

No. _____

07-653 NOV 15 2007

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In The
Supreme Court of the United States

—◆—
LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

SEDRICE MAURICE SIMPSON,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI
—◆—

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**CAPITAL CASE
QUESTION PRESENTED**

Respondent was convicted and sentenced to death in 1998; his conviction became final a year later. At that time, an Arkansas statute made mentally-retarded persons ineligible for the death penalty. Respondent did not once claim during his state-court proceedings that he was mentally retarded. In 2002, this Court overturned its decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment proscribes the execution of the mentally retarded. Respondent later filed a federal habeas corpus petition asserting, for the first time, that he is mentally retarded and therefore ineligible for the death penalty. He claimed that his failure to raise the claim in state court should be excused because the claim was not available until *Atkins* was decided. The question presented is:

Whether the legal basis for respondent's Eighth Amendment mental-retardation claim was unavailable at the time of his state court proceedings, and therefore excuses his procedural default, even though precisely the same claim was available under state law at the time of his trial, conviction, and appeal.

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PETITION FOR WRIT OF CERTIORARI

Larry Norris, Director of the Arkansas Department of Correction, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

**OPINIONS BELOW**

The panel opinion of the Court of Appeals is reported at 490 F.3d 1029. Appendix at 1-13. The unreported decision of the United States District Court for the Eastern District of Arkansas is reproduced in the appendix at 14-64. The District Court's order denying the respondent's motion to amend the judgment is reproduced in the appendix at 65-72.

**JURISDICTION**

The judgment of the court of appeals was entered on June 27, 2007. Appendix at 1. The order denying the petition for rehearing and suggestion for rehearing *en banc* was entered on August 20, 2007. Appendix at 76. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 28 U.S.C. § 2254, which grants federal courts the power to entertain federal habeas corpus petitions filed by persons in state custody, is reproduced in the appendix at 77-80.

Arkansas Code Annotated § 5-4-618 (Repl. 2006), which declares mentally-retarded persons categorically ineligible for the death penalty and sets forth the procedures for raising claims of ineligibility, is reproduced in the appendix at 81-82.

STATEMENT OF THE CASE

In 1998, an Arkansas jury convicted respondent of two counts of capital murder and sentenced him to death. The Supreme Court of Arkansas affirmed his conviction and sentence, *see Simpson v. State*, 339 Ark. 467, 6 S.W.3d 104 (1999), as well as the denial of his application for state post-conviction relief, *see Simpson v. State*, 355 Ark. 294, 138 S.W.3d 671 (2003). Despite the availability of Act 420 of 1993, an Arkansas statute that made mentally-retarded persons categorically ineligible for the death penalty, *see Ark. Code Ann.*

§ 5-4-618(b) (Repl. 2006), and provided a procedure for raising claims of ineligibility, *see* § 5-4-618(d) (Repl. 2006), respondent never claimed, in state court, that he was mentally retarded.

On December 2, 2004, respondent filed a petition seeking federal habeas relief pursuant to 28 U.S.C. § 2254, wherein he raised, *inter alia*, an Eighth Amendment claim alleging that he was ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002), which overruled *Penry v. Lynaugh*, 492 U.S. 302 (1989), and held, for the first time, that it was unconstitutional to execute the mentally retarded. Acknowledging his failure to raise the Eighth Amendment claim in state court, respondent asserted that there was cause to excuse the default because *Atkins*, which was decided after his conviction became final, was a sudden departure from *Penry*, such that his Eighth Amendment claim was unavailable when he challenged the judgment in state court. *Simpson v. Norris*, No. 5:04-CV-429, Docket Entry No. 1, Petition for Writ of Habeas Corpus, at 18. The United States District Court for the Eastern District of Arkansas, finding that respondent could have raised a mental-retardation claim under state law prior to *Atkins*, and could not demonstrate that a reasonable fact-finder would have found him ineligible for the death penalty, declined to excuse the procedural default and denied relief. Appendix at 36-42.

On June 27, 2007, the United States Court of Appeals for the Eighth Circuit reversed the judgment of the District Court, disagreeing that the availability

of a mental-retardation claim under state law had any bearing on whether respondent procedurally defaulted his Eighth Amendment claim. According to the Eighth Circuit, the availability of a similar claim under preexisting state law was “irrelevant” to its analysis because respondent was “raising a previously unavailable federal claim, and that claim is separate and distinct.” Appendix at 11. The court also concluded that the Eighth Amendment claim did not come within the ambit of 28 U.S.C. § 2254(e)(2), which generally bars hearings for habeas petitioners who fail to diligently develop the factual bases for their claims in state court. Despite the availability of a procedure for developing mental-retardation claims under state law, the Eighth Circuit reasoned that § 2254(e)(2) did not apply to respondent because “*Atkins* created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded,” and, therefore, respondent “can hardly be said to have lacked diligence in developing the factual basis of that claim in state court.” Appendix at 11. Indeed, the Eighth Circuit actually determined that respondent was entitled to an evidentiary hearing because his “inability to present his *Atkins* claim in state court precluded him from receiving ‘a full and fair evidentiary hearing’ there,” satisfying one of the conditions in *Townsend v. Sain*, 372 U.S. 293, 312 (1963). Appendix at 12. Consequently, the Eighth Circuit reversed and remanded the case to the District Court for an evidentiary hearing on respondent’s *Atkins* claim.

