No.

IN THE UNITED STATES SUPREME COURT

Joshua D. Baker **PETITIONER**

v.

Eric Chisom and Marcie Bruner,
in their individual capacities **RESPONDENTS**

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael R. Rainwater
Jason E. Owens
Counsel of Record
Jeremy Michael Clifford McNabb
RAINWATER, HOLT & SEXTON, P.A.
6315 Ranch Drive
P.O. Box 17250
Little Rock, AR 72222-7250
Telephone (501) 868-2500
Telefax (501) 868-2505

Counsel for Respondents

QUESTION PRESENTED

Whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, will toll the applicable statute of limitations and "save" an otherwise time-barred claim against a defendant in his/her individual capacity in a subsequent action where (1) the complaint in the initial action, under 42 U.S.C. § 1983, did not specify that the defendant was being sued in his/her individual capacity, (2) the defendant was not actually made a party to the initial action, and (3) the course of the proceedings, including the conduct of the parties and the court in the initial action, did not indicate that the defendant was being sued in his individual capacity?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provisions and Statutes

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eric Chisom and Marcie Bruner, in their individual capacities, respectfully oppose the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Code Ann. § 16-56-126, the "Arkansas Savings Statute," provides, in pertinent part:

> (a)(1) If any action is commenced within the time respectively prescribed in this act, in §§ 16-116-101 -- 16-116-107, in §§ 16-114-201 -- 16- 114-209, or in any other act, and the plaintiff therein suffers a nonsuit, or after a verdict for him or her the judgment is arrested, or after judgment for him or her the judgment is reversed on appeal or writ of error, the plaintiff may commence a new action within one (1) year after the nonsuit suffered or judgment arrested or reversed.

STATEMENT

The Petitioner's underlying allegations in the instant case revolve entirely around incidents that allegedly occurred in mid-August, 2002. Pet. App., p. 32a, ¶ 8. The Complaint in this case, however, was not filed until September 22, 2005, well over three (3) years after the alleged occurrence. *See* Pet. App. 19a.

In the original action, the Petitioner sued the Respondents as follows:

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

JOSHUA D. BAKER PLAINTIFF

v. CASE NO. 5-03-CV-00238 WRW

ERIC CHISOM; MARCIA BRUNER; LARON MEEKS; Individually and in his Capacity as Sheriff of Drew County; and DREW COUNTY QUORUM COURT MEMBERS JOHN THOMPSON, LARKIN BROWN, LOUIS DUNLAP, LAURA SMITH, LARRY EASON, JAMES LASITER, DAMON LAMPKIN, JIMMY POTTER, and DANNY LLOYD, in their official capacities and in their Individual Capacities. DEFENDANTS

Pet. App. 30a.

The Petitioner sought damages, including punitive damages, jointly and severally in the original action against "the Defendants" generally (including the 10 Defendants specifically named in their individual capacities). Pet. App. 35a.

The Respondents answered the Petitioner's above-cited Complaint in the original action in their official capacities only. Pet. App., pp. 39a-46a. Neither the Petitioner nor the district court ever moved for default judgment against the Respondents (or anyone else) in the original action.

After more than 16 months of litigation in the original action, the Respondents moved for summary judgment, arguing, *inter alia*, that the Petitioner had sued the Respondents only in their official capacities. Pet. App. 18a. The Petitioner failed to offer any rebuttal, by proof or argument, to the Respondents' argument that they had not been sued in their individual capacities. *Id.*

At the conclusion of the original action, the District Court found that Respondents Chisom and Bruner had *not* been sued in their individual capacities and that Petitioner Baker would have to

file "new litigation" if he intended to sue them individually:

> Had [Petitioner] Baker not filed a motion for voluntary non-suit, the Court would have given Baker the opportunity to amend the complaint [in order to add Chisom and Bruner, in their individual capacities, as Defendants] to make it clear and unambiguous that he was suing Chisom and Bruner in their individual capacities.
>
> **********
>
> In the event that Baker files new litigation against Chisom and Bruner, [the Defendants'] attorneys will be able to use the [discovery] answers ... that have been developed in this case.

Pet. App. 4a-5a, 20a-21a.

