No. 25-1003

In the Supreme Court of the United States

ERIC GUERRERO, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,
Petitioner,

v.

DEXTER JOHNSON,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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CAPITAL CASE

QUESTION PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits successive habeas applications by state prisoners with only two narrow exceptions, including for claims that "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). Near-identical language allows federal prisoners to file successive habeas motions that contain "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2).

The question presented is:

Whether a claim relies on a "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" when this Court announced the rule before the filing of the prisoner's prior federal habeas petition.

PARTIES TO THE PROCEEDING

Respondent Dexter Johnson is a Texas state prisoner under a sentence of death. He was the petitioner in the United States District Court for the Southern District of Texas and the appellee in the United States Court of Appeals for the Fifth Circuit.

Petitioner Eric Guerrero is the Director of the Texas Department of Criminal Justice, Correctional Institutions Division. He was the respondent in the United States District Court for the Southern District of Texas and the appellant in the United States Court of Appeals for the Fifth Circuit.

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INTRODUCTION

To promote finality of criminal convictions, AEDPA places strict limits on second or successive habeas petitions. 28 U.S.C. § 2244(b)(2) (state prisoners); *id.* § 2255(h) (federal prisoners).[1]

Section 2244(b)(2)(A) governs when changes in the law allow state prisoners to assert claims in second or successive applications. A claim may be asserted if it "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244(b)(2)(A).

Respondent Dexter Johnson's *Atkins* claim does not rely on a change in the law. This Court decided *Atkins v. Virginia* long before Johnson filed his initial federal habeas application, before Johnson's conviction became final on direct review, and before Johnson even committed the capital murder for which he was sentenced to death.

Johnson's claim relies instead on a new factual predicate: the publication of a new diagnostic manual by the American Psychiatric Association (the DSM-5), under which he was diagnosed with an intellectual disability. App. 3. But a claim in a second or successive application based on a new factual predicate must satisfy § 2244(b)(2)(B), which Johnson's *Atkins* claim does not, most obviously because his new evidence has no bearing on whether the jury would have found him "guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

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[1] This brief uses "petition" to include both habeas applications filed by state prisoners, 28 U.S.C. §§ 2244, 2254, and motions filed by federal prisoners, *id.* § 2255.

The Fifth Circuit's interpretation of § 2244(b)(2)(A)—"equat[ing] legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues," Pet. App. 61a—erases the line between claims based on legal developments and claims based on factual developments, vitiating the requirements Congress set forth in § 2244(b)(2)(B).

Federal habeas review of state convictions "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (citation omitted). The intrusion on federalism and comity only increases "when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *McCleskey v. Zant*, 499 U.S. 467, 492 (1991). By expanding the circumstances in which a state prisoner can file a second or successive habeas application, the Fifth Circuit's interpretation undermines Congress's policy judgment regarding the proper balance between finality and error correction. *Jones v. Hendrix*, 599 U.S. 465, 491 (2023).

This Court should defer to the balance struck by Congress, follow AEDPA's plain text and structure, and hold that Johnson's *Atkins* claim does not "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the motion to dismiss is unreported but reproduced at Pet. App. 1a–6a. The memorandum opinion and order of the district court denying the motion to dismiss is unreported but reproduced at Pet. App. 10a–46a. The opinion of the United States Court of Appeals for the Fifth Circuit authorizing Johnson to file a second or successive habeas application, 935 F.3d 284 (5th Cir. 2019), is reproduced at Pet. App. 47a–66a. The order denying rehearing en banc and the dissent from the denial, 164 F.4th 398 (5th Cir. 2026), are reproduced at Pet. App. 67a–73a.

JURISDICTION

The Fifth Circuit entered its judgment on July 23, 2025, and it denied petitioner's timely filed petition for rehearing en banc on January 12, 2026. Petitioner filed a timely petition for writ of certiorari on February 19, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

A. Legal Background

The Antiterrorism and Effective Death Penalty Act of 1996 governs federal courts' issuance of the writ of habeas corpus. Prisoners convicted of state offenses may file applications for habeas relief in federal court under 28 U.S.C. § 2254. Before seeking relief in the federal courts, state prisoners must first exhaust remedies in the state courts. *Id.* § 2254(b).

AEDPA strictly limits the circumstances under which state prisoners can present claims in second or successive applications. "[A] state prisoner always gets one chance to bring a federal habeas challenge to his conviction. But after that, the road gets rockier." *Banister v. Davis*, 590 U.S. 504, 509 (2020) (internal citation omitted); *see also Rivers v. Guerrero*, 605 U.S. 443, 446 (2025) ("Before a federal court can address a petitioner's second or successive federal habeas filing on the merits, the incarcerated filer must clear strict procedural hurdles[.]").

A claim that was presented in a prior application must be dismissed. 28 U.S.C. § 2244(b)(1). A claim that was not presented in a prior application must be dismissed unless it satisfies one of two exceptions.

First, a claim in a second or successive application may avoid dismissal if "the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2244(b)(2)(A).

Second, a claim in a second or successive application may avoid dismissal if "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" and "the facts underlying the claim . . . would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." *Id.* § 2244(b)(2)(B).

Before filing a second or successive application in a district court, a state prisoner must receive authorization from a court of appeals. *Id.* § 2244(b)(3)(A). The court of appeals must grant or deny the motion within 30 days of

its filing. *Id.* § 2244(b)(3)(D). These authorization decisions "shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).[2]

Similar, although not identical, limitations apply to federal prisoners. First, federal prisoners may file a second or successive motion that "contain[s] . . . a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2).

The operative language is identical to § 2244(b)(2)(A), and the courts of appeals have held that the standards are identical. *See, e.g.*, *In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017). Courts of appeals often rely on cases involving one provision when addressing the other. *See, e.g.*, *In re Olopade*, 403 F.3d 159, 162 (3d Cir. 2005). This Court's holding interpreting § 2244(b)(2)(A) will necessarily guide courts in applying § 2255(h).

Second, like state prisoners, federal prisoners can file a second or successive motion based on new facts, although "the requirements for federal prisoners are more lenient." *Bowe v. United States*, 607 U.S. 13, 34 (2026); *see also id.* at 38 (explaining that state prisoners' ability to seek relief for "claims based on new facts" is "more limited" than federal prisoners').

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[2] At least two circuits treat these authorization orders as binding future panels. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018) ("[L]aw established in published three-judge orders issued pursuant to 28 U.S.C. § 2244(b) in the context of applications for leave to file second or successive § 2255 motions is binding precedent on all subsequent panels of this Court[.]"), *abrogated on other grounds by United States v. Taylor*, 596 U.S. 845 (2022); *see also* Pet. App. 61a (describing "the *Cathey* [authorization] decision" as "precedentially determin[ing]" the statutory interpretation).

