No. 21-1021

In the Supreme Court of the United States

DEXTER PAYNE, DIRECTOR
ARKANSAS DEPARTMENT OF CORRECTION,
Petitioner

v.

ALVIN BERNAL JACKSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE --- NO EXECUTION DATE SET

QUESTION PRESENTED

Director Payne terms the Question Presented as:

> Whether courts may consider adaptive strengths in deciding whether a defendant is intellectually disabled and thus ineligible for the death penalty.

Jackson disagrees with that characterization. What Director Payne is really asking is this:

> Whether the Court should overturn its precedents and limit a state's discretion to formulate appropriate ways to enforce the restriction on executing the intellectually disabled even though it is informed by the medical community's diagnostic framework.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to Director Payne's invocation of the Eighth Amendment, the following Arkansas statute is also involved.

> § 5-4-618. Defendants with intellectual disabilities
>
> (a)(1) As used in this section, "intellectual disabilities" means:
> (A) Significantly below-average general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than eighteen (18) years of age; and
> (B) A deficit in adaptive behavior.
> (2) There is a rebuttable presumption of intellectual disabilities when a defendant has an intelligence quotient of sixty-five (65) or below.
> (b) No defendant with intellectual disabilities at the time of committing capital murder shall be sentenced to death.
> (c) The defendant has the burden of proving intellectual disabilities at the time of committing the offense by a preponderance of the evidence.
> (d)(1) A defendant on trial for capital murder shall raise the special sentencing provision of intellectual disabilities by motion prior to trial.
> (2)(A) Prior to trial, the court shall determine if the defendant has an intellectual disability.
> (B)(i) If the court determines that the defendant does not have an intellectual disability, the defendant may raise the question of an intellectual disability to the jury for determination de novo during the sentencing phase of the trial.
> (ii) At the time the jury retires to decide mitigating

and aggravating circumstances, the jury shall be given a special verdict form on an intellectual disability.

(iii) If the jury unanimously determines that the defendant had an intellectual disability at the time of the commission of capital murder, then the defendant will automatically be sentenced to life imprisonment without possibility of parole.

(C) If the court determines that the defendant has an intellectual disability, then:

(i) The jury is not "death qualified"; and

(ii) The jury shall sentence the defendant to life imprisonment without possibility of parole upon conviction.

(e) However, this section is not deemed to:

(1) Require unanimity for consideration of any mitigating circumstance; or

(2) Supersede any suggested mitigating circumstance regarding mental defect or disease currently found in § 5-4-605.

REASONS FOR DENYING THE PETITION

INTRODUCTION

The question on which Director Payne seeks certiorari elides over the oft-stated position of this Court that as long as state courts do not materially deviate from the consensus definition provided by the medical community, state courts are free to "'develop ... appropriate ways to enforce'" the Eighth Amendment's categorical bar against executing "any intellectually disabled individual." Moore v. Texas (Moore I), 137 S. Ct. 1039, 1048 (2017), quoting Atkins v. Virginia, 536 U.S. 304, 317, 321 (2002); Hall v. Florida , 572 U.S. 701, 719 (2014); Moore v. Texas (Moore II), 139 S. Ct. 666, 669 (2019). That is what the Eighth Circuit did in this case. Particularly in light of the factual record in this case, the Eighth Circuit's resolution of this case does not deviate from this Court's established jurisprudence and is not incorrect. This case does not merit the grant of certiorari review

Arkansas's mental retardation statute is Ark. Code Ann. § 5-4-618. In Sasser v. Hobbs, 735 F.3d 833 (8th Cir. 2013), the Eighth Circuit accepted the Arkansas courts' application of Ark. Code Ann. § 5-4-618. as being consonant with Atkins. That statute provides in pertinent part:

> (a)(1) As used in this section, "mental retardation" means:
> (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and
> (B) A deficit in adaptive behavior.
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

This has been restated in Sasser as:

> 1. "Significantly subaverage general intellectual functioning";
> 2. "[A] significant deficit or impairment in adaptive functioning";
> 3. That both of the above "manifest[ed] ... no later than age eighteen"; and
> 4. "A deficit in adaptive behavior."

