

IN THE
Supreme Court of the United States

In re JAMAAL HOWARD,
Petitioner,

On Petition for Original Writ of Habeas Corpus

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF HABEAS CORPUS AND APPLICATION FOR A STAY OF
EXECUTION**

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AMBER PLATT
Deputy Attorney General
For Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

JENNIFER WREN
Assistant Attorney General,
Criminal Appeals Division
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 936-1400
tomee.heining@oag.texas.gov

Counsel for Respondent

This is a capital case.

QUESTION PRESENTED

Should the Court exercise its original habeas corpus jurisdiction where Howard had an adequate remedy in state and federal court, where the Fifth Circuit Court of Appeals has already denied permission to file a successive writ pursuant to 28 U.S.C. § 2244 (b)(1) and (d)(1), the petition is plainly an attempt to circumvent AEDPA, and he has failed to make a prima facie showing of intellectual disability?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

BRIEF IN OPPOSITION

Petitioner Jamaal 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*¹ claim on direct appeal and in postconviction proceedings. But when further (post-*Moore I*²) 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).

Finally, one week before his scheduled execution, Howard filed a subsequent habeas writ in the CCA with yet another iteration of his *Atkins* claim, which the CCA rejected. Appendix B; *Ex parte Howard*, No. 77,906-02 (Tex. Crim. App. Oct. 5, 2026). And a mere *six* days before his scheduled execution, Howard belatedly moved the Fifth Circuit for authorization to file a successive federal habeas petition raising an intellectual disability claim.

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

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

App.A. Howard sought authorization despite *withdrawing* his intellectual disability claim after raising it on initial federal habeas review.³ DE 74 at 1–3. In dispensing with his claim, Howard explained that defense team members had concluded that “an ID claim was not feasible” and that “Howard does not have Intellectual Disability.” *Id.*

One day before his scheduled execution, Howard filed in this Court a dilatory petition for a writ of mandamus and a related application for a stay of execution. In his petition, Howard asserted he was entitled to a writ of mandamus because the Fifth Circuit erred by applying a time bar to his claim under 28 U.S.C. § 2244(d)(1) and finding that his claim was impermissibly successive under § 2244(b)(1). He also filed a petition for writ of certiorari and a motion for stay, appealing the CCA’s dismissal of his subsequent writ of habeas corpus as abusive. Those petitions and motions remain pending.

³ Howard’s claim was adjudicated 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). The federal district court, the Fifth Circuit, and the CCA have all also reviewed extensive briefing on Howard’s *Atkins* claim. Before Howard abandoned it, the federal district court considered his claim in the context of several 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). And the CCA passed over Howard’s most recent claim when it dismissed it as an abuse of the writ, which constitutes 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).

On the afternoon of the execution, Howard filed the instant Petition for Writ of Habeas Corpus. Howard now asks this Court to exercise its original habeas jurisdiction and to order (1) transfer of his petition to the U.S. District Court for the Eastern District of Texas under 28 U.S.C. § 2241(b) for a hearing and determination of his *Atkins* claim, (2) stay his execution pending disposition of the petition or the federal habeas proceeding; or (3) issue the writ and order Respondent to show cause why the writ should not issue. Pet. at 12. Howard is not entitled to the extraordinary relief he requests. His petition is nothing more than an end-run around the Fifth Circuit, which already denied his request for permission to pursue habeas relief in the district court because he failed to meet the requirements of 28 U.S.C. § 2244 (b)(1) and (d)(1). That decision is not appealable. *See* 28 U.S.C. § 2244(b)(3)(E). Howard’s attempt to circumvent the plain language of AEDPA should not be condoned, and his petition should be denied.

First, Howard is appealing the Fifth Circuit’s denial of his motion for authorization; but such an appeal is expressly prohibited by 28 U.S.C. § 2244(b)(3)(E). Second, the Fifth Circuit’s treatment of motions for authorization is consistent with § 2244 and other circuits’ treatment of such motions. The court did not exceed its jurisdiction.

