

No. _____

In the Supreme Court of the United States
October Term, 2026

In re Jamaal Howard,
Petitioner

On Petition for Writ of Habeas Corpus

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

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Questions Presented

CAPITAL CASE

Jamaal Howard’s prior federal habeas counsel pleaded a claim that he is intellectually disabled and therefore ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), and then withdrew it before any court adjudicated it, because under the clinical framework then in force her experts could not attribute the adaptive deficits they found to intellectual disability rather than to Howard’s co-occurring mental illness. After Howard’s initial federal habeas proceeding ended, that framework changed. The Fifth Circuit denied Howard authorization to present the claim in a successive petition. The questions presented are:

1. Whether this Court should exercise its original habeas jurisdiction and transfer this petition to the district court for hearing and determination under 28 U.S.C. § 2241(b), where Howard makes a substantial showing that he is categorically ineligible for execution.

2. Whether an *Atkins* claim that was withdrawn by an amended pleading before any court adjudicated it, and that rests on a clinical framework that did not exist when it was withdrawn, was “presented in a prior application” within the meaning of 28 U.S.C. § 2244(b)(1).

Parties to the Proceeding

Mr. Howard resides on death row at the Allan B. Polunsky Unit of the Texas Department of Criminal Justice in Livingston, Texas. Eric Guerrero, the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice, resides in Huntsville, Texas.

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In the Supreme Court of the United States

In re Jamaal Howard,
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Petition for Writ of Habeas Corpus

Petitioner Jamaal Howard respectfully requests that this Court transfer his application for a writ of habeas corpus to the United States District Court for the Eastern District of Texas for hearing and determination under 28 U.S.C. § 2241(b), or issue the writ, and stay his execution, scheduled for this evening.

Introduction

Jamaal Howard is intellectually disabled, and the Eighth Amendment forbids the State of Texas from executing him. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). No court has ever considered that claim under the clinical framework that now governs it.

Howard also suffers from schizoaffective disorder and attention-deficit/hyperactivity disorder. In 2017, the experts retained by his prior federal habeas counsel had before them a full-scale IQ score of 74 and adaptive-behavior results placing Howard roughly two standard deviations below the mean by age sixteen. They nonetheless believed it would be difficult to attribute his adaptive deficits to intellectual disability rather than to the mental illness that emerged at about the same time, and prior counsel abandoned the claim. The obstacle was not the evidence. It was the clinical framework then in force.

That framework required a diagnostician to find that adaptive deficits were directly related to intellectual impairment, and it closed the developmental period at eighteen, leaving Howard's experts a single window in which to observe deficits that became significant around age fifteen. Both obstacles are gone. Four days after this Court denied certiorari in Howard's initial federal habeas proceeding, the American Association on Intellectual and Developmental Disabilities ("AAIDD") extended the developmental period to age twenty-two. The following year, the American Psychiatric Association ("APA") eliminated the relatedness requirement. The Texas Court of Criminal Appeals ("CCA") has recognized both changes. *Ex parte Mays*, 686 S.W.3d 745, 748 n.5 (Tex. Crim. App. 2024); *Ex parte Estrada*, No. WR-53,499-02, 2025 WL 1122323, at *1 n.2 (Tex. Crim. App. Apr. 16, 2025).

Because Howard was twenty at the time of the offense and twenty-one at trial, the extended developmental period also brings within it a trial record, made under oath more than a year before this Court decided *Atkins*, that is replete with evidence that his deficits persisted. The change does not alter how most people with intellectual disability are identified; it permits the accurate diagnosis of the few who, like Howard, are identified nearer the end of the developmental period.

The Fifth Circuit denied Howard authorization to present his claim in a successive petition, and the CCA dismissed it. App. A; App. B. Howard asks the Court to do what it did in *In re Davis*, 557 U.S. 952, 952 (2009): transfer his petition to the district court for hearing and determination, and stay his execution so that the hearing can occur.

Opinions Below

The published order of the United States Court of Appeals for the Fifth Circuit 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 attached as Appendix A. The order of the CCA dismissing Howard's subsequent application for writ of habeas corpus and denying his motion for a stay of execution, *Ex parte Howard*, No. WR-77,906-02 (Tex. Crim. App. Oct. 5, 2026), is attached as Appendix B.

