No. 09-45

SEP 22 2009

In The Supreme Court of the United States

LARRY NORRIS, Director,
Arkansas Department of Correction,

Petitioner,

v.

ANDREW SASSER,

Respondent.

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

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION

The Petition for a Writ of Certiorari demonstrated that the Eighth Circuit's decision directly conflicts with AEDPA and with this Court's precedent. Nothing in the Brief in Opposition calls into question the need for this Court to grant certiorari.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit decided the question presented in a manner that directly conflicts with *Williams v. Taylor*, 529 U.S. 420 (2000).

Sasser noticeably does not dispute that the Eighth Circuit's interpretation of the opening clause of 28 U.S.C. § 2254(e)(2) nullifies § 2254(e)(2)(B) in cases involving new rules of constitutional law, and, thereby, directly conflicts with the plain language of the statute. He likewise does not dispute that his state counsels' failure to develop the facts underlying his *Atkins* claim, according to this Court's interpretation of the opening clause in *Williams v. Taylor*, 529 U.S. 420 (2000), triggers application of § 2254(e)(2) to his case, or that the facts he alleged in support of his claim do not satisfy § 2254(e)(2)(B). Rather, he evasively asserts, despite plain indications to the contrary – including his own arguments below – that neither the district court, nor the Eighth Circuit, decided the question of whether 28 U.S.C.

§ 2254(e)(2) applies to bar an evidentiary hearing on his *Atkins* claim. He also feebly attempts to distinguish *Williams*, arguing that because it did not interpret the opening clause of § 2254(e)(2) in a case involving a new constitutional rule, the Eighth Circuit's interpretation of the opening clause does not raise a direct conflict warranting this Court's review. Because the question presented was indeed decided below, and the Eighth Circuit's decision is in direct conflict with this Court's interpretation of § 2254(e)(2)'s opening clause in *Williams*, the petition for writ of certiorari should be granted.

Sasser's surprising assertion that "the district court never reached the question of whether § 2254(e)(2) had any application to this case," is, itself, "seriously misleading." Brief in Opposition at 10, 11. The district court's order denying relief concluded that Sasser triggered application of § 2254(e)(2) when he "did not properly and timely raise [his mental-retardation claim] in his state court appeals." Appendix at 29. While the district court used "procedural default" and § 2254(e)(2) interchangeably, and did not expressly declare that Sasser's lack of diligence triggered application of § 2254(e)(2), that conclusion was obvious from the district court's application of the statute's exceptions, finding that it was "unlikely" that Sasser could satisfy § 2254(e)(2)(A)(i) in light of the availability of a claim under Ark. Code Ann. § 5-4-618 (Repl. 2006), Appendix at 30, n.3, and, in any event, his allegations did not satisfy § 2254(e)(2)(B). Appendix at 30.

Even in the absence of these references to § 2254(e)(2), it cannot be seriously questioned that the district court applied it in Sasser's case. After all, if the district court determined that procedural default altogether barred it from considering the merits of Sasser's *Atkins* claim, as he asserts, Brief in Opposition at 10-11, there would be no reason for the district court to thereafter determine, as it did, his entitlement to an evidentiary hearing, or to conclude, as it also did, that he failed to present sufficient facts demonstrating his entitlement to the writ. Appendix at 31, 32. Indeed, Sasser himself understood the district court's order as applying § 2254(e)(2) to his claim, urging amendment of the judgment because, according to the district court's summary of his argument, "the Court wrongly applied 28 U.S.C. 2254(e)(2) when it decided not to order an evidentiary hearing." Appendix at 39; *see also*, Brief in Opposition at 10, n.6; *Sasser v. Norris*, No. 00-4036, Docket Entry No. 73, Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e), at 31-34 (W.D. Ark. January 23, 2007). Finally, the district court's order denying Sasser's motion to amend the judgment leaves no doubt that it applied § 2254(e)(2) to his *Atkins* claim. Appendix at 39-43.

