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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Robert E. Hood, Circuit Court Judge

Appellate Case Number: 2025-001760

GARY DUBOSE TERRY, #5054,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
VOLUME **2** OF **3**

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A Yes.

Q And is relying on the opinions in examinations of neuropsychologists, is that something that's endorsed by the DSM-5 and/or the AAIDD manual?

A Yes. Neuropsychological testimony and assessment is very critical. It should be part of any Atkins case. DSM-5 -- excuse me -- goes even so far as to say that neuropsychological data is often more important than IQ, not only at getting at Prong 2 but also getting at Prong 1, which is intellectual functioning.

And, in fact, Dr. Deysach talks about something that he called adaptive intelligence, quote/unquote, which is a term that's also used in DSM-5 where they indicate that adaptive -- deficits in adaptive intelligence, and they specifically mention risk unawareness as an example of that. It's very important to diagnose the intellectual disability in both Prong 1 and Prong 2.

And by adaptive [indiscernible] are referring to how someone views various stressful and potentially dangerous situations.

MR. GROSE: Your Honor, that's all the questions I have at this time. I would renew offering -- I would renew offering Dr. Greenspan as an expert in psychology and diagnosing intellectual disability.

THE COURT: And is he your first witness?

MR. GROSE: Yes, sir.

THE COURT: Okay.

Dr. Greenspan, just stay with us for a few minutes. Okay? Don't go anywhere but I'm just going to mute you while we do some things here on the record. Okay?

THE WITNESS: Very good, sir.

THE COURT: Thank you.

Rod, are we up? Rod? We're up?

All right. So the applicant has proffered Dr. Greenspan as the expert in the area of psychology and diagnosing intellectual disability as a specialty; is that correct?

MR. GROSE: Yes, sir.

THE COURT: All right. Let me hear your argument as to qualifications and admissibility under -- well, the test for determining the admissibility [indiscernible] evidence under [indiscernible].

MR. EVANS: Your Honor, [indiscernible] mentioned Jones earlier, and the Court ruled [indiscernible] Jones and State v. Council. The indications -- well, I'd just ask you to consider whether or not, to find somebody reliable, those publications and peer-reviewed [indiscernible] by application of the method, the type of evidence involved in the case, quality control procedures to ensure reliability and consistency of the method recognized scientific [indiscernible] procedures.

Our basic argument is, first of all, [indiscernible] nobody else used it [indiscernible] actual results are totally determined by [indiscernible]. And he [indiscernible] with the knowledge of whether or not something is common sense.

Common sense to him is different than common sense to me. Common sense to him is definitely probably different than common sense [indiscernible] in this case. But [indiscernible] determine [indiscernible]. We don't see that in that [indiscernible].

THE COURT: So as far as the -- the way my brain kind of processes through this [indiscernible], just so you understand the framework that [indiscernible], it's kind of step number one is we have [indiscernible], per Council, we have to go through will the evidence assist the trier of fact if he's qualified, and is the underlying [indiscernible] reliable.

You're really focusing in on Factor 3, [indiscernible] triggers and [indiscernible] factors of qualification [indiscernible] criminal in doing, is this the practice in the field. And that's where you're focusing in on to try and exclude him as an expert witness.

There's no doubt that he has the requisite education to be a psychologist or that he's licensed to be a psychologist or has been in the past or has training in psychology or any of that kind of stuff; right?

UNIDENTIFIED MALE: Yes, sir.

MR. EVANS: But, Your Honor, the thing about it is, the second prong [indiscernible] DSM-5. Adaptive functioning must be shown that [indiscernible] to do that, according to DSM-5, only by questioning an individual but also [indiscernible]. Also [indiscernible]. [Indiscernible] did not do that, to force his wife -- he was forcing -- his wife was forced by [indiscernible] Mr. Terry, but also [indiscernible] his mother. You know, Dr. Hall did speak with his mother and got valuable information out of him. That was not done by this doctor. He said in the deposition that [indiscernible] talk to me [indiscernible]. However, Dr. Hall did.

Also, Your Honor, he relied on that questionnaire [indiscernible].

THE COURT: [Indiscernible] questionnaire?

MR. EVANS: Yes, sir, Your Honor. And our opinion is that that's not reliable. Nobody else is using it. It was [indiscernible] reliable [indiscernible] somebody else would be using it in the country. Nobody else is using that questionnaire. It is only him that is using it; therefore, we question his reliability. We question that reliability and for it to be used [indiscernible] deficits of adaptive functioning, we feel that it is wrong. It should not be reliable in this court under testimony of this doctor because that is a major factor in determining whether somebody [indiscernible].

Also, Your Honor, if I can read to the Court regarding what's measured by DSM-5, on page 37, it says, "Standardized measures are used for knowledge or [indiscernible]. Parent or other family members, teacher, counselor, provider." And it's [indiscernible] -- there's no source or information [indiscernible] from a medical and mental health evaluations or some standardized measures and interview sources must be interpreted to use the clinical judgment.

Our opinion is that has not been done in this case in order to make a determination on [indiscernible] functioning; therefore, our argument is that he should not be allowed to testify, especially [indiscernible] because the methods he used are not reliable and should not be followed by this Court in making a determination of whether or not Mr. Terry is intellectually disabled.

THE COURT: Okay. Thank you, Mr. Evans.

Mr. Grose?

MR. GROSE: Yes, Judge. [Indiscernible]. And I think we don't have any issue on the first prong, [indiscernible]. The issue on the third prong [indiscernible]. And I wanted to go more into DSM and these scores because, as Mr. Evans just argued, there's a [indiscernible] judgment now [indiscernible] instruments to determine.

However, first let me say it's just broad. It's not [indiscernible]. Dr. Greenspan did talk to Mr. Terry's mother

and Mr. Terry's ex-wife, so [indiscernible].

Dr. Greenspan will testify about his review of [indiscernible], which was [indiscernible] diagnosis as to Prong 1 and Prong 2. Though they're in the report, we didn't get in to all of that.

I will also note that, you know, if they're trying to make a common sense questionnaire [indiscernible]. Dr. Greenspan is not [indiscernible] something that is not a structured interview where he needs this [indiscernible] assessment. He testified that it's something that the psychiatrist and psychologists generally do, and I would just note [indiscernible], that [indiscernible] call Dr. Hall from DDSN, and [indiscernible] of SCDDSN competency to stand trial instrument that she used.

We've also been provided with a Patton Informal Adaptive Behavior Inventory, Adaptive Behavior [indiscernible] questionnaires as [indiscernible]. Those are also -- I would be [indiscernible] say those are instruments that are structured interviews, particularly the competency to stand trial [indiscernible] that's ever been published in the scientific literature [indiscernible].

So most of what, if not all -- if not all of those [indiscernible] goes to the weight of the evidence and not the admissibility of [indiscernible].

THE COURT: Okay. All right. Anything as to that issue,

Mr. Evans?

MR. EVANS: One thing, Your Honor. In reading Dr. Greenspan's deposition, he specifically stated, "I did not get much out of the interview with the mother. She was very shaky. I concluded that the ex-wife was a much better informant." That's why I said before, he's tried to talk to the mother and he couldn't get much out of her but Dr. Hall did, Your Honor.

And, also, I think that the Court needs to focus on more [indiscernible] decision. Before I stated that you must assess not only, one, whether the expert's method is reliable, but also, two, whether the substance of the testimony is reliable.

The actual measures used by DDSN -- that's a state agency, Your Honor -- [indiscernible]. That's something that you as the other individual can decide to [indiscernible] questionnaire [indiscernible] and totally determination about the common sense from this questionnaire [indiscernible] Dr. Greenspan and no one else. As I said before, that is something that's -- we [indiscernible] differ in that determination. Your common sense may be different than mine. The defendant's common sense may be different [indiscernible], so how can he make that kind of determination [indiscernible]?

MR. GROSE: Your Honor, two things quickly: Just for clarification, [indiscernible].

MR. EVANS: In the memo, page 10.

MR. GROSE: Well, I had reviewed [indiscernible] -- the only reason that I bring that up is they do refer to a Supreme Court [indiscernible] Court of Appeals, so I just wanted the record to be clear on that.

With regard to the adaptive behavior on Prong 2, going to the AAIDD manual, there was testimony there's no requirement that any adaptability of your scale [indiscernible]. [Indiscernible] in regards to [indiscernible] DSM-5 and AAIDD manual.

THE COURT: All right. So the standard before the Court, as found in Council and Jones -- Council is, of course, a 1999 Supreme Court case on the admissibility of scientific evidence; Jones is a back-in-1979 case, but they're all quoted throughout the common-day case law that we use all the way and until Watson v. [Indiscernible]. I cited cases recently on these types of issues, so let's just kind of walk through them one by one.

No. 1: Will the evidence assist the trier of fact? Well, the Court is the trier of fact in this circumstance, so the Court will answer that question in the affirmative, yes.

Is the expert witness qualified? And, clearly, Dr. Greenspan is qualified. He's a psychologist. He's also qualified to give diagnoses in the area of intellectual disability. He has an undergraduate degree, a master's

degree, a doctorate degree. He's a professor and some form of a consulting practice. He's written chapters in books. He's written articles. He's cited in some form in the DSM-5. Clearly, he's qualified as an expert in the area.

Prong C is the underlying science is reliable. And then when you determine and go through your reliability, that's when Jones kind of kicks in and talks about accommodations and [indiscernible] application on the internal procedures [indiscernible].

And so I think the -- you know, where the State is really of focusing in on is this common sense questionnaire. And I don't know that that, in and of itself, automatically kicks out Dr. Greenspan's opinion. I think that's an issue that he's using the common sense questionnaire that no one else uses, I don't think that's the only basis of his opinion. He's told me that he's reviewed other documents, other reports, other doctors' reports. He clearly spoke with the ex-wife and clearly had some conversation with the mother. He clearly has, you know, interview [indiscernible] Mr. Terry's.

So I don't know that this common sense questionnaire is this, you know, smoking gun or magic bullet that is the sole basis of his opinion. I do -- you know, I think that the common sense questionnaire is fair game for cross-examination [indiscernible] no one else uses it, that it's not peer-reviewed, that it's not -- this isn't something that

they're teaching for people to do. There's no quality control procedures.

Like Mr. Evans said, you know, common sense is kind of a, you know, thing that, you know, you're -- when I think that you've demonstrated common sense in asking about the [indiscernible]. I have a 15-year-old child and I see that every single day; he clearly thinks he's exercising common sense and he's clearly not, in my opinion.

So I think the common sense questionnaire is a -- what I would call a tool in the toolbox; that it's not -- you know, it's not the magic -- it's not the magic bullet as to Dr. Greenspan's opinion. His use of the common sense questionnaire can be fully explored on cross-examination and totally attacked on cross-examination as to all the different issues, but I don't know that that's the only thing [indiscernible] in his opinion. I think there are other things that are going into his opinion or I expect him to testify that there are other things going into his opinion besides that one thing, and, therefore, I will allow him to testify under 702 and Council and Jones.

And so we'll be ready to start with that next?

MR. GROSE: Yes, sir. Can we have a --

THE COURT: Yeah, we're going to take a break. I just want to map it out, what we're doing.

MR. GROSE: [Indiscernible] move past this. Those

objections for admitting Exhibit 1 as the C.V. --

THE COURT: Yeah, we're going to admit that [indiscernible].

And then anything else from the State before we take a break and come back to Dr. Greenspan?

MR. EVANS: No, Your Honor.

THE COURT: Okay. All right. So I'm going to go back on here just to tell him what we're doing. Okay? Just give me just a second.

All right. Dr. Greenspan, can you hear me okay, sir?

THE WITNESS: Yes, Your Honor. I can.

THE COURT: Okay. Wonderful. Thank you very much.

So it's about 11:15, give or take a couple of minutes. We're going to take about a ten-minute break because everyone here needs to go to the restroom and get a drink of water and things like that. You're welcome to take that break. If you could just be back -- I'm going to leave the Webex up and running, so if you could just leave yours running, and we'll be back in about 15 minutes, and then we'll start with your testimony. Okay?

And I lost him.

Let me make sure he can hear me.

All right. We'll be in a ten-minute break. Thank you.

(A brief recess was taken from 11:14 a.m. to 11:25 a.m.)

MR. GROSE: Before we start, I do have a -- I don't know

if it's logistical --

THE COURT: Okay.

MR. GROSE: One logistical matter. Obviously, Mr. Terry is here, and under the security that he's been in the cuffs and that black box all morning ---

THE COURT: Okay.

MR. GROSE: --- he tells me that his hands are getting numb.

