

IN THE
Supreme Court of the United States

JAMAAL HOWARD,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI AND
MOTION FOR STAY OF EXECUTION**

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CAPITAL CASE QUESTIONS PRESENTED

After raising an *Atkins*¹ claim on direct appeal and in initial state habeas proceedings, Howard received funding in federal habeas proceedings to further develop his claim. Five-and-a-half months after this Court issued its opinion in *Moore I*,² Howard's federal habeas team concluded that he did not have an intellectual disability and abandoned his *Atkins* claim. Nine years later—and one week before his scheduled execution—Howard asked the Texas Court of Criminal Appeals (CCA) for the third time to review his *Atkins* claim, which he supports with preliminary reports from the same team of experts whose subsequent testing led to the conclusion that an intellectual-disability claim was not viable. The CCA dismissed the writ as abusive pursuant to Texas Code of Criminal Procedure article 11.071, §5.

Did the CCA err in dismissing Howard's subsequent writ as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, § 5, where the claim was previously available to him in prior writs and he failed to state a prima facie claim for relief?

¹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

² *Moore v. Texas*, 581 U.S. 1 (2017).

LIST OF ALL PROCEEDINGS

State v. Howard, No. 15114 (356th Dist. Ct. Hardin Cty., Tex. Apr. 25, 2001) (conviction of capital murder and sentence of death)

Howard v. State, No. AP-74,138 (Tex. Crim. App. Oct. 13, 2004) (direct appeal opinion affirming conviction and sentence)

Ex parte Howard, WR-77,901-01 (Tex. Crim. App. Dec. 12, 2012) (denying relief from initial state habeas application)

Howard v. Director, No. 1:13-cv-256 (E.D. Tex. Sept. 20, 2019) (denying federal habeas relief)

Howard v. Davis, No. 19-70018 (5th Cir. May 11, 2020) (denying certificate of appealability)

Howard v. Lumpkin, No. 20-5996 (Jan. 11, 2021) (denying certiorari off federal habeas)

Ex parte Howard, WR-77,906-02 (Tex. Crim. App. Oct. 5, 2026) (denying motion for stay of execution and dismissing subsequent state habeas application as an abuse of the writ).

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INTRODUCTION

Howard is **scheduled to be executed sometime after 6:00 P.M. on October 7, 2026**. He was convicted and sentenced to death in 2001 for the murder of convenience store clerk Vickie Swartout, after he shot her in the chest and then reached over her dying body to steal \$114.00 and a carton of cigarettes. For the next fifteen years, Howard would assert and develop his *Atkins* claim on direct appeal and in postconviction proceedings. But when further (post *Moore I*) testing revealed that he does not have an intellectual disability, Howard abandoned his *Atkins* claim in federal district court. His federal proceedings carried on for another three-and-a-half years, and then, five-and-a-half more years passed with no litigation. *See Howard v. Lumpkin*, 592 U.S. 1180 (2021) (denying certiorari review on January 11). Then, one week before his scheduled execution, Howard filed a subsequent habeas writ in the CCA with yet another iteration of his *Atkins* claim. The CCA dismissed the application as an abuse of the writ, concluding that Howard failed to satisfy “the requirements of Article 11.071 § 5.” *Ex parte Howard*, No-77,906-2, Order at 2 (Tex. Crim. App. Oct. 5, 2026). Howard now seeks certiorari review of the CCA’s dismissal of his intellectual-disability claim. But because Howard fails to demonstrate any violation of any federal constitutional right, much less a compelling reason for review, certiorari should be denied.

Similarly, Howard’s request for a stay is meritless. In fact, in a corollary federal proceeding October 5, 2026, the Fifth Circuit so found:

Howard is not entitled to a stay of execution. He has no likelihood of success on the merits. His behavior weighs against this court’s granting him the equitable remedy of a stay. And the mere speculative possibility of the Supreme Court’s holding to the contrary proves insufficient to warrant a stay.

...

And because a stay is an equitable remedy, the equitable defenses of laches and unclean hands apply.

In re Howard, No. 26-40605, Order at 8–9 (internal citation omitted).

Howard acted with unclean hands. By waiting until the eleventh hour to file his application and motion—when he had the opportunity to file these motions years before—Howard afforded this court with minimal time to respond to his arguments. And by moving at the eleventh hour, Howard manufactured a sense of urgency that could have been averted by an earlier filing.

Id. at 6.

Indeed, this Court has reiterated time and again that “[l]ast-minute stays should be the extreme exception, not the norm[.]” *Bucklew v. Precythe*, 587 U.S. 119, 150 (2019); *see also Barr v. Lee*, 591 U.S. 979, 981 (2020):

“[T]he last-minute nature of an application” that “could have been brought” earlier, or “an applicant’s attempt at manipulation,” “may be grounds for denial of a stay.” *Hill*, 547 U.S. at 584 (internal quotation marks omitted). . . . If litigation is allowed to proceed, federal courts “can and should” protect settled state judgments from “undue interference” by invoking their “equitable powers” to dismiss or curtail suits that are pursued in a “dilatory”

fashion or based on “speculative” theories. [*Hill*, 547 U.S. at 584–85].

Bucklew, 587 U.S. at 150 (footnote omitted).

By delaying until the last minute to raise his claim, Howard fails to make the requisite showing to justify interference by the federal courts. Twenty-six years have passed since Howard murdered Vickie Swartout. The ensuing delay in carrying out Howard’s sentence should weigh heavily in the evaluation of this application for a stay, and justice for Howard’s victims should be denied no longer. Simply put, “[t]he people of [Texas], the surviving victims of [Howard]’s crimes, and others like them deserve better.” *Id.* at 149. The strong interest of the State in the timely enforcement of Howard’s sentence is not outweighed by Howard’s interest in one more court’s review of a claim whose merits have been adjudicated or considered five times to the same end.³ Howard thus fails to demonstrate that he is entitled to a stay of execution

³ Howard’s claim has been adjudicated twice, first by the CCA on direct appeal, *Howard v. Texas*, 153 S.W.3d 382, 386–89 (Tex. Crim. App. 2004), and then again by the CCA in initial state habeas proceedings, see Supp. SHCR-01 at 22, ¶¶ 19–25; *Ex parte Howard*, No. 77,906-01, 2012 WL 6200688, at *1 (Tex. Crim. App. 2012) (adopting state habeas court’s findings). While not adjudicated since, the federal district court, the Fifth Circuit, and the CCA have all reviewed extensive briefing on Howard’s *Atkins* claim. Before Howard abandoned it, the federal district court considered his claim in the context of Howard’s motions for funding and subsequent complaints of underfunding. See *Howard v. Director*, No. 1:13-cv-256, 2019 WL4573640, at **2, 38–40 (E.D. Tex. 2019). The CCA passed over Howard’s most recent claim when it dismissed it as an abuse of the writ, which this Court treats as an adjudication on the merits. See *Busby v. Davis*, 925 F.3d 699, 709 (5th Cir. 2019); *Blue v. Thaler*, 665 F.3d 647, 653–54 (5th Cir. 2011). And finally, the Fifth Circuit passed over Howard’s *Atkins* claim when it concluded AEDPA precluded relief two ways.

under this Court's precedent. Accordingly, Howard's request for a stay should be denied.

