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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

TIVON SCHARDL*
Chief, Capital Habeas Unit
DONNA COLTHARP
JOSHUA FREIMAN
Assistant Federal Public Defenders
919 Congress Avenue, Suite 950
Austin, Texas 78701
737-207-3007
Tivon_Schardl@fd.org
* Counsel of Record

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

Appendix	TITLE OF DOCUMENT	Appendix Page
A	United States Court of Appeals for the Fifth Circuit Opinion	App 001
B	United States District Court for the Southern District of Texas Order	App 010
C	Court of Criminal Appeals of Texas Dismissal of Application for Writ of Habeas Corpus	App 027
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United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
September 29, 2024

Lyle W. Cayce
Clerk

No. 24-70005

Garcia Glenn White,

Petitioner—Appellant,

versus

Bobby Lumpkin, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee,

consolidated with

Nos. 24-20428, 24-20435

In re Garcia Glenn White

Movant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:02-CV-1805

Before Elrod, Willett, and Ho, *Circuit Judges*.

PER CURIAM:[*]

Garcia Glenn White seeks an order authorizing the district court to consider his successive habeas application. For the reasons stated below, we DENY White's motion.

I

In 1996, a Harris County, Texas jury convicted White of capital murder and sentenced him to death for murdering Bernette and Annette Edwards. Both White's conviction and his sentence were upheld on direct review and in his numerous collateral attacks. To date, White has pursued at least six state habeas petitions and two federal habeas petitions.

On June 25, 2024, the State of Texas scheduled White's execution date for October 1, 2024. To forestall his execution, he has filed a flurry of last-minute challenges in this court and others. White filed this motion on September 24, just seven days before his scheduled execution.

II

In this challenge, White moves for authorization to file a successive federal habeas application under 28 U.S.C. § 2244(b). We grant such authorization only when a movant "makes a prima facie showing that the application satisfies the requirements" of § 2244(b). 28 U.S.C. § 2244(b)(3)(C). As an initial matter, any claim "that was presented in a prior application shall be dismissed." *Id.* § 2244(b)(1). Then, an applicant must show that a new claim arises under one of two exceptions. First, a claim may proceed if it "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244(b)(2)(A); *In re Burton*, 111 F.4th 664, 665–66 (5th

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Cir. 2024). Second, the claim may be raised if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and those facts, "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." § 2244(b)(2)(B); *In re Burton*, 111 F.4th at 666. The movant must also make a *prima facie* showing that his claim has merit. *In re Johnson*, 935 F.3d 284, 294 (5th Cir. 2019).

Next, the movant must also show that his successive petition is timely under § 2244. *In re Jones*, 998 F.3d 187, 189 (5th Cir. 2021). As relevant here, the petition must be brought within one year of "the date on which the constitutional right asserted was initially recognized by the Supreme Court" or "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," whichever is later. *Id.* § 2244(d)(1)(C)–(D).

White seeks to raise three claims in the district court: (1) that he is ineligible for execution under the Eighth Amendment and *Atkins v. Virginia*, 536 U.S. 304 (2002), because he is intellectually disabled; (2) that DNA evidence and evidence of "cocaine psychosis" show he is innocent of the death penalty;[1] and (3) that he is entitled to reweighing of aggravating and mitigating evidence. White fails to commit to whether he moves pursuant to § 2244(b)(2)(A) or § 2244(b)(2)(B), but we cannot grant his motion no matter how we construe it.

A

[1] Innocence of the death penalty means that some condition of eligibility for the death penalty has not been met. *See Murphy v. Nasser*, 84 F.4th 288, 293 (5th Cir. 2023).

To begin, White's second claim—that DNA evidence and evidence of "cocaine psychosis" would show he is innocent of the death penalty—is barred on either view. Section 2244(b)(1) applies to both new-rule and new-fact claims and requires us to dismiss claims presented in prior § 2254 applications. And since White's DNA- and cocaine-based claims are identical to claims he brought in his first federal habeas petition, we must dismiss them on these grounds. *See White v. Thaler*, No. H-02-1805, 2011 WL 4625361, at *4 (S.D. Tex. Sept. 30, 2011).

B

If framed as § 2244(b)(2)(B) new-fact claims, White's arguments run headlong into the statutory text because they deal with death-penalty eligibility rather than guilt. Section 2244(b)(2)(B)(ii) requires evidence that goes to whether a "reasonable factfinder would have found the applicant guilty of the underlying offense." § 2244(b)(2)(B)(ii). But White's claims as to his intellectual disability, DNA evidence, and cocaine psychosis go toward his punishment, not his guilt. He argues that, under *Sawyer v. Whitley*, 505 U.S. 333 (1992), he is "innocent of the death penalty" and cannot be executed. He makes no argument, however, that he is actually innocent of the underlying crime of capital murder, as required by the statutory text and later caselaw. *In re Sparks*, 939 F.3d 630, 633 (5th Cir. 2019) (reasoning that the applicant failed to meet the requirements of § 2244(b)(2)(B) because he "ha[d] not attempted to demonstrate actual innocence of the crime"). Accordingly, because "there is no reason to believe that Congress intended the language 'guilty of the offense' to mean 'eligible for a death sentence,'" § 2244(b)(2)(B) cannot sustain White's claims. *In re Webster*, 605 F.3d 256, 257–59, 257 n.2 (5th Cir. 2010) (drawing this conclusion regarding 28 U.S.C. § 2255(h)(1)'s nearly identical language and noting that the provisions are often read "*in pari materia*").

