No. _____

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) prohibits successive habeas applications by state prisoners with only 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 a successive habeas 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).

The courts of appeals are divided over whether claims rely on "a new rule . . . that was previously unavailable" when a claim based on the rule could have been raised in an earlier federal habeas petition but would not have succeeded. The Eleventh and Fourth Circuits hold that whether a claim would have been meritorious does not affect whether the rule was previously available. In the decision below, the Fifth Circuit adhered to its view (and that of the Ninth Circuit) that a claim was previously available only if it had "some possibility of merit" based on the evidence available to the petitioner at the time of an earlier petition.

The question presented is:

Whether a claim relies on a "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" when the habeas petitioner could have asserted a claim based on the rule in a prior federal habeas petition.

PARTIES TO THE PROCEEDING

Respondent Dexter Johnson is a Texas state prisoner under 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–appellant in the proceedings below.

STATEMENT OF RELATED PROCEEDINGS

Johnson v. State, No. AP-75,749, Texas Court of Criminal Appeals. Judgment affirming conviction and death sentence entered January 27, 2010.

Johnson v. Texas, No. 09-10475, Supreme Court of the United States. Order denying petition for writ of certiorari entered June 28, 2010.

Ex parte Johnson, No. WR-73,600-01, Texas Court of Criminal Appeals. Order denying initial state habeas application entered June 30, 2010.

Johnson v. Stephens, No. H-11-2466, United States District Court for the Southern District of Texas. Order denying habeas relief entered August 19, 2013.

Johnson v. Stephens, No. H-11-2466, United States District Court for the Southern District of Texas. Order denying motion for reconsideration entered October 10, 2013.

Johnson v. Stephens, No. H-11-2466, United States District Court for the Southern District of Texas. Order denying habeas relief entered June 25, 2014.

Johnson v. Stephens, No. 14-70024, United States Court of Appeals for the Fifth Circuit. Judgment affirming denial of habeas relief entered July 2, 2015.

Johnson v. Stephens, No. 15-6401, Supreme Court of the United States. Order denying petition for writ of certiorari entered January 25, 2016.

Johnson v. Davis, No. H-11-2466, United States District Court for the Southern District of Texas. Order denying motion for reconsideration entered November 6, 2017.

Johnson v. Davis, No. 17-70032, United States Court of Appeals for the Fifth Circuit. Order denying certificate of appealability entered August 24, 2018.

Johnson v. Stephens, No. 18–6834, Supreme Court of the United States. Order denying petition for writ of certiorari entered March 25, 2019.

Ex parte Johnson, No. WR-75,478-02, Texas Court of Criminal Appeals. Order dismissing successive state habeas application entered April 29, 2019.

Ex parte Johnson, No. WR-73,600-03, Texas Court of Criminal Appeals. Order dismissing successive state habeas application entered August 13, 2019.

In re Johnson v. Davis, No. 19-20552, United States Court of Appeals for the Fifth Circuit. Order authorizing second or successive habeas application entered August 14, 2019.

Johnson v. Stephens, No. 19-6934, Supreme Court of the United States. Order denying petition for writ of certiorari entered March 23, 2020.

Johnson v. Lumpkin, No. 4:19-cv-3047, United States District Court for the Southern District of Texas. Memorandum and order on successiveness and denying Director's motion to dismiss entered October 28, 2022.

Johnson v. Lumpkin, No. 4:19-cv-3047, United States District Court for the Southern District of Texas. Order certifying interlocutory appeal entered January 12, 2023.

Lumpkin v. Johnson, No. 23-90003, United States Court of Appeals for the Fifth Circuit. Order certifying interlocutory appeal entered May 31, 2023.

Johnson v. Guerrero, No. 23-70002, United States Court of Appeals for the Fifth Circuit. Panel opinion on certified question entered July 23, 2025. Order denying rehearing en banc entered January 12, 2026.

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PETITION FOR WRIT OF CERTIORARI

This petition presents an acknowledged and entrenched circuit split regarding an important question of statutory interpretation: Under what circumstances does AEDPA permit a claim to be asserted in a successive habeas application because 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"? 28 U.S.C. § 2244(b)(2)(A); *id.* § 2255(h)(2) (same for motions by federal prisoners).

Years after this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), Respondent Dexter Johnson committed a brutal rape and murder. The rule of *Atkins*—that the Eighth Amendment prohibits execution of the intellectually disabled—was available to Johnson at trial and in his initial habeas proceedings.

Nonetheless, the Fifth Circuit allowed him to raise an *Atkins* claim in a second federal habeas application. In the decision below, in a certified interlocutory appeal of the order denying a motion to dismiss, the Fifth Circuit narrowly denied rehearing en banc and adhered to its precedent interpreting section 2244(b)(2)(A) to create, in the district court's words, a "*futility* exception." App. 25a. The Fifth Circuit interprets AEDPA's prohibition on new claims in successive petitions as barring only claims that had "some possibility of merit" in a prior petition.[1] *In re Cathey*, 857 F.3d 221, 232 (5th Cir. 2017) (per curiam). The Ninth Circuit has adopted *In re Cathey*.

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[1] We use "petition" to include both habeas applications for state prisoners, 28 U.S.C. §§ 2244, 2254, and motions for federal prisoners, *id.* § 2255.

Under this interpretation, because Johnson lacked the evidence necessary for his *Atkins* claim to succeed at the time of his initial federal habeas application, he can raise an *Atkins* claim in a second habeas application as a claim that "relies on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

The Eleventh Circuit, applying AEDPA's plain text, disagrees. Correctly understood, whether a claim was "previously unavailable" does not depend on "whether the claim would have been a winning one at the time of the first petition," only on "whether it would have been feasible for the petitioner to bring the claim then." *In re Bowles*, 935 F.3d 1210, 1216–17 (11th Cir. 2019); *see also id.* at 1219 (considering and rejecting *In re Cathey* and *In re Johnson,* 935 F.3d 284 (5th Cir. Aug. 15, 2019)). The Fourth Circuit applies an identical test. *See Slusser v. Vereen*, 36 F.4th 590, 596 (4th Cir. 2022) ("'Previously unavailable' in Section 2255(h)(2) refers to the existence of the 'new rule of constitutional law,' not to a particular prisoner's ability to utilize or prevail on it.").

Under the Eleventh and Fourth Circuits' interpretation, AEDPA bars Johnson's second application. The rule of *Atkins* has always been available to Johnson, so he could not assert it in a second habeas application.

This area of the law—prisoners' ability to seek the writ of habeas corpus in the federal courts—is one in which uniformity is particularly important, and the question presented arises most frequently in capital cases.

The issue is a purely legal question of statutory interpretation, and it is squarely implicated by the facts of this case. There are no factual issues or antecedent questions that might interfere with this Court's review.

Not only does this petition present an ideal vehicle to resolve the issue, but it may well present the only vehicle to resolve the issue regarding authorizations for state prisoners to file successive applications, which "shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). This petition presents the first opportunity for this Court to address this important, recurring issue and ensure that the same rules apply in habeas proceedings across the country.

OPINIONS BELOW

The opinion of the court of appeals answering the certified question (App. 1a–6a) is unpublished and unreported.

The memorandum and order of the district court addressing the successive-application requirements of 28 U.S.C. § 2244(b)(2)(A) (App. 7a–46a) is unpublished and unreported.

The opinion of the court of appeals authorizing Johnson to file a second or successive habeas application (App. 47a–66a) is reported at 935 F.3d 284.

The order of the court of appeals denying rehearing en banc (App. 67a–68a) and Judge Ho's dissent from denial of rehearing en banc (App. 68a–73aa) are reported at 164 F.4th 398.

JURISDICTION

The court of appeals entered its opinion answering the certified question on July 23, 2025, and it denied petitioner's timely filed petition for rehearing en banc on January 12, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2244(b) of Title 28 of the United States Code provides, in relevant part:

> (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.
>
> . . .
>
> (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.

Section 2255(h) of Title 28 of the United States Code provides, in relevant part:

> 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.

STATEMENT OF THE CASE

I. Legal Background

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

AEDPA strictly limits the circumstances in 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).

Any claim that was already presented in an earlier application must be dismissed. 28 U.S.C. § 2244(b)(1). New claims in a second or successive applications must be dismissed unless they satisfy one of two narrow exceptions.

First, a claim may be raised 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 may be raised 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 district court, a state prisoner must receive authorization from a panel of a court of appeals. 28 U.S.C. § 2244(b)(3)(A). These authorization decisions "shall not be the subject of a petition for rehearing or for a writ of certiorari." *Id.* § 2244(b)(3)(E).

Similar limitations apply to federal prisoners seeking to file successive motions. Although federal prisoners face a less stringent standard for successive motions based on new facts, *Bowe v. United States*, 146 S. Ct. 447, 463–64 (2026), the new-law exception is substantively identical. Federal prisoners may file successive motions that contain "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. § 2255(h)(2).[2] Like state prisoners, federal prisoners must receive authorization to file successive motions, *id.* § 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*, 146 S. Ct. at 462.

Authorization from a court of appeals reflects only a preliminary determination that a petitioner 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 still determine whether those standards are actually satisfied. *Id.* § 2244(b)(4).

II. Factual Background

Nearly 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). While Johnson raped Aparece, an accomplice held her boyfriend at gunpoint and "taunted" him about what Johnson "was doing to his girlfriend." *Id.* As his victims cried and begged for their lives, Johnson and the accomplice

[2] The courts of appeals agree that section 2244(b)(2)(A) and section 2255(h)(2) are substantively identical. *See, e.g.*, *In re Hoffner*, 870 F.3d 301, 307 n.9 (3d Cir. 2017).

"marched [them] into the woods and shot them each in the head." *Id.*

This murder "was only one episode in [Johnson's] escalating pattern of lawlessness," including "numerous aggravated robberies" (one committed the day after the murder) and "three additional killings during the same time period." *Johnson v. Stephens*, No. CIV.A. H-11-2466, 2013 WL 4482865, at *3 (S.D. Tex. Aug. 19, 2013).

III. 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). At trial, the defense expert opined that Johnson was not intellectually disabled. ROA.464 & n.2. (noting that the expert determined Johnson's IQ was between 74 and 88 and that he did not have obvious deficits in adaptive behavior).

Years before Johnson committed his crimes, in 2002, this Court held in *Atkins v. Virginia* that the Eighth Amendment prohibits execution of the intellectually disabled. 536 U.S. 304.

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 for a writ of habeas corpus. 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) (rejecting this argument).

Johnson's execution was first set for May 2, 2019. App. 17a. Weeks before his scheduled execution, Johnson filed a state habeas corpus application asserting an *Atkins* claim. 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 was again scheduled to be executed on August 15, 2019. ROA.472.

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 asserting an *Atkins* claim. *Johnson*, 935 F.3d at 288. Johnson based this claim on the American Psychiatric Association's May 2013 publication of the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), which substantially revised the diagnostic approach to intellectual disability, deemphasized IQ cutoffs, suggested that individuals with IQ scores above 70 may still meet diagnostic criteria, and placed greater emphasis on clinical judgment and documented adaptive-functioning deficits. App. 15a. In 2018, the Texas Court of Criminal Appeals (the State's highest court for criminal proceedings) adopted DSM-V as the governing standard for intellectual-disability claims in state collateral proceedings. *Ex parte Moore*, 548 S.W.3d 552, 555 (Tex. Crim. App. 2018). Without DSM-V, Johnson contended, he could not have asserted a successful *Atkins* claim. *Johnson*, 935 F.3d at 293.

Relying on an earlier Fifth Circuit decision, the panel granted authorization, holding that section 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." *Johnson*, 935 F.3d at 293–94 (citing *In re Cathey*, 857 F.3d at 221).

AEDPA prevented the Director from seeking rehearing or petitioning this Court for certiorari. 28 U.S.C. § 2244(b)(3)(E).

In the district court, the Director moved to dismiss Johnson's application for not satisfying the requirements of section 2244(b)(2). App. 2a. Following an evidentiary hearing, in October 2022, the district court denied the motion. App. 46a. The district court recognized that the Fifth Circuit "has read a *futility* exception into section 2244(b)(2)(A)" and applied this "judicially created exception" to AEDPA. App. 25a & n.10.

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); App. 2a–3a. The Fifth Circuit accepted the interlocutory appeal, and in the decision below, the same panel that issued the authorization affirmed the denial of the motion to dismiss, App. 1a, 6a, reiterating its view that the "interpretation of 'previously unavailable' in *Cathey* [i]s the correct interpretation." App. 6a.

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

Judge Ho dissented from the denial of rehearing en banc, joined by Judges Jones, Smith, and Engelhardt. App. 68a. The dissent explains that Johnson's subsequent 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." App. 71a. Nor

was *Atkins* "previously unavailable": Johnson's reliance on DSM-V and later expert evidence raises a claim based on new facts, not new law. App. 71a–73a.

Because Johnson seeks to raise a claim based on new facts, he was required to satisfy section 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—leaving him with no statutory path to successive review. 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." App. 72a–73a.

The Director now respectfully petitions this Court for certiorari.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Implicates an Acknowledged and Entrenched Circuit Split Concerning the Meaning of "Previously Unavailable."

The courts of appeals are openly divided over what it means for a claim to "rel[y] on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *see also id.* § 2255(h)(2). The Fifth Circuit, joined by the Ninth Circuit, holds that a rule was not "previously available simply because it was technically available when a prior habeas application was filed" but instead a claim relying on the rule "must have some possibility of merit to [have been] considered available." App. 6a (quoting *In re Cathey*, 857 F.3d at 232).

The Eleventh and Fourth Circuits, in contrast, correctly hold that whether a claim can be raised in a successive habeas petition depends on the legal availability of the rule to a habeas petitioner, not whether a claim based on the rule would have been successful in an earlier petition.

The Fifth and Eleventh Circuits have each considered and rejected the other's interpretation. Resolution of this entrenched circuit split can come only from this Court.

A. In the Fifth and Ninth Circuits, a rule was "previously unavailable" if a claim relying on the rule would have been unsuccessful in a prior habeas proceeding.

1. The decision below relies on an earlier Fifth Circuit decision, *In re Cathey*, in holding that AEDPA's "previously unavailable" language requires a merits inquiry into whether a claim had, at the time of the earlier

federal proceedings, enough evidentiary support to be potentially meritorious. App. 3a–6a.

In re Cathey held that "a claim must have some possibility of merit to be considered available" for purposes of section 2244(b)(2)(A). 857 F.3d at 232. It concluded that there is a "gray area of previous unavailability despite technical availability." *Id.* at 230.

Applying these principles, the Fifth Circuit held that Cathey's *Atkins* claim fell within this gray area. 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.* 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.

With minimal analysis, the panel then held that because of this later-developed evidence, Cathey's *Atkins* claim was "previously unavailable" at the time of the initial federal habeas proceedings because the claim did not have any realistic chance of success until the development of additional evidence. *Id.* at 232. The opinion's 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).

The decision below applied *In re Cathey*'s holding—"a claim must have some possibility of merit to be considered available"—to allow Johnson to raise an *Atkins* claim in a second habeas application. App. 4a–6a. In the panel's view, Johnson's *Atkins* claim, though technically available to him at all times, did not have a possibility of merit before the APA's 2013 publication of DSM-V. App. 4a–6a. Thus, because Johnson's *Atkins* claim was unlikely to succeed factually, the "rule of constitutional law" prohibiting execution of the intellectually disabled was "previously unavailable" to Johnson during his initial federal habeas proceedings. App. 5a–6a.

The district court below correctly described the Fifth Circuit as "read[ing] a *futility* exception" into the statute, *i.e.*, a "judicially created exception" to AEDPA's bar on successive petitions. App. 25a & n.10.

2. In *Muñoz v. United States*, considering the identical "new rule of constitutional law . . . that was previously unavailable" requirement of section 2255(h)(2), the Ninth Circuit repeatedly cited *In re Cathey* and adopted an indistinguishable rule. 28 F.4th 973, 976 & n.3 (9th Cir. 2022). The Ninth Circuit drew on this Court's interpretation of the word "available" in the Prison Litigation Reform Act, *id.* at 975, reasoning that just as the PLRA looks to "real-world" constraints on prisoners, AEDPA's "previously unavailable" language should be read to account for whether a prisoner "could have, as a practical matter, raised that claim at an earlier time," *id.* at 975–76, including whether the prisoner "had a factual basis for" the claim, *id.* at 979.

Muñoz ultimately denied authorization to file a successive habeas motion because the prisoner previously "had the facts that he needed for his claim" and "no systemic or external barrier prevented him from presenting his claim in his initial habeas proceeding." *Id.* at 980.

