THIS IS A DEATH PENALTY CASE
Appeal No. 02-3103
11-3346

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ANDREW SASSER, Petitioner-Appellant.

v.

RAY HOBBS, Director,
Arkansas Department of Correction, Respondent-Appellee.

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

Honorable Jimm Larry Hendren
United States District Judge

APPELLANT'S BRIEF

JENNIFFER HORAN
FEDERAL DEFENDER

By: Scott W. Braden
Scott_Braden@fd.org
Ark. Bar No. 2007123
Deborah Anne Czuba
Deborah_Czuba@fd.org
Ark. Bar No: 2008271
Assistant Federal Public Defenders
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
Counsel for Andrew Sasser

SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In *Atkins v. Virginia*, 536 U.S. 304 (2002) the United States Supreme Court held that the execution of a mentally retarded criminal defendant violates the Eighth Amendment prohibition of cruel and unusual punishment. On remand from this Court, the district court conducted a hearing to determine whether Mr. Sasser was in fact mentally retarded and ineligible for execution. The district court's determination that Mr. Sasser was not mentally retarded is in error. The district court created a definition of mental retardation which does not accord with the one created by the State of Arkansas. Mr. Sasser was also denied the effective assistance of counsel at multiple stages of his trial, direct appeal, and in post conviction, an issue that the district court dismissed as being barred from federal review as well as multiple other issues concerning the failure to instruct the jury on elements of the offense charged by the prosecution. The ineffectiveness of post conviction counsel is "cause" which will excuse any default.

Mr. Sasser requests that this Court set this matter for oral argument. Argument will assist this Court in resolving the complex factual, scientific, and procedural issues presented here. Mr. Sasser requests oral argument in the amount of 20 minutes.

TABLE OF CONTENTS

Table of Contents (cont'd)

Table of Contents (Cont'd)

Table of Contents (Cont'd)

Table of Contents (cont'd)

TABLE OF AUTHORITIES

FEDERAL CASES

Table of Authorities (Cont'd)

Table of Authorities (Cont'd)

Table of Authorities (Cont'd)

STATE CASES

Table of Authorities (Cont'd)

Table of Authorities (Cont'd)

FEDERAL STATUTES

STATE STATUTES

TREATISES AND OTHER MATERIALS

Table of Authorities (Cont'd)

JURISDICTIONAL STATEMENT

Appellant, Andrew Sasser, is a person in the custody of the State of Arkansas pursuant to the judgment of an Arkansas court. He has filed a petition for writ of habeas corpus in the Western District of Arkansas, which alleged violations of the Constitution, laws and treaties of the United States. The district court had authority to entertain Mr. Sasser's Petition pursuant to Title 28 U.S.C. §§ 2241, 2254.

The district court denied relief in this matter twice, once on May 28, 2002 and again on November 3, 2010. Notice of appeals were filed as to both orders on June 27, 2002 and October 7, 2011. The district court also granted a certificate of appealability applicable to both orders on August 15, 2002 and October 26, 2011. This appeal is from two final orders of the district court and has been timely filed in this Court.

This Court has jurisdiction pursuant to 28 U.S.C. § 2253, which subjects final orders in habeas corpus actions to review by the court of appeals for the circuit in which the proceeding is held, and pursuant to 28 U.S.C. § 1291, which provides that United States Courts of Appeal have appellate jurisdiction over final decisions of United States District Courts except where direct review may be had in the Supreme Court.

STATEMENT OF THE ISSUES

CLAIM I

Whether the district court erred in its ruling that Mr. Sasser was not mentally retarded at the time of his crime and therefore his sentence of death does not violate the Eighth Amendment Cruel and Unusual Punishment Clause because he is a person with mental retardation.

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

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

CLAIM II

Mr. Sasser's claims presented to the district court concerning ineffective assistance of counsel at trial and sentencing as well as the failure of the trial court to properly instruct the jury on essential elements of the capital offense, were incorrectly dismissed as being procedurally barred. The State failed to prove there were no remedies available to Mr. Sasser in the State court to present these issues today. Even if there is a bar to the consideration of these issues it can be overcome by the showing of cause and prejudice here and actual innocence.

Murray v. Carrier, 477 U.S. 478 (1986).

Simpson v. Camper, 927 F.2d 392 (8th Cir. 1991).

The ineffectiveness of post conviction counsel is cause which will excuse

any bar to federal review of these claims.

Martinez v. Ryan, ___ U. S. ___ (March 20, 2011).

Strickland v. Washington, 466 U.S. 668 (1984).

CLAIM III

Mr. Sasser's jury was not instructed on essential elements of capital murder. This failure relieved the prosecution of having to prove each element of the capital offense beyond a reasonable doubt. This issue was considered by the State court contrary to the district court's order.

In re Winship, 397 U.S. 358 (1970).

Yates v. United States, 354 U.S. 298 (1957).

United States v. Goodner Bros. Aircraft, Inc., 966 F.2d 380, 384 (8th Cir. 1992).

This claim was not procedurally defaulted.

Sawyer v. Whitley, 505 U.S. 333 (1992).

Ford v. Georgia, 498 U.S. 411 (1991).

Murray v. Carrier, 477 U.S. 478 (1986).

STATEMENT OF THE CASE

Mr. Sasser was convicted of Capital Felony Murder in the Circuit Court of Miller County, Arkansas, and sentenced to death on March 2, 1994. Mr. Sasser's trial counsel also represented him on direct appeal, and filed a brief raising one appellate issue. Mr. Sasser's conviction and sentence were affirmed by the Arkansas Supreme Court on direct appeal on July 17, 1995. *Sasser v. State,* 902 S.W.2d 773 (Ark. 1995). A petition for state postconviction relief was denied by the Miller County Circuit Court on July 2, 1997, and that denial was affirmed by the Arkansas Supreme Court on July 8, 1999. *Sasser v. State,* 993 S.W.2d 901 (Ark. 1999).

A petition for writ of habeas corpus challenging Mr. Sasser's conviction and sentence was filed in the United States District Court for the Western District of Arkansas on July 7, 2000. The district court denied that Petition on May 28, 2002, without conducting an evidentiary hearing. Appellant's Addendum (hereinafter "Add.") 1. Mr. Sasser thereafter appealed the denial of habeas relief to this Court.

While the appeal was pending, the United States Supreme Court issued its opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), holding that the Eighth Amendment Cruel and Unusual Punishment Clause prohibits the execution of persons with mental retardation. Mr. Sasser moved this Court to remand his case to

the district court to permit him an opportunity to raise a claim for relief under *Atkins*. That Motion was granted on August 15, 2003. Appellant's Separate Appendix (hereinafter "App.") 12 and 13.

On remand the district court directed Mr. Sasser to file an Amended Petition setting forth his Eighth Amendment mental retardation claim on September 3, 2004, as well as issues of ineffective assistance of counsel. App. 14. The Petition also contained a number of closely related claims for relief, including the claim that Mr. Sasser's Sixth Amendment right to the effective assistance of counsel had been violated by his trial counsel's failure to investigate and present the evidence of his mental retardation. Without conducting a hearing the district court denied relief on Mr. Sasser's claim of mental retardation. Add. 2.

Mr. Sasser appealed the denial of an evidentiary hearing on the issue of his mental retardation as well as the denial of relief under *Atkins* to this Court. After briefing and argument this Court remanded the matter to the district court instructing it to conduct an evidentiary hearing. *Sasser v. Norris*, 553 F.3d 1121 (8th Cir. 2009). The district court conducted an evidentiary hearing in accordance with this Court's order on June 15 and 16, 2010.

After hearing the evidence in this matter the district court held Mr. Sasser was not mentally retarded and denied relief on November 3, 2010. Add. 3. A

certificate of appealability was granted on this issue. It is from these orders that an appeal was brought to this Court under case number 11-3346.

This Court granted a motion to consolidate the mental retardation appeal, 11-3346, most recently before the district court, with the other issues presented to this Court in Mr. Sasser's opening brief filed January 30, 2003 in case number 02-3103. The Clerk of this Court has informed counsel that the preference of the Court is to proceed in this matter under the 02-3103 case number. This Court also has permitted rebriefing of the issues originally presented to this Court.

STATEMENT OF FACTS

Mr. Sasser has been convicted and sentenced to death for the July 12, 1993 murder of Joanne Kennedy in Garland, Arkansas. Mr. Sasser was arrested by law enforcement officers soon thereafter, arresting officers then conducted a warrantless search of the home of Mr. Sasser's mother, where Mr. Sasser resided.

On August 12, 1993, the Prosecuting Attorney for Miller County, Arkansas, filed a felony information. The information charged Mr. Sasser with capital felony murder alleging four underlying felonies and sought his execution.

The state court appointed Charles A. Potter, a local lawyer and part-time public defender, to represent Mr. Sasser. This was the first capital-murder case in which Mr. Potter had performed as lead counsel in over twenty eight years. Mr. Potter failed, in both the guilt and sentencing stage, to provide Mr. Sasser with the representation guaranteed by the Sixth and Eighth Amendment in a capital case. Among numerous other instances of woefully deficient performance Mr. Potter failed to object to obviously incorrect jury instructions, failed to interview crucial witnesses concerning the crime and failed to properly question potential jurors. Mr. Potter did not even request an investigator until February 11, 1994, just two weeks before Mr. Sasser’s trial began. Mr. Potter provided the investigator no direction and even failed to keep appointments.

As he had failed to do at the guilt stage Mr. Potter conducted no investigation into the mitigating circumstances surrounding this crime and Mr. Sasser's background. At the penalty hearing Mr. Potter presented no opening statement in face of the opening statement of the prosecutor. Trial Transcript, (hereafter TT) 875-77;888-90). Mr. Potter called only one witness, Mr. Sasser's brother. Despite a long history of intellectual disabilities and a troubled childhood Mr. Sasser's brother, at the request of Mr. Potter, only testified that Mr. Sasser was a good worker and that he had good reports while in prison. TT. 837.[1]

During deliberation of whether Mr. Sasser should live or die the jury asked two questions. The jury recognized Mr. Sasser was acting under "unusual pressure as in day to day life, relationships, jobs, such and such. . ." but they sought guidance on whether that should be considered at the time of the crime or prior to it. TT 1034. Secondly, the jury sought a definition of "mitigating." TT. 1035.

The jury was obviously wrestling with very issues of mental retardation and mitigation that trial counsel failed to investigate and present. It is clear that had Mr. Potter conducted and presented the most minimal information in answer to the jury's concerns the verdict would have been different. But other than the scant

[1]Persons with mental retardation usually do very well in very structured environments such as prisons which is why measures of adaptive functioning cannot be conducted in these artificial environments.

information provided by Mr. Potter it did not have the information about Mr. Sasser it sought in its questions. If the jury had been presented with the evidence detailed at the June 2010 evidentiary hearing, which not only showed Mr. Sasser was mentally retarded but also was significant mitigating evidence, it would not have returned a sentence of death.

Compounding these serious deficiencies, Mr. Potter was then appointed to represent Mr. Sasser on direct appeal to the Arkansas Supreme Court. In this appeal, Mr. Potter – now direct appeal counsel – raised only one issue, challenging the introduction of a witness to prove prior bad acts of Mr. Sasser in the guilt phase of the trial. *Sasser v. State*, 902 S.W.2d 773 (Ark. 1995). Not surprisingly Mr. Potter did not challenge the effectiveness of his own performance as trial counsel.

At the conclusion of Mr. Sasser's one issue appeal his conviction and sentence of death were affirmed by the Arkansas Supreme Court. *Sasser v. State*, 902 S.W.2d 773 (Ark. 1995).

At the beginning of Mr. Sasser's state post conviction proceeding a lawyer not burdened with a conflict of interest was finally appointed to represent Mr. Sasser. Even though newly appointed post conviction counsel challenged the constitutional effectiveness of trial and direct appeal counsel she did so only in a limited manner. She did not challenge Mr. Potter's failure to investigate Mr.

Sasser's mental retardation and the mitigating evidence of Mr. Sasser's intellectual disabilities. She did not present to the state court the failure of Mr. Potter to investigate and present the mitigating evidence that could have been presented to the jury and which would have convinced it to return a sentence of life. Post conviction counsel herself was ineffective in failing to investigate and present evidence which would show how Mr. Sasser was prejudiced by the deficient performance of his trial counsel who was also his direct appeal counsel. A great deal more mitigating evidence concerning Mr. Sasser's mental retardation, his intellectual deficits, his compelling limitations in his adaptive functioning as well as a family history of poverty was readily available to trial counsel and post conviction counsel, had either one conducted the most minimal of investigations. Mr. Sasser's jury heard none of this relevant and compelling information and no state court ever reviewed Mr. Potter's constitutional failures.

The state circuit court denied post conviction relief. This denial was affirmed by the Arkansas Supreme Court. *Sasser v. State*, 383, 993 S.W. 2d 901(Ark. 1999).

SUMMARY OF THE ARGUMENT

Claim I. Mr. Sasser Is Mentally Retarded and Not Eligible for Execution.

The Eighth Amendment prohibits the execution of any mentally retarded criminal defendant. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Supreme Court left to the States the task of defining and assessing mental retardation. The district court was instructed, by this Court, to conduct a hearing on whether Mr. Sasser was mentally retarded. The district court, in making this determination, did not follow the law of the State of Arkansas and its statutory definition of mental retardation. Instead the district court created its own definition of mental retardation by creating a clear numerical line saying that an IQ score of 70 is a cut off for finding mental retardation, even though this line is not find in Arkansas law or recognized by any medical organization that defines and treats mental retardation. The district court ignored the Arkansas definition of mental retardation in numerous other ways.

The district court incorrectly determined Mr. Sasser was not mentally retarded.

Claim II. Mr. Sasser's Claims Presented to the District Court Were Not Barred from Review.

