

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

(CAPITAL CASE)

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

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CAPITAL CASE

QUESTION PRESENTED

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,” 28 U.S.C. 2244(b)(2)(A), when a habeas applicant could have asserted a claim based on the rule in a prior federal habeas application.

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INTEREST OF THE UNITED STATES

This case concerns the circumstances in which a state prisoner may file a second or successive application for a writ of habeas corpus based 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). Federal prisoners may similarly be permitted to file a successive collateral attack under 28 U.S.C. 2255 when the motion is certified to “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). The resolution of the question presented

could therefore affect the availability of successive collateral attacks by federal prisoners. Accordingly, the United States has a substantial interest in the resolution of this case.

STATUTORY PROVISION INVOLVED

28 U.S.C. 2244(b)(2) provides:

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.

INTRODUCTION

In 2006, respondent raped and murdered Maria Aparece after he and his friends tried to rob her and her boyfriend. He was convicted of capital murder in 2007. In his first set of habeas claims in state and federal court, he invoked this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), which had held that intellectually disabled individuals are not eligible for the death penalty, to unsuccessfully contend that its holding should

be extended to cover individuals who are mentally ill, but not intellectually disabled.

Several years later, he sought to bring another *Atkins* claim, this time contending, based on updates to the Diagnostic and Statistical Manual (DSM) for mental disorders, that he was, in fact, intellectually disabled. In an effort to satisfy the strict limits on second or successive habeas applications under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. 2241 *et seq.*, he argued that his *Atkins* claim “relie[d] 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). The court of appeals agreed with him, taking the view that although *Atkins* was decided years before respondent even committed his crimes, it was “previously unavailable” to him because his claim under *Atkins* lacked merit before the DSM was updated.

The court of appeals’ approach misinterpreted Section 2244(b)(2)(A), which allows only for a “narrow categor[y],” *Banister v. Davis*, 590 U.S. 504, 509 (2020), of claims that are based on new rules that create previously unavailable legal avenues for challenging a criminal judgment. That provision does not permit renewed collateral attacks on a final criminal judgment anytime the American Psychiatric Association—which is not a court and not entitled to create “a new rule of constitutional law,” 28 U.S.C. 2244(b)(2)(A)—decides to revise standards that may be relevant to legal claims. The “rule of constitutional law” on which respondent’s claim “relies,” *ibid.*, is the rule against executing the intellectually disabled adopted in *Atkins*, which was decided well before his crime, conviction, state postconviction review, and first federal habeas application. The rule

was neither “new” nor “previously unavailable,” *ibid.*, when respondent filed his claim, as Section 2244(b)(2)(A) requires. The decision below should be reversed.

STATEMENT

Following a jury trial in Texas state court, respondent was convicted of capital murder, in violation of Tex. Penal Code § 19.03(a)(2) (2006), and sentenced to death. 2010 WL 2617804, at *1. The state court of appeals affirmed, 2010 WL 359018, and this Court denied a writ of certiorari, 561 U.S. 1031. After the state courts denied state habeas relief, a federal district court denied respondent’s application for a federal writ of habeas corpus. 2014 WL 2882365; see 2010 WL 2617804. The federal court of appeals affirmed, 617 Fed. Appx. 293, and this Court denied a writ of certiorari, 577 U.S. 1121. Respondent later sought authorization from the federal court of appeals to file a second application for a federal writ of habeas corpus, which the court granted. Pet. App. 47a-66a. The district court thereafter denied a motion to dismiss the subsequently filed application as impermissibly second or successive. *Id.* at 10a-46a. On interlocutory appeal, the court of appeals affirmed. *Id.* at 1a-6a.

1. Early in the morning on June 18, 2006, respondent and four friends were driving around a Houston neighborhood looking for someone to rob. 617 Fed. Appx. at 295; see 2010 WL 2617804, at *1. They found 23-year-old Maria Aparece and her boyfriend, Huy Ngo, sitting inside a parked car. Pet. App. 2a; 617 Fed. Appx. at 295. “Brandishing a shotgun, [respondent] ran up to the driver’s side and threatened to bust through the window if Aparece did not open the car door.” 617 Fed. Appx. at 295. One of respondent’s friends aimed a gun at the passenger side. *Id.* at 295-296.

When Aparece eventually complied with respondent's directive to open the car door, respondent pulled her from the car by her hair. 617 Fed. Appx. at 296. Respondent and his accomplice forced Aparece and Ngo into the backseat of the car, and he and his accomplice got into the front seat. *Ibid.* Respondent then drove Aparece and Ngo around, demanding money, but Aparece and Ngo did not have any. *Ibid.* "Angered, [respondent] drove around for another twenty minutes or so searching for a wooded area while Aparece cried and begged for her freedom." *Ibid.*

When they found a park with a wooded area, respondent's accomplice forced Ngo out of the car and onto his knees. 617 Fed. Appx. at 296. Meanwhile, respondent "climbed into the backseat and raped Aparece at gunpoint." *Ibid.* As he did so, his accomplice "held a gun to Ngo's head and taunted him as he was crying, saying things like 'My brother in there having sex with your girlfriend. What you going to do about it?'" *Ibid.* When respondent eventually stopped raping Aparece, he "told the couple that 'it was the end right here' and that he was going to 'off them.'" *Ibid.*