STATEMENT OF THE CASE

I. Facts of the Crime

The CCA summarized the facts as follows:

[Howard] stole a gun from his grandfather the night before the murder and hid it. Despite his family's efforts to persuade him to turn over the gun, [Howard] refused. The following morning, [Howard] retrieved the gun and walked several blocks from his house to the Chevron store. After peering in the windows, he entered the store, went into the secured office area where the victim was sitting, cocked the gun, and shot the victim in the chest. [Howard] stole \$114.00 from the cash register and reached over the dying victim to steal a carton of cigarettes before leaving. The offense was recorded on videotape. [Howard] denied committing the offense until he was told it was videotaped. He told the officer who took his statement that he was not sorry for committing the offense.

Howard v. State, 153 S.W.3d 382, 383–84 (Tex. Crim. App. 2004).

II. Punishment Evidence

The CCA summarized the evidence elicited at Howard's punishment trial:

. . . [T]he State presented evidence that [Howard] demonstrated a disregard for authority and school rules despite the continued efforts of his mother and educators. During one incident, [Howard] punched a pregnant teacher in the chest with his fist when she asked him to return to his seat. When [Howard] was assigned to an alternative school, he refused to comply with its rules and standards, and he was defiant and disruptive. The State also presented evidence of [Howard's] possession of controlled

substances, his fighting with police officers and resisting arrest, his committing several burglaries as a juvenile, and his fighting with other inmates. Dr. Edward Gripon testified for the State that [Howard] was not suffering from schizophrenia, but rather was suffering from antisocial personality disorder.

Id.

III. Competency Evaluations at Trial

At arraignment, trial counsel Tyrone Moncriffe raised the issue of Howard's competency to stand trial after observing some "disturbing" behavior. 2 RR⁴ 48. From then on, the trial court went to great lengths to ensure that Howard was competent before proceeding with the trial on the merits. It approved Howard's absence during voir dire one day on Moncriffe's report that he was "speaking to himself" and "laughing involuntarily." 13 RR 1. And it appointed an independent psychologist to assess Howard's capacity to understand the proceedings against him and communicate with counsel. *See* 2 RR 48–53 (appointing psychologist). When that expert found Howard's competency "questionable," the court set a competency hearing. 21 RR 42–43, 48–53. And when that hearing ended with a deadlocked jury, the court set the next. *See* 30 RR 36–41.

⁴ The Director employs the following citation conventions: "CR" refers to the clerk's record of pleadings and documents filed during Howard's capital murder trial. "RR" refers to the reporter's record of transcribed trial proceedings. "DX" refers to the defense's trial exhibits. "SHCR-01" refers to the clerk's record of pleadings and documents filed during Howard's initial state habeas proceeding. All references are preceded by volume number and followed by page number where applicable.

In addition to the court-appointed psychologist, both parties had their own experts—one for the defense and two for the state—evaluate Howard’s capacity. Four experts, then, wrote reports and testified in one or both of the competency hearings that followed. *See* 29 RR; 31 RR; 32 RR; 34 RR 95–97 (DX 1) 98–99 (DX 2). Where Texas law recognizes both intellectual disability and mental illness as potential sources of incompetence,⁵ all four experts homed in on Howard’s mental illness, with one diagnosing him with schizophrenia, 34 RR 99 (DX2 at 2), and two suspecting as much, 29 RR 68–69. To the extent the experts’ conclusions are relevant to the *Atkins* claim Howard would eventually raise on direct appeal and in initial state habeas proceedings—before abandoning it in federal habeas proceedings—they are summarized below.

A. Dr. James Duncan: court-appointed clinical psychologist

On March 8, 2001, Dr. James Duncan interviewed Howard at the Hardin County Jail for an hour-and-a-half to two hours to assess his mental, emotional, and intellectual functioning. 21 RR 20–21; 34 RR 95 (DX 1 at 1). While “Howard was able to provide a reasonably detailed narrative of his involvement in the alleged incident” and “was aware of the specific charges against him . . . and the possible penalties involved,” Dr. Duncan concluded that his “competency to stand trial . . . [was] questionable.” 34 RR 96 (DX 1 at

⁵ *See* Tex. Code Crim. Proc. art. 46B.024 § 2(A)-(B).

2); 21 R.R. 29, 41–42. He explained that Howard’s “responsiveness seemed inconsistent” and his “thought processes seemed impaired.” 34 RR 95 (DX 1 at 1).

And after administering some of the verbal subtests of the WAIS-IV, Dr. Duncan estimated Howard’s intellectual functioning to be “in the borderline to mildly impaired range.” 21 R.R. 26; 29 RR 66, 76; 34 RR 96 (DX 1 at 1).

I would say in the range of 70; but because I didn’t give the full test, that number would be - - there would be a range there. I would say that based on the - - scoring the subtest that I gave and figuring out that number, would be a 65 to 70 kind of IQ range.

29 RR 76. When asked whether he would expect someone in that range “to pass the TAAS test,” as Howard did as “a sophomore or junior in high school,” Dr. Duncan admitted that he would not. 29 RR 76. Eventually Reconciling Howard’s early academic success with his presentation during their interview, the doctor explained:

Given the available history, his intellectual functioning appears to have deteriorated from a previous level and is now in a range that would be considered mildly impaired. There is evidence of flattening or inappropriate affect. Although hallucinations were not acknowledged by Mr. Howard this examiner observed him responding to apparently internal stimuli.^[6] Jail guards report similar behavior. His logic is unusual and at times unintelligible. Given Mr. Howard’s age and the nature of symptoms displayed, he may well be exhibiting an emerging thought disorder possibly

⁶ Howard would suddenly smile or chuckle when there was no apparent reason to at times, which Dr. Duncan believed may have been responsive to an auditory hallucination. 21 RR 24–25; 34 RR 96–97 (DX 1); *see also* 29 RR 43.

schizophrenia.⁷ An organic condition of unknown origin also cannot be ruled out. Mr. Howard would appear to be in need of psychiatric treatment.