This Court issued its above-cited Opinion and Order, along with its Judgment in the original action on October 12, 2004, leaving Petitioner Baker more than 10 months to file "new litigation" within the prescribed statutory period against Chisom and Bruner in their individual capacities. Pet. App. 5a. Petitioner failed to do so and instead filed this action more than a month after the running of the statutory period. *Id.*

On September 22, 2005, when Petitioner finally did file suit against the Respondents in their individual capacities (well after the expiration of the applicablelimitations period), the District Court re-affirmed its finding from the original action when it found (again) that Eric Chisom and Marcie Bruner were *not* sued in their individual capacities in the original action, that the tolling effect of the "Arkansas Savings Statute" thus did not apply, and that Petitioner's claim(s) against the Respondents in their individual capacities should therefore be dismissed. Pet. App. 15a-26a. The Petitioner appealed and the Eighth Circuit Court of Appeals affirmed the order of the district court. Pet. App. 1a-14a.

REASONS FOR DENYING THE PETITION

The dispositive question in this case is whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, should have applied to toll the applicable statute of limitations and "save" the Petitioner's otherwise time-barred claim(s) against the Respondents in their individual capacities. This dispositive question, largely ignored by the Petitioner in this case, presents a disputed question of Arkansas law that must be answered in the negative based on applicable state law and the facts of the case, namely, (1) that the complaint in the initial action, under 42 U.S.C. § 1983, did not specify that the Respondents were being sued in their individual capacities, (2) that the Respondents were not actually subjected to the jurisdiction of the court in the initial action in their individual capacities, and (3) that the course of the proceedings, including the conduct of the parties and the court in the initial action, did not indicate that the Respondents were being sued in his individual capacity. In the end, the question presented by the Petitioner is not worthy of review under the facts of this case (1) because ruling on Petitioner's question would constitute an improper advisory opinion since the dispositive question -- whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, applies to toll the statute of limitations and "save" Petitioner's otherwise time-barred claim(s) against the Respondents in their individual capacities -- can and should be resolved in the Respondents' favor regardless of the resolution of the question presented by Petitioner and (2) because, even under the "course of proceedings test(s)" urged by the Petitioner, the lower courts' judgments in the Respondents favor still should be affirmed. For these reasons, the Petition for a Writ of Certiorari should be denied.

I. The question presented by the Petitioner is not properly justiciable because, regardless of whether the Respondents were *constructively* named in their individual capacities in the initial suit (or should have been judicially deemed to have been so named), the Respondents were not *actually* made parties to the original suit in their individual capacities and the "Arkansas Savings Statute" is therefore not triggered to toll the otherwise expired statute of limitations.

The Petition for a Writ of Certiorari should not be granted in this case because the issue on which the Petitioner seeks review is not properly justiciable by this Court. It is a well-established doctrine of this Court that the Court will not issue advisory opinions, but will resolve cases only on direct, outcome-determinative questions. *See. e.g., United Public Workers of American (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947) ("[T]he federal courts ... do not render advisory opinions"). When the federal judicial power is invoked to pass upon the validity of actions by the Legislative and Executive Branches of the Government, the rule against advisory opinions implements the separation of powers prescribed by the Constitution and confines federal courts to the role assigned them by Article III. *See Muskrat v. United States*, 219 U.S. 346 (1911). However, the rule against advisory opinions also recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges *precisely framed* and *necessary for decision* from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.' *United States v. Fruehauf*, 365 U.S. 146 (1961) (emphasis added). Consequently, the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a rule consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process. *Flast v. Cohen*, 392 U.S. 83 (1968). The question presented by the Petitioner is neither "precisely framed" nor "necessary for decision" and, thus calls for an advisory opinion.[1]

[1] Even if the Court finds that the question presented by the Petitioner is arguably justiciable, this case is certainly not the "ideal vehicle" for resolving the question, as asserted by the Petitioner (Pet., p. 14) in light of the myriad factual complications and dispositive state law questions in the record. If the problem is indeed "frequently recurring," as also asserted by the Petitioner (Pet., p. 21), then it would certainly behoove the Court to preserve its exceedingly scarce resources until the question is presented in a cleaner record in the future.

Accordingly, the Petition in this case should be denied.

