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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

This petition concerns a pure issue of statutory interpretation on which there is an acknowledged circuit split. Respondent Dexter Johnson does not deny that under the holding of the Eleventh Circuit, AEDPA bars his second federal habeas petition because whether a rule was "previously unavailable" does not depend on "whether the claim would have been a winning one at the time of the first petition." *In re Bowles*, 935 F.3d 1210, 1216–19 (11th Cir. 2019); *see also Slusser v. Vereen*, 36 F.4th 590, 596 (4th Cir. 2022) (holding that "previously unavailable" is not affected by a "prisoner's ability to . . . prevail").

To justify his second federal habeas petition, Johnson relies on the Fifth Circuit's contrary interpretation of AEDPA, in which a second federal petition can be filed if the claim lacked "any possibility of merit" at the time of the initial federal habeas petition. BIO 20.

The facts of this case alone illustrate the importance of the issue. The Fifth Circuit's erroneous authorization of Johnson's successive petition has delayed his execution by nearly seven years. Despite their high cost, authorization decisions are unreviewable by this Court. And this recurring issue of habeas procedure, which arises most frequently in capital cases, should be uniform across the circuits.

There is no need for further percolation. The issue is one of statutory interpretation in which the two alternatives are known. The Eleventh Circuit has analyzed and rejected the Fifth Circuit's interpretation, and the Fifth Circuit narrowly denied rehearing en banc, adhering to its interpretation. Certiorari is warranted now.

I. The Decision Below Implicates an Acknowledged and Entrenched Circuit Split.

As the petition explains, 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 Eleventh Circuit considered and rejected the Fifth Circuit's rule. "There is no futility exception to the AEDPA's restrictions on second and successive petitions." *In re Bowles*, 935 F.3d at 1217 (discussing and rejecting *In re Cathey*, 857 F.3d 221 (5th Cir. 2017) (per curiam), and *In re Johnson*, 935 F.3d 284 (5th Cir. 2019)).

In denying rehearing en banc of the decision below, several Fifth Circuit judges noted the circuit split and rejected *In re Cathey*. *See* Pet. App. 73a (Ho, J., dissenting from denial of rehearing en banc) ("Our decision in *Cathey* has been rejected by at least one other circuit.").

At least the Fourth Circuit follows the Eleventh Circuit. *Slusser*, 36 F.4th at 596; *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004); *see also United States v. Moore*, 589 F. App'x 414, 415 (10th Cir. 2015); *Gray-Bey v. United States*, 209 F.3d 986, 988 (7th Cir. 2000) (per curiam). And at least the Ninth Circuit follows the Fifth Circuit. *Muñoz v. United States*, 28 F.4th 973, 976 & n.3 (9th Cir. 2022); *see also Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005). This split is ripe for this Court's review.

A. Johnson attempts to minimize this conflict as "disagree[ment] over which factual scenarios amount to a feasible claim." BIO 10; *see also id.* at 11 (conceding "a difference in mere application").

That is wrong. The dispute concerns statutory interpretation: the meaning of "new rule of constitutional law . . . that was previously unavailable."

Under the Fifth Circuit's interpretation, a rule was previously available only if a claim based on the rule had "some possibility of merit." Pet. App. 6a (quoting *In re Cathey*, 857 F.3d at 232).

Under the Eleventh Circuit's interpretation, a rule was previously available if "the petitioner could have relied on that 'new rule' in his initial habeas petition." *In re Bowles*, 935 F.3d at 1218. It is irrelevant "whether the claim would have been a winning one," *id.* at 1219, or "lacked merit under case law existing at that time," *id.* at 1217.

Both circuits have acknowledged this as a conflict over statutory interpretation. *Id.* at 1216–17; Pet. App. 73a (Ho, J., dissenting from denial of rehearing en banc).