Like state prisoners, federal prisoners must receive authorization to file successive motions, 28 U.S.C. § 2255(h), although "federal prisoners are not prohibited from seeking certiorari from a panel's denial of authorization to file a second or successive motion," *Bowe*, 607 U.S. at 35–36. And federal prisoners are not subject to the old-claim bar of § 2244(b)(1). *Id.* at 41.

Authorization from a court of appeals reflects only a preliminary determination that a prisoner has made a prima facie showing of satisfying the requirements for a successive petition. 28 U.S.C. § 2244(b)(3)(C). A district court must "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." *Id.* § 2244(b)(4). "Put differently, once a second or successive application is certified, § 2244(b)(4) tells a district court to doublecheck that the application satisfies § 2244." *Bowe*, 607 U.S. at 32.

B. Factual Background

More than twenty years ago, in June 2006, Respondent Dexter Johnson kidnapped, raped, and murdered Maria Aparece. *Johnson v. State*, No. AP-75,749, 2010 WL 359018, at *1 (Tex. Crim. App. Jan. 27, 2010).

In the early morning, Johnson and four accomplices were driving around looking for someone to rob. *Id.* They came across Ms. Aparece, a 23-year-old college student who lived with her parents, sitting in her car with her boyfriend, Huy Ngo. *Id.* After Johnson forced his way into the car by threatening Ms. Aparece with a shotgun, he drove the couple around, demanding money from them. *Id.* He and his accomplices eventually stopped at a

wooded area, where Johnson raped Ms. Aparece in the car while an accomplice held Mr. Ngo at gunpoint and "taunted him about what [Johnson] was doing to his girlfriend." *Id.* Johnson and an accomplice "marched [them] into the woods and shot them each in the head," *id.*, killing them.

Johnson admitted to "ordering the couple out of the car with a shotgun and driving Ms. Aparece's car during the robbery," "rap[ing] Ms. Aparece," and "fir[ing] a .25 pistol" that "may have hit" Mr. Ngo. *Johnson v. Stephens*, No. H-11-2466, 2013 WL 4482865, at *2 (S.D. Tex. Aug. 19, 2013). Following the crime, Johnson made multiple purchases on Ms. Aparece's credit card. *Johnson*, 2010 WL 359018, at *1. He told one of his accomplices "that he 'had to go ahead and off them people,' because 'they didn't want to give him no money.'" *Johnson*, 2013 WL 4482865, at *2.

This murder "was only one episode in [Johnson's] escalating pattern of lawlessness," including similar kidnappings and robberies. *Id.* at *3. "The day after the murder Johnson committed a robbery while driving Ms. Aparece's car." *Id.* During the same time period as Ms. Aparece's murder, Johnson participated in three other killings. *Id.* Johnson bragged to one of his accomplices that "killing people is what he do[es]." *Id.* at *2.

C. Procedural History

Johnson was convicted of capital murder in June 2007 and sentenced to death. *See Johnson*, 2010 WL 359018, at *1 (affirming the conviction on direct appeal); *see also Johnson*, 2013 WL 4482865, at *3 ("Johnson's attorneys faced a difficult challenge in defending against a death sentence.").

Four years before Johnson committed his crimes—and almost eight years before his conviction became final on direct appeal—this Court held in *Atkins v. Virginia* that the Eighth Amendment prohibits the execution of the intellectually disabled. 536 U.S. 304 (2002).

At trial, Johnson introduced evidence about alleged mental health issues, but his expert, Dr. Dale Watson, opined that Johnson was not intellectually disabled. App. 233 & n.2 (noting that he determined Johnson's IQ was between 74 and 88 and that "Johnson did not have obvious deficits in adaptive behavior").

Johnson did not raise an *Atkins* claim in his initial application for a writ of habeas corpus in state court. *Ex parte Johnson*, No. WR-73,600-01, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010) (per curiam) (denying relief).

Nor did Johnson include an *Atkins* claim in his initial federal application. Johnson instead argued that he "is 'borderline [intellectually disabled]'" and urged that the principles of *Atkins* should be extended to the mentally ill. *Johnson v. Stephens*, 617 F. App'x 293, 303 (5th Cir. 2015) (per curiam). The Fifth Circuit noted that "neither the Supreme Court nor this circuit has extended the *Atkins*/*Roper* protections to the mentally ill whose illness does not reach that of incompetency or insanity." *Id.* at 304. This Court denied Johnson's petition for writ of certiorari. *Johnson v. Stephens*, 136 S. Ct. 980 (2016).

Johnson's execution was first set for May 2, 2019. Pet. App. 17a. Weeks before his scheduled execution, Johnson filed a state habeas application asserting an *Atkins* claim. ROA.1773–87. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ. *Ex parte Johnson*, No. WR-73,600-02, 2019

WL 1915204 (Tex. Crim. App. Apr. 29, 2019) (per curiam). Johnson's execution was stayed by the federal district court based on the appointment of additional counsel and his execution rescheduled for August 15, 2019. App. 243.

One week before his new execution date, on August 8, Johnson moved in the Fifth Circuit for authorization to file a successive federal habeas application presenting an *Atkins* claim. Pet. App. 47a.

Johnson based this claim on the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (the DSM-5), which was published in May 2013. *See* App. 25 ("[T]he factual predicate for the claim relies on the publication of the DSM-5[.]"); App. 30 ("Mr. Johnson's claim hinges on the publication of the DSM-5 to make his claim available."). The DSM-5 substantially revised the diagnostic approach to intellectual disability, deemphasizing IQ scoring and placing greater emphasis on clinical judgment and adaptive-functioning deficits. Pet. App. 15a.

After this Court vacated a judgment denying habeas relief and overturned Texas's standard for evaluating intellectual disability claims, *Moore v. Texas*, 581 U.S. 1 (2017), the Texas Court of Criminal Appeals adopted the DSM-5 as the governing standard for intellectual disability claims in state proceedings, *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018).

In April 2019, six years after the publication of the DSM-5, Dr. Greg Hupp administered IQ tests that measured Johnson's IQ as 70 and concluded that Johnson "meets the diagnostic criteria . . . as an individual with an Intellectual Disability, Mild." App.

107–108. Dr. Hupp also based his conclusion on affidavits submitted by Johnson's family members. App. 109–110.[3] In June 2019, Johnson was examined by Dr. Daniel Martell, who issued a report on July 31, 2019, stating that Johnson "meets the criteria for a diagnosis of Intellectual Disability." App. 106. Dr. Martell did not administer IQ tests. App. 63–65. Johnson's trial expert, Dr. Watson, also opined that under the DSM-5, Johnson's scores on the IQ tests that Dr. Watson administered "would not automatically preclude a diagnosis of Intellectual Disability." App. 130.