As the Court of Appeals observed in this case, the Arkansas statute does not require the weighing of, or any special consideration of, any adaptive strengths. Jackson v. Payne, 9 F.4th 646, 658-659 (8th Cir. 2021). That court held— and the full court denied rehearing and rehearing en banc on— that:

> The State also contends that the district court clearly erred by placing no weight on Jackson's purported adaptive strengths, including his conduct in prison. But we expressly directed the district court to consider "whether Jackson's

adaptive functioning deficits rather than his adaptive functioning strengths indicate that he is not intellectually disabled." Jackson III, 898 F.3d at 869 (emphasis added). Our instruction was informed by Moore I, which stressed that the psychiatric literature "focuses ... on" adaptive deficits, not strengths. See 137 S. Ct. at 1050 (citing several psychiatric texts, including DSM-5). Indeed, the DSM-5 is silent about whether adaptive strengths should be considered at all when diagnosing a person with intellectual disability. The Arkansas statute defining intellectual disabilities similarly says nothing about adaptive strengths, requiring only a showing of a "significant deficit or impairment in adaptive functioning." Ark. Code Ann. § 5-4-618; accord Sasser, 735 F.3d at 845 ("Consistent with nationally accepted clinical definitions of [intellectual disability], the Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations."). This view was reinforced in Moore II, where the Supreme Court criticized the lower appellate court for "again rel[ying] less upon the [petitioner's] adaptive deficits ... than upon [his] apparent adaptive strengths." See 139 S. Ct. at 670. Although the Supreme Court has not expressly forbidden any consideration of adaptive strengths, it has twice said that the focus is on adaptive deficits. The Supreme Court's decisions—consistent with the psychiatric literature—suggest that adaptive strengths play little (if any) role in the adaptive functioning analysis. In the absence of new guidance from the Supreme Court or the medical community regarding the appropriate role of adaptive strengths evidence, we cannot say that the district

court's conclusion that Jackson sufficiently demonstrated adaptive functioning deficits was clearly erroneous. /FN 10?

At 658-659

Footnote 10 explained further:

> Another panel of this Court recently held that, notwithstanding Moore I, a district court did not clearly err in considering evidence of an Atkins petitioner's adaptive strengths in assessing the petitioner's overall adaptive functioning. See Sasser v. Payne, 999 F.3d 609, 619-20 (8th Cir. 2021). However, even assuming adaptive strengths could be relevant, the district court here did not clearly err in assigning them no weight. The State points out that Jackson had some menial labor jobs growing up, which, according to the State, indicates that Jackson has adaptive strengths in the practical domain. But Dr. Macvaugh testified that "[n]othing that [Jackson] has done before the first capital murder charge would necessarily be inconsistent by way of work history with someone with an intellectual disability." Indeed, the medical community estimates that "between nine and forty percent of persons with intellectual disability have some form of paid employment." Brief for APA et al. as Amici Curiae 8, Moore v. Texas, —— U.S. ——, 139 S. Ct. 666, 203 L.Ed.2d 1 (2019). The State additionally notes that when Little Rock police questioned Jackson regarding the Colclasure murder, Jackson expressed concern that the police planned to question his girlfriend and stated, "I just don't want her having nothing to do with that." According to the State, Jackson displayed concern and empathy that is "inconsistent with someone who has significant deficits in the social domain."

> Appellant Br. 56. But the evidence of Jackson's empathy for his girlfriend stood in contrast to evidence of his recurring violent outbursts towards other children and teachers. And the fact that some evidence supports the State's position does not render the district court's contrary conclusion clearly erroneous. See Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) (explaining that when there are "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"). We find that the district court did not clearly err in declining to conclude that the State's proffered evidence outweighed or undermined the documented evidence of Jackson's adaptive deficits.

Jackson's background

Jackson's background and the record of the evidentiary hearing demonstrate further that this is not a case appropriate for certiorari. Jackson has a lengthy history of subaverage intellectual functioning and significant deficits in adaptive functioning and behavior. The record of this case includes the transcript of Jackson's 1990 trial for the Colclasure murder. Following is a brief summary of that information.

