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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE: QUESTIONS PRESENTED

1. Whether amending a petition for writ of habeas corpus after a remand by an appellate court makes it a second-or-successive application under 28 U.S.C. § 2244.

2. Whether, when deciding whether a defendant is intellectually disabled and thus ineligible for the death penalty, courts violate the Eighth Amendment by

a) weighing strengths against deficits in the same adaptive-skills domain, or

b) requiring that a defendant prove adaptive deficits at time periods beyond those defined by medical standards.

LIST OF PARTIES

The caption contains the names of all parties.

DIRECTLY RELATED CASES

- *State v. Sasser*, No. CR93-348-3, Circuit Court of Miller County, Arkansas, trial proceedings, judgment entered March 2, 1994.
- *Sasser v. State*, No. CR 94-933, 321 Ark. 438, 902 S.W.2d 773 (1995), Arkansas Supreme Court, direct appeal from conviction and sentence, judgment entered July 17, 1995.
- *Sasser v. State*, No. CR93-348-3, Circuit Court of Miller County, Arkansas, state postconviction, judgment entered July 2, 1997; with addendum dated September 15, 1997.
- *Sasser v. State*, No. CR97-1246, 338 Ark. 375, 993 S.W.2d 901 (1999), Arkansas Supreme Court, appeal from denial of state postconviction, judgment entered July 8, 1999.
- *Sasser v. Norris*, No. 4:99-mc-136, United States District Court for the Eastern District of Arkansas, granting motion to proceed *in forma pauperis* and for appointment of counsel pursuant to 21 U.S.C. 848(q)(4)(B). No final judgment entered.
- *Sasser v. Norris*, No. 4:99-cv-419, United States District Court for the Eastern District of Arkansas, granting motion for stay of execution and transferring the case to Western District of Arkansas. No final judgment entered.
- *Sasser v. Kelley*, No. 4:00-cv-04036, United States District Court for the Western District of Arkansas, federal habeas, judgments entered May 28, 2002 (appealed and remanded); January 9, 2007 (appealed and remanded); November 3, 2010 (appealed and remanded); and March 8, 2018.
- *Sasser v. Norris*, No. 02-3103, United States Court of Appeals for the Eighth Circuit, petitioner's appeal from order denying habeas relief, first partial judgment remanding the case entered August 15, 2003; this judgment was then revised, and amended partial judgment remanding the case entered March 9, 2004; then this appeal was consolidated with a subsequent appeal in the same case, No. 11-3346, and final judgment on both appeals entered November 15, 2013.

- *Sasser v. Norris*, No. 07-2385, United States Court of Appeals for the Eighth Circuit, petitioner's appeal from order denying habeas relief, judgment remanding the case entered January 23, 2009. Petition for rehearing and rehearing en banc denied April 14, 2009, with Judge Colloton dissenting.

- *Norris v. Sasser*, No. 09-45, United States Supreme Court, petition for a writ of certiorari by the State of Arkansas, petition denied October 13, 2009.

- *Sasser v. Hobbs*, No. 11-3346, consolidated with Sasser's previous appeal still pending before the Eighth Circuit, No. 02-3103, United States Court of Appeals for the Eighth Circuit, petitioner's appeal from order denying habeas relief, judgment remanding the case entered November 15, 2013. Supplemental panel opinion filed February 26, 2014. En Banc rehearing denied March 13, 2014, with Judge Colloton dissenting.

- *Sasser v. Kelley*, Nos. 18-1678 and 18-1768, United States Court of Appeals for the Eighth Circuit, respondent's appeal from order granting relief based on *Martinez/Trevino* and petitioner's cross-appeal from order denying relief based on *Atkins*, judgment entered June 2, 2021. Petition for rehearing and rehearing en banc denied August 31, 2021.

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Other Relevant Opinions, Orders, and Material per Sup. Ct. R. 14(1)(ii) & (vi):

App. L Sasser's Second Amended Petition. ECF 48 (Sept. 3, 2004).

App. M District court order, ECF 71, holding that Sasser's Second Amended Petition is second or successive and denying relief. *Sasser v. Norris*, No. 00-cv-4036, 2007 WL 63765 (W.D. Ark. Jan. 9, 2007).

App. N Eighth Circuit opinion, remanding for a hearing on *Atkins* claim. *Sasser v. Norris (Sasser I)*, 07-2385, 553 F.3d 1121 (8th Cir. 2009).

App. O Order denying petition for rehearing and rehearing en banc (Judge Colloton dissents). *Sasser v. Norris*, No. 07-2385, 2009 WL 9160770 (8th Cir. Apr. 14, 2009).

App. P Supreme Court order denying State's Petition for Writ of Certiorari, No. 09-45, *Norris v. Sasser*, 558 U.S. 965 (Oct. 13, 2009).

App. Q District court order, ECF 163, denying relief on *Atkins* claim. *Sasser v. Hobbs*, 751 F. Supp. 2d 1063 (W.D. Ark. Nov. 3, 2010).

App. R Eighth Circuit opinion, reversing the district court finding on *Atkins* claim, and remanding for a hearing on four IAC claims and new *Atkins* findings under the correct standard. *Sasser v. Hobbs (Sasser II)*, 735 F.3d 833 (8th Cir. Nov. 15, 2013).

App. S Eighth Circuit supplemental opinion, also denying panel rehearing. *Sasser v. Hobbs*, 743 F.3d 1151 (8th Cir. Feb. 26, 2014).

App. T Eighth Circuit order denying rehearing en banc, with Judge Colloton dissenting. *Sasser v. Hobbs*, 745 F.3d 896 (8th Cir. Mar. 13, 2014)

App. U District court order, ECF 198, denying Sasser leave to amend his petition. *Sasser v. Kelley*, No. 4:00-CV-04036, 2015 WL 898073 (W.D. Ark. Mar. 3, 2015).

App. V Timeline of Sasser's federal habeas litigation, summarizing major milestones in the district court, four appeals to the Eighth Circuit and subsequent remands, and a previous petition for writ of certiorari filed in this Court by the State of Arkansas. This timeline includes references to case numbers, ECF numbers, and reporter citations, where available.

TABLE OF AUTHORITIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner Andrew Sasser respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. A) is reported at 999 F.3d 609. The order denying rehearing and rehearing en banc (App. D) is unpublished. The district court's order granting relief on ineffective-assistance-of-counsel (IAC) claims (App. B) is reported at 321 F. Supp. 3d 900. The district court's order denying relief on the *Atkins* claim (App. C) is reported at 321 F. Supp. 3d 921.

JURISDICTION

The court of appeals entered judgment on June 2, 2021, and denied a timely-filed petition for rehearing on August 31, 2021. Justice Kavanaugh granted Sasser's Application (21A134) on November 5, 2021, and extended the time to file the petition for writ of certiorari until and including January 28, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(b) states in relevant part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed . . .

STATEMENT OF THE CASE

1. State proceedings.

Petitioner Andrew Sasser was convicted of capital murder in an Arkansas court in 1994. His attorney hired a family and marriage counselor, Mary Pat Carlson, as the sole expert witness. Carlson told the jury, "Andrew Sasser is a 29 year old black man [who] . . . acts impulsively and demonstrates poor judgement as a result. He has marked sexual conflicts and problems with authority, especially women in authority. He is struggling for control of emotions and/or repressed rage which can break through when he is stressed." Carlson concluded, "Mr. Sasser, in all probability, will always be a very dangerous man." The jury returned a sentence of death. Sasser appealed his conviction to the Arkansas Supreme Court, which affirmed his sentence and conviction on July 17, 1995.