Mr. Sasser presented to the district court several issues concerning his conviction and sentence of death. These issues concerned the woeful effectiveness

of Mr. Sasser's counsel at trial and sentencing, challenges to the instructions provided to Mr. Sasser's jury, challenges to the Arkansas capital statute, as well as other issues. The district court found that there were no non-futile remedies available to Mr. Sasser in state court so therefore all of these issues were barred from federal review. The district court was wrong in finding this bar on all of these issues because State remedies are available to Mr. Sasser. Even if these issues were barred the merits of each could still be reached because Mr. Sasser can show "cause" for not previously presenting these claims and how he was prejudiced by the failure to present these issues because of the deficient performance of his post conviction counsel. Because Mr. Sasser is ineligible for execution under the Eighth Amendment he is "actually innocent" of the death penalty which also excuses any procedural bar that might exist.

Claim III. The Trial Court Failed to Give Mr. Sasser's Jury Crucial Instructions Concerning the Elements of His Offense.

The trial court failed to give Mr. Sasser's jury instructions that defined critical elements of capital felony murder. The jury was given no instruction that the prosecution must prove ant the jury must find certain crucial facts before it could convict Mr. Sasser of capital felony murder. Mr. Sasser's trial counsel, though specifically directed to review the trial court's proposed instructions, failed to object to the obvious deficiency. When trial counsel later represented Mr. Sasser

on appeal to the Arkansas Supreme Court this lawyer failed to raise the issue of the deficient instructions or his own failure to raise an objection to the inadequate instructions.

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY DETERMINED MR. SASSER IS NOT MENTALLY RETARDED.

Mr. Sasser is mentally retarded as defined by the State of Arkansas. Because he is mentally retarded his execution is prohibited by the Eighth and Fourteenth Amendments. *Atkins v. Virginia*, 536 U.S. 304 (2002). The district court was in error when it held Mr. Sasser was not in fact mentally retarded.

A. The Standard of Review

Determinations of state law by a district court are reviewed by this Court *de novo. Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991); *Schawitsch v. Burt*, 491 F.3d 798, 802 (8th Cir. 2007).

Because the state court did not resolve this matter on the merits the district court's findings of fact are reviewed for clear error. *Hunt v. Houston*, 563 F.3d 695, 702 (8th Cir. 2009).

B. Introduction

In resolving whether Mr. Sasser is mentally retarded the district court failed to apply Arkansas's own definition of mental retardation. The district court failed to consider evidence which showed Mr. Sasser had significantly subaverage general intellectual functioning and that he has multiple deficits in adaptive behavior, even though Arkansas only requires the showing of one "deficit in

adaptive behavior". Arkansas Code Annotated (hereafter ACA) §5-4-618(a)(1)(B). The evidence presented at the evidentiary hearing is conclusive that Mr. Sasser labored with mental retardation at the time of the offense for which he had been charged as defined by the State of Arkansas.

C. The Arkansas Definition of Mental Retardation

In 1993, nine years before the United States Supreme Court handed down its decision in *Atkins*, the State of Arkansas prohibited the execution of mental retarded defendants by statute. The Arkansas statute defines mental retardation as:

> (a) (1) As used in this section, "mental retardation" means:
>
> (A) Significantly subaverage general intellectual functioning accompanied by a significant deficit or impairment in adaptive functioning manifest in the developmental period, but no later than age eighteen (18) years of age; and
>
> (B) A deficit in adaptive behavior.
>
> (2) There is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below.
>
> (b) No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.
>
> (c) The defendant has the burden of proving mental retardation at the time of committing the offense by a preponderance of the evidence.

ACA § 5-4-618.

Specifically, the Arkansas General Assembly determined that a showing of mental retardation must include a showing of subaverage intellectual functioning, most commonly measured by an intelligence test. These tests produce an intelligence quotient commonly referred to as an IQ score.[2]

Arkansas's statute also requires a showing of one significant deficit or impairment in adaptive functioning on the part of the defendant. The statute goes on specifically to say that a showing of a single deficit in adaptive behavior is sufficient to prove the existence of this second prong. Adaptive behavior, or adaptive functioning, refers to the skills needed to live independently or at the minimally acceptable level for a certain age. The Arkansas statute does not define what adaptive behaviors are but some common examples of adaptive behavior include such things as communication, self care, home living, social and interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety. *See* American Association of Intellectual and Developmental Disabilies, *Intellectual Disability, Definition,*

---

[2]There are several types of tests that measure intelligence or intellectual functioning. Some of the more common ones are the Wechsler Adult Intelligence Scale, (hereafter WAIS), the Stanford-Binet and the Woodcock-Johnson Tests of Cognitive Abilities. Mr. Sasser has been administered two versions of the WAIS, once in 1994 and again in 2010. These tests will be discussed throughout this section.

Classification, and Systems of Supports, 2010 at 43 (hereafter AAIDD manual); American Psychiatric Association, *Diagnostic and Statistical Manual - IV -Text Revision*, 2003 at 41 (hereafter DSM-IV-TR).[3] By statutory definition Arkansas only requires that Mr. Sasser show a deficit or inability to perform in one of these areas.

This statute provides no specific IQ score where a person can be said to be mentally retarded. In fact, the statute is conjunctive in nature, a showing of subaverage intellectual functioning taken together with at least one deficit in adaptive behavior is required to prove mental retardation. No one prong of the Arkansas statute operates independent of the other.

The district court here ignored Arkansas statutory definition of mental retardation in multiple ways. First it held that an IQ score of 70, standing alone, was not sufficient to show subaverage intellectual functioning thus creating a "bright line" rule that does not exist in Arkansas or in any commonly accepted or scientific definition of mental retardation. Secondly, the district court confused

---

[3]These two entities are the nation's leading medical and scientific organizations on mental retardation. The AAIDD, formerly the American Association of Mental Retardation, now refers to mental retardation as intellectual disability. Counsel for Mr. Sasser will continue to use the term "mental retardation" or "mentally retarded" because those are the term used in the Arkansas statute at issue here. ACA § 5-4-618.

"deficit in adaptive behavior" by holding that because Mr. Sasser could perform certain tasks of daily living – such as Mr. Sasser's ability to "get along with his co-workers" – he could not be mentally retarded. In other words the district court found that because Mr. Sasser had some "strength" in a specific area of daily living it ignored the weaknesses or "deficits" required by the statute and shown to exist at the hearing. Finally, contrary to the clear language of the Arkansas statute which requires a showing of mental retardation at the time of committing the offense the district court held that a measure of intellectual functioning (an IQ test) taken in 2010 could be used as evidence that Mr. Sasser did not have subaverage intellectual functioning in 1993.

D. The District Court Is Bound by the Arkansas Definition of Mental Retardation.

In *Atkins* litigation the federal courts are bound by the definition of mental retardation made by the various states. *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011) (federal courts conducting habeas review routinely look to state law); *Wiley v. Epps*, 625 F.3d 199, 208 (5th Cir. 2010) ("We will ordinarily defer to a state court's interpretation of its own law."); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) ("Ohio should have the opportunity to develop its own procedures for determining whether a particular claimant is retarded and ineligible for death.").

The district court was not free to selectively create its own definition of

mental retardation. The Supreme Court left to the various States "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 417 (1986)). The federal courts, including the district court here and this Court on appeal, is bound to follow the definition of mental retardation created by Arkansas, which predates the Supreme Court decision in *Atkins* by nine years.

The district court's definition of mental retardation is contrary to the one made by Arkansas in several distinct and crucial instances and must be reversed.

1. Mental Retardation is to Be Assessed At the Time of the Offense.

Arkansas law is clear that the determination of mental retardation is to be assessed at the time of the crime or offense for which the defendant was charged. Evidence of Mr. Sasser's current intellectual functioning is not relevant in determining if he was in fact mentally retarded at the time of the offense under Arkansas's statutory scheme. Instead the measure of subaverage intellectual functioning most closely administered at the time of the crime for which Mr. Sasser has been charged is the relevant score to the determination before the district court.

Pursuant to Arkansas statute mental retardation must exist "at the time of committing capital murder." ACA § 5-4-618(b). The Arkansas Supreme Court

when assessing mental retardation claims has repeatedly held that the inquiry for the fact finder is whether a defendant was mentally retarded at the time of committing the offense. In *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004), the Arkansas Supreme Court held that the construction of Arkansas's mental retardation statute was directed to the status of a defendant at the time of his offense, stating that "Section 5-4-618 clearly provides that no defendant with mental retardation *at the time of committing* capital murder shall be sentenced to death. The statute specifically places the burden upon the defendant to prove mental retardation *at the time of committing* the offense by a preponderance of the evidence." *Anderson*, 163 S.W.3d at 356 (emphasis in original).

When the issue of mental retardation is tried to a jury the Arkansas Model Jury Instructions (ACMI) require the jury to be asked "Do you, the Jury, unanimously find by a preponderance of the evidence that at the time he committed the capital murder [defendant] was mentally retarded?" The jury must then must check either the Yes or the No box. AMCI-2d 1009-VF. The comments in the model instructions also recognize that mental retardation must exist at the time of committing the capital crime. AMCI-2d 1009EXP, Comment.

Specifically recognizing that the factual question is whether a defendant can prove he was mentally retarded at the time of his offense the *Anderson* court

discounted evidence of mental retardation that the defendant had presented concerning his intelligence quotient four years before his offense. *Id.* Here the relevant question presented to the district court was whether Mr. Sasser was mentally retarded in 1993. Intelligence testing conducted in 2010 is not relevant to this determination. *Coulter v, State*, 227 S.W. 3d 904 (Ark. 2006); *Anderson v, State*, 163 S.W.3d 333, 355 (Ark. 2004) (provid[ing] that no defendant with mental retardation at the time of committing for capital murder shall be sentenced to death); *Engram v, State*, 200 S.W. 3d 367, 371 (Ark. 2004) (same).

a. Mr. Sasser's IQ Score from 1994 as Adjusted Is the Most Relevant to the Determination of Mental Retardation.

At the evidentiary hearing held in June of 2010, evidence was presented that Mr. Sasser had been given two intelligence tests, one in 1994 and one in 2010. Mr. Sasser scored a 79 on the 1994 test and an 83 on the 2010 test. Only the test given in 1994 was relevant to the district court's determination. The 2010 score, because it was from a test administered seventeen years after the offense, was not relevant to the determination of mental retardation and should not have been considered by the district court in resolving the issue of mental retardation. The most relevant test score was the 1993 score. This score, when properly adjusted, supports a diagnosis of mental retardation.

The WAIS-R test administered to Mr. Sasser in 1994 was thirteen years out

of date. The statistical norms used when this test was published in 1981 had become obsolete by the time it was given to Mr. Sasser after his arrest. Because of these obsolete norms, this intelligence measure skewed or disguised the actual measure of Mr. Sasser's subaverage intelligence. However these aged norms can be adjusted to give a better picture of Mr. Sasser's intellectual inabilities. This adjustment is made by deducting .3 points from the score for every year from when the test was normed to when it was administered.[4] Dr. Kevin McGrew, an expert in psychometrics and intellectual assessment measures testified at the hearing that the best estimate of Mr. Sasser's IQ score in 1994 is a 75. Hearing Transcript at 302; App. 1. Affidavit of Dr. Jack Fletcher at 9 (adjusting from 1979 and opining a correction to 74.5).

b. A Standard Error of Measure must Be Applied to this Adjusted Score.

In addition to the norm obsolescence, both the APA and AAIDD recognize that a statistical standard error of measurement must be applied to any testing

---

[4]The obsolescence or aging of statistical norms in intelligence testing instruments is often termed the "Flynn Effect" due to the specific research of Professor James Flynn conducted over the past twenty-six years. James R. Flynn, *What is Intelligence?* 112 (Cambridge Univ. Press 2007). The statistical concept that norms or standardization of any set of data or statistics age over time as the general population changes is not unique to intelligence instruments nor is this concept a creation arising after the United States Supreme Court's decision in *Atkins*.

score:

> It should be noted that there is a measurement error of approximately five points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a rang of 65 to 75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

See DSM-IV-TR at 41-42. Dr. Toomer and Dr. Moore, the experts who testified at the hearing, both agree that the standard error of measurement must be considered in the assessment of an individual's IQ score. Hearing Transcript 60 and 171. When accounting for the standard error of measurement Mr. Sasser's IQ score at the time of the capital murder fell within the range indicative of a person with mental retardation. The 75 score becomes 70.

Put simply the intelligence test Mr. Sasser was given in 1994 skewed the measurement of his IQ because it was old and outdated. The evidence presented at the evidentiary hearing of an adjusted score of 70 is the best reflection of Mr. Sasser's general intellectual functioning at the time of his offense and should have been considered by the district court but was not.

c. The District Court Erred in Considering the 2010 Intelligence Test.

The district court exclusively relied on an intelligence test administered to Mr. Sasser by Dr. Toomer in 2010, seventeen years after the offense at issue here.

The district court held that the testifying experts "all agreed on one point – the 2010 examination is the best indication of Sasser's intellectual functioning," Add. 3 at 43. This finding by the district court is contrary to the experts testimony. What the experts did "agree" on is that a properly administered intelligence test is the best indication of an individual's intellectual functioning at the time that particular test is administered. Evidentiary Hearing at 83 (Testimony of Dr. Jethro Toomer.) This 2010 score reflects Mr. Sasser's numerous years of solitary confinement, an artificial environment, which does not allow for accurate testing as well as not being contemporaneous with the offense as required by the statute.

The district court was in error giving the 2010 report any weight. The determination of whether Mr. Sasser suffers from intellectual functioning is to be assessed at the time of the offense at issue here. Thus consideration and reliance by the district court on the 2010 test score is contrary to Arkansas law.

The district court's determination that Mr. Sasser must show he is mentally retarded at the time of the evidentiary hearing before the federal court creates a moving target Mr. Sasser can never hit. Arkansas law without dispute holds that Mr. Sasser has the burden of proving mental retardation at the time of his offense, but the district court reset that target, requiring him to prove something that the state court does not require. *Anderson v. State*, 163 S.W.3d 333 (Ark. 2004). In

Anderson, the Arkansas Supreme Court discounted evidence presented by Mr. Anderson because it showed mental retardation four years before the offense for which he was charged. This Court did not ask the district court to determine if Mr. Sasser "is" presently mentally retarded but instead it instructed the district court to determine if Mr. Sasser "was" mentally retarded in accord with the Arkansas statute. Add. 13 at 2. Here, the district court, by considering the 2010 IQ score, is rewriting the Arkansas statute in a way the Arkansas Supreme Court has specifically rejected and ignoring precise directives of this Court. The relevant determination is to be made at the time of the offense for which Mr. Sasser is charged, not the time of the federal court evidentiary hearing. The district court was in error admitting and relying on the 2010 IQ score.