Respondent and his accomplice marched Aparece and Ngo into the woods. 617 Fed. Appx. at 296. As Aparece and Ngo "both continued to cry and Aparece begged for her life," respondent and his accomplice shot them each once in the head. *Ibid.* When respondent and his accomplice caught up with the rest of their companions, the two "were laughing and playing loud music." *Ibid.* Later, respondent took the group on a "shopping spree" at two separate stores using a credit card that he had stolen from Aparece. *Ibid.*

2. Respondent was subsequently indicted, convicted, and sentenced to death in Texas state court for

the robbery, kidnapping, and murder of Aparece. 617 Fed. Appx. at 298. Although punishment-phase testimony by a defense expert “portrayed [respondent] as an individual suffering from low intelligence, brain damage, and paranoid schizophrenia,” 2013 WL 4482865, at *18, respondent’s “IQ was higher tha[n] the cutoff in place at that time for a diagnosis of intellectual disability” as necessary to fall within the ambit of *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the death penalty for the intellectually disabled. Pet. App. 13a-14a & n.2 (indicating that the expert determined respondent’s IQ was between 74 and 88 and that he did not have obvious deficits in adaptive behavior).

Respondent’s conviction and sentence were affirmed on direct appeal, 2010 WL 359018, and this Court denied a writ of certiorari, 561 U.S. 1031. While his direct-appeal proceedings were still pending, respondent sought habeas relief in the state courts. 2010 WL 2617804, at *1. Among other things, he claimed that he was mentally ill and that his mental illness should exempt him from the death penalty under *Atkins*. 2013 WL 4482865, at *18. The state habeas court denied relief. See 2010 WL 2617804, at *1. The court explained, *inter alia*, that this Court had not “extended the holding” in *Atkins* “to protect the mentally ill” in addition to the intellectually disabled. 2013 WL 4482865, at *19 (citation omitted). The state appellate court affirmed. 2010 WL 2617804, at *1.

3. In 2011, respondent filed an application for federal habeas corpus relief, asserting 11 claims of error, including the claim—previously raised and rejected in his state habeas application—that he was mentally ill and that his mental illness should exempt him from the death penalty. 2013 WL 4482865, at *18. Pointing to

punishment-phase testimony by his expert, respondent “describe[d] himself as such a ‘severe case’ that he could not ‘maintain a normal life without extensive psychiatric assistance and medication.’” *Ibid.* (citation omitted). Based on a “comparison to” *Atkins*, he contended that his death sentence should be barred. *Ibid.*

The district court denied respondent’s application, observing that circuit precedent had “found that the constitutional protections from * * * *Atkins* do not extend to mental illness.” 2013 WL 4482865, at *19. The court of appeals declined to issue a certificate of appealability, finding (*inter alia*) that “reasonable jurists could not debate that the district court was correct in rejecting [respondent’s] argument that mental illness should prohibit his execution.” 617 Fed. Appx. at 304; see 28 U.S.C. 2253(c)(1) (certificate of appealability requirement). Like the district court, the court of appeals emphasized that neither it nor this Court had extended *Atkins* “to the mentally ill whose illness does not reach that of incompetency or insanity.” 617 Fed. Appx. at 304.

Almost four years later, in 2019, respondent filed a second state habeas corpus application claiming that he is not just mentally ill, but also “intellectually disabled” and, therefore, “his execution would violate the Eighth and Fourteenth Amendments to the United States Constitution.” 2019 WL 1915204, at *1. The Texas Court of Criminal Appeals dismissed the application as an abuse of the writ. *Ibid.*

4. A few months later, respondent asked the federal court of appeals for authorization to file a successive federal habeas application asserting an *Atkins* claim. Pet. App. 47a-48a. Under 28 U.S.C. 2244(b)(3), such authorization is a jurisdictional prerequisite to filing a

second or successive collateral attack in federal court. See *Burton v. Stewart*, 549 U.S. 147, 156-157 (2007) (per curiam). While “a state prisoner always gets one chance to bring a federal habeas challenge to his conviction[,] * * * after that, the road gets rockier.” *Banister v. Davis*, 590 U.S. 504, 509 (2020) (citation omitted). The provisions of AEDPA “set[] stringent limits on second or successive habeas applications,” *id.* at 507, including the preauthorization requirement, see 28 U.S.C. 2244(b)(3).

A court of appeals may grant authorization for a second or successive habeas application only if the prisoner makes a prima facie showing that the application satisfies certain particularized criteria. See 28 U.S.C. 2244(b)(3)(C). Among other things, Section 2244(b)(2) requires the applicant to show that a claim “falls within one of two narrow categories.” *Banister*, 590 U.S. at 509; see 28 U.S.C. 2244(b)(2). To fit within the first category, a prisoner must show that “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). To fit within the second category, the applicant must present compelling new evidence of innocence. 28 U.S.C. 2244(b)(2)(B).

