

# United States Court of Appeals for the Fifth Circuit

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No. 26-40605

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United States Court of Appeals  
Fifth Circuit

**FILED**

October 5, 2026

Thomas B. Plunkett, III  
Clerk

IN RE JAMAAL HOWARD,

*Movant,*

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Motion for an order authorizing  
the United States District Court  
for the Eastern District of Texas  
to consider a successive [28 U.S.C. § 2254](#) application

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## PUBLISHED ORDER

Before SMITH, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:

Jamaal Howard, a convicted murderer, is scheduled for execution on October 7, 2026. Facing impending execution, Howard moves for this court to authorize the district court to consider his second [28 U.S.C. § 2254](#). He argues that new clinical standards—updated after the denial of his first habeas petition—would deem him mentally disabled and therefore ineligible to face execution under the Eighth Amendment, *see Atkins v. Virginia*, [536 U.S. 304, 317–19](#) (2002). Howard further reasons that his second petition’s reliance on new clinical standards is tantamount to reliance on a new, retroactive, and previously unavailable rule of constitutional law. He also claims that his second petition does not advance claims presented in his prior habeas application. So, Howard concludes that consideration of his second

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petition is proper. In the alternative, Howard asks that this court stay his execution pending the Supreme Court's decision in *Guerrero v. Johnson*.

We deny Howard's motions. His second habeas application is barred by the statute of limitations, and he cannot overcome limitations via equitable tolling. Even if limitations proved no obstacle, Howard's second petition makes a previously presented claim, foreclosing consideration in turn.

Nor is a stay of his execution proper. Howard has no likelihood of success on the merits. The balance of the equities militates against a stay. And the mere speculative possibility of the Supreme Court's holding to the contrary proves insufficient to warrant a stay.

I.

We have jurisdiction under [28 U.S.C. § 2244\(b\)\(3\)\(A\)](#).

II.

Consider the procedural history. On May 12, 2000, Howard shot and killed Vickie Swartout at a gas station in Silsbee, Texas. In 2001, he was convicted and sentenced to death. Howard appealed, contending that his mental illness precluded his execution under the Eighth Amendment. The Texas Court of Criminal Appeals ("CCA") disagreed and upheld his conviction and sentence. *Howard v. State*, [153 S.W.3d 382, 383–84](#) (Tex. Crim. App. 2004).

In 2002, the Supreme Court decided *Atkins*, which held that the intellectually disabled are constitutionally barred from execution.

While his direct appeal was pending, Howard filed a state habeas petition. The trial court recommended that the CCA deny relief. The CCA agreed.

Subsequently, on December 12, 2012, Howard filed a federal habeas

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petition. His team, advancing an *Atkins* claim, tested him for an intellectual disability. It concluded in 2017 that he did not have an intellectual disability. And after the Supreme Court concluded that the CCA erred by applying “superseded medical standards” to rule on *Atkins* claims, *Moore v. Texas*, 581 U.S. 1, 11–12 (2017), Howard abandoned his *Atkins* claim.

Two years later, the district court denied Howard’s remaining claims, *Howard v. Stevens*, No. 1:13-cv-256, 2019 WL 4573640 (E.D. Tex. 2019). Howard applied for a Certificate of Appealability (“COA”), which this court denied. *Howard v. Davis*, 959 F.3d 168 (5th Cir. 2020).

On March 26, 2026, Howard’s execution was scheduled for October 7, 2026. On September 28, 2026, Howard, reviving his abandoned *Atkins* claim, sought a writ of habeas corpus in the CCA. While that writ lay pending, Howard moved in this court on October 1 to authorize consideration of a second petition and to stay his execution.

### III.

The statute of limitations precludes Howard’s second habeas application.

#### A.

The statute provides a “1-year period of limitation” to “an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court.” 28 U.S.C. § 2244(d)(1).

The limitation runs “from the latest of . . .

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is

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removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”  
28 U.S.C. § 2244(d)(1)(A)–(D).

B.

Either subsection C or D could supply the latest date for the beginning of the limitation period. But no matter how one construes the statute of limitations or the facts at bar, the one-year period has elapsed.

Subsection C provides Howard no relief. He claims the constitutional right not be executed owing to his mental disability. But the “right” was “initially recognized by the Supreme Court,” § 2244(d)(1)(C), in 2002. *Atkins*, 536 U.S. at 317. Twenty-four years have elapsed.

