No. 21-1021

IN THE

# Supreme Court of the United States

DEXTER PAYNE, Director, Arkansas Division of Correction,

*Petitioner,*

v.

ALVIN BERNAL JACKSON,

*Respondent.*

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

## REPLY BRIEF FOR PETITIONER


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## REPLY BRIEF

This case presents a broad split among courts of appeals and state courts of last resort about a question of undeniable importance: whether courts may only consider evidence of a defendant's adaptive skills that supports his claim of intellectual disability, or may also consider evidence that rebuts that claim. Indeed, another petition pending on this Court's docket—this one filed by a defendant—catalogues largely the same split.

Unable to deny that split or its importance, Jackson resorts to rewriting the court of appeals' decision. According to him, the court of appeals granted him habeas relief because it thought *Arkansas* law barred considering adaptive strengths. That is flat wrong. The court of appeals exclusively relied, as it was required to, on federal law in granting Jackson habeas relief. Had the court of appeals written the opinion Jackson describes, the State would have filed a very different certiorari petition, one attacking the court of appeals' impermissible reliance on state law to grant federal habeas relief. And absent that misdescription of the decision below, Jackson offers no reason to deny review. The Court should grant the Petition.

### I. There is a deep conflict on the question presented.

As the State's Petition detailed, the court of appeals below and at least eight state courts of last resort are split over whether courts can consider adaptive strengths in deciding whether a defendant is intellectually disabled. Six state courts of last resort say they can, Pet. 11-13; two state courts of last resort and the court of appeals below say they cannot, Pet. 9, 14. And after the State filed its petition, a defendant represented by

the Federal Public Defender petitioned for certiorari on the same split, citing most of the same cases and adding decisions from two more courts of appeals and a district court. Pet. for Writ of Certiorari, *Sasser v. Payne*, No. 21-7039, at i, 26-29. Litigants on both sides of this issue agree there is a deep split that requires this Court's resolution.

Jackson does not deny this split exists; indeed, he does not discuss any of the decisions (besides the decision below) that make that split up. Instead, he simply asserts the split is "irrelevant," BIO 19, because whatever split exists must simply be a function of states exercising their discretion on whether to define intellectual disability more protectively than "the floor" prescribed by this Court's decisions, BIO 18. That is simply wrong. The disagreement between the state courts—as well as the court of appeals, *see* II, *infra*—isn't whether to exceed the federal floor, but what that floor is.

To begin with the half-dozen state courts of last resort that consider adaptive strengths, those courts didn't exercise discretion to do so in a void. Rather, each court first held that this Court's decisions permit it. For example, in *Wright v. State*, the Florida Supreme Court wrestled with this Court's decision in *Moore v. Texas* at length before concluding it was still permitted to consider adaptive strengths. 256 So. 3d 766, 776-78 (Fla. 2018). So did the Arizona Supreme Court in *State ex rel. Kemp v. Montgomery in & for County of Maricopa*. 469 P.3d 457, 461-63 (Ariz. 2020). Whether those courts then chose to consider adaptive strengths was indeed a question of state law; *see, e.g.*, *id.* at 462-63 (relying on state statute to conclude considering adaptive strengths was required after

holding it was permitted). But before getting there, each court had to hold federal law permitted it.

By contrast, the state courts that bar review of adaptive strengths, like the court of appeals below, don't just choose not to look at them. Instead, they hold this Court's decisions forbid them to. The California Supreme Court, in refusing to consider adaptive strengths, held that "[t]he *Moore* court rejected the view that adaptive strengths" can "overcome . . . adaptive deficits." *In re Lewis*, 417 P.3d 756, 767 (Cal. 2018). The Nevada Supreme Court, in reaching the same result, cited not Nevada law, but this Court's decision in *Moore* and the court of appeals' earlier decision in *this case*. *State v. Covington*, 433 P.3d 1252, at *3 (Nev. 2019) (table case). These are purely federal-law decisions about what federal law ostensibly forbids. In sum, the disagreement among the States isn't over how to exercise the discretion they have, but how much discretion this Court has given them. Only this Court can answer that question.

## II. The court of appeals' decision exclusively rests on federal law.

Jackson's claim that the state courts merely disagree about state law turns out to be incorrect. But his claim that the *court of appeals*, exercising de novo review in a federal habeas case, merely applied state law is nonsensical on its face. The court of appeals did not—indeed, in habeas, it could not—refuse to consider Jackson's strengths merely because it thought that's what state law required. Rather, it refused to consider Jackson's adaptive strengths because it thought this Court's decisions required it to disregard them.

