Nos. 24-5671, 24A308

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 a Writ of Certiorari to the Court of Appeals for the Fifth Circuit and Application for a Stay of Execution

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

1. Should this Court grant review and a stay of execution where the petitioner seeks review of the lower court's rejection of an appeal that outside counsel lacked authority to bring, and where the lower court rejected outside counsel's indisputably dilatory request for substitution of counsel that sought to raise a futile, successive, time barred, and meritless claim of intellectual disability?

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BRIEF IN OPPOSITION

Respondent respectfully submits this brief in opposition to the petition for a writ of certiorari and application for a stay of execution filed by Garcia White.

Petitioner Garcia White was convicted and sentenced to death in 1996 for the murders of sixteen-year-old twins Annette and Bernette Edwards. He killed their mother, Bonita, in the same gruesome attack, and he killed Greta Williams and Hai Pham in separate offenses. *White v. Thaler*, No. H-02-1805, 2011 WL 4625361, at *1–2 (S.D. Tex. Sept. 30, 2011). The state trial court scheduled White to be executed after 6:00 p.m. (Central Time) today, October 1, 2024.

White has unsuccessfully challenged his conviction and death sentence in state and federal court. He has been continuously represented by appointed counsel, Patrick McCann, for more than twenty years. ROA.253.[1] McCann has ably represented White, challenging White's conviction and sentence in multiple forums and obtaining a stay of White's previously scheduled execution in 2015, *Ex parte White*, No. WR-48,152-08, 2015 WL 375733, at *1 (Tex. Crim. App. Jan. 27, 2015). Nonetheless, with McCann continuing to zealously

[1] "ROA" refers to the Record on Appeal in the court below.

advocate for him,[2] White filed plainly dilatory motions for substitution of counsel and a stay of execution. ROA.1248–81. At bottom, White's motions sought to reinitiate his long-concluded federal habeas proceedings.

The district court denied White's motions. ROA.2054–70. The court reasoned that, since White's substitution request was premised on a forthcoming motion for authorization to raise a successive *Atkins* claim, it was premature for the court to substitute counsel. ROA.2064 ("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."). Despite their request for appointment being denied, outside counsel filed a notice of appeal. ROA.2071.

McCann filed in the Fifth Circuit a motion for authorization to raise, among other claims, a successive *Atkins* claim. Mot. Authorization, *In re White*, No. 24-20428 (5th Cir. Sept. 24, 2024), ECF No. 2. With respect to the proposed *Atkins* claim, the Fifth Circuit held White was not entitled to authorization under § 2244(b) to raise it. Op., *In re White*, No. 24-20428 (5th Cir. Sept. 29,

[2] McCann has, for example, recently filed on White's behalf a clemency application, two petitions for a writ of certiorari, a subsequent state habeas application raising among other claims an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), a motion for authorization seeking permission to file a successive federal habeas petition, a motion for relief from judgment under Federal Rule of Civil Procedure 60(b), and state court and federal court litigation challenging the Texas Board of Pardons and Paroles' procedures. *See infra* Statement of the Case III.

2024), ECF No. 59-1 (Op.). The Fifth Circuit held authorization was not warranted because the claim was impermissibly successive, time barred, and meritless. Op. 5–7. The Fifth Circuit also rejected outside counsel's arguments with respect to whether equitable tolling could save the *Atkins* claim from dismissal as time barred, *id*. at 6 n.4, as well as outside counsel's appeal—that was "ostensibly" brought on White's behalf, *id*. at 8—of the district court's denial of the motions counsel filed for substitution and a stay of execution. *Id*. at 8 n.7, 9 n.8. White's "egregiously dilatory filings," including his untimely motion for substitution of counsel, disentitled him to equitable tolling and appointment of new counsel. *Id*. at 6 n.4, 8 n.7.

The lower courts' disposition of outside counsel's appeal was indisputably correct. Even assuming outside counsel had authority to bring—and the court below had jurisdiction to consider—the appeal, the Fifth Circuit properly held White was not entitled to substitution of counsel or authorization under § 2244(b) to raise an *Atkins* claim. Indeed, the Fifth Circuit's conclusion that White was not entitled to authorization to raise a successive *Atkins* claim is a conclusion that this Court lacks jurisdiction to consider as an independent matter. 28 U.S.C. § 2244(b)(3)(E). Yet White's petition for a writ of certiorari essentially calls on this Court to disagree with the lower court's denial of authorization and find substitution of counsel was required to allow White to seek authorization with new counsel. This Court has held that a petition for a

writ of certiorari is not jurisdictionally barred under § 2244(b)(3)(E) if the "subject" of the petition is not the grant or denial of authorization to file a successive habeas petition. *Castro v. United States*, 540 U.S. 375, 380 (2003). But even if White's petition for a writ of certiorari isn't barred, this Court's review of it is informed by the Fifth Circuit's adjudication of White's motion for authorization, a decision this Court lacks jurisdiction to consider. *Cf. Felker v. Turpin*, 518 U.S. 651, 662–63 (1996) (explaining that while § 2244(b)(3)(E) did not repeal the Court's authority to entertain an original habeas petition, § 2244(b)(1) "inform[s the Court's] consideration of original habeas petitions"). In any event, the lower court's affirmation of the denial of substitution of counsel, and its denial of authorization and a stay of execution, were clearly correct. This Court should deny the petition for a writ of certiorari and application for a stay of execution.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction because outside counsel were unauthorized to bring an appeal, and the appeal involves an appeal of an unappealable order. *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 315 (5th Cir. 2024); *Tracy v. Lumpkin*, 43 F.4th 473, 475–76 (5th Cir. 2022); *Lovelace v. Lynaugh*, 809 F.2d 1136, 1137 (5th Cir. 1987).

STATEMENT OF THE CASE

I. Facts of the Crime

Between November 29 and December 2, 1989, King Solomon tried to contact his girlfriend, Bonita Edwards. After trying for several days, Solomon went to the apartment Edwards shared with her twin sixteen year old daughters, Annette and Bernette. When there was no answer at the door, he asked neighbors if they had seen Bonita, but no one had. After returning later in the day, Solomon spoke to a maintenance man at the apartments who asked the apartment manager to help him open the door to the Edwards' apartment. Solomon saw two bodies lying on the floor.

Houston Police Department ("HPD") officer Leonard Dawson arrived at the crime scene at about 2:45 pm. He found three dead females inside the apartment. Annette Edwards was lying face down semi-nude with her head on a pillow and a blanket partially covering her body. A towel gagged Bernette and was wrapped around her neck. Bonita was clothed but had blood all over her shirt. All three had multiple stab wounds to the neck and chest and had been dead for several days. There was no sign of forced entry, but the phone was off the hook and the bedroom door had been forced open. Another HPD investigator, Sergeant Brad Rudolph, stated that it appeared that Annette was sexually assaulted. There was blood on the walls, in the bathtub, and in the kitchen sink.