Dr. Patricia Kohler, then the director of the Division of Special Education of the Little Rock School District, explained from the records inter alia that at almost seven years of age Jackson was referred for

analysis because of poor schoolwork, emotional outcries and disruptive behavior. He was tested at the borderline range of mental ability.

In 1978, at age eight, Jackson was referred to Elizabeth Mitchell Childrens Center for evaluation. That institution found that he was "unable to function physically or emotionally in a classroom setting at the present time." His verbal IQ was 60, his performance IQ was 90, rendering his full scale IQ as 70. The thirty point discrepancy indicated some "organicity as well as the severeness of his learning problems." She noted that when Jackson was eight years old, the school principal wrote to his mother:

> It will be necessary for you to keep Alvin out of school until something is worked out about his further education. It is almost impossible to get him into or keep him in a classroom. He wanders over the building upsetting furniture, yelling into other classrooms, and hitting or kicking anyone who is within reach. Yesterday he kicked a supervising aide bruising her leg. Today he has choked two children and kicked or bit at a number of others. Last week he announced that he was going to walk home and dashed out of the building. He did not leave, but there is no assurance that he will not leave the next time.

When Jackson was eleven, in 1982, he was again tested and received a mental age of seven years eight months, an IQ of 70 and classification

of very slow learner or poor receptive language development. A 23 point discrepancy at that time between his verbal and performance scores rendered the full scale score irrelevant. He was deemed to have mental retardation.

In 1983 at age 12 he was again evaluated and was placed on Ritalin; the medication was found to be helpful but the dosage level was apparently insufficient to control his hyperactivity. His academic skills were at the second and third grade levels. In December of that year he was placed in a home schooling program.

In 1986 he was again evaluated. It was found, inter alia, that: "There is some difficulty in the visual motor area and expressive and receptive language skills, behavioral concerns are significant..."

Dr. Sam Clements, a child and adolescent psychiatrist at the University of Arkansas, testified at length about ADHD. Inter alia, he testified that it is a mental disorder that first begins in childhood and can continue through a lifetime, that the more severe forms influence almost everything a person does, that some persons afflicted with it exhibit antisocial behavior as they mature, and that if they have borderline mental retardation it makes their lives even more difficult. He testified

that the researchers in the field felt that it is some kind of organic condition or brain dysfunction that the person simply cannot help.

Dr. Lee Archer who examined Jackson at around age 18 and had examined the records as well, inter alia agreed with the diagnosis of borderline mental retardation.

Other exhibits making similar observations of Jackson's childhood and adolescent difficulties include the report of Dr. Bill Johnson in 1978, showing an IQ of 74 (App. 624); the report of Patricia Youngdahl in 1978 (App. 625-626); the report of Dr. Lee Chalhub in 1978 indicating organic impairments (App. 627-628); and the report of Dr. Ronald Johnson in 1984 (App. 629-630). The reliability of these conclusions is reinforced by the fact that they were created and compiled long before Jackson murdered anyone.

In fact, he has been incarcerated for essentially his entire adult life. As Director Payne notes, the Colclasure murder occurred when Jackson was 19.

Concessions made in the evidentiary hearing

In this iteration of the case and after the Eighth Circuit ordered reanalysis of the record, the district court concluded that Jackson was

indeed intellectually disabled and the Eighth Circuit properly accepted that conclusion. Although the district court discounted the opinions of Jackson's expert, the State's own expert, Dr. Gilbert Macvaugh, clearly was torn in his analysis, as one would expect with the lengthy and undeniable childhood history Jackson presents. For instance:

> Q. So to summarize what you are talking about here is your testimony is he may be retarded, you don't know from a forensic standpoint?
>
> A. Correct.
>
> Q. That you develop the clinical but not forensic diagnosis. ...(A)lthough not retarded , he is suffering from legitimate, serious intellectual deficits?
>
> A. It may be helpful for me to rephrase it this way. If he has mental retardation, it's not by much. If he doesn't have it, it's not by much. [emphasis supplied]
>
> (Hrg. at 295)

Earlier on direct examination, after explicitly declining to offer a forensic opinion, he said:

> Clinically, I don't think he has it. Clinically, I think he is squarely in the mid borderline of intelligence and he has other issues. His brain is