Subsequently, Sasser sought post-conviction relief pursuant to Arkansas Rules of Criminal Procedure 37. Sasser's Rule 37 petition included several claims of ineffective assistance of counsel. Rule 37 counsel argued that trial counsel was ineffective because he should have consulted with Carlson earlier, given her more time to prepare, and provided her with additional records. Neither trial nor state post-conviction counsel investigated Carlson. They did not know or argue that Carlson was unqualified, that her counseling license had lapsed, and that the

licensing board had instigated revocation proceedings against her. After conducting an evidentiary hearing, at which Rule 37 counsel called Ms. Carlson again, the circuit court denied Sasser's petition. The Arkansas Supreme Court affirmed the lower court's denial of post-conviction relief.

All of the proceedings in state court predated *Atkins v. Virginia*, 536 U.S. 304 (2002). Sasser did not seek relief on an intellectual-disability claim under state law during either trial or post-conviction.

2. Federal court proceedings.[1]

Of all the claims in Sasser's federal litigation, the IAC and *Atkins* claims are the ones that are relevant to this petition.

i. 2000–2002: Initial proceedings in the district court.

Sasser filed the federal habeas petition in 2000, followed by an amended petition, App. E at App. 81–87, in 2001. The district court dismissed the petition without discovery or a hearing, App. F at App. 88–92.

ii. 2002–2004: First Eighth Circuit Appeal, No. 02-3103.

In 2003 briefing to the Eighth Circuit, Sasser characterized his IAC claim as failure to adequately prepare for trial, including for the sentencing phase of the trial, and to retain qualified experts instead of Carlson and to meaningfully consult with those experts. As evident from this briefing, the Rule 37 IAC claims focused on

[1] Sasser's history of litigation in federal court is extensive and complex. Appendix V, App. 287–293, sets forth a detailed timeline with case numbers, relevant ECF numbers, intervening Supreme Court decisions, and other key events. This timeline may be helpful for understanding the context in which the second-or-successive sua sponte determination occurred in the decision below.

trial counsel's failures to timely consult and prepare Carlson for her testimony, but the gist of Sasser's federal IAC claims was that trial counsel should have never retained her at all.

While Sasser's first appeal was pending, Sasser moved for a remand to determine whether the new *Atkins* decision made him ineligible for the death penalty. The Court granted the motion and issued a judgment remanding on the *Atkins* issue on August 15, 2003, App. G at App. 93. As noted below, this judgment was later amended. The original order added, "[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." Unfortunately, both the district court and the Eighth Circuit on Sasser's second appeal would later rely on this rescinded and subsequently amended order. *See Sasser v. Norris (Sasser I)*, No. 07-2385, 553 F.3d 1121, 1126 n.5 (8th Cir. 2009); Order, ECF 71, *Sasser v. Norris*, No. 00-cv-4036, 2007 WL 63765 (W.D. Ark. Jan. 9, 2007). In turn, the Eighth Circuit's 2021 decision relied on these two flawed opinions.

After the first remand order, the Eighth Circuit issued an Amended Judgment on March 9, 2004. App. H at App. 94. The court acknowledged that it originally remanded just the *Atkins* claim, but now—after the state asserted an exhaustion defense in a petition for rehearing—it was remanding the entire case. App. 94 ("[W]e revise the previously entered order and remand the case to the district court for a determination of the exhaustion issue."). This Amended Judgment included a broad grant of authority to the district court to consider the

issues of exhaustion, statute of limitations, and whether "to hold the remanded petition in abeyance," but it did not mention a second-or-successive petition. App. 95. The court recalled its previous mandate and issued a new one. App. I & J at App. 96–97. The court addressed no other claims presented in the 2002 appeal, presumably because it remanded the entire case. But on Petitioner's motion, the 2002 appeal was later consolidated with Sasser's third appeal to the Eighth Circuit, No. 11-3346.

3. 2004–2007: District court proceedings on exhaustion of *Atkins* claim.

After the remand, the district court ordered Sasser to file "an amended petition," App. K at App. 98. Sasser filed a Second Amended Petition, App. L at App. 99–130, which included an *Atkins* claim, a broader IAC-mitigation claim still related to the IAC claim in his original petition (Claim X), other new IAC claims, and incorporated by reference claims from his first amended petition.

The district court denied Sasser relief without an evidentiary hearing, App. M at App. 131–149, finding the *Atkins* claim was procedurally defaulted. *Sasser v. Norris*, No. 00-cv-4036, 2007 WL 63765 (W.D. Ark. Jan. 9, 2007). Despite the language in the Eight Circuit's Amended Judgment remanding the entire case, App. 94, the district court held that *Atkins* was the only claim properly before the court because of the "limited" remand. App. 145.

Then, despite its post-remand order to file an amended petition, the district court characterized Sasser's Second Amended Petition as successive because, notwithstanding the remand, Sasser's original petition already has been

adjudicated on the merits and because the rescinded August 2003 order authorized filing of a successive petition. App. 135. The court then dismissed all claims in the second amended petition other than *Atkins*. App. 137–49.

4. 2007–2009: Second Eighth Circuit Appeal, No. 07-2385, *Sasser I*.

Considering Sasser's case for the second time, the Eighth Circuit reversed and remanded for an *Atkins* evidentiary hearing. *Sasser v. Norris (Sasser I)*, No. 07-2385, 553 F.3d 1121, 1122 (8th Cir. 2009), App. N at App. 150–61.

The court's ruling on the IAC claims, however, was flawed and contradictory. In holding that the IAC claims were not properly before the district court, the Eighth Circuit erroneously relied on the rescinded August 2003 order, App. G at App. 93: "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.'" App. 158. This language is from the first remand order, which was followed by a recalled mandate, an amended judgment remanding the entire case, and a new mandate. App. 94–97. The court also relied on the same rescinded order to reject Sasser's argument that his Second Amended Petition should be treated as amended, rather than successive. "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.'" App. 157 (fn. 5). When that order was rescinded and the mandate recalled, the superseding Amended Judgment did not address the issue of second-or-successive petitions.

The Eighth Circuit also rejected Sasser's argument that the district court may decide any issue not disposed of on appeal by holding that "there were no lingering issues we failed to dispose of on appeal." App. 158. Just three pages later, however, the court also stated, "If the mental retardation issue returns to us on appeal after the district court adjudicates the merits, we direct that Sasser's mental retardation claim be consolidated with the other unresolved claims Sasser raised in his initial habeas petition." App. 161. On the basis of that phrase, the Petitioner later moved to consolidate the 2002 appeal with the 2011 *Atkins* appeal.

5. 2009–2011: District court proceedings on *Atkins* hearing.

Following the remand, the district court held a two-day evidentiary hearing, found that Sasser was not intellectually disabled, and denied relief. App. Q. *Sasser v. Hobbs*, 751 F. Supp. 2d 1063, 1064 (W.D. Ark. 2010).

Evidence introduced at the *Atkins* hearing[2] included that Sasser had an IQ between 70 and 80, suggesting a significant intellectual deficit. The evidence also showed that 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 even though Arkansas had no designated special education program. His grades were consistently poor even in simple classes. He failed nine classes in four years, including Consumer Education. Sasser eked out a passing "D" in Adult Living because "other group members would

[2] See summary of the evidence in App. R, *Sasser II* opinion issued in 2013, or detailed description in App. Q, the district court's 2010 decision.

cover for him." The State's expert, Dr. Moore, noted that Sasser performed poorly at reading sight words. Sasser was unable to graduate from high school; instead, the school gave him a "certificate of attendance."

