

No. 25A1235

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**In the Supreme Court of the United States**

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

v.

Edward Lee Busby,  
*Respondent*

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**RESPONDENT EDWARD LEE BUSBY'S  
RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION  
TO VACATE STAY OF EXECUTION**

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## **List of Related Proceedings**

Counsel believe the related proceeding below (in which the Texas Court of Criminal Appeals denied without written opinion Busby's motion that asked that court to stay his execution pending a decision in *Hamm v. Smith*, No. 24-872 (U.S. argued Dec. 10, 2025)) was omitted from Petitioner's list of related proceedings.

*Ex parte Busby*, No. WR-70,747-07 (Tex. Crim. App. May 5, 2026), *available at* <https://search.txcourts.gov/Case.aspx?cn=WR-70,747-07&coa=coscca>.

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**I. Introduction**

Every expert who has opined during post-conviction proceedings on whether Respondent Edward Lee Busby is intellectually disabled has determined that he is.<sup>1</sup> One of the judges on the court below recognized this

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<sup>1</sup> Counsel included Dr. Gilbert Martinez's Report of July 11, 2022; Dr. Antoinette McGarrahan's Report of April 21, 2023; and the State's Proposed Findings of Fact and Conclusions of Law as exhibits to Busby's Rule 60(b) Motion in the district court. The exhibits were not included in Petitioner's Appendix in this proceeding. Respondent has included them in a supplemental Appendix filed with this Response. Citations to the Supplemental Appendix appear herein as "Suppl. App. at [page number]." Citations to the Appendix filed by Petitioner appear herein as "App. at [page number]."

fact. One, apparently ignoring this Court's decision in *Moore v. Texas*, elided the issue. One reserved judgment.

Three years ago, after the expert employed by the District Attorney's Office issued her report agreeing that Busby is intellectually disabled, both undersigned Counsel and Counsel for the State asked the trial court to recommend to the Texas Court of Criminal Appeals ("CCA") that that court find Busby to be ineligible for execution because of intellectual disability. In response to the parties' request, the trial court convened a hearing, at which no expert was present, because the trial court informed Counsel experts would not be necessary. That court subsequently entered findings of fact and conclusions of law grounded not in the findings of medical experts but instead in judicial opinions and the judge's own recollections of Busby's trial which had occurred twenty years earlier. When the CCA adopted those findings of fact and conclusions of law in March 2025 and denied Busby relief on his *Atkins* claim, it did precisely what this Court has repeatedly made clear a court must not do when evaluating an *Atkins* claim: the court wholly ignored the view of medical experts.

In the U.S. Court of Appeals for the Fifth Circuit, at least two (and perhaps all three) of the judges on the panel believe Busby is entitled to a certificate of appealability on the issues related his Rule 60(b) Motion; they have disagreed on whether the Motion presents a meritorious claim for relief. The disagreement among the judges centers around whether the state habeas court's decision, which wholly ignored the unanimous opinion of the experts, constituted an unreasonable application of federal law. The third judge anticipates that the opinion this Court is expected soon to issue in *Hamm v. Smith*, No. 24-872 (U.S. argued Dec. 10, 2025), will be instructive on the question of how the trial court should have gone about determining whether Busby satisfies the criteria for intellectual disability. That judge (i.e., Judge Higginson), together with the one (i.e., Judge Graves) who believes Busby is entitled to relief on his claim, have voted to stay Busby's execution (otherwise scheduled to occur tomorrow, May 14, 2026) pending a decision in *Smith*.

In addition, because of the manner the court below approached the case, and its decision to await this Court's ruling in *Hamm*, that court did not yet rule on Busby's Motion for Authorization, filed pursuant to 28 U.S.C §

2244(b)(2)(B)(i).<sup>2</sup> Nevertheless, in spite of the pending motion in the court below, and the modest decision by that court, the Attorney General has asked this Court to intervene to circumvent normal order via an emergency pleading when no emergency exists. Moreover, given that two of the three judges have granted Busby a certificate of appealability on issues related to his Rule 60(b) Motion and given that none of the three judges have issued a decision on Busby's Motion to Authorize, it is unclear what effect this Court's granting the State's Application would have. Accordingly, Respondent Edward Lee Busby respectfully asks this Court to deny Petitioner's Application.

## **II. Statement of the case**

Busby was convicted in November 2005 of a capital murder committed in January 2004. ROA.5396.<sup>3</sup> 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

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<sup>2</sup> The issue of this pending Motion is addressed below.

<sup>3</sup> Citations to the Record on Appeal appearing in this section are to the Record on Appeal in cause number 26-70004 in the Court of Appeals and appear according to that court's Rule 28.2.2.

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 federal 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 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 this 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 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).<sup>4</sup>

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

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<sup>4</sup>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).

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 of Article 11.071 of the Texas Code of Criminal Procedure, 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 (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, the Court of Appeals 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 Court of Appeals 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, the court noted that "no expert has ever opined that Busby is intellectually disabled." *Id.* at 706. This 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 this 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 Report of July 11, 2022 is that Busby is intellectually disabled. Suppl. App. at 3-28.