34 RR 96–97 (DX 1); *see also* 21 RR 26–42; 29 RR 43. Notably, at the same time, Dr. Duncan testified that Howard “knew right from wrong” when he murdered Vickie Swartout. 21 RR 32–35.

B. Dr. Richard Fason: defense psychiatric expert

Dr. Richard Fason conducted two clinical interviews of Howard on February 5 and April 10, 2001. 29 RR 106; 34 RR 98 (DX 2). In between the interviews, he reviewed Howard’s school records and Drs. Duncan’s and Fason’s reports from their competency evaluations; he also consulted with Dr. Duncan, as well as Howard’s counsel, mother, and therapist from adolescence. 29 RR 99–103; 34 RR 98 (DX 2 at 1).

From the interviews, Dr. Fason characterized Howard as “impenetrable,” explaining that he wouldn’t “let [Dr. Fason] see what he was thinking or what he was feeling.” 29 RR 92. The doctor attempted to administer the Minnesota Multiphasic Personality Inventory 2 (MMPI-2) test but was unable because Howard “couldn’t manage” the vocabulary, specifically, “the word[s] ‘mechanics’ . . . and ‘appetite.’” 29 RR 90. While Dr. Fason had doubts about Howard’s credibility, SHCR-01 at 125, his poor vocabulary raised

⁷ The timing of the onset of Howard’s symptoms was significant because it aligned with the expected onset of same for a person with schizophrenia. 29 RR 69, 77.

questions about intellectual disability. 29 RR 91–92. But after reviewing Howard’s school records and interviewing his mother and defense counsel, Dr. Fason discovered that Howard had started out in school as a very bright student. 29 RR 95–103; 34 RR 98 (DX 2 at 1). Specifically, in second grade, Howard was in the ninetieth percentile in math but dropped to the thirtieth percentile in fifth grade. 29 RR 98–99; 34 RR 98 (DX 2 at 99). Dr. Fason theorized that Howard’s declining performance in school was due to schizophrenia. 29 RR 106–08.

Based on his evaluation and review, Dr. Fason concluded:

Howard is suffering from a form of Schizophrenia that markedly impairs his ability to have a rational understanding of the charges . . . and consequences if convicted. Additionally, he does not possess the ability to cooperate . . . and communicate with his attorney in planning his defense. [T]herefore, he should be considered incompetent to stand trial.

34 RR 99 (DX2 at 2). Dr. Fason further opined that, if treated with antipsychotics, Howard’s restoration to competency was likely possible. 34 RR 99. (DX 2).

C. Dr. Ned Groves: state psychiatric expert

Dr. Ned Groves, evaluated Howard on March 30, 2001, at the Hardin County Jail. 1 CR 138. He also interviewed a jailer about Howard’s behavior. 1 CR 138.

After evaluating Howard, Dr. Groves realized that he had met Howard five years prior, when he was 15 years old, at the Texas Rehabilitation Commission's request for a determination of disability, related to his Attention Deficit Hyperactivity Disorder (ADHD). 29 RR 128.⁸ Dr. Groves's notes from the 1995 evaluation reflected that Howard had been an A student into third grade, before his grades plummeted to Ds and Fs. Placed in a specialized learning environment for fourth grade, his academic performance improved some. 29 RR 130. But by fifth grade, Howard's grades started to decline alongside his behavior. 29 RR 130. It was then that Howard was first diagnosed and treated for ADHD. During the time he was treated for ADHD, Howard's mother reported that "It was an overnight change": "[H]e was able to conform his behavior," and "[h]is grades went back to being all As." 29 RR 130. "[T]hings remained fairly well" while "he was taking the medication." 29 RR 130. But by eighth grade or just after, he stopped taking the medication. 29 RR 131.

From his 2001 evaluation, Dr. Groves found that Howard's "cognitive exam was notable for limited effort, if any." 1 CR 140. Howard was "extremely disinterested and frankly bored with the process." 1 CR 140. Referencing Dr. Fason's testimony and the jailer's report of Howard's behavior, Dr. Groves

⁸ Dr. Groves explained that his role as the examiner was "to do an evaluation and send the report to the State of Texas" for a decision on whether his disability was sufficient to warrant a monetary benefit. 29 RR 129.

acknowledged that “[t]here were some subtle clues that might be suggestive of a thought disorder or a schizophrenic type problem.” 29 RR 123, 139–40, 142. But he was unable “to make a specific diagnosis of schizophrenia at [the] time.” 29 RR 123. Notably, Dr. Groves perceived Howard’s “vagueness and superficiality” during the interview to be “volitional,” 29 RR 132, and speculated that some of Howard’s behaviors may have been symptoms of antisocial personality disorder, 29 RR 133–34. In any event, Dr. Groves explained that neither schizophrenia nor ADHD provided a sufficient basis for incompetency. 29 RR 132; 32 RR 26–28, 31. From there, he found Howard competent to stand trial. 1 CR 141.

D. Dr. Edward Gripon

The state’s psychiatric expert, Dr. Gripon, evaluated Howard for an hour-and-a-half on April 10, 2001. 2 CR 213. Based on his conversation with Howard, Dr. Gripon “estimate[d] his intelligence as low average to borderline.” 2 CR 216. He diagnosed Howard as having antisocial personality disorder, rather than schizophrenia. 23 RR 113–18, 26 RR 112–14; 2 CR 217 (explaining that “simple schizophrenia” is not recognized in the DSM-IV and that Howard’s symptoms do not meet the criteria for any of the five DSM-endorsed subtypes).

III. Conviction and Postconviction Proceedings

After one Texas jury determined Howard was competent to stand trial, 32 RR 134, another convicted Howard of capital murder, 3 CR 578; 24 RR 53–

55. Pursuant to the jury's answers to Texas's punishment-phase special issues, the trial court sentenced Howard to death. 3 CR 578; 27 RR 58–64. On direct appeal, the CCA rejected Howard's *Atkins* claim, *inter alia*, to uphold his conviction and sentence. *Howard v. State*, 153 S.W.3d at 383–84 (Tex. Crim. App. 2014).