The murders went unsolved for almost six years. During an investigation into an unrelated murder in July 1995, Tecumseh Manuel, a close friend of White's, told police that White admitted killing the Edwardses. Police arrested White the following day.

White initially denied his involvement but, after seeing a portion of Manuel's interview, stated that he was ready to tell the truth. White then gave a videotaped statement implicating himself and Terrence Moore in the murders. According to White, he and Moore went to the apartment to use drugs and have sex with Bonita. They both tried to have sex with her, but Bonita became angry because they would not share the drugs with her. Moore stabbed her. When the girls came out of their bedroom, Moore

grabbed one and White grabbed the other. White fondled one of the girls and ejaculated. Moore forced his way into the bedroom and stabbed one of the girls. He then came out and stabbed the other girl, and the two men left.

Upon further investigation, police discovered that Moore was killed four months before the Edwards family was murdered. When confronted with this discrepancy, White gave another statement in which he admitted fabricating the story about Moore and confessed to killing all three victims. Serology and DNA testing revealed that semen recovered from a bed sheet was consistent with White's DNA, and blood from the same sheet was consistent with either Annette's or Bernette's DNA. White was convicted of capital murder for the murders of the two girls during the same criminal transaction.

White v. Thaler, 2011 WL 4625361, at *1–2 (footnote and citations omitted).

II. Evidence Pertaining to Punishment

During the penalty phase, the State presented evidence that White committed two other murders. White gave a videotaped statement admitting his involvement in one of the murders, which occurred during the robbery of a convenience store. A grand jury no-billed White on the other murder, but when police questioned Tecumseh Manual about the convenience store robbery-murder, Manuel told them that White admitted his involvement in the other murder, as well. When confronted, White gave another statement in which he admitted killing the victim during a fight after they had sex, which he paid for.

White's mother testified that White was a poor student, but did not have discipline problems in school. White got along well with his siblings. He played football in high school and college, but a knee injury during his first semester of college ended his football career and he dropped out of school. He eventually went to work as a sandblaster. In March, 1988, he fell and suffered injuries to his hand, shoulder, and head requiring hospitalization. After this injury, White began using drugs. White's sister gave similar testimony.

> Robert Yohman, a clinical neuropsychologist, testified that he conducted a number of tests on White and reviewed relevant records. He found that White has an IQ of 76, which is below average; he scored low in concentration, speed of thinking, attention span, achievement, memory, and executive functioning; language functioning was within normal limits; White's scores on the Minnesota Multiphasic Personality Inventory ("MMPI") showed that White was not emotionally distressed, depressed, or anxious, and there was no evidence of psychopathology; the MMPI also showed that White was somewhat hostile, inhibited his aggression, was uncomfortable with others, and handled unacceptable feelings through denial and depression, but he is not antisocial, sociopathic, or psychotic. Yohman also concluded that White's violent episodes occurred while he was intoxicated and that he had no history of violence while sober. Because he would lack access to drugs in prison, Dr. Yohman concluded that he would not be a future danger.
>
> Dennis Nelson, a psychologist, also tested White. He concluded that White has an IQ of 87 and is not emotionally disturbed. He also concluded that White's violent conduct was related to his drug use and that White would not be dangerous in prison where he would lack access to drugs.

Id. at *2.

III. Course of State and Federal Proceedings

White was convicted and sentenced to death for the murder of the Edwards sisters. Op., *White v. State*, No. AP-72,580 (Tex. Crim. App. June 17, 1998). The Texas Court of Criminal Appeals (TCCA) upheld White's conviction and death sentence on direct appeal. *Id*. White then filed a state application for a writ of habeas corpus, which the TCCA denied. Order, *Ex parte White,* No. WR-48,152-01 (Tex. Crim. App. Feb. 21, 2001). White also filed a second state

habeas application, which the TCCA dismissed as an abuse of the writ. Order, *Ex parte White,* No. WR-48,152-02 (Tex. Crim. App. Apr. 24, 2002).

White then filed a federal habeas petition. ROA.287–373. The district court granted White an administrative stay pending the outcome of DNA retesting. ROA.759–62. White later filed two state habeas applications, which the TCCA dismissed pursuant to Art. 11.071, § 5(a) of the Texas Code of Criminal Procedure. Order, *Ex parte White*, Nos. WR-48,152-03, -04 (Tex. Crim. App. May 6, 2009). Following DNA retesting and the state court's dismissal of those applications, the district court lifted the stay. ROA.786. White filed an amended petition on December 31, 2009, ROA.787–882. The district court denied White's petition and denied White a certificate of appealability (COA). *White v. Thaler*, 2011 WL 4625361, at *15. Next, White filed an application for a COA, which the Fifth Circuit denied. *White v. Thaler*, 522 F. App'x 226, 236 (5th Cir. 2013), *cert. denied*, 571 U.S. 1133 (2014).

Thereafter, the convicting court scheduled White's execution for January 28, 2015. On January 8, 2015, White filed in the TCCA a Motion for Leave to file an Original Petition for a Writ of Habeas Corpus, a Motion for Leave to file a Petition for a Writ of Prohibition, and a Motion for a Stay of Execution. SHCR-05, -06. The TCCA denied White's motions on January 15, 2015. *Id.* White then filed in the Fifth Circuit a Motion for Authorization to File a

Successive Federal Habeas Petition, which was denied. *In re White*, 602 F. App'x 954, 958 (5th Cir. 2015).

Subsequently, White filed in state court, on January 19 and January 20, 2015, respectively, a Motion for Leave to File a Petition for Writ of Prohibition and his fourth subsequent state habeas application. SHCR-07, -08. The TCCA denied the Motion for Leave to File a Petition for a Writ of Prohibition on January 21, 2015. SHCR-07. This Court denied certiorari review. *White v. Texas,* 135 S. Ct. 1510 (2015). The TCCA issued an order staying White's execution based on the subsequent habeas application. *Ex parte White*, 2015 WL 375733, at *1. The TCCA ultimately dismissed the application pursuant to Article 11.071, § 5. *Ex parte White,* 506 S.W.3d 39, 52 (Tex. Crim. App. 2016), *cert. denied*, 583 U.S. 850 (2017).

The state trial court then scheduled White's execution for October 1, 2024. White's appointed counsel, McCann, filed in state court an application for a writ of habeas corpus and a motion to withdraw the trial court's execution order. On September 3, 2024, the state trial court denied White's motion to withdraw the execution order. Order, *Ex parte White*, No. 0723847-F (180th Dist. Ct. Harris Co., Tex. Sept. 3, 2024). The TCCA dismissed White's state habeas application and denied his motion for a stay of execution on September 18, 2024. Order, *Ex parte White*, No. WR-48,152-09 (Tex. Crim. App. Sept. 18, 2024). On September 27, 2024, White filed in this Court a petition for a writ of

certiorari and an application for a stay of execution. *White v. Texas*, Nos. 24-5658, 24A302 (Sept. 27, 2024). The petition and application are pending.

