No. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

GARCIA GLENN WHITE,

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

EMERGENCY APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

****Execution scheduled for Tuesday, October 1, 2024, at 6 p.m.****

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APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable Samuel Alito, Associate Justice, and Circuit Justice for the United States Court of Appeals for the Fifth Circuit:

INTRODUCTION

Texas is about to execute Garcia Glenn White even though significant evidence points to White being ineligible for execution because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002). White faces unconstitutional execution because his appointed attorney, Patrick McCann, forfeited review of any fully developed *Atkins* claim White might have presented in state or federal court. McCann could have presented a claim in state and federal court after this Court's decision in *Hall v. Florida*, 572 U.S. 701 (2014), but he didn't investigate in time. McCann could have even arguably presented an *Atkins* claim within a year of this Court's decision in *Moore v. Texas*, 581 U.S. 1 (2017), or *Moore v. Texas*, 586 U.S. 133 (2019), but he didn't work up the evidence then either.

Within a week of learning that McCann forfeited review of White's intellectual impairments, the Capital Habeas Unit of the Federal Public Defender Office gathered what evidence they could, met with White, and filed White's motion for appointment of substitute counsel. White's case arrived in the district court in a posture remarkably like that of *Christeson v. Roper*, 574 U.S. 373 (2015), when it reached this Court. In both cases, counsel appointed under 18 U.S.C. § 3599(a)(2) blew filing deadlines on behalf of an intellectually impaired man who had a shot at merits review by showing that his appointed counsel's conduct was grounds for equitable tolling.

But White's grounds are much, much stronger because in 2022, another judge in the Southern District of Texas granted equitable tolling to another death-sentenced client of McCann's after finding that McCann *intentionally* withheld that man's *Atkins* claim during the limitations period, then concealed from his client that his malfeasance created a conflict between McCann's interest in his professional reputation and livelihood, and his client's interest in not being unconstitutionally executed. ROA.1314-1325.

The district court in White's case denied substitution despite recognizing White's need to seek equitable tolling based on McCann's misconduct, but refused to consider whether or to what extent McCann's self-interest affected his development of White's substantive claim. *See* App. B to Pet. Under Fifth Circuit precedent, White could not get review of his claim in a successive habeas application unless he presented the prima facie case required by 28 U.S.C. § 2244(b)(3)(C) *and* presented grounds for equitably tolling the one-year limitations period.

White's putative substitute counsel appealed. Separately, McCann moved the Fifth Circuit to authorize White's under-developed *Atkins* claim in a successive petition. McCann did not assert his misconduct as grounds for equitable tolling. App. A at 5-6. The Fifth Circuit denied both forms of relief for the same reasons, *i.e.* that McCann's conflicted representation produced neither a fully developed *Atkins* claim, App. A at 7, nor a plausible argument for satisfying an exception to the successor bar, App. A at 5-6; *see* 28 U.S.C. § 2244(b)(2)(A), nor any grounds for equitable tolling, App. A at 5-6; *see Holland v. Florida*, 560 U.S. 631, 651 (2010).

The court further concluded that the district court conducted an "adequate inquiry into White's complaint" of his counsel's conflict, App. A at 8 n.7, despite the district court's explicit refusal to address any of the criteria for substitution identified in *Christeson*, ROA.2060.

REASONS MR. WHITE IS ENTITLED TO A STAY

Under this Court's familiar standard, an application for a stay is reviewed based on the prisoner's likelihood of success on the merits, the relative harm to the parties, and the extent to which the prisoner has unnecessarily delayed his or her claims. *Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004). In the present context, there must be "a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari" and "a significant possibility of reversal of the lower court's decision," in addition to irreparable harm. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) (citation omitted). All of these factors weigh in favor of staying White's execution pending this Court's review of the issues raised in his petition for certiorari.

I. White has not delayed in seeking a stay; any delay is attributable to his conflicted counsel's misconduct.

A consideration for this Court is whether Mr. White's petition is a "last-minute attempt[] to manipulate the judicial process." *Nelson v. Campbell*, 541 U.S. 637, 649 (2004) (quotation marks and citation omitted). The last-minute nature of the request for substitute counsel must be attributed to appointed counsel McCann—not Mr. White. McCann forfeited White's *Atkins* claim for federal court review over nine years ago, when he blew White's deadline to file a successive application in federal court

one year following *Hall*. McCann did not move to withdraw or alert his client to his conflict, even though that is what McCann was ethically required to do. Tex. Disciplinary R. Prof. Conduct 1.06(b)(1)-(b)(2), (c), cmt.4.