The Fifth Circuit granted authorization, holding that § 2244(b)(2)(A) permitted Johnson to assert an *Atkins* claim because it "is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues." Pet. App. 61a (citing *In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (per curiam)). The Director could not seek rehearing or petition this Court for certiorari. 28 U.S.C. § 2244(b)(3)(E).

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[3] In state habeas proceedings, the State submitted an affidavit from Dr. J. Randall Price, who opined that "Dr. Hupp's methodology of assessing adaptive behavior . . . is inconsistent with the standardized administration of the Vineland-III, and contrary to published best practices for the assessment of adaptive behavior[.]" ROA.1872–73. Specifically, Dr. Hupp erred by "obtaining the data . . . from affidavits rather than by *interviewing* informants"; by "using the affidavits of only informants who are likely to be *biased* toward [Johnson]"; and by "the use of *retrospective* reporting by the informants." ROA.1873. "Family members and close friends are often poor choices for informants in capital murder cases as they typically do not want the defendant to be subject to the death penalty." ROA.1873. Dr. Price opined that Dr. Hupp's quantitative results "are invalid and unreliable." ROA.1873.

In the district court, the Director moved to dismiss Johnson's application under § 2244(b)(4). Pet. App. 2a. Following an evidentiary hearing, the district court denied the motion in October 2022. Pet. App. 46a. The district court recognized that the Fifth Circuit "has read a *futility* exception into section 2244(b)(2)(A)" and that it was bound to apply this "judicially created exception" to AEDPA. Pet. App. 25a & n.10.[4]

At the Director's request, the district court certified its order denying the motion to dismiss for interlocutory appeal. 28 U.S.C. § 1292(b); Pet. App. 2a–3a. The Fifth Circuit accepted the interlocutory appeal, and in the decision below, the same panel that issued the authorization order affirmed the denial of the motion to dismiss, Pet. App. 1a, 6a, reiterating its view that the "interpretation of 'previously unavailable' in *Cathey* [i]s the correct interpretation," Pet. App. 6a.

The Director petitioned for rehearing en banc, which the Fifth Circuit denied by a vote of 9 to 7, with Judge Oldham not participating. Pet. App. 68a.

Judge Ho dissented from the denial of rehearing en banc. Pet. App. 68a. The dissent explains that Johnson's pending habeas application does not satisfy AEDPA's requirements: "*Atkins* isn't a new rule of constitutional law. It's a decades old decision, issued years before Johnson brutally murdered Maria Aparece." Pet. App. 71a. The dissent recognizes that *Atkins* was not "previously unavailable": Because Johnson's second application relies on the DSM-5 and later expert

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[4] Although Johnson's motion for authorization also relied on § 2244(b)(2)(B), his response to the Director's motion to dismiss relied only on § 2244(b)(2)(A). ROA.431–37.

evidence, it raises a claim based on new facts, not new law. Pet. App. 71a–73a.

Because Johnson seeks to raise a claim based on new facts, the dissent reasons, he was required to satisfy § 2244(b)(2)(B), which permits successive applications only when, *inter alia*, the evidence concerns innocence of the underlying offense. *See* 28 U.S.C. § 2244(b)(2)(B)(ii) (requiring that the facts underlying the claim "would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense"). Section 2244(b)(2)(B) is unavailable to Johnson, who seeks to challenge only his sentence. Pet. App. 71a–73a. The dissenting judges would have granted rehearing en banc to correct *In re Cathey*, which "is wrong" and "has been rejected by at least one other circuit." Pet. App. 72a–73a.

This Court granted the Director's petition for writ of certiorari.

SUMMARY OF ARGUMENT

I. The text and structure of AEDPA demonstrate that whether a "new rule of constitutional law . . . was previously unavailable" depends on when this Court announced the rule, not whether a claim under the rule would have succeeded or whether the petitioner possessed the factual predicate to assert a successful claim relying on the rule.

When this Court announces a new rule of constitutional law made retroactive to cases on collateral review after the prisoner's previous federal habeas application, the rule was "previously unavailable."

When, as in this case, this Court does so before the prisoner's previous federal habeas application, the rule was not "previously unavailable."

A. Section 2244(b)(2)(A) requires that the "new rule" have been "previously unavailable." "New rule" is the last and only reasonable antecedent. Section 2255(h) confirms this understanding because it also requires a "new rule . . . that was previously unavailable" without mentioning "claim." The Fifth Circuit erred by framing the inquiry as whether "a *claim* . . . [could] be considered available." *In re Cathey*, 857 F.3d at 232 (emphasis added).

A "rule" is "available" when it is "ready for immediate use." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2004). A "new rule" becomes available after it has been announced by this Court. Thus, a rule was "previously unavailable" if this Court announced the rule after entry of a final judgment in the prisoner's previous federal habeas application.

The understanding that "previously unavailable" depends on the state of the law at the time of the prisoner's previous habeas application is consistent with the meaning of "new rule of constitutional law," which depends on the state of the law at the time of the prisoner's direct appeal. *See Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality op.) (explaining that "new rule of constitutional law" depends on "precedent existing at the time the defendant's conviction became final").

Applying § 2244(b)(2)(A) to the facts of this case is straightforward: Because *Atkins* was decided and made retroactive years before Johnson committed the crime of conviction, Johnson's *Atkins* claim does not "rel[y] on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

B. AEDPA's structure reinforces this understanding of its text. Congress provided two avenues for claims to be asserted in second or successive applications: § 2244(b)(2)(A) governs claims based on legal developments, and § 2244(b)(2)(B) governs claims based on factual developments. *See also id.* § 2255(h) (parallel structure for federal prisoners).

The negative inference from § 2244(b)(2)(B) is that a claim that has become meritorious because of a new factual predicate cannot be raised unless it satisfies § 2244(b)(2)(B). *Cf. Jones*, 599 U.S. at 477 (applying the "straightforward negative inference from § 2255(h)").

II. The Fifth Circuit erred by interpreting § 2244(b)(2)(A) to include a futility exception, in which "a claim must have some possibility of merit to be considered available." *In re Cathey*, 857 F.3d at 232. Section 2244(b)(2)(A) requires that the "rule" have been unavailable, not the "claim."

AEDPA does not allow assertion of any claim that has become meritorious. Congress specified "two limited conditions" for claims in second or successive petitions. *Jones*, 599 U.S. at 480 (discussing § 2255(h)).

Johnson's claim illustrates how the Fifth Circuit's interpretation allows prisoners to circumvent AEDPA's limits. His *Atkins* claim primarily relies on a new factual development: publication of the DSM-5. But Johnson cannot raise this claim under § 2244(b)(2)(B), including because these facts are unrelated to whether he would have been found "guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii).

The Fifth Circuit's approach also renders "new rule" surplusage. The holding of *Atkins* was "apparent to all reasonable jurists" at the time Johnson's conviction became final. *Edwards v. Vannoy*, 593 U.S. 255, 265 (2021) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997)).

