CAPITAL CASE No. ________

IN THE

Supreme Court of the United States

ANDREW SASSER,

Petitioner

v.

DEXTER PAYNE, DIRECTOR,
ARKANSAS DIVISION OF CORRECTION,

Respondent

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

APPENDIX

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United States Court of Appeals
For the Eighth Circuit

No. 18-1678

Andrew Sasser

Petitioner - Appellee

v.

Dexter Payne

Defendant - Appellant

No. 18-1768

Andrew Sasser

Petitioner - Appellant

v.

Dexter Payne

Defendant - Appellee

Appeals from United States District Court
for the Western District of Arkansas - Texarkana

Submitted: September 24, 2020
Filed: June 2, 2021

Before COLLOTON, GRUENDER, and GRASZ, Circuit Judges.

COLLOTON, Circuit Judge.

Andrew Sasser is an Arkansas prisoner under a sentence of death for capital murder. After he pursued a direct appeal and a collateral attack on his conviction and sentence in state court, Sasser petitioned for a writ of habeas corpus in the federal district court. In a previous appeal, this court affirmed the dismissal of several claims, but remanded for further proceedings on four claims alleging ineffective assistance of counsel under the Sixth Amendment. *Sasser v. Hobbs*, 735 F.3d 833, 854-55 (8th Cir. 2013). The court also remanded for further proceedings on Sasser's claim that he is ineligible for the death penalty, due to intellectual disability, under the Eighth Amendment and the rule of *Atkins v. Virginia*, 536 U.S. 304 (2002). On remand, the district court rejected the *Atkins* claim, but granted relief on two of the ineffective-assistance claims and set aside Sasser's sentence. Both parties appeal. We affirm the denial of relief under the Eighth Amendment, but reverse the grant of relief based on alleged ineffective assistance of counsel.

I.

Sasser killed Jo Ann Kennedy in July 1993 while she was working alone as the store clerk at an E-Z Mart Store in Garland, Arkansas. Ms. Kennedy was discovered nude from the waist down; pants and panties found in the men's restroom were hers. An autopsy report showed that she died of multiple stab and cutting wounds and blunt-force head injuries. No anal or vaginal injury or spermatozoa was present. At trial, another woman testified that Sasser attacked and raped her in April 1988 while she was working alone at an E-Z Mart Store in Lewisville, Arkansas. The jury imposed a sentence of death for the murder of Ms. Kennedy after finding that an aggravating circumstance (commission of a previous violent felony) outweighed

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mitigating circumstances (that Sasser would be a productive inmate, had a supporting family, and had stipulated that he caused the victim's death). *See Sasser v. State*, 902 S.W.2d 773, 774-77 (Ark. 1995).

After litigating an unsuccessful petition for postconviction relief in Arkansas, *see Sasser v. State*, 993 S.W.2d 901 (Ark. 1999) (per curiam), Sasser petitioned for a writ of habeas corpus in federal court. In this court's most recent decision on the case, the panel ruled that the district court had applied an incorrect legal standard in rejecting Sasser's Eighth Amendment claim based on alleged intellectual disability. Accordingly, the court remanded that claim to the district court for further proceedings. *Sasser*, 735 F.3d at 850.

On Sasser's claims alleging ineffective assistance of trial counsel, the prior panel ruled that all but four of Sasser's sixteen claims were procedurally barred, meritless, or both. But the court listed four remaining claims on which it said that Sasser was "entitled to an evidentiary hearing in light of . . . *Trevino v. Thaler*, 569 U.S. 413 (2013)." *Sasser*, 735 F.3d at 851. *Trevino* held that ineffective assistance of counsel in state postconviction proceedings may be grounds to excuse a procedural default under state law that would otherwise bar a prisoner from obtaining federal review of a claim alleging ineffective assistance of trial counsel. 569 U.S. at 429. The *Sasser* panel said that the district court was "authorized under 28 U.S.C. § 2254(e)(2) and required under *Trevino* to hold an evidentiary hearing on the claims." 735 F.3d at 853 (internal quotation marks and brackets omitted). In response to the State's petition for rehearing, however, the panel clarified that "on remand, the State is free to argue Sasser's postconviction counsel fully raised the four claims," *Sasser v. Hobbs*, 743 F.3d 1151, 1151 (8th Cir. 2014), such that *Trevino* would be inapplicable.

II.

On remand, the district court considered Sasser's "four remaining claims" alleging ineffective assistance of counsel—namely, that Sasser's trial counsel ineffectively failed to:

> 1. Prepare for the sentencing phase of the trial;
> 2. Obtain a timely psychological evaluation of Sasser;
> 3. Meaningfully consult with a mental health professional; and
> 4. Object "when the prosecutor misconstrued the mitigating evidence that the defense had presented concerning [Sasser's] mental impairment and lessened culpability" or to rebut that argument.

Sasser, 735 F.3d at 851.

The district court declined to grant relief on two claims: Sasser abandoned the fourth claim, and the court rejected the first claim. On the first claim, the court determined that Sasser's procedural default could not be excused under *Trevino*, because he fairly presented the claim in state court during the postconviction process before declining to raise it on appeal.

As to the second and third claims, however, the court concluded that Sasser's claims as developed on remand were different from those raised in the state postconviction proceeding. The court then determined that those two claims were procedurally defaulted, but the default was excused under *Trevino* based on ineffective assistance of postconviction counsel. The court reasoned that postconviction counsel's investigation and representation were not reasonably effective, and that Sasser was prejudiced by the ineffectiveness.

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On appeal, the State maintains that postconviction counsel did raise the second and third claims during the postconviction process, and they were then defaulted on appeal in state court. To address this contention, it is necessary to compare the claims in Sasser's federal habeas petition with those set forth in his petition for postconviction relief under Arkansas Rule of Criminal Procedure 37.

When this court listed claims for consideration on remand, the claims were derived from Sasser's amended federal habeas petition filed July 17, 2001. R. Doc. 23. The second claim on remand—that trial counsel failed to "obtain a timely psychological evaluation of Sasser"—was pleaded as follows in the amended habeas petition:

> Both at trial and on direct appeal, Petitioner was represented by the same attorney, Charles Potter. Mr. Potter was appointed to represent Sasser in this Capital case on August 16, 1993, *however the record reflects that virtually nothing was done by way of trial preparation until February 7, 1994, less than two weeks before the beginning of pretrial proceedings when Potter requested a psychological examination.* Some four days later, on February 11, 1994, an investigator was requested and although this record reflects that a number of pretrial motions were filed, *it is clear that trial counsel was unprepared for a Capital case at the time Sasser's trial began.*

R. Doc. 23, at 3-4 (emphases added). Sasser's amended petition alleged that this claim "was fully adjudicated in the state court." *Id.* at 4.

A review of the Rule 37 petition shows that this second claim was indeed fairly presented in state court. The petition alleged:

> *Counsel failed to request assistance of a psychological expert in sufficient time for her to prepare a proper evaluation.* Counsel obtained motions, including one for expert assistance, from the Arkansas Death

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> Penalty Resource Center as early as September, 1993. . . . *He nevertheless waited until February 7, 1994, to file the motion for expert assistance.* The Court granted the request on February 11, 1994, appointing Mary Pat Carlson, who has an agreement with the Court to provide psychological assistance to criminal defendants. . . . The evaluation was set for February 17, 1994, with pre-trial beginning on February 22, 1994.
>
> *Due to this time frame, Ms. Carlson was unable to conduct the in-depth evaluation she would ordinarily have performed.*

App. 1218-19 (emphases added). The Rule 37 petition cited the same alleged shortcoming advanced in the federal petition—namely, that counsel did not request expert assistance until February 7, 1994, and that due to the short time frame, the defense was unprepared when trial began. Sasser's federal claim that trial counsel failed to obtain a timely psychological evaluation of Sasser was therefore presented in the state postconviction court and defaulted when Sasser declined to appeal on that ground. As such, the procedural default cannot be excused based on alleged ineffectiveness of state postconviction counsel. *Thomas v. Payne*, 960 F.3d 465, 473 (8th Cir. 2020); *Arnold v. Dormire*, 675 F.3d 1082, 1086-87 (8th Cir. 2012).

The third claim on remand—that trial counsel failed to "meaningfully consult with a mental health professional"—was pleaded this way in the amended federal habeas petition: "Trial counsel requested a psychological exam on February 7, 1994, however after the exam was performed, counsel failed to meaningfully consult with the examiner so as to prepare for her trial testimony." R. Doc. 23, at 4. Again, the amended petition asserted that this claim was fully adjudicated in state court. The Rule 37 petition confirms that the same claim was fairly presented in state court. It alleged: "Counsel also failed to consult meaningfully with Ms. Carlson prior to trial and as a result, relevant mitigating evidence was inadequately presented, as demonstrated by the fact that the jury did not find that evidence of any mental disease/defect was presented . . . , when in fact there was." App. 1219.

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The state postconviction court construed this claim as a challenge to counsel's performance at the penalty phase and rejected it: "Trial counsel is taken to task for failing to have adequately prepared the testimony of his only expert witness during the penalty phase, Mary Pat Carlson. This contention is simply not borne out by the testimony at the Rule 37 hearing. Trial counsel testified that he believed that Ms. Carlson was adequately prepared and that she never indicated that she did not have enough time to evaluate the petitioner."

The third claim on remand, therefore, was fairly presented to the state postconviction court in Sasser's Rule 37 motion, but the claim was procedurally defaulted on appeal. Accordingly, as with the second claim, the procedural default cannot be excused based on alleged ineffectiveness of state postconviction counsel. *Arnold*, 675 F.3d at 1086-87.

The district court reached a different conclusion on the view that "the second and third claims as characterized on remand" were different from the claims raised in the Rule 37 petition. The court characterized the second claim on remand as one that "trial counsel should have begun his preparations and obtained a psychological evaluation earlier so that he would know that he needed a qualified and licensed expert, and not Carlson, to present mental health evidence in mitigation." The court described the third claim on remand as one that counsel "should have had meaningful consultation with a qualified and licensed mental health professional" other than Carlson. Neither of these claims, the court concluded, was fairly presented in the Rule 37 petition.

We reject this conclusion because the "claims as characterized on remand" are not the claims that were pleaded in the amended petition and remanded by the panel in *Sasser v. Hobbs*. Sasser's effort to bring new ineffective-assistance claims on remand constituted an unauthorized second or successive habeas petition that should have been dismissed. *See* 28 U.S.C. § 2244(b)(3)(A).

The claims considered by the district court on remand first appeared in Sasser's second supplemental and amended habeas petition, dated September 3, 2004. R. Doc. 48. That filing came after this court remanded the case in August 2003 for the limited purpose of considering whether the Eighth Amendment prohibited Sasser's execution in light of *Atkins v. Virginia*. R. Doc. 37. The second amended petition raised new claims that trial counsel was ineffective for failing to obtain an adequate social history of Sasser or to retain "qualified experts" to evaluate Sasser completely, so that Sasser could present additional mitigating evidence at sentencing. R. Doc. 48, at 16-17, 22.

The district court in January 2007 concluded that these claims should have been known when Sasser filed his first habeas petition, and the court thus dismissed them with prejudice as abusive. R. Doc. 71, at 18. This court on appeal agreed that the new ineffective-assistance claims were not properly before the district court after the 2003 remand. *Sasser v. Norris*, 553 F.3d 1121, 1127 (8th Cir. 2009). Sasser's effort to revive these ineffective-assistance claims during the most recent remand functioned as a second or successive habeas petition and an abuse of the writ.

The evidentiary hearing on remand was not a proper forum for Sasser to develop new federal claims that were not raised in his first habeas petition. This court's statement that Sasser was entitled to an evidentiary hearing on remand was limited to the question whether Sasser could show cause and prejudice under *Trevino* to excuse any procedural default allegedly caused by ineffective assistance of postconviction counsel. The panel clarified in response to a rehearing petition that the State was free to argue on remand that Sasser fairly presented his federal claims in the Rule 37 motion. The federal claims at issue in that comparison were only those claims presented in Sasser's amended habeas petition in 2001, R. Doc. 23, not new ineffective-assistance claims that were improperly raised in the second amended petition in 2004, R. Doc. 48, or developed in an evidentiary hearing after the remand in 2014.

We therefore conclude that the district court's grant of relief based on Sasser's second and third claims "as characterized on remand" was in error. The second and third claims on remand were fairly presented in Sasser's Rule 37 motion, and then abandoned on appeal, so alleged ineffective assistance of postconviction counsel is not cause to excuse Sasser's procedural default. The claims identified by the district court on remand were not presented in Sasser's first federal habeas petition, and they are barred as a second or successive petition and an abuse of the writ.

III.

On Sasser's claim asserting ineligibility for execution under the Eighth Amendment based on intellectual disability, this court in 2014 remanded the case "so that the district court may answer the critical factual questions in the first instance according to the correct legal standard." *Sasser*, 735 F.3d at 850. The district court on remand detailed several factual findings and legal conclusions.

To prove that he was intellectually disabled, Sasser was required to prove several elements by a preponderance of the evidence: (1) "Significantly subaverage general intellectual functioning"; (2) "[a] significant deficit or impairment in adaptive functioning"; (3) "[t]hat both of the above 'manifest[ed] . . . no later than age eighteen'"; and (4) "[a] deficit in adaptive behavior." *Id.* at 843 (quoting Ark. Code Ann. § 5-4-618(a)). If Sasser was intellectually disabled "at the time of committing the crime," *id.* at 846; *see* Ark. Code Ann. § 5-4-618(b)-(c), then his execution would be prohibited by the Eighth Amendment. *See Atkins*, 536 U.S. at 321; *Sasser*, 735 F.3d at 845-46 & n.7.

A.

The district court first considered whether Sasser could prove significantly subaverage intellectual functioning that manifested no later than age eighteen.

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Sasser's intelligence quotient (IQ) scores were 83 on a 2010 test, and 79 on a 1994 test; the court adjusted the 1994 score downward to 75 to account for "norm obsolescence." The score ranges were 78 to 88 for the 2010 test, and 70 to 80 for the 1994 test. The court concluded that both scores fell within "the range described as 'borderline intellectual functioning' rather than mental retardation."

Because IQ scores are not conclusive evidence of subaverage intellectual functioning, *Sasser*, 735 F.3d at 844, the court considered additional evidence—namely, Sasser's scores on an aptitude achievement test, a military admission exam, and academic standardized tests; his high school grades; and his performance on a driver's license exam administered shortly before Kennedy's murder. Weighing this evidence along with Sasser's IQ scores, the court concluded that only the lowest ends of the IQ ranges "had any statistical significance," and the other evidence indicated "intelligence that . . . was not so subaverage as to meet the standard for mental retardation." But the court recognized that "impairments in adaptive functioning, rather than an IQ score, are the clearest indicators of intellectual disability," so proceeded to analyze the other criteria for intellectual disability.

The court next considered whether Sasser had proven a significant deficit or impairment in adaptive functioning that manifested no later than age eighteen. The parties disputed whether the court should apply the standard from the fourth or fifth edition of the American Psychological Association's Diagnostic and Statistical Manual of Mental Disorders, known as the *DSM-IV-TR* and *DSM-V*, respectively. The court chose to rely on the fourth edition, because the "updated medical standards in the *DSM-V*" did not "have any bearing on [Sasser's] case," but the court also found that "the same decision would be reached under both definitions."

To show a significant deficit under the *DSM-IV-TR*, Sasser was required to prove "significant limitations in at least two . . . skill areas." *Jackson v. Norris*, 615 F.3d 959, 962 (8th Cir. 2010) (quoting *DSM-IV-TR*, at 41). The court considered

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evidence of Sasser's deficits in the areas of "academic skills, work, and social/interpersonal skills."

On academic skills, the court considered Sasser's enrollment in "remedial or special courses throughout his school years," reports on Sasser's functioning from school teachers and peers to expert psychologists, and Sasser's participation in a prison pre-release program designed to prepare him for a driver's license examination. Sasser achieved perfect scores on both the written and sign portions of the driver's license test in 1993, shortly before Kennedy's murder. The court noted "that ordered environments like prison may result in artificial improvements to adaptive functioning," and thus did not consider Sasser's prison performance as evidence of *improved* adaptive functioning. But the court did view the information "as evidence undermining Sasser's claimed limitations in areas of adaptive functioning prior to incarceration." The court found that its conclusion was bolstered by statements from school friends "that Sasser may have suffered as much from a lack of motivation as a lack of ability." The court ultimately found that Sasser had not proven a significant limitation in academic skills.

On work skills, the court considered reports on Sasser's jobs from his early life, his time in prison, and before and after his prior incarceration. Sasser worked in "basic position[s]" and completed "repetitive, simple task[s]" in some jobs after high school. But other reports indicated that Sasser was able to work independently at a range of tasks on a farm before the age of eighteen, and that he worked successfully "with various levels of supervision" while imprisoned. The court found that Sasser proved neither a significant limitation in work, nor any limitation that manifested before the age of eighteen.

The court next analyzed Sasser's alleged deficit in the social and interpersonal skill domain. Sasser's expert interviewed Sasser's teachers, coaches, and peers from middle school and high school. They reported that Sasser "stared blankly during

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conversations," reacted inappropriately to jokes, was "treated as a nerd or weird student," and had few friends. But the court also considered evidence that pointed in the other direction, including reports that Sasser had friends in high school, "was a good storyteller," and had girlfriends during high school and as an adult, both before and after his prior term of imprisonment. Based on the entirety of the evidence, the court found that Sasser had not established a significant deficit in social and interpersonal skills.

The court also considered whether Sasser had demonstrated a deficit in adaptive behavior. Because this criterion "largely duplicates the second prong" of adaptive functioning deficits, *Sasser*, 735 F.3d at 845, and because Sasser presented no additional evidence, the court found that Sasser failed to prove a behavioral deficit for the same reasons he failed to prove a functioning deficit. The court thus found that Sasser was not intellectually disabled at the time he committed his offense of murder.

The court then analyzed Sasser's claim alternatively under the framework of the *DSM-V*. To prove adaptive functioning deficits under the *DSM-IV-TR*, Sasser was required to show "significant limitations in adaptive functioning in at least two . . . skill areas," including "social/interpersonal skills," "functional academic skills," and "work." *DSM-IV-TR*, at 41. Under the *DSM-V*, he was required to prove that he was "sufficiently impaired" in "at least one domain of adaptive functioning—conceptual, social, or practical"—so as to require "ongoing support" to "perform adequately." *DSM-V*, at 38. The district court explained that the three *DSM-IV-TR* "skill areas" in which Sasser claimed impairments are now "heavily centered" in three different *DSM-V* "domains": academic skills in the conceptual domain, work skills in the practical domain, and social/interpersonal skills in the social domain. *See DSM-IV-TR*, at 42; *DSM-V*, at 37. Because Sasser failed to prove "any limitation in these areas" that was sufficiently significant to require ongoing support, the court

concluded that Sasser could not prove intellectual disability under the updated *DSM-V* criteria for the same reasons he failed to do so under the *DSM-IV-TR* criteria.

B.

Sasser challenges the district court's resolution of his Eighth Amendment claim on several grounds. We review the legal standard applicable to an *Atkins* claim *de novo*, and the factual finding whether an individual is intellectually disabled for clear error. *Sasser*, 735 F.3d at 841-42.

First, Sasser argues that the court erred by applying the diagnostic framework of the *DSM-IV-TR*, rather than the *DSM-V*. Analysis of intellectual disability "must be 'informed by the medical community's diagnostic framework.'" *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). To be "informed by the medical community does not demand adherence to everything stated in the latest medical guide," but a court may not "disregard current medical standards." *Id.* at 1049. Sasser seems to urge a rule that would require a court to reassess an *Atkins* claim each time the medical profession revises its standards, but we need not resolve that issue here. The district court in this case considered Sasser's claim under both the *DSM-IV-TR* and *DSM-V* criteria, and reached the same conclusion based on each, so there was no legal error.

Sasser contends that the district court tied its analysis of his intellectual functioning to the analysis of his adaptive deficits, and therefore relied too heavily on "non-clinical criteria." The court found that Sasser failed to prove significantly subaverage intellectual functioning. The ruling noted that IQ scores are inconclusive, and reasoned that if Sasser demonstrated a significant deficit or impairment in adaptive functioning, then that showing would be evidence that "Sasser's inarguably subaverage general intelligence—as measured by IQ testing, school grades, and other similar markers—was *significantly* subaverage." R. Doc. 283, at 23 (emphasis

added). Where "the lower end of [a defendant's] score range falls at or below 70," courts must "move on to consider . . . adaptive functioning." *Moore*, 137 S. Ct. at 1049. The lowest end of Sasser's lower IQ score range was 70, so the district court did not err by considering additional indicia of intellectual disability. This inquiry necessarily required consideration of "non-clinical" evidence, including statements from people who knew Sasser during his developmental years.

Sasser challenges the court's alleged use of "lay stereotypes" as evidence of his adaptive functioning. He points out that factors such as whether a defendant's "conduct showed 'leadership,'" or whether "those who knew the person best during the developmental stage thought of him as mentally retarded" are not dispositive, because those factors are not grounded in prevailing medical practice and invite "lay perceptions of intellectual disability." *Moore v. Texas*, 139 S. Ct. 666, 669 (2019) (per curiam) (internal quotations omitted).

Some evidence to which Sasser objects came from the State's expert psychologist, Dr. Roger Moore, who interviewed Sasser's peers, family members, and former employers to learn about his adaptive deficits. Dr. Moore necessarily considered the information retrospectively to analyze Sasser's adaptive functioning during his adolescence. For example, Dr. Moore interviewed an employer on whose farm Sasser had worked during high school. The employer told Dr. Moore that Sasser was capable of independent work if he found it engaging. The employer did not render an opinion on whether Sasser was intellectually disabled or whether his conduct demonstrated leadership. *Cf. Moore*, 139 S. Ct. at 669. And Sasser's own expert psychologist, Dr. Jethro Toomer, also considered "firsthand accounts of Sasser's behavior by people who knew him before he turned eighteen years old," including former classmates. *Sasser*, 735 F.3d at 841. The district court permissibly considered expert testimony or reports that conveyed statements from people who knew Sasser during his developmental years.

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Sasser also objects to reliance on statements by a prison official who supervised Sasser's work; the official testified that Sasser worked well and had "no problems doing light work as far as I know." The court, however, cited only the fact that Sasser earned credit toward his sentence, "which could only be given if he was doing the job each position required him to do." The court found that this evidence indicated that Sasser's limitations may be due more to a lack of engagement or motivation than to a significant limitation. Evidence of Sasser's successful work while incarcerated was relevant to the analysis of Sasser's claimed adaptive deficits at the time of his crime, and there was no error in considering it.

Sasser argues that the court unduly emphasized evidence of his adaptive strengths, and used it to "offset proven deficits." Intellectual disability depends on evidence of adaptive deficits, and a court should not consider "significant limitations in adaptive skills" to be "outweighed by potential strengths in *other* adaptive skills." *Jackson v. Kelley*, 898 F.3d 859, 864 (8th Cir. 2018) (emphasis added).

The district court did not err in its consideration of adaptive strengths. The court properly recognized that it could not balance evidence of Sasser's strengths in one skill area against evidence of his deficits in a different skill area. The court said that it is an "open question whether strengths in one area of adaptive functioning can be weighed against weaknesses *in the same area* when analyzing whether a person has limitations in that area." R. Doc. 283, at 26 (emphasis added). *Moore* is not to the contrary; the Court there assumed for the sake of analysis that "clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain." 137 S. Ct. at 1050 n.8.

Citing *Moore*, Sasser argues that a court considering intellectual disability must focus *solely* on evidence of adaptive deficits. *Moore*, however, observed only that there was no "clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths." *Id.* The district court did not balance unconnected strengths

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against weaknesses, but "weigh[ed] evidence of strengths against evidence of limitations in order to see whether Sasser . . . met his burden to show" any limitation in a single skill domain. R. Doc. 283, at 28 n.10. For example, the court addressed conflicting evidence of Sasser's social and interpersonal skills: one classmate testified that Sasser had few friends, but other classmates testified that he had friends. The district court did not weigh evidence across skill domains, but properly considered all available evidence of Sasser's adaptive functioning in order to make the necessary findings of fact in each relevant domain.

Sasser challenges the district court's consideration of evidence of his functioning in prison to support the conclusion that he could not demonstrate adaptive deficits. Medical experts "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is," and seek to obtain corroborating evidence of functioning in uncontrolled settings. *Moore*, 137 S. Ct. at 1050 (quoting *DSM-V*, at 38). The district court, however, was "mindful that ordered environments like prison may result in artificial improvements to adaptive functioning," and thus did not rely on Sasser's behavior in prison as evidence of improved adaptive functioning. Rather, the court found that evidence of Sasser's performance in prison was consistent with other evidence that he "suffered as much from a lack of motivation as a lack of ability." On academics, the court found that Sasser's performance on the driver's license examination while incarcerated supported a statement from a school friend that Sasser was "more capable than his grades reflected." On work, the court found that Sasser's successful employment in multiple jobs while incarcerated corroborated testimony that Sasser was capable of independent farm work before he turned eighteen. The court properly recognized the risk that prison behavior might reflect artificial improvements in functioning, and adequately limited its consideration of prison evidence.

Next, Sasser argues the court inappropriately required him to prove the existence of adaptive functioning deficits "beyond the developmental period" ending

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at age eighteen. The court explained that Sasser's evidence of academic skill limitations was "primarily limited to his school career." Because that evidence was "called into question by reports and evidence that Sasser's performance was due at least in part to a lack of motivation," the court found that Sasser had not "met his burden to demonstrate . . . that he had a significant limitation in academic skills at the time he committed the crime."

Sasser argues that the relevant time for assessing his academic functioning skills was before the age of eighteen, because a significant deficit or impairment must manifest during the developmental period. *See* Ark. Code Ann. § 5-4-618(a)(1)(A). But the *DSM-IV-TR* criteria require both an "onset" that "is before age 18 years," and a showing of "[c]oncurrent deficits or impairments in *present* adaptive functioning" in at least two skill areas. *DSM-IV-TR*, at 49 (emphasis added). Likewise, the *DSM-V* criteria require both an "onset during the developmental period," that is, "during childhood or adolescence," and a showing that "at least one domain of adaptive functioning . . . *is* sufficiently impaired that ongoing support is needed . . . to perform adequately." *DSM-V*, at 38 (emphasis added). In any event, the court found no significant deficits at either point in time, and there was no error in the time period considered.

Sasser contends that the court created "a composite portrait" of his adaptive functioning by piecing together evidence from different points in his life. The court considered evidence of Sasser's functioning during the developmental period and near the time of his crime, both of which were "relevant points in time." *Sasser*, 735 F.3d at 849 n.10. Some evidence from later in Sasser's life confirmed or supported evidence from the developmental period, but it cannot be said that the court on remand mistakenly "mixed and matched evidence of Sasser's capacities from different points in his life, creating a composite portrait of Sasser" at an artificial peak. *Id.* at 849. For example, the court considered evidence that Sasser was able to work independently at manual farm tasks as an adolescent, and found this evidence

consistent with Sasser's success while working as an electrician and furniture manufacturer in prison. On social skills, the court cited reports that Sasser had friends in school and a high school girlfriend, but found that even evidence suggesting that he was not liked by peers and did not have a girlfriend was not good evidence of a substantial limitation in social skills during the developmental period. The court properly analyzed whether Sasser demonstrated intellectual disability at a relevant point in time and found that he failed to do so.

Finally, Sasser argues that the district court required him to "rule out other potential contributing causes" of his adaptive deficits by noting that he "may have suffered as much from a lack of motivation as a lack of ability." "[A] defendant is not required to rule out other contributing causes of his adaptive deficits in order to meet the standard for intellectual disability." *Jackson*, 898 F.3d at 868 (internal quotation omitted). Stated differently, if an individual has demonstrated significant intellectual impairment and significant adaptive deficits, a court may not *also* require him to prove that his intellectual disability is the cause of those deficits. *See id.* But the district court did not require such a showing here, because it found that Sasser failed to prove the existence of any significant functioning deficits in the first place.

* * *

For these reasons, we reverse the grant of relief with respect to Sasser's ineffective-assistance claims, affirm the denial of relief on his *Atkins* claim, and remand with directions to dismiss the petition.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

v. No. 4:00-CV-04036

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

MEMORANDUM OPINION

On March 20, 2014, the United States Court of Appeals for the Eighth Circuit issued a mandate (Doc. 180) in this case affirming in part and reversing in part this Court's previous judgments, and remanding the matter for proceedings consistent with the Eighth Circuit's opinion.

I. Background

On May 4, 1994, Petitioner Andrew Sasser was convicted of capital murder and sentenced to death for the July 12, 1993 homicide of Jo Ann Kennedy. *See Sasser v. State*, 902 S.W.2d 773 (Ark. 1995). The murder occurred while Kennedy worked as a clerk at an E-Z Mart convenience store in Garland City, Arkansas. *Id*. at 774–75. Following a direct appeal, and Sasser's effort to obtain Arkansas state court postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37, Sasser sought federal relief through a writ of habeas corpus. (Doc. 3). The Court dismissed the petition but granted a certificate of appealability with respect to several issues. (Docs. 30 and 34). During Sasser's first appeal to the Eighth Circuit, and following the Supreme Court's decision in *Atkins v. Virginia*,[1] the Eighth Circuit remanded for a determination of whether Sasser was ineligible for the death penalty because of intellectual disability, but retained jurisdiction over the

[1] *Atkins v. Virginia*, 536 U.S. 304 (2002), holds that execution of intellectually disabled persons is prohibited by the Eighth Amendment to the Constitution.

bulk of Sasser's case. After reviewing the *Atkins* issue twice, the Eighth Circuit issued its opinion and mandate remanding to this Court[2] and giving rise to these proceedings. The Eighth Circuit affirmed dismissal of many of Sasser's claims, but reversed with respect to Sasser's *Atkins* claim and four of his claims of ineffective assistance of counsel at the sentencing phase of Sasser's trial. The Eighth Circuit vacated the Court's denial of relief on those four claims and the Court's finding that Sasser is not intellectually disabled under *Atkins*.

The four claims to be considered on remand are that Sasser's trial counsel was unconstitutionally ineffective when he failed to: "1. Prepare for the sentencing phase of the trial; 2. Obtain a timely psychological evaluation of Sasser; 3. Meaningfully consult with a mental health professional; and 4. Object when the prosecutor misconstrued the mitigating evidence that the defense had presented concerning Sasser's mental impairment and lessened culpability or to rebut the argument." *Sasser v. Hobbs* (*Sasser II*), 735 F.3d 833, 851 (8th Cir. 2013) (brackets and quotation omitted). The Eighth Circuit directed the Court to conduct a hearing on the four ineffective assistance of counsel claims to determine whether they are procedurally defaulted claims, and if so, whether they should be excused. *Id.* at 853, 855; *see also Sasser v. Hobbs*, 743 F.3d 1151, 1151 (8th Cir. 2014) (denying rehearing) ("It should be clear the district court, on remand, must consider whether Andrew Sasser's state postconviction counsel failed to raise the four potentially meritorious ineffectiveness claims." (quotation and brackets omitted)). The Eighth Circuit also directed the Court to make a new *Atkins* finding using the appropriate standard. *Sasser II*, 735 F.3d at 855. The Court's *Atkins* finding is addressed by a separate opinion.

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[2] This case was initially assigned to Hon. Harry F. Barnes. On November 13, 2009 the case was reassigned to Hon. Jimm Larry Hendren. On March 25, 2014, following the most recent remand, the case was reassigned to the undersigned.

A hearing was set, and the Court's scheduling order directed the parties that the Court was to hear evidence regarding Sasser's four surviving ineffective assistance claims. (Doc. 217). The Court also directed the parties to submit prehearing briefs with proposed findings of fact and conclusions of law. In February 2016, the Court held a four-day hearing and heard testimony from the following individuals in the following order: Charles Potter ("trial counsel"), Jacquelyn Carter, Rupert Purifoy, Steve Jackson, Leroy Brown, Deborah Sallings ("postconviction counsel"), Joseph Cummings, Dr. Ann Thomas, Dana Harrison, Mark Bezy, Betty Perry, Margie Sasser Kemp, Artha Sasser, H.B. Sasser, James Blackburn, Ph.D., Pamela Blake, M.D., Dale Watson, Ph.D., Leslie Lebowitz, Ph.D., and Richard Burr. Following the hearing, the Court invited posthearing briefing.

II. Applicable Law

A federal court may consider a petition for writ of habeas corpus from a person serving a state court sentence that violates the Constitution or a federal law or treaty. 28 U.S.C. § 2254(a). A state court sentence may violate the Sixth Amendment to the Constitution if the petitioner was deprived of the right to effective assistance of counsel at trial and sentencing, which occurs when counsel's performance is deficient ("counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment") and the performance prejudiced the defense ("counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Before a federal court may grant a petition, the petitioner must first have exhausted state court remedies, "unless the state remedies are ineffectual or non-existent." *Sasser II*, 735 F.3d 833, 842 (citing 28 U.S.C. § 2254(b)(1)). The exhaustion requirement protects a state court's interest in correcting its own constitutional violations, and is grounded in principles of comity. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). Where state court remedies have been exhausted, a federal

court cannot grant a petition for a writ of habeas corpus unless the state's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or … was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

Where a claim has not been exhausted, that new claim must be presented and exhausted in state court proceedings before a federal court can grant a petition. *Rhines v. Weber*, 544 U.S. 269, 274 (2005). Dismissal of the entire petition without prejudice is generally required in such instances. In limited circumstances where there has been good cause for a petitioner's failure to exhaust a claim in state court, a federal court may stay its proceedings and hold the matter in abeyance until the new claim is exhausted, or allow the petitioner to amend his petition and omit the new claim. *Id.* at 277, 278.

Where a claim has been raised but defaulted during state proceedings due to the petitioner's failure to abide by a state's procedural requirements, although it is technically exhausted (because a state remedy is no longer available to the petitioner), the same need for comity exists that undergirds the exhaustion requirement. *Coleman*, 501 U.S. at 732. When there has been a procedural default, there is typically an independent and adequate state ground barring federal habeas relief, unless a petitioner can show cause to excuse the default and prejudice to himself if the default is not excused. *See id.* at 745–47.

As a general rule, the ineffective assistance of counsel in the state postconviction proceedings does not provide cause to excuse a procedural default. *Id.* at 753–54. A narrow exception to this rule exists. Ineffective assistance of counsel during postconviction proceedings may provide cause to excuse procedural default

> where (1) the claim of ineffective assistance of trial counsel was a substantial claim; (2) the cause consisted of there being no counsel or only ineffective counsel during

> the state collateral review proceeding; (3) the state collateral review proceeding was the initial review proceeding in respect to the ineffective-assistance-of-trial-counsel claim; and (4) state law requires that an ineffective assistance of trial claim be raised in an initial-review collateral proceeding.

Trevino v. Thaler, 569 U.S. 413, 423 (2013) (citing *Martinez v. Ryan*, 566 U.S. 1, 14, 17–18 (2012)) (quotations and punctuation omitted). Because there is no meaningful distinction between a state that denies permission to raise ineffective assistance claims on direct appeal and one that, "as a matter of procedural design and systemic operation," technically allows but effectively denies a meaningful opportunity to raise ineffective assistance claims on direct appeal, the Supreme Court has expanded the narrow exception to cover states in the second category. *Id.*, at 429. In this case, Arkansas falls into the latter category. *Sasser II*, 735 F.3d at 853 ("For these reasons, we conclude Arkansas did not 'as a systematic matter' afford Sasser 'meaningful review of a claim of ineffective assistance of trial counsel' on direct appeal." (citation omitted)).

The four ineffective assistance claims before this Court on remand may provide grounds for habeas relief if (1) they were exhausted in state court, and the state court's decision was contrary to or unreasonably applied clearly established federal law, or was based on an unreasonable determination of the facts based on the evidence in the state court proceeding; or (2) they were procedurally defaulted in state court proceedings, but the default was due to postconviction counsel's ineffective assistance and that ineffective assistance would prejudice the petitioner.

III. Analysis

As an initial matter, the Court will address Sasser's fourth claim identified by the Eighth Circuit—that trial counsel was unconstitutionally ineffective when he failed to object when the prosecutor misconstrued the mitigating evidence that the defense had presented concerning Sasser's mental impairment and lessened culpability or to rebut the argument. Sasser has presented

no argument or evidence concerning this claim. Because "[t]he law favors an adversarial presentation of issues in order to conserve judicial resources and to ensure that cases are resolved in the context of an actual dispute," Sasser's failure to present argument or evidence concerning this claim results in abandonment. *Malone v. Vasquez*, 138 F.3d 711, 716 (8th Cir. 1998). This leaves only three claims that must be analyzed—Sasser's claims that his trial counsel was unconstitutionally ineffective when he failed to: (1) prepare for the sentencing phase of the trial; (2) obtain a timely psychological evaluation of Sasser; and (3) meaningfully consult with a mental health professional. *Sasser II*, 735 F.3d at 851.

A. Claim Comparison

The first issue the Court must resolve is whether these three claims are claims that Sasser exhausted before the state court, or if they are new or procedurally defaulted claims and susceptible to a *Martinez/Trevino* analysis. Claims are the same when they have the same factual and legal premises, and are new when new factual allegations fundamentally alter the legal claim already considered. *See Vasquez v. Hillery*, 474 U.S. 254, 260 (1986) (holding supplemental evidence did not fundamentally alter legal claim).

The Court is cognizant that a determination that a claim is new might in a similar case require the Court to follow the stay and abeyance process identified in *Rhines*. *See Sasser v. Hobbs*, 745 F.3d 896, 899 (8th Cir. 2014) (Colloton, J., dissenting from denial of rehearing en banc).

> However, if no state court remedy is available for the unexhausted claim–that is, if resort to the state courts would be futile–then the exhaustion requirement in § 2254(b) is satisfied, but the failure to exhaust 'provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim unless the petitioner can demonstrate cause and prejudice for the default' (or actual innocence, which is not an issue in this case).

Armstrong v. Iowa, 418 F.3d 924, 926 (8th Cir. 2005) (quoting *Gray v. Netherland*, 518 U.S. 152, 162 (1996). That is, if there is no state remedy, new claims are treated as procedurally defaulted. To the extent any of these three ineffective assistance claims is new, Arkansas has no available state court remedy to exhaust the claim. *See, e.g.*, *Ward v. State*, 455 S.W.3d 830, 832, 835 (Ark. 2015) ("This court will recall a mandate and reopen a case only in extraordinary circumstances." … "As we have held, recalling the mandate is an extremely narrow remedy reserved for unique situations; to enlarge it to allow typical claims of ineffective assistance of counsel would alter the nature of the relief entirely.") Therefore, any claim that is new, or any claim that was otherwise procedurally defaulted, may be excused under *Martinez* and *Trevino* and the matter need not be stayed pending exhaustion in state proceedings.

Determining whether any of Sasser's three ineffective assistance claims was exhausted or procedurally defaulted requires the Court to compare those claims to the claims Sasser made in the state court proceedings. This analysis is complicated by the parties' competing arguments that the other party is judicially estopped from asserting the position now taken with respect to whether these claims were exhausted or procedurally defaulted. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000)). It is employed to protect the integrity of the judicial process. *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1047 (8th Cir. 2006). The Court will address the judicial estoppel arguments first.

1. Judicial Estoppel

A nonexhaustive list of three factors should inform the Court's determination of whether judicial estoppel should apply in a given instance:

> First, a party's later position must be clearly inconsistent with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Absent success in a prior proceeding, a party's later inconsistent position introduces no risk of inconsistent court determinations, and thus poses little threat to judicial integrity. A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Id. (quoting *New Hampshire*, 532 U.S. at 750–51).

The Respondent argues that Sasser asserted a prior inconsistent position at the inception of this habeas matter which should prevent the consideration of the ineffective assistance of counsel claims under *Martinez* and *Trevino*. Specifically, the Respondent states that Sasser previously asserted that the ineffective assistance claims pleaded in the amended habeas petition were presented and adjudicated in state court in his Rule 37 proceeding, and therefore, properly preserved for federal review. The Respondent concludes that Sasser should now be estopped from arguing that the claims were procedurally defaulted and now subject to review under *Martinez* and *Trevino*.

Estoppel doctrines are typically applied where there has been some form of substantive reliance on the prior inconsistent position. *See, e.g.*, *Hossaini v. Western Missouri Medical Center*, 140 F.3d 1140, 1143 (8th Cir. 1998) ("Among the circuits that have recognized judicial estoppel, the apparent majority view is that the doctrine applies only where the allegedly inconsistent prior assertion was accepted or adopted by the court in the earlier litigation."); *Total Petroleum, Inc. v. Davis*, 822 F.2d 734, 737 (8th Cir. 1987) ("Equitable estoppel prevents a party from denying a state of facts that he has previously asserted to be true if the party to whom the representation was made has acted in reliance on the representation and will be prejudiced by its repudiation."). The application of judicial estoppel should be made in light of "the rule allowing parties to plead

alternative legal theories." *Total Petroleum, Inc.*, 822 F.2d at 737 n.6. Whether or not Sasser's positions are inconsistent, it is clear from the procedural history of this case that Sasser's earlier position was not accepted by the Court. Sasser gains no unfair advantage and the Respondent suffers no unfair detriment if Sasser is not estopped from asserting that his habeas claims are new. The Respondent's argument is rejected.

Sasser argues that the Respondent should be estopped from arguing that Sasser's claims of ineffective assistance of counsel are not new claims. Specifically, Sasser argues that the Respondent argued to this Court that Sasser's postconviction counsel failed to effectively present the claims of ineffective assistance of counsel and the supporting facts to the state courts. Sasser argues that this Court agreed when it denied Sasser relief due to procedural default, and that the Respondent's position now—that these claims were raised in the state proceedings—is inconsistent with the Respondent's earlier, successful position.

The Court has reviewed the record in this case and agrees that the Respondent previously argued before this Court that Sasser's habeas claims[3] were new claims, and that Respondent partially succeeded in convincing the Court of that position. In particular, in its response to the amended habeas petition, the Respondent argued that "the only ineffective-assistance claim that was fairly presented to and decided by the state courts concerned only counsel's failure to seek a limiting instruction for the jury's consideration of Jacki Carter's testimony, and that is the only ineffective-assistance claim that is preserved for review here." (Doc. 24, p. 3). In its May 28,

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[3] The Court's analysis on the estoppel issue focuses on the claims in the amended petition (Doc. 23). Although Sasser was allowed to file a second supplemental and amended petition (Doc. 48), at the time that document was filed, the Court of Appeals retained jurisdiction over the ineffective assistance claims, and the amendment was allowed for purposes of allowing this Court to address the *Atkins* issue.

2002 memorandum opinion and order denying the amended habeas petition, this Court agreed with the Respondent's position, but only with respect to the claims in the amended petition (Doc. 23), ruling that out of the eight grounds listed in the amended petition, "[w]ith the exception of Ground 8, [Sasser] failed to assert and develop any of the remaining grounds set forth in his Amended Petition at the state court level." (Doc. 30, p. 3). Ground 8 was an ineffective assistance claim premised on trial counsel's failure to request a limiting instruction after the State of Arkansas presented victim testimony from Sasser's previous conviction for battery, rape, and kidnapping. (Doc. 23, p. 3).

The "remaining grounds" in Sasser's Amended Petition that are premised on ineffective assistance of counsel, and which the Respondent successfully argued were "new" claims, are: (1) a general claim that Sasser was deprived of his right to effective assistance; and (2) a claim, in light of standards promulgated by the Arkansas Public Defender's Commission requiring a minimum of two attorneys in capital cases, that Sasser's counsel was ineffective when he did not request additional counsel and a continuance, and when he did not object to being required to proceed alone. The first of these is entirely too general to constitute a claim. It states a legal basis, but no factual basis. The second, a claim premised on the need for additional counsel, may be a reason that trial counsel failed to prepare for the sentencing phase of the trial, obtain a timely psychological evaluation of Sasser, or meaningfully consult with a mental health professional, but it is not one of the three ineffective assistance claims under consideration on remand. While the Respondent would be judicially estopped from arguing that the "additional counsel" claim is not a new claim, because that is not one of the ineffective assistance claims under consideration on remand from the Eighth Circuit, estoppel does not apply.

2. New Claims/Procedural Default

Because there is no estoppel, the Court must now compare the three claims on remand with those raised in the state proceedings to determine whether any is new or procedurally defaulted. In determining whether these claims are the same as any claim exhausted in state court proceedings or otherwise raised in these proceedings, the Court is mindful that

> [a] petitioner must present "*both* the *factual and legal* premises" of his claims to the state courts in order to preserve them for federal habeas review. This standard applies to claims that trial counsel has been constitutionally ineffective. A habeas petitioner who asserts only broadly in his state petition for relief that his counsel has been ineffective has not immunized his federal habeas claim's specific variations from the effects of the state's procedural requirements. Nor has a petitioner who presents to the state courts a broad claim of ineffectiveness as well as some specific ineffectiveness claims properly presented all conceivable specific variations for purposes of federal habeas review.

Flieger v. Delo, 16 F.3d 878, 884–85 (8th Cir. 1994) (citations omitted).

In the Arkansas Rule 37 proceedings, Sasser's final amended petition broadly alleged ineffective assistance of counsel at both the guilt and penalty phases of trial. *See* Respondent's Ex. 2, Vol. 1, p. 130 (Second Amended Petition for Relief Under ARCrP, Rule 37).[4] Specifically, Ground IV of the petition argued that "Sasser's conviction should be set aside because he was deprived of his right to effective assistance of counsel as guaranteed by the U.S. Const., amend. 6 & 14, and Ark. Const., Art. 2, §§ 8, 10." *Id.*, Vol. 1, p. 140. A thorough review of the claims made in Sasser's state proceedings is necessary to compare those claims to the claims the Court must consider on remand.

Sasser's Rule 37 petition argued trial counsel was ineffective at the penalty phase in part because: (1) trial counsel "failed to prepare for his expert's testimony and was unable to adequately present compelling evidence of mitigating circumstances;" (2) trial counsel "failed to investigate

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[4] Unless noted otherwise, all exhibit citations in this opinion are to exhibits from the February 2016 hearing.

for the penalty phase and to call additional witnesses to adduce evidence of relevant mitigating factors;" and (3) trial counsel "failed to counter the State's erroneous characterization of the role of mental disease/defect in penalty mitigation." *Id*., Vol 1, pp. 145, 146, 147. The first claim is premised on trial counsel's failure to interview or prepare Mary Pat Carlson, or to employ her testimony to rebut the State's experts. The second is premised on trial counsel's failure to interview witnesses or obtain records from former employers or the Department of Correction, which would have showed Sasser's favorable qualities, good work history, and amenability to incarceration. The third is premised on trial counsel's failure to object to the prosecution's mischaracterization of the law when the prosecution argued to the jury that evidence of mental disease should not be considered in the penalty phase because if there were any such evidence, it would have been raised in the guilt phase.

In its order ruling on the state postconviction proceedings, the Miller County Circuit Court divided the ineffective assistance claims presented to it into two sections: "Failure to Call Certain Witnesses in the Penalty Phase" and "Failure to Adequately Prepare Expert Witness." *Id*., Vol. 1, pp. 261, 263. With respect to the first section, the Circuit Court noted "[t]rial counsel is alleged to have rendered ineffective assistance for not having called four witnesses to wit, Milton Castleman, Gerald Whistle, Willie Carroll and Janet Thomas to testify in his behalf in the penalty phase." *Id*., Vol. 1, p. 261. The testimony of these witnesses would have been presented to show that Sasser "would be able to control his impulses in the structured environment of prison and thus place his mental disorder in a more mitigating light." *Id*., Vol. 1, pp. 261–62. With respect to the second section, the Circuit Court stated "[t]rial counsel is taken to task for failing to have adequately prepared the testimony of his only expert witness during the penalty phase, Mary Pat Carlson." *Id*., Vol. 1, p. 263.

Based on the evidence presented and the parties' briefs, the Court finds that the first claim of ineffective assistance of trial counsel delineated by the Eighth Circuit for this Court's examination—trial counsel was ineffective when he failed to prepare for the sentencing phase of the trial—is a recharacterization of the ineffective assistance claims presented in the state court, and was fairly presented to the state court during the postconviction process. As summarized in Sasser's post hearing brief, the first claim under consideration in this Court argues that

> Trial counsel's performance fell well below prevailing professional norms when he failed to ensure that Mr. Sasser was represented by two qualified lawyers, failed to perform necessary investigations, unreasonably failed to secure competent expert mental health assistance that was obviously needed, unreasonably failed to secure competent and qualified investigative assistance, unreasonably failed to use properly the investigative assistance he was provided, unreasonably failed to interview and present witnesses who would have provided Mr. Sasser's jury with compelling mitigating evidence, failed to investigate and present evidence of Mr. Sasser's intellectual deficiencies, and unreasonably failed to investigate and present evidentiary exhibits that would have supported Mr. Sasser's case for a life sentence.

(Doc. 273, pp. 5–6).

Some of these "failures of preparation" in the first claim are recharacterizations of the second and third claims now under consideration in these federal proceedings, and their inclusion in this first claim is representative of Sasser's apparent habit of trying to shoehorn multiple claims into one. *Cf. Sasser II*, 735 F.3d at 850 ("At every turn in these proceedings, Sasser has raised new ineffective assistance of counsel claims or recast old claims in new ways. Having carefully scrutinized Sasser's numerous filings, we count no fewer than sixteen ineffective assistance of counsel claims raised under the umbrella of the second ground certified for appeal."). For example, there is little or no fundamental difference in claiming trial counsel failed to adequately prepare for the sentencing phase of the trial by failing to secure competent expert mental health assistance and in claiming trial counsel failed to meaningfully consult with a mental health professional.

Others are essentially the same claims before the state court. For example, there is little or

no fundamental difference in claiming trial counsel failed to interview and present witnesses who would have provided Mr. Sasser's jury with compelling mitigating evidence (Doc. 273, p. 6) and in claiming that trial counsel failed to investigate for the penalty phase and to call additional witnesses to adduce evidence of relevant mitigating factors. Respondent's Ex. 2, Vol. 1, pp. 144–47.