2. The District Court Was in Error Holding the Arkansas Statute Sets a "Bright Line" Measure of "General Intellectual Function."

Contrary to the reasoning of the district court the State of Arkansas has not adopted a "bright line" test for determining the "significantly subaverage general intellectual functioning" prong of its definition of mental retardation. This Court has recognized that there is no firm numerical intelligence test or IQ score that would indicate someone may be diagnosed as mentally retarded. Citing the Diagnostic and Statistical Manual IV-R (DSM-IV-R) of the American

Psychological Association this Court has stated:

> We note that an IQ score may involve 'a measurement error of approximately 5 points,' depending on the testing instrument. DSM–IV–TR at 41. "Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior." Id. at 41–42.

Jackson v. Norris, 615 F.3d 959, 965 n. 7 (8th Cir. 2010). The leading scientific organization in the United States on mental retardation, as this Court has recognized, states "[a] fixed point cutoff score for ID (mental retardation) is not psychometrically justifiable." American Association on Intellectual and Developmental Disabilities, *Intellectual Disability, Definition, Classifications, and Systems of Support*, 11th Edition, 2010 at 40. (AAIDD Manual).

A defendant with an IQ score as high as 75 can still be diagnosed as mentally retarded with a significant showing of a deficit in adaptive behavior. An accurate diagnosis is made by considering the IQ score in tandem with the deficits in adaptive behaviors. In more simple terms, a lower IQ score would need less evidence of adaptive behavior for a diagnosis of mental retardation. Conversely, a higher IQ score would be offset with evidence of more deficits in adaptive behavior in the various areas such as functional academics, work, and home living. Neither prong is considered in isolation from the other, as the district court has done here.

The district court in its order denying relief incorrectly suggests that the Arkansas has established a "cut-off"score of 70 for mental retardation claims and do not allow for cohesive consideration of an individual's intellectual functioning and deficit in adaptive behavior. The district court found:

> the Arkansas statute requires "significant subaverage intellectual functioning," which is a score of 70 or below, *and* it must be "accompanied by significant deficits or impairments in adaptive functioning. A plain reading of the Arkansas statute sets forth the IQ score requirement and the adaptive functioning requirement as discrete prongs, both of which must be met in order to meet the "mental retardation" criteria. ...

Add. 3 at 47. Nowhere is the "70 or below" requirement found in the Arkansas statute. The Arkansas Supreme Court has adopted no such rule in interpreting this statute.

The district court seems to confuse the burden shifting provision of the Arkansas statute with an absolute measure of intellectual functioning. The statute states "[t]here is a rebuttable presumption of mental retardation when a defendant has an intelligence quotient of sixty-five (65) or below." ACA § 5-4-618(a)(2). But instead of drawing a line or setting a diagnostic criteria this language only shifts the burden of proof from the defendant to the State. If the IQ score is 65 or below it is the burden of the State to prove that the defendant is not mentally retarded. If the score is above that line the burden is on the defendant to prove he is mentally

retarded by showing evidence of a deficits in adaptive behavior, the second statutory prong. Nowhere does this statutory provision create a clear line of mental retardation at 65 – or even 70 – that forecloses the review of the deficits in the adaptive behavior prong.

The district court's consideration of Mr. Sasser's IQ score in a vacuum, severed from the consideration of the numerous deficits in adaptative behavior is contrary to the Arkansas statute. The district court held that "[u]tilizing a combination of an IQ score, which is higher than provided for in the statute, along with evidence of adaptive deficits appears to be a shift away from Arkansas' statutory scheme" Add. 3 at 47. However, this is specifically what the statute allows for. The Arkansas statute does not provided for any diagnostic score which would be an absolute barrier to Mr. Sasser's ability to demonstrate that he is a mentally retarded individual. Rather than acting as distinct and severable prongs, as the district court held, the Arkansas statutory definition clearly contemplates that the evidence of intellectual functioning or IQ should be considered in tandem with evidence of deficits in adaptive behavior.

E. Adaptive Behavior

Under Arkansas law, mental retardation is defined as significantly subaverage general intellectual functioning accompanied by one deficit or

impairment in adaptive behavior manifest in the developmental period, but no later than age eighteen; and a deficit in adaptive behavior. ACA § 5-4-618(a)(1)(A)-(B). This definition comports with those put forth by the American Psychological Association in the DSM-IV-TR and the American Association on Intellectual and Developmental Disabilities manual. Both groups have provided definitions for adaptive deficits, lacking in the Arkansas statute. This Court and the State of Arkansas generally follow the diagnostic process adopted by the American Psychiatric Association. *Jackson v. Norris*, 615 F.3d 959 (8th Cir. 2010).

However, Arkansas, unlike the APA, requires only the finding of a single deficit in adaptive behavior. So under Arkansas law, by which this Court and the district court are bound, Mr. Sasser need only show the existence of one deficit in adaptive behavior to be found mentally retarded. As is apparent from record, Mr. Sasser has shown significant deficits in several areas of adaptive functioning. The multiple deficits combined with his subaverage intellectual functioning show Mr. Sasser is mentally retarded contrary to the district court's order.

1. Adaptive Behavior Defined

The AAIDD and the APA generally define adaptive functioning as a measure of how effectively an individual performs in and copes with the demands of everyday life. *See* AAIDD Manual at 43; DSM-IV-TR at 42. While the APA

divides adaptive behavior into several skill areas such as – communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety – and requires deficits in two of these areas for the diagnostic criteria to be met, *see* DSM-IV-TR at 49; the AAIDD conceptualizes adaptive behavior as comprising conceptual skills, social skills, and practical skills, and requires only one deficit in one of these three skill areas. Arkansas requires only the showing of "a deficit in adaptive behavior." ACA § 5-4-618(a)(1)(B).

Under either definition the focus in adaptive behavior or functioning is on the individual's typical performance and not their best or assumed ability or maximum performance. "Thus, what the person typically does, rather than what the individual can do or could do, is assessed when evaluating the individual's adaptive behavior." AAIDD Manual, 10th edition, at 47. Mentally retarded persons, like Mr. Sasser, typically demonstrate both strengths and limitations in their adaptive behavior. It is a common misunderstanding, as seen in the district court's order that possessing strengths in some adaptive functioning areas outweigh or negate limitations in the same areas for the purpose of diagnosis. *Id.*; *see also* Carolyn Everington and J. Gregory Olley, *Implications of Atkins v. Virginia: Issues in Defining and Diagnosing Mental Retardation*, 8(1) J. Forensic

Psychology Practice 1, 10 (2008) ("[A]daptive behavior is the individual's actual performance . . . [k]nowledge of a skill or estimated potential to perform a skill is not an appropriate substitute for performance.").

The district court misunderstanding of adaptive deficits is seen when it held that Mr. Sasser "was able to come to work on time, get along with co-workers, and not abuse absences. The job history also reflects that once a job was given to him within his abilities, he was able to perform the job reliably well." Add. 3 at 68. A finding such as this by the district court that Mr. Sasser was able to perform some of these simple tasks does not mean he does not have a deficit in a specific area of adaptive behavior. In simple terms the issue, as clearly misunderstood by the district court, is not what Mr. Sasser can do but what Mr. Sasser cannot do. *See also* James R. Patton and Denis W. Keyes, *Death Penalty Issues Following Atkins*, 14(4) Exceptionality 237, 250 (2006) ("All professional definitions of mental retardation stress that relative strengths can coexist with deficits in adaptive behavior, as indicated by the fact that deficits do not have to be found in all adaptive skill areas. Nevertheless, certain strengths (e.g., reading at the sixth grade level, driving a car, or having a girlfriend) are often used to discredit the claim that a person has mental retardation.") The district court used some of Mr. Sasser's strengths to discount his clear diagnosis of mental retardation, when what the

district court was required to assess under Arkansas law were the numerous weaknesses or deficits in Mr. Sasser's ability to exist in the modern world.

Even though Arkansas only requires that a single adaptive deficit be shown Mr. Sasser was able to show the existence of deficits in at least four adaptive skill areas. This significant showing of adaptative deficits in conjunction with the subaverage intellectual functioning shows Mr. Sasser was mentally retarded at the time of his capital offense. At the hearing Mr. Sasser presented compelling evidence to show deficits in the following adaptive behavior areas:

2. Deficits in Conceptual Skills

The adaptive behavior domain of conceptual skills encompasses cognitive skills, communication skills and academic skills, e.g., language money concepts, self direction and functional academics.

a. Functional Academics

While Mr. Sasser's school records are limited, it is clear Mr. Sasser struggled with academic deficits from an early age. Mr. Sasser's middle school principal, who was a teacher and administrator at Lewisville Middle School for thirty-one years, recalled Mr. Sasser's abilities in conjunction with the development of services for special education at the school and the utilization of a federal program called Title I to serve struggling students needs.

> Andrew was a slow learner and he was in what could be considered our special education program at that time. Lewisville Middle School, had individualized instruction where the students were taught based on their individual abilities. Students were tested and placed into one of three groups, and all three groups were individualized. The groups consisted of Group I, Group II, and Group III. Group I was considered those who scored well enough to be taught in regular classes without any extra assistance. The majority of the students at Lewisville Middle School were in Group I classes. These students were considered average students. Group II were students who did not score very well and could not keep up with peers nor do well in regular classes. The students in Group II had learning difficulties but needed extra time and attention to catch on to the skills being taught. The students were more or less given tutoring by their teachers and peers who had a strong grasp of the skills. Group III were students who did very poorly on the tests and could not do well even after they had the extra time and assistance provided. I taught Andrew in Math and he was in Group III. Andrew continued to have difficulty even though his curriculum had been modified to the most basic skills available.

App. 2, Declaration of Leroy Brown at 3. *See also* App. 3, Report of Dr. Tom E.C. Smith ("A need-based assistance program, Title I was concerned in particular with reaching out to economically disadvantaged and minority students who were low-achieving. Prior to the passage and implementation of IDEA / EHA, many schools utilized Title I as a way of providing services for their populations of disabled children, in many respects functioning as a rudimentary Special Education program.").

Even though records indicated Mr. Sasser was in the same class room as the other students his school principal recalls the Special Education Program was called Title I and it was not a self-contained class. In the Title I program the special education students such as Mr. Sasser changed classes like the rest of the students, and were taught with students in regular classes, with special attention by the teacher during and after class.

Coach Theodore Blake, coach and Athletic Director at the Lewisville School District for fifteen years, also remembers Mr. Sasser and the development of Special Education his school district and verified the recollections of Principal Leroy Brown.

> When Andrew was attending school, Special Education was not set up like it is now. The Special Education students not only changed classes like regular students, but they also were integrated into regular classes. The special education students fell into the lowest group of students, Group III. Andrew was a Group III student who had been placed with the other students who were struggling.

App. 4, Declaration of Theodore Blake at 1. App. 5, Declaration of fellow student Janice Briggs at 3. (“Group III consisted of students who did not fare well academically. The students in Group III were Special Education students. At that time, Special Education students went to regular classes with all the other students. During the day, at least one of the class periods of a Group III student was in the

Special Education classroom with one of the Special Education teachers. Andrew was in Group III.")

By the time he reached high school, even clearer indications of Mr. Sasser's academic difficulties emerged. Beginning in the 9th grade, Mr. Sasser was enrolled in a total six subjects for the year – Football, Practical Math I, Civics, Science, Practical English I, and 'Farm Mgr.' Mr. Sasser received a grade of C or below in three quarters of the credits in which he was enrolled. App. 6, Mr. Sasser's Academic Records. In 10th grade, Mr. Sasser was again enrolled in only six classes for the year, and despite taking 'Farm Mgr.' the previous year, Mr. Sasser was enrolled in and failed the class his first semester, also failing his entire year of English II. Mr. Sasser received a grade of C or below in eleven of his twelve credits. By his 11th grade year, Mr. Sasser was enrolled in only eleven credits worth of classes, and received a C or below in ten. In his final year, Mr. Sasser was again enrolled in six classes for the year, but was given one semester of Art, one semester of adult living, one semester of Consumer Education, and one semester of Practical English II. *Id*. Mr. Sasser again received a C or below in eleven of twelve of the credits he was taking. Principal Brown remembers Andrew's involvement in the School District's "practical classes" declaring:

> Andrew was not a good student academically. The letter P or Pr before a subject such as English or Math, as

> indicated on Andrew's transcript, meant that the student was taking Practical classes. Practical Math or English classes meant the student's curriculum was modified to be taught the very basic skills. The classes were so basic that they taught high school students skills such as basic addition, subtraction, multiplication, and division so they knew how to handle their money for day to day use. Each student worked at their own pace, so Andrew was taught based on his ability to do the work. The classes were very easy because just the basic skills were taught in a very general manner.

App. 2, Declaration of Leroy Brown at 2. Ultimately Mr. Sasser did not graduate from high school. Instead he was awarded a certificate of attendance instead of a high school diploma. "Despite the fact that Andrew was obviously failing, as indicated on his transcript, we socially promoted him to the next grade. At that time, it was school policy not to retain any student. So the school practice was to promote students to keep them with their peers regardless of their grades and abilities. Andrew's abilities were limited at best." *Id.*

After leaving high school in 1983, Mr. Sasser continued to display difficulties with functional academics. Mr. Sasser's brother Hollis testified that Mr. Sasser never had any type of credit card, checking account, or savings account. Testimony of Hollis B. Sasser, Hearing Transcript at 28. Hollis also recalled when his brother needed to purchase his first vehicle at the age of twenty-eight, that it was Hollis himself who went into the bank, negotiated a personal loan, secured the

loan and had all the paperwork drawn up. *Id*. at 27-28. All that Mr. Sasser had to do to complete the loan was go into the bank the next day and sign his name where he was told on the already completed paperwork. *Id*.

