SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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ERIC GUERRERO, DIRECTOR,)
TEXAS DEPARTMENT OF CRIMINAL)
JUSTICE, CORRECTIONAL INSTITUTIONS)
DIVISION,)
Petitioner,)
v.) No. 25-1003
DEXTER JOHNSON,)
Respondent.)

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Pages: 1 through 62

Place: Washington, D.C.

Date: November 4, 2026

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

Petitioner,

v.) No. 25-1003

DEXTER JOHNSON,

Respondent.

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Washington, D.C.

Wednesday, November 4, 2026

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

WILLIAM R. PETERSON, Solicitor General, Austin, Texas; on behalf of the Petitioner.

EMILY M. FERGUSON, Assistant to the Solicitor General, Department of Justice, Washington D.C.; for the United States, as amicus curiae, supporting the Petitioner.

JEREMY SCHEPERS, ESQUIRE, Dallas, Texas; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument this morning in Case 25-1003, Guerrero versus Johnson.

Mr. Peterson.

ORAL ARGUMENT OF WILLIAM R. PETERSON

ON BEHALF OF THE PETITIONER

MR. PETERSON: Thank you. Mr. Chief Justice, and may it please the Court:

AEDPA's restrictions on second or successive habeas applications reflect the balance struck by Congress between finality and error correction. Rather than pursue error correction at all costs, Congress chose to allow new claims in these applications only in limited circumstances that do not include changes in the diagnostic standards for intellectual disability.

This Court decided Atkins versus Virginia and announced the rule that the Constitution prohibits capital punishment of the intellectually disabled before Respondent even committed his crimes. And Respondent relied on Atkins versus Virginia in his initial

federal habeas application.

The rule of Atkins is not a new rule of constitutional law that was previously unavailable to him under Section 2244(b)(2)(A). And Moore versus Texas, which was a legal change following Respondent's initial federal habeas application, has not been made retroactive to cases on collateral review by this Court. Nor can Respondent pass through the gateway of Section 2244(b)(2)(B) because the facts underlying his claim are unrelated to his guilt for the underlying offense.

This Court should defer to Congress's policy choices, correct the Fifth Circuit's interpretation of Section 2244(b)(2)(A), and reverse.

I welcome the Court's questions.

JUSTICE THOMAS: Well, Mr. Peterson, would you spend a minute or two on the Fifth Circuit's reasoning on unavailability?

MR. PETERSON: Your Honor, as we read the Fifth Circuit's opinion, it focused on the availability of a claim rather than on the availability of a rule, and the Fifth Circuit might well have been right about whether or not

the claim was available. Obviously, a claim has two pieces, a -- a legal rule and --

JUSTICE THOMAS: What should unavailability focus on?

MR. PETERSON: Under the text of 2244(b)(2)(A), it is the rule that must be unavailable, not the claim.

JUSTICE THOMAS: And what's the source of that rule?

MR. PETERSON: Well, we look both at the last antecedent modifier -- that's the only reasonable modification. I believe Respondent now agrees from his merits brief that "previously unavailable" modifies "rule" and not "claim." And we see this as well in Section 2255(h)(2), which uses the identical phrase, "new rule of constitutional law made retroactive to cases on collateral review by this Court that was previously unavailable" without any mention of "claim."

JUSTICE THOMAS: So how -- what role does the DSM play in that analysis?

MR. PETERSON: We think that any claim based on the DSM or based on a diagnosis under an updated DSM would be properly reviewed under

2244(b)(2)(B). These sorts of updates in scientific evidence, the NACDL amicus brief correctly explains in our view, can provide new factual predicates for claims, but the Respondent here has disclaimed any reliance on 2244(b)(2)(B).

And so we see 2244(b)(2)(A) and (b)(2)(B) as dividing a claim into two pieces. If you're trying to raise --

JUSTICE KAGAN: But why is the -- why is the DSM a -- a fact? Why isn't it part of the law? In other words, when Atkins was announced, we made clear that there was -- it was going to be based in large part on psychological criteria that were developed under the DSM. You know, it was clear that it was going to evolve. It was clear that states were going to have a fair bit of flexibility in deciding how to use the DSM with respect to the rule. So we almost said in Atkins that the DSM was going to be -- and -- and other studies or -- or evidence of a similar kind was going to form the legal standard of Atkins.

So why think of it as factual matter rather than the thing that provides in -- at

least in large part the legal standard and was contemplated in just that way?

MR. PETERSON: Respectfully, Your Honor, I think that became most clear following Hall versus Florida and Moore versus Texas. And keep in mind, Hall recognizes that the legal determination of intellectual disability is distinct from a medical diagnosis.

So it's important the keep in mind the distinction between the DSM-5 as a scientific standard and the incorporation of that DSM into law, which occurred here in Texas following Moore versus Texas.

Now my friend hasn't raised a claim under Moore versus Texas. I think, if this Court had made Moore versus Texas retroactive to cases on collateral review, that's the claim that he would be bringing, and he would be making essentially the same argument -- arguments acknowledging that this is a Moore claim.

But my friend says the rule he relies on as a new rule of constitutional law made retroactive to cases on collateral review is Atkins itself.

JUSTICE KAGAN: Yeah. I guess what I'm suggesting is that Atkins is more -- there -- there's more than one Atkins rule. There was an Atkins -- there -- there are -- there are different Atkins rules in different states because different states articulate the standards differently, and there are different Atkins rules over time.

And with respect to big changes, like the change that occurred in the DSM, you might say that there's a kind of Atkins I and an Atkins II. So to sort of think of it as one Atkins rule is to misunderstand the nature of Atkins itself.

MR. PETERSON: Well, Your Honor, I can certainly accept that framing because, in order for that framing to prevail, Atkins II, which I think is probably post-Moore versus Texas, would itself need to be a new rule of constitutional law made retroactive to cases on collateral review by this Court.

Now --

JUSTICE JACKSON: Can I ask you about that? Because I guess I'm not quite sure that that interpretation of the term of art, "new

rule of constitutional law made retroactive," is what this statute is doing.