Still others are so far afield of the four claims identified on remand that it appears Sasser is attempting to revive claims already dismissed by the Eighth Circuit. For example, Sasser claims in Ground VII of his petition that he was "deprived of the effective assistance of counsel and is entitled *to a new trial* because he was not represented by two attorneys." (Doc. 48, p. 3) (emphasis added). This is not one of the surviving claims identified by the Eighth Circuit, but Sasser now argues that the claim that trial counsel was ineffective when he failed to prepare for the sentencing phase results from trial counsel not asking for another attorney to be appointed. (Doc. 273, p. 7). A claim is identified by its legal and factual bases. Because the legal and factual bases Sasser argues in the first claim on remand are the same as those that have already been dismissed, or are fundamentally the same as others to be considered on remand, this claim is not amenable to a *Martinez* and *Trevino* analysis. That is, it is not a claim that has been procedurally defaulted and can therefore be excused. Where it is not duplicative of the second and third claims, it is a claim that has already been dismissed.

However, the second and third claims are different. Sasser argues that prevailing professional norms at the time of trial required the early involvement of a qualified and informed mental health expert in order to effectively present mitigation evidence at sentencing. Sasser also argues that prevailing professional norms required trial counsel to present expert witnesses to discuss mental illness, and that any meaningful expert opinion on mental health will be informed

by family and social history. Sasser argues that trial counsel failed to timely seek the appointment of qualified experts in neurology and neuropsychology to conduct a full test battery on Sasser. Sasser also claims that this failure caused trial counsel to be uninformed as to what he needed a mental health expert to do.

Although trial counsel enlisted the help of Mary Pat Carlson, she was family counselor, not a clinical psychologist. Sasser argues that trial counsel provided Carlson with no referral questions, providing her only with a "copy of my file, and she took it from there." (Doc. 273, pp. 17–18). Sasser argues that trial counsel failed to provide Carlson any other records concerning Sasser, including prior incarceration records. Sasser additionally maintains that because trial counsel conducted no investigation, he had no biopsychological history to give Carlson. Sasser argues that trial counsel failed to investigate Carlson's professional licensure, only "assuming" she was qualified. Sasser states Carlson "was not competent, qualified, or licensed to perform the testing she did in this case;" and, Carlson's results were, therefore, "inaccurate and highly aggravating," overestimated "Sasser's intellectual functioning and failed to discover readily apparent organic brain damage." (Doc. 273, p. 18). Sasser also argues that Carlson's trial testimony was extremely prejudicial, testifying that Sasser "'had repressed and denied vast amounts of rage . . . that in the future could be expected to be directed at women, particularly those perceived as being rejecting, unloving and/or having power.'" (Doc. 273, pp. 18–19).

Sasser asserts that had the proper investigations been timely performed and qualified experts been retained prior to trial, trial counsel would have discovered and presented evidence that Sasser had a structural problem with his brain that was objectively evident on tests. Sasser further asserts that testimony would have been presented that these brain impairments were present from a very young age. Finally, Sasser argues that expert testimony from a psychologist would

have established that Sasser's brain impairments had "broad-reaching detrimental effects on his ability to function in the world" and would have established that Sasser was "particularly lacking in his ability to plan, exercise good judgment, and problem solve." (Doc. 275, pp. 8–9).

The most significant distinction between Sasser's Rule 37 claims and the second and third claims as characterized on remand are that the claims in the Rule 37 petition focus on how trial counsel could have been better prepared for the mitigation arguments he actually raised at sentencing with his chosen expert and how those arguments could have been set forth more effectively, while the claims under consideration on remand concern the steps minimally effective trial counsel would have taken with respect to mental health evidence and obtaining a qualified expert in anticipation of mitigation at the sentencing phase. The second claim on remand is not a claim that trial counsel should have investigated earlier so that he could secure Carlson's evaluation earlier and better consult with her and prepare for sentencing. That issue was fully and fairly raised in the Rule 37 proceedings. *See* Respondent's Ex. 2, Vol. 2, pp. 310–60 (testimony of Mary Pat Carlson); pp. 310–14 (Carlson's testimony that trial counsel did not contact her until close to trial and she did not do most of the work she otherwise might have); pp. 335–36 (Carlson's testimony that trial counsel did nothing to inform her about mitigating circumstances he intended to address). It is that trial counsel should have begun his preparations and obtained a psychological evaluation earlier so that he would know that he needed a qualified and licensed expert, and not Carlson, to present mental health evidence in mitigation. The third claim on remand is not that trial counsel should have done a better job in consultation with Carlson to prepare both her and himself for the sentencing phase, but that he should have had meaningful consultation with a qualified and licensed mental health professional. Given the new evidence of Carlson's lack of qualifications and her licensure issues, Sasser's third claim is essentially that his trial counsel

should not have consulted with her at all, and given the evidence of trial counsel's disdain for mental health professionals and how that disdain impacted trial counsel's preparation, it is hard to see how he could ever be effective in having meaningful consultation. The new claims matter because there is also ample evidence calling into question Sasser's mental health issues and organic brain damage, both arguably exacerbated by poverty and other family conditions. These legal and factual bases were not raised below and the facts now alleged "fundamentally alter the legal claim[s] already considered by the state courts." *Vasquez*, 474 U.S. at 260.

Accordingly, the Court finds that the second and third claims of ineffective assistance of trial counsel claims are new claims not fairly presented to the state court. As stated above, Sasser has no available state remedy to exhaust these defaulted claims. *Ward*, 455 S.W.3d at 835. They are procedurally defaulted and subject to an analysis under the second prong of *Martinez* and *Trevino* to determine whether cause exists to excuse the procedural bar.

B. Cause to Excuse Procedural Default

"[U]nless postconviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite *Trevino*." *Sasser*, 743 F.3d at 1151. Cause exists to excuse procedural default if Sasser's postconviction counsel was ineffective and Sasser was prejudiced as a result. *Sasser II*, 735 F.3d at 853 ("Under *Trevino*, Sasser's postconviction counsel's alleged ineffectiveness, if proved, establishes cause for any procedural default Sasser may have committed in not presenting these claims to the Arkansas courts in the first instance." (citations and brackets omitted)).

Ineffectiveness of counsel is analyzed using the *Strickland* standard. The "proper standard for attorney performance is that of reasonably effective assistance. . . . reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 687–88. "The deficient performance

standard is rigorous." *United States v. Brown*, 528 F.3d 1030, 1033 (8th Cir. 2008). "Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "[C]hoices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal. Therefore, absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." *Brown*, 528 F.3d at 1033 (citations omitted).

"[I]neffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland*, 466 U.S. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. at 694. "When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. An evidentiary hearing is required where the petitioner's underlying claim is "potentially meritorious." *Sasser II*, 735 F.3d at 851.

The remaining two procedurally defaulted claims the Court must analyze are Sasser's claims that trial counsel was ineffective when he failed to obtain a timely psychological evaluation

of Sasser and when he failed to meaningfully consult with a mental health professional. Cause exists if Sasser's postconviction counsel was unreasonable in failing to present these claims in the state proceedings and if, in the absence of that failure, there is a reasonable probability that the state postconviction proceedings would have been different. This second prong will, of necessity, also require a merits analysis of trial counsel's performance.

1. Postconviction Counsel's Ineffective Assistance

Following conviction and direct appeal,[5] Sasser sought postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37. At the state postconviction level, Sasser's final amended petition alleged, broadly, ineffective assistance of counsel, both at the guilt and penalty phase of trial. A hearing was held on Sasser's state postconviction claims on December 16, 1996. Respondent's Ex. 2, Vol. 2. Seven witnesses—Milton Castleman, Gerald Whistle, Mary Pat Carlson, Thomas Crosthwait, Willie Carroll, Bill Sillivan, and Janet Thomas—testified in support of Sasser's case, while the State presented two witnesses—James Robert Blackburn, and Charles Potter. *Id.*, Vol. 2, pp. i–ii. The circuit court denied relief on the postconviction petition in September 1997. Respondent's Ex. 2, Vol. 1, p. 252. Sasser appealed the denial of postconviction relief, and the Supreme Court of Arkansas affirmed the denial in July 1999. *Sasser v. State*, 993 S.W.2d 901, 903 (Ark. 1999).

Postconviction counsel was employed with the Arkansas Capital Resource Center when she began work on the Sasser case in August 1995. The Arkansas Capital Resource Center was funded by a federal grant and was technically without funding for the handling of matters in state

[5] Sasser appealed his conviction to the Supreme Court of Arkansas. Sasser's appeal asserted only one issue: the trial court abused its discretion when it permitted the state to introduce "prior acts" testimony in violation of Arkansas Rules of Evidence 404(b) and 403. The Supreme Court affirmed Sasser's conviction on July 17, 1995. *Sasser v. State*, 902 S.W.2d 773 (Ark. 1995).

court. To further complicate matters, during the summer of 1995 it became evident to the staff of the Resource Center that federal funding was running out and the staff began looking for other employment. The Resource Center finally completely closed for business in March 1996, several months after postconviction counsel's October 1995 filing of the initial postconviction petition. At the time the Resource Center closed, postconviction counsel filed a motion with the state court seeking to be appointed individually to represent Sasser. The motion for appointment of counsel was not ruled on until September 1996. Upon appointment, postconviction counsel was awarded reimbursement for her expenses and compensation with respect to her representation in an amount not to exceed $1,000. Postconviction counsel's reimbursement budget was to cover expenses—for travel, service of subpoenas, witness fees, etc.—and attorney fees. Postconviction counsel was unemployed for several months after the closing of the Resource Center. In October 1996, postconviction counsel was hired by the Pulaski County Public Defender's Office. Although representing Sasser was not part of her job duties, her employer agreed to allow her to continue her representation of Sasser in her spare time.

Despite the many hindrances associated with her representation, postconviction counsel did significant work on the case. Her case file is detailed and extensive. Petitioner's Ex. 47. Prior to the Resource Center's closure, an investigator with the Resource Center performed some background research on Sasser's social history. In addition, postconviction counsel gathered the police files and the files of the prosecutor. Postconviction counsel met with Sasser in prison and communicated with him numerous times. She traveled and met with members of Sasser's family as a group, including his mother and siblings. Postconviction counsel attempted to meet with Sasser's former girlfriend and his child. She gathered medical information, and prison records, and interviewed some of Sasser's former employers, including Castleman and Whistle.

Postconviction counsel met with Willie Carroll, Sasser's childhood friend. She met with Mary Pat Carlson and gathered records from Southwest Mental Health Counseling concerning the mental evaluations which were given to Sasser.

This investigative work was not enough to qualify as reasonable, however. Much of it was performed prior to the closure of the Resource Center, and was characterized as a good but "minimal start" by Richard Burr, Sasser's standard of care expert. Much of it fell far short of the applicable best practices identified in the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[6] While these guidelines are not binding precedent, without some articulated reason why postconviction counsel would deliberately ignore them, the guidelines are good evidence that her failures in investigation and representation were unreasonably deficient, rather than strategic. Postconviction counsel did not gather birth certificates, death certificates, or other documents of a social history nature. She did not meet with family members individually or specifically investigate the family history of poverty. She did not become aware that Sasser did not technically graduate from high school, or that he was not mentally qualified to enlist in the military and that he hid that fact from his family. Postconviction counsel did not request additional funding and did not make a record for the needed additional expenses for a mitigation expert or mental health expert. As a result, postconviction counsel did not hire a mitigation expert. Postconviction counsel did not request that the state appoint another attorney to serve as second-chair. Furthermore, postconviction counsel did not hire a mental health expert, but instead focused on how Carlson, a marriage and family counselor,

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[6] While the ABA Guidelines are not a required standard, they have long been referred to as "guides to determining what is reasonable." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing *Strickland*, 466 U.S. at 688 and *Williams*, 529 U.S. at 396).

could have been a better witness if properly informed by trial counsel. Without a qualified mental health expert, postconviction counsel was unable to understand or effectively present to the postconviction court why trial counsel's mitigation case was wholly insufficient. As evidenced by the testimony to this Court, qualified mental health experts would have been able to rebut the state's expert evidence and present an accurate picture of Sasser's mental health.

It is true that postconviction counsel's decisions were constrained by her circumstances. The Resource Center closed; she was without employment and was unable to find another attorney to take on Sasser's case; after seeking to be appointed, her motion lagged with the state court for months; after appointment, she was given the meager budget of $1,000. These circumstances indicate that not all of postconviction counsel's deficiencies were her own failings. They also make clear that her deficiencies were not reasonable strategic choices, but were another facet of the systematic operation of Arkansas state proceedings to deny capital defendants "meaningful review of a claim of ineffective assistance of trial counsel." *Cf. Sasser II*, 735 F.3d at 853. Postconviction counsel's investigation and representation were not reasonably effective.

2. Prejudice Due to Postconviction Counsel's Ineffective Assistance

Having found postconviction counsel's representation was not reasonably effective, the Court must analyze whether Sasser was prejudiced by that ineffective assistance of counsel. If there was no prejudice, there is no cause to excuse the procedural default.

Whether Sasser was prejudiced by postconviction counsel's failure to raise Sasser's surviving claims about trial counsel's ineffective assistance at the sentencing phase depends on whether trial counsel was actually constitutionally ineffective by failing to obtain a timely psychological evaluation of Sasser and failing to meaningfully consult with a mental health professional. If trial counsel's failure to do these things was an unreasonable deficiency rather

than a reasonable strategic decision, and if there is a reasonable probability that the outcome would be different had trial counsel provided effective representation, then postconviction counsel's procedural default on these issues in the postconviction proceedings would be prejudicial, and would provide cause to excuse the procedural default.

At the evidentiary hearing held by this Court, trial counsel testified that throughout the pretrial period, and up until approximately three weeks before trial, he was expecting to be able to reach a plea agreement, avoiding the death penalty. Trial counsel testified that he really did not prepare for the sentencing phase during the time he spent trying to reach a plea agreement. Trial counsel characterized his strategy as "trying to . . . tug on their heart strings a little bit to keep them from giving the death penalty." Respondent's Ex. 2, Vol. 2, p. 457.

In February 1994, approximately two and a half weeks prior to the trial, trial counsel requested funding for the services of both an investigator and a mental health expert. When funding was secured, trial counsel hired Bill Sillivan to perform an investigation of the crime, with the goal being to avoid the death penalty. Sillivan's investigation was performed in a limited two- to three-week period before trial. Although trial counsel testified that Sillivan "checked out everything I was interested in checking out," the evidence reveals that Sillivan focused his investigation on the crime, and any possible alibi for Sasser, rather than on any psychological or mental health issues that could serve as mitigating factors with respect to sentencing.

At approximately the same time Sillivan was hired, trial counsel hired Mary Pat Carlson as a mental health expert. Trial counsel testified that he hired Carlson because she had done an evaluation for trial counsel in the past. Trial counsel provided Carlson with a copy of his file "and she took it from there." Carlson was not a psychiatrist or psychologist; she was a family counselor. Trial counsel assumed, without confirming, that Carlson had the qualifications to conduct the

testing necessary. Trial counsel testified that a more qualified expert was probably available in the area, but, he said, "I just take those kind of people with a grain of salt anyway . . . ." Respondent's Ex. 2, Vol. 2, p. 458. During the February 2016 hearing, trial counsel was asked what he meant by that statement. Trial counsel stated that he "didn't find that [mental health experts] were all that credible. I didn't think they knew what they were talking about about half the time." (Doc. 265, p. 26:9–1). Testimony was presented in the February 2016 hearing that Carlson was not competent, qualified, or licensed to perform the testing she performed with respect to Sasser, and that she overestimated Sasser's intellectual functioning and failed to discover organic brain damage. Testimony was also presented that disciplinary actions were pending with respect to Carlson's license.

Evidence was presented concerning the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. Petitioner's Ex. 50. The relevant ABA Guidelines, which were in effect from 1989 until 2003, provide that defense counsel should perform an investigation into mitigating evidence which "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Id.*, p. 85 (Guideline 11.4.1(C)). The ABA Guidelines include, in a list of areas for investigation relevant to the sentencing phase:

> medical history, (mental and physical illness or injury, alcohol and drug use, birth trauma and develop- mental [sic] delays); educational history (achievement, performance and behavior) special educational needs (including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct on supervision and in the institution, education or training, and clinical services; and religious and cultural influences.

Id., p. 86 (Guideline 11.4.1(D)(2)(C)).

Sasser also presented testimony from Richard Burr with respect to the standard of care required of defense counsel in a capital case. Burr explained the reason for extensive mitigation phase investigations leading up to a capital trial. Among other things, Burr testified that trial counsel failed to provide effective assistance of counsel during the penalty phase of Sasser's trial because trial counsel conducted no life history or social history investigation, which caused him to work ineffectively with the mental health expert that he called to the stand.

Sasser presented easily attainable documentary evidence surrounding significant events in Sasser's childhood, such as his birth records, death records concerning his father's tragic death when Sasser was two years old, and Arkansas Worker's Compensation Records evidencing the meager benefits provided to the family following Sasser's father's death. This evidence, along with testimony from witnesses, provides insight into the dire financial, economic, and social aspects of Sasser's childhood. Sasser's school records were presented at the February 2016 hearing. Those records, along with testimony from former teachers, established Sasser's lack of ability in school, and set forth sufficient evidence that Sasser had deficits in intellectually functioning from an early age and was "socially promoted" through school, rather than actually graduating from high school. In addition, testimony was presented about Sasser's failure to qualify for military service, and his attempts to cover up that failure. Testimony was also presented from Sasser's coworkers and supervisors concerning his lack of mental ability.

All of this evidence would have been uncovered had trial counsel made a reasonable investigation, and would have assisted him in presenting an effective mitigation case with respect to Sasser's mental health and psychological state. Had this information been provided to Sasser's mental health expert, Carlson, or to Dr. James Blackburn, who testified for the prosecution during the trial, their trial testimony likely would have been different.

"It is unquestioned that under the prevailing professional norms at the time . . . counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)). Trial counsel simply did not investigate or compile a social history of Sasser, and there is no reasonable strategic basis for that decision. It is not unreasonable to hope for a plea and a sympathetic jury, but a reasonable strategy requires some substantive preparation, as well. Trial counsel's failure to investigate was unreasonable, and his investigation was too little, too late.

Trial counsel failed to timely request and meaningfully consult with a mental health professional. He waited to secure funding and contact Mary Pat Carlson until approximately two and a half weeks before trial. Trial counsel simply provided Carlson with his file as preparation. Not only did trial counsel fail to effectively consult with a mental health expert and supply her with the significant social history which would have been available if he had performed a proper investigation, trial counsel also failed to carefully choose a properly qualified expert under the circumstances. Had trial counsel sought out a mental health professional in timely fashion, he likely would have discovered the professional he initially selected was not qualified. Had trial counsel effectively chosen an appropriate and qualified expert who could perform a psychological evaluation, evidence could have been presented to show that Sasser suffered from mental deficiencies.

The Court need not rely on speculation that such evidence could have been presented. During the February 2016 hearing, Sasser presented the testimony of Dr. Pamela Blake, a neurologist, Dr. Dale G. Watson, a neuropsychologist, and Dr. Leslie Lebowitz, a clinical psychologist. Each expert had evaluated Sasser following review of Sasser's background, including various affidavits concerning Sasser's early life, Sasser's academic and social records,

and records from Sasser's previous psychological evaluations and cognitive testing. Both Dr. Blake and Dr. Watson concluded that Sasser suffered moderate neurological impairment or dysfunction. Dr. Lebowitz concluded that Sasser "endured significant adversity throughout his development in the form of extreme poverty and maternal depression and that he was impaired and that his impairment in all likelihood rendered that adversity more overwhelming and harmful than it might have been for somebody else." (Doc. 265, Volume 3, p. 620.)

Had trial counsel effectively presented a mitigation case, there is a reasonably probability that the jury would have returned a different sentence. During Sasser's jury trial, "the jury found one aggravating circumstance: that appellant had previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person. The jury found three mitigating circumstances: that appellant would be a productive inmate, had a supporting family of him as an inmate, and had stipulated he caused the victim's death." *Sasser v. State*, 902 S.W.2d at 777. Had the jury been presented with the mental and psychological health mitigation case presented at the February 2016 hearing, there is a reasonable probability that the jury would have chosen a life sentence instead.

Because trial counsel's ineffective assistance in failing to obtain a timely psychological evaluation of Sasser and meaningfully consult with a mental health professional prejudiced Sasser at the sentencing phase of trial, postconviction counsel's failure to raise these claims in postconviction proceedings was ineffective assistance of counsel and prejudiced Sasser. Because Arkansas as a systematic matter did not afford Sasser meaningful review of his claims of ineffective assistance of trial counsel, the exception to *Coleman* outlined in *Martinez* and *Trevino* applies, and ineffective assistance of postconviction counsel can provide cause to excuse a procedural default. The procedural default is therefore excused. Furthermore, because trial

counsel was unconstitutionally ineffective in these areas, Sasser's petition must be granted.

IV. Conclusion

Because the Court is addressing the *Atkins* issue in a separate opinion, a final order incorporating both opinions will be entered separately.

ENTERED this 2nd day of March, 2018.

/s/ P. K. Holmes, III
P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

v. No. 4:00-CV-04036

WENDY KELLEY, Director,
Arkansas Department of Correction RESPONDENT

MEMORANDUM OPINION

On March 20, 2014, the United States Court of Appeals for the Eighth Circuit issued a mandate (Doc. 180) in this case affirming in part and reversing in part this Court's previous judgments, and remanding the matter for proceedings consistent with the Eighth Circuit's opinion.

I. Background

On May 4, 1994, Petitioner Andrew Sasser was convicted of capital murder and sentenced to death for the July 12, 1993 homicide of Jo Ann Kennedy. *See Sasser v. State*, 902 S.W.2d 773 (Ark. 1995). The murder occurred while Kennedy worked as a clerk at an E-Z Mart convenience store in Garland City, Arkansas. *Id*. at 774–75. Following a direct appeal, and Sasser's effort to obtain Arkansas state court postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37, Sasser sought federal relief through a writ of habeas corpus. (Doc. 3). The Court dismissed the petition but granted a certificate of appealability with respect to several issues. (Docs. 30 and 34). During Sasser's first appeal to the Eighth Circuit, and following the Supreme Court's decision in *Atkins v. Virginia*,[1] the Eighth Circuit remanded for a determination of whether Sasser was ineligible for the death penalty because of mental retardation,[2] but retained jurisdiction over the

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[1] *Atkins v. Virginia*, 536 U.S. 304 (2002), holds that execution of an intellectually disabled person is prohibited by the Eighth Amendment to the Constitution.

[2] The term "mental retardation" is medically outdated and offensive to many people. The phenomenon is more accurately described as an "intellectual disability," and it is this Court's

bulk of Sasser's case. After reviewing the *Atkins* issue twice, the Eighth Circuit issued its opinion and mandate remanding to this Court[3] and giving rise to these proceedings. *Sasser v. Hobbs* (*Sasser II*), 735 F.3d 833 (8th Cir. 2013). The Eighth Circuit affirmed dismissal of many of Sasser's claims, but reversed with respect to Sasser's *Atkins* claim and four of his claims of ineffective assistance of counsel at the sentencing phase of Sasser's trial. The Eighth Circuit vacated the Court's denial of relief on those four claims, and the Court's finding that Sasser is not mentally retarded under *Atkins*.

The Eighth Circuit directed the Court to conduct a hearing on the four ineffective assistance of counsel claims to determine whether they are procedurally defaulted claims, and if so, whether they should be excused. *Id.* at 853, 855; *see also Sasser v. Hobbs*, 743 F.3d 1151, 1151 (8th Cir. 2014) (denying rehearing) ("It should be clear the district court, on remand, must consider whether Andrew Sasser's state postconviction counsel failed to raise the four potentially meritorious ineffectiveness claims." (citation and brackets omitted)). The Eighth Circuit also directed the Court to make a new *Atkins* finding using the appropriate standard. *Sasser II*, 735 F.3d at 855. The Courts' ineffective assistance findings are addressed in a separate opinion.

On remand, the Court denied Sasser's motion to file an amended petition and directed the parties to file post-remand briefs on Sasser's *Atkins* claim. Sasser filed his brief (Doc. 187) on September 17, 2014, and the Respondent filed a response brief (Doc. 195) on December 17, 2014.

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obligation to determine whether Sasser suffers from an intellectual disability that would make his execution unconstitutional. In doing so, in this memorandum opinion, the Court utilizes the outdated term for consistency with prior proceedings because the Arkansas statutory legal standard, the witnesses in this matter, and the majority of older legal authorities cited by the Court on this issue describe the phenomenon as "mental retardation."

[3] This case was initially assigned to Hon. Harry F. Barnes. On November 13, 2009 the case was reassigned to Hon. Jimm Larry Hendren. On March 25, 2014, following the most recent remand, the case was reassigned to the undersigned.

Sasser later filed notices of supplemental authority (Doc. 205, 279, 280).

II. Applicable Law

In 2002, the United States Supreme Court found that the Eighth Amendment "'places a substantive restriction on the state's power to take the life' of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). The *Atkins* Court left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Id.* at 317 (quoting *Ford*, 477 U.S. at 416–17).

Even prior to *Atkins*, Arkansas provided a statutory right against execution for persons "with mental retardation at the time of committing capital murder." Ark. Code Ann. § 5-4-618. Following *Atkins*, the Arkansas Supreme Court has consistently construed this statutory right to be equivalent to the federal constitutional right established in *Atkins*. *See Anderson v. State*, 163 S.W.3d 333, 354–55 (Ark. 2004). Arkansas law defines mental retardation as follows:

> (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.

Ark. Code Ann. § 5-4-618(a)(1). A defendant must prove that he meets the mental retardation standard "by a preponderance of the evidence." Ark. Code Ann. § 5-4-618(c). To meet this burden, Sasser must prove four factors:

> 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."

Sasser II, 735 F.3d at 843 (quoting Ark. Code Ann. § 5-4-618(a)). The third prong modifies both the first and second prongs, while the fourth prong asks the same questions as the second prong,

unbounded by the requirement of juvenile manifestation.

If Sasser can show that he suffered from an intellectual disability, "either (a) at the time of committing the crime or (b) at the presumptive time of execution," to an extent that meets Arkansas's mental retardation legal standard, his execution will be prohibited by the Eighth Amendment. *Id.* at 846.

III. Evidence Presented

At the 2010 evidentiary hearing regarding Sasser's Atkins claim, the Court heard testimony from Mr. Hollis Sasser, Dr. Jethro Toomer, Prof. Tom Smith, Dr. Roger Moore, Mr. Grant Harris, Sgt. John Cartwright, Mr. Bryan Olinger, and Dr. Kevin McGrew. Along with the testimony of witnesses, Sasser submitted exhibits numbered 1–4,[4] which consisted of the following: Petitioner's Exhibit 1: Report of Dr. Jethro Toomer, consisting of three volumes; Petitioner's Exhibit 2: Curriculum Vitae and report of Professor Tom Smith; Petitioner's Exhibit 3: Report of Dr. Kevin McGrew and Appendix, consisting of five volumes. The Respondent submitted exhibits numbered 1–3, which consisted of the following: Respondent's Exhibit 1: Report, Raw Data, and Materials of Dr. Roger Moore, consisting of seven volumes; Respondent's Exhibit 2: Diagram showing correspondence between Sasser's test results and the normal distribution curve; Respondent's Exhibit 3: Arkansas Department of Finance and Administration Driver Permit/License Record for Sasser.

As a summary of the evidence, the Court fully incorporates the Eighth Circuit's description in *Sasser II*:

Beginning on June 15, 2010, the district court held a two-day evidentiary hearing

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[4] Petitioner's Exhibit 4 was "just a continuation of 3" and was accepted ultimately as Petitioner's Exhibit 3. (Doc. 157, p. 283 [page cites to this document use the document's internal pagination, rather than CM/ECF pagination]). Unless noted otherwise, all exhibit citations in this opinion are to exhibits from the June 2010 hearing.

on Sasser's Atkins claim. Sasser first called three witnesses: his brother, Hollis; Dr. Jethro Toomer, a psychologist; and Professor Tom Smith, a special education expert. The State, in turn, called four witnesses: Dr. Roger Moore, a psychologist; Grant Harris; Sergeant John Cartwright; and Brian Hollinger. Sasser called one witness in rebuttal: Dr. Kevin McGrew, a psychologist. We recount only the evidence relevant to this appeal.

Dr. Toomer's Testimony

Dr. Toomer evaluated Sasser in person, conducting an intelligence quotient (IQ) test: the Wechsler Adult Intelligence Scale, fourth edition (WAIS–IV). Dr. Toomer also administered several other psychological tests and interviewed numerous individuals about Sasser's background. Dr. Toomer concluded Sasser "met the criteria for mental retardation [in 1994]." He based his conclusion on qualitative factors in addition to evidence of Sasser's IQ scores, which were 79 in 1994, according to an earlier test, and 83 in 2010, according to Dr. Toomer's test.

Dr. Toomer testified the IQ score of 79 Sasser obtained in 1994 was based on an outdated set of scoring norms, resulting in an inaccurately high result. Specifically, the 1994 score was from the WAIS–R, a test whose scoring norms were developed in 1980. IQ scoring norms rapidly become outdated because an IQ score is a relative rather than an absolute measure: IQ tests including the WAIS–R and WAIS–IV are normed such that 100 is the mean score, meaning approximately 68% of the U.S. population would score between 115 and 85, one standard deviation (15 points) above and below the mean. Approximately 2% of the U.S. population would score 70 (i.e., two standard deviations from the mean) or below. For several decades, however, the U.S. population's average raw IQ score has risen each year.[1] *See, e.g.*, James R. Flynn, *Massive IQ Gains In 14 Nations: What IQ Tests Really Measure*, 101 Psychol. Bull. 171 (1987). Thus, an IQ score of 100 under current scoring norms would likely have been close to 110 under scoring norms in effect thirty years ago. This change in IQ scoring norms over time is referred to as the "Flynn effect." *See, e.g.*, Richard E. Nisbett et al., *Intelligence: New Findings and Theoretical Developments*, 67 Am. Psychologist 130, 148 (2012).

1 Although this rise in raw IQ scores is persistent and widely recognized, psychologists heavily debate its causes. *See, e.g.*, Ted Nettelbeck & Carlene Wilson, *The Flynn Effect: Smarter Not Faster*, 32 Intelligence 85 (2004); Joseph L. Rodgers, *A Critique of the Flynn Effect: Massive IQ Gains, Methodological Artifacts, or Both?*, 26 Intelligence 337, 354 (1999) ("Even with a healthy dose of skepticism, the [Flynn] effect rises above purely methodological interpretation, and appears to have substantive import.").

To correct for the Flynn effect, Dr. Toomer testified Sasser's IQ score from 1994 should be reduced by four points to 75, a score falling within the 70–75 outer range consistent with mental retardation. *Cf., e.g.*, Jack M. Fletcher et al., *IQ Scores*

Should Be Corrected For the Flynn Effect in High–Stakes Decisions, 28 J. Psychoeducational Assessment 469, 472 (2010) (finding IQ scores should be adjusted by a mean of 3 points per decade from the date scoring norms are developed). Dr. Toomer testified that because of the measurement error inherent in IQ tests, a score of 75 indicated that Sasser's actual IQ almost certainly fell between 70 and 80 (i.e., an error of +/− 5 points). Dr. Toomer testified that Sasser's 2010 IQ score was likely higher because he had been in a structured prison environment for an extended period of time. Dr. Toomer explained, "research shows that what tends to be enhanced ... is the area of verbal reasoning on people who have been incarcerated."

Dr. Toomer's diagnosis also relied on qualitative factors. Notably, Sasser had a long history of intellectual and academic difficulties. In high school, he was placed with students in the bottom performance level, indicating that he was a "special education" student despite the fact Arkansas, at the time, did not offer dedicated programs for "special education" students. His grades were consistently poor despite the simplicity of his classes. He was unable to graduate from high school; instead, the school gave him, like all students who failed to meet the minimum graduation requirements, a "certificate of attendance." Apart from time in prison, Sasser lived with his mother virtually his entire life, and he was unable to live independently. After high school, he attempted to join the army, but his dismal performance on the Armed Services Vocational Aptitude Battery (ASVAB) disqualified him. Apparently ashamed of telling his family of this failure, he spent several weeks pretending to be in the Army, hiding in an abandoned cabin in the woods near his mother's home and sneaking into her house to get food.

Sasser never had a checking account or a credit card, did not obtain a driver's license until he was twenty-eight years old, and had extraordinary difficulties performing even the simplest manual labor jobs. For example, he worked for a time at a chicken processing facility, where his supervisor rotated him through several jobs of decreasing difficulty, trying to find one Sasser could perform. In the end, the only job he was able to perform was the simplest task in the facility: pushing a button to dispense ice. Even a slightly more difficult task—color coding pallets—was too difficult because Sasser often mixed up the colors.

Dr. Moore's Testimony

Dr. Moore evaluated Sasser in person and conducted several psychological tests, but did not reassess his IQ.[2] Dr. Moore concluded Sasser was not "mentally retarded as defined by Arkansas law." Dr. Moore admitted Sasser had "borderline mental retardation or impaired cognitive functioning that falls into the upper 70s to low 80s." But in Dr. Moore's view, "as th[e] term is statutorily and clinically defined, ... [Sasser] does not suffer from mental retardation." Dr. Moore based his conclusions primarily on the 1994 and 2010 IQ scores, but he also considered several qualitative factors.

2 Because there are substantial "practice effects," Dr. Moore explained, it is not appropriate to administer multiple IQ tests in short succession.

As to Sasser's IQ, Dr. Moore agreed with Dr. Toomer that (1) the Flynn effect is "a genuine and real observation," and (2) norm obsolescence was a justified concern, but he opined that it was not appropriate to adjust the 1994 score for the Flynn effect. Dr. Moore admitted, however, that the American Association on Intellectual and Developmental Disabilities (AAIDD)—the primary organization in the United States dealing with "the assessment and diagnosis of mental retardation"—considered it a "best practice[] in the diagnosis of mental retardation" to recognize the Flynn effect. Dr. Moore disagreed with Dr. Toomer's scoring of the 2010 IQ test, contending that the score should have been 84 rather than 83. Stating no supportive research exists, Dr. Moore denied that spending time in a structured prison environment could raise IQ scores. Dr. Moore testified that the "cutoff of mental retardation" was a score of 70.

As to qualitative factors, Dr. Moore opined that Sasser "appears to have adequate skills to cook for himself as needed, travel independently in the community, hold a job, take care of his personal needs and communicate effectively." Dr. Moore noted that Sasser had maintained over time two significant relationships and fathered a child. Dr. Moore pointed to a small bank loan obtained in Sasser's name as positive evidence of Sasser's adaptive functioning, but Sasser's brother actually procured the loan, completing all the necessary paperwork on Sasser's behalf.

Other Qualitative Evidence

Both psychologists considered firsthand accounts of Sasser's behavior by people who knew him before he turned eighteen years old. For example, one of Sasser's high school classmates, Janice Washington Briggs, described Sasser's limited interpersonal skills. "[I]f someone did or said something funny, [Sasser] laughed longer than everyone else in an inappropriate way [and] slobbered when he laughed," Briggs said. She said Sasser "was in Group III," and "[t]he students in Group III were Special Education students." After high school, Briggs remembered that Sasser entered into his first relationship, with a woman who "[l]ike [Sasser], ... did not fit in." Dr. Toomer reported Sasser's "social interaction and communication skills" at age 45 "equate[d] with that of an average person age 7 years, 6 months."

Sasser II, 735 F.3d at 838 – 41 (heading numbers omitted, alterations and punctuation in original).

In addition to the foregoing recitation of evidence from the Eighth Circuit, the Court notes the following evidence from the 2010 hearing.

A. Hollis Sasser's Testimony

Hollis Sasser ("H.B.") is Sasser's brother. He testified that when Sasser was two or three years old, their father passed away after an on-the-job accident at a construction site. The family then moved to an area referred to as "Boyd Hill" where several extended family members also lived. Sasser socialized with other children his age, and children older and younger than him when living at Boyd Hill. Sasser was given chores to do, including feeding chickens by himself and gathering firewood with the family. Sasser would fish with his family using simple fishing equipment such as a pole and worm, but not fishing lures and tackle. Sasser would also clean the fish. H.B. did not notice that Sasser had any significant developmental issues as they were growing up.

All of Sasser's employment was in manual labor jobs. During high school, Sasser had a job with the Crank family. Sasser would help with farm duties in chicken houses and assisted with hay baling in the summer months. Sasser was specifically responsible for removal of dead chickens from the houses, cleaning out water troughs, and feeding chickens. Once the chickens were old enough for removal of the initial water troughs, Sasser would take out the troughs and wash them. When Sasser was about eighteen years old, he attempted to take his paycheck from Mr. Crank and alter the check to receive additional funds. The attempt at altering the check was "messy" and "quite obvious," according to H.B., who saw the check. When Sasser attempted to pass the check at a local store, the clerk, who knew both Sasser and Mr. Crank, determined the check was altered and did not honor it.

Sasser did not date much when he was a teenager and a young adult. He never brought a girl home to introduce to the family and H.B. never saw him go out on a date or attempt to "flirt with a girl." Sasser continued to live with his mother while H.B. and the other siblings moved out of the family home. As a teenager, Sasser had a job babysitting for H.B's four children during the

day while H.B. and his wife went to work. The children's ages ranged from one to nine years old. Sasser did not babysit overnight, nor did he ever cook for the children. Sasser's mother would remain next door for extra supervision.

H.B. was surprised to learn Sasser did not actually graduate high school. Following high school, Sasser told everyone he was going into military service, specifically the Army. Because Sasser failed his ASVAB, he instead lived in an abandoned home 100 yards away from H.B.'s house. To hide during daylight hours, Sasser would go approximately five to six hundred yards up a hill. When Sasser knew the family would be away, such as during Sunday church hours, Sasser would take canned goods from H.B.'s house. Sasser would also call his grandparents at those times to keep up the ruse that he was in boot camp. The house where Sasser stayed at night had no running water or electricity, but it did have some furniture. To heat food, Sasser would make a campfire. Sasser was able to maintain this deceit for approximately three weeks.

Thereafter, Sasser found himself out of work and needing a job. H.B. assisted Sasser in securing a common labor job with Young Construction. Sasser's job was joining 20-foot lengths of plastic pipe to lay sewer lines for the city. Sasser would apply a substance to the inside of the pipe fitting, and then push the pipe to make certain the joints were placed together securely. The pipe had to go in far enough to reach a certain point and it had to be straight. This job was supervised. Sasser rode back and forth from this job with H.B.

H.B. also assisted Sasser in securing a job at a lumber mill after Sasser returned home following a period of incarceration. H.B. transported Sasser to and from the lumber mill. While working at the lumber mill, Sasser found an old truck he wanted to buy, at which point H.B. spoke with a loan officer and got a personal loan for Sasser. Sasser signed the paperwork, and it was his responsibility to make the payments on the loan.

Sasser generally lived with his mother except for a period of time he was incarcerated, the short period in which he pretended to join the Army, and another short period of time when he lived with Arch and Margie, his other siblings, due to his employment at the Hudson chicken plant in Hope, Arkansas.

B. Dr. Toomer's Testimony

Prior to the hearing, Dr. Toomer had offered opinion testimony in 18–20 cases since 2006 on an accused criminal defendant's mental retardation. In all of those cases, he found the defendant met the mental retardation standard. Dr. Toomer was retained in other cases where he did not conclude a defendant met the mental retardation standard, but he was not called to testify in those cases.

In addition to the IQ score evidence noted by the Eighth Circuit, Dr. Toomer testified that he attempted to measure what would have been Sasser's level of adaptive functioning when the crime was committed. Adaptive functioning describes a person's level of functioning in community life, such as independent living. This is compared with peer group members in the local community.

There is no instrument developed to do a retrospective adaptive functioning assessment. The Scales of Independent Behavior Revised ("SIB-R") is an instrument used to assess current adaptive functioning deficits. Generally, this instrument is used for planning a course of treatment. The SIB-R has different levels of analysis and is well suited for determination of adaptive functioning deficits because it encompasses quantitative factors as well as qualitative factors. Using this instrument, Dr. Toomer visited with Sasser's friends, family, and peers—specifically with those who could discuss Sasser's functioning within an age range prior to age 18. Using the SIB-R to attempt a retrospective analysis of Sasser's adaptive functioning, Dr. Toomer found

Sasser had eight areas of deficiency: social interaction skills, language comprehension, language expression, time and punctuality, money and value, work skills, home and community orientation, and social interaction.

The AAIDD[5] requires deficiency or weakness in two areas of adaptive functioning to support a diagnosis of mental retardation. A person with mental retardation can perform some tasks in these areas, but still have deficits. For example, such an individual might hold a job, get married, drive a car and have a driver's license, but still be deficient or weak in other areas. The upper level of mental retardation under the Diagnostic and Statistical Manual of Mental Disorders (DSM) used by the experts in this case is mild mental retardation. Moreover, differentiating mild mental retardation from borderline intellectual functioning requires careful consideration of all available information because the two diagnoses appear similar. The difference is that borderline intellectual functioning does not contain the qualitative component of adaptive functioning deficits.

C. Dr. Moore's Testimony

Prior to the hearing, Dr. Moore was a clinical and forensic psychologist who had practiced for about 15–16 years. He had testified in other capital habeas proceedings in federal court for the Respondent, and in at least one such instance found the mental retardation standard was met. He has also performed similar work throughout the country in approximately three dozen state and federal *Atkins* cases, for both petitioners and respondents. In at least three cases where he was hired by a state, Dr. Moore determined the subject met the requirements of mental retardation. On four different occasions in 2007, Dr. Moore also gave a presentation, along with the Attorney General for the State of North Carolina, on the topic of handling experts in mental retardation

[5] Previously, the American Association on Mental Retardation (AAMR).

trials. Each presentation was to a District Attorney's Association or the Attorney General's office.

Dr. Moore reviewed transcripts from school records, records from the Southwest Arkansas Counseling and Mental Health Center, written transcripts of police interviews, police interview reports, medical examiner's reports, and telephone visitation records. He interviewed over two dozen witnesses to evaluate whether Sasser meets the Arkansas standard for mental retardation. In addition to Sasser's intelligence test scores, Dr. Moore looked at Sasser's aptitude test scores on the Scientific Research Associates Achievement Series (SRA), the Armed Forces Qualification Test (AFQT), two Wide Range Achievement Tests (WRATs), and the Wechsler Individual Achievement Test (WIAT). In 2010, Sasser's spelling sub-test score on the WRAT-4 was in the 18th percentile; the arithmetic score was in the 21st percentile; sentence comprehension was in the 30th percentile; and reading composite was in the 34th percentile.

Dr. Moore testified that when clinical psychologists are faced with test results involving aging norms, they will note the reliability of the scores may be reduced due to aging norms. The best practice is to use the most up-to-date test. With respect to IQ test scores, the 2010 administration would be the most reliable because it was given within a year of the norming dates. Dr. Moore placed Sasser's IQ scores and the other scores from instruments measuring Sasser's cognitive functioning along a bell curve to determine if there was a convergence of data. Dr. Moore found the multiple exams mostly fall within the range between the two IQ scores, lending increased confidence that those IQ scores are accurate. As a result, Dr. Moore concluded that Sasser had impaired cognitive functioning, but did not meet the mental retardation standard.

Dr. Moore agreed with Dr. Toomer that Sasser displayed some deficits in adaptive functioning, but did not believe those deficits were significant enough to meet the mental retardation standard. Dr. Moore testified that for deficits to be "significant" in clinical terms,

Sasser would need to be functioning about two standard deviations below the mean. Dr. Moore questioned the reliability of Dr. Toomer's administration of the SIB-R to retrospectively assess deficits in adaptive functioning because 1) the age equivalent scores were not based on an individual's assessment of Sasser, but were a compilation of many different recollections, and 2) the age for when any given assessment applied varied. Dr. Moore did note that Sasser's overall level of adaptive functioning likely falls below the average to borderline range. He opined that adaptive functioning on the job does not mean an individual must be capable of performing a job requiring abstract thinking, but only that the individual could show up on time and work independently without specific guidance.

D. Professor Smith's Testimony

Professor Tom Smith, who was dean of the College of Education and Health Professions at the University of Arkansas, testified that in the 1970s, programs for mentally challenged school children were just being implemented in Arkansas, and were minimally funded. There were no recordkeeping requirements on the part of school districts at that time. Dr. Smith never worked in the Lewisville school system, where Sasser was educated, and he did not review Sasser's IQ scores. Dr. Smith also had no information on whether Sasser was served by a Title One program while in school or if Sasser was considered intellectually disabled while in school.

E. Assistant Director Harris's Testimony

Grant Harris was Assistant Director of Institutions for the Arkansas Department of Correction at the time of the hearing. Prior to that, he was warden of the Varner Supermax unit, which houses death row inmates. In this capacity, he became familiar with Sasser.

Harris testified that prior to Sasser's 1994 conviction, Sasser had been incarcerated in 1989 for an unrelated conviction. He was processed in 1989 through the diagnostic unit, where he was

given a medical evaluation, which included an interview by medical health staff, and an orientation to the procedures for the Arkansas Diagnostic Correction. After a typical processing time, Sasser was placed in the Cummins Unit.

All mentally and physically capable inmates are assigned a job, and if an inmate chooses not to work, he or she is disciplined. Work assignments take into consideration prior employment, institutional needs, education, and background. An inmate can be promoted to a better work assignment or a different Class. Class 2 inmates receive twenty days off their sentences for every month served, while Class 1 inmates receive thirty days off for every thirty days served. At Cummins, Sasser was assigned to kitchen work. Kitchen detail could include all aspects of food preparation, though the actual work Sasser performed is not evident from his records. Sasser was subsequently transferred to the Varner Unit, where he was assigned to inside building utility, and then to inside maintenance. As part of the building utility crew, Sasser was responsible for cleaning, including windows, mopping, and scrubbing walls. After approximately a month on the building crew, Sasser was reassigned to inside maintenance, which is responsible for plumbing, electrical wiring, leaks, and other similar duties. Inmates on inside maintenance have greater freedom to travel the facility, and may have contact with female staff. Sasser maintained Class 1 status for 12 months while on inside maintenance, and was further awarded meritorious good time credit for on-the-job training as an electrician and for showing proficiency and excellence in his job as an electrician. This award is evidence that Sasser was doing his job as required and was not abusing sick call. Sasser remained in this job until he was transferred to the Wrightsville Unit in 1992. At Wrightsville, Sasser was assigned to furniture manufacturing as a saw operator. In this job, he had to cut wood to specification so that the pieces could be collected for later assembly. Sasser was awarded good time credit for his work as a saw operator, which meant he had no re-

cuts or wasted wood. Sasser remained on this job for six months before being transferred to the prerelease program in December of 1992.

Harris testified that prerelease was designed to prepare inmates within 90 to 120 days of release for returning to and functioning in the "free world." Prerelease included classes on interview skills, balancing a checkbook, obtaining a driver's license, and other similar aspects of daily life. Sasser remained in this program for three months.

When Sasser returned to the Arkansas Department of Custody as a death row inmate, he did not process through the diagnostic unit, but went straight to an isolation cell. He was monitored for the first week, provided with a handbook, and told about the grievance process. He was then placed on death row and had no contact with general population inmates.

F. Sergeant Cartwright's Testimony

Sergeant John Cartwright was the maintenance supervisor at the Varner Unit when Sasser was a member of the work crew during his prior period of incarceration. Cartwright testified that he supervised up to eight inmates at a time, and supervised Sasser for three years. Cartwright recalled that Sasser did a good job on the maintenance crew and never had problems. Sasser was on call for this job twenty-four hours per day, and might be called out to make nighttime repairs with the unit's security guard. Sasser used a set of tools assigned to him and kept separately from other inmates' tools. Tools were to be counted before an inmate left a job, and locked up until they were needed again. Sasser never lost a tool, and Cartwright recommended Sasser for good time credit due to his performance as an electrician.

G. Mr. Hollinger's Testimony

Brian Hollinger started the prerelease program at the Wrightsville Unit. He testified the program included computer training and interview skills, would help inmates update their taxes,

and would prepare inmates for the written portion of the driver's license exam. This preparation consisted of two to three days in a classroom environment studying the driver's license manual, a practice test designed by Hollinger, and then an actual examination administered by an Arkansas State Patrol trooper at the Wrightsville Unit. Sasser took the driver's license exam one time, and scored perfectly on both the sign portion and the written portion. This was the only exam he was given in prerelease, and no evaluation was done to see if Sasser understood the program as a whole.

H. Dr. McGrew's Testimony[6]

Dr. Kevin McGrew was the director of the Institute for Applied Psychometrics at the time of the 2010 hearing. The Institute for Applied Psychometrics is a corporation developed to create measures of intelligence and achievement in psychometric consultation and research on intelligence. Dr. McGrew testified about his disagreements with Dr. Moore's expert report and

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[6] In its order (Doc. 163) following the 2010 hearing, the Court (Hon. Jimm L. Hendren) ultimately declined to consider Dr. McGrew's testimony. The Court determined that Dr. McGrew's testimony was offered as rebuttal testimony to Dr. Moore's testimony to educate the Court on the standard and measures for mental retardation and not to offer an opinion on whether Sasser met the standard for mental retardation. The Court found Dr. Moore's testimony credible and persuasive and saw no need for Dr. McGrew's testimony.

Judge Hendren was better positioned than the undersigned to evaluate Dr. Moore's credibility, so the Court will rely on the finding that Dr. Moore was credible. In light of the Eighth Circuit's opinion in *Sasser II*, however, it is clear that Dr. Moore misunderstood the *Atkins* standard. "Dr. Moore testified that the 'cutoff of mental retardation' was a score of 70." *Sasser II*, 735 F.3d at 840. This is clearly incorrect, both legally and medically. "Under Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement.'" *Id.* at 844 (citing *Anderson v. State*, 163 S.W.3d 333, 355–56 (Ark. 2004)). Furthermore, "it is possible to diagnose Mental Retardation in individuals between 70 and 75 who exhibit significant deficits in adaptive behavior." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 39, 41–42 (4th ed., Text Revision 2000).

Judge Hendren did not reject Dr. McGrew's testimony based on a finding that Dr. McGew was *not* qualified or *not* credible, but because Judge Hendren did not find that testimony useful. Even if his methodology is not suspect, Dr. Moore's misunderstanding of the DSM and Arkansas legal standards for mental retardation undermines his conclusions about Sasser's intellectual functioning sufficiently for the Court to consider the substance of Dr. McGrew's testimony on remand.

criticisms of Dr. Moore's methodology. Dr. McGrew criticized Dr. Moore's suggestion that the ASVAB is a good proxy of Sasser's general intelligence because it is an aptitude test, and not an intelligence test. Dr. McGrew also testified that scoring adjustments on the basis of the Flynn effect are best practice (even according to the authorities on which Dr. Moore relied) and that it is incorrect to equate obsolete norms to variables like demographic factors. Dr. McGrew testified that adjusting a score downward three points for every decade provides the best estimate of the Flynn effect when trying to determine what someone's IQ was in the past. Finally, Dr. McGrew testified that because the 2010 test was administered closer in time to the time at which it was normed, it was more reliable than the 1994 test.