> not right, Judge. This man does have intellectual problems, but I don't think that, based upon the information that I had, that his intellectual functioning was so low that he would qualify for that diagnosis. But again, I cannot testify to a reasonable degree of certainty that he does not have it because the consequences of my mistake would be great. And because of the threats to the data and the validity of the information, it would just be intellectually dishonest for me to state an opinion forensically that he does not have it when I would not be confident in that opinion. [emphasis supplied]
>
> (Hrg. At 267-268. App. 326-327)

And on cross-examination this colloquy occurred:

> Q, Dr. Macvaugh, let me start off with something that you said a few minutes ago. You said that Alvin Jackson's brain is not right?
>
> A. Correct.
>
> Q. .... I would assume that's a colloquial expression and not a scientific determination, but you do concede…that he has significant intellectual limitations?
>
> A. I think he has intellectual limitations, yes.
>
> Q. And you said his brain is not right. So we're talking about something in the structure or working of his brain, is that correct?
>
> A. Correct.

> Q. And so in your opinion, the problem is exactly what those problems are and to what extent it....whether it manifests itself in something you call mental retardation or something that doesn't quite go to that level, is that correct?
>
> A. That's one way to capture the essence of this, yes. He has problems with his brain. Whether those problems are due to mental retardation or something else is really the issue.
>
> (Hrg. at 275)

Dr. Macvaugh also conceded that Jackson's choice of words such as "fabricate," language which led him to believe— clinically, at least —that Jackson was not retarded— were words which could be picked up in a prison environment. (Hrg. at 278) He added:

> Whether or not vocabulary usage is a correlate of mental retardation is something we don't have the data on. Obviously, vocabulary is a form of verbal behavior, and verbal behavior is a form of intelligence. So a person's vocabulary usage is relevant, but I wouldn't make an opinion based on just vocabulary usage.
>
> (Hrg. at 279).

He also conceded that "there is a lengthy history of test scores to suggest intellectual problems." (Hrg. 281). There was also this admission:

> Q. And there is no dispute here that whatever he had, whatever Mr. Jackson has has its onset before age 18?
>
> A. Correct.
>
> Q. Okay. So he meets—this is not a, an adulthood phenomenon here for Mr. Jackson.
>
> A. It is not.
>
> (Hrg at 283)

Dr. Macvaugh acknowledged that it is very difficult to determine adaptive behavior of someone in prison. (Hrg at 289) He also agreed that in evaluating pro se pleadings it is very difficult to distinguish whether it is that person's handiwork or whether it has been drafted by someone else. He sees that phenomenon regularly in a correctional setting. (Hrg at 291-292)

With regard to adaptive behavior, Dr. Macvaugh recognized from the "thousands of pages" of records that Jackson had deficiencies in his adaptive behavior before age 18, particularly in areas of social, academic, communications, self direction and functional academics. This is dealt with particularly at Hrg 290-299.

> Q. But there is no question—whatever the cause, there is no question he suffered from

adaptive behavior deficits.

A. I agree with that.

Q. As a child?

A. I agree with that.

(Hrg. at 298)

Although Dr. Macvaugh had speculated that Jackson might have been malingering, he conceded that:

> Although several instruments exist that are designed to assess malingering and memory and cognitive deficits, these instruments lack sufficient normative data for persons with mental retardation in their standardization samples. Therefore, it is unclear as to whether or not persons with mental retardation may score in such a manner on these instruments because of mental retardation that they appear to be malingering when they are not, thereby creating the risk of false positives.
>
> (Hrg. 299-300)

I.

TO THE EXTENT THAT THERE IS A SPLIT AMONG THE STATES AS TO WHETHER AND HOW TO CONSIDER ADAPTIVE STRENGTHS, THE SPLIT IS WITHIN THE FLEXIBILITY AND DISCRETION ENABLED BY THIS COURT'S CASES.

The State asserts that a split of opinion among the states as to the

specifics of determination of intellectual disability essentially mandates a grant of certiorari. However, that position elides over or ignores several undeniable facts about Atkins jurisprudence in particular and federal-state relations in general. Whether and how to consider adaptive strengths is clearly within the flexibility and discretion given the states in enforcing the Eighth Amendment ban on execution of the intellectually disabled.