Statement of Jurisdiction

The Court has jurisdiction to entertain this original petition and grant relief pursuant to 28 U.S.C. §§ 1651(a), 2241(a), 2241(b), 2241(c)(3), and 2254(a). *See Felker v. Turpin*, 518 U.S. 651, 658–62 (1996).

Constitutional and Statutory Provisions Involved

The Eighth Amendment provides, in relevant part: “[N]or [shall] cruel and unusual punishments [be] inflicted.” U.S. Const. amend. VIII.

The Fourteenth Amendment provides, in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

Section 2241(b) of Title 28 provides, in relevant part: “The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.” 28 U.S.C. § 2241(b).

Section 2244(b)(1) of Title 28 provides: “A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” 28 U.S.C. § 2244(b)(1).

The full text of 28 U.S.C. §§ 2241, 2244, and 2254 is reproduced in Appendix D.

Statement of the Case

Howard was convicted and sentenced to death in 2001 for the murder of Vickie Swartout, a gas-station clerk in Silsbee, Texas. 24 R.R. 53–54; 27 R.R. 57.¹ Whether he is intellectually disabled was in question from the start. The court-appointed psychologist who evaluated his competency estimated his IQ at between 65 and 70 and described his functioning as “a borderline to mildly impaired kind of level.” App. C, Ex. 1; 21 R.R. 26. A defense psychiatrist testified that he had to abandon personality testing because Howard could not read at the sixth-grade level it required. 26 R.R. 22.

Howard’s direct appeal brief, filed eight days before this Court decided *Atkins*, argued that he is intellectually disabled. The CCA held that the evidence was not sufficiently developed, noting that evidence of Howard’s adaptive deficits had been presented at trial as evidence of his schizoaffective disorder. *Howard v. State*, 153 S.W.3d 382, 386–87 (Tex. Crim. App. 2004).

Howard’s federal habeas petition included an *Atkins* claim, and the district court funded three experts. ROA.19-70018.152–60, 1033.² In 2017, Dr. Richard Temple obtained a full-scale IQ score of 74, with a 95% confidence interval of 70 to 79 and good effort. App. C, Ex. 2. Dr. James

¹Citations to the Reporter’s Record of Howard’s 2001 trial appear herein as [volume] R.R. [page]. The exhibits to Howard’s proposed petition, attached as Appendix C, are cited herein as “App. C, Ex. [number].”

²Citations to the record on appeal in the Court of Appeals in Cause No. 19-70018 appear herein as ROA.19-70018.[page], as required by that court’s Rule 28.2.2.

Patton found that by age sixteen Howard's General Adaptive Composite was 67, but concluded that his deficits were "strongly linked to the onset of his mental health issues," such that "it would be very difficult to argue otherwise." App. C, Ex. 3. Under the governing manual, which required that adaptive deficits be "directly related to the intellectual impairments," that linkage was disqualifying. APA, *Diagnostic and Statistical Manual of Mental Disorders* 38 (5th ed. 2013). And because the developmental period then closed at eighteen, Dr. Patton could observe the deficits at only one point within it. AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 1 (11th ed. 2010). Prior counsel informed the district court that the team had concluded an intellectual disability claim was not feasible, ECF No. 74 at 2–3, *Howard v. Stephens*, No. 1:13-cv-256 (E.D. Tex.), and omitted the claim from Howard's amended petition, ROA.19-70018.445. The district court denied relief, and this Court denied certiorari on January 11, 2021.

Four days later, the AAIDD extended the developmental period to age twenty-two. AAIDD, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* ch. 3 (12th ed. 2021) ("AAIDD-12"). In March 2022, the APA eliminated the relatedness requirement. APA, *Diagnostic and Statistical Manual of Mental Disorders* 38 (5th ed., text rev. 2022) ("DSM-5-TR").

