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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Lexington County
Court of Common Pleas

Lower Court Case No. 2022-CP-32-00924

GARY DUBOSE TERRY, ... PETITIONER,

v.

STATE OF SOUTH CAROLINA, ...RESPONDENT.

NOTICE OF APPEAL

Petitioner, Gary Dubose Terry, appeals the Honorable Judge Robert Hood's order dismissing his capital post-conviction relief action filed on July 1, 2025 and received by counsel for Petitioner on July 2, 2025, and the order denying Petitioner's motion to alter or amend judgment, which was timely filed on July 14, 2025. The order denying Petitioner's motion to alter or amend judgment was signed on August 6, 2025 and received by counsel for Petitioner on August 11, 2025. A copy of the orders on appeal are attached to this notice.

Respectfully submitted,

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September 3, 2025.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)	
Gary Dubose Terry, #5054)	C/A No. 2022-CP-32-00924
)	*CAPITAL PCR ACTION*
Applicant,)	
v.)	**RESPONDENT'S PROPOSED ORDER OF DISMISSAL**
)	
State of South Carolina,)	
)	
Respondent.)	

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed on March 21, 2022. This is Applicant's third PCR action. Applicant had exhausted his ordinarily available state and federal remedies on or about January 10, 2022, *see* Supreme Court of South Carolina, Appellate Case No. 1997-006197, and a notice of execution was then imminent, *see* S.C. Code § 17-25-370. Applicant requested a stay of execution to pursue this action, which the Supreme Court of South Carolina granted on April 6, 2022. In that same order, the undersigned was assigned jurisdiction over the action.

On May 2, 2022, the State filed its return and moved to dismiss the action. After a hearing on motion held November 30, 2022, the undersigned issued an order on December 8, 2022, filed on December 12, 2022, denying the motion and allowing the action to proceed on the one claim: Whether Applicant can be considered intellectually disabled and avoid his sentence of death pursuant to *Atkins v. Virgina,* 536 U.S. 306 (2002) and *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003).

An evidentiary hearing in the captioned capital post-conviction relief (PCR) matter was held on July 17-18, 2024. The Court received pre-hearing briefing on the matter, and, after completion of the hearing, this Court further received post-trial briefing from both parties and

proposed orders from both parties..[1] After having considered the record and the arguments well-presented by each of the parties, this Court concludes that Applicant has not carried his burden of proof and is due no relief. Applicant's sentence of death as determined by his Lexington County jury, and affirmed after multiple layers of review, must be carried out.

PROCEDURAL HISTORY

The procedural history here is extremely lengthy as Applicant has been in near constant litigation since the late 1990s. The procedural history is more fully set out in the State's return. (*See* Return, pp. 2-19). However, this Court includes the following abbreviated summary.

Charges and Trial Proceedings

Applicant is under a death sentence for murdering Urai Jackson in her Lexington County home on or about May 30, 1994. The Lexington County Grand Jury indicted him in July 1995 for murder, burglary in the first degree, criminal sexual conduct (CSC) in the first degree and malicious injury to telephone system. In its direct appeal opinion, the Supreme Court of South Carolina briefly summarized the crime as follows:

> The victim in this case, 47 year old Urai Jackson, was found beaten to death in her Lexington County home on May 24, 1994. The window on the carport door to her home had been broken out and the telephone wires had been pulled from the phone box. Victim's mostly nude body was found in the living room, and semen was found in her vagina. She had several blunt trauma wounds to the head, and a number of defensive wound injuries. The cause of death was blunt trauma with skull fracture and brain injury.

State v. Terry, 529 S.E.2d 274, 275-76 (S.C. 2000).

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[1] This Court has thoroughly considered the matter and though it may adopt language submitted in either the briefing or proposed orders or both, the undersigned confirms that he has intentionally adopted same upon much thought, reflection, and consideration. *See generally Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (finding adoption of proposed order was allowable where "the evidence sufficiently indicates the PCR judge spent an adequate amount of time reviewing the order before adopting it").

The record also showed that DNA testing established that Applicant's semen was located in the victim's vaginal canal. ***App. 1471-73; 1480, 1497.*** Further, the forensic pathologist who performed the autopsy found at least four and possibly more blunt trauma wounds caused by a blunt, heavy, club-like object hitting the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind her right ear. The appearance of the wounds indicated that the victim was struck from behind and possibly from above and behind with a blunt instrument. ***App. 1466-68.*** Two blunt trauma lacerations on the top of her shoulder appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm and wounds to her left forearm were defensive wounds. Although these wounds were consistent with State's Exhibit 13, the top of a pool cue found at the scene, the head wounds were more likely caused by a heavier instrument that had a rounded end, such as a club or a baseball bat. The victim's thumb was "almost smashed," and the pathologist opined this could be a defensive injury caused by the perpetrator stomping on her thumb. ***App. 1468-70.***

The State timely served a Notice of Intent to Seek the Death Penalty as well as a Notice of Evidence in Aggravation of Punishment. Lexington County Public Defender Elizabeth C. Fullwood, and Isaac McDuffie Stone, III, Esq., represented Applicant at trial.

Following motions hearings before the Honorable Gary E. Clary on May 28, August 22, September 3, and September 8, 1997, Applicant received a jury trial on September 15-21, 1997. The jury found him guilty of all charges. The sentencing phase was held on September 19-21, 1997. At the conclusion of that proceeding, the jury found the presence of the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree and recommended a sentence of death which Judge

Clary imposed. He also imposed consecutive sentences of life imprisonment for burglary in the first degree, thirty years imprisonment for CSC in the first degree and ten years imprisonment for malicious injury to a telephone system. ***App. 2128-30.***[2]

Direct Appeal

Applicant timely served and filed a notice of appeal and his direct appeal was consolidated with the review of his sentence pursuant to S.C. Code Ann. §16-3-25(C) (1985). Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented him on direct appeal. Applicant presented four grounds challenging certain evidentiary rulings (exclusion of his statement; a limitation on cross-examination; and admission of a photograph of the victim) and the disclosure of his mental health records. *See* ***App. 2420.*** Our Supreme Court affirmed his conviction and sentence on March 13, 2000 in *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000), and denied his petition for rehearing on April 19, 2000. ***App. 2318-34.*** Applicant then filed a petition in the Supreme Court of the United States for review of the issue regarding exclusion of his statement. The petition was denied on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). ***App. 2443.***

First Post-Conviction Relief Action

Applicant requested and received a stay of execution to pursue PCR remedies. The stay order also contained a provision assigning the Honorable Marc H. Westbrook to preside over the action. Judge Westbrook appointed H. Wayne Floyd, Esq., and Melissa Reed Kimbrough, Esq., to represent Applicant. The case was subsequently reassigned to then circuit court judge, the Honorable John C. Few.