IV. Analysis

In determining whether execution of a defendant due to his intellectual disability is prohibited by the Eighth Amendment, courts recognize the benefit of being informed by the expertise of the medical profession. *See Hall v. Florida*, 134 S.Ct. 1986, 2000 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."). Both Arkansas's legal standard for measuring intellectual disability and the clinical definition of mental retardation utilized by the experts and parties in the hearing require "significantly subaverage intellectual functioning." *See* American Psychiatric Association (APA), *Diagnostic and Statistical Manual of Mental Disorders*, 39, 41–43 (4th ed., Text Revision 2000) (*hereinafter "DSM-IV-TR"*). A demonstration by Sasser that he met the mental retardation standard at the time the crime was committed, or that he will meet the standard at the presumptive time of execution, entitles him to habeas relief. *See Sasser II*, 735 F.3d at 846 ("As interpreted by the Arkansas Supreme Court, the Arkansas statute thus overlaps with the Eighth Amendment, precluding the execution of an individual who can prove mental

retardation *either* (a) at the time of committing the crime *or* (b) at the presumptive time of execution."). No execution has yet been set, and so there is no presumptive time of execution. The Court's analysis is limited to whether Sasser demonstrated at the hearing that he met Arkansas's mental retardation standard at the time he committed the crime.

To succeed, Sasser must prove by a preponderance of the evidence that at the time he committed the crime he exhibited significantly subaverage general intellectual functioning and a significant deficit or impairment in adaptive functioning, the symptoms of which manifested no later than the age of eighteen,[7] and that he exhibited a deficit in adaptive behavior.

A. Significantly Subaverage General Intellectual Functioning, Manifesting No Later Than the Age of Eighteen

The first and third prongs of Arkansas's mental retardation standard require Sasser to show he had significantly subaverage general intellectual functioning at the time he committed the crime, and that this significantly subaverage general intellectual functioning manifested no later than the age of eighteen. Ark. Code Ann. § 5-4-618(a); *Sasser II*, 735 F.3d at 843. Sasser points to his IQ score as evidence that these prongs are met. An IQ score often provides evidence of a person's level of general intellectual functioning. *Hall v. Florida*, 572 U.S.--, 134 S.Ct. 1986, 1994 (2014). "The *DSM-IV-TR* includes 'an IQ of approximately 70 or below' in its definition of mental retardation." *Sasser II*, 735 F.3d at 843 (quoting *DSM-IV-TR*, at 39). A diagnosis of mental retardation cannot be justified solely on the basis of a fixed score, however, and even individuals with IQ test scores in the 70–75 range can be diagnosed as mentally retarded. *Sasser II*, 735 F.3d at 843 (citing AAIDD, Intellectual Disability: Definition, Classification, and Systems of Support 40 (11th ed. 2010); *Atkins v. Viriginia*, 536 U.S. 304, 309 n.5 (2002); *Jackson v. Norris*, 615 F.3d

[7] Sasser was born October 21, 1964 (Petitioner's Ex. 1, Vol. 1, Tab 13). He turned eighteen years old in 1982.

959, 965 n.7 (8th Cir. 2010)).

"The first prong of Arkansas's mental retardation standard is consistent with clinical definitions of mental retardation." *Sasser II*, 735 F.3d at 843. A legal finding of mental retardation "is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical 'IQ score requirement,'" though an IQ score of 65 or below establishes a rebuttable presumption of mental retardation. *Id.* at 844. In addition to an IQ score, the Court must consider "all evidence of Sasser's intellectual functioning." *Id.* at 847. This can include medical records, mental evaluations, evidence of malingering, academic performance and records, reading levels, and other testing performance. *See, e.g.*, *Weston v. State*, 234 S.W.3d 848, 857 (Ark. 2006); *Anderson v. State*, 163 S.W.3d 333, 355–56 (Ark. 2004); *Sanford v. State*, 25 S.W.3d 414, 419 (Ark. 2000); *accord Hall*, 134 S.Ct. at 1994 (recognizing that the medical community accepts "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances" as "probative of intellectual disability, including for individuals who have an IQ test score above 70").

Here, the Court is presented with two IQ scores.[8] On the 2010 WAIS-4 administered by Dr. Toomer, Sasser scored an 83. Applying a standard margin of error, the range of this score would be 78–88. Dr. Toomer maintained that the score was inflated due to the "artificial environment" of prison, and so Sasser's actual general intelligence would merit a lower score. Because the WAIS-4 was normed more closely in time to the time it was administered to Sasser, Sasser's WAIS-4 IQ score is more likely to accurately reflect his intelligence as compared to the

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[8] Mary Pat Carlson administered a WAIS-R test to Sasser in 1994. Sasser scored a 90 on the full-scale IQ test. However, experts for both parties agree that the score should be disregarded because the test was administered shortly after Dr. Blackburn had administered the WAIS-R, and it is inappropriate to administer tests so closely in time because the score on the second test can improve due to the "practice effect."

general population in 2010. On the 1994 WAIS-R administered by Dr. Robert Blackburn, Sasser scored a 79. Because the WAIS-R had been normed in 1980, Sasser's 1994 IQ score did not reflect his intelligence as compared to the general population in 1994, but as compared to the group against which it was normed. Testimony from Toomer and McGrew justifies adjusting the score downward three points for every ten years. Dr. Moore agreed with the accuracy of the 1994 WAIS-R result, but testified that a downward score adjustment was inappropriate.

Because the 1994 WAIS-R was administered to Sasser 14 years after it was normed, Dr. Toomer accounted for the Flynn effect by adjusting the score downward by 4 points, to 75. Accepting Dr. Toomer's downward adjustment and accounting for the standard margin of error, Sasser's score range from 1994 would be 70–80. A score of 70 or below meets the definition of "significantly subaverage intellectual functioning" under the *DSM-IV-TR*. *DSM-IV-TR*, at 41. Because of the 5-point margin of error, it is possible to diagnose mental retardation under the *DSM-IV-TR* in individuals with IQ scores between 70 and 75 who exhibit significant deficits in adaptive behavior, and individuals with scores lower than 70 who do not exhibit significant deficits or impairments in adaptive functioning will not be diagnosed with mental retardation. *DSM-IV-TR*, at 41–42. While IQ scores are not conclusive evidence of intellectual functioning, Sasser's scoring ranges on both of these tests generally fall in the range described as "borderline intellectual functioning" rather than mental retardation. *See Testimony of Dr. Toomer*, TR p. 77-80.

In addition to Sasser's IQ scores, the Court was presented with certain aptitude and achievement tests which Dr. Moore testified supported a finding of "impaired cognitive functioning" rather than mental retardation. *See Testimony of Dr. Moore*, TR p. 168. For example, Dr. Moore pointed to Sasser's 1986 score on the AFQT. Dr. Moore testified that the AFQT score, while not an intelligence test, correlated with classical IQ measures. *Testimony of Dr. Moore*, TR

p. 182. The Court has reviewed Sasser's ASVAB and AFQT scores from 1986, when Sasser was 21 or 22 years old. *See* Petitioner's Ex. 1, Vol. 1, Tab 14. The AFQT score is determined using scores from verbal, arithmetic reasoning, and math knowledge ASVAB questions. Sasser's AFQT score was 21 on a scale of 1 to 99, with 99 being the highest score. The AFQT scoring formula has changed since 1986, and if his raw scores were processed in 2010, he would have received an AFQT score of 19. The Court has also notes that with the exception of Sasser's general science score, all of his ASVAB scores were within one standard deviation (10 points) of the mean (50 points).

In the 11th grade, Sasser scored in the 10th percentile on the SRA test. This was a group-administered test made up of a number of small tests across a range of subject areas. (Doc. 157, pp. 181–82); Respondent's Ex. 1, Vol. 1, Tab 1, pp. 8–9. At the time of his 1989 conviction, Sasser was administered the Minnesota Multiphasic Personality Inventory (MMPI). While this test does not measure intelligence, Sasser's ability to complete it with a valid response profile indicates he was able to read at a 6th to 8th grade level and understand the questions.

Sasser's high school transcript reflects that he took a number of "practical" courses, which were courses for lower functioning students who were not identified as either educable mentally retarded or trainable mentally retarded. Respondent's Ex. 1, Vol. 1, Tab 1, p. 4; Petitioner's Ex. 1, Vol. 1, Tab 15. Sasser was not in special education courses. Respondent's Ex. 1, Vol. 1, Tab 1, p. 5. Sasser generally performed poorly in the standard level courses he took. In 9th grade, he received Ds and Fs in civics, science, and farm manager courses. In 10th grade, he received Ds and Fs in farm manager, English II, art, and biology courses. In 11th grade, he received Ds and Cs in American history, civics, communications, and English II courses. In 12th grade, he received Cs, Ds, and Fs in American Government, agriculture II, art II, typing, adult living, and consumer

education courses. There were some exceptions to his below-average grades in standard courses, as when Sasser received a C in his second semester of 10th grade art, or Bs and Cs in home economics. In his "practical" courses—math and English—Sasser received a greater diversity of grades. In 9th grade, he received Ds in practical math and a B and C in his practical English semesters. In 10th grade, he received Cs and Ds in practical math II. In 11th grade, he received an A and a C in his practical English III semesters. In 12th grade, he received a B and a D in his practical English IV semesters.

The Court took evidence about Sasser's childhood, education, employment, financial abilities, and personal relationships. The vast majority of this evidence reveals that Sasser did not appear to be intellectually disabled to the point of mental retardation to most people who knew him, but suffered from a lack of motivation when disinterested and an environment where he could not receive sufficient assistance or encouragement to improve his academic performance.

The Court took evidence that Sasser functioned well in the Arkansas Department of Correction just two years before the crime, working, successfully, as an electrician and in furniture manufacturing, as saw operator. Sasser completed a pre-release program prior to his release from the Arkansas Department of Correction, earning his driver's license. After his release, and just prior to the crime, Sasser found employment in a lumber mill, and purchased a truck.

The evidence overall reveals that by most measures, Sasser was intellectually disabled to some degree when he committed the crime, insofar as he had subaverage general intelligence. Because "cognitive IQ . . . tends to remain a more stable attribute," it is likely that Sasser had subaverage general intelligence since before the age of eighteen. *DSM-IV-TR*, at 42. Looking at the various instruments used to measure that general intelligence, however, only the score from the most extreme lower end of the IQ scoring range from an IQ test that required adjustment for

the Flynn effect indicates that Sasser's subaverage general intelligence had any statistical significance. Sasser's other test scores, and his school performance, further indicate he had subaverage general intelligence that nevertheless was not so subaverage as to meet the standard for mental retardation. But as explained in *Sasser II*, the Court's evaluation cannot rely on statistically significant IQ scores alone. *Sasser II*, 735 F.3d at 844; *see also DSM-IV-TR*, at 42 ("Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation."). Because impairments in adaptive functioning, rather than an IQ score, are the clearest indicators of intellectual disability, it is the Court's view that if Sasser demonstrated a significant deficit or impairment in adaptive functioning manifesting no later than the age of eighteen, then that would be evidence Sasser's inarguably subaverage general intelligence—as measured by IQ testing, school grades, and other similar markers—was significantly subaverage.

Because the Court finds below that Sasser has not met his burden to show that he had a significant deficit or impairment in adaptive functioning manifesting no later than the age of eighteen, the Court also finds here that Sasser has failed to show he had *significant* subaverage general intelligence that manifesting no later than the age of eighteen. He therefore cannot demonstrate that his intellectual disability in 1993 met the Arkansas legal standard for mental retardation.

B. Significant Deficit or Impairment in Adaptive Functioning, Manifesting No Later Than the Age of Eighteen

The second and third prongs of Arkansas's mental retardation standard require Sasser to show he had a significant deficit or impairment in adaptive functioning at the time he committed the crime, and that this significant deficit or impairment in adaptive functioning manifested no later than the age of eighteen. Ark. Code Ann. § 5-4-618(a); *Sasser II*, 735 F.3d at 843. "The

second prong is met if an individual has '*significant limitations* in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.'" *Jackson v. Norris*, 615 F.3d at 962 (emphasis added) (quoting *DSM-IV-TR*, at 41).[9] "[T]he Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations." *Sasser II*, 735 F.3d at 845. With respect to adaptive functioning, the *DSM-IV-TR* notes that impairments in this category, rather than general intelligence, "are usually the presenting symptoms in individuals with Mental Retardation." *DSM-IV-TR*, at 42. "*Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." *Id.* The *DSM-IV-TR* identifies a number of instruments that can score a person's adaptive functioning in each of the various areas identified in *Jackson*, but these instruments are intended to score that adaptive functioning at the time they are administered, and may not provide an accurate reflection of an individual's past adaptive

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[9] Sasser points out a difference in the *deficit or impairment prong* as set forth in the updated definition of intellectual disability in the *DSM-V*. The *DSM-V* contains the following requirement for intellectual disability:

> Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

Although Sasser argues that the updated definition should be applied, the Court, notes that the *DSM-V* was published several months before the Eighth Circuit opinion in *Sasser II*, and that Court continued to rely on the factors as stated in the *DSM-IV-TR*. This Court will likewise rely on the *DSM-IV-TR*, but finds that the same decision would be reached under both definitions.

functioning. This may be because "[p]roblems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute." *DSM-IV-TR*, at 42.

In his *Atkins* brief following remand, Sasser relied on evidence of his deficits or limitations in functional academic skills, work, and social/interpersonal skills to argue that he meets these prongs of the Arkansas mental retardation standard. (Doc. 187, pp. 16–22).

1. Academic Skills

Sasser relies on evidence that shows that he was in remedial or special courses throughout his school years to prove a significant limitation in his academic skills. Sasser argues that he was failing middle school, but was socially promoted to high school, that he was in the most basic courses and could not perform well even with time and assistance, that his teachers believed he was "just not there mentally," and that he did not graduate from high school, but was instead given a certificate of attendance. (Doc. 187, pp. 16–18). Sasser also points to the fact that he did not obtain a qualifying score on the ASVAB for entry into the military.

All of this evidence demonstrates that any academic problems Sasser had manifested before the age of eighteen. It does not, however, demonstrate that any limitations were significant at the time the crime was committed. There is not much evidence of Sasser's academic skill that is contemporaneous with his crime. Sasser received his certificate of attendance from high school in the spring of 1983 and took the ASVAB in 1986. In 1993, just prior to release from his first period of incarceration, Sasser participated in a prerelease program that would have dropped him had he not been highly motivated to participate. A short portion of that program is geared towards helping inmates obtain driver's licenses. Sasser was able to take a practice test, learn in a classroom environment for two days, and then study for and pass the official written and sign

portions of the driver's license exam. While it was only for a short term, Sasser's success in this area undermines his argument that his academic skills were *significantly* limited at the time of the crime, and is consistent with evidence that Sasser could perform academically when he was motivated to do so. *See, e.g.*, Respondent's Ex. 1, Vol. 1, Tab 1, p. 5 ("Mr. Sasser indicated that he generally enjoyed school, but had trouble paying attention in some classes. He also noted that his mother did not have sufficient education to help him with school work that he did not understand, so if he experienced difficulty with a concept covered in class, he did not have additional parental help for clarifying it. A close school friend, Karl Sensley, echoed this description, describing Mr. Sasser as more capable than his grades reflected, but noting that low motivation and little academic encouragement or demand from home resulted in poor scholastic effort."). The Court is mindful that it is an open question whether strengths in one area of adaptive functioning can be weighed against weaknesses in the same area when analyzing whether a person has limitations in that area. *See Moore v. Texas*, 581 U.S--, 137 S.Ct. 1039, 1050 n.8 (2017) ("The dissent suggests that disagreement exists about the precise role of adaptive strengths in the adaptive-functioning inquiry. But even if clinicians would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain, neither Texas nor the dissent identifies any clinical authority permitting the arbitrary offsetting of deficits against unconnected strengths . . . ." (internal citation omitted)). The Court is further mindful that ordered environments like prison may result in artificial improvements to adaptive functioning. *See id.* at 1050 ("Clinicians, however, caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." (citation omitted)). The Court does not view evidence of Sasser's performance in prison in adaptive functioning as evidence of improved adaptive functioning, but rather as evidence undermining Sasser's claimed limitations in areas of adaptive functioning prior

to incarceration. The Court takes this view in light of multiple reports that Sasser may have suffered as much from a lack of motivation as a lack of ability.

Because Sasser's evidence of limitations in the area of academic skills is primarily limited to his school career rather than to nearer the time of the crime, and because that evidence is called into question by reports and evidence that Sasser's performance was due at least in part to a lack of motivation, rather than to limitations in adaptive functioning, Sasser has not met his burden to demonstrate by a preponderance of the evidence that he had a significant limitation in academic skills at the time he committed the crime.

2. Work

Sasser relies on evidence that shows he had manual labor and low-responsibility jobs to prove a significant limitation in his work. Sasser points to his employment at Hudson Foods (now Tyson Chicken) as evidence for this limitation. Sasser's supervisors recalled that even simple tasks like color-coded box stacking eluded him. Ultimately, Sasser was placed in a position where his job was to press a button to dispense ice from a machine, and was not fired from Hudson simply because Hudson needed as much help at the time as it could get. Sasser also points to his more recent employment as a stacker at Whistle Lumber Company, where Sasser was employed following his first incarceration. "Stacker" is the most basic position at the lumber mill, requiring the employee only to stack boards that have already been graded for quality into their appropriate stacks, but Sasser's foreman recalled that Sasser consistently could not even perform that job adequately. At both Hudson and Whistle, Sasser was deemed unfit for positions that required judgment, multitasking, or abstract thinking. Sasser was also a pipe joiner at J.K. Young Construction for a period of time, a position his brother testified was comparable to being the shovel man in construction work. The job consisted of manual labor involving a repetitive, simple

task.

This evidence must be weighed against other evidence that Sasser was able to function adequately at work in order to determine whether Sasser has proven a significant limitation in the area of work at the time the crime was committed.[10] For example, Dr. Moore's expert report cited interviews with the Crank family, for whom Sasser worked when he was an adolescent. Sasser's job for the Cranks involved manual labor farm tasks like hay baling and working the chicken houses. Mr. Crank reported that Sasser was capable of independent farm work, and would do it if he found it engaging. During his first period of incarceration (which was prior to his job at the Whistle Lumber Company), Sasser worked first for building utility, cleaning and sanitizing the facility. Sasser then moved to inside maintenance from May of 1989 to June of 1992. Sasser was able to perform in that job with various levels of supervision (which depended on the tools each task required, rather than on Sasser's need for supervision). Sasser worked as an electrician on the inside maintenance crew, and demonstrated proficiency and excellence in that job, receiving satisfactory work results. Sasser then transferred to the Wrightsville Unit, where he worked in furniture manufacturing as a saw operator, cutting wood to particular specifications. Sasser was awarded credit toward his sentence in these positions, which could only be given if he was doing the job each position required him to do. This indicates that in work, as in academic skills, Sasser's apparent limitations may be due more to a lack of engagement or motivation than to a significant limitation. As a result, Sasser has not demonstrated by a preponderance of the evidence that he had a significant limitation in the area of work. In light of his reported capabilities while working

[10] Again, the Court is not weighing evidence of strengths against evidence of limitations to see whether Sasser had more strengths than limitations in any given area, but is weighing evidence of strengths against evidence of limitations in order to see whether Sasser has met his burden to show that he actually was limited in any given area.

for the Cranks, Sasser has also not shown that any limitation manifested before the age of eighteen.

3. Social/Interpersonal Skills

Sasser relies on evidence of his behavior in junior high sports and in school, his lack of a girlfriend in high school, and his general inability to connect with peers to prove a significant limitation in social and interpersonal skills. Sasser's junior high coach testified that Sasser stared blankly during conversations, did not laugh at jokes told by his coach unless the coach first laughed, remained by himself most of the time, and would engage in negative behavior to get the other students to laugh at him. Other teachers and students indicated that Sasser did not have many friends, laughed inappropriately, and was treated as a nerd or weird student. Sasser was purportedly not the type of high school boy that a girl would pick as her boyfriend.

Assuming this evidence demonstrates a significant limitation in social and interpersonal skills, it is clear that it manifested before the age of eighteen. Sasser does not, however, persuade the Court that this evidence demonstrates such a significant limitation. Evidence that an adolescent will not engage in conversation with a coach or laugh at the coach's jokes without the coach laughing first is as easily ascribed to the adolescent being intimidated by the coach as having a significant limitation in social and interpersonal skills. Evidence that an adolescent is not liked by his peers, is considered a nerd or weird, and does not have a girlfriend is also not good evidence for a significant limitation in social or interpersonal skills. Furthermore, this inadequate evidence is not the only evidence bearing on Sasser's social and interpersonal skills. Interviews conducted by Dr. Moore in advance of his report indicate that Sasser had friends in school, did have a high school girlfriend, was a good storyteller, and was a class clown around his peers (consistent with Coach Blake's testimony that Sasser would do negative things or get in trouble just to get a laugh), even if he was quiet in more structured settings. Sasser also had a girlfriend whom he interacted

with prior to his first incarceration, and began to date consistently after his first incarceration, and with whom he fathered a child around the time he committed this crime. She reported to Dr. Moore that Sasser showed concern for her and asked her how she was doing. This concern is reflected in the March 4, 1992 letter Sasser sent her. Petitioner's Ex. 1, Vol. 1, Tab 16. Reports to Dr. Moore also indicated that Sasser remembered birthdays and holidays and would buy gifts on these occasions.

Sasser has not demonstrated by a preponderance of the evidence that he had a significant limitation in social and interpersonal skills at the time he committed the crime.

4. DSM-V

Sasser points out a difference in the *deficit or impairment prong* as set forth in the updated definition of intellectual disability in the Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (*hereinafter* "*DSM-V*"). The *DSM-V* contains the following requirement for intellectual disability:

> Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

(Doc. 187, p. 7 (quoting *DSM-V*, at 33)). Sasser argues that the updated definition should be applied because it reflects the medical community's current opinion with respect to diagnosis of intellectual disability. (Doc. 187, p. 6). The updated definition involves three domains of adaptive functioning—conceptual, social, and practical—and explains there is a significant deficit or impairment in adaptive functioning "when at least one of these three domains 'is sufficiently impaired that ongoing support is needed in order for the person to perform adequately in one or more life settings at school, work, at home, or in the community.'" (Doc. 187, p. 9 (quoting

DSM-V, at 38.)). Sasser's brief omits the next sentence, which admonishes that "[t]o meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual impairments described in Criterion A."

In making his argument that the Court must rely on the *DSM-V*, Sasser overstates the necessity of relying on the medical community's current diagnostic tools. "The legal determination of intellectual disability *is distinct from a medical diagnosis*, but it is *informed by* the medical community's diagnostic framework." *Hall*, 134 S.Ct. at 2000 (emphases added). Current application of that framework supplies "one constraint on States' leeway" in defining intellectual disability. *Moore*, 137 S.Ct. at 1053. Updated medical manuals "[r]eflect[] improved understanding over time." *Id.* None of this is to say that it is incumbent upon a State to rely on an updated diagnostic manual if the updates do not reflect a substantive departure from the outdated diagnostic manual that is relevant to the analysis conducted in a particular case. *Cf. id.*, at 1050 ("The CCA's consideration of Moore's adaptive functioning also deviated from prevailing clinical standards *and from the older clinical standards the court claimed to apply*." (emphasis added)). With respect to intellectual disability, updates in the *DSM V* are intended to "ensure[] that [IQ scores] are not overemphasized as the defining factor of a person's overall ability, without adequately considering functioning levels." American Psychiatric Association, *Intellectual Disability Fact Sheet*, at 1–2 (2013) (*available at* https://www.psychiatry.org/File%20Library/Psychiatrists/Practice/DSM/APA_DSM-5-Intellectual-Disability.pdf) (*last accessed* Feb. 27, 2018). With respect to adaptive functioning, the updates are intended to "ensure that clinicians base their diagnosis on the impact of the deficit in general mental abilities on functioning needed for everyday life." *Id.* at 2.

The adaptive functioning updates in the *DSM V* categorizing adaptive functioning into

conceptual, social, and practical domains overlap with the adaptive functioning standards employed by the AAIDD. *See Moore*, 137 S.Ct. at 1050 (explaining AAIDD inquiry looks for significant limitations in conceptual, social or practical skills). Dr. Toomer, Sasser's own expert, testified that the three categories used by the AAIDD are "not really" significantly different, and are "basically the same," as the *DSM-IV-TR* categories. (Doc. 157, p. 49). And as *Sasser II* makes abundantly clear, IQ scores are not definitive of significantly subaverage general intelligence, but merely a consideration in analyzing whether deficits in general mental abilities exist. Because Sasser does not show that updated medical standards in the *DSM-V* updates have any bearing on his case, the Court is not convinced that it is required to rely on the *DSM-V* diagnostic framework, rather than the *DSM-IV-TR* diagnostic framework, in determining whether Sasser has an intellectual disability.

Nevertheless, because *Sasser II* correctly limits overreliance on IQ scores and because Dr. Toomer testified there are no significant differences in the updated adaptive functioning framework, the Court finds that for the same reasons Sasser could not prove that he had a significant limitation in academic skills (now heavily centered in the conceptual domain), work (now heavily centered in the practical domain), or social/interpersonal skills (now heavily centered in the social domain), he cannot prove that any he had any limitation in these areas that sufficiently impaired him that ongoing support was needed in order for him to perform adequately at school, work, home, or in the community in a way that can be attributed to any limitation in general intellectual functioning.

C. Deficit in Adaptive Behavior

The fourth prong of Arkansas's mental retardation standard requires Sasser to prove a deficit in adaptive behavior. Ark. Code Ann. § 5-4-618(a); *Sasser II*, 735 F3d at 843. "The fourth

prong largely duplicates the second prong, but places 'no age requirement on the evidence used to establish limitations in adaptive behavior.'" *Sasser II*, 735 F.3d at 846 (quoting *Jackson v. Norris*, 615 F.3d 959, 967 (8th Cir. 2010)). To satisfy his burden under this prong, Sasser need only show that he had a significant deficit in adaptive behavior at the time of the crime, whether or not it manifested before the age of eighteen. Because Sasser does not rely on any additional evidence other than that put forward under the second prong, he cannot show that he had a deficit in adaptive behavior as required by the fourth prong.

V. Conclusion

Because Sasser has not demonstrated by a preponderance of the evidence that he meets Arkansas's legal standard for mental retardation, he has not shown that at the time of the crime he fell "within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S. at 317. Sasser has not demonstrated that the Eighth Amendment prohibits his execution on account of intellectual disability at the time the crime was committed.

Because the Court is addressing the ineffective assistance of counsel issue in a separate opinion, a final order incorporating both opinions will be entered separately.

ENTERED this 2nd day of March, 2018.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-1678

Andrew Sasser

Appellee

v.

Dexter Payne

Appellant

No: 18-1768

Andrew Sasser

Appellant

v.

Dexter Payne

Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana
(4:00-cv-04036-PKH)
(4:00-cv-04036-PKH)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Shepherd did not participate in the consideration or decision of this matter.

August 31, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

U. S. DISTRICT COURT
WESTERN DIST ARKANSAS
FILED

JUL 17 2001

CHRIS R. JOHNSON, Clerk
By: [signature]
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER	§	PETITIONER
	§	
	§	
vs.	§	CASE NO. 00-4036
	§	
	§	
LARRY NORRIS DIRECTOR OF ADC	§	RESPONDENT

AMENDED PETITION FOR
WRIT OF HABEAS CORPUS UNDER 28 U.S.C. §2254

Andrew Sasser, petitioner herein, brings before this Court his Amended Petition for Writ of Habeas Corpus and for cause of this Petition does hereby state:

1. The Petitioner is complaining of a judgement of conviction for Capital Murder and a sentence of Death by Lethal Injection which was imposed by the Circuit Court of Miller County Arkansas on May 4, 1994.

2. Petitioner was convicted after a Jury trial at which he did not testify.

3. A direct appeal of his Judgement of Conviction was taken to the Supreme Court of Arkansas which affirmed his conviction and sentence in a decision dated July 17, 1995. (Sasser v. State, 321 Ark 438, 902 S.W. 3rd 773)

4. Subsequent to the above cited decision, Petitioner filed a timely petition for post conviction relief pursuant to Arkansas Criminal Procedure Rule 37. That petition was denied by the Circuit Court after a hearing and the Petitioner filed an appeal to the Arkansas Supreme Court of the denial of his Rule 37 petition. On July 8, 1999, the Arkansas Supreme Court affirmed the denial of relief under Rule 37.

5. In his Petition, pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure, the Petitioner raised the following grounds:

GROUND I. Petitioner was deprived of his rights under the U.S. Const., including the 8th and 14th amend., and the Arkansas Const., Art. 2 §§ 8, 9, 10 by the improper jury instructions given in both the guilt and penalty phases of the trial.

GROUND II. The jury instruction on capital murder improperly stated the law, and Sasser's conviction on that charge is void.

GROUND III. Improper argument by the prosecutors in both the guilt and penalty phases of the trial violated due process and also deprived Sasser of his right under the 8th and 14th amend., U.S. Const., and Art. 2 §9, Ark. Const. to a reliable sentence determination, by interjecting improper and irrelevant considerations into the sentencing decision.

GROUND IV. Sasser's conviction should be set aside because he was deprived of his right to effective assistance of counsel as guaranteed by the U.S. Const., amend. 6 & 14, and Ark. Const., Art. 2 §§ 8,10.

GROUND V. The additional oath administered to jurors who were questioned about their attitudes toward the death penalty violated due process and the 8th amend., U.S. Const., and Art. 2 § 9, Ark. Const.

GROUND VI. Sasser raised the following issues in his Rule 37 Petition to assure their preservation for federal habeas corpus review:

A. The Arkansas death penalty statutory scheme gives rise to the mandatory imposition of the death penalty in violation of the 8th

amendment.

B. The Arkansas death penalty statute is unconstitutional because there is no provision for mandatory or automatic appeal of death sentences.

C. Death qualification of the jury violates due process.

GROUND VII Sasser was deprived of the effective assistance of counsel and is entitled to a new trial because he was not represented by two attorneys as required by the Arkansas Public Defender Commission's Minimum Standards for trial of death cases; the Court should have appointed additional counsel and Sasser's trial counsel was ineffective for not requesting additional counsel and a continuance and for failing to object to being required to proceed without additional assistance.

GROUND VIII. Sasser was deprived of his right to the effective assistance of counsel by trial counsel's failure to request a limiting instruction under AMCI 2d 203-A , to which he was absolutely entitled, after the State presented the testimony of Jackie Carter, the victim in Sasser's previous cases in which he was convicted of battery, rape and kidnaping, to prove intent or *modus operandi* in the capital murder case.

6. The denial of the Petitioners Rule 37 motion was appealed to the Arkansas Supreme Court which affirmed the Circuit Court of Miller County.

7. Petitioners conviction and sentence are unlawful and in violation of the Constitution of the United States in the following particulars:

A. Both at trial and on direct appeal, Petitioner was represented by the same attorney, Charles Potter. Mr. Potter was appointed to represent Sasser in this Capital

case on August 16, 1993, however the record reflects that virtually nothing was done by way of trial preparation until February 7, 1994, less than two weeks before the beginning of pretrial proceedings when Potter requested a psychological examination. Some four days later, on February 11, 1994, an investigator was requested and although this record reflects that a number of pretrial motions were filed, it is clear that trial counsel was unprepared for a Capital case at the time Sasser's trial began. By way of illustration the following examples were developed at the Rule 37 hearing.

Trial counsel requested a psychological exam on February 7, 1994, however after the exam was performed, counsel failed to meaningfully consult with the examiner so as to prepare for her trial testimony.

At trial, counsel's performance was so defective that it was equivalent to no counsel, in regards to the testimony of Jackie Carter. Although counsel objected to the use of Carter's testimony his failure to interview her or in any way prepare for her testimony rendered it impossible for Sasser to rebut this extremely damaging testimony or to mitigate the damage it caused. Further counsel could not make an informed decision as to whether to request a limiting instruction under AMCI 2d 203A, due to his lack of preparation.

These factors should illustrate that Sasser did not have the type of representation guaranteed by the 6th and 14th amendments to the United States Constitution.

This claim of ineffective assistance of counsel was fully adjudicated in the state court, however the State courts decision "was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" 28 U.S.C. §2254 (d)(1) and the Petitioner believes that if allowed a full and fair hearing or review of the record, that this Court will find by clear and convincing evidence that Sasser's trial counsel was ineffective, and that but for this constitutional error, no reasonable fact-finder would have found the petitioner guilty of the underlying offense.

B. Petitioner was deprived of his rights under the 8th and 14th amendments to the Constitution of the United States of America because of improper jury instructions given at both the guilt and penalty phases of the trial.

In the guilt phase the court instructed that the jury could find Petitioner guilty of attempted rape or kidnaping (the underlying felonies) if they found he intended to commit one of these crimes despite the clear directive of Ark. Code Ann § 5-3-201 (a)(2)&(c) which defines an attempt as "purposely engaging in conduct that constitutes a substantial step in a course of conduct intended to culminate in the commission of an offense."

In the penalty phase, the Court instructed the jury that they could consider without limitation the evidence adduced at the guilt phase, as well as evidence produced at the penalty phase. This instruction was improper under Arkansas law and deprived Petitioner of his right to due process of the law.

C. The prosecutor's argument at both the guilt and penalty phases of the trial violated Petitioners due process rights and deprived him of his rights under the 8th and 14th amendments to the Constitution of the United States

D. The Arkansas death penalty statutory scheme violates the 8th amendment to the Constitution of the United States in that it sets out a scheme which leads to the mandatory imposition of the death penalty.

E. The method of selecting the jury i.e. death qualification leads to a jury which is predisposed to convict the defendant and therefore violates his right to due process of law.

F. The Arkansas Death Penalty is in violation of the 8th amendment of the Constitution of the United States in that the penalty constitutes "cruel and unusual" punishment.

G. The petitioner's right to due process was violated by the admission of the testimony of Ms. Jackie Carter who was allowed to testify about a previous crime committed by the Petitioner of which she was the victim. Ms. Carters testimony was admitted under Arkansas Rules of Evidence 404(b) (identical to the Federal Rules), however it should have been excluded because it had no probative value on any issue in dispute and therefore should have been stricken.

8. Petitioner has no other actions currently pending in either state or federal court.

9. Petitioner was represented by Charles A. Potter, 117 East Broad Street, Texarkana, Arkansas, 75502, at trial and on his direct appeal. He was represented on his Rule 37 petition by Deborah Stallings, 1500 Riverfront Drive, Suite 118, Little Rock, Arkansas 72202.

Wherefore, petitioner prays that the Court grant an evidentiary hearing or a full and fair review of the record and reverse his conviction and sentence and for all other and proper relief.

RESPECTFULLY SUBMITTED,

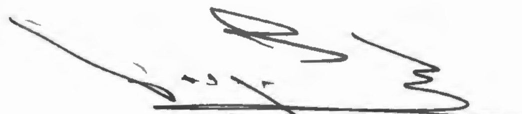
GEORGE L. LUCAS,
ASSISTANT FEDERAL PUBLIC DEFENDER
P.O. BOX 3686
FAYETTEVILLE, AR 72702
(501) 442-2306

CERTIFICATE OF SERVICE

I, George L. Lucas, Attorney at Law, do hereby certify that I have served a copy of the foregoing petition for Defendant by mailing a copy of the same, by U.S. Mail, postage prepaid, to:

Kelly Hill
Office of the Attorney General
323 Center St., Suite 200
Little Rock, Arkansas 72201

on this 13th day of July, 2001.



George L. Lucas
Assistant Defender

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

BY

ANDREW SASSER PETITIONER

V. NO. 00-4036

LARRY NORRIS, Director
Arkansas Department of Correction RESPONDENT

MEMORANDUM OPINION AND ORDER

Before the Court is the Amended Petition for Writ of Habeas Corpus and Motion for Evidentiary Hearing filed on behalf of the Petitioner Andrew Sasser. (Doc. No.'s 23, 27). The Respondent Larry Norris has filed his response. (Doc. No.'s 24, 29). The Court finds that these matters are ripe for consideration.

I. BACKGROUND

On May 4, 1994, a jury convicted the Petitioner of capital murder and sentenced him to death for the homicide of Jo Ann Kennedy. Sasser appealed his conviction to the Arkansas Supreme Court where it was affirmed on July 17, 1995. *See Sasser v. State,* 902 S.W.2d 773 (1995). Subsequently, Sasser sought post-conviction relief pursuant to Arkansas Rules of Criminal Procedure 37. After conducting an evidentiary hearing, the circuit court denied Sasser's Rule 37 petition in September 1997. The Arkansas Supreme Court affirmed the lower court's denial of post-conviction relief on July 8, 1999. *See Sasser v. State,* 993 S.W.2d 901 (1999). There are no non-futile state remedies available in which Petitioner could pursue the grounds presented in the instant application.

In his Amended Petition, Petitioner asserts the following grounds for relief:

1. Petitioner was deprived of his rights under the U.S. Constitution,

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including the 8th and 14th Amendments, and the Arkansas Constitution Article 2, §§ 8, 9, 10, by the improper jury instructions given in both the guilt and penalty phases of the trial.

2. The jury instruction on captial murder improperly stated the law, and Sasser's conviction on that charge is void.

3. Improper argument by the prosecutors in both the guilt and penalty phases of the trial violated due process and also deprived Sasser of his right under the 8th and 14th Amendments to the U.S. Constitution, and Article 2, § 9 of the Arkansas Constitution to a reliable sentence determination, by interjecting improper and irrelevant considerations into the sentencing decision.

4. Sasser's conviction should be set aside because he was deprived of his right to effective assistance of counsel as guaranteed by the U.S. Constitution, Amendments 6 and 14, and the Arkansas Constitution, Article 2 §§ 8, 10.

5. The additional oath administered to jurors who were questioned about their attitudes toward the death penalty violated due process and the 8th Amendment to the U.S. Constitution, and Article 2 § 9 of the Arkansas Constitution.

6. The Arkansas death penalty is unconstitutional because:
a. It gives rise to the mandatory imposition of the death penalty in violation of the 8th Amendment (U.S. Constitution),
b. Because there is no provision for mandatory or automatic appeal of death sentences, and
c. Death qualification of the jury violates due process.

7. Sasser was deprived of the effective assistance of counsel and is entitled to a new trial because he was not represented by two attorneys as required by the Arkansas Public Defender Commission's Minimum Standards for trial of death cases, and because Sasser's counsel failed to request additional counsel, and for failing to object to being required to proceed (or request a continuance) without additional assistance.

8. Sasser was deprived of his right to the effective assistance of counsel by trial counsel's failure to request a limiting instruction.

II. DISCUSSION

A. Evidentiary Hearing

The initial inquiry for the Court is whether Petitioner is entitled to an evidentiary hearing on any or all of his claims. The Eighth Circuit Court of Appeals has said that a petitioner must present and develop both the factual and legal premises of his claims to the state courts in order to preserve them for federal habeas review. *Morris v. Norris,* 83 F.3d 268, 270 (8th Cir. 1996). This requirement includes taking an appeal of adverse rulings to the highest available appellate court. *Picard v. Connor,* 404 U.S. 270, 275 (1971). With the exception of Ground 8, Petitioner failed to assert and develop any of the remaining grounds set forth in his Amended Petition at the state court level. Accordingly, all of Petitioner's grounds except for Ground 8, pertaining to counsel's failure to request a limiting instruction are barred from review.

As previously noted, in order to preserve his claims, a petitioner must have presented and developed both the factual and legal premises underlying each claim in the state courts. *Morris.* Where a petitioner fails to do so, 28 U.S.C. § 2254(e)(2) provides that a "court shall not hold an evidentiary hearing on the claim unless the applicant [satisfies certain criteria]." A failure to develop the factual basis of a claim is established where a claim is not raised as a result of a lack of diligence or some other fault attributable to the petitioner or his counsel. *Michael Wayne Williams v. Taylor,* 529 U.S. 420, 432 (2000). Petitioner failed to develop the factual basis underlying the claim of ineffective assistance of counsel as it pertains to failure to request a limiting instruction) at the state court level. Therefore, an evidentiary hearing on that claim, just as with the others in his Petition, is precluded because Sasser has not demonstrated:

AO 72A
(Rev.8/82)

> (1) that his claims rely on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, or (2) that the claims rely on facts that could not have been previously discovered through the exercise of due diligence, and (3) that clear and convincing evidence shows that no reasonable fact finder would have found him guilty but for the alleged constitutional errors.

28 U.S.C. § 2254(e)(2)(A), (B); *Williams,* 529 U.S. at 440. Sasser has failed to make any of these showings in either his Amended Petition or the Motion for Evidentiary Hearing.

B. Habeas Relief - Ineffective Assistance of Counsel

The only remaining ground Sasser presents for the Court's review is that of ineffective assistance of counsel, specifically trial counsel's failure to request a limiting instruction with respect to Jackie Carter's testimony. In considering Sasser's post-conviction petition, the circuit court noted:

> In this case, petitioner's counsel was faced with overwhelming evidence against the petitioner, not the least of which was evidence that petitioner had attacked another convenience store clerk under very similar circumstances a few years earlier. Because petitioner's counsel was unsuccessful in keeping this evidence out, petitioner's counsel was forced to consider how to deal with [it] in front of the jury. In an effort not to highlight Jackie Carter's testimony, petitioner's counsel chose not to request the instruction that petitioner now alleges [sh]ould have been requested. Counsel's strategy with respect to that instruction was the same as it was with respect to her trial testimony, which is evidenced by counsel's decision not to cross-examine her.

Resp.'s Ex. "C" at 277.

28 U.S.C. § 2254(d) provides that a *habeas* petition cannot be granted with respect to any claim that was adjudicated on the merits in state court, unless the state court decision is contrary to clearly established federal law, involves an unreasonable application of it, or is based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. The standard by which the trial court made its determination was set forth in

AO 72A
(Rev.8/82)

Strickland v. Washington, 466 U.S. 668 (1984). The key inquiry, under *Strickland,* is whether there is any reasonable probability that the outcome of Petitioner's trial would have been any different had counsel for the Petitioner obtained a limiting instruction. The Arkansas Supreme Court considered Petitioner's appeal for post-conviction relief and found that the there was no reasonable probability that the outcome would have been any different. A careful review of the record at trial in this case indicates that there was ample evidence to support Sasser's conviction, even without Carter's testimony. Therefore, the Court agrees with the circuit court's finding that the decision by counsel not to seek a limiting instruction was a plausible trial strategy. Furthermore, the Court finds that the state court's decision was not contrary to clearly established federal law. Accordingly, Petitioner has failed to demonstrate that this claim satisfies the exceptions under § 2254(d), and it should be denied.

CONCLUSION

For the reasons discussed herein, the Court finds the Petitioner is not entitled to an evidentiary hearing and the motion for same should be and hereby is denied. Further, the Court finds the Petition for Writ of Habeas Corpus hereby is dismissed.

IT IS SO ORDERED this 23 day of May, 2002.

U. S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED
MAY 28 2002
CHRIS R. JOHNSON, CLERK
BY
DEPUTY CLERK

Hon. Harry F. Barnes
U.S. District Judge

UNITED STATES COURT OF APPEALS

APPENDIX G | **FOR THE EIGHTH CIRCUIT** | **App. 93**

00-4036

No. 02-3103

Andrew Sasser,

Appellant,

v.

Larry Norris, Director, Arkansas Department of Corrections,

Appellee.

* Appeal from the United States District Court for the Western District of Arkansas

JUDGMENT

The motion to remand is granted. The issue on remand is limited to the question of whether Mr. Sasser is mentally retarded and whether pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002), the Eighth Amendment prohibits his execution. To the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted.

(5361-010199)

August 15, 2003

U. S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED
AUG 21 2003
CHRIS R. JOHNSON, CLERK
BY [signature] DEPUTY CLERK

RECEIVED
AUG 22 2003
FEDERAL PUBLIC DEFENDER
Certified

Order entered at the Direction of the Court

Michael E. Gans

Clerk, U. S. Court of Appeals, Eighth Circuit

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
BY: Michael E. Gans

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-3103

Andrew Sasser,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Arkansas.
Larry Norris, Director, Arkansas	*	
Department of Corrections,	*	
	*	
Appellee.	*	

AMENDED JUDGMENT

Before MORRIS SHEPPARD ARNOLD, MURPHY, and MELLOY, Circuit Judges.

Upon consideration of appellant's petition for rehearing, the panel issues this amended judgment.

Previously, this panel remanded appellant's mental retardation claim to the district court to determine whether appellant was mentally retarded and whether, pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), the Eighth Amendment prohibits his execution. Sasser v. Norris, No. 02-3103 (8th Cir. August 15, 2003) (order). Subsequently, appellee petitioned for rehearing and clarification, arguing that the mental retardation claim is not exhausted. Because it is unclear whether appellant has any currently available non-futile state remedies, we revise the previously entered order and remand the case to the district court for a determination of the exhaustion

issue. See Rhines v. Weber, 345 F.3d 799, 800 (8th Cir. 2003) (per curiam) (decisions about exhaustion and procedural default are better addressed by district court in the first instance), petition for cert. filed, (U.S. Feb. 19, 2004) (No. 03-9046).

In the event the district court concludes appellant has a viable state court remedy, we invite the district court to consider whether appellant's mental retardation claim, which is based on the newly recognized federal constitutional right articulated in Atkins, presents "truly exceptional circumstances" involving "a consideration going beyond the running of the statute of limitations," as those terms are defined in Lee v. Norris, 354 F.3d 846, 850 (8th Cir. 2004). If it so concludes, the district court may wish to hold the remanded petition in abeyance pending the outcome of state court proceedings on the mental retardation claim.

Appellee also seeks clarification as to whether the panel's prior order was entered by a single judge. We refer appellee to Federal Rule of Appellate Procedure 27(c) and Eighth Circuit Rule 27(b) and deny the motion for clarification.

March 9, 2004

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

U.S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED
MAR 12 2004
CHRIS R. JOHNSON, CLERK
BY DEPUTY CLERK

00-4036

No. 02-3103

Andrew Sasser,	*	
Appellant,	*	
	*	
v.	*	Appeal from the United States District Court for the Western District of Arkansas
	*	
Larry Norris,	*	
Appellee.	*	

On the court's own motion, the mandate issued on August 15, 2003, is recalled.

March 9, 2004

RECEIVED
MAR 15 2004 BE
FEDERAL PUBLIC DEFENDER

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

A TRUE COPY OF THE ORIGINAL
MICHAEL E. GANS, CLERK
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
BY: Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
THOMAS F. EAGLETON COURT HOUSE
ROOM 24.329
111 S. 10TH STREET
ST. LOUIS, MISSOURI 63102

AEL E. GANS
Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

April 15, 2004

Mr. Christopher R. Johnson
Clerk
U.S. DISTRICT COURT, WESTERN ARKANSAS
P.O. Box 1547
30 S. Sixth Street
Fort Smith, AR 72902

Re: 02-3103 Andrew Sasser vs. Larry Norris

Dear Clerk:

The mandate of this Court is being sent to the clerk of the district court, together with a receipt. The clerk of the district court is requested to sign, date, and return the receipt to this office.

Any district court records in this court's possession will be returned shortly.

(5175-010199)

Sincerely,

Michael E. Gans
Clerk of Court

cmd

Enclosure

(LETTER FOR INFORMATIONAL PURPOSES ONLY)

---

cc: Andrew Sasser
George L. Lucas
Omar F. Greene II
Bruce David Eddy
Kelly Kristine Hill

District Court/Agency Case Number(s): Civ. No. 00-4036

APR 19 2004

FEDERAL PUBLIC DEFENDER

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

VS. Case No. 00-CV-4036

LARRY NORRIS, Director, Arkansas
Department of Corrections RESPONDENT

ORDER

Before the Court is Petitioner's Motion to Extend Time to File Amended Petition. (Doc. 41) Respondent has responded. (Doc. 42) The Court finds the motion ripe for consideration. In short, the Court agrees with Norris that Sasser's motion was premature and that the Court had no jurisdiction over the case at the time the motion was filed due to Norris' motion for rehearing filed in the Eighth Circuit Court of Appeals on August 29, 2003. The Court also agrees that the Court's Scheduling Order dated August 29, 2003 was premature due to Norris' motion for rehearing filed in the Eighth Circuit. Therefore, the Court finds the motion should be and hereby is **denied.**

Subsequent to Sasser filing his Motion to Extend Time to File Amended Petition, the Eighth Circuit considered Norris' motion for reconsideration and amended its original judgment. Therefore, this Court now has jurisdiction over the case to carry out the Eighth Circuit's amended judgment. Since Sasser has represented to the Court that he can file an amended petition with 120 days of the Eighth Circuit's ruling on Norris' motion for rehearing, the Court believes it best to allow Sasser up to and including July 8, 2004 (120 days after the Eighth Circuit filed its Amended Judgment) to file an amended petition that includes a mental retardation claim. Norris shall have up to and including August 7, 2004 to file his response to the amended petition. The Court will then set forth a briefing schedule regarding issues before the Court under the Amended Judgment.

IT IS SO ORDERED, this 20 day of May, 2004.

U.S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED
MAY 21 2004
CHRIS R. JOHNSON, CLERK
BY
DEPUTY CLERK

Hon. Harry F. Barnes
U.S. District Court

THIS IS A CAPITAL CASE

U.S. DISTRICT COURT
WESTERN DISTRICT ARKANSAS
FILED
SEP 0 3 2004
CHRIS R. JOHNSON, CLERK
BY
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

VS

CASE NO. 00-4036

LARRY NORRIS, DIRECTOR,
ARKANSAS DEPARTMENT OF
CORRECTION RESPONDENT

PETITIONER'S SECOND SUPPLEMENTAL AND AMENDED PETITION FOR WRIT OF HABEAS CORPUS RELIEF

INTRODUCTION

Pursuant to 28 U.S.C. §2254 and this Court's Order of May 26, 2004, Petitioner, Andrew Sasser, presents the instant Supplemental and Amended Petition for Writ of Habeas Corpus Relief.

PROCEDURAL HISTORY

1. A jury in the Circuit Court of Miller County, Arkansas, convicted Mr. Sasser of capital murder and sentenced him to death on May 4, 1994. Mr. Sasser appealed his conviction and sentence to the Arkansas Supreme Court, and it was affirmed. *Sasser v. State*, 321 Ark. 438, 902 S.W.2d 773 (1995) (*Sasser* I).

