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

PETITION FOR WRIT OF CERTIORARI

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

CAPITAL CASE

QUESTIONS PRESENTED

Christeson v. Roper, 574 U.S. 373 (2015), held that a conflict of interest could satisfy the "interests of justice" standard set forth in *Martel v. Clair*, 565 U.S. 648 (2012), and thus require substitution of conflict-free counsel under 18 U.S.C. § 3599(e). In *Christeson*, the district court failed to address the factors set forth in *Clair* because it did not acknowledge the asserted conflict of interest but addressed only the list of additional considerations courts may account for. In this case, the district court and court of appeals similarly did not address the asserted conflict of interest created by appointed counsel's failure to file a potentially meritorious *Atkins* claim within AEDPA's one-year statute of limitation. Rather, they focused on other considerations—timeliness and futility. The questions presented are:

1. Whether the Fifth Circuit's resolution of White's request for substitution of counsel replicates the error identified and corrected by this Court in *Christeson*.

2. Whether counsel appointed under 18 U.S.C. § 3599 was conflicted between serving his own professional interests and acting in the best interest of his client.

PARTIES TO THE PROCEEDING

The Petitioner is Garcia Glenn White. The Respondent is Bobby Lumpkin, the Director of Texas Department of Criminal Justice, Correctional Institutions Division. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

White v. State, No. AP-72,580 (Tex. Crim. App. June 17, 1998) (affirming conviction and sentence)

Ex parte White, No. WR-48,152-01 (Tex. Crim. App. Feb. 21, 2001) (denying initial state habeas application

Ex parte White, No. WR-48,152-02 (Tex. Crim. App. Apr. 24, 2002) (dismissing second state habeas application)

White v. Thaler, No. 4:02-cv-1805 (S.D. Tex. Sept. 30, 2011) (denying federal habeas petition)

White v. Thaler, No. 12-70032, 522 F. App'x 226, 227-28 (5th Cir. 2013), *as revised* (Apr. 3, 2013) (refusing to certify an appeal)

White v. Stephens, No. 13-6783, 571 U.S. 1133 (Jan. 13, 2014) (denying petition for writ of certiorari)

Ex parte White, Nos. WR-48,152-03 & WR-48,152-04, 2009 WL 1272551 (Tex. Crim. App. May 6, 2009) (dismissing third and fourth state habeas applications)

Ex parte White, No. WR-48,152-05 (Tex. Crim. App. Jan 15, 2015) (denying leave to file petition for writ of prohibition)

Ex parte White, No. WR-48,152-06 (Tex. Crim. App. Jan. 15, 2015) (denying leave to file petition for writ of prohibition regarding lethal injection protocol)

Ex parte White, No. WR-48,152-07 (Tex. Crim. App. Jan. 21, 2015) (denying leave to file petition for writ of prohibition)

In re White, No. 15-20022, 602 F. App'x 954, 958 (5th Cir. Feb. 20, 2015) (denying motion for authorization to file successive petition)

Ex parte White, No. WR-48,152-08, 506 S.W.3d 39 (Tex. Crim. App. Nov. 2, 2016) (dismissing fifth state habeas application)

Ex parte White, No. WR-48,152-09 (Tex. Crim. App. Sept. 18, 2024) (dismissing sixth state habeas application)

Ex parte White, No. WR-48,152-10 (Tex. Crim. App. Sept. 25, 2024) (denying leave to file writ of mandamus)

Ex parte White, No. WR-48,152-11 (Tex. Crim. App. Sept. 25, 2024) (denying leave to file petition for writ of prohibition and motion for stay of execution)

White v. Lumpkin, No. 4:02-cv-1805 (S.D. Tex. Sept. 23, 2024), ECF No. 121 (denying motion to substitute appointed attorney and stay execution)

White v. Lumpkin, No. 4:02-cv-1805 (S.D. Tex. Sept. 27, 2024), ECF No. 129 (denying motion for stay of execution and transferring Rule 60(b) motion to Fifth Circuit)

White v. Lumpkin, Nos. 24-70005, 24-20428, 24-20435 (5th. Cir. Sept. 29, 2024), ECF No. 59 (denying motion for authorization to file successive federal habeas petition, affirming district court's denial of outside counsel's motion to substitute counsel a stay execution)

White v. State of Texas, No. 24-5658 (U.S., Sept. 27, 2024) (pending petition for writ of certiorari to the Court of Criminal Appeal of Texas)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Garcia Glenn White respectfully petitions this Court for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court opinion denying White's motion for substitution and stay of execution date is attached as Appendix B. The Fifth Circuit's opinion denying White's appeal is attached as Appendix A.

JURISDICTION

The Fifth Circuit denied White's appeal on September 29, 2024. App. A. Pursuant to Supreme Court Rule 30.1, this petition is timely. The Court has jurisdiction to review the petition under 28 U.S.C. § 1254(1).

Christeson v. Roper, 574 U.S. 373 (2015), also involved a post-judgment appeal from the denial of substitution of counsel, brought on the petitioner's behalf by his proposed new counsel. In *Christeson*, the Eighth Circuit had dismissed the appeal for lack of jurisdiction, believing the petitioner had not authorized proposed counsel to prosecute the appeal. *Christeson*, 547 U.S. at 376. Proposed counsel resolved that possible defect by submitting a signed retainer agreement. *Id.* at 376 n.1. Similarly, White's written authorization for undersigned counsel to represent him in this matter is attached as Appendix D.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C. § 3599(e) provides, in relevant part, that appointed counsel may be replaced by similarly qualified counsel upon the attorney's own motion or upon motion of the defendant[.]"

Title 28 U.S.C.§ 2251(a)(3) provides:

> If a State prisoner sentenced to death applies for appointment of counsel pursuant to section 3599(a)(2) of title 18 in a court that would have jurisdiction to entertain a habeas corpus application regarding that sentence, that court may stay execution of the sentence of death, but such stay shall terminate not later than 90 days after counsel is appointed or the application for appointment of counsel is withdrawn or denied.

STATEMENT OF THE CASE

In 1996, Garcia Glenn White was convicted and sentenced to death for killing Bernette and Annette Edwards. At White's sentencing hearing, his attorneys presented evidence that he had an IQ score of 76. At that time, White had no viable claim that his intellectual disability excluded him from capital punishment.

Post-conviction litigation, 1998-2013. The Texas Court of Criminal Appeals (TCCA) affirmed White's conviction and sentence, *White v. State,* No. AP-72,580 (Tex. Crim. App. June 17, 1998). In January 1998, the TCCA appointed Houston attorney Patrick McCann to represent White in state habeas proceedings. McCann initially raised eight claims on White's behalf. The TCCA denied relief. *Ex parte White,* No. WR-48,152-01 (Tex. Crim. App. Feb. 21, 2001).

In April 2001, McCann was appointed to represent White in federal habeas proceedings. 21 U.S.C. § 848(q).[1] ROA.253. Before he filed White's first habeas petition, McCann voluntarily moved to dismiss the federal case so he could file a subsequent state habeas application. ROA.279-82. The TCCA dismissed that application. *Ex parte White,* No. WR-48,152-02 (Tex. Crim. App. April 24, 2002), and McCann filed White's initial federal habeas petition on May 3, 2002. ROA.289-524. McCann again requested a stay and returned to state court in 2003 pending the outcome of DNA testing. ROA.672-75.