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[2] The citations to "App." refer to the appendix filed in the appeal from the denial of relief in Applicant's first PCR action as provided to this Court by way of the State's return.

Applicant filed his original PCR Application (2000-CP-32-3470) on or about November 30, 2000, alleging multiple ineffective assistance of counsel claims, including allegations that (1) trial counsel failed to adequately explore and present a defense of alibi; (2) trial counsel failed to adequately argue for directed verdict regarding the criminal sexual conduct first degree charge; (3) appellate counsel failed to argue the trial court erred in denial of the motion for directed verdict regarding the criminal sexual conduct first degree charge; (4) trial counsel failed to challenge the State's jury strikes against female jurors; (5) trial counsel failed to adequately investigate and challenge the physical evidence; (6) trial counsel failed to investigate possible defenses; (7) trial counsel erred in advising the jury in guilty phase opening statements that Applicant had confessed to the crimes when the confession at most admitted manslaughter; (8) trial counsel erred in advising the jury in guilty phase opening statements that Applicant confessed when the statement's admissibility had not yet been ruled upon; (9) trial counsel erred in advising the jury in guilty phase opening statements that Applicant confessed based on an erroneous assumption the State would seek to introduce the statement; and also (10) alleged a denial of due process on the allegation that the State mispresented the intent to rely on the confession at trial. ***App. 2444-56.***

Judge Few held an evidentiary hearing on July 10-12, 2006, at the Lexington County Courthouse. Applicant was present at this hearing and Mr. Floyd and Ms. Kimbrough represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented the State. Judge Few allowed Applicant to amend his PCR Application during the hearing. "Applicant's Final Amendments" containing numerous specific claims, many expanding on the general claims previously raised, but none addressing a claim of intellectual disability. ***See App. 2481-82; 2513-15; 2736-38.*** Multiple witnesses were called by the parties regarding the allegations. Subsequently, Applicant filed a post-hearing memorandum,

App. 2804-74, and the State filed a Proposed Order of Dismissal, ***App. 2875-2988***. Applicant filed objections to the proposed order. ***App. 2989-3013***. Judge Few denied relief in an Order of Dismissal filed on February 18, 2009, ***App. 3014-3125***, and denied Applicant's motion for reconsideration on March 12, 2009. ***App. 3127***. Applicant appealed.

First Post-Conviction Relief Appeal

Teresa L. Norris, Esq., was appointed to represent Applicant on appeal, and raised the following claim in a petition for writ of certiorari:

> Was Petitioner denied the effective assistance of counsel during trial due to (1) counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging"; and (2) counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing?

On November 5, 2010, the South Carolina Supreme Court granted review. After additional briefing and oral argument, the Court affirmed the denial of relief on August 29, 2011. *See Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011) (*Terry II*), *cert. denied*, 565 U.S. 1206 (2012). Applicant sought further review by filing a petition in the Supreme Court of the United States raising questions regarding counsel's reference to the confession. The State made its Brief in Opposition on December 29, 2011. The Supreme Court denied the petition in a letter Order filed on February 21, 2012. *Terry v. South Carolina*, 565 U.S. 1206 (2012).

Federal Habeas Corpus Pursuant to 28 U.S.C. § 2254

On March 26, 2012, our Supreme Court issued a notice of execution; however, Applicant sought and received a stay to pursue federal habeas corpus review. The district court appointed Teresa L. Norris, Esq., Derek J. Enderlin, Esq., and Elizabeth Franklin-Best, Esq., to represent Applicant. Applicant filed his Petition for Writ of Habeas Corpus on June 29, 2012. Applicant also filed a motion to stay the federal action to allow a return to state court for a successive PCR action to present claims not previously heard; claims that would otherwise be considered

procedurally defaulted in federal habeas review. The federal court granted the stay, over Respondent's objection, on December 10, 2012.

Second Post-Conviction Relief Action

Applicant filed his second application through counsel on June 29, 2012. (2012-CP-32-02718). Respondent made its Return and Motion to Dismiss on July 30, 2012. The South Carolina Supreme Court filed an Order on September 16, 2014, assigning the Honorable William P. Keesley to preside over the matter. Respondent filed an Amended Return and Motion to Dismiss on October 3, 2014, and argued that Applicant's 2012 Application should be summarily dismissed as untimely and successive without exception. Judge Keesley appointed Mr. Enderlin and Ms. Franklin-Best to represent Applicant. Applicant sought to stay the action until resolution of *Robertson v. State*.[3] Judge Keesley denied the request on January 29, 2015. In July 2015, Judge Keesley relieved Mr. Enderlin as counsel and appointed Ms. Norris to act as co-counsel. On September 8, 2017, Applicant moved to relieve Ms. Norris and to substitute Laura Wood Young, Esq., in her place, which Judge Keesley granted. By Order dated June 15, 2018, Judge Keesley granted the State's motion for summary judgment and dismissed the action as both successive and time barred by the state PCR statute of limitations.

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[3] On December 14, 2016, Respondent advised of the ruling in the *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016), the case that Applicant referenced in support of his request to say the action. In *Robertson*, our Supreme Court acknowledged that federal law recognized an exception to the procedural default rule (*i.e.*, claims not presented and ruled upon in state court are generally barred from review in federal habeas). The federal exception basically relied upon a showing of ineffective assistance of collateral counsel regarding the presentation of ineffective assistance of trial counsel claims. Our Court resolved that the specific federal exception is limited to federal habeas actions and did not affect the state procedural bar then affirmed once again that an applicant may not pursue "a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." *Id.*, at 516, 795 S.E.2d at 34. Additionally, the Court recognized a narrow exception to the general successiveness bar based on an allegation appointed former counsel in a capital PCR action did not meet the qualification requirements set out in S.C. Code Ann. § 17-27-160(B), but that was not at issue in Applicant's successive action attempt.

Federal Habeas Corpus Pursuant to 28 U.S.C. § 2254 (Continued)

The federal court lifted the stay and allowed Respondents to update the filed state court record and its motion for summary judgment and/or other motions as necessary. After additional filings by Respondents and Applicant, the magistrate judge filed a report in which he recommended Respondents' motion for summary judgment be granted. On September 26, 2019, the Honorable Richard Mark Gergel, United States District Judge, filed an Order and Opinion adopting the report and recommendation, granting Respondents' motion for summary judgment, and denied Applicant's timely motion to alter or amend on December 10, 2019.

Applicant appealed to the Fourth Circuit and raised the following issue:

> Whether the district court misapplied the substantiality standard prescribed by *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), by refusing an evidentiary hearing and granting summary judgment on the basis of factual determinations that are inconsistent with Terry's allegations, supporting declarations, and the existing record?

