 at 37). And this Court's review may not "overemphasize[]" the objective evidence of adaptive strengths. *Moore I*, 581 U.S. at 15, 18 n.9; *see also id.* at 30–31 (Roberts, C.J., dissenting) (discussing overemphasis prohibition in majority opinion).

30. The significance of any adaptive deficits is determined by looking at whether the individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive domains. *Moore I*, 581 U.S. at 8 (majority opinion) (citing AAIDD-11 at 43). Standardized tests are not the sole measure of adaptive functioning but they may be helpful to the factfinder. *Ex parte Hearn*, 310 S.W.3d 424, 428 (Tex. Crim. App.) (relying on the fourth edition of the DSM), *cert. denied*, 562 U.S. 1006 (2010).

31. Conceptual skills involve "competence in memory, language, reading, writing, math, reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others." *Brownlow v. State*, No. AP-77,068, 2020 WL 718026, at

*11 (Tex. Crim. App. Feb. 12, 2020) (not designated for publication) (quoting DSM-5 at 37).

32. Social skills involve "awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment among others." *Id.*

33. Practical skills include skills related to language, reading, writing, money concepts, and self-direction. *Hearn*, 310 S.W.3d at 428. They also include skills related to interpersonal relationships, responsibility, gullibility, and following rules. *Id.* Practical skills are related to activities of daily living and include occupational skills and maintaining a safe environment. *Id.*

34. However, the Court of Criminal Appeals has cautioned that the inquiry is not whether a person is currently intellectually disabled and in need of special services. *Cathey I*, 451 S.W.3d at 19. Instead, the operative questions regarding adaptive deficits are:

> 1. Is this person capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior wherever he is?
>
> 2. Or is he so intellectually disabled that he falls within that class of intellectually disabled inmates who are exempt from the death penalty?

Id. at 26.

35. These ultimate questions are muddied by issues associated with retrospective assessments and the well-known effect of an intellectual-disability diagnosis on death-

penalty eligibility. *Id.* The retroactive assessment of adaptive deficits can be a subjective one. *Id.* at 22–23 & n.67. Thus, this Court cannot "become so entangled with the opinions of psychiatric experts as to lose sight of the basic factual nature of the *Atkins* inquiry." *Id.* at 26. And importantly, this Court cannot "turn a blind eye to the inmate's ability to use society and his environment to serve his own needs." *Id.*

C. EARLY ONSET

36. The onset of the alleged subaverage intellectual functioning and adaptive deficits must have occurred while the individual was still a minor—during the developmental period. *Moore I*, 581 U.S. at 7.

III. INTELLECTUAL-DISABILITY DETERMINATION

37. Although this Court held a hearing on Busby's application on September 8, 2023, neither the state nor Busby proffered witness testimony. [9/8/2023 RR] Interestingly, Busby also chose not to present evidence to the federal District Court that considered his intellectual-disability claim, similarly relying on declarations and other attachments. *Busby II*, 2015 WL 1037460, at *2, *10. As the District Court noted, some of Busby's proffered declarations are not sworn under penalty of perjury and some are undated. *Id.* at *10. [1 CR HC-06 102, 106, 108, 111, 114, 117, 120, 123, 132, 141, 369]

38. Accordingly, this Court has referred to the record from Busby's capital-murder trial, the exhibits attached to Busby's application and his proposed findings and conclusions, the exhibits attached to the state's proposed findings and conclusions, and

the exhibits attached to Busby's September 8, 2023 post-hearing briefing. Except for Martinez's 2022 report and testing and McGarrahan's reviewing report, this appears to be substantially the same evidence considered by the federal courts.

A. Intellectual Functioning

1. Test Scores

a. 2001

39. Busby scored 96 on an unidentified IQ test in 2001. There is no further information on this test that would allow this Court to assay its reliability or the meaning of the score. Accordingly, this Court will not consider it further. *See, e.g.*, *Busby II*, 2015 WL 1037460, at *20.

b. 2005

40. Proctor was Busby's court-appointed expert for trial. [36 RR 9] Both Busby and the state recognized that Proctor is an expert in the field of forensic psychology. [36 RR 11]

41. Proctor administered a WAIS-III test to Busby on October 14, 2005, at the Tarrant County Jail. [36 RR 26,42] Proctor testified that the WAIS-III was the "gold standard of IQ tests" because of its length with 13 subtests. [36 RR 40, 46] These subtests "tap[ ] several various areas of intelligence to give [an] overall global picture of a person's intelligence, their IQ." [36 RR 47] Other IQ tests, such as the Beta-III, are shorter versions of the WAIS-III. [36 RR 47-49]

42. Busby's full-scale score on the WAIS-III was 77, and there was no empirical evidence that he was malingering. *See Busby II*, 2015 WL 1037460, at *20. [36 RR 44-45, 53] This score placed Busby in the sixth percentile—94% of the population has a higher IQ. [36 RR 55-56] The SEM for the WAIS-III ("roughly plus or minus five") put Busby's score somewhere between 73 and 82, which placed him in the "borderline" range—"the low part of the low average range." [36 RR 56-57]

43. Proctor also administered a Beta-III test to Busby on November 4, 2005. [36 RR 28, 42] The Beta-III, which Proctor described as a "quick and dirty kind of intelligence test," is a shorter test meant to approximate the longer form WAIS-III. [36 RR 48] Busby scored an 81, which put him in the tenth percentile of the population—90% of the population has a higher IQ. [36 RR 53-54] This score was consistent with the 77 on the WAIS-III and again put Busby in the "borderline" range. [36 RR 55, 65]