THE COURT: Okay.

MR. GROSE: And I think his preference would actually be to go back, that he would waive his appearance for this hearing, if the Court would allow it.

THE COURT: Okay. And can we not just take his handcuffs off? Who is charge of that? The SCDC people?

Hello. Tell me your name.

SGT. JONES: Sergeant Jones.

THE COURT: Hey, Sergeant Jones. How are you?

SGT. JONES: I'm good. How are you?

THE COURT: Can we uncuff Mr. Terry?

SGT. JONES: You want us to take everything off?

THE COURT: No, just his handcuffs.

SGT. JONES: Just this black box?

THE COURT: Yeah.

(Pause in the proceedings.)

THE COURT: Starting to get a little feeling?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Yeah, maybe get him in that chair without arms. That may be a little easier for him to maneuver.

Is that better?

THE DEFENDANT: Thanks, Your Honor.

THE COURT: Okay. You're welcome.

So Mr. Terry is still with us. We've taken off what they call this black box. Just so the record is clear, Mr. -- I have been now in numerous hearings with Mr. Terry, more than I can remember. His behavior has always been exemplary. He's never been a problem or had an issue or caused any behavioral issues for the Court, so I have no problem doing that.

And I can see the marks on his hands where they were digging into him. Somebody should have told me sooner; I would have --

MR. GROSE: That's on me.

THE COURT: That's okay. I would have been happy to do so.

I apologize, Mr. Terry. I didn't -- I didn't know about it, but I have no problem with you being -- with the black box off due to your exemplary behavior throughout all of our hearings. He's never been anything but polite and respectful to the Court, so I appreciate that.

And -- okay, we're going to try to make this -- anything

else we need to take up before we get into Dr. Greenspan?

Mr. Grose?

MR. GROSE: No, sir.

THE COURT: Okay. Anything else from the State?

MR. EVANS: No, Your Honor.

THE COURT: Okay. Let's see if we can get this going in the right direction.

Dr. Greenspan is still not on your screen. Is he on yours?

MR. EVANS: Yes, sir.

THE COURT: Okay.

MR. GROSE: He's not on mine yet.

THE COURT: I don't know that that matters as long as he's on mine and you can see him.

All right. Dr. Greenspan, can you hear me?

THE WITNESS: Yes, sir, I can.

THE COURT: Okay. Great. And make sure you speak up. Okay?

THE WITNESS: Doing my best, sir.

THE COURT: Okay. And why don't you let him use the -- is he on yours, Ms. Franz?

MS. FRANZ: Yeah, [indiscernible].

Dr. Greenspan, can you hear us?

THE COURT: I can't hear him.

MR. GROSE: I don't know why mine's not.

THE COURT: It's because there's not enough internet in these buildings to run six and seven computers on a video system.

(Pause in the proceedings.)

THE COURT: Hang on just for a minute, Dr. Greenspan. We're trying to set something up different.

(Pause in the proceedings.)

THE COURT: All right. Dr. Greenspan, can you hear me?

THE WITNESS: Yes, sir.

THE COURT: Okay. You're going to need to speak up. You have got to keep your voice up.

THE WITNESS: Okay.

THE COURT: Louder.

THE WITNESS: I'll do my best.

THE COURT: That's the level you need to be at. Thank you.

THE WITNESS: Basically shouting. I need to get a microphone.

THE COURT: Ready?

MR. GROSE: Yes, sir.

DIRECT EXAMINATION

BY MR. GROSE:

Q All right. Dr. Greenspan, can you hear me?

A I don't hear Mr. Grose.

THE COURT: You're muted.

MR. GROSE: Oh.

BY MR. GROSE:

Q Can you hear me now?

A Yes, sir.

Q All right. The judge has qualified you as an expert. So what I want to do is turn to the substance of your testimony. And could you explain what is meant by the term "intellectual disability"?

A Yes, it's a condition which has been called various other names over the years. Previously, before that, mental deficiency. Before that, idiocy and other terms that today are no longer acceptable.

Around 1960, the organization now known as AAIDD published a manual which defined it as a condition characterized by deficiencies in intellectual functioning, adaptive functioning, and with onset in the so-called developmental period.

Q Okay. And are there various tools or resources that are used as guides for diagnosing intellectual disability?

A Well, there are these three prongs that I just mentioned, and within each prong, there are methods that are used to try to get at whether a person qualifies on that prong. But there's not really a standardized method. I have been involved in cases where a Court made a determination of intellectual disability without any formal instrument.

And of course there are different levels of severity and in the cases of the most severe impairment, you don't even really need an instrument; it's pretty obvious.

Q All right. Well, before we get into certain instruments, there was some discussion earlier about the DSM-5-TR. Does the DSM-5-TR provide diagnostic criteria for ID?

A Yes. It's the same three criteria that I just mentioned and that are also mentioned in the South Carolina criminal code.

Q Okay. So you have had an opportunity to compare the definition in the South Carolina Penal Code with the DSM-5-TR definition?

A Yes. It's basically the same, except they use the word "adaptive behavior" as opposed to "adaptive functioning," which suggests to me that they derived it more from AAIDD because that's the term they use. But the three definitions -- AAIDD, DSM-5, and the South Carolina Code -- are essentially identical.

Q And so, as I understand it, there's three prongs: The subaverage intelligent functioning, deficits, and adaptive behavior and onset in the developmental period; is that correct?

A Yes, sir.

Q All right. Can you define for the Court what the developmental period is?

A I'm sorry; I lost you there.
Q Can you please define for Judge Hood what the developmental period is?
A Childhood or adolescence? DSM doesn't really define it. They use the term "developmental onset" or "developmental period." AAIDD, at one time, defined it as "before the age of 16" then they changed it to "before the age of 18," and now it's defined as "before the age of 22."

But we're basically talking about onset while the person is still developing in terms of their brain capacity. If the onset occurred in a 30-year-old, they might be diagnosed with dementia or mental disability rather than -- they would be diagnosed with dementia, which is now called something else. I can't remember what. But they would not be eligible for diagnosis. Intellectual disability has to occur before the age of 22.

Q All right. I want to focus on Prong 1, the subaverage intellectual functioning. Can you tell the Court what that means?
A Thinking, problem-solving, abstract reasoning. Very close to academic potential in that the most common way of getting at it is an IQ test, and the IQ test is basically derived from academic achievement instruments. And academic achievement is also very closely related to this prong.
Q And can you explain a little bit more about what an IQ

test is?

A I'm sorry; is there a question?

Q I'm sorry. Can you explain a little bit more about what an IQ test is?

A Yes. IQ refers to intellectual quotient. It was invented around the beginning of the 20th century, around 1905.

MR. EVANS: Your Honor, I would raise an objection. It looks like he's reading something and not testifying. So I would like to know what he's reading and why he's not actually testifying from his knowledge. I mean, that's what it looks like to me. Looks like he's not looking at the camera but looking at a page.

THE COURT: You can ask him about that on cross-examination.

MR. GROSE: Thank you, Judge Hood.

BY MR. GROSE:

Q Dr. Greenspan, the judge has overruled the objection so if you could continue explaining what an IQ test is.

A Yeah. It's short for intellectual quotient. The first IQ test was developed in France by Binet and Simon -- Simon -- and, basically, they took items from the educational curriculum at a time when universal public schooling was first coming about, and that -- and then they administer these items to people of different ages or grade levels. And then they

came up with what they called mental age, which later was used statistically to convert it into quotient, which basically indicates where someone falls in the continuum in terms of percentile rank.

And in the United States, a professor at Stanford University took the Binet and standardized it and translated it, and that became the Stanford-Binet, which was the first American instrument. And that's still around. But then David Wechsler, W-e-c-h-s-l-e-r, in New York came up with his own version.

And those are the two most widely used instruments: The Wechsler scales, which is one for children called the WISC -- Wechsler Intelligent Scale for Children -- and the WAIS, W-A-I-S -- Wechsler Adult Intelligence Scale, and then the Stanford-Binet. And then a third widely used instrument today is the Woodcock-Johnson Cognitive Battery. Those are the three-most widely used measures of intelligence today.

So that's what IQ is. IQ basically measures the ability to reason abstractly. One criticism that I have made over the years is their aspects of intelligence, particularly social intelligence, that are not really tapped by IQ. And that's why we came up with the second prong, adaptive behavior.

Q Well, sticking with the first prong for a moment, what is the role of IQ testing in Prong 1?

A Well, as I said, there are three tests that are widely

used. The Wechsler, W-e-c-h-s-l-e-r, Scales with child and adult versions; the Stanford-Binet, which was not used in this case; and the Woodcock-Johnson, which was used in this case.

Q And how are tasks like the Wechsler scales and the Woodcock-Johnson used in diagnosing ID?

A Well, as a general rule, agencies for the courts or Social Security or adult service agencies use a cutting score of 75; until recently, it was 70. That's a standard score derived from testing of a large standardization sample. And a score of 75 puts someone at the 5th percentile, which means 95 percent of the population does better on that test.

So a standard score of 75 on either of the Wechsler scales or the Stanford -- or, in this case, the Woodcock-Johnson would be a qualifying score, but then it's important to make corrections for possible unreliability of the score, the most common such correction is called the Flynn Effect -- F-l-y-n-n -- which looks at the fact that norms become obsolete. In order to be able to compare scores across different years or tests, it's important to make such corrections.

Q Okay. And the word "Flynn," is that -- Flynn, is that the name of the person who did the research?

A Yes, the main person, but others have also. In England, they call it the Lynn Effect, L-y-n-n, or the Lynn-Flynn Effect.

He is an American who moved to New Zealand and was very interested in -- and discovered the fact that test publishers update their norms every time they come up with a new edition, and he was able to come up with a correction factor for making scores across different versions, put them on the same metrics, so it's fair to compare people.

Q All right. And is the Flynn Effect scientifically recognized?

A Yes. There have been at least a hundred studies of the Flynn Effect. With maybe one or two exceptions, everyone accepts it as valid and important.

Q And is it accepted by the DSM-5-TR and the AAIDD manual?

A Yes, both mention it and say that Flynn [indiscernible] should always be made in any case when diagnosing intellectual disability.

Q And the term "norm obsolescence" is often used with the Flynn Effect. Can you explain what that means?

A Yeah. I want to try to keep it from becoming too complicated. Basically, when they come up with a new version of a test, I'd say the WAIS-4 or as opposed to the WAIS-3, which is the third edition, the previous edition, they'll take a sample of let's say 100 or so subjects in the standardization sample, and they'll give them both the old version and the new version, and they'll counterbalance the order and also allow a few months to elapse because it's

similar and is likely to occur because there's quite a few items that are the same.

And what they find over and over again is that scores go down on the new -- on the new test because, paradoxically, performance goes up. So the test publisher has to adjust the norms in order for everybody in the population to have a mean score of 100, which puts you at the 50th percentile.

So that's how it's calculated.

Q I want to switch gears a little bit. What is meant by "standard error of measurement"?

A Well, it's highly unlikely that someone will perform exactly the same every time they take a test or every time they do any activity, whether it's swinging at a baseball or anything else for that matter.

So standard error is a statistical concept that refers to the likelihood that a score is valid; that is, it will fall within a range. It's say the 90th percentile. You can be 90 percent confident that this is a true score.

So the standard error for IQ tests is generally about five points, which means that the obtained score falls in a range plus or minus five of where that person's true intelligence is likely to fall.

Q And what is meant by the practice effect?

A Well, the practice effect refers to the learning that occurs when you take a test. So if you administer the same

test to someone, let's say a week or a month apart, they're almost always likely to do better the second time because they're more familiar with the items. And this is especially likely to occur with items that are, you know, what's called practical or performance intelligence because these are unique. They're puzzles. They're things that you wouldn't necessarily learn in school, whereas the verbal intelligence items are, in fact, things that are fairly commonplace within school settings.

So in order to correct for the possibility that there's some learning [indiscernible], the recommendation made in the manuals, DSM and AAIDD, is to wait at least six months before administering the same test.

So let's say you have two psychologists coming in to evaluate the same person at around the same time; they should not use the same tests. If one uses the WAIS, the other should use the Woodcock-Johnson or the Stanford-Binet.

But even there, there's likely to be some cross-learning because some of the items are very similar.

Q All right. I want to switch gears and talk about Prong 2, the deficits in adaptive behavior. Can you explain what Prong 2 is all about?

A Yes. In the old days before IQ tests -- and I'm talking about 19th century or early 20th century, before we had IQ tests, if we were to say someone has intellectual disability

or whatever, the term was used back then probably "idiocy" or "imbicility", it would be based on their behavior, the fact that everyone saw them as impaired, unable to live independently or to do -- or to deal with various problems suggests being overly influenced by other people.

