

No. _____

In the Supreme Court of the United States

In re: Jamaal Howard,
Petitioner

**PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

This is a capital case.
Mr. Howard is scheduled to be executed on
Wednesday, October 7, 2026, after 6:00 p.m.

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Question Presented

Capital Case. Jamaal Howard is scheduled to be executed by the State of Texas after 6:00 p.m. central time on Wednesday, October 7, 2026.

A state prisoner who wishes to file a second or successive habeas application must first obtain authorization from a court of appeals. 28 U.S.C. § 2244(b)(3)(A). The court of appeals “may authorize the filing” of the application “only if it determines that the application makes a prima facie showing that the application satisfies the requirements of *this subsection*.” § 2244(b)(3)(C) (emphasis added). The one-year statute of limitations is not in that subsection. It is in a different one. § 2244(d).

The question presented is:

Whether a court of appeals, ruling on a motion for authorization under 28 U.S.C. § 2244(b)(3), may deny authorization on the ground that the proposed application is untimely under 28 U.S.C. § 2244(d).

Parties to the Proceeding

Petitioner is Jamaal Howard. He is incarcerated under a sentence of death at the Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas.

Pursuant to Rule 20.3(a), Howard states that he seeks relief against the United States Court of Appeals for the Fifth Circuit, which, through a panel composed of Circuit Judges Jerry E. Smith, James C. Ho, and Stuart Kyle Duncan, denied his motion for authorization in *In re Howard*, No. 26-40605 (5th Cir. Oct. 5, 2026).

Eric Guerrero, Director of the Texas Department of Criminal Justice, Correctional Institutions Division, who opposed Howard's motion in the court of appeals, is the real party in interest.

Related Proceedings

State v. Howard, No. 15,114 (356th Dist. Ct., Hardin County, Tex.) (judgment entered 2001).

Howard v. State, 153 S.W.3d 382 (Tex. Crim. App. 2004), *cert. denied*, *Howard v. Texas*, 546 U.S. 1214 (2006).

Ex parte Howard, No. WR-77,906-01, 2012 WL 6200688 (Tex. Crim. App. Dec. 12, 2012).

Howard v. Stevens, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. 2019).

Howard v. Davis, 959 F.3d 168 (5th Cir. 2020), *cert. denied*, *Howard v. Lumpkin*, 592 U.S. 1180 (2021).

Ex parte Howard, No. WR-77,906-02 (Tex. Crim. App. Oct. 5, 2026).

In re Howard, No. 26-40605 (5th Cir. Oct. 5, 2026).

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**PETITION FOR WRIT OF MANDAMUS
TO THE UNITED STATES COURT OF APPEALS
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I. Introduction

Jamaal Howard is scheduled to be executed tomorrow evening. He asks this Court to issue a writ of mandamus directing the Fifth Circuit to decide his motion for authorization the way Congress told it to: by asking whether his proposed application makes a prima facie showing that it satisfies the requirements of § 2244(b), and nothing more.

Congress drew the line in a single sentence. A court of appeals “may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of *this subsection*.” 28 U.S.C. § 2244(b)(3)(C) (emphasis added). In the next paragraph, Congress told the district court to dismiss any authorized claim unless the applicant shows that it “satisfies the requirements of *this section*.” § 2244(b)(4) (emphasis added). The statute of limitations is in § 2244, but it is not in § 2244(b); it is in § 2244(d). Whether an application is timely is therefore a question for the district court, not the court of appeals.

The Fifth Circuit did the opposite. It denied Howard’s motion first and principally on the ground that his proposed application is untimely under § 2244(d), and it rejected his claim to equitable tolling—a fact-bound inquiry that no court has conducted on any record. App. A at 3–6. That was not an error in the exercise of the authority Congress gave the court of appeals; it was an exercise of authority Congress gave to a different court.

