

No. 25-1003

In the Supreme Court of the United States

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

v.

DEXTER JOHNSON,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

In AEDPA, Congress created “strict procedural hurdles” that prisoners must overcome before a federal court can consider a second or successive habeas filing on the merits. *Rivers v. Guerrero*, 605 U.S. 443, 446 (2025); *see also Jones v. Hendrix*, 599 U.S. 465, 476 (2023) (“AEDPA strictly limited ‘second or successive’ § 2255 motions[.]”). Section 2244(b)(2)(B)’s limits for raising a claim based on a newly discovered factual predicate necessarily mean that a prisoner may discover a new factual predicate for a claim but be unable to assert that claim in a second or successive habeas filing. 28 U.S.C. § 2244(b)(2)(B). In many circumstances, including those of this case, Congress chose “finality over error correction.” *Jones*, 599 U.S. at 480.

Congress had sound reasons for its policy choice. The Director’s opening brief and the States’ amicus brief demonstrate the sovereign harm from upsetting finality. State Amicus Br. 2 (explaining that finality is “essential to the operation of our criminal justice system” and that its absence creates “a profound injury to the powerful and legitimate interest in punishing the guilty” (citations and quotation marks omitted)). And the amicus brief of Mr. Aparece confirms the real injury that delay and uncertainty inflict on victims’ families. Aparece Amicus Br. 14–16.

The rule of *Atkins*—that the Constitution prohibits the execution of the intellectually disabled—has always been available to Johnson. He cited *Atkins* and argued for an extension of its rule in his initial federal habeas application over a decade ago. *Johnson v. Stephens*, 617 F. App’x 293, 303 (5th Cir. 2015) (per curiam).

Rather than a legal development, Johnson’s *Atkins* claim relies on a new factual predicate: publication of the DSM-5. Johnson’s argument that changes in diagnostic standards allow the assertion of this claim in a second or successive application cannot be harmonized with AEDPA’s text: a claim resting on a new factual predicate must pass through the gateway of § 2244(b)(2)(B), which Johnson cannot satisfy.

In balancing finality against error correction, Congress imposed strict limits on second or successive habeas petitions. The judgment below should be reversed.

ARGUMENT

I. AEDPA’s Text and Structure Confirm the Director’s Interpretation.

A. A rule was previously available if a prisoner could have presented a claim relying on the rule.

1. Johnson correctly acknowledges that “available” modifies “rule” in § 2244(b)(2)(A). Resp. Br. 12. Nonetheless, Johnson effectively equates availability of a rule with the availability of a claim relying on the rule, embracing the Fifth Circuit’s holding. *See In re Cathey*, 857 F.3d 221, 232 (5th Cir. 2017) (per curiam) (reasoning that “a claim must have some possibility of merit to be considered available”). Johnson’s argument fails to give effect to AEDPA’s textual focus on the availability of a “rule.”

Johnson correctly recognizes that a claim comprises a legal rule and factual predicate. Resp. Br. 19. “[A] ‘claim’ as used in § 2244(b) is an asserted federal basis for relief from a state court’s judgment of conviction.”

Gonzalez v. Crosby, 545 U.S. 524, 530 (2005). A rule—without supporting facts or argument—is not “an asserted federal basis for relief” from a judgment, and as in this case, a rule can be available to a petitioner, even in the absence of the factual predicate necessary for a claim relying on the rule to succeed.

The parties generally agree on the definition of “available”: “present or ready for immediate use.” Resp. Br. 12 (quoting *Available*, Black’s Law Dictionary (6th ed. 1990)); Opening Br. 19 (same definition); *see also* Webster’s New World College Dictionary 94 (4th ed. 2002) (“that can be used; usable”). As the United States explains, a rule is “‘available’ when it can be invoked as the basis for a claim for relief,” *i.e.*, after it has been announced by this Court. U.S. Amicus Br. 25.