The Eighth Circuit, moreover, did not merely determine that Sasser's *Atkins* claim survived procedural default, and, thereby, was eligible for an adjudication of its merits – it also directed the manner of that adjudication by ordering the district court to hold an evidentiary hearing. Appendix at 10,

15. It necessarily determined, then, that a hearing was not barred by § 2254(e)(2), and by quoting its rationale in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), it plainly did so for the same reason as in *Simpson* – that § 2254(e)(2)'s opening clause was never triggered because Sasser, like Simpson, can "hardly be said to have lacked diligence" when the Eighth Amendment claim was previously unavailable. Appendix at 7-8 (quoting *Simpson*, 490 F.3d at 1035). Further evincing its belief that § 2254(e)(2) did not apply at all, the Eighth Circuit did not reverse the district court's denial of an evidentiary hearing by evaluating the sufficiency of Sasser's factual allegations differently according to § 2254(e)(2)(B)'s "clear and convincing" standard. Rather, on a mistaken belief that it also derived directly from *Simpson* – that Sasser did not have a full and fair opportunity to develop his mental-retardation claim in state court – the Eighth Circuit evaluated the sufficiency of Sasser's factual allegations according to *Townsend v. Sain*, 372 U.S. 293 (1963), apparently inquiring only whether they could survive dismissal. Appendix at 8, 9-10. The Eighth Circuit, therefore, altogether rejected the district court's finding that § 2254(e)(2) applied to Sasser's *Atkins* claim, and, by doing so, decided the first question presented.[1]

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[1] The State acknowledges that Judge Colloton apparently suggests the Eighth Circuit's decision is restricted to procedural default. Appendix at 50-52. With respect, and assuming that the

(Continued on following page)

Further, Sasser's alternative assertion that the direct conflict alleged in the petition does not exist because "*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," Brief in Opposition at 12, misses the point. That question indeed was not before the Court in *Williams*, because, rather than the exceptions to § 2254(e)(2)'s bar against evidentiary hearings, *see* 28 U.S.C. §§ 2254(e)(2)(A)(i) & (A)(ii), *Williams* decided the issue raised by the first question presented – the meaning of § 2254(e)(2)'s opening clause. 529 U.S. at 430-31. That this Court did not make the error that the Eighth Circuit did here, contravening the plain language of the statute by importing the availability of the legal basis for the claim from § 2254(e)(2)(A)(i) into the statute's opening clause, is actually the point of the direct conflict alleged in the petition. Therefore, despite Sasser's argument to the contrary, a writ of certiorari to resolve the conflict is warranted.

State correctly reads his opinion, Judge Colloton is mistaken for the reasons argued here and in the petition for certiorari.

II. Even if the Eighth Circuit correctly determined that 28 U.S.C. § 2254(e)(2) did not apply to Sasser's *Atkins* claim, the writ should be granted because its decision directly conflicts with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Section 2254 Cases.

Like his first attempt to attack a direct conflict alleged in the petition for certiorari, Sasser misses the point with his argument that the Eighth Circuit's decision, even if it correctly determined § 2254(e)(2) does not apply to his case, does not directly conflict with *Blackledge v. Allison*, 431 U.S. 63 (1977), and the Rules Governing Section 2254 Cases. Brief in Opposition at 15-16. While the Eighth Circuit indeed held that the facts supporting Sasser's *Atkins* claim warranted a hearing, and rejected the district court's efforts, on Sasser's representation that more information was forthcoming, to expand the record, Appendix at 9, 11-12, 19-20, 42-43, it did so on the erroneous belief that directly conflicts with *Allison* and 28 U.S.C. § 2254 Rules 7(a) and 8(a): that an evidentiary hearing is the only fact-development procedure that is available once a petition survives dismissal. It also demonstrated that mistaken belief when it restricted the district court to an evidentiary hearing on remand, Appendix at 12, 15-16, holding that the facts alleged in Sasser's case "required an evidentiary hearing, and not some other type of 'remand procedure' crafted by the district court." Appendix at 12.