III. The strict limits placed by Congress on second or successive applications by state prisoners serve important goals of finality and comity. "Reexamination of state convictions on federal habeas frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *McCleskey*, 499 U.S. at 491 (internal quotation marks omitted).

The Fifth Circuit's interpretation of § 2244(b)(2)(A) upsets the balance between finality and error correction struck by Congress, and this Court should reverse.

ARGUMENT

I. Whether a Rule Constitutes a "New Rule . . . That Was Previously Unavailable" Depends on When This Court Announced the Rule.

Section 2244(b)(2)(A) sets forth the circumstances under which state prisoners may raise claims in second or successive applications as a result of changes in the law. A prisoner can raise a claim that "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

This case turns on the meaning of "previously unavailable." AEDPA's text and structure show that whether a rule was "previously unavailable" depends on when this Court announced the "new rule of constitutional law made retroactive to cases on collateral review."[5]

If this Court does so *after* entry of a final judgment with respect to the prisoner's previous federal habeas application, then the rule was "previously unavailable."[6]

If, as in this case, this Court did so *before* the filing of the prisoner's previous federal habeas application, then the rule was previously available to the prisoner.

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[5] Because *Atkins* was made retroactive to cases on collateral review by this Court before Johnson's initial federal habeas application, this Court need not address the circumstances in which this Court announces a new rule in one decision and makes the rule retroactive to cases on collateral review in a subsequent decision.

[6] "Once the judgment has been entered with respect to the initial habeas petition, a second-in-time filing that makes new habeas claims generally qualifies as a second or successive petition for § 2244(b) purposes." *Rivers*, 605 U.S. at 457.

If this Court did so *while* the prisoner's previous federal habeas application was pending, then whether a rule was previously available depends on whether, practically, the prisoner could have amended the pending application to assert a claim relying on the rule.

Because this Court announced the rule of *Atkins* and made it retroactive to cases on collateral review even before Johnson committed his crimes, Johnson's *Atkins* claim does not "rel[y] on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

A. A rule was previously available if this Court announced the rule before the prisoner's prior federal habeas application.

1. Section 2244(b)(2)(A) requires that the "rule" on which the claim relies have been "previously unavailable."

Under the last-antecedent rule, "the correct antecedent is usually 'the nearest reasonable' one." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 205 (2022) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 144 (2012)). "[C]onstruing a statute in accord with the rule is 'quite sensible as a matter of grammar.'" *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (quoting *Nobelman v. Am. Sav. Bank,* 508 U.S. 324, 330 (1993)).

In the phrase "new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), "rule" is a reasonable antecedent for "that was previously unavailable," so the last-antecedent rule indicates that it is the correct one.

Indeed, "rule" is the only reasonable antecedent for "that was previously unavailable." Eliding the intervening clauses between the phrase and "claim" would make the statute grammatically incorrect: "A claim . . . shall be dismissed unless the applicant shows that the claim . . . that was previously unavailable." *Id.* Had Congress intended "was previously unavailable" to modify "claim," it would have written "and" rather than "that," requiring the prisoner to show that "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, ~~that~~ **and** was previously unavailable."

This understanding of § 2244(b)(2)(A) is confirmed by § 2255(h)(2), which refers to a motion that contains "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Id.* § 2255(h)(2). In § 2255(h)(2), "that was previously unavailable" necessarily modifies "rule" because there is no other possible antecedent. The relevant portions of § 2255(h)(2) and § 2244(b)(2)(A) are identical, and because "that was previously unavailable" modifies "rule" in the former, it modifies "rule" in the latter as well. *In re Olopade*, 403 F.3d at 162 n.3 ("The relevant portion of § 2244(b)(2), however, is identical to the section of § 2255 that is implicated in this case.").

The Fifth Circuit erroneously focused on the availability of the "claim," not the "rule." *See In re Cathey*, 857 F.3d at 232 (reasoning that "a *claim* must have some possibility of merit to be considered available" (emphasis added)).[7] But the ability to assert a claim in a

[7] This Court did the same in dicta, imprecisely paraphrasing § 2244(b)(2)(A) as requiring that "the claim must have been

second or successive application under § 2244(b)(2)(A) does not turn on whether the *claim* was previously unavailable: it turns on whether the *rule* was previously unavailable.

2. In this context, a rule is "available" when it is "present or ready for immediate use." Merriam-Webster's Collegiate Dictionary 84 (11th ed. 2004); *see also* Merriam-Webster's Collegiate Dictionary 79 (10th ed. 1994) (same); Webster's New World College Dictionary 94 (4th ed. 2002) ("that one can avail oneself of; that can be used; usable"). An object—or a rule—can be available even when it is not needed or useful. A carpenter, for example, likely has a hammer "available," even when working on a task for which a hammer would not be necessary or useful.

This Court similarly described "the ordinary meaning of the word 'available' [a]s 'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Ross v. Blake*, 578 U.S. 632, 642 (2016) (quoting *Booth v. Churner*, 532 U.S. 731, 737–38 (2001)). Of course, context matters, and whether an "administrative remed[y]" is available for purposes of the Prison Litigation Reform Act is a different inquiry than whether a "rule" was previously available under

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'previously unavailable.'" *Tyler v. Cain*, 533 U.S. 656, 662 (2001). That case concerned only the retroactivity requirement, not the meaning of "previously unavailable." *See id.* ("[S]econd, the rule must have been 'made retroactive to cases on collateral review by the Supreme Court[.]' . . . In this case, the parties ask us to interpret only the second requirement[.]").

Later in the same paragraph, this Court correctly addressed whether the "rule" at issue was previously unavailable: "[R]espondent does not dispute that *Cage* created a 'new rule' that was 'previously unavailable.'" *Id.*

§ 2244(b)(2)(A).[8] *See Rivers*, 605 U.S. at 455 (noting the "different animating purposes" of limitations and exhaustion rules governing initial and successive applications).

Under the ordinary definition of "available," the rule of *Atkins* was available to Johnson in his initial application because the rule was "ready for immediate use." Whether § 2244(b)(2)(A) permits a claim depends on whether a rule is ready for use by a prisoner, not whether a claim asserted under the rule would have been successful. In discussing § 2255(h)(2), the Fourth Circuit correctly explained that "[p]reviously unavailable" "refers to the existence of the 'new rule of constitutional law,' not to a particular prisoner's ability to utilize or prevail on it." *Slusser v. Vereen*, 36 F.4th 590, 596 (4th Cir. 2022); *see also Gray-Bey v. United States*, 209 F.3d 986, 988 (7th Cir. 2000) (per curiam) ("[F]or purposes of § 2255[(h)](2) a rule is 'unavailable' until the Supreme Court renders its decision[.]").

In the context of limiting second or successive applications, "previously" refers to "a prior application."

