No. 21-7039

In the Supreme Court of the United States

ANDREW SASSER,
Petitioner,

v.

DEXTER PAYNE, Director,
Arkansas Division of Correction
Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Arkansas

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether amending a habeas petition to raise claims that were previously dismissed in a final judgment is a second or successive application or an abuse of the writ.

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

3. Whether courts may consider evidence that a defendant was not intellectually disabled at the time of their offense in deciding whether the defendant is intellectually disabled and thus ineligible for the death penalty.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT

1. The Petitioner, Andrew Sasser, is a hardened criminal. On April 22, 1988, at 1 a.m., Jackie Carter was working at an E-Z Mart convenience store in Lewisville, Arkansas, when Andrew Sasser, the petitioner, entered her shop. *Sasser v. State*, 902 S.W.2d 773, 775, 776 (Ark. 1995). Sasser bought cigarettes, left, returned fifteen minutes later and bought a soda, and then left again. *Id.* at 776. Five minutes later, he returned yet again, this time claiming he'd had a wreck on his motorcycle, and stood outside the store, ostensibly waiting for his wife.[1] *Id.*

Some minutes later, when Carter was putting away items in the store freezer, Sasser snuck up behind her and struck her on the head with a bottle. *Id.* Sasser then forced Carter into a bathroom. *Id.* When a customer approached, Sasser forced Carter out of the store and into an alley, and when the customer left the store and drove by, Sasser forced Carter across the street. *Id.* There, he raped her. *Id.* Afterward, Sasser told Carter that he shouldn't have raped her and that he should kill Carter to silence her. *Id.* Carter begged him not to kill her, and she agreed to say that she'd been dropped out of a truck and that Sasser had found her. *Id.* When she returned to the store, the police were waiting and she identified Sasser as her rapist. *Id.* Sasser was convicted of second-degree battery, kidnapping and rape. *Id.* at 777.

On New Year's Eve, 1992, Sasser was released from prison. *Id.* at 778. Six months later, on July 11, 1993, Jo Ann Kennedy was working alone at the E-Z Mart convenience store in Garland, Arkansas when Sasser appeared at her shop. *Id.* at

[1] Sasser had no wife. Pet. App. 75-76.

775. Between 3:00 p.m. and midnight, Sasser stopped at her store two or three times, ostensibly to buy chips or to use the telephone. *Id.* After midnight, Sasser returned and killed her, by his own admission and in the view of a resident who lived across the street. *Id.* An autopsy report showed Kennedy died of multiple stab wounds and blunt-force head injuries. Pet. App. 2. She was discovered outside the store, nude from the waist down; her clothes were found in the men's restroom. *Sasser*, 902 S.W. 2d at 775.

Sasser did not dispute his guilt at trial and only presented evidence at sentencing. *Id.* at 775-76. The jury found him guilty of capital felony murder, and imposed a sentence of death after finding that Sasser's rape of Jackie Carter outweighed the three mitigating circumstances it found. *Id.* at 776-77. On direct appeal, Sasser solely argued that Carter should have been barred from testifying. *Id.* at 774. The Arkansas Supreme Court rejected that argument and affirmed his conviction and sentence. *Id.* at 779.

2. Sasser then sought postconviction relief in state court, raising a variety of ineffective-assistance claims. *See Sasser v. State*, 993 S.W.2d 901 (Ark. 1999). Among them, he claimed that his trial counsel failed to consult the psychologist who testified in mitigation at sentencing in time for her to prepare a sufficiently in-depth evaluation, or to adequately prepare her to testify. Pet. App. 5-6. The state trial court denied relief on all of Sasser's claims. *Sasser*, 993 S.W.2d at 903. On appeal, Sasser abandoned the claims concerning the psychologist, focusing instead on other claims.

See id. at 905-12. But none availed, and the Arkansas Supreme Court unanimously affirmed the trial court's denial of relief. *Id.* at 912.

3.a. Next, more than two decades ago, in 2000, Sasser brought the habeas case that is the subject of his current certiorari petition. Slightly amended in 2001, Sasser's habeas petition claimed, in relevant part, that his trial counsel failed to obtain a timely psychological evaluation or adequately prepare his mitigation expert to testify at trial—exactly the same claim that he'd raised and abandoned in his state postconviction proceedings. Pet. App. 5-6; Pet. App. 84 (reproducing habeas petition). That habeas petition did not fault counsel, as Sasser would later, for his choice in mitigation experts. In 2002, the district court denied Sasser relief, holding that the Arkansas Supreme Court reasonably adjudicated some of Sasser's ineffective-assistance claims and that Sasser had defaulted the others, including his mitigation-expert claims. Pet. App. 92. Sasser appealed.

