No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Andrew Sasser, through the undersigned counsel, asks leave to proceed in forma pauperis.

Mr. Sasser was declared indigent prior to his trial in 1993. He has remained indigent and represented by court appointed counsel since that time. Mr. Sasser was granted leave to proceed in forma pauperis in 1999 before the United States District Court, Eastern District of Arkansas. The Federal Public Defender was appointed and has continued to represent Mr. Sasser since that time.

Because of Mr. Sasser's poverty, he is unable to pay the costs of these proceedings or give security therefor.

Executed on September 11, 2009.

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No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

Brief in Opposition
to Petition for a Writ of Certiorari
to the United States Court of Appeals for the Eighth Circuit

CAPITAL CASE

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STATEMENT OF THE CASE

The Petition for Certiorari contains serious misstatements of both fact and law which directly bear on what issues properly would be before this Court if Certiorari were granted. As such, and in order to comply clearly and fully with Supreme Court Rule 15(2), Respondent Andrew Sasser includes a statement of the case in this Brief in Opposition. Sup. Ct. R. 15(2); *see also Carcieri v. Salazar*, ____ U.S. ___ (2009) (failure to dispute factual assertion was reason to accept fact as true for Court's decision); *Baldwin v. Reese*, 541 U.S. 27 (2004) (a non jurisdictional argument not raised in respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived). As discussed below, contrary to Petitioner Norris's claims, the Petition presents no significant questions regarding the application of AEDPA; Petitioner Norris has reworked the Eighth Circuit's opinion in *Sasser v. Norris*, 553 F.3d 1121 (8th Cir. 2009), to seek review of the Eighth Circuit's proper response to Arkansas's failure to fully implement this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).

The Eighth Circuit's opinion is not in conflict with the decisions of this Court or those of any other circuit courts. It is simply a ruling that, on the facts of this case, an evidentiary hearing must be conducted on the merits of Mr. Sasser's *Atkins* claim, and that any argument that the State might have had regarding the timeliness of Mr. Sasser's second petition was forfeited by the its failure to properly raise it in the district court.

A. The Court of Appeals' Authorization Decision

On June 20, 2002, after Mr. Sasser's first habeas petition had already been dismissed with prejudice by the district court, this Court handed down its decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). On June 18, 2003, while his appeal of the district court's denial of relief was pending, Mr. Sasser filed a Motion for Remand or, in the Alternative, a Motion to File a Second or Successive Habeas Corpus Petition in the Eighth Circuit Court of Appeals. Mr. Sasser attached to his motion a Petition for a Writ of Habeas Corpus Under 28 U.S.C. § 2254, which contained extensive information and exhibits regarding the evidence underlying his *Atkins* claim. Mr. Norris responded to Mr. Sasser's motion, arguing that this Court's decision in *Atkins* did not create a new rule of constitutional law; that despite this Court's prior decision in *Penry v. Lynaugh*, 492 U.S 302 (1989), Mr. Sasser was required to have raised his federal constitutional claim prior to *Atkins*; and that *Atkins* was not retroactive. At no point did Mr. Norris argue the untimeliness of Mr. Sasser's petition.

On August 21, 2003, the Eighth Circuit granted Mr. Sasser's motion to remand, "and to the extent the request for remand [was] the functional equivalent to an application to file a successive habeas petition," granted Mr. Sasser's motion to file a successive petition. *Sasser v. Norris*, No. 02-3101, Doc. 37, Judgment, at 1 (8th Cir. Aug. 21, 2003). The court directed the district court to decide two questions: (1) whether Mr. Sasser is mentally retarded; and (2) whether pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibits his

execution.

Shortly after remand, on August 29, 2003, the district court entered a scheduling order directing Mr. Sasser to file an amended petition and a motion for an evidentiary hearing, and also adding an additional question to the Eighth Circuit's remand order – whether Mr. Sasser had "waived" his *Atkins* claim by not raising a claim in the state courts under a pre-*Atkins* state mental retardation statute. *Sasser v. Norris*, No. 00-4036, Doc. 40, Scheduling Order, at 1 (W.D. Ark. Aug. 29, 2003).

Also on August 29, 2003, Mr. Norris filed a Petition for Rehearing in the Eighth Circuit, arguing *inter alia* that Mr. Sasser had yet to exhaust his *Atkins* claim in the state courts. *Sasser v. Norris*, No. 02-3103, Petition for Rehearing with Petition for Rehearing En Banc (8th Cir. Aug. 29, 2003). Mr. Norris argued that Mr. Sasser's Atkins claim was unexhausted, and that it was procedurally defaulted because of his failure to exhaust. *Id.* Again, Mr. Norris made no argument regarding the timeliness of Mr. Sasser's petition.[1]

On April 22, 2004, the Eighth Circuit issued an amended judgment, directing the district court to first determine whether Mr. Sasser's *Atkins* claim had been

[1]Mr. Norris misstated the record in his petition for rehearing when he represented that Mr. Sasser's federal constitutional mental retardation claim "plainly was available when his first habeas petition was pending at the time that *Atkins* was decided." *Sasser v. Norris*, No. 02-3103, Appellee's Petition for Rehearing at 4-5 (8th Cir. Aug. 28, 2003). This is incorrect. Mr. Sasser's habeas petition was dismissed on May 23, 2003, approximately one month before *Atkins* was decided.

Mr. Norris's decision to file a petition for rehearing and rehearing en banc, a pleading expressly disallowed by 28 U.S.C. § 2244(b)(3)(E), delayed the proceedings in Mr. Sasser's case for approximately eight months.

exhausted and, in the event that a viable state court remedy was identified, to consider holding the remanded Petition in abeyance pending resolution of Mr. Sasser's claim by the state courts. *Sasser v. Norris,* No. 02-3103, Doc. 44, Amended Judgment, at 1 (8th Cir. Apr. 22, 2004).

B. District Court Proceedings Following Authorization

Pursuant to the district court's direction, Mr. Sasser filed an amended petition setting forth his Eighth Amendment mental retardation claim on September 3, 2004. *Sasser v. Norris*, No. 00-4036, Doc. 48, Second Supplemental and Amended Petition (W.D. Ark. Sept. 3, 2004). Again, Mr. Sasser put forward extensive information regarding the evidence underlying his *Atkins* claim. Mr. Sasser specifically requested an evidentiary hearing on the issue of his mental retardation. *Id.* at 31. Mr. Norris filed his Response on November 5, 2004, *Sasser v. Norris*, No. 00-4036, Doc. 51, Response (W.D. Ark. Nov. 5, 2004), and again, Mr. Norris asserted no issues regarding the timeliness of Mr. Sasser's successive petition.

