No. 25-1003

IN THE

Supreme Court of the United States

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

Petitioner,

v.

DEXTER JOHNSON,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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April 24, 2026

CAPITAL CASE
QUESTION PRESENTED

In lieu of Petitioner's question presented, Respondent suggests:

Whether a claim is "previously unavailable" for the purpose of authorizing a successive federal habeas petition when the claim had no possibility of merit while the first habeas petition was pending.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Eric Guerrero, Director of the Texas Department of Criminal Justice, Correctional Institutions Division.

Respondent is Dexter Johnson.

There are no corporate parties involved in this case.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the Texas Court of Criminal Appeals, the United States District Court for the Southern District of Texas, the United States Court of Appeals for the Fifth Circuit, and the Supreme Court of the United States:

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, 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.

There are no other proceedings directly related to this case.

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OPINIONS AND ORDERS BELOW

The United States Court of Appeals for the Fifth Circuit's opinion answering the certified question, namely "[w]hether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(a)," is unpublished and unreported. The opinion is reproduced at Pet. App. 1a–6a. The court's order denying rehearing en banc is reported at 164 F.4th 398. That order is reproduced at Pet. App. 67a–73a.

The United States District Court for the Southern District of Texas's memorandum and order addressing whether Mr. Johnson satisfied 28 U.S.C. § 2244(b)(2)(A)'s successive petition requirements is unpublished and unreported. The memorandum and order are reproduced at Pet. App. 7a–46a.

The United States Court of Appeals for the Fifth Circuit's opinion authorizing Mr. Johnson to file a second or successive habeas application is reported at 935 F.3d 284. The opinion is reproduced at Pet. App. 47a–66a.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on July 23, 2025, and denied rehearing en banc on January 12, 2026. On February 19, 2026, the Director petitioned for a writ of certiorari. A motion to extend the time to file a response to the petition was granted, extending the time to file this response to April 24, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(b) provides:

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

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

> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)
>
> > (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)

> (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.
>
> (D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.
>
> (E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

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

INTRODUCTION

Petitioner asks the Court to review a Fifth Circuit decision authorizing a successive habeas claim that had no possibility of merit at the time of the first petition. The court below followed the same approach as other circuits when considering whether a claim was "previously unavailable" under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA): a pragmatic approach that takes into account the specific circumstances of the first habeas petition. Applying this test, the Fifth Circuit correctly held that a claim was "previously unavailable" when it had no possibility of merit at the time of the first habeas petition.

Petitioner claims this case "may well present the only vehicle to resolve the issue." Pet. 3. That assertion underscores that the question presented is not recurring. *See* Sup. Ct. R. 10. And it shows that it is not worth this Court's time and resources to resolve. Indeed, in the nearly thirty years since AEDPA took effect only two habeas petitioners utilizing this "no possibility of merit" rule have received preliminary circuit court authorization to proceed on a successive petition. Zero have obtained relief from their conviction or sentence.

This case is also a poor vehicle for two reasons. It is interlocutory: Petitioner can seek review of the same question if a court should grant habeas relief. Second, the petition asks the Court to answer a question different from the one certified to the court of appeals for interlocutory review.

STATEMENT OF THE CASE

Procedural History

Conviction & Trial Record: In June 2007, a jury convicted Respondent, Dexter Johnson, of capital murder and sentenced him to death for the killing of Maria Aparece when Mr. Johnson was 18 years old. Pet. App. 2a. At trial, Mr. Johnson presented Dr. Dale Watson's testimony that his intellectual functioning was roughly equivalent to that of a ten-year-old. Pet. App. 3a. Dr. Watson calculated Mr. Johnson's IQ to be between 74 and 88. Pet. App. 14a n.2 (citing Tr. Vol. 31 at 204).

Because Mr. Johnson's score was higher than 70, based upon the then-existing diagnostic criteria, Dr. Watson testified that Mr. Johnson did not have an intellectual disability. *Id.* The trial testimony showed that a claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), had no possibility of merit at that time.