In addition, Mr. Sasser did not obtain his driving permit until he was nearly twenty-eight years old. *See* Testimony of Bryan Hollinger, Hearing Transcript at 274. The testimony of Respondent's witness Bryan Hollinger, head of the pre-release program at the Wrightsville Unit, indicated that Mr. Sasser obtained his first learner's permit while enrolled in the pre-release program at the prison. Id. at 266. Mr. Sasser was given two half-day long back to back instructional classes on the subject material for the test, and then spent an additional half-day taking practice tests under the supervision of Mr. Hollinger. *Id*. at 269, 271-272. Mr. Hollinger testified that if an inmate got certain areas of the test wrong, he would then spend time going over those areas with the student. *Id*. at 273. Mr. Hollinger further testified, although he could not remember specifically whether this occurred with Mr. Sasser, that they would go as far as to read the learner's permit test to inmates who required the added assistance. *Id*. As a striking example of how Mr. Sasser was unable to function in a normal environment Mr. Hollinger testified at the close of his testimony that he was sixteen years old when he got his drivers license, compared to Mr. Sasser's age of twenty eight. Testimony of Bryan

Hollinger, Hearing Transcript at 274.

b. Communication

Mr. Sasser also struggled with expressive language (his ability to communicate to others) and receptive language (his ability to comprehend communication directed at him). As noted by Dr. Toomer, Mr. Sasser's communication "is primarily concrete and he is unable to engage in abstract reasoning. Mr. Sasser is very limited in his communication skills. He cannot respond when he is criticized because the thought processes required for a response are too abstract and advanced for him." *See* App. 7, Report of Dr. Jethro Toomer at 12.

Coach Blake further recalled Mr. Sasser had great difficulty in understanding and following conversation. He specifically stated:

> Some people you are just able to talk to and converse with about several different topics, Andrew was not that type of person. There were times when I had brief conversations with Andrew where he primarily stared blankly the entire time. If I said something funny to him or told a joke, Andrew would not chuckle until I laughed. Once I laughed about whatever I said, then he would laugh a little too. Otherwise, Andrew just continued to stare blankly. I think he had difficulty comprehending, so he sat quiet most of the time. Andrew did not seem like someone who had the capacity to really grasp things when speaking to him.

App. 4, Declaration of Theodore Blake at 1-2. Coach Blake, along with other

classmates and school employees, recalled Mr. Sasser never seemed quite age appropriate in his responses, recalling:

> You could ask Andrew a direct question and he would just stand there, not answering, but not willing to admit that he did not know the answer. If you looked at Andrew, developmentally he looked appropriate by size. Once you tried to talk to Andrew, you knew almost immediately that he was on a lower level. As with most people like that, you try to adjust what you say to them, put it in basic terms, so they will be able to comprehend what you are saying.

Id. at 3. App. 5, Declaration of Janice Washington Briggs at 1. Another teacher recalled "For the most part, Andrew's personality was quiet and low-key. However, if someone did said something funny, Andrew laughed longer than everyone else in an inappropriate way, and he slobbered when he laughed." App. 8, Declaration of Pinkie Strayhan at 1. "Andrew always seemed very immature to me. Andrew's giggling in the library was similar to the behavior of a child in elementary school, instead of a student in middle school." *Id.*

c. Self Direction

Mr. Sasser also had difficulties in the adaptive skill area of self-direction. "Problems with self-direction are related to deficits in multiple areas, including adapting to changing demands, making good decisions, and engaging in meaningful planning for the future. In adults, this pattern is one of aimlessness,

living for each day, and vocational instability . . . .” See Karen L. Salekin, J. Gregory Olley, Krystal A. Hedge, *Offenders With Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3:2 J. Mental Health Research in Intellectual Disabilities 97, 99 (2010) (hereinafter *Offenders With Intellectual Disability*).

Coach Blake remembers that in terms of playing football, Mr. Sasser could not grasp the plays and what the coaching staff needed him to do, and thus he rarely played,

> We taught basic football plays in P.E., but Andrew really did not grasp any of the plays. It was a waste of time to try to explain the plays to him. We just told Andrew what direction to run and who to run toward by pointing out other players on the field to him. Even with that basic level of instruction, we still had to give this direction to Andrew every time he played.

App. 4, Declaration of Theodore Blake at 2. Coach Robert Strayhan, who coached Andrew in high school football, also described Mr. Sasser’s difficulty learning plays and problems with memory, recall and implementation of plays. App. 7, Report of Dr. Jethro Toomer at 13. Artha Sasser, another of Mr. Sasser’s older brothers, also reported that throughout his school years, family members would have to look out for Mr. Sasser. Artha described making “sure that Andrew got on the right bus. They would on an ongoing basis point out the driver and the number of the correct bus to Andrew to make sure that he could identify the correct one.”

Id. at 16.

As a young adult, Mr. Sasser also attempted to enlist in the military but did not achieve the minimum requirements to qualify. Rather than disclosing his failure to meet the basic enlistment requirements to his family, Mr. Sasser went to live in a small abandoned house with no running water and no electricity, in the woods on his brother's property. Hearing Transcript, Testimony of Hollis B. Sasser at 22, 39. Displaying his limited adaptive skills in facing an adverse and humiliating situation, Mr. Sasser did not move to another town, did not seek out a job or go to live with friends, or even admit his failure to his family but rather subsisted in an environment where he was sure to be eventually discovered. *Id*. at 22-23.

3. Deficits in Social Skills

In addition to his deficits in conceptual skills, Mr. Sasser also manifested deficits in the area of social competence. As his former classmate, Janice Washington Briggs specifically recalled:

> Andrew did not have a girlfriend in high school. Andrew was not the type of guy that you would pick for your boyfriend. Andrew was different; he never really talked and he is not very attractive. Andrew wanted to fit in, but he was not popular. We kids never really focused on Andrew unless it was when we started talking about nerds or students we considered to be weird.

App. 5, Declaration of Janice Washington Briggs at 2. Mr. Sasser's older brother Hollis testified that he never saw his brother go out on a date, never saw him bring a girl home to meet his family, never some him engage in socially expected behavior such as talking to or flirting with a girl. Testimony of Hollis B. Sasser, Hearing Transcript at 19.

4. Deficits in Practical Skills

In yet a third area of adaptive behavior, practical skills, Mr. Sasser again shows significant deficits. Practical skills enable an individual to function in his environment and include activities of daily living, occupational skills, self-care, and home living. "If the individual has not lived independently for any significant period without assistance from others to find work, pay bills, manage money, keep a house or apartment in order, buy and prepare food, and perform the other requirements of adult living, such findings are indicators of mental retardation, regardless of the presence of any other diagnosis." See J. Gregory Olley, *Knowledge and Experience Required for Experts in Atkins Cases*, 16 Applied Neuropsychology 135, 138 (2009).

a. Home Living

Mr. Sasser was never able to master basic daily living skills. Hollis Sasser,

Mr. Sasser's oldest brother, testified that his brother never lived independently. Outside of Mr. Sasser's periods of incarceration, he primarily lived at the home of his mother and for a brief period of time with his brother Artha Sasser and his sister Margaret Kemp. Testimony of Hollis B. Sasser, Hearing Transcript at 28. Mr. Sasser's brief experiment of living with his brother and sister did not go well as reported by Dr. Toomer:

> Margie tried to have Andrew be responsible for his share of the living costs, however on occasions the lights were cut off because Andrew failed to pay the electric bill. It was not a question of having the funds, Andrew simply did not recall to pay, even with repeated prompting from his sister. Andrew also often neglected his hygiene and at night would sleep in clothing meant for working in and cleaning freezer units.

App. 7, Report of Dr. Jethro Toomer at 17. Mr. Sasser's siblings reported that in living with them, Mr. Sasser did not have problems with routine repetitive tasks but had difficulty completing "tasks that required abstract thought. He had difficulty managing money and never possessed a credit, checking or savings account ...". *Id*. at 15. Mr. Sasser's brother Hollis also testified that for jobs which he helped his brother obtain, his brother was totally dependent on him to get back and forth to work everyday. *See* Testimony of Hollis B. Sasser, Hearing Transcript at 26.

b. Work

People with developmental disabilities, such as Mr. Sasser can be productive on work tasks; can work productively in integrated job settings; can be supported in community job settings with a combination of paid supports and natural supports; can earn significant money and be fully integrated into the culture of the workplace. David Mank, *Employment, in Handbook of Developmental Disabilities* 390, 395-396 (Samuel L. Odom et al., ed. 2007). However, significant deficits may co-exist with these strengths. Evidence was presented in the district court that while Mr. Sasser was able to maintain some employment as a teenager on into adulthood, his employment routinely was that of a basic laborer. As a teenager, Mr. Sasser first worked for local landowner, Gayther Crank. Mr. Sasser's brother Hollis testified that this was a manual labor farm job, consisting of baling hay at times and at other times working in the chicken houses cleaning, refilling feed and water troughs, and "walking" the chickens to uncover dead birds which need to be removed. Testimony of Hollis B. Sasser, Hearing Transcript at 17-18.

Mr. Sasser's first employment after high school was with Hudson Foods, a chicken processing plant. The plant had a number of different production lines, from grading the birds as they came into the plant to stacking crates of prepared birds for shipping. As the birds came into the plant, an employee would inspect each bird for blemishes, bruises and missing parts, grading the bird according to its

quality. On separate production lines, the birds would then be stuffed with their giblets, labeled, and packed according to grade into boxes. The boxes would then be weighed and iced, and then stacked onto pallets for shipping. Mr. Sasser began working at the chicken plant as a packer. The supervisor of the Pack-Out Department at the plant, Rupert Purifoy recalls:

> Andrew was a strong guy, but he was slow. I tried to put Andrew in a position where he did not have to think. Andrew began as a packer . . . Andrew's job as a packer required him to place the graded birds into the correct bend. Andrew constantly packed the birds into the wrong bend. Andrew put the A grade birds in C boxes or he mixed up the grades and put them in the wrong bend. He had to be removed off packing and I put him on stacking.

App. 9, Declaration of Rupert Purifoy at 1.

However, Mr. Sasser could not accomplish the basic decision making required of him as a stacker. Despite being moved to stacking because the packing position was too difficult for him, Mr. Sasser still struggled. Mr. Sasser's line supervisor, Steve Jackson recalls,

> To me, Andrew's stacking job is very simple and repetitious. The only decision that Andrew had to make was to determine the color code and then stack the box on the correct pallet. Andrew had difficulty completing this task correctly. There were numerous occasions that Andrew stacked the wrong box on the incorrect pallet. He did that quite often. I had to constantly look in on Andrew to make sure that he stacked the boxes correctly because when he stacked the boxes incorrectly it slowed down the line production. I can remember several

> times when I went to check on Andrew, he had the A grade, B grade and C grade boxes mixed up on all three pallets. So I would have to help him restack the pallets correctly. After I left, I would come back to check on him later and he would have all the boxes all mixed up again. Stacking was too difficult for Andrew, so I decided to move him to an icer position. We did not fire him because help was short so I always tried to find something for him to do because we needed the help. I felt that he could do the icer job because it only required him to push a button to release the ice and the amount was preset so there was basically no way he could mess that up.

App. 10, Declaration of Steve Jackson at 3.

Both Mr. Jackson and Mr. Purifoy recall that they could not allow Andrew to work at any other of the line positions because they required judgment and multi-tasking skills which Andrew did not possess. *See* App. 9, Declaration of Rupert Purifoy at 1-2; App. 10, Declaration of Steve Jackson at 3. Mr. Purifoy also would not allow Andrew to work as a forklift driver because of the possibility that he would injure himself or someone else at the plant,

> I did not let him work as a jack driver (fork lift) because he may have injured himself or someone else. The jack driver position also required the jack driver to write tickets to place the items in the cooler and that would have been too much for Andrew.

App. 9, Declaration of Rupert Purifoy at 2.

Mr. Sasser's next job was at the J.J. Young Construction Company. Hollis Sasser, Mr. Sasser's brother, recalls he was working for the City of Lewisville at that time, and that Mr. Sasser was hired as a favor to him. *See* Testimony of Hollis

Sasser, Hearing Transcript at 24. The job was that of manual labor, and Andrew was simply responsible for lifting and laying pipes down into trenches. *Id*. at 24-25. Even in this, his work was supervised. *Id*. at 25. Hollis also recalls that he had to provide transportation to his brother everyday to get to his job at J.J. Young. *Id*. at 25.

Mr. Sasser's employment at J.J. Young Construction ended when he was incarcerated in 1989. While incarcerated, Mr. Sasser was assigned to various job assignments with the Department of Corrections. *See* Testimony of Grant Harris, Hearing Transcript at 232-233, 236-237. All of these assignments were mandatory and assignment to specific jobs was at the discretion of the Department of Corrections. *Id*. at 230. If Mr. Sasser refused to work, he would be disciplined. *Id*. at 230, 248. While Mr. Sasser worked on various job assignments such as kitchen duty, inside building utility, inside building maintenance, and furniture, as a whole it is unclear what specific jobs Mr. Sasser himself completed, e.g., if he cooked or simply mopped the floor in the kitchen, whether he repaired a heating unit or simply changed a lightbulb. *Id*. at 232, 244, 247. While he testified about Mr. Sasser's prison records, Mr. Harris himself did not supervise Mr. Sasser. *Id*. at 249.

Respondent's witness, Sargent John C. Cartwright, who supervised Mr. Sasser at his job in inside maintenance, testified that he remembered Mr. Sasser

and that he had done a good job and never had a problem out of him. *See* Testimony of Sgt. John C. Cartwright, Hearing Transcript at 255. Mr. Cartwright testified that he couldn't exactly recall what Mr. Sasser had done at this prison job, but that Sgt. Cartwright or his assistant supervisor would work with Mr. Sasser "on the air conditioner and stuff like that." *Id*. at 256. Sgt. Cartwright recalls that the inmates were responsible for certain classes of tools, however, if a tool came up missing, they would be disciplined. *Id*. at 258.

