No. 07-1594

In the

Supreme Court of the United States

JOSE ALFREDO RIVERA,
Petitioner,
v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

BRIEF IN OPPOSITION

GREG ABBOTT
Attorney General of Texas

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

KENT C. SULLIVAN
First Assistant
Attorney General

* KATHERINE D. HAYES
Assistant Attorney General
Postconviction Litigation Division

ERIC J. R. NICHOLS
Deputy Attorney General
for Criminal Justice

Texas Attorney General's Office
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 936-1400; (512) 320-8132 fax

* Counsel of Record

ATTORNEYS FOR RESPONDENT

This is a capital case.

QUESTIONS PRESENTED

Under AEDPA, federal habeas petitioners face a strict, one-year filing period for asserting claims based on *Atkins v. Virginia,* 536 U.S. 304 (2002). On the last day of the limitations period, Petitioner Jose Alfredo Rivera raised an *Atkins* claim in state court. After the claim was rejected by several courts, the Fifth Circuit granted authorization for Rivera to file a successive habeas petition. 28 U.S.C. § 2244(b)(3). Rivera failed to file his successive writ in a timely manner and Respondent Quarterman moved for dismissal. The district court summarily denied the motion, and later granted Rivera habeas relief. On appeal, the Fifth Circuit affirmed the finding of mental retardation; however, it found Rivera's writ untimely and, accordingly, vacated in part and remanded for a determination of whether equitable tolling should apply. *Rivera v. Quarterman*, 505 F.3d 349 (5th Cir. 2007). After his request for rehearing was denied, Rivera petitioned this Court seeking to circumvent the plain language of AEDPA:

1. Does a motion for authorization in the court of appeals that is accompanied by a proposed habeas petition satisfy 28 U.S.C. § 2244(d)'s statute of limitations?

2. Does a finding of mental retardation make Rivera "actually innocent" of the death penalty, and render the one-year statute of limitations in 2244(d)(1)(C) inapplicable?

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On the one-year anniversary of the Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) – and with no additional time remaining on AEDPA's limitations period for raising such claims, 28 U.S.C. § 2244(d)(1)(C) – Rivera[1] applied for state habeas relief asserting that he is mentally retarded. Although unsuccessful, the successive state-court proceedings statutorily tolled the *Atkins* filing deadline through August 6, 2003. 28 U.S.C. § 2244(d)(2). That same day, the Fifth Circuit granted authorization for Rivera's successive petition, and stayed his execution. 28 U.S.C. § 2244(b)(3). Despite needing to file by the following day or face being time-barred, Rivera waited five days before filing his successive petition in the appropriate district court. The Director moved for dismissal, which was denied. Following two evidentiary hearings, the district court found Rivera mentally retarded and granted habeas relief. *Rivera v. Dretke*, No. B-03-139 (S.D. Brownsville); App. 32-108.[2] While the Fifth Circuit affirmed the finding on mental retardation, it also found Rivera's petition was indeed untimely. *Rivera v. Quarterman*, 505 F.3d 349, 353-54, 361-63 (5th Cir. 2007); App. 5-9, 24-31. The court then vacated in part and remanded for an evidentiary hearing, findings, and a ruling on equitable tolling, and later denied Rivera's motion for rehearing. App. 31, 114-15.

Rivera now seeks review of the lower court's decision to vacate and remand. However, the Fifth Circuit's remand provides Rivera with an avenue for

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[1] Respondent Quarterman is referred to herein as "the Director."

[2] "App." refers to the appendix accompanying Rivera's petition for writ of certiorari, whereas "Cert. Pet." denotes Rivera's actual petition.

relief which, if granted, would excuse his failure to timely file his petition and moot both the questions presented. In any event, there is no circuit conflict that warrants review concerning the timeliness of Rivera's petition or the existence of an "actual innocence" exception to AEDPA's statute of limitations. Because Rivera fails to show any extraordinary circumstance, his petition for writ of certiorari should be denied with prejudice.

STATEMENT OF THE CASE

I. Facts of the Crime

Rivera's guilt is not disputed. The evidence supporting the underlying capital-murder conviction was succinctly summarized in a prior opinion:

> On July 10, 1993, the body of Luis [Blanco][3] was discovered floating face down in a resaca[4] located in Lincoln Park in Brownsville, Texas. His shorts and tennis shoes were found in the water near his body. A ligature created from the waistband of his underwear was tied around his neck and the police observed signs that he had been sexually molested. Shortly thereafter, police took Veronica Zavala, a neighbor of the Blanco family, into custody. She gave a statement implicating [Rivera] in the murder and he was then also

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[3] Parts of the state court record referred to the victim as Daniel Luis Blanco.