But with the development of the IQ test, that tended to be all that was used. But it became obvious that that was too limiting. For example, when IQ tests was very popular through the first half of the 20th century and on into the second half, around the same time that classes in special education became developed, too many kids were put in special classes solely on the basis of IQ, even though they could function fine in society or even in the social world or the school. And the minority of the individuals or poor individuals were particularly likely to be overrepresented with the ID label.

So as a corrective against that tenancy, the concept of adaptive behavior or adaptive functioning was developed, and that refers to less to how somehow functions in the classroom and more to how they function in the community or in their family or in their peer group.

Q Are there different domains for assessing adaptive functioning?

A Yes. And this is why I became heavily cited, because, initially, there was no real definition of adaptive behavior. It wasn't really differentiated very much in terms of

different domains.

So around 1980 or so, I proposed that there are three components of adaptive behavior: Conceptual adaptive behavior, social adaptive behavior, and practical adaptive behavior. Those are the domains that are still used and cited and why I'm so heavily cited.

According to the manuals, AAIDD and DSM, one has to be impaired in only one of these three domains, not all three. And that refers to the fact that people with ID, particularly what's called mild ID or high-functioning have differentiating profiles. They could be relatively normal in some areas but definitely impaired in one or more areas.

Q Can you explain what's meant by the conceptual domain?

A Yeah, things like counting, telling time, keeping track of money, use of language, able to communicate, that sort of thing.

Q And can you explain what's meant by the social domain?

A Understanding people, understanding social situations, ability to come up with effective problem-solving, knowing what to do if you find somebody's wallet in the street, for example.

Q And can you explain what's meant by the practical domain?

A Ability to deal with objects, mechanical objects or processes. Getting around using public transportation or other modes of transportation.

Q And I believe you already touched on this but does somebody have to have deficits in all three domains or not?
A No. As I mentioned, you only need -- at least according to the manuals, one has to be significantly impaired in only one of these three domains. At least that's the way the manual approaches it.
Q And of course the manuals are accepted by the scientific community.
A Yes. And by the legal community.
Q All right. Can somebody with an intellectual disability, particularly a mild intellectual disability, have relatively --
A You're kind of fading in and out, Mr. Grose.
Q I'm sorry. Can somebody with an intellectual disability, particularly a mild intellectual disability, have relative strengths?
A Yes. The term "mild" is a misnomer. It implies it's insubstantial. In fact, until recently, people with mild disabilities -- intellectual disability weren't institutionalized and they still are eligible for various government benefits and voc rehab, that sort of thing.

But one of the findings of the research community in recent years is that people with intellectual disability can do many things, contrary to the common stereotype that they're globally impaired. I mean, there was some research by the

U.S. Department of Education following up people with intellectual disability and as the -- as well as other impairments, and what they found is that, five years later, ten years later, people with intellectual disability or labeled with intellectual disability can do all kinds of things. They can get married, hold a job. Most people with intellectual disability are employed in one way or another and often have -- they have more skills than we gave them credit for in the past.

Q And the third prong of intellectual disability is onset during the developmental period. And of course you have already talked about what that means, but how does the onset and developmental period relate to Prong 1 and Prong 2?

A Because the continuity of concern. It doesn't mean that they were labeled in the developmental period because a lot of factors, such as School Board policy or competence of evaluators or family attitudes. It means that there's always been a continuity of concerned people wondering about whether the person could achieve -- for example, being held back at school, retained, which happened in this case. That's a concern about the person's ability to learn.

And the other thing to understand about the developmental period is that we're not necessarily talking about onset in early childhood or in utero or in the childhood, period. Since the developmental period is defined up to age 22, you

could have someone functioning okay and have some accident or other event happens -- illness -- at age 18 or 19 and becomes seriously impaired or more impaired. That's qualifying because it happened during the developmental period. It doesn't have to happen early on, although typically it does.

Q With regard to Prong 1, is it possible to rule out an intellectual disability based on an I-score or other score over a certain level?

A No. In fact, that was the key issue in Hall v. Florida, I believe, because they decided because his score -- he had one or two high scores, there's no point even evaluating Prong 2. And the Court ruled that's not proper; they should have evaluated Prong 2. And that's where the quote I mentioned before, "It's a condition, not a number." You should always evaluate for both Prong 1 and Prong 2, even if the scores on Prong 1 fall above this very arbitrary 75 plus or minus number.

So -- and, also -- and I have written about this subject. It speaks to the reliability issue. There's always going to be some variation in scores. You might have some qualifying scores and some high scores, and there are all kinds of possible explanations, including possible corruption on the part of an evaluator or incompetence. And one should not assume that only the high score is valid.

Q With regard to Prong 2, is it possible to rule out an

intellectual disability based on a particular adaptive behavior, skill, or accomplishment?

A No. And this is probably the major misconception in Atkins cases. The manuals basically state that ID is ruled in by incompetence but is not ruled out by competence. Because there's quite a bit of variability, including the fact that you only need to be deficient in one out of three areas of adaptive behavior, there are always going to be some -- except in the most, most severely impaired people -- globally impaired, you're always going to find the pattern of skills and deficits. And this, in part, reflects the -- what's called the modularity of brain damage and basically would -- when we're talking about ID, we're talking about the outward manifestation of brain damage, since the brain is the -- effects or determines intelligence.

Some forms of brain damage will affect certain areas of skill more than others. So it's a mistake to do what's called cherry-picking, for two reasons. One, because it's always going to be some variability, and two, because we don't always know the context -- like, for example, I have been involved in cases where someone was described as a roofer. If you actually looked at their job performance, they were never allowed on the roof because it was considered dangerous for them or the people down below where they would throw material.

So the fact that someone has some areas of skill, that's

part of the disorder. That's part of being human and should never be used to rule out ID.

On the other hand, if someone has clear deficiencies, that could be indicative of ID. But the fact they have some areas of competence should never be used to rule out ID.

Q Earlier, I asked you a question about intellectual disability being a condition and not a number. Can you explain what that means in your profession?

A Yes. And this is especially important at DSM as opposed to AAIDD. AAIDD is an organization made of mainly people who -- bureaucrats who work either for state agencies or local service agencies or disability determination agencies. For the most part, the people making these determinations don't have the -- either the skills or the opportunity to look at the individual.

They also have a large complement of psychologists who tend to worship numbers, especially if they come from an IQ test.

And so their -- they tend to have more of an emphasis on numbers -- DSM, which is published by the American Psychiatric Association, which is a medical organization.

And I should also point out that, when the Supreme Court cites authorities because they have never come up with their own definition of intellectual disability, they leave it pretty much up to States to do that. They always -- the

Supreme Court always refers to DSM and the American Psychiatric Association. There's much less discussion, if any, on AAIDD.

In the medical profession, to my knowledge, is not a single medical condition -- psychiatric condition. It's diagnosed based on a number on a test. There may be tests which suggest the possible disability or disorder, but the disorder is always diagnosed qualitatively by a clinician using clinical judgment and looking at various sources of information.

And so you can have a low number on a particular medical test and still have somebody who is impaired. And vice versa. And that's kind of how they approach intellectual disability as well. It's a more wholistic approach, looking at the person and not just relying solely on a test number.

Test numbers can be useful, but you have to go beyond them. And that's pretty much [indiscernible] see the disorder.

Q In order to diagnose intellectual disability, is it necessary to determine what the causation is?

A No. Typically, we don't know. I mean, there are well over a hundred possible causes of intellectual disability. In the majority of cases, we don't know the cause and we don't need to know the cause.

Now, if we know the cause, that's usually helpful and

important, but ID is what's called a functional diagnosis. You either meet the criteria or you don't. It doesn't matter what the cause might be.

Q While it's not necessary to determine the cause, can you give the Court some examples of what could cause an intellectual disability?

A It could be an infection such as meningitis or encephalitis, which typically occurs when the individual is a child. It could be the cutoff of oxygen during the birth process, a cord wrapped around the neck, let's say. And that would be anoxia or hypoxia. Anoxia is the total cut-off of oxygen; hypoxia is a partial cut-off.

It could be a traumatic brain injury. It could be a genetic condition such as Down syndrome, which effects brain development.

Q How could a traumatic brain injury --

A Could be malnutrition. Any number of causes.

Q How could a traumatic brain injury play a role in causing ID?

A Yes. Traumatic brain injury is one of the major known causes. My brother, for example, was dropped on his head by a baby nurse when he was three days old, and he has intellectual disability. As a result of that, in fact, the first lecture I went to when I was being trained in intellectual disability at UCLA was by a famous British psychiatrist named Michael

Rutter, R-u-t-t-e-r, and it was all about the role of traumatic brain injury in causing both autism and intellectual disability. And my brother has autism in addition to intellectual disability.

Now, a subvariant of traumatic brain injury is fetal alcohol spectrum disorder or fetal alcohol syndrome where maternal drinking during pregnancy damages the brain and basically causes a traumatic brain injury but it's caused internally rather than being hit on the hit. And that's become a major interest of mine in recent years.

Q For traumatic brain injury to play a role in causation of ID, does it have to occur prenatal or during infancy?

A No. It can occur at any time during the developmental period. And I should also point out that these causes are not necessarily mutually exclusive. For example, you could have someone who was impaired, whether or not it reached the level of intellectual disability, in childhood as a result of sniffing glue or maternal consumption of alcohol or drugs or other things such as birth anoxia and then complicated -- as complicated by head injuries or a major head injury when they're either an adolescent or before the age of 22. And that can kind of push him over the edge because causes, risk factors tend to multiply -- have a multiplier effect. And if you have multiple causes, you're likely to have a more severe impairment.

And, of course, social factors such as family and education play into that as well. For example ---

Q Do you need a break to get a drink of water?

A --- from maternal anoxia. The major study in Hawaii where they looked at kids who suffered birth anoxia, cord wrapped around the neck, cut-off of oxygen. The ones who were from upper-class families or upper/middle-class families, for the most part, recovered. The ones from more impaired families or marginally functioning families, that made it worse. They did not recover because they weren't stimulated enough.

Q Are there various stereotypes regarding intellectual disability or people with intellectual disabilities?

A Yeah, there are many stereotypes.

Q Can you give us an example of some of those?

A That it's obvious that you can look at somebody. Sorry. I was on the board of an ARC, A-R-C, Association for Retarded Citizens, and one of the board members turned out to be a person with intellectual disability who was served by the agency, and it took me six months to figure that out because they had good superficial social skills, I would have called them, cocktail party skills, "How are you?" sort of thing. But after a while, it became obvious because they had a limited repertoire; they'd keep repeating it.

So, for the most part, people with intellectual

disability look normal and have relatively normal social skills. So you can't really tell from looking at somebody. That's a major stereotype. And of course the other major stereotype I have mentioned is that their adaptive functioning limitations are global. It affects every area. That's probably the biggest because, in fact, people with high-functioning intellectual disability always have areas of relative functioning, things like having girlfriends or holding jobs or things of that sort.

I can't tell you the number of cases I have been involved in where a relatively normal woman, educated, sometimes professional, falls in love with and marries a guy with an intellectual disability because they're nice to them or they're good providers, if they happened to belong to a gang, let's say.

So whatever the role is, you're going to find some people with intellectual disability playing it, whether it's driving a car or any of that sort of thing.

Q Can stereotypes regarding intellectual disability result in mistakes in diagnosis?

A Can you repeat that? Sorry.

Q I'm sorry. Can the stereotypes that you have mentioned regarding intellectual disability, can they result in mistakes in making a diagnosis?

A Yes. It's a very common problem. I see it all the time

both in civil and criminal cases.

Q In diagnosing an intellectual disability, what role does clinical judgment play?

A Well, it's very important. We don't want to have the diagnosis made by a computer, and there's not one other condition in the DSM-5 -- as I said, there's several hundred -- where clinical judgment doesn't play a role. And that's true of ID as well. But it's important to know what we mean by clinical judgment.

Q Can you explain that? Can you explain what's meant by clinical judgment?

A Yes. I mean, for one thing, you need to have a clinician with experience. Particularly in this case, people with relatively high-functioning ID because, in criminal cases, that's really what we're talking about. If the person were more severely impaired, most likely, they would have been diverted and not tried. And often you'll have an expert who has worked in institutional settings where the reference group that he's familiar with is much more globally and severally impaired or they may have had training many years ago when the stereotypes were more widely accepted.