The limitations of § 2244(b) “certainly inform[s]” this Court’s consideration of Howard’s original petition, *Felker v. Turpin*, 518 U.S. 651, 663

(1996), and the Fifth Circuit’s well-justified conclusion that Howard’s prior presentation of an *Atkins* claim as well as his failure to timely present his new argument precludes consideration in a successive petition pursuant to § 2244(b)(1) and § 2244(d)(1), and supports the denial of his request for this extraordinary remedy. Consequently, Howard is not entitled to a writ of habeas corpus.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider an original petition for a writ of habeas corpus. 28 U.S.C. § 2241(a); *see Felker*, 518 U.S. at 660–62. The Court lacks jurisdiction to consider a petition for a writ of certiorari appealing the denial of a motion for authorization to file a successive federal habeas petition. 28 U.S.C. § 2244(b)(3)(E).

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, 153 S.W.3d at 383–84.

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 Moncriste 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

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.

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.

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

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

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 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 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.

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.

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.

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 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

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.

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 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).

IV. 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*, 153 S.W.3d at 383–84.

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*, 2012 WL 6200688, at *1.

On December 12, 2012, Howard filed a federal habeas petition in the district court, again raising his *Atkins* claim. DE 16. 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. DE 14 (\$7,500); DE 23

(\$14,000) (DE 44 (\$8,000); DE 50 (\$10,062.50); DE 66(\$5,000); DE 71 (\$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 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, the defense team finally revealed the results: “Howard does not have intellectual disability.” *See* DE 74 at 2–3.

Two years later, the district court issued an order denying relief on Howard’s remaining claims. *Howard*, 2019 WL 4573640. Howard filed an application for certificate of appealability (COA), which the Fifth Circuit denied, *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020), and this Court denied certiorari. *Howard*, 592 U.S. at 1180.

On March 26, 2026, the 356th District Court of Hardin County, Texas, scheduled Howard for execution on this Wednesday, October 7, 2026. Approximately half a year after the 356th District Court issued its order—and days before his scheduled execution—Howard filed a subsequent writ in the CCA reasserting the *Atkins* claim that he had abandoned in 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 on October 5, 2026. App.A. Later that afternoon, the CCA followed suit, dismissing Howard's subsequent application as an abuse of the writ and denying his motion for stay.

On the eve of his execution, Howard filed a petition for writ of certiorari in this Court, as well as a mandamus petition, along with accompanying motions to stay his execution. Those petitions and motions remain pending.

On the day of his execution, Howard filed a free-standing motion for stay of execution in the CCA, which was denied without written order hours later. Finally, he filed the instant Petition for Writ of Habeas Corpus and a Motion for Stay of Execution. This brief in opposition follows.

ARGUMENT

Howard asks the Court to exercise its power to grant an extraordinary writ by either transferring his petition to federal district court for hearing and review of his *Atkins* claim or issue the writ and order the Respondent to show cause. But he fails to justify the extraordinary remedy that he seeks.

Supreme Court Rule 20.4(a) provides that, “[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers, and that adequate

relief cannot be obtained in any other form or from any other court. This writ is rarely granted.” *See Felker*, 518 U.S. at 665 (explaining that Rule 20.4(a) delineates the standards under which the Court grants such writs). For the reasons explained below, Howard fails to advance a compelling or exceptional reason for the Court to exercise its discretionary powers to issue a writ of habeas corpus in this case.

I. Howard is Not Entitled to the Extraordinary Remedy He Seeks.

A. The Court should refuse his request to transfer.

First, Howard’s request that the Court transfer his petition to the district court should be refused. *See* Pet. at 12. While the Court ordinarily has the statutory authority to transfer a petition for a writ of habeas corpus to a district court with jurisdiction to hear it, 28 U.S.C. § 2241(b), the district court does not have such jurisdiction. Howard’s claim is plainly successive, as already found by the Fifth Circuit in refusing his request for authorization. *See* 28 U.S.C. § 2244(b)(3)(A). The relief Howard requests is, consequently, statutorily impermissible. The Fifth Circuit has already denied his request for permission to file in the district court because he failed to meet 28 U.S.C. § 2241(b)(1). *See* App.A. This decision is not appealable. 28 U.S.C. § 2244(b)(3)(E). Howard is thus attempting to circumvent the plain language of AEDPA, and his attempt to do so should not be condoned; his petition should be denied.

