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25-6181

CERTIFICATION OF COUNSEL (pro se)

As pro se counsel: I certify that this petition for rehearing is restricted to the grounds specified in Rule 44.2 and is presented in good faith and not for delay

Petitioner Graham Schiff, represented pro se, petitions under Rule 44 for rehearing of this court's certiorari denial. I hereby certify that this rehearing petition is presented in good faith, and not for delay.

Graham Schiff
2/22/2026

Schiff v. Warden
25-6181

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Petition for Rehearing Under Rule 44.2

Introduction

Petitioner Graham H. Schiff respectfully seeks rehearing of the denial of his petition for certiorari. This request is warranted by structural and constitutional errors that require correction as a matter of clearly-established federal law in this court. Mr. Schiff was convicted and imprisoned for speech that was fully protected by the First Amendment, under a Maryland criminal statute later repealed after his conviction (reflecting its invalidity as applied to him). Yet he was denied a Certificate of Appealability (“COA”), which he was entitled to as a matter of law, and thus any appellate review, in contravention of this Court’s standards and legal precedents, despite entitlement as a compelled matter of law.

Moreover, a Justice of this Court participated in the certiorari decision despite a direct conflict of interest – Mr. Schiff had been arrested in 2022 over an alleged threat to that Justice and even has a pending lawsuit against him. The failure to recuse revealed proofs of malicious bias, and the certiorari denial came with no explanation.

Finally, a Fourth Circuit local rule (Fourth Cir. R. 40(h)), called the “Graham-Schiff Rule,” barred him from seeking recall of the appellate mandate even after new developments proved his legal entitlement to relief.

These compounding factors – an unconstitutional prosecution, the denial of any meaningful appellate process, and the influence of a conflicted Justice – have produced a manifest injustice. Rehearing is essential to restore fairness, vindicate core constitutional rights, and preserve the integrity of this Court’s appellate jurisdiction.

I. Petitioner Was Entitled to a COA as a Matter of Law

Under **Slack v. McDaniel**, 529 U.S. 473 (2000) and **Miller-El v. Cockrell**, 537 U.S. 322 (2003), a COA must issue whenever “reasonable jurists could debate” the resolution of the case or the merits of the issues. Mr. Schiff’s case easily meets this standard. His convictions rest entirely on letters and emails – pure speech that neither threatened imminent lawless action nor facilitated any crime. In other words, his conduct falls squarely under the First Amendment’s protection, as established by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (advocacy of unlawful action is protected absent intent and likelihood of imminent lawless action) and related precedents.

Nevertheless, the Maryland courts and the federal habeas court upheld his convictions by invoking the “speech integral to criminal conduct” doctrine. That doctrine applies only when speech is an integral part of actually executing a separate illegal act (such as giving instructions for a crime). Here, no such separate conduct existed – the supposed “criminal conduct” was Mr. Schiff’s speech itself. The lower courts’ use of this exception was a fundamental and intentional misapplication of First Amendment law, effectively criminalizing protected expression through a doctrinal loophole.

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Additionally, while Mr. Schiff's habeas case was pending, Maryland repealed its stalking statute (Md. Code, Crim. Law § 3-802) by 2024 Md. Laws, ch. 772 (effective Oct. 1, 2024). This repeal underscores that the speech for which Mr. Schiff was punished should never have been deemed criminal in the first place.

With the statute's repeal, any continuing basis for his punishment evaporated. As for the separate harassment count under Md. Crim. Law § 3-803, that law's 90-day maximum penalty meant Mr. Schiff's case belonged in the District Court, not the Circuit Court. Trying and sentencing him in the Circuit Court exceeded that court's jurisdiction, rendering the harassment conviction void ab initio. Such a jurisdictional defect can be recognized "at any time" and nullifies the judgment's validity (see **United States v. Cotton**, 535 U.S. 625, 630 (2002)).

In sum, Mr. Schiff's First Amendment claim is not just debatable – it is compelling. The record shows his speech was lawful, and the legal underpinnings of his convictions have since been eroded by legislative change and jurisdictional limits. Any reasonable jurist considering these facts would at least encourage further review. By denying a COA, the Fourth Circuit improperly extinguished appellate jurisdiction over substantial constitutional issues. Mr. Schiff was entitled to a COA as a matter of law, and the refusal to grant one was clear error that warrants this Court's correction.