On September 28, 2026, Howard filed a subsequent state application raising his *Atkins* claim, and on October 1 he moved the Fifth Circuit for authorization to file a successive petition. On October 5, the CCA dismissed the application as an abuse of the writ. App. B. The same day, the Fifth Circuit denied authorization, holding that the petition was untimely and that the claim had been presented in a prior application; it declined to decide whether the claim was previously

unavailable. App. A at 2, 8. Howard has also petitioned this Court for a writ of mandamus. *In re Howard*, No. 26-5754.

Reasons for Granting the Writ

Rule 20.4(a) requires a petitioner seeking an original writ of habeas corpus to 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.” Sup. Ct. R. 20.4(a). Section 2244(b)(3)(E) bars review of the Fifth Circuit’s order by appeal or certiorari, but it did not repeal this Court’s authority to entertain an original habeas petition, *Felker*, 518 U.S. at 660–62, or to “transfer the application for hearing and determination to the district court,” 28 U.S.C. § 2241(b). The restrictions § 2244(b) places on successive applications do not govern the exercise of that authority, though “they certainly inform [the Court’s] consideration of original habeas petitions.” *Felker*, 518 U.S. at 663. Respondent agrees that this avenue remains available: “This Court’s doors remain open to Howard.” Br. in Opp. 13, *In re Howard*, No. 26-5754.

In 2009, the Court transferred Troy Davis’s original petition to the district court with instructions to take evidence and make findings on his claim of innocence. *Davis*, 557 U.S. at 952. Three Justices explained that the case was “sufficiently ‘exceptional’ to warrant utilization of this Court’s Rule 20.4(a), 28 U.S.C. § 2241(b), and our original habeas jurisdiction.” *Id.* (Stevens, J., concurring). Howard’s case is exceptional in the same way.

A. Howard’s claim is the kind of claim this Court’s original jurisdiction exists to hear.

Many of the original petitions this Court has been asked to consider in capital cases rest on claims of innocence, and for good reason. A prisoner who may be innocent presents the strongest case for the exercise of extraordinary power, because the harm the writ would prevent

is the gravest the law knows, and because such a claim often has nowhere else to go. An *Atkins* claim shares that defining feature. *Atkins* does not regulate the procedure by which a State imposes death; it “places a substantive restriction on the State’s power to take the life” of an intellectually disabled offender. *Atkins*, 536 U.S. at 321 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). Whatever his guilt of the offense, a person who is intellectually disabled is categorically ineligible for the punishment, and in that sense innocent of the death penalty. See *Sawyer v. Whitley*, 505 U.S. 333, 335–36 (1992). And if the Court declines to grant the relief Howard seeks in his contemporaneous mandamus petition, Howard’s claim, like the claim in *Davis*, will have no other forum.

B. Measured by the standards that inform the Court’s discretion, Howard’s claim belongs in a federal forum.

Section 2244(b) informs the Court’s consideration of this petition, and Howard satisfies the standards it reflects. The questions the Court must answer for itself overlap with those the Fifth Circuit addressed, and the panel’s answers to them do not bind this Court.

1. Howard’s present claim was not “presented in a prior application.”

The claim Howard now presents is not the claim his prior counsel pleaded. The panel held otherwise, reasoning that the claim is the same claim supported by new facts, and that a prisoner may not use new facts to re-present a claim already raised. App. A at 8 (citing *In re Coleman*, 768 F.3d 367, 373 (5th Cir. 2014)). The prisoner in *Coleman* offered “essentially the same claim . . . albeit with additional affidavits.” *Coleman*, 768 F.3d at 373. Howard’s claim is different in kind. What has changed is not the evidence offered to satisfy a fixed legal standard, but the clinical framework that gives that standard its content.

That framework is not a matter of evidence. The legal determination of intellectual disability, though distinct from a medical diagnosis, “is informed by the medical community’s diagnostic framework.” *Hall v. Florida*, 572 U.S. 701, 721 (2014). A court applying *Atkins* may not rely on superseded medical standards. *Moore v. Texas*, 581 U.S. 1, 12–13 (2017). The Fifth Circuit’s own precedent recognizes as much: changes “in the medical methodology for evaluating the relevant disabilities and in courts’ recognition of those changes” can render an *Atkins* claim previously unavailable. *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019). *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), the court explained, “precedentially determined that it is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues raised by *Atkins*.” *Johnson*, 935 F.3d at 294. Changes of that kind are not new facts about Howard. They are changes in what the law, informed by medicine, requires a court to ask.