But part of the clinical judgment is being able to context of the testing and know when test results are to be taken less seriously than other occasions. And people put it all together. And very often you have [indiscernible] of

cases. They may be very competent clinicians generally, particularly around mental health issues, but they often have little or no training or familiarity with the literature on intellectual disability.

So, basically, their opinion is that of a layperson, essentially, with all the stereotypes that lay people have about intellectual disability.

Q How has the scientific community's understanding of intellectual disability changed over the years?

A Well, in several ways. One, we no longer use highly pejorative terms, like "mental deficiency" or "mental subnormality" or even "mental retardation." We try to be more respectful in the terminology that we use.

But -- and, actually, some other countries -- in Europe, in particular -- where the fight to change the terminology to "intellectual disability" -- initially, it was resisted in this country, but -- AAIDD, for example, used to be AAMR, and the first vote to change it to AAIDD was turned down. The professionals eventually got on board with it.

But probably the major change has been, like, accepting the -- and this is based on a lot of empirical evidence. It's not a globally disabling condition, at least at the upper levels of it; that people, in fact, do have competencies, and that's a major change.

And then, of course, more acceptance of -- at one time,

even after the definition of -- the three-part definition was developed in the 1970s or 1980s. For at least ten years nobody used Prong 2. Now, it would be considered unprofessional not to look at Prong 2.

Q And then, earlier, you talked sort of about the development of Prong 2 over the years as far as the scientific community's understanding.

A Yes. Well, I mean, the first instrument to get at Prong 2 was developed at an institution in Iowa, and the focus was on very low-level behavior -- [indiscernible] bathroom by himself or dress himself. And that was a time when not only were the institutions made of primarily with people with severe disorders; today, we don't even have very many institutions anymore. They have been closing down. The service model used today is mostly group homes or people living independently with supports. Institutions are becoming a dying breed, so to speak.

But as people moved into the community, it became obvious that Prong 2 -- more meaningful approach to Prong 2 is not whether the person can feed themself or go to the bathroom by themself but, rather, can they cope with the temptations that exist when they're on their own in the community and likely to be exploited in one way or another. And that's why the importance of social awareness has kind of [indiscernible] much more than in the past.

Q When we were going through your qualifications as an expert, the term "adaptive intelligence" came up. Can you remind us what that means?

A Yeah, that's a term that was actually used in the DSM-5 when the committee and the chairperson, James Harris -- Dr. James Harris, a psychiatrist -- no longer alive -- was writing the text for DSM-5 and DSM-5-TR in the section, "Intellectual Disability." He used that term to make the point that the most critical aspect of adaptive behavior or adaptive functioning, which is what DSM calls it, is things like risk awareness, the application of intelligence to real-world situations.

And one reason I'm cited a lot is because that's been my emphasis over the years.

Q Has the scientific community's understanding of change and understanding of intellectual disability also included neuropsychological testing?

A Yes. When I started out quite a few years ago, you'd see an IQ test and that would be -- or maybe educational achievement, that would be -- you would never see any testing or testimony by a neuropsychologist [indiscernible] specialty within clinical psychology. Today, it would be an exception to not see that. It's almost always the case that a neuropsychologist and neuro[indiscernible] are used.

And as I said before, the DSM-5, it even states that, in

cases where there's a belief, based on Prong 2, that the person has ID but IQ scores are too high, then you should look at neuropsych testing as, in some ways, a better indicator of Prong 1 than IQ.

Neuropsych testing kind of falls at the interface between Prongs 1 and 2, and, for that reason, it's very important.

Q Now, earlier, you said that a person can have the condition called intellectual disability even though that was not diagnosed during the developmental period; is that right?

A Yes. All kinds of reasons for that, some of them having to do with changes in the climate of what's acceptable. For example, the incidents of diagnosed ID in schools has gone down at the same time that the incidents of diagnosed autism has gone way up. And the reason for that is that parents -- nobody wants their kid to be labeled ID. It implies hopelessness. Autism is more acceptable, including people who are kind of at the normal end of the spectrum, and it's a more socially acceptable diagnosis, so it's just not diagnosed as much in schools. That doesn't mean the kids don't have it. And where it becomes evident is that they have it later when they leave school and they have trouble coping, or they might cope very well.

But, as an adult, that's where you -- parents will sometimes have a change of heart when they realize that their son or daughter is always going to need support, and a more

optimistic label, such as learning disability or ADHD or autism, doesn't provide them what they need.

Q So is it possible to diagnose an adult or somebody who is outside of the developmental period as having an intellectual disability?

A Yes. Sorry; my shoulder is locking up here.

It's very common. I see it all the time in Atkins proceedings where the person was not labeled as ID earlier for various reasons. Some irrelevant, extraneous, so to speak. And then they're appropriately diagnosed by experts as adults.

So it's not only a possible; it's very common in my experience.

Q So in order to go about diagnosing somebody -- in this case, in an Atkins context -- how do you go about doing that? What procedures do you follow?

A Well, the first step is to look at what's available. I mean, if somebody has had multiple measures of cognition and IQ or other indicators, my job is not to give another IQ test, although that's not necessarily something I do anymore, but, rather, to make sense what's there. And the same is true of all the other evidence. In these cases, there's usually a plethora of evidence and reports, and what's needed is somebody knowledgeable about ID to make sense out of it and pull it together. So that's the starting point.

Now, there may be occasions where I take a more active

role, particularly around Prong 2, and interview people sometimes using a formal instrument, not always. And I have seen many cases where an ID determination was made by the Court where there was no formal instrument.

In this case, there is one, but it was done early on.

Q And we'll come back to that. Go ahead, I'm sorry.

A So it depends on the case, but it's -- the role of the clinician, such as myself, is to use clinical judgment and experience to indicate whether the evidence seems to support ID or not, and often, this involves looking at reports by other experts and indicating which ones I consider valid and which I consider questionable.

And then I would not typically make a formal diagnosis if I haven't met the person. Rather, I would indicate whether the evidence is congruent or not. If I have met the person, then I would feel more confident ethically to say whether I thought they had ID.

Q As part of doing an assessment in an Atkins case, what role does reviewing records play?

A It's a starting point. I see it as very critical. I can often get everything that I need from the records.

Q And what do you mean by that?

A Well, if people expressed concern about the individual's functioning, if there's a lot of evidence that he or she -- usually he -- was failing in school or was unable to keep a

job, was unable to do various things that you would expect somebody for their age to be able to do, that's all important. That's a lot more important than anything I could get out of meeting the person for an hour or two in a prison setting.

Q And you mentioned testing a minute ago, and you said you could review what's available. Is there any requirement that you actually administer a test yourself?

A No. Well, I mean, obviously my role differs according to the case and what I'm asked to do. But I think my most valuable contribution in these cases is usually as a teaching expert, whether I diagnose it or not, because courts -- and lawyers too, for that matter -- typically don't have professional training in ID and they may not understand the literature on it.

Q You mentioned clinical interviews. What's the role of clinical interviews in diagnosing intellectual disability in the Atkins context?

A Well, the interview has to be structured in some way. I can't just go in there and shoot the breeze with the person, although that could be interesting.

So every interview in this kind of setting is clinical. It's for the purpose of drawing conclusions about the person.

Q All right. And then that would include interviewing the person to be diagnosed or not diagnosed with an intellectual disability?

A Yes, as well as percipient witnesses, so people in the family, teachers, people who know him well, because they have information that I could never develop, whether I use a test or not.

Q And speaking of tests, with regard to Prong 1, is an IQ test the only way to assess intellectual functioning?

A No. As I mentioned before, IQ and educational achievement, they're very closely related in part because the first IQ test we developed from achievement tests or achievement curricula, and, to a large extent, that remains the case today. [Indiscernible] educational achievements, such as the Wide Range Achievement Test, which is commonly given, as it was in this case, is important. Grades -- if a person is failing, although there can be various reasons why someone is failing. If a person is retained in school, held back. A lot of different indices, including test indices, such as neuropsych data, as I mentioned. Neuropsych data can be more useful than IQ data.

You would like it to be congruent, all of it, more or less the same, but quite often, you find some discrepancies. And then clinical judgment comes in to play in determining what's important.

Q And as far as Prong 2, you mentioned earlier that there's some instruments to help diagnose the deficits in adaptive functioning. Is an instrument like that required?

A No. I have been involved in many number of cases where there was no such formal instrument.
Q And then that gets back to the clinical judgment as one of the ways of doing it; is that right?
A I missed the first few words there.
Q And then that gets back to clinical judgment?
A Yes. I mean, sometimes we're talking about quite a few years have passed before the person was in the family or in the school. People may have died off. People's memories might have faded. It may be hard to find appropriate witnesses, and these instruments require some degree of certainty by the person filling it out. A very limited number of guesses are allowed.
Q All right. I want to --
A That's just one way of -- there's just one way of getting at it. It's not the only way or necessarily the best way.
Q All right. I want to switch gears and talk about Gary Terry now. Were you asked to do an evaluation of Gary Terry?
A Yes. Yes, I was.
Q And did that include a clinical interview of Mr. Terry?
A Yeah, done remotely at the jail or prison.
Q And did that include interviewing collateral witnesses?
A Yes.
Q And did that include interviewing [sic] records -- both social history records and reports from other -- other

evaluators?
A Yes. I think you misspoke; you used the word "interview." I reviewed all that stuff.
Q Okay. And did you form an opinion as to whether or not Gary Terry is a person with an intellectual disability?
A Yes, I did form an opinion.
Q And what is that opinion?
A Mr. Terry qualifies under South Carolina statute and the major manuals -- diagnostic manuals as someone with an intellectual disability.
Q And that's the DSM-5-TR and the AAIDD manuals?
A Yes.
Q Now, as part of your review in this case, the records that you reviewed, did you review a number of records?
A I'm sorry; you faded there.
Q I'm sorry; I moved away from the screen.
As part of your evaluation, did you review records regarding Gary Terry?
A They're all mentioned in my report. It's quite a few records.
Q Okay. And I want to ask you specifically about certain records, whether you reviewed them. Do you have access to that Dropbox file we sent?
A I have another screen here and it's right in front of me. Go ahead.

(Applicant's Exhibit No. 5, School Records, was premarked for identification.)

BY MR. GROSE:

Q All right. One of the documents that we sent you was premarked as Applicant's Exhibit No. 5, which is school records -- it's about 140 or '42 pages. Did you review that?

A Yes, I did.

Q And we also sent you Applicant's Exhibit No. 6, which is one page from the South Carolina Department of Corrections records. Did you review that?

A Yes.

(Applicant's Exhibit No. 7, Richland Memorial Hospital Records, was premarked for identification.)

BY MR. GROSE:

Q One of the records that we sent you was Applicant's Exhibit No. 7, which is records from Richland Memorial Hospital. Did you review that?

A Yeah. But I missed the number. You kind of pulled away there. What is it?

Q Applicant's Exhibit No. 7.

A Yes.

Q We also sent you Applicant's Exhibit No. 8, which is also more records from the Richland Memorial Hospital. Did you review those?

A Yes, I believe so.

(Applicant's Exhibit No. 9, Emergency Room Records, was premarked for identification.)

BY MR. GROSE:

Q Applicant's Exhibit No. 9 is emergency room records. Did you review those records?

A Yes.

(Applicant's Exhibit No. 10, MUSC Neurology Record, was premarked for identification.)

BY MR. GROSE:

Q Applicant's Exhibit No. 12 is records from the Department of Corrections -- I'm sorry, Applicant's Exhibit No. 10, one page. Did you review that?

A MUSC Neurology, yes.

Q I'm sorry. I'm sorry. I misread that. Thank you for that correction.

(Applicant's Exhibit No. 11, Richland County Detention Center Record, was premarked for identification.)

BY MR. GROSE:

Q Applicant's Exhibit No. 11 is a one-page document from the detention center in Richland County. Did you review those?

A Yes.

(Applicant's Exhibit No. 12, Dr. Hazleton Records, was premarked for identification.)

BY MR. GROSE:

Q And Applicant's Exhibit No. 12 is records from Dr. Hazleton. Did you review those?

A Yes, I did.

Q And so these records that I just reviewed with you in Applicant's Exhibit No. 5 through 12, did these assist you in forming your opinion regarding Gary Terry?

A I'm sorry; I lost most of that.

Q I'm sorry. Applicant's Exhibits No. 6 [sic] through 12, these records that you reviewed, did that assist you in forming your opinion regarding Gary Terry?

A Yes, they did.

Q And are these the type of records that are reasonably relied upon in your profession in conducting an Atkins assessment of intellectual disability?

A Yes. They're very commonly relied on.