3. The Eighth Circuit appears to follow the Fifth and Ninth Circuits in considering the evidence available at the time of an earlier habeas petition to determine whether a claim in a successive petition relies on a rule that was "previously unavailable." *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005).[3] In holding that the rule of *Atkins* was not previously unavailable to a habeas petitioner, the Eighth Circuit noted, "The evidence Davis relies on in support of his request to raise this claim was available to him in the district court, and he earlier used some of this same evidence in state court." *Id.* "Since Davis could have raised his *Atkins* claim in the district court, it was not previously unavailable to him[.]" *Id.*

Under the rule of these circuits, as applied in the decision below, because DSM-V was unavailable at the time of Johnson's prior habeas application and an *Atkins* claim would not have been successful at that time, Johnson could raise an *Atkins* claim in a successive application because the claim "relies on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A).

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[3] *Davis* involved a "motion to remand" that was "the functional equivalent of a second or successive petition for habeas corpus" and thus subject to section 2244(b)(2). 423 F.3d at 878–79.

B. In the Eleventh and Fourth Circuits, a rule was "previously unavailable" only if a claim based on the rule could not have been asserted in a prior proceeding.

The Eleventh and Fourth Circuits, in contrast, hold that whether a rule was "previously unavailable" does not depend on whether a claim would have been successful. Under the interpretation applied in these circuits, Johnson would not have been permitted to raise an *Atkins* claim in a successive application.

1. In *In re Bowles*, the Eleventh Circuit considered and rejected the Fifth Circuit's interpretation of "previously unavailable." 935 F.3d at 1216–17 (citing and discussing *In re Cathey*, 857 F.3d at 221, and *In re Johnson*, 935 F.3d at 284).

The facts of *In re Bowles* are indistinguishable from those of this case: Bowles did not include an *Atkins* claim in his first federal habeas application. *Id.* at 1215. He later sought authorization to file a successive habeas application asserting an *Atkins* claim based on newly developed medical evidence that he was intellectually disabled. *Id.* at 1215–18.

The Eleventh Circuit recognized that AEDPA provides two avenues for new claims to be asserted in successive habeas applications by state prisoners: Section 2244(b)(2)(A) allows claims based on new legal rules, and section 2244(b)(2)(B) allows claims based on new factual predicates. *Id.*

Bowles could not satisfy the requirements of section 2244(b)(2)(A) because *Atkins* "was decided years before his habeas petition" and he "could have included it in his original habeas petition." *Id.* at 1215–16. *Atkins*

was neither a "new rule" nor "previously unavailable." *Id.* at 1216. "[U]nder the statute Congress enacted, whether a claim is 'previously unavailable' depends on when a 'new rule of constitutional law' is made retroactive by the Supreme Court, because it is that new rule that the claim must rely on." *Id.* at 1218 (citing *In re Thomas*, 823 F.3d 1345, 1349 (11th Cir. 2016)).

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. If a claim becomes meritorious for a reason other than a new rule of constitutional law decided by this Court, that development "has no bearing on whether the claim was 'previously unavailable.'" *Id.* at 1218. The "publication of a new diagnostic manual" did not make a claim newly available under section 2244(b)(2)(A). *Id.*

Because Bowles's claim was based on a new factual predicate (rather than a new legal rule), the Eleventh Circuit recognized that he was required to satisfy section 2244(b)(2)(B), which governs "successive petitions based on factual developments, such as the publication of a new DSM manual." *Id.* 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.

The Eleventh Circuit declined to follow *In re Cathey* and *In re Johnson* because the Fifth Circuit's approach undermined AEDPA by blurring the line Congress drew between claims based on "new . . . law" and those based on new "factual developments." *Id.* at 1218; *see also id.* at 1217 ("[W]e are not bound by the decisions of our

sister circuits." (quoting *OSI, Inc. v. United States*, 285 F.3d 947, 952 n.3 (11th Cir. 2002))). The Eleventh Circuit correctly held that "[t]here is no futility exception to the AEDPA's restrictions on second and successive petitions." *Id.*

Rather than follow the Fifth Circuit, the Eleventh Circuit "ch[o]se instead to follow the terms of the statute, which requires that we look to see: (1) whether the claim relies on a new rule of constitutional law that was made retroactive to cases on collateral review by the Supreme Court, and (2) whether the petitioner could have relied on that 'new rule' in his initial habeas petition." *Id.* at 1218.[4]

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[4] The Eleventh Circuit holds that whether a petitioner could have relied on a new rule in an initial habeas petition is not always a mechanistic analysis focused solely on the timing of this Court's decision. *See In re Bowles*, 935 F.3d at 1219 ("[O]ur feasibility analysis does not focus on whether the claim would have been a winning one at the time of the first petition, but on whether it would have been feasible for the petitioner to bring the claim then."). If this Court announces a new rule while a federal habeas petition is pending, whether the claim was available depends on whether the petitioner could have amended the pending petition. *See In re Hill*, 113 F.3d 181, 183 (11th Cir. 1997) (per curiam) ("[T]he liberal amendment policy applicable to habeas petitions may make claims based upon new rules of constitutional law 'available' to the petitioner during a prior habeas action, even when the claim would not have been available at the inception of that prior action."); *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015) ("[I]f 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."). The Fifth Circuit performed a similar analysis in *Mathis v. Thaler*, 616 F.3d 461 (5th Cir. 2010), in which it concluded that a habeas petitioner could not feasibly assert an *Atkins* claim without risking the procedural default of other claims. In this case, *Atkins* was decided long before Johnson committed his crimes, not while his original habeas petition was pending.

2. Like the Eleventh Circuit, the Fourth Circuit squarely rejects the "potentially meritorious" interpretation of the Fifth Circuit. "'Previously unavailable' in Section 2255(h)(2) 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*, 36 F.4th at 596.

In *In re Williams*, the Fourth Circuit held that "previously" refers to "the last federal proceeding—including a PFA [petition for authorization] proceeding—in which the applicant challenged the same criminal judgment" and explained how this applies to the two prongs of section 2244(b)(2):

> [C]onstitutional rules that were established at the time of the applicant's last [federal proceeding] were not "previously unavailable," and facts known or reasonably discoverable at the time of the applicant's last [federal proceeding] cannot satisfy the "could not have been discovered previously" requirement.

364 F.3d 235, 239 (4th Cir. 2004); *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").

Application of this holding to these facts is straightforward: Because the rule of *Atkins* was established at the time of Johnson's initial federal habeas application, it was not "previously unavailable."

A rule was "previously unavailable" if it was decided after the defendant's earlier federal habeas proceeding. *See 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*.").

3. At least two other circuits have also, without analysis, applied a test for "previously unavailable" based on the timing of this Court's decision announcing the rule, without any suggestion that availability depended on whether a claim under the rule would have been meritorious. *See 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."); *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[.]").

Treatises also describe the rule consistently with the Eleventh and Fourth Circuits. *See* Brian R. Means, Federal Habeas Manual § 11:38 ("At a minimum, 'previously' requires that the new rule be established after the time of the filing of the prior federal habeas petition.").

Under the interpretation applied in the Eleventh and Fourth Circuits, the rule of *Atkins* was always available to Johnson, and his successive application does not "rel[y] on a new rule of constitutional law . . . that was previously unavailable" to him. 28 U.S.C. § 2244(b)(2)(A). Authorization should have been denied, and the Director's motion to dismiss should have been granted.

C. The split is entrenched.

The divide between the Fifth Circuit and Eleventh Circuit is solidly entrenched. In *In re Bowles*, the

Eleventh Circuit considered and rejected the Fifth Circuit's interpretation of section 2244(b)(2)(A), instead adhering to its earlier decisions. In the decision below, the Fifth Circuit denied rehearing en banc, albeit narrowly, despite the Director raising the Eleventh Circuit's interpretation. Neither circuit will reconsider its rule.

It is unclear whether the circuits even *could* resolve the split without this Court's intervention. If published authorization decisions are precedential and bind future authorization panels—an issue that only the Fifth and Eleventh Circuits appear to have addressed[5]—then en banc consideration would be necessary for a circuit to change its position regarding the meaning of section 2244(b)(2)(A). But AEDPA bars petitioning for rehearing en banc of authorization decisions for state prisoners. 28 U.S.C. § 2244(b)(3)(E).[6] And the Fifth Circuit denied en banc reconsideration when it had the opportunity in this case. App. 67a–68a.

For at least seven years, the Fifth and Eleventh Circuits have applied inconsistent tests for whether state prisoners may file successive habeas applications. Both courts have considered and rejected the other's position, and absent this Court's intervention, they will continue applying different standards.

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[5] *See* App. 61a (describing *In re Cathey* as "precedentially determin[ing]" the interpretation of AEDPA); *infra* pp. 24–25.

[6] Although AEDPA might permit a court of appeals to grant initial hearing en banc or to grant rehearing *sua sponte*, the 30-day deadline to resolve authorization motions renders these options impracticable. *See* 28 U.S.C. § 2244(b)(3)(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."). The circuits could grant rehearing or this Court grant certiorari regarding authorization for a federal prisoner. *Bowe*, 146 S. Ct. at 462.

II. This Important Issue Warrants Resolution by this Court.

This important and recurring issue of the standard for authorizing successive petitions under AEDPA warrants resolution by this Court.

A. The availability of habeas relief is an area where this Court's responsibility to ensure the uniformity of federal law is at its apex. Whether a prisoner is permitted to raise a claim in a successive habeas petition in federal court should not vary based on whether the prisoner was convicted in the Fifth Circuit or the Eleventh.

If the Eleventh Circuit is correct, then the Fifth Circuit (and other circuits that apply its interpretation) are erroneously intruding on state sovereignty and undermining the finality of convictions by allowing successive petitions in violation of the strict limits on them placed by Congress. If the Fifth Circuit is correct, then the Eleventh Circuit (and the Fourth) are wrongfully preventing prisoners from availing themselves of procedures for seeking habeas relief that Congress has created. Regardless of which interpretation of AEDPA is correct, it should be uniform across the country. A prisoner's right to file a successive petition under section 2244(b)(2) or section 2255(h)(2) should not depend on which federal circuit covers the state of conviction.

And as the cases involved in the split demonstrate, the issue arises most frequently in capital cases, in which there is a heightened need both to protect the finality of convictions and to protect prisoners' rights. In these cases, in particular, this Court should ensure that convictions receive the review in the federal courts that Congress permitted, no less but no more.

Because of AEDPA's role in protecting comity and finality, the capital stakes at issue, and the divergent outcomes across circuits, this Court's guidance is urgently needed.

B. This is an area of particular importance to the States: "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) (citations omitted).

These consequences implicate core federalism concerns. AEDPA rests on the premise that state courts are competent to vindicate federal constitutional rights, and federal courts face a "formidable barrier" to interfering with those decisions. *Bowe*, 146 S. Ct. at 462. Once a state conviction has survived direct review and a full round of collateral proceedings, there is a strong interest in finality. By reading section 2244(b)(2)(A) to permit re-litigation of capital sentencing based on new evidence (such as evolving diagnostic criteria), rather than new rules of constitutional law from this Court, the Fifth Circuit's rule intrudes deeply on the finality of convictions and circumvents the limits Congress placed on claims in successive applications.

Erroneously allowing a successive habeas application creates significant harm to the State. Johnson committed a brutal rape and murder two decades ago, in 2006. He would have been executed in August 2019 but for the Fifth Circuit's erroneous authorization of a successive application. That authorization has now resulted in seven years of litigation in federal district court, with no end in sight. All the while, the people of Texas (and Johnson's victims' families, in particular) still wait for justice.

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 221, and eight years later, that habeas application remains pending in district court, *Cathey v. Guerrero*, No. 4:15-cv-2883 (S.D. Tex.).

C. The prohibition on seeking review of authorization decisions only further underscores the need for clear guidance from this Court. A grant or denial of authorization for a state prisoner to file a successive application is not subject to "a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). The erroneous denial of authorization to file a successive application is final, foreclosing the right of a habeas applicant to file a claim without any opportunity for further review. The erroneous grant of authorization to file a successive habeas application, although potentially subject to eventual reconsideration by a district court, *id.* § 2244(b)(4), will lead to years of litigation and, as in Johnson's case, may well prevent a capital sentence from being carried out. Either way, no matter how egregious the error, the authorization decision of the court of appeals for a state prisoner is not subject to rehearing or certiorari.

And at least some circuits treat these unreviewable orders as precedent binding future authorization panels. *See United States v. St. Hubert*, 909 F.3d 335, 346 (11th Cir. 2018), *abrogated on other grounds by United States v. Taylor*, 596 U.S. 845 (2022) ("Lest there be any doubt, we now hold in this direct appeal that law 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[.]"); *see also* App. 61a (referring to "the *Cathey* decision,

which has *precedentially* determined" (emphasis added)).

This unusual procedural posture—a significant decision by a court of appeals that is not subject to rehearing or review by this Court—makes the need for clear rules particularly acute.

Because the decision below addressed a certified interlocutory appeal under section 1292(b), this Court has the opportunity to grant certiorari and provide the guidance necessary to ensure that panels apply consistent and correct standards to authorization decisions.

D. This Court's review is particularly warranted because the decision below is wrong. The Fifth Circuit's rule undermines the structure of AEDPA, which creates one exception for claims based on changes in the law (28 U.S.C. § 2244(b)(2)(A)) and a separate exception for claims based on new factual predicates (28 U.S.C. § 2244(b)(2)(B)). *See also* 28 U.S.C. § 2255(h) (similar).

By blurring the line between the two—and allowing claims based on new evidence to be raised under section 2244(b)(2)(A)—the Fifth Circuit's rule vitiates the limits placed by Congress on claims based on new evidence, which must "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)(ii). As the decision below demonstrates, the interpretation adopted by the Fifth Circuit permits the assertion of claims in a successive application based on facts that are unrelated to the habeas applicant's guilt for the underlying offense.

Johnson's successive application does not challenge his guilt; it relies on updated diagnostic standards and

new expert evidence bearing solely on his eligibility for the death penalty. Reading section 2244(b)(2)(A) to authorize a new-evidence-based challenge to sentencing blurs the line Congress drew between new law and new facts and effectively rewrites section 2244(b)(2)(B)'s limitations out of the statute. *See In re Bowles*, 935 F.3d at 1217–18.

Nor is there any reason that the Fifth Circuit's "futility" exception would be limited to new evidence. As the Eleventh Circuit suggested in *In re Bowles*, the Fifth Circuit's reasoning would allow successive petitions based on legal developments other than "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." 28 U.S.C. § 2244(b)(2)(A); *see also* 935 F.3d at 1219 ("[T]he more fundamental problem with Bowles' argument is that it does not rely on *Atkins* so much as it does on *Hall* [*v. Florida,* 572 U.S. 701 (2014)]. Despite what he calls it, his claim actually is a *Hall* claim, not an *Atkins* claim. *Hall* did announce a new rule of constitutional law, but the Supreme Court has not made that new rule retroactive to cases on collateral review." (internal citations omitted)). If "futility" means that a claim was previously unavailable, then *any* change of fact or law that renders a claim viable would allow it to be raised in a successive petition.

The Fifth Circuit's interpretation conflicts with the plain text of AEDPA. The terse analysis in *In re Cathey* recites: "We think a claim must have some possibility of merit to be considered available." 857 F.3d at 232. But this reasoning does not track the statute's text. AEDPA does not ask whether a *claim* was available but whether a *rule* was available: A petitioner must show 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." 28 U.S.C. § 2244(b)(2)(A). Whether Johnson's "claim" was available is irrelevant to his right to file a second or successive application.[7] The relevant question is whether the "rule" of *Atkins*—that the Eighth Amendment prohibits the execution of the intellectually disabled—was "previously unavailable" to Johnson. *Atkins* was decided long before Johnson's crimes, and its rule of constitutional law has always been available to him. Indeed, Johnson relied on the rule of *Atkins* and argued that it should be extended to the mentally ill in his original habeas application. *Johnson*, 617 F. App'x at 303 (rejecting this argument).

The Fifth Circuit's interpretation of section 2244(b)(2)(A) also renders the "new rule" requirement meaningless. Neither the Fifth Circuit nor Johnson has ever provided a reasoned explanation for how the rule of *Atkins*, which was decided years before Johnson committed his crimes, could possibly constitute a "new rule of constitutional law" with respect to Johnson. In its authorization decision, the panel simply invoked *In re Cathey* for this point. *See In re Johnson*, 935 F.3d at 293 ("We accept here that the conclusions in *Cathey* necessarily decided that latter point as well and move on.").

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[7] In *dicta* in *Tyler v. Cain*, this Court paraphrased the requirement as "the claim must have been 'previously unavailable.'" 533 U.S. 656, 662 (2001). But this cannot be correct. Grammatically, "was previously unavailable" must modify "rule" and not "claim." Eliding the intervening clauses would make the statute read "the applicant shows that the claim . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). If "previously unavailable" modified "claim," Congress would have written "and" rather than "that."