Apart from time in prison, Sasser lived with his mother virtually his entire life. After high school, he attempted to join the army, but his dismal performance on the Armed Services Vocational Aptitude Battery (ASVAB) disqualified him. Ashamed 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 could not perform even simple manual-labor jobs. For example, while working at a chicken-processing facility, his supervisor rotated him through several jobs of decreasing difficulty, trying to find one Sasser could perform. In the end, he was given 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.

Sasser's brother H.B. testified that he and his family supported Sasser in areas of the practical domain: H.B. found jobs for Sasser, drove him to work, and helped obtain a bank loan for a truck. Even though H.B. did all the paperwork for the loan and handed Sasser the payment book to make payments, Sasser immediately started missing payments. Even the state's expert, Dr. Moore, acknowledged in his report that "math was a relative weakness for Mr. Sasser and

he was poor at budgeting." He also noted a weakness in "long-term money management."

In denying relief, the district court offset limitations against abilities. 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.

6. 2011–2014: Third Eighth Circuit Appeal, No. 11-3346, *Sasser II*.

Sasser again appealed and filed a motion for consolidation. He argued that his IAC claims from the original petition remained pending before the Eighth Circuit and could be reviewed. The Eighth Circuit granted the motion and consolidated the 2002 and 2011 cases (Nos. 02-3103 and 11-3346), aiming to resolve "all outstanding issues presented by Sasser's original and subsequent habeas appeals." App. R. *Sasser v. Hobbs (Sasser II)*, 735 F.3d 833, 836 (8th Cir. 2013).

As to the *Atkins* claim, the Eighth Circuit held that offsetting deficits against strengths was improper. App. 259. The Eighth Circuit found that under the district court's approach, "even an individual with a prototypical case of mild mental retardation could not prove it." *Id.* The court also disapproved of the district court highlighting Sasser's ability to perform a job "within his abilities . . . reliably well."

Citing the DSM, the Eighth Circuit explained that "[d]uring their adult years, [intellectually disabled individuals] usually achieve social and vocational skills adequate for minimum self-support." App. 259. The court vacated the district court's finding that Sasser is not intellectually disabled and remanded for a new *Atkins* finding under the appropriate standard. App. 262.

As to the IAC claims, both *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), were decided during the pendency of this appeal, and the court ordered supplemental briefing. In deciding the IAC claims, the court of appeals reviewed Sasser's numerous filings related to the IAC claims; determined which claims were procedurally barred, meritless, or both; and identified four potentially meritorious IAC claims. App. 264. The Eighth Circuit remanded for a hearing on these four IAC claims so that the district court could determine (1) did Sasser's state post-conviction counsel fail to raise these four ineffectiveness claims, and (2) do these claims merit relief? App. 267. Answering these questions, the court of appeals held, required a hearing. *Id.* The Court denied the State's petition for rehearing but the panel issued a supplemental opinion clarifying that on remand, Sasser would be "free to show substantial and decisive factual differences between these four [IAC] claims and the purportedly similar post-conviction claims emphasized by the State." App 272–73.

The State's petition for en banc rehearing drew a dissent from Judge Colloton, who would have granted petition for rehearing en banc to consider "whether more delay is warranted in the resolution of this case." He opined 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." App. T. *Sasser v. Hobbs*, 745 F.3d 896, 899 (8th Cir. 2014) (Colloton, J., dissenting from denial of rehearing en banc). App. 276–78. None of the other judges joined his dissent, implicitly rejecting this pleadings-based approach.

7. 2014–2018: District court proceedings on four IAC claims and *Atkins*.

On this remand, Sasser again moved to amend his petition. The court denied his motion, App. U at App. 280–286, believing that it was limited by the remand order to consideration of the four IAC claims and an *Atkins* claim. App. 281–82. The court did not hold a new hearing on the *Atkins* claim, but relied on evidence from the 2010 hearing held in front of a different judge. After a four-day evidentiary hearing on IAC claims, the district court issued two opinions and corresponding judgments:

- App. B, applying *Martinez/Trevino* and granting relief on two IAC claims, *Sasser v. Kelley*, 321 F. Supp. 3d 900 (W.D. Ark. Mar. 2, 2018).
- App. C, denying relief on the *Atkins* claim, *Sasser v. Kelley*, 321 F. Supp. 3d 921 (W.D. Ark. Mar. 2, 2018).

In granting relief on the IAC claims, the district court followed the court of appeals' mandate to hold a hearing and determine whether the four claims that the Eighth Circuit defined in its opinion, App. 264, were the same claims as those raised in state court. The court concluded that two of the claims were not: failure to obtain a timely psychological evaluation of Sasser and to meaningfully consult with

a mental-health professional (other than Carlson). App. 32–33. The court held that the default of these claims was excused under *Martinez/Trevino*. App. 45.

In denying relief on the *Atkins* claim, the district court found that Sasser's IQ fell into a range where adaptive deficits should be considered. In considering them, however, the district court again weighed evidence of strengths against deficits and also demanded that Sasser prove deficits at the time of the crime in addition to the developmental period. App. 64. The court found that it was "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." App. 72 (citing *Moore*, 137 S. Ct. at 1050 n.8). The court insisted that it was "not weighing evidence of strengths against evidence of limitations to see whether Sasser had more strengths than limitations in any given area, but [was] 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." App. 74.

This appears to be a distinction without a difference. Sasser presented extensive evidence that he had extraordinary difficulties performing even the simplest manual-labor jobs. The district court acknowledged that "Sasser was deemed unfit for positions that required judgment, multitasking, or abstract thinking." App. 73. Nonetheless, the district court weighed this evidence against evidence that Sasser was able to perform simple jobs while incarcerated to find that

Sasser did not demonstrate that he had limitations in that area at the time of the crime. App. 74–75.

Likewise, in the area of academic deficits, the district court acknowledged that Sasser performed poorly in middle school, did not finish high school even in modified courses, and failed to obtain a qualifying score on the ASVAB. App. 71. But the court held that all that evidence merely demonstrates academic problems before the age of 18, and "[t]here is not much evidence of Sasser's academic skill that is contemporaneous with the crime." App. 71. Therefore, the district court "weighed" evidence about the deficits before the age of 18 against evidence that Sasser was able to pass a written portion of the exam for a driver's license while incarcerated, which was closer to the time of the crime. The court concluded that Sasser did not have a significant limitation in academic skills. App. 74.

The district court used the same approach for social skills, again weighing evidence of deficits against evidence of Sasser having a girlfriend, dating, fathering a child, and showing concern for her. App. 76.

8. 2018–2021: Fourth Eighth Circuit Appeal, *Sasser III*.

Following those decisions, the State appealed the grant of relief on the IAC claims and Sasser cross-appealed the denial of relief on *Atkins*. The Eighth Circuit considered Sasser's claims for the fourth time in *Sasser v. Payne (Sasser III)*, 999 F.3d 609 (8th Cir. 2021), and affirmed the denial of relief on *Atkins* while reversing the grant of relief on the IAC claims. It then denied a petition for rehearing and rehearing en banc.

In its decision on the IAC claims, the Eighth Circuit went back to the implicitly rejected approach of comparing claims from the Rule 37 petition and the first amended petition, App. E, to determine whether they were the same, and therefore, whether *Martinez* applied. App. 5. In doing so, the court of appeals ignored that, in 2013, it had ordered the district court to hold a hearing because it could not determine from the pleadings whether the claims were the same.

The court of appeals insisted, App. 8, that the substance of the IAC claims proved at the evidentiary hearing was not in the Sasser's first amended petition, which was the first adjudicated on the merits. According to Eighth Circuit case law, all subsequent amendments after judgment—even after a remand—are second-or-successive petitions. Therefore, the court concluded sua sponte that "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)." App. 7. This issue was not raised in the district court by either party following the 2013 remand or briefed in the 2021 appeal.