44. Helge, the state's expert, also administered a WAIS-III to Busby shortly after Proctor's testing. Busby received a full-scale score of 79. *See id.* [36 RR 64] Proctor testified that this score was "almost the same" as the other full-scale IQ results and, thus, Proctor seemed to downplay the applicability of a practice effect to the score. [36 RR 61]

45. Proctor, who this Court finds credible, saw no evidence that Busby was intellectually disabled and neither did Helge. [36 RR 64]

46. In 2008, as part of Busby's first state habeas corpus application, Busby retained Dr. Gilda Kessner, a psychologist. She reviewed Busby's test scores and

Proctor's trial testimony. She recognized that the WAIS-III was the current test in 2005, that Busby had scored a 77, and that Proctor had concluded Busby was not intellectually disabled. *Busby III*, 925 F.3d at 718. Kessner believed Proctor should have considered the Flynn Effect, "which posits that there is a rise or gain in IQ scores over time and that '[r]esearch literature has suggested that this figure is .3 per year beginning the year after the test is normed.'" *Id.* [Busby Post-Hearing Briefing Ex. B] Kessner recommended that Busby be administered the WAIS-IV, which at the time was to be released in 2008, "so that the issue of the Flynn Effect and questions about the validity of the score can be avoided." *Id.* Kessner also recommended that Busby's adaptive history be investigated. *Id.* Busby has not proffered Kessner's report as part of the instant habeas corpus proceeding. [1 CR HC-06 17-18]

c. 2010

47. In 2010 while Busby's federal habeas corpus petition was pending in the District Court, Dr. Gilbert Martinez administered a WAIS-IV test to Busby. His full-scale score was 74, which was qualitatively described as "borderline." *Busby III*, 925 F.3d at 717. [1 CR HC-06 90] The applied SEM for the WAIS-IV resulted in a range of 70 to 79. *Id.* [1 CR HC-06 90] There was no indication Busby was malingering. *See id.* [1 CR HC-06 89]

48. Martinez did not give an opinion as to whether Busby's score met the first element of intellectual disability. *See Busby III*, 925 F.4th at 718–19. [1 CR HC-06 89-94]

49. Busby hired a licensed clinical psychologist, Dr. Bekh Bradley-Davino, to opine on Busby's intellectual-disability claim. Although she did not expressly conclude that Busby was intellectually disabled, she concluded that the 2010 74 WAIS-IV score reflected "significant limitations in intellectual functioning" and that he had "significant problems in academic functioning beginning early." *Id.* at 719. Bradley-Davino recommended further evaluation. *Id.* Busby has not proffered Bradley-Davino's report in this proceeding. [1 CR HC-06 17-18]

d. 2022

50. As part of Busby's second subsequent state habeas corpus proceeding, Martinez again administered a WAIS-IV test to Busby. His full-scale score was 81, resulting in a range of 77 to 85. [Busby Proposed FOF & COL at Ex. A, at 7] This score was qualitatively described as "low average." There was no indication of malingering. [*Id.* Ex. A, at 6]

51. Martinez noted that the difference between the 74 in 2010 and the 81 in 2022 was "likely due to the combined effects of several factors that are known to increase intelligence test scores over time," i.e., the Flynn Effect and the practice effect. [*Id.* Ex. A, at 25]

52. Martinez stated that because the WAIS-IV was published in 2008, a test taken in 2022 would result in a score adjustment of four points. [*Id.*] Thus, the Flynn Effect would lower Busby's full-scale score to 77. [*Id.*]

53. The practice effect refers to gains in standardized test scores that result from a person being tested a second time using the same instrument or similar methodology. [Busby Proposed FOF & COL Ex. A, at 25] "There is no universally agreed-upon quantitative score adjustment that can be applied to account for the increase in test scores in a particular case." [*Id.*] Nevertheless, Martinez opined that the practice effects must be considered, "likely contributing several points to the observed increase in IQ composite scores." [*Id.*] Martinez concluded, based on the four-point adjustment for the Flynn Effect and the unidentified adjustment for the practice effect, the 2022 81 score was consistent with the 2010 74 score on the WAIS-IV. [*Id.*] Thus, both WAIS-IV scores should be considered a full-scale score of 74 with an SEM range of 70 to 79 according to Martinez. [*Id.* Ex. A, at 25-26].

54. Martinez concluded that Busby's "adjusted" 2010 and 2022 WAIS-IV scores fell within the range of subaverage intellectual functioning—the first element of intellectual disability. [*Id.* Ex. A, at 2, 26]

e. 2023 review of Martinez's report

55. McGarrahan, the state's proffered expert, did not conduct her own testing or interviews and merely reviewed most of what Martinez had reviewed as well as the 2005 IQ tests. [Busby's proposed FOF & COL Ex. B, at 1-2] According to McGarrahan, more testing was not warranted because Busby had already been given "numerous IQ assessments over many years, which were conducted by qualified individuals and using well-regarded and most recent measures available." [*Id.* Ex. B, at 5]

56. Although McGarrahan has been accepted as an expert in forensic psychology and neuropsychology in other Texas cases, neither she nor the state delineates her education or explains her qualifications to opine on Busby's intellectual condition. *See, e.g., Wells v. State*, 611 S.W.3d 396, 413 (Tex. Crim. App. 2020); *In re Commitment of Dyer*, No. 08-22-00221-CV, 2023 WL 4146288, at *1 (Tex. App.—El Paso June 23, 2023, no pet.). McGarrahan was not called as a witness at this Court's September 2023 hearing on Busby's writ application.