[4] A resaca, or an oxbow lake, is a type of waterway that resembles a canal or small river. Resacas can be spotted throughout Brownsville and the Rio Grande valley.

> taken into custody. After tendering two somewhat contradictory written statements to law enforcement officials, Rivera personally led Brownsville police officers on a guided tour of the crime scene, which was captured on film for presentation to the jury. Rivera told officers about how he had encountered Zavala, who was babysitting Luis, while walking through Lincoln Park in the middle of the afternoon. They began to talk and soon thereafter began ingesting cocaine. Subsequently, they had sexual relations with each other and then decided to rape the young victim. After sexually assaulting Luis, they used his underwear to strangle him and then dumped his body into the nearby resaca.

App. 33-34.

II. Procedural History

In May 1994, Rivera was convicted and sentenced to die for murdering three-year-old Luis Blanco during the course of an aggravated sexual assault. App. 108-12. On direct appeal, the Court of Criminal Appeals affirmed Rivera's conviction and sentence, *Rivera v. State*, No. 71,916 (Tex. Crim. App. Mar. 6, 1996) (unpublished), and Rivera did not seek certiorari review.

Rivera's initial state habeas application was denied. *Ex parte Rivera*, No. 27,065-01 (Tex. Crim. App. Dec. 16, 1998) (unpublished). His federal habeas petition was denied, *Rivera v. Johnson*, No. B-99-123 (S.D. Tex.) (unpublished 2001), as was Rivera's request for a certificate of appealability ("COA"). The Fifth Circuit also denied COA, *Rivera v. Cockrell*, No. 01-41317 (5th

Cir. Nov. 27, 2002) (unpublished per curiam), and Rivera did not seek certiorari review. The convicting court then scheduled Rivera's execution for August 6, 2003.

On June 20, 2003, Rivera filed a second state habeas application, which he supplemented five times, arguing that he is mentally retarded and entitled to relief under *Atkins.* The Court of Criminal Appeals dismissed the writ under Tex. Code Crim. Proc. art. 11.071, § 5(a), finding that Rivera failed to make a prima facie showing of mental retardation. *Ex parte Rivera*, No. 27,065-02, 2003 WL 21752841 (Tex. Crim. App. July 25, 2003) (unpublished). Rivera submitted a suggestion for rehearing on August 1st, but the court ordered that such pleadings are unauthorized under the Texas appellate rules, and declined to reconsider the matter on the court's own initiative. *Ex parte Rivera*, No. 27,065-02 (Tex. Crim. App. Aug. 5, 2003) (unpublished). This Court denied certiorari review on August 6, 2003. *Rivera v. Texas*, No. 539 U.S. 978 (2003).

Meanwhile, on August 5th, Rivera moved the Fifth Circuit for authorization to file a successive federal writ pursuant to 28 U.S.C. § 2244(b), and for a stay of execution. Following a request from the clerk, Rivera's counsel drafted a "Successive Application for a Writ of Habeas Corpus" and faxed it to the court later the same day. On August 6th, the Fifth Circuit denied Rivera's motion, holding that he failed to make a prima facie showing of retardation based on the evidence presented in state court, and that Rivera's *Atkins* claim gained strength by evidence which was never presented until Rivera moved for reconsideration. *In re Rivera*, No. 03-41065 (5th Cir. 2003) (unpublished).

On the afternoon of August 6th – the date of the scheduled execution – Rivera petitioned this Court for an

original writ of habeas corpus and a stay of execution, but the requests were denied. *In re Jose A. Rivera*, 539 U.S. 978 (2003).

Rivera next filed a third state habeas application arguing that he is mentally retarded, yet this time additionally relying on the materials previously submitted in his August 1st suggestion for reconsideration. On August 6th, the Court of Criminal Appeals clarified that it had, in fact, previously considered the materials submitted and arguments made in support of Rivera's suggestion for reconsideration, and had declined to reconsider the matter on the court's initiative. *Ex parte Rivera*, No. 27,065-03 (Tex. Crim. App. 2003) (unpublished). The Texas court then dismissed Rivera's third writ. *Id.*

On August 6th, Rivera filed a second motion for authorization in the Fifth Circuit again seeking leave to proceed on an *Atkins* claim, and asking for review of all the evidence considered by the Texas court during the third state writ proceeding.[5] The Fifth Circuit determined Rivera made a sufficient prima facie showing on the *Atkins* issue, granted authorization, and granted a stay of execution. *In re Rivera*, No. 03-41069 (5th Cir. Aug. 6, 2006) (unpublished).