The denial of certiorari in another Arkansas death penalty case, *Engram v. Arkansas*, 545 U.S. 1159 (Aug. 22, 2005), finally made clear that no viable state court remedy existed for Eighth Amendment claims such as Mr. Sasser's, and the parties accordingly began the discovery process before the district court. In his opposition to Mr. Sasser's discovery requests, Mr. Norris for the first time mentioned the timeliness of Mr. Sasser's Petition, incoherently stating that Mr. Sasser "did not present his claim of mental retardation in state court and because

he did not present it in this Court within a year after *Atkins* had been decided and before his initial petition had been dismissed with prejudice, his current petition is barred and there is, therefore, no basis for the leave to conduct discovery." *Sasser v. Norris*, No. 00-4036, Doc. 61, Motion to Preclude Discovery at 6 (W.D. Ark. Jan. 13, 2006).[2] Mr. Norris further argued that Mr. Sasser was not entitled to a hearing because under 28 U.S.C. §§ 2254(b)(2) and (e)(2) he had not presented his mental retardation claim in state court. *Id.* at 4.

On June 14, 2006, the district court issued a scheduling order regarding the completion of discovery and informing Mr. Sasser that any additional motions regarding his mental retardation claim must be filed by August 31, 2006. *Sasser v. Norris*, No. 00-4036, Doc. 65, Scheduling Order (W.D. Ark. June 14, 2006). As noted, Mr. Sasser had previously moved for an evidentiary hearing before the district court, and this request was still pending at the time of the district court's scheduling order. *Sasser v. Norris*, No. 00-4036, Doc. 48, Second Supplemental and Amended Petition (W.D. Ark. Sept. 8, 2004). Believing that he had already amply established his entitlement to a hearing, Mr. Sasser filed no additional motions.

On January 9, 2007, the district court entered an order denying Mr. Sasser's petition without conducting an evidentiary hearing. Pet'r App. at 17-37. The district court first addressed the exhaustion issue, finding that, as Mr. Sasser had no non-futile state remedies available, his *Atkins* claim was exhausted. The court

[2]This particular reference to the statute of limitations, buried in a seven page opposition to Mr. Sasser's discovery motion, went unnoticed by both parties until two days before oral argument in the Eighth Circuit, when Mr. Norris apparently discovered the reference and included it in a response to a 28(j) letter submitted by Mr. Sasser. It appears nowhere in either party's briefing.

then went on to find that the claim was procedurally defaulted because it had not been presented to the state courts during his state post-conviction proceedings.[3] The district court further found that Mr. Sasser had not shown that an exception to the procedural default doctrine applied to his case, and denied relief.

Mr. Sasser filed a Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) on January 23, 2007. *Sasser v. Norris*, No. 00-4036, Doc. 73, Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P 59(e) (W.D. Ark. Jan. 23, 2007). That Motion was denied by the district court on April 18, 2007. *Sasser v. Norris*, No. 00-4036, Doc. 80, Order Denying Motion to Alter Judgment (W.D. Ark. Apr. 18, 2007). Mr. Sasser timely filed his Notice of Appeal on May 17, 2007. On June 11, 2007, the district court granted a certificate of appealability pursuant to 28 U.S.C. § 2253 on two grounds, "Ground 1: Whether this Court was correct in its ruling that Mr. Sasser was not entitled to relief on his claim that his death sentence violates the Eighth and Fourteenth Amendments because he is a person with mental retardation; [and] Ground 2: Whether this Court was correct in its ruling that Mr. Sasser is not entitled to relief on his claim that his death sentence should be vacated because counsel was ineffective for failing to adequately investigate, develop and present mitigating evidence including evidence of mental retardation." *Sasser v. Norris*, No. 00-4036, Doc. 84, Order (W.D. Ark. June 11, 2007).

[3] Mr. Sasser's state post-conviction proceedings concluded in 1999. *See Sasser v. State*, 993 S.W.2d 901 (1999).

C. The Court of Appeals' Decision

On appeal, Mr. Sasser argued to the Eighth Circuit that its prior decision in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *reh'g denied*, 499 F.3d 874, *cert. denied* 128 S.Ct. 1226 (2008), was controlling on the question of whether his *Atkins* claim was procedurally defaulted and mandated reversal. Mr. Sasser further argued that the district court had incorrectly denied his request for an evidentiary hearing, noting that in its prior remand order the Eighth Circuit had specifically directed the district court to conduct an evidentiary hearing and summarizing the detailed factual allegations Mr. Sasser had made in support of his *Atkins* claim. *Sasser v. Norris*, No. 07-2385, Appellant's Brief and Addendum (8th Cir. Dec. 6, 2007).

Mr. Norris's responsive brief focused on attempting to distinguish the factual and procedural circumstances underlying Mr. Sasser's case from those that had been presented to the Eighth Circuit in *Simpson*.[4] Mr. Norris also argued that Mr. Sasser had not met the requirements for filing a successive petition under 28 U.S.C. § 2244(b), in that his petition was untimely under § 2244(d) and his claim did not rely on a new rule of constitutional law under § 2244(b)(2). Mr. Norris argued that

[4]In his Statement of Facts before the Eighth Circuit, Mr. Norris misleadingly and incorrectly quoted a prior pleading filed by Mr. Sasser. Mr. Norris stated that Mr. Sasser "indicated that, although at that point his claim "may [have] be[en] only a theory and not supported by any solid evidence," he nevertheless was entitled to discovery . . . ." *Sasser v. Norris*, No. 07-2385, Brief for Appellee at 3, 39 (8th Cir. Feb. 21, 2008). Mr. Norris gratuitously altered the context of Mr. Sasser's pleading, which actually was not referring to his own claim, but rather quoting this Court's opinion in *Bracy v. Gramley*, 520 U.S. 899 (1997), in a discussion of the good cause prerequisite to the availability of discovery. *Sasser v. Norris*, No. 00-4036, Doc. 60, Motion for Leave to Conduct Discovery at 5 (W.D. Ark. Jan. 13, 2006).

the district court was correct in disposing of Mr. Sasser's claim on procedural default grounds and averred that the district court had given Mr. Sasser ample opportunities to present additional evidence regarding his claim through motions and pre-hearing discovery. At no point in his brief, did Mr. Norris mention or cite, much less argue, the question of the applicability of 28 U.S.C. § 2254(e)(2).