Moreover, section 2255(h)(2) refers only to a "new rule . . . that was previously unavailable" with no mention of "claim." 28 U.S.C. § 2255(h)(2).

Treating *Atkins* as a "new rule" for Johnson conflicts with this Court's interpretation of the phrase: "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality op.); *accord Chaidez v. United States*, 568 U.S. 342, 347 (2013) (same). 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." *Edwards v. Vannoy*, 593 U.S. 255, 265 (2021) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997)). Because the rule that the Eighth Amendment prohibits the execution of the intellectually disabled was apparent to all reasonable jurists long before Johnson's conviction became final, *Atkins* was not a "new rule" for him.

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 by affirming the denial of the motion to dismiss.

III. This Petition Presents the Ideal Vehicle to Resolve this Circuit Split.

The decision below squarely implicates the circuit split. Under the interpretation of "new rule of constitutional law . . . that was previously unavailable" urged by the Director and applied by the Eleventh and Fourth Circuits, AEDPA bars the claim that Johnson has asserted in his second federal habeas application.

The sole issue is statutory interpretation, and no preliminary issues prevent this Court from resolving the split. The arguments have been thoroughly considered

by the courts of appeals, and the positions are clear: either section 2244(b)(2)(A) and section 2255(h)(2) incorporate a futility exception for claims that would not have succeeded in a prior federal habeas petition (as the decision below held) or they do not. Further percolation would not aid this Court's analysis.

This petition presents the first opportunity for this Court to resolve this entrenched circuit split and provide the necessary guidance.

This issue arises most often in a posture that precludes this Court's review. Decisions authorizing (or denying authorization for) a successive application by a state prisoner "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E). The key cases involved in the circuit split—*In re Cathey*, *In re Johnson*, and *In re Bowles*—all arose in this posture, which precluded parties from seeking certiorari from this Court.

In contrast, the decision below addresses the issue on a certified interlocutory appeal. 28 U.S.C. § 1292(b). It presented the first opportunity for the Director to seek rehearing en banc and presents the first opportunity for the Director to seek certiorari from this Court.

Now that the Fifth Circuit has denied rehearing en banc and confirmed that it will adhere to *In re Cathey*'s interpretation of AEDPA, district courts will almost certainly not certify future orders for interlocutory appeal under section 1292(b).

Until this Court resolves the issue, the courts of appeals will continue to apply different standards, resulting in different access to federal habeas proceedings for prisoners in different parts of the country. Whatever the

correct interpretation of "new rule of constitutional law . . . that was previously unavailable," this Court should grant certiorari to ensure that it is consistent across the circuits.

CONCLUSION

For these reasons, this Court should grant the petition for certiorari.

Respectfully submitted.

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February 19, 2026

APPENDIX

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
July 23, 2025
Lyle W. Cayce
Clerk

No. 23-70002

DEXTER JOHNSON,

Petitioner—Appellee,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-3047

Before SOUTHWICK, GRAVES, and HIGGINSON, *Circuit Judges*. PER CURIAM:*

We authorized a prisoner's petition to file a second or successive application for a writ of habeas corpus. The district court determined the prisoner met the statutory requirements for a successive application and denied the

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

State's motion to dismiss. The district court then granted the State's motion to certify a question for interlocutory appeal. We answer the question and AFFIRM.

FACTUAL AND PROCEDURAL HISTORY

Dexter Johnson was convicted and sentenced to death for the 2006 robbery, kidnapping, and murder of 23-year-old Maria Aparece. The details of his offense are recounted in *Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015). The procedural history of Johnson's state habeas claims and his initial federal habeas proceedings are recounted in our decision that authorized Johnson to file a second or successive federal habeas application under 28 § U.S.C. 2244(b)(2)(A). *In re Johnson*, 935 F.3d 284, 287–88 (5th Cir. 2019).

Johnson filed his second or successive habeas application in the United States District Court for the Southern District of Texas. The application contained a single claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002). The State moved to dismiss the petition as impermissibly successive and untimely. The district court denied the State's motion to dismiss and held an evidentiary hearing. After the hearing, the State renewed its motion to dismiss and urged the district court to answer "whether an *Atkins* claim was functionally unavailable to Johnson during the pendency of his initial federal habeas proceedings." The district court denied the State's motion because it determined Johnson properly demonstrated his *Atkins* claim was previously unavailable and his claim was timely under the equitable tolling doctrine.

The State moved to certify the district court's order for interlocutory appeal under 28 U.S.C. § 1292(b). The State sought to certify the following issues for appeal: (1) "[w]hether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)"; (2) "[w]hether an attorney's

intentional, strategic decisions to not raise a claim he deemed meritless can ever constitute extraordinary circumstances"; and (3) "[w]hether a *prima facie* showing of intellectual disability exempts a petitioner from the diligence requirement of equitable tolling." The district court certified only the first issue.

STANDARD OF REVIEW

We review certified orders *de novo*. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 397 (5th Cir. 2010). "Under § 1292(b), it is the order, not the question, that is appealable." *Id.* at 398. Though we are not limited to considering only the certified issue, we are limited "to reviewing 'questions that are material to the lower court's certified order.'" *Id.* at 398 (quoting *Adkinson v. Int'l Harvester Co.*, 975 F.2d 208, 211 n.4 (5th Cir. 1992)). Although this court is permitted to consider each question raised by the State, we will only address the question certified by the district court: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?"

DISCUSSION

Federal law generally prohibits second or successive applications for a writ of habeas corpus. 28 U.S.C. § 2244. To file a second or successive application, the applicant must obtain authorization from the appropriate court of appeals. § 2244(b)(3)(A). Claims that were "presented in a prior application [will] be dismissed." § 2244(b)(1). Claims that were "not presented in a prior application [will also] be dismissed," except in narrow circumstances. § 2244(b)(2). Relevant here, the application may proceed 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." § 2244(b)(2)(A).

In his motion for authorization to file a successive application, "Johnson argue[d] that *Atkins* is a new rule of constitutional law that is retroactive and that his claim was previously unavailable because the latest professional diagnostic manual changed the framework for intellectual disability." *In re Johnson*, 935 F.3d at 291–92. In *Atkins v. Virginia*, the Supreme Court held that executions of the mentally disabled violate the Eighth Amendment. 536 U.S. at 321. Notably, "*Atkins* was decided long before Johnson even committed his crimes." *Johnson*, 935 F.3d at 292. Nevertheless, we agreed with Johnson that *Atkins* should be applied retroactively to his case, "counterintuitively perhaps, but not unreasonably, with the full weight of our conclusion being borne by this court's recent decision in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017)." *Id.*

Cathey, like Johnson, filed his first habeas petition without an *Atkins* claim although *Atkins* had already been decided. *Cathey*, 857 F.3d at 227. Cathey argued that an *Atkins* claim was nonetheless previously unavailable to him because it was "practically unavailable" until courts recognized a phenomenon called the Flynn Effect and he obtained evidence from the State suggesting his true score was lower than he initially believed.[1] *Id.* at

[1] "The Flynn Effect 'is a phenomenon positing that, over time, standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population. Those who follow the Flynn [E]ffect adjust for it by deducting from the IQ score a specified amount for each year since the test was normalized.'" *In re Cathey*, 857 F.3d at 227 (quoting *Wiley v. Epps*, 625 F.3d 199, 203 n.1 (5th Cir. 2010), *as revised* (Nov. 17, 2010)).

227–28. At the time of his first application, Cathey believed his IQ score was 77, which was not within the *Atkins* range at the time. *Id.* at 227. Later, it came to light that his score was more likely 73, which was within the *Atkins* range. *Id.* In his motion for authorization to file a second or successive application, he argued that "he did not know about the problem of aging norms nor the State's evidence of a lower IQ score, and thus had no reason to pursue an *Atkins* claim that nobody else had won and only one person had even tried." *Id.* at 228 (quotation marks omitted). We determined that "a claim must have some possibility of merit to be considered available" and that Cathey had made a *prima facie* showing that his *Atkins* claim was previously unavailable to him. *Id.* at 232–234.

With that background in mind, we now turn to the certified question: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?" The answer is no. Section 2244(b)(2) is jurisdictional in nature. *See Panetti v. Quarterman*, 551 U.S. 930, 942, 947 (2007). Courts have "no authority to create equitable exceptions to jurisdictional requirements." *Bowles v. Russell*, 551 U.S. 205, 214 (2007).

According to the State, we have gone beyond proper statutory interpretation and created such an exception. The district court also characterized our holding in *Cathey* as "read[ing] a futility exception into [S]ection 2244(b)(2)(A)." Despite the label given by the State and the district court, this court did not create any exceptions to the requirements of Section 2244(b)(2)(A) in *Cathey*. Instead, we interpreted the phrase "previously unavailable" in light of our precedents that allowed for "a gray area of previous unavailability despite technical availability." *Cathey*, 857 F.3d at 230. It is appropriate for

courts to interpret statutes, even jurisdictional statutes like Section 2244(b)(2)(A). *See Tyler v. Cain*, 533 U.S. 656, 662–63 (2001) (interpreting "made" to mean "held" for purposes of Section 2244(b)(2)(A)).

Therefore, we understand the parties' question more accurately to be this: Whether "previously unavailable" can be read in the way *Cathey* instructs, requiring the claim have had "some possibility of merit" for it to be considered previously available for purposes of Section 2244(b)(2)(A)? In answer to that question, we affirm our interpretation of "previously unavailable" in *Cathey* as the correct interpretation. A claim is not automatically considered previously available simply because it was technically available when a prior habeas application was filed. Instead, "a claim must have some possibility of merit to be considered available." *Cathey*, 857 F.3d at 232.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States District Court
Southern District of Texas
ENTERED
January 12, 2023
Nathan Ochsner, Clerk

DEXTER JOHNSON,	§	
	§	
Petitioner,	§	
	§	CIVIL ACTION NO.
VS.	§	4:19-CV-3047
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

ORDER

Dexter Johnson, an inmate on Texas' death row, has filed a successive federal habeas corpus petition arguing that he is intellectually disabled and thus exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). (Docket Entry No. 8). This Court held an evidentiary hearing in March 2022 to hear testimony from Johnson's former state habeas attorney. On October 28, 2022, the Court entered a Memorandum and Order finding that Johnson had met the statutory requirements which would allow his *Atkins* claim to proceed to adjudication. (Docket Entry No. 78).

Respondent Bobby Lumpkin wants immediate appellate review of the October 28, 2022, Order. To that end,

Respondent has filed a motion for an interlocutory appeal. (Docket Entry No. 80). Respondent asks the Court to certify three questions:

1. Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?
2. Whether an attorney's intentional, strategic decisions to not raise a claim he deemed meritless can ever constitute extraordinary circumstances?
3. Whether a prima facie showing of intellectual disability exempts a petitioner from the diligence requirement of equitable tolling?

(Docket Entry No. 80 at 4-5). Respondent also moves for a stay of this case during the appellate proceedings. (Docket Entry No. 81). Johnson opposes Respondent's motions. (Docket Entry No. 82).

Federal law permits a district court to certify an otherwise non-appealable order when "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b); *see also Clark-Dietz & Assocs.-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67, 69 (5th Cir. 1983). The Court finds that an interlocutory appeal would be appropriate in this case. Respondent's first question ("Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?") presents a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal might materially advance the ultimate termination of this litigation.

The Court's certification of only the first question, however, does not limit the issues for which Respondent may seek immediate appeal in the Fifth Circuit. The Fifth Circuit has held that "[u]nder § 1292(b), it is the order, not the question, that is appealable." *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 398 (5th Cir. 2010). The circuit court's jurisdiction extends to "'questions that are material to the lower court's certified order'" and it may review issues not specifically certified by the district court. *See Kemp v. CTL Distribution, Inc.*, 440 F. App'x 240, 243 (5th Cir. 2011) (quoting *Castellanos-Contreras*, 622 F.3d at 398).

An interlocutory appeal does not automatically stay the district court proceedings. *See* 28 U.S.C. § 1292(b) ("That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."). The questions which Respondent will ask the Fifth Circuit to review are dispositive in this case. Because an interlocutory appeal may materially change the course of this lawsuit, a stay of the proceedings is warranted.

The Court, therefore, **GRANTS** Respondent's motion for interlocutory appeal (Docket Entry No. 80) and motion to stay the proceedings (Docket Entry No. 81). This case is **STAYED**.

The Clerk will provide copies of this Order to the parties.

SIGNED on JAN 11 2023 at Houston, Texas.

/s/Alfred H. Bennett
ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States District Court
Southern District of Texas
ENTERED
October 28, 2022
Nathan Ochsner, Clerk

DEXTER JOHNSON,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	4:19-CV-3047
	§	
BOBBY LUMPKIN,	§	
	§	
Respondent.	§	

MEMORAMDUM AND ORDER

The Court of Appeals for the Fifth Circuit has authorized Dexter Johnson, an inmate on Texas' death row, to file a successive federal habeas corpus petition. Johnson wants to litigate a single issue: whether he is intellectually disabled and thus exempt from execution under *Atkins v. Virginia*, 536 U.S. 304 (2002). The strict limitations on federal review contained in the Anti-Terrorism and Effective Death Penalty Act pose a barrier to federal consideration of Johnson's successive petition. This Court must determine under AEDPA's rigorous standards whether it may consider Johnson's successive petition.

This Court held an evidentiary hearing in March 2022. The parties have submitted significant post-hearing briefing. The Court must now decide (1) whether Johnson has complied with AEDPA's successive-petition requirements and (2) whether Johnson has sought federal relief in a timely manner. For the reasons discussed below, the Court finds that successive proceedings are appropriate in this case.

I. BACKGROUND

Johnson murdered 23-year-old Maria "Sally" Aparece during a robbery on June 18, 2006. The Court has already provided a lengthy factual recitation of Johnson's crime. The Court will incorporate that background by reference. (Docket Entry No. 18 at 1-13); *see also Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015); *Johnson v. Stephens*, 4:11-cv 2466, Docket Entry No. 84 at 1-4; *Johnson v. State*, 2010 WL 359018, at *1 (Tex. Crim. App. 2010).

A. Intellectual Disability and the Law

Well before Johnson's trial, the Supreme Court decided that the Eighth Amendment's "evolving standards of decency" meant that "death is not a suitable punishment for [an intellectually disabled] criminal." *Atkins*, 536 U.S. at 321.[1] The Supreme Court, however, "did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability] will be so impaired as to fall within *Atkins*' compass." *Bobby v. Bies*, 556 U.S. 825, 831 (2009) (quotation omitted); *see also Moore v. Quarterman*, 454 F.3d 484,

[1] "Intellectual disability" is the diagnostic term now used for what used to be called mental retardation. *See Hall v. Florida*, 572 U.S. 701, 704 (2014).

493 (5th Cir. 2006) ("[T]he *Atkins* Court did not adopt a particular criteria for determining whether a defendant is mentally retarded[.]"). Courts and legislatures came to apply the framework established by professional psychological organizations. An inmate must make three showings before being entitled to a diagnosis of intellectual disability: (1) significantly subaverage intellectual functioning, manifested by an IQ of about 70 or below; (2) related significant limitations in adaptive skill areas; and (3) manifestation of those limitations before age 18. *See Clark v. Quarterman*, 457 F.3d 441, 446 (5th Cir. 2006). How courts applied those diagnostic criteria have set the course for the matters now at issue.

Many of the issues in this case stem from a judicial gloss that the Texas court placed over the *Atkins* inquiry between 2004 and 2017. The Texas Court of Criminal Appeals crafted "seven evidentiary factors" which became known as the "*Briseno* factors" to aid in deciding whether an inmate had adaptive deficits. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). These factors did not rely on any professional psychological paradigm, but on "lay perceptions of intellectual disability." *Moore v. Texas*, 137 S. Ct. 1039, 1051 (2017) (*Moore I*). The seven factors which "factfinders could focus upon . . . in weighing evidence as indicative of intellectual disability" were:

1. Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was intellectually disabled at that time, and, if so, act in accordance with that determination?
2. Has the person formulated plans and carried them through or is his conduct impulsive?

3. Does his conduct show leadership or does it show that he is led around by others?
4. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
5. Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
6. Can the person hide facts or lie effectively in his own or others' interests?
7. Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?

Brownlow v. State, 2020 WL 718026, at *10 (Tex. Crim. App. 2020) (relying on *Briseno*, 135 S.W.3d at 8-9). Texas courts generally applied these "stereotypes of the intellectually disabled" to limit the scope of *Atkins* relief. *Moore I*, 137 S. Ct. at 1052.