On September 18, 2024, White filed in the TCCA a motion for leave to file a petition for a writ of prohibition. The motion for leave and White's request for a stay of execution were denied without written order on September 25, 2024. *In re Garcia White*, Nos. WR-48,152-10, -11 (Tex. Crim. App. Sept. 25, 2024).

On September 13, 2024, outside counsel filed a motion in White's concluded federal habeas proceedings for substitution of counsel and a stay of execution. ROA.1248–81. The district court denied both motions. ROA.2054–70. Outside counsel filed a notice of appeal regarding that denial. ROA.2071. The Fifth Circuit affirmed the district court's denial of the motions for substitution of counsel and a stay of execution. Op. 6–9. Outside counsel then filed a petition for a writ of certiorari and an application for a stay of execution. The instant brief in opposition follows.

On September 23, 2024, White filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b) and a motion for a stay of execution. ROA.2005–13. On September 27, 2024, the district court transferred the motion for relief from judgment to the Fifth Circuit and denied the motion for a stay of execution. Order, *White v. Lumpkin*, No. 4:02-CV-1805 (S.D. Tex. Sept. 27, 2024), ECF No. 129. On September 29, 2024, the Fifth Circuit denied

the transferred motion for relief from judgment as a successive habeas petition. Op. 9 n.9.

On September 24, 2024, White filed in the Fifth Circuit a motion for authorization to file a successive federal habeas petition. Mot., *In re White*, No. 24-20428 (5th Cir. Sept. 24, 2024), ECF No. 2. The Fifth Circuit denied the motion. Op. 4–9. White filed a petition for a writ of certiorari and an application for a stay of execution regarding the Fifth Circuit's denial of the motion for authorization. *White v. Lumpkin*, Nos. 24-5670, 24A307. The petition is pending.

On September 25, 2025, White filed a civil rights complaint in federal district court. Comp., *White v. Abbott, et al.*, No. 1:24-CV-1136 (W.D. Tex. Sept. 25, 2024), ECF No. 1. He filed a motion for a stay of execution on September 27, 2024. Mot. for Stay of Execution, *White v. Abbott, et al.*, No. 1:24-CV-1136 (W.D. Tex. Sept. 27, 2024), ECF No. The district court denied the motion for a stay of execution. Order on Mot. for Stay of Execution, *White v. Abbott, et al.*, No. 1:24-CV-1136 (W.D. Tex. Sept. 27, 2024), ECF No. 13.

REASONS FOR DENYING CERTIORARI AND A STAY

The petition for a writ of certiorari identifies no reason that justifies this Court's attention. The lower court lacked jurisdiction over the appeal regarding the district court's denial of substitution of counsel and a stay of execution because the appeal was unauthorized, as it was brought by counsel who were

not appointed to represent White. Further, the appeal was from a nonappealable order. Nonetheless, the lower court properly affirmed the district court's denial of the motions for substitution and a stay of execution. The motions were indisputably dilatory. The asserted basis for substitution—appointed counsel's purported failure to timely raise a claim under *Atkins*—has existed for years. Moreover, White was not entitled to substitution of counsel for the purpose of raising a futile *Atkins* claim, a conclusion that was confirmed by the lower court's denial of White's request for authorization to do so. Lastly, White was not entitled to a stay of execution after having waited until mere days before his second scheduled execution date to request substitution of counsel.

ARGUMENT

I. White Is Not Entitled to a Writ of Certiorari or a Stay.

The Court requires those seeking a writ of certiorari to provide "[a] direct and concise argument *amplifying* the reasons relied on for allowance of the writ." Sup. Ct. R. 14.1(h) (emphasis added). The Court would be hard pressed to discover any such reason in the petition, let alone amplification thereof. Left with no true ground for review in his briefing, the only reasonable conclusion is that outside counsel seek mere error correction. But that is plainly not a good reason to expend the Court's limited resources, particularly where the lower courts' "error" was simply reaching a decision other than one outside counsel

preferred. *See* Sup. Ct. R. 10 ("A petition . . . is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Critically, counsel identify no relevant split among the courts or any other reason amplifying the need for this Court's review. Sup. Ct. R. 14.1(h).

Outside counsel assert other circuits have come to different conclusions when faced with substitution requests based on allegations of conflict of interest, Pet. Cert. 29–30, but courts resolving different claims differently does not demonstrate the existence of a circuit split. Indeed, the Fifth Circuit considered outside counsel's allegations regarding a conflict of interest, cited the proper rule of law, and rejected counsel's argument. Op. 8 n.7. This is plainly an insufficient basis on which to grant review. Sup. Ct. R. 10. The petition for a writ of certiorari should be denied.

II. This Court Lacks Jurisdiction.

The lower court lacked jurisdiction over outside counsel's appeal for two reasons. First, the appeal was taken by outside counsel who were unauthorized to do so at the time the notice of appeal was filed. Pet'r's App. D. Outside counsel sought an order in the lower court to be substituted as White's appointed counsel, but the district court denied the request. ROA.2054–70. Counsels' lack of authorization deprived the lower court of jurisdiction. *See United States v. Crocket*, 181 F.3d 96, 1999 WL 346943, at *1 (5th Cir. May 10, 1999) ("The notice of appeal must be signed by the party *or his attorney*, and

nonlawyers who have not obtained next friend status are not authorized to represent others or sign their pleadings." (emphasis added) (citing *Gonzales v. Wyatt*, 157 F.3d 1016, 1020–22 (5th Cir. 1998))); *cf. La Union del Pueblo Entero*, 93 F.4th at 315 ("[N]on-parties generally cannot appeal an order or judgment.").

Relatedly, outside counsel lacked standing as "next friend." 28 U.S.C. § 2242 (authorizing "someone acting in [the inmate's] behalf" to sign a petition); 28 U.S.C. foll. § 2254 Rule 2(c)(5); *see Whitmore v. Arkansas*, 495 U.S. 149, 162–63 (1990) (defining "next friend" standing). Such standing may exist if it is demonstrated that the individual is unable to seek relief on his own behalf or is mentally incompetent to do so. *Lovelace v. Lynaugh*, 809 F.2d 1136, 1137 (5th Cir. 1987) (citing *Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976)). There was no showing White was incompetent. And even if he was, as shown by the extensive litigation recently filed by McCann, White is ably represented by appointed counsel. Outside counsel's "generalized interest in constitutional governance" was insufficient to give them standing to circumvent the district court's denial of their request to be appointed. *Whitmore*, 495 U.S. at 164.