You talked at the beginning about Congress's intent and how they were setting it up, and I suppose there is an interpretation that sees new "rule of constitutional law made retroactive" as a term of art that was established during the Teague v. Lane set of cases to describe a type of claim or a type of rule and really isn't about the timing of the rule.

So what I mean by that is when the Supreme Court announces a rule and determines that it is so significant and monumental and momentous that even prisoners who have closed cases should benefit from it, it's going to be retroactive, says the Supreme Court, we're talking about a -- a -- a certain kind of new rule that is distinguished from other rules where the Supreme Court doesn't decide that they should be retroactive.

If we read the statute in that way, then why wouldn't Atkins, meaning the determination that a person who is intellectually disabled cannot be executed, why

doesn't it satisfy that and Mr. Johnson here can take advantage of it in the way that Justice Kagan suggests because it evolves, as we understood, with new medical standards over time?

MR. PETERSON: Well, two pieces to that, Your Honor.

JUSTICE JACKSON: Yeah.

MR. PETERSON: First, I'd -- I would distinguish the new rule definition from the previously available question.

JUSTICE JACKSON: Which one are you relying on in this?

MR. PETERSON: I'm relying on both of them. I'm asking the Court to resolve the circuit split over previously unavailable. But, certainly, we acknowledge that our argument is that Atkins was not a new rule with respect to Mr. Johnson. So we --

JUSTICE JACKSON: With respect to Mr. Johnson. And I guess what I'm suggesting is that the statute isn't really talking about is a new rule new with respect to a particular petitioner, that that part of the statute is just talking about the nature of this rule and

is not relative to any individual petitioner, that you get to the individual petitioner in the previously unavailable part of the statute.

MR. PETERSON: And I think what that would be doing is taking half of the Teague definition. Part of the Teague definition is looking at the state of the law at the time the prisoner's conviction became final on direct appeal. And then, of course, the statute, 2244(b)(2)(A), requires that the rule had been made retroactive to cases on collateral review by this Court.

That makes perfect sense if the rule is being applied retroactively, if it is a rule that was announced by this Court after the prisoner's conviction became final on direct appeal and is then being applied on collateral review.

JUSTICE SOTOMAYOR: But that's the problem, which is Teague is -- you -- you have to have a timing rule for Teague to avoid the very issue of retroactivity. Under Teague announces a rule of timing to ensure that there's sort of a deadline for that, what cases is it going to apply to today.

But that's not the issue here. The issue here is the use of "previously unavailable."

You argue that a new rule announced before a person's first habeas petition can never be a new rule. That was previously under -- unavailable. But let me give you a stark example of a situation. Let's assume that we announce you can't execute someone before they're 70, before they're 70.

MR. PETERSON: Thank you.

JUSTICE SOTOMAYOR: I'm sorry, after they're 70, that that would violate the Constitution. You would argue that a person who's 28, sentenced to death, would have to bring his rule, but when he turns 70, he can't.

MR. PETERSON: Your Honor, I think that rule would go to the type of claim that would not be considered second or successive.

JUSTICE SOTOMAYOR: Why?

MR. PETERSON: Because that wouldn't be ripe until the time of execution. I -- so I --

JUSTICE SOTOMAYOR: So this is not ripe until the time of execution. And today

you're saying, even if he is mentally disabled under our -- the definition of "mental disability" that Atkins said under the DM-5, let's assume there's no dispute that he wins under DM-5, why isn't it a question of ripeness?

MR. PETERSON: Because, Your Honor, this isn't about his competence or eligibility to be executed. This is about his sentencing, the imposition of capital punishment based --

JUSTICE SOTOMAYOR: I don't see what the difference is. If what we have said under Atkins is you cannot execute someone who is mentally ill, we have a certain way of determining that, and it doesn't become ripe until the DM-5 makes it ripe. Now there's a timing issue that's separate that the court below may have dealt with right or wrong -- I don't know -- but put that aside.

If that wasn't available during his first habeas petition because it wasn't ripe yet, why isn't it ripe now?

MR. PETERSON: So, Your Honor, with respect to ripeness, this is -- it's not a competency-to-be-executed claim. It's about

the moral blameworthiness of the defendant at the time of -- excuse me -- at the time of the crimes. That's why we're not looking at the --

JUSTICE SOTOMAYOR: No. I mean --

MR. PETERSON: It's -- this is -- there's a distinct line of authority for Ford and Panetti claims relating to competence to --

JUSTICE SOTOMAYOR: That -- that, I understand. But we're not talking about Panetti. We're talking about a different constitutional right, not to be executed if you're mentally ill.

MR. PETERSON: Well, but his argument is not that he has become intellectually disabled. He has always --

JUSTICE SOTOMAYOR: No, he's saying: I -- I've been mentally disabled. That's, in fact --

MR. PETERSON: Well, that's right.

JUSTICE SOTOMAYOR: -- the entire Atkins claim.

MR. PETERSON: And he now believes that he has a way to establish his intellectual disability.

JUSTICE SOTOMAYOR: That goes to

availability.

MR. PETERSON: We respectfully disagree, Your Honor, as we see that perhaps going to the availability of the claim but not to the availability of the rule of Atkins, that the Constitution prohibits the imposition of capital punishment on the intellectually disabled.

Justice Kagan, let me return to your question, and I think the helpful way of thinking about this is what the Court recognized in Montgomery versus Louisiana, that when the Constitution prohibits a particular form of punishment for a class of persons, an affected prisoner receives a procedure through which he can show that he belongs to the protected class.

So we have a substantive rule in Atkins protecting a class of persons, the intellectually disabled. And then what we have is Hall and Moore perhaps modifying the procedures by which a person can prove that he would belong to the protected class. But, under Edwards versus Vannoy, those procedures wouldn't be new rules of constitutional law

applied retroactively, and this Court certainly hasn't made them so.

JUSTICE JACKSON: But why are you saying there that it's a modification of the procedures? It is a substantive change in who belongs in the class. It's not about, you know, evidence, right? It's not a change in what Mr. Johnson can offer to show that he's intellectually disabled. It is a substantive change in the criteria of the people who constitute that class.

MR. PETERSON: So, first, every circuit that has recognized Moore as a new rule has treated Moore as a new procedural rule that is not retroactive.