B. This claim is plainly successive and foreclosed by § 2244(b)(1).

While § 2244(b)(3)(E) did not repeal this Court’s authority to entertain original habeas petitions, § 2244(b)(1)–(2) “inform [the Court’s] consideration of original habeas petitions. *Felker*, 518 U.S. at 662–63; *see also In re Davis*, 557 U.S. 952 (2009) (“Federal courts may order the release of convicted state prisoners only in accordance with the restrictions imposed by the [AEDPA]”) (Scalia, J., dissenting). As found by the Fifth Circuit, Howard cannot meet the § 2244(b) requirements. *See* App.A.

Howard’s *Atkins* claim is plainly successive and does not satisfy § 2244(b)(1). Howard’s first argument—that he avoids § 2244(b)(1) because he withdrew the *Atkins* claim before the lower court adjudicated it—is unsupported in law. Fifth Circuit authority is clear, § 2244(b)(1) “admits of no exceptions.” *E.g., In re Sharp*, 969 F.3d 527, 528 (5th Cir. 2020); *United States v. Vargas-Soto*, 35 F.4th 979, 987 (stating that § 2244(b)(1) “bars—with no exceptions—any claim ‘that was presented in a prior application’”); *see also* Brian R. Means, *Federal Habeas Manual*, § 11:22 (2025 ed.) (“Generally, this is an absolute bar against raising in a . . . successive habeas corpus application a claim that was presented in a prior application.”).

Confronting this question, the Seventh Circuit also rejected petitioner’s argument that § 2244(b)(1) did not apply to a claim he raised in his initial application because he abandoned it due to futility before it was adjudicated.

Felder v. McVicar, 113 F.3d 696, 698 (7th Cir. 1997); *cf. Montgomery v. Goodwin*, 841 F App’x 700 (5th Cir. 2021) (holding that a subsequent petition asserting a previously raised but abandoned claim was successive for purposes of § 2244(b)(3)); *Burton v. Stewart*, 549 US 147 (2007) (“There is no basis in our cases for supposing, as the Ninth Circuit did, that a petitioner with unexhausted claims who . . . elects to proceed to adjudication of his exhausted claims . . . may later assert that a subsequent petition is not ‘second or successive’ precisely because his new claims were unexhausted at the time he filed his first petition.”). It reiterated, per § 2244(b)(1), “[a] claim that has been presented in the first petition cannot be presented in a second. Period.” *McVicar*, 113 F.3d at 698. And according to this Court, neither it nor its lower courts have the “authority to amend” AEDPA’s provisions: “Where Congress has erected a constitutionally valid barrier to relief, a court *cannot* decline to give it effect.” *Shinn v. Ramirez*, 596 U.S. 366, 385 (2022).

But even if this Court could decline to apply § 2244(b)(1), there are additional reasons not to in this case. While Howard’s *Atkins* claim ultimately was not adjudicated in federal proceedings, it was extensively funded, extensively developed, and extensively briefed in the district court. That Howard chose to abandon the claim before the judge could reject it should not make it easier for him to do it all over again. As he received far more than the

average petitioner who merely sees his claim to adjudication, § 2244(b)(1)'s should preclude Howard the same.

Howard's second argument—that the Court should disregard § 2244(b)(1) because his *Atkins* claim today is “fundamentally different” than the one he abandoned—fares no better. In addition to being foreclosed by Circuit precedent,⁹ the exception Howard needs here would invite gamesmanship in last-minute litigation, particularly in the context of *Atkins*'s ever-evolving framework: If a petitioner knew he could avoid § 2244(b)(1)'s absolute bar by sandbagging his then-futile *Atkins* claim to assert it a decade later under the latest framework, he would always be wise to do so. For the medical community's continued and competing revisions to the definition of intellectual disability underscore that tomorrow's *Atkins* claim will almost always be a better bet than yesterday's.¹⁰

⁹ See, e.g., *In re Coleman*, 768 F.3d 367 (5th Cir. 2014) (holding that new factual support for a previously presented claim does not save it from § 2244(b)(1)'s absolute bar). This Court has held that factual exhaustion caselaw does not apply in the successiveness context. *In re Young*, 789 F.3d 518, 526 n.2 (5th Cir. 2015). And even if it did, it would have to go to a “previously unraised substantive area.” *Id.*

¹⁰ See, e.g., *Ex parte Mays*, 686 S.W.3d 745, 750 n.1 (Tex. Crim. App. 2024) (Yeary, J., dissenting) (“The criteria for discerning a diagnosis of intellectual disability have changed incrementally with each passing edition of the DSM, and it has become at least marginally less burdensome for applicants to satisfy the criteria with each successive manual.”)