Second, the appeal was from an interlocutory, nonappealable order denying substitution of counsel. *See Tracy v. Lumpkin*, 43 F.4th 473, 477 (5th Cir. 2022). Such an order does not satisfy the "narrow" collateral-order doctrine. *Id.*; *see Crain v. Sec'y, Fla. Dept. of Corr.*, 918 F.3d 1294, 1296 (11th

Cir. 2019) (per curiam); *see also Thomas v. Scott*, 47 F.3d 713, 715–16 (5th Cir. 1995). Therefore, the lower court lacked jurisdiction over the appeal. This Court should deny the petition for a writ of certiorari.

III. The Lower Court Properly Affirmed the Denial of White's Motions for Substitution and a Stay of Execution.

The Fifth Circuit held the district court did not abuse its discretion in denying White's motions for substitution of counsel and a stay of execution. As discussed below, the lower court's judgment was correct, and White fails to provide any reason for this Court to review it.

A. Applicable law

Section 3599 of Title 18 "entitles indigent defendants to the appointment of counsel in capital cases, including habeas corpus proceedings." *Martel v. Clair*, 565 U.S. 648, 652 (2012). Appointed counsel

> shall represent the defendant throughout every subsequent stage of available judicial proceedings, including pretrial proceedings, trial, sentencing, motions for new trial, appeals, applications for writ of certiorari to the Supreme Court of the United States, and all available post-conviction process, together with applications for stays of execution and other appropriate motions and procedures, and shall also represent the defendant in such competency proceedings and proceedings for executive or other clemency as may be available to the defendant.

18 U.S.C. § 3599(e). Appointed counsel is obligated to continue representing the inmate unless and until a court of competent jurisdiction grants a motion to withdraw. *Wilkins v. Davis*, 832 F.3d 547, 557–58 (5th Cir. 2016). When an

indigent defendant moves for the appointment of substitute counsel under § 3599, a court must review the motion under the "interests of justice" standard. *Clair*, 565 U.S. at 652. An indigent petitioner does not have an absolute right to the counsel of his choice. *Christeson v. Roper*, 574 U.S. 373, 377 (2015). The Fifth Circuit has held, however, that "[c]apital habeas petitioners have a statutory right [under § 3599] to conflict-free counsel." *Clark v. Davis*, 850 F.3d 770, 779 (5th Cir. 2017). But § 3599 does not create an independent enforcement mechanism for an aggrieved prisoner to seek a remedy from a federal court about the scope of representation provided to a prisoner with federal funds. *Beatty v. Lumpkin*, 52 F.4th 632, 636 (5th Cir. 2022).

This Court has identified various factors that guide appellate review of the denial of a motion for substitution of counsel: (1) the timeliness of the motion; (2) the adequacy of the district court's inquiry; and (3) the asserted cause for the complaint. *Clair*, 565 U.S. at 663. Review of a substitution request is necessarily fact and context specific. *Clair*, 565 U.S. at 663–64. As discussed below, the lower court properly concluded White's motion for substitution of counsel was untimely, and he was not entitled to new counsel for the purpose of filing a futile motion for authorization to file a successive habeas petition.

B. White's substitution request was indisputably untimely.

Almost a decade after he was previously scheduled to be executed, White requested a last-minute change of counsel. That "egregious dilatoriness," Op. 9 n.9, alone disentitled White from substitution of counsel. *See Clair*, 565 U.S. at 662.

White's federal habeas proceedings concluded almost eleven years ago. *White v. Stephens*, 571 U.S. 1133 (2014). He was previously scheduled to be executed in January 2015. *See Ex parte White*, 2015 WL 375733, at *1. Prior to that date, White attempted to secure assistance from new counsel due to his dissatisfaction with McCann. ROA.1537–40 (White's letters to attorney Richard Ellis in November and December 2014). However, McCann secured a stay of White's then-scheduled execution. *Ex parte White*, 2015 WL 375733, at *1. After succeeding with McCann's assistance, White abandoned his quest for substitute counsel and waited almost a decade, and until only weeks remained before his currently scheduled execution, to again seek new counsel. ROA.1535–36. The dilatory nature of White's request for substitution of counsel was reason enough to deny it. *See Christeson*, 574 U.S. at 380; Op. 8 n.7, 9 n.9. Indeed, the fact that White, himself, has at least twice sought assistance from outside counsel not only undercuts his assertion that he is

intellectually disabled,[3] but the timing of the requests also demonstrated their true purpose was delay.

Notably, outside counsel's petition repeatedly references non-record, self-serving hearsay evidence the lower court excluded. *E.g.*, Pet. Cert. 12, 18; Op. 9 n.9. If that evidence is considered, though, it demonstrates the untimeliness of outside counsel's motion for substitution. Included in that evidence was an unsworn hearsay declaration that explained that another attorney, Dick Burr, believed a decade ago, based on court records and a meeting with White, that White might be intellectually disabled. Ex. to Reply Br., *White v. Lumpkin*, No. 24-70005 (5th Cir. Sept. 27, 2024), ECF No. 47-2 at 4. Outside counsel argue the lower court erred in attributing McCann's delay to White, Pet. Cert. 30, but their "evidence" demonstrated that the motion for substitution was excessively untimely in light of the publicly known and easily discoverable information that has existed for almost a decade. *See, e.g., In re White*, 602 F. App'x at 957, 958 n.4 (the Fifth Circuit's opinion in 2015 discussing White's evidence of limited intellectual functioning and citing this Court's *Atkins* jurisprudence).

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[3] *See Atkins*, 536 U.S. at 320 (explaining that one basis for the Eighth Amendment's prohibition on execution the intellectually disabled is that they "may be less able to give meaningful assistance to their counsel").

White bears responsibility for his own lack of diligence. By way of example, in the statute-of-limitations context, a pro se inmate's lack of diligence may be excused by periods of mental incompetency but only for the time the condition prevented him from pursuing his legal rights. *Fisher v. Johnson*, 174 F.3d 710, 715–16 (5th Cir. 1999). But White failed to justify a *decade* of inaction after exhibiting the ability and willingness to express his dissatisfaction with McCann in 2014. Indeed, the substitution request and motion for a stay were explicit that they sought delay, ROA.1271, so it was in the interests of justice to deny last-minute substitution. *See Clair*, 565 U.S. at 662 ("Protecting against abusive delay *is* an interest of justice." (emphasis in original)). This is particularly true where McCann has ably represented White for more than twenty years, McCann continues to do so, and White only sought court intervention at the last minute so he could reinitiate his federal habeas proceedings.