While his direct appeal was pending, Howard filed a state application for a writ of habeas corpus raising an *Atkins* claim again. SHCR-01 at 21–123. The trial court issued findings of fact and conclusions of law recommending that the CCA deny relief. Supp. SHCR-01 at 20–38. And on December 12, 2012, the CCA did. *Ex parte Howard*, No. WR-77,906-01, 2012 WL 6200688, at *1 (Tex. Crim. App. Dec. 12, 2012).

On December 12, 2012, Howard filed a federal habeas petition in the district court, again raising his *Atkins* claim. DE 16.⁹ Over the next four-and-a-half years, Howard would request \$70,912.50 in funding to develop the claim that he now says was never feasible at that time. *See* Motion for Order Authorizing Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2244 and for Stay of Execution (Mot.) 1, 8 n.3; DE 14 (\$7,500); DE 23 (\$14,000) (DE 44 (\$8,000); DE 50 (\$10,062.5); DE 66(\$5,000); DE 71

⁹ “DE” refers to docket entries on the federal habeas court's electronic docket sheet, available on PACER in Eastern District cause number 1:13-cv-256.

(\$5,000); DE 74 (\$21,350). Having been granted \$36,000 of his ask, Howard was authorized to retain a team of three *Atkins* experts. *See* DE 75 at 2.

In 2015, the team’s psychiatrist, Dr. George Woods, concluded, “to a reasonable degree of medical certainty,” that Howard was intellectually disabled, albeit without administering any IQ or adaptive-deficit tests. DE 76-14. But with the onboarding of two additional experts who were qualified to administer the tests necessary to sustain an *Atkins* claim, Howard was finally tested. *See* DE 44. And on September 12, 2017, Howard’s team of experts finally revealed the results: “Howard does not have intellectual disability.” *See* DE 74 at 2–3 (filed on September 12, 2017 filing date). So five-and-a-half months after this Court overturned the CCA for applying *Briseno*’s “superseded medical standards” to adjudicate *Atkins* claims, Howard made the choice to abandon his intellectual-disability claim. *Moore I*, 581 U.S. at 11–12 (issued on March 28); *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

Two years later, the district court issued an order denying relief on Howard’s remaining claims. *Howard v. Stephens*, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. 2019); DE 75. Howard filed an application for certificate of appealability (COA), in which he curiously updated the Fifth Circuit in a footnote about precedent related to his abandoned *Atkins* claim:

This case was tried pre-*Atkins*, although appellate counsel cited [*Atkins*,] as supplemental authority regarding a claim submitted of intellectual disability on direct appeal. The [CCA] rejected the

claim under [*Ex parte Briseno*]. (The *Briseno* holding was specifically rejected in [*Moore I*].)

See COA App. at 11 n.5. The Fifth Circuit denied Howard’s application for a COA, *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020), and this Court denied certiorari, *Howard v. Lumpkin*, 592 U.S. 1180 (2021).

On March 26, 2026, the 356th District Court of Hardin County, Texas, scheduled Howard for execution on Wednesday, October 7, 2026. Seven months after the 356th District Court issued its order—and nine days before his scheduled execution—Howard filed a subsequent writ in the CCA reasserting the *Atkins* claim that he had abandoned in September 2017, along with a motion to stay his execution. While proceedings were pending in the CCA, Howard took to federal court. On October 1, 2026, he filed in the Fifth Circuit a motion for authorization to file a successive *Atkins* petition and a motion to stay his execution. On October 5, 2026, the Fifth Circuit denied both in a published order. *In re Jamaal Howard*, No 26-40605 (5th Cir. Oct. 5, 2026).

Later that afternoon, the CCA followed suit, dismissing Howard’s subsequent application as an abuse of the writ and denying his motion for stay. *Ex parte Howard*, WR-906-02 (October 5, 2026). And finally, on the eve of his execution, Howard filed a petition for writ of certiorari in this Court, along with an accompanying motion to stay his execution.¹⁰ The instant opposition follows.

¹⁰ Howard also filed in this Court a Petition for Writ of Mandamus to the United States Court of Appeals for the Fifth Circuit, and an Application for Stay of Execution. See *In re*

REASONS FOR DENYING THE WRIT

I. The CCA's Dismissal of an *Atkins* Claim in a Subsequent Writ Pursuant to Article 11.071 § 5 Constitutes a Determination on the Merits.

The law is clear that, in reviewing *Atkins* claims in subsequent habeas applications, the CCA necessarily considers the merits of the federal constitutional claim. See *Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007); *Busby*, 925 F.3d at 709 (citing *Blue*, held CCA conclusion that evidence did not meet subsection 5(a)(3) threshold “was not a denial of relief on purely state-law procedural grounds, independent of federal law, because in addressing the *Atkins* claim, the TCCA necessarily considered federal law in assessing the sufficiency of the facts supporting the claim.”).

In finding Howard failed to satisfy § 5, then, the CCA conducted a prima facie review of the merits and clearly found them lacking. That was correct. Howard's argument to the contrary misunderstands *Moore I* and the DSM-5-TR, and the claim itself is meritless. The CCA's application of the procedural bar was not in error. Howard simply failed to demonstrate a prima facie claim for relief under *Atkins*. Therefore, his claim was properly dismissed as an abuse of the writ.

Jamaal Howard, Nos. 26-5754 & 26A459. The Respondent will file a separate response to those pleadings.

II. Howard fails to make a prima facie claim for relief under *Atkins*.

Where the CCA's order was silent, Howard asks this Court to assume that the court "disregard[ed] . . . current medical standards," or his fusion of recent changes in the DSM-5-TR and the AAIDD-12. *See* Pet. at 10–17. Notwithstanding the CCA's explicit adoption of the DSM-5-TR, Howard argues the court could not have applied it here. *See* Pet. 14–15 n.7 (acknowledging that it "is not incorrect to characterize [the CCA's] opinion in *Mays*¹¹ as having adopted the DSM-5-TR's abandonment of the relatedness requirement). And where the CCA left open whether it would adopt the AAIDD-12's recent expansion of the developmental period to age 22, *see Ex parte Estrada*, No. 53,499-02, 2025 WL 1122323, at *1 n.2 (Tex. Crim. App. 2025). Howard suggests the court decided the issue against him here, in an order that says nothing of it. Pet. at 10, 14–15 & n.7. But the evidence provides the most compelling reason for the CCA's dismissal, as it is facially inadequate to meet the criteria in the DSM-5-TR's framework, even if fused with that of the AAIDD-12. Howard's evidence does not support the diagnosis he needs.