After sentencing, the trial court appointed counsel to represent Mr. Johnson in his state habeas proceedings. His appointed counsel did not raise an *Atkins* claim. Pet. App. 14a. The Texas Court of Criminal Appeals affirmed Mr. Johnson's conviction and sentence on direct appeal. Pet. App. 69a; *Johnson v. State*, 2010 WL 359018 (Tex. Crim. App. Jan. 27, 2010). It also denied his initial state habeas application. Pet. App. 69a; *Ex parte Johnson*, 2010 WL 2617804 (Tex. Crim. App. June 30, 2010). This Court denied certiorari. *Johnson v. Texas*, 561 U.S. 1031 (2010).

Initial federal habeas: In June 2011, Mr. Johnson filed his initial federal habeas petition in the Southern District of Texas without raising an *Atkins* claim or

asserting that he was intellectually disabled. Pet. App. 14a–15a (*Johnson v. Stephens*, 4-11-cv-2466, Dkt. Entry No. 1).

While Mr. Johnson's initial federal habeas petition was pending, the DSM-5[1] was published, which "significantly altered how clinicians viewed the relationship between IQ scores and intellectual disability." Pet. App. 15a. It "recogniz[ed] that an individual with an IQ score over 70 may still qualify as intellectually disabled." Pet. App. 15a (quoting *In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020)).

The Court has confirmed that *Atkins* determinations must be "informed by the medical community's diagnostic framework." *Hall v. Florida,* 572 U.S. 701, 721 (2014); *see* Pet. App. 15a. Texas, however, continued applying its judge-made *Briseno*[2] factors until this Court struck them down in 2017. *Moore v. Texas*, 581 U.S. 1 (2017). On remand, the Texas Court of Criminal Appeals adopted the DSM-5 as the governing standard but still denied relief. *Ex parte Moore*, 548 S.W.3d 552, 560 (Tex. Crim. App. 2018). This Court had to intervene a second time to rectify Texas' continued "failure to adhere closely enough to the psychological profession's standards" captured in the DSM-5. Pet. App 16a; *Moore v. Texas*, 586 U.S. 133, 139–142 (2019).

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[1] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) [hereinafter DSM-5]. The APA designates the Manual as the "DSM-5," but courts in this case have used "DSM-V." This Brief follows the APA's usage, but both terms refer to the same publication.

[2] *Ex parte Briseno*, 135 S.W.3d 1, 8–9 (Tex. Crim. App. 2004) (setting forth seven "evidentiary factors" for factfinders in the criminal context to consider in evaluating intellectual disability).

The district court denied Mr. Johnson's petition on August 19, 2013, shortly after the DSM-5 was published and well before Texas adapted its standards to comply with it. Pet. App. 15a, 27a; *Johnson v. Stephens*, 2014 WL 2882365 (S.D. Tex. June 25, 2014); *Moore*, 548 S.W.3d at 555. The Fifth Circuit affirmed, and this Court again denied certiorari. Pet. App. 69a; *Johnson v. Stephens*, 617 F. App'x 293 (5th Cir. 2015), *cert. denied*, 577 U.S. 1121 (2016).

Atkins *claim*: Mr. Johnson was set to be executed on May 2, 2019. Pet. App. 17a. He wrote to the federal district court raising concerns about his attorney, Patrick McCann, and requesting new counsel, the Federal Public Defender (FPD). Pet. App. 17a, 49a. On February 5, 2019, the district court appointed the FPD as co-counsel alongside McCann. Pet. App. 49a. The FPD eventually moved to remove McCann. *Id.*

On April 22, 2019, McCann filed a successive state habeas application asserting an *Atkins* claim for the first time based on an evaluation performed by Dr. Greg Hupp on April 4. Dr. Hupp administered the WAIS-IV, obtained a full-scale IQ score of 70, and evaluated Mr. Johnson's adaptive functioning. Pet. App. 17a–18a. Dr. Hupp concluded that Mr. Johnson meets the DSM-5 criteria "as a person with an intellectual disability." *Id.*