MR. GROSE: And, at this time, Your Honor, I would offer Applicant's Exhibit 6 through 12 into evidence -- I'm sorry, 5 through 12 into evidence.

MS. BROWN: Your Honor, the State objects. Certainly an expert can use hearsay in forming an opinion. No problem with that. But the admissibility is something total different.

Our Court in State v. Jennings and in the Allegra case talked about the report itself. The report itself cannot come in because that is a reflection of just hearsay statement after hearsay. An expert is not a conduit for hearsay.

Now, that does not in any way mean that there's a limitation for him using that in forming his opinion, but there is no basis for admissibility that has been offered for these documents.

And I have copies of those cases, if I may hand those up to the Court.

THE COURT: You may.

MS. BROWN: Your Honor, the ager (ph) review on that one in State v. Jennings, if you look at the bottom of the Westlaw page that's printed, around pages 4 and 5, the Court talks about the hearsay that comes in with that report. Well, this is the same thing if you introduce the report that has excerpts from these documents. That is hearsay. Our Court has found that that is improper. And that's a 2011 case from our state's Supreme Court.

Allegra is a Court of Appeals case that was reversed on different grounds. But, again, if we look at the Westlaw page 11, we talk about the admissibility of a report. The Court of Appeals also found that it's hearsay in the report. There's no basis for it to be offered. There's no admissibility ruling that could be made. There's nothing that says it's anything other than hearsay; therefore, the report and any kind of indication within the report of a quotation or statement or the like is simply hearsay and not admissible. Therefore, we object, Your Honor.

MR. GROSE: Your Honor, what I'm hearing from them is one case didn't even address this issue as far as the whole thing was concerned. And the other case has do with the report of the person who was testifying.

None of these records, Applicant's Exhibits 5 through 12, are Dr. Greenspan's report. These are records that he relied on insofar as making his diagnosis. In particular, when we get to it, many of these records have to do with why he believes that intellectual disability diagnosis had an onset during the developmental period. So we believe that these are admissible.

MS. FRANZ: Your Honor, if I may. Two things. One is, the only rule I heard that is being relied on for admissibility would be 703. And there's nothing in 703 itself that says that these documents that are reviewed by an expert can be admitted into evidence. Now, if there's another rule that's a hearsay objection, I have not quite heard it yet.

And as I believe we have said before, we're not asking this Court to go through and make its own determination on the individual rulings. This Court is accepting expert opinions so the expert can understand where he's going -- or, excuse me, where the Court can understand where the expert is going and why he's relied upon. But you're not making your own determination based on those records.

Now, if there's a particular record that needs to be

introduced for, say, for instance, impeachment purposes, that's different. But, so far, there hasn't been a rule of evidence that has been offered to Your Honor to form a basis to allow admissibility.

Thank you, sir.

MR. GROSE: Well, their objection, I don't think, was originally based on hearsay. These are not necessarily being offered for the truth but as to what Dr. Greenspan relied upon in forming his opinion, and certainly the information that an expert relies on is relevant and can be of assistance to the Court and --

THE COURT: And the issue isn't is it relevant. The issue is, is it admissible?

MR. GROSE: Relevant evidence is admissible under Rule 401 and 402.

THE COURT: Not automatically, no. That's a blanket statement of the law. That's completely inaccurate, Mr. Grose. Relevant evidence is not admitted in trials every day in South Carolina.

MR. GROSE: We believe --

THE COURT: So tell me how school records, medical records, hospital records, and SCDC records are not all hearsay, and therefore, not admissible as far as admitting it into evidence?

MR. GROSE: Your Honor, at this time, I would just

proffer Exhibit 5 through 12 for the record. Those would be my proffers at this time, and we can come back to this issue after we develop a foundation a little bit more.

THE COURT: Okay. He's certainly allowed to testify as to what he read, how he used the information, how it formulated his opinion, how it formulated his basis for the opinion, how it went into how he came up to the conclusion that he did or what report from what medical record or what hospital record or what school record or what SCDC record and how that -- he's allowed to testify to all that. He's allowed to testify that -- to the information that helped formulate his opinion, but that doesn't make school records, which I assume are from the late 1970s, automatically admissible as evidence, as exhibits. He can use all that information to give his opinion.

And you may continue. You've got about eight minutes, and then we're going to need to break for lunch in eight minutes.

MR. GROSE: Okay.

BY MR. GROSE:

Q Dr. Greenspan, do you have your report of July 5th, 2024, handy?

A Yes. I need to call it up on my computer. Hold on a second.

Q Sure.

A Yes. Go ahead.
Q All right. If you could turn to page 2 and 3 of that report. Is that where you identified the records that you reviewed?
A Yes, it is.
Q All right. And could you list off those records for the Court, please.
A Okay. I'm referring to a not-quite-final draft, so I think I later supplemented it with a few more, but I have head injuries, CAT scan, previous scans, successor final stamped. I'm not quite sure what that is. Adaptive functioning chart, psychological and medical records, medical chronology, 1994 Charter Rivers records, 1986 motorcycle accident records, Deysach testimony -- D-e-y-s-a-c-h -- MUSC Neurology, some more Charter Rivers medical records, defense penalty presentation, SPECT report -- that's S-P-E-C-T, school records, Woodcock-Johnson 2022 report, IQ and adaptive functioning scores table.

As I mentioned, there were a few more that were in the final version, but I'd have to do a little searching to find that.
Q And, of course, you interviewed [sic] the records that we talked about a minute ago; is that correct?
A Yes, I did.
Q In addition to reviewing records, you said that you

interviewed Gary Terry. How did that interview take place?
A Could you repeat that? I lost the first part.
Q That you had interviewed Gary Terry. How did that interview take place?
A Remotely.
Q And how long did you interview him?
A A couple of hours.
Q All right. And did you also do some collateral interviews?
A Yes. Mother, Patsy, and former wife, Luann.
Q Okay. And how did those interviews take place?
A Also remotely.
Q And did the interview of Mr. Terry, his mother, and former wife --
A I'm sorry; I can't hear you.
Q I'm sorry. Did the interview of Mr. Terry, his mother, and his former wife assist you in forming your diagnosis?
A Yeah. The mother and the former wife of Mr. Terry were important. [Indiscernible] the mother had a bad day or not, but I found that rather unhelpful and terminated it fairly soon, as there were just too many "I don't know" responses. I was interested to see that Dr. Hall's report had a much more helpful picture of the mother, and I found that very useful also. So I didn't just rely on my assessment; I relied on some of the information collected by Dr. Hall.

Q Thank you, Dr. Greenspan.

MR. GROSE: Judge, I'm not sure where we are on the eight minutes, but I think that this would be a natural breaking point.

THE COURT: All right. Dr. Greenspan, we're going to take a lunch break. I have another hearing I have to do in a couple of minutes. Let's start back at 1:45 Eastern Time. I assume you're in California. So if you'll do that calculation for me and we'll start back in an hour and 45 minutes. If you'll be back in this virtual courtroom at that time, I would appreciate it.

THE WITNESS: I will. Thank you.

THE COURT: Thank you, Dr. Greenspan.

Okay. Anything from the State before we break for lunch?

MR. EVANS: No, Your Honor.

THE COURT: From the Applicant?

MR. GROSE: Not at this time.

THE COURT: Okay. All right. I'm going to jump on a virtual roster meeting, so y'all are welcome to get out of this. We'll start back at 1:45.

MR. GROSE: Did you say 1:45?

THE COURT: Please.

MR. GROSE: Well, you said we were taking an hour-and-45-minute break a minute ago.

THE COURT: Oh, 2:45. I thought it was noon. Can y'all

tell Dr. Greenspan that? Sorry. I thought it was noon. My bad. 2:45. 2:45. My bad.

(A lunch recess was taken from 12:58 p.m. to 2:48 p.m.)

THE COURT: Dr. Greenspan, are you still with us? There he is.

Can everybody go ahead and turn on their cameras for me?

His restraint's okay, Mr. Grose?

MR. GROSE: Sorry?

THE COURT: Mr. Terry's -- your hands okay?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Okay.

All right. Dr. Greenspan, can you hear me okay, sir? You are muted. Let me unmute you. Can you hear me now, Dr. Greenspan?

Mr. Grose, why don't you see if you can get...

MR. GROSE: Dr. Greenspan, can you hear me? Dr. Greenspan? Dr. Greenspan, you might be on mute.

THE COURT: No, he's not on mute. I think he may just have his volume down.

MR. GROSE: Oh, okay.

THE COURT: That's my guess.

MR. GROSE: Dr. Greenspan? Dr. Greenspan, can you hear me?

THE COURT: Dr. Greenspan, if you're talking, we cannot hear you.

Want to try to call him?

(Pause in the proceedings.)

THE COURT: I'm not sure what he's looking at. Looks like his mouth is moving but...

Can anybody else hear him? Okay. I can't either.

He may have some kind of mute on his computer. I guess he could be talking to somebody else.

MR. GROSE: Dr. Greenspan?

THE COURT: He's holding up the phone. Do you want to try calling him again on his phone?

(Pause in the proceedings.)

THE COURT: All right. Dr. Greenspan, can you hear me okay?

THE WITNESS: Yes, sir.

THE COURT: And we're going to continue now in your continue now in your direct examination by Mr. Grose and you're still under oath. Do you understand that?

THE WITNESS: I do.

THE COURT: Okay. And can everybody hear? Everybody okay? Okay. All right. Let's continue as we were, please, before.

Mr. Grose?

THE WITNESS: Sorry; the picture went away.

MR. GROSE: All right. Well, we can see you. Can you hear me all right?

THE WITNESS: I can hear you. I don't know. I must have touched my screen and it did something. So I joined the meeting again. Well, I guess we'll just have to do it without -- wait a minute. Here we go.

MR. GROSE: Are you ready?

THE WITNESS: Yeah. I can't see you but that's fine. As long as you can hear me.

MR. GROSE: Yes, sir.

BY MR. GROSE:

Q Before we broke for lunch, we had begun talking about your diagnosis of Gary Terry as a person with an intellectual disability. I want to start with Prong 1, the sub-average intellectual functioning, and ask: Did you review Dr. Decker's Woodcock-Johnson Cognitive Test, Fourth Edition, results?

A Yes, I did.

Q And what did you find significant about those results?

A Well, they seem to support a diagnosis of ID. That's what I found significant.

Q Okay. And why is that?

A Well, it was something like 76. They don't call it a full scale but that's basically what it is. And he had taken into account reliability issues plus Flynn Effect issues. It clearly indicates someone functioning at the five -- the 5th percentile, which is in the ID range. And it's also congruent

with other information.
Q I'm going to come back in a minute, but if I told you that score --
A I'm sorry?
Q I'm going to come back to the other information in a minute, but if I told you the score was a 77, is that still your opinion?
A Yes.
Q All right. And when you say "adjusted for Flynn Effect," would that reduce the score?
A Yes, significantly.
Q All right. And do you consider the Flynn Effect to be a controversial concept or one that's accepted in the scientific community?
A It's widely accepted in the scientific community, and it's universally accepted within the Court -- forensic community.
Q All right. In your report, you state, "In my opinion, this is a qualifying score for ID even without being corrected for norm obsolescence." What do you mean by that?
A Well, I would never rule out ID based on one of two points, for one thing. And it's close enough, in my opinion.
Q Okay. And certainly with the Flynn adjustment, it's in range?
A Yes, sir.

Q All right. Now, in your experience and in your opinion, how does the Woodcock-Johnson compare to the WAIS-IV as a test of measuring intelligence?
A Well, I think it's equally [indiscernible] valid as a measure of intelligence. It has certain advantages over the Wechsler scales.
Q And now what are those advantages?
A Well, it's based on a theory of intelligence whereas the Wechsler scales have no theory.
Q So when you say the Woodcock-Johnson is based on a theory of intelligence, what is that theory? What do you mean by that?
A Well, it's a theory called the Horn-Carroll theory of intelligence, and it's considered the state-of-the-art theory of intelligence today. And the main developer of that test is someone I know very well and I have a lot of respect for. I believe it reflects current thinking about what intelligence is. And part of the problem with IQ tests, for the most part, [indiscernible] based on any real definition of what intelligence is, whereas the Woodcock-Johnson is.
Q And in addition to the Woodcock-Johnson test, did you review any of the historical information on Gary Terry?
A Yes, I reviewed achievement scores, including, I believe, the [indiscernible] who gave the Woodcock-Johnson also gave the Woodcock-Johnson. And, if anything, his achievement

scores, including the WRAT, W-R-A-T, scores -- there were three administrations in school.

Q Okay.