B. Nor is Johnson correct to characterize the Eleventh Circuit's holding as "dicta." BIO 12. After rejecting the Fifth Circuit's interpretation, the Eleventh Circuit reinforced its interpretation of the statute by explaining that the petitioner's claim "d[id] not rely on *Atkins* [*v. Virginia*, 536 U.S. 304 (2002)] so much as it d[id] on *Hall* [*v. Florida*, 572 U.S. 701 (2014)]." *In re Bowles*, 935 F.3d at 1219. "Despite what he calls it, his claim actually is a *Hall* claim, not an *Atkins* claim." *Id.*

The same is true of Johnson's claim. Johnson admits that his claim relies on the DSM-5 and *Moore v. Texas*, 581 U.S. 1 (2017). BIO 5. Johnson asserts that his claim was "functionally unavailable" until Texas courts "adopt[ed] the DSM-5 as the governing criteria for an *Atkins* claim." *Id.* at 20–21.

Bowles made the same assertion: "Bowles insists that '[i]t was not until *Hall* that Florida was forced to adapt to current medical standards,' and that change made his 'IQ score [of 74] qualifying, thus making an intellectual disability claim viable for the first time.'" *In re Bowles*, 935 F.3d at 1216 (alterations in original).

In the same way that Bowles' claim "d[id] not rely on *Atkins* so much as it d[id] on *Hall*," *id.* at 1219, Johnson's claim does not rely on *Atkins* so much as it does on *Moore*. Like Bowles, Johnson asserts a claim "dressed up to look like an *Atkins* claim," *id.*, because *Moore* has not been "made retroactive to cases on collateral review by [this Court]," 28 U.S.C. § 2244(b)(2)(A). *See, e.g.*, *In re Richardson*, 802 F. App'x 750, 755–56 (4th Cir. 2020) (per curiam).

This is not an alternative holding but confirms the Eleventh Circuit's interpretation of "previously unavailable." Under AEDPA's plain text, "whether a claim is 'previously unavailable' depends on when a 'new rule of constitutional law' is made retroactive by the Supreme Court." *In re Bowles*, 935 F.3d at 1218. "That a claim has become meritorious for some other reason has no bearing on whether the claim was 'previously unavailable' for § 2244(b)(2)(A) purposes." *Id.*

According to Johnson, his claim became viable only after "the publication of the DSM-5" and after Texas courts "adopt[ed] the DSM-5 as the governing criteria for an *Atkins* claim." BIO 20. In other words, his claim relies on (1) new evidence and (2) a change in the law 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).

These developments do not permit the filing of Johnson's second federal habeas petition. *Id.* § 2244(b)(2). The Fifth Circuit's contrary interpretation of "previously unavailable" conflicts with the Eleventh Circuit's interpretation and AEDPA's plain text.

C. Johnson notes that other circuits "have little to no discussion of the merits of the underlying claim," BIO 12, but this fact hardly supports him. Like the Eleventh Circuit, other circuits also recognize that the merits of the underlying claim have "no bearing" on whether a rule was previously unavailable. *In re Bowles*, 935 F.3d at 1218.

The Fourth Circuit, for example, recognizes that section 2244(b)(2)(A) turns on the timing of this Court's decision: "[C]onstitutional rules that were established at the time of the applicant's last PFA motion were not 'previously unavailable.'" *In re Williams*, 364 F.3d at 239; *see also Slusser*, 36 F.4th at 596 ("'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.").

Johnson dismisses *Slusser* as having "one conclusory sentence," BIO 12, but does not address *In re Williams* or other Fourth Circuit cases.

The Seventh and Tenth Circuits have also held that "previously unavailable" depends on the timing of this Court's decisions. *See* Pet. 20 (discussing *Moore*, 589 F. App'x at 415; *Gray-Bey*, 209 F.3d at 988). Like the Fourth Circuit's decisions, these decisions do not address "the merits of the underlying claim" because the merits of the underlying claim are irrelevant.

D. Johnson incorrectly characterizes the Ninth Circuit as discussing only "challenges pro se prisoners face when preparing legal filings." BIO 12 (quoting *Muñoz*, 28 F.4th at 978).

In *Muñoz*, the Ninth Circuit addressed the meaning of "previously unavailable," 28 F.4th at 978, and adopted *In re Cathey*'s holding that availability depends on "whether the prisoner had a factual basis for a claim," *id.* at 979 (citing *In re Cathey*, 857 F.3d at 230–33). The Ninth Circuit then applied this rule in holding that the petitioner's claim was available in his initial habeas proceeding, noting that "Muñoz had the facts that he needed for his claim." *Id.* at 980.