B. Trial Testimony

Even though Johnson did not qualify for a diagnosis of intellectual disability under the professional standards at place during trial, psychological testimony played an important part in the penalty phase. The defense relied on a mental-health expert, Dr. Dale R. Watson, to present evidence of Johnson's low intelligence. Dr. Watson's testing indicated that Johnson had a low level of intellectual functioning, around the equivalent of a ten-year-old. Tr. Vol. 31 at 167, 171-72.[2] Johnson's expert considered

[2] Dr. Watson assessed Johnson's IQ through two tests: the Stanford Binet Intelligence Scale, Fifth edition, and the Wechsler Adult

him to be in the borderline range for intellectual disability. Tr. Vol. 31 at 178, 205. Because his IQ was higher that the cutoff in place at that time for a diagnosis of intellectual disability, Johnson's expert did not assess whether he suffered from adaptive deficits. Tr. Vol. 31 at 263. Trial testimony, therefore, established that Johnson did not meet the diagnostic criteria for *Atkins*' first prong, but did not provide extensive insight about the other prongs.

On June 28, 2007, Johnson was sentenced to death. That same day, the trial court appointed Patrick F. McCann to represent Johnson in state habeas corpus proceedings. Mr. McCann is an experienced capital attorney, having practiced criminal law for over twenty-five years in trial, appellate, and post-conviction cases. (Docket Entry No. 60 at 98-104). Mr. McCann brought with him deep knowledge and experience in dealing with mental-health issues. (Docket Entry No. 60 at 106-07). Mr. McCann's representation has become a core concern in deciding whether Johnson can litigate an *Atkins* claim.

Johnson did not raise any claim relating to intellectual disability on direct appeal or state habeas review. On June 28, 2011, Mr. McCann filed a federal petition on Johnson's behalf. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 1.[3] Johnson's federal petition did not raise any issue relating to his intellectual functioning.

Intelligence Scale, Third edition (WAIS-III). 31 RR 196. Applying a standard error of measurement and a principle called the Flynn Effect, Dr. Watson opined that Johnson's IQ was somewhere between 74 and 88. 31 RR 204. Dr. Watson testified that Johnson did not have obvious deficits in adaptive behavior. 31 RR 206. Dr. Watson testified that Johnson was not intellectually disabled. 31 RR 20.

[3] The Honorable United States District Judge Gray H. Miller presided over Johnson's initial habeas action.

C. Developments in *Atkins* Jurisprudence

Changes in how both the courts and the mental-health profession view intellectual disability have shaped the extent to which Johnson's low intelligence has mattered. Revised psychological standards governing intellectual disability would eventually enhance Johnson's ability to raise a successful *Atkins* claim. On May 18, 2013, the American Psychological Association revised its diagnostic manual, the Diagnostic and Statistical Manual of Mental Disorders (DSM-V). The DSM-V significantly altered how clinicians viewed the relationship between IQ scores and intellectual disability. The DSM-V "recogniz[ed] that an individual with an IQ score over 70 may still qualify as intellectually disabled." *In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020). Thus, "[t]he latest DSM-5 manual changed the diagnostic framework for intellectual disability. Higher IQ scores no longer bar a diagnosis of an intellectual disability." *In re Johnson*, 935 F.3d 284, 292 (5th Cir. 2019).

Shortly after its publication, the Supreme Court addressed the DSM-V in *Hall v. Florida*, 572 U.S. 701 (2014). *Hall* explicitly held that the *Atkins* determination must be "informed by the medical community's diagnostic framework." 572 U.S. at 721. In *Hall*, the Supreme Court relied on the DSM-V to recognize that, while not "unhelpful," IQ scores are not the only consideration in an *Atkins* inquiry. *Id.* at 723. The DSM-V repudiated previous over-reliance on IQ test scores. *See id.* at 721-22. Simply put, the Supreme Court followed the mental-health profession in recognizing that "intellectual disability is a condition, not a number." *Id.* In subsequent cases, the Supreme Court would continue to emphasize the importance of relying on current standards

developed by professional mental-health organizations. *See Brumfield v. Cain*, 576 U.S. 305, 308 (2015).

The Supreme Court's reliance on the DSM-V did not initially change Texas' use of the *Briseno* factors. As the Supreme Court brought *Atkins* jurisprudence in sync with the medical community, the Texas courts continued to apply the judge-made *Briseno* factors. *See Ex Parte Moore*, 470 S.W.3d 481, 486 (Tex. Crim. App. 2015) (refusing to adopt a recommendation that habeas relief be granted when the lower court relied on the DSM-V); *Ex parte Cathey*, 451 S.W.3d 1, 10 (Tex. Crim. App. 2014) (mentioning, but not relying on, the DSM-V standards). Finally in 2017, Texas' approach to *Atkins* cases came to a head when the Supreme Court threw out the *Briseno* standards in *Moore I*.

On remand in *Moore I* in 2018, the Court of Criminal Appeals finally "conclude[d] that the DSM-5 should control [its] approach to resolving the issue of intellectual disability." *Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018). Even then, the Court of Criminal Appeals supplanted its *Briseno* factors with additional non-psychological factors. The Supreme Court subsequently had to rectify Texas' failure to adhere closely enough to the psychological profession's standards. *See Moore v. Texas*, ___ U.S. ___, 139 S. Ct. 666 (2019) (*Moore II*).

D. The Response to the DSM-V by Mr. McCann and Johnson's Current Attorneys

When the DSM-V issued, Johnson's federal petition was still pending.[4] Mr. McCann knew about the DSM-V and knew it could change the way mental-health professionals evaluated Johnson. While developments in the

[4] On August 19, 2013, the Court denied Johnson's initial federal petition. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19.

law and in psychology which would favor Johnson were occurring, Mr. McCann did not have Johnson reevaluated under the DSM-V standards or otherwise investigate the possibility of raising an *Atkins* claim.

Mr. McCann only began an investigation into *Atkins* relief after the State of Texas set Johnson's execution for May 2, 2019. Mr. McCann filed a successive state habeas application raising an *Atkins* claim as Johnson's execution date approached. *Ex parte Johnson*, 2019 WL 1915204 (Tex. Crim. App. 2019). Mr. McCann also filed a federal motion to proceed *ex parte* in a request for funds to develop an *Atkins* claim. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 75. Mr. McCann based these filings on a psychological evaluation performed by Dr. Greg Hupp less than a month before Johnson's execution date. Using the DSM-V standard, Dr. Hupp diagnosed Johnson with intellectual disability.

New attorneys eventually began representing Johnson in federal court. Johnson's new attorneys arranged for an evaluation by another expert, Dr. Daniel A. Martell. Dr. Martell confirmed the diagnosis of intellectual disability. Johnson's new attorneys brought an *Atkins* claim before the Fifth Circuit. The Fifth Circuit stayed Johnson's execution. The Fifth Circuit also authorized Johnson to file a successive federal petition.

On August 15, 2019, Johnson filed his successive habeas petition in this Court. (Docket Entry No. 1). Johnson amended his successive petition on November 12, 2019 (Docket Entry No. 8) and moved for an evidentiary hearing, (Docket Entry No. 9). Johnson supports his successive habeas petition with the following evidence indicating that he may be entitled to *Atkins* relief:

- An affidavit from Dr. Greg Hupp. On April 4, 2019, Dr. Hupp administered a WAIS-IV

IQ test which resulted in an IQ of 70. Dr. Hupp also assessed lay testimony and the results of testing to decide that Johnson suffers from adaptive deficits. With that testing, Dr. Hupp concluded that Johnson "meets the DSM-5 criteria as a person with an **intellectual disability, mild**." (Docket Entry No. 1, Exhibit 2) (emphasis added).

- A forensic neuropsychological report by Dr. Daniel A. Martell. Dr. Martell found that Johnson qualified for a diagnosis of intellectual disability. In particular, Dr. Martell opined that Johnson suffered mild to moderate impairments in his adaptive deficits. (Docket Entry No. 1, Exhibit 1). Dr. Martell avers that it "is it clear that Dexter Johnson meets the criteria for a diagnosis of Intellectual Disability." (Docket Entry No. 1, Exhibit 1).
- An affidavit from Dr. Dale G. Watson, the defense expert at trial. Dr. Watson states that his test results at the time of trial "would not automatically preclude a diagnosis of Intellectual Disability" under the DSM-V standards. (Docket Entry No. 1, Exhibit 3).
- Declarations from family members and others to show adaptive deficits. (Docket Entry No. 1, Exhibit 3).

Taken together, Johnson's argument and evidence provide the basis for a viable *Atkins* claim.

II. The Evidentiary Hearing and Subsequent Briefing

The Court held an evidentiary hearing on March 31, 2022. (Docket Entry No. 60).[5] The hearing had two discrete purposes: "(1) decide whether Johnson is entitled to proceed with his successive petition and (2) examine the timeliness of Johnson's successive petition." (Docket Entry No. 18 at 1). Only Mr. McCann testified at the hearing. The Court, however, received substantial evidence from the parties, including depositions from other attorneys who had represented Johnson. The parties have each filed post-hearing briefing. (Docket Entry No. 63, 64).

Respondent's post-hearing briefing approaches the evidentiary hearing testimony with a focus on the decisions Mr. McCann made. Respondent urges that "[t]he only unanswered question of the Court at this point is whether an *Atkins* claim was functionally unavailable Johnson during the pendency of his initial federal habeas proceedings because McCann was ineffective." (Docket Entry No. 64 at 20).[6] Respondent urges the Court to find

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[5] The Supreme Court recently explained that, under section 2254(e)(2), a court improperly holds an evidentiary hearing or considers new evidence to determine whether cause and prejudice exist to overcome procedural default "if the newly developed evidence never would 'entitle the prisoner to federal habeas relief.'" *Shinn v. Ramirez*, —— U.S. ——, 142 S Ct. 1718, 1739 (2022). Respondent has not pointed to any authority extending *Ramirez* to the reasons for which this Court held a limited evidentiary hearing.

[6] Aside from addressing the testimony and evidence from the hearing, Respondent's post-hearing brief spends a significant amount of time taking issue with various legal matters which the Court has previously resolved, both in the first instance and in a motion for rehearing. For example, Respondent disputes whether equitable exceptions exist to section 2244(d), whether a district

that Mr. McCann weighed the possibility of raising an *Atkins* claim but felt hobbled by Texas' *Briseno* jurisprudence. Respondent's arguments ask the Court to defer heavily to strategic decisions made by Mr. McCann.

Johnson's briefing also focuses on Mr. McCann's testimony, but does so by contrasting his representation against developments in psychology, changes in the law, and decisions he made in other cases. From his hearing testimony, Mr. McCann was clearly aware that the DSM-V's publication breathed life into an otherwise tepid *Atkins* claim. Mr. McCann was familiar with Texas and federal *Atkins* jurisprudence. Mr. McCann, however, withheld an *Atkins* claim while other cases challenged Texas' *Briseno* standard. Johnson argues that Mr. McCann's failure to raise an *Atkins* claim was negligent or incompetent.

The Court must now decide if Johnson's *Atkins* claim was available before he filed it and whether he filed it too late. The core issues before the Court are simple. The psychological profession changed its understanding of intellectual disability in a manner which transformed a previously weak *Atkins* claim into a potential exemption from execution. The Supreme Court soon thereafter made those standards the law of the land. The testimony in the evidentiary hearing was clear—Mr. McCann knew he could develop a viable *Atkins* claim. Prognosticating

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court can apply law the circuit court has created in its threshold successiveness review, and whether the Court should apply circuit law which considers some *Atkins* claims previously unavailable until the publication date of the DSM-V. (Docket Entry No. 64 at 8-14, 19). To the extent Respondent disagrees with earlier legal decisions, an appeal is the proper vehicle for challenging decisions already made by the Court (and in some instances, reconfirmed on reconsideration). This Court's concern is whether the evidence in the hearing will allow Johnson's petition to proceed toward adjudication.

that the state courts would not follow the Supreme Court's direction in *Atkins* jurisprudence, Mr. McCann withheld raising it. The question is whether Johnson may now litigate his *Atkins* claim under AEDPA's successive petition standards.

III. Successive Federal Review

In 2019, Johnson moved in the Fifth Circuit for leave to file a successive federal habeas petition. AEDPA imposes restrictions on a prisoner's ability to file a second or successive habeas petition. *See* 28 U.S.C. § 2244. An inmate must first receive permission from a circuit court before a district court may consider successive habeas claims.

Johnson's pleadings in the Fifth Circuit relied on section 2244(b)(2)(A) which required three showings: (1) the claim was not presented in a prior petition; (2) the inmate relied on a new rule of constitutional law that the Supreme Court had made retroactive; and (3) he made a prima facie showing that his claim had merit. Respondent conceded that Johnson had not presented his *Atkins* claim in a previous petition. *See In re Johnson*, 935 F.3d 284, 292 (5th Cir. 2019). Relying on *In re Cathey*, 857 F.3d 221 (2017), the Fifth Circuit found that the DSM-V's "significant change . . . in the medical methodology for evaluating the relevant disabilities and . . . courts' recognition of those changes" made Johnson's *Atkins* claim previously unavailable to him. *Johnson*, 935 F.3d at 292-93.[7] Primarily based on Dr. Martell's report, the

[7] Respondent continues to advance a theory that law created in a circuit court's review under 28 U.S.C. § 2244(b)(3)(c)—which Respondent terms the "authorization context" (Docket Entry No. 64 at 16 n.10)—does not apply to the district courts. Respondent faults this Court for following law created in "the Fifth Circuit's nonappealable determinations in the prima facie context." (Docket Entry

Fifth Circuit found that Johnson made a prima facie showing that his claim has merit. *Johnson*, 935 F.3d at 294. The Fifth Circuit authorized Johnson's petition to proceed and stayed Johnson's execution.

Johnson then filed an amended petition in this Court. (Docket Entry No. 8). The Fifth Circuit's authorization of successive proceedings "is tentative" and this Court "must dismiss" Johnson's successive petition "without reaching the merits, if the court finds that the movant has not satisfied the § 2244(b)(2) requirements." *In re Swearingen*, 556 F.3d 344, 349 (5th Cir. 2009).

This Court must determine if the pending petition conclusively meets AEDPA's second or successive petition requirements. Johnson may only proceed on his federal petition if he relies on (1) a new rule that (2) the Supreme Court has made retroactive and which (3) was not previously available to him. *See Tyler v. Cain*, 533 U.S. 656, 662 (2001).

A. A New, Retroactive Rule

Successive federal habeas proceedings in this instance depend on Johnson meeting AEDPA's requirement that he rely on "a new rule of constitutional law, made retroactive . . . ." 28 U.S.C. § 2244(b)(2)(A). Respondent's briefing muddies this Court's inquiry by characterizing Johnson's argument to be that the DSM-

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No. 64 at 8). Respondent has not supported this theory with any precedent. True, federal law requires the district court to consider *de novo* the facts and the application of those facts to the law. Respondent, however, does not cite any precedent which gives district courts authority to write their own law independent of the Fifth Circuit jurisprudence in section 2244(b) cases. Respondent has not provided any reason for this Court to ignore the Fifth Circuit's interpretation of the law, regardless of whether it was created in the "authorization context" or after plenary habeas review.

V, or possibly its application in later cases, created a new rule of constitutional law. (Docket Entry No. 64 at 12-14, 18). In essence, Respondent characterizes Johnson's argument as "rely[ing] on the DSM-V as the operative 'new rule of constitutional law' [that] giv[es] rise to his *Atkins* claim." (Docket Entry No. 64 at 12).[8]

Johnson, however, never argues that the DSM-V itself amounts to a new rule of constitutional law. Johnson clearly argues that "'*Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court.'" (Docket Entry No. 63 at 8) (quoting *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014)).

Atkins unquestionably created a new rule of constitutional law. *See In re Soliz*, 938 F.3d 200, 203 (5th Cir. 2019); *Johnson*, 935 F.3d at 292; *Cathey*, 857 F.3d at 228. *Atkins* was made retroactive on federal habeas review. *See Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002). While *Atkins* is generally considered retroactive, the question in this case is whether *Atkins* should be retroactive *as to Johnson*. For reasons similar to those discussed herein under the "previously unavailable"

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[8] Respondent argues that "Johnson either relies on an old rule that was made retroactive—*Atkins*—and was thus previously available or he relies on new rules [in the *Moore* cases] that have never been made retroactive by the Supreme Court[.]" (Docket Entry No. 64 at 20). "*Atkins* in a generic sense [is] a rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court . . . . " *In re Johnson*, 935 F.3d 284, 293 (5th Cir. 2019). However, a "new rule" generally is one that was "not dictated by precedent existing at the time the defendant's conviction became final." *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993); *see also* Brian R. Means, Federal Habeas Manual, § 27:6 (2021 Edition). Respondent argues that successive proceedings would be inappropriate because *Atkins* was not "new" in this context because it arose before Johnson's conviction.

inquiry, the circumstances are such that the DSM-V "removed a clear barrier to [Johnson's] claim, making *Atkins* available to him for the first time." *Soliz*, 938 F.3d at 203; *see also Cathey*, 857 F.3d at 228. Under Fifth Circuit law, Johnson has met AEDPA's requirement that he relies on a new rule that the Supreme Court has made retroactive.