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[8] In *Booth*, this Court held that a prisoner seeking monetary relief had to exhaust administrative remedies that could not provide that relief. 532 U.S. at 740–41. Looking to the words "available," "remedies," and "exhausted," this Court held that although "the modifier 'available' requires the possibility of some relief for the action complained of[,] . . . the word 'exhausted' has a decidedly procedural emphasis." *Id.* at 738–39; *see also* 42 U.S.C. § 1997e(a) (barring a lawsuit "until such administrative remedies as are available are exhausted"). The precise meaning of "available" cannot be understood in isolation from the noun being modified. The availability of a remedy or procedure is different than the availability of a "rule." The Fifth Circuit's initial error was focusing on the availability of a "claim" rather than a "rule."

28 U.S.C. § 2244(b)(2). The Fourth Circuit explained that "previously" refers to "the last federal proceeding—including a PFA [petition for authorization] proceeding—in which the applicant challenged the same criminal judgment." *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004); *see also* Brian R. Means, Federal Habeas Manual § 11:38 (2026) ("At a minimum, 'previously' requires that the new rule be established after the time of the filing of the prior federal habeas petition.").

Whether a rule was "previously unavailable" depends on "whether the petitioner could have relied on [a] 'new rule' in his initial habeas petition," not "whether the claim would have been a winning one at the time of the first petition." *In re Bowles*, 935 F.3d 1210, 1218–19 (11th Cir. 2019); *see also In re Graham*, 61 F.4th 433, 443 n.5 (4th Cir. 2023) (quoting *In re Bowles*, 935 F.3d at 1218, regarding the definition of "previously unavailable"). "[R]ules that were established at the time of the applicant's last [federal proceeding] were not 'previously unavailable.'" *In re Williams*, 364 F.3d at 239.

3. Interpreting "previously unavailable" to depend on when this Court's decisions made a rule ready for use is consistent with another portion of § 2244(b)(2)(A). A rule constitutes a "new rule of constitutional law" with respect to a prisoner "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (plurality op.); *accord Chaidez v. United States*, 568 U.S. 342, 347 (2013) (same).

In the same way that "new rule" depends on the state of the law at the time the prisoner's conviction became final on direct appeal, "previously unavailable" depends on the law at the time of the prisoner's previous federal

habeas application. Both reinforce that § 2244(b)(2)(A) addresses when legal developments permit prisoners to raise claims in second or successive applications.

4. Under a correct understanding, determining whether a new rule "was previously unavailable" ordinarily requires only comparing the timing of this Court's announcement of the rule with the timing of the prisoner's previous federal habeas application.

A rule was "previously unavailable" if this Court announced it after entry of a final judgment in a prisoner's previous application: "In cases before us where the applicant raises an *Atkins* claim for the first time in a successive federal habeas petition, the applicant has typically filed their federal petition before *Atkins* was decided, making the *Atkins* rule 'previously unavailable' at the time of their first federal petition." *Mathis v. Thaler*, 616 F.3d 461, 467 (5th Cir. 2010); *see also In re Rendelman*, 129 F.4th 248, 254 (4th Cir. 2025) ("As *Counterman* was decided in 2023, its rule was unavailable to [the habeas petitioner] during the 2015 proceeding."); *In re Thomas*, 988 F.3d 783, 790 (4th Cir. 2021) ("*Davis* was not decided until several months later. So at the time of his last motion, Thomas did not have the opportunity to bring a claim based on *Davis*.").

In contrast, a new rule of constitutional law announced by this Court before a prisoner's previous application does not constitute a "previously unavailable" rule. *See, e.g.*, *United States v. Moore*, 589 F. App'x 414, 415 (10th Cir. 2015) ("[N]one of the remaining decisions created a 'new rule' that was 'previously unavailable' to Mr. Moore: *Castillo* was decided before he filed his first § 2255 motion, and

Bousley and *Bailey* were decided before his conviction.").

In this case, because *Atkins* was decided and made retroactive years before Johnson committed his crimes (and even longer before his previous federal habeas application), Johnson's *Atkins* claim does not "rel[y] on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

This case does not present the intermediate situation in which this Court announces a new rule of constitutional law made retroactive to cases on collateral review while a prisoner's federal habeas application is pending. In that circumstance, availability turns on whether the prisoner could, as a practical matter, have amended the pending application to assert a claim relying on the new rule. *See In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015) ("If the new rule was announced while the original § 2254 petition was pending, the applicant must demonstrate that it was not feasible to amend his or her pending petition to include the new claim."); *see also In re Hill*, 113 F.3d 181, 183 (11th Cir. 1997) (per curiam).

B. The structure of § 2244(b)(2) reinforces that § 2244(b)(2)(A) does not depend on when a prisoner discovered a claim's factual predicate.

1. Congress provided two different avenues for claims to be asserted in second or successive applications: § 2244(b)(2)(A) governs claims based on legal developments, and § 2244(b)(2)(B) governs claims based on factual developments.

A parallel structure applies to federal prisoners: § 2255(h)(2) governs claims in second or successive motions based on legal developments, and § 2255(h)(1) governs claims based on factual developments.

For factual developments, state prisoners may assert a new claim in a second or successive application if:

> (i) [T]he factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2)(B). Federal prisoners may file a second or successive motion that contains "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense." *Id.* § 2255(h)(1).

The negative inference from § 2244(b)(2)(B) is that a claim that has become meritorious because of factual developments cannot proceed unless it satisfies this standard. "Congress knew how to provide for second and successive petitions based on factual developments" and chose to allow them only in narrow circumstances. *In re Bowles*, 935 F.3d at 1218.

Because it deals with factual developments, § 2244(b)(2)(B) contains an express standard of proof: the facts underlying the claims must "be sufficient to

establish by clear and convincing evidence" the petitioner's innocence of the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(ii). In contrast, § 2244(b)(2)(A) does not contain "clear and convincing evidence" or any other standard of proof.

Each section plays a distinct role: § 2244(b)(2)(A) provides the exclusive standard when a prisoner seeks to assert a claim in a second or successive application based on legal developments, and § 2244(b)(2)(B) provides the exclusive standard when a prisoner seeks to assert a claim in a second or successive application based on factual developments. To the extent that a prisoner contends that a claim has now become meritorious because of new evidence, presenting the claim in a second or successive application requires the prisoner to satisfy § 2244(b)(2)(B).

This Court applied similar reasoning in *Jones v. Hendrix*, 599 U.S. at 465, where a federal prisoner sought to use § 2255's savings clause to raise a collateral attack on a federal sentence. This Court rejected the attempt, holding that the conditions in § 2255(h) are exclusive: "In § 2255(h), Congress enumerated two—and only two—conditions in which a second or successive § 2255 motion may proceed. . . . [T]he straightforward negative inference from § 2255(h) is that a second or successive collateral attack on a federal sentence is not authorized unless one of those two conditions is satisfied." *Id.* at 477–78. Similarly, § 2244(b)(2)(B) (for state prisoners) and § 2255(h)(1) (for federal prisoners) provide the exclusive conditions for raising a claim in a second or successive habeas petition based on new evidence, and the straightforward negative inference is that a claim in a second or successive petition based on a

new factual predicate—like publication of the DSM-5—is not authorized unless it satisfies those conditions.