On this view, we also would dismiss White's claims as time-barred under § 2244(d)(1)(D). The only newly identified evidence White points to stems from affidavits recently obtained from friends and family in support of his *Atkins* claim.[2] But White fails to justify that evidence's last-minute discovery. It cannot be that his imminent execution date was some necessary trigger, because if it were, those same witnesses would have come forward the last time the state set an execution date, in 2015. White very well may be correct that his loved ones "spent their whole lives protecting [him] against the stigma" associated with intellectual disability, but even if this is true, this same care and concern would also have encouraged them to do everything they could to help him avoid execution. White has not demonstrated any reason why these facts could not have been discovered more than one year prior to the filing of this motion, so § 2244(d)(1)(D)'s limitation period forecloses his claim.[3] *Cf. In re Cantu*, 94 F.4th 462, 470 (5th Cir. 2024) (emphasizing, in a § 2244 reasonable-diligence analysis, that the individual with knowledge of the relevant evidence was the applicant's aunt). White

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[2] White does not identify any newly identified evidence that would support his DNA or cocaine-psychosis claims. Nor could he. White's DNA-based evidence stems from a July 18, 2003 order entered by the district court. *White*, 2011 WL 4625361, at *3. That is, he discovered this evidence long before one year prior to filing this motion. And though he argues that "[t]here is also strong new scientific evidence for a defense of cocaine psychosis," he does not identify what that evidence is. However, based on his own exhibits, that evidence was available, at the very latest, in 2015, much longer than one year ago.

[3] Perhaps anticipating this conclusion, White argues that these sorts of claims can never be time-barred, at least as a practical matter. But this proposition ignores our well-settled precedent to the contrary. *See In re Burton*, 111 F.4th at 666 (collecting cases); *see also id.* at 666–67 (rejecting arguments similar to White's).

also does not present any argument for equitable tolling, so that doctrine cannot salvage his claim.[4]

C

The same outcome results if we view White's claims as § 2244(b)(2)(A) new-rule claims. White filed his first amended habeas petition in 2009, after *Atkins* was decided in 2002. To the extent White asserts that his claim of intellectual disability only became available after the *Moore v. Texas* cases,[5] he has not shown that those cases were made retroactive by the Supreme Court. *See In re Sparks*, 939 F.3d at 632 (citing *Shoop v. Hill*, 586 U.S. 45, 49–52 (2019)); *In re Milam*, 838 F. App'x 796, 798 (5th Cir. 2020) (unpublished) ("We have not definitively rejected or supported the contention that *Moore* is a new retroactive rule of constitutional law in the context of successive habeas petitions sought under 28 U.S.C. § 2244."). Further, "'even if we count *Moore* as the starting date' for [White's] intellectual disability claim, 'the statutory time limit for asserting this claim is one year following *Moore*.'" *In re Jones*, 998 F.3d at 190. The *Moore* cases were decided in 2017 and 2019, so White's 2024 petition is time-barred.

White's two other arguments based on asserted legal changes fail for similar reasons. He cites the Supreme Court's grant of a stay in *Gutierrez v. Saenz*, 144 S. Ct. 2718 (2024), and the Texas Court of Criminal Appeals'

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[4] To the extent we consider outside counsel Capital Habeas Unit's argument for tolling, *see infra* note 7, it is unavailing. Equitable tolling is available where a party has "pursu[ed] his rights diligently" and "extraordinary circumstance[s] . . . prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). That is not the case here, and this record of egregiously dilatory filings does not justify decades of equitable tolling.

[5] 581 U.S. 1 (2017); 586 U.S. 133 (2019).

decision in *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021). However, he fails to show that these cases created "a new rule of constitutional law," much less one made retroactive by the Supreme Court. *See* 28 U.S.C. § 2244(b)(2)(A).

Finally, White has not made a *prima facie* showing that his *Atkins* claim has merit. His motion does not identify the particular evidence of intellectual disability on which he relies, and he does not even cite the standards for a finding of intellectual disability. However, we have considered the evidence presented and conclude that it does not meet the *prima facie* standard. The first prong of a finding of intellectual disability, "intellectual-functioning deficits, is typically 'indicated by an IQ score "approximately two standard deviations below the mean"—*i.e.*, a score of roughly 70—adjusted for "the standard error of measurement[.]"'" *In re Cathey*, 857 F.3d 221, 236 (5th Cir. 2017) (quoting *Moore*, 581 U.S. at 7). However, White's IQ score has been tested at 78, resulting in a range of 73 to 83. Our court "has not recognized the Flynn effect['s]" downward adjustment of IQ scores inversely proportional to age, *Brumfield v. Cain*, 808 F.3d 1041, 1060 n.27 (5th Cir. 2015), and the Supreme Court has noted that it is a "controversial theory." *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021). Thus, we are not required to adjust White's IQ scores downwards and do not choose to do so today. Because the lower end of his score range is not at or below 70, we are not required to consider his adaptive deficits, *see Moore*, 581 U.S. at 14, and White cannot make a *prima facie* showing of the merits of his claim. Accordingly, White's claims cannot proceed on a new-rule theory.

III

In conclusion, no matter how we construe White's motion, he cannot satisfy § 2244(b)'s stringent filing requirements. His *Atkins* claim fails § 2244(b)(2)(B) because it (1) challenges punishment, not guilt and (2) is

time-barred under § 2244(d)(1)(D). Moreover, it fails § 2244(b)(2)(A) because he has neither (1) relied on a retroactive new rule of constitutional law nor (2) made a *prima facie* showing that it has any merit. White's remaining claims fail for the same reasons.

Because we conclude that White has not satisfied § 2244(b),[6] we are statutorily required to DENY his motion for leave to file a successive habeas application.[7] Further, because of our § 2244 determination, "we have no authority to grant a stay of execution." *In re Burton*, 111 F.4th at 667 (quoting

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[6] The state also argues that White's *Atkins* claim is "subject to AEDPA's relitigation bar" insofar as it has been procedurally defaulted. The state may be correct in light of the Texas Court of Criminal Appeals' disposition of that claim. *See Ex parte White*, No. WR-48,152-09, at 2–3 (Tex. Crim. App. Sept. 18, 2024) (dismissing White's claim as an abuse of the writ); *Hughes v. Quarterman*, 530 F.3d 336, 342 (5th Cir. 2008) ("This court has held that, since 1994, the Texas abuse of the writ doctrine has been consistently applied as a procedural bar, and that it is an independent and adequate state ground for the purpose of imposing a procedural bar."). *But see In re Cathey*, 857 F.3d at 236 ("Importantly, 'the state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether [the petitioner] has made a *prima facie* showing of entitlement to *proceed* with his federal habeas application, which is an inquiry distinct from the burden that [the petitioner] must bear in proving his claim in the district court.'" (alterations in original) (quoting *In re Wilson*, 442 F.3d 872, 878 (5th Cir. 2006))). Regardless, though, we need not address the state's argument because of our determination that White cannot otherwise satisfy § 2244(b)'s filing requirements. *Johnson v. Dretke*, 442 F.3d 901, 912 (5th Cir. 2006).

