STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER	)	
	)	
Bobby Wayne Stone, #5051,	)	C/A No. 2018-CP-43-01025
	)	(Capital PCR)
Applicant,	)	
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S POST-HEARING BRIEF

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INTRODUCTION

An evidentiary hearing in the captioned capital post-conviction relief (PCR) matter was held on July 30-31, 2024, to receive testimony and evidence on the sole issue before the Court: whether Applicant, Bobby Wayne Stone, has carried his burden of proof in convincing this Court that he is intellectually disabled and exempt from capital punishment pursuant to *Atkins v. Virgina,* 536 U.S. 304 (2002) and *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003). Respondent submits that based on the totality of the evidence, he cannot. The greater weight of the case firmly and consistently supports that Applicant has not, does not, fall under the intellectual disability exemption.

SUMMARY OF THE ARGUMENT

Our Supreme Court has instructed that in order to have a death-sentence set aside under *Atkins*, a PCR "applicant must show he or she is mentally retarded by a preponderance of the evidence." *Franklin v. Maynard,* 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003).[1] This requires a convincing, *i.e.,* credible, persuasive, and factually supported, showing that he has "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior [that] manifested during the developmental period." *State v. Blackwell*, 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017), quoting S.C. Code Ann. § 16-3-20(C)(b)(10) (2015). Applicant's case fails as the necessary underpinnings for the diagnosis are faulty.

Applicant first claims he may show, by a preponderance of the evidence, that he had significantly subaverage intellectual functioning during the developmental period, but his IQ tests

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[1] Though the case law, mitigation statutory provisions, and definitional statute referenced in *Franklin* all use the term "mentally retarded," our courts recognize the modern term "intellectually disabled" to describe the same, specific condition. *State v. Stanko*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 n. 1 (2013), citing S.C. Code Ann. § 44–20–30 (Supp.2011), *amended by* 2011 Act No. 47, § 13 (2011) (recognizing the change in terminology).

and demonstrated level of functioning do not support his claim. Developmental period testing shows scores of 86, 78, a range that included 69 to 75, and 67 to 73. And, being tested in adulthood, specifically for this action, he received a full-scale score of 79, which even adjusted downward using the controversial *Flynn* effect, was according to the Court's expert, at the lowest, 76.03. DDSN Report, p. 10. (*See also* PCR Tr. 185). But that discounting is not a mandatory application and not generally used apart from discounting a capital defendant's scores to edge him closer to exemption. That should not be accepted. Applicant simply cannot credibly show a score within the generally accepted range of 70 to 75 for mild levels of intellectual disability.[2] As the Court's expert agreed, one generally cannot test higher than real ability. (*See* PCR Tr. p. 257).

Applicant also relies on school records to show significantly subaverage function through academic struggles, (*see* PCR Tr. p. 81, 84); yet, he was identified as essentially having a learning disability, which is distinct from intellectual disability, and also a vision issue, all while sharing an environment at home that was not conducive to good studying habits, and that valued hard work over formal education. (*See* PCR Tr. p. 226-228). Indeed, in considering an allegation of ineffective assistance in the mitigation presentation, our Supreme Court quoted from the trial social worker as she "described how this difficult family structure led to problems with school and employment…." *Stone v. State*, 419 S.C. 370, 402, 798 S.E.2d 561, 578 (2017). Moreover, other

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[2] *See Atkins*, 536 U.S. at 309 n. 3 (observing '"Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70."); *id*, at 309 n. 5 ("an IQ between 70 and 75 or lower ... is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition."); *see also* American Association on Intellectual and Developmental Disabilities ("the AAIDD"), *The Death Penalty and Intellectual Disability* (2014) ("Variability of IQ Test Scores" by Stephen Greenspan and J. Gregory Olley, describing the "conventional upper limit of 70-75"); PCR Tr. p. 186 testimony of Dr. Alicia Hall, "significant cognitive deficits or intellectual deficits" equates with levels that are "at least two standard deviations below th[e] mean of 100, which would be 70 or below…." However, applying the test's standard error of measurement, the level "can actually go up to about 75 and still meet criteria for intellectual disability because their adaptive functioning is so impaired.");

school-age records indicate his academic problems continued in high school until Applicant dropped out after his nineth grade year; however, and tellingly, once Applicant was placed into Birchwood High School, which is part of the South Carolina Department of Juvenile Justice, where attendance was no optional, he maintained C's and B's in remedial classes, including a course in economics. (PCR Tr. pp. 90 and 138-140; 239-241). Together, his scores and records do not support the first prong of an intellectual disability diagnosis.

Applicant next claims that he may show, by a preponderance of the evidence, that he has deficits in adaptive behavior. This is the most subjective prong of the analysis, and it is here that the facts his expert relies upon (which were, unfortunately, shared with the court's expert to taint that opinion, as well), are shown to be insufficient, incomplete, or just simply wrong. *See United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 211 (D.P.R. 2013) ("[b]ecause of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility."). There is a long listing of facts that could either be interpreted differently, or facets of those facts not considered, which undermines the fullness of the factual picture used to make the diagnosis. Indeed, very little is mentioned at all about the great wealth of evidence from the prior proceedings. For example, the Court's expert was not provided school records that Applicant frequently fell asleep in his classes – a point that the trial-level social worker found important. (*See* PCR Tr. 227). And, quite simply, if the general, under-investigated "facts" Applicant's relies upon could be better explained with cultural or socio-economic causes (consistent with prior defense position), he cannot carry his burden by a preponderance of the evidence; the omission of facts led to reliance on surface or unchallenged conclusions insufficient to support the diagnosis. Though the Court

need not evaluate this prong as the first prong is solidly not met, if the Court chooses to do so, Applicant fails to show a credible, persuasive case.

In sum, Applicant has not shown he is exempt from capital punishment under *Atkins,* because he fails to make a case for intellectual disability. Relief should be denied.

STATEMENT OF THE CASE

Procedural History

During the August 1996 term, the Sumter County Grand Jury indicted Applicant for murder, burglary in the first degree, and possession of a weapon during a violent crime. On January 21, 1996, the State gave notice of intent to seek the death penalty. (App. p. 2097).[3] The Honorable R. Markley Dennis was assigned to preside over the proceedings. Cameron B. Littlejohn, Esq., and James H. Babb, Esq., represented Stone on the charges. After a jury trial beginning on January 23, 1997, Applicant was found guilty as charged. After the statutory 24-hour waiting period, the sentencing phase began. On January 28, 1997, the jury found the existence of two aggravating factors – the murder was committed during the commission of a burglary first degree; and the murder of a legal law enforcement officer during or because of the performance of his official duties – and determined death was the appropriate sentence. (App. p. 265). Judge Dennis imposed the death sentence for murder, a consecutive thirty years on the burglary conviction, and five, consecutive, years for possession of a weapon during the commission of a violent crime. (App. p. 269-70).

[3] Citation to "App." refer to the appendix Applicant submitted to the Supreme Court of South Carolina in the appeal from the first denial of post-conviction relief. These documents were filed with the State's Return as attachments.

Direct Appeal

Applicant filed a timely notice of appeal on January 31, 1997. After briefing by both sides, oral arguments was held before the Supreme Court of South Carolina on May 16, 2002. On July 15, 2002, the Supreme Court issued their decision affirming the conviction; however, they reversed and remanded the penalty phase. *State v. Stone,* 350 S.C. 442, 567 S.E.2d 244 (2002).

Resentencing After Appeal Relief

On February 22, 2005, the resentencing hearing began before a new jury. The Honorable Howard P. King presided. Mr. Littlejohn and Mr. Babb continued to represent Applicant. On February 27, 2005, this jury found the State had proven beyond a reasonable doubt that the murder was of a law enforcement officer during or because of the performance of his official duties and similarly assessed Applicant deserved a sentence of death. (App. p. 3630). As required, Judge King imposed the jury's sentencing determination and Applicant was again sentenced to death. (App. p. 3637).

Direct Appeal After Resentencing

After completion of briefing, oral arguments were held before the South Carolina Supreme Court on November 14, 2007. On December 20, 2007, the Supreme Court issued their opinion affirming Applicant's sentence of death. *State v. Stone,* 376 S.C. 32, 655 S.E.2d 487 (2007). A petition for rehearing was filed by the Applicant, this petition was denied on January 23, 2008.

First PCR Action

Applicant filed an initial PCR application on April 1, 2008. (R. pp. 3978-3983). John H. Blume, Esq., and Robert E. Lominack, Esq., represented Applicant in the action, with Emily Paavola, Esq., replacing Mr. Lominack at the conclusion of the hearing for the remainder of the proceedings. (*See* App. 4501).

On April 23, 2012, the Honorable Michael G. Nettles presided over an evidentiary hearing. Applicant presented several experts regarding the following claim:

> 4) Counsel failed to conduct a reasonable investigation into potentially mitigating evidence regarding applicant's impoverished childhood and the family dysfunction resulting from the essentially polygamous household in which he was raised, applicant's very low intellectual functioning, and neurological damage from exposure to dangerous neurotoxins and other chemicals as well as the maternal ingestion of alcohol during the developmental period. Counsel failed to gather relevant social history, educational and medical records which would have corroborated the mitigating evidence that was presented at applicant's trial. Counsel also failed to investigate, develop and present evidence of applicant's good character.