Because Howard raised his *Atkins* claim in “a prior application,” § 2244(b)(1) bars him from presenting it in a second. There are no existing exceptions, and this Court should refrain from writing a new one at this time.

C. This claim is time barred and foreclosed by § 2244(d)(1).

Howard asks for a stay and a remand to the district court for “a hearing and determination, with instructions to receive evidence and make findings on whether Howard is intellectually disabled and therefore ineligible for execution.” Pet.12. But the Fifth Circuit has already found that limitations applies, and it stretches credulity to believe that the district court would hold otherwise. App.A; *In re Howard*, No. 26-40605, 2026 WL 2980644, at *2 (5th Cir. Oct. 5, 2026). Additionally, the Fifth Circuit found that Howard could not excuse his delay via equitable tolling. *Id.* at *3 (Howard “slept on his rights”). In fact, the Fifth Circuit found Howard’s dilatory conduct so egregious that that the equitable doctrine of laches comes into play. *Id.* (“Howard also behaved with *unclean hands*, further foreclosing equitable tolling, an equitable remedy.” (emphasis added)). Indeed, “many of the events that Howard argues renders his claims discoverable transpired *years* before” he began the latest flurry of *Atkins* litigation. *Id.* It beggars belief to think that the district court’s analysis would differ in view of Howard’s foot-dragging.

Howard asserts that Fifth Circuit precedent shows that the initial evaluation of limitations and/or tolling belongs in the district court. Pet.11

(citing *In re Johnson*, 935 F.3d 284, 295–96 (5th Cir. 2019), as revised (Aug. 15, 2019); *In re Cathey*, 857 F.3d 221, 240–41 (5th Cir. 2017)). However, the Fifth Circuit has repeatedly rejected cases on limitations grounds since *Johnson* and *Cathey*. *In re Burton*, 111 F.4th 664, 667 (5th Cir. 2024); *In re Jones*, 998 F.3d 187, 189 (5th Cir. 2021); *In re Sparks*, 939 F.3d 630, 632-33 (5th Cir. 2019). Howard simply shows that the Fifth Circuit will not blindly apply limitations when inmates can muster plausible arguments. Here, Howard blatantly failed to show the Fifth Circuit any reason for a remand to the district court for further development.

Rule 20.4(a) and 28 U.S.C. § 2242 state that an original habeas petition in the Supreme Court must set forth “reasons for not making application to the district court.” In this case, the reasons are clear: Howard is actually seeking to appeal the Fifth Circuit’s denial of authorization despite failing to meet the successive petition and timeliness requirements of 28 U.S.C § 2244 in that court. Howard has not shown any “exceptional circumstances” to warrant the exercise of this Court’s discretionary power.

II. Howard Fails to Demonstrate He is Intellectually Disabled.

While the Fifth Circuit did not reach the merits of his *Atkins* claim the CCA had thrice rejected it: once on direct appeal, once in his first state habeas application, and in a recent *prima facie* review in determining he did could not satisfy 11.071 § 5(a). *See* App.B. Howard has complained that no Court has yet

to review his claim under the current diagnostic standards and recent changes in the DSM-5-TR and the AAIDD-12.

However the CCA has 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); *Ex parte Gonzales*, No. 40,541-07, 2026 WL2482916, at *3. (Tex. Crim. App. Aug. 20, 2026). 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 745, 748 (Tex. Crim. App. 2024).

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.*

There is no reason to believe that the CCA did not apply its precedent in this case in concluding Howard did not satisfy 11.071 § 5(a). And, as shown below, the latest editions of the DSM-5-TR and the AAIDD-12 do not change the analysis in this case because Howard was demonstrating symptoms of psychosis, not intellectual disability. Howard failed to demonstrate a prima facie claim for relief in either court.

Howard cannot demonstrate that he meets 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 5,¹¹ 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.

¹¹ The page references in this section refer to the Petition for Writ of Certiorari pending under Supreme Court No. 26-5759.

A. 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 a88.¹²

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.

¹² In addition, Dr. James Duncan’s notes from his pretrial evaluation of Howard in 2001 were submitted to the state court, Pet. Ex. 1.

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.