As to the *Atkins* claim, the Eighth Circuit held that "[t]he district court did not err in its consideration of adaptive strengths." App. 15. The Eighth Circuit cited *Moore* as not prohibiting balancing strengths and weaknesses within the same adaptive-skill domain. App. 15 (citing *Moore*, 137 S. Ct. at 1050 n.8). The court of appeals also endorsed the district court's approach of calling this offsetting "weighing of the evidence to determine whether the petitioner met his burden." App. 16. The Eighth Circuit also approved of the district court's newly added

requirement that Sasser show evidence of deficits at the time of crime, in addition to onset during developmental period. App. 17.

This petition for writ of certiorari follows.

REASONS FOR GRANTING WRIT

I. The Court's review is necessary to resolve a circuit split on whether amending a petition after a successful appeal constitutes a second-or-successive application within the meaning of 28 U.S.C. § 2244(b).

This Court should grant certiorari to resolve the conflict in the circuits on an important and recurring issue concerning access to habeas relief: whether a habeas petition amended after a remand by the court of appeals is "second or successive."

Under AEDPA, a state prisoner always gets one chance to bring a federal habeas challenge to his conviction. After that, 28 U.S.C. § 2244(b) places restrictions on second or successive applications. But the phrase "second or successive application," is a "term of art," which "is not self-defining." *Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020) (quoting *Slack v. McDaniel*, 529 U.S. 473, 486 (2000)). The courts of appeals agree that an amended petition, filed after the initial one but before judgment, is not second-or-successive. *Id.* But there is no consensus as to whether an amended petition filed after a remand is second-or-successive, with the Eighth Circuit being in a stark minority.

A. The decision below conflicts with decisions of other circuits.

The court of appeals' decision perpetuates a split among the circuits on the question of whether amending a petition after a remand to the district court constitutes a second-or-successive application within the meaning of § 2244(b). Most

courts either expressly hold that these are not second-or-successive applications or simply follow that principle *sub silentio*. The Eighth and the Tenth Circuits are in the minority, holding that the judgment of the district court serves as a demarcation line, beyond which—even after a successful appeal—further amendments would be second-or-successive applications.

1. The Second and Third Circuits agree that when a case is remanded back to the district court, the petitioner may amend the petition without the petition becoming second-or-successive—because it is not filed subsequent to the conclusion of the proceeding that counts as first. Accordingly, Federal Rule of Civil Procedure 15 governs the amendment, rather than AEDPA.

The Second Circuit established that rule in *Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002). The court observed that AEDPA ensures "every prisoner one full opportunity to seek collateral review. Part of that opportunity—part of every civil case—is an entitlement to add or drop issues while the litigation proceeds." *Id.* at 177. And in the AEDPA context, adjudication of an initial habeas petition is not necessarily complete, such that a subsequent filing constitutes a "second or successive" motion, simply because the district court rendered a judgment that is "final" within the meaning of 28 U.S.C. § 1291. *Id.* at 178. The "one full opportunity" ends when the appellate remedies are exhausted and there is final adjudication on the merits of the initial application. *Id.* Accordingly, the court ordered the district court to treat the second application as motion to amend, not a second-or-successive petition, even as appeal was pending.

The Second Circuit followed that holding in *Whab v. United States*, 408 F.3d 116, 120 (2d Cir. 2005), on the same grounds. It held that neither the district court's entry of judgment nor the denial of Certificate of Appealability "made the adjudication of the earlier petition final; that adjudication will not be final until petitioner's opportunity to seek review in the Supreme Court has expired." *Id.*

The Third Circuit followed *Chin* and expressly rejected the government's argument that it should adopt a rule that would construe as "second or successive" all habeas petitions filed by a petitioner following a district court's denial of her initial habeas petition, regardless of whether appellate remedies have been exhausted. *United States v. Santarelli*, 929 F.3d 95, 104 (3d Cir. 2019). In other words, the court explained, "the Government argues that we should interpret 'one full opportunity to seek collateral review' to include an unstated qualifier: 'one full opportunity to seek collateral review' in the district court." *Id.*

2. The Fourth, Fifth, and Eleventh Circuits follow the same rule as the Second and Third, even though they have not made explicit rulings.

Following a remand from *Wolfe v. Johnson (Wolfe I)*, 565 F.3d 140, 171 (4th Cir. 2009), the district court granted leave to amend the petition after discovery and hearing, and then granted habeas relief. *Wolfe v. Clarke (Wolfe II)*, 691 F.3d 410, 415 (4th Cir. 2012). On appeal, the government argued that the court erred by allowing the petitioner to amend his § 2254 petition to broaden his claim with newly disclosed evidence from the hearing. The Fourth Circuit rejected that argument, *id.* at 422, and affirmed the grant of habeas relief.

A district court in the Fourth Circuit, following two remands, also granted leave to amend the petition with new evidence from an evidentiary hearing, over the state's objection. *Porter v. Gilmore*, No. 3:12CV550-HEH, 2020 WL 4742972 (E.D. Va. Aug. 14, 2020). Similarly, the same district court allowed another petitioner three amendments: following the first remand to add *Martinez* claims, and then twice more following a second remand based on evidence developed in discovery. *Juniper v. Hamilton*, 529 F. Supp. 3d 466, 476 (E.D. Va. 2021)

In *Daker v. Tool*e, 736 F. App'x 234, 235 (11th Cir. 2018), following a remand of a previous petition, the circuit court reversed a district court's sua sponte finding that a third petition was second-or-successive. Likewise, following a remand from *Burgess v. Comm'r, Alabama Dep't of Corr.*, 723 F.3d 1308, 1310 (11th Cir. 2013), a district court in the Eleventh Circuit granted leave to amend. *Burgess v. Allen*, ECF No. 62, No. 3:07-cv-474 (N.D. Ala. Feb. 19, 2016).

In *Tabler v. Stephens*, the Fifth Circuit vacated and remanded to consider whether the petitioner "can establish cause for the procedural default of any ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." 591 F. App'x 281 (5th Cir. 2015). The district court ordered an amended petition be filed. Order, *Tabler v. Davis*, ECF No. 79, No. 6:10-cv-34 (W.D. Tex. June 10, 2015).

3. The state of the law is unclear in the Sixth, Seventh, and Ninth Circuits. After making broad pronouncements that motions to amend are not second-or-successive until the petitioner has lost on the merits and exhausted his appellate

remedies, the Circuits have subsequently narrowed those holdings to the time period before the time to file notice of appeal expires. *See, e.g.*, *Moreland v. Robinson*, 813 F.3d 315, 324 (6th Cir. 2016) (discussing *Clark v. United States*, 764 F.3d 653, 660 (6th Cir. 2014) and *Post v. Bradshaw*, 422 F.3d 419, 421, 424–25 (6th Cir. 2005)); *compare Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999) *with Phillips v. United States*, 668 F.3d 433, 435 (7th Cir. 2012); *Goodrum v. Busby*, 824 F.3d 1188, 1194 (9th Cir. 2016) with *Balbuena v. Sullivan*, 980 F.3d 619, 642 (9th Cir. 2020). In these cases appeals were pending or not yet filed; none address what happens after an appellate court remand. The Seventh Circuit in *Phillips* suggested that if a case is remanded after appeal "then the judgment would no longer have been final, and the rationale of *Johnson* would have allowed the amendment." 668 F.3d at 436. In *Balbuena*, a judge wrote separately "to urge the Supreme Court to recognize the circuit split and to adopt the rule stated in *Ching* . . . and *Santarelli*."