Respondents thereafter filed the Brief of Appellees and an Amended Brief of Appellees. On May 5, 2021, the Fourth Circuit filed an unpublished opinion affirming the denial of habeas corpus relief. *See Terry v. Stirling, et al.*, 854 Fed.Appx. 475 (4th Cir. May 5, 2021). Applicant submitted a petition to the Supreme Court of the United States with the following question:

> In determining whether a federal habeas petitioner's pleadings and supporting documents have alleged a substantial but defaulted claim of ineffective assistance of trial counsel that satisfies *Martinez v. Ryan's* "cause" standard, may a district court summarily dismiss the petition by drawing factual inferences against the petitioner without holding an evidentiary hearing?

Respondents filed a brief in opposition to the grant of review. The Court denied the petition on January 10, 2022. *Terry v. Stirling*, 142 S.Ct. 745 (2022).

Third Post- Conviction Relief Action

By Order dated April 6, 2022, our Supreme Court granted a stay of execution for Applicant

to litigate the instant action, noting the claim of intellectual disability. The Court assigned the undersigned to preside over the action.

Specifically, in this Applicant's third PCR action, he alleges:

> 10(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution because he is a person with intellectual disability. South Carolina law defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 16-3-20(C)(b)(10); *see also Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); *Moore v. Texas*, 137 S.Ct. 1039 (2017), *Hall v. Florida*, 572 U.S. 701 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002). Applicant has significantly subaverage intellectual functioning and deficits in adaptive functioning, both of which manifested before he was eighteen years old. He is therefore ineligible for capital punishment.

As recited above, this Court denied the motion to dismiss the application, held an evidentiary hearing and received multiple filings from the parties arguing their respective positions. The matter is now ripe to rule upon.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the filings in this case and has heard the testimony and considered the evidence presented. This Court specifically notes that it has had the opportunity to observe the witnesses presented at the evidentiary hearing, and closely pass upon their credibility, weighing their testimony accordingly. After considering Applicant's and Respondent's positions, the testimony at the evidentiary hearing, and after having carefully reviewed the Record, I find that I must deny the application for post-conviction relief. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code Ann. § 17-27-80 and S.C. Code Ann. § 17-27-160(D).

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)..[4]

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

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[4] 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.

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 or other evidence, and factfinders are guided by the same principles that always guide credibility and weight.

The Applicable Definition

In considering the test necessary to show an exemption under *Atkins,* our Supreme Court in *Franklin v. Maynard,* 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003), instructed courts to follow the definition of mental retardation, now intellectual disability, found in the murder statute, capital provisions which sets out:

> "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.3.5 It also 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*

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[5] 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, 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).

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 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. *State v. Stanko*, 402 S.C. 252, 284-288, 741 S.E.2d 708, 724-726 (2013) (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 by a preponderance of the evidence. *Franklin,* 356 S.C. at 279-280, 588 S.E.2d at 606. 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 of the Evidence

This Court first notes that the records before this Court show that that the issue of whether Applicant was intellectually disabled was initially explored for trial, and *his expert* at trial testified that Applicant did not meet the definition. Applicant has not raised an ineffective assistance of counsel claim related to the investigation of intellectual disability. This leads to a very logical inference that a potential intellectual disability claim was consistently rejected by a variety of experienced capital litigation defense attorneys and/or assisting experts. But the reason for not revisiting the claim earlier need not be determined. The Court does look at the record, though, as there are facts of record specifically relevant to the instant claim.[6]

September 1997 Trial Testimony

The primary focus of counsel's sentencing phase presentation was that Applicant had brain damage and that explained both his willingness to confess to crimes he did not commit and his violent criminal history. Part of the evaluation focused on whether Applicant was mentally retarded, but the diagnosis was rejected. The investigation and presentation of the mitigation case was thorough, which is well-demonstrated by the trial record.

In the sentencing phase, Applicant's mother testified that Applicant did not perform well

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6 By order dated December 8, 2022, this Court denied the State's motion to dismiss the action as procedurally barred. The State asserted as well that Applicant would not be able to carry his burden of proof since he previously presented an opinion, from his own expert, that he was not intellectually disabled. (*See* Order, at 1). Nothing in that order, which merely allowed the action to continue, can be construed as preventing consideration of the information presented at trial. Indeed, this Court cannot ignore what Applicant has already presented.

in school and was diagnosed by school personnel as having a learning disorder and as borderline mentally retarded. Mrs. Terry and her husband found Applicant unconscious from sniffing glue when he was thirteen. Although she called her brother-in-law doctor, she and Mr. Terry were able to revive him without taking him to the hospital and the doctor saw him the following day..[7] The Terrys never sought counseling or any other type of mental health treatment for him. ***App. 1875-80***. Terry dropped out of school at age sixteen. He also began running away from home at this time. His mother later learned that when she would take him to school after he dropped out, he and Tammy Griffin would get on his motorcycle and leave. He and Tammy had a child when he was sixteen but they did not live together as husband and wife following their marriage. At various times, they lived with the Terrys, Billy Terry, and with a woman named Patty when they lost their trailer. ***App. 1881-85***. Mrs. Terry suspected that Applicant used drugs and eventually discovered that he and Tammy had been using marijuana. ***App. 1886-87***. She also described a significant head injury that Applicant had incurred while working for a tree company in Florida, an earlier motorcycle accident, and a head injury that he received when struck in the head with a board during a fight. ***App. 1888***. She further claimed that when incarcerated after his return from Florida, there was an episode in which Applicant coughed up blood and was transported to the hospital. She likewise claimed that she had found blood on his bedroom floor and that she had witnessed him coughing blood when he lived with her. ***App. 1888-90***. Mrs. Terry testified that Applicant had problems with his memory and she had seen him stagger after the head injury that he received in Florida, but he did receive medicine that temporarily helped. ***App. 1890***.

In addition, social worker Janet Vogelsang testified that she did a psychosocial assessment

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[7] She watched Applicant that night. His breathing did not return to normal for three and a half or four hours. ***App. 1879***.

of Applicant. She interviewed Applicant (four times); Lou Ann Terry (twice); Patricia Terry (seven times); his sister; his father (seven times); his brother, Billy; his sister, Faye, his brother, Johnny; Johnny's wife; a former girlfriend, Rhonda; his sister-in-law, Patty; Tammy Griffin; his sons Morgan and Dubose (twice); his daughter, Ashley; his aunt, Marie Steel; and, by telephone his great aunt, Louise Mauldin. She also attempted to speak with other people. ***App. 1953-54.*** Additionally, she reviewed a number of records for Applicant and his family, and she spoke to the defense experts in the case. ***App. 1954-56.***[8] Based upon her investigations, Ms. Vogelsang had several conclusions regarding Applicant, his childhood, and his family environment: (1) he was born to parents whose own lives and circumstances made it "very difficult for them to parent effectively" and who, as a result, could only provide "the very basic needs for their children;" (2) Applicant had "some special developmental needs," and "there were no resources for those and no family members ... who could ... help the family ... ; (3) "the environment was neglectful" because the family "had to put all [of] its energy and effort into surviving financially;" (4) as a result of the family's financial difficulties, "there was little energy or time left ... to give the children the kind of [necessary] attention, the educational help, [or] the social skills in the forming of family relationships that one would hope to see to produce healthy children;" (5) one side of the family has a pattern of alcohol abuse; (6) there was a pattern of "rather unusual medical problems," and