The panel’s discussion of the APA’s 2026 forensic guidelines illustrates the point. The panel observed that the guidelines, which call for the observation of adaptive deficits at multiple points in the developmental period, substantiate Dr. Patton’s methods. App. A at 5. Respectfully, that is Howard’s claim. Dr. Patton found significant adaptive deficits after age fifteen. App. C, Ex. 3. Following the practice the guidelines now describe, he could not make a diagnosis, because the developmental period as then defined closed at eighteen and left him a single window in which to observe those deficits. The AAIDD-12 has since widened that window to include the period of Howard’s offense and trial. The obstacle Dr. Patton faced was the framework, not the facts, and the framework has changed.

Nor was the earlier claim “presented in a prior application” in the sense the statute uses those words. The phrases § 2244(b) employs are terms of art, not ordinary language to be applied literally. *Magwood v. Patterson*, 561 U.S. 320, 332 (2010). An “application” is a filing that contains one or more claims and seeks an adjudication on the merits of them. *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005). Prior counsel withdrew the *Atkins* claim by filing an amended petition, and an amended habeas petition supersedes the original for all purposes. *Calhoun v. Bergh*, 769 F.3d 409, 410–11 (6th Cir. 2014). The panel reasoned that presentation is distinct from adjudication. App. A at 7. But when the district court ruled, the only application seeking an adjudication of anything was the amended petition, and it contained no *Atkins* claim.

2. Howard’s claim relies on a new rule of constitutional law, made retroactive by this Court, that was previously unavailable.

Atkins announced a new rule of constitutional law made retroactive to cases on collateral review. *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014). Under the Fifth Circuit’s settled precedent, an *Atkins* claim is “previously unavailable,” 28 U.S.C. § 2244(b)(2)(A), where changes in clinical standards gave it a possibility of merit it did not previously have. *Cathey*, 857 F.3d at 232; *Johnson*, 935 F.3d at 292–94.³ The panel did not reach the question. App. A at 8.

Howard’s claim is the mirror image of Johnson’s. Johnson’s claim became available when a new manual changed how clinicians evaluate intellectual functioning. Howard’s claim became available when new manuals changed how clinicians evaluate the other two criteria: adaptive deficits and their onset during the developmental period. Neither change could have been

³This Court has granted certiorari to review the Fifth Circuit’s reading of “previously unavailable” and will hear argument on November 4, 2026. *Guerrero v. Johnson*, No. 25-1003 (U.S. cert. granted June 15, 2026). Because § 2244(b) informs, rather than controls, the Court’s consideration of this petition, the Court need not resolve that question in order to transfer Howard’s petition for hearing and determination.

presented in Howard's initial federal habeas proceeding. This Court denied certiorari on January 11, 2021. The AAIDD-12 was published four days later, and the DSM-5-TR more than a year after that.

3. Howard makes a substantial showing that he is intellectually disabled.

Intellectual disability is characterized by (1) significant limitations in intellectual functioning, (2) significant limitations in adaptive behavior, and (3) onset of those limitations during the developmental period. *Moore*, 581 U.S. at 7; AAIDD-12 ch. 2; DSM-5-TR at 37. Howard makes a substantial showing as to each.

Dr. Temple's full administration of the WAIS-IV yielded a full-scale IQ of 74, with a 95% confidence interval of 70 to 79, and effort testing showed good effort. App. C, Ex. 2. Dr. Temple's report indicates that the appropriate Flynn Effect adjustment for a WAIS-IV administered in 2017 is three points, which would place the lower bound of the confidence interval at 67. *Id.* Those results are consistent with Dr. Duncan's 2001 estimate, based on the verbal portion of the WAIS-R, that Howard's IQ falls between 65 and 70. App. C, Ex. 1. The verbal portion was also the portion of Dr. Temple's test on which Howard performed most poorly. App. C, Ex. 2.