Although barely mentioned in the Petition, *the* dispositive question in this case is not the question presented by the Petitioner, but the question of whether the "Arkansas Savings Statute," Ark. Code Ann. § 16-56-126, applies to toll the statute of limitations and "save" Petitioner's otherwise time-barred claim(s) against the Respondents in their individual capacities. Pet. 3a, 6a (the Eighth Circuit Court of Appeals summarized the individual capacity claim(s) against the Respondents by stating that "unless tolled, the individual capacity claims are time-barred" and ultimately held that "the one-year savings statute did not apply, and these claims [against Respondents in their individual capacities] were properly dismissed as time-barred"). This question is substantially different from the question presented by the Petitioner because the Petitioner's question ignores the fact that the Respondents, in their individual capacities, never *actually* filed an Answer (or other responsive pleading) to the Complaint in the original action and therefore were never *actually* made parties in the first case. In the end, the Petitioner's question -- whether Petitioner's Complaint *should have been* construed (several years after its filing) to have named[2] the Respondents in their individual capacities in the original action -- is not outcome-determinative and, thus, does not warrant a grant of certiorari.

The procedural history of this suit involves two separate Complaints (referred to herein as the "original" Complaint and the "second" Complaint), both asserting allegations arising from incidents that allegedly occurred in mid-August, 2002. The second Complaint, which clearly and

[2] Of course, naming an individual as a defendant in a civil complaint in Arkansas (which involves merely typing his name or a pseudonym onto a document filed with a court, subjecting him to nothing) is quite different and legally distinct from that individual actually becoming a party (which generally involves proper service and the filing of a responsive pleading, subjecting him to the jurisdiction of the court and, depending upon the nature of the case, unlimited liability). *See generally*, Ark. R. Civ. Proc.

unambiguously named Respondents Eric Chisom and Marcie Bruner in their individual capacities, was not filed until September 22, 2005, well over three (3) years after the alleged occurrence and well beyond the applicable statute of limitations. *See* Pet. App. 2a (citing *Morton v. City of Little Rock*, 934 F.2d 180, 182 (8th Cir. 1991); *see also Wilson v. Garcia*, 471 U.S. 261 (1985); *Owens v. Okure*, 488 U.S. 235 (1989). Accordingly, Respondents Chisom and Bruner, in their individual capacities, moved for summary judgment on the basis that the claims against them were time-barred. The District Court for the Eastern District Court of Arkansas granted the Respondent's motion for summary judgment (Pet. App. 15a-26a) and the Eighth Circuit Court of Appeals affirmed (Pet. App. 1a-14a).

In an attempt to avoid the result reached by the District Court and the Court of Appeals, the Petitioner argues, if implicitly, that the "Arkansas Savings Statute," Ark. Code Ann. , should have applied to toll the applicable statute of limitations.

At the outset, it should be noted that Petitioner's argument that the savings statute should apply presents, at best, a disputed question of state law, *see. e.g.*, *Bush v. Gore*, 531 U.S. 98, 123 (2000) (dis. opn. of Stevens, J.) ("[w]hen questions arise about the meaning of state laws ... it is our settled practice to accept the opinions of the highest courts of the States as providing the final answers"), and Arkansas' highest courts have held, in an analogous line of cases, that *actual* (rather than *constructive*) party status is required to trigger the Arkansas Savings Statute and its tolling effect. In those intriguingly analogous cases, the Arkansas Supreme Court and the Arkansas Court of Appeals uniformly held that a decedent's children and other heirs and beneficiaries of her estate, despite being *constructive* or "real parties in interest," could not avail themselves of the tolling effect of the "Arkansas Savings Statute" after the death of the administrator of the estate (where the

administrator was the named Plaintiff in the first case and died beyond the expiration of the applicable limitations period) because they were not *actual* parties to the first lawsuit. *Murrell v. Springdale Memorial Hosp*., 330 Ark. 121, 125-126, 952 S.W.2d 153, 156 (1997); *Sanderson v. McCollum,* 82 Ark. App. 111, 117, 112 S.W.3d 363, 366 (Ark. App. 2003) (citing *Murrell*); *see also Tatus v. Hayes,* 79 Ark. App. 371, 88 S.W.3d 864 (2002) & *Smith v. St. Paul Fire & Marine Ins. Co.*, 76 Ark. App. 264, 269, 64 S.W.3d 764, 768 (2001) (Savings Statute also inapplicable where heirs were Plaintiffs in first suit and administratrix was Plaintiff in second suit). The Eighth Circuit Court of Appeals has held similarly, albeit with regard to claims rather than parties, when it held that the Arkansas Savings Statute applies only as long as the second cause of action is "the same in substance[, rather than form,] as the [original complaint] at the time the latter was nonsuited." *Dillaha v. Yamaha Motor Corp.,* U.S.A. 23 F.3d 1376, 1377 (8th Cir. 1994) (citing *Morgan Distrib. Co. v. Unidynamic Corp.*, 868 F.2d 992, 994 (8th Cir.1989) (second bracketed phrase in original). In the end, the appropriate and dispositive inquiry, under Arkansas law, is not whether the Respondents, in their indivual capacities, *should have been deemed to be* named in the original action, but whether they *actually were* parties to the original action. Since they undoubtebly were not, a grant of certiorari in this case is not warranted.

