Nos. 24-5671, 24A308 (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

REPLY BRIEF

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

MAUREEN FRANCO
Federal Public Defender
Western District of Texas

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

REPLY

Texas amplifies the reasons for this Court to intervene in White's case with a Brief in Opposition (BIO) that echoes the Fifth Circuit's topsy-turvy response to this Court's precedent. Texas maintains this Court must follow clearly inapposite Fifth Circuit precedent when considering its own jurisdiction. BIO 13. In the view of Texas and the Fifth Circuit, the same conflict of interest that this Court found "disabl[ed]" counsel in *Christeson v. Roper*, 574 U.S. 373 (2015), from arguing for equitable tolling, 574 U.S. at 377; *id*. at 379, *enabled* White's counsel to ignore his client's need for the same argument. BIO 22. This matter will continue to arise in an ad hoc manner because, as Texas demonstrates here, BIO 15-19, the Fifth Circuit's disposition of White's motion in an analysis-free footnote—i.e. without the "peculiarly context-specific inquiry" this Court's cases require, *Martel v. Clair*, 565 U.S. 648, 663 (2012)—guarantees that neither the bench nor the bar in the Fifth Circuit will be guided by any standards regarding who, if anyone, should intervene in cases of conflicted counsel and when.

I. Texas's challenge to this Court's jurisdiction is frivolous under this Court's cases.

Texas asserts this Court lacks jurisdiction because White's counsel "lack … authorization" to prosecute his appeal. BIO 13. In *Christeson*, this Court found that a representation agreement between the petitioner and his putative substitute counsel "remove[d] any doubt" as to whether counsel were "authorized to file an appeal on *Christeson*'s behalf." 574 U.S. at 376 & n.1. Texas offers no authority for distinguishing White's written authorization for counsel to appeal from the authorization in

Christeson. *See* BIO 13 (citing Pet'r's App. D.—White's written authorization). There could be no such authority because this Court has long held that a public defender and the courts in which they appear must adhere to the same standards that apply to "a private lawyer" in the same situation. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981). Instead, Texas cites Fifth Circuit precedent that says nothing whatsoever about whether White's written authorization is valid. BIO 13.

To the extent Texas implies without authority that White's counsel must have been appointed in order to seek appointment, the argument falls of its own weight. The Criminal Justice Act expressly authorizes appointment "at any stage of the proceedings" in which an eligible person becomes unable to pay for an attorney. 18 U.S.C. § 3006A(c); 18 U.S.C. § 3599(e). Texas simultaneously argues that the Federal Public Defender should have intervened on White's behalf a decade ago (which would be years before Federal Public Defenders in Texas were permitted to have Capital Habeas Units), BIO 17-19, and that the Defender has no authority to intervene on his behalf at all. If federal courts and eligible defendants and petitioner were not able to rely on Defenders to assert their right to counsel (and appeal erroneous denials), first appearances in the district courts and capital habeas proceedings would grind to a halt.

Texas next relies on inapposite Fifth Circuit precedent to challenge this Court's jurisdiction on grounds that White's appeal was "interlocutory" and not covered by the collateral-order doctrine. BIO 14-15. Texas presented this argument below, but the Fifth Circuit implicitly rejected it by exercising its appellate jurisdiction. App. A

at 8 n.7. Texas contradicts itself and misunderstands the meaning of "interlocutory." The collateral-order doctrine applies only to appeals from orders that "do not end the litigation" in the district court in the way that "judgments that 'terminate an action'" do. *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949)). At the same time, Texas contends White must seek authorization to file a second or successive habeas petition, BIO 24-37, a circumstance that only obtains *after* entry of final judgment in the petitioner's initial petition. *See Gonzalez v. Crosby*, 545 U.S. 524, 530-32 (2005).