As relevant here, respondent’s request for authorization argued “that recent changes to the medical standards for determining intellectual disability benefit him.” Pet. App. 56a. Although at trial he “was found not to be intellectually disabled,” respondent asserted that “[t]he latest DSM-5 manual” for mental disorders “changed the diagnostic framework for intellectual disability” and that a doctor had concluded, as of July 2019, that he “‘meets the criteria for a diagnosis of Intellectual Disability’ under the DSM-5.” *Id.* at 57a.

The court of appeals granted authorization for respondent to pursue his *Atkins* claim in a successive federal habeas application to be filed in district court. Pet. App. 48a. In its view, respondent had made a prima facie showing that his “‘claim relie[d] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.’” *Id.* at 56a (quoting 28 U.S.C. 2244(b)(2)(A)); see *id.* at 55a-66a.

The court of appeals recognized that “*Atkins* was decided long before [respondent] even committed his crimes.” Pet. App. 57a. Nevertheless, relying on circuit precedent, the court concluded that an *Atkins* claim was “previously unavailable” to him. 935 F.3d at 292-294. The court reasoned that “there was not a claim ‘with some possibility of merit’ under *Atkins*” until there was “significant change” in “the medical methodology for evaluating the relevant disabilities and in courts’ recognition of those changes.” *Id.* at 292-293 (quoting *In re Cathey*, 857 F.3d 221, 232-233, 237-238 (5th Cir. 2017) (per curiam)). And it stated that, under circuit precedent, “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*.” *Id.* at 294.

5. Having received authorization to do so, respondent filed a second habeas application in the district court. Pet. App. 2a. AEDPA’s limitations on second or successive habeas applications continue past the prima facie determination of the court of appeals and “bind the district court” as well. *Banister*, 590 U.S. at 509. The state warden (State) moved to dismiss respondent’s application as untimely and impermissibly successive. Pet. App. 2a.

The district court denied the dismissal motion, stating that the court of appeals “has read a futility exception into section 2244(b)(2)(A)” and applying that “judicially created exception” to respondent’s case. Pet. App. 25a & n.10 (emphasis omitted). The State filed a certified interlocutory appeal under 28 U.S.C. 1292(b), Pet. App. 2a, and the court of appeals affirmed the district court’s denial of the motion to dismiss, *id.* at 1a-6a. In doing so, it reiterated its view that its prior “interpretation of ‘previously unavailable,’” under which “‘a claim must have some possibility of merit to be considered available,’” is “the correct interpretation.” *Id.* at 6a (citation omitted).

The State requested rehearing en banc, which the court of appeals denied by a vote of nine to seven. Pet. App. 68a. Judge Ho filed a written dissent from the denial of rehearing en banc on behalf of himself and three other dissenters, in which he explained that circuit precedent treating a claim like respondent’s as “‘previously unavailable’ under AEDPA” was “wrong.” *Id.* at 72a (citation omitted); see *id.* at 68a-73a. Judge Ho observed, *inter alia*, that “*Atkins* isn’t a new rule of constitutional law. It’s a decades old decision, issued years before [respondent] brutally murdered Maria Aparece.” *Id.* at 71a. And he explained that for a court to “re-conceptualize” respondent’s reliance on updated medical standards “as a new rule of constitutional law * * * would be tantamount to delegating judicial power to interpret the law to scientists.” *Id.* at 71a-72a.

SUMMARY OF ARGUMENT

The court of appeals erred in treating respondent’s claim, which applies preexisting law to new psychiatric standards, as a claim that “relies on a new rule of constitutional law, made retroactive to cases on collateral

review by the Supreme Court, that was previously unavailable” for purposes of a second or successive habeas application under 28 U.S.C. 2244(b)(2)(A). That provision allows for a “narrow categor[y],” *Banister v. Davis*, 590 U.S. 504, 509 (2020), of claims that are based on new rules that create previously unavailable legal avenues for challenging a criminal judgment. It is not an invitation for renewed collateral attacks on final judgments whenever the American Psychiatric Association—a medical body that does not create “new rule[s] of constitutional law”—decides to issue an updated version of the DSM—which is not “a new rule of constitutional law.”

1. By its terms, Section 2244(b)(2)(A) requires that a claim asserted in a second or successive habeas application be based on “a new rule of constitutional law,” 28 U.S.C. 2244(b)(2)(A), which under this Court’s precedent means “a rule that was not ‘dictated by precedent existing at the time the defendant’s conviction became final,’” *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)) (ellipsis and emphasis omitted). The rule must also be “made retroactive to cases on collateral review by the Supreme Court,” 28 U.S.C. 2244(b)(2)(A), which only new substantive (rather than procedural) rules are. And it must be the rule itself—not some other aspect of the prisoner’s claim—“that was previously unavailable.” *Ibid.* As AEDPA’s statute of limitations reflects, a rule cannot be classified as unavailable after it has been “recognized by the Supreme Court.” 28 U.S.C. 2244(d)(1)(C).