Subsection D fares no better. Howard’s second application relies on five events that he avers “finally rendered his claim discoverable.” “(1) the AAIDD-12’s publication on January 11, 2021; (2) the DSM-5-TR’s publication on March 18, 2022; (3) the CCA’s acknowledgement in *Ex parte Estrada*<sup>1</sup> that the AAIDD extended the developmental period to 22 in April 2025; (4) the CCA’s acknowledgement in *Ex parte Mays*<sup>2</sup> that the DSM-5-TR abandoned the relatedness requirement in March 2024; and, finally, (5) the APA’s [American Psychological Association] issuance of its guide-

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<sup>1</sup> 2025 WL 1122323, at \*1.

<sup>2</sup> 686 S.W.3d 745 (Tex. Crim. App. 2024).

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lines in August 2026.” Opp. at 20 (citing Mot. at 25–26).

Only the APA’s issuance of its guidelines was discoverable within a year of the instant application, which was filed on October 1, 2026. The other events transpired and were discoverable with reasonable diligence over a year before October 1, 2026.

And the new APA guidelines do not generate newly discoverable factual predicates that support Howard’s successive application. The new guidelines suggest that fulfilling the adaptive-deficit prong for intellectual disability requires “observation of deficits at multiple points in the developmental period.”<sup>3</sup> But as Howard notes, so did Dr. Patton, one of the doctors who concluded in 2017 that Howard was not intellectually disabled. *Id.* So, the new guidance substantiates Dr. Patton’s methods and conclusions, rather than uncovering a previously undiscoverable factual predicate. It does not fall within the ambit of § 2244(d)(1)(D) because it is not a “factual predicate of the claim.” Accordingly, the period of limitation has elapsed.

### C.

Howard postulates that he is entitled to equitable tolling because he was seeking to exhaust state court remedies and was diligent with his rights. Not so. Howard was not diligent with his rights, and there was no “extraordinary circumstance that stood in his way and prevented timely filing.” *Holland v. Florida*, [506 U.S. 631, 649](#) (2010). To the contrary, he slept on his rights. He filed his successive habeas application in state court on September 28, 2026, half a year *after* his execution was scheduled and less than two weeks before his scheduled execution. He filed his motions before this court three days later. This was even though many of the events that Howard

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<sup>3</sup> Mot. 16 (citing APA, GUIDELINES ON DIAGNOSIS OF INTELLECTUAL DISABILITY IN FORENSIC SETTINGS, GUIDELINES 6.2, 6.6 (Aug. 2026)).

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argues renders his claims discoverable transpired *years* before September 28, 2026. Howard acted with laches, weighing against equitable relief.<sup>4</sup>

Howard also behaved with unclean hands, further foreclosing equitable tolling, an equitable remedy. A party's hands are unclean when they are "dirtied . . . in acquiring the right he now asserts, or that the manner of dirtying renders inequitable the assertion of such rights against the defendant."<sup>5</sup> Examples include "transferring property to evade suit by creditors," "abusing a legal right or power,"<sup>6</sup> and unreasonable delays to improve a party's litigating position, *see LULAC v. Abbott*, [809 F. Supp. 3d 502, 620](#) (W.D. Tex. 2025) (SMITH, J., dissenting). Equity disfavors parties with unclean hands. *Id.*

Howard acted with unclean hands. By waiting until the eleventh hour to file his application and motion—when he had the opportunity to file these motions years before—Howard afforded this court minimal time to respond to his arguments. And by moving at the eleventh hour, Howard manufactured a sense of urgency that could have been averted by an earlier filing. Given equity's consciousness toward the (in)equitable behavior of the parties, equitable tolling in Howard's favor is unwarranted.

#### IV.

But assume that limitations raises no obstacle. Even then, Howard's motion fails because his *Atkins* claim was previously presented.

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<sup>4</sup> See Samuel L. Bray, *System of Equitable Remedies*, 63 UCLA L. REV. 530, 581 (2016) ("laches . . . is a defense against equitable claims brought with unreasonable delay.")

<sup>5</sup> William P. Baude & Samuel L. Bray, *When the Executive Has Unclean Hands*, 135 YALE L.J. F. 567, 571 (2026) (quoting *Republic Molding Corp. v. B.W. Photo Utils.*, [319 F.2d 347, 349](#) (9th Cir. 1963)).

<sup>6</sup> *Id.* (citations omitted).

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A.

“A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.” § 2244(b)(1). In other words, even if a second habeas application satisfies the *prima facie* requirement for consideration under § 2244(b)(3)(C), it could still be dismissed if it was presented in a prior application.

B.