Johnson acknowledges that a carpenter likely has a hammer “available,” even when working on a task for which a hammer would not be necessary or useful, but he notes that a hammer is not available when it is “locked in a toolbox.” Resp. Br. 13. The Director agrees, but this example hardly helps Johnson. The rule of *Atkins* was not locked away. Johnson could have asserted a claim based on *Atkins*, and *Atkins* would have served as a rule of decision. At most, Johnson can say that he could not have asserted a *successful* claim until he was diagnosed as intellectually disabled. This is the equivalent of arguing that the absence of a nail makes a hammer unavailable. But a rule becomes “available” when it is “capable of use,” not when it is useful. “[C]ompulsory process” similarly is among the “[c]onstitutional safeguards available to defendants,” *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012), even defendants who have no witness testimony to present.

AEDPA recognizes that external impediments may prevent a petitioner from raising a claim. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(B) (limitations runs from the date on which an “impediment to filing . . . is removed, if the applicant was prevented from filing by such State action”); *Shinn v. Ramirez*, 596 U.S. 366, 379 (2022) (cause to overcome procedural default can be shown if “some objective factor external to the defense impeded counsel’s efforts to comply”).

But futility—that a claim would have been unsuccessful—is different from an impediment to filing. *See Engle v. Isaac*, 456 U.S. 107, 130 (1982) (“[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial.”); *Bousley v. United States*, 523 U.S. 614, 623 (1998) (rejecting the argument that “default should be excused because” of futility). Futility of a claim similarly does not render a rule unavailable. *In re Bowles*, 935 F.3d 1210, 1218 (11th Cir. 2019) (noting the “flaw” of “equat[ing] the word ‘cognizable’ with the word ‘meritorious’”).

2. Johnson’s argument that a rule was previously unavailable to a prisoner if it “was of no practical use,” Resp. Br. 12, relies on cases under the Prison Litigation Reform Act (PLRA) that involve a different context and a different object that must be “available.”

Booth v. Churner addresses the exhaustion requirement, which prohibits “an action . . . with respect to prison conditions under section 1983 . . . until such administrative remedies as are available are exhausted.” 532 U.S. 731, 736 (2001) (quoting 42 U.S.C. § 1997e(a)). This Court considered whether a remedial scheme was available when “the administrative process has authority

to take some action in response to a complaint, but not the remedial action an inmate demands.” *Id.*

Both parties relied on dictionary definitions, but this Court found “this exercise in isolated definition . . . ultimately inconclusive”: “[D]epending on where one looks, ‘remedy’ can mean either specific relief obtainable at the end of a process of seeking redress, or the process itself, the procedural avenue leading to some relief.” *Id.* at 738.¹

This Court turned to context to resolve the ambiguity: “[T]he word ‘exhausted’ has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered.” *Id.* at 739. “[O]ne ‘exhausts’ processes, not forms of relief.” *Id.* Thus, this Court held, an administrative remedy would be available for purposes of PLRA exhaustion even if it could not provide the specific relief sought by a prisoner. *Id.* at 741.

In *Ross v. Blake*, this Court provided examples of circumstances in which a process, although purportedly available, was not in fact available. 578 U.S. 632, 643–44 (2016). First, no process is available “when (despite what regulations or guidance materials may promise) [a process] operates as a simple dead end—with officers

¹ Johnson’s medication example, Resp. Br. 13, illustrates a similar distinction. If the question is whether a treatment is available, then access to a medication that could not treat the patient’s condition would not count. But if the question is whether a specific medication is available, then it is available if it is in a cabinet in the bathroom, regardless of whether any person has any condition that the medication could treat. Section 2244(b)(2)(A) resembles the latter, asking whether a “rule” was previously unavailable, not whether the petitioner had a viable claim or remedy available.

unable or consistently unwilling to provide any relief to aggrieved inmates.” *Id.* at 643. Prisoners might be directed to submit grievances to an office that “disclaims the capacity to consider those petitions.” *Id.* Second, “an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use,” *id.*, *i.e.*, “so confusing that no reasonable prisoner can use [it],” *id.* at 644 (internal quotation marks omitted). Third, “prison administrators [might] thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.” *Id.*

Booth and *Ross* provide minimal guidance in this case. As *Booth* illustrates, the meaning of “available” depends heavily on what must be available. 532 U.S. at 738. *Ross*’s discussion of the availability of a “process” under the PLRA’s exhaustion requirements sheds little light on the meaning of the availability of a “rule” under AEDPA. Whether a “watercraft” is “‘capable of being used’ for maritime transport,” Resp. Br. 15 (quoting *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 494 (2005)), similarly does not illuminate whether a “rule” was “previously unavailable.”

