No. _____ 071594 JUN 19 2008

In The
Supreme Court of the United States

JOSE ALFREDO RIVERA,

Petitioner,

v.

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

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Under 28 U.S.C. § 2244(d), enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a one-year statute of limitations applies to applications for a writ of habeas corpus for persons in custody pursuant to the judgment of a state court. Jose Alfredo Rivera filed a successive habeas petition in the United States District Court for the Southern District of Texas, arguing that under *Atkins v. Virginia*, 536 U.S. 304 (2002), Texas could not execute him because he was mentally retarded. Under 28 U.S.C. § 2244(d)(1)(C), Rivera's one-year limitation period began to run from the date on which the *Atkins* decision recognized that executions of mentally retarded offenders were "cruel and unusual punishments" prohibited by the Eighth Amendment. The district court found that Rivera was mentally retarded and permanently enjoined his execution over the Directors' objection that Rivera's habeas petition was untimely under the one-year AEDPA statute of limitations. Upon appeal, the Fifth Circuit affirmed the district court's mental retardation finding, determining that the merits blend inseparably into the question of equitable tolling. But the Fifth Circuit remanded the case to the district court to conduct an evidentiary hearing on the issue of equitable tolling after concluding that Rivera's habeas petition was untimely as a matter of law.

CAPITAL CASE

QUESTIONS PRESENTED – Continued

This case presents the following important questions, which divide some courts of appeals:

1. Is a timely-filed motion for authorization in the court of appeals that is accompanied by the proposed habeas petition sufficient to satisfy AEDPA's statute of limitations?

2. Does the fact that an offender is "actually innocent" of the death penalty under *Atkins* render the one-year statute of limitations in 28 U.S.C. § 2244(d)(1)(C) inapplicable so that it cannot be applied to bar habeas claims because doing so would result in a fundamental miscarriage of justice?

LIST OF PARTIES

This petition stems from a habeas corpus proceeding in which the petitioner, Jose Alfredo Rivera, was the respondent before the United States Court of Appeals for the Fifth Circuit. Rivera is a prisoner sentenced to death and is in the custody of Nathaniel Quarterman, the Director of the Texas Department of Criminal Justice, Institutional Division ("Director"). All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Jose Alfredo Rivera respectfully petitions for a writ of certiorari to review the portion of the judgment of the United States Court of Appeals for the Fifth Circuit that vacated the district court's order denying the state's motion to dismiss on the basis of AEDPA's statute of limitations and remanding the case to the district court with instructions to hold an evidentiary hearing, make specific findings, and rule on the issue of equitable tolling.[1]

OPINIONS BELOW

The opinion of the court of appeals (Appendix A) is reported at 505 F.3d 349 (5th Cir. 2007). The order denying the petition for panel rehearing is unreported (Appendix B).

The Judgment of Conviction and Sentence of the State District Court of Cameron County, Texas' order is unreported (Appendix C). The United States District Court's memorandum opinion and order finding Rivera mentally retarded, granting habeas relief, and permanently enjoining him from being executed is

[1] Rivera does not challenge the Fifth Circuit's affirmance of the district court's finding that Rivera is mentally retarded, nor the Fifth Circuit's decision that the Texas Court of Criminal Appeals' dismissal of Rivera's state habeas petition was an "unreasonable application" of clearly established federal law. *See* 28 U.S.C. § 2254(d); *see also* Appendix A.

unpublished. 2007 WL 870927 (S.D. Tex., March 31, 2006) (Appendix D).

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its decision and entered judgment on October 18, 2007. Appendix A. Petitioner timely filed a Petition for Panel Rehearing on November 1, 2007. Fed. R. App. P. 40(a)(1). The court of appeals denied rehearing on March 21, 2008. A copy of the Order denying rehearing appears at Appendix D. Petitioner has timely filed this Petition for Writ of Certiorari within 90 days of the order denying rehearing. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

28 U.S.C. § 2244(b) of AEDPA provides in relevant part:

> (1) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on

> collateral review by the Supreme Court, that was previously unavailable[.]
>
> * * *
>
> (2) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

28 U.S.C. § 2244(d) provides in relevant part:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from * * * (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review[.]
>
> * * *
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Also at issue in this case is the application of 28 U.S.C. § 1631, which states:

§ 1631. Transfer to cure want of jurisdiction

> Whenever a civil action is filed in a court as defined in section 610 of this title, * * * and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action * * * to any other such court in which the action * * * could have been brought at the time it was filed * * * , and the action * * * shall proceed as if it had been filed in * * * the court to which it is transferred on the date upon which it was actually filed in * * * the court from which it is transferred.

