No. 09-45 JUL 9 - 2009

In The
Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

ANDREW SASSER,

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

DUSTIN MCDANIEL
Arkansas Attorney General

KELLY HILL*
Senior Assistant
Attorney General

LAUREN ELIZABETH HEIL
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8068

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing on Sasser's *Atkins* claim, when his counsel did not diligently develop available facts supporting the claim during State court proceedings.

2. Whether the district court has the authority to expand the record to determine whether Sasser's *Atkins* claim warrants an evidentiary hearing, or must, based solely on the facts alleged in the petition, hold a hearing.

3. Whether the mandatory language of 28 U.S.C. § 2244(b)(4) requires the district court to consider the timeliness of Sasser's *Atkins* claim under 28 U.S.C. § 2244(d)(1) before the claim may be adjudicated on the merits.

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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 553 F.3d 1121. Appendix at 1-16. The unreported decision of the United States District Court for the Eastern District of Arkansas is reproduced in the appendix at 17-37. The district court's order denying respondent Sasser's motion to amend the judgment is reproduced in the appendix at 38-46.

JURISDICTION

The judgment of the Court of Appeals was entered on January 23, 2009. Appendix at 1. The order denying the petition for rehearing *en banc* was entered on April 14, 2009. Appendix at 50-52. 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. § 2244, which imposes a statute of limitations for habeas corpus cases and sets forth procedures for, and restrictions of, the federal courts' exercise of power over second or successive habeas corpus petitions filed by persons in State custody, is reproduced in the appendix at 53-56.

Title 28 U.S.C. § 2254(e)(2), which restricts federal courts' authority to hold evidentiary hearings in habeas corpus cases involving claims based on new rules of constitutional law and newly discovered facts, is reproduced in the appendix at 57.

STATEMENT OF THE CASE

This case presents important questions about the proper construction and application of the Antiterrorism and Effective Death Penalty Act (AEDPA) as it relates to habeas corpus petitions in which state prisoners seek to take advantage of new rules of constitutional law. The Eighth Circuit held that when a state prisoner raises a claim that is based on a previously unavailable rule of constitutional law, a district court

is obligated to hold an evidentiary hearing and adjudicate the merits of the claim as long as it is sufficiently pleaded in the petition, despite the prisoner's complete failure to develop the facts underlying the claim in state court. Appendix at 7-10. The Eighth Circuit further held that, when such a claim is raised in a second or successive petition, the mandatory language of 28 U.S.C. § 2244(b)(4) does not obligate the district court to consider the timeliness of the claim before it holds the mandatory hearing and adjudicates the merits of the claim. Appendix at 13-15. The court ruled that the burden to assert the limitations issue in a second or successive habeas corpus proceeding rests on the State and, just as it does in a first-petition case, it remains subject to the traditional rule of forfeiture, as modified by *Day v. McDonough*, 547 U.S. 198 (2006). *Id.*

The Eighth Circuit's decision presents issues that deserve further review concerning: (1) how 28 U.S.C. § 2254(e)(2) applies to a claim that is based on a previously unavailable rule of constitutional law; (2) if § 2254(e)(2) does not apply to bar a hearing, whether the district court has the authority to expand the record to determine whether a hearing is warranted; and (3) what effect the mandatory language in 28 U.S.C. § 2244(b)(4) has on the parties' burdens and the district court's responsibility to address the timeliness of a second or successive claim before it may be adjudicated on the merits.

A. The Court of Appeals' Authorization Decision

Sasser was convicted of capital murder in 1994 and was sentenced to death by lethal injection. *See Sasser v. State,* 321 Ark. 438, 441, 902 S.W.2d 773, 775 (1995). He pursued his ordinary appellate and post-conviction remedies in state court, and his first federal habeas corpus proceeding was dismissed with prejudice on May 28, 2002. *See* Appendix at 2. Sasser appealed the decision a week after this Court announced its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Appendix at 3. Almost a year later, he filed a motion for remand or, alternatively, for permission to file a second petition raising a claim based on the rule announced in *Atkins*. Appendix at 3, 14.[1]

The Eighth Circuit granted Sasser's motion in a judgment issued August 15, 2003, which it subsequently amended March 9, 2004. It did so in a limited order of remand, instructing the district court that "[t]he issue on remand is limited to the question of whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia,* 536 U.S. 304, 122

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[1] The Eighth Circuit opinion first states the motion was filed on June 18, 2003, and later states it was filed on June 19, 2003. Appendix at 3, 14. The Eighth Circuit's docket indicates that the motion was filed on June 17, 2003, and that a supplemental motion was filed on June 19, 2003. *Sasser v. Norris,* No. 02-3103 (8th Cir.) (Docket Entries, June 17, 2003 & June 19, 2003).