[7] We also have before us a separate appeal filed by outside counsel—the Capital Habeas Unit of the Federal Public Defender's Office of the Western District of Texas—ostensibly on White's behalf. That appeal seeks to challenge the district court's denial of White's motion to substitute counsel and for a stay of execution. The Capital Habeas Unit has also filed a motion in our court for a stay of execution. We consolidated all of White's related cases for purposes of briefing. Even assuming *arguendo* that the Capital Habeas Unit is properly authorized to bring this appeal, the district court did not abuse its discretion in denying the motion to substitute counsel. *See Christeson v. Roper*, 574 U.S. 373, 377 (2015). The motion was untimely; the district court conducted an adequate inquiry into White's complaint; and, as our analysis shows, the motion that the Capital Habeas Unit seeks to file on White's behalf would be futile. *See id.* at 377, 380. Thus, we AFFIRM the district court's denial of the motion to substitute counsel.

In re Sparks, 939 F.3d at 633).[8] Accordingly, we DENY his motion for stay of execution and any other motions he currently has pending.[9]

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[8] Even if we did, we would not do so. We consider four factors when evaluating whether to grant such stays: "(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 a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *In re Burton*, 111 F.4th at 667 n.4 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). We recognize, of course, the gravity of this case, and we do not doubt that Mr. White's imminent execution will constitute irreparable harm. But because none of the rest of the factors are met, we would nevertheless deny the motion for a stay of execution included in the § 2244 motion.

For the same reasons and because White is not entitled to substituted counsel, we AFFIRM the district court's denial of a stay of execution and DENY the motion for a stay filed by the Capital Habeas Unit. White's argument for a stay under *McFarland v. Scott*, 512 U.S. 849 (1994), depends on his asserted need for substituted counsel. Thus, it was not an abuse of discretion for the district court to deny a stay, and we decline to grant a stay.

[9] Finally, the Rule 60(b) motion, transferred to our court, is DENIED as a successive habeas petition for all the reasons stated above. We also DENY the motion to supplement the record filed by the Capital Habeas Unit. "We will not ordinarily enlarge the record on appeal to include material not before the district court." *United States v. Flores*, 887 F.2d 543, 546 (5th Cir. 1989). And the material proffered by White neither justifies the egregious dilatoriness of his filings nor establishes authorization to submit a successive application for habeas.

United States District Court
Southern District of Texas
ENTERED
September 23, 2024
Nathan Ochsner, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

GARCIA GLENN WHITE, Petitioner,	§ § §	
v.	§	4:02-CV-1805
BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent.	§ § § § §	

ORDER

In 1989, a Texas jury convicted Garcia Glenn White for the capital murder of Bonita Edwards and her two sixteen-year-old daughters, Bernette and Annette Edwards. White was sentenced to death. The State of Texas has scheduled White's execution for **October 1, 2024**.

On September 13, 2024, attorneys from the Capital Habeas Unit of the Federal Public Defender for the Western District of Texas ("FPD attorneys") filed an Emergency Opposed Motion for Substitution of Counsel & Motion for a Stay of Execution on White's behalf. (Docket Entry No. 109). White's motion asks to substitute his federally appointed attorney, Patrick F. McCann, with FPD attorneys. White bases his motion on the procedural viability of a potential intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). For the reasons discussed below, the Court **DENIES** White's motion **WITHOUT PREJUDICE**.

I. Background

The Court appointed McCann in 2001. (Docket Entry No. 3; *White v. Thaler*, 4:02-cv-1805 (S.D. Tex)).[1] McCann, with other attorneys, have represented White's interests in both

1 The district court also appointed Rosa A. Eliades as co-counsel. (Docket Entry Nos. 3, 10). It does not appear that Eliades has been an active participant on White's defense team for many years. (Docket Entry No. 109 at 10, n. 4). Appointment of counsel in a capital case, nonetheless, continues until either the State carries out the inmate's death sentence or the court releases an attorney.

federal and state court for more than two decades. McCann unsuccessfully litigated an initial federal habeas petition through a full round of federal habeas review. (Docket Entry No. 81); *White v. Thaler*, 522 F. App'x 226, 227-28 (5th Cir. 2013), *as revised* (Apr. 3, 2013), *cert. denied White v. Stephens*, 571 U.S. 1133 (Jan. 13, 2014).

Not long after McCann's appointment, the Supreme Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that under the Eighth Amendment's "evolving standards of decency" review, "death is not a suitable punishment for a mentally retarded criminal." Jurisprudence generally held thereafter that *Atkins* relief requires a showing of: (1) significantly subaverage intellectual functioning, indicated by a full-scale score of 70 (with a five-point standard error of measurement) on a recognized IQ test; (2) related significant limits in adaptive skills; and (3) manifestation of those limits before age eighteen. *See Lewis v. Quarterman*, 541 F.3d 280, 283 (5th Cir. 2008); *Clark v. Quarterman*, 457 F.3d 441, 444 (5th Cir. 2006).