The Eighth Circuit reversed the decision of the district court and remanded for adjudication of the merits of Mr. Sasser's *Atkins* claim. Pet'r App. at 15-16. The court first recognized that it was bound by its prior decision in *Simpson* to find that Mr. Sasser had not procedurally defaulted his *Atkins* claim by failing to present it in state court at a time when the claim did not exist. The Eighth Circuit further held that, although an evidentiary hearing would not necessarily be required in every case, Mr. Sasser had made a specific factual showing that he is mentally retarded under *Atkins* sufficient to require that an evidentiary hearing be conducted on his claim. The Eighth Circuit noted in its opinion:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy' s murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. While *Simpson* may not mandate an evidentiary hearing in every conceivable set of

> circumstances, there is no question the allegations in Sasser's petition are as adequate as Simpson's pleading threshold where the petitioner "alleged that he is mentally retarded as Atkins defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim.

Pet'r App. at 9-10. Nowhere in its opinion does the court cite to § 2254(e)(2) or discuss its application in Mr. Sasser's case.

The Eighth Circuit also addressed the issue of Mr. Norris's failure to properly raise before the district court his defense that Mr. Sasser's petition was barred by the statute of limitations. Applying its controlling decision in *Barnett v. Roper*, 541 F.3d 804 (8th Cir.), *reh'g en banc denied*, No. 07-1234 (8th Cir. 2008), the court found that Mr. Norris had forfeited his argument by arguing it for the first time on appeal. In *Barnett*, the court had held that, pursuant to the Federal Rules of Civil Procedure, an AEDPA limitations defense is forfeited unless pleaded in an answer or an amendment to the answer. *Id.* at 807. Although noting that an exception to this rule has been established by this Court that allows a district court to *sua sponte* consider the defense, *id.* (citing *Day v. McDonough*, 547 U.S. 198, 209 (2006)), the Court declined to expand that exception to permit an appellate court to disregard the State's forfeiture. *Id.*[5]

[5]Mr. Norris sought rehearing en banc from the Eighth Circuit and it was denied. Judge Colloton dissented from the denial, although on different grounds than those raised by Mr. Norris in his Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I. The First Question Presented

A. The First Question Presented By Petitioner Norris Was Not Raised or Passed On By The Lower Courts.

Certiorari should be denied because the first Question Presented by the Petition was not raised in or decided by the Eighth Circuit Court of Appeals in this case. No citation to, much less discussion of, 28 U.S.C. § 2254(e)(2) appears in the opinion of either court,[6] and it is not mentioned by Mr. Norris anywhere in his appellate brief. Mr. Norris's representation to this Court that "[t]he 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," Pet. at 3, and his criticism of the court's allegedly "flawed construction of § 2254(e)(2)'s opening clause," Pet. at 15, are thus seriously misleading. *See Meyer v. Holley*, 537 U.S. 280 (2003) (refusing to consider issues not directly decided by the court of appeals).

The district court below ruled that Mr. Sasser "did not properly and timely raise [his mental retardation] claim in his state court appeals, nor has he successfully shown that a procedural default exception applies." Pet'r App. at 29. The court held that Mr. Sasser did not satisfy the "cause and prejudice" exception to the procedural default doctrine because he had "failed to provide sufficient evidence

[6]Reference to § 2254(e)(2) appears in the district court order denying Mr. Sasser's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e), but this was in response to the arguments of Mr. Sasser, not those of Mr. Norris.

of mental retardation." *Id.* at 30. Accordingly the district court never reached the question of whether § 2254(e)(2) had any application to this case.

On appeal, Mr. Norris defended the district court's decision on its terms, arguing that the district court "had reached the correct result." *See Sasser v. Norris*, No. 07-2385, Brief for Appellee at 8 (8th Cir. Feb. 27, 2008). Mr. Norris never asked the court of appeals to determine if Mr. Sasser's request for an evidentiary hearing on his *Atkins* claim satisfied the requirements of 28 U.S.C. § 2254(e)(2), or otherwise mentioned that statutory provision.

The Eighth Circuit reversed, finding, as required by its holding in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *cert. denied, Norris v. Simpson*, __ U.S. __, 128 S.Ct 1226 (2008), that Mr. Sasser's mental retardation claim had not been procedurally defaulted. The court also reviewed the evidence that Mr. Sasser had presented to the district court in support of his *Atkins* claim and found it amply sufficient to entitle him to an evidentiary hearing. Contrary to the misleading assertions of Petitioner Norris, the Eighth Circuit, too, never addressed the application of 28 U.S.C. § 2254(e)(2) to Mr. Sasser's mental retardation claim.

Mr. Norris asserts that

> 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.

Pet. at 10-11. In fact, in its opinion the Eighth Circuit never addresses whether Mr.

Sasser exercised diligence in his state court proceedings. Rather, the quoted language appears at the end of a block quote from *Simpson*, which the court cited in Mr. Sasser's case for the proposition that an *Atkins* claim is not defaulted by an omission that occurred before *Atkins* was decided. Pet'r App. at 7-8.

Petitioner Norris essentially is attempting to use Mr. Sasser's case as a vehicle to seek review the decision of the Eighth Circuit in *Simpson*, a case in which this Court has previously denied Mr. Norris's petition for certiorari. *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), *cert. denied, Norris v. Simpson*, __ U.S. __, 128 S.Ct 1226 (2008).