This Court in *Christeson* found the petitioner's substitution request, "while undoubtedly delayed, was not abusive" where it was filed "well before the State had set an execution date" and only one month after outside counsel learned of the petitioner's predicament with his appointed counsel, and it requested only ninety days to investigate. 574 U.S. at 380. White's motion for substitution was not only "undoubtedly delayed," *id.*, it was indisputably abusive. Indeed, it came a decade after White initially expressed to outside

counsel his displeasure with McCann in 2014. ROA.1537–39. As noted above, McCann secured a stay of White's previously scheduled execution in 2015, after which White appears to have been content not to seek new counsel until *another* execution date was set almost a decade later. This entirely distinguishes White's case from *Christeson*. Outside counsel attempted to leverage the lateness of the request to justify substitution of counsel and force a stay of execution, but this got it backwards. The "egregious" lateness weighed against White. Op. 9 n.9; *see Christeson*, 574 U.S. at 380. White cannot use his opportunistic dissatisfaction with McCann—which he seems to have expressed only with a pending execution date—to justify starting his habeas proceedings over.

Outside counsel rely largely, if not entirely, on McCann's alleged conflict of interest in seeking to raise an *Atkins* claim in federal court where doing so would supposedly require him to admit his own error to justify the claim's successiveness or untimeliness. ROA.1255. But this Court has made clear that review of a substitution request is "a peculiarly context-specific inquiry," *Clair*, 565 U.S. at 663, so the asserted basis for substitution is no trump card, *see id*. Indeed, White's is one of the "many cases," *Christeson*, 574 U.S. at 380, where delay warrants denial of substitution. *See, e.g., Woods v. Warden, Holman Corr. Facility*, 952 F.3d 1251, 1255–56 (11th Cir. 2020). And as demonstrated by the motion for authorization recently filed by McCann, the alleged conflict

of interest that White continuously asserts exists did not prevent McCann from filing the motion. Nothing in that motion required McCann to admit fault or attack his own performance to attempt to justify authorization of a successive *Atkins* claim. And White was disentitled to bring a successive *Atkins* claim for several reasons unrelated to McCann's alleged conflict. Op. 6–9. The conflict White assured the lower courts exists was evanescent and indeed irrelevant, and outside counsel's subjective belief that attacking McCann's performance was the best avenue for raising a successive *Atkins* claim does not make it true. ROA.2066 (the district court's observation that "[a]rguing that a conflict warrants equitable tolling is one pathway to federal review, but others exist").

Aside from White's own expression a decade ago of his dissatisfaction with McCann, his substitution request was also untimely considering the particular context in which the complaint arose. *See Clair*, 565 U.S. at 663. His central complaint was McCann's failure to file a motion for authorization to raise a successive *Atkins* claim earlier than he did. ROA.1255. The precise time McCann should have done so, according to White's argument, was at best unclear, but it could not have been any later than when the Fifth Circuit adjudicated a similar request by Dexter Johnson *five years* ago, *In re Johnson*, 935 F.3d 284 (5th Cir. 2019). Counsel have suggested McCann's alleged conflict arose one year after White could have sought authorization to raise an *Atkins* claim in a successive petition, but the demand that counsel have prescience

with respect to when an *Atkins* claim might succeed if raised or when the limitations period might accrue for a successive *Atkins* claim in the face of developing medical standards and jurisprudence fails to pinpoint an actual conflict of interest in McCann, particularly where outside counsel have difficulty identifying the genesis of the conflict. Importantly, applying the rule outside counsel seem to suggest, a petitioner's counsel would be forced to raise an *Atkins* claim at a time the medical and legal standards may not be favorable enough to garner relief or else risk being accused of professional misconduct years later. *Cf. Green v. United States*, 65 F.3d 546, 551 (6th Cir. 1995) (counsel's lack of "prescience" did not constitute ineffective assistance). Moreover, the lower court did not ignore outside counsel's allegations of a conflict of interest that would purportedly justify equitable tolling. Pet. Cert. 15. The court explicitly rejected them. Op. 6 n.4. Again, counsel's disagreement with that decision does not call for this Court's attention.

Relatedly, McCann's mere filing of a motion for authorization to raise an *Atkins* claim did not give rise to an actual conflict of interest. ROA.2066. As discussed above, this was proven true in light of White's arguments in his motion for authorization, which sought avoidance of AEDPA's successiveness and limitations provisions by means other than an alleged conflict. The Fifth Circuit's rejection of White's motion for authorization on grounds other than timeliness confirm that the alleged conflict was not the sole barrier to White's

Atkins claim outside counsel asserted it was. Indeed, outside counsel's allegations of a conflict are irrelevant in light of the lower court's findings that White was not entitled to raise a successive *Atkins* claim because it was not previously unavailable and because it was meritless. Op. 6–9.

Importantly, though, McCann developed evidence regarding White's intellectual functioning during the course of his representation of White. Prior to *Atkins*, McCann presented the state court Dr. Seth Silverman's report stating, among other things, that White had "compromised intellectual functioning," and borderline to low intellectual functioning.[4] SHCR-02 at 78–80, 83. After *Atkins*, McCann presented the state court Dr. Patricia Averill's report reflecting IQ testing that produced a full-scale score of 78 with a range of measurement error between 74–83. SCHR-04 at 11–16. Like Dr. Silverman, Dr. Averill described White as having borderline intellectual functioning. *Id*. at 15. According to Dr. Averill, White was "ineligible for the [intellectual disability] label and associated protections," but suffered from the same limitations as the intellectually disabled. *Id*. Notably, the experts attributed at least some of White's intellectual deficits to his abuse of cocaine. *Id*. at 16;

[4] At trial, Dr. Robert Yohman testified that he administered intelligence testing to White that resulted in a full-scale score of 76, which indicated borderline intellectual functioning. 21 RR 315. Dr. Dennis Nelson testified that he administered two screening tests for intellectual functioning that gave estimates of White's IQ as 85 and 87. 21 RR 391–92.

SHCR-02 at 75. This led to McCann seeking authorization in 2015 of a claim adjacent to *Atkins*, one alleging White's "limited intellectual capacity" should have rendered his confession inadmissible. *In re White*, 602 F. App'x at 958. The resulting opinion in 2015 discussed that evidence and cited this Court's *Atkins* jurisprudence. *Id*. at 957, 958 n.4. Despite the existence of this publicly available opinion, neither White nor outside counsel took any action to rectify what was allegedly unethical conduct on McCann's part until mere weeks before White's scheduled execution. In light of this, White's substitution request was "egregious[ly]" dilatory. Op. 9 n.9. This Court should deny the petition for a writ of certiorari.

C. Substitution of counsel would be futile.

White was also not entitled to substitution of counsel because it would have been futile. Irrespective of White's allegations against McCann, White's proposed successive *Atkins* claim failed to satisfy § 2244(b) and was time-barred, and White did not have a prima facie claim of intellectual disability. Op. 6–9. This Court should deny the petition for a writ of certiorari.

1. White's *Atkins* claim is impermissibly successive.

Substitution of counsel may be denied where it would be a futile exercise. *Clair*, 565 U.S. at 663–66. That is the case here, as White requested it solely for the purpose of seeking permission to raise a successive *Atkins* claim. As

found by the Fifth Circuit, White's *Atkins* claim was impermissibly successive. Op. 6–9.