During his first federal habeas proceedings, McCann sought testing to determine whether White suffered from intellectual disability. McCann subsequently filed a successive state habeas application which "did not assert a claim directly under *Atkins*," but "[i]nstead . . . alleged that White's trial counsel were ineffective for failing to develop and raise evidence of White's 'borderline' mental retardation and argued that the constitution was violated because White's 'borderline' disability would have altered the jury's sentencing calculus." (Docket Entry No. 109 at 11). McCann's choice not to advance an *Atkins* claim at that point likely resulted from the "2008 report of Dr. Patricia Averill, Ph.D., who . . . reported that White obtained a full-scale IQ score of 78" which, "[b]ased on the diagnostic criteria at the time," required her to "conclude[] White's IQ score made him 'ineligible' to be diagnosed as a person with intellectual disability." (Docket Entry

No. 109 at 11). Under the standards of the psychological community and the judicial system in 2008, White's IQ score excluded him from an *Atkins* claim. *See Blue v. Thaler*, No. H-05-2726, 2010 WL 8742423, at *9 (S.D. Tex. Aug. 19, 2010) ("The psychological profession, therefore, sets 75 as the base score that may qualify for a diagnosis of mental retardation, given that the individual also meets the other two prongs of the relevant inquiry. A higher IQ score signifies borderline intellectual functioning, not mental retardation.").

White correctly observes that "[f]ollowing the conclusion of Mr. White's initial federal habeas proceedings, the law and science underlying intellectual disability have undergone major changes." (Docket Entry No. 109 at 13). In 2014, the Supreme Court reemphasized that the *Atkins* inquiry must be "informed by the medical community's diagnostic framework" and repudiated any previous over-reliance on IQ test scores. *Hall v. Florida*, 572 U.S. 701, 721-23 (2014). In subsequent cases, the Supreme Court would continue to emphasize the importance of relying on current standards developed by professional mental-health organizations. *See Brumfield v. Cain*, 576 U.S. 305, 308 (2015). Texas, however, favored its own judicial approach over the diagnostic framework until 2018. *See Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018). Even then, the Supreme Court had to rectify Texas's failure to adhere closely enough to the psychological profession's standards in 2019. *See Moore v. Texas*, 586 U.S. 133 (2019).

During the development of *Atkins* law, White faced an earlier execution date. In 2015, McCann filed a motion on White's behalf in the Fifth Circuit seeking leave to proceed on a successive federal habeas petition. *In re White*, No. 15-20022 (5th Cir). White argued that the state courts should have considered his low IQ when assessing whether he had invoked his right to counsel before confessing to the crime. White, however, had not received any new intellectual

testing, and he did not argue that intellectual disability would prevent his execution. On February 20, 2015, the Fifth Circuit denied the request for successive habeas proceedings. *In re White*, 602 F. App'x 954, 958 (5th Cir. 2015). Since that time, White has not litigated any issue in federal court.

The record as it now stands does not fully divulge what efforts, if any, McCann has made over time to reassess White's intellectual functioning. Most recently, McCann filed a motion for leave to proceed on a successive state habeas application in the Texas Court of Criminal Appeals. (Docket Entry No. 109-1 at 123-248). McCann also filed a motion to stay the upcoming execution. (Docket Entry No. 109-1 at 123-248). White's successive state habeas application included four grounds for relief, only one of which is at issue in this proceeding. White's application argued that his intellectual disability would preclude his execution under *Atkins*:

> Under new facts only recently available and the new medical standard for intellectual disability set out by the US Supreme Court in *Moore v. Texas*, and later adopted by the Court of Criminal Appeals in *Petatan v. State*, and further modified by *Ex parte Mays*, Mr. White meets the standard for a diagnosis of intellectual disability. His execution would violate his 8th Amendment right to be free from cruel and unusual punishment.

(Docket Entry No. 109-1 at 146). McCann based his argument on an affidavit from neurologist Dr. Gregg Hupp dated August 11, 2024. (Docket Entry No. 109-1 at 155-60). According to White,

> Dr. Hupp reviewed the testing by Dr. Averill in 2008 and new information concerning White's adaptive functioning. He determined that the IQ score of 78 reported by Dr. Averill "was likely an over-estimation of [White's] true intellectual abilities" caused by the combination of "[t]he structural limitations of IQ tests, floor effects, discrepancies between IQ and adaptive functioning, and the influence of outdated norms due to both the Flynn Effect and an outdated edition of the intelligence test[.]" Taking these factors into account, Dr. Hupp posited that White's true IQ score would be closer to 68. Dr. Hupp concluded White would meet the criteria for diagnosis as a person with intellectual disability.

(Docket Entry No. 109 at 17). On September 18, 2024, the Court of Criminal Appeals dismissed White's application as an abuse of the writ and denied a stay of execution. *Ex parte White*, No. WR-48,152-09, 2024 WL 4220599 (Tex. Crim. App. Sept. 18, 2024).

White has not yet sought federal review of an *Atkins* claim, although he will likely do so soon. In a responsive pleading, McCann has said that "[i]f the [Court of Criminal Appeals] denies the subsequent writ with an opinion, Mr. White may continue to litigate the matters raised in the writ in the federal courts." (Docket Entry No. 112 at 2). The record as it now stands indicates that McCann will seek permission from the Fifth Circuit to proceed on an *Atkins* claim. (Docket Entry No. 117).

I. White's Motion

On September 13, 2024, the FPD attorneys filed an Emergency Opposed Motion for Substitution of Counsel & Motion for a Stay of Execution. (Docket Entry No. 109). Only a month ago, "White wrote a letter to [an] attorney . . . seeking help on his case and raising concerns about McCann." (Docket Entry No. 109 at 25). White's letter led to the FPD attorneys becoming aware of his case. "When White indicated he wished to consult with FPD attorneys, they visited him on September 11 to explain their view that McCann may have a conflict." (Docket Entry No. 109 at 25). Two days later, the FPD attorneys filed this motion on his behalf.

The pending motion argues that "White's appointed counsel, Patrick F. McCann, has an unavoidable conflict of interest that prevents him from fulfilling his statutory duties of representation under 18 U.S.C. § 3599." (Docket Entry No. 109 at 8). According to White, because "he has a strong claim of intellectual disability, and vehicles by which to raise that claim," he "can satisfy the low bar for authorizing substitution of counsel to further investigate the

potential [*Atkins*] claim, and others unconflicted counsel may identify." (Docket Entry No. 109 at 20). White argues that federal law would allow for a stay of his execution date after the substitution of counsel. *See* 28 U.S.C. § 2251(a)(3); *McFarland v. Scott*, 512 U.S. 849 (1994); *Battaglia v. Stephens*, 824 F.3d 470 (5th Cir. 2016).[2]

White's allegations of conflict are specific. White acknowledges that Respondent will oppose any federal review of his potential *Atkins* claim based on his failure to comply with the Anti-Terrorism and Effective Death Penalty Act's strict limitations period. White argues: "To overcome the limitations bar, White will need to provide reasons for equitable tolling. White's best—and perhaps only—basis for tolling is McCann's failure to raise White's intellectual disability within a year of it becoming available under current medical and legal standards." (Docket Entry No. 109 at 22).