As the Eighth Circuit never reached the issue of whether to apply § 2254(e)(2) in Mr. Sasser's case, it cannot be said to be in conflict with the decision of this Court in *Williams v. Taylor*, 529 U.S. 420 (2000). In *Williams*, the Court examined the application of 28 U.S.C. § 2254(e)(2) to cases in which the claim at issue was raised in state court proceedings, but its factual basis was for some reason not developed. *Williams* did not address the distinct question of how 28 U.S.C. § 2254(e)(2) applies in a "new rule" situation, as this question was not before the Court. Even had the Eighth Circuit ruled as Mr. Norris claims, its decision therefore would not be in conflict with *Williams*.[7]

[7]Nor would it have created any circuit split, as the only other circuit to address this issue is in harmony with the decision of the Eighth Circuit in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007). The Fourth Circuit, in *Walker v. True*, 399 F.3d 315 (4th Cir. 2005), addressed the issue of whether 28 U.S.C. § 2254(e)(2) bars an evidentiary hearing on a mental retardation claim for a prisoner whose state challenges were exhausted by the time *Atkins* was decided. Mr. Walker raised a claim under *Atkins v. Virginia* in a successive petition after his initial habeas petition had been denied by the district court. When the Fourth Circuit originally remanded Mr. Walker's *Atkins* claim to the district court, it left open the possibility that the district court could dismiss the claim to allow Virginia the first opportunity to assess whether Mr. Walker was mentally retarded. However, after the Fourth Circuit authorized Mr. Walker's successive petition, Virginia enacted a statute prohibiting *Atkins* claims from being brought in state court in

It is well established that this Court does not grant certiorari to consider issues that were not decided below. *See, e.g., Smith v. Butler*, 366 U.S. 161 (1961) (dismissing certiorari as improvidently granted because "the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted"). Mr. Norris's Petition should be denied because the court of appeals never passed on the issue he now asks this Court to decide.

B. The Eighth Circuit Was Correct in Remanding Mr. Sasser's *Atkins* Claim for an Evidentiary Hearing.

The Eighth Circuit reached the correct result by remanding Mr. Sasser's *Atkins* claim for an evidentiary hearing. The court found that, in his application for permission to file a successive petition and in his second amended petition for habeas corpus, Mr. Sasser made numerous detailed factual allegations that, if proven, establish he is a person with mental retardation. The Eighth Circuit noted in its opinion:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy' s murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's

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a successive habeas petition. *Walker*, 399 F.3d at 318-319. Finding that Mr. Walker's claim "ultimately derives from his rights under the Eighth Amendment," *id.* at 319, the Fourth Circuit held that § 2254(e)(2) did not apply because *Atkins* was decided after the Mr. Walker's conviction became final; "Walker's entitlement to an evidentiary hearing is not addressed by the federal habeas statutes. Section 2254(e)(2) does not apply because Walker has not "failed to develop the factual basis of [his] claim in State court." *See Walker*, 399 F.3d at 318-319 (quoting *Williams v. Taylor*, 529 U.S. 420,432 (2000)).

> house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning.

Pet'r App. at 9-10. The Eighth Circuit found that, if proven, these allegations entitle Mr. Sasser to relief from his sentence. As the State of Arkansas will not afford Mr. Sasser an evidentiary hearing in which to develop these facts, the Eighth Circuit correctly held that Mr. Sasser was denied a full and fair hearing on his highly meritorious claim in state court, and the district court erred in denying Mr. Sasser a hearing. The decision of the Eight Circuit to remand Mr. Sasser's case for an evidentiary hearing was correct and not contrary to any prior decision of this Court. Therefore, certiorari must be denied.

II. Petitioner Norris's Second Question Presents No Actual Conflict and Merely Seeks To Change a Ruling He Dislikes.

With regard to the second question presented to this Court, the Eighth Circuit's opinion poses no actual conflict with any precedent from this Court, the opinions of any circuit court, or the Rules Governing Habeas Corpus Cases, and Mr. Norris merely seeks certiorari to alter a particular judgment with which he disagrees. Mr. Norris's argument for granting the writ also misstates both the record of the case and the holding of the Eighth Circuit below.

Mr. Norris mischaracterizes the Eighth Circuit's holding as "that the district court must hold an evidentiary hearing on Sasser's *Atkins* claim based solely on the facts alleged in the petition." Pet. at 15. That is not at all what the Eighth Circuit held. Rather than confining the district court reviewing the allegations in the

petition, the court simply recognized that, in this case, those allegations were sufficient to require a hearing:

> Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy' s murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. **While *Simpson* may not mandate an evidentiary hearing in every conceivable set of circumstances, there is no question the allegations in Sasser's petition are as adequate as Simpson's pleading threshold where the petitioner "alleged that he is mentally retarded as *Atkins* defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim.**

Pet'r App. at 9-10 (emphasis added). Accordingly, the court's reference to the language in *Simpson* – that a petitioner "is entitled to a hearing simply by virtue of 'alleging that he is mental retarded as *Atkins* defined that condition,'" Pet'r App. at 11-12 (*quoting Simpson*, 490 F.3d at 1035) – is dicta. The district court had before it detailed factual allegations, plus an expert affidavit setting forth serious and well-grounded suspicions that Mr. Sasser is a person with mental retardation and the detailing the evidence that supports that conclusion. This was amply sufficient to trigger Mr. Sasser's entitlement to an evidentiary hearing, as the Eighth Circuit correctly found. *See* Pet'r App. at 12 ("Given the circumstances and factual

allegations in Sasser's case, *Simpson* expressly requires an *Atkins* evidentiary hearing").

It is obvious then, that there is no conflict with this Court's holding in *Blackledge v. Allison,* 431 U.S. 63 (1977),[8] that not every set of allegations will mandate an evidentiary hearing, to which the Eighth Circuit's language is virtually identical.

Petitioner Norris further mischaracterizes the Eighth Circuit's holding, and the record in this case when he attacks the court's alleged "blatant disregard of a district court's authority to expand the record." Pet. at 17. Firstly, the district court never ordered Mr. Sasser to expand the record. Rather, it simply set forth a briefing schedule, directing Mr. Sasser to provide the court with any additional information, be it evidence or pleadings, that Mr. Sasser wanted the court to consider at that juncture. *Sasser v. Norris*, No. 00-4036, Doc. 65, Scheduling Order at 2 (W.D. Ark. June 14, 2006):

> Motions regarding any additional information Petitioner would like the Court to consider in relation to his mental retardation claim (such as motions for leave to file a supplemental and/or amended Petition, supplement the record, and for an evidentiary hearing) must be filed by August 31, 2006.

Id. Having set forth the factual basis for his claim in detail in his Petition, submitted the preliminary Affidavit of an expert outlining the evidence supporting

[8]In *Allison*, this Court agreed with the Fourth Circuit's remand of the petitioner's habeas petition for an evidentiary hearing. At issue in *Allison* was the sufficiency of the petitioner's plea in state court, and whether the state court record established the adequacy of Mr. Allison's plea. In Mr. Sasser's case, unlike that in *Allison*, there is no state court record, as the State of Arkansas has refused to provide any avenue for addressing mental retardation claims raised post-*Atkins*.

his claim, and moved for an evidentiary hearing, Mr. Sasser had already established his entitlement to a hearing and thus submitted no additional information. The Eighth Circuit so found, Pet'r App. at 11, and limited its decision accordingly; in no sense can it be said to have held that the district court had no authority to order expansion of the record, rather it was addressing the fact that Mr. Sasser's had fulfilled his obligations necessary to receive a hearing.