The adaptive-deficit criterion is satisfied when at least one domain of adaptive functioning is sufficiently impaired that ongoing support is needed for the person to perform adequately in one or more life settings. DSM-5-TR at 43. The ratings Dr. Patton obtained place Howard's General Adaptive Composite at 67 and his conceptual and social domain scores at 69 and 62 by the time he was sixteen. App. C, Ex. 3. The trial testimony corroborates those scores and shows that the deficits persisted. In high school, Howard cycled from regular classes to in-

school suspension, to an alternative campus, to homebound instruction, and to expulsion, and then back through the same cycle. 25 R.R. 20–27, 30. At twenty-one, he could not read at a sixth-grade level. 26 R.R. 22. His grandfather testified that Howard “never could explain himself.” 23 R.R. 83. His mother testified that the most she could get from him in conversation was “maybe a yes or no answer.” 23 R.R. 56. When Howard was twenty, his brother testified, he wore the same clothes for two weeks and, when told to take a shower, stood in the shower fully clothed until told to remove his clothes. 23 R.R. 28, 35–38. He lived with his grandfather at the time of the offense because no one at his mother’s house would be home to get him up in the morning, and he would not get up on his own. 23 R.R. 56.

Howard’s deficits were significant by the time he was sixteen, and therefore manifested during the developmental period under any definition. App. C, Ex. 3. The trial testimony shows that they were not transient and instead continued through age twenty-one, within the developmental period as the AAIDD now defines it. AAIDD-12 ch. 3.

C. Questions of timeliness belong in the district court.

The panel held that Howard’s petition is untimely under 28 U.S.C. § 2244(d). App. A at 3–6. Whether the limitations period applies to an original petition in this Court is a question the Court need not decide, because transfer under § 2241(b) places the question where the Fifth Circuit’s own precedent says it belongs: in the district court, in the first instance. In *Johnson*, the Fifth Circuit treated the publication of a new diagnostic manual as the date the factual predicate became available, recognized that the motion came more than a year later, and left equitable tolling to the district court. *Johnson*, 935 F.3d at 295–96; *see also Cathey*, 857 F.3d at 240–41. The panel here decided equitable tolling itself, without discussing *Johnson*. App. A at 5–6. Howard

will show in the district court that he has pursued his rights diligently and that extraordinary circumstances stood in his way. *See Holland v. Florida*, 560 U.S. 631, 649 (2010).

D. Statement of reasons for not applying to the district court

As 28 U.S.C. § 2242 and Rule 20.4(a) require, Howard states that he has not applied to the district court because that court lacks jurisdiction to consider a second or successive application without authorization from the court of appeals, 28 U.S.C. § 2244(b)(3)(A), and the Fifth Circuit has denied authorization. App. A. Howard has exhausted his state remedies. 28 U.S.C. § 2254(b)(1)(A). He presented his claim to the CCA in a subsequent application, which the CCA dismissed under article 11.071, section 5 of the Texas Code of Criminal Procedure. App. B. The CCA's dismissal of an *Atkins* claim under section 5 is a decision on the merits. *Bushy v. Davis*, 925 F.3d 699, 709 (5th Cir. 2019).

Conclusion

For the foregoing reasons, Howard respectfully requests that this Court:

1. Transfer this petition to the United States District Court for the Eastern District of Texas under 28 U.S.C. § 2241(b) for hearing and determination, with instructions to receive evidence and make findings on whether Howard is intellectually disabled and therefore ineligible for execution;
2. Stay his execution, currently scheduled for October 7, 2026, pending the Court's disposition of this petition and, if the petition is transferred, pending the conclusion of proceedings in the district court; and
3. In the alternative, issue the writ, or order Respondent to show cause why the writ should not issue.

Respectfully submitted,

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Counsel for Jamaal Howard, Petitioner

Verification

I, Jeffrey R. Newberry, counsel for Petitioner Jamaal Howard, acting on his behalf, state that to the best of my knowledge and belief, the facts set forth in this petition are true.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 7, 2026.

/s/ Jeffrey R. Newberry

Jeffrey R. Newberry

Certificate of Service

I, Don Bailey, a member of the Bar of this Court, certify pursuant to Rule 29.5(b) that on October 7, 2026, I served a copy of this petition and its appendices by email on counsel for Respondent:

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All parties required to be served have been served.

/s/ Don Bailey

Don Bailey