JUSTICE JACKSON: But why are you talking about Moore? I'm talking about Atkins, right? Atkins says you can't execute the intellectually disabled. And, in the context of that very case, we indicated that who qualifies as intellectually disabled is keyed to medical standards and that medical standards might vary in -- throughout the country. It might evolve over time.

I don't understand why that's

characterized as a procedural determination.

MR. PETERSON: Atkins did leave the definition of "intellectual disability" to the states. And then, even in Hall, where this Court placed a greater emphasis legally on updated medical definitions, it still reiterated that the legal determination of intellectual disability is distinct from a medical diagnosis.

JUSTICE JACKSON: No, I understand. But I -- it's -- it's -- so let me ask you this. The problem, I think, with your interpretation is that, as you said, we're supposed to be giving effect to the -- Congress's policy choices. And as I understood this set of provisions, Congress's policy choice was to give individuals one clear shot at bringing their constitutional claims.

This is what the whole scheme is about. You can't bring a second or successive claim if you had the opportunity before and you didn't do it. The way you're interpreting this, Mr. Johnson will never get that opportunity because the criteria that makes him eligible for claiming that he's intellectually

disabled came after his original habeas petition, but you're saying that because it relates to the rule that we had laid out before, he's foreclosed.

And -- and that seems like a really incongruous consequence given Congress's policy determination in this case.

MR. PETERSON: Respectfully, Your Honor, I disagree with the premise of the question.

JUSTICE JACKSON: Okay.

MR. PETERSON: I think what you articulated was essentially the common law abuse of the writ doctrine that preceded AEDPA. And what we see in 2244(b)(2) is Congress restricting the abuse of the writ, taking away opportunities.

And the best way of looking at that is the limitation that we see in 2244(b)(2)(B)(ii). We know that Congress didn't intend to allow prisoners to raise any previously unavailable claim because that limitation in (ii) means that if a prisoner uncovers a new factual predicate for a claim that is unrelated to whether they would have

been found guilty of the underlying offense, they do not have an opportunity to bring that claim.

So we don't look at this as Congress attempting to provide a full opportunity. We look at this as Congress placing strict limitations on second or successive applications and favoring finality.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Justice Thomas, anything further?

Justice Alito?

JUSTICE SOTOMAYOR: When I'm thinking of availability, I'm thinking of how we define the term under the PL -- LRA because, for me, these two were passed essentially at the same time, and so the meaning we've given "available" is exactly the same meaning the Fifth Circuit gave it. And it's the meaning that we -- our precedents have given it in the PLRA.

Why isn't that the president -- precedent that we should be following?

MR. PETERSON: Your Honor, when I look at the PLRA, Booth versus Churner recognizes

that the meaning of a phrase involving "available" depends heavily on what must be available. In that case, the Court had to determine what it meant for a remedy to be available.

I'll note that Booth rejects a futility exception under the PLRA. And Ross versus Blake, when it talks about what might make an administrative remedy unavailable under the PLRA, identifies procedural impediments to the filing of that sort of claim, the inability to take advantage of it by even asserting those sorts of arguments, not the fact that it would have been non-meritorious.

CHIEF JUSTICE ROBERTS: Justice Kagan?

JUSTICE KAGAN: Well, there, the impediments were procedural, but Ross v. Blake talks about you run into just a dead end. You run into a brick wall. And if something makes you run into a brick wall, you know, it's not available to you.

So, here, it wouldn't be procedures. It would just be this rule was of no use to me prior to the DSM-5. I was just -- I was going to lose any Atkins claim I brought. So why

isn't that -- it's not about procedures, but it has the same connotation of I couldn't do anything with this new rule before now.

MR. PETERSON: When we look at Ross, that "dead end" phrase, I think the Court explained it involved officers unable or consistently unwilling to provide relief to aggrieved inmates. I think that would be a circumstance where, for example, you might have a -- a district clerk who had simply refused to file a petition --

JUSTICE KAGAN: Well, that would be a closer analogy to the specific facts in Ross. I agree with you there. But the idea, I think, is broader than that, and it -- it reflects what "available" means and it reflects even your own definitions of "available," which is, like, I couldn't use it to achieve my purposes, whatever the "it" is. Here, it's the new rule.

And if I couldn't use this rule to achieve any of my purposes, if I was going to be laughed out of court, then, really, the rule was unavailable to me.

MR. PETERSON: What we would say is it was capable of being used, simply not useful.

Perhaps the usage by this Court in Perry versus New Hampshire, referring to constitutional safeguards available to defendants, including compulsory process -- compulsory process remains a constitutional safeguard available to a defendant even who doesn't -- one who doesn't have any use for it.

So, in this case, we think of the two pieces of the claim. If the prisoner has the legal rule available to him that he can bring to court that would serve as a rule of decision, even if he doesn't have the factual predicate for that claim, that rule is available. And that's consistent with how we see the structure of 2244(b)(2).

JUSTICE KAGAN: Thank you.

CHIEF JUSTICE ROBERTS: Justice Gorsuch?

JUSTICE KAVANAUGH: Just so I understand the exact rule that you're articulating on "previously unavailable," what if the new rule is announced by this Court during the pendency of the first federal habeas. I want to be precise about what you think happens then.

MR. PETERSON: Your Honor, we think that is a difficult question that is not presented on the facts of this case and that you don't need to address in order to resolve this case. However --

JUSTICE KAVANAUGH: I got that part.

MR. PETERSON: Yeah. Yes.

JUSTICE KAVANAUGH: Okay. So --

MR. PETERSON: We agree with the Eleventh Circuit's interpretation in Bowles. That's what we have consistently argued for. If a prisoner can say, even though this Court announced the rule while I had an initial federal habeas petition or a federal habeas petition pending, I could not have actually brought that rule before the district court, I was not in a position to invoke that rule, I would not have been permitted to invoke it and --

JUSTICE KAVANAUGH: Because it was too late in that litigation? Is that what you're suggesting?