Fed. R. App. P. 22(a) provides in relevant part:

> An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court.

STATEMENT OF THE CASE

This death penalty case concerns: (1) whether a petitioner has satisfied AEDPA's statute of limitations by timely filing a motion for authorization in the court of appeals accompanied by the successive habeas application on the last day of the limitations period (even if the habeas application is not subsequently refiled in the district court until two business days after the motion for authorization was granted);

and (2) whether an evidentiary hearing on the issue of equitable tolling is required when the petitioner has been confirmed by the court of appeals to be mentally retarded.

In May 1994, Rivera was convicted and sentenced to death for murdering a child. Appendix C. During his trial, no evidence was adduced regarding Rivera's mental competency. On direct appeal, the Texas Court of Criminal Appeals ("CCA") affirmed the judgment and sentence, and Rivera did not seek certiorari review. Appendix A at App. 2. Rivera then filed a state court habeas petition, which the CCA denied on December 16, 1998. *Id.* Rivera then filed a federal habeas petition, which the district court denied on October 3, 2001. *Id.* The Fifth Circuit denied Rivera's application for a certificate of appealability ("COA") on November 27, 2002. *Id.* Rivera's execution date was set for August 6, 2003. *Id.* Up until this stage of the proceedings, Rivera had not asserted a claim based on mental retardation.

On June 20, 2003 – exactly one year after this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002) – Rivera filed a subsequent application for writ of habeas corpus with the CCA in which he presented for the first time a mental retardation claim based on *Atkins*. Appendix A at App. 2. This was the last day to bring an *Atkins* claim under AEDPA's one-year statute of limitations period. 28 U.S.C. § 2244(d)(1)(C). The CCA dismissed Rivera's application on July 25, 2003 for failure to produce sufficient specific facts to support an *Atkins* claim. Appendix A at App. 2. Thereafter, Rivera submitted a suggestion for rehearing to

the CCA and presented an affidavit from Dr. Richard Garnett. *Id.* at App. 2, App. 13-15. On August 5, 2003, the CCA refused to reconsider its decision. *Id.* at App. 2. Rivera filed, and the state courts rejected, a final state habeas petition on Wednesday, August 6, 2003. *Id.* This Court denied certiorari review on August 6, 2003. *Rivera v. Texas*, 539 U.S. 978 (2003).

Rivera also sought relief in federal court on his *Atkins* claim. Appendix A at App. 3. On Tuesday, August 5, 2003, Rivera filed a motion for authorization to file a successive petition in the Fifth Circuit, as required by 28 U.S.C. § 2244(b)(3)(A). *Id.* With the motion for authorization, Rivera also submitted his proposed successive application for habeas corpus. The Fifth Circuit denied Rivera's first motion on August 6, 2003, concluding that Rivera failed to make a *prima facie* showing of mental retardation because Rivera had not first presented Dr. Garnett's affidavit to the state courts. *Id.*

On the same date – the date of Rivera's scheduled execution – Rivera returned to state court and filed an application for a second subsequent writ of habeas corpus, presenting Dr. Garnett's affidavit that the Fifth Circuit refused to consider. *Id.* The state courts rejected Rivera's petition the same day, and Rivera then returned to the Fifth Circuit, filing a second motion for authorization to file a successive petition with the court. *Id.* The Fifth Circuit issued a second opinion late in the evening on Wednesday, August 6, 2003, concluding that Rivera had made a *prima facie* showing of mental retardation, authorizing the successive petition on that issue only, and

granting Rivera's petition for authorization to file a successive petition and staying the execution. *Id.* Rivera refiled his successive writ petition with the district court on Monday, August 11, 2003. *Id.*

The case was assigned to United States District Judge Filemon B. Vela, the judge who presided over Rivera's first federal habeas petition. The Director moved to dismiss Rivera's writ arguing that it was untimely as a matter of law and that Rivera was not entitled to equitable tolling. Appendix A at App. 3. Before Rivera's counsel could respond to the motion to dismiss, Judge Vela summarily denied the motion during a status conference in September 2003, but indicated that he would be willing to reconsider his ruling. *Id.* at App. 4.