A They're all -- all very supportive of a diagnosis of ID.

Q Okay. So you referred to it, the WRAT, W-R-A-T. Is that the Wide Range Achievement Test?

A Yes, it is.

Q And was Gary administered the Wide Range Achievement Test in the fifth, sixth, and ninth grades?

A Yes, he was.

Q And what did you find significant about the administration of that examination on those three occasions?

A He was very impaired in all three areas that were covered, less so on the third administration. He was still impaired in some areas. On the other two, he was very impaired across the board intellectually or academically.

Q All right. And was Gary ever recommended for special education?

A I believe he was. And I know he was also held back at least once.

Q All right. And what is the significance --

A Let me amend that. He was not only recommended for special education, he was enrolled in special education.

Q And what is the significance of that?

A Well, it nails down the Prong 3, for one thing.

Q I'm sorry? It nails down the what?
A I'm sorry?
Q You said it nails down what?
A The third prong, developmental onset.
Q Okay. And why is that?
A Well, you only hold someone back if they're failing to learn or if there's reason to believe that there's some cognitive impairment, and he -- that was obvious from test scores, from grades, from educational records. He was seen as someone impaired, and I believe, at one time, he was -- the term "mental retardation" was even used in schools.
Q All right. In your report, you reference reviewing the results of the Bender-Gastalt -- I may not be pronouncing that right -- Measure. What is that?
A I think you're pronouncing it right. Bender-Gastalt. I did see it.
Q Earlier in your testimony, you talked about the neuropsychological testing that Dr. Deysach did. Did you find any significance of Dr. Deysach's examinations and testing with regard to Prong 1?
A Well, he found brain damage -- strong indications of brain damage, and certainly that's something that the Bender-Gastalt does. I can't recall exactly what he did in terms of Prong 1.
Q Okay. Can I refer you to your report on this regard?

A Yes, you can.
Q If I could refer you to your response to Question 1 on the third bullet point.
A I'm sorry; I kind of lost you there.
Q I'm sorry. Your response to Question 1, the third bullet point under Prong 1.
A With regard to the Bender-Gastalt?
Q Yes, sir.
A Well, he scored a very impaired level.
Q Okay. And what's the significance of that?
A I'm sorry; I can't hear anything.
Q Oh, I'm sorry. What was the significance of him being -- Gary being very impaired on the Bender-Gastalt?
A Well, it's strongly indicative of brain damage, of which we have other evidence for. I would not -- I would not use that specifically to get at Prong 1, however.
Q But it's consistent with other evidence that you have reviewed?
A Yes.
Q Okay. And in the final three bullet points in that section, you talk about Dr. Deysach's neuropsychological testing. What was significant about his testing with regards to Prong 1?
Dr. Greenspan?
A [Indiscernible] and brain damage also, but it's a

cognitive measure, and he did extremely poorly on the Halstead Category Test.

Q Okay. And we lost you for a second. But was the -- did Dr. Deysach find evidence of brain impairment that could be related to the head injuries?

A Yes, very much so.

Q All right. And with regard to visual memory, Dr. Deysach found impairment there. What is the significance of that?

A Well, it's an aspect of intelligence as well as an aspect of a brain intactness or impairment. An intellectual instability is very much a brain disorder.

Q And the Halstead Category Test, what did -- what was the significance about Dr. Deysach's administration of that?

A Strongly indicative of brain damage and it's a cognitive instrument that he did poorly on. As I said earlier, there are many cognitive [indiscernible] of Prong 1 besides IQ.

Q Now, as part of those school records, were you aware of some IQ scores that were administered or IQ examinations that were administered to Mr. Terry?

A Yes.

Q And was that in 1979 and 1982?

A Yes.

Q And I believe that those were reported -- both were reported as a full-scale IQ of 92. Does the existence of those test scores change your opinion with regard to Prong 1?

A No. I say they're anomalous in the sense that [indiscernible] with other cognitive evidence. Obviously, it does create some ambiguity, but, overall, given all the other indicators of Prong 1, I would not rule it out based on those scores. Also keeping in mind that there are other indices of brain damage that occurred long after that, that are reflected in the later Woodcock-Johnson scores that are much lower.

Q And so if Mr. Terry's brain was damaged and that affected his intelligence and that occurred after the 1979 and 1982 IQ exams but in the developmental period, would Mr. Terry still qualify for a diagnosis of ID?

A Yes, he would because his cognitive performance is qualifying but still -- at the later date but still within the ID range. Now, I have never said that just -- you know, that he's perfectly normal -- was perfectly normal at the earlier age because he was failing in school, was held back, was in special education, did very poorly in terms of academic achievement.

The only evidence from the school years that might be used to dispute [indiscernible].

Q Okay. And going back to something that you said earlier, it's not required that the causation of ID be determined, is it?

A That's true, and it usually isn't.

Q And I think you also mentioned that, earlier in your

testimony, that an accumulation of factors or insults to the brain over a period of time but occurring in the developmental period can cumulatively result in IQ -- or in diagnosis of ID; is that right?

A Yes. Sorry. I mean, a second or third head injury would definitely be a kind of additional, if not multiplier, of the earlier impairments. And certainly there's significant evidence of later brain injury.

Q And we'll talk about that later, but you do see that pattern in Mr. Terry's history?

A Yes, I do.

Q I want to turn to Prong 2, the deficits in adaptive functioning. Do you believe that Gary Terry meets the diagnostic criteria under Prong 2?

A I do, yes.

Q All right. And why is that?

A Well, as I testified earlier, there are three domains. That's actually based on my research and writing. Social, conceptual, and practical. And you only need significant impairment in one of those three. I believe there's significant impairment in two of them, conceptual and social. The only one where it's not clear that he qualifies is practical.

Q Let's start with the practical then. Why do you say it's not clear whether he qualifies in that domain?

A Hold on a second; my battery is dying. I need to change the plug here. I have got two laptops and only one battery charger.

Well, in all the descriptions of him and in his employment history, it seems that he had some practical skills.

Q And would that be an area --

A Around motors, cars, that sort of thing.

Q And would that be an area of relative strengths for Mr. Terry?

A For sure it would be.

Q Okay. The conceptual domain, what was your conclusion about Mr. Terry and this conceptual domain?

A Very impaired.

Q And when you say "very impaired," what leads you to that conclusion?

A Dramatic school failure, for one thing.

Q Okay.

A And Prong 1 is related to conceptual. In fact, in some of my writing, I suggested that we're [indiscernible] the conceptual really should be a Prong 1 issue. Or it's an area that cuts across two areas -- two of the three -- two of the prongs.

But, you know, clearly -- clearly, in terms of conceptual intelligence or conceptual adaptive functioning, if it's an

area of great deficiency as reflected in being held back and just generally failing [indiscernible].

Q And with regard to the social domain, what is your opinion of Mr. Terry in the social domain?

A Severely, if not profoundly, impaired.

Q And why do you say that, Dr. Greenspan?

A Yeah, I mean, I could list a whole bunch of behaviors which, for some reason, never fully made it into my report, but -- such as telling somebody to shoot him in the leg to get out of paying child support. Can you imagine anything dumber than that? Just incredibly bad judgment in all areas of his life in the social domain.

Q So then it is your opinion that Gary Terry has significant deficits in the social and practical domains that qualify him for a diagnosis of intellectual disability?

A Social and conceptual. You said practical.

Q Oh, I'm sorry. Social and conceptual. My mistake. Thank you for correcting me.

A Yes. He's impaired in two of the three. He 's more normal in the practical. But according to the manuals, you only need to be impaired in one of the three, and he meets that.

Q Now, you said earlier that you would never make a diagnosis of intellectual disability without interviewing the person. What was significant in your interview of Gary Terry

with regard to Prong 2, the adaptive functioning?
A Well, I also said earlier that it's really impossible because ID is a somewhat hidden disorder. It's really impossible in a short encounter with someone to make a diagnosis one way or the other. Rather, we look for evidence that might rule it out. And I don't see -- I didn't see anything in my interaction with Mr. Terry that in any way is inconsistent or incongruent with a diagnosis of ID.
Q I believe you testified earlier that you conducted an interview with Patricia Terry, who is Gary Terry's mother?
A Yes. I didn't get much out of that, I'm afraid.
Q All right. But you also mentioned earlier that you looked at the information that Dr. Hall reported in her report regarding her interview of Ms. Terry. Did you find anything significant in what Dr. Hall reported?
A Yes. The mother, Patricia Terry, told all kinds of stories to Dr. Hall that are indicative of deficits in adaptive functioning.
Q Can you give some examples?
A Well, she mentioned -- I believe she mentioned gullibility and social vulnerability. I mean, that's been my hallmark in my career over the last 20 years. I wrote the first book on gullibility and persuaded both AAIDD and DSM to consider gullibility an indicator of ID. And she talked about his being overly influenced by his friends and getting in

trouble as a result.

Q And you mentioned that you interviewed Luann Terry, Mr. Terry -- Gary Terry's ex-wife; is that correct?

A Yes.

Q And what did you find significant from interviewing Luann?

A Well, it was just one story after another about how she propped him up. You need to look at context when you look at what people do. And every time he's been in the community, he depended on someone -- typically a woman -- to prop him up.

And she filled out various paperwork he had to do for his business, which ended up failing, and, you know, he did one thing after another that was foolish, in her opinion, such as driving very recklessly. But she always supported him.

To me, that's an almost universal finding when I see a person with ID living in the community. A very common pattern is to have someone like Luann helping him to function, trying to get him all kinds of help. Often, he would reject that help.

Q And I think you already answered this, but is it typical for people with ID that are living in the community to have benefactors or support structures around them?

A Yes. I mean, there's a lot of research on that. There's a term called the cloak of competence based on a book by an anthropologist. And Robert Edgerton, he called it the cloak

of competence. He looked at people who had been institutionalized in California. Back then, they were all pretty much mildly -- the term was retarded. And, in every case, they had a benefactor who, to some extent, enabled them to cover up the extent of their limitations.

And that's sort of the universal tendency for people with ID, to cover up their limitations and to portray themselves as more competent than they really are. That's one reason why you should always rely on others to tell you about -- what someone can do in terms of adaptive behavior. One should never get that information solely from the person himself.

And that was one of my criticisms of Dr. Hall's report because she relied very heavily on Gary Terry to talk about all the things he could -- claimed to be able to do.

Q And one of the things that you mentioned a minute or two ago was Gary setting up a business. In context, does that rule out or support your diagnosis of intellectual disability?

A No, even if he could do it, it wouldn't rule it out, but the fact is, based on what I have learned, if not for Luann's contribution, he would never have been able to set up or operate that business. And as it is, he -- it ended up failing.

Q All right. Now, in your report, you mentioned a 1977 Vineland Social Maturity Scales, which was administered to Gary. He was 11 years old in the 5th grade at the time. Can

you tell us what the Vineland Social Maturity Scale is?
A Yes. It was -- it's an early version of what later became known as the Vineland Adaptive Behavior Scale, which is currently still in use. The early one was developed by Edward Hall -- no, I'm sorry -- Doll, D-o-l-l. He was one of the early leaders in the intellectual -- in the field of intellectual disability. He defined ID primarily in terms of social incompetence rather than IQ. That was a hallmark.

So the Vineland was a third-party rating scale filled out by a teacher, a parent, or someone else who knew the individual. And that's the case today with the Vineland Adaptive Behavior Scale, which grew out of the Vineland Social Maturity Scale.

In my experience, there's only one reason to administer a third-party adaptive behavior scale, such as the Vineland, and that's if professionals -- in this case, educators -- believed that ID is something that needs to be ruled out or ruled in.

So aside from the performance, the fact that he was rated on the ID indicates that ID was a concern and is supportive of Prong 2, and obviously, Prong 3 as well.
Q Why do you say "obviously Prong 3 as well"?
A Because Prong 3 is based on continuity of concern. And here we had a concern expressed in grade -- what grade did you say? I'm sorry; I don't have the report in front of me.
Q Fifth grade, age 11, 1979.

A So at age 11, I believe he repeated the fifth grade. He was failing in the fifth grade. There was concern both because he repeated it and also because he was given the Vineland, which, as I said, is a measure that's only given if you think the person might have what then was called mental retardation.

And he did very poorly on it. He certainly scored in the ID range on the Vineland, which, in itself, is very supportive of Prong 2, at a point before the later head injuries.

Q And then, of course, the head injuries potentially add to that; correct?

A I would say they definitely added to it.

Q And in your report, you make reference to descriptions that teachers made at the time. What was significant about that?

A Sorry; I have a cold here.