MR. PETERSON: Your Honor, I think of an extreme hypothetical: If this Court were to announce a new rule of constitutional law made

retroactive to cases on collateral review the day that a district court enters final judgment or the day before a district court enters final judgment, the Court could adopt a bright-line rule based on Banister and Rivers, but we might acknowledge that under some circumstances such as those, a prisoner would be able to say that rule was not available to me, even though, theoretically, if I had been able to amend my pending petition the day before final judgment, it would not have constituted a second or successive application.

JUSTICE KAVANAUGH: And, second, we could resolve this case solely on the new rule issue without addressing "previously unavailable," correct?

MR. PETERSON: Yes, Your Honor, you could. Now the State's asking you to resolve it based on "previously unavailable," in part because of the pending Cathey case that we have. In Cathey, Atkins was a new rule because it was announced after his conviction became final on direct appeal. And that would still leave the acknowledged split between at least the Fifth and the Eleventh Circuits.

JUSTICE KAVANAUGH: Thank you.

CHIEF JUSTICE ROBERTS: Justice Barrett?

JUSTICE BARRETT: Picking up on Justice Kavanaugh's first question, would the State support a rule that said that whether the claim was available is measured from the time the habeas -- the first habeas petition is filed?

MR. PETERSON: I suspect that would go a bit too far, Your Honor. It -- we can -- certainly, we would say, if it was announced before the filing of the initial federal habeas application, we do agree that it would have been available. I don't think we would say that every rule announced after the filing of the initial federal habeas petition would be unavailable.

This Court did, in Banister and Rivers, recognize that filings before the entry of final judgment during a pending federal habeas application are not second or successive. We certainly think, in the mine run of cases, a prisoner is going to be able to take advantage of a new rule announced while a

pending -- excuse me -- while a federal habeas petition is pending.

JUSTICE BARRETT: How would you propose -- let's imagine -- assume for the purposes of this question that we agree with your position. How would you recommend writing that so it fudges that issue?

MR. PETERSON: I think what you would write is to say the question presented in this case -- and we tried to narrow it slightly in the merits brief -- was to talk about this is a rule that had been announced before the filing of the -- of the Petitioner's initial federal habeas application and made retroactive to cases on collateral review. We conclude --

JUSTICE BARRETT: So just describing it with reference to the facts of this case?

MR. PETERSON: Yes, Your Honor. You could do that. And that's going to solve, we think, 99 percent of the cases. Certainly, just adopting our understanding of "previously unavailable" is going to avoid the problems that might result with publication of, say, the DSM-6 when new prisoners would come forward saying, I am now intellectually disabled when I

wasn't previously.

JUSTICE BARRETT: So, at one point in this litigation, the issue was cast as a matter of a judicially created futility exception. How, if at all, do you understand the current argument about "previously unavailable" to differ from the futility argument?

MR. PETERSON: We would characterize Respondent's argument the same way. Their theory is that a claim is -- as I understand the argument, it is that a rule is unavailable when a claim is unavailable or a claim would lack merit, and a claim -- and it would be futile to raise that claim.

So I think they still are tying in the availability of a rule to the futility of asserting a claim under that rule.

JUSTICE BARRETT: Thank you.

CHIEF JUSTICE ROBERTS: Justice Jackson?

JUSTICE JACKSON: Can I just get clarification on that? What -- so the rule -- they say the rule is unavailable if I could not take advantage of it. And your argument in response to that is what? It's still available

if it just existed?

MR. PETERSON: The rule is available to be used for whatever purpose the prisoner could make use of it. So, as we define "rule that is capable of being used," it is not necessarily useful to a particular prisoner.

So the way of thinking of it here is there are two pieces of the claim. There is the legal predicate for the claim and the factual predicate. The prisoner may well have the legal rule available to him. He can always make any use of it that he wants to.

And, indeed, Respondent used that rule in his initial federal habeas application, not the same way he's using it now, but he did rely on, cite Atkins, urge a court to follow it and account for it in the arguments he was making.

What he lacked at the time of that initial federal habeas application was the factual predicate, the diagnosis.

JUSTICE JACKSON: Right. So what do you do with the fact that we've sort of rejected -- I -- your -- I noted that your brief didn't cite Panetti versus Quarterman, but the same kind of analysis came up with

respect to Ford claims. This is kind of what Justice Sotomayor was exploring with you.

A Ford claim is one in which we said that the -- that states are prohibited from executing people when they can't understand why they're being killed, and that kind of factual circumstance arises later. And the government in Ford said too bad, you needed to make the claim originally because it was available to you because Ford existed and the fact that you didn't have that factual predicate, you know, sorry.

And we said, no, that doesn't really make sense because it doesn't enable this defendant to ever make the claim. And, here, similarly, I think the same kind of thing is happening.

MR. PETERSON: And, Your Honor, we see those as qualitatively different claims, that Panetti and Ford are about the defendant's competence to be executed, which is focused on the defendant's status at the moment of execution, whereas an Atkins claim concerns the defendant's status at the time of the crime and conviction, the onset of disability -- of the

intellectual disability during the developmental period.

JUSTICE JACKSON: But, if the standards change as to whether or not at the time of the initial conviction he was intellectually disabled, you're saying that doesn't matter, he didn't have the factual predicate at the relevant time?

MR. PETERSON: That's correct, Your Honor. If it's a change in the medical standards, if it's a change in the legal standards, then we would say that would need to be a change that's a new rule of constitutional law made retroactive to cases on collateral review by this Court.

JUSTICE JACKSON: Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Ferguson.

ORAL ARGUMENT OF EMILY M. FERGUSON

FOR THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MS. FERGUSON: Mr. Chief Justice, and may it please the Court:

Respondent seeks prospective

application of an old rule that was available when he filed his first habeas application 15 years ago. That claim does not satisfy AEDPA's bar on second or successive habeas applications.

Atkins is not a new rule with respect to Respondent because it was decided five years before his conviction. He cannot seek retroactive application of a constitutional rule that existed and applied before he even committed his crimes.

And the Atkins rule was previously un -- was previously available during his first habeas application. Atkins was the law of the land, and he used it to advance a different claim in that same application.

Respondent's contrary reading, which would allow successive habeas applications anytime doctors change their understanding of intellectual disability, would seriously undermine Congress's choice in AEDPA to prioritize finality over successive habeas applications spanning decades.

This Court should reverse.