Following the status conference, the mental retardation issue was briefed and a two-day evidentiary hearing was held in January 2004. *Id.* Judge Vela died before rendering a decision, and the case was re-assigned to United States District Judge Andrew S. Hanen. *Id.* Judge Hanen held a second evidentiary hearing on January 14, 2005, during which the court had an opportunity to see, hear, and directly question the three experts who had previously testified on the mental retardation issue before Judge Vela. *Id.* at App. 4-5. Following that hearing and extensive briefing from the parties, the district court, relying on all the evidence presented to both it and Judge Vela, issued its Memorandum Opinion and Order of March 31, 2006, finding Rivera mentally

retarded, granting habeas relief, and permanently enjoining the Director from executing Rivera. *Id.*; Appendix B. The Director did not revisit the AEDPA statute of limitations issue despite the district court's "explicit invitation to the state to brief and raise again the timeliness issue." Appendix A at App. 7. Instead, the state switched litigation strategies and focused on the merits of Rivera's *Atkins* claim. *Id.*

The Director appealed to the Fifth Circuit. On October 18, 2007, the Fifth Circuit affirmed the district court's finding that Rivera is mentally retarded. Appendix A. However, the Fifth Circuit determined that Rivera's application filed with the district court on Monday, August 11, 2003, was untimely. *Id.* at App. 6. The court of appeals vacated the district court's order denying the state's motion to dismiss on the basis that Rivera's claims are time-barred under AEDPA and remanded to the district court with instruction to hold an evidentiary hearing, make specific findings, and rule on the "potentially dispositive" issue of equitable tolling. *Id.* at App. 9.

Rivera moved for rehearing, arguing that his petition for habeas relief met AEDPA's statute of limitations because he filed with the Fifth Circuit within the required time period for a motion for authorization to file a successive petition attaching his proposed habeas petition. Appendix D. Although the Fifth Circuit found Rivera's argument "compelling," the court of appeals held that it was bound by *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002), absent an intervening decision from this Court, an en banc

decision from the Fifth Circuit, or a change in statutory law. *Id.* at App. 114-15. Acknowledging that Rivera attached his proposed habeas petition, which was not required of the petitioner in *Fierro* and which the petitioner there did not do on his own initiative, the court nevertheless held that "this alone did not alter the analysis that undergirds *Fierro*." *Id.* at App. 115.

REASONS FOR GRANTING THE PETITION

I. This Case Provides the Court with a Means to Resolve Confusion in the Circuits over Compliance with AEDPA's Statute of Limitations By Timely Filing a Motion for Authorization with an Attached Habeas Petition.

The Fifth Circuit's determination that Rivera's habeas petition was untimely despite the fact that his motion for authorization was timely filed in the court of appeals with the proposed habeas petition attached presents a substantial issue not resolved by this Court and one which differs from the understanding of the Second Circuit, the Sixth Circuit, and the Tenth Circuit. *See Liriano v. United States*, 95 F.3d 119, 122-23 (2d Cir. 1996); *In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997); *Easterwood v. Champion*, 213 F.3d 1321, 1323-24 (10th Cir. 2000). The Fifth Circuit remanded this case for an evidentiary hearing on the factual basis for equitable tolling, but remand is not required because Rivera's habeas application was timely filed with the Fifth Circuit.

A. The Fifth Circuit's Decision in *Fierro* Should Not Control the Timeliness Issue, But If It Does, then the Analysis Is Inconsistent with Decisions from Other Circuits.