Five days later on Monday, August 11, 2003, Rivera filed an "Application for a Writ of Habeas Corpus" in the district court. *Rivera v. Dretke*, No. B-03-139 (S.D.

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[5] As he had done in his first § 2244(b) motion for leave, Rivera also sought to raise a free-standing claim of actual innocence. However, unlike the previous proceedings, Rivera never submitted a proposed successive petition. Instead, in the interest of "time and economy," Rivera's motion incorporated the merits briefing from the first motion and attached proposed petition.

Brownsville) at Docket Entry ("DE") 1. The Director moved for dismissal, asserting that Rivera's successive petition is untimely. DE 7 (citing 28 U.S.C. § 2244(b)(4) & (d)(1)(C)). United States District Judge Filemon Vela denied the motion. Following an evidentiary hearing in January 2004, both sides provided briefing and reply briefing. Prior to issuing his opinion, Judge Vela was stricken with cancer and passed away.

In April 2004, the case was transferred to United States District Judge Andrew S. Hanen. The court held a second evidentiary hearing in January 2005, during which all the experts testified and answered questions posed by the court and counsel. Following additional briefing, the district court issued a memorandum opinion on March 31, 2006, finding Rivera mentally retarded, granting habeas relief, and permanently enjoining the Director and the State from executing Rivera. App. 32-107.

On appeal, the Fifth Circuit affirmed the district court's mental-retardation finding but held that Rivera's habeas petition was time-barred and, thus, vacated and remanded for a determination of *inter alia* whether equitable tolling applies. App. 24-30, 5-9, 31. Rivera petitioned for rehearing, which was denied on March 21, 2008. App. 114-15. On June 19, 2008, Rivera petitioned for certiorari review. This opposition follows.

III. Time-bar Arguments Raised Below

Rivera filed a successive state habeas application rasing an *Atkins* claim for the first time on June 20, 2003. Although this writ was dismissed on August 5th, on August 6th, Rivera filed a third state application. State habeas proceedings concluded on August 6, 2003, with the dismissal of this third application. *Ex parte*

Rivera, No. 27,065-03 (Tex. Crim. App. 2003) (unpublished). On the same day, Rivera sought leave and was granted authorization to file a successive federal habeas petition. *In re Rivera*, No. 03-41069 (5th Cir. Aug. 6, 2006) (unpublished).

Five days later on August 11th, Rivera filed his successive petition in the district court. The Director moved for dismissal, asserting that the court lacked jurisdiction to reach the merits after a secondary threshold review, 28 U.S.C. § 2244(b)(4). Alternatively, the Director asserted that Rivera's petition is untimely because, even with statutory tolling through the August 6th conclusion of state-court review, 28 U.S.C. § 2244(d)(2), the petition was filed past the one-year limitations period provided by § 2244(d)(1)(C), and Rivera was not entitled to equitable tolling. Rivera never filed an opposition to the motion. At a status conference in September 2003, United States District Judge Vela denied the motion without argument, or explanation, from Rivera.[6]

On appeal, the Director argued that the court erred in denying his motion to dismiss.[7] In his primary brief,

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[6] After the jurisdictional argument was denied, the Director sought a ruling on the time-bar, to which Judge Vela responded: "Denied. You will preserve your exception. We can revisit those matters." Transcript of Status Conference Proceeding at 4. When Rivera later verified whether the court had denied the motion in its entirety, District Judge Vela responded, "If the State wants to, they can favor me with briefs and the like. I will revisit it. But for right now it stands denied." *Id.* at 11. Because the Director believed he had fully briefed the issue in his original motion, he did not file additional briefing or move the court to reconsider its ruling.

[7] The Director also challenged the finding of mental retardation, and the court's choice of de novo review.

Rivera did not dispute that his federal petition was untimely. Rather, he acknowledged AEDPA's one-year limitations period was statutorily-tolled through August 6, 2003, and that his successive petition was not filed until August 11th. Brief of Petitioner-Appellee at 17. In turn, he asked the Fifth Circuit to equitably toll for the period between the court granting authorization for leave (August 6th) and Rivera's filing in district court (August 11th). *Id.* at 29. As Rivera implored, "Absent equitable tolling, Rivera's AEDPA filing deadline was Thursday, August 7, 2003." *Id.* at 15. Rivera also invited the court create a judicial-exception to AEDPA's limitations period for "actually innocent" petitioners.