II. Texas's ad hoc timeliness standard is neither practical nor supported by precedent.

Texas amplifies the reasons for this Court's intervention by arguing that the Fifth Circuit would have been right to find abusive delay based on evidence that random attorneys who tried to advise White's appointed counsel only to be rebuffed did not thereafter seek to remove appointed counsel. BIO 17-18. The State's post-hoc rationalization for the Fifth Circuit's unexplained conclusion demonstrates that the lower court did not conduct the "peculiarly context-specific inquiry" this Court's standard requires. *Clair*, 545 U.S. at 663.

Texas takes no clear position on who had the responsibility to act when White's appointed counsel initially forfeited merits review of White's intellectual disability. Was it the intellectually impaired White himself, despite his statutory right to counsel? Texas says it was. BIO 17-18. But in the same paragraph, Texas acknowledges that White tried to obtain substitute counsel before McCann forfeited review *but failed*. BIO 17. This suggests Texas will cite the Fifth Circuit's decision in White's

case for the proposition that defendants and capital habeas petitioners must pepper the courts with repeated requests for substitution or be found dilatory.

Texas also seems to imply the Federal Public Defender, almost three years before the creation of her Capital Habeas Unit, had the obligation to intervene because "another attorney, Dick Burr, believed a decade ago … that White might be intellectually disabled." BIO 18. To the extent that Texas argues Burr's knowledge must be imputed to White or the FPD—the idea is both unsupported by authority and contradicted by the record below (and the State's contention that the FPD currently lacks authority to litigate this matter on White's behalf). Moreover, White has sworn that he had no knowledge of that he could present an intellectual disability claim in federal court or of his attorney's misconduct in Dexter Johnson's case.

None of these arguments is legally relevant. This Court has held that time for seeking relief *cannot* begin to run "on the discoverability date of facts that may have no significance under federal law for years to come and that cannot by themselves be the basis of a … claim." *Johnson (Robert) v. United States*, 544 U.S 295, 306 (2005). Even assuming an intellectually disabled person is responsible for asserting his own intellectual disability when his appointed counsel does not, in this case, to obtain substitution, White had to know much more than that he had a potential claim.

When the timeliness of a collateral attack turns on the petitioner's diligence, "the important thing is to identify the particular time when … diligence is in order." *Johnson*, 544 U.S at 308. What established timeliness in *Christeson* is what he did *after* "outside counsel became aware of Christeson's plight." 574 U.S. at 380. Texas

doesn't address *Christeson*'s view, and it adopts an unprincipled, ad hoc approach that trips over this obstacle. White only had grounds for substitution after he knew he had a disability claim *and* that his counsel's failure to raise it had "significance under federal law," *id.* at 306, because appointed counsel failed to raise that claim before the statute of limitations expired one year after this Court's decision in *Hall v. Florida*, 572 U.S. 701 (2014).

White moved for substitution of counsel—through the Federal Public Defender—two days after he learned of his predicament. Texas's wild and unsubstantiated accusation that White intentionally delayed until he got a second execution date—rather than avoid the trauma of being scheduled to die—can be made only because the lower court conducted no fact-finding itself and cast off the constraining influence of the interests-of-justice standard it should have applied under *Clair* and *Christeson*. To prevent recurrences of these issues, this Court should grant review and summarily reverse the Fifth Circuit or set this case for argument so that these issues of timing and responsibility can be addressed in a less ad hoc manner.

III. Texas uses evidence of counsel's conflict of interest to try to disprove the conflict.

The "principal error" in the decisions below, as in *Christeson*, has been the courts' disregard for the actual conflict of interest appointed counsel labors under. Texas denies the existence of the conflict that is the basis for White's substitution motion. BIO 22. Like a Bizarro version of *Christeson*, Texas would have this Court use the conclusive proof of counsel's conflict—that he failed to make his client's

strongest arguments for securing review of his potential *Atkins* claim—to justify overlooking the existence of the conflict.

Texas's attempt to sidestep the conflict is particularly perverse when that conflict animates so many of the perceived defects that Texas identifies.