This Court has made clear that no specific national procedure has been ordained to establish whether a death-sentenced prisoner is intellectually disabled. As long as state courts do not materially deviate from the consensus definition provided by the medical community, state courts are free to "'develop[] appropriate ways to enforce'" the Eighth Amendment's categorical bar against executing "any intellectually disabled individual." (Moore I, 137 S. Ct. at 1048 (quoting Atkins, 536 U.S. at 317, 321); see Hall, 572 U.S. at 719; Moore II, 139 S. Ct. at 669. That is what the Eighth Circuit did in this case.)

Nothing in this Court's Atkins jurisprudence prohibits a focus on deficits. In fact, in Moore I, 137 S.Ct, 1039, 1050, this Court specifically instructed that:

In concluding that Moore did not suffer significant adaptive deficits, the CCA overemphasized Moore's perceived adaptive strengths. The CCA recited the strengths it perceived, among them, Moore lived on the streets, mowed lawns, and played pool for money. See 470 S.W.3d, at 522–523, 526–527. Moore's adaptive strengths, in the CCA's view, constituted evidence adequate to overcome the considerable objective evidence of Moore's adaptive deficits, see supra, at 1045; App. to Pet. for Cert. 180a–202a. See 470 S.W.3d, at 522–524, 526–527. But the medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD–11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM–5, at 33, 38 (inquiry should focus on "[d]eficits in adaptive functioning"; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see Brumfield, 576 U.S., at ——, 135 S.Ct., at 2281 ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.' " (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002))). /FN 8/

In addition, the CCA stressed Moore's improved behavior in prison. 470 S.W.3d, at 522–524, 526–527. Clinicians, however, caution against reliance on adaptive strengths developed "in a controlled setting," as a prison surely is. DSM–5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible,

> corroborative information reflecting functioning outside those settings should be obtained."); see AAIDD–11 User's Guide 20 (counseling against reliance on "behavior in jail or prison").

This Court's Atkins jurisprudence does not prevent a state from enacting a more expansive definition of intellectual disability than the floor mandated in cases such as Moore I, Moore II and Hall. This explicit grant of discretion meshes well with the doctrine that a state is free to grant greater protections in the enforcement of a constitutional right than the floor created or recognized by this Court. Danforth v. Minnesota, 552 U.S. 264, 128 S.Ct. 1029 (2008). Although Danforth dealt with enforcement of rights vis-a-vis retroactivity, the principle is the same. In the context of Atkins litigation, a decision to downplay any so-called "adaptive strengths" is permitted both by Atkins jurisprudence and by Danforth. Director Payne's request would nullify that.

Indeed, as the Court of Appeals noted, the Arkansas statute, is Ark. Code Ann. § 5-4-618, deals with deficits and does not direct a consideration of strengths. Again, the statute provides in pertinent part this, without reference to adaptive strengths:

> (a)(1) As used in this section, "mental retardation"

> means:
> (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and
> (B) A deficit in adaptive behavior.
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

Thus although a strained reading of Footnote 8 in Moore I can be taken to note that the question of how to consider adaptive strengths is unsettled, the discretion specifically vested in the states in the Atkins arena makes a split irrelevant for purposes of certiorari review as long as the framework of the analysis meets certain floor criteria. The Arkansas regime, as accepted by the Eighth Circuit in this case, does that. There is no basis for this Court undertaking plenary review.

II.

THE DECISION OF THE COURT OF APPEALS IS NOT INCORRECT.

Although the flexibility and discretion given to the states should be dispositive of Payne's argument, the Court of Appeals's decision is not incorrect under prevailing medical practice.

First, the Court of Appeals properly decided this case under the

finding that the District Court's decision was not clearly erroneous.

Second, the Court of Appeals properly accepted the District Court's finding that Jackson suffered from significantly subaverage general intellectual functioning. The childhood records clearly demonstrate this fact and Payne apparently does not challenge that the conclusion here.