The panel’s alternative holding does not make the writ an empty exercise, as it had already decided the motion and concentrated its opinion on a ground Congress assigned to a different court, and rested its denial of a stay on both holdings together. App. A at 9. Moreover, the panel concluded that § 2244(b)(1) bars Howard’s claim because it was “presented in a prior application.” *Id.* at 6–8. That conclusion is in tension with this Court’s precedent, which asks whether a claim was adjudicated, not merely whether it once appeared in a filing. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643–45 (1998). Howard’s prior counsel withdrew his *Atkins* claim before the district court ruled, and no court has ever adjudicated it. A panel confined to the inquiry § 2244(b)(3)(C) prescribes should consider the motion afresh. *See infra* Part VII.B.

The Fifth Circuit is not alone, and the courts of appeals have divided on this question for nearly two decades. The Sixth and Tenth Circuits read the statute as written and leave limitations to the district court. *Harjo v. Harding*, No. 25-5023, 2025 WL 1499424, at *4 (10th Cir. May 27, 2025); *In re McDonald*, 514 F.3d 539, 543–44 (6th Cir. 2008). The Fifth Circuit, along with the Fourth and the D.C. Circuits, does not. *In re Burton*, 111 F.4th 664, 667 (5th Cir. 2024); *In re Williams*, 759 F.3d 66, 69 (D.C. Cir.

2014); *In re Vassell*, 751 F.3d 267, 270–71 (4th Cir. 2014). Because § 2244(b)(3)(E) forbids certiorari review of authorization orders, the split can persist indefinitely unless this Court uses the authority § 1651(a) preserves. Justice Souter anticipated exactly this problem when the Court first construed the gatekeeping provisions. *Felker v. Turpin*, 518 U.S. 651, 667 (1996) (Souter, J., concurring) (explaining that if avenues other than certiorari for reviewing gatekeeping determinations were closed, a serious constitutional question “could arise if the courts of appeals adopted divergent interpretations of the gatekeeper standard”). That day has come.

II. Opinion below

The published order of the court of appeals denying Howard’s motion for authorization and his motion for a stay of execution, *In re Howard*, No. 26-40605 (5th Cir. Oct. 5, 2026), is reproduced at Appendix A.

III. Jurisdiction

The court of appeals entered its order on October 5, 2026. This Court has jurisdiction to issue a writ of mandamus to the court of appeals under the All Writs Act, 28 U.S.C. § 1651(a), and this Court’s Rule 20. *See Felker*, 518 U.S. at 661–62 (holding that the restrictions in § 2244(b)(3)(E) do not repeal this Court’s authority to entertain original habeas petitions). That authority “is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected.” *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 25 (1943).

IV. Constitutional and statutory provisions involved

28 U.S.C. § 1651(a) (App. D)

28 U.S.C. § 2244 (App. D)

Section 2244(b)(3)(C) provides:

The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Section 2244(b)(4) provides:

A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

V. Statement of the case

A. Howard's conviction and initial habeas proceedings

Howard was convicted of capital murder and sentenced to death in 2001 in the 356th Judicial District Court of Hardin County, Texas. The Texas Court of Criminal Appeals affirmed. *Howard v. State*, 153 S.W.3d 382 (Tex. Crim. App. 2004). The CCA later denied his initial application for state habeas relief. *Ex parte Howard*, No. WR-77,906-01, 2012 WL 6200688 (Tex. Crim. App. Dec. 12, 2012).

Howard's original federal habeas petition, filed in December 2012, included a claim that his execution would violate *Atkins v. Virginia*, 536 U.S. 304 (2002). In 2017, his then-counsel retained experts to evaluate the claim. Dr. Temple administered the WAIS-IV and obtained a full-scale IQ score of 74; his report reflected his view that Howard satisfied the first and third criteria for intellectual disability. App. B at 9. The adaptive-behavior criterion was assigned to Dr. James Patton, who found that Howard "does

demonstrate significant AB deficits after age 15,” but who concluded that, under the clinical framework then in force, those deficits were too “strongly linked to the onset of his mental health issues,” and observable in too narrow a window before age eighteen, to support the diagnosis. *Id.* at 9–10.