A. The CCA's adoption of the DSM-5-TR's framework comports with *Moore I*.

This Court in *Atkins* recognized a national consensus against execution of intellectually disabled offenders, but it also recognized there was "serious

¹¹ *Ex parte Mays*, 686 S.W.3d 745, 748 (Tex. Crim. App. 2024).

disagreement” regarding which offenders are intellectually disabled. 536 U.S. at 317. The Court thus left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentence,” *id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)), with the “medical community’s current standards” supplying “one constraint on States’ leeway in this area,” *Moore I*, 581 U.S. at 20. In *Moore I*, this Court indicated that the latest editions of the American Psychiatric Association’s (APA’s) *Diagnostic and Statistical Manual of Mental Disorders* (DSM) and the American Association on Intellectual and Developmental Disability (AAIDD) *Defenition Manual* constitute “current medical standards” that supply “the best available description of how mental disorders are expressed and can be recognized by a trained clinician.” 581 U.S. at 13–14.

The CCA has since adopted the DSM-5-TR’s framework for intellectual disability to adjudicate *Atkins* claims. *E.g.*, *Ex parte Mays*, 686 S.W.3d 745, 748 (Tex. Crim. App. 2024); *Ex parte Gallo*, 687 S.W.3d 517 (Tex. Crim. App. 2024). Most recently, in *Ex parte Gonzales*, the CCA quoted and applied the DSM-5-TR’s criteria verbatim:

Criterion A refers to intellectual functions that involve reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. *Id.* at 38. It is typically measured with individually administered and psychometrically valid, comprehensive, and culturally appropriate tests of intelligence. *Id.* Individuals with intellectual disability have IQ scores of approximately two standard deviations or more

below the population mean, including a margin for measurement error (generally ± 5 points). *Id.* On tests with a standard deviation of 15 and a mean of 100, this involves a score of approximately 65–75 (70 ± 5). *Id.*

That said, “an individual's intellectual functioning cannot be reduced to a single numerical score.” *Hall*, 572 U.S. at 713 Rather, “[f]or purposes of most IQ tests ... an individual's score is best understood as a range of scores on either side of the recorded score.” *Id.*

Criterion B, deficits in adaptive functioning, refers to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background. DSM-5-TR at 42. According to the DSM-5-TR, there are three “domains” of adaptive functioning: the conceptual (or academic) domain, the social domain, and the practical domain. *Id.* A person has adaptive deficits (and so meets Criterion B) when at least one of these domains is sufficiently impaired that the person needs “ongoing support ... to perform adequately across multiple environments, such as home, school, work, and community.” *Id.*

Criterion C, onset during the developmental period, is met if the person's intellectual and adaptive deficits were present during childhood or adolescence. *See id.*

Ex parte Gonzales, 2026 WL2482916, at *3. In addition to adopting the DSM-5-TR’s framework, the CCA has explicitly incorporated the manual’s abandonment of the “‘relatedness link’ between adaptive and intellectual deficits.” *Ex parte Busby*, 2025 WL 70211, at *1 (Tex. Crim. App. 2025) (adopting habeas court’s findings except for on referencing “relatedness link” because DSM-5-TR had abandoned); *Ex parte Mays*, 686 S.W.3d at 748 n.5.

When confronted with the AAIDD-12's extension of the "developmental period" from 18 to 22 years of age, however, the CCA has yet to find occasion to resolve the issue. It compared this shift to the other "current medical standard," noting that "the DSM-5-TR does not specify when the developmental period ends," but instead defines it as "childhood or adolescence." *Ex parte Estrada*, 2025 WL 1122323, at *1 n.2. Because two experts had "concluded that Estrada's intellectual and adaptive deficits emerged before he turned 18," the CCA declined to decide "whether the developmental period extends all the way to 22." *Id.*

Howard provides no reason to believe that the CCA did not apply its precedent in this case. With no expert to substantiate his alleged intellectual disability, however, Howard assumes that it did not. He goes on to misinterpret *Moore I* to require state courts to fuse the recent changes in the DSM-5-TR that suit a given *Atkins* claim together with same from AAIDD-12. While Howard's opportunistic fusion of two distinct frameworks hardly constitutes "current medical consensus," it does reveal his end-run: That is, to count all the manifestations of his schizophrenia-spectrum disorder toward intellectual disability, too. To get there, he overstates the impact of the relevant shifts in frameworks to mean that all of his symptoms or deficits—regardless of their source—may be pooled for lawyers to prove up intellectual disability, so long as observed by age 22. But Howard's interpretation of the shifts cannot be

reconciled with the text of the DSM-5-TR itself. For the manual maintains its commitment to separating co-occurring disorders, rather than blending them together to manufacture a secondary diagnosis.¹²

Intellectual disability as a “neurodevelopmental disorder,” which “typically manifest early in development, often before the child enters school, and [is] characterized by developmental deficits or differences in brain processes *that produce* impairments of personal, social, academic, or occupational functioning.” *Id.* at 35 (emphasis added). While Criterion B no longer requires a clinician to prove that an individual’s adaptive deficits are “directly related to” his intellectual deficits, “intellectual disability” remains “characterized by deficits in general mental abilities [that] . . . *result* in impairments in adaptive functioning.” *Id.* (emphasis added).

To demarcate “various levels of severity,” the manual uses the “specifiers”: “mild, moderate, and severe.” *Id.* at 38. Mild intellectual disability is distinct from “borderline intellectual functioning,” “differentiating” between the two “requires careful assessment of intellectual and adaptive functions and their discrepancies.” *Id.* at 836. As a diagnosis for intellectual disability requires “clinical assessment and standardized testing of intellectual functions,” *Id.* at 38, the manual explicitly warns that there is a heightened

¹² It also explicitly warns that its frameworks are “not be applied mechanically by individuals without clinical training.” *Id.* at 23.

risk for error when individuals with Howard's co-occurring disorders, specifically, are tested for intellectual functioning:

Differentiating borderline intellectual functioning and mild intellectual [disability] requires careful assessment of intellectual and adaptive functions and their discrepancies, particularly in the presence of coocuring mental disorders that may affect patient compliance with standardized testing procedures (e.g., schizophrenia and attention deficit /hyperactivity disorder, with severe impulsivity)."