The relevant time for assessing White's request for a stay is when "outside counsel learned of [White's] plight." *Christeson*, 574 U.S. at 380. Judged on that timeline, White acted with extraordinary diligence to seek substitution and a stay. Mr. White learned of his counsel's conflict of interest and misconduct in a similar case on September 11, when outside counsel with the Federal Public Defender went to visit him. Outside counsel moved for substitution and a stay under 28 U.S.C. § 2251(a)(3) and *McFarland v.* Scott, U.S. 849 (1994), within two days of visiting White.

Outside counsel themselves could not have learned of McCann's conflict until they were contacted by resource counsel on September 5 who themselves were responding to an August 28 request for new counsel made by Mr. White (without any indication he was aware of the specific conflict of interest at issue in his substitution motion). Outside counsel also could not have acted until McCann raised an *Atkins* claim on White's behalf for the first time on August 23, 2024, or until counsel researched McCann's history of egregious misconduct in the similar case of Dexter Johnson.

The timing of White's request for new counsel is truly regrettable, but it would be an even greater injustice to make White pay with his life for his conflicted counsel's egregious and self-interested delay tactics when the very purpose of his substitution motion is to eject that counsel from his case.

II. A reasonable probability exists that the Court will grant certiorari.

There is a reasonable probability the Court will grant certiorari to review the judgment of the Fifth Circuit and answer the question presented in this case. A "reasonable probability" is usually understood as describing a likelihood lower than "more likely than not[.]" *Smith v. Cain*, 565 U.S. 73, 75 (2012) (discussing "reasonable probability" of a different outcome in the context of *Brady* materiality). Thus, to be entitled to a stay of execution until the Court can review his petition in due course, Mr. White need not demonstrate a high likelihood that the Court will decide to hear his case, but only a reasonably good chance of that outcome.

Rule 10(c) identifies as a relevant consideration in the Court's exercise of its certiorari jurisdiction whether "a United States court of appeals … has decided an important federal question in a way that conflicts with relevant decisions of this Court." White's petition presents this Court with an important federal question regarding substitution of counsel under the statute entitling capital petitioners to counsel, 18 U.S.C. §§ 3599(a)(2), (e). The Fifth Circuit's decision, which failed to consider whether appointed counsel had a conflict of interest when conducting the *Clair* interests-of-justice inquiry, appears to conflict directly with this Court's decision in *Christeson*, which reversed a district court's denial of substitution for the same "principal error": "fail[ing] to acknowledge [counsel's] conflict of interest." 574 U.S. at 378. Because it is apparent that White's case is so clearly controlled by this Court's decision in *Christeson* and the court of appeals erred in failing to apply *Christeson*'s main holding, this is among the rare circumstances in which this Court

may wish to grant the petition and summarily reverse the judgment below. *See Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (explaining that the Court "has not shied away from summarily deciding" even "fact-intensive cases where . . . lower courts have egregiously misapplied settled law").

III. White will suffer irreparable harm absent a stay.

Irreparable harm is indisputably present when a stay of execution is sought. As this Court has explained, "death is different"—"execution is the most irremediable and unfathomable of penalties." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality op.); *see also Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring) ("The third requirement—that irreparable harm will result if a stay is not granted—is necessarily present in capital cases.").

IV. The public interest favors granting a stay.

Texas has no legitimate interest in the execution of persons with intellectual disability. "[T]he American public, legislators, scholars, and judges" have reached a "consensus" that it is immoral to execute the intellectually disabled, as this Court recognized in *Atkins*. 536 U.S. 304, 307. It would therefore defy the public interest to execute White when there is an intolerable risk that he is a person with intellectual disability yet has been deprived of counsel who is capable of proving it, free from the distortion of a deep-seated conflict of interest.

Congress created a statutory right to counsel in capital cases under 18 U.S.C. § 3599, extending through all "available post-conviction process," *id.* § 3599(e), to guard against the possibility of unconstitutional executions. *See McFarland v. Scott*, 512 U.S. 849, 857-58 (1994). *McFarland* recognized that Congress provided a right to

counsel because capital litigation is "unique and complex," but even more so because of "the seriousness of the possible penalty." *Id.* at 855. The Court concluded that this right would be "meaningless" if a petitioner were executed despite the appointment of counsel to perform their duties, *id.* at 857, which "includes a right for that counsel to meaningfully research and present a defendant's habeas claims," *id.* at 858. Where this opportunity is not afforded, '[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.'" *Id.* (quoting *Barefoot*, 463 U.S. at 889) (alterations in original). It would defeat the will of the people acting through their representatives to allow White to be executed when he has been plainly deprived of the benefit of counsel guaranteed by § 3599.

A stay of execution will serve the strong public interest – an interest the State of Texas shares – in administering capital punishment in a manner consistent with the Constitution.

CONCLUSION

For these reasons, this Court should enter an order staying White's execution pending resolution of the issues raised in his petition for writ of certiorari.

Respectfully submitted,

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