In its opinion, the Eighth Circuit Court of Appeals concurrently analyzed the questions of the *constructive* and *actual* party status of the Respondents, in their individual capacities. With regard to the Respondents' actual party status, the Court of Appeals noted that all of the defendants other than the Respondents (including 10 other defendants, who unlike the Respondents, *were* specifically and expressly named in their individual capacities in the caption of the first case Complaint) filed an Answer in the first case "in both their individual and official capacities." Pet.

App. 4a. Conversely, the Court of Appeals noted that the Respondents filed separate Answers, "but only in their official capacities." *Id.* [3] "Some months later," after ample time to amend, the defendants in the first case, including the Respondents in their official capacities, moved for summary judgment and argued, in part, that the Respondents were sued only in their official capacities. Pt. App. 4a, 18a. The Petitioner thereafter responded to the summary judgment motion, but offered no rebuttal, in proof or argument, to the Respondent's argument that they had not sued only in their individual capacities. *Id.*

In the end, the Respondents were not named as defendants in the original action in their individual capacities, therefore, they did not respond to the original complaint in their individual capacities. The tolling effect of the "Arkansas Savings Statute" does not apply to "save" an otherwise time-barred claim unless the party sued in the second action was actually made a party to the original action. Accordingly, since the Respondents were never actually made a party to the original action, the time-barred claim(s) against them in their individual capacities in this lawsuit are subject to dismissal, as held by the district court and the court of appeals. As such, certiorari should be denied.

II. The Petitioner's arguments fail because, even under the course of proceedings test urged by the Petitioner, the "Arkansas Savings Statute" would still not apply to toll the statute of limitations and the Petitioner claim(s) against the Respondents would therefore still be time-barred.

In addition to the non-dispositive nature of the Petitioner's presented question, this case is also unworthy of review because the Petitioner cannot satisfy even the more lenient "course of

[3] Although not noted by the Court of Appeals, neither the Petitioner nor the District Court, *sua sponte*, ever moved for or even mentioned default judgment during the 16 months of litigation in the first case, the expected response when a defendant fails to answer a complaint.

proceedings" tests he advocates in his Petition. Petitioner argues, of course, that he can satisfy the course of proceedings test based upon several phrases in his Complaint and upon several pleadings filed the defendants below. In highly revelatory omissions, however, the Petition fails to note (1) that the caption of the Petitioner's initial complaint specifically and expressly named ten (10) other defendants in their individual capacities, but failed to name the Respondents in their individual capacities and (2) that the Respondents never responded to the Petitioner's initial complaint, by Answer or other responsive pleading, in their individual capacities. Petitioner also fails to note that, despite the fact that the Respondents never filed an Answer in their individual capacities in the first suit, Petitioner never moved for default judgment. The district court likewise never even mentioned the issuance of a default judgment *sua sponte*.

In addition to the omissions in his narrative, Petitioner's "course of proceedings" examples also fail. First, Petitioner argues that he named that Respondents "as individual Defendants" in the body of his complaint in the original action. This argument, however, ignores the course of the proceedings it purports to embrace. In addition to the fact that it entirely contradicts the caption of the complaint, it is also belied by the Petitioner's own conduct in the original action. *See supra* (Petitioner never moved for default judgment and failed to offer any rebutting proof or argument to the Respondents' summary judgment assertion that they were named only in their official capacity). Furthermore, the referenced clause in the Petitioner's Complaint is both "ambiguous" and cryptic" and certainly failed to place the Respondents on notice of potential personal liability.

The Petitioner also argues that, because he sought punitive damages in his original complaint and because punitive damages are not generally recoverable against local governmental entities, his complaint must have been against the Respondents in their individual capacities. Pet., p. 15.