On April 29, 2019, the Texas Court of Criminal Appeals dismissed his application as an abuse of the writ without reaching the merits. *Ex parte Johnson*, No. WR-73,600-02, 2019 WL 1915204 (Tex. Crim. App. Apr. 29, 2019) (per curiam). The following day, the federal district court stayed Mr. Johnson's May 2 execution,

as requested by the FPD based on concerns about McCann's representation, which the Director did not appeal. Pet. App. 50a. McCann withdrew two days later, and the State obtained a new execution date: August 15, 2019. *Id.*

With the rescheduled execution fast approaching, the FPD filed a successive state habeas application asserting an *Atkins* claim with an expanded record. Pet. App. 17a–18a. Included with Mr. Johnson's application was a comprehensive forensic neuropsychological report from Dr. Daniel Martell, a declaration from Dr. Watson, and additional supporting evidence not included in McCann's earlier filing. *Id.* Dr. Martell found that Mr. Johnson has a frontal lobe impairment, right hemisphere brain dysfunction, and is "at or below the bottom two percent of the population" for verbal learning and memory. Pet. App. 61a–62a. Dr. Martell concluded that Mr. Johnson met DSM-5 criteria for an intellectual disability. *Id.* Mr. Johnson's successive state application was dismissed. App. 18a; *Ex parte Johnson*, No. WR-73,600-03, 2019 WL 3812803 (Tex. Crim. App. Aug. 13, 2019).

Mr. Johnson also moved in the Fifth Circuit for authorization to file a successive federal habeas application asserting an *Atkins* claim. *In re Johnson*, 935 F.3d 284 (5th Cir. 2019); Pet. App. 47a–66a. In addition to Dr. Martell's and Dr. Hupp's conclusions, Mr. Johnson's initial expert at trial, Dr. Watson, stated that his prior testing "would not automatically preclude" an intellectual-disability diagnosis under the new DSM-5 criteria and that he would no longer testify that Mr. Johnson was not intellectually disabled. Pet. App. 18a–19a.

A Fifth Circuit panel authorized Mr. Johnson's filing and stayed his execution. Pet. App. 66a. Relying on *In re Cathey*, 857 F.3d 221 (5th Cir. 2017), the panel reasoned that § 2244(b)(2)(A) permitted Mr. Johnson to assert an *Atkins* claim because it was "previously unavailable" and the DSM-5's "significant change . . . in the medical methodology for evaluating the relevant disabilities" gave it some possibility of merit for the first time. Pet. App. 59a (reasoning it "is correct to equate legal availability with changes in the standards for psychiatric evaluation of the key intellectual disability factual issues").

In March 2022, the district court held an evidentiary hearing to determine whether Mr. Johnson satisfied AEDPA's successive-petition requirements and whether his claim was timely. Pet. App. 7a, 19a. The court found that Mr. Johnson "had met the statutory requirements which would allow his *Atkins* claim to proceed to adjudication." Pet. App. 7a.

Petitioner moved the district court to certify three questions for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 8a–9a. Only one relates to the question presented here. The district court certified only that question, written by Petitioner: "Whether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)?" Pet. App. 8a.

Decision Below

The Fifth Circuit accepted the interlocutory appeal, and the same panel that authorized Mr. Johnson's successive application issued its decision on July 23, 2025.

Pet. App. 1a. That opinion was not designated for publication under Fifth Circuit Rule 47.5. Pet. App. 1a. It carries no precedential weight within the Fifth Circuit.

On Petitioner's certified question, the panel answered: no, courts may not create equitable exceptions to jurisdictional requirements contained in § 2244(b)(2)(A). Pet. App. 5a–6a. The panel held that *Cathey* created no such exception but supplied the correct interpretation of "previously unavailable." Pet. App. 5a–6a (explaining "[a] claim is not automatically considered previously available" because it was conceivable; it must have had "some possibility of merit to be considered available" (quoting *Cathey*, 857 F.3d at 232)). The Fifth Circuit denied rehearing en banc. Pet. App. 67a–68a.

The lower courts have not adjudicated the merits of Mr. Johnson's *Atkins* claim, and no final judgment has been entered. In this unusual interlocutory posture, the question presented is only whether AEDPA bars Mr. Johnson from continuing to litigate his claim in federal court.