Howard’s then-counsel omitted the *Atkins* claim from the amended petition. Am. Pet., ROA.19-70018.445. The district court denied relief on the claims in that amended petition. *Howard v. Stevens*, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. 2019). The Fifth Circuit denied a certificate of appealability, *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020), and this Court denied certiorari on January 11, 2021, *Howard v. Lumpkin*, 592 U.S. 1180 (2021).

B. The clinical framework changes

Within days of this Court’s denial of certiorari, the American Association on Intellectual and Developmental Disabilities published the twelfth edition of its manual (AAIDD-12), which extended the developmental period from age eighteen to age twenty-two. In March 2022, the American Psychiatric Association published the DSM-5-TR, which abandoned the requirement that adaptive deficits be directly related to intellectual impairment. The Texas Court of Criminal Appeals recognized these changes in *Ex parte Mays*, 686 S.W.3d 745 (Tex. Crim. App. 2024), and *Ex parte Estrada*, No. WR-53,499-02, 2025 WL 1122323 (Tex. Crim. App. Apr. 16, 2025). And in August 2026, the American Psychological Association issued forensic guidelines explaining that the adaptive-deficit criterion requires observation of deficits at multiple points in the developmental period.

App. B at 10–11. Under the current framework, the deficits Dr. Patton observed are no longer disqualified by their relationship to Howard’s mental illness, and trial testimony about Howard’s functioning at ages twenty and twenty-one is, for the first time, evidence from the developmental period. *Id.* at 14, 17–19.

C. The proceedings below

On March 26, 2026, the state trial court set Howard’s execution for October 7, 2026. On September 28, 2026, Howard filed a subsequent application for state habeas relief raising his *Atkins* claim. The CCA dismissed that application under article 11.071, section 5, of the Texas Code of Criminal Procedure on October 5, 2026. Howard is separately seeking certiorari review of that dismissal.

On October 1, 2026, Howard moved in the Fifth Circuit for authorization to file a second federal habeas application raising his *Atkins* claim, and for a stay of execution. App. B. He argued that the claim satisfies § 2244(b)(2)(A) and that it was not “presented in a prior application” within the meaning of § 2244(b)(1). *Id.* at 12–25. Acknowledging that the State would contest timeliness, he asked the court to leave that question, and the question of equitable tolling, to the district court. *Id.* at 25–26. The State filed its opposition on October 3.

On October 5, a panel of the Fifth Circuit denied authorization in a published order. App. A. The panel held, first, that “[t]he statute of limitations precludes Howard’s second habeas application.” *Id.* at 3. It concluded that the limitations period under § 2244(d)(1)(C) and (D) had run, *id.* at 4–5, and that Howard was not entitled to

equitable tolling because he “was not diligent with his rights” and had acted with “laches” and “unclean hands,” *id.* at 5–6. The panel then held, in the alternative, that “[e]ven if limitations proved no obstacle,” Howard’s claim was “presented in a prior application” and therefore barred by § 2244(b)(1). *Id.* at 2, 6–8. It declined to address whether Howard’s claim satisfies § 2244(b)(2)(A). *Id.* at 8. And it denied a stay, reasoning that Howard had no likelihood of success because his application is “barred by the statute of limitations” and makes “a previously presented claim.” *Id.* at 9.

VI. Statement pursuant to Rule 20.1

A writ under § 1651(a) is “not a matter of right, but of discretion sparingly exercised.” Sup. Ct. R. 20.1. To justify it, a petitioner must show that the writ will be in aid of the Court’s appellate jurisdiction, 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. *Id.* Howard satisfies each requirement.