In June 2002, this Court held that the Eighth Amendment prohibited executing persons with intellectual disabilities. *Atkins v. Virginia*, 536 U.S. 304 (2002). At the time, the clinical definition of intellectual disability required finding (1) subaverage intellectual functioning, (2) significant limitations in adaptive skills such as communication, self-care, and self-direction, and (3) the onset of those features before age 18. *Id.* at 318. The Court held that "an IQ between 70 and 75 or lower … is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition" *Id.* at 309 n.5 (citation omitted).

McCann did not raise an *Atkins* claim on White's behalf in 2007, when he filed White's first post-*Atkins* state habeas application. While that application remained pending, McCann filed, in 2009, another subsequent state habeas application that did mention the emerging constitutional issue of intellectual disability. But he did

[1] Recodified later as 18 U.S.C. 3599 (2006 ed. and Supp. IV).

not assert a claim under *Atkins*. McCann 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 the disability would have altered the jury's sentencing calculus. ROA.1360-61.

These claims relied on the 2008 report of Dr. Patricia Averill, Ph.D., who administered a Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), and obtained an IQ score of 78. Based on the diagnostic criteria at the time, Dr. Averill concluded White's IQ score made him "ineligible" to be diagnosed as a person with intellectual disability. ROA.1367-72; *see Atkins*, 536 U.S. at 309 n.5.

Dr. Averill also noted she lacked information to assess the second prong of intellectual disability—adaptive functioning. McCann provided her "no information," and she had to rely on White's self-report. ROA.1371. Dr. Averill therefore found it "difficult to ascertain" whether White had significant deficits in adaptive behaviors. *Id*.

Nevertheless, Dr. Averill's report contained several signs of White's low intelligence. As to intellectual functioning, White received low achievement scores on the Wide Range Achievement Test—Revision 4 (WRAT4). As to sources of impairment and adaptive functioning, White's self-report included a history of marijuana and crack cocaine abuse, an adolescent head injury resulting from being hit with a baseball bat, an inability to handle money and other personal needs, and poor performance in school. ROA.1369.

The CCA dismissed White's 2007 and 2009 applications. ROA.1375-76.

McCann amended White's federal petition for the last time in December 2009. ROA.787-882. In September 2011, the district court denied the petition. ROA.1158-85. The Fifth Circuit denied certification of an appeal on any issue. *White v. Thaler*, 522 F. App'x 226, 227-28 (5th Cir. 2013), *as revised* (Apr. 3, 2013), *cert. denied sub nom. White v. Stephens*, 571 U.S. 1133 (Jan. 13, 2014).

Changes in science and law. After White's initial federal habeas proceedings, the science and law underlying intellectual disability underwent major changes. In May 2013, the American Psychiatric Association's (APA) released the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V), which significantly changed the diagnostic guidelines for ID, moving "the focus from specific IQ scores to clinical judgment" and recognizing that an individual with an IQ score over 70 may still qualify as intellectually disabled. *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019). Shortly after this revision, this Court decided *Hall* v. *Florida*, 572 U.S. 701 (2014), adopting the DSM-V's conclusion that "[i]ntellectual disability is a condition, not a number." *Id.* at 722-23.

Although *Hall* aligned assessments of intellectual disability for purposes of *Atkins* with the methods and criteria used in the medical community, Texas courts continued to apply nonclinical factors when assessing ID. *See Ex parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015) (refusing to adopt a recommendation that habeas relief be granted when the lower court relied on the DSM-V). As counsel for Bobby James Moore, McCann worked to bring Texas courts into compliance with new diagnostic standards. ROA.1320-22. In 2017, this Court used Moore's case to set the Texas

state courts on the correct legal path, remanding the case to the CCA with instructions to apply current medical standards in assessing intellectual disability. *Moore v. Texas*, 581 U.S. 1, 20 (2017) (*Moore I*). On remand, the TCCA "conclude[d] that the DSM-5 should control [its] approach to resolving the issue of intellectual disability." *Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018).[2]

Post-conviction litigation, 2014-2015. When the DSM-V issued, White's motion for a certificate of appealability had just been denied by the Fifth Circuit. McCann, who was Moore's attorney, "knew about the DSM-V and knew it could change the way mental-health professionals evaluated" clients for intellectual disability. ROA.1300. But McCann did not have White evaluated under the new diagnostic criteria, did not investigate or direct an investigation into White's adaptive functioning, and did not file a subsequent claim in federal court seeking to raise a claim under *Atkins*.

On April 28, 2014, a state court issued an order setting White's execution date for January 28, 2015. On January 15, McCann moved for authorization to file a successive federal habeas application. Mot. Authorization, *In re White*, No. 15-20022 (5th Cir. Jan. 15, 2015). The motion raised whether White's invocation of his right to counsel at the time he made custodial inculpatory statements should be afforded more deference due to his "limited intellectual capacity." *Id.* at 5. The motion cited *Atkins* and *Hall* as support. *Id.* at 11 & n.5. The Fifth Circuit held that White's request did

[2] Even so, the CCA replaced its recently condemned *"Briseno* factors*"* with other non-scientific factors. That error required another intervention by this Court. *See Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*).

not satisfy 28 U.S.C. § 2244(b)(2)(A), noting he did "not raise an Eighth Amendment claim" or "contend that he is intellectually disabled within the meaning of *Atkins* and *Hall*." *In re White*, 602 F. App'x 954, 958 (5th Cir. 2015) (unpublished).

On January 20, 2015, McCann filed another subsequent habeas application in state court, asserting he had previously unavailable scientific evidence that undermined his verdict. *See* Tex. Code Crim. Proc. art. 11.073. The TCCA stayed White's execution to decide whether Article 11.073 applied to sentencing proceedings then dismissed the case and stay when it decided sentencing relief was unavailable. *Ex parte White*, 506 S.W.3d 39 (Tex. Crim. App. 2016).

McCann's conflicted representation of Dexter Johnson. In 2019, McCann represented Texas capital habeas petitioner Dexter Johnson in state and federal court on the eve of his scheduled execution. Johnson received new supplemental counsel to investigate whether McCann had a conflict based on *Trevino v. Thaler*, 569 U.S. 413 (2013). ROA.1558-59. The federal court in *Johnson* granted a stay under 28 U.S.C. § 2251(a)(3), which allowed new counsel to raise McCann's ineffectiveness under *Trevino*, but also permitted counsel the opportunity to investigate and raise Johnson's intellectual disability in a successive petition and to investigate equitable tolling based on McCann's representation. ROA.1556-65. Supplemental counsel concluded that McCann had violated his ethical and professional duties, preventing him from raising numerous meritorious claims including a potential claim of intellectual disability, and they moved to terminate him. ROA.1559-60.

Johnson later moved for authorization to file a successive petition, raising his intellectual disability as a bar to execution. The court of appeals authorized the claim in August 2019. *In re Johnson*, 935 F.3d 284 (5th Cir. 2019), *as revised* (Aug. 15, 2019).

In 2022, after taking testimony from McCann, the district court found that McCann purposely delayed developing and raising an intellectual disability claim on Johnson's behalf until his client faced an execution date—long after the statute of limitations had lapsed. ROA.1314-25. The court found that equitable tolling of the limitations period was warranted due to McCann's conduct. ROA.1325.

White's request for new counsel in 2024. On June 25, 2024, the state court set White's execution for October 1, 2024. One month later, McCann made what appears to be his first request for funding to hire an expert to assess White's functioning since the changes in the medical and legal criteria for intellectual disability. ROA.1405-1406. On August 23, McCann filed White's sixth state habeas application, raising an *Atkins* claim for the first time. ROA.1408-31.