The structure of Section 2244(b)(2) reinforces that a rule’s availability turns solely on the existence of the relevant legal principle, not new facts or new medical developments. Section 2244(b)(2)(A) is one of two

limited avenues for a prisoner to bring a second or successive habeas application. Section 2244(b)(2)(A) allows claims based on previously unavailable legal rules, while the other avenue, 28 U.S.C. 2244(b)(2)(B), allows claims based on facts that could not have been previously discovered and would establish a prisoner's innocence. See, e.g., *Banister*, 590 U.S. at 509. Section 2244(b)(2)(B)'s coverage of the waterfront of potential fact-based claims underscores that Section 2244(b)(2)(A) is strictly legal in scope. Related provisions of AEDPA support the same conclusion.

The backdrop against which AEDPA was enacted provides further confirmation. Under the doctrine of procedural default, which predates AEDPA and continues in force, the Court has distinguished between whether a “claim was ‘available’ at all” and whether “subsequent legal developments have made counsel’s task” of prevailing on the claim “easier.” *Smith v. Murray*, 477 U.S. 527, 537 (1986). Congress’s use of similar terminology in Section 2244(b)(2)(A) analogously focuses the inquiry on whether the rule can be invoked at all, not the difficulty (or even the impossibility) of establishing a sufficient predicate to prevail under it.

2. The court of appeals, however, has read Section 2244(b)(2)(A) to contain “‘a gray area of previous unavailability despite technical availability,’” and has “requir[ed] [a] claim have had ‘some possibility of merit’ for it to be considered previously available for purposes of Section 2244(b)(2)(A).” Pet. App. 5a-6a (citation omitted). That reading, which appears to construe “previously unavailable” as modifying “claim,” is textually untenable. And as the decision below demonstrates, it would allow prisoners to bring virtually any claim so long as it

previously lacked merit—indeed, the claim would not need to rely on “a new rule of constitutional law” at all.

Respondent’s reliance on this Court’s reading of “available” in the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(a), in *Ross v. Blake*, 578 U.S. 632 (2016), cannot justify the court of appeals’ approach to Section 2244(b)(2)(A). *Ross* defined “‘available’” as “capable of use to obtain relief,” and reasoned that the sorts of civil administrative procedures governed by the PLRA are not available when obstacles such as malfeasance by prison officials prevent those procedures from being utilized. *Id.* at 642-643. The difficulty of prevailing under a governing legal rule at a prior time is not a similar obstacle. Whether a constitutional rule was previously “capable of use to obtain relief,” *ibid.*, turns on whether that rule was governing law at a prior time—not whether a particular party could at that time have marshaled the facts necessary to succeed in obtaining relief.

3. Respondent’s claim in this case does not satisfy Section 2244(b)(2)(A). The rule of constitutional law on which the claim relies is the rule in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that intellectually disabled individuals are not eligible for the death penalty. *Atkins*, however, was decided years before respondent’s conviction, and was therefore not a “new rule” of constitutional law at the time of his second or successive habeas application. Nor was *Atkins* “previously unavailable” to respondent: To the contrary, he affirmatively invoked *Atkins* in his first habeas application.

Respondent’s reliance on an updated version of the DSM is not a claim of new law; at best, it is “a claim of new facts—specifically, new scientific evidence.” Pet. App. 71a (Ho, J., dissenting from denial of rehearing en

banc). As such, it falls outside the scope of Section 2244(b)(2)(A)’s prerequisites for claims based on new, retroactive, previously unavailable rules of constitutional law, and would instead be subject to Section 2244(b)(2)(B)’s requirements for claims based on new facts—requirements the court of appeals expressly found respondent could not satisfy. *Id.* at 57a n.1. The court of appeals erred in allowing respondent’s *Atkins* claim to proceed nonetheless.

ARGUMENT

The limited parameters of 28 U.S.C. 2244(b)(2)(A) allow a claim presented in a second or successive federal habeas application by a state prisoner to proceed only 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.” Under the plain language of that provision, the “rule of constitutional law” itself must be both “new” and “previously unavailable.” *Ibid.* Standards promulgated by a board of psychiatrists cannot transform a decision of this Court that predates a prior habeas application into a “new” and “previously unavailable” rule of constitutional law. The court of appeals erred in holding otherwise.

A. 28 U.S.C. 2244(b)(2)(A) Only Allows A Successive Collateral Attack When A Claim Relies On A Constitutional Rule That Is Both “New” And “Previously Unavailable”

Section 2244(b) generally bars the filing of claims in second or successive federal habeas applications, irrespective of whether they rely on grounds that have been raised before. See 28 U.S.C. 2244(b)(1) and (2). Section 2244(b)(2)(A) provides a narrow exception to that general bar, for prisoners who lacked the legal basis to

assert a claim that relies on a “new” and “previously unavailable” retroactive “rule of constitutional law.” 28 U.S.C. 2244(b)(2)(A). But by its terms, Section 2244(b)(2)(A) does not allow for repeat collateral attacks by prisoners who simply assert changed circumstances that increase their chances of prevailing under a preexisting “rule of constitutional law.”