However, a few days before oral argument, Rivera asserted for the first time that his petition was *not* time-barred because his § 2244(b) motion with attached proposed petition was was filed in the Fifth Circuit before AEDPA's one-year period expired. Letter at 1.[8] On rehearing, Rivera again advanced his §2244(b) argument, but now fully briefed a new contention – that the Fifth Circuit should have transferred his successive petition to the district court in the "interest of justice." Motion at 11-14 (citing Fed. R. App. P. 22(a), and 28 U.S.C. § 1631). And while Rivera had originally advanced several reasons for equitable tolling, he now informed the Fifth Circuit that a hearing is unnecessary because his successive petition is timely. *Id.* at 1. The Fifth Circuit denied rehearing, explaining that it was bound by circuit precedent to the contrary. App. 114-15.

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[8] On April 23, 2007, the Director filed a Fed. R. App. P. 28(j) letter regarding the applicability of *In re Lewis*, 484 F.3d 793 (5th Cir. 2007). Rivera responded by letter of July 6, 2007, briefly raising his timeliness argument for the first time, and raising two additional cases concerning equitable tolling.

REASONS FOR DENYING THE WRIT

I. Review is Unwarranted Because the Fifth Circuit's Remand Provides Rivera with an Avenue for Relief That, if Granted, Will Moot Both Questions Presented.

Although this Court has reasoned that § 2244(d) is arguably subject to equitable tolling in light of extraordinary circumstances and the prisoner's diligence, the Court has never squarely decided the issue. *Lawrence v. Florida*, 127 S. Ct. 1079, 1085 (2007) (citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 & n.8 (2005)). However, the Fifth Circuit assumed the availability of such tolling and remanded for the district court to conduct an evidentiary hearing, make specific findings, and determine whether it applies in Rivera's case. App. 6-9, 31 (citing *Davis v. Johnson*, 158 F.3d 806, 811 (5th Cir. 1999)).

If Rivera establishes a case for equitable tolling, then his failure to file a timely successive petition would be excused and the questions presented here would be moot. If Rivera is unsatisfied with the district court's decision, or is ultimately unsuccessful on appeal, then he has another avenue available and can raise his *Atkins* claim in a petition for clemency from the Texas Board of Pardons and Paroles. Although Rivera's case presents an unusual situation, the Court has reflected, "We cannot base our interpretation of the statute on an exceedingly rare inequity that Congress almost certainly was not contemplating and that may well be cured by equitable tolling." *Lawrence*, 127 S. Ct. at 1085.

II. The Fifth Circuit Did Not Abuse its Discretion in Deciding That a Proposed Habeas Petition Submitted on Appeal Does Not Stop AEDPA's Filing Deadline.

Rivera contends that the Fifth Circuit erred in relying on *Fierro v. Cockrell,* 294 F.3d 674 (5th Cir. 2002), to reject his argument that the timely filing of a § 2244(b) motion for authorization – accompanied by a proposed petition – is the equivalent of filing an actual federal habeas petition and, thus, satisfies AEDPA's one-year limitations period. Cert. Pet. at 9-14. He also faults the Fifth Circuit for not transferring his proposed petition to the district court in the "interest of justice"so that it would be considered timely. *Id.* at 14-17. These argument are unavailing and do not warrant review.

A. The Court's Decision in *Fierro* Forecloses Rivera's Statute-of-limitations Argument.

There is no AEDPA provision or Supreme Court precedent which supports Rivera's argument. As a result, the Fifth Circuit correctly relied on its own precedent in considering, and rejecting, Rivera's argument on rehearing. App. 115 (citing *Fierro*); *see also* App. 6 n. 5 (same). There, the court held that "a motion for authorization to file a successive petition is not itself an 'application for a writ of habeas corpus'" and "the filing of such a motion does not satisfy the one-year statute of limitations." *Fierro*, 294 F.3d at 680-81. Rather, it is merely a preliminary motion. *Id.* at 681; *see Woodford v. Garceau,* 538 U.S. 202, 205-08 (2003) (distinguishing preliminary motions from habeas applications for AEDPA purposes).

Rivera contends that *Fierro's* holding is limited to those petitioners who file bare motions for authorization

whereas in his case, his motion was accompanied by a proposed habeas petition. Cert. Pet. at 10. However, it is distinction without a difference, because the analysis underlying *Fierro* holds true even if the motion includes all the essential elements of the habeas petition, *Fierro*, 294 F.3d at 681, or in Rivera's case, where the motion is actually accompanied by the proposed petition.