(Return to Amended Application, at 6).

Notably, mental retardation was mentioned during the hearing and had been considered during the preparations for the resentencing proceeding.

Trial counsel, Mr. Babb, testified to his preparation for a possible mitigation case. (*See* App. 4353). He testified he was "aware that Mr. Stone's IQ had been diagnosed as below normal." (App. 4362). However, in cross-examination, Mr. Babb identified his notes from discussions with his defense team, and his contemporaneous notes reflected, "Not retarded, but a low IQ." (App. 4397). Further, trial co-counsel, Mr. Littlejohn, though not addressing adaptive functioning specifically, testified that Applicant's "family and friends … were behind him," available to the defense, and offered an interesting note that did reflect on Applicant's ability: "[w]hen he was in jail one time, he … sponsored a tournament or a lottery or something for … some lady that was undergoing some health problems…." (App. 4483).

Applicant called Dr. Merikangas, M.D., a neurologist and psychiatrist, at the hearing in the first PCR action. The doctor responded on cross-examination, that he was "not exactly" testifying that Applicant was not mentally retarded, only that "we don't have the evidence that would prove

mental retardation," specifically, "his adaptive living scales" that would have been given. (App. 4137). However, he also testified that he "was the medical director of the mental retardation treatment unit at the University of Pittsburgh between the times of 1973-1979" and, though they did not use the DSM definitions, he considered the diagnosis to require "global assessment of the patient…." (App. 4139). Dr. Merikangas rejected finding that Applicant had "a callous disregard for the rights of other," and noted that Applicant was "caring for a schizophrenic patient in the jail now, taking care of his mental, physical, and bodily needs as a compassionate caregiver." (App. 4141). Dr. Merikangas testified that his review of Applicant's school records reflected "problems with visual coordination and integration" and opined that Applicant "has functioning in the borderline range in intelligence, substantial deficits in the performance area." (App. 4146-4147). On redirect, PCR counsel, Mr. Blume, asked about the school records with IQ testing of 78 at age 11, and at age 14, a range of 69-75, which Dr. Merikangas agreed was the "basis of the school system determining Mr. Stone had mental retardation or was educably mentally retarded." (App. 4152). He even agreed with defense counsel's question that the information could "suggest" to the doctor there was "probable" mental retardation. (App. 4153).

PCR counsel, Mr. Blume,[4] even underscored, in the motion to reconsider, that the second sentencing jury "was not informed that [Applicant] was repeatedly evaluated in school and found to have an IQ score as low as 69-75, which is in the mental retardation range," and to be "educably mentally handicapped (i.e., mentally retarded) or that his academic achievement scores

[4] Mr. Blume has authored articles about the *Atkins* exemption, *see for example,* John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 Cornell J.L. & Pub. Pol'y 689, 698–700 (2009); and has contributed to resources such as one produced by the American Association on Intellectual and Developmental Disabilities ("the AAIDD"), *The Death Penalty and Intellectual Disability* (2014) ("Analysis of *Atkins* Cases," with Karne L. Salekin).

consistently indicated low intellectual functioning." (App. 7291). Further, Mr. Blume argued at the hearing on the motion to reconsider that PCR court should reconsider the finding that Applicant's "low intellectual functioning was thoroughly presented to the sentencing jury at trial" was "not accurate" because the social worker did not have a "complete set of his school records" include those "which indicated that he had an IQ in the mental retardation range and he had been found by the school system in Sumter County to be what was called educable mentally handicapped or what we would now today call intellectually disabled or mentally retarded." (App. 7309).[5] However, though counsel made this argument in regard to presentation of mitigation, counsel did not claim that Applicant was intellectually disabled as would satisfy *Atkins* exemption.

On August 14, 2013, the PCR Court issued an amended order[6] denying the application for post-conviction relief. (App. p. 7339-70). Applicant appealed.

PCR Appeal

The South Carolina Supreme Court granted Applicant's petition for writ of certiorari and reviewed these issues, as framed by our Supreme Court:

> (1) whether Stone's trial and appellate counsel were ineffective in dealing with victim impact evidence, (2) whether Stone's trial counsel was ineffective in investigating and presenting evidence of brain damage, and (3) whether Stone's trial counsel was ineffective in investigating and presenting evidence of the accident theory of the case.

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[5] Evidence offered, even if the condition is rejected by the factfinder as an exemption, may still be considered in mitigation. *See State v. Laney*, 367 S.C. 639, 649, 627 S.E.2d 726, 732 (2006) ("if not found as a threshold issue, mental retardation continues to be a mitigating circumstance under statutory law"); *see also* S.C. Code Ann. § 16-3-20(C)(b)(10) (retaining mental retardation as a statutory mitigating circumstance).

[6] The amended order was a result of motions to alter or amend submitted by both Applicant and the State and again denied all relief. (*See* App. 7291-7307 and 7336-7337).

Stone v. State, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017).

After the submission of briefs by both parties, oral arguments were held on March 23, 2016. The Supreme Court issued an opinion on March 29, 2017, affirming the decision of the PCR court. *Stone v. State, supra.*

Federal Habeas Corpus Proceedings, C/A 2:17-cv-01221-MGL-MGB

Having completed his ordinary state remedies, Applicant filed a petition for writ of habeas corpus in the federal district court. Applicant filed a petition on March 26, 2018, with a supplement filed on March 29, 2018. The filing allows for a stay of execution until completion of the action. However, Applicant moved to stay those proceedings to return to state court and attempt to litigate his successive PCR action. That action remains stayed with the parties filing periodic status reports.

Second PCR Action, C/A 2018-CP-43-1025

On June 5, 2018, Applicant filed this latest application for relief which he amended on July 26, 2018. In his amended application, Applicant alleged (1) that he is intellectually disabled, therefore, he is not eligible for the death penalty; (2) ineffective assistance of counsel for failing to investigate the claim of intellectual disability; and (3) ineffective assistance in the "failure to retain a forensic pathologist, crime scene reconstruction expert and other similar expert assistance to prove that the facts and circumstances of the crime were constituent with an accident theory." (July 25, 2018, Application, filed July 26, 2018, at 2-3).[7] Respondent filed a return to the original application, a return to the amended application, and also moved to dismiss the action as untimely and improper successive; and, additionally, his Eighth Amendment/*Atkins* claim was not

[7] The amendment added the claim of ineffective assistance of counsel regarding investigation of alleged intellectual disability.

cognizable under the Simmons Doctrine[8] as it constitutes a trial claim that was available during the resentencing. (Return to Amended Application, dated August 24, 2018, filed August 28, 2018, at 22-30). Judge Nettles was previously assigned this matter, and, by order filed February 22, 2019, granted the State's motion in part, and denied in part, ruling first that the *Atkins* claim could continue and be heard on the merits with Applicant bearing the burden of proof; second, that the ineffective assistance claims were barred as untimely and improperly successive; and third, that the offered "new" evidence was not new at all, noting not only had the "accident" theory had been explored in the prior PCR action but was also barred under "law of the case." (Order filed February 22, 2019). This Court was subsequently assigned the matter.

By order dated July 3, filed July 9, 2019, this Court directed the South Carolina Department of Disabilities and Special Needs to conduct an *Atkins* evaluation. By order dated December 30, 2019, and filed January 3, 2020, this Court "addresse[d] issues unresolved by the prior order dated July 3, 2019," and addressed issues of presence at the evaluation, and receipt of the DDSN report. Subsequently, this Court, along with counsel for the parties, received the DDSN report by the court's expert, Dr. Alicia V. Hall, Ph.D., on December 2, 2022.

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[8] The scope of this Court's jurisdiction for PCR matters is set out in S.C. Code Ann. § 17-27-20 (A). In addition to the listing of claims that may be raised in Section (A), there is a limitation. Section (B) provides: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State,* 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt,* 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

Dr. Hall began her conclusion with the acknowledgment that "Mr. Stone's case presents a complexity that does not lend it to an obvious decision." DDSN Report, p. 12. She opined that evidence presented argued both for and against the diagnosis of intellectual disability. DDSN Report, p. 12. She resolved that to properly resolve the matter required "in-depth analysis…." DDSN Report, p. 12. Ultimately, she concluded, based on the materials she had available, that Applicant "appears to meet criteria on the first prong," and that he "has met the second prong" based on that evidence, as well. DDSN Report, p. 12. Dr. Hall deferred to this Court to make the determination, but shared her "opinion, based on the totality of the data," available to her that Applicant met the criteria under S.C. Code § 16-3-20 (C)(b)(10)(2003), *i.e.,* "significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." DDSN Report, p. 12 and p. 1. The State advised that upon review of the DDSN evaluation, it assessed that additional expert review was prudent.[9]

An evidentiary hearing was held on July 30-31, 2024. Present before the Court was Applicant along with his counsel Rosland Major, Esq., and Charles Grose, Esq. Representing the State of South Carolina was Melody J. Brown, Senior Assistant Deputy Attorney General, with Assistant Attorneys General Tommy Evans, Jr., and R. Brandon Larrabee. The Court heard from four experts in the mental health field, and a former school psychologist in the district where Applicant attended. At the conclusion of this hearing, this Court allowed the submission of post-hearing briefs following the receipt of the transcripts. Applicant has previously submitted his post-hearing brief. This brief of Respondent follows.[10]

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[9] The Court's July 2019 order provided that neither party was prohibited "retaining their own mental health experts for purposes of this intellectual disability claim."