1. The text of Section 2244(b)(2)(A) includes multiple prerequisites for a claim to be asserted in a second or successive application. For one thing, the claim must not only rely on a “rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” but that rule must be “new.” 28 U.S.C. 2244(b)(2)(A). “A new rule is defined as ‘a rule that was not “dictated by precedent existing at the time the defendant’s conviction became final.”’” *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)) (ellipsis and emphasis omitted). A rule invoked by a habeas applicant is therefore “new” only if it created new law after he himself received a final conviction. See *id.* at 417 (“Because the *Crawford* rule was not dictated by the governing precedent existing at the time when respondent’s conviction became final, the *Crawford* rule is a new rule.”).

The rule must also be “made retroactive to cases on collateral review by the Supreme Court.” 28 U.S.C. 2244(b)(2)(A). While all new rules “apply to cases pending in trial courts and on direct review,” only a subset of them (at this point, only new “substantive rules” that “alter ‘the range of conduct or the class of persons that the law punishes’”) “apply retroactively on federal collateral review.” *Edwards v. Vannoy*, 593 U.S. 255, 276 (2021) (quoting *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004)).

Moreover, even when a prisoner can identify such a new and retroactive rule, Section 2244(b)(2)(A) requires him to make an additional showing that the rule was “previously unavailable.” 28 U.S.C. 2244(b)(2)(A). As a grammatical matter, the modifying phrase “that was previously unavailable” refers to the “rule of constitutional law,” not the prisoner’s individual “claim.” The showing required of the applicant is “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.” *Ibid.* It makes no grammatical sense to read that language to require a showing “that *the claim* * * * *that* was previously unavailable.” *Ibid.* (emphases added). Instead, the only sensible reading is that the adjectival phrase “that was previously unavailable” modifies the intervening noun phrase “rule of constitutional law.” Cf. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (discussing last antecedent rule).*

The “previously unavailable” requirement is not automatically satisfied by every “new” rule of constitutional law. New rules may be recognized in different ways. This Court’s “explicit overruling of an earlier holding” that refused to recognize a rule “no doubt creates a new rule,” *Saffle*, 494 U.S. at 488, and also marks claims barred by the overruled precedent as

* It is especially clear that the analogous criterion for a second or successive collateral attack by a federal prisoner requires that the “new rule of constitutional law” itself be “previously unavailable.” That criterion, specified in 28 U.S.C. 2255(h)(2), requires that the prisoner’s motion “contain * * * a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The word “claim” does not appear, and the only plausible antecedent for “previously unavailable” is “new rule of constitutional law.”

“previously unavailable,” 28 U.S.C. 2244(b)(2)(A). When, however, a “new” rule stems from a decision that “breaks new ground or imposes a new obligation’ on the government” without overruling precedent, *Chaidez v. United States*, 568 U.S. 342, 347 (2013) (citation omitted), the question of whether the rule was “previously unavailable” turns on whether the rule would have been allowed in the relevant jurisdiction at the time of a prior federal habeas application.

Even when this Court has overruled precedent or paved the way for new claims that were previously unavailable, the rule ceases to be “unavailable” as soon as the Court’s decision is issued. Under Section 2244’s statute of limitations, the time for filing a claim based on a right “newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review” is typically one year from “the date on which the constitutional right asserted was initially recognized by the Supreme Court.” 28 U.S.C. 2244(d)(1)(C); see *Dodd v. United States*, 545 U.S. 353, 357 (2005) (interpreting materially identical provision applicable to federal prisoners). A rule cannot be considered “unavailable” during the very time within which a prisoner is required to invoke it. And, *a fortiori*, a constitutional rule cannot be considered “previously unavailable” when it predates the conclusion of prior postconviction litigation.

2. The statutory context of Section 2244(b)(2) highlights its limited role as a narrow outlet restricted to claims that rely on changed law—not other changed circumstances. Section 2244(b)(2)(A) is paired with 28 U.S.C. 2244(b)(2)(B), which provides an alternative permissible basis for a claim in a second or successive habeas application. While Section 2244(b)(2)(A) provides an outlet for claims based on “previously unavailable”

law, Section 2244(b)(2)(B) provides an outlet for claims based on previously unavailable facts. Specifically, it applies when “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)(B).

As this Court has repeatedly recognized, the two paragraphs divide up the universe of potential claims into those that rely on new law (which are subject to Subparagraph (A)) and those that rely on new facts (which are subject to Subparagraph (B)). See, *e.g.*, *Banister v. Davis*, 590 U.S. 504, 509 (2020) (observing that “roughly speaking,” one subsection covers claims that “rel[y] on a new and retroactive rule of constitutional law,” and the other covers claims that “allege[] previously undiscoverable facts that would establish [a prisoner’s] innocence”); *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) (describing the “two narrow exceptions” as resting on “either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence”). The spheres of operation are distinct and nonoverlapping: Section 2244(b)(2)(A) allows only claims that rely on “intervening and retroactive case law,” *Magwood v. Patterson*, 561 U.S. 320, 335 (2010), not claims that rely on the application of previously available rules of constitutional law to new facts.