57. McGarrahan specifically applied the Flynn Effect to the WAIS-IV test scores, but not the practice effect. She merely mentioned that the practice effect "can affect test scores and should be considered when interpreting IQ scores." [*Id.* Ex. B, at 2] She opined that his 74 score on the 2010 test should be reduced to a 73.1 and that his 81 score on the 2022 test should be considered a 76.5 based on the Flynn Effect. [*Id.* Ex. B, at 2] However, she apparently applied a generalized SEM to the unadjusted, full-scale scores and not to the Flynn-adjusted scores.

58. McGarrahan also applied the Flynn Effect to the 2005 tests administered by Proctor and Helge. The Flynn Effect would modify those three scores as follows:

- The WAIS-III test administered by Proctor resulted in a full-scale score of 77 with an SEM range of 73 to 82.[11] The Flynn Effect would reduce Busby's score to 74.

[11] McGarrahan does not explain why the SEM for Proctor's WAIS-III subtracts 4 points but adds 5.

- The Beta-III test administered by Proctor resulted in a full-scale score of 81 with an SEM range of 72-90.[12] The Flynn Effect would reduce Busby's score to 78.6.

- The WAIS-III test administered by Helge resulted in a full-scale score of 79 with an SEM range of 75 to 83.[13] The Flynn Effect would reduce Busby's score to 76.

[*Id.* Ex. B, at 2-3]

59. McGarrahan further stated that on tests "with a mean of 100 and a standard deviation of 15," scores in a range of 65 to 75 would fit the DSM-5 and AAIDD definitions of intellectual disability. [*Id.* at 2-3]

60. McGarrahan could not "controvert the conclusion and opinion of Dr. Martinez" that Busby is intellectually disabled. [*Id.* at 6]

2. The Parties' Arguments

61. Busby argued in his application that his scores showed subaverage intellectual functioning sufficient to establish the first element of intellectual disability. He asserted that a 2005 WAIS-III score, adjusted for an SEM, would be considered two standard deviations below the mean (and, thus, subaverage intellectual functioning) if it fell within a range of 73.3 to 78.3. [1 CR HC-06 39-40]

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[12] McGarrahan does not explain why her stated range for the Beta-III factors for a 9-point SEM. Perhaps McGarrahan applied the SEM after the score was reduced to 78.6 by the Flynn Effect, but nothing supports this guess.

[13] McGarrahan inexplicably applies a 4-point SEM to Helge's WAIS-III.

62. Busby recognized that the Flynn effect should be accounted for by more recent testing than those available in 2005. [1 CR HC-06 40] Indeed, Busby did not apply the Flynn Effect or the practice effect when discussing the 2010 WAIS-IV administered by Martinez. [1 CR HC-06 41-42] Nor did Busby discuss the SEM for Busby's 2010 WAIS-IV score. Busby states in his application that the 2010 WAIS-IV test, which is a "reliable and respected test" and was "administered closest to the date of its norming," is "the most accurate known measurement of Mr. Busby's IQ." [1 CR HC-06 41-42]

63. Busby did argue, however, that his 2005 WAIS-III 77 score "is equivalent to his having scored, rounding up, a 74." [1 CR HC-06 43] This "equivalent" score considered the Flynn Effect.

64. Regarding the 2005 Beta-III administered by Proctor, Busby argues that the Flynn Effect results in an adjusted score of 78.7. Busby continues that practice effects and the fact that the Beta-III is a more non-verbal test than the WAIS-III should be "taken into consideration," but he does not argue the practical application of these measures or how they would specifically affect the 78.7 Flynn-adjusted score. [1 CR HC-06 44-45]

65. The Helge-administered WAIS-III, according to Busby, should be adjusted from a 79 to a 76 to account for the Flynn Effect. The practice effect, which Busby asserts is "significant on this IQ test," again is urged to be "considered" with no specific adjustment attached. [1 CR HC-06 47] Busby does assert that Proctor's trial testimony

that the 79 was equivalent to Proctor's WAIS-III 77 should reduce the Beta-III score to 77, which would then be reduced further by the Flynn and practice effects. [1 CR HC-06 47 n.12].

66. Because Busby filed his subsequent application before the 2022 Martinez testing, the 2022 WAIS-IV test is not discussed. However, in his proposed findings and conclusions he notes that Martinez "believes that when both the Flynn and practice effects" are considered, Busby's 81 "is consistent with his 2010 score of 74" and, thus, meets the first element of intellectual disability. [Busby Proposed FOF & COL, at 17 & Ex. A, at 25-26]

67. The state responded to the instant subsequent habeas corpus application and argued that Busby failed to establish a prima facie case of intellectual disability, pointing to the fact that his claim had "already been considered and rejected under *Moore* [*I*]" in *Busby III*. [1 CR HC-06 396-97] But after Martinez's 2022 report and McGarrahan's concurring report, the state submitted proposed findings and conclusions that reversed course and urged this Court to conclude that Busby's IQ scores showed by a preponderance of the evidence that Busby has subaverage intellectual functioning. [State Proposed FOF & COL at 7]

3. Application of Law to Facts

68. Informed by the reasoning in *Cathey I*, this Court declines to apply the Flynn Effect to Busby's test scores. 451 S.W.3d at 14–18.

