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executing mentally retarded offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment.

On October 1, 2004, Bowling filed suit in state court, arguing that *Atkins* forbade his execution. The state courts treated the petition as proper under Kentucky Civil Rule 60.03, which permits, on appropriate equitable grounds, an independent action for relief from a judgment. Both the state circuit court and the Kentucky Supreme Court rejected this claim, the latter on March 17, 2005. *Bowling v. Commonwealth*, 163 S.W.3d 361 (Ky. 2005). The Kentucky Supreme Court offered two reasons: (1) it concluded that Bowling had not shown an error that was unknown and could not have been known during the prior proceedings, and (2) it concluded that Bowling had not made a prima facie showing of mental retardation that would warrant an evidentiary hearing. On November 14, 2005, the United States Supreme Court denied certiorari. *Bowling v. Kentucky*, 126 S. Ct. 652 (2005).

On October 4, 2004, while his state-court action was pending, Bowling applied to this court for leave to file a second or successive petition for a writ of habeas corpus, offering the same argument as in the state-court action. We denied his application on September 7, 2005, concluding that Bowling could not make out a prima facie case that he was mentally retarded. *In re Bowling*, 422 F.3d 434 (6th Cir. 2005).

In December 2005, Bowling filed the instant habeas petition in the U.S. District Court for the Eastern District of Kentucky. In this petition, Bowling asserts that the Kentucky Supreme Court's adjudication of his *Atkins* claim violates *Atkins* and due process. More specifically, the instant petition raises five claims:

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Claim 1: Applying the procedural-default rule to bar a claim of mental retardation violates *Atkins*.

Claim 2: Executing Bowling violates the Eighth Amendment because he is mentally retarded.

Claim 3: Kentucky's procedures for adjudicating *Atkins* claims violate due process.

Claim 4: Kentucky's definition of mental retardation and its procedures for determining mental retardation violate the Eighth Amendment.

Claim 5: *Atkins* increased the mitigating value of intellectual impairment, which mandates a new sentencing hearing.

The district court treated this petition as a second or successive habeas petition, which requires approval from the appellate court before it can be filed under 28 U.S.C. § 2244(b)(3)(A). Accordingly, the district court transferred the case to us. On August 1, 2006, Bowling moved this court to transfer the case back to the district court, arguing that the 2005 habeas petition is an initial petition and thus is not subject to § 2244(b)'s gatekeeping procedural requirements. We now grant that motion in part and deny it in part, as explained below.

ANALYSIS

A. The Meaning of "Second or Successive"

Section 2244(b)(3) requires a petitioner, before filing a "second or successive" habeas application in the district court, to request from the appropriate court of appeals an order permitting the district court to consider any such application. Sections 2244(b)(1) and (2) determine which claims presented in a "second or successive" habeas application a district court may consider. Thus, we must perform a gatekeeping function to ensure that district courts consider only those

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applications that are permitted by the statute, but this gatekeeping function applies only to “second or successive” applications.

Courts have uniformly held that “[t]he phrase ‘second or successive petition’ is a term of art” that is not to be read literally. *E.g.*, *Slack v. McDaniel*, 529 U.S. 473, 486 (2000);¹ *Crouch v. Norris*, 251 F.3d 720, 723 (8th Cir. 2001). Along these lines, we recently recognized that “[t]he Supreme Court has made clear that not every numerically second petition is ‘second or successive’ for purposes of” § 2244(b)(3). *In re Bowen*, 436 F.3d 699, 704 (6th Cir. 2006) (citing *Slack*, 529 U.S. at 487; *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998)). *See also James v. Walsh*, 308 F.3d 162, 167 (2d Cir. 2002) (“[A] numerically second petition does not necessarily constitute a ‘second’ petition for the purposes of AEDPA.”).