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[8] She reviewed roughly four years of Mrs. Terry's diary entries, which spanned from when Terry was twelve until his arrest; school records for his immediate family and more distant relatives; DSS records on Lou Ann and Terry; DSS records on his brothers, Billy and Johnny; "records ... or documents on two of Billy's sons; the custody papers for his sister Faye; Terry's "corrections records, ... the priors on him, ... and his two brothers and two of his uncles;" medical records of Terry, his parents and his brothers; mental health records and psychological evaluations of Terry, his sister Faye, his brother Johnny, and two of his nieces; the school psychosocial education evaluations for one son and his daughter Ashley; "the reports of the crime" and crime scene photographs; the SPECT scan report from the radiologist; a statement from Dr. Jim Steele concerning the treatment of Terry's father; marriage and birth certificates; and a portion of Terry's taped statement. ***App. 1954-56.***

a pattern of learning and emotional problems for both his immediate and extended family; and (7) Applicant has "a documented history of learning disabilities and ... a history ... [of] attentiveness impulsivity, poor judgment, explosive outbursts and other behavioral indications that later have turned out to be attributable to a medical condition that causes changes in his behavior." With medical intervention, however, "it is entirely possible that he will be able to restrain himself and adapt to prison life." ***App. 1956-59.***

After explaining the bases for these conclusions and reiterating much of the information to which Applicant's parents had testified, *see* ***App. 1959-80***, Ms. Vogelsang testified that she had reviewed his records from Charter Rivers Hospital with whom she was affiliated. She also testified that he received diagnoses of organic explosive disorder, antisocial personality disorder and alcohol dependence at Charter Rivers Hospital. His global functioning was listed as mid-range. She opined that his behavior at Charter Rivers was consistent with his behavior from age thirteen up to the time of the offense, as was the history of his violent behavior. She further opined that his behavioral problems began after the episode where he was found sniffing glue. She likewise testified that someone who was not a neurologist noted that there was actually something abnormal about Applicant's brain scan and opined that such "combined with drug use which would certainly intensify any brain abnormality and then all these other factors certainly would place him at high-risk to end up in serious trouble." ***App. 1980-86.***

Dr. Robert Deysach, a clinical neuropsychologist who is board certified as a forensic psychologist with a specialty in neuropsychology, "reviewed a series of hospital records," including Applicant's records from Charter Rivers[9] and his school records, to decide whether

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[9] The Charter Rivers Hospitalization occurred outside of the developmental period when Applicant was married to Lou Ann Terry. *E.g.*, ***App. 1894; 1936.***

additional neuropsychological testing was warranted because the Charter Rivers records indicated both explosive behavior by Applicant and an abnormal CAT scan, which depicted a "lunar infarction, [or] dead cells involving the basal ganglia in his brain." ***App. 1994-2004.***

Dr. Deysach met with Applicant twice and he did general ability testing. This revealed that Applicant's intellectual functioning was "in the low average range," but that he was not intellectually disabled. Other testing reflected that there was no damage to the left side of Applicant's brain. He also did not have any problems with the right portion of his brain that is involved in perceiving information. Yet, there were problems with Applicant's right frontal lobe. In particular, he performed in the "abnormal range" for his age, and he had "specific difficulties in ... inhibiting and focusing [his] attention," as well as similar tasks. Dr. Deysach explained that Applicant had "an abnormal condition of the brain that tends to be a powerful factor in controlling abnormal behavior." ***App. 2004-12.*** Dr. Deysach opined that Applicant had "a neuropsychological deficit that ... appeared to be consistent with the indication he had of brain injury and that it was due to an abnormality of the brain." This was consistent with Applicant's 1994 organic explosive disorder diagnosis and the CAT scan. Dr. Deysach further opined that people with this type of deficit often cannot manage themselves in unpredictable daily living conditions. However, they adapt to a structured environment. ***App. 2013-14.***

The following exchange between trial counsel and Dr. Deysach is relevant here:

Q DID YOU RELY ON [A CAT SCAN] IN MAKING YOUR DETERMINATION CONCERNING MY QUESTIONS?

A YES. WHAT I DECIDED ON THE BASIS OF THAT WAS THAT [THE CAT SCAN] WAS SUFFICIENT FOR ME TO THEN TAKE THE NEXT STEP AND THAT WAS TO ACTUALLY MEET WITH AND TEST MR. TERRY.

Q NOW, DID YOU MEET WITH AND TEST MR. TERRY?

A YES, I DID ON TWO SEPARATE OCCASIONS.

Q ALL RIGHT. AND WHAT WERE THESE TESTING PROCEDURES THAT YOU DID?

A ... ACTUALLY, ... I WAS ATTEMPTING TO DO TWO THINGS.

THE FIRST THING THAT I DID WAS I DID SOME GENERAL ABILITY TESTING. **I GAVE HIM A BATTERY OF TESTS IN WHICH I WANTED TO MAKE A DETERMINATION OF WHETHER OR NOT ... I WAS DEALING WITH SOMEBODY WHOSE BEHAVIOR FELL IN THE RETARDED RANGE, MENTALLY RETARDED RANGE OR NOT.** DEPENDING ON WHETHER OR NOT HIS PERFORMANCE IS RETARDED, THEN I WOULD EXPECT, PERHAPS, PROBLEMS IN A LOT OF DIFFERENT AREAS.

... IF HIS INTELLIGENCE WAS, HOWEVER, IN THE NORMAL RANGE, THEN IT MIGHT ALLOW ME TO TAKE THE NEXT STEP AND THAT IS TO DO SOME TESTING THAT WOULD ALLOW ME TO SPECIFICALLY LOOK AT PARTICULAR PARTS OF THE BRAIN AND THE RELATIONSHIPS WITH BEHAVIOR THAT THAT PART OF THE BRAIN CONTROLS.

Q **WAS GARY TERRY RETARDED---**

A **NO,** HIS---

Q ---EXCUSE ME, LET ME REPHRASE THAT. **DID YOUR TEST REFLECT THAT GARY TERRY WAS RETARDED?**

A **NO. HIS PERFORMANCE FELL IN THE LOW AVERAGE RANGE.**

Q OKAY. BUT NOT RETARDED?

A **BUT NOT REGARDED.** [(Sic)]

App. 2005-2006 (emphasis added).