The *Fierro* decision draws its support initially from the language of AEDPA. For example, the AEDPA provision governing successive petitions "implicitly recognizes a distinction between a motion for authorization and an application for a writ of habeas corpus":

> Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

Fierro, 294 F.3d at 680 (citing 28 U.S.C. § 2244(b)(3)(A)); *see also* 28 U.S.C. § 2244(b)(3) (court of appeals "may authorize the filing of a second or successive application" if petitioner makes requisite showing). Not only does the statute contemplate that the actual habeas application itself will be filed in the district court, but the rules of appellate procedure "explicitly require" such filing. *Fierro*, 294 F.3d at 680 (citing Fed. R. App. P. 22(a)). Moreover, § 2244(d)(1)'s statute of limitation expressly applies "to an *application* for a writ of habeas corpus" (emphasis added), not to a preliminary § 2244(b) motion.

Further support for *Fierro*'s holding is found in cases addressing the applicability of AEDPA which have similarly concluded that a habeas case is not "pending"

until the actual habeas petition is filed in federal court. *Woodford*, 538 U.S. at 210; *Fierro*, 294 F.3d at 680 (citing *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997), and *Nobles v. Johnson*, 127 F.3d 409, 413-14 (5th Cir. 1997)). As a result, only a successive habeas petition lodged or filed in the district court by August 7, 2003, would have sufficed in Rivera's case. *Fierro,* 294 F.3d at 680 & n.10 (citing *Artuz v. Bennett,* 531 U.S. 4, 8 (2000), and Fed. R. App. P. 22). Rivera did not attempt to comply with this well-established precedent and, thus, the Fifth Circuit correctly found his petition time-barred. App. 5-9.

Although Rivera argues that *Fierro* is not controlling, he is mistaken. Cert. Pet. at 10. He also insists that another Fifth Circuit panel "seemed to intimate" that the timely filing of a § 2244(b) motion accompanied by a habeas petition would suffice for AEDPA's statute of limitation purposes. Cert. Pet. at 11-12 (citing *In re Lewis, supra*). He is mistaken. As the Fifth Circuit explained in denying rehearing, *Lewis* did not analyze this issue[9] and Rivera's panel was bound by *Fierro* in the absence of any intervening en banc or Supreme Court decision to the contrary. App. 115 (citing *United States v. Treft*, 447 F.3d 4321, 425 (5th Cir.

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[9] In *Lewis*, the Fifth Circuit included in a "summary of significant dates," that "On December 8, 2006, Lewis's motion [for authorization] was filed with this court." 484 F.3d at 796. Later, the court stated Lewis's "application" was not filed until December 8, 2006, and as a result, is barred by AEDPA's statute of limitations and must be denied unless he is entitled to equitable tolling. *Id.* at 796. This statement is arguably erroneous because a proposed habeas petition is never "filed" in the circuit court as an independent pleading, and only serves the function of an exhibit or attachment to the motion seeking authorization. In any event, the Fifth Circuit denied authorization "because the motion is time-barred." *Id.* at 798.

2006)). As explained above, Rivera cites no such authority – and the Director is aware of none – which the court failed to consider.

Alternatively, Rivera argues that a circuit conflict exists that requires resolution by the Court. Cert. Pet. at 13-14. Rivera points to *Liriano v. United States*, 95 F.3d 119 (2d Cir. 1996), *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997), and *Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000), as evidence that at least three other circuits have considered whether a request for authorization will satisfy the statute of limitations and, thus, his own petition should be considered timely. There is no circuit split where, at best, only one case offers a holding, but it is easily distinguishable from Rivera.

In *Liriano,* a pro se petitioner filed a 28 U.S.C. § 2255 motion in the district court just two months after AEDPA's amendments, unaccompanied by the required § 2244(b)(3) motion. The Second Circuit held that the proper procedure in such instance is for the district court to transfer the motion (or § 2254 petition) and the movant (or petitioner) would seek authorization from the circuit court or face an order denying leave. *Liriano,* 95 F.3d at 123. In dictum, the court suggested that, depending on the delay occurring before a petitioner files his application and motion in the circuit court, an issue "could be presented" whether only the later application would be considered in determining the applicant's compliance with the applicable one-year limitations period." *Id.* at 122-23. No holding was offered, and the court was only dealing with a hypothetical proposition.