To the extent that *Ross* provides useful guidance, its examples of unavailability support the Director. The examples concern procedural impediments to an administrative process, not the likely outcome of that process or whether an administrative claim would have been meritorious. *Ross* does not suggest that an administrative process is unavailable merely because a request for relief would have been unsuccessful. *See also Booth*, 532 U.S. at 741 n.6 (“[W]e stress the point . . . that we will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided

otherwise.”). A watercraft is similarly capable of being used for maritime transport by a person who has no need or desire to be transported.

No procedural barriers similar to those identified in *Ross* prevent prisoners from relying on rules in habeas petitions. The federal courts remain open for prisoners to seek habeas relief.

Johnson has not argued that any procedural impediment prevented him from asserting a claim relying on the rule of *Atkins*. He merely contends that such a claim would have been unsuccessful—that it lacked merit—until he received a diagnosis of intellectual disability under the DSM-5. If this Court looks to *Ross*, its reasoning confirms that the rule of *Atkins* was available to Johnson.

3. This distinction also answers Johnson’s argument (at 17) that the Director’s position is internally inconsistent because of his arguments regarding this Court announcing a rule while a habeas petition is pending.

As an initial matter, this scenario is not implicated in this case. The availability of a rule announced while a habeas petition is pending is irrelevant to Johnson, who committed his crimes after this Court’s decision in *Atkins*. And if the Court agrees with Johnson that there is tension in the Director’s position, this Court could adopt a bright-line rule that a rule was previously available if it was announced before the entry of final

judgment in the previous petition. *Rivers*, 605 U.S. at 453.²

But there is no internal inconsistency in the interpretation adopted by the Eleventh Circuit and urged by the Director: “[O]ur feasibility analysis does not focus on whether the claim would have been a winning one at the time of the first petition, but on whether it would have been feasible for the petitioner to bring the claim then.” *In re Bowles*, 935 F.3d at 1219. In other words, when a rule is announced while a habeas petition is pending, availability depends on whether the rule could have served as a rule of decision or whether there was a procedural barrier to a prisoner invoking it. This is roughly akin to the procedural impediments recognized by this Court as rendering an administrative process unavailable in *Ross*. In neither circumstance does availability depend on a claim’s factual predicate.

That the DSM-5 was published while Johnson’s initial habeas petition was pending is irrelevant. *Contra* Resp. Br. 31 (asserting that Johnson prevails under the Director’s interpretation). Changes in the diagnostic standards for intellectual disability do not affect whether a “new rule of constitutional law” was previously available to a petitioner. The rule of *Atkins* has always been available to Johnson, regardless of when he possessed the necessary factual predicate to assert a meritorious *Atkins* claim.

² Under *Rivers*, an amendment of a pending habeas petition to assert a new ground of relief filed before a district court’s entry of final judgment does not constitute a second or successive application. 605 U.S. at 453. But classifying a document actually filed is different from asking whether a rule was available.

4. Johnson contends that the Director’s interpretation of “previously unavailable” renders “new rule” surplusage. *See* Resp. Br. 17 (“Every rule that was announced after the last federal habeas litigation would also, by default, be after the direct appeal was final. So the Director’s reading leaves ‘new rule’ without effect[.]”).

As an initial matter, “[t]he anti-surplusage canon is not an iron rule.” *Mullin v. Al Otro Lado*, 609 U.S. 258, 272 (2026). Though the canon “is useful,” it is “subordinate to the ‘cardinal canon’ that ‘a legislature says in a statute what it means and means in a statute what it says there.’” *Id.* at 273 (quoting *U.S. Postal Serv. v. Konan*, 607 U.S. 391, 406 (2026)).

More significantly, the phrase “new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court,” refers to this Court’s retroactivity jurisprudence from *Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality op.), and its progeny. *See Tyler v. Cain*, 533 U.S. 656, 665 (2001) (explaining, in discussing § 2244(b)(2)(A), that “[u]nder *Teague*, a new rule can be retroactive to cases on collateral review”); *see also Williams v. Taylor*, 529 U.S. 362, 380 n.12 (2000) (non-majority opinion of Stevens, J.) (noting “the verbatim adoption of the *Teague* language in” § 2244(b)(2)(A) and § 2254(e)(2)).