First, the writ would aid this Court’s appellate jurisdiction. “The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction.” *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380 (2004) (internal quotation marks and alteration omitted). That is the precise relief Howard seeks. Were the Fifth Circuit confined to the inquiry § 2244(b)(3)(C) prescribes, Howard’s *Atkins* claim would proceed to the district court, and any judgment in that court would

ultimately be within this Court’s certiorari jurisdiction. *See Roche*, 319 U.S. at 25. The panel’s order forecloses that path entirely.

Second, the circumstances are exceptional. A court of appeals has denied a capital prisoner access to the federal courts on a ground that Congress assigned to a different court, on the eve of his execution, on a question that has divided the circuits for nearly two decades and that, by statutory design, can reach this Court in no other way. *See Felker*, 518 U.S. at 667 (Souter, J., concurring).

Third, adequate relief is not available in any other form or from any other court. Section 2244(b)(3)(E) bars both rehearing and certiorari. And because the Fifth Circuit has followed the rule the panel applied here for twenty years, no panel of that court will depart from it. *See Burton*, 111 F.4th at 667; *In re Wilson*, 442 F.3d 872, 874–75 (5th Cir. 2006). Howard is scheduled to be executed tomorrow.

VII. Reasons for granting the writ

A. The Fifth Circuit exceeded the authority § 2244(b)(3)(C) confers.

1. The text confines the court of appeals to the requirements of § 2244(b).

Section 2244(b)(3)(C) tells a court of appeals what it may consider when it decides whether to authorize a successive application: whether the application “makes a prima facie showing that the application satisfies the requirements of *this subsection*.” 28 U.S.C. § 2244(b)(3)(C) (emphasis added). The subsection is § 2244(b). Its requirements are the ones Congress listed there: the claim must not have been “presented in a prior

application,” § 2244(b)(1),¹ and a new claim must rely either on a new, retroactive, and previously unavailable rule of constitutional law, or on a newly discoverable factual predicate that, together with the rest of the evidence, establishes innocence by clear and convincing evidence, § 2244(b)(2). The panel did not begin with those requirements. It began with § 2244(d). App. A at 3.

Congress knew how to refer to the whole section when it wanted to. In the very next paragraph, it directed the district court to dismiss any authorized claim “unless the applicant shows that the claim satisfies the requirements of this *section*.” § 2244(b)(4) (emphasis added). “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted); *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020) (“Only the written word is the law, and all persons are entitled to its benefit.”); *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (“Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another.”). The presumption is at its strongest here, where the two terms appear in adjacent paragraphs of the same subsection and assign the same inquiry to two different courts. The court of appeals asks whether the application satisfies “*this subsection*.” The district court asks whether it satisfies “*this section*.” The statute of limitations is in the section. It is not in the subsection.

¹ The panel held, in the alternative, that Howard’s claim was “presented in a prior application.” App. A at 6–8. Howard addresses that holding below. *See infra* Part VII.B.

The structure of § 2244 confirms what the text says. Subsection (b) comes before subsection (d). Subsection (b) sets out, in a self-contained sequence, the requirements a successive claim must meet and the procedure by which a court of appeals screens for them. Nothing in subsection (b) incorporates or refers to subsection (d). A court cannot add to the conditions Congress enumerated in an earlier provision by borrowing from a later one that Congress did not mention. As the Sixth Circuit put it, “investigating compliance with the one-year statute of limitations outlined in 28 U.S.C. § 2244(d)—clearly a separate subsection from 28 U.S.C. § 2244(b)—is not within the purview of the court of appeals’ consideration of applications requesting authorization to file a second or successive habeas corpus petition pursuant to 28 U.S.C. § 2244(b).” *McDonald*, 514 F.3d at 543.