McCann supported the claim with an affidavit prepared by neuropsychologist Greg Hupp, Ph.D. ROA.1440-45. Dr. Hupp reviewed the 2008 testing by Dr. Averill and determined that White's reported IQ of 78 "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[.]"[3] ROA.1440. Dr. Hupp placed White's true IQ closer to 68 and concluded White would meet the criteria for a diagnosis of intellectual disability. *Id.*

In August 2024, White wanted to consult outside counsel due to his frustration with McCann. On September 11, after reviewing the available record, attorneys from the Office of Federal Public Defenders for the Western District of Texas (FPD) visited White and explained that McCann may have a conflict of interest stemming from his failure to file an *Atkins* claim within the limitations period. *See* ROA.1290-93. White asked the FPD to represent him. ROA.1292. Two days later, counsel filed a motion in district court to appoint substitute counsel and grant a 90-day stay under § 2251(a)(3).

McCann filed a response deferring to White's request for subtitution. ROA.1614-17. But McCann also stated his intention to continue representing White in state court. ROA.1615. He also noted that the Fifth Circuit would hear oral argument in *Johnson v. Lumpkin*, No. 23-70002—the case FPD lawyers argued put McCann on notice of his conflict—and suggested that the equitable tolling issue might receive an unfavorable resolution and "impact the Court's decision in this matter." ROA.1615-16.

[3] In his affidavit, Dr. Hupp noted that at the time Dr. Averill administered the WAIS-III to White, "an updated edition of that intelligence test was being released on the market[.]" ROA.1443.

On September 22, FPD counsel filed an advisory notifying the Court that White had directed McCann not to file anything "until the judge rule[d]" on the substitution motion. ROA.1995-99. Nonetheless, the next day, McCann filed a "Motion for relief under Rule 60(b)(6)." ROA.2005-53. He argued that "new evidence"—affidavits regarding White's intellectual disability—should be considered to determine whether White voluntarily waived counsel when he made a statement after his arrest. ROA.2005-2053.

Almost immediately after McCann filed White's 60(b) motion, the district court denied White's motion to substitute counsel and for a stay of execution, without prejudice. ROA.2054-70. The court declined to determine whether McCann had a conflict because his loyalties were divided between White and protecting his reputation and financial interests.[4] App. 025. That question, it held, would not be ripe unless and until the court of appeals authorized a successive habeas petition under 28 U.S.C. § 2244(b). ROA.2067-68. Before then, the court could not "anticipate what McCann's litigation strategy will be going forward." App. 022. It suggested that avenues other than raising his own conflict in support of "equitable tolling," such as actual innocence, might be available. App. 022. Finally, the court believed that McCann could avoid arguing for equitable tolling because, in the court's view, that "question … is

[4] Texas law bars an attorney from appointment to a capital case if he has "been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case" unless a local selection committee determines the "conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation[.]" Tex. Code Crim. Proc. art. 26.052(d)(2)(C).

secondary," and the court believed the Fifth Circuit "only considers AEDPA's limitations period, and the subsidiary question of equitable tolling, after deciding whether a petitioner has complied with § 2244(b)'s successive petition requirement." App. 020-21 (citations omitted). Therefore, the court stated, "the wisest course" would be to deny the motion but permit White to raise it again if the court of appeals authorized a successive petition based on McCann's motion. App. 025.

White appealed. In his opening brief, he argued the district court had failed to apply the standards and procedures established in *Christeson v. Roper*, 574 U.S. 373 (2015), and *Martel v. Clair*, 565 U.S. 648 (2012). *See* Brief for Appellant at 45-50, No. 24-70005 (5th Cir. Sept. 25, 2024). He also argued that the district court suggested legally foreclosed bases for equitable tolling and ignored the court of appeals' demonstrated willingness to consider and reject tolling arguments when considering motions for authorization. *Id.* at 53-57.

McCann filed a motion for authorization to file a successive habeas petition, raising an *Atkins* claim. *See* Motion, *In re White*, No. 24-20428 (5th Cir. Sept. 24, 2024). In the proposed application attached to the motion, McCann claimed that before White's second execution date, White's family and friends were unwilling to "provide adaptive deficit information." Mem. in Support of Pet. for Writ of Habeas Corpus at 6, *In re White*, No. 24-20428, (5th Cir. Sept. 24, 2024). McMann did not mention AEDPA's one-year statute of limitations.

In its response, Texas invoked the statute of limitations. Opp. Mot. Authorization & Mot. Stay Execution at 38-42, *In re White,* No. 24-20428 (5th Cir. Sept. 26,

2024). On September 27, 2024, McCann advised the court that he would not file a reply in support of White's motion. Letter, *In re White*, No. 24-20428 (5th Cir. Sept. 27, 2024).

The Fifth Circuit consolidated White's appeal with the authorization action. The FPD simultaneously filed in the consolidated case White's reply brief and a motion to supplement the record with evidence the FPD discovered in the two days since White's opening brief and motion for authorization. That evidence included affidavits from family members and friends who swore that they had not been contacted by McCann or an investigator between 2015 and July 2024, that they had never refused to answer questions about White, and that they would have been willing to discuss his deficits. *See* Reply Br. at 23-24, *White v. Lumpkin*, No. 24-70005 (5th Cir. Sept. 27, 2024) (discussing family declarations).

In addition, a mitigation specialist whom McCann hired just five weeks before White's 2015 execution date stated in a declaration that McCann had not hired her in time to conduct a thorough investigation but she had been able to speak with family members, who willingly told her of "red flags" indicating White may be intellectually disabled. She also said that, when she separated from White's case, she told McCann she believed White is intellectually disabled and that she feared McCann would avoid making an *Atkins* claim because he did not want to admit his failure to raise it within the limitations period. *See* Reply Br. at 10-12.; *id.* 23-34 (discussing mitigation specialist Pirmohamed's declaration) (ECF 50); *see also* Exhibits A-F, Suppl. App'x, *White v. Lumpkin*, No. 24-70005 (5th Cir. Sept. 27, 2024).

The Fifth Circuit denied all the relief White sought. In two footnotes, it denied substitution and the related request for a stay. *See* App. A at 8 n.7 (denying substitution); *id.* at 9 n.8 (denying stay).[5] The court held that the district court had not "abused its discretion" in denying the motion to substitute and that it had "conducted an adequate inquiry into White's complaint." App. A. at 8 n.7. It also held the motion was untimely and, relying on its analysis in denying the motion for authorization, that substitution would be futile because White had no avenue for relief. *Id.*[6]

As to the authorization motion, the court held White could not seek relief under 28 U.S.C. § 2244(b)(2)(B), because the claim involved sentencing rather than guilt. App. A at 4. White also could not seek relief under § 2244(b)(2)(A) because he could not identify a relevant new rule that had been given retroactive effect, *id.* at 6, and because he had not made a prima facie showing that his *Atkins* claim had merit, *id.* at 7.

Finally, the Fifth Circuit held that White's *Atkins* claim was time-barred. App. A at 5-6. Under 28 U.S.C. § 2244(d), he was required to bring his claim within one year after "the date on which the factual predicate of the claim or claims presented could have been discovered with due diligence." 28 U.S.C. 2244(d)(1)(D). White had been dilatory in discovering the affidavits demonstrating White's adaptive deficits. In reaching that conclusion, the court appeared to find White's claim that the family

[5] It also refused to supplement the record. App. at 9 n.9.