II. Substitution of Counsel Standard

Federal law entitles indigent capital petitioners to the appointment of counsel, but a petitioner has no right to an attorney of his choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); *see also Wheat v. United States*, 486 U.S. 153, 159 (1988) (stating that it was not "the essential aim of the [Sixth] Amendment . . . to ensure that a defendant will inexorably be represented by the lawyer whom he prefers"). A court may only substitute counsel for capital inmates when doing so is in the "interests of justice." *Martel v. Clair*, 565 U.S. 648, 662 (2012). This "context-specific inquiry" involves "several relevant considerations," including: "the timeliness of the motion; the adequacy of the district court's inquiry into the defendant's

[2] White's arguments for the substitution of counsel and for a stay of execution are inseparable. White's pleadings presume that the Court cannot substitute counsel without providing time to develop an *Atkins* claim.

complaint; and the asserted cause for that complaint, including the extent of the conflict or breakdown in communication between lawyer and client (and the client's own responsibility, if any, for that conflict)." *Id.* at 663.

White argues that "McCann's representation is impaired because White has a strong claim of intellectual disability that may be entertained by this Court, but McCann cannot effectively raise it." (Docket Entry No. 109 at 8). A petitioner is "entitled to new counsel to pursue his federal habeas relief [when] his original counsel would have had to argue his own ineffectiveness." *Beatty v. Davis*, 755 F. App'x 343, 346 (2018) (quotation omitted). The Court, however, declines to substitute counsel at this time. The question of whether to substitute counsel is best left to be decided after consideration by the Court of Appeals.

III. ANALYSIS

The question of whether a conflict exists because of McCann's representation involves the confluence of two limitations imposed by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). First, AEDPA impedes White's ability to litigate an *Atkins* claim because he has already received one full round of habeas review. *See* 28 U.S.C. § 2244. "The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a stringent set of procedures that a prisoner 'in custody pursuant to the judgment of a State court,' 28 U.S.C. § 2254(a), must follow if he wishes to file a 'second or successive' habeas corpus application challenging that custody, § 2244(b)(1)." *Burton v. Stewart*, 549 U.S. 147, 152 (2007). The successiveness provisions place exclusive primary jurisdiction in the circuit court. A petitioner must first "move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A). The circuit court will only grant authorization if the petitioner can make a prima

facie showing that either (1) his claim "relies on a new rule of constitutional law" that was "made retroactive to cases on collateral review by the Supreme Court" and was "previously unavailable"; or (2) "the factual predicate for the claim could not have been discovered previously" with due diligence, and these facts, if proven, "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." *Id.* §§ 2244(b)(2)(A), (b)(2)(B). Only then does a district court have jurisdiction over the petitioner's successive petition.[3]

White's arguments presume that he possesses a strong *Atkins* claim. This Court cannot entertain the merits of any *Atkins* claim until White first seeks leave from the Fifth Circuit. White's motion does not allege that McCann will not move for successive review in the Fifth Circuit. His motion, in fact, presumes McCann will.[4] White's concern is whether McCann's continued representation would prevent him from raising arguments which would allow for federal review of the putative *Atkins* claim.

The second constraint at issue in this case is AEDPA's strict limitations period. AEDPA "enacted a one-year period of limitation for federal habeas proceedings that runs, unless tolled, from the date on which the petitioner's conviction became final at the conclusion of direct review." *Cantu-Tzin v. Johnson*, 162 F.3d 295, 298 (5th Cir. 1998). Because of White's litigation history, the parties' pleadings agree that AEDPA's limitations period will be a concern going forward.

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3 Even then, AEDPA makes the district court a second-gatekeeper that "conduct[s] a 'thorough' review to determine if the [petition] 'conclusively' demonstrates that it does not meet AEDPA's second or successive motion requirements." *Reyes-Requena v. United States*, 243 F.3d 893, 898-99 (5th Cir. 2001) (quoting *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1165 (9th Cir. 2000)); *see* 28 U.S.C. § 2244(b)(4).

4 The Court observes that White's motion only deals with one claim even though McCann recently raised others in state court. White does not argue that any conflict impairs McCann's ability to advance other claims which may be as strong as his *Atkins* claim.

Operation of AEDPA's limitations period is an affirmative defense. *See United States v. Petty*, 530 F.3d 361, 364 n.5 (5th Cir. 2008) ("[T]his circuit does not view the AEDPA limitations period as a jurisdictional bar, but rather as a statute of limitations that functions as an affirmative defense."). Respondent's pleadings indicate they will rely on that affirmative defense against any *Atkins* claim. (Docket Entry No. 114 at 34-37).

In recognition of AEDPA's harsh consequences, the Supreme Court has held that equitable tolling may forgive noncompliance with the timeliness provision. *See Holland v. Florida*, 560 U.S. 631, 634 (2010). "To establish his entitlement to equitable tolling, a petitioner must 'sho[w] (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.'" *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) (quoting *Holland*, 560 U.S. at 649). Courts have found that equitable tolling is appropriate under various circumstances, including when state actors impair the ability to bring claims, when physical or mental limitations prevent timely filing, or when a petitioner is innocent.

White's motion focuses on one recognized argument for equitable tolling: conflict. The Supreme Court has found that, while a "garden variety claim of misconduct" by counsel does not warrant equitable tolling, "far more serious instances of attorney conduct may." *Holland*, 560 U.S. at 651; *see also Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) ("[M]ere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified."). In the context of equitable tolling, the Supreme Court has emphasized that a "conflict of interest" may allow for equitable tolling. *Christeson v. Roper*, 574 U.S. 373, 379 (2015). Not all attorney errors or potential conflicts allow for equitable tolling. "Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for 'serious instances of attorney misconduct.'"