The Fifth Circuit, citing its prior holding in *Fierro v. Cockrell*, 294 F.3d 674 (5th Cir. 2002) determined that the filing of a motion for authorization to file a successive petition with the attached proposed habeas petition does not satisfy the AEDPA statute of limitations. Appendix D at App. 114-15. Accordingly, the court of appeals determined that Rivera's habeas application filed in the district court was untimely. *Id.*; *see also* Appendix A at App. 6. However, even assuming *Fierro* was correctly decided, *Fierro* is not controlling. *Fierro* holds only that a bare motion for authorization not accompanied by a habeas application will not satisfy the AEDPA statute of limitations.

In *Fierro*, AEDPA's one-year statute of limitations expired on November 28, 1997. Fierro filed his motion for authorization in the court of appeals on October 20, 1997. Fierro argued that his motion for authorization effectively initiated the one-year statute of limitations notwithstanding that a habeas petition must be filed in the district court. Fierro asserted that his motion included all the elements of a habeas petition, including a jurisdictional statement, a statement of facts, a statement of his claims, and legal authority supporting those claims. However, Fierro was not required to attach a proposed habeas petition to his motion for authorization nor did he do so on his own initiative. The Fifth Circuit

rejected Fierro's argument that his motion for authorization was sufficient, holding that the language of AEDPA and analogous case law compel the conclusion that a motion for authorization to file a successive petition is not itself an "application for writ of habeas corpus." 294 F.3d at 680; *see id.* at n.9 (citing *In re Epps*, 127 F.3d 364, 365 (5th Cir. 1997) (acknowledging that the current law requires a petitioner seeking to file a successive petition to attach the proposed petition to the motion for authorization).

Fierro's holding that a preliminary motion for authorization cannot satisfy the statute of limitations under the AEDPA, even if correct, does not resolve the issue in this case where the motion for authorization was accompanied by the habeas petition. *Fierro* expressly stated that it only dealt with "whether a motion for authorization alone could satisfy the statute of limitations." *Id.* at 681 n.11.

The Fifth Circuit's *In re Lewis*, 484 F.3d 793 (5th Cir. 2007) decision addressed the time-bar issue under AEDPA and seemed to intimate that the timely filing of a motion for authorization accompanied by a habeas application would be sufficient to satisfy the AEDPA's one-year statute of limitations and would be distinguishable from the situation presented in *Fierro*. In *Lewis*, the petitioner filed his successive application for habeas corpus in Texas state court on the very last day of his AEDPA period. *Id.* at 796. On December 6, 2006, the CCA issued a final judgment denying Lewis' state application. *Id.* This left Lewis one business day, until December 7, 2006, to file his

application in federal court. *Id.* The Fifth Circuit concluded:

> Although Lewis mailed his motion for authorization to file a successive federal habeas petition on December 7, 2006, generally mailing is not the equivalent of filing, and *an application is not considered filed until it is placed in the possession of the clerk of court.* Thus, Lewis' application was not filed until December 8, 2006. As a result, Lewis' application is barred by AEDPA's statute of limitations and must be denied, unless he has demonstrated that he is entitled to equitable tolling of the limitations period.

Id. (emphasis added, footnote omitted). Thus, in *Lewis*, the Fifth Circuit intimated that the application would not have been time-barred if the authorization motion (which had to be accompanied by the proposed habeas application) had been filed with the court by the deadline.

Rivera filed his motion for authorization accompanied by his successive federal habeas petition on the last day of the deadline for the AEDPA statute of limitations period. Rivera's application accompanied by the successive habeas application should be considered timely and sufficient to satisfy the AEDPA's statute of limitations. However, the Fifth Circuit has held that the analysis that undergirds *Fierro* is not altered by timely submitting the proposed habeas petition with the motion for authorization and that *Lewis* did not analyze this issue. Appendix D at App. 115.