S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution." Appendix at 13, 47-49.

B. The District Court Proceedings Following Authorization

The district court reopened Sasser's first proceeding and issued a scheduling order directing Sasser to file an amended petition and directing the State to respond to the amended petition within a set period of time. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 45, Scheduling Order, at 1 (W.D. Ark. May 21, 2004). The order did not account for preliminary review under 28 U.S.C. § 2254 Rule 4. Sasser filed his petition on September 3, 2004, raising the Eighth Amendment *Atkins* claim he had presented for authorization to the Eighth Circuit and adding more claims, some new – including a claim that counsel had been ineffective in failing to prepare and present evidence of mental retardation in state court – and some that duplicated grounds that had been adjudicated in his first petition. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 48, Second Supplemental and Amended Petition for Writ of Habeas Corpus, at 5-31 (W.D. Ark. Sept. 3, 2004).

Following the State's answer and Sasser's reply, the district court issued a scheduling order setting deadlines for discovery. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 59, Scheduling Order (W.D. Ark. Nov. 22, 2005). The State opposed discovery, asserting for the first time that, pursuant to 28 U.S.C.

§ 2244(b)(4), the district court was obligated to dismiss Sasser's petition without a hearing unless he first showed his claims satisfied 28 U.S.C. § 2244, and he could not do so because, *inter alia*, his petition was untimely under 28 U.S.C. § 2244(d). The State further asserted that a hearing was precluded, in any event, by 28 U.S.C. § 2254(e)(2). *Sasser v. Norris,* No. 00-4036, Docket Entry No. 61, Motion to Preclude Discovery or, in the Alternative, Motion for Discovery at 1, 3-6 (W.D. Ark. Jan. 13, 2006). Nevertheless, the district court issued an order informing the parties that discovery and expansion of the record was necessary "to assist with the question of whether an evidentiary hearing is warranted," *Sasser v. Norris,* No. 00-4036, Docket Entry No. 64, Order at 2-3 (W.D. Ark. Feb. 13, 2006), and it granted Sasser's request for discovery to obtain documents related to mental evaluations he had undergone prior to his trial.

Four months later, the district court issued another scheduling order, setting a cut-off date for discovery, a deadline for Sasser to submit any additional information he wanted the court to consider in relation to his *Atkins* claim, and warning that his failure to request to submit any additional information by way of amendment of his petition, supplementation of the record, or by evidentiary hearing would serve as notice that he did not intend to present additional information to the court. Appendix at 19-20. Sasser did not seek to present additional information, and the district court subsequently considered the substantive allegations and evidentiary

proffer supporting his *Atkins* claim. The court concluded that, even assuming the claim had been unavailable prior to the decision in *Atkins*, a hearing was foreclosed by § 2254(e)(2)(B) and relief unwarranted because, considering the allegations in his petition and the evidentiary proffer he had made, the facts underlying his *Atkins* claim, if proven, would be insufficient to show by clear and convincing evidence that but for the constitutional error no reasonable factfinder would have imposed a sentence of death. Appendix at 29-32.

Sasser challenged the district court's conclusion in a motion for post-judgment relief, arguing that 28 U.S.C. § 2254(e)(2) did not apply to him because he could not have failed to develop the factual basis for his claim in state court at a time when the claim was unavailable. Appendix at 40. Relying on *Williams v. Taylor*, 529 U.S. 420 (2000), the district court determined that Sasser indeed exhibited a lack of diligence for purposes of § 2254(e)(2), particularly because he failed to avail himself of a State remedy that made mentally-retarded persons categorically ineligible for the death penalty and provided a procedure for adjudicating such a claim. *See* Ark. Code Ann. § 5-4-618(b) & (d) (Repl. 2006) (enacted in 1993). Appendix at 39-40. The court further concluded that, even assuming the *Atkins* claim had been previously unavailable for purposes of 28 U.S.C. § 2254(e)(2)(A)(i), Sasser had done nothing in two years to substantiate his allegations and proffer, which the court found simply insufficient to satisfy the standard to warrant

a hearing under 28 U.S.C. § 2254(e)(2)(B). Appendix at 40-42.