Similarly, in *Easterwood*, 213 F.3d at 1324, the Tenth Circuit offered no holding, but simply assumed without explanation that AEDPA's limitations period tolled during the time a pro se petitioner's request to file

a successive petition was pending in the circuit court.

The only holding comes from the Sixth Circuit, but the case differs from Rivera's. In *Sims*, 111 F.3d at 47, the court faced a pro se petitioner who (just three months after AEDPA's enactment) filed a successive § 2255 motion to vacate without having received the necessary authorization under § 2244(b)(3). There, the court held that when a prisoner either seeks authorization directly from the district court or files his successive application without leave, then the court shall transfer the document to the circuit court and deem it filed for § 2244(d) purposes when it was given to prison authorities for mailing. *Id.* (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988) (pro se inmate's notice of appeal was filed at moment of delivery to prison authorities for mailing)).

In contrast, Rivera moved for authorization from the Fifth Circuit, not the district court, and therefore Rivera had no application to deem filed. Also, Rivera's motion was properly filed with the circuit court which had jurisdiction to consider his request, so no transfer was necessary. While Sims was pro se, Rivera was represented by court-appointed federal habeas counsel who investigated and presented his *Atkins* claim. And while Sims may have been unfamiliar with AEDPA's requirements when he filed his successive § 2255 motion in July 1996, Rivera's § 2244 motion was filed by counsel in August 2003, over seven years after AEDPA's enactment. Considered together, Rivera's reliance on these cases is unavailing, and fails to demonstrate any conflict requiring this Court's resolution.

B. The Court Had No Authority to Transfer Rivera's Unfiled Proposed Habeas Petition.

Rivera asserts that his petition should be considered timely because the Fifth Circuit could have transferred his proposed habeas petition to the district court in the "interests of justice." Cert. Pet. at 15-17. He petitions the Court to "resolve the confusion in the courts below" concerning whether a time-bar can be avoided by timely filing a § 2244(b) motion and proposed petition in the circuit court instead of filing the actual § 2254 habeas petition in the district court. Cert. Pet. at 17. There is no confusion in the circuit courts, and Rivera's attempt to shift the blame to the Fifth Circuit for his untimely petition should be rejected out of hand.

As an initial matter, the Court arguably lacks jurisdiction to consider this claim. In order to properly invoke the jurisdiction of this Court, it is crucial that a federal question not only be raised in prior proceedings, but that it be raised at the proper point. *Beck v. Washington,* 369 U.S. 541, 550-54 (1962); *Godchaux Co., Inc. v. Estopinal,* 251 U.S. 179, 181 (1919). A claim first raised on rehearing "comes too late unless the court actually entertains the petition and passes upon the point." *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Godchaux Co.,* 251 U.S. at 181. It was not until Rivera moved for rehearing that he actually fully briefed this issue. Although the Fifth Circuit did entertain Rivera's complaint that *Fierro* is distinguishable, the court denied rehearing without commenting on the "interest of justice" argument. *See* App. 114-15. Even if the Court has jurisdiction, Rivera's claim does not warrant certiorari review.

Rivera initially relies on *In re Wilson*, 442 F.3d 872 (5th Cir. 2006), as authority enabling the Fifth

Circuit's transfer. Cert. Pet. at 14-16. According to Rivera, *Wilson* stands for the proposition that an unauthorized successive petition filed in the district court within the one-year limitations period can be transferred to the circuit court and considered timely. *Id.* (citing 28 U.S.C. § 1631). In *Wilson*, the court noted that if the district court had transferred, rather than dismissed, the unauthorized application, then the date of filing would have related back to the date of the initial timely filing in district court. *Wilson*, 442 F.3d at 874 n. 3.

In Rivera's case, there was no petition in the district court which required transfer. And the only pleading before the Fifth Circuit was Rivera's § 2244(b)(A) motion for authorization and for stay of execution, which the court certainly had jurisdiction to consider. *E.g.*, 28 U.S.C. § 2244(b)(3)(B) (motion shall be determined by a three-judge panel); § 2244(b)(3)(D) (court of appeals shall grant or deny the authorization). Although Rivera's motion was accompanied by a proposed habeas petition, that petition was never filed in the Fifth Circuit as a separate document, but simply served the function of an exhibit or attachment for determining whether Rivera made a prima facie showing on his *Atkins* claim. *See* 28 U.S.C. § 2244(b)(3)(C) (court of appeals may authorize filing of successive application only if it determines that the application makes a prima facie showing).