[10] This Court has previously rejected the State's arguments that the entire action is barred as improperly successive and untimely and/or by S.C. Code Ann. § 17-27-20(B) and the Simmons

Facts Established at Trial

Guilt Phase

Applicant began the day of February 26, 1996, purchasing beer and two guns, one a .410 bore shotgun and another a competition grade .22 caliber semi-automatic. Applicant spent most of the day shooting in the woods. *Stone,* 419 S.C. at 378, 798 S.E. at 565. That evening Mary Ruth McLeod was at the home of her mother Ruth Griffith when they heard a knocking at the back door, Ruth pulled the curtain back and saw Applicant. (Supp. App. pp. 229-32, pp. 259-60, pp. 291-42). Ruth told her daughter that Applicant was outside, and she did not want him in her house. Ms. McLeod went outside and approached Applicant. She told him to "go home." Applicant initially headed to a shed in Ms. Griffith's backyard. With more prompting Applicant decided to head back to the woods. As he walked away Ms. McLeod saw Applicant had something under the back of his jacket. Ms. McLeod walked to the edge of the woods to make sure he was headed home. She then saw Applicant standing there, holding a shotgun, arms crossed, staring back at the house. (Supp. App. pp. 232, 264-65, 279; App. pp. 2942-46, 2969-71).

Ms. McLeod then went back inside the house and dialed 911. Sergeant Charlie Kubala of the Sumter County Sheriff's Department arrived. Sergeant Kubala reported arriving at 6:06pm. Once he arrived Ms. McLeod and Ms. Griffin explained to him what happened. They walked to the edge of the woods and saw that Applicant had left. Sergeant Kubala told them to call him if they had any more trouble. (Supp. App. pp. 232-33; App. pp. 2946-48).

Shortly after Sergeant Kubala left, Ruth heard gunshots in the backyard. At 6:47 pm she called her neighbor Landrow Taylor, who also heard the shooting and promptly responded next

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Doctrine. Though the State maintains those defenses for purposes of appeal, those defenses are not re-argued in this briefing.

door to Ms. Griffith house. They both then heard someone attempting to enter Ms. Griffith's car by jiggling the car door handle that was parked right outside the bedroom window. They dialed 911 again at 7:02pm. As they went to the living room, they heard someone banging on a rarely used side door. Mr. Taylor then yelled "[W]hat are you trying to do back there?" There was then a moment of silence, then the beating started back. (Supp. App. pp. 234-38, 255-56, 283-84)

Sergeant Kubala reported back on the scene. Mr. Taylor when out to the front porch and motioned for the deputy. Sergeant Kubala walked around the corner of the house. Mr. Taylor and Ms. McLeod then heard someone shout either, "Halt," or "Hold it," followed immediately by three or four gunshots. As Mr. Taylor ran back to the front porch, Deputy John Prince arrived in his cruiser. Mr. Taylor saw Sergeant Kubala's flashlight and walkie-talkie lying on the ground. He yelled to Deputy Prince that Sergeant Kubala was around the side of the house. Ms. McLeod again called 911 to let them know that Sergeant Kubala was shot. (Supp. App. pp. 240-42, pp. 285 -87, App. p. 3065).

Deputy Prince shined his flashlight, and saw Sergeant Kubala. Sergeant Kubala was on the ground, face up, bleeding profusely from his mouth and neck. Deputy Prince saw Sergeant Kubala's gun near his fingertips, and his walkie talkie. His flashlight was between his body and his right arm. Deputy Prince rolled Sergeant Kubala over attempting to clear his airway, then another gunshot rang out. Deputy Prince took cover at the corner of the house. (Supp. App. pp. 287, 90, 299-301; App. p. 3066-67. 3069-71).

Emergency Medical Services (EMS) and other officers soon arrived. Because Deputy Prince heard another shot, law enforcement cleared a nearby shed in the area. EMS found Sergeant Kubala not breathing and without a pulse. Sergeant Kubala was pronounced dead at the scene. He

died from one gunshot that entered his right ear, and another that entered his neck. (App. p. 3068, 3087-88, 3183-92).

Law enforcement looked around the woods and found Applicant lying near a log with the murder weapon under him. Bullets from that gun, and those was found in Sergeant Kubala's body was later sent to the South Carolina Law Enforcement Division (SLED) for identification. SLED conclusively matched the gun to two bullet fragments and one bullet found in Sergeant Kubala's body. The .22 pistol also matched three spent .22 cartridge cases found on the side porch as well as casings found in the nearby woods. Seargeant Kubala's 9mm service pistol was found fully loaded and had not been fired. (App. p. 3091, 3202, 3229, 3279, 3285-97).

After his arrest Applicant gave a statement to law enforcement. Applicant admitted to being at Ms. McLeod house earlier that day. Applicant claimed that as soon as he entered the back yard a women he did not know came out of the house "raising cane" at him telling him to get off the property. Applicant returned to the woods, found and paid David who left. Applicant then walked around the woods shooting the guns and finishing off a beer. Around dark he returned to Ms. McLeod's house. Applicant told law enforcement that he walked up the steps to the little screen porch, sat down the shotgun, but he kept the .22 in his right hand. Applicant admitted he started beating on the inside door, which he broke because he hit it so hard. Applicant then stated that he heard a man's voice yelling outside the house, as he turned, the gun went off. Applicant then ran into the woods. In his statement, Applicant claimed that his gun only went off once, he stated that he never saw Sergeant's Kubala or his patrol car. (App. pp. 3160-69).

Sentencing Phase

During the sentencing phase of the trial Applicant called social worker TeAnne Oehler to explain Applicant's personal background. She stated that Applicant grew up in poverty and

described his mother's affair with an abusive and drinking man, Wesley Miles. She theorized this upbringing led to Applicant's poor performance in school and frequent troubles with the law, which began with an arrest for stealing a car. Ms. Oehler concluded his background affected his judgment and decision making. (App. p. 3391-414). During cross-examination Ms. Oehler admitted she believed Applicant had anti-social personality disorder and a problem with authority figures, and she admitted knowledge of his extensive history of burglary and theft. (App. pp. 3426-30).

Applicant's paternal aunt Bernice, his sister Melinda, and his niece Linda testified about Applicant's parents, his upbringing and his family, and their relationship with Applicant. (App. pp. 3431-35, 3446-51, 3457-670).

Ms. Griffith's sister-in-law Mary Wilson testified, she stated her daughter Michelle was living with Ms. Griffith at some point in the 90's and Applicant would visit her there. She also testified that Applicant did some work for Ms. Griffith and sometimes all of them would go out to a honky tonk. Supposedly, Ms. Griffith admitted drinking beer and smoking marijuana with the Applicant.

Psychopharmacologist Dr. Andrew Morton described the effects of Applicant's drinking on his brain, and on his judgment and decision making. (App. p. 3485-509). Former warden James Aiken also testified as to the Applicant's ability to adapt to prison, despite the commission of some infractions. Mr. Aiken was asked to describe Applicant's life in prison. Mr. Aiken testified that Applicant would be in the company of many dangerous people, and that Applicant is relatively old and vulnerable to violent and sexually aggressive inmates. Mr. Aiken also was allowed to testify that regardless of whether Applicant was good in prison or bad in prison, SCDC could safely contain him "under the gun" for the rest of his life. (App. 3522-36).

ALLEGATION FOR POST-CONVICTION RELIEF

As referenced above, the only issue allowed to proceed to hearing was the *Atkins* issue, which Applicant framed as follows:

> 10 & 11(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact he is intellectually disabled. Because Applicant has significantly subaverage intellectual functioning existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Moore v. Texas,* 137 S.Ct. 1039 (2017), *Hall v. Florida,* 134 S.Ct. 1986 (2014), *Atkins v. Virginia,* 536 U.S. 306 (2002); *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003).

DISCUSSION

The history of this action shows that a claim of intellectual disability was rejected during investigation at the trial level and was, apparently, rejected as a claim in the initial post-conviction relief proceedings. Specifically, the record shows that trial counsel, in consultation with the defense team, noted in regard to Applicant, "Not retarded, but a low IQ," (App. 4397), and the first PCR team developed all manner of information on intellectual functioning, even referencing a specter of mental retardation, but specifically did not raise an *Atkins* claim. Respondent submits that is so because the totality of the facts does not support the diagnosis. Even the Court's own expert, on limited context which is more fully shown below, admits that Applicant "has a history of intellectual functioning both in the ID range *and outside of it*." DDSN Report, p. 12 (emphasis added). That concession alone militates in favor of finding Applicant fails to carry his burden of proof here. But further, this Court has heard from experts Dr. Michael Vitacco and Dr. Kimberly Kruse who have offered well-informed and supported opinions that align with the prior treatment of the known information: the facts show Applicant is not intellectually disabled.