C. The Court of Appeals' Decision

Sasser appealed the denial of relief, relying exclusively on *Simpson v. Norris,* 490 F.3d 1029 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied*, 128 S.Ct. 1226 (2008), to support his argument that, because his *Atkins* claim had been previously unavailable, it had to be adjudicated on the merits after a mandatory evidentiary hearing. In addition to arguing that the district court correctly denied relief without a hearing, the State alternatively argued that the court could affirm on a ground not considered or decided by the district court, that being, *inter alia*, the untimeliness of Sasser's petition.

The Court of Appeals reversed and remanded "for an evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim." Appendix at 12, 15-16. Relying on its decision in *Simpson*, it held that because the Eighth Amendment claim was unavailable before the decision in *Atkins*, any failure to develop the claim or the facts underlying it in State court was "irrelevant" to the question of whether Sasser was entitled to an evidentiary hearing and adjudication on the merits of his claim. Appendix at 8-9. The court explained that an evidentiary hearing is mandatory as long as a previously unavailable claim is well pleaded in a petition. As the court put it, "*Simpson* explains Sasser is entitled to a hearing

simply by virtue of 'alleg[ing] that he is mentally retarded as *Atkins* defines that condition.'" Appendix at 10, 11-12 (quoting *Simpson*, 490 F.3d at 1035). The district court was not free to assess, as it did, whether Sasser's pleaded allegations and evidentiary proffer actually were sufficient to warrant a hearing or relief under § 2254(e)(2), or to require Sasser to expand the record with more information to convince the court a hearing was necessary. In the Eighth Circuit's view, "*Simpson* expressly requires an *Atkins* evidentiary hearing, not some other type of 'remand procedure' crafted by the district court" for post-*Atkins* claims of mental retardation. Appendix at 12.

The court also rejected the State's alternative argument based on the limitations issue. Appendix at 13-15 & n.7. First, it adopted Sasser's erroneous contention that the State had not raised the issue at any time prior to the final adjudication in district court. Appendix at 14 & n.8. Then, despite the mandatory language in § 2244(b)(4), the court relied on *Day v. McDonough*, 547 U.S. 198 (2006), to hold that the district court was not obligated to consider the timeliness of a claim before adjudicating its merits in a second or successive proceeding. Appendix at 15. Finally, the Eighth Circuit held that federal-court "discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level," Appendix at 15, and, therefore, it refused to decide whether the fully-briefed limitations issue provided a basis to affirm. Moreover, it did not direct

the district court to consider the issue on remand pursuant to 28 U.S.C. § 2244(b)(4).

The State sought rehearing en banc, and the Eighth Circuit denied the request by a vote of 5 to 4. Two judges did not participate in the vote, and Judge Colloton specifically dissented from the denial of rehearing en banc on the same ground as he had in *Simpson* – that the court should have agreed to review the question of whether Sasser's previous failure to pursue relief under the State's pre-existing remedy precluded the court from relying on the claim's previous unavailability to excuse the procedural default under the reasoning of *Dugger v. Adams*, 489 U.S. 401 (1989). Appendix at 50-52. The Eighth Circuit issued its mandate on April 21, 2009, and on June 3, 2009, granted the State's motion to recall and stay the mandate.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit and the Fourth Circuit interpret 28 U.S.C. § 2254(e)(2)'s opening clause, which inquires whether "the applicant has failed to develop the facts of the claim during State court proceedings," in a manner that voids 28 U.S.C. § 2254(e)(2)(B), and is directly contrary to *Williams v. Taylor*, 529 U.S. 420 (2000).