Under the Ninth Circuit's holding, *Atkins* was "previously unavailable" to Johnson because he did not have the facts—the DSM-5—that he allegedly needed for his claim.

Johnson similarly incorrectly describes the Eighth Circuit as "merely ma[king] a passing reference to 'evidence.'" BIO 12 (quoting *Davis*, 423 F.3d at 879). The Eighth Circuit relied on the availability of evidence to the petitioner in holding that a claim was previously available: "The evidence Davis relies on in support of his request to raise this claim was available to him in the district court[.]" *Davis*, 423 F.3d at 879. As a result, "the issue was available to Davis." *Id.* Analysis of the evidence available to the petitioner formed part of the Eighth Circuit's holding.

There is an acknowledged and entrenched split on a question of statutory interpretation that is squarely implicated by the facts of this case.

II. The Issue Warrants Resolution by this Court.

This important and recurring issue concerning the interpretation of AEDPA's provision limiting successive habeas petitions warrants resolution by this Court.

A. As the petition details and *amici* States confirm, the uniformity of federal law is particularly important in the context of habeas procedure. Pet. 22–24. On both sides of the circuit split, the stakes are high. The Fifth Circuit's rule, if wrong, erroneously intrudes on state sovereignty. *Harrington v. Richter*, 562 U.S. 86, 103 (2011); *see also* State Amicus Br. 3 (explaining that the Fifth Circuit's rule both conflicts with the statutory text and "frustrates States' ability to carry out just punishment for violations of their laws"). The Eleventh Circuit's rule, if wrong, erroneously deprives prisoners of federal court review of their convictions and sentences. Either way, the right of a petitioner to file a successive habeas petition should not vary from circuit to circuit.

B. Johnson minimizes the significance of the Fifth Circuit's rule by suggesting that it narrowly applies only if a claim "bec[a]me a 'possible claim' because the framework for analyzing it changed around the time or after th[e] first application was denied." BIO 15 (quoting Pet. App. 58a–59a).

But the Fifth Circuit's interpretation of "previously unavailable" extends beyond those circumstances. The decision below reaffirms that the Fifth Circuit has adopted a far broader test: "[A] claim must have some possibility of merit to be considered available." Pet. App. 6a (quoting *In re Cathey*, 857 F.3d at 232). This principle does not depend on why the claim previously lacked "some possibility of merit" or why it later acquired "some possibility of merit." Under *In re Cathey*, if a claim

lacked "some possibility of merit"—for any reason—then it was "previously unavailable" and thus can be asserted in a second or successive habeas petition. *Id.* (quoting *In re Cathey*, 857 F.3d at 232).

The Eleventh Circuit and district court correctly recognized that the Fifth Circuit's interpretation creates a "futility exception to the AEDPA's restrictions on second and successive petitions." *In re Bowles*, 935 F.3d at 1217; Pet. App. 25a.

As the petition explains, this holding erases the strict limits on claims based on new evidence. Pet. 25. Rather than demonstrate "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), habeas petitioners should instead proceed under section 2244(b)(2)(A) and argue that the claim was "previously unavailable" because it had no possibility of merit without the new evidence.

The Eleventh Circuit recognized these absurdities when it rejected *In re Cathey*. "Congress did not say that the claim could proceed if it relied on any other type of change in case law." *In re Bowles*, 935 F.3d at 1217–18. And "Congress knew how to provide for second and successive petitions based on factual developments, such as the publication of a new DSM manual" but did not do so. *Id.* at 1218.

The Fifth Circuit's "possibility of merit" interpretation of "previously unavailable" extends beyond the specific facts at issue in this case.

C. The petition explains the errors in the Fifth Circuit's analysis. AEDPA's text "does not ask whether a

claim was available but whether a *rule* was available." Pet. 26 (discussing 28 U.S.C. § 2244(b)(2)(A)). "Previously unavailable" modifies "new rule of constitutional law," not "claim." Pet. 27 & n.7.