B. Previously Unavailable

Johnson must show that *Atkins* was "previously unavailable" to him. 28 U.S.C. § 2244(b)(2)(A). AEDPA itself does not define that phrase. The phrase contains two components: a question of timing (simply put, previous to what?) and a question of accessibility (in other words, what does it mean to be unavailable?). Considering both those factors, Johnson has shown that he could not have raised an *Atkins* claim during his initial habeas proceedings.

1. Previously/Futility

AEDPA itself does not set out when a claim could have been raised "previously."[9] Soon after AEDPA' s enactment, courts generally agreed that the term focuses on when "the first federal habeas application was filed."

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[9] AEDPA uses the same phrase when allowing a federal evidentiary hearing if the petitioner failed to develop the factual basis of his claim in state court so long as the petitioner's claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the United States Supreme Court, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). The courts have not provided a definition of that phrase beyond the text of the statute. *See* Brian R. Means, Postconviction Remedies § 22:8 (June 2021 update) ("The statute does not indicate what the establishment of the new, retroactively-made rule must be 'previous' to."). AEDPA also uses the phrase in the comparable provision for federal prisoners. *See* 28 U.S.C. § 2255(h).

In re Medina, 109 F.3d 1556, 1566 (11th Cir. 1997); *see also Mathis v. Thaler*, 616 F.3d 461, 467 (5th Cir. 2010) ("The issue before us is whether Mathis has demonstrated that his *Atkins* claim was "previously unavailable" at the time he filed his first federal habeas application."); *Rodriguez v. Superintendent, Bay State Correctional Center*, 139 F.3d 270, 274 (1st Cir. 1998) ("The time frame of the applicant's previous habeas petition provides the coign of vantage from which we assess whether a rule of constitutional law was 'previously unavailable.'"). *Atkins* was the law of the land, and technically available as a ground for relief to petitioners, when Johnson filed his federal petition in 2011. Under a strict reading of section 2244(b), any inmate who filed a federal petition after 2002 would have to include an *Atkins* claim in his initial petition or forever forfeit his right to bring the claim.

Johnson argues that, despite the theoretical existence of *Atkins* as a ground for relief, it only became a viable claim after the DSM-V's publication in 2013. (Docket Entry No. 63 at 8). Johnson's argument comports with Fifth Circuit law. The Fifth Circuit eschews a "strict rule" regarding when a claim was available to an inmate and recognizes "a gray area of previous unavailability [of a new constitutional rule] despite technical availability." *Cathey*, 857 F.3d at 229-30. In other words, the Fifth Circuit has read a *futility* exception into section 2244(b)(2)(A).[10] This exception includes a "rebuttable presumption that a new rule of constitutional law was

[10] Respondent argues that "there is no futility exception in § 2244(b)(2)(A)," but does not explain away the Fifth Circuit cases which have recognized that judicially created exception other than to say that they do not apply to a district court. (Docket Entry No. 64 at 13).

previously available if published by the time a district court ruled on a petitioner's initial habeas petition," which can be overcome by presenting "cogent arguments that [the claim] was previously unavailable" during the initial habeas proceedings. *Cathey*, 857 F.3d at 229; *see also Muñoz v. United States*, 28 F.4th 973, 977 (9th Cir. 2022) ("Under this approach, the prisoner seeking to file a second or successive request for habeas relief must show that the real-world circumstances that he faced prevented him, as a practical matter, from asserting his claim based on a new rule of law in his initial habeas proceeding.").

Thus, when circumstances arise—such as changes in the methodology for assessing intellectual disability under DSM-V—which remove a clear barrier to raising a claim, the Fifth Circuit asks when a new rule has functionally been made "available to [the inmate] for the first time." *Soliz*, 938 F.3d at 203 (describing the Fifth Circuit's action in *Johnson*); *see also Milam*, 838 F. App'x at 799 (citing *Johnson*, 935 F.3d at 293). In the specific context of *Atkins* cases, the Fifth Circuit has recognized that both the "significant changes in medical methodology for evaluating relevant disabilities" and the "courts' recognition of those changes" may make a claim available for the first time. *Milam*, 838 F. App'x at 799 (quoting *Johnson*, 935 F.3d at 294); *see also In re Halprin*, 788 F. App'x 941, 944 (5th Cir. 2019).

Applying a futility exception in its preliminary review under section 2244(b), the Fifth Circuit recognized that the *Atkins* claim "had previously been unavailable because under earlier medical understandings of intellectual disability relevant to Johnson's condition" and thus any "*Atkins* claim would have been futile." *Soliz*, 938 F.3d at 203 (relying on *Johnson*). This Court agrees that,

because earlier psychological standards made *Atkins* relief inapplicable to Johnson, raising an *Atkins* claim would have been futile until the DSM-V issued.[11] The Court, therefore, finds that Johnson could not have raised his claim previously; that is, he could not have raised it when he filed his federal petition.

2. Unavailability/Feasibility

The futility of raising an *Atkins* claim ended for Johnson when the DSM-V was published on May 18, 2013. Johnson was then still litigating his first federal habeas petition. The evidentiary hearing testimony established that Mr. McCann was aware that the DSM-V was published and that it would make a difference to Johnson. Mr. McCann, however, did not file any *Atkins* claim on Johnson's behalf between that point and when a final judgment issued months later. Johnson's case requires considering whether a claim can still be unavailable when it comes into existence midstream in the federal habeas process.

AEDPA itself does not spell out when a claim has been "unavailable." The Fifth Circuit reads into the "previously unavailable" phrase a functional concern for when it was "'feasible to amend [the inmate's] pending petition to include the new claim.'" *In re Wood*, 648 F. App'x 388, 391 (5th Cir. 2016) (quoting *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015)); *see also Cathey*, 857 F.3d at 233.[12] The Court must decide whether it would

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[11] While arguing that no "futility exception to the successiveness-bar exist[s]," Respondent says that "raising an *Atkins* claim on Johnson's behalf would have been entirely futile until at least *Moore I*." (Docket Entry No. 64 at 17).

[12] Other circuits have also rejected a "mechanistic test" when assessing previous unavailability. *In re Hill*, 113 F.3d 181, 183 (11th

have been *feasible* for Johnson to litigate an *Atkins* claim during his on-going federal action.

As a general rule, federal habeas practice does not sanction adding new claims late in the adjudicative process. The habeas rules encourage inmates to "specify all [available] grounds for relief" in their original habeas petition and to "state the facts supporting each ground." Rule 2(c) of the Rules Governing Section 2254 Cases in the United States District Courts. A habeas petition "may be amended . . . as provided in the rules of procedure applicable to civil actions." 28 U.S.C. § 2242. Federal Rule of Civil Procedure 15 provides that "leave to amend shall be freely given when justice so requires." Under the applicable federal rules, "pleadings may be amended once as a 'matter of course,' i.e., without seeking court leave" before "a responsive pleading is served[.]" *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (citing Fed. Rule Civ. Proc. 15(a)). After that point, leave to amend is by no means automatic and a district court has discretion whether to allow amendment. *Addington v. Farmer's Elevator Mut. Ins. Co.*, 650 F.2d 663, 666 (5th Cir. 1981).

A federal court will consider various factors in deciding whether to permit amendment in a case such as this one, both after Respondent files an answer and occurring late in the adjudicative process. A court may disallow amendment for various reasons including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or]

Cir. 1997); *see also Muñoz v. United States*, 28 F.4th 973, 977 (9th Cir. 2022); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005).

futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962).[13]

When the DSM-V issued, the parties were still briefing a motion Johnson had filed to amend his petition on other grounds. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 14. That attempted amendment came late in the habeas process—"almost two years after Mr. Johnson filed his initial federal habeas petition, nearly fifteen months after the State filed its answer, and nearly ten months after Mr. Johnson replied." (Docket Entry No. 63 at 18-19). Three months later the Court entered a Memorandum and Order denying habeas relief on all but one claim. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19. The Court also denied Johnson's request to amend his petition. The Court gave several reasons for denying amendment. Amendment at that late stage "would needlessly insert delay into the habeas process," "high procedural obstructions" including exhaustion existed to "federal habeas review and relief," and Johnson's proposed claims were inadequately developed. *Johnson v. Stephens*, 4:11-cv-2466, Docket Entry No. 19 at 14-15.

Those same problems would have doomed any effort to add an *Atkins* claim. Johnson had not exhausted any *Atkins* issue. An *Atkins* claim requires serious consideration of numerous factual issues. Federal habeas practice has long given the state courts the right to adjudicate claims in the first instance. It would have run contrary to AEDPA's stated concern for efficiency to pause

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[13] Habeas amendments raising claims involving the same "conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading" will "relate back to the date of the original pleading." *Mayle v. Felix*, 545 U.S. 644, 656 (2005). Without the "common core of operative facts," however, a court may be discouraged from allowing amendment. *Id.* at 664.

federal review, possibly for years, when the other claims in Johnson's petition were ripe for adjudication.

Johnson could not have amended his petition to include a claim based on *Atkins*. Given the totality of the circumstances in this case, and particularly how late in the proceedings in which an *Atkins* claim based on the DSM-V arose, the Court finds that it would not have been feasible for Johnson to try amending his petition. Thus, the Court finds that Johnson has shown that his *Atkins* claim was unavailable.

3. Deficient Representation Exception to Section 2244

In addition to its interpretation of the phrase "previously unavailable," the Fifth Circuit has recognized that an extra-statutory exception to the AEDPA language may exist when a petitioner's "representation in the initial federal habeas proceedings was so deficient as to render the *Atkins* claim functionally unavailable." *Wood*, 648 F. App'x at 392. Johnson argues that Mr. McCann's representation made his *Atkins* claim "functionally unavailable" to him. (Docket Entry No. 16 at 8). With the Court's decision above, it is not necessary to consider Mr. McCann's representation in the section 2244(b)(2) inquiry. If it would have been futile to raise an *Atkins* claim before the DSM-V came out, and it was not feasible to add it to the on-going proceedings, then concerns about Mr. McCann's representation dissipate in the section 2244(b)(2) review. The Court observes, however, that the discussion that follows below concerning AEDPA's limitation period applies with full force to Mr. McCann's representation immediately after the DSM-V issued.

C. Conclusion of Successiveness Review

Under AEDPA's second-gatekeeper review, the Court finds that the Johnson relies on a new, retroactive rule that was previously unavailable to him. The Court, therefore, can adjudicate Johnson's successive petition.

IV. Limitations Period

The question of timeliness is separate from the authorization of successive proceedings. Section 2244(d) created a strict timetable which inmates must comply with when filing for federal habeas relief. The relevant subsections create a series of trigger dates from which an inmate has a year to file his federal petition. 28 U.S.C. § 2244(d)(1).

Johnson filed his *Atkins* claim on August 15, 2019, several years after the DSM-V issued. Under any scenario,[14] he filed his federal petition late. Strict application of AEDPA's statutory language would bar federal consideration of his *Atkins* claim.

A. Equitable Tolling Standard

In recognition of AEDPA's harsh consequences, the Supreme Court has held that equitable tolling may forgive noncompliance with the timeliness provision. *See Holland v. Florida*, 560 U.S. 631, 634 (2010). "To establish his entitlement to equitable tolling, a petitioner must 'sho[w] (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.'" *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) (quoting

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[14] The Fifth Circuit has not yet decided whether to measure an inmate's compliance with the limitations period from the publication of the DMS-V or from *Moore I*. *See In re Jones*, 998 F.3d 187, 190 (5th Cir. 2021); *Milam*, 838 F. App'x at 798; *Sparks*, 939 F.3d at 632.

Holland, 560 U.S. at 649). Johnson asks this Court to find equitable tolling under one of three theories: (1) actual innocence, (2) abandonment, or (3) ineffective representation.

B. Actual Innocence of the Death Penalty

Johnson argues that "[t]his Court may exercise [the] equitable exception to the statute of limitations because Mr. Johnson's intellectual disability renders him innocent of the death penalty." (Docket Entry No. 66 at 21). Johnson relies on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), in which the Supreme Court held that a credible showing of actual innocence can overcome the habeas statute of limitations. The briefing, however, is still insufficient to allow equitable tolling on that basis for two reasons.

First, the *McQuiggin* case only approached equitable tolling from the question of an inmate's innocence of the underlying crime. *See McQuiggin*, 569 U.S. at 399 (basing its exception to the limitations period on showing "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence") (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Claims of innocence in sentencing invoke far different concerns than the execution of one innocent of the crime. *See Schlup*, 513 U.S. at 324-27 ("Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of finality and comity than do claims that focus solely on the erroneous imposition of the death penalty."). To date, the Fifth Circuit has avoided the question of whether actual innocence of the death penalty may forgive a procedural bar. *See Tamayo v. Stephens*, 740 F.3d 986, 990 (5th Cir. 2014). Johnson has not cited any precedent extending *McQuiggin* to allow equitable tolling for questions involving sentencing.

Second, the record at this point is insufficient to find that Johnson is actually innocent of his death sentence. Even if *McQuiggin* jurisprudence allows for intellectual disability to be make an inmate actually innocent of the death penalty, the evidence before the Court is still insufficient to find that Johnson warrants protection under *Atkins*. As a prima facie matter, Johnson appears to have a strong *Atkins* claim available to him. But Johnson's evidence has not yet been tested in adversarial proceedings. It would be premature to find Johnson actually innocent of his death sentence before full review of his *Atkins* claim. The Court, therefore, reserves the question of whether actual innocence overcomes the procedural bar until further proceedings shed greater light on his *Atkins* claim.

C. Abandonment

Johnson next suggests that the Court should find that Mr. McCann had abandoned him. Johnson alleges that Mr. McCann did not make choices based on any plan, but instead just neglected Johnson's case. Johnson's abandonment argument depends on finding that Mr. McCann was not credible when he explained why he did not advance an *Atkins* claim before 2019.

The Court, however, finds that Mr. McCann was a credible witness whose account was believable. From his testimony, it is apparent that Mr. McCann made choices based on his own assessment of the law and Johnson's own circumstances. Mr. McCann never ceased litigating on Johnson's behalf. He just did not litigate an *Atkins* claim until the eve of an execution date.

D. Deficient Representation

Equitable tolling depends on Mr. McCann's representation. Johnson argues that "Mr. McCann's chosen

course of litigation was objectively unreasonable to the point that it constituted egregious professional misconduct." (Docket Entry No. 63 at 2). In other words, equitable tolling is warranted because Mr. McCann "claimed to deliberately choose not to raise a claim that would have resulted in relief" for Johnson." (Docket Entry No. 63 at 3).

Among other possible circumstances, the Supreme Court has said that "at least sometimes, professional misconduct . . . could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Holland*, 560 U.S. at 651. The Supreme Court has recognized that, while a "garden variety claim of misconduct" by counsel does not warrant equitable tolling, "far more serious instances of attorney conduct may." *Id.* at 651-52; *see also Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002) ("[M]ere attorney error or neglect is not an extraordinary circumstance such that equitable tolling is justified.")). "Tolling based on counsel's failure to satisfy AEDPA's statute of limitations is available only for "'serious instances of attorney misconduct.'" *Christeson v. Roper*, 574 U.S. 373, 378 (2015) (quoting *Holland*, 560 U.S. at 651-52). The Court must decide whether Mr. McCann's representation provides a basis for equitable tolling because he withheld claims from federal review and failed to litigate zealously for Johnson, as he had for other inmates.

Mr. McCann' s evidentiary hearing testimony demonstrated that he has a rich understanding of *Atkins* law and mental-health issues in capital cases. The Court was left with little doubt that Mr. McCann had kept abreast of changes in both the psychological understanding of intellectual disability and the legal responses to those changes. (Docket Entry No. 60 at 51-61). Mr. McCann

used that knowledge to pursue *Atkins* relief in other cases. For instance, in early 2014 Mr. McCann began litigating an *Atkins* claim based on the DSM-V in behalf of another client, Texas death-row inmate Bobby Moore. (Docket Entry No. 60 at 105). Through litigation which resulted in two trips to the Supreme Court, Bobby Moore's case caused the Texas state courts to bring their *Atkins* jurisprudence in line with the DSM-V and federal law. *See Ex parte Moore*, 548 S.W.3d 552, 555 (Tex. Crim. App. 2018) (resulting in *Moore I*); *Ex parte Moore*, 470 S.W.3d 481, 484 (Tex. Crim. App. 2015) (resulting in *Moore II*).

