

THIS IS A CAPITAL CASE

No. _____

In the Supreme Court of the United States

ANDREW SASSER,
Petitioner

v.

DEXTER PAYNE, Director,
Arkansas Department of Correction,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**UNOPPOSED APPLICATION FOR EXTENSION OF TIME
TO FILE PETITION FOR A WRIT OF CERTIORARI**

To the Honorable Brett M. Kavanaugh, Associate Justice of the Supreme
Court of the United States and Circuit Justice for the Eighth Circuit:

Under Rule 13.5, Petitioner Andrew Sasser respectfully requests an
extension of sixty days, up to and including January 28, 2022, in which to file a
petition for a writ of certiorari.

Petitioner will seek review of an opinion of the United States Court of
Appeals for the Eighth Circuit in the consolidated appeals of *Sasser v. Payne*, Case
Nos. 18-1678 and 18-1768, 999 F.3d 609 (June 2, 2021), attached as Appendix A.
The Eighth Circuit denied a timely-filed petition for rehearing on August 31, 2021.

See Appendix B. The time to file a petition for writ of certiorari in this Court currently expires on November 29, 2021. This application has been filed more than ten days before that date. The Court has jurisdiction under 28 U.S.C. § 1254(1).

The extension of time is necessary to adequately prepare an argument on significant constitutional issues raised by the Eighth Circuit's decision in this capital habeas corpus case. The court of appeals in this case reversed a grant of habeas relief by the district court on several of Petitioner's ineffective-assistance-of-counsel claims. Though the Eighth Circuit had previously remanded the case for consideration of precisely these claims, the new Eighth Circuit panel *sua sponte* held that the claims were actually "second or successive." App. A at 9. ("The claims identified by the district court on remand were not presented in Sasser's first federal habeas petition, and they are barred as a second or successive petition and an abuse of the writ.") Sasser never filed a "second or successive" application; all of his claims were litigated in a single habeas case, albeit after several remands by the Eighth Circuit. This Eighth Circuit's decision is contrary to the Supreme Court's jurisprudence on second-or-successive petitions and on *sua sponte* decisions by federal courts. This decision also conflicts with decisions of other circuits and therefore creates a question that this Court should decide: whether amending a habeas petition after a remand by the court of appeals renders claims in the amended petition "second or successive."

The petition will also address the Eighth Circuit's treatment of intellectual-disability claims under *Atkins v. Virginia*, 536 U.S. 304 (2002). Here, the Eighth

Circuit affirmed the denial of habeas relief on a novel ground: that *Atkins* requires proof of adaptive deficits at the time of the crime, after the developmental period. App. A at 16–17. The Eighth Circuit also endorsed a practice repeatedly denounced by this Court: weighing adaptive strengths against adaptive deficits. App. A at 15 (“The district court did not err in its consideration of adaptive strengths.”) Finally, the Eighth Circuit affirmed the district court’s finding that Sasser failed to rule out other potential causes of his adaptive deficits, such as that he “may have suffered as much from a lack of motivation as a lack of ability.” App. A at 18. Although this Court could not have been clearer in articulating legal standards for evaluating intellectual disability in its *Moore* and *Moore II* decisions, apparently more clarity and reinforcement is needed. *See Moore v. Texas*, 139 S. Ct. 666 (2019); *Moore v. Texas*, 137 S. Ct. 1039 (2017).

Counsel’s duties in other death-penalty matters will prevent her from completing the petition in the time Rule 13.1 allows. Since the denial of the en banc petition, undersigned counsel has been working on an active field investigation of another intellectual-disability claim in a different case, as well as preparing a reply brief—which has not yet been filed—in an appeal involving complex questions of cause and prejudice to excuse the default of four claims of constitutional error stemming from off-the-record jury selection conducted without knowledge or presence of the defendant, the public, or defendant’s subsequent appeal and post-conviction attorneys. *See Marcyniuk v. Payne*, No. 19-1943 (8th Cir. Oct. 13, 2021). Additionally, last week counsel was assigned a new death-penalty case due to

impending retirement of the attorney who has been working on the case for a number of years. The undersigned counsel expects to invest significant time over the next two months into this case—while her retiring co-counsel is still available to guide the investigation and answer questions—to ensure continuity of care for the client and to prevent the loss of institutional knowledge.

An extension will not prejudice Respondent. The undersigned counsel contacted Nicholas J. Bronni, Solicitor General of Arkansas and counsel for the Respondent, who stated he does not object to the additional time.

WHEREFORE, Petitioner Andrew Sasser respectfully requests that the Court allow him until January 28, 2022, to file his petition for a writ of certiorari.

November 2, 2021

Respectfully submitted,

Nadia Wood* (Sup. Ct. Bar # 291584)

/s/ Nadia Wood

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