I welcome the Court's questions.

JUSTICE THOMAS: Do you agree with the State that we should decide this on the previously unavailable prong?

MS. FERGUSON: I think this Court could resolve it on either prong. I think it would be most helpful to address both and address the statute holistically.

So just to discuss the new rule issue to begin, I think, to address, I think, Justice Jackson's questions about whether new rule encompasses a concept of the sorts of rules that the Court has in -- at one time deemed a new rule that was important enough to -- to make retroactive, I think that is inconsistent with the way this Court has, in dozens of cases, described what it means for a rule to be new. It's consistently described the concept of a new rule as with respect to the particular defendant who is invoking the rule.

And that's in cases both pre- and post-AEDPA. You have cases pre-AEDPA like Saffle, you have cases post-AEDPA like Whorton v. Bockting, all of which --

JUSTICE JACKSON: But -- but those would be -- and I guess I'm just a little

concerned that if we -- that we have two timing issues in this statute. We have "previously unavailable," which is particular to the Petitioner, but it's not clear to me that Congress intended for the phrase "new rule" in the way that it exists in the other part of the statute to also do that work because you could end up with a situation in which you have such overlap that one part of the statute is superfluous if we read it in the way that you're talking about.

Can you speak to that?

MS. FERGUSON: Yes. So I think I would point to a few things. One is, for example, this Court in Magwood described Section (b) -- Subsection (b)(2)(A) as requiring intervening case law, and I think that puts a really fine point on it. This is not just a rule that was new at the time it was decided. This is a rule that is -- has intervened in the time between the individual's conviction and this -- this application.

And so that, I think, is -- is some evidence of what the Court --

JUSTICE JACKSON: Do we have evidence

that that's what Congress intended, that that's what they were doing in this statute?

MS. FERGUSON: Well, I think, by incorporating language that very, very closely tracks Teague and that -- and given that Teague was describing when these rules can apply on collateral review, it would be exceedingly unusual for the Court to use the same framework that Teague adopted but divorce it from the rule that Teague was actually applying, which requires that it be new with respect to the particular defendant.

JUSTICE KAGAN: So that makes a fair bit of sense to me, Ms. Ferguson, but it still leaves sort of my alternative theory, which is, yes, we are talking about with relation to the particular defendant, but we don't have to think of Atkins and, indeed, it would be wrong to think of Atkins as a single rule that we decided exactly when we decided the Atkins case given that Atkins was very cognizant that the substantive standard for the rule was going to be supplied principally by diagnostic criteria.

So, if the diagnostic criteria fundamentally changes, as it did between DSM-IV

and DSM-5, you basically get an Atkins II rule, and -- and -- and then the question with respect to that defendant would be whether that is new.

MS. FERGUSON: Well, I think a few responses to that, Justice Kagan. One is that I think it's -- it's difficult to imagine Congress enacting a law that would allow the American Psychiatric Association, without independent action of this Court, to create a new rule of constitutional law.

JUSTICE KAGAN: Well, I suspect Congress didn't think about this one way or the other. It was not thinking about Atkins claims when it wrote this statute. And I completely agree with you that -- I mean, I think that part of what you're saying is the -- the Atkins standard is a very unusual one, so Congress wouldn't have been thinking about it.

But I think that that doesn't answer the point because Congress didn't reject it either. I mean, we just have this very unusual kind of rule, which -- which the -- which -- whose legal standard is supplied at least partly, maybe principally, by something else.

And so, when that something else changes, the rule changes.

MS. FERGUSON: Sure. I -- I think, looking at Atkins, the substantive rule that Atkins announced was that individuals who were intellectually disabled at the time they committed their crime cannot be sentenced to -- to -- to death for that because they lack the culpability necessary to warrant execution.

That rule isn't changed by the adoption of a new DSM. That is the underlying rule of Atkins. That's what Hall described the rule of Atkins as. And so the DSM updating who falls within the definition of "intellectually disabled" or who might be diagnosed as intellectually disabled isn't creating a new rule of constitutional law. The rule of constitutional law is the same.

JUSTICE KAGAN: Well, what -- what is it doing? General Peterson said it was supplying a fact. But I -- I guess I don't really see it that way. It's supplying -- it's supplying sort of the content to the new legal rule.

It's like the legal rule is one with

a -- a -- a big gap in it and understanding that something else is going to supply the content, so the DSM comes and plugs it in and it becomes part of the legal standard, not anything to do with facts.

MS. FERGUSON: Sure. I -- I think Atkins, to the extent it incorporated the DSM and updated psychological understandings of intellectual disability, it also incorporated state processes for determining intellectual disability. It expressly said that states would be responsible for developing the method of determining intellectual disability.

And I don't think that it would make a lot of sense for there to be an available successive application anytime the relevant state had a -- a new case, a new state supreme court case, for example, or even a state lower court case that changed the framework that the state was using.

I think that would run contrary to the structure of the law, which is the structure of (b)(2)(A), which says that it has to be a new rule of constitutional law made retroactive to cases on collateral review by this Court.

And I think that when the update that renders the rule available on Respondent's view is the DSM or, for that matter, some state court decision that's changing the way that a court is to assess an IQ score or a -- a type of adaptive functioning, then that can't possibly trigger (b)(2)(A) because it's not a new rule of constitutional law made retroactive by this Court.

JUSTICE JACKSON: What if the Court said so and made it prospective? What if the Court said: We are announcing this rule and, in the future, if the category changes per state law, we intend for that to be applied retroactively?

MS. FERGUSON: If the --

JUSTICE JACKSON: Would they have to just do it every time there's -- is your position that it only satisfies the retroactive part of this statute if the Supreme Court rubber stamps each change in the DSM?

MS. FERGUSON: I think, if -- if the Court -- if this Court says now the DSM is the governing standard, then I think that's a procedural change. And so I -- I don't know

that that -- I suppose, if this Court said it is retroactive anyway, then that would satisfy it.

I don't think it would ordinarily be considered retroactive under the way -- you know, after Edwards and the way this Court conceptualizes what it means for a rule to be substantive versus procedural and therefore retroactive.