[6] Because, the court held, he was not entitled to new counsel, he was also not entitled to a stay under 28 U.S.C. § 2251(a)(3). App. A. at 9 n.8

was at fault incredible. *See* App. A at 5. McCann had not made an argument for equitable tolling, "so that doctrine cannot salvage his claim." *Id.* at 5-6. And, if the court were to consider the FPD's "argument for tolling," it would reject it because of "this record of egregiously dilatory filings." *Id.* at 6 n.4.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit and District Court Ignored *Martel v. Clair* and *Christeson v. Roper* by Failing to Consider Whether Appointed Counsel's Conflict of Interest Required Substitution.

The Fifth Circuit and district court disobeyed this Court's rules governing substitution motions in capital cases. Death-sentenced petitioners are entitled to the assistance of counsel "throughout every … stage of available judicial proceedings …including all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures." 18 U.S.C. § 3599(e). Because § 3599's right to counsel necessarily includes the "statutory right to conflict-free counsel," *Clark v. Davis*, 850 F.3d 770, 779 (5th Cir. 2017), a conflict of interest is a compelling ground for substitution.

When an appointed counsel has a conflict of interest, a court should "replace[ ]" that conflicted attorney with "similarly qualified counsel," § 3599(e), if that substitution serves the "interests of justice." *Clair*, 565 U.S. at 659-60. This standard is "context specific." *Id.* at 663. In assessing what justice requires, courts examine a number of factors, including the timeliness of the motion and the asserted cause for the request. *Ibid.*

This Court has found that the interests-of-justice standard is satisfied when a habeas petitioner makes a timely showing that his counsel is burdened by a conflict of interest. *Christeson*, 574 U.S. at 377, 379. A court should not deny substitution unless the motion is plainly futile. So long as there remains some avenue for relief that conflict-free counsel may pursue—even when a "host of procedural obstacles" makes success exceedingly unlikely—substitution is warranted. *Id.* at 380.

White has demonstrated that McCann had a disabling conflict of interest with regard to White's potential claim of intellectual disability under *Atkins*. Because McCann failed to raise the claim within any arguable limitations period under federal law, 28 U.S.C. § 2244(d), no court would consider the merits of White's claim unless White could present equitable grounds for overcoming statutory bars. The strongest of those grounds would be McCann's malfeasance. *See Holland v. Florida*, 560 U.S. 631, 651 (2010) (holding equitable tolling of limitations period available for some egregious claims of attorney misconduct or negligence). "Because [White's] appointed attorney[ ]—who had missed the filing deadline—could not be expected to argue that [White] was entitled to the equitable tolling of the statute of limitations, [White] requested substitute counsel who would not be laboring under a conflict of interest." *Christeson*, 574 U.S. at 373-74.

Even though this case is plainly controlled by *Clair* and *Christeson* and appointed counsel's conflict is even starker than in *Christeson*, the courts below repeated the "principal error" that led to reversal in that case: "its failure to acknowledge" appointed counsel's glaring conflict of interest. 574 U.S. at 378.

A. Appointed counsel has an obvious conflict of interest.

"A 'significant conflict of interest' arises when an attorney's 'interest in avoiding damage to [his] own reputation' is at odds with his client's 'strongest argument.'" *Christeson*, 574 U.S. at 378 (quoting *Maples v. Thomas,* 565 U.S. 266, 285-286, n.8 (2012)).

1. Appointed counsel's conflict of interest began when he forfeited federal review of White's claim of intellectual disability over nine years ago.

McCann's conflict of interest with his client began in 2015, when McCann failed to develop and raise an *Atkins* claim for White in state or federal court. With each successive opportunity for relief that McCann forfeited, his conflict deepened.

In January 2015, McCann forfeited White's first (and, it seemed at the time, last) opportunity to raise a claim of his client's intellectual disability. At that time, White had already concluded his state and federal habeas proceedings. On April 28, 2014, the state trial court issued its order setting White's first execution date for January 28, 2015.

McCann had been aware of testing performed at the time of White's trial and Dr. Averill's 2008 IQ testing, which indicated that White may be intellectually disabled. The reported IQ scores were in the mid to high 70s (1995: 76+/-5; 2008: 78+/-5), placing White beyond the cut-off that was then used to diagnose ID. *See Atkins*, 536 U.S. at 309 n.5 ("an IQ between 70 and 75 or lower … is typically considered the cutoff

IQ score for the intellectual function prong of the mental retardation definition" (citation omitted)).[7]

As the district court correctly found, *Hall v. Florida* (decided May 27, 2014) and the APA's change in the diagnostic criteria for ID (published May 18, 2013) gave White his first opportunity to plead an *Atkins* claim because those changes in the law and the facts made White's reported IQ scores viable for proving prong one of *Atkins*'s three-prong standard. ROA.2065-66.

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[7] Adjusting these scores to account for the obsolete norms used to standardize the tests would produce even lower scores after the DSM-V removed use of strict IQ cut-offs.

In 2024, McCann retained Dr. Hupp, who adjusted the IQ score reported by Dr. Averill in 2008 by applying the Flynn effect. The Flynn effect "refers to the tendency for scores on an IQ test normed for one particular age group on one date to increase when that same test is given to others many years later." *Ex parte Cathey*, 451 S.W.3d 1, 12 (Tex. Crim. App. 2014). Averill had administered a test that was being replaced by a new version. Dr. Hupp posited that, using the standard error of measurement, the Flynn effect, and other factors, White's true IQ score would be closer to 68. ROA.1444. Adjusting for norm obsolescence is recognized by mental health practitioners. *See* DSM-V-TR at 38.

Similarly, White was administered the WAIS-R test, which was standardized in 1978. *In re Salazar*, 443 F.3d 430, 433 n.1 (5th Cir. 2006). Eighteen years separate the standardization of the WAIS-R and White's testing in 1995. The Flynn adjustment calls for a reduction of 0.3 points for every year between standardization and testing. *Id.* Thus, White's *actual* IQ at the time of trial was probably 5.4 points (18 x 0.3) lower than 76, or roughly 71 (or 66-76, expressed with the standard error of measurement). McCann did not seek expert review of this WAIS-R score or rely on it in his pleadings.

Yet in January 2015, as White's execution date approached, McCann did not raise an *Atkins* claim for White in either state or federal courts. At that moment—when White's execution was imminent—he had forfeited White's *Atkins* claim.[8]

When White obtained a stay on other grounds, he still had until May 27, 2015, one year after *Hall*, to bring the newly available *Atkins* claim in federal court within the one-year limitations period, 28 U.S.C. § 2244(d). McCann did not.

Evidence indicates that McCann's decision not to file then was deliberate. McCann began an *Atkins* investigation in late December 2014, four weeks before any habeas application would be due.[9] The mitigation specialist he hired, Salima Pirmohamed, could not complete the investigation in that period. Mot. Suppl., Ex. A. ¶¶ 40-41.

In the billing records McCann filed in state court, he memorialized that on January 5, 2015, he "reject[ed] intellectual disability claims due to deficient adaptive evidence." Mot. Suppl., Ex. E at 5. That was only two weeks after McCann had retained mitigation specialist Pirmohamed to start investigation of whether White had adaptive deficits. Pirmohamed's billing records show her *first* contact with a member of White's family was December 22. Ex. A ¶ 11. In total, then, the available evidence

[8] By filing a state habeas application raising other claims, White also forfeited the ability to raise an *Atkins* claim based on *Hall* as a new legal basis that was unavailable at the time the previous application was filed, Tex. Code Crim. Proc. art. 11.071, § 5(a)(1).