The same dichotomy is reflected in other, related, AEDPA provisions. The statute of limitations has separate provisions under which an applicant has either one year from “the date on which the constitutional

right asserted was initially recognized by the Supreme Court,” 28 U.S.C. 2244(d)(1)(C), or one year from “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)(D), to file an application. And where an “applicant has failed to develop the factual basis of a claim in State court proceedings,” his entitlement to an evidentiary hearing in federal court depends on whether the claim relies on *either* “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; *or* * * * a factual predicate that could not have been previously discovered through the exercise of due diligence.” 28 U.S.C. 2254(e)(2)(A)(i) and (ii) (emphasis added).

This Court has never suggested that Section 2244(b)(2)(A) can apply where the “rule of constitutional law” was in force at the time the prisoner’s conviction became final. A claim invoking such a rule would necessarily rely on changes pertaining to the facts, not the law. Cf. *Hensley v. Eckerhart*, 461 U.S. 424, 434-435 (1983) (describing “claims for relief” as “based on * * * facts and legal theories”). And if Section 2244(b)(2)(A) allowed for claims based on changed factual circumstances, it would allow for an end-run around Section 2244(b)(2)(B)’s requirement that a claim must involve new facts that could not previously have been discovered, 28 U.S.C. 2244(b)(2)(B)(i), and that clearly and convincingly establish “that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the offense,” 28 U.S.C. 2244(b)(2)(B)(ii).

3. Allowing a claim under Section 2244(b)(2)(A) that invokes a preexisting constitutional rule would also be inconsistent with the legal backdrop against which

AEDPA was enacted. Before AEDPA’s enactment, review of successive applications for habeas relief was governed by the abuse-of-the-writ doctrine. See *McCleskey v. Zant*, 499 U.S. 467, 470 (1991); see generally *id.* at 479-489 (discussing history of rules governing successive applications for collateral review). “That doctrine was more forgiving than AEDPA’s gatekeeping provision—for example, enabling courts to hear a second or successive petition if the ‘ends of justice’ warranted doing so.” *Banister*, 590 U.S. at 514 (quoting *McCleskey*, 499 U.S. at 485). But even before AEDPA, the “rule against repetitive litigation still had plenty of bite,” and it “demanded the dismissal of successive applications except in ‘rare case[s].’” *Ibid.* (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 451 (1986) (plurality opinion)) (brackets in original).

Section 2244(b)(2)(A) advances “AEDPA’s objective of encouraging finality,” *Rhines v. Weber*, 544 U.S. 269, 277 (2005), by tightening the restriction on claims raised in second or successive collateral attacks. In doing so, it employs language that this Court had previously used in the context of the procedural default doctrine to refer only to a highly circumscribed set of circumstances. Under the procedural default doctrine—which predates AEDPA and continues to apply to claims under it—a prisoner who asserts a claim that he did not assert earlier must generally “demonstrate ‘cause’ to excuse the procedural defect and ‘actual prejudice’ if the federal court were to decline to hear his claim.” *Shinn v. Ramirez*, 596 U.S. 366, 371 (2022) (post-AEDPA) (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (pre-AEDPA)). One potential basis for “cause” is when a constitutional claim “is so novel that its legal basis is not reasonably available to counsel.” *Reed v. Ross*, 468

U.S. 1, 16 (1984). And in that context, the Court has drawn a sharp line between the “availability” of a claim and its likelihood of success.

For example, the Court’s decision in *Smith v. Murray*, 477 U.S. 527 (1986), emphasized that “the question” with regard to cause was “not whether subsequent legal developments have made counsel’s task easier, but whether at the time of the default the claim was ‘available’ at all.” *Id.* at 537. This Court has rejected the idea that a claim was “unavailable” when “various forms of the claim * * * had been percolating in the lower courts for years.” *Ibid.*; see *Bousley v. United States*, 523 U.S. 614, 622 (1998) (observing that the legal basis for a claim was “available” when “the Federal Reporters were replete with cases involving” the relevant legal question) (citation omitted). Congress is unlikely to have had an especially loose conception of that term in Section 2244(b)(2)(A), under which a rule would be deemed “previously unavailable” when the rule existed, but the factual predicate for a successful claim under it did not.

B. The Court Of Appeals’ Approach Is Unsound

The court of appeals, however, sees “a gray area of previous unavailability despite technical availability,” and thus it interprets Section 2244(b)(2)(A) to allow some claims that rely on retroactive constitutional rules predating a prisoner’s prior habeas application to be raised in second or successive habeas applications. Pet. App. 5a (quoting *In re Cathey*, 857 F.3d 221, 230 (5th Cir. 2017) (per curiam)). In order for such a claim to actually be precluded, the court “requir[es] the claim have had ‘some possibility of merit’ for it to be considered previously available for purposes of Section 2244(b)(2)(A).” *Id.* at 6a. For the reasons explained above, that approach cannot be squared with the

statutory text. Among other things, it appears to untenably presume that the “previously unavailable” limitation applies to claims, rather than rules. And the court of appeals’ practice, and respondent’s endorsement of it (see Br. in Opp. 20-21), are unsound for other reasons as well.

1. This Court has long recognized that “[i]t is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Yet on the court of appeals’ approach, the requirement that “the claim relies on a new rule of constitutional law,” 28 U.S.C. 2244(b)(2)(A), would essentially be subsumed by the “previously unavailable” requirement. It is unclear that a court would ever need to determine whether the rule at issue was “new.”