Petitioner unsuccessfully sought rehearing by the panel and rehearing *en banc* in the Eighth Circuit. Writing for the three judges dissenting from the denial of rehearing *en banc*, Judge Steven Colloton observed that there was “a serious question” of whether respondent could demonstrate cause to excuse the procedural default, because if he “had pursued successfully a defense of mental retardation under Arkansas law, then the State would have excluded him categorically from eligibility for the death penalty, and thus complied with the equivalent rule of federal law announced later in *Atkins*.” Appendix at 75. Judge Colloton also noted that respondent’s case, “where the applicant failed to pursue an available claim under a state statute that anticipated and embodied the subsequently announced federal rule,” was indistinguishable from *Dugger v. Adams*, 489 U.S. 401, 407-10 (1989). Appendix at 75-76. In closing, Judge Colloton observed that “[t]his case raises the important question whether Arkansas may enforce its procedural requirement that a claim of mental retardation must be raised in a timely way through the means specified by state law.” Appendix at 76.

Petitioner subsequently filed a motion seeking a stay of the Eighth Circuit’s mandate pending the filing of a petition for writ of certiorari in this Court. The Eighth Circuit denied the motion and issued its mandate on August 31, 2007. On October 1, 2007, petitioner applied to Justice Alito for a stay of the

Eighth Circuit's mandate, which he granted on October 16, 2007.

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REASONS FOR GRANTING THE WRIT

I. **The Eighth Circuit's Decision Directly Conflicts With This Court's Decision in *Dugger v. Adams*, 489 U.S. 401 (1989).**

The Eighth Circuit's holding in this case – that the availability of a similar claim under state law is irrelevant to the determination of whether there is cause to excuse the default of a subsequently available federal claim – directly conflicts with this Court's holding in *Dugger v. Adams*, 489 U.S. 401 (1989). In *Adams*, this Court considered the availability of a similar claim under state law to be a “critical fact,” and held that when an element of the state-law claim is also a “necessary element” of the federal claim, the novelty of “the subsequently available federal claim does not excuse the procedural default.” *Adams*, 489 U.S. at 407-08, 410. The Eighth Circuit decided that the availability of the state claim had no bearing on the issue of default solely because state-law claims are generally “separate and distinct” from claims under federal law. Appendix at 11. It failed to analyze whether any part of a mental-retardation claim under Arkansas law was a necessary element of respondent's *Atkins* claim. Its analysis, which altogether ignored *Adams*, led to the erroneous excusal of respondent's procedural default despite the availability of a mental-retardation claim under Arkansas law.

Appendix at 11. This Court should grant certiorari and reverse this blatant disregard of *Adams's* principles.

1. In *Adams*, this Court reversed the Eleventh Circuit's judgment excusing the procedural default of Adams's claim that the state trial judge's instructions, which misinformed the jury about its sentencing responsibility under state law, invalidated his death sentence under *Caldwell v. Mississippi*, 472 U.S. 320 (1985). See *Adams*, 489 U.S. at 406, 411. The Eleventh Circuit held that *Caldwell*, which was decided after Adams's conviction became final, was so novel that a legal basis for the claim was not reasonably available during Adams' trial or direct appeal, the time at which the state court held he should have raised it. See *Adams*, 489 U.S. at 406.

This Court held that *Caldwell* did not provide cause to excuse the default, noting that pre-existing state law already invalidated sentences on precisely the same ground as a "necessary element" of the *Caldwell* claim – misinformation that diminished the jury's responsibility to impose a death sentence. *Adams*, 489 U.S. at 407-08, 410. The Court concluded, therefore, that a legal basis to challenge the instructions – the same as later alleged in the *Caldwell* claim – was "plainly available" during state-court proceedings, and it was not safe to assume that the novelty of the *Caldwell* claim was the reason for the default. *Adams*, 489 U.S. at 409. Additionally, the Court observed that because a successful claim under state law could have corrected the error in the state

system, the State had “every interest” in a timely challenge to the instruction, and “that interest does not disappear when it is later held that the instruction violates the Federal Constitution if it erroneously describes the role of the jury under state law.” *Adams*, 489 U.S. at 409.