In further support of the position, David Bachman, a behavioral neurologist at MUSC, opined that the result of Applicant's CAT scan was "relatively normal with one exception." A tiny dot reflected an abnormality that could have been caused by a stroke or otherwise. The SPEC scan performed in 1997 showed an abnormality and decreased activity on the right frontal lobe of the brain. This meant that the "brain tissue is dysfunctional" and that blood flow in that area was "down." Dr. Bachman opined that this abnormality was confirmed by Dr. Deysach's neuropsychological testing. ***App. 2020-30.*** Dr. Bachman opined that the abnormality present in Applicant's brain was "very consistent" with organic explosive disorder because that 1994 diagnosis, which was based on behavior that Applicant had exhibited, was confirmed by the subsequent testing. ***App. 2030-31.*** This type of abnormality can be caused by a head injury. A person with it may become irritable, demanding, abusive, and even physically so. The person does not necessarily have legal problems but will have problems in the family. While the person may

have difficulty controlling his behavior, he can do so to some extent. The first step in treating this abnormality is to recognize it exists. There are three ways to treat it. The first is changing the environment in which the person lives. Second, both the patient and his family can be educated. Third, it can be treated with medication. While at Charter Rivers in 1994, Applicant was placed on Tegretol, which takes "the edge off" of the person's behavior; and Dr. Bachman testified that Applicant responded well to it. ***App. 2032-37.***

Dr. Donna Schwartz-Watts, a forensic psychiatrist retained by trial counsel, opined that Applicant had "an organic mental disorder not otherwise specified." She described this as a major mental disorder that is caused by brain dysfunction, as opposed to chemical imbalances or personality disorders. She explained that "it affects his thinking, his feelings and his behavior." Persons with this disorder "can at times become suspicious and paranoid[,] ... [and] they can be quite moody." As an example, she said that they may laugh or cry "out of context." She further opined that the behavior of a person with this disorder "can be quite aggressive, [and] explosive," the person might have "sexual indiscretions," and can be "very, very impulsive." ***App. 2055-56.*** She testified that Applicant reported that he was using crack and Valium, and she believed that he had minimized his alcohol use when asked about it at Charter Rivers. The drug use and brain disorder may have "greatly dis-inhibit[ed] [his] behavior." ***App. 2059-60.*** She testified that Tegretol is used to control mood, and Applicant immediately reported a positive benefit from using it, and even requested it when in the Richland County Jail. ***App. 2060-62.***

This Court considers this information very persuasive. The fact that intellectual disability as a condition[10] was considered without any possibility of a tinge of bias due to the later established

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[10] The diagnosis would not have been merely informational at the 1997 proceedings, but supportive of a statutory mitigation circumstance. *See* S.C. Code Ann. §16-3-20(C)(b)(10) (Supp. 1997). Thus, the defense would have had discrete reason to want to develop the information on

exemption in *Atkins* makes the opinion particularly compelling. The record also shows a history not of intellectual disability, but of learning disabilities and drug use, which began as a teenager, and later in life head injuries.

The Court does not consider the prior opinion and presentation as wholly dispositive (hence the prior order allowing the action to continue) and it has considered the new evidence presented in this proceeding. However, the new evidence does not convince this Court that Applicant has carried his burden of proof. The credible evidence supports that Applicant does not suffer from the specific condition at issue, *i.e.,* intellectual disability, which, in turn, is consistent with the opinion acknowledged at the 1997 trial.

Applicant's New Experts

At the hearing, Applicant first presented Dr. Stephen Greenspan, who was found qualified as an expert in psychology with a specialization in diagnosing intellectual disability..[11] (PCR Tr. p. 19, 39, 47). During his testimony Dr. Greenspan admitted that he was opposed to the death penalty. (PCR Tr. p. 127). Dr. Greenspan also admitted that he testified in numerous *Atkins* proceedings, however, each was for the defense and he never testified for the State. (PCR Tr. pp. 128-129). Dr. Greenspan testified that the only people he spoke with was Applicant and his ex-wife Louanne. (PCR Tr. p. 130). Dr. Greenspan admitted that he was not able to sufficiently interact with Applicant's mother for an information interview of substance; however, Dr. Hall was able to have a good interview with her.

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the condition had there been a basis to do so.

[11] Respondent challenged the methods used by Dr. Greenspan, though not his qualifications. Respondent submitted that methods, particularly certain testing, was not recognized in the psychological community. This Court allowed the witness to testify, *see* PCR Tr. pp. 45-47, but has considered his methods, and particularly reliance on his individually developed test questions as opposed to use of accepted instruments or dialog, as part and parcel of the credibility analysis.

(PCR Tr. p. 131). Dr. Greenspan admitted never speaking with Applicant's teachers, childhood friends, or any of his previous doctors. (PCR Tr. p. 132).

Dr. Greenspan acknowledged that this action constituted a legal proceeding, not a medical proceeding. (PCR Tr. p. 133). Further, he acknowledged that the law as stated in Section 16-3-20(C)(b) of the South Carolina Code of Laws is what must be followed. (PCR Tr. p. 134). He also agreed that the definition of intellectual disability in the DSM-V is very similar to South Carolina law. (*See* PCR Tr. p. 134). Yet his opinion broke with the relevant test in important ways.

For example, he agreed, DSM-V sets out that "deficits must be confirmed by both clinical assessments and individualized, standardized intelligent testing." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS Fifth Edition pg. 33. (*See* PCR Tr. 135-136). However, during the developmental period Applicant submitted to two IQ tests. One at age 11 in which he scored 92, and one at age 14 in which he also scored 92. When Dr. Greenspan was questioned on these scores, he admitted that these scores were not mentioned in his report. He testified that it was "probably an oversight," but admitted that those tests, well-above the cut-off and given during the developmental period, were "certainly complicating factors." (PCR Tr. p. 136). Dr. Greenspan also testified that he would have to see actual reports from psychologist, and that he would be more confident in those scores if he knew how they were administered, but he conceded he had "no reason to think they aren't" validly given tests. (PCR Tr. p. 139). The test were tests given by a school psychologist, and no evidence demonstrates these tests were not properly given or that the scores are not valid. (*See* PCR Tr. 140-141). The Court is left with a distinct impression that the test were not included as they could not be discounted. Dr. Greenspan did include the 2022 test results, but did not note or address that Applicant had Shingles at the time that affected his vision, though Dr. Greenspan admitted "[i]t could affect the score, yes." (PCR Tr. pp. 136-137). These

significant omissions greatly undermine Dr. Greenspan's credibility on an essential basis for evaluating the first prong.

Dr. Greenspan's credibility was likewise undermined by lack of supporting and/or persuasive data as to the next prong. Dr. Greenspan testified that he believed that Applicant had problems with adaptive functioning; however, he made this determination having not spoken to Applicant's mother, teacher, or any of his friends that he had during the developmental period. (PCR Tr. pp. 142,144). During his testimony Dr. Greenspan admitted that he did not know what kind of adaptive functioning Applicant demonstrated during the developmental period; only that Applicant had made bad grades, which is common with someone with a learning disability, and he was given a maturity scale test in fifth grade. (PCR Tr. pp. 142-146). Dr. Greenspan agreed that Applicant was never diagnosed as having intellectual disability while he was in school but was tested and assessed as having a learning disability. (PCR Tr. pp. 142-143, 146).