Three months before the district court entered judgment, this Court decided *Atkins v. Virginia*, which held that people with intellectual disabilities were ineligible for the death penalty. In response, Sasser moved one year later to remand the case back to district court—or in the alternative for leave to file a second or successive petition—so he could pursue an *Atkins* claim. Pet. App. 93. In 2003, the court of appeals granted his motion, stating that the issue for the district court on remand was limited to eligibility for the death penalty under *Atkins*, and retaining jurisdiction over Sasser's appeal of the denial of his ineffective-assistance claims. *Id.* The

court of appeals further stated that, inasmuch as Sasser sought leave to file a successive habeas petition, it granted him leave to file one. *Id.*

Concerned that the court of appeals had instructed the district court to reach the merits of an unexhausted claim, the State petitioned for rehearing. Pet. App. 94. In response, the panel issued an amended judgment, clarifying that exhaustion remained an open question for the district court to resolve, but not otherwise modifying the scope of its remand. Pet. App. 94-95. In his petition, Sasser insists that because the court of appeals said it "remand[ed] the *case* to the district court for a determination of the exhaustion issue," *id.* (emphasis added), it must have switched course from its original judgment and remanded for a fresh consideration of all issues, not just Sasser's *Atkins* claim. Pet. 4. That does not follow, and the only issues the order mentioned were Sasser's *Atkins* claim and its exhaustion. Pet. App. 94-95. Indeed, Sasser himself recognized the court of appeals retained jurisdiction over the ineffective-assistance claims when, a decade later, he moved to consolidate his long-dormant ineffective-assistance appeal with his *Atkins* appeal. Pet. 5. In any event, nothing ultimately turns on the scope of the remand.

b. On remand, Sasser filed an amended petition in 2004. His new petition raised an *Atkins* claim, but it also, less expectedly, raised a series of new ineffective-assistance claims. Pet. App. 8. Among these was a claim that Sasser's counsel did "not retain[] qualified experts to completely evaluate Mr. Sasser," Pet. App. 120, and that the expert counsel did retain was "unqualified" to serve as a mitigation expert, Pet. App. 116.

The district court dismissed Sasser's second amended petition in its entirety. It held Sasser's *Atkins* claim was procedurally defaulted by his failure to present it in state court. Pet. App. 142-45. As to Sasser's new ineffective-assistance claims, including the ones discussed above, it held they were an abuse of the writ under longstanding pre-AEDPA principles because the factual predicates for his claims were available to him at the time he filed his original petition. Pet. App. 146 (citing *Schlup v. Delo*, 513 U.S. 298, 318 n.34 (1995)), Pet. App. 147-48. Indeed, his new petition challenged his counsel's retention of an expert that his original petition claimed his counsel had not adequately prepared to testify. The district court did not, as Sasser claims, Pet. 5-6, hold Sasser's new ineffective-assistance claims were barred on second-or-successive grounds, or simply dismiss them because they were outside the scope of the remand. But it did correctly note the remand was limited to Sasser's *Atkins* claim and "specific questions regarding [its] exhaustion." Pet. App. 145.

Sasser appealed. In 2009, the court of appeals reversed the district court's dismissal of his *Atkins* claim, but affirmed its dismissal of his ineffective-assistance claims. The court of appeals held Sasser did not default his *Atkins* claim because *Atkins* postdated his trial and appeal; though Arkansas law provided an intellectual-disability defense to the death penalty, the court held his forfeiture of that defense was not tantamount to a default of his federal *Atkins* claim. Pet. App. 154-55. As to his ineffective-assistance claims, the court held its remand was limited to Sasser's *Atkins* claim, and did not authorize proceedings on other issues. Pet. App. 158-59. Judge Colloton, along with Judges Loken, Gruender and Wollman, dissented from

the denial of the State's petition for rehearing, contending that Arkansas's intellectual-disability defense complied with "*Atkins* before *Atkins* was decided," and that by defaulting it, Sasser defaulted his *Atkins* claim. Pet. App. 163.

c. On remand, the district court concluded in 2010, in a 70-page opinion, that Sasser was not intellectually disabled. Pet. App. 169-238. It found Sasser neither had significantly subaverage intellectual functioning, Pet. App. 212-13, nor significant deficits in adaptive functioning, Pet. App. 235. As to intellectual functioning, Sasser presented two IQ scores, one at 79, the other at 83, both well above the significantly subaverage level. Pet. App. 207. As to adaptive deficits, the district court found Sasser was a below-average, but not unusually poor student, Pet. App. 233; that while he struggled with some jobs, he performed well at others, and lived on his own for a period of time before being incarcerated, Pet. App. 233-34; and that he had an ordinary social life, maintaining relationships with a number of friends and girlfriends, Pet. App. 234.