Under the court of appeals’ approach, a claim that previously *had* “some possibility of merit,” Pet. App. 5a (citation omitted), would be “previously available,” and thus automatically not cognizable in a second or successive habeas application, regardless of whether it “relies on a new rule of constitutional law,” 28 U.S.C. 2244(b)(2)(A). And as this case illustrates, a claim that previously did *not* have “some possibility of merit,” Pet. App. 5a, would be considered “previously unavailable,” 28 U.S.C. 2244(b)(2)(A), and thus automatically cognizable—again, irrespective of whether it “relies on a new rule of constitutional law,” *ibid.* Here, for example, respondent’s claim was found to be cognizable notwithstanding that it was “obvious” that the constitutional

rule it invoked “was decided long before [respondent] even committed his crimes.” Pet. App. 57a.

Reading the word “new” simply to require that the constitutional rule have been “new” to defendants when it was adopted would not solve the problem—it would fundamentally misinterpret what it means for a rule to be “new.” See p. 15, *supra*. Presumably almost every constitutional rule was “new” for some defendant at some point. Accordingly, there would be no apparent limit to prisoners relying on essentially any rule of constitutional law, even those from decades or even centuries before their convictions. The word “new” would mean next to nothing under such an approach.

2. In defending the court of appeals’ approach, respondent relies on this Court’s interpretation of “available” in the PLRA to assert that “[u]navailability must be interpreted functionally.” Br. in Opp. 19-20 (citation omitted). As a threshold matter, the Court’s procedural-default precedents, which form part of the backdrop of AEDPA, see pp. 20-21, *supra*, are a much better indication of the relevant meaning of “available” than the PLRA, which addresses prisoner complaints about prison conditions or alleged civil rights violations, see *Jones v. Bock*, 549 U.S. 199, 203 (2007). In any event, this Court’s PLRA precedent does not on its own terms support reading “previously unavailable,” 28 U.S.C. 2244(b)(2)(A), to mean “practically unavailable,” Pet. App. 4a (citation omitted).

In *Ross v. Blake*, 578 U.S. 632 (2016), this Court interpreted the PLRA’s requirement that inmates exhaust “such administrative remedies as are available,” 42 U.S.C. 1997e(a), to stop short of requiring prisoners to also exhaust “unavailable ones,” *Ross*, 578 U.S. at 642. In doing so, the Court noted that “the ordinary

meaning of the word ‘available’ is ‘capable of use for the accomplishment of a purpose,’ and that which ‘is accessible or may be obtained.’” *Ibid.* (citation omitted). But the Court cautioned that “[t]o state that standard * * * is just to begin,” and further explicated what “‘available’” meant in the context of that PLRA provision. *Id.* at 643. And the “three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief,” *ibid.*, which the Court identified in *Ross*, provide no support for the court of appeals’ view that the substantive weakness of a claim can render a constitutional rule “unavailable.”

Ross first stated that “an administrative procedure is unavailable when (despite what regulations or guidance materials may promise) it operates as a simple dead end,” because officers refuse to or cannot use the procedure to provide relief. 578 U.S. at 643. Next, the Court recognized that an administrative remedy might also be unavailable if it is “so opaque” that “no ordinary prisoner can discern or navigate it.” *Id.* at 643-644. Finally, the Court reasoned that “interference with an inmate’s pursuit of relief” via “machination, misrepresentation, or intimidation” can render an administrative process unavailable. *Id.* at 644. All of those circumstances involve obstacles to utilizing an administrative process. They have no analogue in the open and orderly processing of claims in the federal court system. And even if they did, the substantive weakness of a claim is not analogous to any of the three.

Moreover, even the unadorned definition of “available” from *Ross* would not aid respondent here. A “rule of constitutional law,” 28 U.S.C. 2244(b)(2)(A), is “capable of use for the accomplishment of a purpose,” “accessible,” and “may be obtained,” *Ross*, 578 U.S. at 642

(citation omitted), so long as it can supply the rule of decision for a claim. The “purpose” of a constitutional rule is not for one party to win or lose; it is for a court to be able to apply the law properly to the case before it. Just as the “administrative remedies” in *Ross* were “available” so long as they could be used to process a claim, regardless of the outcome, *id.* at 642-643, a constitutional rule is likewise “available” when it can be invoked as the basis for a claim for relief, regardless of whether relief is granted.

C. Respondent’s Claim Under *Atkins v. Virginia* Does Not Satisfy Section 2244(b)(2)(A)

Respondent’s claim here relies on *Atkins v. Virginia*, 536 U.S. 304, which was decided in 2002—four years before his crime, five years before his conviction and sentence, and nine years before his first federal habeas application. 935 F.3d 287, 287; 617 Fed. Appx. 293, 298. The claim accordingly does not “rel[y] on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” 28 U.S.C. 2244(b)(2)(A).

1. At the time *Atkins* was decided, the constitutional rule it announced—that the Eighth Amendment prohibits the execution of individuals who are intellectually disabled, 536 U.S. at 321—was “new” as to prisoners whose convictions were already final. The Court had previously rejected such a rule in *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). And “[t]he explicit overruling of an earlier holding no doubt creates a new rule.” *Saf-fle*, 494 U.S. at 488.