During his direct testimony, Dr. Greenspan mentioned that somebody stated that Applicant was borderline retarded. (PCR Tr. p. 147). However, the record supports that he was mistaken. Dr. Greenspan apparently admitted that he was referencing a school psychologist Tommy Wicker who recommended that Applicant remain in regular education classes and be placed in the resource room daily. (PCR Tr. p. 147)..[12] Applicant was retained in the fifth grade and his mother recalled to Dr. Hall that a teacher named Fritzgerald being adamant that "Gary was a slow learner but was not retarded." Ms. Terry and Ms. Fitzgerald believed that Applicant needed to get more individual attention. And Applicant benefited from this one-on-one attention because all of his test scores

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[12] Dr. Greenspan also appeared to misunderstand a note from a social worker in the original trial to be information from Applicant's mother and agreed on cross-examination that the information was neither in the school reports nor provided by Mrs. Terry. (PCR Tr. p. 150-151). This follows the consistent and troubling imprecision and/or omissions in Dr. Greenspan's opinion.

improved, and he was promoted to the sixth grade. (PCR Tr. pp. 147-148). Dr. Greenspan was totally mistaken regarding any teacher stating that Applicant was mentally retarded. Quite to the contrary, there was a teacher advocating that Applicant was not mentally retarded. And, also critically, once Applicant had more resource classes his grades improved, supporting that he was not in fact intellectually disabled.

Dr. Greenspan admitted that he was good at practical adaptive functioning because Applicant could do his work as a child with no assistance and was able to fix things; "that shows good, practical adaptive functioning." (PCR Tr. p. 149). This Court credits that portion of his testimony as the facts support that conclusion.

There was evidence that Applicant was not easily manipulated as may be the case with the intellectually disabled; rather, Applicant was good at manipulating others. He first met his wife when he was a high school dropout, and she was a college student. He lied to her telling her he was 26 when he was only 19 and she fell for it. (PCR Tr. p. 152). Applicant's wife Louanne told Dr. Greenspan that the Applicant would sweet-talk her and bring her flowers when he messed up. (PCR Tr. p. 153). Louanne found Applicant "charming and amusing." (PCR Tr. p. 153). Applicant also convinced a woman to marry him while he was on death row. (PCR Tr. p. 153). Dr. Greenspan admitted that Applicant had a lot of girlfriends, that he had some skill in that department. (PCR Tr. p. 153). [13]

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[13] Other evidence in the records also well-established Applicant's violent, predatory interactions with women, which was not contested at the hearing. For example, Applicant once stabbed a prostitute in the neck and was calm afterwards. ***App. 1620.*** He also raped his ex-wife, Tammy Griffin, during their marriage, and she ultimately obtained a divorce from him on the grounds of his physical cruelty. ***App. 1773-75.*** A former girlfriend, Dianne Gibson, testified that he had a "hot, quick temper," and that he "would throw things" if she disagreed with him. ***App. 1744.*** Applicant also damaged several of her cars, setting one on fire. ***App. 1755-56.*** "After one fight, [Applicant] left her at a friend's house" and went and "busted" her answering machine and tore up photos and threw them around her room. ***App. 1744.*** On another occasion, he threw her

Applicant also had a successful repossession business that he started himself. This business was successful until he got injured and relied on his cousin to manage the business, but his cousin stole from him. (PCR Tr. p. 155). So, the failure of the business was not due to any business decision made by the Applicant other than trusting a family member who ended up stealing from him. This is something that many people have done, unfortunately, but is not indicative of a personal, intellectual failing of any kind in general business acumen or skill. Dr. Greenspan's reliance on a failed business as indicative of *intellectual* limitations is not credible and is unpersuasive.

Dr. Greenspan also discussed and found important that Applicant generally worked at menial jobs. Applicant had worked at two grocery stores, at a gas station as a mechanic and for a tree service. However, these are the types of jobs that someone with only a tenth-grade education would most likely be able to get. A person without an education, particularly without graduating from high school, will not be qualified for a high-paid, high-level job. Dr. Greenspan's reliance on the jobs as indicative of *intellectual* limitations is not credible and is unpersuasive.

Dr. Greenspan also discussed his questionnaire where during his examination he would ask questions that are in certain scenarios where the person would have to come up with a "good answer" or a "bad answer." And the determination of the good or bad answer would only be made by him. (PCR Tr. p. 165). However, these scenarios are not just black and white, there were some gray in these cases so a person might do a bad answer for a good reason. Dr. Greenspan admitted that in one of his scenarios a person might lie to a doctor or a nurse, which is a bad thing to avoid

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kitten up against the wall and threw the T.V. off the shelf in a house they shared. ***App. 1744-45.*** Gibson recalled that there were multiple incidents where she tried or threatened to leave him, and he threatened to burn down her home or otherwise threatened her home or family. ***App. 1756.*** She testified that although Applicant did not physically abuse her, he controlled her "emotionally and mentally." ***App. 1745.*** She knew that he would steal things, to fund his drug habit, including money from her paychecks. ***App. 1745-47.***

their child being taken. (PCR Tr. p. 167). And unlike Dr. Hall, Dr. Greenspan never asked questions to determine Applicant's intelligence. (PCR Tr. p. 169). Dr. Greenspan's reliance on an imprecise and self-created questionnaire undermines his credibility.

In sum, Dr. Greenspan's overall lack of precision and omissions negatively affect his credibility and the sufficiency of his diagnosis. This Court rejects his opinion. It is entitled to such little weight that it does not aid Applicant in his burden of proof.

Applicant also called Dr. Scott Decker. Dr. Decker was found qualified as an expert in neuropsychology and IQ test administration. (PCR Tr. p. 200). However, Dr. Decker was not asked to offer an opinion on intellectual disability. (PCR Tr. p. 200). Dr. Decker merely administered the Woodcock-Johnson IQ test for purposes of this litigation (*i.e.*, well-past the developmental period). Applicant's final score was a 77. However, at the time Applicant was tested, he was actively suffering from Shingles. In his report Dr. Decker wrote that Applicant "complained of right eye facial pain due to shingles and stated it occasionally obstruct – obscured vision in his right eye." (PCR Tr. p. 215)..[14] Also Dr. Decker stated in his report that Applicant "demonstrated a specific weakness in visual processing speed test. Although his performance on this test could be considered the context of right-sided facial pain with possible visual difficulties in his right eye due to shingles virus." (PCR Tr. p. 218). Dr. Decker admitted that the shingles virus could have affected his scoring that is why it was documented. (PCR Tr. p. 218). The score, with these admitted limitations, should be given no weight in this analysis, and this Court affords it no weight.