After his incarceration, Mr. Sasser was employed at the Whistle Lumber Mill. Hollis Sasser, Mr. Sasser's brother, again assisted him in getting this job, going into the Lumber Mill and talking to people he knew that worked at the Mill. *See* Testimony of Hollis B. Sasser, Hearing Transcript at 26. Milton Castleman, Andrew's supervisor, in describing the working of the lumber mill, recalls that Andrew was a good employee and did his manual labor job well,

> Andrew was employed as a stacker on the lumber side. Andrew was a good employee. He never "talked back" or caused problems. He was very mild mannered and always showed up to work on time. He did not have any disciplinaries. I never had to say a word to him. It did not take much smarts to pick up a piece of wood and stack it off of the transfer chain from the saw. The number of workers stacking depended on how many grades of lumber we were producing at the given time. There are several positions on the lumber crew. The grader is the first worker that handles the lumber on the transfer chain. The grader was responsible to mark the boards

> appropriately to be stacked in the correct bundle. The boards were graded as one, two, three or four. A grade one is the best, four being the worst. The stacker was responsible to pull the specific board he was told to stack. Working as a stacker, Andrew was always told which grade board to pull and stack. Andrew did not have to make any decisions of his own.

App. 11, Declaration of Milton Castleman at 1-2. Mr. Castleman described the simple marking mechanism which the graders used to indicate the quality of the wood, a 'C' indicating grade one, a '/' for grade two, an 'S' for grade three, and an 'X' for grade four. *Id*. at 2. As Mr. Sasser's supervisor, Mr. Castleman noted that Andrew's job at the mill was the most basic laborer position they had. *Id*. While Mr. Castleman recalled that Andrew was correctly able to stack the boards, each piece needed to be marked for Andrew to do his job.

> I know for a fact that Andrew did not have the judgment to stack the boards if they were not marked. Andrew did not have the ability to "eye" refinished boards and stack them without being marked. That took a lot more judgment and skill on the part of the stacker to do that. There were stackers that could do that. I can do that myself, but Andrew could not do that.

Id. Throughout Mr. Sasser's employment history, it is clear that while he was able to sporadically maintain employment, his skills were limited to that of basic labor, and that more complicated tasks, tasks which requiring multiple steps or decision making skills, were beyond his grasp.

Mr. Sasser has shown the existence of not only one adaptive deficit but he has shown numerous deficits in his adaptive abilities.

F. Onset Before Age 18

Mr. Sasser's mental retardation manifested during the developmental period, i.e., before age 18. The record is replete with undisputed evidence that Mr. Sasser exhibited significant deficits in many areas of adaptive functioning before the age of 18. Likewise, even though no intelligence testing of Mr. Sasser was done prior to the age of eighteen, there is evidence that prior to this period his academic functioning was significantly impaired.

G. Conclusion

Mr. Sasser has demonstrated by the preponderance of the evidence to the district court that he is a person who suffers from mental retardation as defined by the State of Arkansas. It was error for the district court to ignore the definition of mental retardation created by the Arkansas General Assembly and upheld by the Arkansas Supreme Court. Mr. Sasser, who is mentally retarded, was sentenced to death in violation of the Arkansas statute and the Eighth Amendment. The judgment of the district court must be reversed.

II. MR. SASSER CLAIMS PRESENTED TO THE DISTRICT COURT WERE NOT BARRED FROM REVIEW AND SHOULD NOT HAVE BEEN DISMISSED.

The district court dismissed seven of Mr. Sasser's claims as being barred from federal review because there were "no non-futile state remedies available in which Petitioner could pursue the grounds presented in the instant application." Add. 1 at 1. Included in these seven claims was the claim that Mr. Sasser was deprived of the effective assistance of counsel at both stages of his capital trial[5]. Add. 1 at 2. Mr. Sasser was deprived the effective assistance of counsel because counsel failed to raise the issue of Mr. Sasser's mental retardation at trial and, even if Mr. Sasser were not mentally retarded, for failing to investigate and present a compelling life history of intellectual disabilities and poverty which would have mitigated his sentence of death. This bar can be excused because Mr. Sasser was denied the effective assistance of post conviction counsel.

---

[5]The claims the district court barred include issues of improper jury instructions (Ground 1 and 2), misconduct on the part of the prosecutor in the closing arguments at both the guilt and sentencing stage of trial (Ground 3), ineffective assistance of counsel during the guilt and sentencing stage of trial (Ground 4), a second or supplementary oath administered to the jurors violated due process (Ground 5), the Arkansas death penalty is unconstitutional because it a) requires the mandatory imposition of a death sentence, b) there is no provision for automatic appeal in the statutory scheme, and c) death qualification of the jurors is a violation of due process (Ground 6), the failure to appoint Mr. Sasser two lawyers denied him the effective assistance of counsel (Ground 7). Add. 1 at 2-3.

A. Standard of Review

The district court dismissed several of Mr. Sasser's claims as barred from review by the doctrine of exhaustion. This Court conducts *de novo* review. *Grass v. Reitz*, 643 F.3d 579, 583 (8th Cir. 2011); *Dixon v. Dormire*, 263 F.3d 774, 777 (8th Cir.2001). Because there is (at the very least) a plausible argument that Mr. Sasser still could have his claims reviewed on the merits in state court, the district court erred by finding them procedurally defaulted.

B. The Right to Effective Assistance of Counsel

Since 1982 the Supreme Court has held evidence of mental age and mental development must be considered as mitigating evidence. *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (evidence of mental development where petitioner was several years below his age must be considered as mitigation). Trial counsel had a duty to investigate this evidence and present it to the jury, and his unreasonable and prejudicial failure to do so constituted ineffective assistance of counsel. *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). This right to effective assistance of counsel is even more compelling here where the jury during its deliberation in the sentencing phase recognized Mr. Sasser was "under unusual pressure as in day to day life. . ." even with the minimal amount of information it had been provided. TT 1034. The jury even asked the trial

judge for a definition of "mitigating." which TT. 1035. The jury was struggling with these issues. If the jury had been presented with the evidence detailed at the June 2010 evidentiary hearing they would not have returned a sentence of death. If Mr. Sasser's post conviction counsel has presented this issue supported by the evidence trial counsel did not investigate post conviction relief would have been affirmed.

Because the claim of trial counsel's ineffectiveness turns on facts outside the trial record, and as such, could not have been presented on direct appeal this issue could only be presented in state post conviction proceedings. See *Ratchford v. State*, 159 S.W.3d 304 (Ark. 2004). Even if the issue of trial counsel ineffectiveness could have been presented on direct appeal Mr. Sasser was denied conflict free counsel. Mr. Potter was appointed to represent Mr. Sasser at both trial and on direct appeal and was unlikely to effectively raise his own ineffective performance. Mr. Sasser was therefore entitled to the effective assistance of counsel in state post conviction proceedings. *Martinez v. Ryan*, ___ U.S. ___ (March 20, 2012); *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963). Mr. Sasser should have been provided, but was not, an effective lawyer so these issues could have been presented in post conviction proceedings.

Mr. Sasser's counsel was ineffective for failing to present mental retardation to the jury that sentenced him to die. Even if Mr. Sasser is not mentally retarded a great deal of evidence has been presented showing that Mr. Sasser's has lived his whole life with serious intellectual challenges. *See* Claim I(E) *supra*. The mitigating nature of intellectual evidence even if it does not support a finding of mental retardation is recognized in the Arkansas Model Instructions. The comment explains that even if the jury finds the defendant is not mentally retarded the jury is not "precluded from considering the defendant's mental retardation or intellectual deficit as a mitigating factor." AMCI-2d 1009VF, Comment. *See also Carmargo v. State*, 987 S.W. 2d 680 (Ark. 1999).

This testimony and the declarations as detailed throughout the two day hearing shows the overwhelming amount of evidence that the jury never heard because of trial counsel's failure to investigate and present this evidence. See Hearing Testimony, June 15 and 16, 2010; App. 1-11; *supra*., Issue 1(E).

C. How this issue was presented below.

Mr. Sasser raised the issue of ineffective assistance of counsel in the district court in his amended habeas corpus petition. Add. 1 at 2. There, the district court dismissed this claim as being barred from review. Add. 1 at 3.

The issue of this bar on the ineffective assistance of counsel claim and all the

other dismissed claims was raised on appeal to this Court in Mr. Sasser's opening brief. Appellant's Opening Brief and Addendum, January 30, 2003 at 40. After the initial briefing, and before the resolution of the appeal, this Court remanded this matter to the district court to allow Mr. Sasser to exhaust his claim of mental retardation in state court, if an avenue was available. App. 13 at 2. Because the district court's order was not clear as to whether Mr. Sasser had any state remedies available to exhaust his mental retardation issue this Court held "we revise the previously entered order and remand the case to the district court for a determination of the exhaustion issue." *Rhines v. Weber*, 345 F.3d 799, 800 (8th Cir. 2003) (per curiam) (decisions about exhaustion and procedural default are better addressed by district court in the first instance); *see also* App. 13 at 2.

In the district court Mr. Sasser attempted to resolve the issue of ineffectiveness of counsel when he alleged it in his amended petition. Mr. Sasser alleged counsel was ineffective for "failing to adequately investigate, develop, and present mitigating evidence" as well as investigating and presenting the issue of mental retardation. App. 14 at 16. The district court determined that the issue of ineffectiveness of counsel had not been remanded for consideration and this Court agreed. *Sasser v. Norris*, 553 F.3d 1121, 1127 (8th Cir. 2009). The issue of the effectiveness of Mr. Sasser's counsel remains pending before this Court.

D. The District Court Erred by Finding a Procedural Default When Plausible State Remedies Remain.

The district court denied the claim of Mr. Sasser's ineffective assistance of counsel and the six other claims solely on procedural grounds . Add. 1 at 3. ("Accordingly, all of Petitioner's grounds except for Ground 8, pertaining to counsel's failure to request a limiting instruction are barred from review.") The district court, with no inquiry, incorrectly held that there "are no non-futile state remedies available in which Petitioner could pursue the grounds presented in the instant application." Add 2 at 1. The district court did find a procedural default even if it did not use that phrase.

Specifically, the district court held that these claims were subject to a federal bar to review for failure to present them in the "state courts in order to preserve them for federal habeas review." Add. 1 at 3. This procedural default sets up a qualified bar to federal habeas corpus relief where the following circumstances are present: (1) the exhaustion rule required the prisoner to present his claim to the state courts, (2) the prisoner has not fairly presented his claim to the state courts, and (3) any future effort to pursue a state remedy for the claim is unequivocally foreclosed by a state procedural rule that is independent of federal law and adequate to support rejection of the claim. *See* 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* §§ 23, 26 (5th ed. 2005). The

district court's holding that there was a bar to federal review was erroneous on numerous grounds. Because the district court was required to, but did not, address the merits of Mr. Sasser's claims, this Court should vacate and remand with instructions that it do so in the first instance. *See Rasul v. Bush*, 542 U.S. 466, 485 (2006); *Nooner v. Norris*, 499 F.3d 831, 834 (8th Cir. 2007) ("Because the district court did not reach the merits of the first certified question [in a habeas case], we remand for further proceedings so the district court can consider the matter in the first instance."); *Goldblum v. Klem*, 510 F.3d 204, 213–14 (3d Cir. 2007) ("[T]he district court in the first instance should make a merits analysis of a habeas corpus petition if one is to be made.").

Because state-court remedies presently remain available for Mr. Sasser's ineffective assistance of counsel claim and all of the other dismissed claims the district court's determination was in error. Nonexhaustion and procedural default are related but separate procedural defenses to habeas corpus relief, either of which may arise when habeas claims have not been properly presented in state court. *See generally* 2 Hertz & Liebman, *supra*, §§ 23, 26. The nonexhaustion defense generally applies if the prisoner's habeas claims have not been "fairly presented" to the state courts. The procedural default defense, on the other hand, is <u>not</u> applicable <u>solely</u> because the prisoner's claims have not been fairly presented. Rather, it

requires a further showing: that the claims, "if presented today in the state courts, would be procedurally barred" from review in state court by an independent and adequate state ground. *Pike v. Guarino*, 492 F.3d 61, 73–74 (1st Cir. 2007) (explaining thoroughly the interplay between the two defenses). This further showing is necessary because procedural default is the stronger defense while nonexhaustion is the weaker defense. Where a prisoner's failure to fairly present his claims in state court is deemed a procedural default, those claims are forever barred from federal review absent a showing of cause and prejudice or miscarriage of justice. Nonexhaustion, however, is curable. That defense is overcome if the petitioner returns to state court to present the claims. *See Rhines v. Weber*, 544 U.S. 269 (2005).

The district court found that Mr. Sasser's claims were procedurally defaulted holding there were no non-futile state remedies available to him. Add. 1 at 1. But the district court is plainly in error. State court remedies remain readily available to Mr. Sasser today. *See Pike*, 492 F.3d at 73; *Thomas v. Wyrick*, 622 F.3d 411, 413 (8th Cir. 1980) (explaining that the "question . . . is not merely whether Thomas has in the past presented his federal claim to the state courts, but also whether there is, under [state law], any presently available state procedure for the determination of the merits of that claim.").

This Court has already recognized that it is for the district court to determine the existence or not of any available state remedy. App. 13 at 2. Even the State maintains that the issue of exhaustion must be resolved by the lower courts. After this Court had entered an order remanding this case to the district court to consider Mr. Sasser's claim of mental retardation the Appellee filed a Petition for Rehearing. Appellee's Petition for Rehearing With Petition for Rehearing *En Banc*. (August 28, 2003). In amending its order in response to this rehearing petition, this Court held "it is unclear whether appellant has any currently available non-futile state remedies." The amended judgment ordered the district court to make this determination in the first instance. App. 13 at 1.

The district court on remand made a detailed analysis of whether Mr. Sasser's mental retardation claim was precluded from being raised in state court and therefore exhausted as futile. Add. 2 at 8. The district court concluded that the Arkansas Supreme Court would not hear a claim of mental retardation based on *Atkins v. Virginia*, 526 U.S. 304 (2002). This determination of exhaustion because of futility is based on *Engram v. State*, 200 S.W. 3d 367 (Ark. 2004) and applies exclusively to issues of mental retardation but not issues of ineffective assistance of counsel or other issues dismissed by the district court. This analysis made by the district court on the issue of mental retardation is lacking on the claim of

ineffective assistance of counsel and the other claims it dismissed as barred.