Thus, this question represents a mine-run application of law, rather than a broad decision of general principle worthy of this Court's attention.

III. The Third Question Presented

The Third Question Presented is stated as whether a district court has a mandatory duty to consider the timeliness of a successive petition under 28 U.S.C. § 2244(d)(1) before a petition can be adjudicated on the merits. Pet. at i. The argument presented by Mr. Norris in his Petition for Certiorari as the reason to grant the writ with respect to this question, however, actually raises two distinct issues. First, what are the consequences of the failure of a party to raise a statute of limitations defense in the district court. Second, if the statute of limitations defense is not raised or addressed below, does an appellate court have discretion to raise the issue *sua sponte* on appeal.

A. The Eighth Circuit's Holding that a Statute of Limitations Defense May Be Forfeited by the State's Failure to Raise It In Its Responsive Pleading in the District Court Creates No Conflict With the AEDPA.

While it is the case that, under 28 U.S.C. § 2244(b), one of the issues that a district court is charged with considering is the timeliness of an authorized second

petition, this truism does not answer the real question: what are the consequences of a party's failure to raise a statute of limitations defense in the district court. Mr. Norris's argument conflates two separate issues – namely which party has the burden of proof on a particular question and what happens when the opposing party fails to raise the argument that the party has failed to meet that burden.

The issue is analogous to sufficiency of the evidence claims. Unquestionably in a criminal trial, the state has the mandatory duty of proving each element of an offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970). However, if the state fails to meet its burden with respect to an element, the consequences depend on whether the defendant has objected and raised that failure as an issue. If he has not, it is forfeited.

It is commonplace that defendants must make an appropriate motion in the trial court to preserve an argument for appeal even where the plaintiff or prosecution has the burden of proof on the issue. *See, e.g., United States v. Cathey*, 259 F.3d 365, 368 (5th Cir. 2001) (failure to move for a judgment of acquittal at the close of evidence forfeits a claim that the evidence was insufficient). *Cf. Queenie, Ltd. v. Nygard Int'l*, 321 F.3d 282, 291-92 (2d Cir. 2003) (Sotomayor, J., concurring) (defendants waived argument that plaintiff's attorney's fees were not compensable damages that could support punitive damages by "neglecting to make this argument in the district court;" a party is barred from challenging the sufficiency of evidence on an issue unless it has timely moved in the district court for judgment as a matter of law on that issue); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir.

1992) (defendant forfeited argument that government failed to meet Fed. R. Evid. 404(b)'s preliminary showing requirement; "the burden was on [the defendant] to move to strike the evidence when the government failed to satisfy its burden of proof").

The same result pertains here; therefore, there is no basis to treat the statute of limitations in a second or successive petition context any differently than as in *Day v. McDonough*, 547 U.S. 198 (2006), where the factual setting involved a first petition. In *Day*, this Court held that, in limited circumstances, district courts may, in their discretion, consider the issue of limitations *sua sponte*, despite the State's forfeiture.[9] *See Day v. McDonough*, 547 U.S. 198 (2006). *Day* involved an initial habeas petition in which the State miscalculated the filing date for the petition, concluding that it was timely when in fact it was not. The magistrate judge in the case noticed the miscalculation, and recommended that the petition be dismissed. The Court noted that the magistrate judge, at that stage of the case, also could have taken the path of asking the State to amend its answer. Ultimately, this Court found that statute of limitation defenses are not jurisdictional, and that while district courts may consider the statute of limitations *sua sponte*, they are also under no obligation to do so. *Id.* at 205.[10]

[9]In footnote 3 of this Court's decision, the Court disagreed with Petitioner Day's reading of the Eleventh Circuit's opinion as placing a mandatory duty on district courts to address the statute of limitations. *Day*, 547 U.S. at 204 n. 3.

[10]Petitioner Norris relies on Justice Scalia's dissent in *Day* as authority for it's proposition that where habeas rules conflict with forfeiture rules, that the forfeiture rule will not apply. Beyond the obvious concerns regarding relying on dissents as persuasive authority, Justice Scalia's dissent found no conflict between the Federal Rules of Civil Procedure and AEDPA with regards to the limitations issue, and would have applied the ordinary forfeiture rule, under which the state in *Day* would have

Relying on *Tyler v. Cain*, 533 U.S. 656 (2001), Mr. Norris, as stated above, confuses the issue of who has the burden to make a particular showing with the distinct question of whether the opposite party can forfeit an argument that the burden has not been satisfied. Petitioner Norris's reliance on *Tyler* is unavailing. In *Tyler*, the Court was speaking to which court and to what standard a claim in a successive petition must be made and must satisfy. *Id.* at 660-661 and n.3. *Tyler*, however, does not speak to whether a defense that a burden has not been met can be forfeited.

Petitioner Norris's reliance on *Bowles v. Russell*, 551 U.S. 205 (2007), is equally unavailing.[11] In *Bowles*, this Court dealt with a district court's extension of a deadline to file a notice of appeal, after the initial time period for filing the notice of appeal had already expired. *Id.* The Court found that the deadline for filing a notice of appeal is jurisdictional, and therefore the petitioner could not rely on forfeiture or waiver of the issue by the state. *Id.* at 213. In contrast, this Court expressly held in *Day* that the AEDPA statute of limitations is an affirmative defense and is not jurisdictional.

Mr. Norris additionally attacks the factual basis of the Eighth Circuit's decision, stating that the court "adopted Sasser's erroneous assertion that the State did not raise the limitations issue at any time before adjudication in the district

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forfeited the timeliness issue it had failed to raise due to miscalculation. *Day,* 547 U.S. at 212-219.