In essence, this Court is now tasked with evaluation of the outlier opinions. In doing so, this Court must critically consider the basis for the diagnosis. That is where Applicant has failed. *First*, Applicant fails to show proper consideration of the intellectual function prong, discounting the attained score with a theory only beneficial in "best practices" to a death sentenced inmate, and ignoring the consistency of the 79 IQ range, which could be as high as 83. *Second*, the factual support cited relies on assumed or incorrectly investigated matters that were either wrong or incomplete. This renders the diagnosis infirm. Unfortunately, the first faulty basis and opinion was shared between Applicant's expert here and the Court's expert, which caused the infirmity to be repeated. Viewed in light of the totality of the evidence and without bias, this case remains as it has been; one that shows the defendant is not intellectual disability and is eligible for capital punishment – punishment assessed by two separate juries and that has been undisturbed on review. It should remain undisturbed here.

The Atkins Determination

Atkins is not an intellectual disability case for medical professionals; rather, *Atkins* is an Eighth Amendment case. *Atkins,* 536 U.S. at 321. And it is well-established at this point that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders *about whom there is a national consensus." Atkins,* 536 U.S. at 317 (emphasis added).[11]

In nearly every *Atkins* case, qualified experts offer competing opinions. The Court's critical review often turns on the factual basis and the methods and practices relied upon. To be sure, the Supreme Court has referenced "prevailing clinical standards" in determining the

[11] The prevalence of true intellectual disability occurrences is limited estimated at "approximately 1% of the general population. DSM-5, at 38, or stated differently, "10 per 1,000" individuals. DSM-5TR, 43.

condition. *Id., See also, Moore v. Texas,* 581 U.S. 1, 15 (2017). Yet, the Court has been equally clear that clinical opinions neither dominate nor control the decision to be made under the Eighth Amendment. *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003) ("The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence"); *Hall v. Florida,* 572 U.S. 701, 721 (2014)("views of medical experts … do not dictate the Court's decision") *Id.* ("The legal determination of intellectual disability is distinct from a medical diagnoses, but it is informed by the medical community's diagnostic framework"); *Id.,* at 736 n. 12 ("organizations might recommend examining evidence of adaptive behavior even when an IQ is above 70, but that sheds no light on what the *legal* rule should be given that most States appear to require defendants to prove each prong separately by a preponderance of the evidence")(emphasis in original); *see also, Moore,* 581 U.S. at 13 ("being informed by the medical community does not demand adherence to everything stated in the latest medical guide"); *Id.* at 22 ("clinicians, not judges, should determine clinical standards; and, judges, not clinicians should determine the content of the Eighth Amendment") (Roberts, C.J., dissenting). *Cf. Kansas v. Crane,* 534 U.S. 407, 413 (2002)("the science of psychiatry, which informs but does not control ultimate legal determination, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law").

Notably, the medical profession recognizes its own limitations in legal matters. The American Psychological Association in the *Diagnostic and Statistical Manual of Mental Disorders,* 5th Ed., Text Revision, (DSM-5-TR), 29 sets out its "Cautionary Statement for Forensic Use of DSM-5, "that there exists an 'imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis." The caution continues that "[i]n most situations, the clinical diagnoses of a DSM-5 mental disorder such as intellectual developmental

disorder (intellectual disability) … does not imply that an individual with such condition meets legal criteria for the presence of a mental disorder … or specified legal standard…" *Id.* The conclusion is inescapable that the legal determination on exemption is separate and "distinct" form medical opinion. *See, Hall, supra.*

Thus, courts presented with evidence going to a claim of intellectual disability are guided by the same principles that always guide admissibility of witness testimony, and factfinders are guided by the same principles that always guide credibility and weight.

The Applicable Definition

In *Franklin* our Supreme Court instructed courts to follow the definition of mental retardation, now intellectual disability, found in the murder statute, capital provisions:

> "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior manifested during the developmental period."

S.C. Code Ann. §16-3-20(C)(b)(10).

This largely follows the clinical definition referenced in *Atkins,* "... clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins,* 536 U.S. at 318. The Supreme Court noted the definition so phrased in *Atkins* was roughly the same as that announced by the American Association on Mental Retardation (AAMR); the American Psychiatric Association (APA), and consistent with the IQ range then identified in the DSM (IQ level of 50-55 to approximately 70). *Id.,* at 318 n.3[12] It also

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[12] If one applies a true Eighth Amendment exemption analysis, "[a]t most, *Atkins* may be said to have prohibited the death penalty for those who were 'mentally retarded' based upon a national consensus about what society believed that meant *in 2002*." *Ex parte Segundo,* 663 S.W.3d 705, 712-13 (Tex. Crim. App. 2022). This is generally supported in the Supreme Court's treatment of the test. The Court has consistently referenced the condition as "the generally accepted,

generally follows the definition recognized by the American Association on Intellectual and Developmental Disabilities (AAIDD) *Moore v. Texas,* 586 U.S. 133, 135 (2019). Though recognizing reference is occasionally made to other considerations, our Court adheres to the state statutory definition. *State v. Blackwell,* 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017).

Moreover, in *Blackwell,* our Court reasoned that the Supreme Court's *Moore* decision, which addressed a Texas test in comparison with medically accepted approaches, requires no different approach. *Id.,* 420 S.C. at 144, 801 S.E.2d at 721 n. 11. The Supreme Court in *Moore* was primarily concerned with application of non-medical factors for guidance. *Id.* Specifically, one of the Supreme Court's concerns in *Moore* was that the non-medical factors appeared to rest more on stereotypes than facts for clinical evaluation. *Moore,* 581 U.S. at 18, *see also, Moore (II),* 586 U.S. at 137. An example of the Texas court's reliance on "stereotypes," the Supreme Court compared the lower court's rulings that "evidence that Moore 'had a girlfriend' and a job as tending to show he lacks intellectual disability," with these sources: "AAIDD – 11 at 151 (criticizing the 'incorrect stereotypes' that persons with intellectual disability 'never have friends, jobs, spouses, or children') and Brief for APA et al. as *Amici Curiae* 8 ([I]t is estimated that between nine and forty percent of persons with intellectual disability have some form of paid employment'). 586

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uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean' – *i.e.* a score of roughly 70 – adjusted for 'the standard error of measurement.' …; (2) adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances' … and (3) the onset of these deficits while still a minor." *Moore v. Texas,* 581 U.S. 1, 7 (2017). (citations omitted). *See also, Hall, 572* U.S. at 736 (noting through "organizations might recommend examining evidence of adaptive behavior even when an IQ is above 70, but that sheds no light on what the *legal* rule should be given that most States appear to require defendants to prove each prong separately by a preponderance of the evidence")(emphasis in original). *Accord Shoop v. Hill,* 586 U.S. 45, 52 (2019)(*per curiam*) (vacating lower court opinion in federal habeas corpus appeal where the Court of Appeals relied upon *Moore* to grant relief when *Moore* was not in existence when the state court decided the issue.

U.S. at 142. In other words, a superficial glance at such evidence is not sufficient. But neither is a superficial glance at stereotypical deficits. A robust look at the evidence is required.

Moreover, all three prongs are required to be met. Courts do not find a lone showing of difficulties in adaptive functioning to be sufficient. *Hall,* 572 U.S., at 737 n.12 ("The longstanding views of professional organizations have also been the intellectual functioning and adaptive behavior of independent factors."); *cf. United States v. Roof,* 10 F.4th 314, 380 (4th Cir. 2021) ("Although 'significant limitations in adaptive skills such as communication' are part of the *Atkins* test, *id.,* they are not sufficient by themselves to render a defendant mentally incapacitated."). South Carolina has rejected a similar argument based on general "alleged mental abnormalities" other than intellectual disability. *Stanko,* 402 S.C. at 284-288, 741 S.E.2d at 724-726 (defendant's claim of brain damage, though refuted by other evidence, with evidence arguably demonstrating his "inability to adept," would not support finding "an inability to communicate or care for himself adequately, or sub-average intellectual functioning.").

Credibility, Weight and the Burden of proof

A defendant (or PCR applicant) bears the burden of showing all three prongs of intellectual disability to fall under the South Carolina definition. For this, then, he must present credible and persuasive evidence. Courts have considered a variety of reasons to find some experts more credible or that their opinions should be assigned more weight even if the qualifications are equally matched. *See generally, Hill v. Shoop,* 11 F4th 373, 394 (6th Cir. 2021), *cert. denied,* 213 L.Ed.2d 1134, 142 S.Ct. 2579 (2022) (noting the state court was called upon to resolve a difference in opinions given by "[t]hree credentialed and independent physicians").