Rather than asking whether a "rule" was available to a petitioner, the Fifth Circuit erroneously focused on whether a "claim" was available. *See In re Cathey*, 857 F.3d at 232 ("We think a *claim* must have some possibility of merit to be considered available." (emphasis added)). Johnson commits the same error. *See* BIO i (proposing the Question Presented as "[w]hether a claim is 'previously unavailable'"); *id.* at 3 ("whether a claim was 'previously unavailable'"); *id.* at 9 (same); *id.* at 10 (same); *id.* at 12 (same); *id.* at 20 (same); *id.* at 20 (arguing that "Johnson's *Atkins* claim was not available").

These arguments are unfaithful to AEDPA's text, which allows a successive petition if the claim "relies on a new rule of constitutional law . . . that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A); *accord id.* § 2255(h)(2). The question is whether the *rule* of constitutional law was "capable of use," *Booth v. Churner*, 532 U.S. 731, 737 (2001), not whether a *claim* would have succeeded.

D. Johnson also disregards the "new rule" requirement. *See* Pet. 27–28. Whether a rule is "new" depends on the law when a defendant's conviction became final: If a "rule was already 'apparent to all reasonable jurists'" at the time the defendant's conviction became final, it is not a "new rule." *Edwards v. Vannoy*, 593 U.S. 255, 265 (2021) (quoting *Lambrix v. Singletary*, 520 U.S. 518, 528 (1997)).

Atkins was decided years before Johnson's conviction became final (indeed, years before Johnson

committed his crimes). Pet. 7–8. Its rule was apparent to all reasonable jurists at the time his conviction became final and cannot be characterized as a "new rule of constitutional law" with respect to Johnson.

Johnson has no response beyond the conclusory assertion that "*Atkins* [was] a new rule of constitutional law made retroactive by this Court." BIO 20.

But a rule is not "new" in the abstract; it is "new" for a particular defendant. *See Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality op.) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."); *accord Chaidez v. United States*, 568 U.S. 342, 347 (2013) (same); *see also* State Amicus Br. 7–8.

The decision below was incorrect to hold 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 to affirm the denial of the motion to dismiss.

III. This Petition Presents an Ideal Vehicle.

The decision below squarely implicates the circuit split, and no preliminary issues prevent this Court from deciding the issue.

A. This petition represents the first opportunity for this Court to resolve the split. Johnson acknowledges the bar on seeking rehearing or certiorari from authorization decisions, *id.* § 2244(b)(3)(E), but speculates that the courts of appeals might grant rehearing en banc sua sponte, BIO 13. But Johnson fails to address the 30-day deadline to grant or deny authorization. 28 U.S.C. § 2244(b)(3)(D). The Fifth Circuit narrowly denied rehearing en banc in this case, and Johnson offers no

reason to believe the Eleventh Circuit (or any other circuit) will grant rehearing to change its position. The split shows no sign of resolving without this Court's intervention.

B. Johnson's quibbles with the form of the certified question disregard its context and do not present a vehicle issue. The district court (correctly) understood *In re Cathey* to have adopted a "judicially created exception" to AEDPA. Pet. App. 25a (describing the Fifth Circuit as "read[ing] a *futility* exception into section 2244(b)(2)(A)"). The certified question—"[w]hether there can be judicially created exceptions to [§ 2244(b)(2)]," Pet. App. 8a—reflected that understanding. The panel also understood the certified question in this context: "[W]e understand the parties' question more accurately to be this: Whether 'previously unavailable' can be read in the way *Cathey* instructs[?]" *Id.* at 6a. And the panel, "[i]n answer to that question . . . affirm[ed] [its] interpretation of 'previously unavailable' in *Cathey* as the correct interpretation." *Id.*

C. Johnson suggests waiting to grant review until a final judgment, BIO 17–18, but the issue is fully presented now. No further factual development will aid this Court's review.

Moreover, this case has already been delayed far too long. Johnson committed his brutal crimes nearly twenty years ago and was sentenced to death in June 2007.

Johnson was scheduled for execution in 2019 until the Fifth Circuit erroneously authorized him to file a second federal habeas petition. For the people of Texas in general and for the families of Johnson's victims in particular, justice delayed is justice denied.

CONCLUSION

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

Respectfully submitted.

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