Despite *Adams*, the Eighth Circuit considered the availability of a claim of ineligibility for the death penalty under Ark. Code Ann. § 5-4-618 irrelevant to its determination of whether to excuse the procedural default of respondent’s *Atkins* claim. To be sure, the Eighth Circuit is correct in its apparent belief that state and federal law claims generally are “separate and distinct” because, unlike federal claims, state-law claims are generally not the concern of federal courts during habeas proceedings. *See, e.g., Lewis v. Jeffers*, 497 U.S. 764, 780 (1990). *Adams* dictates, however, that federal courts must go beyond that technical state-federal distinction before excusing the default of a federal claim that has a preexisting state-law analogue, as the issue is whether the court should exercise its “equitable power to overlook the respondent’s state procedural default,” and, not simply whether he had an analogous federal claim, and, therefore, “could have obtained federal habeas relief at the time of his trial.” *Adams*, 489 U.S. at 410. The decision requires an exercise of discretion that is lacking in the Eighth Circuit’s opinion; one that weighs “Congress’ expressed interest in providing a federal forum for the vindication of the constitutional rights of state prisoners,” against “the State’s interest

in the integrity of its rules and proceedings and the finality of its judgments.” *Reed v. Ross*, 468 U.S. 1, 10 (1984). *Adams* establishes that the State’s interests are greater when an element of the preexisting state-law claim is a “necessary element” of the defaulted federal claim.

2. Arkansas’ preexisting prohibition against executing mentally-retarded persons gives it a significant interest in finality where procedurally defaulted *Atkins* claims are concerned. By enacting Ark. Code Ann. § 5-4-618 in response to *Penry v. Lynaugh*, 492 U.S. 302 (1989), and becoming part of the national consensus that helped settle the Eighth Amendment’s categorical prohibition against executing the mentally retarded, see *Atkins*, 536 U.S. at 314-17, 321, Arkansas “already complied with the Eighth Amendment rule announced in *Atkins* . . . even before *Atkins* was decided.” Appendix at 74. Indeed, *Atkins* relies on the state statute’s criteria to define ineligibility for the death penalty under the Eighth Amendment. See *Atkins*, 536 U.S. at 317. Accordingly, the Supreme Court of Arkansas treats the state and federal claims as one-in-the-same; see *Anderson v. State*, 357 Ark. 180, 215, 163 S.W.3d 333, 354-55 (2004), and, as it no doubt would have done in respondent’s case, refuses to disturb the finality of state judgments by recalling its mandate to allow litigation of the *Atkins* claims of defendants who never claimed they were mentally retarded under state law. See *Coulter v. State*, 365 Ark. 262, 269, 227 S.W.3d 904, 909 (2006), cert. denied sub nom. 127

S. Ct. 138 (2006); *Engram v. State*, 360 Ark. 140, 151-52, 200 S.W.3d 367, 373-74 (2004). Despite Arkansas' significant interest in finality, as well as in the integrity of procedural rules that further it, the Eighth Circuit did not afford these interests any weight before excusing the procedural default of respondent's *Atkins* claim.

3. Indeed, in direct conflict with *Adams*, the Eighth Circuit dismissed the availability of a mental-retardation claim under Arkansas law as *irrelevant* and erroneously found cause to excuse the default of respondent's mental-retardation claim because it was unavailable, as a federal claim, until this Court decided *Atkins* in 2002. Respondent's *Atkins* claim is identical to the mental-retardation claim that was available under state law when he was tried in 1998. The necessary element of his claim of ineligibility for the death penalty under *Atkins* – that he meets the state's criteria for mental retardation – obviously is an element of the same claim under Ark. Code Ann. § 5-4-618. *See Atkins*, 536 U.S. at 317. Certainly, if respondent successfully alleged that he met the criteria for mental retardation at the time of his trial, a state court would have declared him ineligible for the death penalty, and he would have no basis for his *Atkins* claim. A legal basis for respondent's *Atkins* claim – that he is ineligible for the death penalty because he meets the state's criteria for mental retardation – was plainly available to him, despite the state-federal distinction.

Consequently, Arkansas' preexisting prohibition against executing mentally-retarded persons gave it "every interest" in a timely claim, and its interest did not disappear simply because *Atkins* made the prohibition a constitutional matter. The Eighth Circuit nevertheless held that respondent's mental-retardation claim was unavailable until *Atkins* because, contrary to *Adams*, its analysis did not go beyond the technical distinction between state and federal claims. The result is an unwarranted infringement on Arkansas' interest in finality, as respondent is now allowed to litigate a claim that he surely would have asserted in state court if he really was mentally retarded. This Court should grant the petition and grant plenary review or summarily reverse the Eighth Circuit's judgment.

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CONCLUSION

For the reasons and authorities set forth above, the petitioner respectfully requests that the petition for writ of certiorari be granted.

Respectfully Submitted,

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