The Eighth Circuit did not merely disagree, moreover, with the district court's evaluation of an expanded record, as Sasser implies with his reference to the affidavit he proffered in the district court. Brief in Opposition at 16-17. The Eighth Circuit did not acknowledge, let alone reject, the district court's conclusion that the affidavit merely expressed the opinion that Sasser's background "*suggests* he 'may be mentally retarded,'" Appendix at 41, or that it was provisional to the extent that it called for additional evaluation. Appendix at 42. Indeed, the Eighth Circuit held that a hearing was required despite Sasser's acknowledged need for additional proof; again, on its belief that the factual allegations alone were sufficient. Because that decision directly conflicts with *Allison* and the Rules Governing Section 2254 Cases, this Court should grant the petition for certiorari.

III. The Eighth Circuit's decision evades the mandatory statute of limitations imposed on second and successive petitions by 28 U.S.C. § 2244(b)(4).

Sasser agrees that, as a result of the gatekeeping requirements in 28 U.S.C. § 2244(b), "one of the issues . . . a district court is charged with considering is the timeliness of an authorized second petition." Brief in Opposition at 17. This is because § 2244(b)(4)'s reference to "this section" encompasses the limitation provision in 28 U.S.C. § 2244(d)(1). Noticeably absent from Sasser's response, however, is

any discussion, much less mention, of the additional language in § 2244(b)(4) that mandates dismissal of a claim unless the petitioner demonstrates, among other things, that his second or successive petition satisfies the timeliness requirements of § 2244(d)(1).[2] This gatekeeping limitations provision is not subject to the forfeiture rule that the Eighth Circuit applied because it is not merely an inflexible claim-processing rule, but, rather, is a Congressional restriction on a district court's power to adjudicate a claim raised in a second or successive habeas petition. Having missed this critical point, Sasser's entire argument is simply unresponsive to the third question presented in the petition. Brief in Opposition at 17-18.

It is unremarkable, for example, that *Day v. McDonough*, 547 U.S. 198 (2006), recognized that the limitations provision in 28 U.S.C. § 2244(d)(1), because it does not expressly restrict a district court's authority to adjudicate claims raised in an untimely petition, is not, itself, "jurisdictional," – the apparent linchpin of Sasser's argument in response. Indeed, unlike § 2244(b)(4), there is no language in § 2244(d)(1) indicating Congress expressly intended it

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[2] While he does not address opposing authority, Sasser acknowledges the timeliness issue largely concerns whether filing an application for authorization in the court of appeals – rather than a second petition in the district court – stops the one-year clock. Brief in Opposition at 28-31. This acknowledgement of the legal nature of the issue undercuts his argument elsewhere that he was unable to make a record on the issue. Brief in Opposition at 23 n.14.

to limit the district courts' power to adjudicate untimely petitions in general, so it is akin to an inflexible claim-processing rule that "courts have typed 'non-jurisdictional,'" *Day*, 547 U.S. at 205, and that are generally subject to forfeiture. *See Kontrick v. Ryan*, 540 U.S. 443, 456 (2004) (differentiating time prescriptions that delineate classes of cases within a court's adjudicatory authority, which are not subject to forfeiture, from those that are inflexible claim-processing rules, which are subject to forfeiture). *See also Eberhart v. United States*, 546 U.S. 12, 16 (2005) (per curiam) (same).

Focused on this "jurisdictional" point made in *Day*, Sasser apparently misses the significance of the Court's holding that, despite its "non-jurisdictional" or claim-processing-rule status, the limitations provision, standing alone, is sufficiently like other traditional threshold barriers to habeas relief so as to be incompatible with the strict rule of forfeiture embodied in the Federal Rules of Civil Procedure and deserving of different treatment in keeping with Habeas Rule 11. *Day*, 547 U.S. at 208-09. He, therefore, necessarily misses the State's point that, as incorporated into AEDPA's gatekeeping provision by § 2244(b)(4), with its requirement of mandatory dismissal for non-compliance, the limitations statute is rendered even more incompatible with the forfeiture rule in successive-petition cases than it was in the first-petition case of *Day* and, therefore, is deserving of different treatment.