ARGUMENT

This case does not warrant the Court's review. Lower courts follow a similar, pragmatic standard to determine whether a claim was "previously unavailable." In this case, the Fifth Circuit applied the standard to Mr. Johnson's *Atkins* claim correctly. Moreover, the "no possibility of merit" question arises rarely, and this case is a poor vehicle for resolving it.

I. The opinion below does not implicate a division of authority worth resolution by this Court.

Petitioner claims that the decision below implicates an "acknowledged and entrenched circuit split." Pet. 12. The "acknowledge[ment]" refers to a single Eleventh Circuit panel decision stating that it disagrees with the result in *Johnson* and *Cathey*. *In re Bowles*, 935 F.3d 1210, 1219 (11th Cir. 2019). The Petitioner's assertion overstates the conflict between the courts of appeals on the question presented.

Lower courts are not conflicted on the appropriate legal standard for authorizing successive habeas claims—they uniformly apply a feasibility standard to determine whether a habeas claim was "previously unavailable." The feasibility standard "takes into account the particular circumstances of the previous habeas proceeding" to determine whether a claim was "previously unavailable." *Cathey*, 857 F.3d at 229 (quoting *In re Wood*, 648 F. App'x 388, 391 (5th Cir. 2016)). The lower courts Petitioner claims disagree have all rejected a strict rule in favor of this pragmatic approach. *In re Everett*, 797 F.3d 1282, 1288 (11th Cir. 2015) (using a feasibility standard to determine previous unavailability in second or successive habeas petitions); *Cathey*, 857 F.3d at 229 (adopting the Eleventh Circuit's feasibility standard to determine unavailability); *Muñoz v. United States*, 28 F.4th 973, 975–76 (9th Cir. 2022) (following a "pragmatic approach" that considers whether, "as a practical matter," a habeas petitioner could have raised a claim in an earlier petition).

To be sure, the Fifth and Eleventh Circuits disagree over which factual scenarios amount to a feasible claim. In the Fifth Circuit's view, a habeas petitioner

can make a "prima facie showing that it was not feasible to amend his initial petition to include a [claim for habeas relief]" when, at the time of the initial petition, the claim had no possibility of merit. *Cathey*, 857 F.3d at 223. The Eleventh Circuit, by contrast, does not consider "whether the claim would have been a winning one at the time of the first petition," opting instead to consider the timing of the retroactive rule in relation to the initial habeas petition. *Bowles*, 935 F.3d at 1219. But courts of appeals uniformly follow the same test, and a difference in mere application does not warrant this Court's review.

Petitioner attempts to frame the circuit split as one that implicates a "futility exception" or "judicially created exception" to AEDPA's bar on successive habeas petitions. Pet. 14, 18. But there is no conflict on that question either. Indeed, the decision below expressly states that it *does not* recognize any futility exception to successive habeas claims. Pet. App. 5a ("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*."). And for good reason. As the court below noted, courts have "no authority to create equitable exceptions to jurisdictional requirements." Pet. App. 5a (quoting *Bowles v. Russell*, 551 U.S. 205, 214 (2007)). Rather, the lower court explained that its interpretation of the term "previously unavailable" was only that: statutory interpretation, which is permissible "even [of] jurisdictional statutes like Section 2244(b)(2)(A)." Pet. App. 6a (citing *Tyler v. Cain*, 533 U.S. 656, 662–63 (2001)).

Even if framed as a split on the interpretation of AEDPA's "previously unavailable" standard, Petitioner overstates the conflict on that question. Only the Fifth and Eleventh Circuits have directly addressed whether the merits of a prior habeas petition should impact the inquiry into whether a claim was "previously unavailable." *Cathey*, 857 F.3d at 227–34; *Bowles*, 935 F.3d at 1215–21. And even though the Eleventh Circuit considered the question, it did so only in dicta. *Bowles*, 935 F.3d at 1219 (explaining that the "fundamental problem" with Bowles' argument is that it relied on *Hall*, which has not been made retroactive to cases on collateral review, unlike *Atkins*).