Rivera additionally relies on statutory law and federal appellate rules as authority for the Fifth Circuit to have transferred his petition. Cert. Pet. at 15-16 (citing 28 U.S.C. § 1631, and Fed. R. App. P. 22(a)). According to Rivera, a circuit conflict exists because at least two circuits utilize 28 U.S.C. § 1631 for transferring cases from the district court when an unauthorized

petition is filed. *Id.* at 16 (citing *In re Sims*, 111 F.3d at 47, and *Liriano*, 95 F.3d at 123). Rivera is mistaken because neither the statutory provision or appellate rule is applicable to this case.

Specifically, 28 U.S.C. § 1631 governs transfers to cure want of jurisdiction, and provides that whenever a civil action *is filed in a court* and that court later finds there is a want of jurisdiction, the court shall transfer the case to the appropriate court. In the habeas context, such transfer is appropriate because "§ 2244(b)(3)(A) acts as a jurisdictional bar to the district court's asserting jurisdiction over any successive habeas petition until [the circuit court] has granted the petitioner permission to file one." *United States v. Key*, 205 F.3d 773, 774 (5th Cir. 2000). Accordingly, the Fifth Circuit has affirmed the transfer of successive motions or petitions filed in the district court without prior authorization.[10] Thus, there is no confusion over this provision or conflict requiring resolution in this Court.

In contrast, Rivera had no unauthorized petition filed in district court, and his successive petition was never filed in the Fifth Circuit (nor could it be). Therefore, the courts had nothing to transfer. For the same reason, Rivera's argument is not supported by Rule

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[10] *E.g., Henderson v. Haro*, 282 F.3d 862,863 (5th Cir. 2002) (affirming transfer of successive § 2255 motion); *In re Smith*, 142 F.3d 832, 833-34 (5th Cir. 1998) (affirming transfer of fourth habeas petition); *In re Colburn*, 65 Fed.Appx. 508, 2003 WL 1922929 at *2 (5th Cir. 2003) (unpublished) (affirming transfer of motion for stay which was construed as successive petition); *United States v. Ruiz*, 51 Fed.App. 483, 2002 WL 31319400 at *1 (5th Cir. 2002) (unpublished) (affirming transfer of Fed. R. Civ. P. 60(b) motion because it represented a successive petition requiring prior authorization).

22 of the Federal Rules of Appellate Procedure, which provides only that an application for writ of habeas corpus *made to a circuit judge* must be transferred to the appropriate district court. Cert. Pet. at 16 (citing Fed. R. App. P. 22(a)). Again, as explained above, Rivera never applied to the Fifth Circuit for habeas relief.

Finally, because Rivera allowed the one-year filing period to almost completely expire before raising his *Atkins* claim, it was imperative that he promptly file his successive petition in the district court after being granted authorization. He failed to do so, and the Fifth Circuit correctly found his petition time-barred. In light of *Fierro's* holding that a § 2244(b) motion does not stop the limitations period, Rivera should have sought leave of the district court to lodge his successive petition by August 6, 2003. He made no such attempt. The responsibility for Rivera's untimely petition rests solely with Rivera, and not the Fifth Circuit.

III. The Court of Appeals Correctly Rejected Rivera's Arguments That There Should be a Judicially-created Exception to AEDPA's Explicit Limitations Period That Would Excuse his Untimely Filing.

Rivera contends that the lower court's refusal to recognize a miscarriage-of-justice exception to the statute of limitations is in conflict with other circuits, and that the Court should review the instant case in order to resolve it. Cert. Pet. 18-25 (citing *Souter v. Jones,* 395 F.3d 577 (6th Cir. 2005), and *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000)).

Rivera's reliance on *Souter* is misplaced. The actual-innocence exception addressed there is *innocence of the crime itself,* not innocence of the death penalty.

See 395 F.3d at 596 ("If 'it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt,' the petitioner may 'pass through the gateway and argue the merits of his underlying claims.'") (quoting *Schlup v. Delo,* 513 U.S. 298, 327 (1995)). This is a distinctly different kind of actual innocence from innocence of the penalty.[11] *See Sawyer v. Whitley,* 505 U.S. 333, 348 (1992) (actual innocence of the death penalty requires showing, by clear and convincing evidence that, but for constitutional error, no reasonable juror would find petitioner eligible for the death penalty under state law). In fact, the Sixth Circuit itself has explained that there is no such exception for innocence of the penalty. *Ross v. Berghuis,* 417 F.3d 552, 555-57 (6th Cir. 2005). Nor is there an exception for mere legal innocence. *Craig v. White,* 227 Fed.Appx. 480, 481 (6th Cir. 2007) (unpublished per curiam opinion); *Harvey v. Jones,* 179 Fed.Appx. 294, 298-99 (6th Cir. 2006) (unpublished opinion). Thus, no conflict exists that is worthy of certiorari review.