[11]Petitioner Norris raises this line of argument, that Mr. Sasser cannot rely on the forfeiture rule to excuse the alleged untimeliness of his successive petition, for the first time in this petition for certiorari to this Court. It was not raised to the Eighth Circuit below.

court." Pet. at 18. This is a red herring. In the district court, Mr. Norris indeed made passing references to the statute of limitations in a motion to preclude discovery and in a response made to Mr. Sasser's request for discovery. Neither of these references were sufficient to satisfy the requirements of *Day* and the Federal Rules of Civil Procedure that the defense be raised in the first responsive pleading or amendment thereto. *See* Fed. R. Civ. Proc. 8(c). *See also Gray v. Netherland*, 518 U.S. 152, 166 (1996); *Diaz v. Kelly*, 515 F.3d 149, 153 (2d Cir. 2008) (applying Rule 8(c) in a habeas case); *Ford v. Norris*, 67 F.3d 162, 165 (8th Cir. 1995); *Lawrence v. Armontrout*, 31 F.3d 662, 666 (8th Cir. 1994). *See generally* SECTION 2254 RULES 11 ("The Federal Rules of Civil Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules"). As with other affirmative defenses listed in Rule 8(c), the statute of limitations is not a jurisdictional issue, *see Day v. McDonough*, 547 U.S. 198 (2007). The fact that the state mentions the issue in a motion filed years into the litigation that recites a laundry list of procedural issues and ultimately concerns only discovery patently fails to satisfy the requirement that it be properly presented in a responsive pleading.[12]

[12]Indeed the fact that Mr. Norris did mention the statute of limitations defense before the district court undercuts his argument before this Court. The district court's silence on the matter in the face of Mr. Norris's reference supports the proposition that it considered the statute of limitations, and found that Mr. Sasser's petition was timely, instead rejecting the petition on procedural default grounds.

B. There is No Conflict Between the Eighth Circuit and the Sixth Circuit On This Issue.

Contrary to Mr. Norris's contention, there is no conflict whatsoever between the decision of the Eighth Circuit in this case and the decision of the Sixth Circuit in *In re McDonald*, 514 F.3d 539 (6th Cir. 2008). First, the Eighth Circuit did not find that 28 U.S.C. § 2244(d)(1) is not encompassed by the "requirements" of 28 U.S.C. § 2244(b)(4). Rather, following this Court's holding in *Day*, the Eighth Circuit correctly found that a district court has the discretion, but no obligation, to consider a statute of limitations defense *sua sponte* when the state fails to raise it. The decision of the Sixth Circuit in *McDonald* is in no way to the contrary. Rather, the opinion stands for the distinct proposition that a circuit court may not consider the statute of limitations when deciding whether a petition has met the requirements for receiving permission to file a second petition under § 2244(b)(3)(C). *McDonald*, 514 F.3d at 543-544.

In *McDonald*, the petitioner filed an application for permission to file a successive petition in the Sixth Circuit.[13] In opposition to the application, the government argued that the court should dismiss the application as time barred under 28 U.S.C. § 2244(d)(1)(D). The Sixth Circuit found that issues regarding compliance with the statute of limitations were "not within the purview of the court

[13]In addition to the fact that the holding in *McDonald* does not support his "mandatory" reading of the AEDPA statute and an artificial conflict with the Sixth Circuit, the petitioner in *McDonald* was in a procedurally different position than Mr. Sasser. While Mr. Sasser is on an appeal from the reversal of a denial of a successive habeas petition, the petitioner in *McDonald* was before the Sixth Circuit on a motion for authorization to file.

of appeals' consideration of applications requesting authorization to file a second or successive habeas corpus petition," *McDonald* at 543, and that the matter is left to the district courts to decide in the first instance.[14] In no sense did the Sixth Circuit find that a state may not forfeit the statute of limitations defense by thereafter failing to raise it in the district court.

C. There Is No Disarray in the Lower Federal Courts Regarding "AEDPA's Distribution of Responsibilities of the Courts and of the Parties under 2244(b) and about the Scope of 2244(b)(4)"

Petitioner Norris cites to a number of cases from circuits around the country, contending that they present indicia of confusion regarding the interpretation and application of 28 U.S.C. § 2244(d)(1) in second petition cases. Pet. at 21-22. However, there is nothing reflecting disarray regarding 28 U.S.C. § 2244(d)(1) in the cases cited by Mr. Norris from the Third, Fifth, Seventh, Ninth and Tenth Circuits, which in dicta, all unremarkably state that a successive petition must fall into one of the categories enunciated by 28 U.S.C. § 2244(b)(2) before a district court can consider the merits of the petition, and do not bear at all on the issue of whether Mr. Norris can waive the statute of limitations defense by raising it for the first time on appeal.[15]

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[14]Notably, the court based its decision in part on the fact that, when considering such applications, an appellate court does not yet have a developed record before it and therefore cannot resolve fact bound issues that often arise regarding the application of the statute of limitations, such as the question of equitable tolling. *Id.* This reasoning highlights the impropriety of allowing a state to raise the issue for the first time before the appellate court without allowing the petitioner to develop a record before the district court.

[15]*See Goldblum v. Klem*, 510 F.3d 204 (3d Cir. 2007) (discussing whether to apply AEDPA or pre-AEDPA abuse of writ doctrine to substantive standards for filing successive petitions); *Brown v. Lensing*, 171 F.3d 1031 (5th Cir. 1999) (dismissing appeal from denial of a successive petition based on the fact that it did not satisfy § 2244(b)(2)(A)); *Bennett v. United States*, 119 F.3d 468 (7th Cir.

The decisions of the Eleventh and Fifth Circuits in *In re Hill*, 437 F.3d 1080 (11th Cir. 2006) and *In re Lewis*, 484 F.3d 793 (5th Cir. 2007), are even more irrelevant. Both are cases in which the circuit court denied authorization to file for second or successive petitions based on statute of limitations issues. While those opinions might be in tension with *McDonald, supra*, the issue they address is not present in this case and so consideration of it will have to wait until the proper case comes before the Court. Mr. Sasser's case was before the Eighth Circuit on appeal after authorization had been granted and the district court had denied the petition, and thus posed a different issue, again, whether Mr. Norris forfeited the statute of limitations defense by not properly raising it until on appeal. In short, there is no disarray for this Court to resolve and certainly none that this Court could address via the case at bar.

D. The Eighth Circuit Considered and Resolved Against Petitioner Norris the Statute of Limitations Issue, and Language Regarding Its Ability To Raise the Statute of Limitations Sua Sponte is Dicta and Irrelevant to the Decision in Mr. Sasser's Case.