Id. at 836. As schizophrenia also causes cognitive and functional decline, a neurodevelopmental diagnosis is inappropriate when the functional impairments are a secondary consequence of a post-developmental psychiatric illness, rather than a lifelong failure to meet baseline developmental milestones. *See id.* at 23, 116 (recognizing that cognitive impairments are a ubiquitous feature of schizophrenia and are "strongly linked to vocational and functional impairments"), *id.* at 119–20 ("Schizophrenia is associated with significant social and occupational dysfunction. Among individuals with schizophrenia, deficits in reading ability are more severe than what would be predicted by the general cognitive impairments associated with the disorder.").

To account for the concerns about the validity of testing measures under the circumstances here, clinicians are instructed to protect the diagnostic baseline by using their training and judgment to interpret test scores and to corroborate results with cross-sectional histories from collateral sources. *Id.* at 23, 38.

So while the removal of the relatedness requirement may lessen a clinician's burden to psychometrically prove that a specific lower IQ score is the "cause" of a specific adaptive deficit, it does not permit clinicians—or lawyers—to dump active psychiatric symptoms into the adaptive-deficit criteria to support a diagnosis for intellectual disability. *See id.* at 23 (instructing that its frameworks are "not [to] be mechanically by individuals without clinical training").

Howard similarly overstates the impact of the AAIDD-12's expansion of the developmental period to open the door to permit consideration of his behavior at the time of the offense and during the trial. But he faces the same problem here. Like the DMS-5-TR, the AAIDD-12 guards against diagnostic overshadowing, providing a comprehensive framework on co-occurring disorders, or dual diagnoses. Evidence surrounding Howard's behavior at the time of the murder has not been overlooked. It just does not show what Howard wants it to.

As shown below, the latest editions of the DSM-5TR and the AAIDD-12 do not change the analysis in this case because Howard was demonstrating symptoms of psychosis, not intellectual disability.

B. Howard fails to meet the DSM-5-TR's criteria for intellectual disability.

To demonstrate Criterion A, or “significantly subaverage intellectual functioning,” Howard relies on an IQ score of 74, which was obtained in 2017 to support his *Atkins* claim before he abandoned it, *See* Pet. at 14; Ex. 2 at 5, and a ballpark estimate from Dr. Duncan, which Howard alleges was based on “the verbal portion of the WAIS-R” in March 2001. Pet. 5 (“As part of his work, Duncan administered the verbal portion of the WAIS-R to Howard in March 2001.”). And for Criterion B and C, adaptive deficits and onset during the developmental period, Howard relies on affidavits from his mother, sister, and close family friend, detailing their observations of Howard from childhood to his arrest, Pet. Exs. 5, 6, 7, as well as evidence elicited at trial in 2001. *See* Pet. 15–16. But he fails to show that the CCA violated this Court’s precedent with respect to any of the three criteria.

1. Howard’s supporting evidence in state court

Howard submitted a report from psychiatric expert Dr. George Woods in state court. It reflects that Dr. Woods interviewed Howard and conducted neuropsychological testing; he also reviewed school records. Dr. Woods “surmise[d] from [Howard’s] academic scores and behavior that he had a long history of cognitive deficits before the onset of his psychosis.” Pet. Ex. 4 at a83. With respect to adaptive functioning, Dr. Woods found that Howard’s “academic impediments alone would meet the adaptive dysfunction criteria.” Pet. Ex 4 at a.86. Ultimately, however, Dr. Woods concluded that Howard was

impaired in all three domains of adaptive functioning.” Pet. Ex. 4 at a89. Finally, Dr. Woods found that Howard’s intellectual disability occurred in the developmental period. Pet. Ex. 4 at a90. In conclusion, Dr. Woods stated that it was his “professional opinion, which [he] held to a reasonable degree of neuropsychiatric certainty, that further evaluation of . . . Howard’s Intellectual Disability should be undertaken to corroborate [his] diagnosis of intellectual disability.” Sub. Writ, Ex. 4 at a90.

Having proffered a tentative diagnosis, subject to corroboration, Dr. Woods went on to summarize the relationship between intellectual disability and schizophrenia, explaining that “[d]iagnostic accuracy is paramount in determining psychotic illnesses, particularly schizophrenia, among the persons with [intellectual disability].” Sub. Writ, Ex. 4 at a87. Assessing Howard in that framework, Dr. Woods noted that he had “two specific periods of deterioration” that helped “differentiate between the two comorbid disorders.” Pet. Ex. 4 at a87. He attributed the first deterioration, which was in early childhood, to intellectual disability, and the second, which was in his adolescence, to the prodromal phase of schizophrenia. Pet. Ex. 4 at a88. According to Dr. Woods, “There is a clear distinction between his two disorders

in spite of the severity of both his schizophrenia and intellectual disability.”
Sub. Writ, Ex. 4 at a88.¹³

Howard also submitted a report from Dr. Richard Temple, who was retained in 2017 to administer the intellectual-functioning tests that Dr. Woods did not. *See* Pet. Ex. 4 at a90. Dr. Temple’s report reflects that Howard received a full-scale IQ score of 74 on the WAIS-4. Accordingly, Dr. Temple concluded “with a 95% confidence interval” that Howard’s full scale IQ score is between 70 to 79. Pet. Ex. 2 at a64. Notably, Dr. Temple’s report further reflects that “there [was] no report or evidence of discrete injuries or illnesses in adulthood that could account for the observed weaknesses.” Pet. Ex. 2 at a67.

After Drs. Woods and Temple wrote their reports, however, a third expert, Dr. Patton evaluated Howard to assess his adaptive behavior. *See* DE 74 at 2–3. Howard did not submit any of Dr. Patton’s reports or notes in state court, however. While it is not entirely clear why, after additional “additional diagnostic procedures, neuropsychological testing and adaptive behavior measures were conducted, the defense concluded that “Mr. Howard does not have [i]ntellectual [d]isability.” DE 74 at 3. Five-and-a half months after this Court issued *Moore I*, Howard abandoned his *Atkins* claim.

¹³ In addition, Dr. James Duncan’s notes from his pretrial evaluation of Howard in 2001 were submitted to the state court, Pet. Ex. 1.

2. Application

As noted above, the DSM-5-TR requires “clinical assessment and standardized testing of intellectual functions” to satisfy the intellectual-functioning criterion. DSM-5-TR at 38. Individuals with intellectual disability have scores approximately two standard deviations or more below the population mean, including a margin for measurement error. DSM-5-TR at 42; *see In re Cathey*, 857 F.3d at 236. In *Moore I*, this Court reiterated that, per *Hall*, “where an individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual-functioning deficits,” adaptive deficits must then be considered. *See Moore I*, 581 U.S. at 14.