2. Nothing in AEDPA suggests that the availability of a rule depends on the merits of a hypothetical claim at the time of a prior application. The Federal Habeas Manual explains that in determining whether a rule was "previously available" to a prisoner, "the appellate court does not conduct any assessment of the merits of the underlying claim, preliminary or otherwise." Means, *supra*, § 11:86 (citing *Ochoa v. Sirmons*, 485 F.3d 538, 542–43 (10th Cir. 2007) (per curiam)). The merits "are not relevant to whether [the movant] can obtain permission to bring a second or successive § 2255 motion to vacate." *In re Joshua*, 224 F.3d 1281, 1282 n.2 (11th Cir. 2000) (per curiam).

The Eleventh Circuit correctly explained that the relevant question is "whether the petitioner could have relied on th[e] 'new rule' in his initial habeas petition," not "whether the claim would have been a winning one at the time of the first petition." *In re Bowles*, 935 F.3d at 1218.

This Court recently explained that the limited responsibility of the courts of appeals in authorizing a second or successive petition—which does not include a "more searching inquiry on the merits"—"facilitates the 30-day deadline." *Bowe*, 607 U.S. at 39–40. "It is unlikely that a court of appeals could make such a determination in the allotted time if it had to do more than simply rely on Supreme Court holdings on retroactivity." *Tyler*, 533 U.S. at 664.

* * *

Atkins was decided years before Johnson committed the crime of conviction. His claim does not "rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by [this Court], that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), but instead relies on new evidence of intellectual disability unrelated to his "guil[t] [for] the underlying offense," *id.* § 2244(b)(2)(B).

The Fifth Circuit erred in authorizing Johnson's second or successive application, and the decision below erred in affirming the denial of the Director's motion to dismiss.

II. The Fifth Circuit's Futility Exception Vitiates AEDPA's Limits on Second or Successive Petitions.

The Fifth Circuit interpreted § 2244(b)(2)(A) to include a futility exception. Pet. App. 25a n.10 (district court description of the Fifth Circuit's holding). Under its interpretation, "a claim must have some possibility of merit to be considered available" for purposes of § 2244(b)(2)(A). *In re Cathey*, 857 F.3d at 232. Evaluating whether a rule was "previously unavailable" thus requires a merits inquiry into whether a hypothetical claim would, at the time of the earlier federal proceedings, have had enough evidentiary support to be potentially meritorious. Pet. App. 3a–6a.

Johnson summarized the Fifth Circuit's interpretation in his briefing below: "[A] claim that would have been futile when the initial federal petition was filed, but which has become viable because of changed standards and methodologies for proving the claim, was previously unavailable for purposes of satisfying § 2244(b)(2)(A) in this circuit." ROA.432.

This holding is not grounded in AEDPA's text or structure, and it conflicts with the strict limits that Congress placed on second or successive petitions.

A. The Fifth Circuit adopted this rule with little analysis in *In re Cathey*, 857 F.3d at 232. At the time of Cathey's first federal habeas petition, his IQ score of 77 did not constitute evidence of intellectual disability under *Atkins*. *Id.* at 230. Cathey later developed evidence that his IQ might have actually been lower, thus rendering him intellectually disabled and ineligible for execution under *Atkins*. *Id.* at 230–33.

The *In re Cathey* panel held that because of this later-developed evidence, Cathey's *Atkins* claim was "previously unavailable" at the time of the initial federal habeas proceedings. *Id.* at 232. The statutory analysis comprises three sentences:

> [The Director's] argument assumes the conclusion: that claims are "available" despite being meritless. We think a claim must have some possibility of merit to be considered available. In the same way we would not expect someone who, based on evidence, believed he was nineteen-years-old at the time of his crime to bring a *Roper* claim, we cannot expect someone who, based on evidence, believed his IQ was 77 to bring an *Atkins* claim two years after *Atkins* was decided in a state that had declared 70 as the benchmark IQ score[.]

Id. (footnote omitted).

In authorizing Johnson's second habeas application, the panel held that *In re Cathey* was "correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability

factual issues raised by *Atkins*." Pet. App. 61a. The panel explained that Johnson provided "reasons that [his] *Atkins* claim is possibly meritorious when it had not previously been." *Id.*

The decision below applied *In re Cathey*'s holding—"a claim must have some possibility of merit to be considered available"—in affirming the denial of the motion to dismiss and holding that Johnson could raise an *Atkins* claim in his second habeas application. Pet. App. 4a–6a.

These decisions do not ground their interpretation in AEDPA's text. The Fifth Circuit erroneously focused on the availability of a "claim" rather than the availability of a "rule." *Compare In re Cathey*, 857 F.3d at 232, *with* 28 U.S.C. § 2244(b)(2)(A); *supra*, Part I.A.

In granting authorization for Johnson's second habeas application, the Fifth Circuit also disregarded the "new rule" requirement of § 2244(b)(2)(A), dismissing as irrelevant the critical distinction that "Cathey's conviction was final before *Atkins* was decided, while Johnson committed his crimes after *Atkins*." Pet. App. 60a.

Nor has the Fifth Circuit explained how its interpretation of § 2244(b)(2)(A) is consistent with the structure of AEDPA more generally, including § 2244(b)(2)(B)'s limits on when prisoners can raise claims in second or successive applications based on new factual developments.

B. The Fifth Circuit's assumption that a claim can be raised in a second or successive application whenever it "is possibly meritorious when it had not previously been," Pet. App. 61a, is not supported by AEDPA's text.

There are only two reasons that a previously meritless claim might become meritorious: either legal or factual developments. Congress spoke to both in AEDPA's text. Rather than allowing any newly meritorious claim to be raised in a second or successive petition, Congress provided that only specific legal and factual developments permit the assertion of a new claim. *Cf. Jones*, 599 U.S. at 480 ("Section 2255(h) specifies the two limited conditions in which Congress has permitted federal prisoners to bring second or successive collateral attacks on their sentences.").

There is no general "newly meritorious" exception. Section 2244(b)(2)(A) allows the assertion of a claim that has become meritorious because this Court has announced a new rule of constitutional law, not "a claim [that] has become meritorious for some other reason." *In re Bowles*, 935 F.3d at 1218.

The Fifth Circuit's interpretation allows prisoners to evade the limits of § 2244(b)(2)(B). Under the Fifth Circuit's interpretation of "previously unavailable," a prisoner with new evidence could proceed instead under § 2244(b)(2)(A). A prisoner who acquires evidence of a *Batson* claim, for example, could argue that the claim was "previously unavailable" under § 2244(b)(2)(A) rather than attempting to satisfy the strict requirements of § 2244(b)(2)(B).