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2. Mr. Sasser then filed a motion for post conviction relief pursuant to Rule 37 of the Arkansas Rules of Criminal Procedure. The following claims were raised:

A. Petitioner was deprived of his rights under the U.S. Const., including the 8th and 14th amend., and the Arkansas Const., Art. 2 §§ 8, 9, 10 by the improper jury instructions given in both the guilt and penalty phases of the trial.

B. The jury instruction on capital murder improperly stated the law, and Mr. Sasser's conviction on that charge is void.

C. Improper argument by the prosecutors in both the guilt and penalty phases of the trial violated due process and also deprived Mr. Sasser of his right under the 8th and 14th amend., U.S. Const., and Art. 2 §9, Ark. Const. to a reliable sentence determination, by interjecting improper and irrelevant considerations into the sentencing decision.

D. Mr. Sasser's conviction should be set aside because he was deprived of his right to effective assistance of counsel as guaranteed by the U.S. Const., amend. 6 & 14, and Ark. Const., Art. 2 §§ 8,10.

E. The additional oath administered to jurors who were questioned about their attitudes toward the death penalty violated due process and the 8th amend., U.S. Const., and Art. 2 § 9, Ark. Const.

F. Mr. Sasser raised the following issues to assure their preservation for federal habeas corpus review, should such become necessary:

1. The Arkansas death penalty statutory scheme gives rise to to the mandatory imposition of the death penalty in violation of the 8th amendment.

2. The Arkansas death penalty statute is unconstitutional because there is no provision for mandatory or automatic appeal of death sentences.

3. Death qualification of the jury violates due process.

G. Mr. Sasser was deprived of the effective assistance of counsel and is entitled to a new trial because he was not represented by two attorneys as required by the Arkansas Public Defender Commission's Minimum Standards for trial of death cases; the Court should have appointed additional counsel and Mr. Sasser's trial counsel was ineffective for not requesting additional counsel, a continuance, and for failing to object to being required to proceed without additional assistance.

H. Mr. Sasser was deprived of his right to the effective assistance of counsel by trial counsel's failure to request a limiting instruction under AMCI 2d 203-A , to which he was absolutely entitled, after the State presented the testimony of Jackie Carter, the victim in Mr. Sasser's previous cases in which he was convicted of battery, rape and kidnaping, to prove intent or *modus operandi* in the capital murder case.

3. After an evidentiary hearing, the petition for post-conviction relief was denied. The denial was affirmed on appeal. *Sasser v. State*, 338 Ark. 375, 993 S.W.2d 901 (1999) (*Sasser* II).

4. A federal habeas corpus petition was filed on July 7, 2000, and an amended petition was filed on July 17, 2001. On May 23, 2002, the district court denied Mr. Sasser's amended petition for writ of habeas corpus relief without an evidentiary hearing. Following the denial, Mr. Sasser filed a Notice of Appeal and an Application for Certificate of Appealability which this Court granted.

5. In June 2003, and prior to oral argument in the Eighth Circuit, Mr. Sasser filed a motion to remand the case to the district court, and a supplemental motion to remand to the district court or in the alternative a motion to file a second

or successive habeas corpus petition, with the Eighth Circuit Court of Appeals. Respondent filed a response as directed by the Eighth Circuit.

6. On August 15, 2003, the Eighth Circuit granted Mr. Sasser's motion and remanded the case to the district court.

7. On August 29, 2003, respondent filed a petition for rehearing or in the alternative a motion for clarification challenging the Eighth Circuit's August 15, 2003, Judgment on various grounds including exhaustion and procedural default. Petitioner filed an answer on September 5, 2003, and pursuant to the Eighth Circuit's request filed a response on September 25, 2003.

8. On March 9, 2004, the Eighth Circuit recalled the mandate issued on August 15, 2003, and entered an Amended Judgment, stating that , "[b]ecause it is unclear whether appellant has any currently available non-futile state remedies, we revise the previously entered order and remand the case to the district court for a determination of the exhaustion issue."

9. This Court entered an Order on May 21, 2004, ordering "Sasser . . . to file an amended petition that includes a mental retardation claim. . . . The Court will then set forth a briefing schedule regarding issues before the Court under the Amended Judgment."

10. This second supplemental and amended petition for habeas corpus relief is being filed in compliance with this Court's Order of May 21, 2004, and is therefore limited to mental retardation and related claims so that a briefing schedule can be set.

11. The filing of this second supplemental and amended petition is in no way a waiver of any non-mental retardation claims or of the additional time that Mr. Sasser needs to complete the investigation and preparation of a complete social history and otherwise be in a position to determine what if any additional testing and/or evaluation may be necessary. Another supplemental and amended petition for habeas corpus relief will then be filed and include the non-mental retardation claims as well as any additional claims that are found as a result of this investigation so that Mr. Sasser's constitutional rights may be fully and effectively protected.

GROUNDS FOR RELIEF

12. By this Second Supplemental and Amended Petition for Writ of Habeas Corpus, Mr. Sasser asserts that his convictions and death sentence violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, for each of the reasons set forth herein.

CLAIMS FOR RELIEF[1]

IX. MR. SASSER'S DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HE IS MENTALLY RETARDED

13. The claims and factual allegations set forth in all other sections of this supplemental and amended petition are realleged as if set forth entirely herein.

14. Mr. Sasser's death sentence violates the Eighth and Fourteenth Amendments because he is mentally retarded. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

15. *Atkins* did not provide a single definition of "mental retardation." However, the Court did describe typical clinical definitions of mental retardation as having three components: (a) "subaverage intellectual functioning"; (b) "significant limitations in adaptive skills"; and (c) manifestation before age 18. *Id.* at 318.

A. As examples of typical clinical definitions, the Court cited definitions given by the American Association on Mental Retardation ("AAMR") and the American Psychiatric Association ("APA"), which the Court described as "similar" to each other. *Atkins* at 308 n.3.

[1] Claims 1 to 8 are in Mr. Sasser's original and/or amended petition for habeas corpus relief and are incorporated herein.

B. The AAMR defines mental retardation as follows:

> Mental retardation is a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.

AAMR, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 1 (10th ed. 2002).

C. The APA defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS at 41 (4th ed. 2000).

D. These AAMR/APA clinical definitions establish a constitutional minimum. Under *Atkins*, any prisoner who is mentally retarded under these definitions cannot be executed, and no state can, consistent with the Eighth and Fourteenth Amendments, require a more restrictive definition. States are free, however, to provide *Atkins* protection to more prisoners than would be protected by the AAMR/APA definitions. Arkansas' mental retardation statute is just the opposite finding a

presumption of mental retardation if the person's I.Q. is 65 or below. *See* Ark. Code Ann. § 5-4-618.

E. Under any of these definitions, or any other definition consistent with the Eighth and Fourteenth Amendments, Mr. Sasser is mentally retarded.

16. Mr. Sasser's mental retardation was confirmed by the initial findings of Dr. Lee Norton and Ms. Lisa Moody.

> Based on the preliminary information we have reviewed to date, it is our opinion that Mr. Sasser may suffer from mental retardation and other organic deficits. The data we find especially relevant include: 1) an I.Q. score of 79, which may, considering the five-point margin of error, place Mr. Sasser cognitively in the range of mental retardation. In addition, the test itself may not have been reliable. Dr. Blackburn's trial testimony states, "The examination was done on an emergency basis" and that he asked orally "in excess of eighty" questions. This is about half the amount of questions in the usual short-form test of 168 items. This evaluation should have prompted counsel to look at mental retardation very carefully, by critically reviewing Dr. Blackburn's scoring and investigating adaptive behavior; 2) Mr. Sasser's consistently low academic performance and inability to pass the required courses to achieve a high school diploma; 3) consistently low adaptive skills, including deficits in communication, education, and social interactions, as evidenced by his never having become economically independent, never having established an independent home environment, never having obtained a driver's license (prior to going to prison), never having opened or maintained a checking account or completed other routine financial transactions such as paying rent, utilities, insurance, phone bills or being able to conceptualize the necessity of establishing and conforming to a budget that would ensure his financial security, and never having established consistent and stable employment or the

means by which to secure upward mobility. However, in order to rule out these provisional conclusions, it is imperative that a complete psychosocial history and thorough evaluation by a medical doctor or professional qualified by an appropriate licensing board to evaluate developmental disabilities be conducted.

* * *

Our preliminary evaluation revealed that at each juncture of this case, the psychosocial history and related evaluations of Mr. Sasser have been markedly insufficient. Especially relevant are the issues of Mr. Sasser's cognitive and organic status, and his adaptive skills. At no point could we find a comprehensive psychosocial history that is required to assess an individual's cognitive, social, and emotional status. The work product we reviewed revealed inconsistent and incomplete efforts to obtain psychosocial information. In at least one instance the only source of information relied upon by the evaluator was Mr. Sasser. . . . Furthermore, despite indications of traumatic head injuries, Mr. Sasser did not receive a complete physical evaluation to rule out the possible medical causes (e.g. mental retardation) of his perception, judgment and behavior (see Kaplan and Sadock, 1998, *Comprehensive Textbook of Psychiatry*).

Our preliminary assessment produced several indicators of problems with adaptive skills and cognitive functioning. An interview with Mr. Sasser suggested that, even today, his understanding of many critical concepts, words and the legal process in general is significantly limited. . . .

* * *

Mr. Sasser's school records and social behavior are consistent with deficits in cognitive and adaptive functioning. Instead of graduating and receiving a high school diploma, Mr. Sasser received a Certificate of Attendance. The principal of Sasser's high school stated that students who met the requirements but could not pass the required 21 credits were awarded a certificate of attendance. He further stated that approximately 1-2% of the students received only certificates of

attendance. This percentage approximates the prevalence of mental retardation in the general population. A childhood friend of Mr. Sasser reported "I thought only the students in special education received certificates of attendance. I wonder why Andrew wasn't in special education. I know he wasn't in the same classes I was; I took things like chemistry and I know he wasn't in that class." This same witness, who has known Mr. Sasser since kindergarten and who holds a bachelor's degree and credits towards an MBA, described Mr. Sasser as the "class clown" in elementary school: " He was always cutting up and telling funny stories; I think maybe he did some it to distract attention from books and things like that." This is consistent with individuals who have cognitive deficits as they learn to compensate for their lack of understanding by distracting attention away from academic and other cognitive tasks. Mr. Sasser's high school grades (no elementary or junior high school records could be located) were consistently low; generally D's and F's, with an occasional A, B or C.

Deficits in a number of Mr. Sasser's other adaptive skills also are consistent with mental retardation. For example, unlike all his siblings, Mr. Sasser never took the written test required for a learner's permit to drive a car, and never received a driver's license. His brother stated he did not think Mr. Sasser could "pass the test." Similarly, unlike his four other siblings, Mr. Sasser never left the care of his mother's home. Witnesses report that he stayed with "his cousins on Boyd Hill" at times, but his constant residence was at his mother's home. Moreover, Mr. Sasser never attempted to obtain or manage a checking account. All witnesses interviewed indicated he always used cash to buy what he needed. There is no evidence Mr. Sasser ever attempted to rent or buy a home, or paid rent, utilities, phone or other bills associated with independent living. It would appear he largely depended on his mother for basic necessities. His work history likewise suggests a very low level of functioning. He reported, and this information was corroborated by other witnesses, that his jobs consisted of manual labor, sometimes of a particularly menial sort. He worked on a local farm where he completed tasks as needed by the owner. He also worked at a carpet factory for a period of time, and later at a lumber mill. This is inconsistent with his siblings, all of

whom have had consistent employment, maintained their own homes, and raised families. His brothers have worked for the same companies for at least 10-15 years, where they have held fairly responsible positions. One brother also became a "preacher". He holds a full-time job and manages the numerous responsibilities of a small, rural church in his spare time. All Mr. Sasser's siblings graduated from high school; no one else in his family received a certificate of attendance. Mr. Sasser's social life appears to have been limited. He reports visiting his cousins and spending time with his nephews, who were much younger than he. He was not active in community organizations, although he did attend church regularly as a child up until the age of about 20. We have found no evidence of his participation in peer group activities such as little league, Boy Scouts, camps, music, Boys Club or other socializing organizations instrumental to developing interpersonal, coping and problem solving skills.

Other evidence revealed in our preliminary review of Mr. Sasser's psychosocial history relevant to his mental and emotional status that two of his siblings repeatedly talked to Mr. Sasser in an effort to "get him to see he had a problem but he kept telling us there was nothing wrong with him." However, Mr. Sasser's behavior appears to have become disorganized and bizarre. For example, Mr. Sasser told his family he was leaving home to join the Army, though he declined to inform them where he was to be inducted or attend boot camp and "no one saw any papers he would have had to fill out." Mr. Sasser was thought to have left his home town to enlist in the United States Army and was not seen for approximately two months. At that time children began reporting that they had seen Mr. Sasser in a secluded, wooded area not far from his mother's home. The family had noticed items and food missing from time to time during this two month period, but dismissed these irregularities until they spoke with the children. This lead to Mr. Sasser's sister and mother searching the woods where they ultimately found Mr. Sasser sleeping in "an abandoned cab of an old truck." Family members report that upon being awakened Mr. Sasser was startled and quickly ran away from the area. Eventually his family was able to coax him to return to his home, whereupon he provided what the family considered to be a highly irrational and implausible explanation for his absence. He

stated to them that he had enlisted in the Army though, despite concerned inquiries from his family, he never disclosed where he enlisted and attended boot camp, or what his ultimate duty station was to be. He said only that he had "hurt his knee and had to quit. But we never saw any papers and never saw any signs that his knee was actually hurt." Moreover, when one of his brother's returned to the woods, he found a skillet and other items that would indicate Mr. Sasser had "been camping out there the whole time and going down to Mom's house to get food." Mr. Sasser's brother also noticed "a whole lot of foot tracks, like he had been pacing or something." Mr. Sasser refused to discuss the matter further and eventually the family gave up in frustration and confusion. However, it confirmed for the family that something had indeed changed dramatically in Mr. Sasser's ability to think and plan rationally. As further evidence they pointed to the fact that Mr. Sasser, who at the time did not possess a driver's license, was "always running his truck off the road into the ditch." Two of his brothers confirmed that these collisions became so frequent that they became somewhat of a joke among their friends. "We would have people come up to us and say, 'hey, I had to pull your brother out of the ditch again last night.'" This pattern culminated in a serious accident in which Mr. Sasser "nearly totaled" his brother-in-law's truck. Two of his brothers reported that Mr. Sasser, who had planned to spend the night at the home of one brother "all of a sudden became convinced he needed to leave. I told him I was confused because he had come there to spend the night, but there was no talking to him. He was convinced he wanted to leave and he talked our brother-in-law into lending him his truck. Not long afterward we got a phone call from him saying he needed us to come and pull him out of the ditch. When we got there the truck was just about totaled and I was extremely upset with him. I kept telling him how much damage he had done, but he didn't seem to understand. He kept wanting to talk about how a deer had run in front of him and caused the accident. But it was obvious that it wasn't caused by a deer. I'm not even sure if he knows what caused it, but he couldn't focus on the damage and inconvenience he caused our brother-in-law and kept wanting to return to this story about a deer. There was no question at that point in my mind that he had some kind of problem. My sister tried to talk to him, too, but he kept insisting he was O.K. Not long after all of this is

when I heard he had been arrested for rape. . . .

We could find no evidence that Mr. Sasser received a comprehensive examination conducted by a team comprised of a physician, neuropsychologist, and neurologist prior to his murder trial or during any of his post-conviction proceedings. Nor could we find a comprehensive psychosocial history conducted by a social worker or other qualified professional that would inform and offer a context to a mental health team's findings (see Kaplan and Sadock's 1998 *Comprehensive Textbook of Psychiatry*).

> Mr. Sasser's cognitive and adaptive skills may also have been influenced by his nuclear and extended family environment. Interviews consistently indicate he was born into abject poverty in an oppressive and racist milieu. His father, who was killed in a work-related injury that constituted a catastrophic loss for the Sasser family, was functionally illiterate. His mother attempted to make ends meet by picking up to 300 pounds of cotton a day while trying to raise five children in a "shot-gun shack". The Sasser's lived in extremely sub-adequate housing until the 1970's, and even then could meet only their basic needs. Furthermore, all family interviews indicate a strong predisposition on both sides of the Mr. Sasser's family toward severe alcoholism that family members describe as causing numerous medical problems and early deaths due to cerebral hemorrhages and other alcohol related conditions. As a result, Mr. Sasser had very few positive role models or individuals who could recognize the significance of or find adequate intervention for his special needs.

See Affidavit of Lee Norton, Ph. D. and Lisa Moody attached hereto as Exhibit 1.

17. The State's expert at trial, Dr. Blackburn, notes in his February 11, 1994, report numerous examples of deficits in cognitive and adaptive functioning.

For example, Mr. Sasser was still living with his mother at age 29 and employed in only menial jobs such as cutting plywood in a lumber mill and doing farm work. Additionally, Dr. Blackburn found that the WRAT suggests that Mr. Sasser reads at a sixth grade level and does math at a seventh grade level both of which are consistent with the highest level of academic functioning for individuals meeting Mental Retardation criteria.

18. Dr. Blackburn further notes Mr. Sasser's 90-degree rotation when he first attempted drawing items in the Bender and finds "mild features of visual-perceptual impairment." A comprehensive examination and a further investigation into the adaptive behavior deficits already noted by Dr. Blackburn is necessary for the preparation of an accurate and reliable social history.

19. The social history will include in-depth interview with Mr. Sasser and his family members and others (e.g. teachers, neighbors, peers, clergy, physicians, mental health professionals, law enforcement officials, social service providers) who observed him over time and during critical periods. The investigation should also include a through collection of objective, reliable documentation about the client and his family, including, among others, medical, educational, employment, psychiatric/psychological, social service, criminal (juvenile and adult), probation and parole, and court records. Such contemporaneous records are intrinsically

credible and may document events that Mr. Sasser and other family members do not otherwise recall or can recount. See Exhibit 1.

20. Mr. Sasser did not raise the issue of mental retardation in state court or in his original or first amended habeas corpus petition and respectfully suggests that a remand to State court is necessary for a full and fair opportunity to litigate his meritorious Eighth Amendment mental retardation claim.

21. Mr. Sasser is mentally retarded. His death sentence violates the Eighth and Fourteenth Amendments.

22. Counsel was ineffective for failing to adequately prepare and present mental retardation as required by Sixth Amendment standards. As set forth herein, there is ample evidence of Mr. Sasser's mental retardation that was available at the time of the original trial and capital sentencing proceedings. Notwithstanding, counsel did not prepare a full and complete social history and present the evidence. Counsel was ineffective for failing to develop and raise mental retardation, in violation of the Sixth and Fourteenth Amendments.

23. To the extent that trial, direct appeal, and post-conviction counsel failed to reasonably and meaningfully raise and litigate the errors described above, counsel were ineffective in violation of the Sixth and Fourteenth Amendments.

X. PETITIONER'S DEATH SENTENCE SHOULD BE VACATED BECAUSE COUNSEL WAS INEFFECTIVE FOR FAILING TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT MITIGATING EVIDENCE INCLUDING EVIDENCE OF MENTAL RETARDATION

24. The claims and factual allegations set forth in all other sections of this supplemental and amended petition are realleged as if set forth entirely herein.

25. Mr. Sasser's death sentence should be vacated because counsel was ineffective at capital sentencing for failing to present Mr. Sasser's mental retardation as mitigation. Counsel failed to adequately investigate, develop, and present mitigating evidence, including a complete social history, resulting in prejudice to Mr. Sasser.

26. Trial counsel presented only two (2) witnesses at the capital sentencing, Mary Pat Carlson and Hollis Sasser. Ms. Carlson is a family counselor and has had her license in Arkansas revoked for giving tests that she is not qualified to give such as those she administered to Mr. Sasser. The entire mitigation presentation comprised just twenty-six (26) pages. Eighteen (18) of those pages were the testimony of the unqualified Ms. Carlson. Hollis Sasser did not present some important mitigation during his brief testimony because counsel never asked. But if counsel had adequately investigated and prepared, as required by Sixth Amendment standards, there would have been much more mitigation to

present, including mental retardation, as described herein.

27. Full pre-trial investigation is vital, especially so in a capital trial. *Wiggins v. Smith*, 123 S.Ct. 2527, 2536 (2003). The requirements for a full investigation of life history mitigation in a death penalty case were well established in 1993 when trial counsel was appointed in Mr. Sasser's case. The American Bar Association's guidelines on investigation in 1993 were as follows:

GUIDELINE 11.4.1: INVESTIGATION

A. Counsel should conduct independent investigations relating to the guilt/innocence phase and to the penalty phase of a capital trial. Both investigations should begin immediately upon counsel's entry into the case and should be pursued expeditiously.

B. The investigation for preparation of the guilt/innocence phase of the trial should be conducted regardless of any admission or statement by the client concerning facts constituting guilt.

C. The investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered. This investigation should comprise efforts to discover all reasonably available mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.

D. Sources of investigative information may include the following:

1. Charging Documents:

Copies of all charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (*inter alia*):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double Jeopardy) which can be raised to attack the charging documents.

2. The Accused:

An interview of the client should be conducted within 24 hours of counsel's entry into the case, unless there is a good reason for counsel to postpone this interview. In that event, the interview should be conducted as soon as possible after counsel's appointment. As soon as is appropriate, counsel should cover A-E below (if this is not possible during the initial interview, these steps

should be accomplished as soon as possible thereafter):

A. seek information concerning the incident or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

B. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors;

C. collect information relevant to the sentencing phase of trial including, but not limited to: medical history, (mental and physical illness or injury of alcohol and drug use, birth trauma, and developmental delays); educational history (achievement, performance and behavior) special educational needs including cognitive limitations and learning disabilities); military history (type and length of service, conduct, special training); employment and training history (including skills and performance, and barriers to empolyability); family and

social history (including physical, sexual, or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences.

D. seek necessary releases for securing confidential records relating to any of the relevant histories.

E. obtain names of collateral persons or sources to verify, corroborate, explain and expand upon information obtained in C) above.

3. Potential witnesses:

Counsel should consider interviewing potential witnesses, including:

A. eyewitnesses or other witnesses having purported knowledge of events surrounding the offense itself;

B. witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), possible mitigating reasons for the offense(s), and/or other

mitigating evidence to show why the client should not be sentenced to death;

C. members of the victim's family opposed to having the client killed. Counsel should attempt to conduct interviews of potential witnesses in the presence of a third person who will be available, if necessary, to testify as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews.

4. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports. Where necessary, counsel should pursue such efforts through formal and informal discovery unless a sound tactical reason exists for not doing so.

5. Physical Evidence:

Where appropriate, counsel should make a prompt request to the police or investigative agency for any physical evidence or expert reports relevant to the offense or sentencing.

6. The Scene:

Where appropriate, counsel should attempt to view the scene of the alleged offense. This should be done under circumstances as similar as possible to those existing at

the time of the alleged incident (*e.g.*, weather, time of day, and lighting conditions).

1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, cited and discussed in *Wiggins*.

28. Trial counsel's failure to adequately investigate was unreasonable and prevented the jury from hearing compelling life history mitigation. The life history that was gathered was superficial and insufficient. Counsel further failed to have Mr. Sasser properly evaluated in large part due to the incomplete life history. The jury did not know many things about Mr. Sasser's life including his tremendously deprived and dysfunctional childhood, or his problems in school, or the trauma that he suffered. By not obtaining an adequate social history, not retaining qualified experts to completely evaluate Mr. Sasser, or preparing a full and complete life history, counsel failed to measure up to the prevailing professional norms and was ineffective.

SOCIAL HISTORY

29. The social history investigation undertaken by undersigned counsel is still in its preliminary stage due to time constraints. However, the evidence uncovered to date confirms Mr. Sasser's mental retardation and other rich areas of mitigation that require further investigation. *See* Exhibit 1. Substantial mitigating evidence could and should have been presented by counsel based upon Mr.

Sasser's cognitive limitations, dysfunctional life history, and mental retardation. Counsel did not effectively develop the expert evidence as to mitigation, did not develop the critical life history information and prove it existed to the jury, and did not make an effective presentation for life. Effective assistance would have made a difference in the case. The failure of counsel to effectively develop and use mental health experts and life history mitigating information undermines confidence in the results.

30. To the extent that trial, direct appeal, and post-conviction counsel failed to reasonably and meaningfully raise and litigate the errors described above, counsel were ineffective in violation of the Sixth and Fourteenth Amendments.

XI. MR. SASSER'S STATEMENT WAS TAKEN IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, REQUIRING THAT HIS CONVICTIONS AND DEATH SENTENCE BE VACATED

31. The claims and factual allegations set forth in all other sections of this supplemental and amended petition are realleged as if set forth entirely herein.

32. Mr. Sasser's statement was involuntary since it was the result of false promises of help. Based on the totality of the circumstances, the promises made by law enforcement officials to Mr. Sasser coupled with Mr. Sasser's vulnerability, that included but was not limited to his mental retardation, led to an involuntary confession that should have been suppressed.

33. In order to determine whether Mr. Sasser's statement was voluntarily given, it is necessary to review the facts surrounding his statement. On July12,1993, Mr. Sasser was arrested on the front porch of his mother's home outside of Lewisville, Arkansas. Mr. Sasser was told that he had been arrested for capital murder and was then transported to the Lafayette County Sheriff's office. After reaching the Sheriff's office at about 7:30 p.m., Mr. Sasser was then interrogated for the next 2.5 hours. The interrogation concluded about 10:00 p.m. with the final 20 to 25 minutes being taped recorded, and this became Mr. Sasser's "statement." During the 2 hours before his taped statement, Mr. Sasser testified that he steadfastly denied any involvement in the offense until such time as Sheriff Phillips promised Mr. Sasser that if he would confess that Mr. Sasser would not be charged with capital murder since it was not premeditated. Sheriff Phillips further promised that if Mr. Sasser would confess that Sheriff Phillips would talk to the judge the first thing the next morning about a bond for Mr. Sasser's release. Mr. Sasser further testified that he would not have confessed but for the promises made by Sheriff Phillips.

34. When Sheriff Phillips and Deputy Donald Nix testified about what was discussed during the 2 hours before Mr. Sasser's taped statement, both were evasive and gave contradictory accounts. The upshot was that the three just sat

around and had a friendly chat and got to know each other. Both Sheriff Phillips and Deputy Nix did testify that Mr. Sasser initially told them that he did not have any information on the homicide and did not say otherwise until after they had "chatted" for a couple of hours.

35. When Mr. Sasser was questioned as to why he did not state on the tape that he had received the aforementioned promises in return for his statement, he explained that Sheriff Phillips had been writing on a sheet of paper when he made the promises and assured Mr. Sasser that the writing was all that was necessary. Mr. Sasser gave his statement in reliance on those promises and what he believed to be a written assurances that those promises would be honored. During Sheriff Phillips testimony, he first denied even having pencil and paper during the interrogation much less writing anything. It was only later on cross examination that he reluctantly admitted to not only having pencil and paper but to writing things down while he interrogated Mr. Sasser.

36. The trial court found that Mr. Sasser had been advised of his rights, understood those rights, and had an IQ of 91 per the testing done by Mary Carlson. There was no finding made concerning any ambiguity in the promises made by Sheriff Phillips, the voluntariness of Mr. Sasser's statement, or his vulnerability at the time that the promises were made. Moreover, the trial court did not dispute

that Mr. Sasser's statement was made in reliance on Sheriff Phillips' promises to him. The trial court apparently limited its perfunctory determination of Mr. Sasser's vulnerability at the time by saying that Mr. Sasser had an IQ of 91. It is uncontested that the IQ score assigned by Carlson is erroneous. The State of Arkansas seized her license as a family counselor for administering the type of tests that she gave to Mr. Sasser in another case since she was not is not qualified to administer those tests much less compute an IQ score. The trial court was not made aware that even though Mr. Sasser attended school for 12 years, he did not graduate, or that Mr. Sasser reads on only a sixth grade level. "Mr. Sasser's school records and social behavior are consistent with deficits in cognitive and adaptive functioning. Instead of graduating and receiving a high school diploma, Mr. Sasser received a Certificate of Attendance. The principal of Mr. Sasser's high school stated that students who met the requirements but could not pass the required 21 credits were awarded a certificate of attendance. He further stated that approximately 1-2% of the students received only certificates of attendance. This percentage approximates the prevalence of mental retardation in the general population." *See* Exhibit 1.

37. Mr. Sasser was certainly vulnerable on the evening of July 12, 1993, when he gave his statement. He was 28 years old but had never been able to live

on his own or have his own place and relied instead on his mother to provide for his needs. Mr. Sasser was sitting in his mother's home, where he lived, in the living room when the police arrived and was arrested on his mother's front porch after the police asked him to step outside. As Officer Giles testified, when he advised Mr. Sasser that he was under arrest for capital murder, Mr. Sasser did not understand the meaning of capital murder. Mr. Sasser then asked Officer Giles to explain what capital murder was and Giles refused.

38. Mr. Sasser, who is seriously cognitively impaired, had his will undermined by the Sheriff's false promises, which had the effect, *inter alia*, of invalidating the protections found necessary by the Supreme Court in *Miranda* and its Fifth Amendment precedents.

39. As noted in the testimony, there was 2.5 hours between the *Miranda* warnings and the completion of the statement which resulted not only in an involuntary statement but also an invalid waiver of Mr. Sasser's *Miranda* rights. Mr. Sasser's will was overcome by the false promises of the possibility of a release on bond and not being charged with capital murder, the entirety of the circumstances surrounding the elicitation of the statement and the failure to provide accurate *Miranda* warnings when they were necessary.

40. Counsel were ineffective at trial and on direct appeal for failing to reasonably investigate Mr. Sasser's social history and to effectively litigate the Constitutional validity of Mr. Sasser's statement. If counsel had reasonably investigated, counsel would have been aware of Mr. Sasser's adaptive and cognitive deficits.

41. The admission of and state court ruling on Mr. Sasser's statement, violated the Fifth, Sixth, and Fourteenth Amendments.

42. To the extent that trial, direct appeal, and post-conviction counsel failed to reasonably and meaningfully raise and litigate the errors described above, counsel were ineffective in violation of the Sixth and Fourteenth Amendments.

XII. MR. SASSER WAS NOT COMPETENT AT THE TIME OF TRIAL, DIRECT APPEAL, AND POST-CONVICTION PROCEEDING STAGES AND PRIOR COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON THESE MATTERS

43. The claims and factual allegations set forth in all other sections of this supplemental and amended petition are realleged as if set forth entirely herein.

44. Mr. Sasser's rights under the Sixth, Eighth, and Fourteenth Amendments were violated because he underwent state court trial, sentencing, appeal, and post-conviction proceedings while not competent to do so. There was

ample evidence of Mr. Sasser's mental illness and cognitive incapacity that prior counsel should have developed and presented at each of these stages. Prior counsel ineffectively failed to do so. Mr. Sasser should not have stood trial and sentencing because there were significant indications of his lack of competency. Prior counsel's failure to litigate these issues constituted ineffective assistance.

45. Moreover, counsel failed to provide necessary information to the Southwest Arkansas Counseling and Mental Health Center psychologist, Dr. James Blackburn, who evaluated Mr. Sasser to determine his competency to stand trial. For example, counsel did not provide Dr. Blackburn with Mr. Sasser's school records including his certificate of attendance which clearly demonstrate Mr. Sasser's academic deficits. Nor was Dr. Blackburn provided with information on Mr. Sasser's head injury or given information from Mr. Sasser's employer on his work deficits or family information about Mr. Sasser on his other deficits including communication, self-care, home, and interpersonal relationships. All of this information was relevant to Dr. Blackburn's determination of Mr. Sasser's competency and his IQ. Even without this critical information, Dr. Blackburn found that Mr. Sasser reads at a beginning 6th grade level and has math skills at a beginning 7th grade level. Counsel should have then requested a *qualified* expert to review Dr. Blackburn's findings and further investigate and evaluate Mr. Sasser's

competency.

46. If counsel would have requested and adequately prepared for a competency hearing, counsel could have called witnesses and effectively countered and otherwise impeached Dr. Blackburn's finding that Mr. Sasser was competent to stand trial. Instead counsel left Dr. Blackburn's assertion of competent to stand trial argument unanswered.

47. Counsel's failure to obtain a complete social history on Mr. Sasser prevented the jury from hearing and understanding the effects of Mr. Sasser's trauma on his daily life, understanding his many adaptive behavior deficits, about his mental retardation, and the other significant life experiences that made Mr. Sasser who he is. A complete social history would have aided qualified experts in rendering accurate opinions and performing all necessary evaluations.

48. Counsel's failure to obtain a complete social history also prevented an accurate determination of Mr. Sasser's mental retardation.

49. To the extent that trial, direct appeal, and post-conviction counsel failed to reasonably and meaningfully raise and litigate the errors described above, counsel were ineffective in violation of the Sixth and Fourteenth Amendments.

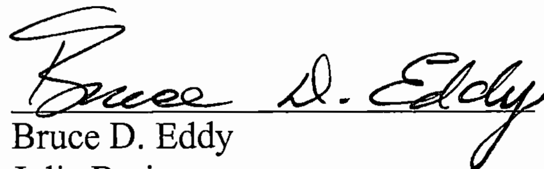
CONCLUSION

WHEREFORE, based on the foregoing, Petitioner, Andrew Sasser, requests that the Court grant him the following relief:

1. That Petitioner be granted such discovery as is necessary for full and fair resolution of the claims contained in this supplemental and amended petition;
2. That leave to amend this petition be granted;
3. That an evidentiary hearing be conducted on all disputed issues of fact;
4. That Petitioner's convictions and death sentence be vacated; and
5. That all other appropriate relief be granted.

Respectfully submitted,

JENNIFFER HORAN
Federal Public Defender

By: 
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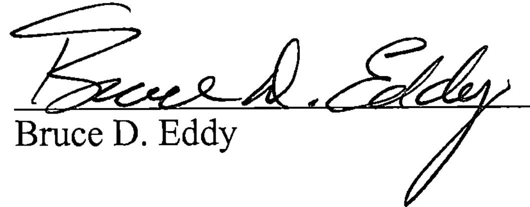
CERTIFICATE OF SERVICE

I hereby certify that on 2nd day of September, 2004, a copy of this pleading was mailed to:

Kelly Hill
Assistant Attorney General
323 Center Street, Suite 200
Little Rock, Arkansas 72201



Bruce D. Eddy

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

V. Civil No. 00-4036

LARRY NORRIS, Director of
Arkansas Department of Corrections RESPONDENT

MEMORANDUM OPINION AND ORDER

Currently before this Court are Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief (Doc. 48), Respondent's Response (Doc. 51), Petitioner's Reply (Doc. 56), and Petitioner's Supporting Affidavit (Doc. 58). The Court finds that these matters are ripe for consideration. For the reasons stated in this Order, Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief (Doc. 48) is hereby **DENIED** in its entirety.

I. PROCEDURAL HISTORY

On May 4, 1994, a jury convicted Petitioner of capital murder and sentenced him to death for the homicide of Jo Ann Kennedy. Petitioner appealed his conviction to the Arkansas Supreme Court, where it was affirmed on July 17, 1995. *See Sasser v. State*, 902 S.W.2d 773 (Ark. 1995). Subsequently, Petitioner sought post-conviction relief pursuant to Arkansas Rules of Criminal Procedure 37. After conducting an evidentiary hearing, the trial court denied Petitioner's Rule 37 petition, in September 1997. On July 8, 1999,

the Arkansas Supreme Court affirmed the trial court's denial of post-conviction relief. *See Sasser v. State*, 993 S.W.2d 901 (Ark. 1991).

On July 7, 2000, Petitioner sought a writ of *habeas corpus* in federal court. (Doc. 3.) Throughout several pleadings, Petitioner presented eight (8) claims upon which he requested relief.[1] On May 23, 2002, this Court denied Petitioner's Petition for Writ of *Habeas Corpus*. (Doc. 30). On August 15, 2002, a Certificate of Appealability was issued for five (5) of Petitioner's claims. (Doc. 34).

While on appeal at the United States Court of Appeals for the Eighth Circuit (Eighth Circuit Court), Petitioner moved to have the case remanded to this Court to exhaust his mental retardation. On August 15, 2003, the Eighth Circuit Court entered a judgment, remanding the mental retardation issue to this Court, and granted the motion to file a successive petition. (Doc. 37). On August 27, 2003, this Court entered a Scheduling Order, stating that this Court would determine whether Petitioner is mentally retarded and whether his execution is prohibited, using the standard for mental retardation set forth in Ark. Code Ann. § 5-4-618. (Doc. 40). Then, on March 9, 2004, the Eighth Circuit Court entered an Amended Judgement, revising the previously entered order and remanded the case to this Court for a determination of whether the mental

[1] None of these claims addressed Petitioner's alleged mental retardation.

retardation claim had been exhausted. (Doc. 44). The Judgment provided that if this Court were to conclude that Petitioner has a viable state court remedy, the Eight Circuit Court "invited this Court to determine whether "truly exceptional circumstances" involving "a consideration going beyond the running of the statute of limitations" exist. *Id.* (citation omitted).

On September 3, 2004, Petitioner filed a Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief. (Doc. 48). Petitioner raised a mental retardation claim, alleging that Petitioner's sentence to death by lethal injection violates the Eighth and Fourteenth Amendment. Petitioner also raised ineffective assistance of counsel claims; a claim that Petitioner's statement was taken in violation of the Fifth, Sixth, and Fourteenth Amendments; and a claim that Petitioner was incompetent during the trial and post-trial proceedings. Additionally, Petitioner incorporated his previously adjudicated eight claims, contained in his first *habeas* petition, all of which this Court had previously denied.

After a period of inactivity, on June 14, 2006, we entered a scheduling order to ensure progression of the case. (Doc. 65.) Completion of discovery was set for July 31, 2006 and motions regarding additional information related to mental retardation (such as motions for leave to file a supplemental and/or amended petition, supplement the record, and request for an evidentiary hearing) were to be filed by August 31, 2006. The order stated that a failure to

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file motions regarding additional evidence by the date provided would constitute notice to the Court that Petitioner did not intend to present additional evidence regarding his mental retardation claim. *Id.* Petitioner failed to file any motions regarding the introduction of additional information to support the mental retardation claim.

II. FACTUAL BACKGROUND

The facts of this case have been recounted in detail at *Sasser v. Arkansas*, 902 S.W.2d 773 (Ark. 1995). To summarize, Petitioner was found guilty of killing Jo Ann Kennedy, a store clerk, by stabbing, cutting and causing blunt force head injuries during the commission or attempted commission of raping or kidnapping her.

III. PETITION

Before addressing the merits of the petition, we must first determine what type of petition is before the Court. There is a clear distinction between supplemental and/or amended petitions and successive petitions, with the latter having more restrictive rules governing what issues may be raised. Petitioner titled the petition currently before the Court as "Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus*." However, a supplemental/amended petition is filed prior to the adjudication of the original petition, whereas a petition that asserts claims that have been adjudicated on their merits in a prior *habeas* petition and/or claims that could have been asserted in a prior *habeas* petition is a successive petition. *See* 28 U.S.C. §2244(b)(3)(A);

Vancleave v. Norris, 150 F.3d 926, 928 (8th Cir. 1998) (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 642-43 (1998) (the Court found that a claim raised in a prior petition that was dismissed as premature escapes the requirements of successive petitions); *Tyler v. Purkett*, 413 F.3d 696, 701 (8th Cir. 2005) ("Because the Rule 60(b) motion 'sought ultimately to resurrect the denial' of [petitioner's] earlier habeas petitions by asserting new claims of error in his state conviction and reasserting prior claims, however, it was properly construed as second or successive." (Citations omitted)).

In the case *sub judice*, the original petition has been adjudicated on its merits and Petitioner was in the process of appealing that decision when he raised the issue of mental retardation for the first time. The Eighth Circuit Court granted permission for Petitioner to file a successive petition, specifically to raise a mental retardation claim. (Doc. 37.) What has been titled Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* is actually a successive petition in both definition and function. Thus, for the reasons stated herein, the rules governing the type of claims permitted in a successive petition will apply (see discussion under Section V. below).

IV. STANDARD OF REVIEW

A prisoner in state custody may petition a federal court for a writ of *habeas corpus* "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United

States." 28 U.S.C. §2254 (1996). Specifically, Section 2254(d)(1) of Title 28, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides as follows:

> (d) An application for a writ of *habeas corpus* on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

28 U.S.C. § 2254(d)(1).

State courts should have a proper opportunity to address a petitioner's claims of constitutional error before those claims are presented to the federal court. *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991). The requirement of exhaustion of remedies is satisfied if the petitioner has "fairly presented" his claims to the state court, thus preserving those claims for federal review, by properly raising both the factual and legal bases of the claim in state court proceedings, affording that court "a fair opportunity to rule on the factual and theoretical substance of [the] claim." *Krimmel v. Hopkins*, 56 F.3d 873, 876 (8th Cir. 1995). "In order to fairly present a federal claim to the state courts, the petitioner must have referred to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in a claim before the state courts." *McCall v. Benson*, 114 F.3d 754,

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757 (8th Cir. 1997)(citations omitted).

Even when a petitioner has technically met the exhaustion requirement, the federal court may still be prevented from considering the federal *habeas* claim if it is procedurally defaulted. "A *habeas* petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." *Coleman*, 501 U.S. at 729-32. Finally, a claim may be lost due to procedural default at any level of state court review: at trial, on direct appeal, or in the course of state post-conviction proceedings. *Kilmartin v. Kemna*, 253 F.3d 1087, 1088 (8th Cir. 2001); *see also Noel v. Norris*, 194 F. Supp. 2d 893, 903 (E.D. Ark. 2002).

V. DISCUSSION OF PETITIONER'S CLAIMS

After a court of appeals authorizes the filing of a successive petition based on a prima facie showing that the application satisfies the statutory standard, the petitioner must *actually show* that he satisfies the standard. *Tyler v. Cain*, 533 U.S. 656, 2481 n.3 (2001). The statutory requirement evidences Congress's intent that court of appeals review an application as a whole rather than examining each individual claim and that court's decision to permit the petition to go forward applies to the entire petition, not particularly specified claims. *Nevius v. McDaniel*, 104 F.3d 1120, 1121 (9th Cir. 1997). Therefore, the district court must address, claim by claim, the entire application authorized by the court of

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appeals. *Id.*

A. Claim IX: Death by Lethal Injection of a Mentally Retarded Person is Unconstitutional

The Eighth Circuit Court has remanded to this Court the questions of whether Petitioner's mental retardation claim has been exhausted and whether the facts of his case present "truly exceptional circumstances".

1. Exhaustion

Exhaustion is a prerequisite to a writ of *habeas corpus* except where such exhaustion would be futile. 28 U.S.C. § 2254(b) & (c); *Tatzel v. Hanlon*, 530 F.2d 1205 (5th Cir. 1976). If there is a viable state remedy for the non-exhausted claim, the petition should be dismissed to allow the state to decide the issue. *Carmichael v. White*, 163 F.3d 1044 (8th Cir. 1998) (finding that the district court should have dismissed petitioner's claims for failure to exhaust state remedies, as petitioner failed to show that exceptional circumstances existed to excuse the failure to exhaust). However, a petitioner is excused from exhaustion requirements when going back to the state would be futile. *Hawkins v. Higgins*, 898 F.2d 1365, 1367 (8th Cir. 1990) (finding that "[a]ny court challenge would be futile, and a waste of judicial resources"). In cases that present a "truly exceptional circumstance," a court may stay the petition and hold it in abeyance pending the outcome of state proceedings. *Lee v. Norris*, 354 F.3d 846 (8th Cir. 2004).

Respondent has essentially conceded that Petitioner, at the

present time, has no non-futile state remedies in which to address his mental retardation claim.[2] (Doc. 51 at 11-12.) We find this position is reasonable in light of a recent state decision. *See Engram v. State*, 200 S.W.3d 367 (Ark. 2004) (where the Arkansas Supreme Court foreclosed any avenue of reopening a case in state court involving a never before raised issue of a petitioner's mental retardation baring state execution under the new constitutional law articulated in *Atkins v. Virginia*, 536 U.S. 304 (2002), stating that Arkansas has a similar rule of law that requires a defendant to raise a mental retardation claim prior to trial and the state law adequately addresses the new constitutional law). Therefore, we find the mental retardation claim has been exhausted, as no non-futile state remedies currently exist.

The question whether "truly exceptional circumstances" exist cannot be addressed as that inquiry would be necessary only if a claim has not been exhausted in state court and the court is considering holding the petition in abeyance to allow the petitioner to exhaust his claim in state court. *See Lee v. Norris*, 354 F3d 846

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[2] Respondent stated that "[t]he respondent would contend that Sasser's claim is exhausted because he no longer has 'the *right* under the law of the State to raise, [by a belated appeal procedure], the question presented [in *habeas*,]' but rather has only a procedure by which he can *attempt to revive* that right." (Doc. 51, pg. 11 (citing 28 U.S.C. § 2254(c)) (alterations in original.)) Respondent went on to argue that regardless of the existence of a right of law, the State courts should have the opportunity to review the issue and possibly create a remedy. (Doc. 51, pg. 12.) However, the Court notes that in *Engram v. State*, the Supreme Court of Arkansas addressed this issue and declined to create a state remedy for this issue. 200 S.W.3d 367 (Ark. 2004), *cert. denied*, 125 S. Ct. 2965 (2005).

(ruling on when a "truly exceptional circumstance" exists to allow a district court hold the petitioners *habeas* petition in abeyance and dismissing the unexhausted claim without prejudice to allow petitions the opportunity to raise a claim in state court instead of dismissing entire petitions). In light of our finding that Petitioner is excused from exhausting his *Atkins* claim--as there are no non-futile state remedies currently available to Petitioner--the question of whether or not there are "truly exceptional circumstances" is moot.

2. Procedural Default

If a claim has been exhausted, but was not adjudicated on the merits in state court, the question of whether the claim has been procedurally defaulted must be addressed. "A federal court conducting habeas corpus review must ordinarily refrain from reviewing any issue that a state court has already found to be defaulted on an adequate and independent state-law basis." *Murray v. Hvass*, 269 F.3d 896, 900 (8th Cir. 2001) (citing *Owsley v. Bowersox*, 234 F.3d 1055, 1058 (8th Cir. 2000)). Where a petitioner has defaulted his federal claims pursuant to an independent and adequate state procedural rule, "federal habeas review of the claims is barred unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice," *Coleman v. Thompson*, 501 U.S. 722, 750 (1991), or "where a constitutional violation has

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probably resulted in the conviction of one who is actually innocent," even if the petitioner failed to show cause for the default, *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *see also Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). *See Langley v. Norris*, 465 F.3d 861, 863 (8th Cir. 2006) (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998) (holding that a procedurally defaulted claim can be raised in *habeas* only if the defendant can first demonstrate cause and actual prejudice for the failure to raise it on direct review, or that he is actually innocent)). The United States Supreme Court has held that the novelty of a constitutional issue at the time of state court proceeding can give rise to cause for defense counsel's failure to raise the issue in accordance with applicable state procedures, permitting entertainment of the claim in subsequent federal *habeas* proceeding. *Reed v. Ross*, 468 U.S. 1 (1984).

The United States Supreme Court has also recognized an exception for those actually innocent. To meet this exception, a petitioner must show that he is actually innocent of the crime or the punishment and that a failure to review his claim would be a miscarriage of justice, and a "court may grant the writ even in the absence of a showing of cause for the procedural default." *Murray*, 477 U.S. at 496. The Eighth Circuit Court clarified the actual innocence exception, stating "the concept of actual innocence is used as a 'gateway,' that is, actual innocence, if it can be shown, opens the gate to consideration of constitutional claims on their merits,

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claims that would otherwise be procedurally barred. . . ." *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002) (citing *Sawyer v. Whitley*, 505 U.S. 333 (1992); *Kuhlmann v. Wilson*, 477 U.S. 436 (1986)). To establish actual innocence, a petitioner must demonstrate that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 327-28 (citation omitted).

The actual innocence exception is not limited to inquiry into actual innocence of the crime, but extends to actual innocence of the punishment. In *Sawyer v. Whitley*, the United States Supreme Court examined the issue of actual innocence of the death penalty. 505 U.S. 333 (1992). The Court held that to show actual innocence of the death penalty, a petitioner has to "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." *Id.* at 336. The Eighth Circuit Court has applied a more lenient test, stating the actual innocence exception "will be available if the federal constitutional error alleged *probably* resulted in a verdict of death against whom the jury would otherwise have sentenced to life imprisonment." *Id.* at 345, (quoting *Stokes v. Armontrout*, 893 F.2d 152, 156 (8th Cir. 1989) (additional citation omitted)).

In the case *sub judice*, the mental retardation claim has been procedurally defaulted, as Petitioner did not properly and timely

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raise the claim in his state court appeals, nor has he successfully shown that a procedural default exception applies. The "Cause and Prejudice" exception and the "Actual Innocence" exception, as well as a showing of fundamental miscarriage of justice may have been applicable to Petitioner's mental retardation claim, except, as discussed below, Petitioner has failed to provide sufficient evidence of mental retardation.[3] Without a sufficient showing of mental retardation, further inquiry into Petitioner's *Atkins* claim is not warranted. *See Wiggins v. Lockhart*, 825 F.2d 1237, 1238 (8th Cir. 1987), *cert. denied*, 484 U.S. 1074 (1988), *see also* 28 U.S.C. § 2254(e)(2)(B) (a Court may not hold an evidentiary hearing on a claim arising from a new rule of constitutional law unless the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error no reasonable fact finder would have imposed the death penalty).

3. Evidence of Mental Retardation

Petitioner carries the burden of presenting sufficient facts to show that a writ is warranted. *Id.*

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[3] It is unlikely that Petitioner would have qualified for the "Cause and Prejudice" exception. Petitioner argues that *Atkins* created a new constitutional right, therefore, cause exists for his failure to raise his *Atkins* claim in state court. *See Reed v. Ross*, 468 U.S. 1, 16 (1984) ("where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures"). However, cause does not exist if a petitioner had tools available for him to construct the necessary legal argument during earlier proceedings. *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996), *see also* 28 U.S.C. § 2254(e)(2)(A)(i). Here, Petitioner had available to him during trial and in later proceedings Ark. Code Ann. § 5-4-618(b), which prohibits the sentence of death when the defendant is mentally retarded.

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The standard to prove mental retardation is set fourth as[4]:

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

Ark. Code Ann. § 5-4-618 (Michie 2004).