Id. at 378 (internal quotation omitted).

Christeson recognized that a conflict may occur in a case because an attorney cannot "reasonably be expected to make . . . an argument," particularly "his client's strongest argument," when it "threatens their professional reputation and livelihood." *Id.* White argues that McCann's representation was deficient because he has delayed raising an *Atkins* claim until now, and he cannot argue his own ineffectiveness to overcome the anticipated limitations defense. White argues that the alleged conflict would warrant equitable tolling.

White's request for substitution is specific—for example, he makes no allegation that there was a failure to communicate or a breakdown in the attorney/client relationship. White's allegations all center on McCann's choice not to raise an *Atkins* claim until recently. White asks for the substitution of the FPD attorneys so that they can argue that McCann's conflict should allow for equitable tolling.

Respondent opposes the pending motion on two general grounds. First, Respondent contends that the present motion is "indisputably dilatory" because any challenge to McCann's litigation strategy "has existed for at least *five years*." (Docket Entry No. 114 at 18). Second, Respondent contends that "White is not entitled to substitution of counsel for the purpose of raising a futile *Atkins* claim." (Docket Entry No. 114 at 18). Respondent's pleadings argue that "White's evidence does not present a prima facie claim for intellectual disability." (Docket Entry No. 114 at 38). The Court, however, will deny the pending motion without prejudice in deference to the Fifth Circuit's preliminary role in deciding whether federal review should go forward.

White's arguments presume that he possesses a "strong" *Atkins* claim. This Court does not have jurisdiction to assess the merits of an *Atkins* claim. In fact, AEDPA gives sole discretion to

the circuit courts to decide as an initial matter whether a successive claim warrants further review. *See* 28 U.S.C. § 2244(b)(3)(A). McCann has indicated that he will soon litigate an *Atkins* claim in the Fifth Circuit. As part of that review, the Fifth Circuit will decide if White has made a "prima facie showing that . . . his *Atkins* claim has merit." *In re Cathey*, 857 F.3d 221, 233-34 (5th Cir. 2017) (quotations omitted); *see also In re Johnson*, 935 F.3d 284, 294 (5th Cir. 2019). The Court will not make any preliminary assessment of whether White's proposed *Atkins* claim is meritorious.[5]

The question of equitable tolling in this case is secondary to the primary question of whether any review is available for White's proposed *Atkins* claim. *See Adams v. Thaler*, 679 F.3d 312, 317 (5th Cir. 2012) (passing over questions of conflict when the petitioner failed to comply with AEDPA's successive-petition standards). White's concerns derive from whether federal review is foreclosed by AEDPA's limitations period, but his proposed *Atkins* claim cannot receive any substantive review until the Fifth Circuit authorizes it. The Fifth Circuit does not traditionally deny leave to proceed on a successive petition based on limitations-period arguments alone. "It is an open question" in the Fifth Circuit whether, "in [its] role as 'gatekeeper' under § 2244(b)(3)(C)," it has "the statutory authority to deny a motion for authorization solely on the basis of timeliness under § 2244(d)(1)(C)." *In re Salazar*, 443 F.3d 430, 434 n.2 (5th Cir. 2006); *see also In re Mathis*, 483 F.3d 395, 400 (5th Cir. 2007). The Fifth Circuit generally only considers AEDPA's limitations period, and the subsidiary question of equitable tolling, after deciding

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5 In a different context, the Fifth Circuit has declined to find a conflict under *Christeson* because the proposed claim lacked merit. *See Ramirez v. Davis*, 780 F. App'x 110, 117 (5th Cir. 2019). Mindful of the circuit's preliminary role in successive habeas cases, the Court wishes to avoid making any advisory opinion on the strength of White's proposed *Atkins* claim.

whether a petitioner has complied with § 2244(b)'s successive-petition requirements. *See In re Burton*, 111 F.4th 664, 666 (5th Cir. 2024) (considering equitable tolling only after deciding that the petitioner did not meet the successive-review standards); *In re Cantu*, 94 F.4th 462, 473 (5th Cir. 2024) (same); *In re Jones*, 998 F.3d 187, 189 (5th Cir. 2021) (same); *In re Sparks*, 944 F.3d 572, 576 (5th Cir. 2019) (same).[6] White's pleadings, in fact, do not point to any case in which the Fifth Circuit has denied authorization to proceed in a successive petition based only on the limitations period.

White's arguments push the question of equitable tolling to the forefront. The Court, however, is hesitant to make any decision on timeliness before the Fifth Circuit decides whether White's *Atkins* claim may proceed. If the Fifth Circuit allows successive review, then questions of timeliness and equitable tolling will be fully before the Court. In cases similar to the instant one, the Fifth Circuit has found that "it is unclear if equitable tolling is warranted" and thus "premature" to address equitable tolling, saying that "the district court will be best-positioned to resolve whether equitable tolling applies." *In re Campbell*, 750 F.3d 523, 534 (5th Cir. 2014); *see also In re Johnson*, 935 F.3d at 296; *see also Holland*, 560 U.S. at649 ("[W]e also recognize the prudence, when faced with an equitable, often fact-intensive inquiry, of allowing the lower courts to undertake it in the first instance."). The Fifth Circuit has left questions about equitable tolling to the district courts, but only after authorizing successive review.

After the Fifth Circuit makes a preliminary decision about successiveness, the Court can decide whether McCann's representation created a conflict and was an impediment to federal

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6 The Fifth Circuit also bypasses the question of timeliness when the petitioner has not met the AEDPA's successiveness standards. *See In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020).

review. As they now stand, White's arguments would require an assessment of McCann's representation on the cold record with little insight into his litigation choices. An attorney is not required to "raise every nonfrivolous claim, but rather may select among them in order to maximize the likelihood of success." *Smith v. Robbins*, 528 U.S. 259, 288 (2000); *see Slater v. Davis*, 717 F. App'x 432, 438 (5th Cir. 2018). And, of course, "counsel cannot be ineffective for failing to raise a meritless claim." *Guidry v. Lumpkin*, 2 F.4th 472, 491 (5th Cir. 2021). Reasons for McCann's litigation choices may exist which are not obvious from the pleadings as they stand. The record before the Court has not yet been developed adequately to assess McCann's past litigation strategy.