The other circuits have little to no discussion of the merits of the underlying claim. The issue in the Ninth Circuit was not the merits, but instead "challenges pro se prisoners face when preparing legal filings." *Muñoz*, 28 F.4th at 978. The Fourth Circuit case Petitioner cites addresses the "no possibility of merit" issue in one conclusory sentence, likely because the earlier petition was denied on the merits and therefore raised the issue claimed to be "unavailable." *Slusser v. Vereen*, 36 F.4th 590, 596 (4th Cir. 2022). The Eighth Circuit, too, merely made a passing reference to "evidence" when considering the "previously unavailable" standard. *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005). These cursory references, without any substantive analysis as to whether the merits of a claim should be considered, are not enough to contribute to the alleged circuit split. As a result, this Court should allow this issue to percolate in the lower courts prior to intervention. *See Baker v. City of McKinney,*

Texas, 145 S. Ct. 11, 13 (2024) (Sotomayor, J., joined by Gorsuch, J., respecting the denial of certiorari) ("Only a few Courts of Appeals have weighed in [on the question presented] . . . . [The question presented] is an important and complex question that would benefit from further percolation in the lower courts prior to this Court's intervention.").

These cases, and other authorities Petitioner relies on, relate to timing—not the merits of a claim. Pet. 20. Those cases merely assumed, absent any rebuttal, that a new constitutional rule was available so long as it had been published by the time of the district court's ruling on the first habeas petition. The Fifth Circuit agrees with that approach. *See Cathey*, 857 F.3d at 229 ("[Our previous decision] essentially adopted a rebuttable presumption that a new rule of constitutional law was previously available if published by the time a district court ruled on a petitioner's initial habeas petition."). The authorities Petitioner cites regarding timing provide no support for the alleged circuit split.

Finally, Petitioner claims that the alleged circuit split is "entrenched" because neither the Fifth nor the Eleventh Circuit will reconsider its rule. Pet. 21. True, AEDPA bars petitioning for rehearing en banc of authorization decisions for state prisoners. 28 U.S.C. § 2244(b)(3)(E). But it does not bar rehearing *sua sponte*. *See In re Byrd*, 269 F.3d 585, 588 (6th Cir. 2001) (Jones, J., concurring) (explaining that § 2244(b)(3)(E) does not "alter the authority of the *en banc* court to order a rehearing on its own motion"). It also does not bar petitioning for rehearing by federal prisoners,

a circumstance which occurred in several of the cases creating the alleged circuit split. *Bowe v. United States*, 146 S. Ct. 447, 462 (2026) ("[F]ederal prisoners are not prohibited from seeking certiorari from a panel's denial of authorization to file a second or successive motion."); *Muñoz*, 28 F.4th at 974 (addressing a successive § 2255 motion); *Slusser*, 36 F.4th at 592 (resolving a § 2241 motion by a federal prisoner, who previously filed a successive § 2255 petition). And even if rehearing of the authorization decision is as limited as Petitioner claims, those limitations do not apply to the merits determination that inevitably follows authorization. There are plenty of routes for lower courts to consider this issue for the first time or reconsider their rule on the matter.

Accordingly, there is no conflict among lower courts warranting the Court's review.

II. This case is fact-bound and the peculiar circumstances in this case arise infrequently.

The question presented arises infrequently and is not important enough to warrant this Court's attention. Petitioner admits exactly that when he argues that this case presents a rare opportunity for this Court to resolve it. Pet. 29. That only two petitioners—Mr. Johnson and the prisoner in *Cathey*—in the nearly thirty years since the passage of AEDPA have received circuit authorization on this issue shows how rare it is. And neither has actually received relief yet, as both of their cases are still pending. Given the narrowness of the Fifth Circuit's interpretation of

§ 2244(b)(2)(A) and AEDPA's multitude of hurdles for habeas relief, the question presented is seldom decisive.

First, consider the narrowness of the rule. The prisoner's claim must rest on a new rule of constitutional law made retroactive by the Supreme Court which was previously unavailable because it lacked any "possibility of merit." *Cathey*, 857 F.3d at 230, 232. The universe of cases this rule could possibly apply to is already small because there are few new rules of constitutional law in habeas cases. And only a small subset of these new rules—substantive, not procedural rules—are made retroactive. *Edwards v. Vannoy*, 593 U.S. 255, 264 & n.3 (2021). Those substantive rules are ones which "forbid[] criminal punishment of certain primary conduct" or "prohibit[] a certain category of punishment for a class of defendants because of their status or offense." *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989), *overruled by Atkins*, 536 U.S. 304). The rule from *Atkins* is one of the few.