4. Both the Eighth and Tenth Circuits treat the judgment of the district court as terminal, after which every amendment is a second-or-successive petition. In addition to its rulings in this case, in *Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006), the Eighth Circuit rejected the argument that "an amendment to a petition is not a successive habeas if it occurs after the petition is denied, but before the denial is affirmed on appeal." The Tenth Circuit has adopted the same rule. In *Ochoa v. Sirmons*, 485 F.3d 538 (10th Cir. 2007) (per curiam), the Tenth Circuit held that "the pendency of an appeal from the denial of a first petition does not

obviate the need for authorization of newly raised claims" under § 2244(b), *id.* at 539; such authorization, the court reasoned, "is required whenever substantively new claims are raised" after "the district court has adjudicated a habeas action." *Id.* at 540. Although the court did not explicitly address what would happen on remand, the reasoning behind this decision suggests that it would treat the motion to amend after a remand as second-or-successive. The court held that the approach of advocated by the petitioner, that authorization under § 2244(b) is unnecessary so long as the first habeas action has not been finally adjudicated on appeal, "would greatly undermine the policy against piecemeal litigation embodied in § 2244(b). Multiple habeas claims could be successively raised without statutory constraint for as long as a first habeas case remained pending in the system." *Id.* at 541.

This circuit split has persisted for over two decades and is unlikely to resolve itself without intervention by this Court.

B. The decision below sua sponte declaring Sasser's IAC claims second-or-successive is incorrect.

1. The Eighth Circuit's decision finding 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," App. 7, 8, is contrary to the Supreme Court's holding in *Magwood v. Patterson*, 561 U.S. 320, 334 (2010). In *Magwood*, the Supreme Court explicitly rejected the argument that claims, not applications, are barred by § 2244(b). The Court held that it had "previously found Congress' use of the word 'application' significant," and "refused to adopt an interpretation of § 2244(b) that would 'elid[e] the difference between an 'application'

and a 'claim.'" *Id.* at 334 (citing *Artuz v. Bennett*, 531 U.S. 4, 9 (2000)). It also held that "AEDPA modifies those abuse-of-the-writ principles and creates new statutory rules under § 2244(b). These rules apply only to 'second or successive' applications." *Id.* at 337. Therefore, Sasser's IAC *claims* could not have been second-or-successive or an abuse of writ.

2. This case illustrates why the Court's intervention to remedy the split on amendments after a remand is necessary. None of this complexity and piecemeal litigation would have transpired if the Eighth Circuit had joined the majority of other courts in recognizing that amendments after a remand are merely further iterations of the first habeas application, provided they meet the Fed. R. Civ. 15(c) relation-back test. *See Mayle v. Felix*, 545 U.S. 644, 645 (2005). In that scenario, Sasser's second amended petition would have actually been an amended petition instead of being declared second-or-successive. This would have provided for a much more economic and effective appellate process. *Cf. Banister*, 140 S. Ct. 1708. The IAC and the *Atkins* claims would have stayed together in the same petition, which is perhaps what the Eighth Circuit intended to do with its Amended Judgment, App. 94, remanding the entire case. But instead, applying the Eighth Circuit rule, the district court decided that Sasser's petition filed after a remand was second-or-successive and that the only viable claim before the court was *Atkins*, prompting confusion up and down the courts as to which claims were before which court, which claims were in the original petition and which ones were in the subsequent, which ones were adjudicated, and which ones were remanded for a hearing. Despite

Sasser's multiple attempts, he was never allowed to clarify or expand the claims he was litigating. Lack of clarity resulted in prolonged litigation and confusion regarding what claims remained.

With a consistent, clear standard on whether amendments after a remand that relate back to the original claims are second-or-successive petitions, the disagreement between two panels of the same court would not have happened. Here, the 2013 panel "carefully scrutinized" all relevant pleadings, determined which ones were potentially meritorious in light of *Martinez* and *Trevino*, concluded that it could not decide based on the pleadings "whether these four claims remain procedurally barred in light of *Trevino,*" and remanded the claims to the district court for further proceedings and a hearing, for which the district court would have lacked jurisdiction had the petition containing the claims been second-or-successive. App. 264. The Eighth Circuit's sua sponte determination eight years later in 2021 that the claims are second-or-successive and that, based solely on pleadings, the claims in Sasser's first habeas petition were fairly presented in state court, represents a startling reversal of 20 years of litigation in this case.

Applying AEDPA's second-or-successive rules in the manner that the Eighth and Tenth Circuits do is also inconsistent with principles of civil litigation. AEDPA's rules are "a modified res judicata rule," with exceptions to the otherwise strict doctrine that gives a preclusive effect to claims. *Felker v. Turpin*, 518 U.S. 651, 664 (1996). A bedrock principle of preclusion law is that a reversed judgment cannot support preclusion. *Butler v. Eaton*, 141 U.S. 240, 242–44 (1891), *see also*

Wright & Miller, 18A Fed. Prac. & Proc. Juris. § 4427 (3d ed.) ("Should the judgment be vacated by the trial court or reversed on appeal, however, res judicata falls with the judgment."). In the habeas context, that means that if the court of appeals vacates and sends the case back to the district court, that habeas judgment is no longer final, and the second-or-successive restrictions should not apply.

3. Finally, the sua sponte decision on the second-or-successive issue by the Eighth Circuit deprived Sasser of opportunity to respond. With briefing, reliance on rescinded orders could have been avoided, and Sasser could have pointed to the 2003 briefing as the source of the information before the Eighth Circuit in 2013, when it defined IAC claims for consideration by the district court on remand. To the extent that the court was applying a traditional doctrine of abuse-of-the-writ,[3] it was the government's burden to plead the doctrine with particularity, *McCleskey v. Zant*, 499 U.S. 467, 482 (1991) (superseded by statute). The government did not raise abuse-of-the-writ as a defense either in the district court after the latest remand or during this latest appeal to the Eighth Circuit. At a minimum, the Eighth Circuit should have afforded a capital petitioner the opportunity to respond and be heard before adopting an argument on the State's behalf. *Day v. McDonough*, 547 U. S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present

[3] Even though such reliance was foreclosed by *Magwood*, 561 U.S. at 338 ("In light of this complex history of the phrase 'second or successive,' we must rely upon the current text to determine when the phrase applies, rather than pre-AEDPA precedents or superseded statutory formulations.").

their positions"). This lack of notice left Sasser without a meaningful opportunity to dispute the grounds on which the court reversed the district court's decision to grant him habeas relief.[4]

The Court should remedy the Circuit split to ensure that every petitioner is afforded "one full opportunity to seek collateral review," without an unstated qualifier: *in the district court*.

II. The Court review is necessary to resolve a circuit split over whether balancing adaptive deficits against strengths in the same skills domain and requiring proof of deficits beyond the developmental period violates the Eighth Amendment.

In *Atkins*, the Court held that execution of an intellectually disabled person is "cruel and usual punishment" prohibited by the Eighth Amendment. *Atkins* left states some flexibility, but not unfettered discretion, in enforcing the restriction on executing the intellectually disabled. The medical community's standards constrain states' leeway in this area. *See Moore*, 137 S. Ct. at 1052–53. The decision below highlights two areas of the intellectual-disability analysis where the courts have struggled to interpret and apply those standards. First, the courts are split on whether they may weigh strengths against deficits in the same adaptive-skills domain. Second, the courts differ widely on the time period from which a defendant must produce evidence of deficits. Without further guidance from this Court, the

[4] This is the second time within a year that the Eighth Circuit has reversed a grant of habeas relief to a capital petitioner on grounds not raised in the appeal, without notice or opportunity to respond. *See Thomas v. Payne*, 142 S. Ct. 1 (2021) (Sotomayor, J., statement respecting the denial of certiorari).

split on these issues among the courts is unlikely to resolve itself. And the split has already led to inconsistent adjudications both across and within jurisdictions on what literally is a matter of life and death, creating an unacceptable risk that people with an intellectual disability will be executed in violation of the Eighth Amendment. This Court's review is warranted.