In evaluation of a diagnosis, courts have considered whether the information on adaptive functioning deficits is corroborated, *Bourgeois v. Watson*, 977 F.3d 620, 635 (7th Cir. 2020), the

depth, or lack thereof, of critical review, *Bryant v. State,* C/A 2016-CP-43-828 (Sumter County, filed Jan. 4, 2019); or even if opposition to the death penalty generally has clouded the expert's judgment, *Commonwealth v. Flor*, 259 A.3d 891, 917 (Pa. 2021). Our Supreme Court has underscored trial courts tasked with considering a claim of intellectual disability will be "the sole judge[s] of the credibility of the witnesses and the weight to be given their testimony…." *State v. Blackwell*, 420 S.C. 127, 140, 801 S.E.2d 713, 720 (2017). A failure to consider known facts (or have those facts provided to an expert) is cause to find a lack of credibility. *See Commonwealth v. Flor*, at 917 ("The PCRA court, as with Appellant's earlier expert witnesses, found Dr. Martell lacking in credibility by essentially cherry-picking information to support a predetermined conclusion" and "[t]he shortcomings perceived by the PCRA court were compounded by the mutual reliance by the experts upon one another's reports"). In particular, as to the second prong, "[b]ecause of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one." *United States v. Candelario-Santana,* 916 F.Supp.2d 191, 211 (D.P.R. 2013).

As is always the case, "[c]ourts are not required to credit expert testimony." *Ybarra v. Gittere*, 69 F.4th 1077, 1092 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 2582, 219 L. Ed. 2d 1241 (2024).

Analysis

At the evidentiary hearing, this Court first heard from Applicant's expert. The discussion here will begin with that witness's testimony as that witness first shows the deficiencies that are ultimately demonstrated. The Court's expert, Dr. Hall, received the faulty information and even jointly interviewed the limited individuals identified by Applicant's team. This led to share infirmity as is shown below.

Applicant's Expert

Applicant called Dr. Sarah Boyd, who was found qualified as an expert in psychology of intellectual disability (PCR Tr. p. 13). Dr. Boyd admitted that she is opposed to the death penalty. (PCR Tr. p. 110). She testified that she gave Applicant an IQ test to assist in the diagnosis of intellectual disability. (PCR Tr. p. 109). In her report the result of the IQ test was a 79. (PCR Tr. p. 115). Dr. Boyd testified that, according to records, Applicant's initial IQ test score was 86. (PCR Tr. p. 114). This test was given before he was 10 years old. Dr. Boyd testified that this test was "possibly tainted" (PCR Tr. p. 114). Yet, Applicant's second test showed he scored 78 and his test in 2017 while awaiting this hearing he scored 79. (PCR Tr. p. 115). At the age of 14 Applicant was once again given an IQ test with a score 66-76. (Dr. Boyd's report pg. 8). However, this test was given at age 14, close to when Applicant finally dropped out of school in the 9th grade. Dr. Boyd confirmed that Applicant never tested under 70. (PCR Tr. p. 115).

Applicant, while in school, was diagnosed as having a learning disability and designated educable mentally handicapped. [13] Pursuant to South Carolina law, students who are so designated are, "pupils of legal school age whose intellectual limitations require special classes or specialized education instruction to make them economically useful and socially adjusted." S.C. Code Ann. §59-21-510. Dr. Boyd admitted that this is a category for learning and not a mental health diagnoses. (PCR Tr. p. 118). She also admitted that this definition will not be found in the DSM-5 or the AAIDD. (PCR Tr. p. 118).

Returning to Dr. Boyd's testimony, she referenced acts or actions that are quite common among many individuals as evidence of deficits in adaptive functioning. Moreover, she found

[13] As would be shown by a school official who later testified, Dr. Boyd's assumptions about Applicant's testing and designations in school were wrong. That is discussed further below.

deficits casually where details undermined that determination. For instance, Dr. Boyd relied in part on the fact Applicant had to take the driver's test twice. (Dr. Boyd's report pg. 12). However, Applicant passed the *written* portion of the exam on the *first* try. (PCR Tr. p. 252). Dr. Boyd also discussed that the Applicant only worked jobs that were "typical physical menial labor," jobs that did not require complex math, reading and writing skills. (PCR Tr. p. 130). Notably, in her report, Dr. Boyd used as an example of jobs that Applicant could not hold were an accountant, professional writer or engineer. (Dr. Boyd's report p. 6). That is clearly true of a large portion of society. Moreover, Dr. Boyd admitted during the PCR hearing that people with only a ninth-grade education, such as Applicant, do not qualify for these types of jobs. (PCR Tr. p. 131). Dr. Boyd's comparison scale for ability is unreasonable.

Dr. Boyd also used as examples of deficits in adaptive functioning the fact Applicant did not have a checking account and that he paid bills in cash or gave his check to his live-in girlfriend so she can pay the bills. However, during her testimony, Dr. Boyd admitted that many people do not have checking accounts, that it could be possible that Applicant does not trust banks which would not make him intellectually disabled. (PCR Tr. p. 127). Applicant also did not have credit or debit cards, but Dr. Boyd admitted that many people, especially poor people, do not possess debit or credit cards. (PCR Tr. p. 128). Dr. Boyd also related the fact that Applicant's family informed her that he never planned a trip or purchased a ticket. However, she admitted that his family was of modest means; therefore, none may have taken such trips because they could not afford it. Dr. Boyd admitted that the fact the Applicant never planned trips could have nothing to do with intellectual disability and more to do with finances, that he just did not have the money to go on trips. (PCR Tr. p. 128). Her speculation and comparisons are in tension with clear, clinical

standards that provide the relevant deficits identified for the diagnosis "must be directly related to the intellectual impairments" described. *See* DSM-5, p. 38.

Further, Dr. Boyd discussed information on Applicant's home life. She stated that Applicant was not able to do housework, and he left that up to his mother and then to the women he lived with, while he did all the yard work and fixed the cars. But Applicant told Dr. Boyd that this was an agreement between them. (PCR Tr. p. 134). Dr. Boyd never spoke to Mary Hunt, Mary Cook or Michelle Price the three women that the Applicant once lived with to explain the work arrangements around the house to contrast *ability* with cultural expectations or preferences. (PCR Tr. p. 112). However, Applicant told her that he felt that was the appropriate partition of responsibility. (PCR Tr. p. 134). Again, that "direct[]" relationship to impairment is lacking.

Dr. Boyd also asserted in her report that Applicant's family told her that he did not share much concerning his thoughts and feelings. However, the report also reflects that he was easy to get along with and that he was vulnerable to exploitation. (Dr. Boyd's report p. 11). As an example, she related a story provided to her by Applicant's sister, the gist of which was that Applicant's car was stolen by his friends, but Applicant was back with them partying the next day. (PCR Tr. p. 125). When asked about the possibility of the sister's story not being true, Dr. Boyd stated that it's possible that the event was mischaracterized to her and admitted that there were a number of possibilities of what actually happened. (PCR Tr. p. 126). Yet, Dr. Boyd admitted to using this in her assessment of adaptive functioning even though this information could be false. (PCR Tr. p. 126).

During her testimony Dr. Boyd also discussed the very low grades that Applicant had in school. Applicant made mostly D's and F's during his period in school up to the point he dropped out in the ninth grade. (PCR Tr. p. 137). However, his high school records revealed that Applicant

missed many days from school. In English he missed sixteen days; in math lab he missed 9 days; he missed twenty-three days in Civics; fourteen in General Science; and nine in physical education. (PCR Tr. p. 137). Dr. Boyd admitted that Applicant missed numerous days in school while in high school, which could have played a part as to his poor grades. (PCR Tr. p. 137). Absent from her consideration was the lack of stability in the home life, and the Stone children would fall asleep in class. (*See* PCR Tr. p. 226-227). But the records from Birchwood high school, part of DJJ, show Applicant made B's and C's in remedial classes. She did not address structured learning and supports away from the family setting as affecting her opinion, but Dr. Boyd agreed that this would be a more structured setting where he would be forced to go to class. (PCR Tr. p. 139). She also agreed that home life can certainly contribute to a child's problems in school. (PCR Tr. p. 140).

Notably, the conclusion that lower scores and grades were likely due to his chaotic home life and not intellectual disability is not new. That was the theme in the trial-level proceedings. *See Stone v. State*, 419 S.C. at 402, 798 S.E.2d at 578 (noting social working "described how this difficult family structure led to problems with school and employment…."); (App. 3406-3408, 3412). It is a better fit.

Further, Dr. Boyd's lack of precision and omission of the prior investigations and testimony led to taint in the opinion offered in this case by the Court's expert, which is next discussed.

The Court's Expert

Applicant called the court's witness *after* his witness testified; the testimony shows the reason for this – the opinions were hopelessly intertwined, and just as hopelessly ill-informed.

To her credit, Dr. Alicia Hall testified that this case was not easily resolved and required consideration of the details, (PCR Tr. 210); however, Dr. Hall did not review the information available from prior actions in any detail, and particularly orders and opinions, as she was

attempting to avoid consideration of the facts of the crime, (PCR Tr. p. 214-215). In reviewing records, Dr. Hall, much like Dr. Boyd, defaulted to generalities rather than specific information. (*See* PCR Tr. p. 217, 225). The testimony and reports show the troubling, in tandem synergy. And, though Dr. Hall agreed that "there was some difficulty in the family that could impact Mr. Stone's schooling and his behavior as an adult," (PCR Tr. p. 216), like Dr. Boyd, Dr. Hall rejected that which was firmly shown to be much more consistently tied (as the defense had done on the trial level) with Applicant's disadvantages or general upbringing than an impairment in functioning.