Sasser appealed again. On Sasser's motion, his appeal was consolidated with his long-dormant appeal from the denial of his original ineffective-assistance claims. Pet. 9. In 2013, the court of appeals vacated the district court's *Atkins* ruling, holding it had applied an incorrect legal standard, Pet. App. 262, and remanded several of Sasser's ineffective-assistance claims for an evidentiary hearing, holding that in light of this Court's then-new decision in *Trevino v. Thaler*, Sasser might be able to excuse their procedural default, Pet. App. 268.

With respect to *Atkins*, the court of appeals claimed the district court erred by imposing a "strict 'IQ score requirement'" of 70 or below, Pet. App. 257, by "offsetting [Sasser's] limitations against abilities, even across skill areas," Pet. App. 258, and by failing to equate significant "limitations" with significant adaptive "deficits," *id.* The court of appeals accordingly remanded for findings under its preferred standard. Pet. App. 262.

As to Sasser's ineffective-assistance claims, the court of appeals held that of Sasser's sixteen claims, all but four were "procedurally barred, meritless, or both." Pet. App. 263. But it held that four of the claims, which the district court had held procedurally defaulted, had potential merit; possibly had been defaulted in the initial stage of Sasser's state postconviction proceedings, rather than on appeal; and could possibly proceed under *Trevino*'s equitable exception to procedural default for initial-stage defaults caused by postconviction counsel's ineffectiveness. Pet. App. 264, 267-68; *see also* Pet. App. 272 (denying panel rehearing but clarifying the stage of the default remained an open question). It thus remanded for an evidentiary hearing on whether Sasser could satisfy the *Trevino* exception. Among these claims were Sasser's original claims that his counsel failed to adequately consult with his mitigation expert. Pet. App. 264. Judge Colloton dissented from the denial of rehearing en banc. He argued that a comparison of Sasser's petition for postconviction relief to his habeas petition revealed that Sasser presented his claims in his initial postconviction proceedings and abandoned them on appeal, and that *Trevino* was therefore inapplicable. Pet. App. 276-78.

d. On remand, in 2018, the district court granted Sasser relief on two ineffective-assistance claims regarding his counsel's ostensible failure to retain a qualified mitigation expert, Pet. App. 45-46, and denied Sasser relief on his *Atkins* claim, Pet. App. 79.

The district court concluded Sasser's ineffective-assistance claims were new and *Trevino*-eligible by effectively allowing him to make new claims. Initially, the district court denied Sasser's motion to amend his habeas petition, ruling the court of appeals' remand limited its review to the four remanded ineffective-assistance claims in Sasser's original petition, and his *Atkins* claim. Pet. App. 281-82. But on further review, the district court, relying on Sasser's submissions at the evidentiary hearing, interpreted two of the ineffective-assistance claims "as characterized on remand" to essentially be new claims. Pet. App. 34. "[A]s characterized on remand," Sasser's original claim that "counsel failed to meaningfully consult with the examiner" he retained, Pet. App. 87, became a claim that "his trial counsel should not have consulted with her at all" and retained someone else instead, Pet. App. 34-35. Likewise, his original claim that his counsel should have obtained the psychological evaluation he obtained sooner, Pet. App. 87, became a claim that had counsel obtained it earlier, he would have recognized that the expert he retained was the wrong person for the job. Pet. App. 34. These, of course, were the very claims the district court held were an abuse of the writ when it had previously dismissed Sasser's second amended petition.

Having allowed Sasser to present new claims crafted by his habeas counsel, the district court unsurprisingly found these claims were never presented in state court.

Pet. App. 34-35. It then concluded that Sasser's postconviction counsel was ineffective for failing to make them, excusing the default. Pet. App. 40. On the merits, it held that trial counsel performed ineffectively in choosing the expert he did, Pet. App. 44, and that there was a reasonable likelihood of a different sentence had the jury heard from a different mitigation expert, Pet App. 45. It thus granted Sasser relief. Pet. App. 46.

In its *Atkins* ruling, the district court, in a decision written by a different judge than the one who previously denied him relief, concluded that Sasser met neither of the key clinical requirements to establish intellectual disability. On significantly subaverage intellectual functioning, the district court was again presented with the same IQ scores: a 1994 score of 79, and a more recent score of 83. Pet. App. 65-66. The district court acknowledged that if the 1994 score was adjusted downward four points to take account of the "Flynn effect" (improvements in the population's intelligence over time since the test Sasser took was "normed" in 1980), and then adjusted still again to take account of the standard error of measurement, it would fall just barely within the significantly subaverage range. Pet. App. 66.