A habeas petitioner must obtain leave from the court of appeals before filing a second habeas petition in the district court. *Adams v. Thaler*, 679 F.3d 312, 321 (5th Cir. 2012); *see Felker*, 518 U.S. at 664; 28 U.S.C. § 2244(b)(3)(A). White has filed both an initial federal habeas petition, which was denied in 2011, ROA.1158–86, and a motion for authorization to file a successive petition, which was denied in 2015, *In re White*, 602 F. App'x at 958. Therefore, he would be required to satisfy an exception under 28 U.S.C. § 2244(b).

Prior to the filing of his pending motion for authorization, White had not raised an *Atkins* claim in federal court. *See* 28 U.S.C. § 2244(b)(1). Therefore, to establish an entitlement to file another federal petition, White was required to show his *Atkins* claim was previously unavailable. Op. 2 (citing 28 U.S.C. § 2244(b)(2)(A) (requiring that a claim presented in a successive application "that was not presented in a prior application shall be dismissed unless" it relies on a new, retroactive rule of constitutional law));[5] *see In re Pruett*, 711 F. App'x 732, 736 (5th Cir. 2017) ("[T]here is no reason why Pruett could not have discovered the contamination of the murder weapon before filing his [earlier]

[5] An *Atkins* claim cannot satisfy § 2244(b)(2)(B). Op.4; *In re Johnson*, 935 F.3d at 291 n.1; *see In re Webster*, 605 F.3d 256, 258–59 (5th Cir. 2010) (a successive *Atkins* claim based on new evidence would not negate the evidence of the petitioner's guilt).

2015 motion to file a successive habeas petition."); *United States v. Jones*, 796 F.3d 483, 485 (5th Cir. 2015) ("[H]abeas applications are defined in relation to the judgment that they attack[.]" (citing *Magwood v. Patterson*, 561 U.S. 320, 332 (2010)).

The lower court dismissed the notion that White could satisfy the exception under § 2244(b)(2)(A). Op. 6. That was because White filed his amended federal habeas petition in 2009, well after this Court decided *Atkins*, Op. 6, and there was no later applicable rule recognized by this Court and made retroactive, including this Court's opinions in *Moore v. Texas*, 581 U.S. 1 (2017) (*Moore I*), and *Moore v. Texas*, 586 U.S. 133 (2019) (*Moore II*). Op. 6. The lower court also found, as discussed below, that White's *Atkins* claim was time barred and meritless. In light of that, the district court could not have abused its discretion in denying the motion for substitution of counsel for the purpose of filing a futile motion for authorization. Op. 8 n.7. Outside counsel provide no basis on which this Court may review the Fifth Circuit's authorization decision, a decision this Court lacks jurisdiction to independently review. 28 U.S.C. § 2244(b)(3)(E). Therefore, this Court should deny the petition for a writ of certiorari. *See Clair*, 565 U.S. at 663–66.

2. White's successive *Atkins* claim is time-barred.

Substitution of counsel would have been futile also because a successive *Atkins* claim would be time barred. Op. 6 n.4, 9 n.8; *see In re Jones,* 998 F.3d

187, 189 (5th Cir. 2021). White's claim was admittedly time barred, and he failed to justify a decade's worth of equitable tolling to make it timely, as the lower court found. Op. 6 n.4.

Section 2244(d)(1) applies a one-year limitations period to any application for writ of habeas corpus. In this case, the limitations period begins running from the latest of either:

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2244(d)(1); *In re Jones,* 998 F.3d at 189. Giving all benefit of the doubt, White's claim was untimely whether measured from publication in 2013 of the DSM-5 or this Court's opinions in *Moore I* or *Moore II*. *See In re Burton*, 111 F.4th 664, 666 (5th Cir. 2024); *In re Sparks,* 939 F.3d 630, 632 (5th Cir. 2019); *In re Jones,* 998 F.3d at 189–90 (even considering *Moore II*, decided in 2019, petition filed in 2021 was still untimely).

Indeed, White admitted his claim would be untimely and that he would require the benefit of equitable tolling, but he failed to show he would be entitled to it. Op. 6 n.4. A habeas petitioner is entitled to equitable tolling of the limitations period if he shows (1) that he has pursued his rights diligently

and (2) extraordinary circumstances prevented timely filing. *Holland v. Florida*, 560 U.S. 631, 649 (2010).

As discussed above, White expressed dissatisfaction with McCann's performance ten years ago. ROA.1537–39. White has not suggested he made any further attempt to secure new counsel or made any effort to notify any court of his dissatisfaction prior to or soon after his previously scheduled execution in 2015. *Cf. In re Lewis*, 484 F.3d 793, 797 (5th Cir. 2007) (rejecting argument for equitable tolling based on the withdrawal of the petitioner's appointed counsel on the day the petitioner "became eligible to raise his *Atkins* claim"). Indeed, it appears White took no further action during the intervening decade until his execution was scheduled a second time when White, himself, wrote to outside counsel. ROA.1535. The lower court emphasized White's demonstrable lack of diligence as reason he would not be entitled to relief even considering outside counsel's allegations against McCann. Op. 6 n.4. That independent basis on which to reject the successive *Atkins* claim—and perforce the substitution request—makes outside counsel's allegations of a conflict of interest irrelevant and means that the request for this Court to correct the lower court's application of *Christeson* is actually a request that this Court issue an advisory opinion.

To the extent outside counsel rely on White's purported intellectual disability as reason not to require him to exercise the diligence needed to

receive equitable tolling, such an argument would be undermined by the fact that he has exhibited an ability to seek assistance from outside counsel. ROA.1535–40. And despite counsel's argument to the contrary, White bears responsibility for exhibiting a lack of diligence for a decade. *See Jones v. Stephens*, 541 F. App'x 499, 505 (5th Cir. 2013) ("Although mental illness may warrant equitable tolling, a petitioner (i) must make a threshold showing of incompetence and (ii) must show that this incompetence affected his ability to file a timely habeas petition[ ]."), 505 n.34 (collecting cases); *Smith v. Kelly*, 301 F. App'x 375, 377 (5th Cir. 2008) ("[W]hile mental illness *may* [equitably] toll AEDPA's statute of limitations, it does not do so as a matter of right." (emphasis in original)); *see also Holland,* 560 U.S. at 653 (Holland wrote his attorney numerous letters; repeatedly contacted the state courts, clerks, and the Florida State Bar Association to have attorney removed from his case; and upon learning counsel had missed AEDPA deadline, prepared his own habeas petition *pro se* and filed it with the District Court); *Manning v. Epps*, 688 F.3d 177, 185 (5th Cir. 2012) (a counseled petitioner "seeking to establish due diligence must exercise diligence even when they receive inadequate representation"); *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004) (Sotomayor, J.) ("[T]he act of retaining an attorney does not absolve the petitioner of his responsibility for overseeing the attorney's conduct or the preparation of the petition.").