In § 2244(b)(4), Congress made clear its intent to prohibit a district court from adjudicating a claim in a second or successive petition unless the petitioner first demonstrates the petition is timely. Indeed, by giving the limitation provision the extraordinary effect of mandatory dismissal for non-compliance and by drawing the limitation provision into the district court's gatekeeping mechanism, itself, Congress plainly indicated that the primary goal of the limitation provision in successive-petition cases is much greater than simply protecting defendants from unduly delayed claims, a protection to which the forfeiture rule would apply. Rather, Congress specifically crafted this statute with an eye toward achieving a much broader, system-related goal beyond a defendant's case-specific interest in timeliness. "The Court has often read the time limits of these statutes as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *John R. Sand and Gravel v. United States,* 552 U.S. 130, ___, 128 S.Ct. 750, 753 (2008). Both Sasser and the Eighth Circuit missed this jurisdiction-like quality of § 2244(b)(4). Where a court's adjudicatory authority over a class of cases is conditioned on a time prescription, as is the case in § 2244(b)(4), the forfeiture rule will not apply even in ordinary civil cases. A party cannot expand a court's adjudicatory authority by its conduct – that is, by failing to assert the lapse of a time prescription that circumscribes that authority. Section 2244(b)(4) makes consideration

of the limitations issue part of a district court's independent and *sua sponte* gatekeeping responsibility, and it precludes adjudication of any claim absent a petitioner's preliminary demonstration that his petition is timely as a threshold matter. Sasser's reliance on *Day*'s determination that § 2244(d)(1), standing alone, is not a "jurisdictional" limitation, therefore, simply misses the mark – as does the Eighth Circuit's decision on this point.

Moreover, though he argued to the contrary in the Eighth Circuit, Sasser now also concedes that the State presented the timeliness issue before final adjudication in the district court, contrary to the finding that formed the premise for the Eighth Circuit's decision to apply the forfeiture rule. Brief in Opposition at 20-21. Sasser dismisses the erroneous nature of the Eighth Circuit's premise, however, by insisting that, under *Day* and Rule 8(c) of the Federal Rules of Civil Procedure, the State nevertheless was obligated to assert the limitations issue in its first responsive pleading or in a formal amendment thereto in order to avoid forfeiture. Brief in Opposition at 21. Though this requirement is not found in *Day*, where the State never argued a limitations bar and, in fact, expressly conceded the limitations issue in its answer, according to Sasser, "[t]he fact that the state mention[ed] 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." Brief in Opposition at 21.

Like his "jurisdictional" litmus test that focused only on § 2244(d)(1), Sasser's inflexibility here again demonstrates his misunderstanding not only of *Day* and the flexible relationship of the Civil Rules to habeas proceedings, but also the Civil Rules themselves. Although in ordinary civil cases, the Civil Rules require that affirmative defenses generally must be raised in a first responsive pleading, *see* Fed. R. Civ. P. 8(c), it is widely recognized that "a defense may be raised in a number of ways even if the defense is not presented in the initial response" – including by pretrial motion and for the first time on appeal – and forfeiture will not apply where, as here, no prejudice has accrued from any delay. 2 James W. Moore, *Moore's Federal Practice* § 8.07[3], at 8-38 (3d ed. 2005). *See also* 5 Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1278, at 666-73, 685-87 (2004). It is further recognized that the judiciary plays a distinctive role in enforcing jurisprudential and Congressional limitations on habeas relief, even where doctrines of forfeiture might preclude their enforcement in private civil litigation. In *Granberry v. Greer,* 481 U.S. 129 (1987), for example, the Court held that a court of appeals has the power to dismiss a habeas petition for failure of a petitioner to exhaust state remedies even though the State failed to raise nonexhaustion in the district court. *Id.* at 134. Though *Granberry* informed the Court's decision in *Day*, Sasser's brief in opposition is completely silent

about *Granberry*'s recognition that the forfeiture rule in habeas cases is not necessarily determined exclusively by reference to the State's answer or formal amendments to it. No purpose would be served by insisting on such formality, especially in a context in which courts have an express obligation to dismiss a claim if it is presented in an untimely, successive petition or where, as here, the habeas petitioner has suffered no prejudice. For that reason, even assuming the forfeiture rule of *Day* applied to the gatekeeping provision in § 2244(b)(4), Sasser's concession that the State raised the timeliness issue before any discovery was allowed renders the Eighth Circuit's decision contrary to *Day* and *Granberry*.

CONCLUSION

The petition for writ of certiorari should be granted.

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