1. The Eighth Circuit rejected the district court's application of 28 U.S.C. § 2254(e)(2) to Sasser's *Atkins*

claim, reasoning, as it did in *Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied*, 128 S.Ct. 1226 (2008), that, because the new constitutional rule announced in *Atkins* was not available during State court proceedings, Sasser "can hardly be said to have lacked diligence in developing the factual basis of that claim in state court." Appendix at 8 (quoting *Simpson*, 490 F.3d at 1035). By doing so, the Eighth Circuit joins the Fourth Circuit, *see Walker v. True*, 399 F.3d 315, 326-27 (4th Cir. 2005), in interpreting § 2254(e)(2)'s opening clause in a manner that examines a petitioner's diligence according to the availability of the legal basis for the claim, rather than, as this Court directed in *Williams v. Taylor*, 529 U.S. 420, 433 (2000), the material facts underlying it. Because that interpretation voids § 2254(e)(2)(B) in cases involving claims relying on previously unavailable rules of constitutional law, and that outcome is patently contrary to Congress's intent, this Court should grant certiorari to address the Court of Appeals' flawed construction of § 2254(e)(2).

2. A "cardinal principle" of statutory construction is "to give effect, if possible, to every clause and word of a statute," *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted), and the Eighth Circuit and the Fourth Circuit's interpretation of § 2254(e)(2)'s opening clause violates that principle by voiding § 2254(e)(2)(B) in cases where Congress clearly intended it to apply – those in which the factual basis of a claim was not developed during

State court proceedings because "the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2254(e)(2)(A)(i). According to the Court of Appeals' interpretation, petitioners who failed to develop the factual basis of a claim relying on a previously unavailable rule of constitutional law would never come within the ambit of § 2254(e)(2) at all, and, thus, would not be required to also show that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

3. The Court of Appeals' construction of § 2254(e)(2) is flawed because it extends the diligence inquiry outlined in *Williams v. Taylor*, 529 U.S. 420, beyond its intended limits. While this Court held in *Williams* that "[u]nder the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel," 529 U.S. at 432, it did not interpret the opening clause's diligence inquiry to account for the availability of new constitutional rules during State court proceedings. Indeed, the Court limited the diligence inquiry to examining the extent of a petitioner's effort to develop the material facts of his claim, as opposed to whether the lack of any effort should be excused because the legal basis for the claim, or the facts themselves, were

ultimately unavailable. *Williams*, 529 U.S. 435 ("Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court, it does not depend . . . upon whether those efforts could have been successful"). Rather than in the opening clause of § 2254(e)(2), the circumstances excusing a lack of effort to develop the facts underlying a claim are accounted for in § 2254(e)(2)(A)(i) and (A)(ii). As this Court recognized, "in [those] two parallel provisions Congress has given prisoners who fall within § 2254(e)(2)'s opening clause an opportunity to obtain an evidentiary hearing where the legal or factual basis of the claims did not exist at the time of the state-court proceedings." *Williams*, 529 U.S. at 436. The Courts of Appeals in the Eighth and Fourth Circuits, however, conflate § 2254(e)(2)'s opening clause with § 2254(e)(2)(A)(i) by interpreting its diligence inquiry in a manner that examines the availability of the legal basis for the petitioner's claim. By construing § 2254(e)(2)'s opening clause in that manner, the Eighth Circuit in *Sasser*, and the Fourth Circuit in *Walker*, directly conflict with *Williams*, as well as the plain language of § 2254(e)(2).

4. As a result of its flawed construction of § 2254(e)(2)'s opening clause, the Eighth Circuit has held, in further conflict with *Williams*, that Sasser, who acknowledged that his state trial and post-conviction counsel failed to diligently develop available facts underlying his *Atkins* claim in state court,

did not come within the ambit of § 2254(e)(2), and, thus, was entitled to an evidentiary hearing despite his failure to satisfy § 2254(e)(2)(B). Because it focused § 2254(e)(2)'s diligence inquiry exclusively on the availability of the legal basis for Sasser's *Atkins* claim, the Eighth Circuit dismissed as "irrelevant" the availability of the same claim under Arkansas law, *see* Ark. Code Ann. § 5-4-618, which, if raised during State court proceedings, most assuredly would have developed the facts underlying Sasser's purportedly novel Eighth Amendment claim. *See Atkins v. Virginia*, 536 U.S. 304, 314, 317, n.22 (2002) (leaving the task of developing appropriate ways to enforce the Eighth Amendment prohibition to the states, and noting that existing statutes, including Arkansas's, generally conform to the clinical definitions of mental retardation). Indeed, Sasser acknowledged as much in his successive application, asserting that "there [was] ample evidence of [his] mental retardation that was available at the time of the original trial and sentencing proceedings," and, consequently, his trial counsel was ineffective for failing to develop evidence to support his Eighth Amendment claim, as well as a mitigating circumstance during the penalty phase of his trial. *Sasser v. Norris*, No. 00-4036, Docket Entry No. 48, Petitioner's Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief, at 13-15, 16-23 (W.D. Ark. Sept. 3, 2004); *see also* Appendix at 12 (observing that Sasser's ineffective-assistance-of-counsel claim "flatly contradicts" his argument that his failure to pursue the retardation issue should be excused because it was previously