And the Court cannot anticipate what McCann's litigation strategy will be going forward. McCann will seek Fifth Circuit authorization on the *Atkins* claim he developed and presented in state court. White argues that he "has a strong claim of intellectual disability, and *vehicles* by which to raise that claim," but bases his motion on one specific ground for equitable tolling. (Docket Entry No. 109 at 20) (emphasis added). White says that he "could not present" his *Atkins* claim "unless . . . he could persuade a court that McCann breached a duty to him by failing to develop and present the claim earlier." (Docket Entry No. 116 at 12). Arguing that a conflict warrants equitable tolling is one pathway to federal review, but others exist. Attorneys often make other arguments, such as disputing when the limitations period began running, to avoid dismissal as untimely. Other attorneys have argued that actual innocence—even actual innocence of the death penalty because of intellectual disability—should prevent the harsh application of AEDPA's limitations period. *See Johnson v. Lumpkin*, 4:19-cv-3047 (S.D. Tex. 2019). (Docket Entry No. 78 at 19). Arguing conflict is only one possible litigation strategy, but the Court cannot anticipate

what litigation strategy McCann will employ in the Fifth Circuit and whether it would be successful.

White repeatedly draws this Court's attention to *Johnson v. Stephens*, a case in which he argues that "another judge in this district, under the authority of 28 U.S.C. § 2251(a)(3), stayed an execution in a case in which it had appointed conflict-free counsel to review McCann's performance." (Docket Entry No. 116 at 7). Before his withdrawal as counsel, McCann represented Dexter Johnson. The district court eventually found that McCann's representation in that case allowed for equitable tolling. *Johnson v. Stephens*, 4:11-cv-2466 (S.D. Tex. 2014). (Docket Entry No. 70).

The circumstances of *Johnson*, however, are different from those in the instant case. The conflict which resulted in appointment of supplemental counsel in that case did not result from any malfeasance or error on McCann's part. In *Johnson*, the Court appointed outside counsel to assist in the case because McCann had served both as the attorney in the initial state habeas proceedings and the initial federal petition. *Id.* Appointing state habeas counsel to continue as federal counsel was a common practice until the Supreme Court decided in *Martinez v. Ryan*, 566 U.S. 1 (2012), that the dual representation could forgive procedural barriers to federal review.[7] McCann eventually withdrew from the *Johnson* case voluntarily. *See* 4:11-cv-2466. (Docket Entry No. 91).

McCann's failure to raise an *Atkins* claim earlier only became an issue after Johnson sought

[7] **Error! Main Document Only.** In fact, under the heading "Continuity of Representation," the CJA Guide to Judiciary Policy stated—and still states—that "[i]n the interest of justice and judicial and fiscal economy, unless precluded by a conflict of interest, presiding judicial officers are urged to continue the appointment of state post-conviction counsel, if qualified . . . when the case enters the federal system." 7A Guide to Judiciary Policy § 620.70; *see also Johnson v. Davis*, No. 11-CV-2466, 2019 WL 13440694, at *1 (S.D. Tex. Aug. 12, 2019).

leave in the Fifth Circuit to proceed on a successive petition. Johnson argued that McCann had a conflict that prevented raising a timely *Atkins* claim, but only alleged that the conflict arose "because he was also his state habeas lawyer." *In re Johnson*, 19-20552 (5th Cir. 2019). (Docket Entry No. 2 at 11). Finding that "questions of equitable tolling are best left to the district court for the initial analysis," the Fifth Circuit remanded the case "to gauge the timeliness of the motion for a successive application." *In re Johnson*, 935 F.3d 284, 296 (5th Cir. 2019).

Any conflict due to failing to raise an *Atkins* claim was only emphasized once the Fifth Circuit had authorized review. After holding an evidentiary hearing on the question of McCann's representation, the district court performed its duty as the second gatekeeper and allowed Johnson's successive habeas action to proceed. The lower court then found that Johnson had "made a prima facie showing that he is intellectually disabled" and found that "[a] zealous attorney should have brought Johnson's *Atkins* claim to the federal courts many years [before]." *Johnson v. Lumpkin*, 4:19-cv-3047 (S.D. Tex. 2019). (Docket Entry No. 78 at 29, 31).

Johnson's case is currently before the Fifth Circuit on several issues, including the question of whether McCann's representation equitably tolled the limitations period. White's case comes before this Court under a different posture than *Johnson* did. The district court in *Johnson* only considered whether McCann's representation allowed for equitable tolling after the Fifth Circuit had made a preliminary decision that his *Atkins* claim should proceed under § 2244(b). The circumstances in *Johnson* did not require the district court to make any assessment of the petitioner's *Atkins* claim until after the circuit court had done so. Further, the district court did not find any deficiency in McCann's representation until after a full evidentiary hearing which delved

into why McCann had not raised the *Atkins* claim previously.[8] Here, McCann has said that "the facts of Mr. White's case raise different issues" than those in *Johnson*. (Docket Entry No. 112 at 2). White's pleadings ask this Court to presume no differences, but summarily find that McCann provided deficient representation. The record in its current state is insufficient to make that determination. This Court's holding on the present motion will place things in the same position as in *Johnson*—the questions of conflict and equitable tolling will follow any circuit decision on successiveness and allow for full factual review.