Next, even with a new, retroactive decision, the Fifth Circuit's rule opens the door to pursue relief only in rare situations. A habeas petitioner's claim, which previously lacked any "possibility of merit," must have become a "possible claim" because the framework for analyzing it changed around the time or after their first application was denied. Pet. App. 58a–59a (quoting *Cathey*, 857 F.3d at 232). In the context of an *Atkins* claim, the switch which turns the claim from meritless to meritorious is not mere new factfinding or "a reassessment by medical professionals

of [an] inmate's particular mental abilities." Pet. App. 59a. Instead, "the significant change [is] in the medical methodology for evaluating the relevant disabilities and in courts' recognition of those changes." *Id.*

Mr. Johnson's is the rare case. The DSM-5 contained "significant changes in the diagnosis of intellectual disability" and was published just 17 days before his first habeas application was denied. *Id.* Before the DSM-5's publication and acceptance, Mr. Johnson's *Atkins* claim had "no possibility of merit." But because the criteria for assessing intellectual disability has changed, his claim now has possible merit.

Unsurprisingly, other petitioners have failed to fit *Atkins* claims in their successive habeas applications within the "no possibility of merit" rule. *See In re Soliz*, 938 F.3d 200, 203–04 (5th Cir. 2019) (denying leave to file successive application on *Atkins* claim because petitioner failed to show that there was a meaningful change in the medical field's analysis of fetal alcohol spectrum disorder as equated to intellectual disability under *Atkins*); *In re Milam*, 838 F. App'x 796, 799 (5th Cir. 2020) (denying leave to file successive application when an *Atkins* claim was feasible during first application under the pre-DSM-5 regime).

Second, AEDPA imposes numerous additional barriers to successive applications that sink prisoners' claims seeking to benefit from the narrow "no possibility of merit" rule. Applications raising claims that were raised in a prior application must be dismissed. 28 U.S.C. § 2244(b)(1). Additionally, AEDPA imposes a limitations period on successive claims. § 2244(d).

All these hurdles exist before a court even reaches the merits of the habeas claim. Mr. Johnson's claim has not yet been resolved. It is too early to tell whether the Fifth Circuit's interpretation of § 2244(b)(2)(A) has ever made a difference in the ultimate disposition of a single habeas claim. The question does not warrant this Court's review at this time.

III. This case is also a poor vehicle because it comes in an interlocutory posture and seeks review of a different question than the district court certified.

The Petition comes in an unusual posture that makes it a poor candidate for certiorari. The district court certified an interlocutory appeal under § 1292(b). Had this case proceeded to merits review of the *Atkins* claim after the district court's decision in 2022, an evidentiary hearing on the merits of the *Atkins* claim would have been completed by now, allowing the normal course of the merits and procedural questions being considered together on appeal. This Court is hesitant to take cases from an interlocutory order rather than final judgment. *See* Sup. Ct. R. 11; *Harrel v. Raoul*, 144 S. Ct. 2491, 2492 (2024) (statement of Thomas, J.) ("This Court is rightly wary of taking cases in an interlocutory posture."); *Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) (Roberts, C.J., respecting the denial of certiorari) (noting that a case is "better suited for certiorari review" after final judgment and not in an interlocutory posture); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012) (Alito, J., respecting the denial of certiorari) (agreeing with denial of certiorari when a petition came in an "interlocutory posture"). At this stage in the litigation, it is uncertain

whether the question presented will control the final outcome of Mr. Johnson's petition. Mr. Johnson's habeas petition should continue to final judgment.