In contrast, the Second Circuit has suggested in *Liriano* that a petitioner could submit an "application" to the court of appeals "accompanied by" the motion for authorization that "would be considered in determining the applicant's compliance with the applicable one-year limitations period." *Liriano v. United States*, 95 F.3d at 122-23. Citing *Liriano*, the Sixth Circuit has held:

> In facing this problem, the Second Circuit held that "when a second or successive petition for habeas corpus relief or § 2255 motion is filed in a district court without the authorization by this Court that is mandated by § 2244(b)(3), the district court should transfer the petition or the motion to this Court in the interest of justice pursuant to § 1631, as was done in this case." *Liriano v. United States*, 95 F.3d 119, 123 (2d Cir. 1996) (per curiam).
>
> The Second Circuit's view is persuasive. Thus, we hold that when a prisoner has sought § 2244(b)(3) permission from the district court, or when a second or successive petition for habeas corpus relief or § 2255 motion is filed in the district court without § 2244(b)(3) authorization from this court, the district court shall transfer the document to this court pursuant to 28 U.S.C. § 1631. The § 2244(b)(3) motion to file the second or successive petition or § 2255 motion will be deemed filed, for purposes of the one-year limitation periods established by § 2244(d) and § 2255, on the date that the § 2244(b)(3) motion is given to prison authorities for

> mailing and the prisoner has satisfied the verification requirements of Fed. R. App. P. 25(a)(2)(C). *See Houston v. Lack*, 487 U.S. 266, 270, 108 S.Ct. 2379, 2382, 101 L.E.2d 245 (1988).

In re Sims, 111 F.3d at 47. The Sixth Circuit has therefore indicated that even if no actual application is filed in the United States District Court, a mere request for authorization will satisfy the statute of limitations. *See id.* The Tenth Circuit has assumed, without explanation, that the time a motion for authorization was pending before it tolled the statute of limitations. *See Easterwood v. Champion*, 213 F.3d at 1323-24 (limitations period was "tolled during the twenty-three days that [petitioner's] request to file a successive habeas petition was pending before this court."), *appeal after remand*, 2001 WL 1204379 (10th Cir. Oct. 10, 2001) (unpublished). Because Rivera's habeas petition was actually filed with the Fifth Circuit before the AEDPA limitations period expired, it should be considered timely.

B. Rivera's Successive Habeas Application Should Be Considered Timely Filed Because It Would Have Been Timely if Transferred in the "Interest of Justice."

An unauthorized habeas application filed within the AEDPA limitations period in the district court can be transferred to the court of appeals and considered timely. The Fifth Circuit's *In re Wilson* decision confirms that a habeas application filed without the

court of appeal's prior authorization in the district court within the one-year limitations period that is transferred by the district court to the court of appeals is considered to be timely filed. *See In re Wilson*, 442 F.3d 872, 874 (5th Cir. 2006).

On June 20, 2003, the very last day of Wilson's AEDPA limitations period, Wilson filed successive applications for habeas corpus in both federal district court and Texas state court. The federal court proceedings were dismissed, and the state application went forward until the CCA issued final judgment denying Wilson's state application on November 10, 2004. *Wilson*, 442 F.3d at 874. Wilson then had one business day to re-file his application in federal court. Because November 11 was a federal holiday, Wilson's filing deadline was November 12, 2004. *Id.* On November 12, Wilson attempted to re-file his successive application in the district court without this Court's prior authorization as required under AEDPA. *Id.* (citing 28 U.S.C. § 2244(b)(3)(A)). The district court dismissed Wilson's successive application as unauthorized. *Id.* The Fifth Circuit acknowledged that had the district court transferred the application to it, the application would have been timely:

> Had the district court transferred the application to this court, rather than dismissing it as unauthorized, the application would have been timely, as the date of filing for limitations purposes would have related back to the date of the initial filing in the district court on November 12. *See* 28 U.S.C. § 1631 (permitting district court to transfer unauthorized

> successive applications for habeas corpus to court of appeals if "in the interest of justice," and providing for relation back).

Id. at 874 n.3 (emphasis added).

28 U.S.C. § 1631 provides authority for a transfer from the district court to the court of appeals. At least two circuits require the transferring of the document from the district court to court of appeals when the successive petition for habeas corpus relief is filed in the district court without authorization. *See In re Sims*, 111 F.3d 45 (6th Cir. 1997); *Liriano*, 95 F.3d at 123. Under § 1631, the document would be treated as if filed in the transferee court on the date upon which it was actually filed in the transferor court.