In sum, this case is not before the Court in a posture to decide whether White's *Atkins* claim has potential merit, whether McCann's failure to raise an *Atkins* claim caused a conflict of interest, or whether any conflict requires equitable tolling. Those are questions for another day. The Fifth Circuit has the exclusive initial authority over the merits of a successive petition. With that, the Fifth Circuit possesses authority to appoint supplemental counsel when the question of conflict may arise. *See Beatty*, 755 F. App'x at 348; *Speer v. Stephens*, 781 F.3d 784, 786 (5th Cir. 2015); *Mendoza v. Stephens*, 783 F.3d 203 (5th Cir 2015). The wisest course in this case is to refrain from any judgment before the circuit court acts in its gatekeeping role under § 2244(b)(3)(C).

In lieu of granting the Motion to Substitute Attorney and Motion to Stay Execution, the Court will pause to allow the circuit court to perform its statutory duty. Circumstances may change, particularly if the Fifth Circuit authorizes successive review. In that case, the Court may

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[8] The FPD attorneys also point to *In re Hearn*, 376 F.3d 447, 458 (5th Cir. 2004), a case where an unrepresented prisoner sought the assistance of counsel to develop an *Atkins* claim. There, the Fifth Circuit observed that "a prisoner's motion for counsel to investigate and prepare a successive *Atkins* claim need only be supported by a colorable showing of mental retardation." *Id.* at 455. Unlike *Hearn*, White is not without an attorney who has litigated and can continue to litigate an *Atkins* claim on his behalf. The question in *Hearn* was not, as it is in this case, whether substituting counsel could remove procedural barriers to a possibly meritorious claim.

reconsider the need for substitution.

The Court, therefore, **DENIES** White's Motion to Substitute Attorney and Motion to Stay Execution **WITHOUT PREJUDICE**.

SIGNED at Houston, Texas, on this the 23rd day of September, 2024.

KEITH P. ELLISON
United States District Judge

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-48,152-09

EX PARTE GARCIA GLEN WHITE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 723847-F IN THE 180TH DISTRICT COURT HARRIS COUNTY

Per curiam.

O R D E R

Before us is a subsequent application for a writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[1] Also before us is a motion for stay of execution.

Applicant Garcia Glen White was convicted of capital murder and sentenced to death in July 1996. On direct appeal, we affirmed the trial court's judgment of guilt and

[1] Unless otherwise specified, all mentions of "Articles" and "Chapters" in this opinion refer to the Articles and Chapters of the Texas Code of Criminal Procedure.

sentence of death. *White v. State*, No. AP-72,580 (Tex. Crim. App. Jun. 17, 1998) (not designated for publication).

In December 2000, White filed his initial postconviction habeas application under Article 11.071. We denied relief. *Ex parte White*, No. WR-48,152-01 (Tex. Crim. App. Feb. 22, 2001) (not designated for publication). In March 2002, White filed his first subsequent 11.071 application; we dismissed the application under Article 11.071, Section 5. *Ex parte White*, No. WR-48,152-02 (Tex. Crim. App. Apr. 24, 2002) (not designated for publication). In March 2009, White filed his second and third subsequent 11.071 applications; we dismissed both applications under Section 5. *Ex parte White*, Nos. WR-48,152-03, -04 (Tex. Crim. App. May 6, 2009) (not designated for publication). In January 2015, White filed his fourth subsequent 11.071 application. We filed and set the application to decide whether Article 11.073 "appl[ies] to newly discovered scientific evidence affecting only the punishment stage of trial." *Ex parte White*, No. WR-48,152-08 (Tex. Crim. App. Mar. 23, 2015). We ultimately handed down a published opinion holding that, if a habeas "applicant's proffered scientific evidence relates solely to punishment, his evidence cannot meet" Article 11.073. *Ex parte White*, 506 S.W.3d 39, 52 (Tex. Crim. App. 2016). We therefore dismissed White's fourth subsequent 11.071 application under Section 5. *Id.*

On August 23, 2024, White filed in the convicting court the instant pleading, his fifth subsequent 11.071 application. In it, White raises four claims for habeas corpus relief. In claim one, White alleges that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. *See Atkins v. Virginia*, 536

U.S. 304 (2002). In claim two, White argues that the federal district court's Memorandum and Order in the case of *Gutierrez v. Saenz*, 565 F.Supp. 892 (S.D. Tex. 2021), should cause this Court to reconsider its 2016 opinion in *Ex parte White*, 506 S.W.3d at 52. In claim three, White alleges that two unenacted bills from the Texas House of Representatives should cause this Court to reconsider *Ex parte White*, 506 S.W.3d at 52. In claim four, White alleges that this Court's opinion in *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021), represents new law in contemplation of Article 11.071, Section 5(a)(1). In the same pleading, White also prays for this Court to stay his execution. In an abundance of caution, we shall treat this prayer as a freestanding motion for stay of execution.

Having reviewed White's application, we conclude that the application does not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ. *See* Art. 11.071, § 5(c). White's motion for stay of execution is denied. The Court shall not reconsider this Order on the Court's own motion or otherwise.

IT IS SO ORDERED THIS THE 18TH DAY OF SEPTEMBER, 2024.

Do Not Publish

DECLARATION OF Garcia White

I, Garcia "Glenn" White state and declare as follows:

1. My name is Garcia "Glenn" White. My date of birth is 2/4/1963, and my address is the Polunsky Unit in Livingston, TX.

1. On September 11, 2024, Donna Coltharp and Joshua Freiman of the Federal Public Defender visited me at my request to speak about my case.

2. After they advised me about my case, I asked them to file a motion in federal court to replace my lawyer Pat McCann. I signed a declaration that day about what they told me and what I wanted them to do.

I have read and reviewed this 3 page declaration. (Initial) GGW

3. On September 24, 2024, Joshua Freiman visited me again. He told me that the federal district court had denied my request to replace Mr. McCann and to stay my execution.

4. I want the lawyers from the Federal Public Defender to represent me still. I want them to appeal the federal court's order.

I have read and reviewed this 3 page declaration. (Initial) GGW

I declare, under penalty of perjury, under the laws of the United States and the State of Texas that the foregoing is true and correct to the best of my knowledge and that this declaration was executed in the County of Polk, State of Texas, on the 24th day of September, 2024, in Livingston, Texas.

Gurcia G. White 999205

Signature

I have read and reviewed this 3 page declaration. (Initial) GGW