Petitioner presented the Court with an affidavit (Doc. 58) to support his claim of mental retardation. Petitioner states that the affidavit "confirms Petitioners mental retardation." *Id.* However, it is imperative to recognize that the affiants do not state that Petitioner was mentally retarded, but opined that he *may* be mentally retarded. The affidavit was prepared by two licensed clinical social workers, hired by Petitioner's attorney to "provide an opinion regarding the adequacy of previous investigations specifically as they relate to identifying mental retardation and other relevant social, emotional and mental deficits in the case of [Petitioner]." The affiants discussed Petitioner's I.Q. (79), school records, and social behaviors to support their belief that Petitioner may be mentally retarded.

The evidence presented to the Court does not rise to the level

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[4]The United States Supreme Court left the definition of mental retardation to the States. *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (quoting *Ford v. Wainwright*, 477 U.S. 399, 405, 416-17 (1986) ("we leave to the States the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences")).

of requiring further inquiry. *See Wiggins*, 825 F.2d at 1238 ("In order to warrant relief, or, as an initial matter, even an evidentiary hearing, a habeas corpus petitioner must allege sufficient facts to establish a constitutional claim. Mere conclusory allegations will not suffice.") Petitioner has not provided the results of an I.Q. test that would trigger a presumption that he is mentally retarded (I.Q. of 65 under Ark. Code Ann. § 5-4-618), nor did he present any medical findings that Petitioner is mentally retarded. The claim that Petitioner is mentally retarded and cannot be executed without violating the constitution, in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), is not supported by sufficient facts for the Court to grant a writ of *habeas corpus* or to order an evidentiary hearing. Accordingly, we find that Petitioner's mental retardation claim is procedurally defaulted and default is not excused. The claim is hereby **DISMISSED with prejudice.**

B. Remaining Claims

The Eighth Circuit Court limited the issue on remand to "the question of whether Mr. Sasser is mentally retarded and whether pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002) the Eighth Amendment prohibits his execution." (Doc. 37.) The Eight Circuit Court amended its judgment (Doc. 37) by remanding specific questions regarding exhaustion of the mental retardation claim. (Doc. 44.) The only proper claim before the Court is whether

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Petitioner is mentally retarded and whether his execution is prohibited by the Eighth Amendment. However, in order to preserve judicial economy, we reviewed the remaining claims.

1. Claims X-XII[5]

Abusive claims, one that could have been brought at the time of the original *habeas* petition, are unreviewable absent showing of either cause and prejudice or actual innocence. *Cochrell v. Purkett*, 113 F.3d 124 (8th Cir. 1997) (citing *Schlup v. Delo*, 513 U.S. 298, 318 n.34 (1995)). The facts alleged in Claims X-XII were known or should have been known to Petitioner at the time he filed his first *habeas* petition.

Because Claim X is related to the mental retardation claim remanded by the Eight Circuit Court, we will review the claim on its merits. Claim X includes a claim that Petitioner's trial defense counsel was ineffective for failing to investigate whether Petitioner was mentally retarded. *Atkins v. Virginia*, established a new constitutional rule that prohibits the execution of mentally retarded persons. 536 U.S. 302 (2002). The creation of a new constitutional rule may excuse a Petitioner from raising the newly recognized claim in a previous petition for writ of *habeas corpus*, if the issue is

[5] Claim X, Petitioner's Death Sentence Should be Vacated Because Counsel was Ineffective for Failing to Adequately Investigate, Develop, and Present Mitigating Evidence Including Evidence of Mental Retardation.

Claim XI, Mr. Sasser's Statement was Taken in Violation of the Fifth, Sixth, and Fourteenth Amendments, Requiring that his Convictions and Death Sentence be Vacated.

Claim XII, Mr. Sasser was not Competent at the Time of Trial, Direct Appeal, and Post-Conviction Proceeding Stages and Prior Counsel Provided Ineffective Assistance on These Matters. (Doc. 48.)

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novel enough to warrant excusing the procedural default. *Reed v. Ross*, 468 U.S. 1 (1984); 28 U.S.C. 2244(b)(2). However, in the case *sub judice*, Petitioner had a State rule similar to the one created in *Atkins,* available to him both at trial and during his appeals. Due to the similar State rule prohibiting the execution of mentally retarded persons, whether Petitioner is mentally retarded or that his counsel failed to discover he was mentally retarded are issues that could or should have been known at the time Petitioner filed his first *habeas* petition. Furthermore, "'attorney error that results in a procedural default' is not cause unless the attorney's performance was constitutionally deficient." *Armstrong v. Iowa*, 418 F.3d 924, 927 (8th Cir. 2005) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)), *cert. denied*, 126 S. Ct. 1351 (2006). Petitioner has failed to show that he is mentally retarded, therefore, he cannot show prejudice in his attorney's failure to find and present evidence of mental retardation.[6]

The issues contained in the rest of Claim X (failure to investigate and present mitigating evidence) and Claims XI-XII

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[6]Even if Claims X-XII were not abusive, they would not survive a review on their merits. There has not been an adequate showing that Petitioner is mentally retarded or was not competent during trial or after trial. The ineffective assistance of counsel claims would fail under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, Petitioner "must show that counsel's performance was deficient.... [and] that the deficient performance prejudiced the defense." *Id.* Objective medical and clinical data does not show that Petitioner is mentally retarded or that he was not competent during trial, thus failure to conduct further investigations into the issues was not objectively unreasonable under *Strickland*, as any possible deficiency failed to prejudice Petitioner. Since there is no finding of mental retardation, the claim that Petitioner's statement was involuntary due to mental retardation must also fail.

(whether Petitioner was competent during proceedings and whether counsel provided ineffective assistance regarding Petitioner's alleged incompetence[7]) also could or should have been known at the time Petitioner filed his first *habeas* petition. Accordingly, the Court finds Claims X-XII impermissible as abusive claims and they are hereby **DISMISSED with prejudice**.

2. Claims I-VIII

Same-claim successive petitions are prohibited. 28 U.S.C.A. §2244(b)(1) (1996) ("A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed."). Any claim that had been previously adjudicated and denied on the merits in a previous federal *habeas* proceeding, shall be dismissed, without a finding, unless a "substantial injustice" will occur in the absence of a finding. 28 U.S.C. 2244(b)(1); *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *LaFevers v. Gibson*, 238 F.3d 1263, 1256-66 (10th Cir. 2001).

Petitioner attempts to relitigate claims raised in his original petition by stating he is incorporating the claims of the prior petition,[8] and by numbering the first claim in the successive petition IX (the initial petition contained claims numbered I-VIII.

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[7] *Id.*

[8] Petitioner states that "Claims 1 to 8 are in Mr. Sasser's original and/or amended petition for habeas corpus relief and are incorporated herein." Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* Relief, p. 6 n.1 (Doc. 48).

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The claims contained in the original petition have been adjudicated on their merits and are thus impermissible claims in Petitioner's current successive petition. Therefore, the claims that were adjudicated as part of the original petition, Claims I-VIII, are impermissible claims and are hereby **DISMISSED with prejudice.**

VI. CONCLUSION

In light of the above findings, the Court finds that Petitioner's Second Supplemental and Amended Petition for Writ of *Habeas Corpus* should be and hereby is **DENIED** in its entirety. Judgment will be entered accordingly.

IT IS SO ORDERED this 9th day of January 2007.

/S/ Harry F. Barnes
Harry F. Barnes
United States District Judge

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2385

Andrew Sasser,	*	
	*	
Appellant,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Western District of Arkansas.
Larry Norris, Director, Arkansas	*	
Department of Corrections,	*	
	*	
Appellee.	*	
	*	

Submitted: September 25, 2008
Filed: January 23, 2009

Before RILEY, BRIGHT, and MELLOY, Circuit Judges.

RILEY, Circuit Judge.

Andrew Sasser (Sasser) appeals the district court's denial of his Second Supplemental and Amended Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254. Sasser argues the district court erred by ruling Sasser is not entitled to an evidentiary hearing on his claims that his death sentence (1) violates his Eighth Amendment rights because he is mentally retarded, and (2) should be vacated because his trial counsel was ineffective for failing to investigate and develop the mental

retardation issue at trial. We reverse and remand to the district court for an Atkins[1] evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim. We affirm the district court's denial of relief on Sasser's ineffective assistance of counsel claim.

I. BACKGROUND

Sasser is an Arkansas state prisoner sentenced to death in 1994 for the July 1993 brutal murder of Jo Ann Kennedy, a convenience store clerk. In 1995, the Arkansas Supreme Court affirmed Sasser's conviction and sentence, Sasser v. Arkansas, 902 S.W.2d 773, 779 (Ark. 1995), and in 1999 affirmed the denial of Sasser's application for state post-conviction relief, Sasser v. Arkansas, 993 S.W.2d 901, 903 (Ark. 1999). On July 7, 2000, Sasser filed a petition for writ of habeas corpus in the United States District Court for the Western District of Arkansas challenging his conviction and sentence. Sasser later filed an amended petition. The Arkansas district court denied Sasser's petition on May 28, 2002.

On June 20, 2002, the United States Supreme Court issued its decision in Atkins, "[c]onstruing and applying the Eighth Amendment in the light of our 'evolving standards of decency,'" and concluding execution of mentally retarded persons is cruel and unusual punishment in violation of the Eighth Amendment. 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). On June 27, 2002, Sasser filed his notice of appeal from the district court's denial of his habeas petition. On June 18, 2003, Sasser filed a motion in this court styled "Appellant's Supplemental Motion to Remand to the District Court or in the Alternative Motion to File a Second or Successive Habeas Corpus Petition." Sasser sought remand so the district court could consider his claim that, under Atkins, he is mentally retarded and ineligible for the death penalty. This court granted Sasser's motion to remand on August 15, 2003, stating, "[t]he issue on remand is limited to the question of whether

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[1] Atkins v. Virginia, 536 U.S. 304 (2002).

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Mr. Sasser is mentally retarded and whether pursuant to [Atkins], the Eighth Amendment prohibits his execution." We also explained the remand would be treated as a successive habeas petition rather than as an amendment to Sasser's earlier petition, declaring, "[t]o the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted."

On August 29, 2003, the government filed a motion for rehearing, arguing Sasser had not yet exhausted his mental retardation claim in Arkansas state court. On March 9, 2004, this court issued an amended judgment directing the district court to first determine whether Sasser had exhausted his claim in Arkansas state court and, if the district court determined Sasser had a viable state court remedy, to consider holding the remanded petition in abeyance pending resolution of the claim by the Arkansas state courts.

On remand, Sasser filed a motion for extension of time, which the district court granted, and on September 3, 2004, Sasser filed a "Second Supplemental and Amended Petition" setting forth his mental retardation claim. Sasser also presented several other claims, including a claim his attorney was constitutionally ineffective for failing to investigate and develop the mental retardation issue at Sasser's trial. On August 22, 2005, the United States Supreme Court denied certiorari in Engram v. Arkansas, 200 S.W.3d 367 (Ark. 2004), thereby establishing Sasser did not have a viable Arkansas state court remedy.[2]

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[2]In Engram, the Arkansas Supreme Court held the defendant was not entitled to have a mandate affirming his death sentence recalled based on the Supreme Court's subsequent decision in Atkins. The court reasoned the defendant could have raised the mental retardation issue at trial by availing himself of an Arkansas statute in effect at the time of trial that prohibited the execution of mentally retarded individuals. Engram, 200 S.W.3d at 371.

On November 22, 2005, the district court entered a scheduling order, stating, "the Court has determined that any outstanding issues concerning the presentation of evidence on the issue of mental retardation need to be resolved in a timely fashion." The district court ordered any motions regarding mental evaluations of Sasser be filed by January 13, 2006. On January 13, 2006, Sasser filed a discovery motion indicating he needed to prepare a complete social history so he could identify which experts would be needed to evaluate him. Sasser also requested permission to serve a subpoena duces tecum on various entities and individuals. The district court granted Sasser's motion to conduct discovery, stating discovery would "allow facts to be presented to the Court to assist with the question of whether an evidentiary hearing is warranted." On June 14, 2006, the district court ordered that discovery be completed by July 31, 2006, and any additional motions (including motions for an evidentiary hearing) be filed by August 31, 2006. The court warned, "Petitioner's failure to file the above mentioned motions will constitute notice to the Court that Petitioner does not intend to present additional evidence regarding his mental retardation claim." Sasser filed no additional motions.

On January 9, 2007, without holding an evidentiary hearing, the district court denied Sasser's Second Supplemental and Amended Petition in its entirety. The district court determined Sasser's claim that his death sentence violates the Eighth Amendment was procedurally defaulted because Sasser did not raise the issue in state court. The district court found Sasser did not satisfy the "cause and prejudice" exception to procedural default because he could have raised the retardation issue during trial under an Arkansas statute prohibiting execution of mentally retarded persons. The district court also found Sasser did not satisfy the "actual innocence" exception to procedural default because he failed to present sufficient evidence of his mental retardation.

With respect to Sasser's ineffective assistance of counsel claim, the district court concluded, "[t]he Eighth Circuit limited the issue on remand to 'the question of

whether Mr. Sasser is mentally retarded and whether pursuant to [Atkins], the Eighth Amendment prohibits his execution'. . . . [Therefore] [t]he only proper claim before the Court is whether Petitioner is mentally retarded and whether his execution is prohibited by the Eighth Amendment."

On appeal, Sasser maintains his mental retardation claim was not procedurally defaulted by his failure to raise the claim in Arkansas state court. Sasser argues he is entitled to an evidentiary hearing to present evidence in support of his claim that he is mentally retarded and the Eighth Amendment prohibits his execution. Sasser also contends the district court erred by denying an evidentiary hearing on Sasser's claim that his trial counsel was ineffective for failing to investigate and present evidence of Sasser's mental retardation during the penalty phase of Sasser's trial.

II. DISCUSSION

A. Eighth Amendment Claim

"We review a district court's finding of procedural default *de novo*." Schawitsch v. Burt, 491 F.3d 798, 802 (8th Cir. 2007) (citing Kerns v. Ault, 408 F.3d 447, 449 (8th Cir. 2005)).

Sasser contends this court's decision in Simpson v. Norris, 490 F.3d 1029 (8th Cir. 2007), requires the district court hold an evidentiary hearing on the merits of Sasser's mental retardation claim. We agree. In Simpson, the district court denied the petitioner an evidentiary hearing on his Atkins claim in part "because 'before trial, at trial, or in his post-conviction petition,' [the petitioner] did not present a mental retardation defense to the death penalty (a defense that was available to him under state law, *see* Ark. Code. § 5–4–618)." Id. at 1034. The Simpson petitioner argued the district court erred by holding his Eighth Amendment mental retardation claim under Atkins was defaulted by an omission that occurred before Atkins was decided. Id. at 1032. We reversed, explaining,

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> We think, contrary to the district court's holding, that the availability of a similar claim under Arkansas law is irrelevant to our consideration here: Mr. Simpson is raising a previously unavailable federal claim, and that claim is separate and distinct. . . . Since Atkins created a previously unavailable claim based on the unconstitutionality of executing the mentally retarded, Mr. Simpson can hardly be said to have lacked diligence in developing the factual basis of that claim in state court.

Id. at 1035.

We further explained, "[w]here the facts are in dispute, the federal court in habeas corpus *must hold an evidentiary hearing* if the habeas applicant did not receive a full and fair evidentiary hearing in state court." Id. (citing Townsend v. Sain, 372 U.S. 293 (1963)) (emphasis added). "Mr. Simpson has alleged that he is mentally retarded as Atkins defines that condition, which would entitle him to relief, and that matter remains in dispute." Id.[3] We therefore directed the district court to "give Mr. Simpson the chance to develop the factual basis of his claim *and present it at an evidentiary hearing*." Id. (emphasis added). We recently reaffirmed our Simpson holding. See Jackson v. Norris, 256 Fed. Appx. 12 (8th Cir. 2007) (per curiam) (unpublished).

Like the petitioner in Simpson, the district court in Sasser's case concluded Sasser's Atkins claim was procedurally defaulted because Sasser did not raise the issue in state court under state law, and did not satisfy the "cause and prejudice" exception to procedural default because he could have raised the retardation issue under the same Arkansas statute prohibiting execution of mentally retarded persons. This reasoning is now invalid under Simpson, 490 F.3d at 1035 (declaring, "the availability of a similar claim under Arkansas law is irrelevant to our consideration here").

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[3]Atkins actually does not define mental retardation, leaving the development of the new constitutional restriction to the states. Atkins, 536 U.S. at 317.

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The district court further found Sasser did not satisfy the "actual innocence"[4] exception to procedural default because he failed to present sufficient evidence of his mental retardation. This reasoning is contrary to Simpson, which found Simpson's pleading adequate when Simpson "alleged that he is mentally retarded as Atkins defines that condition" in order to be allowed to present evidence in support of his claim at an evidentiary hearing. Id. at 1035. Sasser's petition alleges (1) he meets the diagnostic criteria for mental retardation promulgated by the American Association on Mental Retardation and the American Psychiatric Association; (2) his IQ is 79, which Sasser asserts places him in the mentally retarded range, taking into account the margin of error; (3) he was incapable of graduating from high school despite being enrolled in school for twelve years; (4) he was never able to live independently and was 29 at the time of Kennedy's murder and still living with his mother (Sasser claims he once attempted to leave home, living in an abandoned truck in the woods near his mother's home, and sneaking into his mother's house to get food from the refrigerator); (5) he was incapable of paying bills or maintaining a checking account; (6) he was capable of only the simplest, manual-labor jobs; and (7) he manifests significant deficits in intellectual and adaptive functioning. While Simpson may not mandate an evidentiary hearing in every conceivable set of circumstances, there is no question the allegations in Sasser's petition are as adequate as Simpson's pleading threshold where the petitioner "alleged that he is mentally retarded as Atkins defines that condition" in order to obtain an evidentiary hearing on his mental retardation claim. Id. Nothing in Sasser's case precludes the need for an Atkins evidentiary hearing.

The government attempts to distinguish Simpson in two ways. First, the government argues Sasser's petition should be subject to more stringent standards because, unlike the first-time habeas petitioner in Simpson, Sasser's petition is a

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[4]A petitioner is "actually innocent" of the death penalty where he is ineligible for the death penalty. See Sawyer v. Whitley, 505 U.S. 333, 345 (1992).

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successive habeas petition.[5] This distinction has no effect on whether Sasser is entitled to an evidentiary hearing. The government contends Sasser's petition fails to meet 28 U.S.C. § 2244(b)(2)(A)'s requirement that a successive petition asserting claims not presented in a prior application be dismissed, unless "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." As Sasser correctly notes, we expressly recognized in Simpson, "Atkins created a *previously unavailable* claim based on the unconstitutionality of executing the mentally retarded." Simpson, 490 F.3d at 1035 (emphasis added). Because Atkins teaches us Sasser's future execution would violate the Eighth Amendment if Sasser were mentally retarded, the application of Atkins to Sasser's petition actually is prospective. Sasser meets the requirement of § 2244(b)(2)(A).

The government also attempts to distinguish Simpson by arguing, unlike the petitioner in Simpson, the district court afforded Sasser a "remand procedure." Sasser failed to comply with the district court's directive that any additional motions (including motions for an evidentiary hearing) be filed by August 31, 2006. The district court warned, "Petitioner's failure to file the above mentioned motions will constitute notice to the Court that Petitioner does not intend to present additional evidence regarding his mental retardation claim." Sasser was not obligated to expand the record with additional evidence showing he was entitled to a hearing, nor was he obligated to file another motion requesting a hearing—Sasser already requested a hearing in his "Second Supplemental and Amended Petition." Simpson explains Sasser is entitled to a hearing simply by virtue of "alleg[ing] that he is mentally

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[5] Sasser argues his petition should be treated as an amendment to his first habeas petition rather than a successive petition. This Court expressly stated in its remand order, "[t]o the extent the request for remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted." Thus, we will treat Sasser's petition as a successive habeas petition.

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retarded as Atkins defines that condition." Simpson, 490 F.3d at 1035. Given the circumstances and factual allegations in Sasser's case, Simpson expressly requires an Atkins evidentiary hearing, not some other type of "remand procedure" crafted by the district court. Id. We therefore reverse and remand to the district court for an evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim.

B. Ineffective Assistance of Counsel

Sasser asserts the district court erred by concluding his ineffective assistance of counsel claim was not properly before the court. Sasser claims he is entitled to a hearing on the issue of whether his counsel was ineffective for failing to investigate and develop Sasser's alleged mental retardation at trial. This argument flatly contradicts Sasser's Eighth Amendment argument. On one hand, Sasser argues his failure to pursue the retardation issue should be excused because the claim was "previously unavailable" until Atkins. On the other hand, Sasser's argues his trial counsel was constitutionally ineffective for failing to pursue what Atkins characterizes as a "previously unavailable" claim. Trial counsel's failure to anticipate new law does not constitute ineffective assistance of counsel. See Schawitsch, 491 F.3d at 804 (citing Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999)).

Regardless of the merit of Sasser's ineffective assistance of counsel claim, the district court properly concluded Sasser's ineffective assistance of counsel claim was not properly before it. We expressly limited the issue in our prior remand "to the question of whether Mr. Sasser is mentally retarded and whether pursuant to [Atkins], the Eighth Amendment prohibits his execution." Sasser cites Pediatric Specialty Care, Inc. v. Arkansas Dept. of Human Servs., 364 F.3d 925, 931 (8th Cir. 2004) for the proposition that the district court may "decide any issue not expressly or impliedly disposed of on appeal." Id. at 931 (quotation marks and citation omitted). Pediatric Specialty Care is not on point. In Sasser's case, there were no lingering issues we failed to dispose of on appeal. We expressly limited the district court to consideration of *one issue.* By doing so, we impliedly prohibited the district court's consideration

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of *any other issue*. Our remand order did not give Sasser license to raise whatever other claims he wished, so long as those claims had some relationship to his alleged mental retardation. The district court correctly decided Sasser's ineffective assistance claim was not properly before it.

C. Statute of Limitations

The government argues, for the first time on appeal, that Sasser's successive petition is barred by the statute of limitations. The statute at issue, 28 U.S.C. § 2244(d)(1)(C), provides,

> [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 the latest of [various events, including] 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[.][6]

The statute of limitations in Sasser's case began to run on June 20, 2002, when Atkins was decided. Sasser filed his application in this court for authorization to file a successive habeas petition on June 19, 2003, less than one year after Atkins. However, Sasser did not actually file his successive habeas petition in the district court until September 3, 2004.[7]

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[6]The parties agree Atkins is retroactively applicable to cases on collateral review.

[7]We express no opinion on whether Sasser's petition was timely filed.

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Sasser protests the government is not entitled to raise the statute of limitations issue for the first time on appeal.[8] In its brief, the government offers no justification for, or even acknowledgment of, its failure to raise the statute of limitations issue at any time before its appellate brief. "The [Federal] Rules [of Civil Procedure] provide that [statute of] limitations defenses are forfeited unless pleaded in an answer or an amendment to the answer." Barnett v. Roper, 541 F.3d 804, 807 (8th Cir. 2008) (citing Day v. McDonough, 547 U.S. 198, 207 (2006) (in turn citing Fed. R. Civ. P. 8(c), 12(b), and 15(a)) (addressing one-year statute of limitations in habeas case); see also Trussell v. Bowersox, 447 F.3d 588, 590 (8th Cir. 2006) (addressing the merits of a habeas petition because, while it was "doubtful that Trussell filed his petition within the one-year limitations period. . . . the statute of limitations [does not] constitute[] a jurisdictional bar to our review"). District courts may consider *sua sponte* the timeliness of a habeas petition, but because the statute of limitations defense is not regarded as jurisdictional, district courts are under no obligation to raise the issue *sua sponte*. Day, 547 U.S. at 202, 205 (citations omitted). The discretion to consider the statute of limitations defense *sua sponte* does not extend to the appellate level. Barnett, 541 F.3d at 807. Because the government did not timely assert the statute of limitations defense, the statute of limitations defense is forfeited, and we will not address the defense any further.

III. CONCLUSION

We reverse and remand to the district court for an Atkins evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim. We affirm the district court's denial of relief on Sasser's ineffective assistance of counsel claim. If the mental retardation issue returns to us on appeal after the district court adjudicates the

[8]The government mentioned the statute of limitations issue for the first time after the district court denied Sasser's successive petition in a footnote to the government's response to Sasser's motion to alter or amend the district court's judgment. The government did not argue Sasser's petition was time-barred until its appellate brief.

merits, we direct that Sasser's mental retardation claim be consolidated with the other unresolved claims Sasser raised in his initial habeas petition.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2385

Andrew Sasser,

Appellant

v.

Larry Norris, Director, Arkansas Department of Corrections,

Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana
(4:00-cv-4036-HFB)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Loken, Judge Wollman, Judge Colloton and Judge Gruender would grant the petition for rehearing en banc.

Judge Smith and Judge Shepherd did not participate in the consideration or decision of this matter.

COLLOTON, Circuit Judge, dissenting from denial of rehearing en banc.

For the reasons discussed in *Simpson v. Norris*, 499 F.3d 874 (8th Cir. 2007) (opinion dissenting from denial of rehearing en banc), I would grant rehearing to reconsider the panel's conclusion that Andrew Sasser did not procedurally default his Eighth Amendment claim based on *Atkins v. Virginia*, 536 U.S. 304 (2002), by

failing to raise the defense of mental retardation in accordance with the Arkansas Code during state court proceedings. *See Sasser v. Norris*, 553 F.3d 1121, 1125 (8th Cir. 2009). Arkansas already complied with the Eighth Amendment rule of *Atkins* before *Atkins* was decided, *see* 536 U.S. at 314 & n.12; Ark. Code Ann. § 5-4-618, yet Sasser made no effort to invoke the protections that Arkansas law provided. The district court thus concluded that Sasser had procedurally defaulted his *Atkins* claim. *Sasser v. Norris*, No. 00-4036, 2007 WL 63765, at *6-7 & n.3 (W.D. Ark. Jan. 9, 2007).

The *Sasser* panel concluded that the district court's reasoning was "invalid" in light of *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007). *Sasser*, 553 F.3d at 1125. That is one plausible reading of *Simpson*, although the potentially applicable discussion is cryptic. *See* 490 F.3d at 1035. Simpson himself, on the other hand, argued in opposition to the State's petition for writ of certiorari that the issue of procedural default was not decided by this court, and that *Simpson* addressed only the applicability of 28 U.S.C. § 2254(e)(2) and the statutory requirements for an evidentiary hearing. Brief in Opposition to Petition for Writ of Certiorari at 4, *Norris v. Simpson*, No. 07-653 (U.S. Jan. 16, 2008). Indeed, in response to the State's contention that this court's decision on procedural default conflicted with *Dugger v. Adams*, 489 U.S. 401, 407-10 (1989), Simpson urged that "the Eighth Circuit is still free to adopt [the State's] position if it is timely presented to that court in a later case." Brief in Opposition at 6.

In this case, the issue is squarely presented. The district court ruled that Sasser's *Atkins* claim was procedurally defaulted, and the three-judge panel of this

court addressed the point directly. I would therefore grant rehearing to reconsider the panel's conclusion on procedural default.[1]

April 14, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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[1] The State also urges rehearing on the question whether Sasser's petition for writ of habeas corpus is an impermissible successive petition under 28 U.S.C. § 2244(b)(2)(A). The State's argument on that point, however, does not seem to recognize the possibility that if a prisoner *had raised* a meritorious mental retardation claim in accordance with the Arkansas procedure, but the Arkansas courts nonetheless rejected it, then relief would not have been available from federal courts applying the Eighth Amendment to a first federal habeas petition that was resolved before *Atkins*.

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Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

October 13, 2009

Clerk
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 S. 10th Street, Rm. 24329
St. Louis, MO 63102

Re: Larry B. Norris, Director, Arkansas Department of Correction
v. Andrew Sasser
No. 09-45
(Your No. 07-2385)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter, Clerk

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER **PETITIONER**

v. **CIVIL NO.: 4:00-cv-04036-JLH**

RAY HOBBS, Director,
Arkansas Department of Corrections[1] **RESPONDENT**

O R D E R

Petitioner Andrew Sasser ("Sasser"), sentenced to death for murder and confined at the Maximum Security Unit of the Arkansas Department of Correction ("ADC"), seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996. Pet., ECF No. 48. After careful consideration, and for the reasons that follow, Sasser's remaining claim, that he is mentally retarded and thus ineligible for the death penalty, will be dismissed with prejudice.

I. Procedural History

A. Summary of Petitioner's Criminal Trial

On May 4, 1994, a jury convicted Sasser of capital murder and sentenced him to death for the homicide of Jo Ann Kennedy. *See Sasser v. State*, 902 S.W.2d 773 (Ark. 1995).

[1] Respondent Ray Hobbs was officially named the Director of the Arkansas Department of Correction on June 26, 2010, terminating his position as "interim director." The Clerk of the Court is directed to amend the docket sheet accordingly.

At the jury trial, Sasser's guilty plea was not accepted by the trial court due to the state's refusal to waive the death penalty. *Id.* at 775. Sasser stipulated that he caused the death of the victim while in the possession of and while driving his brother's pickup truck. *Id.* Other stipulated facts included: Sasser stopped at the E-Z Mart in Garland City two or three times to buy chips and to use the telephone between the hours of 3:00 p.m. on July 11, 1993 and approximately 12:00 a.m. on July 12, 1993; the victim was discovered nude from the waist down; and the pants and panties found in the E-Z Mart's men's bathroom were hers. *Id.*

The State's first witness at trial, Jeanice Pree, testified she and her mother, Gloria Jean Williams, lived across the street from the Garland City E-Z Mart. *Id.* Pree testified she had an unobstructed view of the store. *Sasser*, 902 S.W. 2d at 775. Pree testified she also worked at the E-Z Mart and believed its front door was locked at 12:00 midnight and thereafter customers were required to use a drive-through window. *Id.* Pree testified she was sitting on her couch watching television when she looked out her window, saw the victim and a man behind the store counter and assumed he was a friend of the victim. *Id.* Pree testified she looked back and saw the victim and the man coming to the store's front door. *Id.* Pree testified she could tell the victim was being forced to come out because it looked like her hands were behind her

back. *Id.* Pree testified she telephoned 911. *Sasser*, 902 S.W.2d at 775. The police dispatcher testified he received Pree's 911 telephone call at approximately 12:46 a.m. on July 12, 1993, and that she stated "there was a woman that she believed was being killed at the E-Z Mart, being drug through the window." *Id.*

Gloria Jean Williams testified she watched the E-Z Mart from the window in her house while her daughter (Pree) telephoned 911. *Id.* Williams testified she saw a truck leave the store, and then the victim "came around from the side of the E-Z Mart. She reached for the door and she just collapsed, right there." *Id.*

Miller County Sheriff's Deputy Jim Nicholas testified the victim was found lying just outside the E-Z Mart door on the sidewalk, and appeared to be dead. *Sasser,* 902 S.w.2d at 775. Nicholas testified the victim was nude from the waist down, and what appeared to be her panties and pants were located in the men's restroom of the store. *Id.* Nicholas testified one of the victim's shoes was in the front aisle and one behind the counter, and a large wad of hair was found behind the cash register near the drive-through window. *Id.* Nicholas testified blood spatters were observed at the drive-through window, on the store's "outside aisles," counter, and on the men's bathroom wall. *Id.* at 775-76. Nicholas testified the drive-through window was open. *Id.* at 776.

Numerous items of physical evidence and photographs were introduced into evidence through the testimony of Nicholas and

Miller County Sheriff's Department Investigator Toby Giles, including a photograph of the drive-through window and cash register area showing two plastic containers of nachos. *Sasser*, 902 S.W.2d at 776.

Arkansas State Police Investigator Robert Neal testified he and Miller County Sheriff H.L. Phillips interrogated Sasser at the Lafayette County Sheriff's Office in Lewisville for approximately two hours beginning around 7:45 p.m., on July 12, 1993. *Id.* Sasser's tape recorded statement and a transcript of the same were introduced at trial and provided as follows. *Id.* Sasser stated he drove up to the window at the Garland City E-Z Mart and ordered nachos from the victim. *Id.* He described the victim as a "lady ... [who] had an attitude" and was angry because someone else had ordered nachos, then failed to pick up the order. *Id.* Sasser stated the victim tried to sell him two orders of nachos, but he declined. *Sasser*, 902 S.W.2d at 776. He stated they argued and the victim slammed the drive-through window on his hand. *Id.* Sasser stated he jerked the window open whereupon the victim cut him with an knife-like object with a blade. *Id.* Sasser stated he grabbed the victim and she jerked him through the drive-through window. *Id.* He stated they scuffled, moving from the drive-through window area, down the counter area, out into the store's interior, back to the store office at the rear of the store, and up to the potato chip rack at the front of the store.

Id. Sasser stated the victim opened the store's front door, they exited the store and the victim followed him to his pickup truck, still fighting. *Id.* Sasser stated he entered the vehicle and left. *Sasser*, 902 S.W.2d at 776.

Sasser stated he did not recall going into the E-Z Mart's restrooms but that he "had to go back there." *Id.* He stated the victim repeatedly hit him with her fists while they scuffled. *Id.* Sasser stated he wrested the victim's knife-like object from her and used it to hit her, finally dropping the object near the pickup truck. *Id.* Sasser stated he did not know why the victim's clothes were removed. *Id.* When asked whether he did not remove the victim's clothes or did not remember doing so, he replied: "No sir." *Sasser*, 902 S.W.2d at 776. Sasser stated he did not try to rape the victim or to rob her. *Id.*

The State's final witness, Ms. Carter, testified Sasser attacked and raped her on April 22, 1988 at the E-Z Mart Store in Lewisville. *Id.* Carter testified she was the only employee on duty when Sasser entered the store at approximately 1:00 a.m. and purchased cigarettes, returned fifteen minutes later and purchased a soft drink, then returned five minutes later, asked to use the telephone and stated he had a wreck on his motorcycle. *Id.* Carter testified Sasser then stood in the store after stating he was waiting on his wife to pick him up. *Id.* Carter testified that, at approximately 1:35 a.m., a truck drove up and appellant went

outside to talk to its occupants. *Sasser*, 902 S.W.2d at 776. Carter testified she moved from behind the cash register and began putting up items in the freezer when Sasser approached her from behind and hit her on the back of the head with a soft-drink bottle. *Id.* Carter testified she and Sasser struggled and he continued to hit her, then forced her to a utility/bathroom located at the back of the store. *Id.* Carter testified another man approached and Sasser decided to take her out of the store. *Id.* Carter testified Sasser forced her out of the store, picked up his bicycle, and pushed Carter and the bicycle into an alley. Carter testified that, when the other man drove by, Sasser forced her across the street, told her to pull down her clothes, pulled down his own clothes, and raped her. *Id.* Carter testified Sasser then told her he should not have done it and should kill her, whereupon she begged him not to and agreed to say a truck had dropped her off and Sasser had found her. Carter testified Sasser forced her back to the store where the police were waiting. *Sasser*, 902 S.W.2d at 776. Carter testified that, when she gained the opportunity to speak privately to a policeman, she identified Sasser as her attacker. *Id.*

The state then rested and the defense presented no evidence. *Id.* The jury returned a verdict of guilty; the verdict did not identify the predicate offense or offenses the jury found as a required element of the crime of capital felony murder. *Id. at*

776-77. The state then introduced, for the jury's consideration in the sentencing phase, a certified copy of Sasser's 1988 convictions for Carter's second degree battery, kidnapping and rape. *Id. at 777.* The jury found one aggravating circumstance: that Sasser had previously committed another felony an element of which was the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another person. *Sasser*, 902 S.W.2d at 777. The jury found three mitigating circumstances: that Sasser would be a productive inmate, had a supporting family of him as an inmate, and had stipulated he caused the victim's death. *Id.* The jury found the aggravating circumstance outweighed any mitigating circumstances and justified the death sentence. *Id.*

B. State Court Appeal of Conviction

Sasser appealed his conviction to the Arkansas Supreme Court, raising one issue - whether the trial court abused its discretion when it permitted the state to introduce "prior acts" testimony in violation of Arkansas Rules of Evidence 404(b) and 403. *Id.* The Arkansas Supreme Court affirmed Sasser's conviction and sentence on July 17, 1995. *Id.*

C. State Post-conviction Relief

Subsequently, Sasser sought post-conviction relief pursuant to Arkansas Rules of Criminal Procedure 37. After conducting an evidentiary hearing, the circuit court denied Sasser's Rule 37

petition, in September 1997. On July 8, 1999, the Arkansas Supreme Court affirmed the lower court's denial of post-conviction relief. *See Sasser v. State*, 993 S.W.2d 901 (1999).

D. Federal Relief - Writ of Habeas Corpus

On July 7, 2000, Sasser petitioned for a writ of habeas corpus in federal court. Pet., ECF No. 3. Throughout several pleadings, Sasser presented eight (8) claims upon which he requested relief. At that point, Sasser had not raised a mental retardation claim. On May 23, 2002, this Court denied Petitioner's Petition for Writ of Habeas Corpus. Order, ECF No. 30. This Court issued a Certificate of Appealability for five (5) of Sasser's claims, on August 15, 2002. Certif. Appeal, ECF No. 34.

While on appeal at the United States Court of Appeals for the Eighth Circuit (Eighth Circuit Court), Sasser raised, for the first time, the claim of mental retardation as a bar against his execution. On August 21, 2003, the Eighth Circuit Court entered a judgment, remanding the mental retardation issue to this Court, and granted the motion to file a successive petition. J., ECF. No. 37. On August 29, 2003, this Court entered a Scheduling Order, stating that this Court was to determine whether Sasser is mentally retarded and whether his execution in prohibited. Sch. Order, ECF No. 40. This Court also stated that the appropriate standard for "mental retardation" is contained in ARK. CODE ANN. § 5-4-618. *Id.*

Then, on March 9, 2004, the Eighth Circuit Court entered an Amended Judgement, revising the previously entered order and remanded the case to this Court for a determination of whether the mental retardation claim had been exhausted. Am. J., ECF No. 44. If this Court were to conclude that Sasser had a viable state court remedy, the Eighth Circuit Court went on to "invite" this Court to determine whether "truly exceptional circumstances" involving "a consideration going beyond the running of the statute of limitations" exist. *See id.* (citation omitted).

On September 3, 2004, Sasser filed a Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief (the Petition). Pet., ECF No. 48. Sasser raised the mental retardation claim, alleging that Sasser's sentence to death by lethal injection violates the 8th and 14th Amendments. Sasser also raised an ineffective assistance of counsel claim; a claim that Sasser's statement to police was taken in violation of the 5th, 6th, and 14th Amendments, as it was involuntary in part due to Sasser's mental retardation; and that Sasser was incompetent during the trial and post-trial proceedings, and his counsel provided ineffective assistance on these matters. *Id.*

On November 5, 2004, Respondent filed a response. Resp., ECF No. 49. Sasser filed a reply on February 3, 2005. Reply, ECF No. 56. Additionally, on April 4, 2005, Sasser filed two affidavits from two licenced social workers as exhibits to the Petition. Ex.

1, ECF No. 58.

On June 14, 2006, this Court entered a Scheduling Order, Sch. Order, ECF No. 65, requiring any motions regarding "additional information Petitioner would like the Court to consider in relation to his mental retardation claim" be filed on or before August 31, 2006. *Id.*

Sasser failed to file any motions regarding the introduction of additional information to support the mental retardation claim. Thus, on January 9, 2007, this Court entered an Order, Order, ECF No. 71, denying the Second Supplemental and Amended Petition for Writ of Habeas Corpus Relief in its entirety on the grounds that Sasser's mental retardation claim was procedurally defaulted because he did not raise the issue in state court under state law. *See also* J., ECF No. 72.

Sasser then filed a Motion to Alter Judgment pursuant to FED. R. CIV. P. 59(e), Mot. ECF No. 73, which was denied on April 18, 2007. Order, ECF No. 80.

A Motion for Certificate of Appealability was filed, Certif. Appeal, ECF No. 82, and the Certificate was granted in part and denied in part. Order, ECF No. 84. The Certificate was denied regarding any claims outside the alleged mental retardation, as the remand from the Eighth Circuit Court of Appeals was limited to issues involving the mental retardation claim. *Id.*, *see also* Am. J., ECF No. 44. The Certificate was granted regarding

Petitioner's claims he should not be subject to a sentence of death due to mental retardation, and Petitioner's claims of ineffective assistance of counsel. Order, ECF No. 84.

After a petition for writ of certiorari with the United States Supreme Court was denied on October 29, 2009, Pet., ECF No. 90, this case was again remanded back to the district court on November 3, 2009 from the Eighth Circuit Court of Appeals. Mandate, ECF No. 91. The Eighth Circuit remanded "to the district court for an *Atkins* evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim." *Id.* at 11.

The Eighth Circuit disagreed with the procedural default analysis applied by this Court, because under the precedent of *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), the ability of a petitioner to raise a similar state-statute mental retardation claim and failing to do so will not default an *Atkins* constitutional claim. Mandate 8, ECF No. 91. Moreover, Sasser had "alleged that he is mentally retarded as *Atkins* defines that condition," and was entitled to an evidentiary hearing on that claim. *Id.* at 8-9.

The Eighth Circuit Court of Appeals concurred with this Court's reasoning that the ineffective assistance of counsel claim was not properly before it, and stated the review of the district court was limited to one issue, with prohibition from consideration of any other issue. *Id.* at 9-10. Additionally, the Eighth

Circuit stated that while a statute of limitations argument could be made regarding the mental retardation claim, the government had forfeited that defense by raising it for the first time on appeal, and the Eighth Circuit "will not address the defense any further." *Id.* at 11.

Pursuant to the Opinion and Mandate of the Eighth Circuit Court of Appeals, this Court held an evidentiary hearing regarding Sasser's claim of mental retardation for two days on June 15 and 16, 2010. *See* Mins., ECF Nos. 153, 154 and Tr., ECF No. 157. Respondent filed his post hearing brief on July 16, 2010, Hr'g Br., ECF No. 158, and Sasser filed his post hearing brief on the same date. Hr'g Br., ECF No. 159. Rely briefs were filed on July 30, 2010. Reply Br., ECF Nos. 161, 162.

II. Applicable Law

In 1988, the United States Supreme Court held that there was not then a national consensus to bar the execution of those who were mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989)(abrogated by, *Atkins v. Virginia*, 536 U.S. 304(2002)). However, when the high court again reached the question in 2002, it held that a national consensus had emerged, in the thirteen years since *Penry*, against the execution of mentally retarded offenders. *Atkins v. Virginia*, 536 U.S. 304 (2002).

In fact, while only two states barred the execution of mentally retarded persons at the time the Court decided *Penry*,

thirty states barred the practice at the time *Atkins* was decided in 2002. *See Penry*, 492 U.S. at 334; *Atkins*, 536 U.S. at 314; *see also Roper v. Simmons*, 543 U.S. 551, 592 (2005) (O'Connor, J., dissenting). Arkansas was one of the states mentioned by the Supreme Court to have passed legislation against executions of mentally retarded persons during the thirteen-year gap. *Atkins*, 536 U.S. at 314 (enumerating state statutes enacted between 1989 and 2001 exempting the mentally retarded from the death penalty.).

The Court in *Atkins* went on to hold that the Eighth Amendment "'places a substantive restriction on the state's power to take the life' of a mentally retarded offender." *Id.* at 321, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986). The Court further implicitly rejected the suggestion in *Penry* that the death penalty could not be barred if any mentally retarded person might theoretically deserve it, so that the effect of mental retardation should instead simply be considered as a mitigating factor. *Id.* at 318-19. Rather, it said, the very fact that persons are mentally retarded not only makes them more likely to give a false confession, but also makes them less able to assist their counsel, typically makes them poor witnesses, and may cause them to exhibit a demeanor that is unsympathetic and that may incorrectly imply a lack of remorse. *Id.* at 320-21. The Court concluded that "death is not a suitable punishment for a mentally retarded criminal." *Id.* at 321.

In *Atkins*, the Supreme Court refrained from imposing a definition of mental retardation, leaving that to the states. *Atkins*, 536 U.S. at 317. However, the Supreme Court did cite two clinical definitions formulated by psychological associations, that of the American Association on Mental Retardation (AAMR) and the American Psychiatric Association. *Id.* at 309, n.3. Using the 1992 edition of the AAMR's definition, the Court presented mental retardation as

> substantial limitations in present functioning . . . characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.

Id. at 318.

These three elements — subaverage intellectual functioning, limitations in adaptive skills and manifestation before age 18 — also appear in the 2000 edition of the American Psychiatric Association's definition, which states:

> [t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C)." *Id.* The court explained that this definition added a quantitative measure, stating that "Mild' mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70.

Id. The *Atkins* Court noted that state statutory definitions of mental retardation generally conform to these clinical definitions. *Id.*

Consistent with the language of the Supreme Court in *Atkins*, which found "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences," *Atkins,* 536 U.S. at 318 (*quoting Ford*, 477 U.S. at 405, 416-17), Arkansas in *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004), held that the Supreme Court's decision in *Atkins* was "merely reaffirming the States' preexisting prohibition against executing the mentally retarded." *Anderson*, 163 S.W.3d at 354-55. Section 5-4-618(a)(2) of the Arkansas Code Annotated, which is part of Act 420 of 1993, provides that no defendant with mental retardation at the time of committing capital murder shall be sentenced to death.[2]

Arkansas Code Annotated Section 5-4-618 states in relevant part:

---

[2] Sasser did not claim mental retardation in any state court proceeding. As noted above in the background, *supra*, the Eighth Circuit stated this was not a procedural default of Sasser's *Atkins* claim, because *Atkins* was a new constitutional claim, despite the identical right conferred by state-statute. Further, the Eighth Circuit made it clear in *Simpson v. Norris*, 490 F.3d 1029 (8th Cir. 2007), that there was no requirement to remand to the Arkansas Supreme Court to determine mental retardation, because the Arkansas Court had expressly stated it would not recall a mandate affirming a death sentence to consider a defense arising from *Atkins* of any capital defendant who failed to raise a similar defense under state law. In other words, the Arkansas Supreme Court would consider the claim to be solely a federal one. As a petitioner such as Sasser or Simpson would therefore be unable to present the claim in state court and receive a full and fair evidentiary hearing, such petitioners could satisfy the conditions of receiving an evidentiary hearing in federal court.

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

(A) Significantly subaverage general intellectual functioning[3] accompanied by a significant deficit or impairment in adaptive functioning[4] manifest in the developmental period, but no later than age eighteen (18) years of age; and

(B) A deficit in adaptive behavior[5].

(2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.

(b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.

(c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

ARK. CODE ANN. § 5-4-618.

Neither the Federal Death Penalty Act, nor the federal Constitution, requires government to prove, by any standard, that a capital defendant is not mentally retarded; rather, it is up to states to determine how to enforce the constitutional prohibition against executing mentally retarded persons. *United States v. Webster*, 421 F.3d 308 (5th Cir. 2005). Arkansas has stated it is the petitioner's burden to prove mental retardation by a preponderance of the evidence. *Anderson*, 163 S.W.3d at 355. The parties in this case agree this is the standard to apply and that

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[3] Intellectual functioning is defined by the intelligence quotient (IQ). AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 41 (4th ed. 2003).

[4] Adaptive functioning refers to how effectively individuals cope with common life demands. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42 (4th ed. 2003).

[5] Adaptive behavior refers to how well a person meets the standards of personal independence expected of someone of their particular age group, sociocultural background, and community setting. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 42 (4th ed. 2003).

the Arkansas statutory provision controls.

III. Evidence Presented

At the evidentiary hearing regarding Sasser's *Atkins* claim, this Court heard testimony from the following individuals in the following order: Mr. Hollis Sasser, Dr. Jethro Toomer, Prof. Tom Smith, Dr. Roger Moore, Mr. Grant Harris, Sgt. John Cartwright, Mr. Bryan Olinger, and Dr. Kevin McGrew. Along with the testimony of witnesses, Sasser submitted exhibits numbered 1 -4, which consisted of the following:

Petitioner's Exhibit 1: Report of Jethro Toomer, consisting of three volumes;

Petitioner's Exhibit 2: Curriculum Vitae and report of Prof. Tom Smith;

Petitioner's Exhibit 3: Report of Dr. McGrew and Appendix, consisting of five volumes.

Respondent submitted exhibits numbered 1-3, which consisted of the following:

Respondent's Exhibit 1: Report, Raw Data, and Materials of Dr. Roger Moore, consisting of seven volumes;

Respondent's Exhibit 2: Diagram showing correspondence between Sasser's test results and the normal distribution curve;

Respondent's Exhibit 3: Arkansas Department of Finance and

Administration Driver Permit/License Record for Sasser.

All of the exhibits presented by the parties have been throughly reviewed by the Court and will be summarized as appropriate to the discussion, section IV, *infra*.

The following is a summary of the evidence, which bears upon Sasser's cognitive and behavioral development and capacities, presented via witnesses at the *Atkins* hearing.

- Hollis Sasser ("H.B.") is a brother of Petitioner Sasser. When Sasser was two or three years of age, Sasser and H.B.'s father passed away after an on-the-job accident at a construction site. The family, including Sasser, then moved to an area referred to as "Boyd Hill" where several family members also lived.
- Sasser socialized with other children his age, and children older and younger than him when living at Boyd Hill.
- Sasser was given chores to do, including feeding chickens by himself and gathering firewood with the family.
- Sasser would also fish with his family, using simple fishing equipment such as a pole and worm, but not fishing lures and tackle. Sasser would also clean the fish.
- During high school, Sasser had a job with the Crank family. Sasser would help with farm duties in chicken houses and assisted with hay baling in the summer months. Sasser was

specifically responsible for removal of dead chickens from the houses, cleaning out water troughs, and feeding chickens. Once the chickens were old enough for removal of the initial water troughs, Sasser would take out the troughs and wash them.

- All of Sasser's employment was in manual labor jobs.
- When Sasser was about eighteen years of age, he attempted to take a pay check he had been given by Mr. Crank, Sasser's employer, and alter the check to receive additional funds. The attempt at altering the check was "messy" and "quite obvious," according to H.B., who saw the check. When Sasser attempted to pass the check at a local store, the clerk knew the check had been altered and also personally knew Mr. Crank and Sasser and did not honor the check.
- Sasser did not date much when he was a teenager and a young adult. He never brought a girl home to introduce to the family and H.B. never saw him go out on a date or attempt to "flirt with a girl."
- Sasser continued to live with his mother while H.B. and the other siblings moved out of the family home.
- Sasser received a certificate of attendance for high school, but no actual diploma. H.B. was surprised to learn Sasser did not actually graduate high school.
- Sasser told everyone he was going to go into military service,

specifically the Army, but instead lived in an abandoned home 100 yards away from H.B.'s house at night and in the daytime would stay out of sight of everybody by hiding in a wooded area. Sasser would go approximately five to six hundred yards "up a hill" and hide during the daylight hours. On times Sasser knew the family would be away, such as Sunday church hours, Sasser would take canned goods from H.B.'s house for food. At the times when Sasser would get food from H.B.'s house, Sasser would also call his grandparents to keep up the ruse that he was in boot camp. The house where Sasser stayed at night had no running water or electricity, but it did have some furniture. To heat food, Sasser would make a campfire. The duration of Sasser's stay at the home was approximately three weeks.