Faced with these competing scores, the district court reviewed other tests Sasser took in his early 20s, on all but one of which he scored within one standard deviation of the mean, Pet. App. 67, and his high-school grades, which were generally passing, with numerous C's and several B's, Pet. App. 67-68. The district court concluded that in its totality, this evidence would not support a finding of significantly subaverage intellectual functioning. Pet. App. 69. However, it held the question was close

enough that, if Sasser could prove significant adaptive deficits, he would thereby prove—indirectly—that his intellectual functioning was significantly subaverage. *Id.*

The district court proceeded, then, to the question of adaptive deficits. There, it concluded Sasser did not have significant deficits in any skill area. Pet. App. 71-76. Throughout its findings, the district court considered evidence of Sasser's strengths, as well as his weaknesses, to determine whether he had overall deficits in any one skill area. Pet. App. 72-73. The district court explained it was not tallying strengths against limitations, but considering strengths to determine whether Sasser had proven "he actually was limited in any given area," Pet. App. 74 n.10, as well as to determine whether his apparent limitations may have stemmed from "a lack of motivation," rather than "a lack of ability." Pet. App. 73.

For example, the district court acknowledged evidence that Sasser apparently struggled to stack boxes by color. Pet. App. 73. Yet it also heard evidence that Sasser "demonstrated proficiency" and even "excellence" as an electrician—a job that requires considerable sensitivity to differently colored objects. Pet. App. 74. In light of this evidence, the district court could hardly conclude that Sasser had proven "a significant limitation in the area of work," *id.*, and it doubted whether his "apparent limitations" in other jobs were due to true deficits rather than "a lack of engagement," *id.*

Both the State and Sasser appealed their respective losses. In a unanimous opinion by Judge Colloton, the court of appeals reversed the district court's grant of relief

on Sasser's ineffective-assistance claims, and affirmed its denial of relief on Sasser's *Atkins* claim. Pet. App. 18.

On Sasser's ineffective-assistance claims, the court of appeals agreed with Sasser and the district court that his "claims as characterized on remand" were different from the ones he pursued in his initial postconviction proceedings in state court. Pet. App. 7-8. The problem, the court of appeals held, was that in Sasser's effort to present claims that differed from those initially raised in state court, and thus qualified for the *Trevino* exception, he had presented claims that differed from those raised in his habeas petition. *Id.* Indeed, the claims on which the district court granted relief were the added claims the district court dismissed from Sasser's second amended petition as abusive a decade prior, in a decision the court of appeals affirmed. Pet. App. 8. "Sasser's effort to revive" these previously dismissed claims, the court concluded, functioned both "as a second or successive habeas petition and an abuse of the writ." *Id.* It therefore reversed the district court's grant of relief. Pet. App. 9.

Turning to Sasser's *Atkins* claim, the court of appeals took up a series of attacks on the district court's adaptive-deficit finding. Pet. App. 13-18. Most relevantly here, Sasser argued that the district court improperly weighed his strengths against his weaknesses, Pet. App. 15, and improperly required him to prove adaptive deficits at the time of his murder, rather than when he was 18 or younger, as he claimed clinical definitions of intellectual disability required, Pet. App. 16-17.

The court of appeals held the district court's limited consideration of strengths was proper. Distinguishing a prior decision of that court, *Jackson v. Kelley*, 898 F.3d

859 (8th Cir. 2018), which it read to only bar balancing strengths against weaknesses in different skill areas, Pet. App. 15, the court of appeals held the district court had permissibly "addressed conflicting evidence" within the same domain "in order to make the necessary findings of fact in each" one, Pet App. 16. Rejecting Sasser's argument that this Court's decision in *Moore v. Texas* prohibited even that kind of reliance on strengths, the court of appeals held that *Moore* only prohibited offsetting deficits against unrelated strengths. Pet. App. 15.

The court of appeals also rejected Sasser's claim that the district court erred by requiring him to prove intellectual disability at the time of his crime. On the contrary, it observed that the clinical definitions of intellectual disability unsurprisingly required both onset before the age of 18, *and* deficits at the time of the diagnosis. Pet. App. 17. "In any event," it concluded, the district court "found no significant deficits at either point in time," so any error, if there was one, was harmless. *Id.*

The court of appeals denied Sasser's petition for rehearing without dissent. Pet. App. 80.

DISCUSSION

I. The first question presented does not merit review.

Sasser's first question presented asks the Court to decide "[w]hether 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." Pet. i. Sasser argues it does not, and he claims the court below held it does. Pet. 20-23.

Arkansas agrees with Sasser that when a dismissed petition is revived on appeal and remains live on remand, amendments to that petition normally are not second or

successive applications. *Cf. Banister v. Davis*, 140 S. Ct. 1698, 1705 (2020) ("[T]he courts of appeals agree . . . that an amended petition, filed after the initial one but before judgment, is not second or successive."). But the court below did not hold that an amendment to a petition on remand is a second or successive application; nor has any other court of appeals so held. Rather, what the court below held is that when a petition has been partially dismissed under a final judgment—as Sasser's second amended petition was here 15 years ago—an attempt to revive the claims that were dismissed is a second or successive application, or, alternatively, an abuse of the writ. The first holding is uncontroversial, and Sasser does not even attack the second, making review of the first futile. So the Court should deny review of the first question presented.