A. The court of appeals' decision on weighing of adaptive strengths against deficits conflicts with decisions of other courts of appeals and state courts of last resort.

A defendant seeking to prove an intellectual disability that makes him ineligible for the death penalty must prove that he has significant adaptive deficits in at least one of three adaptive-skill domains. Applying that requirement, *Moore* rejected the view that evidence of adaptive strengths can overcome evidence of adaptive deficits, noting that the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. 137 S. Ct. at 1039. The Court reaffirmed its reasoning on a subsequent reconsideration of the same case, faulting the lower court for again relying less upon the adaptive *deficits* than upon Moore's apparent adaptive *strengths*. *Moore v. Texas* (*Moore II*), 139 S. Ct. 666, 670 (2019).

And yet, *Moore* seeded confusion among lower courts by not explicitly ruling out balancing deficits against strengths within the same adaptive-skills domain. While the Court explicitly and unequivocally held that no clinical authority permits "the arbitrary offsetting of deficits against unconnected strengths," it also assumed for the sake of argument that clinicians "would consider adaptive strengths alongside adaptive weaknesses within the same adaptive-skill domain." *Id.* at 1050

n.8. This footnote eight in *Moore* launched a thousand disagreements among the courts, with some rejecting weighing completely, some allowing for weighing within the same adaptive-skills domain, and some equivocating and issuing repeated conflicting decisions.

1. Most courts—consistent with the guidance from the medical community—ignore the "for the sake of the argument" footnote and do not permit any weighing or balancing of adaptive functioning after *Moore*. The Eighth Circuit's decision below conflicts with the decisions of these other courts of appeals and state courts of last resort.

The Tenth Circuit has concluded that the state's attempt to refute deficits in adaptive behavior carried little weight in light of the Supreme Court's warning in *Moore I* against undue emphasis on perceived adaptive strengths. *Smith v. Sharp*, 935 F.3d 1064, 1086 (10th Cir. 2019). Further, whereas petitioner's adaptive deficits were shown by standardized testing, much of the evidence offered to offset them were nothing more than lay stereotypes about the intellectually disabled. *See Moore II*, 139 S. Ct. at 672 (citing AAIDD–11[5] at 151, criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children"). The Tenth Circuit has concluded that reliance on this disfavored evidence is impermissible. 935 F.3d at 1086–870.

[5] AAIDD–11 refers American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports (11th ed. 2010). AAIDD-12 refers to the 12th edition of the same, published in 2021.

Similarly, the Eleventh Circuit has stated that, after *Moore*, "it is abundantly clear that states may not weigh a defendant's adaptive strengths against his adaptive deficits. Doing so contradicts the medical community's current clinical standards." *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1343 (11th Cir. 2019). The state court in that case found that Smith showed deficits in adaptive functioning based upon test results, but then considered other factors, such as ability to take care of his mother, as strengths that outweighed his deficits. The Eleventh Circuit was unequivocal: "This approach was acceptable at the time. But after *Moore*, it no longer is." *Id.* However, the court appears to have softened its stance later in an unpublished opinion, allowing balancing within the same adaptive-skills domain. *See Wright v. Sec'y, Dep't of Corr.*, No. 20-13966, 2021 WL 5293405, at *7 (11th Cir. Nov. 15, 2021).

Likewise, citing *Moore*, the California Supreme Court rejected the state's attempt to focus on petitioner's strengths rather than deficits. *In re Lewis*, 417 P.3d 756, 767 (2018). These so-called strengths included ability to maintain relationships and to banter with police when questioned, *id.*, again inviting reliance on the incorrect stereotype that intellectually disability never have relationships.

In a federal death-penalty case, the district court in New Jersey also eschewed reliance on adaptive strengths over deficits. *United States v. Roland*, 281 F. Supp. 3d 470, 536 (D.N.J. 2017) (citing *Moore*, 137 S. Ct. at 1050). The court held that state expert's reliance on "cherry-picked examples (that *might* indicate strengths in Roland's adaptive functioning) to conclude Roland does not

demonstrate adaptive-behavior deficits" contravened the guidelines because it failed to focus on the deficits. *Id.*

2. Other courts see more nuance in *Moore*. Seizing upon the footnote, these courts hold that *Moore* prohibits only "arbitrary offsetting of deficits against *unconnected* strengths," therefore, weighing of the strengths and weaknesses in the same adaptive-skills domain is proper. The decision below is in line with those cases. *See* App. 15–16.

The Florida Supreme Court adopted this rule in *Wright v. State*, 256 So. 3d 766 (Fla. 2018). The court lamented the lack of guidance from the Supreme Court on "exactly where *Moore* drew the tenuous line of 'overemphasis' on adaptive strengths." *Id.* at 776 & n.9. Referring to footnote eight as "clarification" that "strikes at the heart of the Supreme Court's rationale," the court held that relying on testimony about *connected* strengths to determine adaptive deficits in the same domain does not run afoul of *Moore*. *Id.* at 777; *see also Haliburton v. State*, No. SC19-1858, 2021 WL 2460806, at *8 (Fla. June 17, 2021) (holding that it is still proper to consider evidence that may rebut adaptive deficits after *Moore*).

The Supreme Court of Alabama found it proper to consider evidence of a petitioner's adaptive abilities "to reconcile the opinions of the experts regarding his functional limitations." *Carroll v. State*, 300 So. 3d 59, 72 (Ala. 2019). The court then considered evidence that the petitioner earned a GED in prison, that he was "a good kitchen worker" while incarcerated, and that he was able to read out loud one sentence from the *Miranda* statement of rights. Even though the court dedicated an

entire section to analyzing *Moore*, it did not recognize that it was relying on lay stereotypes of the intellectually disabled that the Court eschewed. *Moore I*, 137 S. Ct. at 1052; *Moore II*, 1398 S. Ct. at 672.

3. Some courts appear to equivocate. For example, the Supreme Court of Pennsylvania has held that the lower court's "emphasis on Appellant's adaptive capabilities is similarly antithetical to the principles clarified in *Hall*, *Brumfield*, and *Moore*." *Commonwealth v. Cox*, 651 Pa. 272, 301 (2019). But just two years later, over a vehement dissent, it concluded that examples of adaptive abilities "were not offered to discount or offset scientific conclusions of Appellant's deficits, but to illustrate that the experts often neglected to consider all sources of information in forming their opinions." *Commonwealth v. Flor*, 259 A.3d 891, 923–24 (Pa. 2021).

The Eighth Circuit itself, after deciding this case, issued an opinion mere weeks later that reached the opposite conclusion, holding that "adaptive strengths play little (if any) role in the adaptive functioning analysis." *Jackson v. Payne*, 9 F.4th 646, 659 (8th Cir. 2021).

The Eleventh Circuit, at first plainly disavowing adaptive balancing in *Smith*, 924 F.3d 1330, discussed above, two years later issued an unpublished decision tacitly approving balancing in the same skills domain. *See Wright v. Sec'y, Dep't of Corr.*, No. 20-13966, 2021 WL 5293405, at *7 (11th Cir. Nov. 15, 2021).

The conflict illustrated by these contradictory opinions—with some courts explicitly inviting further guidance—warrants the Court's review. The Court should

grant certiorari to unequivocally announce that weighing adaptive strengths against adaptive deficits is antithetical to the medical standards that define intellectual disability.