- As a teenager, Sasser had a job babysitting for H.B's four children during the day while H.B. and his wife went to work. The children's ages ranged from one to nine years old. Sasser did not babysit overnight, nor did he ever cook for the children. Additionally, Sasser's mother was next door for extra supervision.
- As a young man, Sasser found himself out of work and needing a job. H.B. assisted Sasser in securing a common labor job with Young Construction. Sasser's job was putting together 20-foot joints of plastic pipe to lay sewer lines for the

city. Sasser would apply an "ointment" type substance to the inside of the pipe, and then push the pipe to make certain the joints were placed together securely. The pipe had to go in far enough to reach a certain point and it had to be straight for welding. This job was supervised. Sasser rode back and forth from this job with H.B.

- H.B. also assisted Sasser in securing a job at a lumber mill after Sasser returned home following a period of incarceration. H.B. also transported Sasser to and from the lumber mill. While working at the lumber mill, Sasser found an old truck he wanted to buy, so H.B. helped Sasser purchase the truck. Sasser did not have any credit established so H.B. spoke with the loan officer and got a personal loan for Sasser. Sasser just had to sign the paperwork. H.B. did give the payment book to Sasser and it was Sasser's responsibility to make the payments on the loan. Prior to this, Sasser had done no banking, had no checking account, and no savings account.
- Sasser lived with his mother except for the time he was incarcerated. There was also short period of time when Sasser lived with Arch and Margie, his other siblings, due to employment at the Hudson chicken plant in Hope, Arkansas. Other siblings came back to the family home for short periods of time, but Sasser stayed there much longer.

- H.B. did not notice any significant developmental issues with Sasser as they were growing up.
- Dr. Jethro Toomer, a clinical and forensic psychologist, gave Sasser the Wechsler Adult Intelligence Scale, fourth edition ("WAIS-4") to assess Sasser's intellectual functioning. Dr. Toomer began the vocabulary sub-test at question five, due to Sasser's age, and gave Sasser credit for getting the first four questions correct, although those questions were not asked.
- Sasser received one point on question number 11 of the vocabulary sub-test. The score of one reflects an answer that is generally correct, but is characterized by what is called the poverty of content, which means the answer is vague and questionable if the person really understands.
- Some of the vocabulary sub-test questions are marked "DK" which indicates that Sasser simply did not know the answer and he could not provide any particular response to that particular item.
- On question 23 of the vocabulary sub-test, Sasser provided the response "different things" to the prompt of "diverse." According to the scoring guide, the next step is to query Sasser with his understanding of that particular term, because according to the manual, an understanding of the term diverse goes beyond just the notion of being different.

- When Sasser was questioned after giving this response, he was unable to provide any further clarification or indication of understanding the particular concept. Thus, he earned a score of zero. Dr. Toomer then stopped the exam because Sasser had given three consecutive answers which received a score of zero, and the rules require the examiner to stop after three consecutive scores of zero. The scoring manual, at page 45, states "[i]f the examinee spontaneously gives a zero or a one-point response that is appropriately queried but the examinee does not improve his or her response, the score retains its original value."
- According to the scoring manual "different things" was a one point score, and Dr. Toomer stated the answer was only worth one point if the examinee could properly respond to the subsequent query.
- On page 30 of the administration manual for the WAIS-4, it states "[a]ll 15 sub-tests have a single start point for all ages. Examinee suspected of intellectual disability, i.e. mental retardation or general intellectual deficiencies, should always begin with Item 1." Dr. Toomer maintained he was not predisposed to any particular belief that Sasser was mentally retarded, so he began with question five, and not question one. If Sasser had missed the questions beginning at question five, the instruction is to go back to be beginning

of the test and give questions one through five.

- The full scale IQ score for the exam administered by Dr. Toomer was an 83. Applying a standard margin of error, the range of this score would be 78-88. However, Dr. Toomer also maintained there would be a rise in the score, or an inflation of the score, due to the "artificial environment" of the prison. This inflation was not quantifiable.
- In 1994, Sasser was administered the Wechsler Adult Intelligence Scale Revised ("the WAIS-R,"), which was the test in effect at that time. However, that instrument had been normed in 1980. So, when Sasser took the exam in 1994, his score was not compared with peers, but with the group against which it was normed fourteen years prior. The concept of norm obsolescence, which can call into question the adequacy of a particular instrument, is also called the Flynn effect. The score on the examination can be adjusted for the Flynn effect, which results in roughly a three point inflation for every ten years. In 1994, Sasser's IQ score was 79. Taking into account the Flynn effect, his score would be 75. The standard error of measure would be plus or minus five points. Thus, the accurate IQ score for Sasser from the 1994 test would be the range of 70-80.
- Mental retardation also consists of adaptive functioning or adaptive deficits, which is a person's level of functioning in

community life, such as independent living. This is compared with peer group members in the local community. There is no instrument developed to do a retroactive functioning assessment. In this case, a retroactive assessment is what is required because there is no instrument that would measure Sasser's adaptive functioning in the year 1994.

- The Scales of Independent Behavior Revised ("SIB-R"), is an instrument used to assess adaptive functioning deficits. Generally, this instrument is a tool for planning a course of treatment. The SIB-R has different levels of analysis and is well suited for retrospective determination of adaptive functioning deficits because it encompasses quantitative factors as well as qualitative factors.
- Using this instrument, Dr. Toomer visited with Sasser's friends, family, and peers. Specifically, those who would know Sasser's functioning within an age range prior to age 18. Using the SIB-R to attempt a retrospective analysis, Dr. Toomer found Sasser had eight areas of deficiency in terms of adaptive functioning. The areas of deficiency are as follows: social interaction skills, language comprehension, language expression, time and punctuality, money and value, work skills, home and community orientation, and social interaction. The AAMR requires deficiency or weakness in two areas of adaptive functioning to support a diagnosis of mental

retardation.

- A person with mental retardation can perform some tasks in these areas, but still have deficits. For example, these individuals can hold jobs, get married, drive a car and have a driver's license, as well as have a relationship. The upper level of mental retardation, under the DSM, is mild mental retardation. The range of IQ for mild mental retardation is a range of 50 to 55 to 70. The DSM describes borderline intellectual functioning as an IQ range from 71-84, generally. Moreover, the DSM establishes that "[d]ifferentiating mild mental retardation from borderline intellectual functioning requires careful consideration of all available information" because the two can look similar. Borderline intellectual functioning does not contain the qualitative component of adaptive functioning deficits.
- In assessing the evaluation with the SIB-R, Dr. Toomer was inquiring about Sasser from people who had information as to his behavior prior to the age of 18. Therefore, he did not interview Janet Thomas, who had a relationship with Sasser and is the mother of his child, although Ms. Thomas knew Sasser at the time of the crime and his incarceration. Further, when Dr. Toomer utilized the software for scoring the SIB-R, he used the pre-eighteen years of age data, but assessed how Sasser actually functions in the present time.

- Dr. Toomer has testified in 18-20 cases since 2006 on the issue of mental retardation of an accused criminal defendant. In the cases where he testified, he found there was mental retardation. However, in some cases where he was retained he did not make a conclusion of mental retardation, but he was not called to testify in those cases.
- Professor Tom Smith, the dean of the College of Education and Health Professions at the University of Arkansas testified that in the 1970's programs for mentally challenged school children were just being implemented in Arkansas and were minimally funded. There were no record-keeping requirements on the part of school districts at that time.
- Dr. Smith never worked in the Lewisville school system, where Sasser was educated, and he did not review the IQ scores for Sasser. Dr. Smith also had no information on whether Sasser was served with a Title One program while in school or if Sasser was considered intellectually disabled while in school.
- Dr. Moore is a clinical and forensic psychologist who has practiced for about 15 to 16 years. He has testified in other federal court capital habeas proceedings for the respondent, including the *Simpson*[6] case in the Eastern District of Arkansas. In *Simpson*, Dr. Moore preformed a psychological evaluation and found Mr. Simpson met the statutory

[6] Simpson v. Norris, 490 F.3d 1029 (8th Cir. 2007).

requirements for mental retardation in Arkansas. He has also preformed similar work throughout the country in federal and state cases in approximately three dozen *Atkins* cases for both the petitioner and respondent. In at least three cases when hired by the state, Dr. Moore determined the subject met the requirements of mental retardation. Dr. Moore also gave a presentation, along with the attorney general for the State of North Carolina, on the topic of handling experts in mental retardation trials on four different occasions in 2007. Each presentation was to a District Attorney's Association or the Attorney General's Office.

- Dr. Moore reviewed transcripts from school records, records from the Southwest Arkansas Counseling and Mental Health Center, written transcripts of police interviews, police interview reports, medical examiner's report, and telephone visitation records as well as interviewed over two dozen witnesses to evaluate whether Sasser meets the Arkansas standard for mental retardation.
- Dr. Moore disregarded an IQ test given to Sasser by Ms. Mary Pat Carlson due to issues with the assessment that called into question the reliability and validity of this exam. The IQ score was higher than the 1994 score of 79, but Dr. Moore found the administration of the test rendered it of questionable validity and reliability.

- Regarding the 1994 score of 79, the standard error of measure would indicate a confidence interval of 74 to 84. For the 2010 score of what Dr. Moore believed to be an 84, but was given a score of 83, the confidence interval would be 78 to 88.
- Dr. Moore disagreed with Dr. Toomer's assessment of a zero score on Item number 23 of the vocabulary sub-test of the examination given in 2010. Dr. Toomer awarded no score for the answer "different things" given by Sasser to the prompt of "diverse." Dr. Moore testified the manual clearly states the response "different things" is a one-point response. Dr. Moore agreed the response must be queried, but stated that a query can only retain the score originally awarded, or allow the individual to get a higher score. As the original response of "different things" was a one-point answer, Dr. Moore disagreed that the answer could be deducted points to yield a score of zero, despite Sasser giving the same response upon a query. Moreover, as this response was not a zero response, the test should not have been discontinued at that point. The query also was not properly documented according to the test publisher's manual.
- In the field, when clinical psychologists are faced with test results involving aging norms, they will note the reliability of the scores may be reduced due to aging norms. The best

practice is to use the most up-to-date test. The 2010 administration would be the most reliable because it was given within a year of the norming dates. If the Flynn effect was realized here, the 2010 results should be lower than the 1994 score. Wechsler manuals acknowledge Dr. Flynn's work regarding the increase in scores over time, however there is no recommendation to alter a score because of the potential impact of the Flynn effect. Adjusting a score downward is not generally accepted clinical practice. In fact, Dr. Moore testified he had only observed the IQ score adjusted downward for the Flynn effect in evaluations done by the defense in mental retardation hearings. The AAIDD states the best practice to diagnose mental retardation is to recognize the Flynn effect, and it is the primary organization of its kind that deals with the assessment and diagnosis of mental retardation.

- Also, Dr. Moore disagreed with the caution urged by Dr. Toomer as to artificial increases in the 2010 score due to Sasser being imprisoned in an "artificial environment." Dr. Moore found the contention that death row would lead to greater intellectual development to be "striking."
- Dr. Moore also looked for supporting data to the IQ scores, such as aptitude and achievement tests. These are not IQ tests, but are correlated with it, and these are measures of

cognitive functioning. Dr. Moore looked at the SRA[7], the AFQT[8], two WRATs[9], and the WIAT[10]. In 2010, Sasser's spelling sub-test score on the WRAT-4 was in the 18th percentile; the arithmetic score was in the 21st percentile; sentence comprehension was in the 30th percentile; and reading composite was in the 34th percentile. Dr. Moore placed the IQ scores, along with the other scores from instruments measuring Sasser's cognitive functioning along a bell curve, to determine if there was a convergence of data. Dr. Moore found the multiple exams mostly fall within the range between the two IQ scores, lending increased confidence those IQ scores are accurate. (Respondent's Exhibit 2). As a result, Dr. Moore concluded that Sasser had impaired cognitive functioning, but not mental retardation as defined under Arkansas law.

- Dr. Moore agreed with Dr. Toomer that Sasser displayed some deficits in adaptive functioning, however he disagreed those deficits were significant enough to meet statutory requirements. To be "significant deficits" under the statute, in clinical terms, Sasser would need to be functioning about

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[7] Science Research Associates Achievement Series

[8] Armed Forces Qualification Test

[9] Wide Range Achievement Test

[10] Wechsler Individual Achievement Test

two standard deviations below the mean. Also Dr. Moore opined that Dr. Toomer's administration of the SIB-R to retroactively assess deficits in adaptive functioning was not valid and reliable because 1) the age equivalent scores were not based on an individual's assessment of Sasser, they were a compilation of many different recollections and 2) because the age for the assessments varied, there is no indication of a specific age, but just a wide range of assessment across various ages. Dr. Moore did note that Sasser's overall level of adaptive functioning likely falls below the average to borderline range. Adaptive functioning on the job would not mean a job required abstract thinking, but that the individual could show up on time and work independently without specific guidance.

- Grant Harris, the Assistant Director of Institutions with the Arkansas Department of Correction at the time of the hearing, was previously the warden of the Varner Supermax unit, which is the facility that houses death row inmates. In this capacity he became familiar with Sasser.
- Previous to his conviction in 1994 which placed him on death row, Sasser was incarcerated in 1989 for an unrelated conviction. He was processed in 1989 through the diagnostic unit, where he was given a medical evaluation, including an interview by medical health staff, and given an orientation to

the procedures for the Arkansas Department of Correction. Sasser completed orientation on February 16, 1989. From diagnostic, he was moved to the Cummins Unit on February 24, 1989. The two and a half week processing time at the diagnostic unit is typical for new inmates.

- All inmates physically and mentally capable are assigned a job, if an inmate chooses not to work, he or she is given a disciplinary. Work assignments take into consideration prior employment, institutional needs, education, and background. An inmate can receive a promotion to a better work assignment, or to a different Class. Class 2 inmates receive twenty days off their sentence for every month served, Class 1 inmates receive thirty days for every thirty days served, and can essentially cut their sentence in half.
- Sasser was initially assigned to the kitchen. He was then transferred to the Varner Unit in April and assigned to inside building utility and then to inside maintenance. Kitchen detail could include all aspects of food preparation, the actual work Sasser performed is not evident in the records. As part of the building utility crew, Sasser was responsible for cleaning including windows, mopping, and scrubbing walls. In about a month, Sasser moved to inside maintenance which is responsible for plumbing, electrical, wiring, leaks, and other similar duties. Sasser remained in this job for the duration

of his sentence which began in 1989, until he was transferred to the Wrightsville Unit in 1992. Inside maintenance is a sought-after job because the inmate can travel one end of the facility to another, including places where the inmates has contact with female staff.

- The level of supervision Sasser would have would depend on the tools he was using for a particular job. Class A tools are those which could be used in an escape attempt and require direct supervision. Class B tools are those which could not aid in an escape attempt and can be used with more autonomy.
- Sasser maintained his class 1 status for 12 months while on inside maintenance, he also was awarded meritorious good time for on-the-job training as an electrician and for showing "proficiency and excellence at his job as an electrician." This would mean Sasser was doing the job as required, and not abusing sick-call.
- When Sasser transferred to the Wrightsville unit in 1992, he was assigned to furniture manufacturing. Sasser was a saw operator. In this job, Sasser would have cut the wood down to the specifications for each piece to put together for assembly. Sasser was awarded good time credit for his performance as a saw operator. To receive the good time credit award, Sasser would have to have no re-cuts or wasted wood. He held this position for six months, then he

transferred to the pre-release program in December of 1992.

- Pre-release was designed for inmates within 90 to 120 days of release, to aid them in anything the inmates needed to know, or be trained on, for getting back into the "free world" and functioning there. This includes classes on getting a driver's license, interview skills, how to balance a checkbook, and similar other aspects of daily life. It is a highly motivated program, and an inmate has to want to be in it or he or she will be removed. Sasser was in the pre-release program for three months.
- When Sasser returned to the Arkansas Department of Correction two years later, in 1994, as a death row inmate, he did not go through the diagnostic unit, but went straight to an isolation cell. He was monitored closely for the first seven days and was given a handbook and told about the grievance process. After that, Sasser was placed on death row and had no contact with the general population inmates.
- Sergeant John Cartwright was the maintenance supervisor at the Varner Unit when Sasser was a member of that work crew. Cartwright would supervise up to eight inmates at a time and supervised Sasser for three years. Cartwright remembered Sasser because he did a good job in the maintenance crew and there was never a problem with him. In this job, Sasser was on call basically twenty-four hours a day. He could get

called out at night to make a repair with the security guard of the unit. Sasser had his own set of tools, kept separately from the tools of other inmates in a tool pouch or toolbox, and tools had to be counted before an inmate left a job, and then they were locked up until needed. Sasser never lost a tool. Carwright also recommended Sasser for good time credit due to Sasser's performance as a electrician.

- Brian Hollinger was hired to start the pre-release program at the Wrightsville unit. This program was to help inmates make a transition to the real world, including computer training and interview skills. The program would also help inmates get their taxes up to date, as well as study and sit for the written portion of the drivers license exam. The driver's license portion consisted of two to three days in a classroom environment studying the driver's license manual, a practice test designed by Mr. Hollinger, and then the actual examination administered by a state trooper at the Wrightsville unit.
- Sasser scored 100% on both the sign portion of the driver's license test and the written portion of the test. He took the exam one time. The driver's license exam is the only exam Sasser was given in pre-release. There was no other evaluation done to see if Sasser understood the program as a whole.

- Dr. Kevin McGrew is the director of the Institute for Applied Psychometrics, a corporation developed for creating measures of intelligence and achievement in psychometiric consultation and research on intelligence. Dr. McGrew disagreed with Dr. Moore's report in so far as it suggested the ASVAB[11] was a good proxy of general intelligence for Sasser. The ASVAB is an aptitude test. Tests for adults which measure general intelligence are the WAIS, the WAIS-3, the WAIS-4, the Stanford-Binet-5, and the Woodcock-Johnson.
- Dr. McGrew criticized Dr. Moore's findings and observations in the following respects: When Dr. Moore suggested that the ASVAB is a "heavily loaded" measure of general intelligence, he violated joint test standards. Moreover, the Flynn effect is a real effect and should be adjusted for as a matter of common practice, especially in those situations where there is a specific cutoff score. In his report Dr. Moore incorrectly equated obsolete norms to other test variables such as demographic factors. Also Dr. Moore relied on an article published by Dr. Hagan in 2008 which suggested the Flynn effect should not result in an adjustment of score, however Dr. Hagan wrote a more recent article in 2010 wherein he stated the Flynn effect should be taken into consideration, but not to a specific score deduction.

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[11] Armed Services Vocational Aptitude Battery

- Dr. McGrew further stated an adjustment should be made to Sasser's score to account for the Flynn effect and this is now the best practice. The best estimate would be to adjust three points per decade. Sasser's 1994 score would be 75, plus or minus the standard error of measurement. To account for the standard error of measurement, the score range would be 70 to 80. Accordingly, the best estimate on Sasser's WAIS-R score in 1994 would be a range of 73 to 78. The best test would be the one given in 2010, because it is closer in time to the norms.

IV. Discussion

A. Expert Witnesses

As a threshold matter, the Court must determine if the witnesses presented as experts are qualified to testify in that capacity. Dr. Toomer, Dr. Moore, Dr. Smith, and Dr. McGrew were each submitted as expert witnesses, with no objections. Dr. Smith was proposed as a qualified expert in the history of special education in the state of Arkansas. Dr. McGrew was proposed as an expert in intelligence theory, psychometrics, and psychological and educational testing. Doctors Toomer and Moore rendered ultimate opinions as to whether or not Sasser is mentally retarded as defined by the applicable law.

Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony. FED. R. EVID. 702. Under Rule

702, proposed expert testimony must satisfy three prerequisites to be admitted. *See Lauzon v. Senco Prods. Inc.*, 270 F.3d 681, 686 (8th Cir. 2001).

First, evidence based on scientific, technical, or specialized knowledge must be useful to the finder of fact in deciding the ultimate issue of fact. *Id.* Second, the proposed witness must be qualified. *Id.* Third, the proposed evidence must be reliable or trustworthy in the evidentiary sense, so that if the finder of fact accepts it as true, it provides the assistance the finder of fact requires. *Id.* The district court has a "gatekeeping" obligation to make certain that all testimony admitted under Rule 702 satisfies these prerequisites. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597-98 (1993).

The Court finds that all the submitted testimony of the experts, with the exception of Dr. McGrew, should be admitted and considered as admissible expert testimony.

Dr. McGrew was presented as an expert on intelligence theory, psychometrics, and psychological and educational testing and was asked: to review Dr. Moore's interpretation of the ASVAB; to review Dr. Moore's and Dr. Toomer's treatment of the Flynn effect; to give an opinion on the application of the Flynn effect as a professionally accepted standard; to review the standard error of measurement as applied by Dr. Moore and Dr. Toomer; and to review the scoring issue on the vocabulary subtest of the WAIS-4, as

administered by Dr. Toomer.

Dr. McGrew testified that the ASVAB was a measure of aptitude, specifically created to measure aptitude for skills used in the military. He stated that Dr. Moore's characterization of the ASVAB -- as related to intelligence -- was incorrect and could mislead the reader in violation of joint test standards. Dr. McGrew also opined that the Flynn effect should be accepted scientific fact and should be adjusted for -- particularly in those situations where there is a specific cutoff score. Noting that Dr. Moore included the Flynn effect in other things which are considered in the norming stage of the test creation (such as demographic variables), Dr. McGrew concluded Dr. Moore's characterization to be misleading.

Dr. McGrew made no evaluation of Sasser as to whether he was mentally retarded or had an onset of mental retardation prior to age 18. Instead, he stated that his testimony was "criticism" and "to educate the Court." TR. 8, ECF No. 157. Thus, while Dr. McGrew's testimony could have had some bearing on the Court's evaluation of Dr. Moore's credibility and evaluation of his testimony, it was not helpful to the Court in determining whether Sasser was mentally retarded to an extent he would be granted relief from the death penalty. Accordingly, if Dr. McGrew's testimony met the first prong of the criteria mentioned above -- which is doubtful -- the Court found it to be unpersuasive and

outweighed by the testimony of Dr. Moore, which the Court found to be both credible and persuasive.

B. Mental Retardation

As noted above, the law applicable to this case requires four discrete prongs to be met, before a determination of "mental retardation" can be made.

First, Sasser must have significantly subaverage general intellectual functioning.

Second, the significantly subaverage general intellectual functioning must be accompanied by a significant deficit or impairment in adaptive functioning.[12]

Third, the significant deficit or impairment in adaptive functioning must manifest in the developmental period, but no later than age eighteen (18) years of age.

Fourth and finally, Sasser must also suffer from a deficit in adaptive behavior.

The Court will address each specific prong, as it relates to Sasser, in turn.

1. Significantly Subaverage General Intellectual Functioning

[12] The Court notes the Arkansas Statute appears to only require a single deficit or impairment in adaptive functioning, however, Act 420 of 1993 refers to "deficits or impairments" in the plural. 1993 Ar. Legis Serv. 420 (West).

Significantly subaverage general intellectual functioning is a clinical term defined in the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., Text Revision)("DSM-IV") as "an IQ of about 70 or below (approximately 2 standard deviations below the mean)." At the hearing, the experts also stated "significantly subaverage intellectual functioning" correlates with an IQ of 70 or below.

Sasser received two IQ scores which were presented to the Court, a score of 79 in 1994 and a score of approximately 83 in 2010.[13] Those who testified in this case, Dr. Toomer, Dr. Moore, and even Dr. McGrew all agreed on one point – the 2010 examination is the best indication of Sasser's intellectual functioning.

Petitioner argues in his post-hearing brief, Br. ECF No. 159, that the 1994 exam is the best indicator because Arkansas law specifically demands reliance on intelligence measures performed closest to or contemporaneously with the time of the capital offense. *Id.* at 14. However, Sasser's expert at the evidentiary hearing, Dr. Toomer, testified that IQ is relatively stable over time. Thus, despite when the tests were given, both could adequately establish Sasser's IQ because Sasser's IQ should remain somewhat constant throughout his adult life.

Moreover, *Atkins* itself, under which precedent Sasser brings

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[13] A separate IQ test was given to Sasser in 1994, but this was not considered by either Dr. Toomer or Dr. Moore due to issues in administration, and the proximity in time to the first 1994 examination.

this claim, holds the Eighth Amendment's prohibition of cruel and unusual punishment prohibits the *execution* of person who is mentally retarded, which means Sasser's current intellectual functioning has been put at issue by counsel. (emphasis supplied) *Atkins v. Virginia*, 536 U.S. 304 (2002).[14] Thus, the Court will discuss the most recent examination, and the one supported by the experts at the hearing to be the most reliable indicator of Sasser's intellectual functioning, first.

Respondent argues the score of 83 on the 2010 examination is likely lower than Sasser's true score due to a scoring error on the

[14] The case cited by Sasser for the proposition that Arkansas law is solely concerned with the status of the defendant at the time of the offense is *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004). However, in that case the Arkansas Supreme Court was faced with the specific issue of whether or not the defendant was mentally retarded at the time of the offense, because unlike Sasser, Anderson had raised the issue in the trial court and was then directly appealing the death sentence. *Id.* The Arkansas Supreme Court stated that "*Atkins* merely reaffirmed this State's preexisting prohibition against executing the mentally retarded." *Id.* at 334-35. Moreover, the evidence rejected by the Arkansas Supreme Court was evidence of Anderson's IQ as scored in 1996, while the crime took place in 2000. *Id.* The Court favored a 2001 IQ score because it was closer in time to the offense, and appeared to be a better indication of Anderson's mental abilities, stating "[s]ection 5-4-618 clearly provides that no defendant with mental retardation *at the time of committing* capital murder shall be sentenced to death. The statute specifically places the burden upon the defendant to prove mental retardation *at the time of committing* the offense by a preponderance of the evidence." *Id.* at 356. Clearly, in the context of Anderson's case, the issue was his mental retardation at the time of the offense. In fact, the Arkansas statute, written before *Atkins* was decided, is written to address the issue of mental retardation when presented at the trial court level. However, there is no indication in *Anderson* that the Arkansas Supreme Court would reject or discount an IQ score rendered *after* the commission of a crime, as this subsequent IQ score may be relevant, as here, to whether the defendant is mentally retarded at the time of execution. *Atkins* would prohibit the execution of someone proven to have mental retardation, despite any evidence of superior cognitive abilities at the time of the commission of the crime. *See Atkins*, 536 U.S. 304. Therefore, to suggest that the Arkansas Statute only bars from execution those with mental retardation at the time of the crime, but not those mentally retarded at the time of execution, could call into question its validity, an issue not raised by the parties, and is too broad of a reading of *Anderson*.

vocabulary subtest at question 23, which led to a one point reduction of score and a premature termination of the exam. The implication by Respondent is that Sasser could have attained at least an 84 on the exam, if the exam had been properly scored, and possibly a higher score could have been achieved if Sasser had the opportunity to answer additional questions.

A determination of whether the true score should be 83 or 84 and even higher is unnecessary because if the Court assumes Sasser's score was correctly stated at an 83, applying the standard deviation of error, there is a 95 out of 100 percent chance that Sasser's IQ is in the range of 78 to 88. At the very lowest estimation of the score, a 78, which is derived by accepting the examination as scored by Dr. Toomer and application of the standard deviation of error to the lowest deviation, Sasser's score still remains eight points higher than two standard deviations from the mean, or a score of 70. Therefore, such score does not meet the definition of "significantly subaverage general intellectual functioning."

Additionally, although the DSM-IV states it is "possible to diagnose Mental Retardation in individuals with IQs between 70 and 75," Sasser's 2010 score, even at its lowest projected level, still is above this range by three points. APA, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 49 (4th ed. Text Revision 2000). Thus, the 2010 score provides no evidence Sasser's intellectual functioning

is "significantly subaverage."

The Court then turns to the IQ test administered in 1994. On this examination, Sasser achieved a score of 79. Sasser's contention is that due to the obsolescence of the norms for that test, the score should be discounted to a score of 75. This is called the "Flynn effect"[15] and essentially is a way of accounting for an increasingly intelligent population. Applying the standard margin of error to the score of 75 leaves the Court with a 95 out

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[15] While much evidence was presented regarding the Flynn effect, the Court does not find it necessary to make a determination of whether or not the Flynn effect should be applied. In this case, the decision to apply the Flynn effect is not a dispositive one, because even with the discounted score, Sasser still can not prove subaverage intellectual functioning by a preponderance of the evidence. The Court does note the more recent cases appear to be taking into account the Flynn effect phenomenon, at least in the capital context. See, e.g., *Thomas v. Allen*, 614 F. Supp.2d 1257 (N.D. Ala. 2009)(holding that '[a] court must consider the Flynn effect and the standard error of measurement in determining whether a petitioner's IQ score falls within a range containing scores that are less than 70"); *Walker v. True*, 399 F.3d 315, 322-23 (4th Cir. 2005)(vacating the district court's opinion which dismissed the habeas petition, and remanding for consideration of "relevant evidence, namely the Flynn effect evidence"); *Walton v. Johnson*, 440 F.3d 160 (4th Cir. 2006) (en banc); *In re Hicks*, 375 F.3d 1237, 1242 (11th Cir. 2004) (Birch, J., dissenting from the denial of a stay of execution because the IQ scores generated by a 1985 administration of the Wechsler Adult Intelligence Scale to the habeas petitioner were "likely to have been artificially inflated by what has been labeled 'The Flynn effect'"); *United States v. Davis*, 611 F.Supp.2d 472, 486-88 (D. Md. 2009) (district court considered Flynn effect in evaluation of defendant's intellectual functioning); *People v. Superior Court*, 28 Cal. Rptr.3d 529, 558-59 (Cal. Ct. App. 2005), overruled on other grounds by 40 Cal.4th 999, 56 Cal. Rptr.3d 851, 155 P.3d 259 (2007) (recognizing that Flynn effect must be considered); *State v. Burke*, No. 04AP-1234, 2005 WL 3557641, at *13 (Ohio Ct. App. Dec. 30, 2005) (stating that court must consider evidence on Flynn effect, but it is within court's discretion whether to include it as a factor in the IQ score).

There are also courts that do not recognize the Flynn effect. *See In re Mathis*, 483 F.3d 395, 398 n. 1 (5th Cir. 2007) (noting that circuit has not recognized Flynn effect as scientifically valid); *Berry v. Epps*, No. 1:04CV328-D-D, 2006 WL 2865064, at *35 (N.D. Miss. Oct. 5, 2006) (refusing to consider Flynn effect); *Bowling v. Commonwealth*, 163 S.W.3d 361, 374-75 (Ky. 2005) (noting that because Kentucky statute unambiguously sets IQ score of 70 as cutoff, courts cannot consider Flynn effect or standard error of measurement).

of 100 percent confidence Sasser's score on the 1994 test was in the range of 70 to 80.

For the Court to find that the 1994 examination is evidence of "significantly subaverage" intellectual functioning, it would have to assume not only that 1) the Flynn effect is appropriately applied to discount the score, but also 2) that Sasser should actually be considered in the lowest deviation possible for that score, a 70. Such an assumptions would take the Court to what is often called the "cut-off point" for finding subaverage intellectual functioning.

The evidence before the Court, as testified by the expert witnesses for the Petitioner and Respondent, is that Sasser's score is just as likely to be an 80 as it is to be a 70. In other words, the score has the same statistical probability to land at *any* point in the 70 to 80 range. Under a preponderance of the evidence standard, wherein Sasser must establish "the existence of a fact is more probable than its nonexistence," Sasser can not establish that it is more probable his IQ score is a 70 than it is any other score in the confidence range. *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, n. 9 (1997).

As noted above and as Sasser mentions throughout his post-hearing brief, mental retardation "is possible" to be diagnosed in individuals with IQ scores in the range of 71 to 75, if those individuals also "exhibit significant deficits in adaptive

behavior." However, the Arkansas statute requires "significant subaverage intellectual functioning," which is a score of 70 or below, *and* it must be "accompanied by significant deficits or impairments in adaptive functioning." ARK. CODE ANN. 5-4-618.

A plain reading of the Arkansas statute sets forth the IQ score requirement and the adaptive functioning requirement as discrete prongs, both of which must be met in order to meet the "mental retardation" criteria. Utilizing a *combination* of an IQ score, which is higher than provided for in the statute, along with evidence of adaptive deficits appears to be a shift away from Arkansas' statutory scheme.

Earlier this year in *Miller v. State*, ___S.W.3d___, 2010 WL 129708 (Ark. 2010), the Arkansas Supreme Court rejected an argument that the Arkansas standard was unconstitutionally restrictive because *Atkins* recognized intelligence quotients of between 70 and 75 as mentally retarded. *Id.* The Court held such a contention "is entirely without merit" as *Atkins* left the states the ability to develop ways to enforce the restriction of execution of the mentally retarded. *Id.* The *Miller* court went on to find the evidence of an undetermined intelligence quotient, but an agreement the score was above a 65, and conflicting evidence as to adaptive behavior, supported a determination mental retardation was not proven by a preponderance of the evidence. *Id.*

Accordingly, Sasser has not proven he has "significantly

subaverage intellectual functioning" by a preponderance of the evidence, and does not meet the first prong of the Arkansas statute. The only evidence before the Court to establish this prong is Sasser's 1994 IQ score, once the Flynn effect is applied to discount the score and a assumption is made that Sasser's actual ability is at the lowest point in the confidence interval range. However, the evidence also established it is no more likely that Sasser functions at the lowest end of the confidence range than it is likely he functions at the highest end of the confidence range.

2. Significant Deficit or Impairment in Adaptive Functioning

Even if this Court were to conclude that Sasser had proven significantly subaverage intellectual functioning, Sasser has not proven significant deficits or impairments in adaptive functioning.

Adaptive behavior refers to the skills – conceptual, social, and practical, that are required for people to function in their everyday lives. *U.S. v. Davis*, 611 F. Supp.2d 472, 490 (D. Md. 2009). In one sense, adaptive behavior addresses how persons apply their cognitive potential. *Id.* In considering adaptive functioning, one should consider actual performance, not knowledge or potential.

Adaptive functioning may be assessed by two different constructs-the classification in AAMR 2002 and the classification in DSM-IV-TR, which essentially measure the same skills.

The DSM-IV-TR classification of adaptive behavior addresses ten domains: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, and heath/safety. A diagnosis of mental retardation requires a significant limitation in at least two of the ten domains. *See* DSM-IV-TR at 41.

The AAMR classification divides adaptive behavior into three broader categories: conceptual, practical, and social. Diagnosis of mental retardation requires a significant limitation in one of the three categories. Conceptual skills include language, reading and writing, money concepts, and self-direction. Social skills include interpersonal skills, personal responsibility, self-esteem, gullibility, following rules, obeying laws, and avoiding victimization. The practical category includes the activities of daily living, including personal hygiene and grooming as well as home and financial management, occupational skills, and maintenance of a safe environment. *See* AAMR 2002 at 82.

Both Dr. Toomer and Dr. Moore agreed that while there are testing instruments developed to measure an individual’s current adaptive functioning, no such instruments are developed to make a retrospective assessment of an individual’s adaptive functioning. A retrospective assessment is required because the significant deficits in adaptive functioning, if any, must have their onset

prior to the age of 18. ARK. CODE ANN. § 5-4-618. Sasser is currently forty-five years of age.[16]

The AAMR User's Guide specifically addresses how one should assess adaptive behavior when one is forced to conduct a retrospective diagnosis:

> In reference to the assessment of adaptive behavior: (a) use multiple informants and multiple contexts; (b) recognize that limitations in present functioning must be considered within the context of community environments typical of the individual's peers and culture; (c) be aware that many important social behavioral skills, such as gullibility and naivete, are not measured on current adaptive behavior scales; (d) use an adaptive behavior scale that assesses behaviors that are currently viewed as developmentally and socially relevant; (e) understand that adaptive behavior and problem behavior are independent constructs and not opposite poles of a continuum; and (f) realize that adaptive behavior refers to typical functioning and not to capacity or maximum functioning.

User's Guide at 20. The *User's Guide* goes on to advise clinicians to "recognize that self-ratings have a high risk of error in determining 'significant limitations in adaptive behavior,' " but that they can be used with caution in conjunction with multiple informants or respondents. *Id.* at 21. It also instructs evaluators not to rely upon past criminal or verbal behavior to make

[16] Additionally, it could also be relevant to know Sasser's adaptive functioning at the time of the crime, if such adaptive functioning would allow his then-scored IQ range of 70 to 80 to demonstrate mental retardation, as suggested by the DSM-IV. However, as stated above, this Court feels it was clear in *Miller v. State* that the state statute would not allow for such an interpretation, and because the statute requires "subaverage intellectual functioning," a score of 70 or below, *in addition* to any adaptive functioning deficits.

inferences about adaptive functioning or the presence of mental retardation. *Id.* at 22.

The AAMR 2002 manual states unequivocally that "[o]bservations, interviews, or other methods of assessment to gather information about adaptive behavior may complement, but ordinarily should not replace, standardized measures." AAMR 2002 at 84 (emphasis added).

Dr. Toomer found Sasser was "adaptively compromised in all three of the areas" noted in the AAMR. Pet'rs Ex. 1, Tab 1 at pg. 10. Dr. Toomer also testified that Sasser had eight areas of deficiency, apparently referencing the adaptive functioning definition of the DSM-IV. Tr. 66, ECF No. 157. Sasser's adaptive deficits were noted to include communication, social skills, community use, self direction, function academics, leisure and work in Dr. Toomer's report, and social interactions skills, language comprehension, language expression, time and punctuality, money and value, work skills, home and community orientation, and social interaction at the evidentiary hearing. Pet'rs Ex. 1, Tab 1; Tr. 66-67, ECF No. 157.

To retroactively assess Sasser's adaptive functioning, Dr. Toomer utilized an instrument called the Scales of Independent Behavior Revised ("SIB-R"). Dr. Toomer found this instrument was well suited for a retroactive assessment of Sasser's adaptive functioning, although such a purpose did not utilize the instrument

as intended, because the SIB-R took into account the various areas of adaptive functioning and was intended to be a qualitative measure. Tr. 64-5, ECF No. 157.

Dr. Moore took issue with Dr. Toomer's use of the SIB-R, not necessarily as an instrument to retroactively assess adaptive functioning, but in the administration of the SIB-R, its scoring, and comparison to the norming standards. Resp't Ex. 1, Tab 1. Dr. Moore found the scores obtained on the SIB-R to be "invalid and unreliable." *Id.* at 17.

Specifically, Dr. Moore took issue with the manner Dr. Toomer conducted the interviews and assimilated the information in the SIB-R. Dr. Toomer interviewed several individuals who knew Sasser in his developmental years and then combined the answers of these individuals and marked along the SIB-R where these responses fell. Dr. Moore opined that Dr. Toomer did not give the individuals a single frame of reference for reporting Sasser's abilities. In other words, one interviewee may have been recalling Sasser's abilities at age eight, and another at age twelve. However, all of these answers were combined to give a picture of Sasser's adaptive functioning. Dr. Moore further stated the best practice would be to interview each person individually and have them separately complete a SIB-R, then combine those individual scores. Tr. 188, ECF No. 157. Further, there should be a standard identification point for each individual who is

interviewed. The result of Dr. Toomer's adaptive functioning evaluation is a compilation of many people's recollections of Sasser's abilities over a wide range of ages. *Id.* at 190.

Dr. Toomer relied upon interviews with the following individuals to make his assessment of Sasser's adaptive functioning:

- Theodore Blake - High School Coach and Teacher of Sasser
- Paul Breakfield - custodian at Lewisville High School
- Janice Washington Briggs - school classmate of Sasser
- Leroy Brown - Teacher and Principal of Lewisville Middle School
- Milton Castelman - Sasser's supervisor at Whistle Lumber Company
- Steve Jackson - Sasser's supervisor at Hudson Foods
- Elvie Jamerson - Classmate and fellow inmate with Sasser
- Robert Purifoy - Sasser's supervisor at Hudson Foods
- Dorthy Smith - Sasser's teacher
- Pinkie Strayhan - Sasser's teacher
- Robert Strayhan - Sasser's middle school football coach
- Lecia Tallent - Sasser's high school teacher
- Margie Kemp - Sasser's sister
- Arthur Sasser - Sasser's brother
- Frank Sasser - Sasser's brother

- Gloria Sasser - Sasser's mother[17]
- HB Sasser - Sasser's brother

Mr. Blake described Sasser in his affidavit, Pet'rs Ex 1, Tab 28, as a "mentally slow" individual who was in special education in high school, specifically what was known as Group III and served the lowest-functioning students. Mr. Blake also remembered Sasser as staring blankly when spoken to, and as not able to understand a joke because Sasser would only laugh when others did so. Sasser was not able to grasp football plays and attempting to explain them to him was a "waste of time" so fundamentals of the game had to be explained to him repeatedly. Sasser kept to himself, was at times made fun of, and never seemed age-appropriate.

Paul Breakfield is eight years older than Sasser and knew Sasser's family well and also saw Andrew everyday at school when he was the custodian. *Id.* at Tab 29. Breakfield reports Sasser was well behaved and respectful, but did not have athletic ability.

Janice Briggs was an elementary, middle, and high school classmate of Sasser. *Id.* at Tab 30. She saw him everyday as their siblings were friends, they rode the bus together, and the families knew each other well. She describes Sasser as a "loner" who would laugh longer than everyone else in an inappropriate

[17] Apparently Dr. Toomer did not use the responses by Ms. Sasser, as he found she minimized Sasser's dysfunction. Tr. 119-20, ECF No. 157.

manner.

Sasser was friends with Willie Carroll who was Brigg's second cousin. Sasser and Carroll were seen as "class nerds" and did not know if they were "coming or going." *Id.* Willie was in Group I, with the brightest students, and was Valedictorian of the class. Sasser was in Group III, with the lowest level students.[18] Brigg remembered that Sasser did not have a girlfriend, and was the class clown.

Brigg also remembered that Sasser walked in graduation with the rest of the class. However, special education students would receive a certificate of attendance rather than a diploma. After high school, Brigg knew Sasser had a job at a lumber mill and found a girlfriend.

Leroy Brown taught Sasser math and was the assistant principal and then principal of the Lewisville Middle School during Sasser's school years. *Id.* at Tab 31. Brown stated that Sasser was mischievous, and for example, he and other boys would take lunch trays outside and eat the food from the trays. Sasser would "clown around" but take things too far and get in trouble. Sasser was not a good student, but took classes designated on his transcript with a "P" or "Pr," which signaled a "practical" class which taught

[18] It should be noted that Willie Carroll testified at the Rule 37 hearing, Pet'rs Ex. 1, Tab. 16, 88, and stated he and Sasser were friends throughout their school years. Carroll also indicated he and Sasser were in the same group - Group II. Mr. Carroll reiterated this in his interview with Dr. Moore. Resp't Ex. 1, Tab 3, 139-143.

basic skills at the student's own pace.

The school practice was to promote failing students, even though Sasser earned C's in his lower level classes. Sasser was considered a Group III student because he did poorly on tests and could not do well even after extra time and assistance was provided. Sasser received a certificate of attendance because he was in special education classes. The information Mr. Brown gave to Dr. Moore in his interview is consistent with that in Mr. Brown's affidavit.

Milton Castleman was a Mill foreman with Whistle Lumber company when Sasser was employed there. Pet'rs Ex. 1, tab 32; Pet. Ex. 1, Tab 16, 12-24. Sasser was arrested on his capital charges while employed at Whistle Lumber. Sasser was a good worker who showed up on time and had no disciplinary actions. Sasser was a stacker, he was told which grade of lumber to pull and stack. He did not have to make any decisions and had the most basic laborer position. It would take judgment and skill to grade the lumber, and Sasser did not have such judgment or skill, although some individuals working as stackers were able to judge unmarked lumber. Sasser was only able to stack the boards when marked by the Grader, who is the person responsible for marking the boards appropriately to be stacked in the correct bundle.[19]

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[19] Dr. Toomer indicates that Mr. Castleman stated Sasser had to have boards specially designated for him in order to be a stacker because Sasser was incapable of determining wood grade. Pet'rs Ex. 1, Tab 1, 16. However, Mr. Castleman did not indicate in his declaration that Sasser had any

Steve Jackson was a supervisor at Hudson foods when Sasser was employed there. Pet'rs Ex. 1, Tab 33. Sasser was a stacker which means he would stack packed boxes on a wood pallet. The boxes would be color coded as to the grade of chicken and Sasser's job was to place twenty-five boxes of each specific grade on to each wood pallet. Mr. Jackson stated that Sasser had difficulty completing the task and had to be monitored quite carefully because he would place the incorrect box on an incorrect pallet and slow production.

Due to the constant incorrect placement of the boxes on the pallets, Sasser was moved to an icer position. The machine was pre-set to the amount of ice to be dispensed, and Sasser simply had to push a button in order to complete his job. Sasser was not fired because the help was needed at the time.

Elvie Jamerson grew up around Sasser and Sasser's family. Pet'rs Ex. 1, Tab 34. Additionally, he served time with Sasser in 1986 and in 1990-2001.[20] Jamerson remembered Sasser from school,

"difficulty" as noted by Dr. Toomer. Mr. Castleman stated that one person was designated as a grader, and that person would grade and mark the lumber according to the quality of each piece. As a stacker, Sasser would pull the correct grade of lumber to stack. Mr. Castleman indicated the grader would grade and mark all lumber, not just that which Sasser was to stack. From the declaration it appears Sasser was quite capable as a stacker, but would not be able to move up to the position of a grader, because he would be unable to grade wood on his own judgment. This is quite distinct from the notion posited by Dr. Toomer that Sasser required special assistance in his job at Whistle Lumber Company.

[20] It was noted at the hearing that Mr. Jamerson's dates of when he was incarcerated with Sasser do not correlate to the actual dates Sasser was incarcerated, because Sasser was not incarcerated until 1989. TR at 122-23.

and was a year older than Sasser's brother, H.B. Jamerson stated at school it was always known that "something was wrong" with Sasser. *Id.* He believed Sasser "has never been right in the head" due to Sasser's behavior. *Id.* Sasser would make comments to himself and then laugh too long or he would mutter where no one could understand, but still laugh to himself. Sasser was slow. Sasser would bale hay with Jamerson and Sasser was good at this job.

Sasser also did things which "made no sense at all" to Mr. Jamerson, including when Sasser stated he was in the Army, but in fact was living out of an old car. *Id.*[21]

Sasser, when incarcerated with Jamerson, would make up stories of girls he had dated and asked Jamerson to draw on envelopes Sasser sent out. Jamerson indicated he was housed with Sasser again when Sasser was charged with a parole violation due to the capital charges against him.[22]

Robert Purifoy was a supervisor at Hudson Foods when Sasser worked there. Pet'rs Ex. 1, Tab 35. Sasser was strong, but slow. Sasser was removed from packing because he would place graded

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[21] Some evidence indicated Sasser lived in a car in the woods, perhaps just in the day time, while other evidence is that Sasser lived in an abandoned house near his mother and H.B.'s homes, at least at night. The record is unclear on the specific location of where Sasser lived while continuing the ruse of being at Army boot camp.

[22] The records from the Arkansas Department of Correction do not show Sasser was housed in the ADC after his release from his rape conviction until Sasser was convicted of murder and sent to death row.

chickens into an incorrect box. Sasser would only follow directions for ten to fifteen minutes. Sasser was eventually moved from stacking to the ice machine.

Dorothy Smith was Sasser's teacher for Home Economics, Adult Family Living, and Consumer Education. Pet'rs Ex. 1, Tab 36. Ms. Smith also knew Sasser's family for many years.

Sasser passed the lab portion of Home Economics because other group members would cover for him. Smith did not think Sasser was mentally disabled, but she did find him slow. Sasser received a D in Adult Living and an F in consumer education. Smith also recounted the same information regarding special classes as other affiants had.

Ms. Pinkie Strayhan was a librarian when Sasser was a student. Pet'rs Ex. 1, Tab 37. She remembered that Sasser would come into the library with friends and giggle or laugh, rather than study. Strayhan had to discipline Sasser for his actions. Additionally, Sasser always seemed immature.

Mr. Robert Strayhan was also a teacher and coach of Sasser's. Pet'rs Ex. 1, Tab 38. Sasser, like many other players, had trouble learning the football plays. Sasser had correct manners and was respectful.

Ms. Lecia Tallent was another teacher of Sasser's in High School. Pet'rs Ex. 1, Tab 39. Sasser was in Group III, the lowest level learners, and he used a curriculum, books, and

examinations which had been modified similar to how Special Education modifies these items for students today. Sasser was awarded a Certificate of Attendance and was a Title I student.

Dr. Moore also interviewed those who knew Sasser in order to gauge Sasser's adaptive functioning and behavior. The notes from the interviews with H.B. Sasser and John Cartwright are consistent with the testimony at the evidentiary hearing and will not be summarized here.

Dr. Moore also interviewed Sasser's mother, Gloria Sasser, who recounted Sasser as someone who helped her with chores, would read books on mechanics and the encyclopedia, and was proficient at ironing his clothes. She indicated he could cook, wash his own clothes, and wash dishes. Resp't. Ex. 1, Tab 3, 94.

Archie Sasser, Sasser's brother, was also interviewed by Dr. Moore. Resp't. Ex. 1, Tab 3, 98. He stated that Andrew lived with him and their sister Margie at times, but did not pay rent as he would stay for a few days up to a week at a time, "crashing" on the couch. During these times Margie would do some cooking, but generally it was "fend for yourself." Archie also recalled Sasser being a good driver, with some accidents before Sasser went to jail, with alcohol likely being involved in the accidents.

Dr. Moore also interviewed someone who appears to be "Robert Reeves" but the notes from this interview are difficult to read. Resp't Ex. 1, Tab 3, 102. The same is true for an individual who

appears to be "Milton Castelman," who stated that Sasser never complained about the jobs he was doing; that he was fine at his job; that he was at work on time; that he did not skip days; and that he got along well with co-workers. Resp't. Ex. 1, Tab 3, 103.

Janet Thomas was also interviewed by Dr. Moore, she was Sasser's girlfriend at the time he was incarcerated and is the mother of his child. Resp't Ex. 1, Tab 1, 105. She stated Sasser would write to her when he was incarcerated. Additionally, when he would take her out, he always saw that she got home safely, was a good driver, and checked on her welfare. Sasser always looked appropriately dressed to the situation and maintained proper hygiene. In their relationship they spoke about the future, including buying her a promise ring.