unavailable). Sasser further asserted that, in light of the information available, his post-conviction counsel was "ineffective" for failing to "meaningfully raise and litigate" his Eighth Amendment claim, as well as his ineffective-assistance-of-counsel claim. *Sasser v. Norris*, No. 00-4036, Docket Entry No. 48, Petitioner's Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief, at 15, 23 (W.D. Ark. Sept. 3, 2004). Sasser acknowledged, in other words, the precise lack of diligence that this Court held would trigger application of § 2254(e)(2)'s opening clause, *Williams*, 529 U.S. at 432, 438-40, and, yet, because of the Eighth Circuit's flawed construction, he need not, as other negligent petitioners must, show that he can satisfy § 2254(e)(2)(B). Because that result is in direct conflict with *Williams* and the statute, this Court should grant certiorari to correct the Court of Appeals' flawed construction of § 2254(e)(2)'s opening clause.

II. The Eighth Circuit's decision that the district court must hold an evidentiary hearing on Sasser's *Atkins* claim based solely on the facts alleged in the petition is directly contrary to *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Habeas Corpus Cases Under Section 2254.

1. Compounding its error regarding the construction of § 2254(e)(2)'s opening clause, the Eighth Circuit remanded the case to the district court for an evidentiary hearing based solely on the facts alleged

in Sasser's petition, rejecting the district court's previous attempts to expand the record to determine whether Sasser's *Atkins* claim actually warranted a hearing. According to the Eighth Circuit, Sasser was entitled to a hearing "simply by virtue of 'alleging that he is mentally retarded as *Atkins* defines that condition'" Appendix at 11-12 (quoting *Simpson*, 490 F.3d at 1035), and, despite the district court's apparent desire that he do so, Sasser was "not obligated to expand the record with additional evidence showing that he was entitled to an evidentiary hearing." Appendix at 11. Because that decision directly conflicts with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Habeas Corpus Cases Under Section 2254, this Court should grant certiorari to address the Eighth Circuit's disregard for the district court's authority to expand the record to determine whether Sasser's *Atkins* claim warrants an evidentiary hearing.

2. On September 28, 1976, Congress adopted the Rules Governing Habeas Corpus Cases Under Section 2254, making them applicable to all petitions filed "on or after February 11, 1977." Act of Sept. 28, 1976, PL 94-426, 90 Stat. 1334 (1976). Among them, Rule 6 authorizes discovery "for good cause," 28 U.S.C. § 2254 Rule 6(a); Rule 7 allows district courts to "direct the parties to expand the record by submitting additional materials relating to the petition," 28 U.S.C. § 2254 Rule 7(a); and Rule 8 requires district courts to "review the answer, any transcripts and records of state-court proceedings, and *any materials*

submitted under Rule 7 to determine whether an evidentiary hearing is warranted." 28 U.S.C. § 2254 Rule 8(a) (emphasis added). In *Allison*, moreover, this Court recognized that not "every set of allegations not on its face without merit entitles a habeas corpus petitioner to an evidentiary hearing," 431 U.S. at 80, and, in addition to the summary judgment procedure available under Rule 56 of the Federal Rules of Civil Procedure, Rules 6 and 7 collectively authorize district courts to "employ a variety of measures in an effort to avoid the need for an evidentiary hearing." *Id.* at 81; *see also Porter v. Gramley*, 112 F.3d 1308, 1317-18 (7th Cir. 1997) (observing that, in light of *Allison* and the Habeas Rules, *Townsend v. Sain*'s requirement of a hearing on disputed facts "cannot be taken literally") (internal quotations marks omitted).