For example, declining to do housework, she agreed, was actually quite consistent with his expressed intent to do what he wanted when he was an adult having worked excessively hard as a child. (PCR Tr. 220-221). Further, the division of work with a girlfriend doing "inside chores," she agreed, was reported as being the type of division of work that was customary to him. (PCR Tr. 221). She admitted that Applicant did other work such as outside work and automobile care. (PCR Tr. 221-222). She also admitted that his mother taught him to cook, yet she asked nothing about what that meant and how much he understood – such as asking about recipes he followed, methods he used – nothing that would be "helpful" in determining his ability to think through and accomplish cooking tasks. (PCR Tr. p. 222).

Further, Dr. Hall agreed that intellect essentially rested on two foundations: genes and environment. (PCR Tr. p. 223). However, though patterns showing mental retardation in family members may be a helpful data point, there were no diagnosis of mental retardation, but his siblings – from the same household (*i.e.,* environment) – did have handicaps. (PCR Tr. pp. 223-224). Further, Applicant's brother Jerry had a hearing issue, while Applicant had a neurological vision issue. (PCR Tr. 226). This again explains necessary support that were not directly related to intellectual functioning impairment. Dr. Hall did not review the sentencing mitigation testimony

from the trial-level social worker so she was unaware of the testimony that the Stone children would often attend school and be sleepy and she received that information from no other source. She testified that she was unaware of school records that Applicant would fall asleep in his classes. (PCR Tr. 227). She agreed, though, that it would not be conducive to learning. (PCR Tr. 227).

Again, having not reviewed the sentencing phase testimony, she was not aware of the particulars of Applicant's mother's parenting skills (or lack thereof), but she was aware that Applicant's mother worked hard, valued hard work, and encouraged Stone to work as a child. (PCR Tr. p. 228). And she agreed that Applicant took satisfaction in his work as an adult, and kept his job with a tree service, showing up on time and where he should be on the specific day, and completing his work without reports or errors or repeated attempts. (PCR Tr. p. 228-229). And though she found deficits in having friends suggest work for him, he also worked construction on the side ("under the table") and that is commonly the time of work contracted by word of mouth. (PCR Tr. p. 230).

In the same discounting or negative vein, Dr. Hall considered reports by Applicant's friend, that Applicant wanted to be a "nice guy," was evidence he was easily led, but agreed that Applicant could either want to be a "nice guy" or use a "nice guy" approach to manipulate (recall that he was diagnosed with antisocial personality disorder and had a history of stealing, another data point that Dr. Hall did not read, nor was provided evidence of otherwise). (PCR Tr. pp. 231 – 233).

And as far as relationship information is concerned, Dr. Hall depended on Applicant's friend, Frankie Norton, to opine about specific with the relationship with Ms. Price, but admitted that the better information would come from the two people actually in the relationship. (PCR Tr. p. 235). Dr. Hall also agreed that Applicant maintained work to provide financially for his girlfriends, a point he was proud of. (PCR Tr. p. 234). Dr. Hall also agreed that it would make

sense that Applicant learned about checks or debit cards later in life given a very disadvantaged background. (PCR Tr. p. 235-236).

She recognized that, through review of the DJJ records, it appeared that supports in learning aided Applicant, but then also recognized that school records showed that Applicant moved a lot. She agreed that attending different schools would impact a child with a learning disability more than a child without one. (PCR Tr. pp. 240-242). Further, he had, without doubt, a neurological vision problem that required support. (PCR Tr. pp. 242-243). Thus, again, the known factual record supports the prior position of the defense team and not the instant opinion.

Other evidence also undermines her diagnosis. Though Dr. Hall was concerned about the "cloak of competence" and wanted to ensure she was obtaining correct and critical information for evaluation, she often judged Applicant's responses with an eye toward simple rejection of his explanations, rather than considering his background and upbringing as part and part of Applicant's response. For instance, when he responded about not having lived on his own, he told her it was a choice, and for this reason: "It just puts more work on me." (PCR Tr. p. 244). But, on cross-examination, she agreed that reason was consistent with the fact that he had to work very hard as a child, and that he wanted to do what he wanted to as an adult. (PCR Tr. pp. 244-245). When he described removing a tree, she did not evaluate the information on his response, but only because it "did not appear" to be as explicit as perhaps it should be. (PCR. Tr. p. 245). Regarding his responses as to how to go about getting an apartment, she assessed "hesitancy" as his implicit acknowledgement of inability to quickly answer but agreed that could be because he's been in SCDC for many, many years. (PCR Tr. p. 247). *See also* DDSN Report, p. 11. Moreover, his answers when given were not wrong, and in the "open-ended question" about things to do if he should be released, he came up, on the spot, with a plan, to get a job; get a camper, stay with his

brother until he could get a place of his own; determine how much is needed for a deposit and first month's rent; get the lights turned on; get furniture and clothes; make a budget, etc. (*See* PCR Tr. p. 249).[14] Yet, she interpreted that as "struggling," though she also admitted the responses did reflect thought and foresight. (PCR Tr. p. 250). And, perhaps most troubling, Dr. Hall relied on "that *word was* that when he was in the community, there was not a time when he did not require the assistance of other people to be successful." (PCR Tr. pp. 250-251).[15] That was a *concept* advanced by Applicant in this proceeding, but it was not a fact, and a point rejected personally by Applicant, which was supported by his record of his upbringing. That is unfortunate evidence of confirmation bias, not fair evaluation. And examples of that continued.

For instance, as to driving, Dr. Hall did not include anything in her report about tests and skills, but in her notes, Applicant admitted not passing the driving test on his first attempt. And his license lapsed, but it lapsed because he was incarcerated, not for failing to recognize and meet obligations to keep current. (PCR Tr. pp. 251-252). But he had passed the *written* portion of the test. (PCT Tr. p. 252). However, Dr. Hall did not consider any of this important information to include in the report. Applicant also reported a health scare and his affirmative steps to address his health problems even within the confines of institutional restrictions; and also reported his aid to another inmate who cannot help himself. (PCR Tr. pp. 252-253). Another item in the notes was Applicant's very complete answer on what to do if he saw smoke; leave, report it, do not yell

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[14] The discussion from the notes and at the hearing appear to blend some responses as to general "tell someone how to get an apartment" questioning and what to do should he leave prison. However, the basic gist is how to handle obtaining a place to live.

[15] Dr. Hall's report reflects that she received information second hand via an investigation for Applicant in this action that a person reported "the applicant was dependent on others to take care of him." DDSN Report, p. 6. Yet the quote in the section is specifically tied to a generational/cultural fact: "Maybelle cooked for them and the women did the other chores like laundry." DDSN Report, p. 6. The characterization and later reference to "word" received very much is dependent on an adversarial position rather than unbiased view of direct evidence.

faire because if someone dies, you would be "legally responsible." (PCR Tr. p. 254). Yet, that was not referenced in the report.

As to evidence that brings developmental period testing and his current score into context, Dr. Hall agreed that Applicant reported drug use especially about the high school level when he would have taken an achievement test, and agreed that, at that time, Applicant was, at the time, "cutting school a lot." (PCR Tr. 254-256). Yet, even with that background, his current score was 79 on a recognized testing instrument. (PCR Tr. 256). With the test standard error of measurement, that could mean his true score was as high as 83. (PCR Tr. 256-257). And, though she applied the Flynn effect, she acknowledged the limitations, and that it was only "best practice" in *Atkins* cases – not standard medical practice. (PCR Tr. p. 258). Further, when the AAIDD manual references application of the Flynn effect, it also acknowledges the limitations and lack of agreement. (PCR Tr. p. 259). There is even evidence that there is some "reverse" Flynn effect, and noted disagreement on whether the discounting of the score is the same for each year. (PCR Tr. p. 260-261). Dr. Hall admitted that the recent score, 79, was consistent with the borderline (not intellectually disabled) range which was established in the school records. (PCR Tr. p. 261). Again, the score, under the calculation measures regularly applied to the test, the type of range approved of in *Hall v. Florida*, places his 79 score as high as 83 and not near the generally 70 level. (PCR Tr. 263).

Respondent's First Expert in Forensic Psychology

Respondent called Dr. Michael Vitacco who was found qualified as an expert in the field of forensic psychology. (PCR Tr. p. 288). Dr. Vitacco expressly considered the methodology of the forensic psychologists who found Applicant intellectually disabled in rendering their opinion. (PCR Tr. p. 288-289).

During his testimony, Dr. Vitacco set out several concerns in the methods that were used by Dr. Boyd and Dr. Hall to reach their conclusions. First, Dr. Vitacco concerned about the shared data and the shared interviews. (PCR Tr. p. 289). Dr. Vitacco called this "Groupthink" this is when you get into an idea where you're sharing information and sharing data you develop opinions together. (PCF Tr. p. 289). Dr. Vitacco testified that they did interviews together and the IQ testing was only done by Dr. Boyd, but it was relied solely by Dr. Hall. (PCR Tr. p. 290). Dr. Hall considered herself an "amicus psychologist," or appointed by the Court, and should reflect her opinion would be objective and neutral. However, Dr. Hall relied heavily on data provided by Dr. Boyd who was hired by Applicant. Dr. Hall stated that she re-scored the test, however, Dr. Vitacco testified that there are several "sub-scales" that cannot be re-scored or scored unless that person actually with the individual while the test is being administered. (PCR Tr. p. 290).