E. The Burden Is on the State to Prove No State Court Remedies Are Available.

The State bears the burden of showing that no state-court remedies remain available to the petitioner and the state cannot make that showing here. *See Gordon v. Nagle*, 2 F.3d 385, 388 n.4 (11th Cir. 1993); Hertz & Liebman, *supra*, § 26.2a & n.5. In order to support a procedural default of claims that it says have never been presented to the state courts, the State must persuade the federal court to "a high degree of confidence that the state court, if asked to adjudicate the claim, would declare it to be procedurally defaulted." *Pike*, 492 F.3d at 74. "Whether a state remedy is presently available is a question of state law as to which only the state courts may speak with final authority," and thus a federal court may find a procedural default only if it is "sure" that further state review is unavailable. *Simpson v. Camper*, 927 F.2d 392, 393 (8th Cir. 1991).[6] This Court has recognized

[6]*See also Banks v. Horn*, 126 F.3d 206, 212–13 (3d Cir. 1997) (holding that federal courts should not embark "upon an intricate analysis of state law" to determine whether a claim is procedurally defaulted but should simply find nonexhaustion in all "questionable cases"); *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983) (holding that federal courts may not find a procedural default "where there is a reasonable possibility" that state courts might hear the claims under "an exception" to state procedural bars); *Roberts v. Norris*, 526 F. Supp. 2d 926, 946 (E.D. Ark. 2007) (Kopf, J.) (explaining that finding procedural default is inappropriate where "there is a plausible argument that the petitioner has an available state remedy"); 2 Hertz & Liebman, *supra*, § 26.1 at n. 25 (explaining

that this finding belongs to the State courts when it amended its 2007 judgment. There this Court ordered the district court to determine exhaustion and suggested the petition be held in abeyance pending the outcome of any available state court proceedings. App. 13 at 2.

The State cannot make a showing that no remedies are available to Mr. Sasser. This Court should vacate and remand this matter to the district court.

F. This Court May Determine If State Remedies Remain Available to Mr. Sasser

Alternatively, this Court can determine in the first instance that the plausibility of further state remedies precludes a finding of procedural default. Mr. Sasser alleged in district court that his "conviction should be set aside because he was deprived of his right to effective assistance of counsel" under the Sixth Amendment. Add. 1 at 2. Mr. Sasser received grossly deficient representation by trial counsel as well as counsel on direct appeal and in state postconviction proceedings, which will support a motion to recall the mandate under Arkansas law. Trial counsel not only did not investigate and present compelling evidence of mitigation but counsel also failed to object to prejudicial jury instructions, failed to conduct any relevant voir dire of prospective jurors, which can support a motion to

---

that the State must show that a state-court remedy is precluded by a rule that is "clear as a matter of unequivocal state law").

recall the mandate under Arkansas law. *See Wooten v. State*, ___ S.W.3d ___, 2010 Ark. 467, 2010 WL 4909670; *id*. (Brown, J., concurring); *Lee v. State*, 238 S.W.3d 52 (Ark. 2006); *Collins v. State*, 231 S.W.3d 717 (Ark. 2006). The other issues dismissed by the district court could also support a motion to recall the mandate under Arkansas law. *See Wooten*, *supra* (Hannah, C.J., dissenting) (explaining that each "petition to recall the mandate must be separately examined to determine whether justice requires that the mandate be recalled under the unique facts of that particular case"). The Arkansas Supreme Court has recently granted a motion to recall its mandate from a 1995 conviction and sentence of death because of a general breakdown in the appellate system which included the failure to raise issues on appeal. *Williams v. State*, 2011 Ark. 534, 2011 WL 6275536 (Ark. 2011) ("We grant the motion and reverse and remand for new sentencing based not on the specific arguments of Williams, but because there was indeed a breakdown in the appellate process in this death-penalty case.") The state cannot show there is no likely state process available to Mr. Sasser on any of these issues.

As this Court held in *Simpson v. Camper*, 927 F.2d 392, 393 (8th Cir. 1991), if there is a possibility that the state supreme court would recall its mandate to permit consideration of a federal claim on the merits, as there is here, the claim cannot be deemed procedurally defaulted. A state supreme court petition to recall

its mandate or for writ of error coram nobis are proper means for fairly presenting federal constitutional claims. *See, e.g.*, *Minor v. Lucas*, 697 F.2d 697 (5th Cir. 1983) (affirming finding of nonexhaustion of claims not presented in state court on ground that habeas courts should "leave it to the state courts to determine whether [a] petitioner's federal constitutional claims will be entertained by way of a writ of error coram nobis"). At a minimum, "[g]iven the diverse possibilities that attend this situation," it is at least "uncertain what procedural course the state . . . court would take if asked to rule on [Mr. Sasser's] claim[s]. That uncertainty dooms the procedural default defense." *Pike*, 492 F.3d at 74. For these reasons the district court must be reversed.

In finding that Mr. Sasser's claims were procedurally defaulted, the district court did not consider whether those claims were subject to the alternative defense of nonexhaustion, and it did not consider what course to take in the event the claims are deemed unexhausted. The district court could find that the State has waived any nonexhaustion defense or it could find that this case should be stayed and abated for Mr. Sasser to present his claims to the state courts (*see Rhines v. Weber*, 544 U.S. 269 (2005) and App. 13. These are all issues that should be explored in the first instance by the district court on remand. *See Howard v. Norris*, 616 F.3d 799, 802–03 (8th Cir. 2010); *Rhines v. Weber*, 409 F.3d 982, 982 (8th

Cir. 2005) (per curiam); Add 6 at 2 ("the district court may wish to hold the remanded petition in abeyance pending the outcome of state court proceedings. . .")

In the alternative, if this Court finds that Mr. Sasser's claims are unexhausted, and if it finds that a remand to the district court is not in order, the Court should stay this case and hold it in abeyance in its own right. That this Court has the authority to stay a habeas corpus appeal and hold it in abeyance pending the exhaustion of state remedies was decided by *Simpson*, 927 F.2d at 394 ("This appeal will be held in abeyance pending the outcome of a motion to recall the mandate in the Missouri Court of Appeals."); *see Palmer v. Clarke*, 961 F.2d 771, 773 (8th Cir. 1992) ("we held the appeal in abeyance pending resolution of proceedings in Nebraska state courts"); *see also Carriger v. Stewart*, 132 F.3d 463, 467 (9th Cir. 1997) (court of appeals granted prisoner's motion to "stay consideration of his appeal while he pursued a new state postconviction petition"); *Hatch v. Oklahoma*, 58 F.3d 1447, 1452 (10th Cir. 1995) (court of appeals "ordered that [petitioner's] appeal be held in abeyance pending petitioner's exhaustion of his claims in state court"), *overruled on other grounds by Daniels v. United States*, 254 F.3d 1180, 1188 n.1 (10th Cir. 2001); *cf. United States v. Outen*, 286 F.3d 622, 631 & n.6 (2d Cir. 2002) (holding that an appellate court

"unquestionably" has the "power" to "hold [an] appeal in abeyance" pursuant to Fed. R. App. P. 26(b)).

The merits of Mr. Sasser's claims are compelling. (App. 1-11, Hearing Testimony June 15 and 16, 2010). Mr. Sasser has not engaged in dilatory conduct. Mr. Sasser sought to resolve his claim of ineffective assistance of post conviction counsel in the district court when this case was on remand to determine the issue of mental retardation. Add. 2, App. 12 and 13. Mr. Sasser filed an amended petition for a writ of habeas corpus setting out the issue of ineffectiveness. App. 14. Claim X in that petition included a claim of ineffectiveness for not raising the issue of mental retardation and included a section dealing with the failure to investigate and present mitigating evidence at trial. ("To the extent that trial, direct appeal, and post-conviction counsel failed to reasonably and meaningfully raise and litigate the errors described above, counsel were ineffective in violation of the Sixth and Fourteenth Amendments.") App. 14 at 15 and 23.

These issues were in turn raised to this Court on appeal. This Court held that only the issue of Mr. Sasser's actual mental retardation had been remanded to the district court and not issues of ineffective of assistance of counsel. *Sasser v. Norris*, 553 F.3d 1121, 1127 (8th Cir. 2009). Mr. Sasser has been diligent in trying to present this issue.

If this Court decides to abate this appeal and allow exhaustion in the state court this Court can eliminate any possibility of unnecessary delay by conditioning Mr. Sasser's return to state court on his adherence to deadlines imposed by this Court and on his filing of regular status reports. Under the circumstances, the Court should exercise its discretion in favor of allowing stay and abeyance. *Cf. Rhines*, 544 U.S. at 277–78.

G. The Procedural Bar Found by the District Court Can Be Excused on a Showing of Cause and Prejudice or by Showing a Miscarriage of Justice.

Mr. Sasser has shown that the district court was wrong in holding that his ineffective assistance of counsel claim and all of the others dismissed by the district court were procedurally defaulted. Assuming for the sake of argument that the district court were correct and Mr. Sasser's claims were in fact procedurally defaulted, Mr. Sasser can prove the two exceptions that will defeat or excuse any procedural bar.

"If the state has asserted the procedural default doctrine in a timely and proper fashion, and if each of the preconditions for its application has been satisfied," "the petitioner is barred from raising the defaulted claim as a basis for federal habeas corpus relief unless he can (1) 'excuse' the default by 'demonstrat[ing] . . . cause for the default and actual prejudice as a result of the

alleged violation of federal law or (2) show that the case falls within the category of cases that the Supreme Court characterized as 'fundamental miscarriages of justice.'" 2 Hertz & Liebman, *supra*, § 26.3 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). After deciding erroneously that seven of Mr. Sasser's claims, including the claim of ineffective assistance of counsel were procedurally defaulted, the district court failed to make any determination whether cause and prejudice or actual innocence existed to excuse the procedural default. Even though the district court failed to grant an evidentiary hearing on the procedural default issues in this case, the record before this Court is sufficient to show any procedural default can be excused.

1. This Default Is Not Adequate to Bar Federal Review.

Any procedural default, which bars federal review, must be both adequate, in that it is regularly applied. The bar found here by the district court is not adequate.

The Arkansas Supreme Court has determined this matter on the merits under Ark.Sup.Ct.R. 4-3(h) (now Rule 4-3(i)). This Rule states:

> **Court's review of errors in death or life imprisonment cases**. When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113(a). To make that review possible, the appellant must abstract, or include in the Addendum, as appropriate, all rulings adverse to him or her made by the circuit court on all objections, motions and requests made

> by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted, or included in the Addendum, and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

Under the statute cited in this rule "where either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant." ACA 16-91-113(a). The Arkansas Supreme Court changed this rule in Mr. Sasser's case where it held "[i]n accordance with Ark.Sup.Ct.R. 4-3(h), the transcript has been examined for prejudicial errors objected to by appellant but not argued on appeal and we conclude no such errors occurred." *Sasser v. State*, 902 S.W. 2d 773, 779 (Ark. 1995). This determination is a newly created rule contrary to the one codified in the statute and referenced in the court rule. In the statute the requirement for the Supreme Court to review only "those matters briefed and argued by the appellant" applies only to cases where death or life imprisonment has not been issued as a punishment. As is clear here Mr. Sasser has been sentenced to death. The "brief and argued by the appellant" portion of the state statute is not applicable to him, despite the Supreme Court's holding.

To comply with Arkansas law and the court's own rules they must have

conducted a review on direct appeal of all issues that "are prejudicial to the rights of" Mr. Sasser which would include the effectiveness of counsel and all of the other issues presented to the district court. If the Arkansas Supreme Court complied with state law and its own rule then it would have conducted this review and these issues are exhausted.

If, on the other hand the Arkansas Supreme Court is adopting a new version of its own Rule 4-3(h), applicable to only Mr. Sasser, then it is creating a new rule with no notice to Mr. Sasser. Such a new rule, or a rule that is not evenly applied with regularity to all petitioners, is not "adequate" to bar federal review. *Ford v. Georgia*, 498 U.S. 411 (1991). The district court should have addressed this claim on the merits. *See also* Claim III(C)(1).

2. Ineffective Assistance of Counsel Excuses Any Default.

The ineffectiveness of Mr. Sasser's counsel at all levels of his case, trial, direct appeal, and state post conviction, provides cause to excuse the default of any claim in the state court. *Martinez v. Ryan*, ___ U.S. ___ (March 20, 2012); *See Murray v. Carrier*, 477 U.S. 478, 485–97 (1986). The harm stemming from the denial of the effective assistance of counsel is more than adequate to show prejudice under the second prong of the standard, *see* 2 Hertz & Liebman, *supra*, § 26.3c. Had Mr. Sasser been provided effective counsel, he would have been able

to present to the jury his long history of intellectual disabilities and mental retardation. Had he been provided effective assistance of counsel in post conviction proceedings, trial counsel's failure to investigate and present this lengthy and compelling history would have been the basis to reverse Mr. Sasser's sentence of death thus showing he was prejudiced by post conviction counsel's deficient performance. The outcome of the post conviction proceeding would more likely than not have been different.

Initially, the district court failed to assess whether Mr. Sasser has further state court remedies by which he might raise the ineffectiveness of his counsel as well as his other dismissed claims. A showing, by the State, that Mr. Sasser has no further state court remedies is a basic element of the State's procedural default defense, and the district court failed to require the State to meet its burden. Even though the district court found that there were "no non-futile" remedies left to Mr. Sasser it was based on no analysis the current remedies and was just plainly wrong. Mr. Sasser does have remaining state court remedies. The ineffectiveness of trial, direct appeal, and post conviction counsel "constitutes a defect or breakdown in the appellate process," that Mr. Sasser could raise by way of a motion to recall the mandate of his direct or his post conviction appeal. *See, e.g.*, *Wooten*, ___ S.W.3d ___, 2010 Ark. 467, 2010 WL 4909670; *Williams v. State*, 2011 Ark. 534, 2011

WL 6275536 (Ark. 2011). For the reasons detailed above in Part D the district court committed reversible error when it applied the doctrine of procedural default without assessing whether plausible state remedies remain.