Texas has opposed certiorari in scenarios before final judgment in federal habeas proceedings. In cases where a prisoner petitions for certiorari to review the denial of his state habeas claims while a federal habeas claim is pending, Texas has urged this Court to deny certiorari before the federal proceedings have completed. *See* Brief in Opposition at 13, *Uvukansi v. Texas*, 142 S. Ct. 2811 (2022) (No. 21-151), 2021 WL 5513772, at *13. It has even made the same argument when the federal avenue is unlikely to allow the Court to reach the question, like where AEDPA's statute of limitations bars the claim. *See* Brief in Opposition at 11–12, *Santana v. Texas*, 144 S. Ct. 546 (2024) (No. 22-1139), 2023 WL 8112707, at *11–12. Now Petitioner makes the inverse argument: grant certiorari before federal proceedings have rendered a final judgment because it may be hard to reach the question otherwise.

And contra Petitioner's suggestion, taking this case on interlocutory review is not the only way for the Court to answer this question. The Court can wait for final judgment in this case. Or it can review a certification decision by a court of appeals on a successive application from a prisoner in federal custody. Federal prisoner claims based on previously unavailable constitutional rules are governed by substantially similar language as state prisoners, § 2255(h)(2), and are not subject to the certiorari bar that state custody claims are, § 2244(b)(3)(E).

Another wrinkle in this case that shows that it is a poor vehicle to review the question presented is that Petitioner asks this Court to decide a different question than the one he asked the district court to certify for interlocutory review. Upon Petitioner's request, the district court certified the question "[w]hether there can be judicially created exceptions to 28 U.S.C. § 2244(b)(2)(A)." *See* Pet. App. 8a. The Fifth Circuit answered in the negative. Pet. App. 5a. Petitioner does not dispute that answer but instead disagrees with the Fifth Circuit's decision not to overrule *Cathey* and *Johnson*. While a § 1292(b) appeal gives this Court jurisdiction over the order and not only the certified question, the Court should not reward Petitioner for failing to present his real issue in the certified order. *Cf. Clark v. Sweeney*, 607 U.S. 7 (2025).

IV. The lower court was correct.

AEDPA provides that a prisoner may bring a second or successive habeas claim if the applicant can 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). As the district court observed, "*Atkins* unquestionably created a new rule of constitutional law . . . [and] *Atkins* was made retroactive on federal habeas review." Pet. App. 23a. And in the decision below, the Fifth Circuit relied on its definition of "previously unavailable" as applied in *Cathey*. This interpretation was correct.

The Court has interpreted "available" in the context of the Prison Litigation Reform Act (PLRA). *Booth v. Churner*, 532 U.S. 731, 737–38 (2001); *Ross v. Blake*, 578 U.S. 632, 642 (2016)). In those cases, the Court adopted the ordinary meaning of

"available," which means "'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" *Booth*, 532 U.S. at 737–38 (quoting Webster's Third New International Dictionary 150 (1993)); *Ross*, 578 U.S. at 642. A similar approach is called for here regarding the interpretation of "unavailable" in AEDPA. *See* A. Scalia & B. Garner, *Reading Law* § 25, at 170–73 (2012) (discussing how the presumption of consistent usage can apply to statutes that are "enacted at the same time, and deal[] with the same subject").

Unavailability must be interpreted functionally. When a claim has "no possibility of merit," it cannot "be obtained." *See Booth*, 532 U.S. at 737–38 (quoting Webster's Third New International Dictionary 150 (1993)). Determining whether a claim is "available" requires a consideration of "real-world workings." *Ross*, 578 U.S. at 643. Solutions which "operate[] as a simple dead end" or are, "practically speaking, incapable of use," are unavailable. *Id.*

Mr. Johnson's *Atkins* claim was not available when he filed his first application for habeas relief in federal court. Despite *Atkins* being a new rule of constitutional law made retroactive by this Court, it required the publication of the DSM-5 to have any possibility of merit. And Texas courts (which establish the substantive *Atkins* standard which federal courts must follow for Texas cases) did not adopt the DSM-5 as the governing criteria for an *Atkins* claim until 2018—nearly seven years after Mr. Johnson's initial federal habeas petition. *Moore*, 548 S.W.3d at 555. Because Mr.

Johnson's *Atkins* claim was functionally unavailable, the Fifth Circuit correctly authorized his successive petition.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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