Dr. Vitacco also was unclear as to why the results of the test of memory malingering (TOMM) "came from out of nowhere" being in the second report issued in 2023. (PCR Tr. p. 290-91). Dr. Vitacco was also concerned the TOMM was administered 800 days after the original IQ test was administered. (PCR Tr. p. 291). Dr. Vitacco testified that this was so far away from the best practices and standardization. Dr. Vitacco stated that "in my 30 years of clinical forensic practice, I've never seen such a thing, and the rationale for that still even after listening to the testimony yesterday, I still do not understand it." Dr. Vitacco did not understand doing the TOMM some 800 days after the original test because the TOMM is to provide information about the individual's effort on the day of the test. (PCR Tr. p. 291). A person's response, style and effort is not static, it changes. That is why psychologists give the effort testing on the day of the exam. Dr. Vitacco believed to give the test years later and suggest that it was okay is not accurate. (PCR Tr. p. 292).

Dr. Vitacco also had concerns with Dr. Boyd's methods to make a determination regarding adaptive functioning. (PCR Tr. p. 292). Dr. Vitacco thought that the biggest thing was that she made an unfair bar for the Applicant to obtain. Dr. Boyd spoke about the Applicant in his employment wasn't using mathematical or reading skills. (PCR Tr. p. 292). The fact that Dr. Boyd stated that Applicant was not working an employment unsupportive as an accountant, professional writer or engineer which a lot of people do not do, does not make them have intellectual development disorder. (PCR Tr. p. 292).

Dr. Vitacco also thought that Dr. Boyd was considering things as deficits in adaptive functioning that may not actually be deficits. He spoke about how Dr. Boyd mentioned that the Applicant was gullible enough that people that would come and take his car, that they stole his car and he seemed to be okay with it. Dr. Vitacco thought too, on its face, that could be an issue. However, it was not discussed why someone was taking the car – were they taking the car to acquire drugs or to get alcohol? Was the car returned? Dr. Vitacco thought that there were all sorts of questions that could have been answered if Dr. Boyd dig deeper into that issue. (PCR Tr. p. 293).

Respondent's Second Expert in Forensic Psychology

Also testifying during the PCR hearing was Dr. Kimberly Kruse. As Dr. Vitacco, Dr. Kruse was found qualified as an expert in the field of forensic psychology. (PCR Tr. p. 305). However, unlike Dr. Vitacco, Dr. Kruse was asked to provide an opinion on intellectual functioning. (PCR Tr. p. 306). Dr. Kruse's review did more than any expert to link the known facts of this case, *i.e.,* history, and prior records and diagnosis, with review for this case. She noted that for the trial proceedings, Applicant was examined by Dr. Harold Morgan, who diagnosed Applicant with antisocial personality disorder. (App. p. 68-69; *see also* App. 3426 (social worker's testimony also finding ASPD)). As explained by Dr. Kruse antisocial personality disorder is:

> is one that involves a pattern of maladaptive behaviors over years that ignore social norms or rules, tend to break laws, have difficulty with impulsivity, someone who is possibly going to lack empathy at times, and someone who might be out to get things for themselves.

(PCR Tr. p. 307).

Dr. Kruse also gave more detailed analysis as to what the various testing meant as to function, and the causes of learning difficulties.

Dr. Kruse testified that Applicant had a non-verbal brain disorder. Which is explained as affecting the non-verbal aspects of learning; Anything that does not involve language vocabulary. This relates to visual special skills being able to see the big picture or the whole of something versus the details. (PCR Tr. p. 307). Non-verbal learning disorder is different than intellectual disability they are not synonymous. (PCR Tr. p. 307).

Dr. Kruse also testified about Applicant's previous IQ scores as found in his school records – clearly within the developmental period. He scored 86, 78, 65-79, and, as an adult, 79. (PCR Tr. p. 309). She noted Applicant had a drop in scores from age 11 and 14 (as had been discussed at the trial level (first sentencing), *see* App. 1137). Dr. Kruse related that to his known difficulty in the educational environment caused by Applicant's difficult home setting, which was manifested in his falling asleep at school, missing days at school, and also due to the fact he moved about eight times to nine schools during his educational career. (PCR Tr. p. 309). Dr. Kruse estimated that Applicant would have a decrease in a measured score, that would be reflected in his school records at that time. (PCR Tr. p. 309).

In examining his IQ scores Dr. Kruse noticed that his lowest score was perceptual reasoning. Dr. Kruse explained that perceptual reasoning aligns with what she had described about non-verbal learning disorder. It is how one perceive the environment and how they are able to reason with it. (PCR Tr. p. 310). Dr. Kruse explained that there was a twenty-point gap between

the Applicant's highest index score and his lowest which equates to a learning disorder, which was identified while the Applicant was in the fourth grade. (PCR Tr. p. 311). At age fourteen the Applicant was diagnosed as being educable mentally handicapped. Dr. Kruse explained that this was a classification that is used for someone with learning difficulties, but they can learn. This is how they would place them in supportive environments. (PCR Tr. p. 311). Dr. Kruse explained that this is different than educable training handicapped which would go into a setting of being more vocational or basic task driven versus general learning. (PCR Tr. p. 312).

In Dr. Kruse's opinion the Applicant had a learning disability and did not have intellectual developmental disorder. Moreover, even applying competence intervals, the Flynn effect, his scores still fall above the cut off. (PCR Tr. p. 312).

Dr. Kruse also explained that the TOMM is a test of effort and can pick up malingering. However, it is meant to guide the person administering the test on how to proceed. It is kind of a gauge on how well this person can participate with what your about to do. (PCR Tr. p. 313). She has never seen this test administered almost two years after the initial test. (PCR Tr. p. 313). Dr. Kruse explained to administer this test this long after the initial test she would not be sure what they would be measuring. It would not apply to anything that was done previously, certainly not done years before. (PCR Tr. pp. 313-314).

Further, when looking at the records as it relates to adaptive functioning Dr. Kruse did not find deficits in adaptive functioning, she found just the opposite. (PCR Tr. p. 314). Dr. Kruse found many examples of Applicant performing well across domains. Applicant had sustainable long-term relationships, he drove a car and was promoted at his job. That Applicant chose to live with people and do certain task at home but not others is very common. Dr. Kruse thought that there

were many things that could be found that support Applicant's abilities in adaptive functioning. (PCR Tr. p. 314).

As for the Flynn effect, Dr. Kruse thought that it was necessary after the first test to be used to gauge a person's performance but even after the first test if you apply it, Applicant's scores are still within range. (PCR Tr. p. 314). Dr. Kruse testified that the second time a test was performed there was no reason to apply the Flynn effect and in that case his score was well above the cut off for intellectual developmental disorder and that was during the developmental period. (PCR Tr. p. 315). In her opinion, Applicant cannot meet the criteria for being intellectually disabled. She opined that there is a preponderance of data to support that the Applicant cannot be consider intellectually disabled.

Respondent's Fact Witness: Dr. Elaine Harris, School Psychologist

Respondent called Dr. Elaine Harris to testify. Dr. Harris was a school psychologist in Sumter School District 17, where Applicant attended school. Dr. Harris began her employment on August 29, 1977, (PCR Tr. p. 330), she retired in 2015. (PCR Tr. p. 338). Though Applicant's expert, and in turn, the Court's expert relying on the same, leaned heavily on cold records and presumptions, Respondent presented the only witness who was present for any of the assessments during Applicants' developmental period. Not only was Dr. Harris one of the psychologist who was working for the school district where Applicant attended school all during the developmental period, Dr. Harris actually administered the IQ tests to Applicant during these school years. (PCR Tr. p. 332).

Dr. Harris testified about what was known then as "arena testing." (PCR Tr. p. 331). Dr. Harris explained that in "arena testing" students would rotate among a number of different stations during IQ tests. The training of individuals administering each of the stations varied. (PCR Tr. p.

331). However, Dr. Harris did also state that she never administered an IQ assessment through "arena testing." (PCR Tr. p. 331). Dr. Harris also testified that Sumter School District 17 did not, as a matter of standard practice, use "arena testing." (PCR Tr. p. 332).[16]

Further, Dr. Harris testified that at the time of testing, as the law was interpreted, Applicant qualified as being in the educable mentally handicapped range, because of his full-scale IQ, even though Applicant had some areas in the average range. (PCR Tr. p. 337). Dr. Harris stated that since that time, the definition for being intellectually disabled had been refined. Now you have to find pervasive below average functioning on everything. (PCR Tr. p. 337) This qualification is more in line with the qualifications found in the DSM-5 and the AAIDD where you don't only look at the IQ scores to determine intellectual disability.

Dr. Harris testified that the school psychologists were becoming aware that by using the full-scale IQ scores, they were over-placing black males into the program, thus began to rethink how they were looking at intelligence for this population. (PCR Tr. p. 338). Dr. Harris stated during her testimony, "In this particular instance he would not have been found as ID." (PCR Tr. p. 339). As Dr. Harris stated during her testimony'

> I would not consider him under as the practices, the program, the way we switched to looking at it as we gained more understanding.