3. Nevertheless, as though it was unaware of these authorized measures, the Eighth Circuit dismissed the district court's use of them as "'a remand procedure' crafted by the district court," and held that because the facts that Sasser asserted in support of his *Atkins* claim could survive dismissal, the district court *must* hold an evidentiary hearing to adjudicate the claim. That holding is plainly contrary to *Allison* and the Rules Governing Habeas Corpus Cases Under Section 2254, and, thus, even if the Court agrees that § 2254(e)(2) does not apply to Sasser's *Atkins* claim, it should nevertheless grant certiorari to correct the Eighth Circuit's blatant disregard of a district court's authority to expand the record to determine whether an evidentiary hearing is warranted.

III. In conflict with the Sixth Circuit and *Day v. McDonough*, 547 U.S. 198 (2007), the Eighth Circuit's decision evades the mandatory statute of limitations imposed on second and successive petitions by 28 U.S.C. § 2244(b)(4).

1. In conflict with AEDPA's plain restriction on the district court's authority to adjudicate the merits of an untimely, second claim, the Eighth Circuit held that when such a claim satisfies 28 U.S.C. § 2244(b)(2)(A), a district court has the option, but no duty, to consider the timeliness of the petition before it must hold a hearing on the claim and adjudicate the merits, unless the State raised the limitations issue in the district court. Having adopted Sasser's erroneous assertion that the State did not raise the limitations issue at any time before adjudication in the district court, the Eighth Circuit further held, in conflict with *Day v. McDonough*, 547 U.S. 198, 206 (2006), that because the State had not raised the limitations issue at any point in the district court, the appellate court did not have discretion to consider the fully-briefed limitations issue as an alternative basis to affirm the decision of the district court.

2. It is a settled rule that statutory interpretation begins with the plain language of the statute. *E.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). In plain terms, AEDPA requires in 28 U.S.C. § 2244(b)(4) that "[a] district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed

unless the applicant shows that the claim satisfies the requirements of this section." In contrast, 28 U.S.C. § 2244(b)(3)(C) permits a court of appeals to authorize the filing of a second or successive application "only if it determines that the application makes a prima facie showing that [it] satisfies the requirements of this subsection." The intended reference in § 2244(b)(4) to the entirety of "section" 2244, in contrast to § 2244(b)(3)(C)'s reference to "subsection" (b), is obvious. A district court considering a second or successive petition must dismiss the petition unless the petitioner satisfies the entirety of "section" 2244, including the statute of limitations in subsection (d)(1). Its duty to do so, moreover, is mandatory, not discretionary. Construing similar mandatory language in 28 U.S.C. § 2244(b)(2)(A), this Court said the statute "requires a district court to dismiss a claim . . . unless, as relevant here, the applicant 'shows' that the 'claim [satisfies § 2244(b)(2)(A)]' " and it further noted that "to survive dismissal in district court, the applicant must actually 'sho[w]' that that the claim satisfies the standard." *Tyler v. Cain*, 533 U.S. 656, 660-61 & n.3 (2001).

3. When Congress conditions the federal courts' authority to adjudicate a class of cases on the satisfaction of a limitations statute, as it has in 28 U.S.C. § 2244(b)(4), a litigant may not rely on the forfeiture rule to excuse his lack of compliance with the statute. *See Bowles v. Russell*, 551 U.S. 205, 127 S.Ct. 2360, 2364-66 (2007) (considering courts' power to extend time to file notice of appeal and reasoning that

because Congress, as opposed to a court rule, forbade federal courts from adjudicating an otherwise legitimate class of cases after a certain period of time had elapsed from final judgment, the limitation was more than a simple claim-processing rule subject to forfeiture). *See also Day*, 547 U.S. at 212-13 (Scalia, J., dissenting) (explaining that where the forfeiture rule is inconsistent with the habeas corpus statute, such as where the limitations statute is given "further qualification" or "further elaboration," the forfeiture rule will not apply).

4. The Eighth Circuit's view that 28 U.S.C. § 2244(d)(1) is not encompassed by the mandatory requirements of 28 U.S.C. § 2244(b)(4) and, therefore, is subject to the modified forfeiture rule of *Day*, 547 U.S. 198, conflicts with the Sixth Circuit's view that § 2244(b)(4) encompasses § 2244(d)(1). *See In re McDonald*, 514 F.3d 539, 543-44 (6th Cir. 2008) (holding the limitations issue is not within the purview of the courts of appeals when making an authorization decision pursuant to § 2244(b)(3)(C), but is for the district court to consider pursuant to § 2244(b)(4) following authorization of the claim). It further contradicts the plain text and structure of the statute and is incompatible with Congress's recognized intent, through AEDPA, to "greatly restrict[ ] the power of federal courts to award relief to state prisoners who file second or successive habeas corpus applications." *Tyler,* 533 U.S. at 661; *see also Felker v. Turpin,* 518 U.S. 651, 658 (1996) (noting AEDPA's second-or-successive limitations "impose new conditions on [the]