The Tenth Circuit has reached the same conclusion about the nature of the gatekeeping inquiry. Section 2244(b)(3)(C), it explained, “focuses our inquiry solely on the conditions specified in § 2244(b) that justify raising a new habeas claim.” *Ochoa v. Sirmons*, 485 F.3d 538, 541 (10th Cir. 2007) (per curiam). “[T]he plain language of the statute directs us to focus solely on the conditions Congress has designated as controlling with respect to the authorization of second or successive habeas petitions.” *Id.* at 544. Authorization “is only a preliminary determination that a claim satisfies the statutory conditions; it is for the district court, under § 2244(b)(4), to confirm that the petition does, in fact, satisfy the requirements of § 2244(b) when it hears the case.” *Id.* at 543 (internal quotation marks and alterations omitted). Applying that reasoning, the Tenth Circuit holds that its authorization of a successive application “does not speak to the

timeliness” of that application, which is a merits question outside the gatekeeping inquiry. *Harjo*, 2025 WL 1499424, at *4.

2. Limitations is an affirmative defense that belongs to the State and to the district court.

The text is enough. But the nature of the limitations defense shows why Congress allocated it as it did. Section 2244(d) is not jurisdictional. *Holland v. Florida*, 560 U.S. 631, 645 (2010); *Day v. McDonough*, 547 U.S. 198, 205 (2006). It is an affirmative defense that the State may raise, forfeit, or deliberately waive, *Wood v. Milyard*, 566 U.S. 463, 466, 470 (2012), and it is subject to equitable tolling, *Holland*, 560 U.S. at 645. *Wood* permits a court of appeals reviewing a district court’s judgment to raise a forfeited limitations defense on its own initiative in exceptional cases. *Wood*, 566 U.S. at 473. It does not suggest that a court of appeals may adjudicate limitations before an application has been filed, before the State has answered it, and before the State has decided whether to assert the defense at all. Whether the State will assert it in the district court, and how a district court should resolve a claim to equitable tolling, are questions that cannot be answered at the authorization stage. The court of appeals considers a motion without the benefit of a district-court record, and it must decide within thirty days. § 2244(b)(3)(D). As the Tenth Circuit explained, that compressed, record-free procedure is “a streamlined procedure with a narrow focus on a fixed set of pre-specified and easily assessed criteria, which would be disrupted by engaging the manifold merits issues raised by potentially complex, fact-bound constitutional claims.” *Ochoa*, 485 F.3d at 542.

Equitable tolling is the paradigm of a fact-bound question. Whether a petitioner “has been pursuing his rights diligently” and whether “some extraordinary circumstance stood in his way,” *Holland*, 560 U.S. at 649 (internal quotation marks omitted), turn on evidence that a court of appeals has neither the means nor the authority to receive. “[C]ourts of appeal cannot determine whether the one-year statute of limitations should be equitably tolled, . . . or on what date the defendant was able to discover the evidence in question through due diligence.” *McDonald*, 514 F.3d at 543. The Fifth Circuit has itself recognized as much when it has suited it. See *In re Johnson*, 935 F.3d 284, 295–96 (5th Cir. 2019) (authorizing a successive *Atkins* application and leaving equitable tolling to the district court); *In re Campbell*, 750 F.3d 523, 533–34 (5th Cir. 2014) (same). Here, by contrast, the panel resolved diligence and tolling against Howard without a single fact found by any court. App. A at 5–6.

3. The Fifth Circuit’s rule rests on precedent, not on the statute.

The panel’s ruling followed Fifth Circuit precedent. The rule dates to 2006, and the court has reaffirmed it repeatedly. *Burton*, 111 F.4th at 667; *In re Jones*, 998 F.3d 187, 189 (5th Cir. 2021); *Campbell*, 750 F.3d at 532 n.9 (“We have the authority to deny a motion to authorize based on timeliness.”); *Wilson*, 442 F.3d at 874–75. But none of those decisions grounds the rule in the language of § 2244(b)(3)(C). The Fifth Circuit has never explained how the requirements of *this subsection* can include a requirement located in a different subsection, or why Congress distinguished “*this subsection*” from “*this section*” in adjacent paragraphs if it meant the same thing by both. The panel’s order does not

explain it either. The panel turned to § 2244(d) without addressing the question. App. A at 3–6.