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[16] In his post-hearing brief, Applicant argues that "[i]nformation from a school psychologist who worked in the district when Stone was in school" revealed that "the school psychologist who conducted [a 1975] IQ test was known for regularly conducting the testing in a manner that was a 'very significant departure' from how the tests are supposed to be administered." Br. 8 n. 6. Dr. Susan Boyd testified about the potential use of arena testing (though she did not use that term) by one of the psychologists involved in that assessment. (PCR Tr. p. 49-50). In explaining her testimony, Dr. Boyd said she spoke to two psychologists about the testing and named Dr. Harris as one of the psychologists to whom she spoke. (PCR Tr. p. 49). At the hearing, Dr. Harris recalled a conversation about Stone's assessments with two women, (PCR Tr. pp. 340-41); one of these could have been Dr. Boyd. Further, in Dr. Boyd's report she states that she spoke to "Elanie and Joseph Harris" about testing at this time. (Dr. Boyd's report p. 8). However, the assessment that Applicant questions was conducted in 1975, before Dr. Harris began working at Sumter School District 17.

> School psych was a relatively new field when I entered into it. So but then we grew a lot, and I think I also acquired a lot more skills with what I was doing and understanding but we did move to make it rather difficult to qualify as intellectually disabled.

PCR Tr. p. 339.

Even if she does not recall her assessment of Applicant more than forty years ago, Dr. Harris was the only witness at trial who was directly involved in one of the assessments during his developmental period. But Applicant does not appear to mention any of her testimony by name in his post-hearing brief, even though one of the experts seemingly relied on comments by Dr. Harris to call the 1975 IQ score into question. This greatly damages credibility of his witness (and the "facts" he presented to the court's witness which in turn also lessens the credibility of that conclusion). Notably, the surety of what the records truly mean is critical. In an Arizona case, it made the difference between not finding intellectual disability and finding intellectual disability. This passage is instructive:

> The school records reviewed by the trial court in 2005 appeared to suggest good adaptive skills, but when fully explained in 2009 and properly understood, those records instead establish that Grell has suffered from adaptive behavior deficits since he was a young child. These school records, notably, were created in Grell's youth, for an educational purpose unrelated to these proceedings or any other litigation. The teachers and social workers who relied on them had no motive to fabricate or distort their observations or findings.

State v. Grell, 291 P.3d 350, 353 (Ariz. 2013).

Dr. Harris' testimony undermines the Applicant's argument in another way. In his post-hearing brief, Applicant repeatedly argues that a finding of educable mentally handicapped during Stone's younger years is more or less directly equivalent to a finding of intellectual disability in the current context. But it is more complicated than that, as Dr. Harris' testimony shows. Based on her review of the Applicant's assessment from 1979, Dr. Harris concluded that by the time she

retired in 2015, Applicant *would not* have been considered intellectually disabled. While that assessment is of course not binding on this court – Dr. Harris is a medical practitioner, while the ruling in this case must be grounded in legal standards – it is instructive given Applicant's attempt to transform a decades – old label into a current diagnoses. It is not that simple, and it does not aid in carrying his burden of proof.

Flynn Effect

The Supreme Court has not accepted the *Flynn Effect* for discounting IQ scores. It has described the effect as "a controversial theory involving the inflation of IQ scores over time" that results in reducing scores. *Dunn v. Reeves,* 594 U.S. 731, 736 (2021). The only adjustment to scores that the Court has found must be applied is the standard error of measurement (SEM). *Hall, supra; Moore, supra.* That is not a clinical permissive step reserved to discretion, but a uniformly recognized limitation on establishing a confidence level, acknowledged by clinicians and by the testing instruments. *See Hall,* 572 U.S. at 723 (underscoring the significance of IQ testing, but including the caution that "in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do"),[17] *see also id.,* at 712 ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range.) The *Flynn* effect is not the SEM, and it is not, under the Eighth

[17] The Supreme Court recognizes that the IQ result is more readily framed with the SEM range than a single number. *Hall,* 572 U.S. at 723. That is generally consistent with clinical practice. See DSM-5-TR, at 38, ("individuals with intellectual developmental disorder have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally ± 5 points)," which is generally "a score of 67-75 (70 ± 5)"). Ranges are no longer used for determining *level of severity,* but that is separate than determining the first prong, *i.e.*, "deficits in general mental abilities. DSM-5-TR, at 38 (separating "specifiers from "diagnostic features").

Amendment analysis at issue, an adjustment that must be applied. Nor should it when viewed under comments regarding its use in current manuals.

For example, the DSM-5-TR, simply acknowledges that scores "may" be "affect[ed]" by "practice effects" and the "Flynn effect." *Id.*, at 38. The text does not establish a norm for its application. Even the AAIDD notes its limitations. (PCR Tr. p. 259). And as set out above, it is not uniformly used. To reserve the "best practice use" for *Atkins* use only is particularly questionable and raises issues of bias. If there is particular, specific cause for concern, as the DSM-5 suggests clinicians "may" apply the theory (as Dr. Kruse suggested in regard to one particular test), but uniformly applying the questionable theory to discount a death sentenced inmate's score, again, only shows bias, not clinical standard. This Court should reject its general use here.

Suggestion to Revisit Atkins

Respondent previously briefed the issue of revisiting *Atkins,* (Respondent's Pre-trial Brief, pp. 12-14), and continues to assert that it would be wise to do so.

The *Atkins* decision was not unanimous. The dissent, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, criticized the majority's opinion lack of consensus by "objective factors" such as legislative enactments. *Atkins,* 536 U.S. at 341, 344 (Scalia J. dissenting).[18] The dissent also recognized, for Eighth Amendment analysis, "the peril of discerning a consensus where there is none." *Id.,* at 345-347. The dissent posited that the majority must have believed that there is an "inability of judges or juries to take proper account of mental retardation," yet the legal system is based on the ability of judges or juries to consider the facts of each case.

[18] Chief Justice Rehnquist also authored his own dissent and underscored his agreement "that the Court's assessment of the current legislative judgment regarding the execution of defendants like [Atkins] more resembles a *post hoc* rationalization for the majority's subjective preferred result rather than any objective effort to ascertain the content of an evolving standard of decency." *Atkins,* 536 U.S. at 322 (Rehnquist C.J. dissenting).

Id., at 349. The dissent also questioned the majority's reasoning on culpability, deterrence, excessive punishment, and "special risks" the majority referenced. *Id.,* at 349-352. The dissent further correctly recognized that the necessary reliance on soft science would increase litigation and inmates would "claim[] for the first time, after multiple habeas petitions, that they are retarded." *Id.,* at 353-354. In the interim since *Atkins* to now, the Court has seen the "practical difficulties" and has also begun to recognize the express lack of guidance in *Atkins* cases has increased the difficulty in complying with the exception.

Notably, Justice Alito observed in a later case considering one State's attempt to comply with the exception that "[u]nder our modern Eighth Amendment cases, what counts are our society's standards – which is to say, the standards of the American people – not the standards of professional associations, which at best represent the views of a small professional elite." *Hall,* 572 U.S., at 731 (Alito, J., dissenting).

In another case, Chief Justice Roberts, joined in dissent by Justice Thomas and Justice Alito, similarly remarked that the "Court's precedents … establish[] that the determination of what is cruel and unusual rests on a judicial judgment about societal standards of decency, not a medical assessment of clinical practice." *Moore v. Texas,* 581 U.S. 1, 29 (2017).(Roberts, C.J., dissenting). The dissent highlighted "the lack of guidance . . . offer[ed] to States seeking to enforce the holding of *Atkins." Id.*

When Moore returned to the Supreme Court, the Chief Justice, writing a separate concurring opinion, again affirmed that in his view, "the majority articulation of how courts should enforce the requirements of *Atkins v. Virgina* ... lacked clarity," *Moore v. Texas,* 586 U.S. 133, 143, 2019)(Roberts, C.J., concurring). Justice Alito, joined by Justice Thomas and Justice Gorsuch, dissented, similarly noting the lack of guidance to the States. *Id.,* at 143-144.

As Justice Scalia alluded to in his *Atkins* dissent, the exemption recognition was, at best, premature, as there was no consensus in identifying the group of individuals to be exempt. Had there been, the Court would have announced a bright line test with the type of definitive clarity (if not the simplicity) in *Roper.* As is stands, precedent has continued to reflect to difficulty in determining the defendants meant for exemption and calls for expansion of the exemption abound. Unacceptably, the soft definition could lead to discarding a duly returned jury verdict – the very epitome of society's view – in favor of ever evolving concepts from the medical profession or simple disagreement with the jury's assessment of the evidence by a later reviewing court. That does not honor the Eighth Amendment. The exemption should be revisited for modification and clarification, and, if that cannot be done upon further review and consideration, then the exemption itself should be revisited. Respondent respectfully suggests that indications in the case law warrant a revisiting of the *Atkins* exception.

CONCLUSION

WHEREFORE, based on the foregoing, Respondent submits that Applicant has failed to prove beyond a preponderance of the evidence that he is intellectually disabled.

Respectfully submitted,

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