The client's delay in discovering his counsel's conflict and raising the substitution motion, BIO 17-24: The reason is because appointed counsel violated his fiduciary duties of honest, loyalty, and diligence to White by concealing his conflict from his impaired client, failed to inform White that he had been found to have committed egregious misconduct in another capital habeas case just like his, and then undermined the arguments made by White's FPD counsel.

The shoddy development of evidence of intellectual disability, BIO 30-35: The reason is because conflicted counsel purposefully delayed investigating White's *Atkins* claim for years and now makes facially implausible claims that are intended to mislead the courts about his supposed diligence. Appointed counsel's misconduct in failing to investigate before the limitations period expired gave counsel a perverse incentive—on a "no harm, no foul" theory—to make it appear that White had a weaker claim than diligent inquiry would have produced.

The failure to provide, in the Fifth Circuit's view, *any* plausible reason for satisfying or tolling the statute of limitations or *any* coherent argument for meeting the requirements of § 2244(b)(2), BIO 24-29: That is, of course, because conflicted counsel did exactly what *Christeson* would have predicted: he failed to raise his client's

"strongest argument"—that his own misconduct egregiously delayed White from raising his *Atkins* claim and that the claim became available years earlier—in order to protect his own reputational interests.

IV. McCann's continuing work on behalf of White does not diminish the conflict.

Texas points to work that McCann did in White's case and states that White has been "ably represented" by McCann. BIO 39. But that is at best irrelevant to the narrow issue this Court must examine—appointed counsel's conflict of interest regarding the question of intellectual disability. At worst, it is a fig leaf for McCann's many egregious lapses. As this Court held in *Christeson*, an attorney may have a "disabling" conflict with his client, even if he cannot be said to have wholly "abandoned" him. *Christeson*, 574 U.S. at 379-80. Indeed, the Court held, "the specific substitution-of-counsel clause contained in § 3599(e) . . . must contemplate the granting of such motions in circumstances beyond those where a petitioner effectively 'has no counsel at all'—as is the case when counsel is conflicted." *Id.* Faithfully following *Christeson*, the Fourth Circuit recognized this rule, ordering that a defendant receive substitute counsel because he testified against his client's interest when he testified against his client at a hearing on his motion to withdraw his guilty plea, even though the guilty plea was likely of benefit to the client. *United States v. Glover*, 8 F.4th 239, 247-49 (4th Cir. 2021).

Further, that McCann "developed evidence regarding White's intellectual functioning," BIO 23, highlights the disabling conflict rather than resolves the question before the Court. McCann's expert found that White had an IQ score that fell within

a range of 74-83. Indeed, Dr. Averill's estimated range is incorrect. The standard error of measurement for IQ scores is 5, not 4. DSM-V-TR at 41. The correct range is therefore 73-83.[1]

At the time, *Hall* had not been decided. But, after that decision came down—especially in light of the 76 score obtained at the time of trial—McCann should have had his client retested and should have investigated for adaptive deficits. He started on that path a mere five weeks before his client's execution date of January 28, 2015, and, after that date was stayed, he did not pick it up until 2018 at the earliest, when he retained an investigator. *See* MFA at 1-2 (starting work "after the *Moore* cases"); ROA.2024 (Aff. Vitale) (retained in April 2018).

Texas suggests McCann might have acted strategically, because the *Atkins* claim was weak. BIO 35-35. This claim falls for myriad reasons. First, the question is not whether McCann or Texas can imagine some strategic reason for his conduct; the question is whether McCann acted on his client's behalf with divided loyalties. The attorney in *Glover, supra*, likely had a strategy in mind—he wanted a beneficial plea agreement to go forward. But that did not obviate his obvious conflict.