That is why only this Court can correct the error. Fifth Circuit panels are bound by that precedent. Section 2244(b)(3)(E) forbids rehearing, so the en banc court cannot revisit it in an authorization proceeding. And the same provision forbids certiorari. If § 1651(a) is unavailable, the Fifth Circuit’s rule—and the opposite rule in the Sixth and Tenth Circuits—will remain in place permanently, and whether a prisoner may proceed to district court will depend on the circuit in which he happens to be confined.

B. The panel’s alternative holding under § 2244(b)(1) does not render the writ futile.

The panel also held, in the alternative, that § 2244(b)(1) bars Howard’s claim because it was “presented in a prior application.” App. A at 6–8. Howard recognizes that this holding is itself a gatekeeping determination. He respectfully submits, however, that it does not make the writ futile.

First, the question the panel answered is a difficult one. Howard’s prior counsel omitted the *Atkins* claim from the amended federal petition, and the district court adjudicated only the claims in that pleading (i.e., the amended petition). App. B at 10, 13. Howard argued below that, because an amended pleading supersedes the original and renders it of no legal effect, the claim was not part of any application when the district court ruled. *Id.* at 13 (citing *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994)). The panel rejected that argument, reasoning that “[p]resentation is distinct from adjudication” and that the claim was “funded, developed, and briefed before it was abandoned.” App. A at

7. But this Court has looked to adjudication, not to the mere fact of a filing, in deciding what counts toward the second-or-successive bar. In *Martinez-Villareal*, the prisoner’s claim “had previously been presented” in his first petition, yet the Court held that his later application was not second or successive because the claim had never been adjudicated. *Martinez-Villareal*, 523 U.S. at 643–45; *see also Magwood v. Patterson*, 561 U.S. 320, 332 (2010); *Slack v. McDaniel*, 529 U.S. 473, 485–86 (2000). The Ninth Circuit has applied the same principle to § 2244(b)(1): “Because the claim before us was presented in Sandoval’s first petition and because the claim was not previously adjudicated on the merits, § 2244(b) does not bar the instant petition.” *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1169 (9th Cir. 2003). And the only decision the panel cited for treating a withdrawn claim as “presented” predates all of those decisions. It involved a petitioner who voluntarily dismissed his entire petition, after the district court had found it worthy of an evidentiary hearing, because his counsel concluded she could not carry his burden on the same claim under the same law. *Felder v. McVicar*, 113 F.3d 696, 697–98 (7th Cir. 1997); *see App. A at 7 n.8*. Howard’s prior counsel withdrew his claim because the clinical framework in force at the time foreclosed it, and that framework has since changed. *App. B at 1–3*.

Second, the panel reached the § 2244(b)(1) question only after it had resolved the motion on limitations grounds, and the limitations ruling shaped the rest of its order, including its denial of a stay. *App. A at 9–10*. A panel confined to the inquiry § 2244(b)(3)(C) prescribes should have the opportunity to consider Howard’s motion on that basis in the first instance.

VIII. Conclusion

Howard respectfully asks the Court to issue a writ of mandamus directing the Fifth Circuit to vacate its October 5, 2026 order and to reconsider his motion for authorization under 28 U.S.C. § 2244(b) alone, without regard to § 2244(d). He further asks the Court to stay his execution, scheduled for October 7, 2026, pending its consideration of this petition.

Respectfully submitted,

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Appendix A	<i>In re Howard</i> , No. 26-40605 (5th Cir. Oct. 5, 2026) (published order denying motion for authorization and motion for stay of execution)
Appendix B	Motion for Order Authorizing Consideration of Second Petition for Writ of Habeas Corpus Under 28 U.S.C. § 2244 and for Stay of Execution, <i>In re Howard</i> , No. 26-40605 (5th Cir. filed Oct. 1, 2026)
Appendix C	Proposed Second Petition for Writ of Habeas Corpus (filed with Appendix B)
Appendix D	28 U.S.C. §§ 1651, 2244