The court of appeals began its analysis of Jackson's *Atkins* claim by quoting Arkansas's intellectual-disability statute. Pet. App. 7a. But it then immediately said that "[t]he Arkansas Supreme Court has consistently construed [this statute] to be concurrent with the federal constitutional right established in *Atkins*." *Id.* (second alteration in original) (quoting *Jackson v. Kelley*, 898 F.3d 859, 863 (8th Cir. 2018)). Arkansas's statute then all but dropped out of the court's analysis.

When the court of appeals turned to the question of adaptive strengths, its focus was almost exclusively, and ultimately dispositively, federal. It began by noting that its prior decision in the case had, in its view, barred considering adaptive strengths. Pet. App. 22a. That decision, it accurately stated, was "informed by *Moore*." *Id.* Indeed, *Moore* was the only authority that decision cited on the subject. *See Jackson*, 898 F.3d at 864-65.

Seeking to shore that decision up, the court then claimed the DSM-5 says nothing about considering adaptive strengths. Pet. App. 22a. Only then turning to state law, the court remarked in an aside that Arkansas's statute "similarly says nothing" about them. Pet. App. 23a. That was all it said about state law, which it earlier read to mirror federal law. Turning back to federal law, the court claimed this Court discouraged considering adaptive strengths in its second decision in *Moore*, and concluded that this "Court's decisions—consistent with the psychiatric literature—suggest that adaptive strengths play little (if any) role." *Id.* Finally, it said that absent "new guidance from the Supreme Court or the medical community regarding the appropriate role of adaptive strengths," it would not consider them. *Id.* In other words, whatever state law might say about

adaptive strengths, if this Court or the medical literature its decisions look to authorized considering adaptive strengths, the court of appeals would have considered them.

Moreover, the court of appeals had no choice but to rely exclusively on federal law. For the court of appeals is not a state court, but a federal court that was sitting in habeas. And as a federal court sitting in habeas, it could only grant Jackson relief if his sentence violated federal law, not state law. As this Court held in *Wilson v. Corcoran*, which concerned whether an error under state death-penalty law justified habeas relief from a death sentence, "it is only noncompliance with *federal* law that renders a State's criminal judgment susceptible to collateral attack in the federal courts." 562 U.S. 1, 5 (2010) (per curiam). So even if Arkansas law prohibited its courts from considering adaptive strengths, the court of appeals could only affirm relief on Jackson's *Atkins* claim if federal law compelled that prohibition. The court of appeals' decision only was about—and could only *be* about—federal law.

**III. This case is an ideal vehicle.**

Jackson devotes the balance of his brief in opposition to arguing that the court of appeals' decision is correct. BIO 19-25. Insofar as he argues that a defendant's strengths are irrelevant to whether that defendant is intellectually disabled, that merits argument is not a reason to deny review. And his string-citations to medical literature defining intellectual disability in terms of deficits, BIO 21-22, simply beg the question of whether strengths are relevant to deciding if someone has overall deficits in the first place. Insofar, however, as Jackson argues that his particular strengths would not affect the result under

any rule, BIO 23-25, he ignores some basic facts about this case's history that make it an ideal vehicle to decide the question presented.

As Jackson concedes, BIO 11, the district court discredited his expert and credited the State's. Pet. App. 5. As he also concedes, though the State's expert thought the question was close, he opined that Jackson did not have intellectual disabilities. BIO 11-12. On the basis of that testimony and other evidence, including evidence of Jackson's strengths, the district court concluded Jackson was not intellectually disabled.[1] Pet. 6-7. The district court only found Jackson intellectually disabled after the court of appeals instructed it to disregard Jackson's strengths, an instruction it followed scrupulously. Pet. 8. Finally, on appeal, reviewing the district court's new finding for clear error, the court of appeals acknowledged that "some evidence supports the State's position" on Jackson's strengths and that there were "two permissible views of the evidence." Pet. App. 24a n.10.

In sum, the district court has already answered how it would decide this case if permitted to consider Jackson's strengths: it would find Jackson isn't

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[1] Jackson's attempts to discredit his strengths are really attacks on factual findings underlying this conclusion. For example, he says he may not have drafted his pro se pleadings and that the State's expert conceded pro se pleadings are often drafted for prisoners by other inmates. BIO 25. But the district court indicated at length that Jackson's testimony to that effect, and his particular explanation of how he circumvented prison rules barring correspondence with inmates to obtain pro se pleadings from them, wasn't credible. *Jackson v. Norris*, No. 5:03-CV-00405 SWW, 2016 WL 17401419, at *19-20 (E.D. Ark. Mar. 31, 2016).

intellectually disabled. And the court of appeals has already answered how it would review the district court's finding were it instructed that reliance on adaptive strengths is permissible: it would affirm. The Court will not see a better opportunity to resolve this question.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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