CAPITAL CASE
EXECUTION SCHEDULED AUGUST 5, 2025, AT 10:00 A.M.

No.

IN THE
Supreme Court of the United States

BYRON LEWIS BLACK,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE TENNESSEE SUPREME COURT

APPLICATION FOR STAY OF EXECUTION

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**Counsel for Petitioner*

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Sixth Circuit:

Byron Black is scheduled to be executed on **August 5, 2025, at 10:00 AM**. Mr. Black respectfully requests a stay of his execution pending this Court's disposition of his petition for a writ of certiorari.

STANDARDS FOR A STAY OF EXECUTION

Mr. Black respectfully requests that this Court stay his execution pursuant to Supreme Court Rule 23 and 28 U.S.C. 2101(f), pending consideration of his concurrently filed petition for a writ of certiorari (the "Petition"). *See Barefoot v. Estelle*, 463 U.S. 880, 889 (1983) ("Approving the execution of a defendant before his [petition] is decided on the merits would clearly be improper."); *see also Lonchar v. Thomas*, 517 U.S. 314, 320 (1996) (holding that a court may stay an execution if needed to resolve issues raise in initial petition).

The standards for granting a stay of execution are well established. Relevant considerations include the prisoner's likelihood of success on the merits, the relative harm to the parties, the extent to which the prisoner has unnecessarily delayed his or her claims, and the public interest. *See Hill v. McDonough*, 547 U.S. 573, 584 (2006); *Nelson v. Campbell*, 541 U.S. 637, 649-50 (2004); *Barefoot*, 463 U.S. at 895.

All four factors weigh strongly in Mr. Black's favor.

MR. BLACK SHOULD BE GRANTED A STAY OF EXECUTION

A. Mr. Black is likely to succeed on the merits.

As detailed in Mr. Black's petition for a writ of certiorari, every expert who has evaluated Mr. Black has concluded that he is a person living with intellectual disability. Indeed, his IQ scores on gold-standard individually administered objective measures (57, 67, 69, 73, and 76) all meet the criteria to establish significantly

subaverage intellectual functioning. The very question that this Court is considering in *Hamm v. Smith*, No. 24-872, is the same question that has bedeviled courts in Mr. Black's case: "Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim." *Hamm*, 2025 WL 1603602, at *1 (June 6, 2025) (order granting certiorari). In fact, the petitioner in *Hamm* relies on Mr. Black's 2017 case as evidence of the split in the circuits.

As the issue in the lower courts percolated, Mr. Black obtained new evidence proving that prior decisions rejecting his *Atkins* claim are legally and factually erroneous—including the fact that the state's key expert now admits that Mr. Black meets current medical standards for the diagnosis of intellectual disability. His new evidence is so compelling that it resulted in a stipulation from the State of Tennessee that Mr. Black is indeed ineligible for the death penalty and his capital sentence should be set aside.

Mr. Black attempted to avail himself of a state-created right to establish his ineligibility for the death penalty through a motion to recall the mandate. The Tennessee Supreme Court refused to permit him access to this process by relying on decisions which are premised on legal analysis that conflicts with this Court's decisions in *Hall v. Florida*; 572 U.S. 701 (2014), *Brumfield v. Cain*, 576 U.S. 305 (2015), and *Moore v. Texas*, 586 U.S. 133 (2019). The Tennessee Supreme Court's action deprived Mr. Black of a protected liberty interest to establish his innocence of the death penalty conflicting with this Court's decisions. *Gutierrez v. Saenz*, 145 S. Ct. 2258 (2025); *Reed v. Goertz*, 598 U.S. 230 (2023); *Skinner v. Switzer*, 562 U.S. 521 (2011); *District Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52,

68 (2009); *Evitts v. Lucey*, 469 U.S. 387, 401 (1985); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Given that the Court is already considering a related issue in *Hamm* and for the reasons detailed in his petition, Mr. Black has established he is likely to succeed on the merits of his claim.

B. Mr. Black has been timely and diligent

Mr. Black has been more than diligent in pursuing his right to be determined ineligible for the death penalty. In fact, he brought his claim too soon. As a result, his *Atkins* claim was evaluated under an unconstitutional rubric. There is no question that had he sat on his rights he would be removed from death row in Tennessee pursuant to a recent amendment which abandoned Tennessee's 30-year-old definition of intellectual disability in favor of one which complies with modern medical standards and this Court's controlling precedent. But Mr. Black has been barred from pursuing relief under the statute, which was made retroactive by the legislature, because he had the prior (unconstitutional) adjudication. This factor weighs in favor of Mr. Black.[1]

C. Mr. Black will be irreparably harmed if a stay is not granted.

The constitution protects against the impermissible risk that a person with intellectual disability will be executed. *Moore*, 581 U.S. at 6. The evidence is clear that Mr. Black is person with intellectual disability whose execution would violate

[1] Mr. Black has filed a motion for stay of execution with the Tennessee Supreme Court contemporaneous with this filing. *Black v. State*, No. M2004-01345-SC-R11-PD. Mr. Black will supplement this filing as soon as he receives a ruling from the Tennessee Supreme Court.

the Eighth and Fourteenth Amendments to the United States Constitution. This factor weighs in favor of a stay of execution.

D. The public interest weighs in favor of a stay.

The public has a strong interest in the protection of constitutional rights. Moreover, the public has no interest in the execution of a person with intellectual disability. This factor also weighs in favor of a stay.

For the foregoing reasons, and those set forth in the Petition for a Writ of Certiorari, Mr. Black respectfully requests that his application for a stay of execution be granted.