B. 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 a65.¹³ Notably, the Fifth Circuit has held that the CCA reasonably determined that a petitioner's identical test score did not demonstrate 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

¹³ 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.

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 18.¹⁴ Further, this Court "has not recognized the Flynn effect," *Brumfield v. Cain*, 808 F.3d 1041, 1060 n. 27 (5th

¹⁴ 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.

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.

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 is Not Entitled to a Stay of Execution.

A. Standard of Review

A stay of execution is an equitable remedy. *Hill v. McDonough*, 547 U.S. 573, 584 (2006). “It 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.” *Id.* (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). 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)).

In deciding this issue yesterday, the Fifth Circuit 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 more speculative possibility of a favorable Supreme Court ruling proves insufficient to warrant a stay.

App.A at 8–9.

B. Howard has not made a strong showing that he will succeed on the merits.

Given the dilatory and meritless nature of his petition, Howard fails to show that there is any significant possibility that the Court will grant his petition for original writ. When the Fifth Circuit reviewed this issue on Monday, it explained: “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.” App.A at 9. As demonstrated above and found by the lower court, Howard’s failure to offer a sound claim for relief supports the denial of a stay of execution.

C. Howard is unlikely suffer irreparable harm.

In a capital case, a court may properly consider the nature of the penalty in deciding whether to grant a stay¹⁵, but “the severity of the penalty does not in itself suffice.” *Barefoot*, 463 U.S. at 893. Howard cannot demonstrate a likelihood that he will suffer irreparable harm if a stay of execution is not granted. His claim has been repeatedly raised in the federal and state courts, with no relief forthcoming.

¹⁵ The Fifth Circuit did consider this factor in Howard’s favor, but it was the only one. App.A at 10.

D. The State and the public have a strong interest in seeing the state court judgment carried out.

The State and crime victims have a “powerful and legitimate interest in punishing the guilty.” *Calderon*, 523 U.S. at 556 (citation omitted). And “[b]oth the State and the victims of crime have an important interest in the timely enforcement of a [death] sentence,” *Bucklew*, 587 U.S. at 149 (quotation omitted); see *Nelson*, 541 U.S. at 650 (“a State retains a significant interest in meting out a sentence of death in a timely fashion”); *Gomez v. United States Dist. Court*, 503 U.S. 653, 654 (1992) (per curiam) (“[e]quity must take into consideration the State’s strong interest in proceeding with its judgment”). Once post-conviction proceedings “have run their course . . . finality acquires an added moral dimension.” *Calderon*, 523 U.S. at 556. “Only with an assurance of real finality can the State execute its moral judgment in a case” and “the victims of crime move forward knowing the moral judgment will be carried out.” *Id.* The State should be allowed to pursue its “strong interest in enforcing its criminal judgments without undue interference from the federal courts.” *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (citations and internal quotations omitted).

Indeed, Howard has already passed through the state and federal collateral review process. The public’s interest is not advanced by postponing Howard’s execution, and the State opposes any action that would cause further

delay. *Martel v. Clair*, 565 U.S. 648, 662 (2012) (“Protecting against abusive delay *is* an interest of justice.”) (emphasis in original).

Finally, it is no secret that “capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of a sentence of death.” *Rhines v. Weber*, 544 U.S. 269, 277–78 (2005). The fact that this claim was not raised until after an execution was set must inform the Court’s analysis. “A court considering a stay must also apply ‘a strong equitable presumption against the grant of a stay where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay.’” *Hill*, 547 U.S. at 584 (quoting *Nelson*, 541 U.S. at 650). Here, Howard’s claim is meritless and does not warrant staying his execution. “And because . . . Howard acted with laches and unclean hands . . . [h]is inequitable behavior further disfavors a stay.” App.A at 9–10.

CONCLUSION

The Court should deny Howard’s request to transfer his original petition for writ of habeas corpus to the district court, deny his petition, and deny his motion for stay.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

AMBER PLATT
Deputy Attorney General
for Criminal Justice

TOMEE M. HEINING
Chief, Criminal Appeals Division

s/ Jennifer Wren _____
*JENNIFER WREN

*Attorney in charge

Assistant Attorney General
Criminal Appeals Division
Texas Bar No24088680
Office of the Attorney General
Criminal Appeals Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
jennifer.wren@oag.texas.gov

Telephone: (512) 936-1600
Telecopier: (512) 320-8132