A. This case does not present Sasser's first question.

When Sasser claimed on remand in 2016 that his counsel was ineffective for failing to retain a different mitigation expert, it was not the first time he had made that claim. As the court below observed, Pet. App. 8, to no dispute from Sasser here, Sasser raised that claim in his second amended petition in 2004. Pet. App. 120 (faulting trial counsel for "not retaining qualified experts"). The district court dismissed that petition in 2007, reasoning, in part, that the different-expert claim was an abuse of the writ because Sasser could have made it in his original habeas petition. Pet. App. 146-48. While the appeal of his old ineffective-assistance claims' dismissal remained pending, the court of appeals affirmed the dismissal of Sasser's new ineffectiveness claims in 2009. Pet. App. 158-60. Then this Court denied certiorari. Pet. App. 160.

When, then, in 2013 the court of appeals remanded four of Sasser's original ineffective-assistance claims for an evidentiary hearing, Pet. App. 264, 268, his case was in an unusual posture. The ineffective-assistance claims in his original petition remained live, but his subsequent ineffective-assistance claims in his second amended petition were out of the case, dismissed under a long-final judgment. So when Sasser attempted to revive those dismissed claims on remand, the question before the court of appeals was not simply whether amending a live petition after a remand was a second or successive petition. Rather, it was whether amending a petition to bring claims previously dismissed under a final judgment amounted to one. The court of appeals concluded, unremarkably, that it does. Pet. App. 8 ("Sasser's effort to revive these ineffective-assistance claims during the most recent remand functioned as a second or successive habeas petition.").

That holding was correct. *See* 28 U.S.C. 2244(b)(1) ("A claim presented in a second or successive habeas corpus application . . . that was presented in a prior application shall be dismissed."); *Gonzalez v. Crosby*, 545 U.S. 524, 530 (2005) ("Under § 2244(b), the first step of analysis is to determine whether a 'claim presented in a second or successive habeas corpus application' was also 'presented in a prior application.' If so, the claim must be dismissed."). Sasser's attempt to amend his petition was not, to be sure, second or successive relative to his original petition that was live on remand. But it was second or successive relative to his dismissed amended petition.

Because Sasser sought to amend his petition after a final judgment dismissing his claims, not only after a vacated one, this case does not present the question of whether amending a formerly dismissed petition after a remand to add new claims amounts to a second or successive application. Rather, it presents the question of whether amending a petition to raise claims that were previously dismissed in a final judgment is a second or successive application. The court of appeals' unremarkable holding that it is does not merit further review.

B. There is no conflict on the first question presented.

In addition to this case's not presenting the first question presented, there is no conflict on that question. The reason is that no court of appeals has ever held that when it reverses the dismissal of a habeas petition, amendments to that petition on remand are second or successive applications for relief. Indeed, apart from his mischaracterization of the decision below, Sasser does not claim that the court below or any other court of appeals has ever adopted that rule.

Sasser argues that several courts of appeals have held that when a court of appeals remands a habeas petition to a district court, amendments to that petition are not—at least relative to that petition—second or successive applications. Pet. 16-17. That is true, and their holdings follow logically from the well-settled rule that "an amended petition, filed after the initial one but before judgment, is not second or successive." *Banister*, 140 S. Ct. at 1705. But no court of appeals disagrees with them.

Sasser principally claims that the decision below conflicts with the decisions permitting amendments after remand. But the lynchpin of the court of appeals' holding

that Sasser's new claims were a second or successive petition was that they had previously been dismissed in a final judgment—a factor absent in all of the cases on which Sasser relies to claim a split. Pet. App. 8 (recounting the new claims' prior dismissal and the court of appeals' decision affirming that dismissal, then holding that "Sasser's effort to *revive* these ineffective-assistance claims during the most recent remand functioned as a second or successive habeas petition" (emphasis added)). Nothing in the court of appeals' decision suggests that absent a final judgment, amendments to a habeas petition on remand are second or successive applications.

Sasser also claims that in other cases, both the court below and the Tenth Circuit have held that after the district court enters judgment, "every amendment is a second-or-successive petition," regardless of how the district court's judgment fares on appeal. Pet. 19. But as he immediately concedes, the decisions he cites do not "address what would happen on remand." Pet. 20.