If Congress had used language other than “new rule” and “retroactive,” the statute might well have been read to direct this Court to depart from its existing retroactivity jurisprudence. And as the United States notes, the definition of “new rule” includes substantive aspects. U.S. Amicus Br. 15–16; *see also Teague*, 489 U.S.

at 301 (“In general, however, a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government.”).

Johnson insists that “AEDPA does not codify *Teague*,” Resp. Br. 26 (quoting *Rodriguez v. Superintendent, Bay State Corr. Ctr.*, 139 F.3d 270, 274 (1st Cir. 1998)),³ but this is true in the sense that AEDPA “eliminates the lower federal courts’ role in deeming new rules of constitutional law a permissible basis for habeas relief.” *Rodriguez*, 139 F.3d at 274–75; *see also Tyler*, 533 U.S. at 666 (“The most he can claim is that, based on the principles outlined in *Teague*, this Court *should* make *Cage* retroactive to cases on collateral review. What is clear, however, is that we have not ‘made’ *Cage* retroactive to cases on collateral review.”). Nothing in AEDPA suggests that this Court should alter its own “new rule” and retroactivity analyses, and this Court has continued to apply that test. *See Tyler*, 533 U.S. at 665 (“Under *Teague*, a new rule can be retroactive to cases on collateral review if, and only if, it falls within one of two narrow exceptions to the general rule of nonretroactivity.”).

³ Citing *Learning Res., Inc. v. Trump*, 607 U.S. 229, 248–49 (2026), Johnson contends that “[w]here Congress intends to adopt a judicially crafted or specialized meaning, it does so ‘expressly.’” Resp. Br. 26. The relevant portion of the opinion states that “this Court sometimes assumes that Congress incorporates judicial definitions into legislation . . . when the term’s meaning was well-settled before the adoption,” 607 U.S. at 252 (internal quotation omitted), which “new rule” was in the retroactivity context.

Bostock v. Clayton County, 590 U.S. 644, 658–59 (2020), which Johnson also cites for this proposition, Resp. Br. 26, does not discuss legislation incorporating judicial definitions.

5. Johnson suggests that under AEDPA, “new rule” depends solely on “the novelty (or lack thereof) of the rule itself,” Resp. Br. 23, regardless of when the defendant’s conviction became final. As the United States explains, this interpretation renders “new rule” close to meaningless. *See* U.S. Amicus Br. 23 (“The word ‘new’ would mean next to nothing under such an approach.”). Every argument is, presumably, based on a rule that was, at some time, “new.”

Nor is Johnson’s argument consistent with the requirement that the rule have been “made retroactive to cases on collateral review.” Such a requirement makes sense only if the rule is being applied retroactively, *i.e.*, if it was announced after the prisoner’s conviction became final on direct appeal. State Amicus Br. 8.

Johnson notes that the statute does not expressly “say ‘new as to the petitioner,’” Resp. Br. 26, but neither does it say “previously unavailable to the petitioner.” Johnson acknowledges that “previously unavailable” necessarily refers to the rule’s availability to the petitioner. *See* Resp. Br. 13 (“availability is relational”). In the same way, “new rule” refers to a rule that is “new” with respect to the petitioner. And nothing in the text of § 2244(b)(2)(A) indicates an intent to depart from *Teague*’s retroactivity test: “[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.” 489 U.S. at 301 (plurality op.); *see also* 28 U.S.C. § 2244(d)(1)(C) (involving a “right [that] has been newly recognized”); *Dodd v. United States*, 545 U.S. 353, 358–59 (2005) (“[I]f this Court decides a case recognizing a new right, a federal prisoner seeking to assert that right

will have one year from this Court’s decision within which to file his § 2255 motion.”).