As Dr. Temple’s report confirms, Howard received a composite score of 74 on the WAIS-R when he was tested in 2017. Pet. 14. When adjusted for the standard error of measurement, Howard’s testing data indicates that his full-scale IQ is in the range of 70 to 79, at a 95% confidence level. Pet. 20. This places him in the 4th percentile, i.e., “in the borderline deficient range.” Pet. Ex. 2 at a65.¹⁴ Notably, the Fifth Circuit has held that the CCA reasonably determined that a petitioner’s identical test score did not demonstrate

¹⁴ Howard also offers Dr. Duncan’s 2001 estimation of his IQ as support for the intellectual functioning prong. But the DSM-5-TR requires comprehensive tests warns against this sort of partial testing. DSM-5-TR at 37–43.

subaverage intellectual functioning. *See Busby*, 925 F.3d at 716–20 (considering Busby’s 74 on the WAIS-4, yielding a range from 70–79, which the test’s administrator described as “Borderline”).

In any event, the DSM-5-TR provides reason to doubt the reliability of Dr. Temple’s test results and conclusions. First, where the DSM-5-TR warns that “careful assessment of intellectual . . . deficits” is “require[d] to differentiate between mild intellectual disability and borderline intellectual functioning” for individuals with schizophrenia and ADHD, DSM-5-TR at 866, Dr. Temple made no mention of either diagnosis and stated that there was “no evidence of discrete injuries or illnesses in adulthood that could account for the observed weaknesses.” Pet. Ex. 2 at a67. Dr. Temple’s failure to account for this concern raises questions about the accuracy of the IQ test he administered. Second, Dr. Temple’s report is problematic because it reflects that, he seemed to render his diagnosis without any consideration of the adaptive-deficit prong. Pet. Ex. 2. Finally, and most compellingly, it is unclear whether Dr. Temple’s testing was related to the defense’s subsequent conclusion that Howard is not intellectually disabled. *See* DE 74 at 3.

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 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 18.¹⁵ Further, this Court “has not recognized the Flynn effect,” *Brumfield v. Cain*, 808 F.3d 1041, 1060 n. 27 (5th Cir. 2015), and has called it a “controversial theory.” *Dunn v. Reeves*, 594 U.S. 731, 736–37 (2021) (per curiam)

Nor does Howard’s ballpark estimate from Dr. Duncan help him, for the DSM-5-TR calls for “comprehensive . . . tests of intelligence” and warns against this sort of partial testing. *Id.* at 38. Howard’s performance on a few subtests from the verbal portion of the WAIS-4 says nothing about “[c]ritical components” of intellectual functioning, such as “working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy.” *Id.* Nor is there any evidence that Dr. Duncan conducted effort testing to rule out malingering. See Pet. Ex. 1.

¹⁵ The CCA 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” only “[w]hen it is impossible to retest using the most current IQ test available.” *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.

Contrary to Howard's assertion, *Hall* does not require state courts to find Criterion A satisfied based on a borderline IQ score of 74. It couldn't because the DSM-5-TR reflects that, particularly for individuals with Howard's co-occurring conditions, clinical judgment is required to assess test results. And in this case, we know that some four months after Dr. Temple administered the tests supporting his tentative diagnosis, clinical judgment derived from further testing led the defense team, which included Dr. Temple, to conclude that "Howard does not have Intellectual Disability." DE 74 at 3.

If the CCA determined that Howard did not make a prima facie showing of intellectual disability, then, it had the discretion under *Hall* and *Moore I* to do so. But is also had discretion to dismiss his writ based on his failure to produce any objective evidence of adaptive deficits. As noted above, the DSM-5-TR requires standardized tests of adaptive functioning to support a diagnosis for intellectual disability. DSM-5-TR at 38. What we know from Howard's admissions so far is that Dr. Patton, the expert who administered adaptive-deficit tests "was unable to find [he] satisfies *Atkins* second prong." Pet. at 13. So Howard proffers a one-page untitled, undated document that appears to be Dr. Patton's notes, reflecting what appear to be results from a retrospective ABAS-3 test. It states that Howard "does not demonstrate adaptive deficits prior to 15 and that the significant deficits thereafter "are strongly linked to the onset of his mental health issues." Pet. Ex. 3 at a69. It further indicates

that Howard’s mom’s results from the ABAS-3 “provide[d] powerful arguments about the impact of his mental health issues on functioning.” *Id.* By his own evidence, then, Howard cannot satisfy the adaptive-deficit criteria for intellectual disability.

So Howard attempts to overcome his expert’s conclusion—informed by standardized testing—with declarations from his mother, sister, assistant principal from middle school, and family friend. *See* Mot. 21–24. But decades old recollections of Howard’s behavior when he was a minor hardly provide an “objective” measurement of Howard’s behavior. *See Ex parte Cathey*, 451 S.W.3d at 20 (recognizing that measurement of adaptive behavior was not designed to be administered retrospectively and was susceptible to reporters being “highly motivated to misremember”).

Howard also cherry picks snippets of testimony from his 2001 trial to argue that his aberrant “behavior when he was 20 and 21. . . . confirms that the deficits” Dr. Patton identified at age 15, “continued.” Pet. at 15–16. But a more comprehensive review confirms that three mental health experts who contemporaneously evaluated him at his trial suspected that schizophrenia was the reason for his aberrant behavior. While the DSM-5-TR’s abandonment of the “relatedness requirement” may provide clinicians discretion that they did not have under the previous edition, it affords lawyers none. *See* DSM-5-TR at 23. Howard cannot overcome Dr. Patton’s clinical judgment with his

lawyer's idiosyncratic application of the criteria. *Id.* And because he offers nothing else, Howard still fails to make a prima facie showing of adaptive deficits.

With respect to the final criterion, Dr. Patton's notes undermine Howard's argument that his deficits manifested during the developmental period, as they reflect that no significant adaptive deficits were observed before the age of 15, as does Dr. Woods's report. And even if the developmental period were extended to age 22, Howard fails to refute the opinion that any deficits were related to schizoaffective disorder, which experts who have examined him have consistently noted.

Howard fails to present evidence that would support significantly subaverage intellectual or adaptive deficits that occurred during the developmental period. Because he cannot make out a prima facie *Atkins* claim, the CCA did not err in dismissing his writ as successive.