The lower court considered and rejected outside counsel's argument for equitable tolling. Op. 6 n.4. The court's decision was plainly correct in light of White's demonstrated willingness and ability to seek assistance from outside counsel, and his lack of diligence in doing so. *Id*. This was another reason independent of McCann's actions on which to reject both the request for new counsel and the motion for authorization. Therefore, the petition for a writ of certiorari should be denied. *See Clair*, 565 U.S. at 663–66.

3. White is not intellectually disabled.

To obtain authorization to raise a successive *Atkins* claim, White was also required to make a prima facie showing that he is intellectually disabled, but he failed to do so. Op. 7. White has presented an *Atkins* claim in state court, which the TCCA has rejected. Order, *Ex parte White*, No. WR-48-152-09 (Tex. Crim. App. Sept. 18, 2024). That adjudication was on the merits. *Busby v. Davis,* 925 F.3d 699, 709 (5th Cir. 2019) (citing *Ex parte Blue,* 230 S.W.3d 151, 163 (Tex. Crim. App. 2007)).

To demonstrate he is intellectually disabled and thus ineligible for execution, White must show: (1) he has deficits in intellectual functioning; (2) he has deficits in adaptive functioning; and (3) the onset of these deficits occurred during childhood or adolescence. *Moore I*, 581 U.S. at 7; *Petetan v. State*, 622 S.W.3d 321, 333 (Tex. Crim. App. 2021). In support of his claim in state court, White presented an IQ score of 78, which was presented in support

of his 2009 subsequent habeas application. *See* ROA.2018–23; SCHR-04 at 11–16. He also presented a report by Dr. Greg Hupp who stated application of the Flynn Effect to White's score of 78 would adjust the score downward at least to 75, and the score could be, accounting for the lower end of the standard error of measurement, possibly as low as 68. ROA.2022. Dr. Hupp also concluded White exhibited adaptive deficits during the developmental period. ROA.2022.

White's evidence did not present a prima facie claim for intellectual disability. Under the DSM-5-TR, individuals with intellectual disability have scores approximately two standard deviations or more below the population mean, including a margin for measurement error, or a score of 65–75. DSM-5-TR at 42; *see In re Cathey*, 857 F.3d 221, 236 (5th Cir. 2017). According to Dr. Averill, who administered the test that produced an IQ score of 78 and applied the standard range of measurement error to White's unadjusted IQ score produced a range of 74–83. ROA.2120. According to Dr. Hupp, the range would be 71–85 if applying a seven-point error of measurement.[6] ROA.2022. Based on this Court's decision in *Moore I*, even the low end of the range of error does not fall within the range of intellectual disability sufficient to trigger an analysis of adaptive deficits. *See Moore I*, 581 U.S. at 14 ("Because the lower

[6] It is at least questionable why Dr. Hupp suggests such a larger range of error should apply than Dr. Averill—who conducted the assessment that produced the score of 78—reported in 2008. *Compare* ROA.2120, *with* ROA.2022.

end of Moore's score range falls at or below 70, the TCCA had to move on to consider Moore's adaptive functioning.").

The Fifth Circuit has held the TCCA reasonably determined that a petitioner could not demonstrate subaverage intellectual functioning when the lowest IQ score he provided was a 74 on the WAIS-IV (yielding a range from 70–79), which the test's administrator described as "Borderline." *Busby*, 925 F.3d at 716–20; *see* ROA.2121 ("[T]his assessment and Mr. White's records indicate that he is functioning in the borderline range of intelligence[.]"). The Fifth Circuit reached a similar conclusion in another opinion that postdated *Moore I*, where the petitioner's score, considered with the range of error, did not fall at or below 70. *Green v. Lumpkin*, 860 F. App'x 930, 940 (5th Cir. 2021) (per curiam) (holding that where lowest IQ score submitted was 78, the state court was not unreasonable under *Moore I* for determining the petitioner was not intellectually disabled because petitioner could not satisfy the first *Atkins* prong). The Fifth Circuit stated that reason alone was enough to foreclose relief on the *Atkins* claim. *Id.* The same is true here.

As for the Flynn Effect, adjustment of IQ scores is not required. The Flynn Effect posits that over time, IQ scores of a population rise without corresponding increases in intelligence and, thus, the test must be re-normed. *In re Mathis*, 483 F.3d 395, 398 n.1 (5th Cir. 2007). The Flynn Effect "may affect" a test score. DSM-5-TR at 38; *see Ex parte Cathey*, 451 S.W.3d 1, 12–14

(Tex. Crim. App. 2015). Importantly, though, the DSM-5-TR does not require adjusting a score downward for the Flynn Effect. DSM-5-TR at 38. Additionally, Texas law holds that an IQ score "may not be changed" to adjust for the Flynn Effect. *Cathey*, 451 S.W.3d at 18.[7] Further, the Fifth Circuit "has not recognized the Flynn effect," *Brumfield v. Cain*, 808 F.3d 1041, 1060 n. 27 (5th Cir. 2015),[8] and this Court has called it a "controversial theory." *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021) (per curiam). Without this adjustment, White cannot make a prima facie showing on the first criteria for intellectual disability, making it unnecessary to assess his adaptive behavior.[9] *See Moore I*, 581 U.S. at 15 ("[W]e require that courts continue the inquiry and consider

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[7] The TCCA has noted that practice effects and the Flynn Effect "may affect test scores," *Petetan*, 622 S.W.3d at 338 (citing DSM-5 at 37), and courts "may consider the Flynn Effect and its possible impact on IQ scores generally." *Ex parte Cathey*, 451 S.W.3d at 5, 18. And even then, courts "may consider that effect only in the way that they consider an IQ examiner's assessment of malingering, depression, lack of concentration, and so forth." *Id.* at 5.

[8] Unlike *In re Cathey*, White does not have other evidence—in *Cathey,* it was purported evidence that Cathey's IQ was below 73—to support an inference raised by the Flynn Effect that his score of 78 was artificially inflated. 857 F.3d at 236–37. Importantly, neither *In re Cathey* nor *In re Johnson* contradict *Brumfield* because they do not resolve the issue regarding application of the Flynn Effect. Moreover, unlike *In re Johnson*, White has not produced a new full scale IQ score within the *Atkins* range of 70 or below. *In re Johnson*, 935 F.3d at 292.

[9] Outside counsel proffer an adjustment of the IQ score of 76 that was obtained prior to White's trial. Pet. Cert. 17 n.7. But it is proffered by counsel, not an expert. *See Busby*, 925 F.3d at 717 ("Nor is there evidence as to the SEM of this test or the range of the score when the SEM is considered. Again, there was only argument of counsel.").

other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits.").