69. Although the discretionary Flynn Effect is recognized by the medical community, its genesis after *Atkins* and its creator's motives are questionable. And it is not normally and universally applied. *Id.* As was found in *Cathey I*, there is insufficient evidence that clinicians routinely subtract points from IQ scores to account for the Flynn Effect. *Id.* at 15. Martinez did not mention the Flynn Effect in either his 2010 testing results or his 2022 report. McGarrahan applied the effect to all of Busby's scores after a brief recognition that the DSM-5 and the AAIDD acknowledge that the Flynn Effect "can" affect test scores.

70. As Kessner recognized, the Flynn Effect as a concept should be factored into scoring by retesting with more recent tests. *Cathey I*, 451 S.W.3d at 16; *see Busby II*, 2015 WL 1037460, at *20. And its efficacy is questionable. *Cathey I*, 451 S.W.3d at 15-17. By all accounts, the WAIS-IV is the most reliable IQ test available. [Busby Proposed FOF & COL, at 15] Martinez stated that the WAIS-IV has "robust statistical properties and well-established validity and reliability profiles." [*Id.* Ex. A, at 25] The WAIS-IV has not been updated and is the latest version. [*Id.*] McGarrahan recognized that each test Busby has taken was conducted by qualified individuals and used the most recent testing measures. [*Id.* Ex. B, at 5]

71. The practice effect is on ever shakier ground. There is no evidence of the practical application of this effect.

72. For example, Martinez merely assumed that the practice effect would work in tandem with the Flynn Effect to lower Busby's 2022 WAIS-IV 81 score to a 74,

consistent with his 2010 result. Martinez benchmarked the presumed 74 result off Busby's 2010 WAIS-IV 74 score and then apparently subtracted from 81 the 4.5 points for the Flynn Effect—.3 X the number of years since the WAIS-IV had been published (15)—and subtracted an additional and arbitrary 2.5 points for the practice effect. But Martinez does not explain other than to conclude that the 2022 81 is a 74 based on the two effects and based on his 2010 74 score.

73. McGarrahan also did not quantify the practice effect, merely recognizing that "[p]ractice effects (learning from repeated testing) . . . can affect test scores and should be considered when interpreting IQ scores." [Busby Proposed FOF & COL Ex. B, at 2]

74. In this case, the practice effect has no guidelines, no quantitative measures, and no limits. It ostensibly has been applied to reach a desired result—lower Busby's 2005 and 2022 scores to comport with his 2010 score. However, an SEM already accounts for "practice from earlier tests." *Hall*, 572 U.S. at 713. The evidence of the practice effect, such as there is, is not credible, and the Court will not attempt to apply an unspecified practice-effect number to Busby's scores.

75. The SEM, however, should be applied. *Hall*, 572 U.S. at 713–14, 724; *see also Cathey I*, 451 S.W.3d at 18.

76. The specific SEMs for the WAIS-III, the WAIS-IV, and the Beta-III are, for the most part, unexplained in the evidence. Proctor testified at Busby's trial that the SEM for the WAIS-III was plus or minus five. [36 RR 57] McGarrahan states that the

SEM for "scores" is "generally ±5 points." [Busby Proposed FOF & COL Ex. B, at 2] However, she inconsistently and inexplicably applies differing SEMs to different scores and tests. Martinez states that his applied SEM ranges for the 2010 and 2022 WAIS-IV are "based on the Overall Average SEMs" and that the SEMs are "based on the examinee's age." [*Id.* at 3, 7] Busby, relying on the AAIDD-11 and the DSM-5, asserts that the SEM for the WAIS tests "is approximately 5 points." [1 CR HC-06 26, 39-40] The state agrees with Busby. [State Proposed FOF & COL 12]

77. However, a test's SEM is not an automatic plus or minus 5; it must be individually calculated for each test based on statistics as reflected in the DSM-5. *Ex parte Wood*, 568 S.W.3d 678, 680 n.9 (Tex. Crim. App. 2018); *see also Moore I*, 581 U.S. at 14 (recognizing SEM must be "test-specific"). The SEM evidence before this Court consists only of SEM generalizations and does not explain or mention the statistical calculation for each test. In short, the evidence of a specific SEM for each test is conclusory. In an abundance of caution, this Court will consider the SEM ranges for each test that are supported by at least some evidence or that were previously used by the federal habeas courts.

78. The evidence before this Court and that had been submitted to the federal habeas courts reveals the following score ranges based on the application of a generalized SEM to Busby's scores:

- 2005 Proctor WAIS-III: **73 to 82**. [36 RR 56-57; Busby Proposed FOF & COL Ex. B, at 2] *But see Busby III*, 925 F.3d at 716 (stating range as 72 to 82).

- 2005 Proctor Beta-III: **76 to 86**, assuming a similar SEM as the WAIS-III.[14] *Id.* at 717.

- 2005 Helge WAIS-III: **74 to 84**. *Busby II*, 2015 WL 1037460, at *21.