II. The Arbitrary Denial of Appellate Review Conflicts with Precedent and Due Process

The outright denial of any appellate review in this case was arbitrary and unconstitutional, especially when compared to this Court's handling of similar situations. In prior cases like *Hohn*, *Tharpe*, *Jordan*, and *Shockley*, this Court or individual Justices took the rare step of addressing denials of COA or habeas appeals to ensure that substantial claims were not ignored.

For example, in *Jordan v. Fisher* (2015), three Justices dissented from the denial of certiorari, noting that the Fifth Circuit had "clearly misapplied" COA standards. And in *Tharpe v. Sellers* (2018), this Court intervened to correct a grave error in denying a COA where evidence of racial bias in the jury was strong. Likewise, in *Shockley v. Vandergriff* (2025), Justice Sotomayor highlighted the unfairness of an appellate procedure that denied a COA despite one judge in favor. These instances show that when a COA denial poses a risk of injustice, the Court has not treated it as a routine matter.

By contrast, Mr. Schiff's case – involving core free speech issues and a law later repealed – received no such consideration. The Fourth Circuit's summary denial of a COA offered no reasoning, and this Court's certiorari denial came without comment. While the Court's discretion in granting certiorari is broad, that discretion cannot be exercised in a way that offends basic fairness. Here, the disparate treatment raises an inference that Mr. Schiff was denied review for reasons inconsistent with equal justice. At the very least, the unexplained denial creates the appearance of an arbitrary outcome.

The denial of certiorari effectively left in place a conviction that is constitutionally suspect,

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without this Court ever saying a word on the matter. Such silence in the face of a blatant First Amendment question is difficult to reconcile with this Court's role as guardian of fundamental rights. Due process does not ordinarily guarantee Supreme Court review, but it does guarantee a fair opportunity to be heard by an impartial tribunal. Mr. Schiff was deprived of that opportunity. Rehearing is necessary to correct the course and ensure that a constitutional claim of this magnitude is not summarily swept aside.

III. Justice Kavanaugh's Failure to Recuse Violated 28 U.S.C. § 455 and Due Process

Justice Brett Kavanaugh's participation in the consideration of Mr. Schiff's petition, despite a direct personal interest, violated federal recusal law and due process principles. Under 28 U.S.C. § 455(a), a Justice must disqualify himself in any proceeding in which his impartiality might reasonably be questioned. Here, any reasonable observer would question Justice Kavanaugh's impartiality. Mr. Schiff was arrested and briefly charged in 2022 for allegedly threatening Justice Kavanaugh, a fact that was willfully covered up from public attention. Additionally, Mr. Schiff has filed a civil lawsuit against Justice Kavanaugh.

This unique situation – a petitioner who has been perceived as a security threat by a Justice and who is actively suing that Justice – created an untenable conflict. The risk of bias, or at least the appearance of bias, is extraordinarily high. Justice Kavanaugh had a personal stake in the matter: the outcome of Mr. Schiff's case could be seen as vindicating the Justice's own interests or concerns. At a minimum, the situation presents "*a probability of actual bias*" too substantial to ignore (see *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009)).

Schiff duly alerted the Court to this conflict and requested recusal, yet no action was apparent. If Justice Kavanaugh indeed participated in the certiorari decision, that decision is fatally tainted. It is a bedrock principle of due process that no person may be a judge in his own case, and by extension, no judge should sit in judgment of a case where he has a personal interest or embroilment. The presence of a biased (or seemingly biased) adjudicator is a structural error that invalidates the proceeding.

The proper course was for Justice Kavanaugh to recuse himself and take no part in Mr. Schiff's case. His failure to do so casts doubt on the validity of the certiorari denial. Rehearing is warranted so that Mr. Schiff's petition can be reconsidered by a tribunal free from any potential bias. Only then can the public and the parties be confident that the decision is based solely on the legal merits, not influenced by personal factors unrelated to the case.