Under the Fifth Circuit's reasoning, such a claim would have been "previously unavailable" because the new evidence would be a "reaso[n] that [the claim] is possibly meritorious when it had not previously been." Pet. App. 61a. The decision below candidly acknowledged that it "equate[d] legal availability with changes in the standards for psychiatric evaluation of the

key intellectual disability factual issues." Pet. App. 61a (citing *In re Cathey*, 857 F.3d at 221).

Reading § 2244(b)(2)(A) to authorize a new-evidence-based challenge to sentencing erases the line Congress drew between new law and new facts and effectively writes § 2244(b)(2)(B)'s limitations out of the statute. *See In re Bowles*, 935 F.3d at 1217–18.

In discussing the interaction of § 2255(h) and § 2244(b), this Court recently explained that if Congress had incorporated § 2244(b)(2)(B)'s more stringent limitations into § 2255(h), then "§ 2255(h)(1)'s more lenient exception would become a dead letter." *Bowe*, 607 U.S. at 38. "Congress presumably does not enact useless laws." *Id.* (quoting *Garland v. Cargill*, 602 U.S. 406, 427 (2024)). The same reasoning applies here. If state prisoners could bring claims based on new evidence under § 2244(b)(2)(A), then the strict requirements of § 2244(b)(2)(B) would be meaningless.

Johnson's claim illustrates how the Fifth Circuit's rule allows habeas petitioners to circumvent these limits. In his application, Johnson contended that the DSM-5 "significantly alter[ed] the diagnostic criteria for the disorder and ma[de] an *Atkins* claim available to [him]." App. 171. His Brief in Opposition added that his *Atkins* claim required Texas courts to "adopt the DSM-5 as the governing criteria for an *Atkins* claim" in the wake of *Moore*, 581 U.S. at 1. BIO 20–21. Before those events, according to Johnson, his *Atkins* claim was "functionally unavailable." *Id.*

But these developments satisfy neither § 2244(b)(2)(A) nor § 2244(b)(2)(B). Even if it constituted a "new rule," *Moore* has not been "made retroactive to cases on collateral review by [this Court]." 28 U.S.C.

§ 2244(b)(2)(A); *see, e.g.*, *In re Richardson*, 802 F. App'x 750, 755–56 (4th Cir. 2020) (per curiam). There have been no legal developments of the kind that Congress determined would permit a prisoner to assert a claim in a second or successive application.

The Eleventh Circuit considered similar circumstances in *In re Bowles*: "Bowles insists that '[i]t was not until *Hall* that Florida was forced to adapt to current medical standards,' and that change made his 'IQ score [of 74] qualifying, thus making an intellectual disability claim viable for the first time.'" 935 F.3d at 1216 (alterations in original). In the same way that Bowles's claim "d[id] not rely on *Atkins* so much as it d[id] on *Hall*," *id.* at 1219, Johnson's claim does not rely on *Atkins* so much as it does on *Moore*. But like Bowles, Johnson has asserted a claim "dressed up to look like an *Atkins* claim," *id.* at 1220, because this Court has not made *Moore* retroactive to cases on collateral review. The "existence of a 'new rule of constitutional law' . . . depends solely on Supreme Court decisions, not on the issuance of a new diagnostic manual by the American Psychiatric Association." *Id.* at 1219.

Similarly, publication of the DSM-5—the factual predicate for Johnson's claim—does not permit Johnson to assert a new claim under § 2244(b)(2)(B) because, *inter alia*, it has no relevance to Johnson's guilt for the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(ii). *Atkins* concerns only a defendant's eligibility for execution, not guilt. *See In re Webster*, 605 F.3d 256, 257–58 (5th Cir. 2010) (explaining that an *Atkins* claim does not "negate [a prisoner's] guilt of the offense of which he was convicted" and citing cases in support).

The Eleventh Circuit correctly analyzed publication of the DSM-5 in *In re Bowles*. Because Bowles's claim was based on a new factual predicate (rather than a new legal rule), he was required to satisfy § 2244(b)(2)(B), which governs "successive petitions based on factual developments, such as the publication of a new DSM manual." 935 F.3d at 1218. Like Johnson, Bowles's *Atkins* claim challenged "only his eligibility for a death sentence, and not whether he [was] 'guilty of the underlying offense,'" so it did "not fall within the narrow statutory exception in § 2244(b)(2)(B)(ii)." *Id.* at 1220.

C. The Fifth Circuit's interpretation of § 2244(b)(2)(A) also renders the "new rule" requirement surplusage. The Fifth Circuit has never explained how the rule of *Atkins*, which was decided years before Johnson committed his crimes, could constitute a "new rule of constitutional law" with respect to Johnson. In its authorization decision, the panel appeared to rely on *In re Cathey* for this point. *See* Pet. App. 59a ("We accept here that the conclusions in *Cathey* necessarily decided that latter point as well and move on."). *But see* Pet. App. 60a (acknowledging that "Cathey's conviction was final before *Atkins* was decided, while Johnson committed his crimes after *Atkins*").

Whether a rule is "new" depends on the law when a defendant's conviction became final: If a "rule was already 'apparent to all reasonable jurists'" at the time the defendant's conviction became final, it is not a "new rule" for the defendant. *Edwards*, 593 U.S. at 265 (quoting *Lambrix*, 520 U.S. at 528). The rule of *Atkins*, which had been decided years earlier, was already apparent to all reasonable jurists at the time Johnson's conviction became final.

Johnson has no response beyond the assertion that "*Atkins* [was] a new rule of constitutional law made retroactive by this Court." BIO 20. But whether a rule was "new" is not determined in the abstract—whether a decision announces a "new rule" varies from defendant to defendant. A case can announce a "new rule" with respect to one defendant but not with respect to another. *See Teague*, 489 U.S. at 301 (plurality op.) ("[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."); *accord Chaidez*, 568 U.S. at 347 (same). *Atkins* was decided before Johnson committed his crimes and long before his conviction became final on direct appeal and is not a "new rule" for him.

D. The futility exception adopted by the Fifth Circuit resembles pre-AEDPA jurisprudence regarding successive petitions. Under the common law, res judicata did not attach to a court's denial of habeas relief, and prisoners could file "endless successive petitions." *McCleskey*, 499 U.S. at 479. This Court adopted rules to prevent abusive use of the writ. *Salinger v. Loisel*, 265 U.S. 224, 232 (1924); *see also id.* ("[T]he court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application, and, if so, what action was had on it.").