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[14] The transcript reflects the word "visitation" however, that is a clear typographical error which should be "vision."

The Court's Experts

The Court ordered that Applicant be examined by the Department of Disabilities and Special Needs ("DDSN"). For the evaluation, Applicant was given another IQ test by Dr. Jessica Davis. Dr. Davis testified at the hearing. She was found qualified as an expert in psychology and administering IQ tests. (PCR Tr. p. 233). Notably, Dr. Davis administered an IQ test at a time when Applicant did not have any visual problems. (PCR Tr. p. 238). The range that Dr. Davis reported was 78 to 86, with a full-scale score of 82. (PCR Tr. pp. 242-243). Dr. Davis also acknowledged that Applicant tested previously, during the developmental period (age 14), and scored a 92, which is within the average range. (PCR Tr. p. 247). Dr. Davis testified that it is extremely rare that a person tested, *twice*, higher than their capabilities; in fact, she has never seen it happened before. (PCR Tr. p. 248). She explained that it is relatively easy to get a lower score due to certain factors like fatigue or low effort, but it is very difficult to fake a higher intelligence level. (PCR Tr. pp. 247-248).

The last person to testify was Dr. Alicia Hall from DDSN. Dr. Hall was qualified as an expert in the field of forensic psychology and in intellectual disability assessment both before and after the developmental period. (PCR Tr. p. 274). Dr. Hall testified that she examined over 10,000 pages of records and that she interviewed Ms. Louanne Smith, Applicant's second wife, and his mother, Mrs. Patsy Terry. (PCR Tr. p. 275). She also reviewed South Carolina Department of Corrections records for Applicant, along with the trial transcript and documents from Applicant's previous appeals. (PCR Tr. p. 275). Dr. Hall testified that she also interviewed Applicant. Dr. Hall testified that information on menial labor employment or one's ability to drive a car, for instance, is a data point, and does not, alone, indicate intellectual disability. (PCR Tr. pp. 287-288). Dr. Hall's testimony showed that she was not influenced by stereotypes either for or against

intellectual disability. (PCR Tr. p. 288). This contrasts greatly with Dr. Greenspan's summary, and often incorrect, basis for his assertions.

Dr. Hall noted that in Applicant's case, there was no record or report or indication of any developmental delays. (PCR Tr. p. 291). In questioning about his life abilities, Applicant's mother told Dr. Hall that he was doing work around the house contributing to the household and learning skills that help facilitate independent living. (PCR Tr. p. 292). Applicant had a traditional family in terms of gender role assignment. Mother did all the work and delegated to the children, father did nothing. (PCR Tr. p. 292). Dr. Hall found that Applicant was placed in general education work where he would get assistance instead of special education teaching. (PCR Tr. p. 296). When he was admitted into Charter Rivers (as an adult) his medical notes indicate good intellectual capacity. (PCR Tr. p. 297). Notably, Applicant interacted with a mental health professional and that professional was not concerned about the presence of intellectual disability. (PCR Tr. p. 297).

Considering the first prong in particular, Dr. Hall testified that starting at age 11 Applicant was given the Wechsler Intelligence Scale for Children and had a full scale of 92. This was a test not only that she could professionally recognize, but also one that she has relied on before. (PCR Tr. p. 299). Three later years later, at the age of 14, Applicant was given the same test and once again tested at 92. (PCR Tr. p. 299). This told Dr. Hall that Applicant was testing in the average range and was consistent from time one to time two. (PCR Tr. p. 299). She requested a test that was administered by Dr. Davis which had a full-scale score of 82. (PCR Tr. p. 301). The lower score in adulthood was not likely reflective of significantly low intellectual ability in the developmental period, though she did believe, and quite candidly noted, that Applicant has some cognitive defects presently from "injuries that he incurred in the post-developmental period...." (PCR Tr. p. 301).

Dr. Hall stated that even with the Flynn effect.[15] his first two scores would remain around 90, which is still considered around the average mark. (PCR Tr. p. 302). Dr. Hall explained that the normal range would be from 90 to 109. (PCR Tr. p. 303). Applying the Flynn effect, the two scores are still considered average, the last at the cusp of low-average: the age 11 test at 90.68 and at that age 14 test at 89.36. (PCR Tr. p. 304). Dr. Hall also considered the difficult childhood that Applicant had. She noted that any type of abuse, or a lack of support for homework, *i.e.,* a child's environment, can affect the ability of a child to successfully go through school. (PCR Tr. pp. 306-307). However, that has nothing to do with intellectual functioning. (PCR Tr. p. 307).

When asked about the work Applicant had to do at the house when he was married, Applicant explained that his wife did the work inside the house, and he did the outside work. He brought money home from work and gave money to his wife to go grocery shopping. Applicant stated that he would occasionally prepare a meal, but he primarily left that up to his wife. (PCR Tr. p. 308). Notably, Dr. Hall questioned Applicant for examples and did not leave the information

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[15] 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"), *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 Amendment analysis at issue, an adjustment that must be applied. Nor should it when viewed under comments regarding its use in current manuals. 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. This Court does not find the referenced Flynn effect is generally accepted, or even reasonable or necessary to apply, but in this case, the effect, if it exists and is applicable, simply makes no difference in light of valid and credible testing results from the developmental period, and particularly, from Dr. Davis.

at surface or face value, and additionally considered Applicant's beliefs on how work should be divided, essentially what his background would dictate as preferred or expected. (*See* PCR Tr. pp. 307-309). This adds great credibility to her opinion. Likewise, Dr. Hall observed that Applicant took a protective stance for his brother, believing himself to be "emotionally stronger than his brother, able to deal with some things more than his brother could," and taking "responsibility to step up and take care of his brother in those ways." (PCR Tr. p. 309). This reinforces choices, not limitations. This Court credits Dr. Hall's detailed assessment.

Finally, Dr. Hall testified that even if you took away the third prong time limitation, Applicant would still not meet the first two prongs for intellectual disability. (PCR Tr. p. 310). However, Dr. Hall opined that looking at all the evidence during the developmental period reveals that Applicant is not intellectually disabled. (PCR Tr. p. 310).

Again, the credible opinions rest with Dr. Hall and Dr. Davis. This Court finds that Applicant fails in his burden of proof.

Conclusion

Based on the foregoing, this Court does not afford any significant weight to Applicant's experts based on specific errors, bias, and lack of accurate and/or meaningful support as demonstrated above. On the other hand, Dr. Hall and Dr. Davis gave credible and supported testimony showing that Applicant cannot meet his burden of proof. This Court finds that based on the totality of the evidence, including the fact that the opinion Applicant does not meet the criteria for establishing intellectual disability is consistent with the opinion of his expert from the 1997 trial, Applicant has failed to meet his burden of proof. Applicant has not shown he suffers from intellectual disability and Applicant is not exempt from execution. .[16]

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[16] The Court acknowledges that Respondent submitted and argued that the intellectual disability exemption recognized under the Eighth Amendment in *Atkins v. Virginia* should be revisited. (*See*

IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to and remain in the custody of the South Carolina Department of Correction until such time as his death sentence may be carried out.