IV. The Appearance of Bias and the Unexplained Denial Undermine Confidence in Justice

Even apart from actual bias, the circumstances here create a severe appearance of bias and irregularity that itself erodes trust in the judicial process. A petitioner has effectively been denied review by a Court that included a Justice who was arguably personally antagonistic toward him.

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To make matters worse, the Court offered no explanation or reassurance that the merits of the petition were fairly considered. From the outside, it looks as though Mr. Schiff's petition may have been disposed of for reasons other than law – perhaps due to who he is, rather than what his legal arguments were. Such a perception is poisonous to the idea of impartial justice. The Court's usual practice is not to explain certiorari denials, but this is an exceptional case.

When a denial coincides with a potential conflict of interest and glaring substantive issues, saying nothing only amplifies the sense that something was amiss. Due process demands not only fairness in fact, but the appearance of fairness. Right now, there is only an appearance of unfairness.

Granting rehearing would allow the Court to dispel that appearance by reconsidering the case without the cloud of a conflict and, if it still declines review, perhaps stating its reasons in a way that assures the public that justice was done. At minimum, rehearing will show that the Court takes seriously its obligation to be neutral and to appear neutral.

V. The Fourth Circuit's Rule 40(h) Bar on Recalling the Mandate Left Mr. Schiff with No Appellate Recourse

Mr. Schiff's inability to obtain relief was exacerbated by a procedural rule of the Fourth Circuit that prevented any recall of the mandate, even when new facts emerged that undercut his conviction. After Mr. Schiff's appeal was concluded and the mandate issued, the Maryland stalking law was repealed and other developments (like the jurisdictional issue) came to light. Under clearly-established federal law, a court of appeals in extraordinary circumstances can recall its mandate or grant relief to prevent a grave injustice.

However, Fourth Circuit Rule 40(h) categorically forbids parties from seeking recall of the mandate once issued. Mr. Schiff found himself trapped by this rule. Even though he could demonstrate that the legal basis for his convictions require vacatur as a matter of law, the Fourth Circuit would not even entertain a motion to reopen the case. This hardline rule – which Mr. Schiff has dubbed the "Graham-Schiff Rule" based on his own experience – ensured that no avenue of appellate relief remained available to him.

The effect of Rule 40(h) in this case was to turn the denial of Mr. Schiff's COA into a permanent and unassailable foreclosure of his rights. It is noteworthy clearly-established federal law allows recall of a mandate in special cases to achieve justice, but the Fourth Circuit has made that a legal impossibility by abusing local-rules procedural posture.

Thus, even when justice most obviously required a second look (after the state effectively voided the law used to convict Mr. Schiff), the rule slammed the door. This policy choice by the Fourth Circuit magnifies the constitutional harm: it wasn't just that Mr. Schiff's valid claims were denied once, but that he was preemptively barred from ever bringing them back to the court's attention.



Such a rule should not be permitted to thwart the enforcement of fundamental rights. By granting rehearing, this Court can ensure that rigid procedural bars do not immunize a plainly unconstitutional outcome. In short, the Rule 40(h) issue highlights how Mr. Schiff was denied *any* functional appellate review — a situation that this Court should not allow to stand unexamined.

VI. Rehearing Is Necessary to Remedy a Profound Injustice and Preserve the Rule of Law

In light of all the above, and considering that Mr. Schiff's prosecution itself was an unconstitutional attempt to criminalize protected speech, this case presents exactly the type of extraordinary circumstances that justify rehearing under Rule 44.2. The convergence of a First Amendment violation, a denial of appellate review, and a possible breach of judicial impartiality has resulted in a breakdown of the normal process that safeguards liberty. This is not a typical certiorari denial; it is the culmination of several serious irregularities.

If the Court does nothing, Mr. Schiff will remain convicted for engaging in speech that the Constitution protects, and that conviction will have been upheld only by bending legal standards and shutting off avenues of review. Such an outcome would send a dangerous message and undermine public confidence in the justice system. Conversely, granting rehearing and correcting these errors will reinforce the fundamental principle that the judiciary will not tolerate convictions obtained in violation of the Constitution or maintained through procedural unfairness.