3. Cause and prejudice

The district court's peremptory dismissal of all these issues gives inadequate attention to the exceptions to any procedural bar arising from a supposed default in state court. Any default of his ineffective assistance of counsel claim would be excused by the miscarriage of justice exception, as set forth below.

In addition, Mr. Sasser can show cause and prejudice for this supposed default of the issues dismissed by the district court. During state postconviction proceedings, the State violated due process when it provided Mr. Sasser with unqualified counsel who failed to present these issues. Post conviction counsel unreasonably failed to discover and present readily-available evidence that would have substantiated Mr. Sasser's claim that trial counsel was ineffective for failing to discover or present compelling mitigating evidence of mental retardation, intellectual disabilities, and poverty. *See* Claim I, *supra*. Mr. Sasser can also show he suffered prejudice as a result of post conviction counsel's deficient performance. To prove the prejudice prong of an ineffective assistance of counsel claim, the prisoner "must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. But for post conviction counsel's deficient performance during state postconviction proceedings, Mr. Sasser would have presented a compelling claim that his trial attorney was ineffective during the sentencing stage of his capital trial. The extensive mental health information detailed at the June, 2010 evidentiary hearing and seen in the declarations show at a minimum Mr. Sasser was severely disabled intellectually even if he was not mentally retarded. App. 1-11. Neither the jury or the state post conviction court heard any of this evidence presented to the federal district court. Had either heard this compelling evidence it is more probable than not that Mr. Sasser would not have been sentenced to death.

Mr. Sasser was denied effective state post conviction counsel and such a deficient performance constitutes "cause" under the cause-and-prejudice standard. *Martinez v. Ryan*, ___ U.S. ___ (March 20, 2012). The harm caused by any failure of post conviction counsel to adequately investigate and present the failure the ineffectiveness of trial counsel claim is "prejudice" under the cause-and-prejudice standard. *See* 2 Hertz & Liebman, *supra* § 26.3c.

Because the district court did not determine whether Mr. Sasser's post

conviction counsel was in fact ineffective and did not address the question of prejudice this Court must remand the issue of "cause" to the district court to make those determinations.

4. Mr. Sasser Can Prove a Miscarriage of Justice That Will Excuse Any Procedural Default.

The miscarriage of justice exception allows review of a defaulted federal constitutional claim where the prisoner can show that he is "actually innocent"—i.e., where he can show that "it is more likely than not that no reasonable juror" would now find him "guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006); *See* 2 Hertz & Liebman, *supra* § 26.4. Mr. Sasser can show that because he is mentally retarded he is ineligible for a sentence of death and therefore innocent of the death penalty. His execution would result in a miscarriage of justice excusing any procedural default. *Atkins v. Virginia*, 526 U.S. 304 (2002); *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992).

Any principle of comity and finality that protects the State's death sentence here must yield to the imperative of correcting the unjust sentence and unconstitutional sentence of death. *House v. Bell*, 547 U.S. 518,536 (2006). Mr. Sasser, a mentally retarded man, has been sentenced to death in violation of the Eighth Amendment. The district court was in error finding other wise. *See* Claim I, *supra.* Because Mr. Sasser is ineligible for execution he is in fact "innocent of the

death penalty" making his execution a miscarriage of justice. Mr. Sasser's jury, had it known the information which was not investigated and presented by trial counsel could not have sentenced Mr. Sasser to death. ACA § 5-4-618(b) ("No defendant with mental retardation at the time of committing capital murder shall be sentenced to death.") Executing Mr. Sasser without reviewing his otherwise defaulted habeas corpus claims would amount to a "manifest miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298 (1995). It is more likely than not that no reasonable juror would or indeed could have sentenced Mr. Sasser to death in the light of the new evidence of mental retardation presented to the district court at the June evidentiary hearing. Hearing Testimony, June 15 and 16, 2010, App. 1-11.

This Court should reverse the district court with instructions to consider in detail the procedural default alleged here and the facts that can excuse any bar to review. Also, this Court should instruct the district court to hold Mr. Sasser's habeas petition in abeyance to allow the State courts to consider these issues in the first instance. Any proper bar found by the district court can be excused by a showing of ineffective assistance of state post conviction counsel. This Court must reverse this matter to the district court with instructions to determine in the first instance the ineffectiveness of post conviction counsel and how Mr. Sasser was prejudiced by this ineffectiveness. *Martinez v. Ryan*, ___ U.S. ___, Slip at 15

(March 20, 2012).

III. MR. SASSER'S JURY WAS NOT INSTRUCTED ON AN ESSENTIAL ELEMENTS OF THE OFFENSE.

The trial court here failed to instruct Mr. Sasser's jury on the essential element of the offense charged by the prosecution. The prosecution charged that Mr. Sasser had committed capital felony murder based on the underlying felonies of attempted rape, attempted kidnap, rape, or kidnap. The jury was not instructed that an essential element of attempted rape or attempted kidnap, and therefore capital murder, was that the prosecution had to show beyond a reasonable doubt Mr. Sasser "engaged in conduct that was a substantial step in the course" of this crime. Not only was the jury not instructed but this failure relieved the prosecution from having to prove each and every element of the offense he charged.

Mr. Sasser's trial counsel was ineffective when he failed to review and to object to jury instructions which failed to inform the jury on the essential elements of capital murder. This failure was not only deficient performance but it prejudiced Mr. Sasser. Because this error was so fundamental as to be structural Mr. Sasser does not even need to show prejudice.

A. Standard of Review.

Because the district court's determination here concerns a federal bar the standard of review is *de novo*. *Grass v. Reitz*, 643 F.3d 579, 583 (8th Cir. 2011);

Dixon v. Dormire, 263 F.3d 774, 777 (8th Cir.2001).

B. Procedural History.

The district court dismissed this issue as being defaulted for failing to present it to the State court. The district court held that it was therefore barred from reviewing the issue on the merits. Add 1 at 3. However the district court was wrong. This issue was presented to the Arkansas Supreme Court where they reviewed this issue and the failure of trial counsel to object to the trial court's failure to give the proper instruction. *Sasser v. State*, 993 S.W.2d 901 (Ark. 1999). There is no bar here contrary to the district court's determination.

Even though the district court dismissed this issue as barred it did grant a Certificate of Appealability on this issue. Add. 4 at 5.

Because these issues are not barred the district court should have resolved them on the merits. This Court should reverse with instructions for the district court to consider the merits of this claim in the first instance.

C. Procedural Default.

1. Independent and Adequate Bar

Any procedural default, which bars federal review, must be adequate, in that it is regularly applied and it must be independent of any federal constitutional provision. The bar found here by the district court is neither.

Initially, the Arkansas Supreme Court has determined this matter on the merits under Ark.Sup.Ct.R. 4-3(h) (now Rule 4-3(i)). This Rule states:

> **Court's review of errors in death or life imprisonment cases**. When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113(a). To make that review possible, the appellant must abstract, or include in the Addendum, as appropriate, all rulings adverse to him or her made by the circuit court on all objections, motions and requests made by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted, or included in the Addendum, and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

Under the statute cited in this rule "where either a sentence for life imprisonment or death has been imposed the Supreme Court shall review all errors prejudicial to the rights of the appellant." ACA 16-91-113(a). The Arkansas Supreme Court uniquely changed this rule in Mr. Sasser's case where it held "[i]n accordance with Ark.Sup.Ct.R. 4-3(h), the transcript has been examined for prejudicial errors objected to by appellant but not argued on appeal and we conclude no such errors occurred." *Sasser v. State*, 902 S.W. 2d 773, 779 (Ark. 1995). This determination is a newly created rule contrary to the one codified in the statute and referenced in the court rule. In the statute the requirement for the

Supreme Court to review only "those matters briefed and argued by the appellant" applies only to cases where death or life imprisonment has not been issued as a punishment. As is clear here Mr. Sasser has been sentenced to death. The "brief and argued by the appellant" portion of the state statute is not applicable to him, despite the Supreme Court's holding.

To comply with Arkansas law and the court's own rules they must have conducted a review on direct appeal of all issues that "are prejudicial to the rights of" Mr. Sasser which would include this jury instruction error. If the Supreme Court complied with state law and its own rule then they have conducted this review and this issue is exhausted.

If, on the other hand the Arkansas Supreme Court is adopting a new version of its own Rule 4-3(h) then it is creating a new rule with no notice to Mr. Sasser. Such a new rule, or a rule that is not evenly applied with regularity, is not "adequate" to bar federal review. *Ford v. Georgia*, 498 U.S. 411 (1991). The district court should have addressed this claim on the merits.

This bar is also not independent of the constitution. *Ake v. Oklahoma* , 470 U.S. 68 (1986). When this claim was presented on post conviction appeal to the Arkansas Supreme Court it held that it could only hear the claim in that proceeding if the error was "so fundamental as to render the judgment of conviction void and

subject to collateral attack." *Sasser v. State*, 993 S.W.2d 901, 906 (Ark. 1999). In rejecting this issue on post conviction review the Supreme Court has determined that this issue is not "fundamental" which is an analysis entwined with the constitution and therefore not independent.

2. Cause and prejudice.

Even if the district court's bar was adequate and independent, thus barring review it can be excused by a showing of cause and prejudice.

The state court found that it would not consider this issue for the first time in state post conviction proceedings. *Sasser v. State*, 993 S.W. 2d 901, 907 (Ark. 1999). It held that it should have been raised in direct appeal. On appeal Mr. Sasser was represented by Mr. Potter, the very lawyer who failed to object to this issue at trial. On appeal Mr. Potter did not raise this issue nor his own ineffectiveness for failing to object. Not only was Mr. Potter ineffective but he was laboring under a conflict of interest since it was his own performance as trial counsel he would have to challenge on appeal. The ineffectiveness of Mr. Sasser's counsel on direct appeal provides cause to excuse the default of this claim in the state court. *See Murray v. Carrier*, 477 U.S. 478, 485–97 (1986). Mr. Sasser had the right to effective assistance of counsel on direct appeal. *Douglas v. California*, 372 U.S. 353 (1963). The Arkansas Supreme Court has determined Mr. Potter was deficient

for not raising this issue when it held it had little doubt Mr. Sasser was rendered deficient performance by Mr. Potter. Mr. Sasser has shown that ineffective assistance of counsel on appeal and at trial is cause.

Mr. Sasser was prejudiced by this deficient performance because it is more likely than not that the Arkansas Supreme Court would have reversed Mr. Sasser's conviction had this issue been timely raised. Though the Supreme Court seems to be conducting a prejudice analysis on this issue in the post conviction proceedings it is actually looking at the issue as to how the jury would respond to the proper instruction. What the court does not weigh is how they would have responded if the issue was presented to them in the proper manner on direct appeal. If this issue had been presented in a timely fashion the state court would have granted relief because this instruction on attempted kidnaping and attempted rape is an essential element of the crime of capital murder. Mr. Sasser was prejudiced by Mr. Potter's failure to raise this issue on direct appeal. Even more prejudicial, if Mr. Potter's ineffectiveness of counsel would have been presented on direct appeal the Supreme Court would have been aware of the serious deficiencies of trial counsel and would have been more thorough in its mandatory review.

3. Miscarriage of Justice

The miscarriage of justice exception allows review of a defaulted federal

constitutional claim where the prisoner can show that he is "actually innocent"—i.e., where he can show that "it is more likely than not that no reasonable juror" would now find him "guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 537 (2006); *See* 2 Hertz & Liebman, *supra* § 26.4. Mr. Sasser can show that because he is mentally retarded he is ineligible for a sentence of death and therefore innocent of the death penalty. His execution would result in a miscarriage of justice excusing any procedural default. *Atkins v. Virginia*, 526 U.S. 304 (2002); *Sawyer v. Whitley*, 505 U.S. 333, 348 (1992).

Any default found here can and should be excused.

D. DISCUSSION.

1. Omitting Elements of the Offense in the Jury Instruction Relieved the State of its Burden to Prove and for the Jury to Find Each and Every Element of the Offense it Charged Against Mr. Sasser.

Mr. Sasser was charged with first degree felony murder on August 12, 1993. The charging document accused that Mr. Sasser "did unlawfully: commit or attempt to commit rape, or kidnaping, and in the flight therefrom, cause the death of Jo Ann Kennedy. . ."

Despite the lack of any evidence or even any effort on the part of the prosecution to prove these essential elements of the charges the trial court instructed the jury on these crimes. The Court instructed the jury as to what the

prosecution must prove before it could convict Mr. Sasser of capital murder with attempted rape or attempted kidnap as the underlying felony:

> "To prove the crime of attempted rape the State must prove beyond a reasonable doubt that Andrew Sasser intended to commit the offense of rape. . . . To prove the crime of attempted kidnaping, the State must prove beyond a reasonable doubt that Andrew Sasser intended to commit the crime of kidnaping."

(TT. 924). But the trial court failed to give the jury the crucial instruction which requires the jury to find that the defendant "engaged in conduct that was a substantial step in a course of conduct intended to culminate in the commission" of either rape or kidnaping to prove "attempt". *See* Arkansas Model Jury Instructions 2d - 501; *see also United States v. Burks*, 135 F.3d 582, 583 (8th Cir. 1998) ("To prove attempt, the government must show 1) intent to engage in the crime and 2) conduct constituting a substantial step towards the commission of the crime.") *United States v. Spurlock*, 386 F.Supp. 2d 1072, 1074 (W.D. Mo. 2005) (The government needs to prove intent and "substantial step."). This instruction was omitted.

Mr. Sasser has a right to a correct and complete charge of the law so that each issue of fact charged by the prosecution will be submitted to the jury upon proper instructions. *Elmore v. State*, 682 S.W. 2d 758 (Ark. App. 1985) ("It is the trial court's responsibility to give wholly correct instructions.") The law requires

that all of the elements of each offense be described and defined in connection with that offense. *State v. Cravens*, 764 S.W.2d 754, 756 (Tenn.1989). A verdict of guilty implies a finding of every element essential to constitute the crime as charged. *Barnett v. State*, 39 S.W.2d 321 (Ark. 1931); *Wallace v. State*, 22 S.W. 2d 395 (Ark. 1930).