After Counsel shared Dr. Martinez's Report with Counsel for the State, Counsel for the State employed a second expert -- Dr. Antoinette McGarrahan -- who issued a report on April 21, 2023, agreeing that Busby is intellectually disabled. Suppl. App. at 29-34. Both Counsel and Counsel for the State then filed proposed findings of fact and conclusions of law, recommending the trial court find Busby to be ineligible for execution due to intellectual disability. Suppl. App. at 35-56.

In response, and as noted above, the trial court convened a hearing at which no expert was present, and subsequently, relying solely on judicial opinions and its own recollections of Busby's trial (which occurred in 2005), entered findings of fact and conclusions of law recommending relief be denied. App. at 358-400. On March 5, 2025, the CCA adopted the trial

court's findings of fact and conclusions of law, denying Busby relief on his claim. This Court denied Busby's subsequently filed petition for a writ of certiorari.

On April 2, 2026, Busby filed a Motion pursuant to Rule 60(b) in the district court. App. at 1-43 (Motion); Suppl. App. at 3-56 (Exhibits). On April 15, 2026, the district court entered an order finding Busby's Rule 60(b) Motion to be a successive habeas petition, untimely, and meritless and also purporting to transfer the motion to the Court of Appeals as a successive petition. App. at 96-104. Counsel filed Busby's Application for a Certificate of Appealability in the Court of Appeals on April 27. App. at 105-38. On May 7, Counsel filed a Motion that asked the Court of Appeals to authorize the filing of a second habeas petition. App. at 212-74.

On May 8, the Panel issued its per curiam order staying Busby's execution pending a decision from this Court in *Hamm v. Smith*. App. at 324. As the accompanying opinions make clear, there was a disagreement on the panel regarding the merits of Busby's *Atkins* claim. Judge Graves and Judge Richman both found Busby is entitled to a certificate of appealability regarding the issues surrounding his Rule 60(b) Motion. Both believe it was

appropriate for the Court of Appeals to consider the merits of Busby's claim. Judge Graves found that Busby was entitled to relief, while Judge Richman found the opposite. Judge Higginson appears to have also concluded it appropriate to consider the merits of Busby's claims and decided any decision about those merits would likely be impacted by this Court's decision in *Hamm v. Smith*. Judge Graves joined Judge Higginson in granting Busby a stay of execution pending a decision from this Court in *Smith*.

**III. The state court wholly ignored medical opinions in denying Busby relief on his claim.**

Judge Graves's opinion accompanying the Panel's per curiam order crystallizes precisely why Busby's claim can survive § 2254(d) deference: the state habeas court substituted its own observations of Busby from his trial which occurred twenty years ago for the opinions of the medical experts. App. at 353 ("But the state trial judge refused to accept the medical community's consensus and chose to rely on his own 'recollections.'"). In other words, the state courts of Texas did in this case precisely what this Court made clear in *Moore* must not be done. Rather than defend the state court's resolution of Busby's *Atkins* claim through certiorari review, the Attorney General has asked this Court to intervene in an emergency posture

to simply ignore the state courts' near outright defiance of this Court's precedent.

**IV. Because Busby has been granted a certificate of appealability and because the Court of Appeals has not disposed of his Motion to Authorize, it is unclear what affect this Court's vacating the stay would have.**

Two pleadings are pending in the Court of Appeals: an Application for a Certificate of Appealability (App. at 105-38) related to his Rule 60(b) Motion and a Motion to Authorize the consideration of a second habeas petition (App. at 212-74). The Panel's per curiam order addresses neither and merely states Busby's execution is pending a decision from this Court in *Smith*. App. at 324. Judges Richman's and Graves's concurring opinions reveal that each would grant Busby a certificate of appealability on the issues related to his Rule 60(b) motion. Neither opinion (nor Judge Higginson's opinion) reveals how any judge would have voted on Busby's Motion to Authorize.<sup>5</sup>

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<sup>5</sup> In its emergency filing in this Court, the Attorney General misleadingly suggests Busby did not file a motion for authorization to pursue a successive habeas application. In footnote 2 of its Emergency Application, the government states: "Busby has not argued he is entitled to authorization under § 2244(b)(2)(A)." That statement is correct, but Busby has in fact sought authorization under § 2244 -- he has sought authorization under § 2244(b)(2)(B), a different subsection of the statute. That motion remains pending in the court below.

Further, aside from this matter's being inappropriate for this Court's emergency docket, it is unclear what effect this Court's vacating the stay would have. If this Court were to grant Petitioner's Application, the proceeding presumably would be remanded to the Court of Appeals so that Judge Higginson could make a decision on the merits of Busby's claim and so that each of the three judges could decide (and announce their decision on) Busby's Motion to Authorize.

## **V. Conclusion**

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.

The judges on the Panel in the Court of Appeals disagree about whether Busby's *Atkins* claim is meritorious, with one believing it to be, one rejecting the claim on the basis of the state court's judgment, which itself ignored this Court's opinion in *Moore*, and the final judge believing any such decision would be premature until this Court has spoken in *Hamm*.

Respondent Edward Lee Busby respectfully requests this Court deny  
Petitioner's Application to Vacate the court of appeals' stay of his execution  
and allow this case to proceed in an ordinary fashion.

Respectfully submitted,

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