Moreover, as White's expert Dr. Hupp has acknowledged, ROA.2021, "White has never been administer[ed] nor evaluated on a standardized measure of adaptive functioning." The DSM-5-TR requires "[t]he diagnosis of intellectual developmental disorder is based on both clinical assessment and standardized testing of intellectual functions, standardized neuropsychological tests, and standardized tests of adaptive functioning." DSM-5-TR at 38. Consequently, White's *Atkins* claim was facially inadequate to justify authorization. Even then, reliance on White's friends' and family's forty-year-old recollections of White's behavior when he was a minor would be problematic even in the context of an "objective" measurement of White's adaptive behavior. *See Ex parte Cathey*, 451 S.W.3d at 20 (recognizing that a measurement of adaptive behavior was not designed to be administered retrospectively and was susceptible to reporters being "highly motivated to misremember").

Moreover, much of outside counsel's argument depends on the unsupported, speculative notion that McCann purposefully "stunted" development of the *Atkins* claim to divert courts' attention from his failure to raise the claim earlier. Pet. Cert. 25. A more likely explanation for McCann's decision not to raise the claim earlier is that the chances of success on White's

Atkins claim are—and always have been—slim. As discussed above, the evidence supporting the claim is inadequate, but that is not the fault of McCann. That White achieved a score on an IQ test that put him outside the protection of the Eighth Amendment is not the product of oversight or misconduct by McCann. Outside counsel set forth how they might litigate an *Atkins* claim in this posture, Pet. Cert. 34, but their litigation choices are not required practice.[10] Outside counsel's cynical exercise in hindsight does nothing to show a meritorious *Atkins* claim has been waiting to be uncovered. Indeed, McCann developed the very evidence on which outside counsel rely to suggest White is intellectually disabled.

White failed to present evidence of either significantly subaverage intellectual or adaptive deficits. White cannot make out a prima facie *Atkins* claim without such evidence, and substitution of counsel would have been futile. At most, outside counsel proffered nothing but their hindsight and disagreement with McCann's strategic choices to show White was denied his rights under 18 U.S.C. § 3599. Such conjecture does nothing to show error in the lower courts' judgment. This Court should deny the petition for a writ of certiorari.

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[10] For instance, administration of another IQ test to White may produce results even more unfavorable to an *Atkins* claim than what already exists.

IV. This Court Should Deny White's Request for a Stay of Execution.

A. White is not entitled to a stay under *McFarland*.

This Court in *McFarland v. Scott* stated that permitting a petitioner's execution without affording appointed counsel the opportunity to meaningfully to research and present an initial habeas petition would be improper. 512 U.S. 849, 858 (1994). But a court would not abuse its discretion where the petitioner "inexcusably ignores this opportunity and flouts the available process." *Id*.

Under this standard, White plainly failed to show an entitlement to a stay of execution. White, with the continuous representation by McCann for more than two decades, undeniably had the opportunity (and did) fully litigate his state and federal habeas challenges, including the filing of a motion for authorization to file a successive federal petition and obtaining a stay of execution in 2015. *In re White*, 602 F. App'x at 958; *Ex parte White*, 2015 WL 375733, at *1. Consequently, neither substitution of counsel nor a stay of execution was necessary to make White's statutory right under § 3599 effective where he has enjoyed that right for decades. Op. 9 n.8. White was not entitled to last-minute substitution of counsel and to force an automatic stay where he had more than sufficient time to file a petition alleging a prima facie *Atkins* claim. It was neither legal error nor an abuse of the district court's discretion to deny a stay of execution where White has undeniably had the opportunity to make "effective" and meaningful use of his right to appointed counsel under

§ 3599. *See In re Hearn*, 389 F.3d 122, 123 (5th Cir. 2004); *Battaglia v. Stephens*, 824 F.3d 470, 475 (5th Cir. 2016). Indeed, White continues to receive the benefit of that right today.

Moreover, as discussed above, White expressed dissatisfaction with McCann in 2014, but after the stay of his execution in 2015, White waited idly for a decade until another execution date was scheduled. Under *McFarland*, White was disentitled to a stay. *See McFarland*, 512 U.S. at 858 ("[I]f a dilatory capital defendant inexcusably ignores [the opportunity to request counsel and file a federal habeas petition] and flouts the available processes, a federal court presumably would not abuse its discretion in denying a stay of execution."). Therefore, his motion for a stay of execution should be denied.

B. White is not entitled to a stay under *Nken*.

In considering whether to grant a stay under *Nken v. Holder*, 556 U.S. 418 (2009), a court considers (1) whether the petitioner has made a strong showing that he is likely to succeed on the merits, (2) whether the petitioner will be irreparably injured absent a stay,[11] (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Id*. at 425–15. As discussed below, White fails

[11] As the Fifth Circuit has explained, the merits of the petitioner's "case are essential to [the court's] determination of whether he will suffer irreparable harm if a stay does not issue." *Walker v. Epps*, 287 F. App'x 371, 375 (5th Cir. 2008).

to show an entitlement to a stay under the *Nken* factors. As the Fifth Circuit concluded, Op. 6–9, White is not entitled to proceed on a successive *Atkins* claim. Conclusively, then, he has failed to make a strong showing that he is likely to succeed on the merits.

In *Battaglia*, the Fifth Circuit granted a stay of execution because the petitioner was not meaningfully represented by counsel due to appointed counsel's abandonment of him, appointed counsel's abandonment precluded the development of evidence that the petitioner was incompetent to be executed, the possibility of irreparable harm to the petitioner weighed in his favor, and the petitioner's dilatory filing was due to the late-developing nature of a *Ford*[12] claim and appointed counsel's abandonment. 824 F.3d at 475–76. Such circumstances do not exist here. As discussed above, White has been continuously represented by appointed counsel who have never abandoned him, and there is nothing late developing about the nature of White's proposed *Atkins* claim. White has sought authorization to raise a successive *Atkins* claim, but he was not entitled to it irrespective of outside counsel's accusations against McCann. For the same reasons, White cannot show he will suffer irreparable harm if denied a stay, as he cannot be harmed by the denial of

12 *Ford v. Wainwright*, 477 U.S. 399 (1986).

additional process to which he is not entitled. *See Walker*, 287 F. App'x at 375. Consequently, White fails to show he is entitled to a stay.

Finally, the State, the victims of White's numerous murders, and the public have a strong interest in carrying out White's sentence. White has challenged his capital murder conviction and death sentence for more than twenty years during which he has been ably represented by McCann. As discussed above, White fails to show an entitlement to reinitiate his federal habeas proceedings, that McCann's representation of him has been inadequate, or that he is intellectually disabled. Considering the circumstances in this case, a stay of execution should be denied.

CONCLUSION

White fails to identify any reason justifying this Court's review or any error in the lower courts' judgments, and he fails to justify his request for a stay of execution. His petition for a writ of certiorari and his application for a stay of execution should be denied.

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