Petitioner also argues that, because he alleged joint and several liability in his original complaint and because joint and several liability makes "no sense" as against multiple official capacity defendants who are employees of the same local governmental entity, since such claims are legally duplicative. [4] *Id.* These arguments fail, however, because the referenced punitive damages and joint and several liability allegations were made against the "Defendants" generally, which included ten (10) other defendants who were (unlike the Respondents) specifically and expressly named in their individual capacities in the original complaint. Pet. App. 35a. As such, neither allegation, even under a course of proceedings analysis, indicates an intent to sue the Respondents in their individual capacities (as they might have, for instance, if the Respondents had been the only defendants).

In addition to specific excerpts from the original complaint, Petitioner asserts that the allegations of the original complaint were "grounded" in "individual wrongdoing" rather than "ministerial implementation of a municipal custom or policy that would underlie an official-capacity claim." Petitioner's argument on this point, however, is contradicted by the express language of the original complaint, in which Petitioner, after alleging the purported facts of the case, asserted that "[t]hese acts, omission, and conduct constitute official policies, practice or customs of the defendants, Drew County and Drew County Sheriff, LaRon Meeks." Pet. App. 34a, ¶18.

---

[4] Petitioner's argument regarding his joint and several liability claim is, at best, disingenuous. Petitioner now concedes (in a new attempt to further his course of proceedings argument) that official capacity claims against officials and employees of the same local governmental entity are the same claim, such that it would make "no sense" to pursue multiple official capacity claims against officials and employees of the same local governmental entity (despite the fact that Petitioner did just that in both of the underlying cases). Pet., p. 15. In the second case below, however, subsequent to and despite the District Court's outright dismissal of at least ten (10) other official capacity claims against Drew County in the original action, the Petitioner filed and vigorously pursued the same official capacity claims against the Respondents. Petitioner's previous argument (in direct contradiction to his current argument) on this point imposed substantial costs on both the parties and the courts below. At the very least, Petitioner should not now benefit from his opportunistic about-face.

In addition to the original complaint, the Petitioner also discusses two events in the "course of proceedings" in the original action that purportedly "confirm[ed] that respondents understood that they had been sued in both their official and their individual capacities." First, Petitioner cites to a motion for extension of time filed by the undersigned counsel on behalf of the Respondents "in both their official and their individual capacities." This motion, however, clearly stated that undersigned counsel had "agreed to defend" only "certain of the Defendants in this action." Pet. App. 36a. Undersigned counsel did not agree to defend the Respondents in their individual capacities until several years later when he filed an Answer on their behalf in the second action. Furthermore, the Respondents did not subsequently answer or otherwise respond to Petitioner's Complaint and were never actually made defendants in the original action in their individual capacities. Petitioner also asserts that, because the defendants in the original action asserted the defense of qualified immunity, in their Answers and in their motion for summary judgment, they must have understood the complaint to be made against them in their individual capacities. This is incorrect. With regard to the summary judgment motion, qualified immunity was asserted collectively for all defendants, including ten (10) other defendants who were (unlike the Respondents) specifically and expressly named in their individual capacities in the original complaint. With regard to the Answers, Petitioner fails to note that those Answers were expressly filed by the Respondents only in their official capacities. Pet. App. 39a-46a.

In the end, this case is far from the "ideal vehicle" for resolution of Petitioner's question, in part, because even if the Court accepted the course of proceedings test, the result in this case would not change. Accordingly, the Respondents respectfully request the denial of the Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Eric Chisom & Marcie Bruner, in their Individual and Official Capacities,
Respondents

By: _____

Michael R. Rainwater
Jason E. Owens
Counsel of Record
Jeremy Michael Clifford McNabb
Attorneys for Respondents
RAINWATER, HOLT & SEXTON, P.A.
P.O. Box 17250, 6315 Ranch Drive
Little Rock, Arkansas 72222-7250
Telephone (501) 868-2500
Telefax (501) 868-2505

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served on the following by U.S. Mail on this __ day of May, 2008:

Mr. Wm. C. Plouffe, Jr.
211 North Washington Street
Post Office Box 1537
El Dorado, Arkansas 71730

Ms. Amy Howe
7272 Wisconsin Avenue, Suite 300
Bethesda, MD 20814

Mr. Thomas C. Goldstein
1333 New Hampshire Avenue NW
Washington, DC 20036

Pamela Karlan
559 Nathan Abbott Way
Stanford, CA 94305

_____

Jason E. Owens