[9] The Court of Criminal Appeals and Fifth Circuit require any pleading or motion requesting a stay of execution be filed at least a week before the execution date. *See* 5th Cir. R. 8.10; CCA Misc. R. 11-003.

shows McCann permitted only a two-week investigation of White's adaptive deficits, just a month before the execution date, during the holiday season.

Pirmohamed suspected McCann was deliberately attempting to avoid raising the claim rather than face his own conflict and informed him that she believed a valid claim could be raised with more investigation. *Id.* ¶¶ 43, 45-46. She recalls she had begun a fruitful relationship with White's family and identified red flags of intellectual disability. But McCann did not follow up on her work until 2024. Ex. B ¶¶ 4-5, Ex. C ¶¶ 3-5, Ex. D ¶¶ 3, 6, 7.

Courts evaluate the propriety of attorneys' conduct "from their perspective at the time." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). When McCann forfeited White's *Atkins* claim in state court on January 20, 2015, and on May 27, 2015, in federal court, he could not have known that the Supreme Court in 2017 and 2019 would overturn the CCA's non-scientific criteria for assessing adaptive functioning.

Because he failed to investigate between May 2014, when *Hall* was decided, and December 2014, when White's execution was imminent, McCann could not have known whether White even had evidence of adaptive deficits under the diagnostic criteria. He could not have made a strategic decision about the viability of a claim he had not investigated. *See Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (quoting *Strickland*, 466 U.S. at 690-91)) ("'[S]trategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'").

McCann's own timeline offered in his Motion for Authorization suggests he did nothing between late January 2015, when White's execution was stayed on other grounds, and April 2018, when he retained mitigation investigator Gina Vitale. *See* Mot. Auth. 1-2 ("efforts at obtaining the information… began promptly after the *Moore v. Texas* cases…."); ROA.1454. New evidence from family members and Pirmohamed refute this claim. Exs. A-D. But even assuming it were true that developing evidence of adaptive deficits from White's family took years, as Vitale says in her declaration, McCann allowed years to pass with no action.

When McCann finally took action by hiring Vitale, it came too late for White. The Court decided *Moore I* on March 28, 2017. But Vitale did not begin work on White's case until April 18, 2018—after the federal statute of limitations ran from that decision. There was no way for McCann to know that the Court would reverse the CCA again in *Moore II*, decided on February 19, 2019. *Moore II* might have given McCann another arguable opportunity to bring White's *Atkins* claim. Other than McCann's self-serving and unsubstantiated claim that White's family members refused to disclose evidence of adaptive deficits between February 2019 and February 2020—which now appears to be false—when another potential statute of limitations ran, McCann did nothing.

2. In 2022, appointed counsel was found to have committed egregious misconduct by intentionally withholding a client's *Atkins* claim until his execution date was scheduled.

In October 2022, a federal district court found McCann had committed misconduct in his former client Dexter Johnson's case by intentionally withholding work on

Johnson's *Atkins* claim, warranting equitable tolling of the statute of limitations. *See* ROA.1314-1325 (Memorandum and Order, *Johnson v. Lumpkin*, No. 4:19-cv-03047 (S.D. Tex. Oct. 28, 2022), ECF No. 78.

When the trial court set White's second execution date in June 2024, McCann knew—but White did not—that he had been found to have committed misconduct in a similar case. ROA.1290-93 (White's declaration); ROA.1537-40 (correspondence between White and McCann and White and outside attorney Richard Ellis describing lack of communication). As even the State "concede[s]," "White's case is similar to Johnson's in that each had initial federal habeas proceedings that postdated *Atkins*, both were represented by McCann in state and federal court, and neither raised an *Atkins* claim until long after *Atkins* was decided." ROA.1878.

By 2022, then, McCann was on notice that his intentional withholding of an *Atkins* claim for White would require scrutinizing his own likely misconduct as a ground for equitable tolling, making it obvious that he had a "significant conflict of interest." *Christeson*, 574 U.S. at 378; *accord* Tex. Disciplinary R. Prof. Conduct 1.06(b)(1)-(b)(2), cmt.4. Yet McCann refused to acknowledge his own conflict by withdrawing or advising White of the conflict and seeking the client's waiver. *See* Tex. Disciplinary R. Prof. Conduct 1.06(c).

Tellingly, in a response to the substitution motion, McCann undermined White by stating that "the facts of White's case raise different issues" than those in *Johnson* and suggesting that his conduct would no longer give rise to an argument for equitable tolling as it did in *Johnson*. ROA.1616. McCann also distorted the federal court's

misconduct holding to deflect blame from himself and credit his "strategic decisions." ROA.1615. The opposite was true: the district court found McCann's uninformed strategy was misconduct warranting tolling. ROA.1322 (finding equitable tolling because "McCann's 'choice not to litigate a meritorious claim on behalf of his death sentence client ... had the functional effect of forfeiting any federal review of Mr. Johnson's *Atkins* claim.'"). McCann's excuses mirror those of appointed counsel in *Christeson*, which were "directly … contrary to [their] client's interest, and manifestly serve[ ] [counsel's] own professional and reputational interests." 574 U.S. at 379.

3. The motion for authorization filed by appointed counsel confirmed his conflict of interest when he refused to raise his own misconduct as equitable tolling.

When White's substitution motion was before the district court, it was already apparent that McCann had a long-standing conflict that would erupt to the surface if McCann were to file a motion for authorization to file a successive application. At that time, White's state habeas application raising *Atkins* had been dismissed, *see* App. C, leaving federal court the only remaining option. McCann admitted that he intended to seek authorization to file a successive petition in federal court to raise the *Atkins* claim. ROA.2058.[10] Texas confirmed it would raise the limitations defense and dispute White's grounds for equitable tolling, arguments that McCann would have to make about himself. ROA.1882-1885. Yet the district court insisted that it had to let appointed counsel file White's MFA before it would determine whether he had a conflict.

[10] The Order cites ECF No. 117, a sealed ex parte advisory.

The motion for authorization purportedly filed on White's behalf removed any doubt that appointed counsel's loyalties are divided. McCann availed himself of weak and foreclosed arguments for authorization in order to avoid his responsibility for White's *Atkins* claim being raised at the eleventh hour.

To prevail on an authorization motion, a petitioner must make a prima facie showing that his claim has merit and satisfies an exception to the successor bar for any claim not presented in a prior application. *See* 28 U.S.C. § 2244(b)(3)(C). Under Fifth Circuit law, the petitioner must also have a prima facie basis for overcoming the time bar. *See In re Burton*, 111 F.4th 664, 666 (5th Cir. 2024) (discussing "well-established" circuit precedent permitting denial based on time bar).

McCann's conflict was evident at every step of the analysis.

First, as to the limitations period, McCann did "not present any argument for equitable tolling." App. A at 6.[11] He thus refused to raise his own conduct as grounds for equitable tolling. *See Holland v. Florida*, 560 U.S. 631, 651 (2010). McCann demonstrated his "significant conflict of interest" when he put his "interest in avoiding damage to [his] own reputation" above White's "strongest argument." *Christeson*, 574 U.S. at 378 (quoting *Maples*, 565 U.S. at 285-286, n.8).