"Court" as used in § 1631 includes the courts of appeals and the district courts of the United States. 28 U.S.C. § 610. Thus, not only is the district court authorized to transfer an unauthorized habeas application to the court of appeals, but the court of appeals is likewise authorized to transfer an application for writ of habeas corpus to the appropriate district court. § 1631; Fed. R. App. 22(a) ("An application for writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court."); *see, e.g., U.S. v. McBride*, 149 F.3d 1175 (5th Cir. 1998) (per curiam) (unpublished) (transferring case from court of appeals to district court in the interest of justice because otherwise defendant would be denied the opportunity to appeal his conviction and sentence).

Because Rivera's habeas application could and should have been transferred from the court of appeals to the district court in the "interests of justice," it should be considered timely. This Court should grant the relief requested and resolve the confusion in the courts below regarding whether the timely filing of a motion for authorization in the court of appeals accompanied by the proposed habeas petition satisfies AEDPA's statute of limitations.

II. The Fifth Circuit's Decision Conflicts with the Holdings of Other Circuits that Actual Innocence of the Death Penalty Overcomes AEDPA's Statute of Limitations.

Finding that the district court did not clearly err in determining that Rivera had significantly subaverage intellectual functioning, related adaptive functioning deficits, and onset before age 18, the Fifth Circuit affirmed the district court's finding that Rivera is mentally retarded. Despite the potentially dispositive AEDPA statute of limitations issue, the court properly reached the merits of the also "potentially determinative" mental retardation issue holding that the merits of that issue "blend inseparably" into the issue of equitable tolling. Appendix A at App. 9-10. The Fifth Circuit observed that "answering whether Rivera is retarded is logically antecedent – if not a core element itself – to determining whether equitable tolling is available." *Id.* The court of appeals held that mental retardation was merely one consideration relevant to the determination of whether the AEDPA statute of limitations was to give way. But

the court held that such an inquiry was highly fact-specific and that the factual record from the district court from the initial habeas proceeding was not sufficient to make such an inquiry: " . . . what occurred during the nearly six months between the end of the first federal habeas proceedings and the filing of Rivera's state petition raising his *Atkins* claim is unclear." *Id.* at App. 8-9.

In remanding to the district court for a factual determination on equitable tolling,[2] the Fifth Circuit implicitly rejected the argument that Rivera's mental retardation itself precludes application of the AEDPA statute of limitations to bar his claim under the habeas doctrine's "miscarriage of justice" exception. *See id.* at App. 7. Other circuits have held that where, as here, a habeas petitioner has a credible claim of actual innocence, the AEDPA statute of limitations must effectively give way in order to permit a hearing of the petition. *See, e.g.*, *Souter v. Jones*, 395 F.3d 577, 599 (6th Cir. 2005). This Court should resolve the dispute among the circuits because important Eighth Amendment rights are implicated, as well as issues of judicial efficiency.

Because, as shown below, the statute of limitations must categorically yield to one who is death

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[2] This Court has never determined whether 28 U.S.C. § 2244(d) allows for equitable tolling. *Lawrence v. Florida*, __ U.S. ___, 127 S.Ct. 1079 (2007). In *Lawrence*, this Court assumed, without deciding, that equitable tolling was available. *Id.* at 1085.

ineligible under the Eighth Amendment, there is no basis to remand for a fact-specific inquiry on the issue of equitable tolling. There has already been a fact-finding on the issue of Rivera's mental retardation, and the Fifth Circuit determined that the district court's mental retardation finding was not clearly erroneous. Assuming that Rivera's habeas application was untimely, Rivera is nonetheless entitled to habeas relief under the miscarriage of justice exception.

To reach the merits of a procedurally defaulted claim in federal court a habeas petitioner generally must show "cause and prejudice." *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977); *Murray v. Carrier*, 477 U.S. 478, 492 (1986). However when failure to hear a claim would result in a "miscarriage of justice" this Court has recognized the power of federal courts to hear procedurally defaulted claims even without a showing of cause and prejudice. *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992); *Schlup v. Delo*, 513 U.S. 298, 315 (1995). The miscarriage of justice exception requires that the petitioner "establish that under the probative evidence he has a colorable claim of factual innocence." *Kuhlmann v. Wilson*, 477 U.S. 435, 454 (1986).