Interpreting “new rule” and “previously unavailable” together makes sense: both reinforce that § 2244(b)(2)(A) concerns when legal developments permit prisoners to raise claims in second or successive applications. “Previously unavailable” “refers to the existence of the ‘new rule of constitutional law,’ not to a particular prisoner’s ability to utilize or prevail on it.” *Slusser v. Vereen*, 36 F.4th 590, 596 (4th Cir. 2022); *see also Gray-Bey v. United States*, 209 F.3d 986, 988 (7th Cir. 2000) (per curiam) (“[F]or purposes of [§ 2255(h)(2)] a rule is ‘unavailable’ until the Supreme Court renders its decision[.]”); *see also* Brian R. Means, *Federal Habeas Manual* § 11:38 (2026) (“At a minimum, ‘previously’ requires that the new rule be established after the time of the filing of the prior federal habeas petition.”).

B. The structure of § 2244(b)(2) confirms the Director’s interpretation.

The structure of § 2244(b)(2) confirms this understanding: Section 2244(b)(2)(A) allows claims to be asserted in second or successive applications based on certain legal developments, and § 2244(b)(2)(B) allows claims based on certain factual developments. As the United States explains (at 18–19), this structure is found throughout AEDPA, including in the limitations period of § 2244(d).

1. Johnson contends that “[t]he phrase ‘relies on’ does not mean ‘relies exclusively on,’ and subparagraph (A)—unlike subparagraph (B)—does not ask courts to examine whether the facts underpinning the claim are

new or old.” Resp. Br. 20. This is true, but it does not support Johnson. Section 2244(b)(2)(A) requires a previously unavailable rule, and “whether the facts underpinning the claim are new or old” is irrelevant to whether a rule was previously available.

The Director does not contend that § 2244(b)(2)(B) bars Johnson’s *Atkins* claim because the claim involves a new factual predicate. Section 2244(b)(2) generally prohibits new claims in second or successive applications. Section 2244(b)(2)(A) is an *exception* that Johnson cannot take advantage of because his claim relies on a new factual predicate and not a previously unavailable rule.

Like § 2244(b)(2) and § 2255(h), the limitations provision contains different paths for legal and factual developments. *See* 28 U.S.C. § 2244(d)(1)(C) (“the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review”); *id.* § 2244(d)(1)(D) (“the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence”). AEDPA’s structure has a consistent pattern: one provision for legal developments and another for factual developments.

2. Factual developments allow new claims to be filed only if they satisfy the requirements of § 2244(b)(2)(B). By providing an express provision for newly discovered factual predicates, Congress confirmed that a new factual predicate does not affect the availability of a rule under § 2244(b)(2)(A). Section 2244(b)(2)(B) implicitly

limits the circumstances in which new factual predicates allow claims to be raised: “Congress knew how to provide for second and successive petitions based on factual developments” and chose to allow them only in narrow circumstances. *In re Bowles*, 935 F.3d at 1218.

Johnson’s interpretation of § 2244(b)(2)(A)—in which a missing factual predicate renders a rule unavailable—nullifies these limits. Although he challenges the example hypothetical posed by the Director, Resp. Br. 24 (noting that *Batson* has not been made retroactive by this Court), Johnson does not quarrel with the broader principle: Under his textual arguments, a prisoner who discovers a new factual predicate for a claim could present the claim in a second or successive application under § 2244(b)(2)(A) based on the theory that the claim relies on a rule that was “previously unavailable.” See Resp. Br. 12 (“was of no practical use”). This would allow prisoners to evade § 2244(b)(2)(B)’s requirements, including that “the facts underlying the claim” must be sufficient to establish that “no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(ii).

Relying on an unpublished decision, Johnson suggests that the Fifth Circuit’s § 2244(b)(2)(A) holding applies only to *Atkins* claims. Resp. Br. 32 (citing *In re Halprin*, 788 F. App’x 941, 944 (5th Cir. 2019) (per curiam)). But the decision below and *In re Cathey* phrase the exception more broadly: “[A] claim must have some possibility of merit to be considered available.” Pet. App. 5a (quoting *In re Cathey*, 857 F.3d at 232). And *In re Cathey* analogizes the unavailability of an *Atkins* claim to a *Roper* claim being unavailable based on a prisoner’s incorrect beliefs about his age. 857 F.3d at 232.