The allegations of attempted rape or attempted kidnaping were essential elements of the felony murder charge against Mr. Sasser. In proving the elements of felony capital murder, it is necessary to prove the elements of the underlying felony. *Martin v. State*, 639 S.W.2d 738 (Ark.1982). The State was required to prove, and the jury must find the existence of the attempts of rape and kidnaping because they are actual elements of the offense charged. Only if the jury found that Mr. Sasser attempted to rape or kidnap Ms. Kennedy could the jury find him guilty of capital murder. Without this finding they could not convict him. It is not enough that the prosecution accuse Mr. Sasser with an attempt of either rape or kidnaping. They must prove he took a substantial step and the jury must find Mr. Sasser took a "substantial step." But the jury cannot make this finding if it is not informed that it must find that crucial fact. The jury is misled by the failure to give complete and accurate instructions. The instructions must contain accurate information.

The state court held Mr. Sasser was not prejudiced by this failure because

there was sufficient evidence to find the underlying rape or kidnaping charge. *Sasser v. State*, 993 S.W. 2d 901, 907 (Ark. 1999). But the issue here is not one of sufficiency of the evidence the question is what choice did the jury make. The jury only returned a generalized verdict finding Mr. Sasser guilty of capital murder. TT 955. The jury made no finding on what basis it rested this verdict.

With the generalized verdict found here, there is no way to determine which, if any, of the theories, alleged by the prosecution, garnered the constitutionally required unanimous support. "Where a jury returns a general verdict that is potentially based on a theory that was legally impermissible or unconstitutional, the conviction cannot be sustained" because "jurors, as non-lawyers, cannot be expected to eliminate the legally impermissible option." *United States v. Naghani*, 361 F.3d 1255 (9th Cir 2004); *quoting United States v. Fulbright*, 105 F.3d 443, 451 (9th Cir. 1997); *see Yates v. United States*, 354 U.S. 298, 312 (1957); *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380, 384 (8th Cir. 1992).

The charges here brought by the prosecution were not mere theories of the offense but were elements of the crime. The jury was not being asked to chose one option over another, all of which are supported by some evidence. Instead the prosecution has charged Mr. Sasser with different crimes but has not been required to prove each and every element of the charges they chose to bring. The

prosecution must prove every element of its charge. *In re Winship*, 397 U.S. 358 (1970). The jury must be told what it must find and what the prosecution must prove.

Mr. Sasser's conviction of capital murder, based on a fractured jury verdict as to whether he was guilty of "committing" attempted rape or kidnaping or actually having committed a rape or kidnap is in violation of his constitutional right to due process. The omission of this instruction also relieved the prosecution of its burden of proving beyond a reasonable doubt each and every element of the offense it had charged against Mr. Sasser. The jury was relieved of its duty to review and weigh the evidence against Mr. Sasser and to find each element charged. All of this denied Mr. Sasser a fair trial under the Sixth, Eighth, and Fourteenth Amendments.

2. Mr. Sasser Was Deprived of the Effective Assistance of Counsel.

a. Mr. Potter Was Deficient in Failing to Object to the Lack of the Critical Instruction.

Despite the long standing requirement in Arkansas law that to prove any attempted crime the prosecution must prove the "substantial step" element Mr. Potter did not object to the trial court's failure to give the required jury instruction. This failure is just one more instance of the failure of the State to provide Mr.

Sasser with constitutionally effective counsel.

Before the trial court read to the jury the instructions Mr. Potter was given an opportunity to review the proposed instructions.

> THE COURT: Okay. The instructions for the first phase are ready, and if you would just look through those - -
>
> MR. POTTER: I've got those.
>
> THE COURT: All right. Be sure and look through them before in the morning also. Court is in recess.

TT 915.[7] Despite Mr. Potter's assurance to the trial court he would review the proposed instructions it is apparent he did not.

The Arkansas Supreme Court reviewed Mr. Potter's ineffectiveness on the merits. The state high court held it had little doubt "trial counsel rendered deficient performance when he failed to object to the omission of the *actus reus* elements in the attempt felonies. . ." *Sasser v. State*, 993 S.W.2d 901, 907 (Ark. 1999). But the court went on that even though the deficient performance part of the *Strickland v. Washington*, 466 U.S. 668 (1984) test had been met Mr. Sasser failed to show he

[7]It appears this conversation between Mr. Potter and the trial court took place one day before the instructions were read to the jury but the record is not clear. In any event Mr. Potter was given time to review the trial court's proposed instructions, to offer his own proposed instructions, and to object. What the record is clear on though is that Mr. Potter did nothing, even at the prompting of the trial court.

was prejudiced. This finding is contrary to federal law as interpreted by the United States Supreme Court.

b. Mr. Sasser Was Effectively Denied Counsel at a Critical Stage Which Excuses Any Showing of Prejudice.

To establish prejudice, a defendant must show there is a reasonable probability that the trial's outcome would have been different absent the deficiency. *Strickland*, 466 U.S. at 694; *White v. Luebbers*, 307 F.3d 722, 728 (8th Cir. 2002). The Supreme Court has recognized some exceptions to the prejudice requirement when (1) assistance of counsel has been denied completely, (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," or (3) counsel is denied during a critical stage of the proceedings. When counsel is effectively denied the "likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary." *White*, at 728.

Mr. Sasser was entitled to counsel at the crucial stage of preparing and instructing the jury. But, despite specific instructions from the trial court to "be sure and look through them by in the morning" Mr. Potter did nothing to review the proposed instructions or if he did he made not objection to the incomplete set of instructions. This failure to perform as the trial court directed and then to object to the obvious lack of the correct instructions denied Mr. Sasser counsel during this

key stage. This crucial error goes to the structure of the trial. If Mr. Potter had performed effectively the jury would have been properly instructed but instead crucial elements of the offense for which Mr. Sasser was charged was kept from the jury. Mr. Potter did not just perform this task incorrectly, it is clear that he did not perform this task at all. There is little doubt that the missing instruction would have been provided to the jury had Mr. Potter simply reviewed the instructions and made the objection. Mr. Sasser was actually deprived of counsel at this critical stage, which removes any need of showing prejudice.

c. Mr. Sasser Was Prejudiced by Trial Counsel's Failure to Object.

Even if a showing of prejudice is required to prove Mr. Potter's ineffectiveness Mr. Sasser can make that showing. Mr. Potter failed to review and to object to instructions that did not contain fundamental elements of capital murder as defined by Arkansas. Mr. Sasser's jury was told that the prosecution "must prove beyond a reasonable doubt each element of the offense charged." TT 920. But because of Mr. Potter's failure to conduct even the most minimal review of the instructions the jury was not given this crucial *actus reus* instruction. This instruction set out the objective element of the crime that the prosecution charged and was constitutionally required to prove. The other instructions given to the jury did not cure the lack of the critical "substantial step" element. The jury was not

told in any other way that it had to find Mr. Sasser had taken a “substantial step” before it could find him guilty of capital felony murder based on attempted rape or attempted kidnap.

Even if there was evidence to support other theories of the crime the prosecution promised to prove these elements of attempt as well but for Mr. Potter’s failure to object. Mr. Sasser has established a reasonable probability that but for counsel’s error, the result of the proceeding would have been different.

d. The Cumulative Effect of Mr. Potter’s Ineffectiveness Can Provide Prejudice.

Finally, Mr. Potters multiple instances ineffectiveness throughout trial and into direct appeal can be considered cumulatively. The district court should have considered all of counsel's errors and omissions which rendered Mr. Potter’s performance unreasonable and that the cumulative effect of counsel's errors and omissions was prejudicial. Counsel recognizes that this Court has refused to recognized "cumulative" *Strickland* claims, e.g., *Middleton v. Roper*, 455 F.3d 838 (8th Cir. 2006), but urges the Court to reconsider this rule. *See* J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341,357-59 (2005). This Court should overrule *Middleton* for the following five reasons.

First, this Court's approach “contravenes the clear holding of *Strickland v.*

Washington," in which the Court made "repeated reference to the plural 'errors' in the opinion" making "clear" that it "contemplated cumulative consideration of counsel's performance, as well as individual errors." J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341 at 358. *See Ex Parte Aguilar*, 2007 WL 3208751 (Tex. Crim. App.) ("The language in Strickland . . . is replete with the use of the plural tense, referring to counsel's alleged 'errors' and thus indicating a cumulative, not individual, consideration of such errors."); *but see Weatherford v. State*, 363 Ark. 579, 588,215 S.W.3d 642,650 (2005) ("The mere reference to 'errors' in plural does not appear, in our reading of the case, to indicate the Court in *Strickland* contemplated cumulative review."). Indeed, "*Strickland's* language indicates that cumulation begins in the first prong – that deficient performance is itself an 'overall' error: Strickland says that the reviewing court must 'assess counsel's overall performance to determine whether 'identified acts and omissions rise to the level of deficient performance.'" John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 1. Crim. L. & Criminology 1153, 1169 n.58 (2005) (quoting *Strickland*, 466 U.S. at 688).

Second, this Court's approach conflicts with *Kyles v. Whitley*, 514 U.S. 419

(1995). In *Kyles* the Court examined "the cumulative effect" of all the favorable evidence suppressed by the prosecution in determining whether the "reasonable probability" standard had been met. *Id*. at 437. Although *Kyles* involved a claim of prosecutorial misconduct under *Brady v. Maryland*, that is a distinction without a difference; the identical standard ("reasonable probability" of a different result) is applied to both types of claims. Indeed, the prosecutorial misconduct standard was self-consciously "adopt[ed]" from the "formulation announced in *Strickland*." *Kyles*, 514 U.S. at 434. Thus, *Kyles* shows that the Strickland standard contemplates claims of cumulative error. See Blume & Seeds, 95 J. Crim. L. & Criminology at 1169 ("Following Kyles, it seems a given that the prejudice arising from individual errors of defense counsel must also be considered together."). *See also Mackey v. Russell*, 148 Fed. App. 355, 365 (6th Cir. 2005) (unpublished) (citing *Kyles* for the proposition that the cumulative effect of defense counsel's errors should be considered).

Third, "the Supreme Court's most recent ineffective assistance of counsel decisions reinforce ... that cumulating deficiencies is the appropriate and intended practice under Strickland." Blume & Seeds, 95 J. Crim. L. & Criminology at 1169 (citing *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Williams v. Taylor*, 529 U.S. 362 (2000) (both reversing based on multiple failures of defense counsel during the

penalty phase of a capital trial). *See also Porter v. McCollum*, 130 S. Ct. 447, 449-56 (2009) (granting an ineffective assistance of counsel claim because penalty phase counsel unreasonably failed to uncover and present "(1) Porter's heroic military service in two of the most critical-and horrific-battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling") (emphasis added).

Fourth, this Court is the "minority" approach, J. Thomas Sullivan, *Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority*, 59 U. Miami L. Rev. 341 at 359, and it should consider adopting the prevailing majority view that *Strickland* contemplates a cumulative analysis. *See, e.g.*, *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001); *Lindstadt v. Keane*, 239 F.3d 191 (2nd Cir. 2001); *Washington v. Smith*, 219 F.3d 620 (7th Cir. 2000); *Combs v. Coyle*, 205 F.3d269 (6th Cir. 2000); *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432 (9th Cir. 1995); *Ross v. State*, 954 So.2d 968 (Miss. 2007); *State v. Condor*, 860 N.E.2d 77 (Ohio 2006); *People v. Briones*, 816 N.E.2d 1120 (Ill. App. 2004); *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003); *State ex rel. Myers v. Painter*, 576 S.E.2d 277 (W. Va. 2002); *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App.

1997); *In re Jones*, 917 P.2d 1175 (Cal. 1996); *Ex Parte Welborn*, 785 S.W.2d 391 (Tex. Crim. App. 1990).

Fifth, and finally, refusing to consider cumulative *Strickland* claims makes scant sense theoretically. Where there is a reasonable probability that the outcome of the trial would have been different absent error by defense counsel, why should it matter whether it is a single error or multiple errors that cast doubt on the outcome? The fairness of the proceedings is undermined just as much in the latter case as in the former. The risk of sustaining a wrongful conviction (and in this case, a wrongful execution) is just as great in both situations.

For these reasons this Court must reverse the district court and remand for consideration of this claim and all of the other claims on the merits.

IV. CONCLUSION

Mr. Sasser has shown at the evidentiary hearing that he is mentally retarded. The district court was wrong when it redefined mental retardation in a manner that does not accord with Arkansas law in numerous ways. The district court's own definition of mental retardation does not even comport with the definition of the leading scientific groups that assess mental retardation.

The district court failed to consider numerous issues presented by Mr. Sasser when it found a bar prevented federal consideration of these claims. This bar can

be and should have been excused by the district court. This matter must be remanded to the district court to allow the proper consideration of the issues the district court failed to consider including the ineffective assistance of Mr. Sasser's counsel.

After oral argument, the judgments of the district court in this case must be reversed.

Dated: March 20, 2012

Respectfully submitted,

JENNIFFER HORAN
FEDERAL DEFENDER

By: /s/ Scott W. Braden

Scott W. Braden
Scott_Braden@fd.org
Ark. Bar No. 2007123
Deborah Anne Czuba
Deborah_Czuba@fd.org
Ark. Bar No: 2008271
Assistant Federal Public Defenders
1401 W. Capitol, Ste. 490
Little Rock, AR 72201
(501) 324-6114
Counsel for Andrew Sasser

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that on March 21, 2012, a copy of the foregoing Brief and the accompanying Addendum were submitted to the Eighth Circuit Court of Appeals and served upon Assistant Attorney General Kelly Hill via the CM/ECF system. The Appendix was filed with the Eighth Circuit and mailed to Kelly Hill, Office of the Attorney General, 323 Center Street, Suite 200, Little Rock, AR 72201-2610.

I further certify that (1) this Brief was prepared in 14-point Times New Roman font using WordPerfect X5 software, (2) this Brief contains 21,908 words, excluding the parts of the Brief exempted by the rules of the court, and (3) this Brief and Addendum to this Brief have been scanned for viruses and the Brief and Addendum are virus-free.

/s/ Scott W. Braden
Scott W. Braden