Further, McCann could not know whether the claim was weak. The only scores he had were outdated standard error measurement adjustments. Even with those numbers, contrary to Texas's argument, it is not difficult to see when the conflict

[1] Texas notes that another doctor obtained higher results, but that doctor administered only screening tests. DSM-V-TR at 37 (reliance on short screening tests may produce "invalid" results). The two scores obtained from administration of full, but outdated, IQ testing are remarkable similar—76 and 78.

became viable, and the conflict accrued. BIO 22. After *Hall v. Florida*, 572 U.S. 701 (2014), an *Atkins* claim was available with a scores as low as 71 and 73 (accounting for the standard error of measurement), and McCann should have conducted an adaptive deficits claim.[2] He did not, and he has been avoiding the effects of that decision ever since. Texas does not even cite *Hall* in its BIO.

The question is not whether new counsel would have done things differently. The FPD has acknowledged from the beginning that a thorough, conflict-free investigation must be conducted. Faulting the FPD and the record for not "proving" an ID claim, then, misses the point. McCann failed in his responsibilities to a client to investigate a potentially meritorious claim. White just seeks time for investigation by someone free of that conflict. *See* ROA.1256 (asking for time to investigate); ROA.1267 (same); ROA.1271 (conflict-free counsel must investigate . . .); ROA.1274 (same); ROA.1280 (ID argument takes "time to investigate); Appellant's Br. 61 (White asks for "nothing more than conflict-free counsel and 90 days to investigate").[3]

The focus of this case should not be whether White is second-guessing McCann on the merits; the question is whether the FPD suffers the same conflict as McCann in deciding whether to pursue it. It does not. The FPD did not avoid the obvious consequences of *Hall* to this case, thereby missing the one-year AEDPA deadline. The

---

[2] It did not take prescience for McCann to read *Hall* and understand its import to this case. *See* BIO 21-22.

[3] Nor does the FPD have to "know" that the best route to tolling is McCann's failure, *see* BIO 21—although the FPD has demonstrate this is so. The relevant fact is that McCann has avoided the route—which is supported by this Court's precedent, unlike the routes he has attempted to take.

FPD has not continued to avoid the subject of tolling based on misconduct, all the while knowing that misconduct was the best argument available. The FPD has not continued to, likely falsely, blame White's family members for the failure to timely raise the claim.[4]

V. White's motion is not futile.

Texas spends the most time defending the Fifth Circuit's view that White's motion is "futile" because his conflicted counsel failed to secure authorization of an *Atkins* claim. BIO 24-35. The effort is wrong as a matter of law.

Texas presumes that White is shackled to the work of conflicted counsel. Not so. The proper focus is on the potential claim White—represented by conflict-free counsel—"might file." *Christeson*, 574 U.S. at 380. Since Texas concedes White has "a statutory … right to conflict-free counsel," BIO 16 (quoting *Clark v. Davis*, 850 F.3d 770, 779 (5th Cir. 2017)), White also has a right to have that counsel "meaningfully [ ] research and present [his] habeas claims," *McFarland v. Scott*, 512 U.S. 849, 858 (1994).

White further demonstrated the ways in which McCann's pursuit of his self-interest is evident in his pleadings, culminating with the motion for authorization. Petition 23-27. At each step of the analysis, White has shown how McCann's conflict

[4] Texas calls the supplemental declarations "unsworn," "hearsay," and "self-serving." Opp. 18, Of course 28 U.S.C. § 1746 permits the submission of unsworn declarations, "under penalty of perjury." Texas is correct in suggesting that the declarations remain untested by a court, however. But it is Texas who tries to avoid that result. White has submitted them only to show that there is a "there there" in support of his request for 90 days to investigate.

distorted the motion's presentation of the merits, time bar, and grounds for bringing a successive petition. White knows he "faces a host of procedural obstacles" just like in *Christeson*, 574 U.S. at 380, but his arguments are far stronger than conflicted counsel's briefing or Texas's BIO suggest.

A. Merits of claim.

Contrary to Texas' assertion that White need show a prima facie claim of intellectual disability at this juncture, the Fifth Circuit in *Hearn* found that a successive *Atkins* claim only had to be "colorable" to justify replacement of counsel, even if it was "certainly insufficient to establish a prima facie case of [intellectual disability]" prior to proper investigation. *In re Hearn*, 376 F.3d 447, 455 (5th Cir. 2004).

