No. 25A1235

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.

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO VACATE STAY OF EXECUTION

(EXECUTION IS SCHEDULED FOR MAY 14, 2026)

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REPLY

Petitioner, the Director, has demonstrated the stay granted by the Fifth Circuit was legal error. Neither judge who voted to stay Edward Busby's execution explained how a court can address the merits of the intellectual disability claim despite the numerous procedural barriers to merits review. App. 325–26, 350–57. Merits review violated this Court's precedent, *e.g., Gonzalez v. Crosby*, 524 U.S. 524, 532 (2005), and the plain text of 28 U.S.C. §§ 2244(b) and 2254(d). Busby's Rule 60(b) motion was, in truth, simply an impermissible successive petition that rehashed a repeatedly denied claim the federal courts lack jurisdiction to consider.

The merits analysis provided by Judge Graves and Busby is incorrect. Busby's expert—a forensic psychologist—testified at trial that he is not intellectually disabled. *See Busby v. Davis*, 925 F.3d 699, 705 (5th Cir. 2019); App. 341–43. But procedurally, the merits never should have been reached, and the Court should vacate the stay.

I. Busby's Provides No Response Regarding the Barriers that Should Have Prevented a Merits Re-adjudication.

Busby focuses almost exclusively on the merits of his *Atkins*[1] claim. Resp. 12–14. In doing so, he provides no response to the Director's argument

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

that a re-adjudication of his *Atkins* claim is not possible at this late stage. The barriers to a merits adjudication of the claim are numerous and jurisdictional. *See* Emergency Appl. to Vacate Stay (Em. Appl.) 8–15. As the Emergency Application details, Busby's Rule 60(b) motion was a successive petition subject to 28 U.S.C. § 2244. *See* Em. Appl. 8-9 (citing *Gonzalez*, 545 U.S. at 532). Busby has no response to this characterization of the motion, and none of the judges below provided a contrary analysis.

Busby's response asserts that he "s[eeks] authorization under § 2244(b)(2)(B)." Resp. 13 & n.5. But that provision is facially inapplicable: it allows a claim to be presented in a successive habeas petition based on new evidence only if "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)(2)(B). Busby's *Atkins* claim concerns his eligibility for capital punishment—it has nothing to do with his guilt for the underlying offense.

Busby's Rule 60(b) motion is, in truth, a successive habeas petition barred by 28 U.S.C. § 2244(b). Neither Busby nor any judge has articulated a basis for his motion to evade this prohibition.

Moreover, as detailed in the Emergency Application, even if Busby's Rule 60(b) were not a successive petition, it fails to satisfy the requirements for relief under Rule 60(b). *See* Em. Appl. 11-12. Again, neither Busby nor any judge provided a contrary analysis of these requirements.

Busby also urges the Court to leave the stay in place so the Fifth Circuit may apply this Court's forthcoming opinion in *Hamm v. Smith*, 145 S. Ct. 2776 (June 6, 2025). But as the Director has shown, Em. Appl. 12–13, this Court's opinion in *Hamm* has no bearing on the threshold determination the Fifth Circuit must make as to whether Busby's *Atkins* claim may be jurisdictionally authorized under 28 U.S.C. § 2244(b). *See Tyler v. Cain*, 533 U.S. 656, 662 (2001) (under § 2244(b)(2)(A), an applicant must rely on a new rule of constitutional law that has been "made retroactive" by this Court and was previously unavailable). *Hamm* is also irrelevant for the application of § 2254(d)'s standard—the applicability of which no judge below disputed—because the state court rejected (for a second time) the merits of Busby's claim more than a year ago, prior to *Hamm*'s issuance. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011).

AEDPA imposes strict limits on habeas relief that were disregarded in the decision below. The stay the Fifth Circuit granted is a futile exercise that facilitates a jurisdictionally impermissible second habeas petition.

II. Busby's *Atkins* Claim Is Meritless.

Even if a federal habeas court could again adjudicate the merits of Busby's claim—having already rejected it on initial federal habeas review—it would fail. Busby's only argument is that because his postconviction expert found him to be intellectually disabled and the State's expert could not controvert that opinion, the state habeas court was obligated to find he is intellectually disabled. Resp. 12. Busby provides no support for that proposition, and it ignores that his own expert testified at trial that he is not intellectually disabled. *See Busby*, 925 F.3d at 705 (explaining that Busby's trial expert testified he was not intellectually disabled and that "Busby made no claim before or during that trial, on direct appeal, or in his first state habeas corpus application that he is intellectually disabled or that any of his counsel had been ineffective in failing to investigate or pursue such a claim").

The state court's denial of the claim is subject to the strict limitations of the Antiterrorism and Effective Death Penalty Act (AEDPA). And as Judge Richman's and Judges Graves's opinions reflect, there is disagreement between them as to the merit of Busby's claim. App. 340–57. But "the very existence of reasonable disagreement forecloses relief." *Langley v. Prince*, 926 F.3d 145, 170 (5th Cir. 2019); *see Davis v. Ayala*, 576 U.S. 257, 269 (2015). For

that reason alone, Busby cannot succeed on his claim and was not entitled to a stay of execution. *See Nken v. Holder*, 556 U.S. 418, 434 (2009).

Moreover, as Judge Richman thoroughly explained, App. 339–40, the state habeas court entered extensive findings. Among them, the court found the practice effect and the Flynn effect may affect IQ scores, but courts should not adjust individual scores to account for them. App. 368–69, 382–83. Critically, adjustment for the Flynn effect is not required under this Court's clearly established precedent, *see Dunn v. Reeves*, 594 U.S. 731, 736 (2021) (calling the Flynn effect "a controversial theory"), so the state court's conclusion cannot have been unreasonable. As to the practice effect in particular, the state habeas court correctly found that no expert quantified a numerical adjustment that should have been made to any of Busby's individual scores. App. 383. Without scientific evidence validating a specific adjustment to account for the practice effect, the federal court would have no basis on which to substitute its own view of Busby's intellectual functioning. Nor could the state court's factual finding be unreasonable in the absence of any evidence to the contrary.

