CAPITAL CASE 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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I. Arkansas agrees that Sasser's second question presented is worthy of this Court's review.

Sasser's second question presented asks in part whether it is permissible to weigh adaptive strengths in the same adaptive-skills domain when determining whether a person is intellectually disabled. Arkansas agrees that this question is of "undeniable importance," Reply Brief for Petitioner at 1, *Payne v. Jackson*, (No. 21-1021) and "merits review in an appropriate case," Brief for Respondent at 19–20, *Sasser v. Payne*, (No. 21-7039). Sasser agrees with Arkansas that the "conflict is genuine," as demonstrated by disarray among the lower courts, and that "both sides of this issue need clarification from this Court." *Id*. at 20.

II. This case, rather than *Payne v. Jackson*, is a superior vehicle to address this pressing question.

The Court should opt to answer this critical question in Sasser's case. First, here the disputed issue is plainly presented. The Eighth Circuit squarely held that the district court did not err in considering adaptive strengths. App. 15. Second, whether such balancing is permitted will determine whether Sasser is eligible for execution. The district court found that "evidence reveals that by most measures, Sasser was intellectually disabled to some degree when he committed the crime" but that unless Sasser also demonstrated a "significant deficient or impairment in adaptive functioning" he would not meet his legal burden to establish intellectual disability. App. 68–69. The district court ultimately found Sasser could not meet his burden because his purported strengths negated a finding of adaptive deficits. *See* App. 16.

Arkansas makes several unavailing arguments for why this case is an inferior vehicle for the Court to address the weighing question. First, Arkansas argues that the *Jackson* opinion shows that the holding in *Sasser III* is "receding" in the Eighth Circuit. But other than timing, there is no indication that is true. *Jackson* was issued a little over two months after *Sasser III*, and the majority opinion does not discuss or distinguish *Sasser III*. Only the dissent points out that *Jackson* is "inconsistent in important ways with our own recent precedent," namely, *Sasser III*. *Jackson v. Payne*, 9 F.4th 646, 662 (8th Cir. 2021) (Grasz, J. dissenting and citing *Sasser v. Payne*, 999 F.3d 609, 619–20 (8th Cir. 2021)). But rather than showing retreat from the idea that adaptive strengths can be weighed, the inexplicable existence of *Sasser* and *Jackson* coming out of the same circuit court within months are a symptom of the "widespread conflict among the circuits over the question." *Commissioner v. Estate of Bosch*, 387 U.S. 456, 457 (1967) (granting certiorari where two divergent panel opinions from the same circuit were indicative of a larger circuit split).

Second, Arkansas argues that the district court performed an unrelated legal error by linking intellectual and adaptive functioning in Sasser's case and urges that *if* they could convince a lower court that such an error was made then the weighing question *may* become immaterial. Brief for Respondent at 21. On the contrary, the district court's linking of the issues shows that Sasser's intellectual functioning was sufficiently in question as to render the question of adaptive functioning determinative of the entire *Atkins* issue. *See Hall v. Florida*, 572 U.S.

701, 723 (2014) (reiterating "the Court's independent assessment that an individual with an IQ test score 'between 70 and 75 or lower" … may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning"); App. 66 (explaining that Sasser's pre-trial IQ score, after adjustments, fell within the margin of error permitting an intellectual disability diagnosis if adaptive deficits are present). The criticality of that issue in the district court's analysis makes this an ideal vehicle to address the legal question presented. Whether Arkansas could later convince a lower court that the district court impermissibly allowed adaptive behavior to influence its assessment of Sasser's intelligence is irrelevant to the legal question presented by the opinion currently at issue.

Finally, *Jackson* has a confounding element that is not present in *Sasser* to the same degree. Alvin Jackson committed his murder while in prison after spending several years in prison. Parsing the adaptive evidence in *Jackson* will inevitably run up against *Moore*'s "caution against relying on prison-based development." *Moore v. Texas*, 139 S.Ct. 666, 671 (2019). Though the State attempts to amplify prison evidence as showing Sasser's strengths, there is "outside" evidence on both sides of the scale that can be discussed here. *See* App. 53–59 (detailing testimony about Sasser's behavior as a free man). In *Jackson*'s case, however, the evidence that Arkansas wants added to the scale is "Jackson's adaption to prison" and his "activities in prison." *Jackson v. Norris*, 448 F.Supp.3d 1028, 1047–48 (E.D. Ark. 2020). Because that evidence is separately problematic, the instant case is better

suited for certiorari. However, should the Court grant certiorari in *Jackson* and not here, Sasser joins Arkansas's request that his petition be held pending a decision in *Jackson*. Brief for Respondent at 19.

III. Proper consideration of adaptive evidence will lead to a ruling exempting Sasser from execution.

Arkansas argues that ultimately the district court got it right—because looking at Sasser's adaptive strengths disproves that he is intellectually disabled. But the State's arguments rely on prison evidence, disregard the record, or resort to lay-stereotypes about the intellectually disabled. As Sasser related in his Petition, he presented evidence of poor performance at complex work tasks. Pet. at 8. Arkansas counters that Sasser was an "electrician" in prison who must've mastered color coding. This representation supplants a free-world view of what an electrician does with the actual evidence of what a prisoner on an "inside-maintenance" crew does as an "electrician." The only tangible example of what kind of independent task Sasser may have performed in this role is that "he could be assigned to maybe go in seven barracks and change all the light bulbs that were out." 2010 Habeas Tr. at 235. The State also fails to acknowledge the supports incumbent in a prison environment: penalties for missing work, extreme structure, supervision, and provision of food and shelter. Arkansas's highlighting of Sasser's relationships likewise resorts to lay-stereotypes which fail to acknowledge that persons with intellectual disabilities can form relationships and become parents. *Moore*, 139 S.Ct. at 672.

CONCLUSION

The parties have ensured that considering Sasser's Petition will necessarily involve consideration of Jackson's. Doing so should leave the Court troubled. A cornerstone of the Court's Eighth Amendment jurisprudence is reliability—and here, two men face the death penalty, both allege they are exempt because of intellectual disability. Unless this Court intervenes, and because of ambiguity in this Court's precedence, one man will be spared while the other is executed due to a disparate application of the same law.

For the reasons articulated in his Petition and above, Sasser urges the Court to grant certiorari.

Respectfully Submitted,

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