To determine whether a particular petition is “second or successive” and thus invokes § 2244(b)(3)’s gatekeeping procedures, we apply the abuse-of-the-writ doctrine, under which “a numerically second petition is ‘second’ when it raises a claim that could have been raised in the first petition but was not so raised, either due to deliberate abandonment or inexcusable neglect.” *Bowen*, 436 F.3d at 704 (citing *McCleskey v. Zant*, 499 U.S. 467, 489 (1991)). “[T]he abuse-of-the-writ doctrine [has] concentrate[d] on a petitioner’s acts to determine whether he has a legitimate excuse for failing to raise a claim at the appropriate time.” *Hill v. Alaska*, 297 F.3d 895, 898 (9th Cir. 2002) (quoting *McCleskey*, 499 U.S. at 490) (alterations in original). Both the Supreme Court and this court have concluded that petitions that do not constitute abuses of the writ are not “second or

¹Although the *Slack* Court applied pre-AEDPA law, it noted that it “d[id] not suggest the definition of second or successive would be different under AEDPA.” 529 U.S. at 486.

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successive,” and thus fall outside the ambit of § 2244(b). *Martinez-Villareal*, 523 U.S. 637 (no abuse of the writ when subsequent petition includes claims rejected as premature in initial petition, and therefore, subsequent petition not subject to § 2244(b)); *Bowen*, 436 F.3d at 705-06 (no abuse of the writ when petitioner had been legally barred from bringing claim in first habeas petition, but then brought that claim in second petition). We “consider each claim independently in deciding whether it is ‘second or successive’ under AEDPA.” *United States v. Orozco-Ramirez*, 211 F.3d 862, 869 (5th Cir. 2000); *see also Allen v. Ornoski*, 435 F.3d 946, 950 (9th Cir.), *cert. denied*, --- U.S. ---, 126 S. Ct. 1140 (2006).

Claim 1: In this claim, Bowling maintains that applying the procedural default rule to an *Atkins* claim violates the Eighth Amendment. The factual basis for this claim is the Kentucky state courts’ handling of Bowling’s post-conviction direct *Atkins* claim. At the time Bowling attempted to file his 2004 habeas petition, the Kentucky courts had not yet ruled on Bowling’s direct *Atkins* claim. Accordingly, the factual basis for this claim did not exist in 2004, and it could *not* have been raised in the first petition. For this reason, the claim is not “second or successive.” *See Bowen*, 436 F.3d at 704.

Claim 2: In his second claim, Bowling argues that Kentucky’s executing him would violate the Eighth Amendment’s prohibition on cruel and unusual punishment, as defined by *Atkins*, because he is mentally retarded. Bowling already raised this claim in his 2004 application for leave to file a second or successive habeas petition, which we denied. *In re Bowling*, 422 F.3d 434 (6th Cir. 2005). Recycling this claim constitutes an abuse of the writ, *see Crone v. Cockrell*, 324 F.3d 833,

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836-37 (5th Cir. 2003), so the claim is “second or successive.” Section 2244(b)(1) requires us to dismiss this claim.

Claim 3: Here, Bowling argues that Kentucky’s procedures for adjudicating *Atkins* claims violate due process. Like the first claim, (1) Bowling here challenges Kentucky’s administration of Eighth Amendment rights defined by *Atkins*, and (2) the factual basis for this claim did not exist in 2004, when Bowling filed his most recent application for permission to file a habeas petition. This claim, like the first, could not have been raised in 1999 or in 2004, and accordingly is not “second or successive.”

Claim 4: Bowling’s fourth claim asserts that Kentucky’s definition of mental retardation and its procedures for determining mental retardation violate the Eighth Amendment. Again, Bowling challenges the state court’s administration of *Atkins*, and again, the factual basis for this claim did not exist in 2004. Therefore, this is not a claim that “could have been raised” in a previous petition, so it is not “second or successive.”