In *Sawyer,* this Court held that the miscarriage of justice exception also applies to claims of death ineligibility or actual innocence of the death penalty. *Sawyer*, 505 U.S. at 340. A petitioner who has a colorable claim of being actually innocent of the death penalty is entitled, just as one who is factually innocent, to lift a procedural bar because failure to hear such claims would result in a fundamental

miscarriage of justice. *See id.* Accordingly, a claim of actual innocence provides a "gateway" through which otherwise procedurally barred constitutional claims may be considered. *Schlup*, 513 U.S. at 315. An "actual innocence" exception to the bar on successive habeas petitions was codified through AEDPA at 28 U.S.C. § 2244(b)(2)(B)(ii), but Congress did not include the same or any similar exception in the provisions governing time limitations at § 2244(d). In *Dretke v. Haley*, 541 U.S. 386 (2004), this Court confirmed that the fundamental miscarriage of justice exception survived the AEDPA and that it remains available to capital offenders with colorable claims of actual innocence, whether of the sentence or of the crime charged. *Id.* at 393-94.

"Innocence of the death penalty" focuses on the objective elements that render a defendant eligible for the death penalty. *Id.* at 347. *Sawyer* held that to show "actual innocence" one must show by "clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer*, 505 U.S. at 336. When this standard is satisfied, a petitioner may access review of his otherwise time-barred claims via the "actual innocence" gateway. *Schlup*, 513 U.S. at 324, 237-38.

The Eighth Amendment's ban on imposing capital punishment on certain classes of persons provides definition to the concept of "innocence of the death penalty," and the Constitution categorically exempts

from execution the mentally retarded. *See Atkins v. Virginia*, 536 U.S. at 319-22. As this Court recognized in *Atkins*, the social purposes served by the death penalty – retribution and deterrence of capital crimes by prospective offenders – do not apply to mentally retarded offenders. *Id.* at 319. Because of their disabilities in the areas of reasoning, judgment, and control of their impulses, mentally retarded offenders do not act with the level of moral culpability that characterizes that narrow category of the most serious crimes for which the death penalty may be imposed. *Id.*

In addition, mentally retarded offenders have cognitive and behavioral impairments, including diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses. Their impairments make it less likely that they can process the information of the possibility of execution as a penalty, and as a result deter their future conduct based upon that information. *Id.* at 320. Thus, in *Atkins*, this Court concluded that the goals of retribution and deterrence were not furthered by executing mentally retarded offenders. *Id.* at 319-20.

Moreover, because of their reduced capacity, mentally retarded offenders face a special risk of wrongful execution. *Id.* at 321. They are less able to give meaningful assistance to their counsel, are typically poor witnesses, their demeanor may create an unwarranted impression of lack of remorse for

their crimes, and they are more likely to unwittingly confess to a crime that they did not commit. *Id.*

This Court has explicitly tied the miscarriage of justice exception to the petitioner's innocence because it preserves the balance between "the societal interests in finality, comity, and conservation of judicial resources with individual justice in the extraordinary case." *Schlup*, 513 U.S. at 324. Claims of categorical ineligibility for the death penalty, like mental retardation, are uniquely unsuitable for application of a rule intended to promote finality because society has no legitimate interest in sentencing these defendants to death in the first place. *See Penry v. Lynaugh*, 492 U.S. 302, 330 (1989) ("There is little societal interest in permitting the criminal process to rest at a point where it ought never to repose.") (internal quotation marks omitted). AEDPA's one-year statute of limitations period "quite plainly serves the well-recognized interest in finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 179 (2001). Inclusion of an actual innocence exception to the limitations provisions does not foster abuse and delay, but rather recognizes that in extraordinary cases the societal interests of finality, comity, and conservation of scarce judicial resources "must yield to the imperative of correcting a fundamentally unjust incarceration." *Carrier*, 477 U.S. at 495.