But Mr. McCann did not have Johnson evaluated under the new DSM-V standards or raise an *Atkins* claim on Johnson's behalf until 2019. In the evidentiary hearing Mr. McCann testified that he did not raise an *Atkin* claim after the DSM-V issued because of "a whole bunch of decisions that come together." (Docket Entry No. 60 at 114). Mr. McCann provided two main reasons for withholding an *Atkins* claim. Mr. McCann explained that "the primary thing" was that he focused on litigating a different claim for which he had received a Certificate of Appealability rather than investigating whether Johnson was eligible for a diagnosis of intellectual deficiency. (Docket Entry No. 60 at 134). Mr. McCann, however, repeatedly emphasized that his decision also came about because capital litigators "were still struggling with the *Briseno* standard." (Docket Entry No. 60 at 114). Mr. McCann feared that raising an *Atkins* claim in state court—as AEDPA's exhaustion doctrine required him to do in the first instance—would result in a decision by the state courts which would eventually result in unfavorable federal review. Mr. McCann testified that he felt impaired in this case by what he saw as inalterable Texas

law. Respondent argues that Mr. McCann engaged in strategic decision making to which courts must defer. The Court must decide if these decisions may forgive strict compliance with AEDPA's limitations period.

Several features of Mr. McCann's decision-making cause concern in this case. **First**, Mr. McCann formulated a strategy which, while ostensibly based on anxiety about the deference afforded claims, operated to withhold them from federal court. Federal courts have long worried that inmates may engage in "sandbagging" by holding back claims until a more-favorable forum becomes available. *Murray v. Carrier*, 477 U.S. 478, 492 (1986). Federal habeas procedure has strongly criticized "a strategy of piecemeal attacks on [an inmate's] conviction." *Galtieri v. Wainwright*, 582 F.2d 348, 358 (5th Cir. 1978). Capital attorneys absolutely should not withhold viable claims when an avenue of federal relief exists. *See In re Sparks*, 944 F.3d 572, 574 (5th Cir. 2019) (Jones, J., specially concurring) ("It is hard to envision competent counsel's having sat on a potentially meritorious exclusion from capital punishment until the eve of execution."). Federal review cannot countenance any decision—however strategic it may seem—formed with the intent of withholding potentially viable claims from an initial federal habeas petition.

Second, Mr. McCann believed that exhausting an *Atkins* claim in state court would be futile at best, and possibly fatal to any hope of federal relief. Yet the Supreme Court has been wary of forgiving an inmate's trepidation at exhaustion when state law was unfavorable to him. *See Engle v. Isaac*, 456 U.S. 107, 130 (1982) ("If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be

unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."). The Supreme Court has found that unfavorable state law does not forgive exhaustion even when the disputed claim "was unacceptable to that particular court at that particular time." *Id.* at n. 35 (citations and quotation marks omitted).

Third, concerns about AEDPA's exhaustion and deferential provisions came at a cost: running afoul of the stringent one-year limitations period. Mr. McCann said that he was waiting for the Court of Criminal Appeals to change its state-law interpretation of *Atkins* which would then trigger "a new factual basis or a new legal basis and essentially you'd have one year from the time of either." (Docket Entry No. 60 at 140). Yet the Fifth Circuit has not treated Texas' eventual compliance with the DSM-V as a new trigger date for the limitations period. *Milam*, 838 F. App'x at 798; *Sparks*, 939 F.3d at 632. It is unclear how any change in a state court's application of settled federal law would create a basis for successive proceedings under section 2244.

Fourth, Mr. McCann feared that a trip through the state courts would result in a decision which, when later considered by the federal courts under the AEDPA's deferential review, would doom any federal *Atkins* claim. Mr. McCann based this fear on Texas' use of the *Briseno* factors—or ones similar to them after *Moore I*. Even though the Fifth Circuit had formerly "held that *Briseno* is a constitutionally permissible interpretation and application of *Atkin*," *Matamoros v. Stephens*, 783 F.3d 212, 218 (5th Cir. 2015), that changed when the Supreme

Court expressly rejected the *Briseno* factors in 2017.[15] After *Moore I*, the federal courts gave no deference to the *Briseno* factors. *See In re Cathey*, 857 F.3d 221, 235 (5th Cir. 2017).

Accordingly, Mr. McCann's strategy does not hold water after *Moore I*. Mr. McCann expressed confidence that the Court of Criminal Appeals would replace *Briseno* with another standard based on lay biases rather than expert diagnostic standards. (Docket Entry No. 60 at 84). But that would not matter in federal court. Whether or not Texas courts applied *Briseno* or another other judge-made standard, federal law (now based on the DSM-V) would guide federal review.[16] The Court cannot endorse decisions based on the fear of a standard that the federal courts would never honor.

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[15] It is worth noting that the *Moore* case never reached the federal habeas stage. The Supreme Court took the case up from the Texas state courts. Even if AEDPA theoretically posed a threat to federal habeas review, the Supreme Court erased Texas' *Briseno* jurisprudence on review from the state habeas courts.

[16] Johnson argues that, while the Court of Criminal Appeals again denied relief to that one inmate after *Moore I*, the Court of Criminal Appeals recognized that *Briseno* was no longer the law and repeatedly expressed a willingness to apply the correct law. Johnson provides an extensive summary of cases in which the Court of Criminal Appeals appears to have followed the dictates of *Moore I*. (Docket Entry No. 63 at 5-7). While Johnson's briefing on this point may prove that Mr. McCann was incorrect in his assessment of how Texas cases would proceed, it still somewhat misses the mark. Once the Supreme Court decided *Moore I*, it was the law of the land. A federal court's review at that point was not on the sufficiency of any state-judge-made standard—it was whether an inmate could show that the state-court decision was contrary to, or an unreasonable application of, federal law. 28 U.S.C. § 2254(d)(1). Federal courts would not defer to decisions departing from federal law.

Fifth, Mr. McCann based his decision on his own subjective beliefs about the viability of an *Atkins* claim without seeking an expert assessment of that claim's strength. Since the beginning of his representation, Mr. McCann believed that Johnson was intellectually disabled. (Docket Entry No. 60 at 138). Mr. McCann knew about changes in the DSM-V but did not immediately seek an expert evaluation of Johnson for intellectual disability.

Time has shown that the DSM-V transformed a weak *Atkins* claim into a viable ground for relief. Mr. McCann testified that the DSM-V did not have any effect on a Texas inmate's ability to raise an *Atkins* claim because *Briseno* was still good law. (Docket Entry No. 60 at 138). Mr. McCann explained that the publication of the DSM-V was "pretty much no help" because the *Briseno* standards were still in place. (Docket Entry No. 60 at 139). Mr. McCann particularly worried that the "aggravating factors" in Johnson's case would doom him under the *Briseno* paradigm. (Docket Entry No. 60 at 73). Mr. McCann explained: "So as far as bad facts, he had some pretty bad facts to overcome and under the *Briseno* standard, he would not have made [an intellectual disability] claim." (Docket Entry No. 60 at 73). Mr. McCann was specifically concerned because Johnson "was more or less in charge, which shows leadership," he "hid the vehicle," he "was the shooter," and was involved in "an extraneous killing." (Docket Entry No. 60 at 139).

The seven *Briseno* factors did not necessarily look at aggravating facts or contain factors explicitly covered by Mr. McCann's concerns. *Briseno* attempted to lay aside "any heinousness or gruesomeness" of the crime. *Williams v. State*, 270 S.W.3d 112, 114 (Tex. Crim. App. 2008). Mr. McCann possibly referred to *Briseno*'s focus

on whether an offender's conduct "show[ed] leadership," exhibited an ability to "formulate[] plans," or "require[d] forethought, planning, and complex execution of purpose." *Id.*

Still, *Briseno* was never meant to replace professional standards, but to be weighed with (or against) them. The Court of Criminal Appeals did not craft the *Briseno* standards as "a substitute or alternative definition of [intellectual disability]," but only as additional factors which a court "'might also' take into consideration." *Chester v. Thaler*, 666 F.3d 340, 355 n.5 (5th Cir. 2011) (Dennis, J., dissenting); *see also Briseno*, 135 S.W.3d at 8. The Court of Criminal Appeals "did not make consideration of any or all of [the *Briseno* factors] mandatory," but rather expressed that "they reflected [its] concern that the [professional] guideline should not be considered in isolation, but rather in the context of the concerns expressed by the Supreme Court in *Atkins*." *Ex parte Sosa*, 364 S.W.3d 889, 892 (Tex. Crim. App. 2012). An attorney could not make a fair assessment of how the *Briseno* factors would weigh in that calculus without knowing how the professional factors would weigh in also. Concerns about *Briseno* were only one piece of an underdeveloped picture of how Texas courts would view Johnson's intellectual functioning.

Mr. McCann testified that he knew raising an *Atkins* claim on Johnson's behalf would require more investigation. (Docket Entry No. 60 at 66-67). Mr. McCann still relied on his own subjective assessment of Johnson's intellectual functioning and how it would factor into a legal analysis. Despite his familiarity with *Atkins* law, Mr. McCann lacks the education and training to diagnose intellectual disability. Testing finally performed in 2019 reveals a much stronger *Atkins* claim than anticipated by

the trial evidence. There is no reason to believe that testing performed at any point after the DSM-V issued would have resulted in a similarly strong *Atkins* claim.

Accordingly, Mr. McCann formulated strategy while only knowing half of the equation. Any valid strategy involving Johnson's intellectual functioning must rest on scientific inquiry and a full understanding of the evidentiary landscape, not conjecture.

Finally, Mr. McCann aggressively challenged the *Briseno* standard for one of his clients—Bobby Moore. Mr. McCann participated in litigation which, through two trips to the Supreme Court and repeated efforts in the Court of Criminal Appeals, finally expunged Texas law of its reliance on improper factors in *Atkins* cases. Mr. McCann deserves commendation for his efforts in the *Moore* case which served to realign Texas' precedent with federal law.

Notwithstanding his advocacy on behalf of Bobby Moore, the difference in how Mr. McCann handled the two cases is extraordinary. Mr. McCann did not file an *Atkins* claim on Johnson's behalf out of fear that the Court of Criminal Appeals would not relinquish the *Briseno* standards. (Docket Entry No. 60 at 115-16). In Johnson's case, Mr. McCann decided that AEDPA deference created "a rigged game for [his] client," so he "thought the better option would be to see if we could find some way under a new standard or to get a new standard." (Docket Entry No. 60 at 142). Mr. McCann testified: "to me, if I couldn't get a fair standard of review, then none of this was going to help because I'd be litigating it in a state court where I was likely to get an adverse finding." (Docket Entry No. 60 at 124).

But Mr. McCann did nothing in this case but wait for a new standard to emerge. While he aggressively fought

against the *Briseno* standard in *Moore*, Mr. McCann felt hobbled by the *Briseno* standard in Johnson's case. Zealously litigating an *Atkins* claim on Johnson's behalf (especially after *Moore I*) could have ended in the same result as in *Moore*. Without rendering an opinion on the strength of the *Atkins* claim in either case, the Court observes that both Moore and Johnson have similar cases for *Atkins* relief. Moore relied on an IQ "score of 74, adjusted for the standard error of measurement, [which] yields a range of 69 to 79." *Moore I*, 137 S. Ct. at 1049. Johnson alleges his "IQ score was a 70, squarely in the range of intellectual disability." (Docket Entry No. 1 at 14). Moore relied on "affidavits and . . . testimony from Moore's family members, former counsel, and a number of court-appointed mental-health experts. The evidence revealed that Moore had significant mental and social difficulties beginning at an early age." *Moore I*, 137 S. Ct. at 1045. Johnson relies on similar material, culminating in an expert's opinion that he "functions adaptively in the range of Intellectual Disability." (Docket Entry No. 1 at 28). On their face, the case for *Atkins* relief seems similar for both Johnson and Moore. A comparison between the two cases begs the question of it could have been Johnson's case, not Moore's, in which the Supreme Court ended Texas' use of the *Briseno* standard.

Mr. McCann knew that the DSM-V had probably created a viable claim for Johnson. He successfully litigated *Atkins* claims in state court based on the DSM-V for other inmates. But he did not raise a claim on Johnson's behalf in federal or state court. Mr. McCann's representation was an impediment to filing which, until removed, precluded Johnson from advancing an *Atkins* claim. Mr. McCann's "choice not to litigate a meritorious claim on behalf of his death sentence client . . . had the functional

effect of forfeiting any federal review of Mr. Johnson's *Atkins* claim." (Docket Entry No. 63 at 2). Mr. McCann's representation amounts to an extraordinary circumstance that warrants equitable tolling in this case.

E. Diligence

To merit equitable tolling, Johnson must also have shown diligence. The Supreme Court has instructed that "[t]he diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotation omitted). Mr. McCann represented Johnson throughout the whole period when he should have filed his *Atkins* claim. Despite that representation, "petitioners seeking to establish due diligence must exercise diligence even when they receive inadequate legal representation." *Manning v. Epps*, 688 F.3d 177, 185 (5th Cir. 2012). "The act of retaining an attorney does not absolve the petitioner of his responsibility for overseeing the attorney's conduct or the preparation of the petition." *Doe v. Menefee*, 391 F.3d 147, 175 (2d Cir. 2004) (Sotomayor, J.).

Johnson has made a prima facie showing that he is intellectually disabled. Respondent contends that Johnson, apparently despite his low IQ and possible intellectual deficiency, should have recognized that a potential *Atkins* claim existed, discerned the probable impact of AEDPA's limitations period, and encouraged Mr. McCann to litigate more zealously. (Docket Entry No. 64 at 52-54). Respondent cites no law which places that burden on a potentially intellectually disabled client. With his level of functioning as described in the exhibits to his federal petition, it is unreasonable to expect that Johnson could litigate an *Atkins* claim on his own, much less one based on the distinctions brought by changes in the law and the DSM-V.

Johnson's attorneys sought leave to file a successive federal petition soon after their appointment. Under the fact-dependent circumstances of this case, the Court finds that Johnson has shown the requisite diligence to merit equitable tolling.

F. Conclusion of Equitable Tolling

Attorneys representing capital defendants face a challenging task, particularly once they reach federal habeas corpus review. At that point, the presumption of innocence has long dissipated. Capital inmates come to federal court after unsuccessful attempts at state court review which will haunt them throughout AEDPA's federal habeas process. With limited exceptions, federal courts will heavily defer to the state court's earlier rejection of their claims. Federal review largely eschews any new factual development. Overarching principles of comity, federalism, and finality of judgments tip the scales away from the inmate's favor. The task of capital habeas practitioners is formidable.

Capital habeas practitioners—like all attorneys—must make tactical decisions which will place their client's interests before the courts in the most favorable light. Complex and interweaving procedural doctrines—such as the federal exhaustion doctrine and AEDPA's deferential review scheme—force attorneys to plan the most effective manner in which to present viable claims. The fact that federal claims must first pass through state court—and do so in a manner which alters the prism through which federal courts consider claims—may influence how an attorney chooses to present his claims.

Capital defense attorneys know that later stages of review may place their decisions under a microscope. Courts try to judge an attorney's decisions without the harsh, but illuminating, light of hindsight. Still, decisions

made in the moment may not hold up over time. When weighing the various factors which play into litigation strategy, an attorney bears an overarching ethical duty to leave no potentially meritorious claim aside, to preserve a client's right to raise any claim which may provide relief. In capital litigation, those litigation decisions may be ones of life or death.

As it stood under the then-governing psychological standards, Johnson did not have a viable *Atkins* argument at trial. That changed when the DSM-V manual changed the diagnostic framework for intellectual disability on May 18, 2013. This development happened at a disadvantageous time for Johnson—he had already finished state post-conviction review and his federal habeas proceedings neared completion. Mr. McCann made decisions that would nearly close the door to federal review. Those were difficult decisions, decisions which have come to cloud other zealous efforts Mr. McCann has made on behalf of Johnson. Mr. McCann has acted on Johnson's behalf in a way that has required the courts to examine many important issues. The weight of those good decisions, however, cannot sink the potentially meritorious claim Johnson advances in his successive petition. In fact, the contrast between Mr. McCann's admirable representation in *Moore* which forced Texas into compliance with Supreme Court standards stands in contrast to his inaction in this case. Courts cannot countenance any litigation strategy based on withholding grounds for relief.

A zealous attorney should have brought Johnson's *Atkins* claim to the federal courts many years ago. Johnson's claim deserves to be heard. The Court finds that Johnson has shown that equitable tolling should forgive

his failure to comply with the technical temporal requirements of AEDPA.

V. CONCLUSION

For the reasons discussed above, the Court finds that Johnson has complied with AEDPA's requirements for the consideration of his federal habeas corpus petition. The Court **DENIES** Respondent's Renewed Motion to Dismiss. (Docket Entry No. 64).