McCann's alternative excuse for raising the claim within the limitations period was far weaker. McCann claimed his "efforts at obtaining the information needed to make a claim of intellectual disability began promptly after the *Moore* cases," but "it

[11] He did not even file a reply when Texas asserted the limitations defense. *See* Letter, *In re White*, No. 24-20428 (5th Cir. Sept. 27, 2024).

took years to obtain the affidavits from family and friends" because of their reluctance to speak about White's deficits. MFA 1-2. [12] *See* 28 U.S.C. § 2244(d)(1)(D).

Even when taken at face value, McCann's story was implausible. As the Fifth Circuit noted, "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." App. A at 5. McCann gave no account of his "efforts" that would be needed to show the factual predicate for the *Atkins* claim was newly discovered under § 2244(d)(1)(D). *Id.*

Worse still, McCann's account appears to be false and misleading from the evidence conflict-free counsel began to gather in response to McCann's claims of diligence. White's sister, Angela Swanson, says the family was not contacted by Vitale until the summer of 2024. That was the first time she had been contacted since 2015, when mitigation specialist Salima Pirmohamed contacted her before McCann let her go. Mot. Suppl., Ex. B. Pirmohamed found White's family eager to assist but needing more time and attention. Mot. Suppl., Ex. A. ¶¶ 15, 40-41.

One sibling, Theo White, admits that he refused to sign an affidavit when Vitale asked him to on August 18. But Vitale wanted him to sign a declaration that had already been written for him. And he was angry that no one from McCann's team had seen the family since 2015, then suddenly appeared to ask him to sign onto words he had not written. Mot. Suppl., Ex. C, ¶¶ 3-8.

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[12] McCann also made an argument that *Atkins* claims should be unwaivable, which defied "well-settled precedent to the contrary." App. A at 5 n.3.

The evidence collected by FPD counsel suggests McCann did nothing between May 2014 when *Hall* issued and December 2014, when White's execution was five weeks away, even though he knew from the testing done in 1995 and 2008 that White had impairments and might be able to qualify for an intellectual disability diagnosis under the DSM-V. Then, as Pirmohamed attests, McCann dropped the work again. Mot. Suppl., Ex. A. ¶¶ 45-47. Although Vitale came back on in 2018, the evidence indicates McCann did not begin collecting family declarations until August 2024. *See* Mot. Suppl., Exs. B-D.

In sum, McCann's implausible arguments seemed calculated to mislead the courts and give cover for what the court in *Johnson* found was deliberate delay.[13]

Second, McCann's weak presentation of the merits of White's probable intellectual disability cannot be disentangled from his conflict. As the Fifth Circuit had recognized in a prior case, a court cannot meaningfully assess the merits of a potential claim that newly appointed counsel might file when the prior attorney's reluctance to pursue the claim "stunted the evidence developed thus far." *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016).

The district court's findings in *Johnson* alone raise a strong inference that McCann intentionally delayed development of White's claim. *See* ROA.1320 (criticizing McCann for relying on "subjective assessment" of ID, instead of having client re-tested under DSM-V criteria). By McCann's own account, if accepted, delay worked

[13] McCann repeats this false and misleading account in his cert. petition from the Texas Court of Criminal Appeals' dismissal of White's *Atkins* claim. Pet. Writ Cert. at 18, *White v. Texas*, No. 24-5658.

to White's disadvantage because of the supposed reluctance of family members to discuss deficits.

Dr. Hupp's declaration shows another effect of McCann's delay: Hupp's report was rushed to completion before McCann had even obtained declarations from family and friends about White's deficits. McCann's hurried, incomplete work also shows in Hupp's failure to adjust the incorrectly reported score from the 1995 testing. ROA.1440.

And, most prominently, McCann failed to have White evaluated under current diagnostic standards using a new testing instrument. *See also* ROA.1320 (same issue in *Johnson*). In the Fifth Circuit's analysis, this misstep was enough to doom White's claim. App. A at 7 ("we are not required to adjust White's IQ scores downwards and do not choose to do so today").

Perhaps plain incompetence led to this unfortunately poor presentation of White's disability. But whether he was conscious of it or not, the parallels between White's case and Johnson's gave McCann a powerful incentive both to blame White's family for the delay and to plead a weak claim alongside his weak procedural arguments.

Finally, as to the successiveness bar, McCann failed to argue that White can make a prima facie showing that he can satisfy either 28 U.S.C. § 2244(b)(2)(A) or § (b)(2)(B). App. A at 3. He appeared to argue that the claim was not previously available because White's family prevented it, or it was not available until the advent of *Moore I* and/or *Moore II*. As the Fifth Circuit found, his assertions were not supported

by evidence or law. App. A at 5-6. More important, McCann's litigation choices reflected his interests, not White's. It was in McCann's interest to select the latest possible event that made the claim newly available under § 2244(b)(2)(A), even if that argument was far weaker than other available arguments.

McCann ignored a winning argument under Fifth Circuit precedent—that "[t]he significant change" that made *Atkins* newly available to him "was in the medical methodology for evaluating the relevant disabilities and in courts' recognition of those changes." *Johnson*, 935 F.3d at 293. Like White, Johnson had a pre-2013 IQ score above 75, leading experts to opine that he was not a person with ID. Johnson argued that the DSM-V, published in 2013, "recognizes that an individual with an IQ score over 70 may still qualify as intellectually disabled." *Id.* The court thus found that *Atkins* was previously unavailable to Johnson until at least 2013 and Johnson had provided prima facie evidence that he could satisfy § 2244(b)(2)(A). *Id.* at 294.

This "significant change" in diagnostic criteria applies with equal force to White, whose initial habeas petition was denied in September 2011. ROA.1158-1185. But to make that argument under § 2244(b)(2)(A)'s "previous unavailability" element, McCann would have to address the far longer period during which he had failed to develop and raise a claim on his client's behalf.

B. The Fifth Circuit and district court repeated the error of *Christeson*: failing to consider the conflict of interest that was the principal basis for White's substitution motion.

Neither the district court nor the court of appeals gave consideration to the question whether appointed counsel have a conflict of interest—that is, to the principal basis for White's substitution motion.

The district court decision stated that it had to defer to the court of appeals for a decision on whether there was a conflict of interest. *See* App. 016 ("question of whether to substitute counsel is best left to be decided after consideration by the Court of Appeals"); App. 025 (refusing to decide "whether McCann's failure to raise an *Atkins* claim caused a conflict of interest"). The court of appeals in turn deferred to the non-decision of the district court, finding that the district court had "conducted an adequate inquiry into White's complaint." App. A at 8 n.7.

As a result, neither court addressed the one question that mattered—whether McCann labored under a conflict of interest. As in *Christeson*, the courts' "principal error" was "fail[ing] to acknowledge [appointed counsel's] conflict of interest." 574 U.S. at 378.