Well, one of the teachers, according to Patricia, the mom -- and this is in Dr. Hall's report -- [indiscernible] mildly retarded. Now, Patricia disputed it, but, you know, she certainly qualified as a diagnostician, and most parents don't feel good about having a child called retarded.

But, you know, he was seen as quite impaired back then.

Q And in your report, with regard to Prong 2, you referenced Dr. Deysach's report again and the use of the term "adaptive intelligence." What did you find significant with

regard to that as far as your diagnosis on Prong 2?
A Well, adaptive intelligence, as used by Dr. Deysach -- and actually as mentioned in the DSM-5 and in my own research, which DSM-5 cited, the most important aspect of Prong 2 for diagnosing ID is how you understand and deal with complicated and emotionally challenging situations, often the kinds of things that get people in serious legal difficulty and certainly as seen in Mr. Terry's very dumb behaviors, impulsive behaviors.

So adaptive intelligence is very informative both in terms of why Mr. Terry does poorly in the community and was always in trouble, but it's also very supportive of someone with brain damage and intellectual disability.
Q Now, I think you've already touched on this, but with regard to Prong 3 -- well, actually, before I move on to Prong 3, there were some questions earlier during your qualifications about the common sense questionnaire. Can you explain again what that is?
A It's a social problem -solving measure, but -- or interviews -- structured interview. But unlike most social problem-solving interviews which ask people to generate good solutions to problems, the common sense questionnaire asked them to see if they can recognize bad solutions, which I think is more meaningful because, if you can't identify a bad situation or a bad course of action, very often, they're

attributed by other people who take advantage of someone's gull -- naive-tility (ph) then you're likely to get in trouble. And, in fact, criminal behavior of people with ID as reflected in the original Atkins ruling by Justice Stephens talks about gullibility. I don't think the word was used. But that's one reason used by the Supreme Court for taking death penalty off the table because almost always -- not always but very often when a person with ID gets in trouble, including commits a homicide or participates in a homicide, very often they're in cahoots with a more competent confederate who may have [indiscernible] but is more likely to understand the consequences both to the victim but also legally to themselves, not to mention that are able to make a deal with the prosecution.

So -- sorry; I kind of lost the thread here. What was the question again?

Q Well, that's all right. I was going to move on and ask you about social risk awareness. That's something that you mentioned that the common sense questionnaire measures. What is meant by social risk awareness?

A The fact that a particular course of action -- in the case of the common sense questionnaire, portrayed action -- could get you arrested, it could get you killed, it could bring about an undesirable outcome. And it's something that all of us have to do regardless of our level of intelligence.

We're always faced with temptation with inducements to do things that are not in our interest, and survival in the world physically, as well as in terms of staying out of prison, requires the ability to recognize behaviors that should not be engaged in. And they're affected by both judgment and as well as impulsivity. And impulsivity is the usual outcome of brain damage as is poor judgment.

Q Was the common sense questionnaire the only tool that you relied on for your diagnosis on Prong 2?

A No. I relied on other records, some of it reflected in my report, other things as I mentioned that I have got from other -- subsequently. So I looked at everything that I had access to. I didn't just rely on the common sense. In fact, I doubt I would come to a different conclusion even if I hadn't done the common sense questionnaire.

Q And why is that?

A Because there's much evidence to support deficits in Prong 2 that have nothing to do with anything I got from the common sense questionnaire.

Q I think you have touched on this already, but I want to turn to the developmental onset. And with Prong 1, what's your opinion about the --

A I'm sorry; I'm losing you there.

Q I'm sorry. With regard to Prong 1, what is your opinion with regard to onset in the developmental period?

A Well, I believe it qualifies, in terms of ID. Certainly in terms of the later assessment, but on the Woodcock-Johnson more recent assessments. But even with regard to the earlier, except for the two IQ scores, it was a lot of suggestion that Prong 1 was impaired.

Q And are you aware of the test that was administered this year by the Department of Disabilities and Special Needs, the WAIS-IV examination?

A Yes.

Q And you were aware of the full scale that was reported of an 82?

A Yes.

Q Does that test change your opinion with regard to Prong 1 -- not only Prong 1 but also the onset of Prong 1 during the developmental period?

A Does it change my opinion? No.

Q And why is that?

A Well, for one thing, if you correct for the Flynn Effect, you have a qualifying score because it's an old test. And it's also a possible practice effect because he was given that same test once before. Or I may be mistaken about that.

And, also, I don't think the Woodcock-Johnson is a better indicator of his cognitive -- level of cognitive impairment.

Q Let's unpack a couple of things there. You already mentioned the Woodcock-Johnson. Why do you believe that

that's a better indicator?

A Yeah, again, you sort of faded a little bit.

Q I'm sorry. I wanted to unpack that last answer a little bit. The Woodcock-Johnson, why do you believe that that's a better indicator than the WAIS-IV?

A Well, I believe it's a more valid test. The one thing that's interesting, there's no current research that I'm aware of with regard to the congruence or discongruence in results from either the WAIS -- from both the WAIS and the Woodcock-Johnson. There was some research early on but not recently. I know that because it came up in a case in Nevada that I participated in recently, and I actually called the main scientist, Kevin McGrew, for the Woodcock-Johnson cognitive test. I know him because he was kind of a student of mine, although he was at the University of Minnesota. I was kind of an outside member of his doctoral committee, and the topic of his dissertation actually cited me in the title. It was a test of the validity of Greenspan's theory of adaptive behavior, which is interesting because Kevin McGrew started out stating adaptive behavior and then moved over into Prong 1.

And what he told me was there's no -- not only is there no current research on -- I mean, what we know is they're correlated. That's what people do. And correlated means that someone who does high on one test will do high on the other,

and someone who does poorly on one test will do poorly on the other. But in and of itself, you could have a high correlation between two tests, but they may come up with a different answer -- a different [indiscernible].

His position is that it's not an important question. I think it is an important question because decisions are made based on the result of a test and it would be useful to know if they consistently differ. And I believe they do consistently differ. Now, that doesn't mean that the Woodcock-Johnson is an inferior test. It's very likely, in my opinion and that of others, it's a better test. But...

Q All right. You mentioned the Flynn Effect. In Dr. Hall's report, was the Flynn Effect for the 2024 WAIS-IV, was that correctly applied?

A No. She used the date of publication in determining -- in determining obsolescence, which is the number of years that have expired since the norms were collected. She used the date of publication.

Q And what date is the appropriate date to use?

A The date of norming (ph). And it takes a long time to develop these tests before they're published. And the date of norming is usually, on average, about two years prior to the date of publication. So she should have used the date of norming, which would have caused her score to come down by at least one point. And I believe there was one other issue.

Q The --
A I'm sorry?
Q Beg your indulgence for just a moment.
A I can't hear you; sorry.
Q Are you aware as to whether or not there was an observer present while the WAIS-IV was administered?
A Yes. The WAIS-IV was administered by another psychologist, whose name escapes me at the moment. And Dr. Hall was in there as a supervisor to observe. More typically when you do a supervisor kind of relationship, it's done through a one-way mirror. In this case, she was in the same room as the person administering it.
Q And what kind of concerns arise when there's an observer in the room when the test is administered?
A Well, it's definitely not recommended practice.
Q And why is that?
A It could make the person nervous or in some way affect them.
Q And with regard to your opinion on Prong 2, did the deficits of adaptive function, did they onset during the developmental period?
A Yes, for sure.
Q And why do you say "for sure"?
A Well, there's a lot of evidence for poor judgment and deficiencies in both conceptual and social, adaptive

functioning that occurred both in the period between 18 and 22, which is the current AAIDD ceiling, but even before 18, as reflected, for example, in the history of academic failure. And also things like not having friends.

It was noted by, I believe, the mother that -- and also Luann -- that he didn't have very many friends, which is one reason why, when people with intellectual disability don't have friends, one reason why they're so gullible, aside from their cognitive limitations, is because they're [indiscernible] to maintain the friendship by doing whatever they're asked to do.

Q Earlier in your testimony and in your report, you refer to ID as a functional diagnosis. What do you mean by "functional diagnosis"?

A It's not an etiological -- e-t-i-o-l-o-g-i-c-a-l -- diagnosis. That is, we don't usually know the case -- the cause, and we don't need to know the cause. What we need to know is whether they meet the criteria, which are essentially behavorial criteria. How do they behave in school? How do they behave in the job? That sort of thing.

So, in that sense, it's functional in that we don't need to know if there's a cause or what the cause might be.

Q And in your report and in your testimony today, you have talked about the significance of the traumatic brain injuries that Gary suffered. Can you explain the role of that in

reaching your opinion with regard to onset of both Prong 1 and 2 during the developmental period?

A Well, those traumatic brain injuries, by all accounts, were very severe and significant, and certainly it would account for why his intelligence went down. And it might account for his, obviously, deficient social judgment, including in his criminal history.

Q All right. Prior to those injuries, would you consider Gary Terry to have been somebody who was normal functioning?

A No. I would consider him very sub-average functioning but not necessarily ID functioning.

Q But then after the traumatic brain injuries, would you consider him ID functioning?

A Yes.

Q And why is that?

A Well, for one thing, cognitively, he's doing very poorly, and in terms of his adaptive intelligence or adaptive behavior, many of the incredibly stupid things that he did, such as asking somebody to shoot him in the leg to get out of paying child support, happened after the head injuries, I believe.

Q And are your opinions here today to a reasonable degree of scientific certainty?

A Yes.

Q And to a reasonable degree of scientific certainty, what

is your opinion as to whether or not Gary Terry is a person with an intellectual disability?

A I believe all the evidence that I looked at, including my meeting with him, supports a diagnosis of intellectual disability as defined by the two manuals and also by the South Carolina criminal statute.

Q And you prepared reports on July 25th, 2024, and a supplemental report on July 10th, 2024, that have been marked as Exhibits 2 and 3.

(Applicant's Exhibit No. 2, Dr. Greenspan's 7/25/24 Report, was premarked for identification.)

(Applicant's Exhibit No. 3, Dr. Greenspan's 7/10/24 Report, was premarked for identification.)

MR. GROSE: At this time, Your Honor, I would move Exhibits 2 and 3 into evidence.

MR. EVANS: Your Honor, we object to these reports being placed into evidence, piggy-backing the objection earlier for the records to be placed into evidence. Also, we feel that this is cumulative. He already testified about what was in the reports. There's no need for these reports to be entered into evidence. The best evidence is the testimony, Your Honor.

THE WITNESS: I'm sorry. I don't hear anything anymore. I don't know if you're talking to me or not.

MR. EVANS: No, I'm talking to the judge.

THE COURT: He can't hear you.

MR. GROSE: Dr. Greenspan, they're making an objection to your reports.

THE WITNESS: Okay.

MR. EVANS: Basically, the best evidence is testimony. He already testified to the things that are actually in the reports. This evidence is cumulative. It doesn't need to be entered into evidence. We would go with his testimony, and therefore, we object to his reports being entered into evidence. And, also, this is also considered hearsay, as was argued previously before this Court regarding the records being placed into evidence, Your Honor.

MR. GROSE: Well, Your Honor, both of these reports -- and you have not seen them -- but both of them are designated declarations where Dr. Greenspan states that "My opinions in this declaration are made with a reasonable degree of scientific certainty, and I'm willing to testify regarding these opinions under penalty of perjury."

A declaration is, in a lot of ways, equivalent to an affidavit, and the PCR statute expressly authorizes accepting affidavits. Obviously, they are relevant, and that would be our argument.

MR. GROSE: Your Honor, an affidavit is only acceptable when the witness cannot be in court to testify.

This witness is in court to testify, was under the

penalty of perjury under oath testifying today, Your Honor.

THE COURT: Do they say anything different?

MR. GROSE: No, sir.

MR. EVANS: And, Your Honor --

THE COURT: What's the point of it? is what I don't understand.

MR. GROSE: Well, that's what I don't understand either. I think that dilatates in favor of admitting them, but...

MR. EVANS: Yeah, what's the point of putting them into evidence when he testified what was in the record. And it's also unnecessary bolstering, Your Honor. He already testified to this.

THE COURT: They're admitted. He's already testified to it. It's fine.

MR. GROSE: Okay. Thank you, Your Honor. Beg the Court's indulgence for a moment.

(Applicant's Exhibit Nos. 2 and 3 were received into evidence.)

MR. GROSE: Dr. Greenspan, that's all the questions I have of you at this time. I believe that Mr. Evans or somebody from the Attorney General's Office is going to ask you some questions, and there may be a brief pause while we switch out the computers here at the podium.

THE COURT: He can just -- you can stay right there.