Nor does Johnson make any attempt to harmonize an *Atkins*-only exception with the statute's text. He argues that "a rule under which the petitioner's claim has *no* possibility of merit" is unavailable. Resp. Br. 14. This interpretation of § 2244(b)(2) would extend beyond *Atkins* claims and allow any newly meritorious claim to be raised in a second or successive petition.

Johnson argues that the negative implications of § 2244(b)(2)(B) should prevent, at most, claims involving "newly discovered evidence going to guilt or innocence" from proceeding under § 2244(b)(2)(A). Resp. Br. 20. Other claims involving a new factual predicate, he suggests, could be raised under § 2244(b)(2)(A). But this is the wrong inference. By expressly permitting only claims based on a factual predicate showing that the prisoner would not have been found guilty of the underlying offense, Congress made clear that this was the only type of new factual predicate that would allow a claim to be asserted in a second or successive petition.

This limit was a conscious choice. Amicus National Association of Criminal Defense Lawyers notes that by the time AEDPA was enacted, this Court had already recognized several constitutional rights that limit only punishment and are unrelated to guilt for the underlying offense. NACDL Br. 5–6. Congress nonetheless chose that new factual predicates would allow a claim in second or successive applications only when, *inter alia*, the prisoner would not have been found guilty of the underlying offense. 28 U.S.C. § 2244(b)(2)(B)(ii).

C. *Atkins* was not “previously unavailable” to Johnson.

Johnson’s *Atkins* claim does not rely on “a new rule of constitutional law . . . that was previously unavailable.” 28 U.S.C. § 2244(b)(2)(A). *Atkins* was decided before Johnson committed his crimes, and its rule has always been available to him. He relied on *Atkins* (seeking its extension) in his initial habeas application. *Johnson*, 617 F. App’x at 303; App. 178–79.

Rather than a “new rule,” Johnson relies on a new factual predicate: his diagnosis of intellectual disability under the DSM-5. Amicus NACDL correctly recognizes the nature of Johnson’s claim as involving “a previously unavailable factual basis for a claim under established legal principles.” NACDL Br. 16 (explaining that “scientific advances” may identify a new factual basis); *see also id.* at 17 (“[R]ecognizing advancements in scientific and clinical diagnostic tools does not change the fundamental prohibition on execution of the intellectually disabled.”).⁴

Changes in diagnostic standards are not uncommon. One recent petitioner, for example, invoked the American Association on Intellectual and Developmental

⁴ The NACDL’s analysis and discussion largely support the Director. It urges affirmance because, like the decision below, it incorrectly focuses on the availability of a “claim” rather than the availability of a “rule.” *See* NACDL Br. 18 (“[T]he Fifth Circuit correctly allowed Johnson to pursue a claim that was previously unavailable.”); *id.* (“The Court should affirm the Fifth Circuit, and hold that a claim is previously unavailable when it had no reasonable chance of success of prevailing[.]”). Johnson acknowledges that “previously unavailable” modifies “rule” rather than “claim.” Resp. Br. 12.

Disabilities’ “publication on January 11, 2021,” “the DSM-5-TR’s publication on March 18, 2022,” and the APA’s issuance of “guidelines in August 2026.” *In re Howard*, No. 26-40605, 2026 WL 2980644, at *2 (5th Cir. Oct. 5, 2026). Under Johnson’s view, each of these changes in diagnostic standards might have allowed prisoners to seek relief under *Atkins*, no matter how long ago their crimes were committed. Congress did not delegate AEDPA’s gatekeeping function to private mental health associations, and these diagnostic changes do not permit new claims in second or successive applications under § 2244(b)(2).

Johnson’s merits brief suggests that the DSM-5 is legal rather than factual, calling it “no different from a change in the legal standard.” Resp. Br. 21. This is incorrect: his habeas application itself describes the DSM-5 as part of the factual predicate for the claim. *See* App. 25 (“[T]he factual predicate for the claim relies on the publication of the DSM-5[.]”); App. 30 (“Mr. Johnson’s claim hinges on the publication of the DSM-5 to make his claim available.”). A publication by the American Psychiatric Association is not a change in the law. Johnson contends that the DSM-5 “uncovered no previously unknown facts” because “Mr. Johnson’s intellectual and adaptive characteristics” have not changed, Resp. Br. 29, but historical facts never change. Instead, a new factual predicate for a claim is discovered, and Johnson’s diagnosis under the DSM-5 provided a factual predicate for an *Atkins* claim—that Johnson is allegedly intellectually disabled—that did not previously exist.