Christeson applied *Clair*'s interests-of-justice standard to a case that presented the same conflict that disqualifies White's counsel: counsel's divided loyalty between their own professional and financial interests in preserving their reputations, and their clients' interest in and right to representation focused solely on their interests. In White's case and *Christeson*, appointed counsel failed to file a petition for habeas review within AEDPA's "strict 1-year statute of limitations." *Id.* at 374. When, seven years later, Christeson's attorneys sought advice about the case, they realized that they could not file a motion arguing that the limitations period should have been equitably tolled, because that motion would be premised on their own deficient performance. *Ibid.* Outside counsel then filed a motion for substitution under § 3599, which was denied. *Id*. at 375. After Christeson got an execution date, outside counsel

tried again. *Id*. at 376. This time, the district court held the substitution was not in the interests of justice for four reasons, including that "the Eighth Circuit … had not appointed substitute counsel." *Ibid*. But the court failed to acknowledge the attorneys' conflict of interest. *Id.* at 378. This Court suggested that whether appointed counsel had a conflict of interest outweighed other factors in the analysis of the interests of justice. The district court's attention to other considerations could not "justify its decision to deny petitioner new counsel" "[g]iven the obvious conflict of interest." *Id.* at 379.

The Fifth Circuit's treatment of White's appeal deviates from other circuits' faithful interpretation that *Christeson* requires substitution of counsel when a significant conflict of interest adversely affects an attorney's performance. *See*, *e.g., United States v. Scurry*, 992 F.3d 1060, 1068-69 (D.C. Cir. 2021) (citing *Christeson* for the contention that "[t]he appointment of counsel despite an 'obvious conflict of interest' constitutes an abuse of discretion under the 'interests of justice' standard[,]" and that a "host of procedural obstacles" does not necessarily render a habeas petition futile); *United States v. Glover*, 8 F.4th 239, 247-49 (4th Cir. 2021) (remanding for appointment of conflict free counsel and citing *Christeson* where, despite ultimately obtaining a good result for his client, appointed counsel was nonetheless making arguments contrary to his client's interest and in favor of his own representation); *Nassiri v. Mackie*, 967 F.3d 544, 547-50 (6th Cir. 2020) (remanding for appointment of unconflicted counsel where, similar to *Christeson*, counsel could not reasonably be expected to argue equitable tolling was justified based on his own misconduct); *Stewart v. Sec'y,*

Fla. Dep't of Corr., 635 Fed. Appx. 711, 715-17 (11th Cir. 2015) (remanding for appointment of conflict-free counsel pursuant to *Christeson*, where appointed counsel's failure to argue for equitable tolling stemmed from personal interest in avoiding scrutiny of his own conduct and was at odds with his client's best interests); *Davis v. Lempke*, 642 F. App'x 31, 32-34 (2d Cir. 2016) (remanding for hearing on conflict of interest and citing *Christeson* where the circuit court believed counsel could not reasonably be expected to argue his own incompetence was "extraordinary," and that conflict-free counsel likely needed to be appointed).

This Court should reverse to bring the Fifth Circuit into accord with these other circuits.

C. The Fifth Circuit further erred in its reliance on the motion's futility and dilatoriness—questions inseparable from whether appointed counsel had a conflict of interest.

Without addressing the existence or severity of the conflict, the court of appeals could not have conducted the inquiry required by *Clair* and *Christeson*.

1. White's motion for substitution was timely.

Without examining counsel's conflict, the court of appeals could not properly assess timeliness. The Fifth Circuit summarily stated that White's motion was untimely, App. A at 8 n.7, because the court incorrectly attributed McCann's dilatory tactics to his client, *id*. at 6 n.4, *id*. at 9 n.9. That defies *Christeson,* which examined timeliness and abusive delay in relation to the date "outside counsel became aware of Christeson's plight"—especially his counsel's conflict of interest in their representation of him—and the date of the execution. *Christeson*, 574 U.S. at 380.

Christeson's approach makes sense under this Court's application of agency law when considering the actions or inaction of post-conviction counsel. "'[A] litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as his agent in any meaningful sense of that word.'" *Maples*, 565 U.S. at 282 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)); *accord* Restatement (Third) of Agency § 5.04 (2006) (An agent's action "is not imputed to the principal if the agent acts adversely to the principal in a … matter.").

Christeson's analysis of timeliness further underscores the error of the Fifth Circuit's approach, which failed to acknowledge counsel's conflict of interest. The Fifth Circuit ignored this rule and held White responsible for delay McCann engineered for his own self-interest and at White's expense. It was McCann, not White, who had the knowledge and duty to alert both White and the courts to the conflict that arose after McCann's inaction gave the State a statute-of-limitations defense.

It is undisputed that McCann did not disclose to the court or his client that he had a conflict. ROA.1290-1293. ROA.1535-1540. *Cf.* ROA.1615-1616 (McCann's response in district court). Under Texas Disciplinary Rule of Professional Conduct 1.06(b)(1) and (c), McCann had an affirmative duty to withdraw or get the client's consent to his continued representation (if the conflict was waivable, his client was given conflict-free advice on the risks of waiving, and his client was competent to execute a waiver). Lawyers have this affirmative obligation to withdraw or disclose because the conflict may be impossible to uncover for even a sophisticated represented party, let alone a cognitively impaired prisoner. *See Wynn v. United States,*

275 F.2d 648, 649 (D.C. Cir. 1960) (it is "hardly to be expected that appellant," who was not a lawyer, "would be sufficiently aware of" a conflict with counsel to object). *See also Mendoza v. Stephens,* 783 F3d. 203, (5th Cir. 2015) (Owen, J., concurring in decision to appoint new supplemental counsel) (noting, as part of *Martel*'s "context" inquiry, that "clearly, [petitioner] bears no responsibility" for the conflict).

White could only have become aware of McCann's conflict, at the earliest, when attorneys who were not burdened by the conflict advised him (a) that he had an intellectual disability claim and (b) that he could not present that claim because McCann intentionally withheld it unless (c) he could persuade a court that McCann breached a duty to him by failing to develop and present the claim earlier. Conflict-free counsel, in turn, could have become aware of those conditions only when McCann presented White's *Atkins* claim in state court on August 23, 2024, after his malfeasance in Dexter Johnson's case was publicized by the court in 2022.

On September 11, 2024, White consulted with attorneys from the FPD. He learned that the statute of limitations presented a barrier to him raising in federal court the claim McCann belatedly filed in state court. He learned that his attorney had let the statute of limitation expire in another case. And he learned that his attorney's failure created a conflict that might toll the statute of limitations. He authorized a motion to replace his counsel to be filed, ROA.1293, and the FPD filed it two days later, on September 13. *See* ROA.1248.

To be sure, unlike *Christeson*, White filed his motion less than a month before his scheduled execution date. But once again, the fault is attributable to McCann, not

White or his outside counsel. Christeson was able to seek substitution earlier because conflicted counsel sought advice from outside counsel. *See* 574 U.S. at 375 (attorneys "contacted" outside counsel "to discuss how to proceed in Christeson's case"). White's execution should not turn on the happenstance of when conflicted counsel made contact.

No one is more aware—or chagrined—by the late date at which White made these discoveries than White himself.[14] White should not have been before the Fifth Circuit a week before a scheduled execution asserting that he is ineligible for execution due to intellectual disability. White's interest lay in not facing execution at all. If McCann had pursued White's interest exclusively, as his duty of loyalty required, and done so diligently and competently, it is likely White would not have had an execution date in 2024.