Frank Sasser, a brother to Sasser, was also interviewed and stated he moved out when Sasser was ten or eleven, so his knowledge of this time is limited. Resp't Ex. 1, Tab 3, 110. However, he felt others regarded Sasser as a good worker. Frank remembered Sasser being "slow" but thought he was "normal." For hobbies, Sasser could install car stereos, with a result of a good sound with hidden wires. Frank stated Sasser had pretty good common sense.

Dr. Moore also interviewed Jerry Whistle who stated Sasser was a good employee, on time, polite, and did his job. Resp't Ex.

1, Tab 3, 111-12. Sasser "seemed intelligent enough." *Id.* at 112.

Margie Sasser stated she remembered Sasser working on cars, hers specifically, which sometimes made it worse than before. Resp't Ex. 1, Tab 3, 113. One time a friend had to help put it back together correctly. When she lived with Sasser and Archie, Sasser would sometimes help with bills and sometimes not. Sasser was not responsible with money. She would cook for her brothers at this time. During the time when Sasser was living in the woods with the ruse of being in the Army, Margie stated he seemed different in attitude, perhaps depressed, and began "letting himself go" by wearing clothes several days in a row.

Dr. Moore, like Dr. Toomer, also interviewed Dorothy Smith, and to the extent his notes are legible, the interview appears consistent with that reported by Dr. Toomer and summarized above. Resp't Ex. 1, Tab 3, 116.

Mr. Gayther Crank and Ms. Jana Crank were interviewed by Dr. Moore, and Mr. Crank described when Sasser, like Sasser's brothers and sisters, would work on his farm. Resp't Ex. 1, Tab 3, 121. Crank described Sasser as capable with farm tasks, but "lazy" and "not dependable" to show up for work. However, when he would show up, "you could depend on him to do the job" and Sasser would drive the tractor and disc the fields. *Id.* Sasser "could do lots of stuff but it was getting him to do it," and he "would work twice as hard not to do something." *Id.* at 122.

Sasser would work on lawnmowers and other equipment for Crank. Sasser was described as having a dull nature, and not someone you could joke with like other members of Sasser's family.

Ms. Crank taught high school English and Art and "very definitely" did not believe Sasser was mentally retarded. *Id.* at 123. The Cranks had employed mentally retarded individuals to work for them, and Sasser clearly did not have the same issues.

Dr. Moore also interviewed Whitney, whose last name appears to be Whitelaw. Resp't Ex. 1, Tab 3, 125. Whitelaw did not remember Sasser, but did give some information about the way classes were structured when Sasser was in high school. Whitelaw stated the "basic" "practical" courses are not special education classes. The use of "practical" on Sasser's transcript meant to her that he was not in special education.

Dr. Moore, like Dr. Toomer, also interviewed Ms. Pinkie Strayhan, and to the extent the interview notes are legible, they appear to be consistent with the interview reported by Dr. Toomer. Resp. Ex. 1, Tab 3, 127.

Dr. Moore, like Dr. Toomer, also interviewed Ms. Lecia Tallent, who stated she was the only special education teacher when Sasser was in school, and he was not one of her students. Resp. Ex. 1, Tab 3, 130. She stated she would specifically remember a student because she would teach the special education students for four years. Her interview, to the extent it is legible, is similar

to that given to Dr. Toomer.

Kenneth Lindsay was interviewed by Dr. Moore. Resp. Ex. 1, Tab 3, 133. Lindsay was principal of Lewisville schools in around 1986. Lindsay stated that he was not sure if Sasser was in special education classes, but he thought he was. Lindsay indicated Lecia Tallent would be the one who would know that information.

Dr. Moore interviewed Dr. Mariann Seider, but the majority of those notes are illegible. Resp't Ex. 1, Tab 3, 137.

Willie Carrol, a life-long friend of Sasser's, was interviewed by Dr. Moore. Resp't Ex.1, Tab 3, 139. Carrol stated that mentally retarded kids rode a special bus and had special classes, and that Sasser did not ride with or attend those classes. Carrol was just friends with Sasser, and they did not do much together outside of school because neither had a car. However, Carrol "never noticed" anything to indicate Sasser's IQ, based upon their general conversations as friends. *Id.* at 140.

Sasser was like the "class clown," cracking jokes, and making comments about girls. Sasser dated a few girls that Carrol could remember.

After high school, Sasser and Carrol went down different paths. Carrol went to college and held two jobs. He did visit Sasser after Sasser's first arrest, but after that they only saw each other in passing.

Dr. Blackburn was also interviewed by Dr. Moore. Resp't Ex.

1, Tab 3, 144. Dr. Blackburn conducted the 1994 IQ testing on Sasser. Mostly, this interview is illegible. However, Dr. Blackburn recorded his perceptions of Sasser in a report prepared for Sasser's state court trial. Resp't Ex. 1, Tab 6, 224. Dr. Blackburn noted in his report, which was made contemporaneous with the testing of Sasser in 1994, that Sasser had "dull normal" reading abilities, but his functioning was "certainly not at a 'mentally retarded level.'" *Id.* at 227. Moreover, general information and vocabulary skills are "somewhat below average adult level" but "certainly are not consistent with any degree of 'mental retardation.'" *Id.*

Dr. Moore interviewed Maxine Cornelius, who started teaching in 1982 or 1983. Resp't Ex. 1, Tab 3, 148. She did not remember Sasser at all. She did state basic English used the same book as regular English classes, but went at a slower pace.

Dr. Moore also interviewed Martin Herman. Resp't Ex. 1, Tab 3, 153. Herman was a football coach at Lewisville schools and remembered Sasser. He stated Sasser was a loner who was just by himself all the time.

Mike Deal was interviewed by Dr. Moore. Resp't Ex. 1, Tab 3, 155. Deal became the high school principal in Lewisville in 1982. He remembered Sasser as a quiet kid who never bothered anybody.

Via telephone, Dr. Moore interviewed Pamela Galloway, whose

husband coached football, and she was a teacher in Lewisville. Resp't Ex. 1, Tab 3, 167. She remembered Sasser and did not know of anything negative about him. She did not remember having Sasser in her classes and she taught Math and Science classes. Practical math was for those not college bound, and perhaps with learning disabilities. It was not for mentally retarded students.

Vivian Morlar was also interviewed by Dr. Moore via telephone. Resp't Ex. 1, Tab 3, 169. She remembered Sasser as a "good" guy from a poor family, who was never any trouble. She stated Sasser's transcript should reflect if he was "special education" or "resource" status in high school. The "practical" classes or "pr" classes were lower level, but not resource or special education.

Karl Sensley was a friend of Sasser's who was also interviewed via telephone by Dr. Moore. Resp't Ex. 1, Tab 3, 171. Sensley stated he knew Sasser in elementary and middle school, but about ninth or tenth grade they began to take different classes and were not around each other as much. In school Sasser was placed with the slow readers in group "c" in about sixth or seventh grade. Sasser would get distracted and fall behind, and he wanted to talk and be disruptive. Sensley did not see Sasser after graduation. However, socially Sensley remembered Sasser to be "just like the rest of us – just high school country kids." *Id.* at 172. Sensley also characterized Sasser as having the potential but being lazy,

Sasser "just did not want to do it . . Not pushed to do his homework." *Id.* Sasser also indicated to Sensely that he had no one at home pushing him to complete school work, had no curfew set, and did what he pleased. *Id.* at 173.

Sensely also stated Sasser was "pretty artistic" and recalled a particular paper meche project Sasser created. Id. at 174. Sensely also stated it was not uncommon for those not going to college to remain living at home for a few years.

The Court agrees with Dr. Moore regarding the manner in which the SIB-R was completed by Dr. Toomer. The convergence of data across a wide range of ages combined with the lack of specificity in the interviews to the items noted in the SIB-R renders the instrument somewhat unreliable. For example, the SIB-R under the "Social Interaction" sub heading asks how well the subject "[w]aits at least 2 minutes for turn in a group activity". Pet'rs Ex. 1, Tab 3,6, question 7. Dr. Toomer clearly marked "does, but not well-or about 1/4 of the time-may need to be asked." *Id.* However, there is no reflection of enough data in the interviews, provided by Dr. Toomer as the raw data underlying his report, to support this conclusion.

Many of those interviewed remembered Sasser as "dull" and at times immature and inappropriate to the situation at hand, such as laughing longer than others, not laughing until others did, or laughing to himself. Sasser was not a high-achieving student, but

it is unclear if he was simply placed in slower-paced classes, or if he was considered a "resource" or "special education" student. The only clear indication is his transcript, which reflects he was placed in several "practical" classes. The majority of those interviewed appeared to regard practical classes as slower and modified from the regular curriculum, but not resource or special education level.

Many of those interviewed described Sasser as having potential, but not much motivation. While Sasser did not graduate from high school, his transcript, the interview with "senior sponsor" Ms. Strayhan and interviews with his family members reflect that all assumed Sasser was on track to graduate. He came back to school his senior year taking courses that would lead to a diploma. Moreover, his family first learned of his failure to earn a diploma during the criminal trial and the family was "surprised" by the information.

From his work history, it is clear Sasser struggled with job duties which involved labeling and grouping, such as the chickens at Hudson Foods. However, Sasser was able to come to work on time, get along with co-workers, and not abuse absences. The job history also reflects that once a job was given to him within his abilities, he was able to perform the job reliably well.

Sasser also was able to live on his own for a period of time. During this time Sasser was pretending to be at Army boot camp, but

he was actually living on his own in an abandoned car and an abandoned home. Sasser was able to provide for himself, although to do so he had to take food from his brother's house. However, Sasser managed to take the food at times no one was home to continue the ruse. Moreover, he placed calls to keep up the charade that he was in boot camp by phoning his family to tell them about Army life. The Court also notes Sasser did not end the charade on his own, but was spotted by others and confronted by family members. It is unclear how long Sasser would have managed to live on his own.

Sasser also managed to maintain relationships outside of the family with friends and with girlfriends. While some people remembered Sasser as socially awkward, he also was remembered as being a regular kid of his age. In fact, no person who knew Sasser in the developmental period, even those trained in special education, regarded Sasser as mentally retarded. He was described as "slow" by some, which would be consistent with the low-average intelligence scores noted in the previous section.

The opinions of those interviewed can not be substituted for expert opinion on the subject of mental retardation. However, the data underling the reports is simply inconclusive to show Sasser suffered significant deficits in adaptive behavior to the extent reported by Dr. Toomer. There is simply not enough consistent information in the data to make any sort of reliable conclusion

about the defendant's actual performance of adaptive behaviors. The characterization by Dr. Moore appears most consistent with the underlying data and suggests Sasser had limitations, but no significant deficits in adaptive functioning. At the very least, Sasser has not shown significant adaptive deficits by a preponderance of the evidence.

Due to the forgoing analysis of the first two prongs of the statute, the Court does not find reason to consider the last two prongs.

V. CONCLUSION

For the forgoing reasons, the Court concludes -- after conducting an evidentiary hearing on Sasser's mental retardation claim -- that he is not mentally retarded as that condition is defined in *Atkins v. Virginia, 536 U.S. 304 (2002)* and that Sasser's Amended Petition for Writ of Habeas Corpus, ECF No. 48, should be, and hereby is, **DENIED.**

IT IS SO ORDERED this 3rd day of November, 2010.

/S/ Jimm Larry Hendren
JIMM LARRY HENDREN
CHIEF UNITED STATES DISTRICT JUDGE

United States Court of Appeals
For the Eighth Circuit

No. 02-3103

Andrew Sasser

Petitioner - Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Respondent - Appellee

No. 11-3346

Andrew Sasser

Petitioner - Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Respondent - Appellee

Appeal from United States District Court
for the Western District of Arkansas - Texarkana

Submitted: November 14, 2012
Filed: November 15, 2013

Before RILEY, Chief Judge, WOLLMAN and MELLOY, Circuit Judges.

RILEY, Chief Judge.

We consider Andrew Sasser's death penalty appeal for the third time. After an Arkansas jury sentenced Sasser to death in 1994 for capital murder, he lost his Arkansas direct appeal in 1995 and his effort to obtain postconviction relief in Arkansas state court in 1999. See Sasser v. State, 993 S.W.2d 901, 903 (Ark. 1999) (per curiam) (Sasser 1999); Sasser v. State, 902 S.W.2d 773, 774, 779 (Ark. 1995) (Sasser 1995). In 2000, Sasser filed the federal habeas petition from which this appeal arises. The district court dismissed the petition, but granted Sasser a certificate of appealability on several issues.

While Sasser's initial appeal to our court was pending, the Supreme Court decided in Atkins v. Virginia, 536 U.S. 304, 321 (2002), that the Eighth Amendment prohibits the execution of mentally retarded individuals. Retaining jurisdiction over the bulk of Sasser's case, we ordered the district court to determine in the first instance whether Atkins made Sasser ineligible for the death penalty. Without an evidentiary hearing, the district court denied Sasser relief, finding he had procedurally defaulted on his Eighth Amendment mental retardation claim. Considering Sasser's case for the second time, we reversed and remanded "for an Atkins evidentiary hearing to adjudicate the merits of Sasser's mental retardation claim." Sasser v. Norris, 553 F.3d 1121, 1122 (8th Cir. 2009) (Sasser I), abrogated on other grounds by Wood v. Milyard, 566 U.S. ___, ___, 132 S. Ct. 1826, 1834 (2012). The district court held a two-day evidentiary hearing and found Sasser was not mentally retarded under Arkansas law and Atkins. Sasser again appeals and, resolving all outstanding

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issues presented by Sasser's original and subsequent habeas appeals, we affirm in part, dismiss in part, reverse in part, vacate in part, and remand.

I. BACKGROUND

A. Arkansas Proceedings

Shortly after midnight on July 12, 1993, Sasser brutally murdered Jo Ann Kennedy while she worked as a clerk at a Garland City, Arkansas, E-Z Mart convenience store. See Sasser 1995, 902 S.W.2d at 774-75. The State of Arkansas charged Sasser with capital felony murder. See id. at 774. In an effort to avoid the death penalty, Sasser's counsel attempted to plead Sasser guilty. See id. at 775. Because the State had not waived capital punishment—a predicate in Arkansas to acceptance of a guilty plea in a capital case—the trial court refused to accept the plea. See id. Proceeding to trial, Sasser stipulated to the following facts:

1. Sasser "caused the death of the victim while in the possession of and while driving his brother's pickup truck";
2. Sasser "stopped at the E-Z Mart in Garland City two or three times to buy chips and to use the telephone between the hours of 3:00 p.m. on July 11, 1993 and approximately 12:00 a.m. on July 12, 1993";
3. "[T]he victim was discovered nude from the waist down"; and
4. "[T]he pants and panties found in the E-Z Mart's men's bathroom were hers."

Id. At trial, in addition to evidence which overwhelmingly established Sasser's guilt, the State presented testimony from another E-Z Mart clerk, Jackie Carter, whom Sasser had attacked and raped on April 22, 1988. See id. at 776. The trial court admitted the testimony under the Arkansas equivalent of Federal Rule of Evidence 404(b). See id. at 777. After the State rested, Sasser's counsel presented no witnesses. See id. at 776. Without specifying which underlying felony or felonies

Sasser committed, the jury found Sasser guilty of capital felony murder. See id. at 776-77.

One aspect of the trial judge's instructions to the jury was concededly erroneous. See Sasser 1999, 993 S.W.2d at 905. The prosecution based its felony murder charge on "four possible underlying felonies: kidnapping, attempted kidnapping, rape, or attempted rape." Id. The trial judge correctly instructed the jurors that to reach a guilty verdict, they had to find Sasser committed at least one of the underlying felonies. See id. But the trial judge incorrectly defined the elements of attempted kidnapping and attempted rape, instructing the jury that either attempt crime was completed when Sasser formed the mental state to commit the corresponding offense. See id. at 905-06. The trial judge thus omitted the *actus reus* (i.e., the requirement that Sasser take a "substantial step" toward completing the crime) from the instructions related to the attempt felonies. Id. at 906.

In the penalty phase, the State introduced a certified copy of Sasser's 1988 conviction for the second-degree battery, kidnapping, and rape of Ms. Carter. See Sasser 1995, 902 S.W.2d at 777. Sasser's counsel called two witnesses during the penalty phase: a licensed professional counselor (LPC) and Sasser's older brother, Hollis. The LPC testified, "Sasser, in all probability, will always be a very dangerous man," but he "could probably function in the penitentiary." Hollis expressed his "sorrow and . . . deepest, deepest sympathy for" the victim's family, and testified Sasser "was a hard worker." Hollis had received reports from prison about Sasser that "were good." The State called a psychologist and a psychiatrist to rebut the LPC's testimony. The psychologist testified Sasser's IQ was "dull normal."

The jury imposed the death penalty, finding a single aggravating circumstance outweighed three mitigating circumstances. See id. The aggravating circumstance was Sasser's previous felony involving "the use or threat of violence to another person or creating a substantial risk of death or serious physical injury to another

person." Id. The three mitigating circumstances were that Sasser (1) "would be a productive inmate, [(2)] had a supporting family of him as an inmate, and [(3)] had stipulated he caused the victim's death." Id.

Sasser's trial counsel appealed, challenging only the admission of Ms. Carter's testimony. See id. at 774. On July 17, 1995, the Arkansas Supreme Court, with three justices dissenting, rejected this claim and affirmed the judgment and penalty. See id. at 779. Sasser next sought postconviction relief in Arkansas state court under Arkansas Rule of Criminal Procedure 37. See Sasser 1999, 993 S.W.2d at 903. In his Arkansas Rule 37 petition, Sasser raised five ineffective assistance claims and argued the incorrect jury instruction violated his Sixth Amendment right to a trial by jury. See id. at 905, 909-12. On July 8, 1999, the Arkansas Supreme Court affirmed the Arkansas circuit court's denial of relief on all claims. See id. at 912.

B. Federal Habeas Proceedings

On July 7, 2000, Sasser petitioned for a writ of habeas corpus in the Western District of Arkansas. Sasser amended his petition on July 17, 2001. In all, Sasser raised eight grounds for relief. The district court determined seven of Sasser's grounds were procedurally barred because he had not raised them in state court. Sasser had raised the eighth ground in the Arkansas Rule 37 proceeding—alleging Sasser's trial counsel provided ineffective assistance by failing to request a limiting instruction as to Ms. Carter's testimony. The district court found neither an evidentiary hearing nor relief were warranted because the decision "not to seek a limiting instruction was a plausible trial strategy" and the Arkansas court did not misapply clearly established federal law. The district court dismissed the petition on May 23, 2002. Sasser requested a certificate of appealability.

On August 14, 2002, the district court certified appealability on four of the eight grounds raised in Sasser's amended petition for writ of habeas corpus:

> 1. Petitioner was deprived of his rights under the U.S. Constitution . . . by the improper jury instructions given in both the guilt and penalty phases of the trial.
>
> . . . .
>
> [2.] Sasser's conviction should be set aside because he was deprived of his right to effective assistance of counsel as guaranteed by the U.S. Constitution.
>
> . . . .
>
> [3.] The additional oath administered to jurors who were questioned about their attitudes toward the death penalty [is unconstitutional].
>
> [4.] The Arkansas death penalty is unconstitutional.

Sasser filed his first appeal to our court.

1. First and Second Appeals

On August 15, 2003, in light of the Supreme Court's decision in Atkins, 536 U.S. at 321, we granted Sasser's motion to remand on "the question of whether [he] is mentally retarded and whether pursuant to Atkins . . . the Eighth Amendment prohibits his execution." In that judgment, we also granted Sasser permission "to file . . . a successive petition" "[t]o the extent the request for remand is the functional equivalent to an application to file a successive habeas petition." The State petitioned for rehearing, and on March 9, 2004, our court

> issued an amended judgment directing the district court to first determine whether Sasser had exhausted his claim in Arkansas state court and, if the district court determined Sasser had a viable state court remedy, to consider holding the remanded petition in abeyance pending resolution of the claim by the Arkansas state courts.

Sasser I, 553 F.3d at 1123.

On remand, after the district court ordered Sasser to file an amended petition setting forth his mental retardation claim, the district court dismissed the petition without a hearing, finding that Sasser procedurally defaulted on the Atkins claim by not raising a mental retardation claim under the Arkansas statute that predated Atkins. See Ark. Code Ann. § 5-4-618. For the second time, Sasser appealed.

On January 23, 2009, we reversed and remanded for an evidentiary hearing on Sasser's Atkins claim based on our decision in Simpson v. Norris, 490 F.3d 1029, 1035 (8th Cir. 2007), that Atkins created a new federal constitutional right and this right was "separate and distinct" from any preexisting Arkansas statutory right. See Sasser I, 553 F.3d at 1125-27.

2. Mental Retardation Hearing

Beginning on June 15, 2010, the district court held a two-day evidentiary hearing on Sasser's Atkins claim. Sasser first called three witnesses: his brother, Hollis; Dr. Jethro Toomer, a psychologist; and Professor Tom Smith, a special education expert. The State, in turn, called four witnesses: Dr. Roger Moore, a psychologist; Grant Harris; Sergeant John Cartwright; and Brian Hollinger. Sasser called one witness in rebuttal: Dr. Kevin McGrew, a psychologist. We recount only the evidence relevant to this appeal.

a. Dr. Toomer's Testimony

Dr. Toomer evaluated Sasser in person, conducting an intelligence quotient (IQ) test: the Wechsler Adult Intelligence Scale, fourth edition (WAIS-IV). Dr. Toomer also administered several other psychological tests and interviewed numerous individuals about Sasser's background. Dr. Toomer concluded Sasser "met the criteria for mental retardation [in 1994]." He based his conclusion on qualitative factors in addition to evidence of Sasser's IQ scores, which were 79 in 1994, according to an earlier test, and 83 in 2010, according to Dr. Toomer's test.

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Dr. Toomer testified the IQ score of 79 Sasser obtained in 1994 was based on an outdated set of scoring norms, resulting in an inaccurately high result. Specifically, the 1994 score was from the WAIS-R, a test whose scoring norms were developed in 1980. IQ scoring norms rapidly become outdated because an IQ score is a relative rather than an absolute measure: IQ tests including the WAIS-R and WAIS-IV are normed such that 100 is the mean score, meaning approximately 68% of the U.S. population would score between 115 and 85, one standard deviation (15 points) above and below the mean. Approximately 2% of the U.S. population would score 70 (i.e., two standard deviations from the mean) or below. For several decades, however, the U.S. population's average raw IQ score has risen each year.[1] See, e.g., James R. Flynn, Massive IQ Gains In 14 Nations: What IQ Tests Really Measure, 101 Psychol. Bull. 171 (1987). Thus, an IQ score of 100 under current scoring norms would likely have been close to 110 under scoring norms in effect thirty years ago. This change in IQ scoring norms over time is referred to as the "Flynn effect." See, e.g., Richard E. Nisbett et al., Intelligence: New Findings and Theoretical Developments, 67 Am. Psychologist 130, 148 (2012).

To correct for the Flynn effect, Dr. Toomer testified Sasser's IQ score from 1994 should be reduced by four points to 75, a score falling within the 70-75 outer range consistent with mental retardation. Cf., e.g., Jack M. Fletcher et al., IQ Scores Should Be Corrected For the Flynn Effect in High-Stakes Decisions, 28 J. Psychoeducational Assessment 469, 472 (2010) (finding IQ scores should be adjusted by a mean of 3 points per decade from the date scoring norms are developed). Dr.

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[1] Although this rise in raw IQ scores is persistent and widely recognized, psychologists heavily debate its causes. See, e.g., Ted Nettelbeck & Carlene Wilson, The Flynn Effect: Smarter Not Faster, 32 Intelligence 85 (2004); Joseph L. Rodgers, A Critique of the Flynn Effect: Massive IQ Gains, Methodological Artifacts, or Both?, 26 Intelligence 337, 354 (1999) ("Even with a healthy dose of skepticism, the [Flynn] effect rises above purely methodological interpretation, and appears to have substantive import.").

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Toomer testified that because of the measurement error inherent in IQ tests, a score of 75 indicated that Sasser's actual IQ almost certainly fell between 70 and 80 (i.e., an error of +/- 5 points). Dr. Toomer testified that Sasser's 2010 IQ score was likely higher because he had been in a structured prison environment for an extended period of time. Dr. Toomer explained, "research shows that what tends to be enhanced . . . is the area of verbal reasoning on people who have been incarcerated."

Dr. Toomer's diagnosis also relied on qualitative factors. Notably, Sasser had a long history of intellectual and academic difficulties. In high school, he was placed with students in the bottom performance level, indicating that he was a "special education" student despite the fact Arkansas, at the time, did not offer dedicated programs for "special education" students. His grades were consistently poor despite the simplicity of his classes. He was unable to graduate from high school; instead, the school gave him, like all students who failed to meet the minimum graduation requirements, a "certificate of attendance." Apart from time in prison, Sasser lived with his mother virtually his entire life, and he was unable to live independently. After high school, he attempted to join the army, but his dismal performance on the Armed Services Vocational Aptitude Battery (ASVAB) disqualified him. Apparently ashamed of telling his family of this failure, he spent several weeks pretending to be in the Army, hiding in an abandoned cabin in the woods near his mother's home and sneaking into her house to get food.

Sasser never had a checking account or a credit card, did not obtain a driver's license until he was twenty-eight years old, and had extraordinary difficulties performing even the simplest manual labor jobs. For example, he worked for a time at a chicken processing facility, where his supervisor rotated him through several jobs of decreasing difficulty, trying to find one Sasser could perform. In the end, the only job he was able to perform was the simplest task in the facility: pushing a button to dispense ice. Even a slightly more difficult task—color coding pallets—was too difficult because Sasser often mixed up the colors.

b. Dr. Moore's Testimony

Dr. Moore evaluated Sasser in person and conducted several psychological tests, but did not reassess his IQ.[2] Dr. Moore concluded Sasser was not "mentally retarded as defined by Arkansas law." Dr. Moore admitted Sasser had "borderline mental retardation or impaired cognitive functioning that falls into the upper 70s to low 80s." But in Dr. Moore's view, "as th[e] term is statutorily and clinically defined, . . . [Sasser] does not suffer from mental retardation." Dr. Moore based his conclusions primarily on the 1994 and 2010 IQ scores, but he also considered several qualitative factors.

As to Sasser's IQ, Dr. Moore agreed with Dr. Toomer that (1) the Flynn effect is "a genuine and real observation," and (2) norm obsolescence was a justified concern, but he opined that it was not appropriate to adjust the 1994 score for the Flynn effect. Dr. Moore admitted, however, that the American Association on Intellectual and Developmental Disabilities (AAIDD)—the primary organization in the United States dealing with "the assessment and diagnosis of mental retardation"—considered it a "best practice[] in the diagnosis of mental retardation" to recognize the Flynn effect. Dr. Moore disagreed with Dr. Toomer's scoring of the 2010 IQ test, contending that the score should have been 84 rather than 83. Stating no supportive research exists, Dr. Moore denied that spending time in a structured prison environment could raise IQ scores. Dr. Moore testified that the "cutoff of mental retardation" was a score of 70.

As to qualitative factors, Dr. Moore opined that Sasser "appears to have adequate skills to cook for himself as needed, travel independently in the community, hold a job, take care of his personal needs and communicate effectively." Dr. Moore noted that Sasser had maintained over time two significant relationships and fathered

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[2]Because there are substanial "practice effects," Dr. Moore explained, it is not appropriate to administer multiple IQ tests in short succession.

a child. Dr. Moore pointed to a small bank loan obtained in Sasser's name as positive evidence of Sasser's adaptive functioning, but Sasser's brother actually procured the loan, completing all the necessary paperwork on Sasser's behalf.

c. Other Qualitative Evidence

Both psychologists considered firsthand accounts of Sasser's behavior by people who knew him before he turned eighteen years old. For example, one of Sasser's high school classmates, Janice Washington Briggs, described Sasser's limited interpersonal skills. "[I]f someone did or said something funny, [Sasser] laughed longer than everyone else in an inappropriate way [and] slobbered when he laughed," Briggs said. She said Sasser "was in Group III," and "[t]he students in Group III were Special Education students." After high school, Briggs remembered that Sasser entered into his first relationship, with a woman who "[l]ike [Sasser], . . . did not fit in." Dr. Toomer reported Sasser's "social interaction and communication skills" at age 45 "equate[d] with that of an average person age 7 years, 6 months."

3. District Court's Mental Retardation Decision

Noting Atkins left it to the states to define mental retardation, the district court weighed the evidence presented at the hearing pursuant to the Arkansas mental retardation statute. See Ark. Code Ann. § 5-4-618. The district court interpreted Arkansas's mental retardation standard as follows:

> First, Sasser must have significantly subaverage general intellectual functioning. Second, the significantly subaverage general intellectual functioning must be accompanied by a significant deficit or impairment in adaptive functioning. Third, the significant deficit or impairment in adaptive functioning must manifest in the developmental period, but no later than age eighteen (18) years of age. Fourth and finally, Sasser must also suffer from a deficit in adaptive behavior.

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Believing that Arkansas law strictly requires an IQ score of 70 or below, the district court concluded Sasser did not meet the first prong. As to the second prong, the district court found "the data underling [sic] the reports is simply inconclusive to show Sasser suffered significant deficits in adaptive behavior to the extent reported by Dr. Toomer."

Having decided Sasser did not meet the first two prongs, the district court saw no reason to consider the remaining prongs and concluded Atkins does not preclude Sasser's execution. Asserting the district court misconstrued Arkansas's mental retardation standard, Sasser moved to alter the judgment. The district court denied the motion, and Sasser again appeals.[3]

II. DISCUSSION

Recognizing the gravity of our task, we have carefully scrutinized the vast record and the voluminous filings in this case. We first set out the applicable standards of review and then address each of Sasser's arguments in turn.

A. Standards of Review

The legal standard applicable to an Atkins claim presents a pure question of law, which we review de novo. See Atkins, 536 U.S. at 317; Raymond v. Weber, 552

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[3]Fewer than two weeks before oral argument on appeal, the State filed a letter allegedly authorized by Fed. R. App. P. 28(j). The letter consisted entirely of argument that could have been included in the State's brief. The most recent case cited was more than a decade old, although the State incorrectly said the case was more recent. Sasser moves to strike the letter, and we grant his motion. The letter violates our Rule 28(j), which authorizes only "setting forth the *citations*" of "pertinent and significant authorities [which] come to a party's attention *after* the party's brief has been filed . . . but before decision." Fed. R. App. P. 28(j) (emphasis added). Rule 28(j) is not a vehicle for parties to say what they could and should have argued in their briefs. See, e.g., United States v. Thompson, 560 F.3d 745, 751 (8th Cir. 2009).

F.3d 680, 683 (8th Cir. 2009); see also Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 n.15 (1982). Whether an individual is mentally retarded under the applicable legal standard, however, is a pure question of fact, which we review for clear error. See Ortiz v. United States, 664 F.3d 1151, 1164 (8th Cir. 2011); Raymond, 552 F.3d at 683. A district court's finding is clearly erroneous when "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

An ineffective assistance of counsel claim "presents a mixed question of fact and law," which we review de novo. United States v. White, 341 F.3d 673, 677 (8th Cir. 2003); see also Ortiz, 664 F.3d at 1164; Raymond, 522 F.3d at 683. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), precludes federal courts from granting habeas relief on claims adjudicated on the merits in state court unless the state court adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d); see also Williams v. Roper, 695 F.3d 825, 830 (8th Cir. 2012). AEDPA also bars federal courts from granting habeas relief if the petitioner has failed to exhaust available state remedies, unless the state remedies are ineffectual or non-existent. See 28 U.S.C. § 2254(b)(1).

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B. Atkins Claim

The Constitution does not require each person legally condemned to die to approach death with the metaphysical awareness of Socrates, but does require a minimum capacity to reflect on the somber nature of the sentence. In Atkins, the Supreme Court first fully recognized that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Atkins, 536 U.S. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)). While referencing several clinical definitions of mental retardation, the Atkins court "'le[ft] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Id. at 317 (last two alterations in original) (quoting Ford, 477 U.S. at 416-17). Accordingly, subject to constitutional limits, we look to Arkansas law for the legal standard applicable to Sasser's mental retardation claim.

1. Arkansas Mental Retardation Standard

Well before the Supreme Court decided Atkins, Arkansas provided a statutory right against execution for persons "with mental retardation at the time of committing capital murder." Ark. Code Ann. § 5-4-618. Since Atkins, the Arkansas Supreme Court has consistently construed its state's statutory right to be concurrent with the federal constitutional right established in Atkins. See Anderson v. State, 163 S.W.3d 333, 354-55 (Ark. 2004) ("We believe that the court in Atkins merely reaffirmed this State's preexisting prohibition against executing the mentally retarded."). Arkansas law defines mental retardation as follows:

> (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.

Ark. Code Ann. § 5-4-618(a)(1).

Arkansas places the burden of proving mental retardation "by a preponderance of the evidence" on the defendant. Id. § 5-4-618(c). To meet this burden, Sasser had to prove four factors by a preponderance of the evidence:

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."

Ark. Code Ann. § 5-4-618(a).

a. Significantly Subaverage Intellectual Functioning

The first prong of Arkansas's mental retardation standard is consistent with clinical definitions of mental retardation. See, e.g., American Psychiatric Association (APA), Diagnostic and Statistical Manual of Mental Disorders 39, 41-43 (4th ed., Text Revision 2000) (DSM-IV-TR).

The psychiatric and psychological communities, including those specializing in the treatment of mental retardation, agree "[a] fixed point cutoff score for [mental retardation] is not psychometrically justifiable." AAIDD, Intellectual Disability: Definition, Classification, and Systems of Support 40 (11th ed. 2010). The DSM-IV-TR includes "an IQ of approximately 70 or below" in its definition of mental retardation.[4] DSM-IV-TR, supra, at 39. As we recognized in Jackson v. Norris, 615

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[4]The APA's recently released Diagnostic and Statistical Manual of Mental Disorders 33, 37 (5th ed. 2013) (DSM-V), replaces the term "mental retardation" with "intellectual disability" and removes IQ score from the diagnostic criteria, explaining "IQ test scores are approximations of conceptual functioning but may be insufficient

F.3d 959 (8th Cir. 2010), "'it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior'" because there is "'a measurement error of approximately 5 points' [in assessing IQ], depending on the testing instrument." Id. at 965 n.7 (quoting DSM-IV-TR, supra, at 41-42); see also DSM-V, supra, at 37 ("Individuals with intellectual disability have [IQ] scores of approximately two standard deviations or more below the population mean, including a margin for measurement error . . . . [generally equivalent to] a score of 65-75."). In Atkins itself, the Supreme Court noted "an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Atkins, 536 U.S. at 309 n.5.

If Arkansas's definition of mental retardation categorically excluded individuals who fell within the nationally accepted clinical definition of mental retardation, we might need to confront the difficult constitutional question whether Arkansas sufficiently protects "the range of mentally retarded offenders about whom there is a national consensus."[5] Id. at 317. Compare, e.g., id. ("As was our approach in Ford[] with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" (quoting Ford, 477 U.S. at 416-17)), with Panetti v. Quarterman, 551 U.S. 930, 950 (2007) (holding state procedures for preventing the execution of insane individuals "failed to provide . . . the minimum process required by Ford"). Out of

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to assess reasoning in real-life situations and mastery of practical tasks." In this case, however, we continue to rely primarily on the earlier version (the DSM-IV-TR) and refer to the diagnosis as "mental retardation," in accordance with the record and expert testimony before us.

[5]Indeed, the Supreme Court recently granted the petition for certiorari in Hall v. Florida, No. 12-10882, 2013 WL 3153535 (U.S. Oct. 21, 2013), which presents the precise constitutional question whether a state violates the Eighth Amendment Atkins right by imposing a strict IQ cutoff score of 70.

respect for the states' role in our federalist system, we will not assume—without a clear indication from the state's legislators or courts—that a state intends to stretch constitutional limits. See, e.g., Arizona v. United States, 567 U.S. ___, ___, 132 S. Ct. 2492, 2510 (2012) ("'So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed; and it is to be presumed that state laws will be construed in that way by the state courts.'" (quoting Fox v. Washington, 236 U.S. 273, 277 (1915)); N.J. Payphone Ass'n v. Town of W.N.Y., 299 F.3d 235, 249 (3d Cir. 2002) (Alito, J., concurring) (explaining that "resolving [a] case on state-law grounds does less violence to principles of federalism and dual sovereignty" than does "invo[king] . . . federal supremacy over local laws").

Fortunately, there is no reason to interpret Arkansas law in a constitutionally questionable manner because post-Atkins cases decided by the Arkansas Supreme Court indicate that it has carefully avoided such a reading. Under Arkansas law, mental retardation is not bounded by a fixed upper IQ limit, nor is the first prong a mechanical "IQ score requirement." See, e.g., Anderson, 163 S.W.3d at 355-56 (finding that a mental health assessment relying on "achievement scores consistent with average intelligence" and "reading performance . . . on the high school level" potentially outweighed an IQ test score of 65). Neither does Arkansas law compel a finding of mental retardation below a certain IQ limit, although it establishes a "rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below." Ark. Code Ann. § 5-4-618(a)(2).

Simply put, an IQ test score alone is inconclusive of "significantly subaverage general intellectual functioning," Ark. Code Ann. § 5-4-618. See, e.g., Miller v. State, 362 S.W.3d 264, 277-78 (Ark. 2010) (reviewing a range of evidence other than IQ scores); Weston v. State, 234 S.W.3d 848, 857 (Ark. 2006) (concluding the trial judge properly considered not only the defendant's IQ score but also "the records and . . . mental evaluations, including the evidence suggesting that appellant was malingering"); Sanford v. State, 25 S.W.3d 414, 419 (Ark. 2000) (referring to an IQ

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score of 75 as "in the borderline range"); Arkansas Model Jury Instructions – Criminal 1009-EXP (2d ed. 2012) (not definitively linking "significantly subaverage general intellectual functioning" to *any* IQ test score or range, but allowing, while not requiring, a finding of mental retardation upon a finding of an IQ of 65 or below).

b. Significant Deficit or Impairment

The second prong of the Arkansas standard is identical to the "adaptive functioning" prong of the DSM-IV-TR's diagnostic definition of mental retardation. See Jackson, 615 F.3d at 961-62, 965-66; DSM-IV-TR, supra, at 41-42. As we said before, "[t]he second prong is met if an individual has 'significant *limitations* in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety.'" Jackson, 615 F.3d at 962 (emphasis added) (quoting DSM-IV-TR, supra, at 41).

Consistent with nationally accepted clinical definitions of mental retardation, the Arkansas standard does not ask whether an individual has adaptive strengths to offset the individual's adaptive limitations. See, e.g., id. at 962, 965-66; Miller, 362 S.W.3d at 277-78; cf. DSM-IV-TR, supra, at 39. Instead, like the DSM-IV-TR diagnostic criteria, the Arkansas standard asks only whether an individual has at least two "significant limitations in adaptive functioning." DSM-IV-TR, supra, at 39, 41. In Miller, for example, the Arkansas Supreme Court found "conflicting opinions and evidence" of defendant's adaptive behavior where almost all evidence indicated reasonably average functioning (e.g., defendant had "held a steady job for fourteen years" and had "kept up with financial transactions"), but there was evidence of two adaptive limitations (i.e., defendant had been in "special education classes from the third grade on" and had discipline-related difficulties on the job). Miller, 362 S.W.3d at 277-78; see also Jackson, 615 F.3d at 966 (explaining the second prong could be satisfied by "significant limitations in two skill areas prior to age 18").

c. Manifestation of Symptoms Before Age Eighteen

The third prong of Arkansas's mental retardation standard, like the first two, mimics nationally accepted diagnostic criteria. See, e.g., DSM-IV-TR, supra, at 41. Arkansas requires proof that both "[s]ignificantly subaverage general intellectual functioning" and "significant deficit or impairment in adaptive functioning" "manifest[ed] . . . no later than *age eighteen*." Ark. Code Ann. § 5-4-618(a)(1) (emphasis added); see also Jackson, 615 F.3d at 961. The DSM-IV-TR explains "[t]he onset must occur before *age 18 years*." DSM-IV-TR, supra, at 41 (emphasis added).

d. Deficit in Adaptive Behavior

Although the fourth prong of Arkansas's mental retardation standard "does not appear in the DSM-IV-TR's criteria for mental retardation," the prong is fully consistent with nationally accepted diagnostic criteria. Jackson, 615 F.3d at 966. The fourth prong largely duplicates the second prong, but places "no age requirement on the evidence used to establish limitations in adaptive behavior." Id. at 967.[6]

e. Timing of Proof

Timing affects a defendant's ability to prove all four prongs. The Arkansas Supreme Court has consistently described the federal Atkins and state statutory rights as concurrent despite the fact that a plain reading of the Arkansas statute, Ark. Code Ann. § 5-4-618, and Atkins indicates a temporal inconsistency between the two rights. The Arkansas statute bars the execution of those mentally retarded "*at the time of committing* capital murder," Ark. Code Ann. § 5-4-618(b) (emphasis added),

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[6]To "avoid[] surplusage," Freeman v. Quicken Loans, Inc., 566 U.S. ___, ___, 132 S. Ct. 2034, 2043 (2012) (emphasis omitted), the fourth prong could be read to require a concurrent showing of an adaptive deficit, as opposed to before the age of eighteen. But the Arkansas Supreme Court has not interpreted Ark. Code Ann. § 5-4-618(a)(1)(B) in this manner. See Miller, 362 S.W.3d at 278 (considering evidence "from about age twelve to fourteen years" under the fourth prong).

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while Atkins decided the Eighth Amendment bars "the execution *of a mentally retarded person*," Roper v. Simmons, 543 U.S. 551, 559 (2005) (emphasis added) (citing Atkins, 536 U.S. at 304). At first glance, one might read the federal and state rights differently, interpreting Arkansas's statute to protect only those mentally retarded at the time of *the offense* and the Eighth Amendment to protect only those mentally retarded at the expected time of *execution*. But Arkansas courts have consistently avoided such a reading of their state's statute:

> It is a violation of the Eighth Amendment's protection from cruel and unusual punishment to execute a person who *is* mentally retarded. [Atkins, 536 U.S. at 304.] Arkansas law *likewise* prohibits a death sentence for anyone who is mentally retarded *at the time of an offense*. Ark. Code Ann. § 5-4-618(b).

Miller, 362 S.W.3d at 276 (emphasis added). As interpreted by the Arkansas Supreme Court, the Arkansas statute thus overlaps with the Eighth Amendment, precluding the execution of an individual who can prove mental retardation *either* (a) at the time of committing the crime *or* (b) at the presumptive time of execution.[7]

From a medical perspective, this temporal distinction might matter because "Mental Retardation is not necessarily a lifelong disorder." DSM-IV-TR, supra, at 47. There is emerging evidence, based on genetic research, that certain forms of mental retardation may be treatable. See, e.g., Aileen Healy et al., Fragile X Syndrome: An Update on Developing Treatment Modalities, 2 ACS Chem. Neurosci. 402 (2011). Furthermore, "appropriate training and opportunities" may enable certain individuals with mild mental retardation to develop sufficient "adaptive skills" to "no

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[7] This is not to say the Eighth Amendment requires Arkansas to give defendants an opportunity to prove mental retardation using evidence from the time of commission. We merely recognize Arkansas has elected to define "mental retardation" for the purpose of proving mental retardation under Atkins in this manner. See Ark. Code Ann. § 5-4-618(b); cf. Roper, 543 U.S. at 559.

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longer have the level of impairment required for a diagnosis of Mental Retardation." DSM-IV-TR, supra, at 47.

In most cases, timing will be more important as a legal matter because a mentally retarded individual may have better evidence of his condition at one point in life than another. Certain environments may artificially affect the scores obtained on common IQ tests just as practice effects may unmoor an individual's IQ score from his underlying intellectual capacity. Under Atkins and Ark. Code Ann. § 5-4-618(b), Arkansas may not execute an individual who sufficiently proves he met all four prongs of the Arkansas mental retardation standard at *either* relevant time, even if the individual lacks proof he satisfied the standard at *both* relevant times. See Miller, 362 S.W.3d at 276.

2. District Court's Legal Analysis

Having set out the applicable standard, we now turn to Sasser's case. Challenging the district court's finding that he was not mentally retarded, Sasser claims the district court erred as a matter of law by using an incorrect mental retardation standard. We must agree. Though looking to the right source—Arkansas law—the district court misconstrued the standard.

a. Significantly Subaverage Intellectual Functioning

First, without any basis in Arkansas or federal law, the district court read a strict upper IQ limit into the Arkansas statute: "the Arkansas statute requires . . . *a score of 70 or below*." (Emphasis added). The district court even referred to the first prong of the Arkansas statute as an "IQ score requirement." Having adopted this interpretation, the district court confined its factual analysis to Sasser's 1994 and 2010 IQ test scores, concluding "[t]he only evidence before the Court to establish th[e first] prong is Sasser's 1994 IQ score, once the Flynn effect is applied to discount the score and a[n] assumption is made that Sasser's actual ability is at the lowest point in the confidence interval range [(i.e., 70)]." Arkansas law, the district court

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believed, would not allow Sasser's "then-scored IQ range of 70 to 80 to demonstrate mental retardation, as suggested by the DSM-IV." Because Sasser had not obtained an IQ test score of 70 or lower on either the 1994 or 2010 intelligence tests, the district court found Sasser had not proved the first prong of the Arkansas standard by a preponderance of the evidence.

It was legal error to read a strict "IQ score requirement" into the Arkansas statute defining mental retardation.[8] As we have emphasized, IQ "test scores are imprecise and standing alone cannot support a diagnosis." Ortiz, 664 F.3d at 1168. As the Arkansas Supreme Court showed in case after case, the first prong encompasses more than mere IQ test scores. See, e.g., Weston, 234 S.W.3d at 857; Anderson, 163 S.W.3d at 355-56; Sanford, 25 S.W.3d at 419. In evaluating whether Sasser proved the first prong, the district court should have considered all evidence of Sasser's intellectual functioning rather than relying solely on his IQ test scores.

[8]The district court's error is understandable to the extent some Arkansas Supreme Court cases seem to blur the distinction between the rebuttable presumption of mental retardation, which hinges solely on IQ score, and the first prong of the mental retardation standard, which does not. See Miller, 362 S.W.3d at 278 ("[A]lthough there was no consensus among the expert opinions as to exactly what Miller's intelligence quotient was, all experts agreed that it was above 65."). A careful reading of Miller and the statute reveals the rebuttable presumption cuts across *all four* prongs, meaning a defendant with an undisputed IQ of 65 or below is not required to prove any of the four prongs to prevent execution. See Ark. Code Ann. § 5-4-618(a)(2); Miller, 362 S.W.3d at 278. This presumption, which in some cases offers a laxer alternative to the nationally accepted diagnostic criteria for mental retardation, is entirely consistent with, but not mandated by, Atkins. See Atkins, 536 U.S. at 317; Miller, 362 S.W.3d at 276-78; cf. DSM-IV-TR, supra, at 42 ("Mental Retardation would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning."). The Arkansas Supreme Court's view that Atkins does not require Arkansas to adopt a rebuttable presumption of mental retardation when a defendant scores 75, rather than 65, is thus entirely correct. See Engram v. State, 200 S.W.3d 367, 373 & n.3 (Ark. 2004).

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b. Significant Deficit or Impairment

Second, the district court misunderstood the relationship between "a significant deficit or impairment in adaptive functioning" under Arkansas law, Ark. Code Ann. § 5-4-618(a)(1)(A), and the DSM-IV-TR diagnostic criteria (i.e., "significant limitations in adaptive functioning in at least two of [several] skill areas"), DSM-IV-TR, supra, at 41. As our decision in Jackson made clear, the Arkansas standard required the district court to recognize that if Sasser had more than one significant adaptive *limitation*, as defined by the DSM-IV-TR, then he had a "significant *deficit or impairment* in adaptive functioning" under Arkansas law, Ark. Code Ann. § 5-4-618(a)(1)(A). See Jackson, 615 F.3d at 961-62.

The district court looked for evidence of more than one significant *deficit* in adaptive behavior and concluded "Sasser has not shown significant adaptive *deficits* by a preponderance of the evidence." (Emphasis added). The district court found "Sasser had *limitations*, but no significant *deficits* in adaptive functioning." (Emphasis added). The question Arkansas law required the district court to answer was not whether Sasser had more than one significant *deficit* but whether Sasser had more than one significant *limitation*, as defined by the DSM-IV-TR. See Jackson, 615 F.3d at 962. Thus, the factual finding that Sasser had "limitations"—without specifying whether these limitations were significant under the diagnostic criteria—"but no significant deficits" misunderstands the issue.

The district court also held Sasser to the wrong legal standard by improperly offsetting limitations against abilities, even across skill areas. For example, the district court found it "clear Sasser struggled with job duties which involved labeling and grouping" (i.e., work skills), but balanced this limitation against Sasser's ability to "get along with co-workers" and be at work on time (i.e., social/interpersonal skills). Although Sasser has lived in prison or with his mother virtually his entire life, the district court found Sasser "was able to live on his own for a period of time" based

on the few weeks after Sasser failed the ASVAB and hid in an abandoned shed without electricity or running water.

This balancing approach was inconsistent with Arkansas law, which required Sasser to prove only two significant limitations in the DSM-IV-TR adaptive skill areas. See Jackson, 615 F.3d at 962. Under the district court's approach, even an individual with a prototypical case of mild mental retardation could not prove it. For example, although Sasser "was described as 'slow' by some," the district court emphasized that "no person who knew Sasser in the developmental period, even those trained in special education, regarded Sasser as mentally retarded." Yet as the DSM-IV-TR explains, individuals with mild mental retardation "often are not distinguishable from children without Mental Retardation until a later age," supra, at 43. As another example, the district court highlighted Sasser's ability to perform a job "within his abilities . . . reliably well." Again, the DSM-IV-TR explains that "[d]uring their adult years, [mildly mentally retarded individuals] usually achieve social and vocational skills adequate for minimum self-support." Id.