B. The court of appeals' decision requiring proof of deficits outside of the developmental period conflicts with decisions of other courts of appeals and state courts of last resort.

Both *Hall* and *Moore* dictate that the determination of intellectual disability must be "informed by the medical community's diagnostic framework." *Moore*, 137 S. Ct. at 1048 (quoting *Hall v. Florida*, 572 U.S. 701, 721 (2014)). Under that framework, the onset of deficits must occur during the developmental period. The court of appeals' decision below, however, imposed an additional requirement that a petitioner demonstrate deficits at the time of the offense. App. 17. This decision is inconsistent with medical standards and the decisions of this Court. Other circuit courts and state courts of last resort use widely divergent standards for the time period during which a petitioner must demonstrate deficits. This is another area that needs clarification from this Court.

1. Some courts apply the clinical definition and do not require proof of deficits outside of the developmental period. The Seventh Circuit has held that to accept testimony that a defendant was functioning at the level of an intellectually disabled person at the time of his crimes and is thus ineligible for death penalty would require an extension of *Atkins*, not an application of it. *McManus v. Neal*, 779 F.3d 634, 652 (7th Cir. 2015). The Supreme Court of Nevada focuses on the developmental period, in part to ensure that the person suffers from intellectual

disability rather than some other mental impairment. *Ybarra v. State*, 127 Nev. 47, 57 (2011). The Kentucky Supreme Court referred to the issue of the relevant timeframe as "more semantical than real . . . [s]ince [intellectual disability] is a developmental disability that becomes apparent before adulthood." *Bowling v. Kentucky*, 163 S.W.3d 361, 376 (Ky. 2005) (abrogated on other grounds). And while the plain text of the Arkansas statute makes those who are intellectually disabled "at the time of committing capital murder" ineligible for execution, Ark. Code Ann. § 5-4-618(b), the Arkansas Supreme Court has consistently interpreted this statute to be coterminous with *Atkins*. Test *See Miller v. State*, 362 S.W.3d 264, 277–78 (Ark. 2010); *Anderson v. State*, 163 S.W.3d 333, 354–55 (Ark. 2004). The state statute requires nothing more than what is required under the federal constitution, which is to show the onset of deficits during the developmental period.

2. Other courts consider time periods beyond the developmental period relevant, such as current functioning. In *Hill v. Shoop*, 11 F.4th 373, 385 (6th Cir. 2021), the Sixth Circuit held that the district court did not unreasonably apply *Atkins* in evaluating a defendant's intellectual abilities at the time of the hearing, rather than the time of the offense. The court reasoned that *Atkins* supports the conclusion that intellectual disability is not a transient condition, therefore, the outcome should not change if the court evaluates a defendant's abilities at the time of the crime or at the time of a later *Atkins* hearing.

While the condition itself may not change, however, availability of the evidence certainly would. Many petitioners in death-penalty cases could be

incarcerated for years before a court holds an *Atkins* hearing. Having been held in solitary confinement, they would have been denied opportunities for employment, academics, and social skills for years, and would have a difficult time showing the presence of deficits at the time of hearing. Moreover, this evidence would come from an institutionalized, structured environment with a built-in support system, precisely the kind of environment from which the medical standards and the Supreme Court caution against obtaining evidence.

The Alabama Supreme Court looks for proof of intellectual disability in three relevant time periods. It holds that implicit in the intellectual-disability definition is that deficient IQ and the deficits in adaptive behavior must exist not only prior to the age of eighteen but also both at the time of the crime and currently. *Smith v. State*, 213 So. 3d 239, 248 (Ala. 2007). The court based this conclusion on a footnote in *Atkins*, in which the Supreme Court defined intellectual disability as "substantial limitations in *present* functioning.'" *Smith*, 213 So. 3d at 248 (citing *Atkins*, 536 U.S. at 308 n.3 (second emphasis added by *Smith*)). Consequently, the Supreme Court of Alabama reversed a lower court's decision for "placing great emphasis on new evidence that tended to show deficits in Smith's intellectual functioning and adaptive behavior before he reached the age of 18, while ignoring evidence that shows that Smith's intellectual functioning and adaptive behavior as an adult places him above the [intellectually disabled] range." *Id.* at 251.

The Eleventh Circuit has recognized and applied Alabama's requirement that the criminal defendant must show that the problems existed before the age of 18, at

the time of the capital offense, and currently. *See Burgess v. Commn'r, Ala. Dep't of Corr.*, 723 F.3d 1308, 1321 n.13 (11th Cir. 2013); *Thomas v. Allen*, 607 F.3d 749, 752–53 (11th Cir. 2010); *Powell v. Allen*, 602 F.3d 1263, 1272 (11th Cir. 2010).

3. Like the Eighth Circuit in this case, both the Supreme Court of Mississippi and the Supreme Court of Idaho require proof of deficits before the age of 18 and at the time of the crime. *Chase v. State*, 171 So. 3d 463, 468 (Miss. 2015); *Pizzuto v. State*, 146 Idaho 720, 734 (2008).

But the Eighth Circuit is really struggling with consistently defining the relevant time period for determining the existence of deficits. In *Sasser v. Hobbs (Sasser II)*, 735 F.3d 833 (8th Cir. 2013), the Eighth Circuit found that under the Arkansas statute, a defendant can prove intellectual disability at either (a) the time of committing the crime or (b) at the presumptive time of execution, even if he lacks proof that he satisfied the standard at both relevant times. *Id.* at 846. In the same opinion, the Eighth Circuit defined other relevant points in time: (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. *Id.* at 849 n.10. In *Sasser v. Payne (Sasser III)*, 999 F.3d 609 (8th Cir. 2021), the Eighth Circuit held that the district court did not err by requiring Sasser to show evidence of deficits both before the age of 18 and at the time of the crime. Then, just a few weeks later, it issued another opinion in *Jackson*, 9 F.4th at 660–61, holding that nothing more was required of the petitioner than a showing of the onset of deficits during the developmental period.

4. No real consensus exists even among federal courts applying federal law in federal death-penalty cases. One court has held that *Atkins* requires proof of deficits before the age of 18 and at the time of the crime. *United States v. Wilson*, 170 F. Supp. 3d 347, 369 (E.D.N.Y. 2016). Another has held that "the assessment of mental retardation for purposes of *Atkins* looks backwards—past even the time of the crime and back into the developmental period." *United States v. Hardy*, 762 F. Supp. 2d 849, 881 (E.D. La. 2010). But, the court reasoned, "[e]ven if a person's level of adaptive functioning outside of the developmental period were relevant, it is clear from *Atkins* that it would be the level of adaptive functioning at the time of the crime, not the time of hearing, that is relevant." *Id.* at 881 n.151. Yet another court simply applied the clinical definition, looking for evidence of onset of intellectual and adaptive deficits during the developmental period. *United States v. Roland*, 281 F. Supp. 3d 470, 476 (D.N.J. 2017).

This lack of consensus among courts on the relevant timeframe for defining intellectual disability is striking, has been ongoing since *Atkins* was decided, and should be remedied through the Court's review.

C. The court of appeals' decision is incorrect.

1. The Eighth Amendment must offer the same protection in all United States jurisdictions. Allowing states to formulate their own definitions of intellectual disability that do not generally conform to the clinical definitions creates an unacceptable risk that a person with an intellectual disability will be executed in violation of the federal constitution. Medical standards are clear that

intellectual disability is a developmental disability that manifests during the developmental period, in childhood and adolescence. DSM-V at 37; AAIDD-12 at 32. In setting out guidelines on how to make a retrospective diagnosis for an individual outside of the developmental period, AAIDD-12 at 41 instructs that "it is necessary for clinician to assess the *past* functioning of the individual" and to establish that the deficits "were present during the period of the individual's development." (emphasis added). Nothing more is required.