While not stated as a Question Presented, Mr. Norris makes a second argument to the Court, that the Eighth Circuit's opinion held that the "discretion to consider the statute of limitations defense *sua sponte* does not extend to the

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1997) (denying of a federal prisoner's request to file a third motion for post-conviction relief under 28 U.S. § 2255, based on a finding that newly discovered evidence insufficient to establish innocence by clear and convincing evidence); *United States v. Villa-Gonzalez*, 208 F.3d 1160 (denial of a federal prisoner's appeal following dismissal of an authorized successive § 2255 motion, determining application of pre-AEDPA versus AEDPA standards and the application of § 2244(b)(4) in § 2255 proceedings); *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (authorizing successive petition containing *Atkins* claim, finding no requirement of a preliminary merits review prior to authorization on an *Atkins* claim).

appellate level," in conflict with this Court's decision in *Day*, and the Seventh Circuit's holdings in *Cotton v. Grisby*, 456 F.3d 727 (7th Cir. 2006), and *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006). However, this statement by the Eighth Circuit is pure dicta, for it considered the statute of limitations issue not *sua sponte*, but rather at the behest of Mr. Norris, and not on a blank slate but in the role of an appellate court reviewing the district court's decision not to address the question *sua sponte* for an abuse of discretion. Again, certiorari should be denied as dicta is not the definitive position of a court and makes Mr. Sasser's case a poor vehicle for the question posed as it was not material to the outcome of his case.

Black's Law Dictionary (8th ed. 2004), defines *sua sponte* as "without prompting or suggestion" or "on its own motion." Black's Law Dictionary (8th ed. 2004) (on-line edition). While the Eighth Circuit noted in passing that it lacks discretion to *sua sponte* raise a statute of limitations defense on behalf of the state, that determination is irrelevant to the decision in Mr. Sasser's case and is not the determination which the Eighth Circuit reached with regards to the actual record of Mr. Sasser's case.

Mr. Norris briefed the statute of limitations issue in his initial brief in the Eighth Circuit. *Sasser v. Norris*, No. 07-2385, Brief for Appellee at 16-29 (8th Cir. Feb. 27, 2008). Mr. Sasser responded to Mr. Norris's statute of limitations arguments as best he could on an undeveloped record in his reply brief before that court. *Sasser v. Norris*, No. 07-2385, Appellant's Reply Brief at 7-31 (8th Cir. Aug. 11, 2008). The issue was also aired at length at oral argument. *Sasser v. Norris*,

No. 07-2385, Oral Argument Transcript at 7-31 (8th Cir. Sept. 25, 2008).[16] Ultimately the Eighth Circuit decided, "[b]ecause the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited and we will not address the defense any further." Pet'r App. at 15.[17]

Mr. Norris argues that statement of the Eighth Circuit in dicta, that it did not have discretion to consider the statute of limitations issue sua sponte, represents a split from the holdings of the Seventh Circuit. However, neither case from the Seventh Circuit cited by Petitioner Norris as support for a claimed circuit split conflicts with the actual holding in this case. In *Cotton v. Grisby*, 456 F.3d 727 (7th Cir. 2006), the petitioner brought his initial habeas petition sixteen years after his conviction for attempted robbery. On appeal to the Seventh Circuit, the state raised the untimeliness of the petition for the first time. The court found that it was "under no obligation to enforce a state's forfeiture or a petitioner's procedural failings." *Id.* at 731. As in Mr. Sasser's case, the court was not raising the issue *sua*

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[16]Mr. Norris also raised his statute of limitations argument in a petition for rehearing en banc, which was denied by the Eighth Circuit. *Sasser v. Norris*, No. 07-2385, Order (8th Cir. Apr. 14, 2009).

[17]Petitioner Norris contends that the Eighth Circuit's holding is "especially troubling," speculating that the district court must have felt constrained by the Eighth Circuit's remand order and that is why the district court did not address the statute of limitations, "despite the fact that it was raised." *See* Pet. at 24, n. 2. This speculation is grossly misleading and inaccurate. Mr. Norris did not properly raise the timeliness of Mr. Sasser's petition. And in any event, the district court clearly did not feel constrained by the Eighth Circuit's remand order.

The remand order directed the district court to address two issues: (1) whether Mr. Sasser was mentally retarded; and (2) whether pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), the Eighth Amendment prohibited his execution. *Sasser v. Norris*, No. 00-4036, Doc. 37, Judgment, at 1 (8th Cir. Aug. 21, 2003). The district court however, quickly added a third issue, asking the parties to address whether Mr. Sasser had defaulted his *Atkins* claim by not raising it in the state courts under a pre-*Atkins* state mental retardation statute, and indeed ultimately decided the case, wrongly, on that basis. *Sasser v. Norris*, No. 00-4036, Doc. 40, Scheduling Order, at 1 (W.D. Ark. Aug. 29, 2003).

sponte, but rather in response to the State's attempt to raise it for the first time on appeal. And, just like the Eighth Circuit, the Seventh Circuit found that,

> it was the state's duty to raise those defenses in the district court, and it has provided us no reason to excuse its failure to do so. . . . The period of limitations set out in 28 U.S.C. § 2244(b)(3) is not jurisdictional, and thus we are not bound to enforce it against a petitioner. *See Day*, 126 S. Ct. at 1681. In this case, it would be inappropriate for us to reach a timeliness argument that the state did not raise in its response in the district court, and which did not form the basis for the district court's ruling.

Cotton v. Grisby, 456 F.3d at 731.

In *Jones v. Hulick*, 449 F.3d 784 (7th Cir. 2006), the Seventh Circuit did consider a statute of limitations argument made for the first time on appeal. However, it did so because of the particular circumstances of the case before it. *Id.* at 787. In the district court, the petition had been dismissed on exhaustion grounds before the State had an opportunity to file an answer, and so, rather than forfeiting the issue, the state had actually raised it at the earliest possible opportunity. *Id.* The instant case, presenting the entirely different scenario in which the state failed to raise the defense despite filing an answer and having a lengthy opportunity to amend it, is not in conflict.

Of course, Petitioner Norris is correct that this Court in *Day* held that district courts can raise statute of limitations issues *sua sponte*. *See Day*, 547 U.S. at 209. The Eighth Circuit's decision is not in conflict with *Day*. *Day* addressed the discretion of the district court in addressing statute of limitations issue *sua sponte*, and does not address whether the same principles apply on appeal when a district

court has declined to raise the issue *sua sponte*. The Eighth Circuit did not hold otherwise, but rather refused to overlook the State's forfeiture on appeal.