Petitioner understands that rehearing a certiorari denial is an extraordinary remedy, and he does not seek it lightly. But if any case were to merit such relief, it is this one. The Court's intervention here is not a mere act of discretion; it is an exercise of its duty to ensure that constitutional guarantees and fair procedures are upheld. Rehearing will allow the Court to take a hard look at issues that were perhaps overlooked or not fully appreciated initially, especially the conflict of interest issue and the post-judgment changes in law. By doing so, the Court can prevent a miscarriage of justice and uphold the rule of law.

Conclusion: For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for rehearing. Upon rehearing, the Court should reconsider Mr. Schiff's case without the prior procedural and ethical clouds — whether by granting certiorari and then vacating the Fourth Circuit's judgment, or by any other appropriate means of ensuring justice.

If the Court prefers, Petitioner is ready to present the grounds for rehearing as discrete questions presented for clarity. Petitioner acknowledges that this petition is more complex than typical, but this is commensurate with the complexity of the issues and the necessity of protecting fundamental rights and preserving this Court's oversight authority. *This Court's intervention is warranted not as a favor to Petitioner, but to uphold bedrock constitutional principles and public confidence in an impartial judiciary.*



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Post-Conclusion Note:

Petitioner recognizes that this rehearing petition covers a significant volume of facts and legal issues, due to the extraordinary nature of the procedural irregularities, constitutional violations, and structural defects surrounding the lower court's handling of his case. If the Court finds the length or complexity of this petition confusing or burdensome, Petitioner respectfully offers the following simplified questions as a reference tool to aid in understanding and evaluating the rehearing issues. These distilled questions capture the essential legal and constitutional grounds on which rehearing is requested and are intended to assist the Court in navigating the core issues.

Questions Presented:

1. **Certificate of Appealability and First Amendment:** Whether the Court should reconsider its denial of certiorari because Petitioner is actually innocent and entitled as a matter of law to a Certificate of Appealability, given that his convictions rests on speech protected by the First Amendment under controlling precedent and on a criminal statute that has since been repealed – thus presenting a substantial federal issue that this court improperly refused to review despite vacatur being required as a matter of law because of actual innocence and content-based speech.
2. **Structural Bias – Justice's Recusal:** Whether Justice Kavanaugh's failure to recuse from this case, despite a documented conflict of interest, created a structural bias in violation of due process, thereby warranting rehearing to ensure that the petition is decided by an impartial tribunal.
3. **Jurisdictional Voidness and Actual Innocence:** Whether the Court should reconsider its denial of certiorari in light of Petitioner's showing that his convictions are jurisdictionally void *ab initio* and subject to constitutional avoidance in addition to the fact that he is actually innocent of any valid offense – extraordinary circumstances that were overlooked and that compel vacatur
4. **Fourth Circuit Rule 40(h) and Mandate Recall:** Whether Fourth Circuit Local Rule 40(h), which bars Petitioner from seeking recall of the appellate mandate and thus foreclosed any avenue to correct a void judgment, operates as an unconstitutional impediment to due process, thereby warranting this Court's intervention on rehearing



Schiff vs Warden; 25-6181 *Petition for Rehearing*
Word Count:

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Rehearing referenced above contains 2,755 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

[Handwritten Signature]
1/19/2026

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No. 25-6181

IN THE
SUPREME COURT OF THE UNITED STATES

Graham Schiff — PETITIONER
(Your Name)

VS.

Warden — RESPONDENT(S)

PROOF OF SERVICE

February 23 ~~January 19th~~, Graham Schiff, do swear or declare that on this date, ~~January 19th~~, 2026, as required by Supreme Court Rule 29 I have served the enclosed ~~MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS~~ *Rehearing* ~~PETITION FOR A WRIT OF CERTIORARI~~ on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Attorney General of MD
200 St. Paul Place
Baltimore, MD 21202

I declare under penalty of perjury that the foregoing is true and correct.

Executed on ~~January 19th~~, 20 26

February 23rd, 2026

[Signature]
(Signature)