IT IS SO ORDERED this 27 **day of** June **, 2025**

Robert E. Hood, Presiding Circuit Court
Judge by Special Assignment

Columbia, South Carolina.

Respondent's Post-Hearing Brief, at pp. 18-20). Whether this Court agrees or not, the Court lacks the authority to overrule Supreme Court precedent and will decline the invitation to review and reconsider *Atkins*.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Gary Dubose Terry, #5054 Applicant, v. State of South Carolina, Respondent.	)	C/A No. 2022-CP-32-00924 *CAPITAL PCR ACTION* **ORDER DENYING APPLICANT'S MOTION TO ALTER OR AMEND JUDGMENT**

This Court issued its order of dismissal in the above captioned case on June 27, 2025. Applicant filed a timely motion to alter and amend the Court's order, and the State filed a response. Upon consideration of the parties' positions, this Court denies the motion.

Petitioner argues four overall points in his motion: 1) the Court should not have adopted a proposed order; 2) the Court did not view the evidence correctly under the relevant standards; 3) the Court should not have considered the prior trial testimony when the trial was conducted prior to *Atkins v. Virginia,* 536 U.S. 304 (2002); and 4) continues in his argument that the record is not complete due to miscellaneous errors in the hearing transcript. Applicant's arguments rest largely on his mere disagreement with the findings of fact and conclusions of law in this Court's order and his continued objection to the sufficiency of the transcript that was separately ruled upon. Applicant has failed to show any change to the order is warranted. This Court sets out its reasons for the denial more fully as follows:

1. As to adopting the language of the State's proposed order, as Applicant concedes, the Court did make changes to the proposed order. (Mtn., n. 1). This Court underscores that it based its decision on the evidence and the order reflects this Court's view of the case. This Court afforded detailed review of the order and has again reviewed the order in considering the relative

positions of the parties and again affirms that the order reflects this Court's decision. This process neither offends *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), or *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589-90 (2019). The process of submitting proposed orders is built into our rules, (*see* Rule 5(b)(3), SCRCP), and custom, *Hall, supra*. To be clear, this Court carefully reviewed the proposed order in detail and found that the facts are well and fully supported, and that the order accurately reflects the Court's view of the case considering the pre-trial filings, the testimony and the post-trial filings where the parties ably presented their competing positions. *See also United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 656 (1964) (in reviewing the order from district court's adoption of entirety of proposed order, "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."); *Patton v. State*, 784 So. 2d 380, 388 (Fla. 2000) (rejecting challenge to verbatim adoption noting,"[t]he court chose to adopt the State's arguments as an accurate and well-documented reflection of the facts and law pertaining to the issues"); *Young v. Catoe*, 205 F.3d 750, 755 n. 2 (4th Cir. 2000) ("disposition of a petitioner's constitutional claims [through adoption of one party's proposed language] is unquestionably an 'adjudication' by the state court").

Further, there is an element of waiver here. As Applicant is constrained to admit, he engaged in the proposed order process not simply by having notice of the proposed order as submitted by the State (which he did), but also by submitting *his own* proposed order. (*See* Mtn., at 2). *See generally Maybank v. BB&T Corp.*, 416 S.C. 541, 564, 787 S.E.2d 498, 510 (2016) (finding "Corporation waived its right to contest personal jurisdiction by actively participating in litigation"). *Cf. Davis v. Parkview Apartments*, 409 S.C. 266, 281, 762 S.E.2d 535, 543 (2014) (to

appeal discovery order, one must suffer contempt and appeal, and if not, the rulings "[r]ight or wrong" are "the law of the case"). Either by waiver or on the merits, Applicant's argument fails.

2. As to his complaint that the Court has accepted and applied "incorrect applications of the law of *Atkins*" and "clinical guidelines" in making its decision, (Mtn., at 4), Applicant has failed to support his assertion. Applicant first argues the Court's footnote 5, which correctly states, even by Applicant's critique of the case, the statement from a Texas jurist that supposed a reading of what a "true Eighth Amendment" analysis would entail.[1] (*See* Mtn., at 4-5). What he wholly missed is that the Court was not *applying* the observation, and the Court *declined* to consider whether *Atkins* should be revisited. (Order, at 31 n. 16). Applicant fails to cite to any perceived error in "The Applicable Definition" section that controls. (*See* Order, at 11-13). Applicant's arguments fail to show any incorrect standard set out in the acknowledgment of the controlling case or any incorrect application of *Atkins* in the Court's analysis. The remainder of Applicant's arguments simply ask the Court to again review the case and view it differently, *i.e.,* in the fashion Applicant desires. There is no basis for modification shown, and Applicant's argument fails.

3. As to his complaint that the prior sworn testimony from Applicant's original trial should not be considered here because the "1997 trial … took place before *Atkins* was decided[.]" This Court was aware of the fact and considered the prior evidence consistent with the conclusion. (Order, at 22 and 31). It would be exceedingly odd for the conclusions to differ since the condition is a developmental one, not one that can be developed after the developmental period. *See Franklin v. Maynard,* 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003) (citing S.C. Code Ann. § 16-3-20

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[1] That statement was based, in large measure, on dissents authored by Chief Justice Roberts and Justice Alito, along with principles extrapolated from Supreme Court precedent. See *Ex parte Segundo*, 663 S.W.3d 705, 712 (Tex. Crim. App. 2022). The Texas jurist was in good company.

(C)(b)(10)). Even so, this Court set out specifically, "the new evidence does not convince this Court that Applicant has carried his burden of proof." (Order, at 22). Thus, this Court treated each body of evidence separately and Appellant's argument fails.

4. As to Applicant's last argument, this Court finds his complaint is ill-phrased. Applicant complains the *transcript* of the hearing is not complete, not that the Court did not hear the evidence. The record is not materially incomplete. At any rate, the Court has already ruled on that issue and that was not a ruling made in the Order of Dismissal; thus, the complaint is not proper for a motion to alter or amend. The purpose of Rule 59(e), SCRCP to alter or amend the judgment is to request the trial judge to "reconsider matters properly encompassed in a decision on the merits." *Arnold v. State,* 309 S.C. 157, 172-173, 420 S.E.2d 834, 842 (1992), quoting *Budinich v. Becton Dickinson and Co.,* 486 U.S. 196, 200, 108 S.Ct. 1717, 1720 (1988). Applicant's argument fails.

IT IS THEREFORE ORDERED, Applicant's motion to alter or amend is DENIED.

Robert E. Hood, Presiding Circuit Court
Judge by Special Assignment

August 5, 2025

Columbia, South Carolina.