III. Howard Presents No Important Questions of Law to Justify Certiorari Review.

Howard's unadorned request for error correction is unworthy of the Court's attention. This Court's Rule 10 provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." Where a petitioner asserts only factual errors or that a properly stated rule of law was misapplied, certiorari review is "rarely

granted.” *Id.* Here, Howard advances no compelling reason to review his case, and none exists.

Howard’s present complaint stems from the CCA’s application of Texas Code of Criminal Procedure Article 11.071, § 5(a), where it determined that Howard did not satisfy any of the exceptions to the abuse-of-the-writ bar and dismissed his writ accordingly. While this would typically divest the Court of jurisdiction, entirely, it does not here because the CCA’s determination that an *Atkins* claim does not satisfy § 5(a) encompasses a *prima facie* review of the merits. *See Busby*, 925 F.3d at 709; *Blue*, 665 F.3d at 653–54.

Even so,

This Court rarely grants review at this stage of the litigation even when the application for state collateral relief is supported by arguably meritorious federal constitutional claims. Instead, the Court usually deems federal habeas proceedings to be the more appropriate avenues for consideration of federal constitutional claims.

Kyles v. Whitley, 498 U.S. 931, 932 (1990).

Howard has not furnished a single reason for this Court to grant certiorari review, let alone a compelling one. He fails to demonstrate even a *prima facie* showing that he is intellectually disabled and thus ineligible for the death penalty. His petition is unworthy of the Court’s review. Because Howard’s petition presents no important questions of law to justify this Court’s exercise of its certiorari jurisdiction, review should be denied.

IV. Howard Is Not Entitled to a Stay of Execution.

Howard asks this Court to stay his execution because it granted certiorari review in another case concerning “the effect of changing clinical standards on *Atkins* claims,” and because “[n]o court has ever decided whether [he] is intellectually disabled under the clinical standards that govern today.” Mot. Stay at 2. But *Guerrero v. Johnson*, No. 25-1003 (U.S. cert. granted June 15, 2026), a federal habeas corpus case under AEDPA, is not relevant to the propriety of the CCA’s application of its § 5 bar here. Federal precedent does “not for a moment countenance ‘last-minute’ claims relied on to forestall an execution.” *Nance v. Ward*, 597 U.S. 159,174 (2022).

A stay of execution “is not available as a matter of right, and equity must be sensitive to the State’s strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citing *Nelson v. Campbell*, 541 U.S. 637, 649–50 (2004)). “It is well-established that petitioners on death row must show a “reasonable probability” that the underlying issue is “sufficiently meritorious” to warrant a stay and that failure to grant the stay would result in “irreparable harm.” *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983), *superseded on other grounds* by 28 U.S.C. § 2253(c)(2).

Indeed, “[a]pplications for stays of death sentences are expected to contain the information and materials necessary to make a careful assessment

of the merits of the issue and so reliably to determine whether plenary review and a stay are warranted.” *Id.* To demonstrate an entitlement to a stay, a petitioner must demonstrate more than “the absence of frivolity” or “good faith” on the part of petitioner. *Id.* at 892–93. Rather, the petitioner must make a substantial showing of the denial of a federal right. *Id.* In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay, but “the severity of the penalty does not in itself suffice.” *Id.* at 893. The State’s “powerful and legitimate interest in punishing the guilty,” as well as its interest in finality, must also be considered, especially in a case such as this where the State and victims have for years borne the “significant costs of federal habeas review.” *Herrera v. Collins*, 506 U.S. 390, 421 (1993) (O’Connor, J., concurring); *Calderon v. Thompson*, 523 U.S. 538, 556 (1998) (both the State and the victims of crime have an important interest in the timely enforcement of a sentence).

Thus, in deciding whether to grant a stay of execution, the Court must consider four factors: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 434 (2009)

(quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); see also *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).

Deciding this issue on Monday, the Fifth Circuit held that Howard was not entitled to a stay:

Howard is not entitled to a stay of execution. He has no likelihood of success on the merits. His behavior weighs against this court's granting him the equitable remedy of a stay. And the more speculative possibility of a favorable Supreme Court ruling proves insufficient to warrant a stay.

To begin, this court has foreclosed stays premised on the fact that the Supreme Court granted certiorari. Howard's argument to the contrary is unavailing. As this court repeatedly held, "[t]he Court's grant of certiorari in a capital case does not allow us to deviate from circuit law, nor is it grounds for a stay of execution."¹⁶

...

But even if we apply the *Nken* factors for a discretionary stay, Howard's motion for a stay still fails. Howard has not demonstrated a likelihood of success on the merits. As aforementioned, his successive habeas petition is barred by the statute of limitations. And it is barred by the fact that it makes a previously presented claim.

The state's and the public's interests also weigh against a stay. A stay is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citations omitted). Indeed, "both the State and the victims of crimes have important interests in the timely enforcement of a sentence." *Id.* And because Howard acted with laches and unclean hands. . . . [h]is inequitable behavior further disfavors a stay.

¹⁶ *Cantu v. Collins*, 967 F.2d 1006, 1012 n.10 (5th Cir. 1992) (citing *Johnson v. McCotter*, 804 F.2d 300, 301 (5th Cir. 1986)); see also *Monroe v. Collins*, 15 F.3d 180 (5th Cir. 1994) (similar) (citing *Hawkins v. Lynaugh*, 862 F.2d 487, 490 (5th Cir. 1988) (Higginbotham, J., concurring)).

And because a stay is an equitable remedy, *see id.*, the equitable defenses of laches and unclean hands apply. As aforementioned, Howard has acted with unclean hands. His inequitable behavior further disfavors a stay.

With irreparable injury the only factor in Howard's favor, and with every other stay favor weighing against him, we decline to grant a stay of execution.

In re Howard, No. 26-40605 at 8-9, DE 43-1.

Nothing Howard says undermines the Fifth Circuit's analysis. Procedural impediments block further review of his claim in state and federal courts. As the victim and her family deserve justice for this decades old crime, Howard should not be permitted another opportunity to delay his sentence.

CONCLUSION

For the reasons set forth above, Howard's petition for a writ of certiorari should be denied. Moreover, the State's strong interest in the timely enforcement of a sentence is not outweighed by Howard's interest in the review he forfeited when he abandoned his claim years ago. Thus, his motion for a stay of execution should be denied as well.

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