Rather, all those cases held is that "the pendency of an appeal from the denial of a first petition" does not permit what would otherwise be unauthorized successive filings. *Ochoa v. Sirmons*, 485 F.3d 538, 539 (10th Cir. 2007); *see also Williams v. Norris*, 461 F.3d 999, 1004 (8th Cir. 2006) (holding an amendment to a petition is a successive application "if it occurs after the petition is denied, but before the denial is affirmed on appeal"). They do not say or imply that once a denial is *reversed*, subsequent amendments to the remanded petition are second or successive. And contrary to Sasser's suggestion, there is no logical tension between treating a dismissal on a pending appeal as preclusive of subsequent applications, and not treating it as

preclusive once it has been reversed. To the contrary, that's how preclusion generally works. Charles Alan Wright and Arthur Miller, 18A Fed. Prac. & Proc. 4427 (3d. ed.) (April 2021 update) ("res judicata ordinarily attaches to a final lower-court judgment even though an appeal has been taken and remains undecided," but "[s]hould the judgment be vacated by the trial court or reversed on appeal, however, res judicata falls with the judgment"). There is no circuit split.

C. The court of appeals' holding that Sasser's new claims were an abuse of the writ makes review of the first question presented futile.

The court of appeals reversed the district court's grant of relief on Sasser's new ineffective-assistance claims on two grounds. It held "they are barred as a second or successive petition, *and* an abuse of the writ." Pet. App. 9 (emphasis added); *see also* Pet. App. 8 ("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 former is a jurisdictional bar, codified in 28 U.S.C. 2244; the latter is a non-jurisdictional, common-law doctrine barring certain repetitive applications. Yet Sasser seeks review only on the first ground: that his claims were second or successive. Pet. i. Were the Court to grant review on that question and hold the court of appeals erred, the judgment below would remain undisturbed. So review of the first question presented is futile.

Sasser ultimately acknowledges that the court of appeals "was applying a traditional doctrine of abuse-of-the-writ" in addition to the second-or-successive bar, Pet. 23, and briefly raises some criticisms of that holding, Pet. 23-24. But he cannot raise questions for review in the body of his petition that are missing from his questions

presented. Sup. Ct. R. 14.1(a). And his criticisms are both un-certworthy and meritless.

Sasser makes no argument that review of the court of appeals' abuse-of-the-writ holding is certworthy; he simply argues the court of appeals erred. On the merits, he first claims that this Court "foreclosed" reliance on abuse of the writ in *Magwood v. Patterson* and held its abuse-of-the-writ precedents had been abrogated by Section 2244. Pet. 23 n.3. But the part of the opinion he cites was joined by only two Justices. *Id.* (citing 561 U.S. 320, 338 (2010) (opinion of Thomas, J.)). The other members of the majority disagreed and described scenarios where "abuse-of-the-writ principles would apply"—principally a second challenge to an "undisturbed state-court judgment," like the one here. *Magwood*, 561 U.S. at 343 (Breyer, J., concurring in part and concurring in the judgment). Absent a majority holding that AEDPA abrogated the Court's abuse doctrine, that doctrine still survives—at least in cases not controlled by the second-or-successive bar, as Sasser argues is the case here.

Sasser next argues that, unlike the second-or-successive bar, which is jurisdictional, the State forfeited reliance on abuse of the writ. But the abusiveness of Sasser's new claims was the law of the case; the district court held, and the court of appeals affirmed, that the same claims were an abuse of the writ a decade prior. The State did not have to argue his claims were an abuse of the writ for the court of appeals to follow its prior decision. Otherwise, courts of appeals would not only be free but required to depart from their prior decisions whenever the parties failed to argue for adherence to some aspect of them. The court of appeals' abuse-of-the-writ holding

was correct, does not merit further review, and most critically, is outside the scope of the first question presented.

II. Only the first part of the second question presented potentially merits review.

Sasser's second question presented is really two questions and only the first half potentially merits review. The first half of Sasser's second question asks whether "courts violate the Eighth Amendment by a) weighing strengths against deficits in the same adaptive-skills domain." Pet. i. Before Sasser filed his petition here, in *Payne v. Jackson*, No. 21-1021, Arkansas petitioned for certiorari on an essentially identical question. If Arkansas's petition in *Jackson* is granted, the Court should hold this petition on that question pending a decision in that matter, and it should deny review if Arkansas's *Jackson* petition is denied.

The other half of Sasser's second question asks whether lower courts violate the Eighth Amendment if they require defendants to prove adaptive deficits at the time of their offenses. *Id.* That issue is not presented here, does not present a conflict among the lower courts, and was correctly decided below. Review on it should be denied.

A. The Court should hold this petition pending resolution of Arkansas's petition on essentially the same question in *Payne v. Jackson*, or if the Court denies review in *Jackson*, it should deny the petition here.