These legal errors mean the district court has not answered the question Atkins required it to answer: under Arkansas law, did Sasser prove by a preponderance of the evidence that he had "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety"? DSM-IV-TR, supra, at 41; see Jackson, 615 F.3d at 961-62. Answering this question does not involve balancing strengths against limitations. It simply requires deciding whether the evidence

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establishes significant limitations in two of the listed skill areas.[9] See DSM-IV-TR, supra, at 41.

c. Manifestation of Symptoms by Age Eighteen

Third, the district court thought the age prong applied only to the adaptive functioning prong of the Arkansas standard. In this respect, the district court held Sasser to a lower standard than Arkansas law—and the DSM-IV-TR diagnostic criteria. See Jackson, 615 F.3d at 961; DSM-IV-TR, supra, at 47. The Arkansas standard actually required Sasser to prove the onset of his mental retardation, both the intellectual and the adaptive functioning prongs, occurred "no later than . . . eighteen years of age." Jackson, 615 F.3d at 961.

d. Timing of Proof

Fourth, the district court's successive orders seem to rely on the clinical reality that mental retardation is normally a lifelong disorder to mix proof of Sasser's mental condition at the time he committed murder with proof from other periods. Denying Sasser's motion for reconsideration, the district court said that it "never limited Atkins or the Arkansas statute . . . to mental retardation as it may have existed *at a single point in time*—be it contemporaneous with execution or with the offense." (Emphasis added). In evaluating Sasser's adaptive functioning, the district court mixed and matched evidence of Sasser's capacities from different points in his life, creating a composite portrait of Sasser at a peak he never actually experienced rather than a distinct snapshot of Sasser's actual mental capacity at a single relevant point

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[9]For example, the finding that "once a job was given to [Sasser] within his abilities, he was able to perform the job reliably well," misses the point: the question is not whether Sasser could perform a job "within his abilities," but whether "his abilities" *significantly* limited his performance of *normal* job-related tasks. See Jackson, 615 F.3d at 962; DSM-IV-TR, supra, at 41.

in time.[10] It was error to ignore the temporal distinction underlying the Arkansas standard. See Ark. Code Ann. § 5-4-618(b); Miller, 362 S.W.3d at 276.

This timing mistake compounded the erroneous balancing approach to the second prong of the Arkansas standard. Mixing strengths and limitations from different periods of Sasser's life, the district court found "[t]here [wa]s simply not enough consistent information in the data to make any sort of reliable conclusion about [Sasser]'s actual performance of adaptive behaviors." The real question is whether Sasser proved "a significant deficit or impairment in adaptive functioning," Ark. Code Ann. § 5-4-618(a)(1)(A), at a relevant point in time, not whether the record provided a full picture of Sasser's mental condition *at all times* throughout his life. See, e.g., Miller, 362 S.W.3d at 276.

3. Effect of the Legal Errors

Although the district court judged Sasser's mental retardation claim by a legal standard that deviated from Arkansas law in several critical respects, even constitutional errors do not always require automatic reversal. See Fry v. Pliler, 551 U.S. 112, 120 (2007); Chapman v. California, 386 U.S. 18, 22 (1967); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The errors were certainly not structural, so we must decide whether "the error[s] w[ere] harmless." Neder v. United States, 527 U.S. 1, 8 (1999). We easily conclude the district court's error with respect to the third prong, holding Sasser to a lower standard than required by Arkansas law, was harmless. The other errors present closer questions. "Recognizing '[o]ur duty to search for constitutional error with painstaking care is never more exacting than it is

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[10]The relevant points in time were (1) the time of the murder or the time of the hearing, and (2) for the purposes of the age prong, the period through age eighteen. See Miller, 362 S.W.3d at 276 (citing Ark. Code Ann. § 5-4-618(b)).

in a capital case,' we cannot say the[se] error[s] w[ere] harmless." Ortiz, 664 F.3d at 1166 (quoting Kyles v. Whitley, 514 U.S. 419, 422 (1995)).

The district court carefully summarized the evidence, and, recognizing the district court's "unique opportunity . . . to evaluate the credibility of witnesses and to weigh the evidence," Inwood, 456 U.S. at 855, we give deference to the district court's factual findings. See, e.g., Story v. Norwood, 659 F.3d 680, 685 (8th Cir. 2011). Yet misconceptions about the Arkansas legal standard led the district court to answer the wrong factual questions, leaving the pertinent questions unanswered.

As a result, we cannot say the legal errors were harmless unless no reasonable factfinder, applying the correct standard, could find Sasser mentally retarded. In light of Dr. Toomer's testimony about Sasser's intellectual functioning and evidence that Sasser had the communication and social skills of a seven-year-old, struggled with basic tasks like color-coding, failed to graduate from high school, never had a checking account, and did not obtain a driver's license until the age of 28, we cannot safely say it would be unreasonable to find Sasser mentally retarded. Cf., e.g., Ortiz, 664 F.3d at 1166 (concluding a district court's mistaken belief that a defendant obtained a driver's license was not harmless even though "the driver's license was but one of many facts upon which the district court relied").

The proper course, then, is to vacate the district court's finding that Sasser is not mentally retarded and remand so that the district court may answer the critical factual questions in the first instance according to the correct legal standard. See, e.g., Waldau v. Merit Sys. Prot. Bd., 19 F.3d 1395, 1402 (Fed. Cir. 1994) ("We therefore vacate the . . . decision . . . and remand for application of the correct legal standard to the facts of this case in light of this decision."); Bigge v. Albertsons, Inc., 894 F.2d 1497, 1503 (11th Cir. 1990) ("[W]e believe that the district court should reconsider the evidence in light of the correct legal standard.").

C. Ineffective Assistance of Counsel Claims

At every turn in these proceedings, Sasser has raised new ineffective assistance of counsel claims or recast old claims in new ways. Having carefully scrutinized Sasser's numerous filings, we count no fewer than sixteen ineffective assistance of counsel claims raised under the umbrella of the second ground certified for appeal. All but four of these claims are procedurally barred, meritless, or both. See, e.g., Harrington v. Richter, 562 U.S. ___, ___, 131 S. Ct. 770, 784 (2011) (holding 28 U.S.C. § 2254(d) bars federal relief on a claim adjudicated in state court unless "there was no reasonable basis for the state court to deny relief"); Kennedy v. Delo, 959 F.2d 112, 117 (8th Cir. 1992) (holding claims raised for the first time on appeal are procedurally barred and constitute abuses of the writ).[11]

The four remaining claims, all related to the sentencing phase, assert that Sasser's trial counsel ineffectively failed to:

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[11]We reject Sasser's contention his initial habeas counsel's purported ineffectiveness excuses his failure to raise claims in the district court. The case Sasser cites in support of this contention, Maples v. Thomas, 565 U.S. ___, ___-___, 132 S. Ct. 912, 922-24 (2012), is inapposite because (1) it applied to counsel's failure in *state* postconviction proceedings, and (2) it involved counsel who literally abandoned the client. The overwhelming evidence of Sasser's guilt renders harmless any purported ineffectiveness during the guilt phase.

We also reject Sasser's unusual exhaustion argument, which he raises for the first time in this appeal. Although a "*State* shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement," 28 U.S.C. § 2254(b)(3) (emphasis added), a habeas *petitioner* is not similarly protected by AEDPA. By failing to raise exhaustion below, Sasser waived whatever exhaustion argument he might have had. See Granberry v. Greer, 481 U.S. 129, 131 (1987) ("[F]ailure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application.").

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1. Prepare for the sentencing phase of the trial;
2. Obtain a timely psychological evaluation of Sasser;
3. Meaningfully consult with a mental health professional; and
4. Object "when the prosecutor misconstrued the mitigating evidence that the defense had presented concerning [Sasser's] mental impairment and lessened culpability" or to rebut that argument.

On these four potentially meritorious claims, Sasser is entitled to an evidentiary hearing in light of the Supreme Court's recent decision in Trevino v. Thaler, 569 U.S. ___, 133 S. Ct. 1911 (2013).

1. Trevino

In Martinez v. Ryan, 566 U.S. ___, ___, 132 S. Ct. 1309, 1315 (2012), the Supreme Court created a "narrow exception" to the Coleman rule that ineffective assistance of counsel in a state postconviction proceeding does not provide cause to excuse procedural default. Cf. Coleman v. Thompson, 501 U.S. 722, 753-54 (1991). The Supreme Court expanded this exception in Trevino, reasoning "a distinction between (1) a State that denies permission to raise [an ineffective assistance of counsel] claim on direct appeal and (2) a State that in theory grants permission but, as a matter of procedural design and systematic operation, denies a meaningful opportunity to do so is a distinction without a difference." Trevino, 569 U.S. at ___, 133 S. Ct. at 1921.

At issue in Trevino was Texas's procedural system, which the Supreme Court concluded "as a matter of its structure, design, and operation[] does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of counsel on direct appeal." Id. For practical reasons, Texas courts have "discouraged" defendants from bringing ineffective assistance of counsel claims on direct review, and the Supreme Court emphasized that Texas procedures make it "difficult, perhaps impossible," to develop the factual record required for an ineffective assistance claim

on direct appeal. Id. at ___, 133 S. Ct. at 1919. "What the Arizona law [considered in Martinez] prohibited by its explicit terms, Texas law precludes as a matter of course." Id. at ___ , 133 S. Ct. at 1921.

Decisively for this case, Arkansas does not provide capital defendants with new counsel on direct appeal as a matter of course. See Ark. R. App. P.-Crim. 16(a)(i) ("Trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause."). Indeed, the same allegedly ineffective lawyer represented Sasser, unsuccessfully, throughout his trial and direct appeal. Texas, by contrast, provides new appellate counsel as a matter of course and did so in the Trevino case, yet the Supreme Court still found Texas's procedure insufficient.

Although new appellate counsel is not, by itself, sufficient to guarantee capital defendants a meaningful opportunity to challenge their trial counsel's effectiveness on direct appeal, it is a necessary part of such a guarantee. Otherwise, appointed trial counsel must question his own effectiveness—a conceptually difficult task for several reasons, including trial counsel typically must be a witness in any ineffectiveness hearing. As the Arkansas Supreme Court recognized in Rounsaville v. State, 282 S.W.3d 759, 760 (Ark. 2008) (per curiam), "it is unrealistic to expect trial counsel, who is also appellate counsel, to call into question his own competence."

In Rounsaville, the Arkansas Supreme Court remedied this problem by appointing new counsel. See id. But the problem came to the attention of the court and trial counsel because the defendant himself "filed . . . a pro se motion for new trial based upon his claims of ineffectiveness of his current counsel." Id. at 759. The few reported cases in which an Arkansas defendant successfully obtained an ineffective assistance hearing on direct appeal all involved defendants who raised the

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claims pro se or who had the means to hire new counsel. See Rounsaville v. State, 288 S.W.3d 213, 215, 220 (Ark. 2008); Missildine v. State, 863 S.W.2d 813, 817-18 (Ark. 1993); id. at 819 (Brown, J., concurring) (questioning "the wisdom of considering the issue of ineffective counsel on direct appeal" because it would incentivize "defendants to shuck trial counsel after trial and either proceed *pro se* or retain new counsel to pursue an ineffectiveness claim as part of post trial relief prior to direct appeal"); Halfacre v. State, 578 S.W.2d 237, 239 (Ark. 1979) ("After the appellants were convicted and sentenced, they wrote directly to the trial judge asking for a hearing on the question of effectiveness of their court-appointed counsel."). In most reported cases, the Arkansas Supreme Court has simply refused to consider ineffectiveness claims on direct appeal. See, e.g., Maxwell v. State, 197 S.W.3d 442, 445 (Ark. 2004); Ratchford v. State, 159 S.W.3d 304, 309 (Ark. 2004); Anderson v. State, 108 S.W.3d 592, 606 (Ark. 2003); Willis v. State, 977 S.W.2d 890, 894 (Ark. 1998).

Rounsaville and Halfacre indicate that if Sasser, acting pro se, had moved for a new trial based on his trial counsel's ineffectiveness, the trial court could and probably would have appointed new counsel. But a procedure to assure adequate representation cannot depend on a defendant's acting *without* representation. At best (i.e., according to the State's expert) Sasser has "borderline mental retardation or impaired cognitive functioning that falls into the upper 70s to low 80s." At worst, he is mentally retarded and has the communication and interpersonal skills of a seven-year-old. Either way, the State could not expect Sasser to understand the need and file a pro se motion for a new trial and appointment of new counsel.

As the facts of this case demonstrate, it is only possible for an indigent capital defendant to bring an ineffective assistance claim on direct appeal in Arkansas if (1) the defendant raises the claim pro se in the trial court or (2) the defendant's trial counsel "falls on his own sword" by moving for a new trial based on his own ineffectiveness and also moving for appointment of new counsel. Neither alternative

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is sufficient in light of Trevino, and the latter alternative is especially troubling as a matter of professional ethics, potentially requiring trial counsel to choose between accurately asserting he was effective or inaccurately asserting that he was not. The first option would violate the lawyer's duty of zealous representation to his client and the second his duty of candor to the court. A direct appeal procedure predicated on such a conflict of interest does not present indigent capital defendants a viable opportunity to challenge their appointed trial counsel's effectiveness.

For these reasons, we conclude Arkansas did not "as a systematic matter" afford Sasser "meaningful review of a claim of ineffective assistance of trial counsel" on direct appeal. Trevino, 569 U.S. at ___, 133 S. Ct. at 1919.

2. This Case

Trevino creates a two-part question: (1) did Sasser's state postconviction counsel fail to raise these four ineffectiveness claims, and (2) do these claims merit relief? Answering this question, Sasser says, requires an evidentiary hearing. Applying the law as it stood at the time, the district court deemed these claims procedurally barred and denied Sasser's request for a hearing. In the new light of Trevino, that denial was erroneous.

Sasser asserts that if given an opportunity to present new evidence, he could show his trial counsel failed to prepare for the sentencing phase by not (1) developing mitigating evidence of Sasser's limited mental capacities, and (2) interviewing Sasser's first victim, Ms. Carter, whose dramatic testimony during the guilt phase was an important factor supporting the jury's decision to impose the death penalty. According to Sasser's district court filings, Ms. Carter would have been prepared to testify during the sentencing phase that despite her ordeal, she did *not* believe Sasser deserved execution. Yet Sasser's trial counsel apparently never interviewed Ms. Carter and thus never learned what a compelling mitigation witness she might have been. Sasser also asserts that his trial counsel's general lack of preparation, including

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a failure to obtain a timely psychological analysis and meaningfully consult with a mental health expert,[12] led to an inexcusable failure to present evidence of Sasser's intellectual difficulties and potential mental retardation.

Under Trevino, Sasser's postconviction counsel's alleged ineffectiveness, if proved, establishes "cause for any procedural default [Sasser] may have committed in not presenting these claims to the [Arkansas] courts in the first instance." Williams v. Taylor, 529 U.S. 420, 444 (2000); see Trevino, 569 U.S. at ___, 133 S. Ct. at 1921 ("[F]ailure to consider a lawyer's 'ineffectiveness' during an initial-review collateral proceeding as a potential 'cause' for excusing a procedural default will deprive the defendant of any opportunity at all for review of an ineffective-assistance-of-trial-counsel claim."). Thus, the district court is authorized under 28 U.S.C. § 2254(e)(2) and required under Trevino to "hold an evidentiary hearing on the claim[s]." See Williams, 529 U.S. at 437 (explaining § 2254(e)(2) does not preclude district courts from holding an evidentiary hearing if the petitioner "was unable to develop his claim in state court despite diligent effort").

As in Sinisterra v. United States, 600 F.3d 900, 912 (8th Cir. 2010), we must reverse the district court's denial of Sasser's request for an evidentiary hearing and vacate the district court's determination that these four claims are procedurally barred. On remand, after giving Sasser an opportunity to present evidence related to these four claims, the district court should determine whether any of these claims merits relief.

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[12]Sasser's trial counsel called a witness whose testimony ("Sasser, in all probability, will always be a very dangerous man") could hardly have caused more self-inflicted damage to Sasser's mitigation case.

D. Incomplete Jury Instruction Claim

Pointing to the trial court's admittedly incomplete definition of the elements of attempted rape and kidnapping, Sasser contends the error was structural or, at least, prejudicial. The State counters that the "independent and adequate state ground doctrine" precludes us from considering this claim. Coleman, 501 U.S. at 730. Assuming the State is wrong, Sasser's claim still merits no relief because the error was neither structural nor prejudicial.

Reviewing the trial court's jury instruction error, the Arkansas Supreme Court concluded the error was not structural. See Sasser 1999, 993 S.W.2d at 907. We agree. "[T]he omission of an element is an error that is subject to harmless-error analysis." Neder, 527 U.S. at 16; see also Sullivan v. Louisiana, 508 U.S. 275, 279 (1993). Given the overwhelming weight of evidence supporting Sasser's conviction, we "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." Neder, 527 U.S. at 19; cf. Sasser 1999, 993 S.W.2d at 908 ("[T]here is ample evidence in the record to support a finding of either kidnapping, attempted kidnapping, or attempted rape as the underlying felony for the capital murder charge."). Sasser "has presented no plausible argument," Johnson v. United States, 520 U.S. 461, 470 (1997), that his actions did not constitute kidnapping, attempted kidnapping, or attempted rape under Arkansas law. Even if the error were serious enough to preclude finding Sasser guilty of felony murder based on either of the attempt crimes, the error would still be harmless. Overwhelming evidence supported a conviction for felony murder based on the underlying felony of *completed* kidnapping, as to which the trial court correctly instructed the jury. Sasser is not entitled to habeas relief on this claim.

III. CONCLUSION

We dismiss the claims Sasser attempts to raise for the first time on appeal. We affirm the district court's dismissal of all of Sasser's remaining claims with the exception of his Atkins claim and the four ineffective assistance claims meriting a

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hearing under Trevino.[13] We vacate (1) the district court's denial of relief on these four claims, and (2) the district court's finding that Sasser is not mentally retarded under Atkins. We reverse the district court's denial of a hearing on the four potentially meritorious ineffective assistance claims. We remand for further proceedings consistent with this opinion, including (1) a hearing on the four ineffective assistance claims, and (2) a new Atkins finding under the appropriate standard.

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[13]In a conclusory manner, Sasser claims (1) the Arkansas death penalty statute is unconstitutional, and (2) requiring prospective jurors to take an additional oath before being questioned about their attitudes toward the death penalty is unconstitutional. Both claims are meritless under current, well-settled law. See, e.g., Lockhart v. McCree, 476 U.S. 162 (1986); Gregg v. Georgia, 428 U.S. 153 (1976).

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United States Court of Appeals
For the Eighth Circuit

No. 02-3103

Andrew Sasser

Petitioner - Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Respondent - Appellee

No. 11-3346

Andrew Sasser

Petitioner - Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Respondent - Appellee

Appeal from United States District Court
for the Western District of Arkansas - Texarkana

Submitted: December 13, 2013
Filed: February 26, 2014

Before RILEY, Chief Judge, WOLLMAN and MELLOY, Circuit Judges.

RILEY, Chief Judge.

The State of Arkansas's petition for panel rehearing is predicated on a misreading of our opinion and a mischaracterization of the record. It should be clear the district court, on remand, must consider whether "[Andrew] Sasser's state postconviction counsel fail[ed] to raise the[] four [potentially meritorious] ineffectiveness claims." Sasser v. Hobbs, 735 F.3d 833, 853 (8th Cir. 2013). It should equally be clear that Sasser's "postconviction counsel's *alleged* ineffectiveness" will excuse procedural default only "if proved." Id. (emphasis added). Far from determining Sasser has affirmatively overcome the procedural bar, our opinion recognizes we cannot presently determine whether these four claims remain procedurally barred in light of Trevino v. Thaler, 569 U.S. ___, 133 S. Ct. 1911 (2013).

Our opinion therefore vacates the procedural default determination and remands for the district court to decide the two-part Trevino question in the first instance, after giving Sasser an opportunity to present evidence in support of his argument the four claims are no longer procedurally barred. This hearing will necessarily address the underlying merits of the four claims because, unless postconviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite Trevino. See Strickland v. Washington, 466 U.S. 668, 687 (1984). On remand, the State is free to argue Sasser's postconviction counsel fully raised the four claims, see Arnold v. Dormire, 675 F.3d 1082, 1087 (8th Cir.

2012), just as Sasser is free (1) to argue the State forfeited this argument or is estopped from relying upon it, and (2) to show substantial and decisive factual differences between these four claims and the purportedly similar postconviction claims emphasized by the State.

Because we do not consider it appropriate in this capital case to decide such fact-intensive questions for the first time on appeal, we deny the State's petition for rehearing by the panel.

____

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 02-3103

Andrew Sasser

Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Appellee

No: 11-3346

Andrew Sasser

Appellant

v.

Ray Hobbs, Director, Arkansas Department of Corrections

Appellee

Appeal from U.S. District Court for the Western District of Arkansas - Texarkana
(Civ. No. 00-4036)
(4:00-cv-04036-JLH)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied. *See* panel supplemental opinion dated February 26, 2014.

Judge Colloton would grant the petition for rehearing *en banc*.

Judge Smith and Judge Shepherd did not participate in the consideration or decision of this matter.

COLLOTON, Circuit Judge, dissenting from denial of rehearing en banc.

Andrew Sasser murdered Jo Ann Kennedy on July 12, 1993. That was more than twenty years ago. The jury recommended a sentence of death, and Sasser was sentenced to death by lethal injection. The Supreme Court of Arkansas affirmed the judgment in 1995. *Sasser v. State*, 902 S.W.2d 773, 779 (Ark. 1995). Sasser sought postconviction relief in state court, which was denied, and the Supreme Court of Arkansas affirmed that denial in July 1999. *Sasser v. State*, 993 S.W.2d 901, 903 (Ark. 1999). Sasser then sought a writ of habeas corpus in federal court, and the district court denied relief in May 2002. Sasser filed a notice of appeal in this court in August 2002. *After more than eleven years*, in November 2013, a panel of this court finally ruled on Sasser's appeal, and the resolution was to remand the case for still further proceedings in the district court. *Sasser v. Hobbs*, 735 F.3d 833, 854 (8th Cir. 2013). I would grant rehearing en banc to consider whether more delay is warranted in the resolution of this case.

Much of the delay in resolving Sasser's appeal is attributable to this court's questionable orders remanding the case for further proceedings in light of *Atkins v. Virginia*, 536 U.S. 304 (2002). Well before *Atkins*, Arkansas provided that no defendant with mental retardation at the time of committing capital murder could be sentenced to death. *See Atkins*, 536 U.S. at 314 & n.12; Ark. Code § 5-4-618. Despite this bar on the execution of mentally retarded offenders in Arkansas, Sasser raised no claim of mental retardation until years after his conviction and sentence were affirmed on direct appeal. The panel in this appeal remands the case yet again for further proceedings on the issue of mental retardation. Whether Sasser procedurally defaulted his challenge to the sentence based on mental retardation continues to be a question of exceptional importance that warrants en

banc review. *See Sasser v. Norris*, No. 07-2385, 2009 WL 9160770 (8th Cir. Apr. 14, 2009) (opinion dissenting from 5-4 denial of rehearing en banc).

In resolving the 2002 appeal, the panel considered several claims of ineffective assistance of trial counsel. The district court concluded that these claims were procedurally defaulted because Sasser failed to present and develop his claims in state court through the highest available appellate court. The panel did not say that the district court's procedural default ruling was wrong, but nonetheless summarily remanded four of these claims to the district court for an evidentiary hearing. 735 F.3d at 851. The cited reason for the remand was the Supreme Court's decisions in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013). These cases held that a federal habeas court may excuse a procedural default of a substantial ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

In its order denying rehearing, the panel explains that one purpose of the remand is for the district court to determine whether Sasser properly presented the four ineffective-assistance claims in the state postconviction proceeding. *Sasser v. Hobbs*, Nos. 02-3103/11-3346, 2014 WL 764171, at *1 (8th Cir. Feb. 26, 2014) (order denying rehearing by the panel). Whether the claims were properly presented in state court, however, is not a matter for an evidentiary hearing. The state court record already exists, and a review of that record and Sasser's present federal claims will determine the question. With more than eleven years having elapsed since the district court's ruling on procedural default, this court should do the work necessary to determine whether there is any basis to reverse the district court's decision.

The petition that Sasser filed in his state postconviction proceeding pursuant to Arkansas Criminal Procedure Rule 37, moreover, suggests strongly that some or all of the claims cited by the panel were properly presented in the initial-review collateral proceeding, such that *Martinez* and *Trevino* are inapplicable:

* The panel remands on a claim that "trial counsel ineffectively failed to . . . [o]btain a timely psychological evaluation of Sasser." 735 F.3d at

851. In his second amended Rule 37 petition, however, Sasser asserted that "[c]ounsel failed to request assistance of a psychological expert in sufficient time for her to prepare a proper evaluation." Sasser's Second Amended Rule 37 Petition, at 12.

* The panel remands on a claim that "trial counsel ineffectively failed to . . . [m]eaningfully consult with a mental health professional." 735 F.3d at 851. Sasser's second amended Rule 37 petition asserted, however, that "*[c]ounsel also failed to consult meaningfully with [psychological expert] Ms. Carlson prior to trial* and as a result, relevant mitigating evidence was inadequately presented, as demonstrated by the fact that the jury did not find that evidence of any mental disease/defect was presented, when in fact there was." Sasser's Second Amended Rule 37 Petition, at 13 (emphasis added).

* The panel remands on a claim that "trial counsel ineffectively failed to . . . [o]bject when the prosecutor misconstrued the mitigating evidence that the defense had presented concerning Sasser's mental impairment and lessened culpability or to rebut that argument." 735 F.3d at 851. Sasser's second amended Rule 37 petition, however, alleged that "[c]ounsel failed to counter the State's erroneous characterization of the role of mental disease/defect in penalty mitigation," and elaborated as follows: "The State argued to the jury that the evidence of Sasser's mental disease should not be considered in the penalty phase because had there been such evidence, it would have been raised as a defense in the guilt phase. *Not only did counsel fail to object to this incorrect argument but he also failed in his closing argument even to address the point*." Sasser's Second Amended Rule 37 Petition, at 18 (emphasis added).

* The panel remands on a claim that "trial counsel ineffectively failed to . . . [p]repare for the sentencing phase of the trial." 735 F.3d at 851. In Sasser's second amended Rule 37 petition, he argued some failures to prepare at the sentencing phase: "Counsel failed to prepare for his expert's testimony and was unable to adequately present compelling

> evidence of mitigating circumstances," and "[c]ounsel failed to investigate for the penalty phase and to call additional witnesses to adduce evidence of relevant mitigating factors." Sasser's Second Amended Rule 37 Petition, at 16-17.

If the record shows that Sasser's ineffective-assistance claims were properly presented in the initial-review collateral proceeding, but abandoned on appeal, then *Martinez* and *Trevino* are inapplicable. *Arnold v. Dormire*, 675 F.3d 1082, 1087 (8th Cir. 2012). I would grant rehearing to decide this issue directly without further delay.

Rehearing also would provide an opportunity to address significant federalism issues raised by the panel opinion. The panel opinion suggests that if an ineffective-assistance claim was not properly presented in the initial-review collateral proceeding, then the district court should proceed with an evidentiary hearing on the merits of that claim in federal court, *even though the claim has never been presented and exhausted in state court*. *Martinez* and *Trevino* do not establish that proposition. In *Martinez*, the petitioner had presented his claims in state court, and the state court deemed them defaulted and thus exhausted. *Martinez*, 132 S. Ct. at 1314. In *Trevino*, the federal habeas petition claimed for the first time that the petitioner had not received constitutionally effective counsel at trial, so the district court followed the stay-and-abeyance procedure of *Rhines v. Weber*, 544 U.S. 269 (2005), and permitted the petitioner to present the unexhausted claim to the state courts. *Trevino*, 133 S. Ct. at 1916. After the state courts concluded the claim was procedurally defaulted and thus exhausted, the petitioner was able to return to federal court, leading to the Supreme Court's decision in *Trevino*. *Id.*

The panel opinion does not discuss these federalism issues. Despite the panel's directive for the district court to hold an evidentiary hearing, there is reason to hesitate before reading the opinion to prescribe a formula for circumventing the requirement of exhaustion of state remedies and the restrictions of 28 U.S.C. § 2254(d) on the granting of writs of habeas corpus. *See generally Cullen v. Pinholster*, 131 S. Ct. 1388 (2011). As the panel opinion is silent on the matter, and the court denies rehearing, the district court should have the option to apply the

stay-and-abeyance procedure, and to require exhaustion of administrative remedies in state court, if Sasser's procedural default of any ineffective-assistance claim is excused based on *Martinez* and *Trevino*.

March 13, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
TEXARKANA DIVISION

ANDREW SASSER PETITIONER

V. Case No. 4:00-cv-04036

WENDY KELLEY, Director,
Arkansas Department of Corrections RESPONDENT

ORDER

Currently before the Court are Petitioner Andrew Sasser's motion for leave to file a third amended petition (Doc. 185), Sasser's motion for discovery (Doc. 188), and Sasser's motion for resolution of the intellectual disability issue prior to an evidentiary hearing (Doc. 196). Respondent Wendy Kelley[1] has filed a response in opposition to all motions (Docs. 190, 192, 197). Sasser filed a reply in support of his motion for leave to amend (Doc. 191) and in support of his motion for discovery (Doc. 193).

The Eighth Circuit issued a mandate (Doc. 180) on March 20, 2014, affirming in part and reversing in part the previous judgments of the Court and remanding to this Court for proceedings consistent with the Eighth Circuit's opinion. Specifically the Eighth Circuit held as follows: (1) affirmed dismissal of Sasser's claims "with the exception of his *Atkins*[2] claim and the four ineffective-assistance claims meriting a hearing under *Trevino*;"[3] (2) vacated both denial of relief

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[1] Wendy Kelley was officially named the Director of the Arkansas Department of Corrections on January 13, 2015. As Ray Hobbs's successor in office, Ms. Kelley is automatically substituted as a party pursuant to Federal Rule of Civil Procedure 25(d). The Clerk of the Court is directed to amend the docket sheet accordingly.

[2] *Atkins v. Virginia*, 536 U.S. 304 (2002).

[3] *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

on the four ineffective-assistance-of-counsel claims and the Court's "finding that Sasser is not mentally retarded under *Atkins*;" (3) reversed "the Court's denial of a[n evidentiary] hearing on the four potentially meritorious ineffective assistance claims;" and (4) remanded for further proceedings including an evidentiary hearing on the ineffective assistance claims and "a new *Atkins* finding under the appropriate standard." *Sasser v. Hobbs*, 735 F.3d 833 (8th Cir. 2013).

Upon remand, the case was reassigned to the undersigned. After reviewing the Eighth Circuit's order, the Court set this matter for an evidentiary hearing to begin on January 20, 2015. The parties were also directed to brief Sasser's *Atkins* claim in light of the Eighth Circuit's opinion. The *Atkins* issue has been fully briefed as of December 17, 2014. The evidentiary hearing, however, was cancelled to be rescheduled after resolution of Sasser's pending motions. The Court will address each motion in turn.

I. Motion for Leave to Amend

Sasser requests leave to amend his petition pursuant to Federal Rule of Civil Procedure 15(a)(2), which provides that "[t]he court should freely give leave [to amend] when justice so requires." Sasser argues "[j]ustice requires amendment because the Eighth Circuit remanded this case to this Court to resolve issues of fact," and "[a]n amended petition setting out the facts that Mr. Sasser will show at the . . . hearing will not only guide the Court in its determination of the merits it will also provide notice to the Respondent of what Mr. Sasser intends to prove at the evidentiary hearing." (Doc. 185, ¶ 2). Although previous petitions by Mr. Sasser have been relatively short, Sasser's proposed third amended petition is over eighty pages. The proposed third amended petition also appears to advance new substantive claims that Sasser is precluded from bringing, as the Court is limited to consideration of only the four ineffective-assistance claims and

the *Atkins* claim remanded by the Eighth Circuit. *See Sasser v. Norris*, 553 F.3d 1121, 1128 (8th Cir. 2009) (on the second appeal of this case noting that where the Eighth Circuit, on the first appeal, had "expressly limited the district court to consideration of *one issue*" the Court was "impliedly prohibited" from considering any other issue).

To the extent Sasser seeks only to plead additional facts in support of the claims falling within the scope of the remand, the Court sees no need for additional pleading in the form of an amended petition. Once an evidentiary hearing is reset, the parties will be given an opportunity to file prehearing disclosure sheets as well as prehearing briefs setting out proposed findings of fact and conclusions of law. (*See* Doc. 182, p. 3).

II. Motion for Discovery

Sasser moves for leave to conduct discovery, specifically seeking the following:

- The complete institutional file of Andrew Sasser, SK#929, including, but not limited to visitation logs, behavioral reports, inmate grievances, classification documents, and medical and mental health records. This includes all electronically maintained information, including EOMIS records.

- Any and all records, of any nature, in the possession of the Arkansas Parole Board concerning Sasser.

(Doc. 188, pp. 3 and 7). Kelley opposes Sasser's motion.

"A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). Rather, "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Rule 6(a) of the Rules Governing Section 2254 Cases ("Rule 6"). "The 'good cause' that authorizes discovery under Rule 6(a) requires a

showing 'that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to [habeas] relief.'" *Rucker v. Norris*, 563 F.3d 766, 771 (8th Cir. 2009) (quoting *Bracy*, 520 U.S. at 909). The petitioner argues that good cause exists for the requested discovery because it is relevant and necessary to support his claims of ineffective assistance of counsel, particularly the claim that Sasser's trial counsel ineffectively failed to prepare for the sentencing phase of the trial. Sasser argues that his trial counsel should have inspected these records for mitigating evidence.

Kelley argues that discovery is not warranted; that the discovery request is duplicative, as Sasser's counsel was previously allowed access to Sasser's prison file in 2010; alternatively, that the request for discovery is premature prior to the Court deciding whether the remanded ineffective-assistance claims were procedurally defaulted; and, alternatively, that Sasser's discovery requests are not appropriately limited in time or scope.

It is hard for this Court to find that discovery is not warranted in this case, where it was previously ordered (Doc. 138) albeit in a different procedural and substantive context. The current motion is raised at a time when this case has been ongoing for fifteen years and survived to be remanded after three appeals. The Court is also ever cognizant of the fact that this is a case in which the petitioner faces the death penalty. Where a question of discovery is left to the discretion of the Court, a man's life must weigh more heavily than relatively trivial or technical concerns of a respondent. In this case, given the protracted nature of the litigation and the high stakes involved, it would seem most prudent to allow Sasser's requested discovery. In any event, the Court agrees that Sasser has shown good cause for the Court to allow his requested discovery to proceed.

Addressing Kelley's objections, the Court finds that the requested discovery is relevant to the issue on remand as to whether Sasser's counsel was ineffective at sentencing. The Court does not find that Sasser's request for production of his prison file should be denied as duplicative of the request that was previously granted in 2010. Sasser's counsel could not have been expected to review Sasser's file in 2010 with prescient awareness of claims that would be remanded for consideration four years later. It is not unduly burdensome for either the Arkansas Department of Corrections or the Arkansas Parole Board to produce or allow review of Sasser's files. The request is not premature, as the Eighth Circuit has stated that even questions of procedural default will necessitate a hearing, which "will necessarily address the underlying merits of the four [ineffective-assistance] claims because, unless postconviction counsel's failure to raise a claim was prejudicial, the claim remains procedurally barred despite *Trevino*." *Sasser v. Hobbs*, 743 F.3d 1151, 1151 (8th Cir. 2014) (denying rehearing en banc). The records requested by Sasser will be relevant to showing prejudice, an issue that must be considered even as to the threshold matter of procedural default.

However, the Court agrees with Kelley that the requests are not appropriately limited in time. Sasser has not, at this time, shown good cause for why all records should be produced up to the present date. All ineffective-assistance claims to be heard by the Court on remand relate to Sasser's sentencing. Any *Trevino* procedural-default consideration of whether postconviction counsel was ineffective would also be limited to postconviction counsel's alleged failures to investigate trial counsel's failure to investigate relevant records prior to sentencing. The Court will therefore order the Arkansas Department of Corrections and the Arkansas Board of Parole to produce Sasser's requested documents from prior to the time of the entry of his judgment and

commitment order on May 4, 1994. If Sasser believes later dated documents are relevant to his claims, he may file a separate motion showing good cause for the production of those documents specifically.

III. Motion to Resolve Intellectual Disability Issue

Sasser requests the Court to resolve the issue of whether he is intellectually disabled before holding an evidentiary hearing on the ineffective-assistance claims. Sasser argues that, if the Court finds that Sasser is intellectually disabled, there might be no need to hold "the more costly and time consuming hearing on the merits of the ineffective assistance of counsel claims." (Doc. 196, ¶ 2). Kelley objects to this approach. Kelley's position is that no evidentiary hearing is necessary on the ineffective-assistance claims, and so such claims should be considered together with the *Atkins* claims as the Court's docket allows. While the Court cannot find at this time that no hearing on the ineffective-counsel claims is necessary for the reasons advanced by either side, the Court does agree with Kelley that it is not necessary to delay consideration of the ineffective-assistance claims in order for the Court to consider the *Atkins* claim.

The Court is aware that the *Atkins* claim has been briefed and is ripe for consideration. The Court will rule on that issue as its docket allows without regard for whether or not the ineffective-assistance claims have also ripened. The Court will therefore deny Sasser's motion insofar as it seeks to bind the Court to decide the *Atkins* claim before consideration of the ineffective-assistance claims.

IV. Conclusion

For all of the reasons set forth above, IT IS ORDERED that Sasser's motion for leave to file a third amended petition (Doc. 185) is DENIED.

IT IS FURTHER ORDERED that Sasser's motion for discovery (Doc. 188) is GRANTED. A separate order will be entered directing the Arkansas Department of Corrections and the Arkansas Board of Parole to produce the requested documents.

IT IS FURTHER ORDERED that Sasser's motion to resolve issue of intellectual disability prior to evidentiary hearing (Doc. 196) is DENIED.

A hearing on the ineffective-assistance-of-counsel claims will be reset by separate order.

IT IS SO ORDERED this 3rd day of March, 2015.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE

TIMELINE OF ANDREW SASSER'S FEDERAL HABEAS PROCEEDINGS

Included under the Supreme Court Rule 14(1)(i)(vi)

Because the arguments in this Petition depend upon a complex procedural history, the following is a brief reference of major milestones in Sasser's federal habeas proceedings:

I. 2000–2002: Initial proceedings in the district court, 4:00-cv-04036 (W.D. Arkansas).

A. Initial filings.

- ECF 3, Federal Habeas Petition filed (July 7, 2000).
- ECF 9, State's Response filed (August 30, 2000).

B. First Amended Petition.

- ECF 23, First Amended Petition filed (July 17, 2001), Appendix E.
- ECF 24, State's Response filed (Sept. 20, 2001).
- ECF 26, Sasser's Motion for evidentiary hearing (Jan. 22, 2002).

C. First district court disposition.

ECF No. 30, district court denies Sasser's amended petition and motion for evidentiary hearing (May 28, 2002), Appendix F, *Sasser v. Norris*, No. 00-cv-4036, 2002 WL 35646192 (W.D. Ark. May 28, 2002).

- ECF No. 34, district court grants COA (August 15, 2002).

II. 2002–2004: First Eighth Circuit Appeal, No. 02-3103.

- June 16, 2003. After the briefing is complete but before the decision is issued, Sasser files a Motion to Remand to District Court to litigate an intellectual disability claim under recently decided *Atkins v. Virginia*, 536 U.S. 304 (2002).

- June 18, 2003. Sasser files a Supplemental Motion to Remand, arguing that if the Eighth Circuit finds the remand is not appropriate, he can meet the requirements for leave to file a second or successive petition.

- Aug. 15, 2003. First Remand Order (subsequently rescinded and replaced by March 9, 2004 Amended Judgment), enclosed as App. G. The Eighth Circuit grants a motion to remand to litigate the *Atkins* claim. The Eighth Circuit adds that "[t]o the extent the request for

remand is the functional equivalent to an application to file a successive habeas petition, the motion to file such a successive petition is granted."

This rescinded Order will later be erroneously relied upon by the Eighth Circuit during the second Eighth Circuit appeal, No. 07-2385, *Sasser v. Norris (Sasser I)*, 553 F.3d 1121, 1126 n.5 (8th Cir. 2009), Appendix N, to deem Sasser's petition successive and not merely amended. The same Eighth Circuit opinion will also cite this rescinded order to hold that the district court was limited to consideration of just one issue and Sasser's ineffective assistance of counsel (IAC) claims were not properly before the district court. *Id.* at 1127. Subsequently, the district court will in 2015 rely on this language from *Sasser I* to deny Sasser's motion to amend petition, ECF 198, Appendix U.

Further propagating the error of relying on this rescinded order, the Eighth Circuit in 2021 will again cite this language to conclude that IAC claims were not properly before the district court and that "Sasser's effort to revive these ineffective-assistance claims during the most recent remand functioned as a second or successive habeas petition and an abuse of the writ." *Sasser v. Payne (Sasser III)*, 999 F.3d 609, 615 (8th Cir. June 2, 2021), Appendix A.

- March 9, 2004. Second Remand Order, enclosed as Appendix H. After petition for rehearing by the State, the Eighth Circuit issues an Amended Judgment to "revise the previously entered order and remand the case to the district court for a determination of the exhaustion issue." This Order does not discuss whether this is a second or successive petition.

  The Eighth Circuit addresses no other claims presented in this appeal in this Amended Judgment, presumably because it remanded the entire case. But on Petitioner's motion, this appeal No. 02-3103 will later be consolidated with Sasser's third appeal to the Eighth Circuit, No. 11-3346.

- Following the issuance of the Amended Judgment, the Eighth Circuit recalls a previously-issued mandate, Appendix I, and issues a new mandate to the district court, Appendix J.

III. 2004–2007: District court proceedings on exhaustion of *Atkins* claim.

A. Second Amended Petition.

- ECF 45. District court issues an order acknowledging the Amended Judgment issued by the Eighth Circuit on March 9, 2004, and orders Sasser "to file an amended petition that includes [an intellectual disability] claim." This Order is enclosed as Appendix K.
- ECF 48. Second Amended Petition filed (Sep. 3, 2004), Appendix L.
- ECF 51. State's Response to Second Amended Petition (Nov. 5, 2004).
- Motions for discovery and miscellaneous orders follow.

B. Second district court disposition.

- ECF 71. District court issues order holding that Sasser's Second Amended Petition, ECF 48, is second or successive and denying relief, (Jan. 9, 2007), enclosed as Appendix M.
  Sasser v. Norris, No. 00-cv-4036, 2007 WL 63765 (W.D. Ark. Jan. 9, 2007).
- ECF No. 84. District court issues order denying motion for COA in part and granting in part (June 11, 2007), *Sasser v. Norris*, No. 00-cv-4036, 2007 WL 9728712 (W.D. Ark. June 11, 2007).

IV. 2007–2009: Second Eighth Circuit Appeal, No. 07-2385, *Sasser I.*

- Jan. 23, 2009. The Eighth Circuit issues an opinion that affirmed in part, reversed in part, and remanded for a hearing on the *Atkins* claim, enclosed as Appendix N.

  Sasser v. Norris (Sasser I), 553 F.3d 1121 (8th Cir. 2009).
- The Eighth Circuit rejects in a footnote Sasser's argument that his petition is amended and not second or successive, 553 F.3d at 1126 n.5, but does so citing the Aug. 15, 2003 Remand Order from 2002 Appeal, which was rescinded and replaced by the Amended Judgment on March 9, 2004.
- Relying on its own rescinded order, the Eighth Circuit holds that the district court correctly decided that Sasser's IAC claim was not properly before it, 553 F.3d at 1127, because it "expressly limited the issue in our prior remand 'to the question of whether Mr. Sasser is [intellectually disabled] and whether pursuant to [*Atkins*], the Eighth

Amendment prohibits his execution.'" *Id.* (quoting rescinded Order dating August 15, 2003 from Case No. 02-3103, App. G). The Eighth Circuit also erroneously states that "expressly limited the district court to consideration of *one issue*" and "there were no lingering issues we failed to dispose of on appeal." *Id.* The "one issue" limitation was removed in the Amended Judgment that followed, App. H. Contradicting itself, the same opinion states that "If the [intellectual disability] issue returns to us on appeal after the district court adjudicates the merits, we direct that Sasser's [intellectual disability] claim be consolidated with the other unresolved claims Sasser raised in his initial habeas petition." *Id.* at 1128. Sasser will later rely on this sentence to consolidate the previous appeal, No. 02-3103, with the subsequent Eighth Circuit appeal in Case No. 11-3346.

- Petition for rehearing and rehearing en banc denied, *Sasser v. Norris*, No. 07-2385, 2009 WL 9160770 (8th Cir. Apr. 14, 2009), enclosed as Appendix O. Judges Colloton, Loken, Wollman, and Gruender would grant rehearing en banc. Judge Colloton dissents and would grant rehearing "to reconsider the panel's conclusion that Andrew Sasser did not procedurally default" his *Atkins* claim.
- The U.S. Supreme Court denies State's petition for writ of certiorari, Case No. 09-45, *Norris v. Sasser*, 558 U.S. 965 (Oct. 13, 2009), Appendix P.

V. 2009–2011: District court proceedings on *Atkins* hearing.

A. Evidentiary hearing on *Atkins* claim.

- After a remand, scheduling orders, motions for discovery, and motions *in limine* follow.
- ECF 157. Evidentiary hearing held on *Atkins* claim, June 15–16, 2010.
- Post-hearing briefs and replies filed by both parties.

B. Third district court disposition.

- ECF 163. District court denies Sasser's Second Amended Petition, ECF 48, holding that he is not intellectually disabled under *Atkins* (Nov. 3, 2010), Appendix Q.

  Sasser v. Hobbs, 751 F. Supp. 2d 1063 (W.D. Ark. 2010).
- ECF 173. COA Granted (Oct. 26, 2011).

VI. 2011–2014: Third Eighth Circuit Appeal, No. 11-3346, *Sasser II.*

A. Appeals consolidated.

- Dec. 5, 2011. Sasser moves to consolidate Eighth Circuit cases 11-3346 and 02-3103.
- Dec. 16, 2011. The Eighth Circuit grants motion to consolidate and re-brief cases.

B. Briefing.

- Mar. 20, 2012. *Martinez v. Ryan*, 566 U.S. 1 (2012) is decided.
- Mar. 21, 2012. Sasser files Appellant's Brief. He argues that the issue of ineffectiveness raised in his Second Amended Petition, ECF 48, remains pending before the Eighth Circuit. *Id.* at 59, 79.
- July 5, 2012. The State files Appellee's Brief. The State argues that because the district court rejected Sasser's IAC claim related to intellectual disability and mitigation raised in the Second Amended Petition (ECF 48) as "abuse of writ" (ECF 71), and the Eighth Circuit affirmed in 2009 (*Sasser I*), this IAC claim is barred from review. *Id.* at 40–42.
- May 28, 2013. *Trevino v. Thaler*, 569 U.S. 413 (2013) is decided.
- June 7, 2013. The Eighth Circuit orders supplemental briefing on *Trevino*.

C. Eighth Circuit's decisions in *Sasser II.*

- Nov. 15, 2013. The Eighth Circuit reverses the district court finding on the *Atkins* claim, and remands for a hearing on four IAC claims and new *Atkins* findings under the correct standard, enclosed as App. R.

  Sasser v. Hobbs (Sasser II), 735 F.3d 833 (8th Cir. 2013) (2013 panel opinion).
- The Eighth Circuit defines four potentially meritorious IAC claims based on several documents, including the 2003 briefing and Second Amended Petition, ECF 48, thus rejecting the State's argument that those IAC claims are barred.
- The Eighth Circuit holds that the district court "held Sasser to the wrong legal standard by improperly offsetting limitations against

abilities" and that this "balancing approach was inconsistent with Arkansas law." 735 F.3d at 848.

- Feb. 26, 2014. After the State petitions for panel re-hearing, the panel denies rehearing but issues a supplemental opinion, Appendix S. *Sasser v. Hobbs*, 743 F.3d 1151 (8th Cir. 2014) (supplementing opinion and denying panel rehearing).
- Mar. 13, 2014. The Eighth Circuit also denies petition for en banc rehearing, enclosed as Appendix T.
  Sasser v. Hobbs, 745 F.3d 896 (8th Cir. 2014) (Colloton, J., dissenting from denial of rehearing en banc).

  Judge Colloton dissents. He would grant petition for rehearing en banc to consider "whether more delay is warranted in the resolution of this case" and whether Sasser procedurally defaulted his *Atkins* claim based on availability of state statute. Judge Colloton also wrote that "[w]hether the claims were properly presented in state court, however, is not a matter for an evidentiary hearing. The state court record already exists, and a review of that record and Sasser's present federal claims will determine the question."

VII. 2014–2018: District court proceedings on four IAC claims and *Atkins*.

A. Sasser moves to file Third Amended Petition.

- ECF 185. Sasser moves under Rule 15(a)(2) for leave to file Third Amended Habeas Petition. (Sep. 4, 2014).
- ECF 198. District court denies motion to amend (Mar. 3, 2015).

  Sasser v. Kelley, No. 4:00-CV-04036, 2015 WL 898073 (W.D. Ark. Mar. 3, 2015), enclosed as Appendix U.

  In denying leave to amend, the district court cites *Sasser v. Norris (Sasser I)*, 553 F.3d 1121, 1128 (8th Cir. 2009) opinion, Appendix N, which in turn quotes from its own rescinded 2003 order, Appendix G.

B. Evidentiary hearing held.

- Various motions and orders related to discovery and hearing.
- Pre- and Post-evidentiary hearing briefs are filed.
- ECF 265. Evidentiary Hearing on IAC claims (but not *Atkins*) held on Feb. 9–12, 2016.

C. 2018: The district court issues two decisions.

- ECF 282. *Sasser v. Kelley*, 321 F. Supp. 3d 900 (W.D. Ark. Mar. 2, 2018) (applying *Martinez/Trevino* and granting relief on two IAC claims), enclosed as Appendix B.
- ECF 283. *Sasser v. Kelley*, 321 F. Supp. 3d 921 (W.D. Ark. Mar. 2, 2018) (denying relief on *Atkins* claim), enclosed as Appendix C.

VIII. 2018–2021: Fourth Eighth Circuit Appeal, *Sasser III*.

- The State appeals the grant of relief on IAC claims, Eighth Circuit Case No. 18-1678.
- Sasser Cross-Appeals the denial of relief on *Atkins* claim, Eighth Circuit Case No. 18-1768.
- The Eighth Circuit, Judge Colloton, issues an opinion in *Sasser v. Payne (Sasser III)*, 999 F.3d 609 (8th Cir. June 2, 2021) disposing of both appeal and cross-appeal, affirming the denial of relief on *Atkins* and reversing grant of relief on IAC claims. This opinion is enclosed as Appendix A.
- The Eighth Circuit denies petition for panel rehearing and rehearing en banc on August 31, 2021, enclosed as Appendix D.