Although this Court has not yet determined whether a showing of actual innocence is grounds for overcoming AEDPA's statute of limitations, several circuits are in disagreement about the issue. The Seventh Circuit has held that freestanding

claims of actual innocence are not alone sufficient to merit waiving AEDPA's statute of limitations: "Section 2244(d) has a rule for when new factual discoveries provide a fresh period for litigation; unless that standard is met, a contention that the new discoveries add up to actual innocence is unavailing." *Escamilla v. Jungwirth*, 426 F.3d 868, 872 (7th Cir. 2005). The Eighth Circuit has also held that when a petitioner has failed to show extraordinary circumstances prevented him from timely filing, a claim of actual innocence will not toll the statute of limitations under AEDPA because it "would take the equitable-tolling doctrine far from its original and legitimate rationale." *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002). Similarly, the First Circuit has indicated in dicta that the miscarriage of justice exception would not toll AEDPA's statute of limitations. *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003).

In contrast, the Sixth Circuit has held that Congress "enacted [the AEDPA limitations defense] consistent with the *Schlup* [*v. Delo*, 513 U.S. 298 (1995)] exception. Therefore, equitable tolling of the one-year limitations period on a credible showing of actual innocence is appropriate." *Souter v. Jones*, 395 F.3d at 599. The Tenth Circuit has also stated in dicta that equitable tolling "would be appropriate * * * when a prisoner is actually innocent." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000). Thus, a division exists among the circuit courts as to whether the miscarriage of justice exception compels the conclusion that AEDPA's statute of limitations must give way to a proven claim of mental retardation.

While the First, Fifth, Seventh, and Eighth Circuits have rejected automatic tolling on the basis of credible claims of actual innocence, the Sixth and Tenth Circuits have concluded that AEDPA's statute of limitations must give way for credible claims of actual innocence. Because important constitutional interests are at stake, this Court should resolve the split in the Circuits. *See Triestman v. United States*, 124 F.3d 361, 378-39 (2d Cir. 1997) (finding serious Eighth Amendment and due process concerns if AEDPA's procedural limitations barred habeas petition claiming actual innocence from collateral review).

The clear implication from this Court's line of cases from *Sawyer* to *Dretke* is that AEDPA's statute of limitations must yield to an offender who presents a credible claim of actual innocence of the death penalty. Inclusion of an actual innocence exception to the limitations provisions is also consistent with the underlying principles of the AEDPA. As the conference report stated, one of the purposes of the act was to "curb the abuse of the statutory writ of habeas corpus and to address the acute problems of unnecessary delay and abuse in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 945.

In this case, Rivera has established his claim of actual innocence with the Fifth Circuit's affirmed finding that Rivera is mentally retarded. *See* Appendix A at App. 31. A remand for an evidentiary hearing on equitable tolling when Rivera has shown that he is actually innocent of the death penalty needlessly

postpones final adjudication of his claim and perversely prolongs the very injustice that the miscarriage of justice standard was designed to prevent.

CONCLUSION

As the Fifth Circuit properly concluded, all of the expert testimony, testimony of teachers and family, and the documentary evidence support the district court's determination that Rivera is mentally retarded. Appendix A at App. 30-31. In light of the relative culpability of mentally retarded offenders and the relationship between mental retardation and the penological purposes served by the death penalty, this Court has determined that the death penalty is not a suitable punishment for mentally retarded offenders and that such punishment is excessive under the Eighth Amendment. *Atkins*, 536 U.S. at 317-21. Even though the Fifth Circuit has affirmed the district court's finding that Rivera is mentally retarded, the court of appeals has remanded the case to the district court for an evidentiary hearing to develop the facts on equitable tolling based on its determination that Rivera's habeas petition was untimely.

Rivera timely filed his motion for authorization with an attached proposed habeas petition in the court of appeals. The court of appeals is authorized to transfer the application to the district court and it is considered timely filed as of the date it was filed in

the court of appeals. *See* 28 U.S.C. § 1631; Fed. R. App. P. 22(a). Under these circumstances, Rivera's habeas petition should be considered timely-filed under AEDPA's statute of limitations.

Even assuming Rivera's habeas petition was not timely filed, remand to the district court for an evidentiary hearing on equitable tolling is not required here where Rivera not only has a credible claim of actual innocence of the death penalty, but an established claim of actual innocence of the death penalty. The district court's finding that Rivera is mentally retarded has now been reviewed and affirmed by the court of appeals. Accordingly, AEDPA's statute of limitations must yield.

For the reasons set forth above, Petitioner respectfully prays that this Court grant a writ of certiorari.

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