2. Substitution of counsel would not be plainly futile.

Both the district court and the Fifth Circuit assumed that White's entitlement to substitution depended on what his conflicted counsel would produce in the motion for authorization he intended to file. The district court refused to grant relief—or even decide whether McCann was conflicted—unless and until White could demonstrate that the *Atkins* claim developed and pled by his conflicted counsel had sufficient merit

[14] It is not realistic to believe that White knowingly traded the real possibility of never facing an execution date for the real possibility of being executed because his ineligibility for execution could not be considered. *Cf. United States v. Rosales-Mireles*, 585 U.S. 129, 144-45 (2018) (rejecting notion that that defense counsel would deliberately forgo a timely sentencing objection and subject her client to plain-error review later).

to proceed in a motion for authorization. App. 021-022. The Fifth Circuit assumed that any motion substitute counsel would be futile because the court had denied conflicted counsel's motion. App. A at 8 n.7 ("as our analysis shows, the motion that the Capital Habeas Unit seeks to file on White's behalf would be futile.").

But as described above, the motion for authorization was tainted by appointed counsel's conflict of interest. At each step, an unbiased counsel could have made an argument that might succeed under circuit precedent, but that appointed counsel—out of concern for his own reputation—refused to make. With conflict-free counsel, he could have argued that his *Atkins* claim became available in May 2014, and that counsel had intentionally failed to investigate or raise it for years, a lapse that was not attributable to White—which is exactly what Dexter Johnson was able to show to obtain authorization to file a petition. *See Johnson*, 935 F.3d at 293, 295-296.

Moreover, unbiased counsel would obtain a new evaluation of White's intellectual functioning, mooting the Fifth Circuit's critique of the IQ score interpreted by Dr. Hupp. *Compare* App. A at 7 (refusing to recognize adjustment to 2008 score) *with Johnson*, 935 F.3d at 294 (discussing results of evaluation by expert retained by new counsel).

Requiring White to demonstrate that he can secure merits review based on the claim developed and pleaded by conflicted counsel runs contrary to *Clair* and especially *Christeson*, which hold that it is in the interests of justice that petitioners and the courts receive conflict-free filings. *Christeson*, 574 U.S. at 380.

Christeson is clear on this point, stating that a district court may reject substitution only if it is "plain that any subsequent motion that substitute counsel might file on [White]'s behalf would be futile." *Christeson*, 574 U.S. at 380; *see also Battaglia*, 824 F.3d at 474 ("A court may only deny appointment of counsel if litigation of the inmate's claims would be a 'wholly futile enterprise.'") (quoting *Cantu-Tzin v. Johnson*, 162 F.3d 295, 296 (5th Cir. 1998), and citing *Christeson*).

The inquiry is also prospective—about the claim "substitute counsel *might* file." *Christeson*, 574 U.S. at 380. Congress's expressed requirement of qualified counsel for capital habeas petitioners cannot be realized it petitioners must know the law well enough to identify counsel's conflict then rely on that conflicted lawyer to file a sufficiently meritorious claim that his misconduct will appear in sharper relief, all as a pre-requisite to obtaining conflict-free counsel.

II. The Interests of Justice Require that White Receive the Conflict-Free Counsel Guaranteed Him by § 3599.

The issue in this case is simple—must White suffer the dire consequences of his conflicted counsel's self-interested decisions? Under this Court's precedent, the answer is equally simple. A conflict in which an attorney's interest causes him to act in a way that is contrary to his client's interest in that it "manifestly serve[s] [his] own professional and reputational interests," rather than his client's, is grounds for substitution. *Christeson,* 574 U.S. at 379; *cf. Holloway v. Arkansas*, 435 U.S. 475, 484 (1978) (Sixth Amendment right to counsel means right to conflict-free counsel). To obtain substitution, a defendant must show only that substitution serves the interests of justice. *Clair*, 565 U.S. at 662.

As White has demonstrated, this is not an onerous burden, and White's case illustrates why it should not be. Because of a conflict over which White had no control, White's intellectual deficits have never been properly evaluated or properly raised before a tribunal. Without the remedy provided by § 3599(e), *Clair*, and *Christeson*, White will be executed without having had the benefit of qualified counsel that Congress bestowed on him and all capital habeas petitioners.

Appointed counsel's conflict and the resulting delay are not attributable to White. *See Clair,* 565 U.S. at 663 (one factor to consider in deciding whether to appoint new counsel is extent of client's responsibility for conflict). White relied on his appointed attorney to act in his best interest, but his attorney has labored under divided interests from at least the time he let AEDPA's statute of limitations elapse without following up on red flags indicating his client was intellectually disabled.

McCann did not tell White the limitations period had expired, and, perhaps most damning, he did not tell him that a court had found that he had a conflict for the same failures in another case. McCann's disregard for White's interests went further: rather than acknowledge his failures, he falsely blamed White's family for the lapsed limitations period. And, even as the FPD pointedly identified his conflict it, McCann dug in. He did not mention the limitations period in his motion for authorization, and he did not seek equitable tolling when Texas invoked it.

It would appear—at this early juncture—that White has more than "'a garden variety claim of excusable neglect'" but a "far more serious instance[ ] of attorney misconduct." *Holland*, 560 U.S. at 651-52 (citation omitted). By deliberately hiding

his conflict and his conflict-produced inaction and misdirecting the courts' attention to non-meritorious arguments and issues, McCann "severed the principal-agent relationship" with White. *Maples*, 565 U.S. at 922-23. This is especially so in light of White's cognitive deficits, which make it difficult for him to "understand and process information" and "engage in logical reasoning." *Atkins*, 536 U.S. at 318. It is unlikely that White could have sussed out the extent of his attorney's betrayal on his own, let alone devised a strategy to extricate himself.

The court of appeals obvious frustration with the late arrival of this request is understandable. White asks for nothing more than conflict-free counsel and 90 days to investigate and, if merited, present a claim that he is intellectually disabled. *See* 28 U.S.C. § 2251(a)(3).

Capital representation is "frequently an incomplete patchwork of state and federal appointments." Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. Rev. 1319, 1372 (2020). White arrived on Texas's death row long before the Federal Public Defender Capital Habeas Units were opened in January 2018 (at least two years after White's statute of limitations in federal court expired). As Chief Judge Carnes on the Eleventh Circuit described of Florida in 2014, offices like these can track pending cases, support counsel, and reduce the number of defendants whose counsel miss the statute of limitations. *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1215 (11th Cir. 2014). But that system is not perfect. Specialists are "so profoundly resource-constrained" that "they cannot know every legal possibility in every" capital case. Kovarsky, *supra*, at 1380. Even an excellent tracking system cannot

force recalcitrant attorneys to correct course. *See id*. at 1382 ("Texas is notorious for housing a death row population represented by unqualified counsel[.]"). *See also* Ad Hoc Comm. to Review the CJA, 2017 Report of the Ad Hoc Committee to Review the CJA at 193 (2018), https://cjastudy.fd.org (documenting poor capital representation in Texas).

There are ways to address lapses such as McCann's. A reviewing court or the State Bar, for example could impose sanctions. But regardless of these policies, Congress entrusted the federal courts to apply § 3599 to ensure meaningful representation by "qualified legal counsel" through all post-conviction proceedings. *See McFarland v. Scott*, 512 U.S. 849 (1994). It would be unjust and inconsistent with § 3599(e) to require White to pay with his life for his attorney's conflict-tainted representation.

III. This Court Should Summarily Reverse the Decision Below.

The Fifth Circuit failed to heed this Court's clear instructions in *Christeson*. Reversal of the Fifth Circuit is necessary to ensure adherence to this Court's precedent. Summary reversal is warranted. *See Wearry v. Cain*, 577 U.S. 385, 394-95 (2016) (explaining that the Court "has not shied away from summarily deciding" even "fact intensive cases where . . . lower courts have egregiously misapplied settled law").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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