The Court **ORDERS** the parties to submit a joint proposed scheduling order for the continued litigation of his case within **twenty-one (21)** days from the entry of this Order.

SIGNED on OCT 28 2022 at Houston, Texas.

/s/Alfred H. Bennett
ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX D

REVISED August 15, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-20552

United States
Court of Appeals
Fifth Circuit
FILED
August 14, 2019
Lyle W. Cayce
Clerk

In re: DEXTER JOHNSON,

Movant

Consolidated with 19-70013

DEXTER JOHNSON,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeals from the United States District Court
for the Southern District of Texas

Before SOUTHWICK, GRAVES, and HIGGINSON, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

A Texas inmate whose execution is imminent has presented to us both a request to review the district court's denial of his Rule 60(b) motion for relief from a prior judgment and also a motion for permission to file a successive application for a writ of habeas corpus. We

conclude there is no merit in the appeal and DENY review. On the other hand, we conclude that the motion for permission to file has demonstrated possible merit in a claim regarding a current intellectual disability that warrants full exploration by the district court. We GRANT the motion and STAY the execution.

FACTUAL AND PROCEDURAL BACKGROUND

Dexter Johnson was convicted of the murder of Maria Aparece in the course of attempting a robbery on June 13, 2007, and he was sentenced to death. Far greater detail is given of the offense in *Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015). His conviction and sentence were affirmed on direct appeal.

Patrick McCann was appointed as Johnson's state habeas counsel. Johnson filed a state application for writ of habeas corpus while his direct appeal was pending. His state habeas claims were denied, and McCann did not raise an ineffective assistance of trial counsel (IATC) claim. That application also did not include a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). McCann continued to represent Johnson in federal habeas proceedings, filing an application one year later that was duplicative of the state habeas claims, plus one claim that Johnson was interrogated in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981). It also did not include an *Atkins* claim.

After *Martinez v. Ryan*, 566 U.S. 1 (2012), was decided, McCann filed a motion in federal court to stay and to abey Johnson's proceeding to allow exhaustion of his IATC claims or to amend his application under *Martinez* to add those claims. That claim alleged that trial counsel were ineffective for failing to present evidence of Johnson's brain damage and mental illness during the guilt phase to show he could not form intent for murder and

that appellate counsel were ineffective for failing to raise IATC claims.

The district court ordered supplemental briefing on *Trevino v. Thaler*, 569 U.S. 413 (2013). It ultimately denied Johnson's motion to stay and abey or amend the federal application and Johnson's request for habeas relief. The district court granted a Certificate of Appealability (COA) on Johnson's claim that his custodial statement was admitted in violation of his Fifth Amendment rights. We then affirmed the denial of habeas relief on his Fifth Amendment claim and denied an additional request for a COA. *Johnson*, 617 F. App'x at 305. Johnson sought Supreme Court review, which was denied. *Johnson v.Stephens*, 136 S. Ct. 980 (2016).

On June 4, 2017, Johnson filed a motion in the federal district court requesting a new trial. The court denied the motion and his motion for reconsideration. Johnson requested a COA, which was denied by this court. *Johnson v. Davis*, 746 F. App'x 375, 381 (5th Cir. 2018) (per curiam). The Supreme Court again denied him a writ of certiorari.

On January 18, 2019, Johnson, *pro se*, requested a Federal Public Defender (FPD) be appointed in his case because of the conflict of interest between himself and McCann established after *Martinez* and *Trevino*. McCann filed an opposition under seal. Johnson then filed a *pro se* motion on February 1, 2019, again asking for independent counsel. On February 5, 2019, the court appointed a FPD, but McCann remained counsel as well. The FPD requested removal of McCann, which the State and McCann opposed.

Six days after the motion to remove him, McCann filed a single-issue successive habeas application in state court, which was denied April 29, 2019. McCann also filed

a clemency petition. On April 30, 2019, the district court stayed Johnson's execution, noting "troubling concerns" about McCann. McCann withdrew two days later.

On June 24, 2019 Johnson filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b). The district court denied the motion on August 12, 2019 and did not certify any issue for appeal. Johnson immediately applied for a certificate of appealability with this court.

On August 6, 2019, Johnson moved in state court to strike his second successive state habeas application, alleging that it was filed by McCann without his permission. Along with that motion, he also filed a successive habeas application. The new habeas application was denied "as an abuse of the writ without reviewing the merits of the claims raised" on August 13, 2019. The motion to strike the prior application also was denied.

On August 8, 2019, Johnson also moved in this court under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for a writ of habeas corpus based on an *Atkins* claim.

We first discuss Johnson's Motion for a Certificate of Appealability relating to the district court's denial of relief under Rule 60(b). Then we will review the motion for an order authorizing a successive habeas application.

DISCUSSION

I. Motion for COA on denial of Rule 60(b) motion

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 137 S. Ct. 759, 773 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). This

court reviews the district court's order denying a Rule 60(b) motion for an abuse of discretion, so on a COA this court must determine whether reasonable jurists could conclude the district court abused its discretion. *Id.* at 777. While a full merits inquiry is not proper in the COA analysis, we conduct a threshold inquiry to determine if the district court's decision was debatable. *Id.* at 774.

"[R]elief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Id.* at 777 (quoting *Gonzales v. Crosby*, 545 U.S. 524, 535 (2005)). Extraordinary circumstances "will rarely occur in the habeas context." *Gonzalez*, 545 U.S. at 535. The district court is permitted to consider a "wide range of factors" in determining whether extraordinary circumstances are present. *Buck*, 137 S. Ct. at 778. "These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Id.* (quoting *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 863-64 (1988)). "Moreover, a Rule 60(b)(6) movant must show that he can assert 'a good claim or defense' if his case is reopened." *Ramirez v. Davis*, 19-70004, 2019 WL 2622147, at *6 (5th Cir. June 26, 2019) (quoting *Buck*, 137 S. Ct. at 780).

The district court concluded that Johnson's motion was a valid Rule 60(b) motion because it attacked a defect in the integrity of the prior federal habeas proceeding. *See Gilkers v. Vannoy*, 904 F.3d 336, 344 (5th Cir. 2018). That defect was McCann's ineffective assistance and conflicts of interest. Jurists of reason would not conclude that the district court abused its discretion in finding Johnson's motion to be a true Rule 60(b) motion.

The district court also determined that Johnson's motion was timely because newly appointed counsel filed the motion within six months after appointment as co-

counsel and very shortly after original habeas counsel was removed. The question of timeliness is based on the "facts and circumstances of the case." *Ramirez*, 2019 WL 2622147, at *5 (quotation omitted).

Johnson challenges here the district court's denial of his Rule 60(b) motion based on its finding that there were not extraordinary circumstances justifying reopening the judgment. The district court determined that Johnson had properly alleged a defect in the integrity of his proceeding but concluded that he had failed to demonstrate extraordinary circumstances, basing its opinion primarily on Johnson's failure to plead any meritorious defaulted IATC claims. Johnson claims that the district court unnecessarily narrowed the wide range of factors that should have been considered, focusing only on whether Johnson described a meritorious IATC claim that was defaulted and whether Johnson had pled that his federal habeas proceeding was deficient.

Johnson claims that under the COA standard, jurists of reason could debate whether the district court abused its discretion in concluding that Johnson needed to present the merits of a defaulted IATC claim. Johnson argues that the question under Rule 60(b) is not whether there is a meritorious habeas claim if he was represented by conflict-free counsel, but whether his previous counsel McCann's performance was so deficient that he failed to provide the quality of representation that 18 U.S.C. § 3599 guarantees. Johnson's claim is that McCann's representation fell so far below the standards of Section 3599 that his case presents extraordinary circumstances.

Johnson also claims that the district court, which based its decision on the lack of any debatable defaulted IATC claim, has placed habeas applicants in an impossible situation. Johnson argues that requiring him to

identify and litigate the substantive merit and procedural defenses of defaulted IATC claims would effectively require Mr. Johnson to transform his Rule 60(b) motion into a successive petition.

Finally, Johnson argues that reasonable jurists could debate whether the district court abused its discretion by failing to address McCann's ethical violations. Johnson claims that McCann violated multiple ethical rules, including the duty of candor for not explaining his conflict of interest and the duty of loyalty for not remedying the conflict.

Responding to these arguments, we point out that having conflicted counsel is not enough to obtain relief under Rule 60(b). *See Raby v. Davis*, 907 F.3d 880, 884 (5th Cir. 2018). The Supreme Court explained that even if it is shown to be debatable that state habeas counsel was constitutionally ineffective, there is another "significant element" of a Rule 60(b)(6) motion: the claim must have "some merit." *Buck*, 137 S. Ct. at 780. The Court elaborated that this means that the movant must show "a good claim or defense" because that "is a precondition of Rule 60(b)(6) relief." *Id.* (second quotation from 11 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2857).

The district court properly held that Johnson fell short on this significant requirement. In the reply brief, current counsel mentioned a few potentially meritorious claims that were previously defaulted but failed to brief them in any detail whatsoever. The district court stated that it had directed the conflict-free attorneys to "scour the record" for *Strickland* claims that meet the prerequisites for *Martinez* and *Trevino*, but there were no identified "procedural default[s] that would otherwise bar a federal habeas court from hearing a substantial claim of

ineffective assistance at trial." *Jennings*, 760 F. App'x 319, 324 (5th Cir. 2019) (citations omitted). Our finding here is consistent with *Buck*'s directive that we not delve too deeply into the underlying merits of a claim, because none was presented. 137 S. Ct. at 774. Furthermore, in a deficient representation case such as this, there needed to be some factor besides the representation. *See Id.* at 777-780 (finding that *Martinez/Trevino* was one significant element but relying in significant part on other circumstances such as race being a basis for the verdict). Johnson failed to brief these claims, and so we find that reasonable jurists would not debate the district court's decision that Johnson's *Martinez* and *Trevino* conflict arguments were inadequate to show exceptional circumstances.

As to Johnson's argument that the district court ignored his claims about McCann's alleged deficient performance, the district court stated that Rule 60(b) relief is ordinarily not appropriate in the habeas context. *Buck*, 137 S. Ct. at 777. If there were no underlying meritorious waived claims, then it can hardly be argued that there is a "risk of injustice" to Johnson because he did not argue he would be entitled to any form of relief if his case were reopened. *See Liljeberg*, 486 U.S. at 863-864 (cited in *Buck,* 137 S. Ct. at 778). Furthermore, in other cases where habeas counsel was deficient for omitting certain claims, the Supreme Court has stated that such an attack "ordinarily does not go to the integrity of the proceedings." *Gonzales v. Crosby*, 545 U.S. at 532 n.5. Although Johnson attempts to recast McCann's actions as choices, not omissions, the thrust of the logic still applies: McCann's alleged deficient performance was not itself sufficient to constitute exceptional circumstances.

Reasonable jurists would not debate that the district court did not abuse its discretion in concluding that Johnson's claims did not present extraordinary circumstances. This is because Johnson failed to brief any waived claims sufficient to allow the district court to determine whether any of them had some merit. Johnson also fails to provide us any authority that Section 3599 has ever provided relief pursuant to Rule 60(b). In sum, reasonable jurists would not debate that the district court did not abuse its discretion in denying Johnson's Rule 60(b) motion.

Johnson's motion for a COA is DENIED.

II. Motion for Successive Application

We review a motion for the filing of a successive habeas application to determine if the applicant makes a *prima facie* showing that he has met the requirements of Section 2244. 28 U.S.C. § 2244(b)(3)(C). A *prima facie* showing is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court." *In re Morris*, 328 F.3d 739, 740 (5th Cir. 2003) (quoting *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997)).

A person in custody under a state-court judgment who moves to file a successive application for a writ of habeas corpus in federal court must satisfy these requirements:

> (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.

28 U.S.C. § 2244(b).

Johnson's two primary arguments in support of his *Atkins* claim are that his only recently discharged counsel had a conflict of interest because he is the one whose ineffectiveness in state habeas needed to be challenged, and that recent changes to the medical standards for determining intellectual disability benefit him. Applying Section 2244(b)(2)(A), Johnson argues that *Atkins* is a new rule of constitutional law that is retroactive and that his claim was previously unavailable because the latest

professional diagnostic manual changed the framework for intellectual disability.[1]

At trial, Johnson was found not to be intellectually disabled. This was under an earlier manual, DSM-IV-TR, which relied on Johnson's IQ score that was above 70.[2] The latest DSM-5 manual changed the diagnostic framework for intellectual disability. Higher IQ scores no longer bar a diagnosis of an intellectual disability. Dr. Daniel A. Martell concluded that as of July 31, 2019, Johnson "meets the criteria for a diagnosis of Intellectual Disability" under the DSM-5. In 2019, Johnson scored 70 on a full-scale WAIS-IV IQ test.

First, Johnson must show that his claim was not presented in a prior federal application. 28 U.S.C. § 2244(b)(1). The State concedes that it was not. Thus, Johnson has met the requirements of Section 2244(b)(1).

Second, "*Atkins* created a new rule of constitutional law . . . made retroactive to cases on collateral review by the Supreme Court." *In re Campbell*, 750 F.3d 523, 530 (5th Cir. 2014). As is obvious, though, *Atkins* was decided long before Johnson even committed his crimes. A meaningful hurdle for Johnson is to demonstrate why we should consider that case to be retroactive as to him. The

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[1] Johnson also argues that his claim satisfies Section 2244(b)(2)(B), dealing with the factual predicates for his claims. We conclude that the arguments and evidence before us satisfy only Section 2244(b)(1).

[2] The manuals express current medical standards for defining intellectual disability. "Reflecting improved understanding over time, . . . current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians.'" *Moore v. Texas*, 137 S. Ct. 1039, 1053 (2017) (quoting the DSM-5 and noting that current medical standards constrain a state's definition of what is an intellectual disability).

State argues that it is not. We hold to the contrary, counterintuitively perhaps but not unreasonably, with the full weight of our conclusion being borne by this court's recent decision in *In re Cathey*, 857 F.3d 221 (5th Cir. 2017). We discuss that case next.

A. Claim was previously unavailable

We analyze whether Johnson's "claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2244(b)(2)(A).

In *Cathey*, the determination before trial that the defendant had an IQ of 77 meant his IQ was too high for intellectual disability. *In re Cathey*, 857 F.3d at 230. Upon Cathey's admission to prison, though, which was pre-*Atkins*, an IQ test was given to him that supported that his IQ was about 73, within the range of error for sufficient intellectual disability to be exempt from the death penalty. *Id.* at 232. For disputed reasons, the documents for that test did not become available to the inmate and counsel until at least 12 years after his conviction. *Id.* Further, it was 9 years after Cathey's conviction that courts recognized as viable a theory called the Flynn Effect which supported that IQ scores could be inflated for certain reasons. *Id.* at 227, 229-33. Finally, any authority for making an IQ of 70 a ceiling for intellectual disability was rejected in 2014 when the Supreme Court held that there could not be a mandatory IQ number cutoff for consideration of intellectual disability. *See Hall v. Florida*, 572 U.S. 701, 721-22 (2014); *In re Cathey*, 857 F.3d at 237-38.

For all these reasons, even though when Cathey filed his initial state and federal habeas applications there was not a claim "with some possibility of merit" under *Atkins*, there later was a possible claim. *In re Cathey*, 857 F.3d

at 232-33, 237-38. To be clear, it was more than just a reassessment by medical professionals of this inmate's particular mental abilities. The significant change was in the medical methodology for evaluating the relevant disabilities and in courts' recognition of those changes.

Those facts amounted at least to a *prima facie* showing that *Atkins* was previously unavailable as required by Section 2244(b)(2)(A). *Id.* at 233. We did not separately analyze whether it was enough that *Atkins* in a generic sense was a rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, even though it was not so clearly retroactive in its application to Cathey. We accept here that the explicit conclusions in *Cathey* necessarily decided that latter point as well and move on.

The facts relevant to Johnson are quite similar. In 2013, six years after Johnson's conviction, a new diagnostic manual called the DSM-5 for mental disorders was released. The new diagnostic guidelines included significant changes in the diagnosis of intellectual disability, which changed the focus from specific IQ scores to clinical judgment. The DSM-5 recognizes that an individual with an IQ score over 70 may still qualify as intellectually disabled. The previous diagnostic manual, in effect when Johnson filed his initial federal habeas petition, did not classify Johnson as intellectually disabled because of his IQ. Further bolstering that his claim was unavailable until now, Johnson under a current full-scale IQ testing scored 70, within the *Atkins* range. Johnson also argues that although the DSM-5 was published before his habeas petition was denied for the first time in federal court, the DSM-5 was published only 17 days before the denial, which renders his claim not feasible as an amendment to his first petition. This change in diagnostic

standards is comparable to what allowed Cathey to proceed with his *Atkins* claim, which were the judicial recognition of the Flynn Effect and the abandonment of any rule-of-thumb for a maximum relevant IQ level. *Id.* at 232-33.