authority to grant relief"). With its enactment of 28 U.S.C. § 2244(b)(4), Congress made it a petitioner's burden in a successive case to affirmatively demonstrate that his petition satisfies the limitations period or else suffer mandatory dismissal. In successive cases, the limitations issue is not subject to forfeiture, but rather is one of the "new restrictions on successive petitions [that] constitute . . . a restraint on . . . 'abuse of the writ.'" *Id.* at 664. These restrictions were "intended to reduce the universe of cases in which a habeas petition may go forward on a second or successive petition." *In re Minarik*, 166 F.3d 591, 600 (3d Cir. 1999) (referring to substantive restrictions in § 2244(b)(2)). Consideration of the limitations issue, thus, is not only mandatory, but as it relates to the evolutionary abuse-of-the-writ doctrine, it is "preliminary as well as collateral to a decision as to the sufficiency or merits of the allegation itself." *Price v. Johnston*, 334 U.S. 266, 287 (1948), *quoted in McCleskey v. Zant*, 499 U.S. 467, 496 (1991).

5. Despite the structure and plain language of the statute, decisions of the lower federal courts reflect confusion about how 28 U.S.C. § 2244(d)(1) applies in second or successive cases. The Eighth Circuit is the first court of appeals to decide a district court has no obligation to consider a limitations issue in a second or successive proceeding if it is not raised by the State before final adjudication. The Sixth Circuit, on the other hand, has held that the limitations statute falls squarely within the scope of the district court's duties under 28 U.S.C. § 2244(b)(4).

McDonald, 514 F.3d at 543-44. The Third, Fifth, Seventh, Ninth, and Tenth Circuits have recognized that a district court's duty to dismiss under subsection (b)(4) is mandatory and is conditioned on the habeas petitioner's satisfaction of the statute, but so far these Circuits have considered the requirement of subsection (b)(4) only as it applies to the substantive standard in 28 U.S.C. § 2244(b)(2) – which contains its own mandatory dismissal requirement independent of subsection (b)(4). *Goldblum v. Klem*, 510 F.3d 204, 217 (3d Cir. 2007), *cert. denied sub nom. Goldblum v. Kerestes*, 129 S.Ct. 106 (2008); *Brown v. Lensing*, 171 F.3d 1031, 1032 & n.8 (5th Cir. 1999); *Bennett v. United States*, 119 F.3d 468, 469-70 (7th Cir. 1997); *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1164-65 (9th Cir. 2000) (per curiam); *Ochoa v. Sirmons*, 485 F.3d 538, 542 n.5 (10th Cir. 2007) (per curiam). *See also Tyler*, 533 U.S. at 660-61 & n.3 (construing similar language contained in § 2244(b)(2), itself). And finally, the Fifth and Eleventh Circuits also permit the limitations issue to be considered *sua sponte* by the court of appeals as part of the authorization process for second or successive petitions, despite the contrast in language between subsections (b)(3)(C) and (b)(4). *In re Hill*, 437 F.3d 1080, 1083 (11th Cir. 2006); *In re Lewis,* 484 F.3d 793, 796 n.3 (5th Cir. 2007) (per curiam); *but see In re Salazar*, 443 F.3d 430, 434 n.2 (5th Cir. 2006) (per curiam) (questioning whether court of appeals has statutory authority to consider timeliness of underlying claim as part of decision to allow applicant to file successive petition). Because the Eighth Circuit's decision is in

conflict with the plain terms of the statute and with the Sixth Circuit's decision in *McDonald*, and because the lower federal court decisions are in disarray about AEDPA's distribution of responsibilities of the courts and the parties under § 2244(b) and about the scope of § 2244(b)(4), this Court should grant certiorari to settle these issues and to correct the Eighth Circuit's error.