Third, the Court of Appeals properly credited the District Court findings of adaptive deficits.[1] The childhood records clearly demonstrate this fact and Payne does not challenge that the conclusion here.

Fourth, although the precise clinical terminology has evolved over time, the core principles about the interpretation of adaptive deficits have been well settled among clinicians for decades. Central to this clinical consensus is agreement that the inquiry must focus on deficits in adaptive skills, and not some form of "balancing" those deficits with supposed strengths that an individual might appear to possess. Clinical diagnostic standards focus exclusively on deficits in adaptive functioning because

[1] The District Court wrote: " Upon reconsideration, the Court finds that Jackson has significant deficits in adaptive functioning as required under the second prong of Arkansas's intellectual disability statute....As stated previously in this case, it is undisputed, and the Court finds, that the onset of Jackson's deficits occurred during the developmental period and were present before his eighteenth birthday, and Jackson has proven deficits in adaptive behavior, without regard to the age of onset." (Payne's Petition 73a)

practically every individual who has intellectual disability also has things that he or she has learned to do, and can do. AAIDD, Manual 2010, supra note 5, at 1 ("significant limitations . . . in adaptive behavior"); [2] DSM-5, supra note 5, at 33 ("[d]eficits in adaptive functioning"); [3] American Psychological Association, Manual of Diagnosis and Professional Practice in Mental Retardation 13 (John W. Jacobson & James A. Mulick eds., 1996) ("[s]ignificant limitations in adaptive functioning"); American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) ("limitations in adaptive skills"); American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 32 (3d ed. rev. 1987) ("[c]oncurrent deficits or impairments in adaptive functioning"); American Association on Mental Deficiency [now AAIDD], Classification in Mental Retardation 11 (rev. ed. 1983) ("deficits in adaptive behavior"); American Association on Mental Deficiency, Manual on Terminology and

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[2] American Association on Intellectual and Developmental Disabilities. Intellectual Disability: Definition, Classification, and Systems of Supports. Eleventh Edition (2010)

[3] American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (2013)

Classification in Mental Retardation 11 (rev. ed. 1973) ("existing concurrently with deficits in adaptive behavior"); American Association on Mental Deficiency, A Manual on Terminology and Classification in Mental Retardation 3 (2d ed. 1961) ("[i]mpairment in adaptive behavior")

As a result, the existence of one or more adaptive strengths cannot negate a diagnosis of intellectual disability. American Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992) ("Specific adaptive limitations often coexist with strengths in other adaptive skills or other personal capabilities . . . ."); see also Martha E. Snell & Ruth Luckasson et al., Characteristics and Needs of People with Intellectual Disability Who Have Higher IQs, 47 Intellectual & Developmental Disabilities 220, 220 (2009) ("[A]ll individuals with intellectual disability typically demonstrate strengths in functioning along with relative limitations."). This Court has recognized this key aspect of the definition of intellectual disability. See Brumfield v. Cain, 576 U.S. 305, 320 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'" (quoting American

Association on Mental Retardation, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)).

Director Payne extracts from a supposed silence in Intellectual Disability: Definition, Diagnosis, Classification and Systems of Support (12th Ed. 2021) as to the consideration of adaptive strengths that adaptive strengths must be considered. (Payne Br. at 19). But Director Payne ignores this language from the same publication, at 20:

> The wording used in the definitions of ID referenced in Tables 2.1 and 2,2 has changed somewhat over the past 60+ years. What has not [emphasis in original] changed in these definitions is the <u>emphasis on significant deficits [emphasis supplied by Jackson]</u> both in intellectual functioning and adaptive behavior, and age of onset in the developmental period.

So, Director Payne's argument boils down to whether the lower courts here were somehow way off base in not considering or in downplaying Jackson's supposed adaptive strengths. But the record shows that the lower courts were well within the accepted boundaries in how they approached the issue.