Even if the APA’s publication of the DSM-5 were a “change in the legal standard,” Resp. Br. 21, it would not

constitute 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). The same is true of *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas*, 581 U.S. 1 (2017). Johnson contends that these decisions simply “illuminate what *Atkins* means,” Resp. Br. 29–30, but this Court has already rejected the argument that “*Moore* merely spelled out what was clearly established by *Atkins*.” *Shoop v. Hill*, 586 U.S. 45, 48–49 (2019); *see also Weathers v. Davis*, 915 F.3d 1025, 1027–28 (5th Cir. 2019) (“[I]t cannot be contended that *Hall* . . . simply enunciated ‘clearly established Federal law’ made retroactive as required by AEDPA.”). Neither *Hall* nor *Moore* constitutes a new rule of constitutional law made retroactive by this Court.

Applying § 2244(b)(2)(A) to Johnson’s *Atkins* claim is straightforward. The rule of *Atkins* has always been available to him, so he cannot satisfy § 2244(b)(2)(A), and his newly discovered factual predicate—his diagnosis of intellectual disability pursuant to the DSM-5—does not satisfy § 2244(b)(2)(B).

D. The Director has consistently urged the adoption of the Eleventh Circuit’s decision in *In re Bowles*.

Rather than resolve the circuit split, Johnson suggests that this Court dismiss the writ as improvidently granted, accusing the Director of changing positions from the certified question in the Fifth Circuit and from the petition for writ of certiorari.

In truth, the Director has consistently urged the Fifth Circuit and this Court to adopt the Eleventh Circuit’s holding from *In re Bowles*, 935 F.3d at 1210. *See*

ROA.275 (“[A]t least one court of appeals has soundly rejected the Fifth Circuit’s holding that the publication of the DSM-5 makes a claim newly legally available.”); ROA.361 (quoting *In re Bowles* “to assert [the Fifth Circuit’s] conclusion is erroneous”); ROA.401 (“The Eleventh Circuit explains it better and more succinctly, in soundly reject[ing] the Fifth Circuit’s holding[.]”); ROA.432 (Johnson: “The Director would have this Court overrule the Fifth Circuit and follow the Eleventh Circuit’s opinion in *In re Bowles* . . . instead.”); ROA.509–16 (relying on *In re Bowles*).

The certified question in the Fifth Circuit— “[w]hether there can be judicially created exceptions to [§ 2244(b)(2)],” Pet. App. 8a—reflected the district court’s understanding that *In re Cathey* adopted a “judicially created exception” to AEDPA. Pet. App. 25a (district court describing the Fifth Circuit as “read[ing] a *futility* exception into section 2244(b)(2)(A)”). The Director explained the Eleventh Circuit’s disagreement with the Fifth Circuit in seeking certification. *See* ROA.1090 (“[A]pplying a judicially created futility exception to § 2244(b)(2)(A) is an issue over which the Fifth and Eleventh Circuits disagree[.]”); *see also* ROA.1109 (Johnson: “The Director’s reliance on *In re Bowles* . . .”); ROA.1115 (“[T]wo circuit courts disagree on the *exact* question presented by the Director[.]”). The Director’s appellant’s brief urged the Fifth Circuit to follow *In re Bowles*, 935 F.3d at 1210. *See* Appellant’s Br. 28–29, 31, 34. And the Fifth Circuit panel 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[.]” Pet. App. 6a. The panel, “[i]n answer to that

question . . . affirm[ed] [its] interpretation of ‘previously unavailable’ in *Cathey* as the correct interpretation.” *Id.* The issue was raised and decided below.