Indeed, the main flaw the Fifth Circuit found with White's claim—exclusive reliance on adjusting downward an old IQ score by applying the Flynn effect, *see* App. A at 7—was a product of conflicted counsel's rushed development of the claim and failure to have his client re-evaluated in the weeks before White's execution date. Conflict-free counsel would not make the same mistake. *See* Petition at 34.

B. Federal successor bar.

White had more than a reasonable probability of securing authorization had his counsel asked the Fifth Circuit to apply *In re Johnson*, 935 F.3d 284, 292-94 (5th Cir. 2019), to his case.

Texas knows that White's arguments for satisfying § 2244(b)(2)(A) would be "similar" to Dexter Johnson's. It said so in the district court. ROA.1878 ("White's case is similar to Johnson's in that each had initial federal habeas proceedings that post-

dated *Atkins*, both were represented by McCann in state and federal court, and neither raised an *Atkins* claim until long after *Atkins* was decided."). As in Johnson's case, White's IQ testing prior to the publication of the DSM-5 and *Hall v. Florida*, barred him from an ID diagnosis. After those events, the removal of an IQ cut off made an ID claim newly available to White. *See* Petition 26-27 (discussing *Johnson* holding); *id.* at 34; *id.* at 7-8 (discussing background of Dexter Johnson case).

But raising that argument would have required McCann to excuse his delay in developing White's claim for nearly a decade. So it is unsurprising he avoided it. Because appointed counsel did not raise the *Johnson* argument for White, the Fifth Circuit did not even mention *Johnson*. *See generally* App. A. (Notably, the Fifth Circuit could not even discern what conflicted counsel's alternative argument was because of his inadequate briefing. App. A at 3 ("White fails to commit to whether he moves pursuant to § 2244(b)(2)(A) or § 2244(b)(2)(B), but we cannot grant his motion no matter how we construe it.").)

This shows why it is illogical to use conflicted counsel's self-interested filing to prevent conflict-free counsel from investigating and developing White's *Atkins* claim.

C. Time bar.

Below, Texas assumed for the sake of argument that the record of McCann's misconduct as found by a federal district court in Dexter Johnson's case "could justify enough equitable tolling to make [White's] claim timely." Appellee Br. 46, No. 24-70005 (5th Cir. Sept. 26, 2024). There is nary a mention of Dexter Johnson's case

here, no doubt because it is so damaging for Texas's effort to prop up McCann and for Texas's own statute of limitations defense.

That explains why Texas exclusively focuses on what it believes is evidence enough to say that White could not demonstrate his diligence. BIO 28-30. But diligence is a "fact-intensive inquiry." *Holland*, 560 U.S. at 654. Texas lacks the full factual picture that can only be developed once conflict-free counsel is appointed. Surely McCann's conflict is part of that picture. Texas ignores McCann's affirmative duty to disclose his conflict or withdraw and the uncontroverted evidence that McCann did neither. *See Johnson*, 935 F.3d at 295 (authorizing *Atkins* claim where Johnson alleged diligence in light of McCann's conflict of interest). White was diligent from the moment he became aware he had a potentially meritorious *Atkins* claim that had been time-barred because of his counsel's actions. *Christeson*, 574 U.S. at 380.

CONCLUSION

For the foregoing reasons and those in the petition and application for a stay, a stay of execution should be issued, the petition for writ of certiorari should be granted, and the judgment of the court of appeals reversed.

Respectfully submitted,

MAUREEN FRANCO
Federal Public Defender
for the Western District of Texas

/s/ Tivon Schardl
TIVON SCHARDL
Chief, Capital Habeas Unit

JOSHUA FREIMAN

DONNA COLTHARP
Assistant Federal Public Defenders
919 Congress Ave., Ste. 950
Austin, Texas 78701
512-499-1584 (fax)
737-207-3007 (tel.)
Tivon_Schardl@fd.org

October 1, 2024