Respectfully submitted,

/s/ *Kelley J. Henry*

KELLEY J. HENRY*
Chief, Capital Habeas Unit

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**Counsel for Petitioner*

Dated: July 28, 2025.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Application for Stay of Execution was delivered to opposing counsel, Nicholas Spangler, Asst. Attorney General, P.O. Box 20207, Nashville, TN 37202, via email and United States Mail, First Class, postage pre-paid, on this 28th day of July 2025.

/s/ *Kelley J. Henry*
Counsel for Petitioner

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BYRON LEWIS BLACK v. STATE OF TENNESSEE

Criminal Court for Davidson County
No. 88S1479

No. M2004-01345-SC-R11-PD

ORDER

On July 1, 2025, Byron Lewis Black, a death-row inmate scheduled for execution on August 5, 2025, filed a motion to recall the March 2006 mandate that issued following his unsuccessful appeal from the trial court's determination that he is not intellectually disabled. Mr. Black contends the 2005 opinion is outdated and legally erroneous, and he insists he is intellectually disabled under the current intellectual disability definition. Mr. Black asks the Court to either withdraw the 2005 opinion or issue a certificate of commutation based on these extenuating circumstances. In its response, the State maintains that Mr. Black's intellectual disability claim has been fully litigated on the merits and that he has presented no extenuating circumstances to warrant recall of the mandate or issuance of a certificate of commutation. We agree with the State.

Tennessee Rule of Appellate Procedure 42(d) provides that this Court has the power to recall its mandate. Tenn. R. App. P. 42(d). However, recalling the mandate is "an extraordinary remedy and should be exercised sparingly." *State v. Smith*, 151 S.W.3d 533, 544 (Tenn. Crim. App. 2003), *perm. app. denied* (Tenn. Oct. 4, 2004) (quoting *State v. Abu–Ali Abdur'Rahman*, M1998–00026–SC–DPE–PD (Tenn. Apr. 5, 2002) (order)). The power to recall the mandate is "one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* (quoting *Calderon v. Thompson*, 523 U.S. 538, 550 (1998)). Furthermore, the circumstances should be "sufficient to override the strong public policy that there should be an end to a case in litigation." *Id.* (quoting *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958)).

Mr. Black pursued an intellectual disability claim after this Court and the United States Supreme Court held that an intellectually disabled (formerly "mentally retarded") person is categorically ineligible for the death penalty. *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001); *Atkins v. Virginia*, 536 U.S. 304 (2002). After a hearing, the trial court

determined that Mr. Black failed to establish he is intellectually disabled. The Court of Criminal Appeals affirmed, and this Court denied Mr. Black's application for permission to appeal. *Black v. State*, No. M2004-01345-CCA-R3-PD, 2005 WL 2662577 (Tenn. Crim. App. Oct. 19, 2005), *perm. app. denied* (Tenn. Feb. 21, 2006), *cert. denied*, *Black v. Tennessee*, 549 U.S. 852 (2006). The mandate issued on March 8, 2006.

Almost twenty years later, Mr. Black is seeking to recall the mandate on the eve of his scheduled execution and relitigate his intellectual disability claim. Mr. Black's core premise is that the 2005 decision is based on an intellectual disability definition that has been upended by subsequent decisions of this Court and the United States Supreme Court, initially citing *Coleman v. State*, 341 S.W.3d 221, 232 (Tenn. 2011), and *Atkins*. However, because Mr. Black's state intellectual disability proceedings overlapped with the federal habeas proceedings, the Sixth Circuit twice remanded the habeas corpus proceedings to the federal district court specifically for reconsideration of Mr. Black's intellectual disability claim in light of *Atkins* and *Coleman* and ultimately affirmed the denial of habeas relief. *See Black v. Bell*, 664 F.3d 81 (6th Cir. 2011), *reh'g denied* (6th Cir. 2012); *Black v. Carpenter*, 866 F.3d 734 (6th Cir. 2017), *reh'g en banc denied* (6th Cir. 2017), *cert. denied sub nom*, *Black v. Mays*, 584 U.S. 1015 (2018). Mr. Black also cites *Hall v. Florida*, 572 U.S. 701 (2014), and the 2021 amendments to Tennessee Code Annotated section 39-13-203 (our intellectual disability statute) as further support for his contention that the 2005 decision is constitutionally infirm. However, in 2021, Mr. Black pursued a new intellectual disability claim based on these developments. *Black v. State*, 2023 WL 3843397 at *3 (Tenn. Crim. App. June 6, 2023). The trial court concluded Mr. Black's new claim was precluded by the statute's procedural bar, rejecting the parties' attempt to avoid the bar via a stipulation. *Id.* at *4. In affirming the trial court, the Court of Criminal Appeals panel agreed that the amended statute barred the new claim and that the parties may not stipulate questions of law, and notably the panel further explained why the 2005 appeal is not undermined by *Hall v. Florida*. *Id.* at *4-11. Mr. Black chose not to seek review in this Court. Thus, Mr. Black's intellectual disability claim was fully litigated on the merits, and the judgment is final. He may not seek to recall the mandate as a vehicle to relitigate his claim.

Finally, Mr. Black alternatively asks the Court to issue a certificate of commutation based on the extenuating circumstances. *See* Tenn. Code Ann. § 40-27-106 (2018); *Workman v. State*, 22 S.W.3d 807 (Tenn. 2000). This Court previously denied Mr. Black's request for a certificate of commutation in its February 24, 2020 order setting Mr. Black's original execution date. Mr. Black has presented no extenuating circumstances to warrant reconsideration of our earlier denial. Accordingly, it is hereby ORDERED that the motion to recall the mandate is DENIED.

It appearing to the Court that Mr. Black is indigent, costs are taxed to the State of Tennessee.

PER CURIAM