- 2010 Martinez WAIS-IV: **70 to 79**. *Busby III*, 925 F.3d at 719. [Busby Proposed FOF & COL Ex. A, at 2-3; 1 CR HC-06 90]

- 2022 Martinez WAIS-IV (not available to federal reviewing courts): **77 to 85**. [Busby Proposed FOF & COL Ex. A, at 7 & Ex. B at 2]

79. "[T]he analysis of multiple IQ scores jointly is a complicated endeavor." *Hall*, 572 U.S. at 714. Nevertheless, this Court cannot discount that of the five scores Busby received over the course of seventeen years, only one is low enough to include 70 in the generalized SEM range, and just barely. *See Moore I*, 581 U.S. at 34 n.1 (Roberts, C.J., dissenting) (noting majority opinion should not be read to question states that do not "treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores"); *see, e.g.*, *Ferguson v. Comm'r, Ala. Dep't of Corr.*, 69 F.4th 1243, 1255–56 (11th Cir. 2023). Subaverage intellectual functioning is established, requiring examination of adaptive deficits, if the lower end of the SEM range falls at or below 70. *Moore I*, 581 U.S. at 14 (majority opinion); *see also Green v. Lumpkin*, 860 F. App'x 930, 937–38 (5th Cir. 2021) (determining SEM would be impermissibly double counted if a lower-end SEM range up to 75 were sufficient to satisfy first element of intellectual

[14] This Court will not apply McGarrahan's unexplained, 9-point SEM range of 72 to 90. [Busby Proposed FOF & COL Ex. B, at 2]

disability), *cert. denied*, 142 S. Ct. 1234 (2022). The preponderance of Busby's intellectual-functioning evidence does not meet this test.

80. Accordingly, the preponderance of Busby's IQ scores shows that he does not satisfy the first element of intellectual disability. *See, e.g.*, *Cathey I*, 451 S.W.3d at 18–19; *Wood*, 568 S.W.3d at 680. The federal courts that reviewed Busby's intellectual-disability claim and had Busby's 2010 WAIS-IV 74 score before them also concluded that Busby had failed to sufficiently establish subaverage intellectual functioning, albeit under different review standards than the one at issue here. *Busby III*, 925 F.3d at 718; *Busby II*, 2015 WL 1037460, at *21. Because Busby failed to meet the first element, his constitutional claim fails.

81. But to ensure the Court of Criminal Appeals has complete findings on the entirety of Busby's issue, this Court will consider the remaining two elements. *See Moore I*, 581 U.S. at 15 (holding courts must "continue the inquiry and consider other evidence of intellectual disability" if IQ score, adjusted for SEM, falls at or below 70); *Hall*, 572 U.S. at 723 (requiring analysis of other evidence of intellectual disability, including adaptive deficits, if IQ score falls within the test's "acknowledged and inherent margin of error"); *Cathey I*, 451 S.W.3d at 19 (addressing adaptive deficits after concluding first intellectual-disability element not proven by a preponderance of the evidence). *But see Salazar*, 443 F.3d at 432 ("To state a successful claim, an applicant must satisfy all three prongs of this test."); *Petetan*, 622 S.W.3d 332 (holding adaptive deficits must be related to subaverage intellectual functioning). Even so, this Court's intellectual-disability

conclusion ultimately rests on the determination that Busby has not shown by a preponderance of the evidence subaverage intellectual functioning.

B. Adaptive Deficits Related to Intellectual Deficit

1. The Domains[15]

82. In elementary school, Busby had to repeat the first grade, and struggled with reading. *Busby II*, 2015 WL 1037460, at *8 [1 CR HC-06 96]

83. In junior high, he was placed in math and reading classes that would focus on ameliorating learning deficits in those areas. *Id.* [35 RR 24-25] He earned "average and above" grades in junior high. *Id.*

84. Busby's junior-high football coach, Steve Porter, stated in a 2010 affidavit that Busby's "intellect was lacking." [1 CR HC-06 119] He was unable to understand complex plays and would "get confused about who to block, or which route to run." [1 CR HC-06 119] Although he was in danger of not being able to pay football because of his grades, his grades improved after he was moved to appropriate classes, and he was able to continue playing. [1 CR HC-06 120]

85. Busby earned "average" grades as a high-school freshman, and "below average" grades as a high-school sophomore. *Id.* Busby was exempt from taking state

[15] The following evidence is not the entirety of the adaptive-deficit evidence that was proffered or that this Court considered. It is merely a summary of the overarching tenor of that evidence.

standardized tests his freshman year of high school.[16] *Id.* [1 CR HC-06 98; 35 RR 28-29] Although he was in special-education classes, those classes were targeted to those with IQs between 70 and 82, which would not have been considered in the "mentally retarded range." [35 RR 27; 1 CR HC-06 101; Busby Proposed FOF & COL Ex. A, at 14] Busby was described in one teacher's declaration as having had a "perfect storm of deficits." [1 CR HC-06 101] Busby dropped out of school after he was required to repeat his sophomore year. [35 RR 32; Busby Proposed FOF & COL Ex. A, at 19]

86. Busby's sister, Kimiko Coleman, testified at Busby's trial that Busby was "always trying to learn"; however, he had problems in school. [35 RR 57] Busby's other sister, Tarsharn Busby, also testified and agreed that school had been "something positive" for Busby until he "started having problems in high school . . . with the teachers." [35 RR 76]

87. Proctor administered a wide-range achievement test (WRAT) to Busby in 2005. [36 RR 42] That test showed his reading skill was at a fourth-grade level, spelling skill was at a third-grade level, and math skill was at a sixth-grade level. [36 RR 51-52] Martinez's 2022 WRAT had similar results. [Busby Proposed FOF & COL Ex. A, at 7] Proctor testified that although these results showed a learning disability, Busby is not intellectually disabled. [36 RR 51, 64] Martinez concluded the opposite. [Busby FOF & COL Ex. A, at 26]

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[16] Busby also would have been exempt his junior year, but he was required to repeat his sophomore year.