6. Even if the Eighth Circuit is correct in its view that § 2244(b)(4) has no effect on how the limitations period in § 2244(d)(1) is to be treated for a second petition, its decision that it had no discretion to consider the fully-briefed limitations issue as a basis for affirmance conflicts with this Court's decision in *Day* and the Seventh Circuit's decisions in *Cotton v. Grigsby*, 456 F.3d 727, 731 (7th Cir. 2006) (recognizing *Day* and *Granberry v. Greer*, 481 U.S. 129 (1987) afforded courts of appeals discretion to consider limitations issue raised for first time on appeal in first-habeas case), and *Jones v. Hulick*, 449 F.3d 784, 787 (7th Cir. 2006) (recognizing it could consider fully-briefed limitations issue raised for first time on appeal pursuant to *Day* and the rule that a court may affirm on any ground, even one not considered below). In *Day*, this Court approved of a modified rule of forfeiture for the limitations defense, allowing federal courts the discretion to raise the issue *sua sponte* like other threshold barriers to relief such as exhaustion, procedural default, non-retroactivity, and abuse of the writ. While *Day* specifically approved of the situation in which a district court, rather than a court of appeals, addressed the issue

sua sponte, it found support for its holding by looking to, *inter alia*, *Granberry v. Greer*, 481 U.S. 129 (1987) and *Caspari v. Bohlen*, 510 U.S. 383 (1994). In *Granberry*, the Court held federal courts of appeals have discretion to consider the threshold issue of exhaustion for the first time on appeal. In *Bohlen*, the Court emphasized that since the non-retroactivity rule is a threshold bar to relief, this Court had discretion to consider it if the State did not raise it. *Granberry*, 510 U.S. at 389. Significantly, it noted that "if the State does argue [it,]" – as was the case here – "the court *must* apply [the rule] before considering the merits of the claim." *Id.* Inasmuch as *Day*'s holding rests on the premise of federal-court discretion recognized in, *inter alia*, *Granberry* and *Bohlen*, the Eighth Circuit's decision that it had no discretion to consider the limitations issue is directly contrary to *Day*.[2] And, because

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[2] That the Eighth Circuit based its ruling on the State's failure to raise the limitations issue is especially troubling, considering the manner in which the Eighth Circuit made its authorization decision. It did so by issuing a limited order of remand restricting the question to "whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution." Appendix at 49. In the alternative, it granted permission to file a successive petition. *Id.* It is apparent that the district court felt constrained by the mandate rule to adjudicate the *Atkins* claim, rather than to consider any threshold review required by 28 U.S.C. § 2244(b). It recognized the petition as a successive one, but did not review the *Atkins* claim pursuant to the successive-petition provisions in § 2244(b). Rather, it specifically followed the limited remand order when it analyzed the *Atkins* claim, yet it readily applied § 2244(b) and writ-abuse principles to the other claims Sasser raised in addition to the

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the limitations issue not only was raised in the district court, but also was raised and fully briefed in the Eighth Circuit, the court's refusal to consider this threshold bar to relief as an alternative basis for affirmance contravened *Bohlen*, and the black-letter principle that "[t]he prevailing party may . . . assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970). The Eighth Circuit violated these principles and the Congressional restrictions on federal-court authority by remanding Sasser's second habeas case to the district court for a mandatory evidentiary hearing and adjudication on the merits without requiring preliminary consideration of the limitations issue.

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authorized *Atkins* claim. *Compare* Appendix at 24-32 *with* 21-22, 33-37. And, upon considering the State's argument that § 2244(b) and § 2244(d) foreclosed relief and therefore precluded discovery, the district court rejected the argument stating that discovery was necessary to allow Sasser an opportunity to present facts to support relief or a hearing. *Sasser v. Norris,* No. 00-4036, Docket Entry No. 64, Order at 2-3 (W.D. Ark. Feb. 13, 2006). While review of the Eighth Circuit's grant of authorization to file is neither challenged nor subject to review here as a result of 28 U.S.C. § 2244(b)(3)(E), the facts surrounding the authorization may indicate why the district court did not address the limitations issue despite the fact that it was raised, and they are further indication of the Eighth Circuit's flawed understanding of the proper construction and application of § 2244(b), § 2244(d), and § 2254(e) in cases that involve new rules of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

DUSTIN MCDANIEL
Arkansas Attorney General

KELLY HILL*
Senior Assistant
Attorney General

LAUREN ELIZABETH HEIL
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-8068

**Counsel of Record*