With respect to adaptive behavior, Judge Richman correctly explained that it was a matter of disagreement among experts. App. 341. Not only that, the objective measures of Busby's adaptive functioning did not support an

intellectual disability diagnosis, *see* App. 389–90, and Busby has never argued that any change in the diagnostic criteria or this Court's *Atkins* jurisprudence makes the adaptive behavior evidence more compelling now than it was when the courts previously rejected his *Atkins* claim. Further, the state court explicitly applied the current diagnostic and forensic standards to Busby's claim, explaining for example that it did not overemphasize Busby's adaptive strengths. App. 370, 394. And the TCCA did not require evidence of Busby's adaptive deficits to be related to an intellectual deficit. *Ex parte Busby*, No. WR-70,747-06, 2025 WL 702111, at *1 (Tex. Crim. App. Mar. 5, 2025).

In purporting to adjudicate the merits of Busby's claim, Judge Graves made numerous errors. As a fundamental matter, "it is not apparent how [Judge Graves's] analysis would have been any different without AEDPA." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). His "readiness to attribute error" to the state court despite its extensive and well-supported findings is incompatible with AEDPA and warrants vacatur of the stay of execution. *Klein v. Martin*, 607 U.S. 213, 223 (2026).

Further, Judge Graves began by erroneously discarding evidence presented at Busby's trial, which postdated *Atkins*. Judge Graves stated intellectual disability was not at issue at Busby's trial. App. 353. But Busby's expert conducted an evaluation and found Busby was not intellectually

disabled, and Busby's intellectual functioning was discussed at trial. ROA.11100–21. As Judge Richman put it, a finding of intellectual disability would have been the "ultimate" basis for mitigation. App. 341. If intellectual disability was not at issue at Busby's trial, as Judge Graves suggested, it was only a non-issue because Busby was not intellectually disabled. Relatedly, Judge Graves found every expert to offer an opinion has found Busby is intellectually disabled. App. 353. This is plainly incorrect because *Busby's* expert at trial determined he was not intellectually disabled.[2] ROA.11121. Judge Graves also stated the diagnostic definitions and factors have changed since Busby's trial, App. 354, but neither he nor Busby's postconviction expert Dr. Gilbert Martinez stated that any such change rendered a diagnosis of intellectual disability viable now for the first time.

Ironically, while accusing Judge Richman and the state court of substituting their opinions for medical experts, App. 352, Judge Graves made several manipulations of Busby's IQ scores that no expert proffered. First, Judge Graves found Busby's score of 77 in 2005 should be adjusted to 74 to account for the Flynn effect, which would then produce a standard error of measurement (SEM) of 69-77. App. 354. But no expert stated that an SEM

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[2] Judge Graves discounted the testimony of Busby's trial expert, Dr. Timothy Proctor, by classifying him as a mitigation expert. App. 354. That is wrong. Dr. Proctor was a clinical and forensic psychologist. ROA.11066–68.

could be devised for a Flynn-adjusted score, nor did any expert proffer such a range. *See* App. 345 (chart reflecting Busby's IQ scores). Similarly, Judge Graves criticized the State's expert for devising the SEM for Busby's score of 77 in 2005, App. 354, because Judge Graves seems to have erroneously assumed the SEM for every IQ test is plus-or-minus 5. *See Hall v. Florida*, 572 U.S. 701, 713–14 (2014) (noting SEMs applicable to various IQ tests); *id.* at 741 (Alito, J., dissenting) ("An approach tied to a fixed score of 75 can be dismissed out of hand because, as discussed, every test has a different SEM."). Judge Graves's assessment of the evidence was based on multiple suppositions that were not supported by any evidence. His unsupported assessment of the merits of Busby's *Atkins* claim is inadequate to sustain the lower court's stay of execution.

Judge Graves also jettisoned the state court's findings with respect to Busby's adaptive behavior. App. 356–57. He asserted the state court did not show how or why the adaptive behavior evidence was conflicting. App. 357. This was plainly wrong. The state court detailed the ways in which the lay witness recollections—provided by Busby's sisters—were contrary to the *objective scientific* evidence reflecting Busby's abilities. App. 388–97. For instance, Busby's scores on the Wide Range Achievement Test—conducted at trial in 2005 and recently in 2022—reflected similar scores and indicated a

fourth grade reading level and a sixth-grade level in math skills. App. 389. Yet the lay individuals who provided recollections of Busby's behavior from decades prior stated Busby could not even count money or order food. App. 390. Nothing in this Court's *Atkins* jurisprudence requires courts to uncritically accept witness attestations that are contradicted by objective evidence.

Busby provides the Court no basis on which to sustain the Fifth Circuit's stay of execution. The stay amounts to legal error in the face of numerous barriers to re-adjudication of Busby's *Atkins* claim at this late date. The Court should vacate the stay of execution.

III. The Pendency of Litigation in the Court Below Is No Reason to Leave a Legally Erroneous Stay in Place.

Busby also seems to argue the Court should not vacate the Fifth Circuit's stay because "it is unclear what effect" it would have. Resp. 14. That is not a reason to leave a legally erroneous stay in place. If this Court vacates the stay, there would be no barrier to Busby's sentence being carried out. The pendency of Busby's baseless Rule 60(b) appeal and his motion for authorization do not prevent his execution absent another stay entered by the Fifth Circuit.

CONCLUSION

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

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