88. Martinez interviewed Busby in 2022. [*Id.* Ex. A, at 3] Martinez noted that Busby was optimistic, compliant, and polite during the interview with a broad, loud affect. [*Id.* Ex. A, at 5] Busby stated that he was unable to "fully" read or write and was able to recount his educational history, stating that "nobody was interested in teaching [him] to read or write" because he played sports. [*Id.* Ex A, at 3-4] However, Busby reported to Martinez that he had "several pen pals," whom he writes to "about 20 to 25 times per year." [*Id.* Ex. A, at 5] He recounted his "sometimes happy, sometimes not" childhood; sporadic work history; and his medical history (admitting that he has "anger issues" and a history of alcohol and drug abuse). [*Id.* Ex. A, at 3-5]

89. Several 2010 declarants described Busby as "slow." [1 CR HC-06 108, 110, 113, 116, 122, 130, 368] Several also noted that he was not good with numbers, even unable to count money or order fast food, which contradicts his WRAT score showing he performed at a sixth-grade math level. [1 CR HC-06 104, 108, 110, 113, 117] The mother of one of his children noted that he could not read or write, which again contradicts the WRAT results; other declarants noted his difficulty reading. [1 CR HC-06 104, 108, 116, 139] But there was also evidence that Busby never had to figure out how to do things for himself because either his sisters or other women, whom he was "smooth" with, did everything for him. *See* [1 CR HC-06 105; Busby Proposed FOF & COL Ex. A, at 14]

90. He was also described as a "follower" who could be easily manipulated by women, e.g., Latimer. *Busby I*, 253 S.W.3d at 664. [Busby Proposed FOF & COL Ex.

A, at 15; 1 CR HC-06 106, 110-11, 116, 131; 35 RR 37] However, his sister Tarsharn testified at his trial that he was "a leader-type person in some ways," but not with women. [35 RR 78] Coleman testified that Busby was not gullible with men. [35 RR 56] And he was a high-ranking gang member who had prostitutes working for him in exchange for drugs.

91. One of Busby's teachers testified at trial that Busby was able to regulate his behavior when his mother was present. [35 RR 42-43] He also was compliant if told to "sit down and be quiet for a while." [35 RR 42]

92. Busby had poor hygiene, but Coleman stated that improved in high school. [Busby Proposed FOF & COL Ex. A, at 12, 18; 1 CR HC-06 119, 122] Busby did not help with chores in the home; however, Coleman reported that this was not related to a deficit but was "motivational, as he reportedly thought it was the role of women." [Busby Proposed FOF & COL Ex. A, at 9, 12]

93. It was reported that Busby could not budget his money, had low self-control, and did not understand the consequences of his actions. [*Id.* Ex. A, at 9-10, 12, 17] Busby had little to no work history; however, the women who "took care of him," did not want him to work. [*Id.* Ex. A, at 12] According to Coleman, Busby "did not need to work as they [i.e., the women in his life] cooked, cleaned, and paid his bills." [*Id.*] Tarsharn testified that Busby was protective of women and that he did not "go for" violence toward women. [35 RR 78-79] Coleman testified however that Busby had hit her in the past, which was consistent with his behavior toward Cooper and Latimer. [35

RR 63] And as for his understanding of consequences, Busby sought a reprieve from the Board of Pardons and Paroles after this Court set his 2021 execution date to accommodate his request to have a spiritual adviser accompany him to the execution chamber.

94. Busby would speak in code to his friends to avoid "other's listening to their conversation." [*Id.* Ex. A, at 11] But there was also evidence that his communication skills were below average and he could not follow complex instructions. [*Id.* Ex. A, at 8-9, 11] His choices, communication, manners, and willingness to take responsibility for his actions reportedly were based on his "mood" at the time. [*Id.* Ex. A, at 10-12] There was little to no evidence that his "mood" was related to any adaptive deficits.

95. Busby's upbringing involved racial segregation, violence in the home, and poverty. [1 CR HC-06 125-26, 128-29, 135-37; 35 RR 40, 54] He had a history of mental illness and made several suicide attempts, the most recent of which occurred days before he murdered Crane. *Busby II*, 2015 WL 1037460, at *11. [36 RR 80] Busby also was diagnosed with severe antisocial personality disorder and was at high risk to commit future acts of violence. *Id.* [36 RR 34-39]

96. Martinez administered the third version of the Adaptative Behavior Assessment System questionnaire (ABAS-III) to Busby's sisters[17] and further

[17] McGarrahan represented in her reviewing report that the ABAS-III was given to one of Busby's sisters and a former teacher. [Busby Proposed FOF & COL Ex. B, at 4]

interviewed each separately regarding Busby's adaptive functioning. [Busby Proposed FOF & COL Ex. A, at 8, 19] It is unclear when these tests and interviews occurred or whether the interviews were conducted face-to-face. [*Id.*] The ABAS-III is "designed to elicit and quantify information about a person's adaptive functioning." [*Id.* Ex. A, at 19] These results, based on the sisters' answers about Busby, showed that Busby was substantially deficient in the adaptative-deficits domains. [Busby Proposed FOF & COL Ex. A, at 20, 26]

2. Application of Law to Facts

97. Although this Court may not overemphasize adaptive strengths, neither can this Court ignore them and uncritically focus on pointed out deficits. *Petetan*, 622 S.W.3d at 358; *Cathey I*, 451 S.W.3d at 19–22, 27.