The first half of the second question presented asks whether courts may weigh adaptive strengths against deficits within the same skill domain. Pet. i. Arkansas's petition in *Payne v. Jackson* asks the same question. Pet. for Writ of Certiorari, *Payne v. Jackson*, No. 21-1021, at i. Arkansas agrees with Sasser that this question merits

review in an appropriate case. And the fact that both Arkansas and a defendant represented by the Federal Public Defender agree that there is a conflict among the lower courts on this issue, citing many of the same cases, *compare id.* at 11-15, *with* Pet. 26-29, underscores that the conflict is genuine and that both sides of this issue need clarification from this Court.

This case also aptly illustrates why, on the merits, considering adaptive strengths is appropriate, and why it is vital that the Court grant review in an appropriate case to correct the contrary view of some lower courts. For example, under Sasser's rule, which would bar review of adaptive strengths, the courts below should have only considered the "simple[] manual-labor jobs" at which he struggled, Pet. 12, disregarded his "proficiency and excellence" as an electrician, Pet. App. 74, and concluded that he had significant adaptive deficits in the area of work, Pet. 12-13, 39. Yet how could a court reasonably conclude a person had significant adaptive deficits in work skills, to the point of intellectual disability, if he displayed excellence as an electrician? And even if strengths were not relevant in themselves, how could a court determine whether a defendant's struggles at manual-labor jobs were a result of deficits, or of disinterest, without considering evidence that the same defendant could perform similar and more demanding tasks? What Sasser's rule boils down to is that courts should only consider evidence that favors Sasser and other capital defendants claiming intellectual disability. Predictably, that approach would result in error, as this case shows.

However, though the first half of Sasser's second question presented warrants review in an appropriate case, *Jackson*, not this case, is the superior vehicle for the Court's review. In *Jackson*, that question is outcome-determinative; the district court there has already held that if strengths are relevant, then the respondent there is not intellectually disabled. *See Jackson* Pet. at 6-7, 21-22. Here, it is far less clear that question is outcome-determinative. Below, the district court found Sasser had failed to prove he had significantly subaverage intellectual functioning, apart from whether he had adaptive deficits. Pet. App. 69. And though it said it would find he had significantly subaverage intellectual functioning if he could prove significant adaptive deficits, Arkansas would argue on remand that applying adaptive-functioning evidence to the distinct question of intellectual functioning is inappropriate. So whether Sasser has adaptive deficits may ultimately be immaterial.

Moreover, since its decision in this case, the court of appeals held in *Jackson* that its prior precedent compels courts to disregard adaptive strengths. *Jackson* Pet. 9. So were the Court to grant review in this case, rather than in *Jackson*, it would be reviewing a position from which the court of appeals has since receded. Accordingly, the better course is to grant Arkansas's petition in *Jackson* and hold this petition pending a decision there, or to deny Sasser's petition if the Court denies the petition in *Jackson*.

B. The second half of the second question presented does not merit review.

The second half of the second question presented asks whether courts may require capital defendants to prove they had significant adaptive deficits at the time of

their crimes, or may only require proof of adaptive deficits in the developmental period. Pet. i, 30. That question is not presented, because the district court did not find deficits in either period. There is no conflict on it. And the court of appeals correctly held that both periods are relevant. Review on this question should be denied.

1. This case does not present the second half of Sasser's second question.

Below, the court of appeals agreed with the district court that it was appropriate to require proof of adaptive deficits at the time of Sasser's crime, not only in the developmental period. Pet. App. 17. But it ultimately and unambiguously concluded that the distinction was immaterial, writing that "[i]n any event, the court found no significant deficits at either point in time." *Id.* Thus, for the Court to reach this question, it would have to first conclude that the court of appeals misunderstood the district court's opinion. Such a factbound inquiry does not merit this Court's review.

In any event, the court of appeals did not misinterpret the district court's opinion. Sasser contends that the district court found "Sasser had limitations in academic and math skills during the developmental period," and that it used subsequent strengths to outweigh those limitations. Pet. 40. But the district court did not find Sasser's "academic problems" in high school, though real, amounted to significant deficits. Pet. App. 71. To the contrary, it found that "Sasser's performance was due at least in part to a lack of motivation," Pet. App. 73, and even relied on his academic record to conclude that—absent evidence of significant adaptive deficits—he did not have significantly subaverage intellectual functioning. *See* Pet. App. 69 ("Sasser's other

test scores, and his school performance, further indicate that he had subaverage general intelligence that nevertheless was not so subaverage as to meet the standard for mental retardation.").

Moreover, when the district court did turn to evidence of Sasser's academic skills from his adulthood, it did not simply rely on that evidence to conclude he lacked academic deficits at the time of his crime; rather, it viewed that evidence as "undermining Sasser's claimed limitations in areas of adaptive functioning prior to incarceration." Pet. App. 72-73. If Sasser is correct that intellectual disability "is not a transient condition," Pet. 36, but invariably persists from the developmental period onward, it follows a court can take evidence from adulthood to decide whether a defendant was disabled in the developmental period. So on Sasser's own standard, there was no error.