Howard’s claim was presented in his prior habeas application, foreclosing consideration under § 2244(b)(1).

Howard offers two reasons why his instant *Atkins* claim was not “presented in a prior application,” § 2244(b)(1). *First*, he maintains that his *Atkins* claim was not presented in a prior application because he had abandoned it; no court has adjudicated it. *Second*, he posits that his current *Atkins* claim is fundamentally different from his first petition’s claim because it relies on a new factual predicate: updated clinical standards.

Both arguments prove unavailing. Howard’s first argument does violence to the text of § 2244. It requires the dismissal of claims that were “*presented* in a prior application.” § 2244(b)(1). Presentation is distinct from adjudication: Indeed, § 2244 contemplates the distinction.<sup>7</sup> Howard plainly presented an *Atkins* claim in his first habeas petition. His *Atkins* claim was funded, developed, and briefed before it was abandoned.<sup>8</sup> In turn, this *Atkins*

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<sup>7</sup> See § 2244(c) (providing that “all issues of law or fact with respect to an asserted denial of federal right which ground for discharge in a habeas corpus proceeding, actually *adjudicated* by the Supreme Court therein” “shall be conclusive.”) (emphasis added).

<sup>8</sup> Further, the Seventh Circuit has rejected the argument that § 2244(b)(1) does not apply to claims abandoned before adjudication. See *Felder v. McVicar*, [113 F.3d 696, 698](#) (7th Cir. 1997).

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claim is barred by § 2244(b)(1).

Precedent easily forecloses Howard’s second argument. His argument proceeds that his current *Atkins* claim is “fundamentally different” from his previous claim because it relies on new clinical standards. In other words, the clinical standards provide new factual support for his *Atkins* claim: Howard is relying on the same legal standards for determining intellectual disability as set out in *Atkins*. But in *In re Coleman*, [768 F.3d 367](#) (5th Cir. 2014), we found that § 2244(b)(1) bars the use of new facts to support the same legal claim. As we wrote, Coleman raised “essentially the same claim . . . albeit with additional affidavits, and thus her claim is barred as previously raised in under section 2244(b)(1).” *Id.* at 373. As did the petitioner in *Coleman*, Howard relies on new facts to satisfy old law. And as in *Coleman*, § 2244(b)(1) bars consideration of Howard’s application.

### C.

We need not address the issue of whether the new diagnostic standards generated a new, retroactive, and previously unavailable rule of constitutional law. Howard’s prior presentation of an *Atkins* claim independently precludes consideration of the instant application.<sup>9</sup>

### V.

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

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<sup>9</sup> Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579, 595](#) (FRANKFURTER, J., concurring) (“A basic rule is the duty of the Court not to pass on a constitutional issue at all, however narrowly it may be confined, if the case may, as a matter of intellectual honesty, be decided without even considering delicate problems of power under the Constitution.”).

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favorable Supreme Court ruling proves insufficient to warrant a stay.

To begin, this court has foreclosed stays premised on the fact that the Supreme Court granted certiorari. Howard's argument to the contrary is unavailing. As this court repeatedly held, "[t]he Court's grant of certiorari in a capital case does not allow us to deviate from circuit law, nor is it grounds for a stay of execution."<sup>10</sup>

But even if we apply the *Nken* factors for a discretionary stay,<sup>11</sup> Howard's motion for a stay still fails. Howard has not demonstrated a likelihood of success on the merits. As aforementioned, his successive habeas petition is barred by the statute of limitations. And it is barred by the fact that it makes a previously presented claim.

The state's and the public's interests also weigh against a stay. A stay "is not available as a matter of right, and equity must be sensitive to the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts." *Hill v. McDonough*, 547 U.S. 573, 584 (2006) (citation omitted). Indeed, "[b]oth the State and the victims of crimes have an important interest in the timely enforcement of a sentence." *Id.*

And because a stay is an equitable remedy, *see id.*, the equitable defenses of laches and unclean hands apply. As aforementioned, Howard

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

<sup>11</sup> *Nken v. Holder*, 556 U.S. 418, 438 (2009) ("(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.") (citation omitted).

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acted with laches and unclean hands. His inequitable behavior further disfavors a stay.<sup>12</sup>

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

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The motion for authorization and the motion for a stay of execution are DENIED.

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<sup>12</sup> See *Nelson v. Campbell*, [541 U.S. 637](#), 649–50 (2004) (holding that courts considering stays sit in equity and “must take into consideration the State’s strong interest in proceeding with its judgment and . . . *attempt[s] at manipulation.*”) (citation modified).