The doctrine of abuse of the writ became "a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions." *McCleskey*, 499 U.S. at 489. A prisoner "ma[d]e an abusive use of the writ of habeas corpus" by reserving evidence to support a later petition if the first one failed. *Wong Doo v. United States*, 265 U.S. 239, 241 (1924). "The petitioner had full opportunity

to offer proof of it at the hearing on the first petition, and, if he was intending to rely on that ground, good faith required that he produce the proof then." *Id.*

Even if a petitioner did not intentionally withhold a claim, "a petitioner [could] abuse the writ by failing to raise a claim through inexcusable neglect." *McCleskey*, 499 U.S. at 489. "[A] petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." *Id.*

In contrast, a petitioner did not abuse the writ if the petitioner "present[ed] adequate reasons for not making the allegation earlier." *Price v. Johnston*, 334 U.S. 266, 291 (1948). "[I]f for some justifiable reason [a prisoner] was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." *Id.*

The ultimate question, this Court summarized, was "whether [the petitioner] has a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 499 U.S. at 490.

In AEDPA, Congress replaced this abuse-of-the-writ standard with the strict limits found in § 2244(b)(2) and § 2255(h).

The Fifth Circuit's interpretation of § 2244(b)(2)(A) effectively tracks the pre-AEDPA standard by asking whether a claim is "possibly meritorious when it had not previously been." Pet. App. 61a.

Johnson's contention that his "*Atkins* claim was functionally unavailable," BIO 21, is, in substance, an assertion that he had a legitimate excuse for failing to

raise the claim in an earlier application. *See also* ROA.432 (Johnson arguing that "a claim that would have been futile when the initial federal petition was filed, but which has become viable because of changed standards and methodologies for proving the claim, was previously unavailable").

Far from *Atkins* being "unavailable" to him, Johnson actually invoked *Atkins* and sought its extension in his initial federal habeas application. *See Johnson*, 617 F. App'x at 303 ("Johnson argues . . . that his mental illness is similar to the [intellectually disabled] persons and children protected from execution by *Atkins* . . . and *Roper*[.]").

The *In re Cathey* panel allowed Cathey to assert a claim in a second or successive application because "we cannot expect [him] . . . to [have brought] an *Atkins* claim" in his earlier application. 857 F.3d at 232. The panel's inquiry into whether it could have expected a prisoner to bring a claim in a prior application closely resembles whether a prisoner "ha[d] a legitimate excuse for failing to raise a claim at the appropriate time." *McCleskey*, 499 U.S. at 490; *see also Muñoz v. United States*, 28 F.4th 973, 975–76 (9th Cir. 2022) (interpreting "previously unavailable" to account for whether a prisoner "could have, as a practical matter, raised that claim at an earlier time").

The Fifth Circuit erred. AEDPA places "added restrictions" on second or successive habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see also Jones*, 599 U.S. at 476 ("AEDPA strictly limited 'second or successive' § 2255 motions.").

* * *

The Fifth Circuit's interpretation overrides the strict limits that Congress placed on successive petitions under AEDPA. The decision below erred by holding that Johnson's *Atkins* claim "relies on a new rule of constitutional law . . . that was previously unavailable," 28 U.S.C. § 2244(b)(2)(A), and affirming the denial of the motion to dismiss.

III. AEDPA's Limits on Second or Successive Petitions Advance Finality and Comity.

Federal habeas corpus review imposes significant costs. "One of the law's very objects is the finality of its judgments." *McCleskey*, 499 U.S. at 491. "Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, 489 U.S. at 309 (plurality op.).

This Court has recognized that "[f]inality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491. "Reexamination of state convictions on federal habeas frustrates both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Id.* (internal quotation marks omitted).

"Federal habeas review of state convictions . . . intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Richter*, 562 U.S. at 103 (citations omitted). AEDPA rests on the premise that state courts are competent to vindicate federal constitutional rights, and federal courts face a "formidable barrier" to interference with those decisions. *Bowe*, 607 U.S. at 35. Once a state conviction has survived direct review and a full round of collateral proceedings, there is a particularly strong interest in finality. "If reexamination of convictions in the first round of habeas offends federalism and comity, the

offense increases when a State must defend its conviction in a second or subsequent habeas proceeding on grounds not even raised in the first petition." *McCleskey*, 499 U.S. at 492.

AEDPA's restrictions on second or successive petitions "embody Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction." *Jones*, 599 U.S. at 491. How to strike that balance is a policy question on which courts must defer to Congress. Particularly with respect to state convictions, Congress has adopted rules that will, in some circumstances, promote "finality over error correction." *Id.* at 480.

President Bill Clinton explained the policy judgment behind these restrictions: "For too long, and in too many cases, endless death row appeals have stood in the way of justice being served." Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 1 Pub. Papers 630, 631 (Apr. 24, 1996). AEDPA was intended to prevent "more delays, more unnecessary appeals, and more grief for the victims of crime and their families." 141 Cong. Rec. S5805, S5841 (Apr. 27, 1995) (statement by Sen. Dole).

And even before AEDPA, Congress consistently sought to introduce "a greater degree of finality of judgments in habeas corpus proceedings." *Kuhlmann v. Wilson*, 477 U.S. 436, 450 (1986) (plurality op.) (discussing the 1966 amendments and noting Congress's concern about the "steadily increasing" burden imposed on the federal courts by "applications by State prisoners for writs of habeas corpus" (citation omitted)).

The facts of this case illustrate the need recognized by Congress for AEDPA and the importance of enforcing its limits. Johnson committed his crime against Ms. Aparece—one of many killings and aggravated robberies in which he participated—more than two decades ago. Based on overwhelming evidence of guilt and aggravating circumstances, the people of Texas determined that a capital sentence was the just punishment for these crimes.

Johnson's conviction and sentence were reviewed and affirmed on direct appeal, state collateral review, and federal collateral review. After Johnson received thirteen years of process, the State was prepared to carry out his sentence in August 2019.

The Fifth Circuit's last-minute authorization of Johnson's assertion of an *Atkins* claim in a second application, just one week before his scheduled execution, led to seven years of further litigation.

Or consider Eric Cathey, who committed capital murder in 1995. The Fifth Circuit authorized him to file a successive application in 2017, *In re Cathey*, 857 F.3d at 223, and nine years later, that habeas application has not been finally resolved in district court, *Cathey v. Guerrero*, No. 4:15-cv-2883 (S.D. Tex.).

AEDPA's strict limits on second or successive petitions were meant to prevent endless death row appeals. At some point, a conviction must be final. Congress determined that state prisoners should be permitted to file second or successive applications only in limited circumstances, and Johnson's *Atkins* claim does not fall within them.

CONCLUSION

For these reasons, this Court should correct the Fifth Circuit's interpretation of § 2244(b)(2)(A) and reverse the judgment below.

Respectfully submitted.

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July 30, 2026

STATUTORY APPENDIX

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28 U.S.C. § 2244. Finality of determination

* * *

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) 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.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) 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.

28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence

* * *

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.