98. Much of the adaptive-deficit evidence comes from anecdotal declarations and interviews that occurred when it was clear Busby was claiming an exemption from the death penalty based on his asserted intellectual disability. Some reveals Busby's ability to "use society and his environment to serve his own needs." *Cathey I*, 451 S.W.3d at 26.

99. And some evidence is internally inconsistent. For example, some evidence indicates Busby cannot read or write; but his achievement tests place him at a fourth-grade level around the time of the offense, he lodged written complaints while in the Tarrant County Jail, he was found with detailed drawings and a letter, and he admitted to having several pen pals. Another example: Busby was described as unable to count

money or even order food from a fast-food restaurant; however, the evidence also shows that he ran a prostitution ring, was a high-ranking member of a criminal street gang, and had women take care of him because he believed that is their role. Finally, the anecdotal evidence that Busby does not understand the consequences of his actions is contradicted by his request for a spiritual adviser to accompany him to the execution chamber, indicating his awareness of the consequences and gravity of his murder of Crane.

100. This Court is not impermissibly focusing on adaptive strengths but on conflicting evidence of the asserted deficits. *Petetan*, 622 S.W.3d at 349, 355; *see also Moore I*, 581 U.S. at 15; *Cathey I*, 451 S.W.3d at 27. Further, this Court cannot ignore Busby's demonstrated ability to serve his own needs by using society and his environment. *Cathey I*, 451 S.W.3d at 26.

101. The ABAS-III results initially appear convincing that Busby has sufficient adaptive deficits to meet the second element of intellectual disability, mainly because the results ostensibly are objective measures of adaptive deficits. But the Court of Criminal Appeals has noted that the second version of the ABAS was "not normed for retrospective assessments," and no evidence in this case shows that the ABAS-III has been so normed. *Petetan*, 622 S.W.3d at 356; *see also Cathey I*, 451 S.W.3d at 26 ("[C]ourts should not become so entangled with the opinions of psychiatric experts as to lose sight of the basic factual nature of the *Akins* inquiry . . . .").

102. Indeed, it is hard to justify giving conclusive effect to ABAS-III scores that rely on answers from relatives who had not seen Busby for approximately six years before his 2005 trial and who were asked to answer the questions as part of Busby's intellectual-disability claim. *Petetan*, 622 S.W.3d at 355 (noting family members who took the ABAS "had an obvious vested interest in the outcome of their interviews . . . : saving Appellant from a possible death penalty"); *Cathey I*, 451 S.W.3d at 20 (declining to credit expert conclusion of adaptive deficits because participants' responses conflicted with trial testimony, test was not designed to have retrospective application, and participants were "highly motivated to misremember" adaptive abilities). [35 RR 62, 77-78] This Court concludes that the preponderance of the adaptive-deficit evidence is, at best, conflicting and, at worst, suspect. Busby has not satisfied the second element by a preponderance.

103. Further, there is little evidence linking these asserted adaptive deficits to his intellectual deficit, which is required. *Petetan*, 622 S.W.3d at 332–34 (citing DSM-5 at 38). Busby's traumatic childhood experiences "count in the medical community as 'risk factors' *for* intellectual disability." *Moore I*, 581 U.S. at 16 (quoting AAIDD-11 at 59–60). However, such a factor merely leads to further investigation of the issue; it does not supply the required relatedness link. *See id.* ("Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination.").

104. How to determine relatedness is not well defined, and neither the state nor Busby discuss the issue. Clearly, the former *Briseno*[18] factors, which were an attempt to standardize the adaptive-deficit determination, are disavowed and cannot be used to "restrict qualification of an individual as intellectually disabled." *Id.* at 17–19.

105. This Court has been given no guidance on the relatedness between Busby's asserted adaptive deficits and his asserted subaverage intellectual functioning. The parties treat the asserted deficits as *ipso facto* related to his subaverage intellectual functioning.[19] This Court cannot be so conclusory. *See, e.g.*, *Petetan*, 622 S.W.3d at 332–33. Because Busby has not shown by a preponderance of the evidence that any adaptive deficits are related to his intellectual functioning, even if that functioning were subaverage, the second intellectual-disability element is not met. And, again, because Busby failed to show subaverage intellectual functioning by a preponderance, he necessarily has not shown that any adaptive deficits would be related. *Cathey I*, 451 S.W.3d at 25–26.

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[18] *Ex parte Briseno*, 135 SW.3d 1, 6 (Tex. Crim. App. 2004), *invalidated by Moore I*, 581 U.S. at 20–21.

[19] This Court recognizes that some asserted adaptive deficits such as money handling and reading skill would generally be related to subaverage intellectual functioning; however, this evidence was contradicted. Other asserted adaptive deficits such as gullibility, self-control, and the like are not so obviously related.

106. In short, there is not a preponderance of the evidence that Busby is not capable of functioning adequately in his everyday world with intellectual understanding and moral appreciation of his behavior wherever he is. *Id.* at 26.