2. There is no conflict on the second part of the second question presented.

Sasser claims that three courts only require proof of deficits in the developmental period. Pet. 30-31. Though two of those courts do require proof of deficits at that point, none of the decisions he cites hold that developmental deficits are all a defendant must show.

Sasser first cites *McManus v. Neal*, 779 F.3d 634 (7th Cir. 2015), a habeas decision reviewing a reasoned decision by the Indiana Supreme Court. There, the Seventh Circuit held it would "require an *extension* of *Atkins*" to hold a defendant ineligible for the death penalty on the basis of deficits at the time of the crime alone, absent "symptoms that manifest before adulthood." *Id.* at 652. This decision is doubly irrelevant, both because it only addressed what *Atkins* clearly established under

AEDPA—not what the Eighth Amendment itself prohibits—and because it merely held that *Atkins* requires proof of disability in the developmental period, not that disability at the time of the crime isn't required as well.

The state supreme court decisions on which Sasser relies are no more inconsistent with the decision below. In *Ybarra v. State*, the Nevada Supreme Court considered in some detail what the necessary "age of onset" was and concluded it was 18. 247 P.3d 269, 275-76 (Nev. 2011). Like *McManus*, it did not hold that proof of disability before 18 was sufficient, only that it was necessary. *See id.* at 276 ("[S]ubaverage intellectual functioning and adaptive behavior deficits must originate before 18 years of age to meet the definition of mental retardation."). Finally, in *Bowling v. Kentucky*, 163 S.W.3d 361 (Ky. 2005), the Kentucky Supreme Court actually *upheld* a state statute requiring defendants to prove they were intellectually disabled at the time of pretrial proceedings, *id.* at 369, 377, reasoning that this was appropriate because "[i]f diminished personal culpability is the rationale for not executing a[n] [intellectually disabled] offender, logic dictates that the diminished culpability exist at the time of the offense," *id.* at 376.[2] Though this Court's decision in *Atkins* has spawned a number of conflicts, this is not one of them.

3. The decision below is correct.

Though the decision below did not turn on the question, the court of appeals' endorsement of requiring proof of disability at the time of the offense, as well as in

[2] Sasser's observation that Arkansas has interpreted its intellectual-disability statute "to be coterminous with *Atkins*," Pet. 31, though correct, is irrelevant; Sasser begs the question of what *Atkins* requires.

the developmental period, was correct. That is so for two reasons: *Atkins* requires disability at the time of the offense, and not all people who are intellectually disabled in the developmental period continue to be disabled through adulthood.

In *Atkins*, this Court held the Eighth Amendment forbids the execution of "offenders" who are intellectually disabled. 536 U.S. 304, 317 (2002). The Court reasoned that those offenders were "less morally culpable" than other offenders, *id.* at 320, and that their "cognitive and behavioral impairments . . . ma[d]e it less likely" that "the possibility of execution" would deter them from "carrying out murderous conduct," *id.* These rationales for exempting "offenders" with intellectual disabilities from the death penalty make sense only if that classification means what it says and applies to persons who are intellectually disabled at the time of their offense. If their intellectual disability is a malady they have overcome, it cannot diminish their culpability, or make them unsusceptible to the deterrent effects of the death penalty.

If intellectual disability, after the age of onset, were invariably permanent, proof of intellectual disability at the age of onset would suffice to prove intellectual disability at the time of the offense. But intellectual disability is not invariably permanent. To the contrary, the leading clinical manual says that "interventions may improve adaptive functioning throughout childhood and adulthood. In some cases, these result in significant improvement of intellectual functioning, such that the diagnosis of intellectual disability is no longer appropriate." Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 39 (5th ed. 2013). Likewise, its prior edition, which the court of appeals relied upon to require proof of disability at the time of the

offense, said that intellectual disability is "not necessarily a lifelong disorder," and that "training and opportunities" can allow some individuals with intellectual disabilities "to develop sufficient 'adaptive skills' to 'no longer have the level of impairment required for a diagnosis.'" Pet. App. 255-56 (quoting Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 47 (4th ed., text revision 2000)).

Because intellectual disability is not necessarily a lifelong disorder, proof of disability in the developmental period does not prove disability at the time of the offense. And if evidence shows that a defendant was not disabled at the time of the offense, evidence of disability in the developmental period does not automatically rebut that evidence, on the theory that intellectual disability is permanent. *See* Pet. 36 (claiming that "[i]f 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"). The district court did not err in considering evidence of Sasser's adaptive functioning at the time of the offense, and the court of appeals did not err in approving that consideration.

CONCLUSION

The Court should hold the petition pending a decision in *Payne v. Jackson* if certiorari in that case is granted, and deny the petition if certiorari in *Jackson* is denied.

Respectfully submitted,

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