But, if this Court expressly said we think that the substance of an Atkins claim depends on the DSM-5 and that is retroactive, then that could be the basis for a second or successive.

JUSTICE GORSUCH: Ms. -- Ms. Ferguson, we had some questions earlier about the -- what happens when a new rule is announced, made retroactive during the pendency of a first habeas petition.

And I just wanted to give you, if you have any additional thoughts to what Mr. -- Mr. Peterson had offered, a chance to do so.

MS. FERGUSON: Yes. So I -- I agree with -- with Mr. Peterson that there's no need to address the particular circumstances in this

case. It's not presented by this case. But, if this Court wanted to wade into exactly when during the first habeas the rule would have to be announced, I do think that a final judgment rule makes sense. I think it accords with this Court's approach in Rivers, and it accords with the availability of -- you know, habeas actions are generally, for most purposes in the civil rules, considered civil actions. You can amend your application once as of right. You can also amend it again if justice requires.

And so, in that circumstance, if this Court were to announce something that really is a new rule, retroactive on collateral review, then that would provide -- Mr. Chief Justice, may I?

CHIEF JUSTICE ROBERTS: Sure.

MS. FERGUSON: That would provide an opportunity to address it on first habeas.

CHIEF JUSTICE ROBERTS: Justice Thomas, anything further?

Justice Alito?

JUSTICE ALITO: To follow up on -- excuse me -- Justice Kagan's line of questioning about the nature of the Atkins

rule, would you say that the rule is that a person may not be executed if the person has an intellectual disability that is regarded as such by medical professionals? That's one alternative.

Or would you say it is that a person may not be executed if the person has an intellectual disability that can't be justified by the recognized purposes of punishment, particularly retribution and deterrence, in which case the DSM would be evidence but not part of the standard itself?

MS. FERGUSON: I think your latter formulation captures what the -- the Atkins Eighth Amendment rule was.

JUSTICE ALITO: Thank you.

CHIEF JUSTICE ROBERTS: Justice Sotomayor?

JUSTICE SOTOMAYOR: I'm not all together sure I understood your answer to Justice Gorsuch.

MS. FERGUSON: Okay.

JUSTICE SOTOMAYOR: You are taking the position that -- do you want to limit this -- you -- you said to Justice Thomas earlier that

you wanted to go under both prongs, but your colleague wanted to limit this to -- that it can't be a new rule if it was announced before the filing of the first petition.

MS. FERGUSON: Justice Sotomayor, I -- our position certainly -- and I understand General Peterson's position to be that it cannot be a new rule if it was announced after -- it cannot be a new rule with respect to a particular applicant if it was announced after that applicant -- before that applicant's conviction.

JUSTICE SOTOMAYOR: I thought he said it differently. I took down what he said. It can't be a new rule if it was announced before filing of the first petition. He didn't say before the final conviction because there is a final conviction the moment you file a habeas. You're trying to undo that final conviction.

MS. FERGUSON: So I suppose I'm best speaking just for -- for our own position. I think that it is a new rule -- the -- the timing of a new rule is defined with respect to when the particular defendant's conviction becomes final.

The timing for previous availability is tied to the first habeas application, and --

JUSTICE SOTOMAYOR: Now you're -- now you're doing two different -- that makes no sense to me. I mean, I understand the General's position, but yours makes no sense. Why would you have two different timeframes?

MS. FERGUSON: I think that -- that --

JUSTICE SOTOMAYOR: New rule announced before this but not before the -- but not previously available until the first habeas?

MS. FERGUSON: I think that accounts for why the statute has two different terms that both have reference to timing. So "new" is incorporating the concept from Teague, which is tied to the time of conviction.

And then "previously unavailable" should be tied to the first habeas application or the -- the immediately preceding habeas application because we're dealing with second or successive habeas applications specifically. So the question in a second or successive is whether it could have been raised in the first or the immediately preceding.

And so that's -- that's how we would

justify the -- the two different timing questions, one for a new rule and the other for previous unavailability.

JUSTICE SOTOMAYOR: You're not unhappy with the General's suggest -- suggestion earlier?

MS. FERGUSON: I -- I didn't understand us to be advancing different positions, but to the extent that they are --

JUSTICE SOTOMAYOR: We'll both listen to the transcript.

CHIEF JUSTICE ROBERTS: Justice Kagan?

Justice Gorsuch, anything?

Justice Barrett?

Justice Jackson, anything?

Thank you, counsel.

MS. FERGUSON: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Schepers.

ORAL ARGUMENT OF JEREMY SCHEPERS

ON BEHALF OF THE RESPONDENT

MR. SCHEPERS: Mr. Chief Justice, and may it please the Court:

The Fifth Circuit correctly interpreted the federal successor statute. It did so according to the ordinary meaning of

that statute's words. Under that interpretation, a rule is new when the case in question announced a novel legal standard. It's retroactive when this Court has said so. And a claim relying on that rule is previously unavailable if it had no possibility of merit under the governing legal standard.

In contrast, the Petitioner and the United States assert that a rule is available simply when it's been announced. But existence and availability aren't the same thing. Many things exist that aren't necessarily available to us. This Court's decisions in Booth and Ross strongly support the Fifth Circuit's rule here. There, this Court held that "available" means "capable of use" and that it requires the possibility of some relief. Importantly, in those cases, that was relief to the specific prisoner in question, not just whether the grievance system generally was capable of providing relief.

Much has been discussed regarding the clinical standards of intellectual disability as being facts, and while that's certainly true in some sense, there are also facts with

important legal significance. This Court has described those standards as the fundamental premise of its Atkins decision. When those standards change, the Eighth Amendment's protected class potentially changes as well. And in those rare circumstances, that can render a rule legally available for the first time, as it does here for Mr. Johnson.

But those changes are, in fact, rare. Mr. Johnson is the only individual who has been authorized to proceed based off of the changes in 2013 in the DSM-5. And when the DSM was again updated in 2022, no one has been authorized to proceed under those changes.

I welcome the Court's questions.

JUSTICE THOMAS: Does Atkins ever stop being a new rule?

MR. SCHEPERS: In our view, Atkins was new at the time it was decided.

JUSTICE THOMAS: We're talking about now, though.