Claim 5: In his final claim, Bowling argues that *Atkins* changed the mitigating value of intellectual impairment, which mandates a new sentencing hearing. Unlike the first, third, and fourth claims, this claim does not challenge Kentucky’s administration of the *Atkins* right. And unlike those claims, the factual underpinnings of this claim (the *Atkins* decision and Bowling’s intellectual impairments) were known in 2004, so Bowling could have raised it in his 2004 application for leave to file a second or successive habeas petition. Accordingly, this claim is “second or successive,” and § 2244(b) applies. Further, because the claim neither relies on a rule of constitutional law recognized

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since Bowling's last attempt to file a habeas petition nor presents a previously unknown factual predicate, § 2244(b)(2) demands that we dismiss this claim.

CONCLUSION

For the reasons described above, we conclude that Bowling's second and fifth claims are "second or successive." Because Bowling's second claim "was presented in a prior application," 28 U.S.C. § 2244(b)(1) demands that it be dismissed. Similarly, because Bowling's fifth claim relies on neither "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court," *id.* § 2244(b)(2)(A), nor a "factual predicate [that] could not have been discovered previously through the exercise of due diligence," *id.* § 2244(b)(2)(B)(i), it must be dismissed as well. *Id.* § 2244(b)(2).

In contrast, we conclude that the first, third, and fourth claims in Bowling's pending habeas petition are not "second or successive," and accordingly, that § 2244(b)'s gatekeeping requirements do not apply to them. For this reason, we **GRANT** Bowling's motion to transfer his petition to the district court insofar as it pertains to his first, third, and fourth claims. We **DISMISS** Bowling's second and fifth claims.

ENTERED BY ORDER OF THE COURT


Clerk

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JULIA SMITH GIBBONS, Circuit Judge, dissenting. While I am in agreement with the dismissal of Bowling's second and fifth claims, I respectfully dissent from the majority's decision to transfer Bowling's first, third, and fourth claims to the district court. Our controlling precedent, *In re Cook*, 215 F.3d 606, 608 (6th Cir. 2000), stresses that, if a previous petition has been dismissed on the merits, then a subsequent petition is "second or successive." Bowling's previous petition was in fact dismissed on the merits and thus qualifies as "second or successive."

To the extent *In re Bowen*, 436 F.3d 699 (6th Cir. 2006), on which the majority relies, conflicts with *Cook*, *Cook* controls as the earlier case. Moreover, the majority's approach of looking at whether the factual basis for a claim existed at the time of the earlier petition to determine whether it is "second or successive" renders 28 U.S.C. § 2244(b)(2)(B) a nullity. A claim for which "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence," § 2244(b)(2)(B)(i), is excluded from the definition of a "second or successive" petition, yet § 2244(b)(2)(B) only applies to "second or successive" petitions, *see* § 2244(b)(2). The end result is the elimination of the gatekeeping requirements applicable to such claims under § 2244(b)(2)(B)(ii) and the circumvention of the congressional intent in enacting § 2244(b).

If his petition is categorized as "second or successive," Bowling's application must make a *prima facie* showing that it meets the requirements of § 2244(b)(2)(B)(ii). Under § 2244(b)(3)(C) "a court of appeals may authorize the filing of a second or successive petition only if it determines that the application makes a *prima facie* showing that [it] satisfies the requirements of this subsection." The pertinent requirement of "this subsection," subsection (b), provides that, in order to avoid dismissal, "the facts underlying the claim, if proven and viewed in light of the evidence as

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a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.” 28 U.S.C. § 2244(b)(2)(B)(ii). Here, Bowling cannot establish his own ineligibility for the death penalty because he cannot establish that he is mentally retarded, as we have previously found. *In re Bowling*, 422 F.3d 434, 439 (6th Cir. 2005). Thus, he cannot prevail even if he establishes constitutional deficiency in Kentucky’s procedures for determining mental retardation. Thus, he has failed to make a prima facie showing that he would be entitled to relief in the absence of constitutional error. I would dismiss all of Bowling’s claims.