E. Mr. Sasser's Second Petition Was Timely.

In any event, Mr. Sasser's second petition was timely filed and thus this case presents a poor vehicle for deciding issues regarding the interpretation or the duties and responsibilities of the federal courts under 28 U.S. § 2244(b)(4). Mr. Norris admitted in his Brief before the Eighth Circuit that Mr. Sasser filed his Motion to Remand,[18] seeking relief under *Atkins*, within the one-year window. Additionally, Mr. Sasser's Supplemental Motion for Remand, which alternatively requested authorization to file a successive petition, was filed two days after his Motion to Remand, on June 18, 2003, and also within one year of the issuance of the *Atkins* decision. Thus, Mr. Sasser's *Atkins* claim clearly was timely filed.

A motion for authorization is the first pleading in a successive habeas action, and it is the equivalent of a habeas petition filed in the district court in a first petition situation. In the Eighth Circuit, local rules call a motion for authorization an "application for second or successive habeas corpus relief." See 8th Cir. R. 22(B)(a). And, those rules require the motion for authorization to include "the grounds for relief," 8th Cir. R. 22(B)(a)(1), just like an application filed in the

[18]Mr. Sasser's initial motion before the Eighth Circuit was styled a "Motion to Remand and Brief in Support," *Sasser v. Norris*, No. 02-3103, (8th Cir. July 16, 2003); two days after this Mr. Sasser filed a supplemental motion to remand, and alternatively a motion to file a second or successive petition, *Sasser v. Norris*, No.02-3103, Appellant's Supplemental Motion to Remand to the District Court or in the Alternative Motion to File a Second or Successive Petition (8th Cir. July 18, 2003). The district court and the Eighth Circuit have treated Mr. Sasser's application as an application for permission to file a successive petition.

district court, SECTION 2254 RULES 2(c) (stating that a habeas application should contain "the grounds for relief"). The Seventh Circuit, too, has expressly held that motions for authorization are the equivalent of postconviction applications for the purpose of applying the AEDPA. *See Bennett v. United States*, 119 F.3d 468, 471 (7th Cir. 1997) (holding that a motion for leave to file a second or successive application is itself an application for the purposes of applying the AEDPA, and that denial of the motion for leave represents an adjudication of the merits of the underlying application).

Numerous courts across the country have recognized that a motion for authorization satisfies the statute of limitations. *See Buchanan v. Lamarque*, 121 Fed App'x 303, 316 (10th Cir. 2005) (unpublished) (holding that a "motion for leave to file" a successive petition will satisfy the statute of limitations if filed within the one-year limitations period); *Outlaw v. Sternes*, 233 F.3d 453, 456 (7th Cir. 2000) (characterizing a motion for authorization as an "application" for the purposes of applying the limitations period, and holding that the statute of limitations is satisfied if a motion for authorization is filed within the limitations period); *Coleman v. United States*, 106 F.3d 339, 341 (10th Cir. 1997) (stating that a "petition or motion" should be "filed in this court for the purposes of the limitations periods"); *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996) (stating that the motion for authorization "to this Court" "could be considered in determining the applicant's compliance with the applicable one-year limitations period"). *See also In re Lewis*, 484 F.3d 793 (5th Cir. 2007) (applying the statute of a limitations to a

motion for authorization to file a successive petition, and holding that a timely motion would be an "application" sufficient to satisfy the statute); *In re Daniels*, 2001 U.S. App. LEXIS 27453 (D.C. Cir.) (unpublished) (applying "the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act" to a "motion for leave to file a second or successive motion under 28 U.S.C. § 2255"). *Cf. Whab v. United States*, 408 F.3d 116, 120 (2d Cir. 2005) (stating that "the moment of filing" for a second or successive petition occurs when "the petitioner files directly in the district court or first files an application for gatekeeping approval in the court of appeals").

This result is fully consistent with the policies underlying the AEDPA's statute of limitations.[19] The purpose of the limitations period is to promote the finality of criminal convictions and sentences by ensuring that a petitioner's "claims" are brought before a court within the one-year window. *See Mayle v. Felix*, 545 U.S. 644, 662 (2005). In moving for authorization, a petitioner must place all

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[19] The policy arguments advanced against this interpretation are unpersuasive. The argument that a petitioner can and should be required to file an authorized petition in the district court within the one-year limitations period because the AEDPA requires that the authorization process be completed within just thirty days blinks reality. Courts have uniformly held that the thirty-day limitation on the authorization process is "horatory or advisory rather than mandatory." *In re McDonald*, 514 F.3d 539, 542 n.2 (6th Cir. 2008).

In practice, especially in death penalty cases, where the stakes are high and the issues are more complex, the authorization process frequently takes many months to complete. Indeed, in this case, it was nearly nine months after Mr. Sasser filed his Motion to Remand (June 16, 2003) that the mandate finally issued (March 9, 2004) to allow the district court to consider his *Atkins* claim. Nearly seven of these months of delay resulted from the State's filing of a motion for reconsideration of the Eight Circuit's initial order. Were a motion for authorization itself insufficient to satisfy the statute of limitations, a petitioner could file his application for authorization a month or more before the expiration of the limitations period and yet still be deemed time-barred if the court fails to rule on his application within the statutory time period, or if the court's ruling is challenged by the respondent.

his "grounds for relief" before the court, *see e.g.* 8th Cir. R. 22B(a)(1), and thus this purpose is fully accomplished by the filing of the motion.

As both Mr. Sasser's motion for remand and his supplemental motion to remand, or in the alternative to file a second or successive petition were both filed in the Eighth Circuit within one year of this Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), his petition was timely filed, and certiorari in this case should be denied on this ground also.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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September 11, 2009

No. 09-45

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2009

Larry Norris, Director
Arkansas Department of Correction,

Petitioner,

v.

Andrew Sasser,

Respondent.

CERTIFICATE OF SERVICE

I certify that I have served upon the attorney for the Petitioner a copy of the Brief in Opposition to the Petitioner for Writ of Certiorari and a copy of the Motion for Leave to Proceed In Forma Pauperis in this action. Service was made by Federal Express, postage prepaid, to Kelly Hill, Office of the Attorney General, 323 Center Street, Suite 200, Little Rock, Arkansas 72201-2610.

Executed on September 11, 2009.

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