MR. SCHEPERS: That -- we believe that Atkins was new based off of the character of the decision in 2002 and that it remains new now.

JUSTICE THOMAS: What about Marbury versus Madison?

MR. SCHEPERS: Every rule was certainly new at some point and is --

JUSTICE THOMAS: When does it ever stop being new?

MR. SCHEPERS: Under our reading, the rule is just new based off of what this Court did at the time. And then, while that -- while that provision of the statute does little work, the next prong, retroactivity, is a significant limiter on which rules petitioners can use to proceed under the statute. And then prior unavailability continues to narrow the field down farther.

JUSTICE BARRETT: Well, why doesn't that render your -- why doesn't your definition of "new" just sort of render it irrelevant? It also seems very odd. In your brief, you talk about it as the ordinary meaning of "new," but I was thinking kind of along Justice Thomas's lines about Marbury. I mean, when Alexander Graham Bell invented the telephone, that was new. I don't think anybody would describe the telephone as new today. It's just not how we

think of the word "new."

MR. SCHEPERS: We view the word "new" in the statute as doing very little work at the end of the day in anyone's definition. Certainly, with ours, it gets wrapped into the retroactivity assessment, as I believe Justice Jackson was alluding to in questioning before. In the Petitioner and the United States' view, it just simply moves a different timing window that already exists.

So I think all versions of "new," it's doing very little work in terms of the statutory construction here.

JUSTICE JACKSON: And that's because, I think, right, what -- what you're saying is that, really, we have to take the whole phrase, that we don't just isolate, like, what does it mean to be new. It is a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court.

And those are the rare circumstances in which the Supreme Court makes an announcement and determines that this thing that it is announcing is so significant that even defendants with closed cases should be

able to benefit from it.

In -- in that framing, as you say, Atkins was a new rule. And any other circumstance in the past in which the Supreme Court made that kind of announcement related to the significance of its ruling is a new rule. It's not about the timing of it. It's about the character of it.

MR. SCHEPERS: Absolutely, Justice Jackson.

JUSTICE BARRETT: Counsel, when did the statute --

JUSTICE KAGAN: I think I kind of read the --

JUSTICE BARRETT: Oh, go ahead.

JUSTICE KAGAN: I think I kind of read that whole phrase, if you would, a little bit differently. It seems to me that that "made retroactive to cases on collateral review" actually works against you, that the -- if you read the whole phrase, what we're talking about is a rule that you can't benefit from unless it's been made retroactive. And why can't you benefit from it? It's because it was new as to you. It wasn't -- it -- it didn't exist prior

to the time that you went through -- you know, didn't exist by the end of the direct appeals process.

So, to me, that phrase that comes after it actually does suggest that we're talking about new, not in the kind of, you know, it was new when it was invented, but it was new as to you because it came later.

MR. SCHEPERS: Respectfully, Justice Kagan, we disagree with that position. We think both new and retroactivity go to the character of the rule and also to this Court's decision, and then the courts look to see whether that rule was, in fact, available or capable of being used by the Petitioner in question.

JUSTICE BARRETT: Counsel, when did the statute of limit --

JUSTICE SOTOMAYOR: I don't think that's what you said.

JUSTICE BARRETT: When did the statute of limitations start running? I mean, because that's the other timing thing that we would think of, right? I mean, if Atkins is the relevant rule, you know, then it -- it -- under

your conception of new, Atkins was still new. Every day was a new day, even at the time the conviction became final.

And the DSM-5 changed things. So what's your theory of when the statute of limitations would begin to run?

MR. SCHEPERS: Justice Barrett, we took the position in the lower court that the statute of limitations began to run with the publication of the DSM-5.

JUSTICE BARRETT: Well, you invoked the factual exception in -- as I read your petition.

MR. SCHEPERS: That's correct, we did.

JUSTICE BARRETT: But you now are saying it's a matter of law, you're saying it's not a new fact.

MR. SCHEPERS: In this instance, we believe it's both. And the statute of limitations can run from the latest of the two triggers.

Our position is both that the DSM-5 is a fact, but based off of the character of the rule in Atkins, it is also a part of the legal standard, which this Court has tethered to the

medical community's diagnostic criteria that goes further --

JUSTICE BARRETT: Well, what about the actual innocence requirement? If you want to treat it as a fact, then you -- you have a harder road to hoe.

MR. SCHEPERS: We had also raised this issue under 2244(b)(2)(B), which the Fifth Circuit rejected in the authorization decision.

JUSTICE GORSUCH: So just to understand that then, you think you have both a (2)(A) claim and a -- a (2)(B) claim?

MR. SCHEPERS: At the current time, Justice Gorsuch.

JUSTICE GORSUCH: Both a new -- new rule -- not currently. But you think it's proper to think of cases like this as raising both a new rule of constitutional law and a new fact that can be pursued under both provisions?

MR. SCHEPERS: We had argued it under both theories, with recognition that the Fifth Circuit has foreclosed the (b)(2)(B) theory at the time it was presented earlier.

JUSTICE GORSUCH: Yeah, but I'm asking you. Your view is it's proper under both?

MR. SCHEPERS: It could potentially be proper under both depending on how this Court chooses to interpret (b)(2)(B) in a different case.

JUSTICE GORSUCH: Mm-hmm. And then I -- well, I think -- oh, just I did want to get one other thing clear. Do -- do we all now agree that the phrase "previously unavailable" modifies "rule" and not "claim"?

MR. SCHEPERS: We do, as does the Fifth Circuit. Multiple times in the Cathey decision, which was the -- the first case that the Fifth Circuit announced this rule, they referred to the previous unavailability of rules.

They certainly do refer to claims being previously unavailable at other -- at other times too, but what we think that means is that it shows that the focus is on what previously unavailable means.

But, here, again, the Fifth Circuit repeatedly referred to rules being previously unavailable.

JUSTICE KAVANAUGH: The amicus brief for Louisiana and the 22 states says that

because medical standards surrounding intellectual disability are constantly evolving, your position is a recipe for eternal Atkins claims and zero finality, exactly what AEDPA was intended to prevent.

That's what they say. I just want to give you a chance to address that.