Perhaps most prominent is the fact that Jackson has been in prison essentially his entire adult life. DSM-5 notes that "Adaptive functioning

may be difficult to assess in a controlled setting…" (At 38). Indeed, that may be something of an understatement. Clinicians agree that prison behavior is not a valid measure of an individual's real-life functioning. Caroline Everington et al., Challenges in the Assessment of Adaptive Behavior of People Who Are Incarcerated, in The Death Penalty and Intellectual Disability 201, 202 (Edward A. Polloway ed., 2015) ("[A] satisfactory assessment of AB [adaptive behavior] is not possible in a prison context because the individual has no opportunities to demonstrate the presence or absence of adaptive skills typical in day-to-day life. Inmates do not cook, choose clothing, or make independent choices about their day-to-day existence. By design, correctional settings remove virtually all personal control from the individual, and, as such, practical behaviors pertinent to the diagnosis cannot be demonstrated."); Marc J. Tassé, Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases, 16 Applied Neuropsychology 114, 119 (2009) ("The prison setting is an artificial environment that offers limited opportunities for many activities and behaviors defining adaptive behavior.") Payne's expert Dr. Macvaugh conceded as much. (Hrg 289).

Moreover, the so-called strengths that Payne identifies were in fact

discounted by Dr. Macvaugh: He also agreed that in evaluating pro se pleadings it is very difficult to distinguish whether it is that person's handiwork or whether it has been drafted by someone else. He sees that phenomenon regularly in a correctional setting. (Hrg 291-292)

Dr. Macvaugh also conceded that Jackson's choice of words such as "fabricate," language which led him to conjecture that Jackson might not be retarded— were words which could be picked up in a prison environment. (Hrg. 278) He added:

> Whether or not vocabulary usage is a correlate of mental retardation is something we don't have the data on. Obviously, vocabulary is a form of verbal behavior, and verbal behavior is a form of intelligence. So a person's vocabulary usage is relevant, but I wouldn't make an opinion based on just vocabulary usage.
>
> (Hrg. at 279)

In fact, an article co-authored by Dr. Macvaugh's notes[4]:

> [A]n assessment of a particular inmate's adaptive behavior while in a highly-structured prison environment has very limited correspondence to the adaptive demands of the open community, whether or not the offender's

[4] Macvaugh, Gilbert S. III & Mark D. Cunningham, Atkins v. Virginia: Implications and Recommendations for Forensic Practice, 37 J.Psychiatry & L. 131 (2009)

adaptation is compared with other inmates."). Macvaugh & Cunningham, supra note 11, at 161

Thus, the great weight of authority demonstrates that the Eighth Circuit's decision is not incorrect. Certiorari should not be granted on the basis Director Payne asserts.

III.

THIS CASE DOES NOT PRESENT APPROPRIATE GROUNDS FOR CERTIORARI REVIEW.

As Jackson has explained supra, this case does not present a compelling reason for certiorari review. This Court's Rule 10 notes that the writ is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The District Court made, and the Court of Appeals affirmed, factfindings that finds that "Jackson has significant deficits in adaptive functioning.... the onset of Jackson's deficits occurred during the developmental period and were present before his eighteenth birthday, and deficits in adaptive behavior, without regard to the age of onset."

Moreover, the analysis conducted by the Court of Appeals was within the bounds set by this Court in Atkins, Moore I, Moore II, Hall, and

Brumfield. Although facially Payne only seeks resolution of the supposed unsettledness of Footnote 8, in reality what Payne is seeking is a repudiation of the flexibility granted the states in devising Eighth Amendment - Atkins remedies and a holding that the states cannot exceed a floor. Considering the myriad professional authorities counseling a reliance on deficits— not strengths— Director Payne's position should be rejected and his petition denied.

CONCLUSION

The petition for writ of certiorari should be denied.

ALVIN BERNAL JACKSON

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CERTIFICATE OF SERVICE

I, Jeff Rosenzweig, hereby certify that I have served Arkansas Solicitor General Nicholas Bronni through the electronic filing process and by US mail this 21st day of March, 2022.

/s/ Jeff Rosenzweig

_____

JEFF ROSENZWEIG

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of F.R.A.P. 32(a)(7)(B) because it contains 6014 words, including the tables of contents and authorities and including the fact that the program counts each part of a case citation as a separate word.

2. This motion complies with the typeface requirements of F.R.A.P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using WordPerfect X-6 in 14 point Century Type.

/s/ Jeff Rosenzweig

_____

JEFF ROSENZWEIG