C. EARLY ONSET

107. Busby must also show that the onset of his subaverage intellectual functioning and adaptive deficits occurred before he was 18. *Atkins*, 536 U.S. at 318; *Hall*, 572 U.S. at 710; *Petetan*, 622 SW.3d at 331. [1 CR HC-06 363] Much of the evidence presented to this Court shows that any intellectual-functioning or adaptive-deficit issue began before Busby was 18. [Busby Proposed FOF & COL Ex. A, at 26 & Ex. B, at 4-5]

108. Busby showed onset during the developmental period by a preponderance. But, of course, this finding presumes that Busby established the first two elements, which he did not. *Cathey I*, 541 S.W.3d at 28.

IV. SUMMARY

109. Most of the evidence before this Court, including Busby's 2010 WAIS-IV IQ test that he posits is the "the most accurate known measurement" of his intellectual functioning, has been presented in federal habeas corpus proceedings and been found insufficient to show intellectual disability, although under different standards than are at issue today. *See Busby III*, 925 F.2d at 716–20;[20] *Busby II*, 2015 WL 1037460, at *18–

[20] This Court recognizes that the Fifth Circuit stated the need for "further evaluation" by an expert in intellectual disability, which has now occurred, as part of its

21. [1 CR HC-06 41-42] For the first time, Busby presents his 2022 WAIS-IV test, Martinez's 2022 report (which considers anecdotal and adaptive-testing evidence, at least some of which was available in Busby's federal habeas corpus proceedings), and McGarrahan's concurring report (which added nothing new to Martinez's report). The differences are that now (1) Martinez, contrary to his 2010 no-conclusion, expressly concludes that Busby is intellectually disabled; (2) McGarrahan concurs; and (3) Busby has a WAIS-IV full-scale score of 81, resulting in a generalized SEM range of 77 to 85, according to McGarrahan and Martinez.

110. Martinez and McGarrahan rely heavily on the 2010 WAIS-IV and discount the 2022 WAIS-IV, concluding that the 2010 WAIS-IV is the true measure of Busby's intellectual functioning. However, this Court's acceding to that view of the evidence would appear to be the same legal mistake that has been pointed out regarding adaptive deficits: This Court would be overemphasizing some evidence (e.g., the 2010 WAIS-IV result) and underemphasizing the other (e.g., the 2022 WAIS-IV result and the 2005 WAIS-III and Beta-III results). *Moore I*, 581 U.S. at 15, 18 n.9; *see also Moore II*, 139 S.

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holding that a reasonable factfinder could have failed to conclude that Busby was intellectually disabled even though he had an asserted history of intellectual- and adaptive-functioning limits. *Busby III*, 925 F.3d at 719–20. However, the new evidence before this Court does not meet Busby's burden considering all the presented evidence unless this Court were to impermissibly accept Martinez's 2022 report and McGarrahan's concurring report whole-hog without any critical analysis and without reference to the other available evidence. *See Cathey I*, 451 S.W.3d at 26 (cautioning courts to "not become so entangled with the opinions of psychiatric experts as to lose sight of the basic factual nature of the *Atkins* inquiry").

Ct. at 673 (Thomas, J., dissenting) (discussing *Moore I*'s evidentiary review standard for adaptive deficits). This Court's review must be a holistic review, not a selective one. *See Hall*, 572 U.S. at 721 (recognizing experts' views do not dictate result but inform it); *Cathey I*, 451 S.W.3d at 24–25, 27 (considering "the entire body of evidence taken from the trial and the habeas hearing, including applicant's school records and the death-row cell exhibits of his pen-pal letters and . . . articles and poems," to conclude intellectual disability had not been shown by a preponderance).

111. Busby's four other IQ tests—2005 Proctor WAIS-III, 2005 Proctor Beta-III, 2005 Helge WAIS-III, and 2022 Martinez WAIS-IV—must be weighed as well. And the methods to adjust Busby's scores on those tests—the Flynn Effect and the practice effect—are either not well defined in the evidence, inconsistent, or are not credible under the facts of this case. The evidence of the test-specific SEMs is not much better, although the Court has used the generalized ±5 to the scores here. The preponderance of the evidence reveals that Busby's intellectual functioning is not so subaverage that he is exempt from the death penalty under the Eighth Amendment.

112. Although this Court addressed the adaptive-deficits element in an abundance of caution, it was not necessary based on the intellectual-functioning conclusion. In any event, Busby has failed to expressly show that any adaptive deficits are specifically related to his intellectual functioning by a preponderance. And the preponderance of the credible evidence, including evidence of his deficits, shows that

Busby is capable of functioning adequately in his everyday world with an intellectual understanding and moral appreciation of his behavior wherever he is.

113. Based on this Court's review of the law, the presented evidence, the parties' arguments, and this Court's own recollections and credibility determinations, this Court RECOMMENDS that relief be denied.

V. ORDER

This Court ORDERS the clerk to (1) send a copy of these findings and conclusions to the attorneys of record and (2) transmit to the Court of Criminal Appeals in cause number WR-70,747-06 a second supplemental clerk's record containing all documents filed on or after June 8, 2021, including the court reporter's transcript of the September 8, 2023 hearing and these findings and conclusions. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 9(f).

SIGNED October 12th, 2023.

Honorable Wayne Salvant
Presiding Judge