Moreover, in *Gibson* the Tenth Circuit was not considering an actual innocence exception to AEDPA's limitations period. Instead, the court suggested in dictum that *equitable tolling* would be appropriate when a petitioner is actually innocent. *Gibson*, 232 F.3d at 808 (citing *Miller v. Marr*, 141 F.3d 976 (10th Cir. 1998)). And the exception in *Miller* was, again, one for actual innocence of the crime, and not the punishment. *Miller*,

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[11] It is worth noting that Congress explicitly included an actual-innocence exception for successive petitions in § 2244(b)(2)(B) but did *not* do so in § 2244(d). Presumably, Congress did not intend for such an exception to apply. Moreover, if such an exception existed, it should comport with the one in § 2244(b)(2)(B) and be limited to actual innocence of the crime itself.

at 978 (citing *Schlup*, and *Cooper v. Oklahoma*, 517 U.S. 348, 352-56 (1996)).

Furthermore, Congress never created any "actual innocence" exception to the limitations period, even though other parts of AEDPA do refer to that doctrine. Compare 28 U.S.C. § 2244(d)(1) *with* 28 U.S.C. § 2244(b)(2)(B)(ii). Extending the existing innocence exception to permit belated filing in the manner Rivera seeks is contrary to AEDPA's purpose. With the AEDPA's enactment, Congress required state prisoners to face "an explicit limitation period" for filing federal habeas petitions. *Fisher v. Johnson,* 174 F.3d 710, 711 (5th Cir. 1999) (citing *Lonchar v. Thomas*, 517 U.S. 314, 327 (1996)). "AEDPA severely constricts the time period allowed for filing a federal habeas corpus action," compared to pre-AEDPA period when a "prisoner could wait almost a decade" before filing his habeas petition. *Fisher*, 174 F.3d at 713 n.10 (quoting *Flanagan v. Johnson*, 154 F.3d 196, 198 (5th Cir. 1998)). The Fifth Circuit correctly declined Rivera's invitation to engraft a judicial-made exception onto congressional language that is clear on its face.

Not only would a judicial-exception to the limitations period prove entirely unworkable,[12] but extending tolling beyond the circumstances specifically enumerated in the statute risks frustrating the manifest intent of Congress. *See Fierro*, 294 F.3d at 684 (although application of time-bar may "may appear formalistic – particularly in a death penalty case –" federal court must be mindful "that Congress has imposed a strict one-year

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[12] Indeed, if the Court announced an exception, then any inmate could assert an *Atkins* claim (how ever unfounded it may be) at any time, and the statute of limitations would toll regardless.

limitations period for the filing of all habeas petitions under the AEDPA, subject only to the narrowest of exceptions"); *Felder v. Johnson*, 204 F.3d 168, 172 (5th Cir. 2000) (court asked to grant equitable relief from AEDPA's strict limitations period "must be mindful of the framework Congress established in § 2244(d)"); *Cantu-Tzin v. Johnson*, 162 F.3d 295, 299 (5th Cir. 1998) ("when Congress has stepped in to balance the competing interests [of equities in capital cases], as it did in AEDPA, courts should be loath to evade that balance").

"Statutes of limitations[] necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." *United States v. Locke,* 471 U.S. 84, 101 (1985). While recognizing the potential for harsh results in some cases, the Court has reasoned that it is "not free to rewrite the statute Congress has enacted." *Dodd v. United States*, 125 S. Ct. 2478, 2483 (2005). Yet even if the Court is compelled to create a judicial exception, it need not do so in this case. As explained above, the Fifth Circuit's remand provides an opportunity for Rivera to establish a case for equitable tolling but, if unsuccessful, Rivera may seek clemency.

CONCLUSION

For the foregoing reasons, the Court should decline to grant certiorari review.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ERIC J. R. NICHOLS
Deputy Attorney General
For Criminal Justice

EDWARD L. MARSHALL
Chief, Postconviction
Litigation Division

*KATHERINE D. HAYES
AAG, Postconviction
Litigation Division

* Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132

ATTORNEYS FOR
RESPONDENT