MR. SCHEPERS: That's incorrect. First off, for state prisoners, they get one opportunity to raise any claim, and so a prisoner could not raise a second Atkins claim under 2244.

And then, within 2255, while that explicit limitation has not been extended to federal prisoners, the Fifth Circuit's no possibility of merit rule would eliminate successive Atkins claims. If an individual is raising a claim under Atkins, that by definition or at least by our definition would be a claim with a possibility of merit.

And so, at the end of the day, everyone gets one opportunity to raise an Atkins claim, not an eternal sequence of them.

JUSTICE BARRETT: What if there were a DSM-6?

MR. SCHEPERS: That would certainly depend on the specifics of the case. But, again, if it's an individual who has raised an Atkins claim before, that would lose under the Fifth Circuit's rule. It would also lose under 2244.

JUSTICE JACKSON: And, of course, a person who didn't fit under 5 could bring it under 6, but if he did fit under 5, then it was previously unavailable to him when 6 came along?

MR. SCHEPERS: Precisely.

JUSTICE JACKSON: Or previously available to him when 6 came along, right?

MR. SCHEPERS: The only -- the only person who would be able to use the DSM-6 in this scenario would be someone who's currently outside of the Eighth Amendment's protected class.

JUSTICE ALITO: Well, what if DSM-6 or 7 or 8 makes smaller changes but changes that are sufficient to provide a greater opportunity for success than was previously the situation?

MR. SCHEPERS: That would fail under the Fifth Circuit's rule. It's not a question

of easier to succeed or stronger. It's only a question of whether the claim had a possibility of merit before.

So someone who was intellectually disabled before but now has stronger evidence would fail under the Fifth Circuit's rule.

JUSTICE BARRETT: Well, you're saying under the Fifth Circuit's rule. What do you think is right?

MR. SCHEPERS: We believe the Fifth Circuit's rule is correct and appropriately reflects this Court's prior interpretation of "available" in Booth and Ross.

JUSTICE SOTOMAYOR: Could you reprise for me the (2)(B)(ii) argument on why you think the First Circuit was wrong on not considering a factual change? I think the General said that you can't succeed under (2)(B)(ii) because it doesn't go to your -- to your guilt of the crime. It just makes you a class of people. Is that the Fifth Circuit's thinking?

MR. SCHEPERS: That is.

JUSTICE SOTOMAYOR: And why do you think that is wrong?

MR. SCHEPERS: The argument that we

had made is that should be extended to individuals who would be essentially innocent of the underlying sentence, such as the death penalty, which the Fifth Circuit has rejected.

But the argument is basically that the sentence would be illegal for the intellectually disabled and that (b)(2)(B) should -- should cover that zone. But, again, that's been rejected by the Fifth Circuit.

JUSTICE SOTOMAYOR: And that would take care of my hypothetical?

MR. SCHEPERS: Yes, Your Honor.

JUSTICE SOTOMAYOR: Meaning, if you've turned 70, that's a factual change that makes you eligible. Under the General's view of or the Fifth Circuit's view of (2)(B)(ii), that factual change wouldn't entitle you to relief?

MR. SCHEPERS: I believe so, Your Honor.

JUSTICE SOTOMAYOR: All right.

MR. SCHEPERS: Regarding the new rule prong, which has been discussed some, and the potential interpretation of Teague, I would also like to point out not only did the Congress choose not to add the language

"finality of conviction," we can actually see a specific intent from Congress to not adopt the Teague language.

And the second prong of that statute or of the statute, the retroactivity determination has to be made by this Court. So, in addition to the other arguments we've heard, we believe that there is specific congressional intent to not verbatim adopt Teague just based off of the text of the statute itself.

CHIEF JUSTICE ROBERTS: Anything further, counsel?

MR. SCHEPERS: Nothing further, Your Honor.

CHIEF JUSTICE ROBERTS: Anything?

Thank you, counsel.

Rebuttal?

REBUTTAL ARGUMENT OF WILLIAM R. PETERSON
ON BEHALF OF THE PETITIONER

MR. PETERSON: Thank you, Your Honor.

First, I apologize if I misspoke. We fully agree with the federal government's explanation of the timing of new rule versus the timing of previously unavailable, that "new

rule" concerns the state of the law when the prisoner's conviction became final on direct appeal and that "previously unavailable" refers to availability in a prior federal habeas application.

And -- and, fundamentally, the purpose of 2244(b)(2) is to ask: Should the prisoner be permitted to file a claim in a second or successive application? The inquiry here is what has changed from the previous federal habeas application that the prisoner has filed.

And we see 2244(b)(2)(A) and 2244(b)(2)(B) handling each of the possible changes. 2244(b)(2)(A) allows claims to be raised based on certain limited changes in the law by this Court. Intervening changes in the law, new rules of law that a prisoner could not -- were not -- did not exist and could not have been raised in the initial federal habeas application. 2244(b)(2)(B) allows intervening changes in the facts.

There have been discussion about the extent to which the DSM is incorporated into Atkins itself. I -- I think the hypothetical would be not necessarily a narrower DSM-6 but a

much broader DSM-6, a DSM-6 that said every person with an IQ under 85 is intellectually disabled.

Whether that is truly incorporated as a matter of law into the standard for intellectual disability would require a new decision from the Court. Those changes to the legal standards happen in cases, as they did in Hall, as they did in Moore.

And I'll point you to my friend's state -- it's Record on Appeal 2420, which we think describes the circumstances perfectly. "The current medical standard for evaluating intellectual functioning in the DSM-5 created a previously unavailable factual basis for the claim, and the Supreme Court's decision in Moore versus Texas created a previously unavailable legal basis."

It's very easy to see how Congress could have written the statute or this Court could have decided differently in a way that would have allowed Johnson to proceed. If you struck a line through 2244(b)(2)(B)(ii), he would be able to say I have a new diagnosis of intellectual disability that was unavailable to

me, I would like to proceed under (b)(2)(B). If this Court had made Moore retroactive to cases on collateral review, he would say I have a claim based on Moore, a new rule of constitutional law.

But under the law as -- as it exists and this Court's decisions as they exist, he has neither, and we'd urge the Court to reverse.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:03 a.m., the case was submitted.)

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