Nor is there any conflict between the petition for writ of certiorari and the Director’s merits brief. The petition explains the circuit split and that “[t]he Eleventh and Fourth Circuits hold that whether a claim would have been meritorious does not affect whether the rule was previously available.” Pet. i. The Director has consistently urged this Court to adopt the Eleventh Circuit’s rule from *In re Bowles*. Compare Pet. 2 (arguing that “‘previously unavailable’ does not depend on ‘whether the claim would have been a winning one at the time of the first petition,’ only on ‘whether it would have been feasible for the petitioner to bring the claim then’” (quoting *In re Bowles*, 935 F.3d at 1218–19)), with Opening Br. 21 (“Whether a rule was ‘previously unavailable’ depends on ‘whether the petitioner could have relied on [a] ‘new rule’ in his initial habeas petition,’ not ‘whether the claim would have been a winning one at the time of the first petition.’” (quoting *In re Bowles*, 935 F.3d at 1218–19)). Johnson criticizes the modification of the question presented from a rule’s availability when a petitioner “could have asserted a claim based on the rule in a prior federal habeas petition” to availability “when this Court announced the rule before the filing of the prisoner’s prior federal habeas petition,” but the Director’s position is that the two are substantively identical. If this Court announced a rule before the prior federal habeas petition, then the prisoner necessarily “could have relied on [it] in his initial habeas petition.” *In re Bowles*, 935 F.3d at 1218; see also Pet. 19 (“[C]onstitutional rules that were established at the time

of the applicant's last [federal proceeding] were not 'previously unavailable[.]'" (quoting *In re Williams*, 364 F.3d 235, 239 (4th Cir. 2004))).

Throughout this case, the Director has consistently argued that the Fifth Circuit erred in *In re Cathey* and that the Eleventh Circuit's holding in *In re Bowles* should be followed instead. As this Court recognized in granting the petition for writ of certiorari, this split warrants resolution by this Court, and under the Eleventh Circuit's rule, the motion to dismiss should have been granted.

II. AEDPA Limits Second or Successive Petitions.

Johnson relies on the intuition that he should receive a single bite at the apple for his *Atkins* claim. Resp. Br. 16 ("Congress meant to restrict petitions filed by prisoners who had a full and fair opportunity to present a claim and squandered it or strategically held it in reserve."). Johnson embraces the abuse of the writ comparison, Resp. Br. 16, arguing in effect that he should be permitted to raise his claim now because he "has a legitimate excuse for failing to raise" it earlier. *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

But AEDPA changed the law by placing "added restrictions" on second or successive habeas petitions. *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *see also Jones*, 599 U.S. at 476 ("AEDPA strictly limited 'second or successive' § 2255 motions.").

Johnson is incorrect to characterize the Director as suggesting that he should have filed a frivolous *Atkins* claim in his initial federal habeas application. Resp. Br. 18 (citing *Panetti v. Quarterman*, 551 U.S. 930 (2007)). Johnson did not forfeit a viable *Atkins* claim because of

a procedural misstep. His claim is unavailable because of the balance struck by Congress between finality and error correction. AEDPA's limits mean that some claims cannot be raised, and changes in diagnostic standards do not allow an *Atkins* claim to be raised in second or successive applications.

AEDPA reflects "Congress' judgment regarding the central policy question of postconviction remedies—the appropriate balance between finality and error correction." *Jones*, 599 U.S. at 491. In this case, where Johnson discovered a new factual predicate for a claim unrelated to his guilt for the underlying offense, 28 U.S.C. § 2244(b)(2)(B), Congress chose "finality over error correction." *Jones*, 599 U.S. at 480.⁵

As the amicus briefs confirm, Congress had strong policy reasons for making such a choice. *See* State Amicus Br. 2 (detailing the "profound injury to the powerful and legitimate interest in punishing the guilty"); Opening Br. 37–39. And the absence of finality imposes ongoing harm on victims, who must wait for years (even decades) before knowing whether a capital sentence will be carried out. *Aparece* Amicus Br. 15.

Johnson committed his crimes more than twenty years ago. "One of the law's very objects is the finality of its judgments." *McCleskey*, 499 U.S. at 491. AEDPA bars Johnson from raising an *Atkins* claim in his second federal habeas application.

⁵ *Welch v. United States*, 578 U.S. 120 (2016), discusses finality interests in determining whether rules should be made retroactive and applied in an initial § 2255 motion, *id.* at 131, not whether AEDPA permits the filing of a second or successive petition.

CONCLUSION

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

Respectfully submitted.

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