But it was not new as to respondent: “the rule” in *Atkins* was “dictated by the governing precedent existing at the time when respondent’s conviction became final.” *Whorton*, 549 U.S. at 417. As the court of appeals

acknowledged, it is “obvious” that “*Atkins* was decided long before [respondent] even committed his crimes.” 935 F.3d at 292. All of the relevant events in this case occurred well after 2002. Respondent raped and murdered Maria Aparece in 2006. Pet. App. 2a, 68a. He was convicted and sentenced in 2007, *id.* at 14a; his conviction and sentence were affirmed in 2010, *id.* at 69a; and his state habeas petition was denied the same year, *ibid.* Respondent filed his first federal habeas application in 2011, the district court denied it in 2014, and the Fifth Circuit affirmed its denial in 2015. 617 Fed. Appx. at 298-299, 305. *Atkins* was in place that entire time.

As the court of appeals has recognized, *Atkins* claims were raised in that court well before respondent’s proceedings here. See *Mathis v. Thaler*, 616 F.3d 461, 467 (5th Cir. 2010), cert. denied, 562 U.S. 1257 (2011). And respondent himself affirmatively invoked *Atkins* in his first set of state and federal habeas claims. See 617 Fed. Appx. at 303-304. Specifically, he asked the state and federal courts to extend the reach of *Atkins* to preclude the death penalty not only for individuals who are intellectually disabled, but also for individuals who are mentally ill. See *ibid.* The actual legal rule in *Atkins* itself—which is limited to individuals who were intellectually disabled at the time of their offenses, see 536 U.S. at 319-321—was likewise “available” to him.

Respondent may have chosen not to rely on the rule set forth in *Atkins* as the basis for a claim of relief in earlier proceedings because he deemed it unlikely to provide him with relief. See Br. in Opp. 20. But given that “various forms of the claim [respondent] now advances had been percolating in the lower courts for years at the time of his [first habeas challenge],” “it simply is not open to argument that the legal basis of

the claim * * * was unavailable,” *Murray*, 477 U.S. at 537. And the court of appeals also erred when it agreed with respondent that it “should consider [*Atkins*] to be retroactive as to him,” Pet. App. 57a. A rule cannot be applied “retroactively” to an individual who is convicted *after* its decision. See *Edwards*, 593 U.S. at 262 (explaining that a decision need not apply retroactively to apply to cases on direct review).

Although the brief in opposition mentions, in addition to *Atkins*, this Court’s post-*Atkins* decisions in *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017), see Br. in Opp. 20-21, the claim that respondent raised in his second habeas application was not based on either *Hall* or *Moore*; instead, it identified *Atkins* alone as the relevant “new rule of constitutional law.” J.A. 179-180 (citation omitted); see also J.A. 28-29. It is far from clear that *Hall* or *Moore*—which addressed the propriety of Texas’s and Florida’s methods of determining intellectual disability under *Atkins*, see *Moore*, 581 U.S. at 14-15; *Hall*, 572 U.S. at 709—could in fact be the source of law on which his claim “relies,” 28 U.S.C. 2244(b)(2)(A). And it is even less apparent that those methodology-focused decisions announced rules that are “retroactive,” *ibid.*, as opposed to rules that simply “alter ‘the range of permissible methods for determining whether a defendant’s conduct is punishable,’” *Welch v. United States*, 578 U.S. 120, 129 (2016) (citation omitted), which are not retroactive, see *Edwards*, 593 U.S. at 276.

2. As Judge Ho’s opinion dissenting from the denial of rehearing en banc pointed out, respondent’s reliance on an updated version of the DSM is not a claim based on a relevant change in law but is instead more plausibly categorized as “a claim of new facts—specifically, new

scientific evidence.” Pet. App. 71a; see also *In re Bowles*, 935 F.3d 1210, 1218 (11th Cir. 2019) (noting that the applicant “read[] into the statute words that are not there when he argue[d] that the publication of a new diagnostic manual can serve as a predicate to make a claim newly available under § 2244(b)(2)(A)”). As such, it would be outside the legal sphere governed by Section 2244(b)(2)(A) and in the factual sphere governed by Section 2244(b)(2)(B). See Pet. App. 71a-72a, see also pp. 17-19, *supra*. And it is difficult to see how updates to the DSM could establish that “no reasonable factfinder would have found the applicant guilty of the underlying offense,” as Section 2244(b)(2)(B) requires. See Pet. App. 71a (citation omitted).

Indeed, the court of appeals panel itself rejected reliance on Section 2244(b)(2)(B), Pet. App. 57a n.1, and instead relied exclusively on Section 2244(b)(2)(A). *Id.* at 57a-61a. Section 2244(b)(2)(B) is accordingly not encompassed within the question presented here, which concerns only the issue of whether respondent’s claim falls within Section 2244(b)(2)(A). And with respect to that issue, it is clear that the court of appeals erred by treating updates to the DSM as 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).

CONCLUSION

The judgment of the court of appeals should be reversed.

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