The State's principal argument about *Cathey* is that it was "effectively overruled by the Supreme Court in *Shoop v. Hill*, 139 S. Ct. 504, 507-08 (2019) (per curiam)." The court in *Cathey* relied significantly on *Moore* in evaluating the *prima facie* showing of Cathey's intellectual disability. *In re Cathey*, 857 F.3d at 234-36. The Supreme Court in *Moore* had reviewed a Texas Court of Criminal Appeals decision which had not applied updated medical standards in evaluating an *Atkins* claim. *Moore*, 137 S. Ct. at 1053. Later, the Supreme Court in *Shoop* determined that *Moore* was not clearly established law for the purposes of deciding whether a state court, whose decision was reached before *Moore* was decided, had unreasonably applied established law to a habeas claim. *Shoop*, 139 S. Ct. at 507-08 (citing 28 U.S.C. § 2254(d)(1)). *Shoop*, though, concerned the relitigation bar of Section 2254(d)(1), and it did not overrule *Cathey*, which concerned a *prima facie* showing under Section 2244.

The State gives us little else on which to evaluate *Cathey*. Its sole secondary argument is to distinguish the present case from *Cathey* in these ways: Cathey's conviction was final before *Atkins* was decided, while Johnson committed his crimes after *Atkins*; by the time Cathey was seeking Section 2254 relief, *Atkins* had been decided but it was unclear how to present the claim, uncertainties that did not apply to Johnson's initial pursuit of federal habeas; and Cathey showed greater diligence in bringing the *Atkins* claim than did Johnson. These distinctions do not assist the State. The central problem

here is that both Cathey and now Johnson were presented — after all the events which the State argues are distinctions — with reasons that an *Atkins* claim is possibly meritorious when it had not previously been. The State seemingly recognizes the weakness of the distinctions, as after describing them, it returns to the argument that *Cathey* has been overruled by *Shoop*.

What opens the door for Johnson is the *Cathey* decision, which has 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*. We are applying that decision to a new, but not meaningfully distinguishable, set of facts.

B. Prima facie *showing of disability*

The requirement of a *prima facie* showing comes from Section 2244(b)(3)(C). Part of the showing is not only that his claim relies on retroactive Supreme Court precedent that was previously unavailable, but also a *prima facie* showing that his claim has merit. *See In re Cathey*, 857 F.3d at 226. To be intellectually disabled, an individual must establish intellectual-functioning deficits, adaptive deficits, and onset of those deficits when the individual is a minor. *See id.* at 235. Dr. Daniel Martell concluded after extensive evaluation of Johnson, including IQ scores, neuropsychological testing, and interviews with witnesses and Johnson, that Johnson has deficits in intellectual functioning. This is "confirmed by his IQ score of 70 on the WAIS-IV, IQ scores from tests administered pretrial, and the clear cognitive deficits displayed on multiple neuropsychological tests." Dr. Martell concluded also that Johnson is at or below the bottom two percent of the population with regard to verbal learning and memory, that Johnson has frontal lobe

impairment, and that he has right hemisphere brain dysfunction. Furthermore, Dr. Watson, the trial expert, averred that he would no longer testify that Johnson is not intellectually disabled based on Johnson's IQ test scores from that time.

Dr. Martell also concluded that Johnson exhibited deficits in all three domains of adaptive functioning. Johnson repeated the second grade and struggled with reading comprehension and problem solving. He also struggled to articulate words. In high school, Johnson functioned at the sixth-grade level. Johnson also exhibited deficits in the social domain, as he struggled to make friends, was immature compared to peers, could not make eye contact, could not hold a conversation, struggled to control his emotions, and could not read the emotions of others. Johnson's deficiency in the practical domain was evidenced by his inability to follow bus or walking directions, struggles with personal hygiene, and inability to manage money or his own affairs.

Finally, Dr. Martell concluded that the onset of Johnson's disability was during the developmental period, through witness declarations, trial testimony, and records.

The State contends that we must review whether the Texas Court of Criminal Appeals "unreasonably determined that the facts set forth in [applicant]'s petition, if true, would not establish by clear and convincing evidence that no rational factfinder would fail to find [applicant] intellectually disabled." *Busby v. Davis*, 925 F.3d 699, 716 (5th Cir. 2019). The State contends Johnson's application here lacks merit because we should defer to the Texas Court of Criminal Appeals' decisions. There are actually two state court denials of Johnson's *Atkins* claim. One was on April 29, 2019, the other on August 13,

2019. Both orders from the Court of Criminal Appeals stated that the court dismissed the "application as an abuse of the writ without reviewing the merits of the claims raised." Both orders post-date *Moore*.

Whether the decisions were on the merits is affected by recent caselaw that recasts a similarly-phrased Texas decision as a merits one "when a defendant who was convicted post-*Atkins* raises an *Atkins* claim for the first time in a successive habeas application[; that is because] the Texas court must determine whether the defendant has asserted facts, which if true, would sufficiently state an *Atkins* claim to permit consideration of the successive petition." *Busby*, 925 F.3d at 707. We understand the *Busby* court to be referring to the analysis the Texas court is to undertake in considering a successive application under Texas Code of Criminal Procedure article 11.071, section 5(a), and calling that merits-based. Regardless of what the best reading of *Busby* may be, the initial decision in this case is for the district court.

We now consider whether Johnson must overcome the relitigation bar of Section 2254(d). Section 2244(b)(3)(C) states that a court "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." It makes no mention of Section 2254(d), which is in a different subsection. *In re Cathey* discussed this issue. 857 F.3d at 236. It recognized that Cathey's *Atkins* claim was previously brought in a successive habeas petition before the state court, but the court did not analyze the relitigation bar of Section 2254(d) in making its Section 2244 analysis. *Id.* We held that "the state court findings concerning the *Atkins* claim are wholly irrelevant to our inquiry as to whether [the petitioner] has

made a *prima facie* showing of entitlement to *proceed* with his federal habeas application, which is an inquiry distinct from the burden that [the petitioner] must bear in proving his claim in the district court." *Id.* (alteration in original) (quoting *In re Wilson*, 442 F.3d 872, 878 (5th Cir. 2006)). We therefore conclude that Johnson is not yet required to address the Texas court's decisions.

Having determined that Johnson at this stage is not required to show that the state court unreasonably determined the facts, we find that Johnson has at least made a *prima facie* showing of intellectual disability.

C. Timeliness

Johnson also must show that his application is timely. There is a one-year statute of limitations on applications for a writ of habeas corpus running 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 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).

Johnson devotes his argument to the equitable tolling of the statute of limitations, which he claims began to run on the date which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. § 2244(d)(1)(D). The date that factual predicate became available was on May 18, 2013, with the publication of the DSM-5. Though that does not meet the one-year statute of limitations, Johnson argues he is entitled to equitable tolling under *Holland v. Florida*, 560 U.S. 631, 649 (2010). "To establish his entitlement to equitable tolling, a petitioner must 'sho[w] (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way and prevented timely filing.'" *Manning v. Epps*, 688 F.3d 177, 183 (5th Cir. 2012) (quoting *Holland*, 560 U.S. at 649). As to diligence, Johnson claims that he was diligent in seeking counsel that was not conflicted. He requested, *pro se*, conflict-free counsel once he was aware of the conflict. He has also filed this motion within six months of appointment of conflict-free counsel.

Johnson argues that the conflicts of his counsel were the extraordinary circumstances sufficient to justify his delay. The Supreme Court held that "at least sometimes, professional misconduct that fails to meet [a circuit court's] standard could nonetheless amount to egregious behavior and create an extraordinary circumstance that warrants equitable tolling." *Holland*, 560 U.S. at 651. Johnson also argues that equitable tolling is best decided at an evidentiary hearing because of its fact-bound nature. "[W]e also recognize the prudence, when faced with an equitable, often fact-intensive inquiry, of allowing the lower courts to undertake it in the first instance." *Id.* at 654 (quotation marks and citation omitted).

Similarly, we have held that questions of equitable

tolling are best left to the district court for the initial analysis. *In re Cathey*, 857 F.3d at 240-41. We stated there that the delay gave us pause but determined further factual development was needed. *Id.* The district court here is also better positioned than are we to gauge the timeliness of the motion for a successive application.

We GRANT Johnson's motion for authorization to file a successive application for a writ of habeas corpus and STAY the execution. We DENY a COA on the district court's order rejecting the Rule 60(b) motion.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 12, 2026
Lyle W. Cayce
Clerk

No. 23-70002

DEXTER JOHNSON,

Petitioner—Appellee

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-3047

ON PETITION FOR REHEARING
EN BANC
PUBLISHED ORDER

Before SOUTHWICK, GRAVES, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled, and a majority did not vote in favor of rehearing (FED. R. APP. P.40 and 5TH CIR. R.40).

In the en banc poll, seven judges voted in favor of rehearing (JUDGES JONES, SMITH, WILLETT, HO, DUNCAN, ENGELHARDT, and WILSON), and nine voted against rehearing (CHIEF JUDGE ELROD, and JUDGES STEWART, RICHMAN, SOUTHWICK, HAYNES, GRAVES, HIGGINSON, DOUGLAS, and RAMIREZ).*

JAMES C. HO, *Circuit Judge*, joined by JONES, SMITH, and ENGELHARDT, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The Constitution affords those accused of a crime with certain protections. But as with any other litigant, the accused must assert their rights in timely fashion, or else risk forfeiting them. Our adversarial system of justice relies on party presentation.

When it comes to criminal defendants, however, our legal system is especially generous—some would say, too generous—in providing multiple bites at the apple.

Consider this case. In 2006, Dexter Johnson kidnapped Maria Aparece, an innocent 23-year-old woman, at gunpoint. He raped her. And he marched her into the woods and shot and killed her as she begged for her life.

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* Judge Andrew S. Oldham, did not participate in the consideration of the rehearing en banc.

He was subsequently tried, convicted, and sentenced to death.

In the two decades since that brutal murder, Johnson has received an extraordinary amount of process—trial and conviction, followed by direct appeal to multiple appellate courts, followed by a state habeas petition and subsequent appeal, followed by a federal habeas application and subsequent appeal, as well as a number of subsequent petitions further challenging his conviction. *See*, *e.g.*, *Johnson v. State*, 2010 WL 359018 (Tex. Crim. App. Jan. 27, 2010), *cert. denied sub nom.*, *Johnson v. Texas*, 561 U.S. 1031 (2010) (initial conviction & affirmance); *Ex parte Johnson*, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010) (accepting the trial judge's recommendation that state habeas be denied); *Johnson v. Stephens*, 2014 WL 2882365 (S.D. Tex. June 25, 2014), *aff'd*, 617 F. App'x 293 (5th Cir. 2015), *cert. denied*, 577 U.S. 1121 (2016) (denial of his first federal habeas petition); *Johnson v. Davis*, 2017 WL 8790978 (S.D. Tex. Nov. 6, 2017) (denial of a Rule 59 motion for reconsideration); *Johnson v. Davis*, 746 F. App'x 375 (5th Cir. 2018), *cert. denied*, 586 U.S. 1249 (2019) (denial of an application to file a subsequent habeas petition); *Ex parte Johnson*, 2019 WL 1915204 (Tex. Crim. App. Apr. 29, 2019) (denial of a subsequent state habeas petition); *Johnson v. Davis*, 2019 WL 13440694 (S.D. Tex. Aug. 12, 2019) (denial of a Rule 60(b) relief from judgment); *Ex parte Johnson*, 2019 WL 3812803 (Tex. Crim. App. Aug.13, 2019) (denial of a subsequent state habeas petition).

Extraordinary delays like this are, alas, extraordinarily commonplace in our criminal justice system. And they are far from costless. Never mind the expense to the taxpayer. Such delays also force the family and friends

of victims like Maria Aparece to wait for justice—for over two decades, in this case.

It's for precisely this reason that Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA). Where, as here, a criminal defendant has been convicted, and their convictions have already been affirmed, not just on direct appeal, but also on state and federal habeas review, AEDPA imposes significant restrictions on what additional claims the individual can bring on a subsequent, successive federal habeas petition. *See, e.g.*, *Banister v. Davis*, 590 U.S. 504, 523 (2020) (Alito, J., dissenting) ("Integral to AEDPA's design are its restrictions on 'second or successive' habeas petitions, which, prior to AEDPA, sometimes led to very lengthy delays.").

Under AEDPA, federal courts may grant a successive application of habeas corpus only if (1) "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 (2) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," and "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)(A)–(B).

So subsection (A) sets forth the standard for successive habeas applications based on new law, and subsection (B) sets for the standard for successive habeas applications based on new facts. And this case falls far short of these standards.

In this successive habeas application, Johnson seeks relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). In *Atkins*, the Supreme Court held for the first time that the execution of a mentally retarded criminal constitutes cruel and unusual punishment under the Eighth Amendment.

Johnson's successive habeas application fails under AEDPA for one simple reason: His claim does not rely on a "new rule of constitutional law." 28 U.S.C. § 2244(b)(2)(A).

Atkins isn't a new rule of constitutional law. It's a decades old decision, issued years before Johnson brutally murdered Maria Aparece.

For his part, Johnson contends that there is new scientific evidence available to him today that wasn't available to him before—and that that new evidence indicates that he is in fact mentally retarded under *Atkins*. As the panel put it, Johnson claims that "the latest professional diagnostic manual changed the framework for intellectual disability." *Johnson v. Guerrero*, 2025 WL 2060781, *2 (5th Cir.) (quoting *In re Johnson*, 935 F.3d 284, 291–92 (5th Cir. 2019)).

But that's not a claim of new law. It's a claim of new facts—specifically, new scientific evidence.

New facts can warrant a successive habeas application under AEDPA, but only if the new facts would have prevented a reasonable jury from finding him "guilty" of murder. *See* 28 U.S.C. § 2244(b)(2)(B) (requiring new facts to establish that "no reasonable factfinder would have found the applicant guilty of the underlying offense"). And that standard is obviously not met here.

The only way for Johnson to satisfy AEDPA, then, is for us to somehow re-conceptualize his new scientific evidence as a new rule of constitutional law. But that would

be tantamount to delegating the judicial power to interpret the law to scientists.

That would not just get AEDPA wrong—it would distort our constitutional system of government. *See United States v. Skrmetti*, 605 U.S. 495, 531 (2025) (Thomas, J., concurring) ("To hold otherwise would permit elite sentiment to distort and stifle democratic debate under the guise of scientific judgment, and would reduce judges to mere spectators in constructing our Constitution.") (cleaned up); *see also Whole Woman's Health v. Paxton*, 10 F.4th 430, 468 (5th Cir. 2021) (Ho, J., concurring) (as judges, our duty is to follow the law, not to "blindly follow the scientists").

In reaching the opposite conclusion, the panel dutifully followed circuit precedent. *See In re Cathey*, 857 F.3d 221 (5th Cir. 2017).

But our circuit precedent is wrong. In *Cathey*, our court held that an *Atkins* claim is "previously unavailable" under AEDPA so long as the petitioner couldn't previously establish that he was mentally retarded under the scientific evidence available at that time. *Id.* at 230–31. But that conflicts with the text of AEDPA in multiple ways. For one, *Cathey* essentially conflates AEDPA's requirement of a "new rule of constitutional law" with the mandate that the claim be "previously unavailable"—ignoring the fact that these are distinct prongs. 28 U.S.C. § 2244(b)(2)(A). *See, e.g., Tyler v. Cain*, 533 U.S. 656, 662 (2001) (explaining the "new rule" prong separately from both the "retroactivity" and "previously unavailable" prongs); *see also Dodd v. United States*, 545 U.S. 353, 359 (2005) (recognizing separate "new rule" and "retroactivity" prongs for language identical to that of § 2244(b)(2)(A)). In addition, the text of AEDPA requires that the claim be "previously unavailable"—not that it be

"previously unwinnable." And as already noted, *Cathey* (like Johnson) treats new evidence as new law.

Our decision in *Cathey* has been rejected by at least one other circuit. *See In re Bowles*, 935 F.3d 1210, 1217 (11th Cir. 2019) (explicitly rejecting the reasoning of *Cathey* and *Johnson*); *see also In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004) ("constitutional rules that were established at the time of the applicant's last [pre-filing authorization] motion were not 'previously unavailable'"). *But see Munoz v. United States*, 28 F.4th 973, 976 (9th Cir. 2022) (following *Cathey*).

I would have granted rehearing en banc here to correct our precedent—and perhaps bring the friends and family of Maria Aparece one step closer to justice.