Here, the Eighth Circuit and several other jurisdictions have crafted definitions of intellectual disability that place a higher burden on the petitioner seeking to prove that he is intellectually disabled than what is required under the medical standards and, thus, the federal constitution. In addition to showing the onset of deficits during the developmental period, they require a showing of deficits during some other arbitrary time period. Under many circumstances, a petitioner with an intellectual disability may not be able to make that additional showing. Some may have been incarcerated for a long time and some would be far removed from school age, when a showing of academic deficits is easier. If they are unable to make that showing, they will be executed.

This additional burden imposed by some jurisdictions lies outside of the diagnostic framework that *Moore* says should inform a court's determination of intellectual disability. 139 S. Ct. at 669. This added requirement is also simply unnecessary. This Court's decisions and the medical standards support the conclusion that intellectual disability is one that accrues in the developmental

period and is not a transient condition. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 322–23 (1993) (noting, in a different context, that intellectual disability "is a developmental disability that becomes apparent before adulthood" and "is a permanent, relatively static condition" (citing S. Brakel et al., The Mentally Disabled and the Law 37 (3d ed. 1985)). If the disability had manifested itself during the developmental age, then an individual is indeed presently intellectually disabled and was disabled during other relevant time periods in his life. Therefore, if an individual meets the diagnostic criteria, no further proof should be necessary.

2. The medical standards are unequivocal in that "all people with ID have strengths, but . . . the diagnosis of ID focuses on their significant limitations." AAIDD-12 at 40. That is also one of the assumptions made in diagnosing ID: "within an individual, limitations often coexist with strengths." AAIDD-12 at 15. Nothing in the standards allows for "balancing" or "weighing" of strengths against deficits, even in the same adaptive-skills domain.

The courts should not engage in it either. *Moore*'s caution against overemphasis on strengths recognized that courts considering adaptive "strengths" in reality often resort to lay stereotypes about the intellectually disabled. *See Moore II*, 139 S. Ct. at 672 (citing AAIDD–11 at 151, criticizing the "incorrect stereotypes" that persons with intellectual disability "never have friends, jobs, spouses, or children"). The courts lack education, training, experience, or clinical judgment[6]

[6] AAIDD repeatedly emphasizes the necessity of clinical judgment in making ID assessments. It is defined as "as a special type of judgment" that "emerges from the clinician's training and experience, specific knowledge of the person and their

necessary to know when it is appropriate to "balance" or "weigh" the key factors in an intellectual-disability determination. What they may perceive as "strengths" could merely be a trait common to many, if not a majority, of people with disabilities. The courts are also likely to use examples of "capacity or maximum functioning," rather than "typical functioning" necessary for an accurate adaptive-deficit assessment. AAIDD-12 at 42. In plain language, that means using examples of performance achieved with supports or under unusual circumstances, rather than day-to-day, typical behavior.

For example, the Supreme Court in Alabama weighed the evidence of deficits against "strengths" such as that the petitioner was able to earn his GED while in prison, that he was "a good kitchen worker" while incarcerated, and that he was able to read out loud one sentence from the *Miranda* statement of rights. *Carroll v. State*, 300 So. 3d 59, 72 (Ala. 2019). None of these are inconsistent with the diagnosis of an intellectual disability. People with intellectual disabilities graduate from high school, maintain relationships, hold jobs, obtain drivers' licenses, drive cars, and parent children. And performance in prison is not "typical functioning" needed to make an accurate assessment. AAIDD-12 at 42; DSM-V at 38.

This Court— citing medical standards—has cautioned against relying on evidence of skills developed in prison. *Moore I*, 137 S. Ct. at 1050. An institutional environment of any kind necessarily provides "hidden supports" whereby the

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contexts, analysis of extensive data, and the use of critical thinking skills." AAIDD-12 at 7, 36, 37, 38, 39, 41, et seq.

inmates or residents are told when to get up, when to eat, and when to bathe. Inmates do not need to go get health insurance, buy a car, pay bills, get a job, fill out applications, or perform many other normal independent living requirements. However, the ability to perform adequately with ongoing support does not negate a finding of intellectual disability. After all, intellectually disabled individuals who are placed in medical institutions because of the severity of their limitations do not cease to be intellectually disabled due to the level of care they receive.

One of the AAIDD's key factors in the assessment of adaptive functioning requires that the behavior is "assessed in reference to the community settings that are typical for age peers," rather than in comparison to other inmates. AAIDD-12 at 29, 42. Prison staff are unlikely to be particularly good informants. Their observations are limited to an unusual set of circumstances, and are likely to be filtered through their experience with other prisoners, many of whom may also suffer from intellectual limitations. *Hardy*, 762 F. Supp. 2d at 900. Their intuitive "control group" is therefore not representative of the general population. *Id.*

3. Requiring the proof of deficits at times other than the developmental period also invites reliance on this poor-quality prison evidence. Adding in "balancing" or "weighing" of deficits from the developmental period against behavior in prison makes the risk of an erroneous determination even higher.

This is exactly what happened to Sasser. The court required evidence from the time of the offense, which for Sasser was shortly after prison, a structured environment with hidden supports. The court then "weighed" a significant amount

of evidence introduced about the developmental period against evidence from the prison environment (that Sasser was able to do simple jobs in prison and was able to pass a written portion of the driver's license test while incarcerated) and evidence based on layperson stereotypes (Sasser had a girlfriend, dated, fathered a child, and showed concern for her). App. 72–76. The court concluded that Sasser was able to "function adequately." App. 73–74. The court also disregarded evidence of typical performance that the medical standards require; instead, the court insisted that Sasser could do better when motivated or with more support from his family. App. 68, 72 (Sasser "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," and "little academic encouragement or demand from home resulted in poor scholastic effort"). But medical standards require that adaptive behavior be assessed on the basis of "what the person typically does, rather than what the individual can do or could do." AAIDD-11 at 47. An assistance or encouragement is a support system, and performance with a support system would not be "typical."

The Eighth Circuit held this was proper because "[e]vidence 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." App. 15. The Eighth Circuit also endorsed balancing adaptive strengths against deficits in the same skill area, even though it involved lay stereotypes. The Eighth Circuit characterized this approach as "weighing the evidence to see whether Sasser

met his burden to show any limitation in a single skill domain," App. 16, but this "rose" by another name still fails to pass the smell test.

The state and the court agree that Sasser had limitations in academic and math skills during the developmental period, which should be enough for the diagnosis of intellectual disability. Nevertheless, barring the Court's intervention, he will be executed.

The lack of uniformity among the courts, the added requirement of proving deficits beyond the developmental period that invites reliance on poor-quality evidence, the weighing of deficits without knowledge or experience to do so—all of these factors increase the unacceptable risk that persons with intellectual disability will be executed. *Hall*, 134 S. Ct. at 1990. As one federal court put it, "[i]t would be in the interests of justice for defendants, efficiency for the courts, and closure for the victims, for the Supreme Court or Congress to provide clearer guidance" than the "murky precents" a court must apply when deciding an *Atkins* claim. *United States v. Wilson*, 170 F. Supp. 3d 347, 391–92 (E.D.N.Y. 2016).

CONCLUSION

Sasser respectfully asks that the Court grant his petition for writ of certiorari or, in the alternative, issue a grant, vacate, remand order in light of *Magwood v. Patterson*, 561 U.S. 320 (2010), and *Moore v. Texas*, 137 S. Ct. 1039 (2017).

DATED: January 28, 2022

Respectfully submitted,
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