THE WITNESS: Okay. Thank you.

THE COURT: Yeah, just turn on -- just unmute yourself right there. And then let's see if we can hear everybody.

MR. GROSE: All right. I've muted this, and I've turned down the volume here, but I can turn it back up.

THE COURT: Well, let's play with it. Try talking, Mr. Evans.

MR. EVANS: Dr. Greenspan, can you hear me?

THE WITNESS: Yes, Mr. Evans, I can.

MR. EVANS: Okay. Your Honor, can you hear?

THE WITNESS: I can hear, but I can't see anything.

THE COURT: Why don't y'all pull that computer down to the table.

All right. Try talking again, Mr. Evans.

MR. EVANS: Dr. Greenspan, can you hear me?

THE WITNESS: Yes, I can hear you loud and clear, Mr. Evans.

MR. EVANS: Okay. MR. EVANS: Okay.

CROSS-EXAMINATION

BY MR. EVANS:

Q Now, in your report, you say you were initially contacted by Mr. Terry's counsel back in 2023; isn't that correct?

A Yes. I believe there might have been some change in the --

THE COURT: Ms. Franz, can y'all hear?

MR. GROSE: I cannot hear.

MR. EVANS: Hold on, Mr. Greenspan -- Dr. Greenspan.
A I was initially contacted by counsel, but --
MR. EVANS: Dr. Greenspan, could you hold on a minute?
THE WITNESS: Yeah.
THE COURT: Do y'all have your computer up?
MS. FRANZ: I'm sorry, Your Honor. I'm having some computer difficulties. I'll have it back up in a minute.
MR. GROSE: I unplugged it and it cut off. My apologies.
(Pause in the proceedings.)
THE COURT: Dr. Greenspan, just hold right there. We're trying to get something set up. Okay?
THE WITNESS: Thank you.
THE COURT: Thank you, Dr. Greenspan. And thank you for your patience.
THE WITNESS: No problem.
(Pause in the proceedings.)
MR. EVANS: Dr. Greenspan, can you hear me?
THE WITNESS: Yes, I can.
BY MR. EVANS:
Q Now, as I said earlier, in your report, you were initially contacted by Mr. Terry's counsel in 2023; isn't that correct?
A Yes, but the person who contacted me I don't believe is on that team anymore.
Q Okay. And you were asked to evaluate and make an

assessment regarding if Mr. Terry was intellectually disabled; correct?

A Well, it may have evolved somewhat, but that's generally accurate, yes.

Q Okay. And at that time, you knew Mr. Terry was given the death penalty and is currently sitting on death row?

A Yes, I did.

Q And during the deposition, you admitted that you are against the death penalty?

A Well, it's evolved. I started out being pretty neutral, and as I learned more about the death penalty and as I got involved in these various cases, I do have some concerns about it, the way it's administered or inconsistency as to how it's applied.

Q So you are opposed to the death penalty: Yes or no?

A Yes.

Q Okay. Now, you're currently living in Berkeley, California; isn't that correct?

A Yes.

Q I'm sure there are a lot of experts between Lexington, South Carolina, and Berkeley, California; isn't that correct?

A I'm assuming you're -- that's true, yes.

Q But they decided that, of all the psychological experts in this country they could have contacted, they decided to contact you; wasn't that true?

A I'd like to believe it's because they thought no one else was as good as me.

Q Okay. Maybe so.

Now, during your deposition, you testified that you testified in 30 Atkins hearings; isn't that correct?

A Approximately and maybe more.

Q Okay. And you never once testified for the prosecution; isn't that true?

A I have never been asked. I used to hand out my card to prosecutors. None of them ever called me.

Q So your answer is yes, you never testified for the prosecutor, only for the defense; correct?

A In death cases, I have testified -- I have gotten involved in -- as a consulting expert by prosecution, yes, but not in death cases.

Q Not in death cases.

So in all your Atkins cases that you testified in, it was only for the defense?

A Well, I testify as to the truth as I see it. I don't see myself as a member of the team, so to speak.

Q Okay. So that's a yes? You only testified for the prosecutor -- I mean, for the defense, never for the prosecution?

A Correct.

Q Now, during your deposition, you said, right now, you are

actively involved in researching and publishing. You're not teaching anymore, are you?

A No, except when I give lectures, which I do from time to time.

Q Okay. And you also said you have a small forensic practice and you consult and testify in criminal cases, most of that being in death penalty cases; isn't that true?

A And I sometimes get involved in service eligibility cases, which are civil.

Q All right. But criminal cases, for the most part, are death penalty cases; correct?

A Yeah. I mean, I have had a few non-death cases and hopefully more in the future, but that's been the bulk of my testimony, yes.

Q And of course you're being compensated for your work in this case; isn't that correct?

A If I remember to bill, which is, for me, a problem. But, yes, I am being compensated.

Q Okay. So your livelihood depends on your opinion in this case; isn't that true?

A I wouldn't say I'm independently wealthy, but I can assure you, I don't depend on what I get from these cases. Between my investments and my pension, I do pretty well without it.

Q Now, during the deposition, you say you spoke to

Mr. Terry for one to two hours?
A Yes.
Q And most of that time was primarily to fill out that common sense questionnaire; isn't that true?
A Probably half, yeah.
Q Did you speak to him about anything else during that session?
A I asked about how he was doing. Things of that sort. I generally try to stay away from the crime facts because that's not my area of responsibility.
Q Okay. And you also spoke to his ex-wife, Luann?
A I did, yes.
Q And also you said you attempted to speak with his mother.
A That didn't go very well, unfortunately.
Q But Dr. Hall was able to speak with her and get valuable information from her; isn't that correct?
A Which I relied on to some extent, yes.
Q Oh. You relied on Dr. Hall's assessment to come to your final assessment on your original -- your first report?
A No, because I think I got it later.
Q Okay. So you did not rely on what Dr. Hall got from his mother for your first assessment on your report?
A Well, I relied on it to some extent in preparing to testify today because I found it very interesting, and I'm impressed that she was able to have a good interview with

Patricia Terry. Unfortunately, I did not have that experience.

Q All right. Now, in your report, you stated you reviewed medical records, prison records, and psychological records. Where were these records from?

A Well, a lot of the records were school based from his experience in school. There was a -- he was hospitalized a couple of times because of alcohol dependency, primarily through the efforts of his wife Luann. I have to look at the name of that facility, but there was some good stuff in there. There was the report from Dr. Deysach. There was the Woodcock-Johnson report from -- excuse me while I look up his name.

Q And, Dr. Greenspan, what are you reading while you're testifying right there?

A Well, I'm trying to look up the name of -- of the psychologist who administered the Woodcock-Johnson. I have another laptop with my report on it, and I thought I might find it on there.

Q That's Dr. Decker; isn't it? Isn't that correct?

A Dr. Decker. Scott Decker, who I believe is a professor at the University of South Carolina. I relied on his report. The Charter Rivers, there was quite a bit of stuff from that.

Q Okay. And you said you read the transcript of the testimony of Dr. Deysach?

A No, I wouldn't call it a transcript. It was a report but it was an unusual format, kind of question and answer that I assume he came up with.
Q Okay. So --
A It was not a standard report.
Q Okay. So his testimony in the original case was not provided to you?
A Not in terms of a [indiscernible], no.
Q And you never spoke to any of Mr. Terry's teachers?
A No, I did not.
Q You never speak to any of his friends?
A I'm sorry; I lost you there.
Q You never spoke to any of his friends?
A Generally, I don't.
Q Generally, you don't speak to any friends of the individual you're examining?
A Occasionally I do, but I did not in this case.
Q And you never spoke to any of his doctors?
A No.
Q Now, you wrote a supplemental report assessing the report made by Dr. Hall; isn't that correct?
A I'm not sure I would say I assessed it. I commented on it.
Q Well, I would say you critiqued it; didn't you? There were certain things about it you disagree with?

A Yes.
Q Okay. And that report was done on July 10th of this year?
A Yeah. I -- I received [indiscernible] right after I [indiscernible] report and that's why it's a later date.
Q Okay. Now, in this report on page 1, you stated that, "Dr. Hall states the diagnostic criteria for ID correctly, according to DSM-5, but she does not cite the AAIDD manual"; isn't that correct?
A No, I said she cited DSM's definition but did not cite the AAIDD definition.
Q Okay. I just said that.
Now, you do realize this is a court proceeding and not a scientific or medical proceeding; isn't that correct?
A I missed part of that. Could you repeat it?
Q You understand this is a court proceeding and not a scientific or medical proceeding?
A Yes, of course.
Q Okay. So Dr. Hall, yourself, and this Court has to apply the definition of intellectual disability that's found under South Carolina law; isn't that correct?
A Yes.
Q Okay. Now, Section 16-3-20(C)(b) of the South Carolina Code of Laws define intellectual disability as "significantly subaverage generally intellectual functioning existing

concurrently with deficits and adaptive behavior and manifested during the developmental period."

You are aware of this definition; isn't that correct?

A Very -- very much so.

Q All right. Now, the DSM-5 defines intellectual disability as "There must be three criteria that must be met: Deficits in intellectual functioning, deficits in adaptive functioning, and onset intellectual and adaptive deficits during the developmental period." That is very familiar to the current statute in South Carolina law; isn't that correct?

A It's basically the same thing except they call it adaptive functioning rather than adaptive behavior.

Q Okay. And that was the criteria that Dr. Hall followed; isn't that correct?

A Yes. That was the framework she said she used.

Q Okay. Now, the DSM-5 is the book that psychologists use in order -- for the determination of diagnosis; isn't that correct?

A Not just psychiatrists -- not just psychologists but psychiatrists or social workers. Anyone in the mental health profession who is making a diagnosis that relates to a mental condition.

Q Okay. And in the preface of the DSM-5 it states, "The American Psychiatric Association's Diagnostic and Statistical Manual of mental disorders is a clarification of mental

disorders with associated criteria designed to facilitate more reliable diagnosis of these disorders." So the DSM was created in order for the uniform diagnosis of psychologists or psychiatrists or social workers all over the country; isn't that correct?

A Yes, I would say that's true.

Q All right. Now, in your report -- your supplemental report, you stated that Dr. Hall cites the letter of the DSM-5 but does not appear to the application of the spirit. Do you remember writing that in your report?

A Well, I said she applies the letter but not necessarily the spirit.

Q Okay. And it was your opinion that she relayed on scoring and not the wholistic approach to make an actual diagnosis of intellectual disability?

A I believe that's what I said, yes.

Q Okay. But the DSM-5 states under "Deficits of intellectual disability" that "deficits must be confirmed by both clinical assessments and individualized, standardized intelligent testing so test scores are important to assess intellectual functioning"; isn't that correct?

A I believe that's true, yes.

Q Okay. And the only score that you mentioned in your report is the 77 IQ score given by Dr. Decker; correct?

A Yeah, that was probably an oversight. I wrote that

report very quickly. I didn't have a lot of time to do it.
Q Okay. And that IQ test was done on 2022, two years ago, well beyond the developmental period of Mr. Terry; correct?
A That's true.
Q Okay. Now, did you ever consider the 92 IQ score that he got at age is 11 or the 92 score he got at age 14, both within the developmental period?
A I'm sorry? Do I what?
Q Did you ever consider the IQ score of 92 that he got at age 11 and the 92 score he got at age 14, both tests done during the developmental period?
A So what's the question?
Q Did you consider those tests in making your diagnosis?
A I said before that that's certainly complicating factors.
Q Okay. But they're not at all mentioned in your report.
A No, that's true.
Q Okay. Now, it's true Dr. Hall considered these tests in her report; isn't that correct?
A I would say so, yes.
Q Okay. Also in your report, you failed to mention that, during the testing of Dr. Decker, Mr. Terry has shingles, which is a painful debilitating virus that causes a painful rash that cause debilitating eyesight of Mr. Terry during that test; isn't that true, that he has shingles at the time he did that test?

A I have had shingles. I know how -- I know what it is.
Q And he had shingles while he took Dr. Decker's test; isn't that correct?
A I didn't know that.
Q Well, did you read Dr. Decker's report? Because it's mentioned in his report.
A Yeah, he did talk about eyesight. I don't remember specifically whether he linked it to shingles.
Q Excuse me?
A Yeah, I do remember his reference to the eyesight issue.
Q Okay. But that's not referenced in your report whatsoever, is it?
A No, it's not in my report.
Q Would you agree that having a debilitating rash, especially curtailing some of your eyesight, could affect your scoring and the IQ test?
A Well, the scoring is something performed by the psychologists. It could affect the score, yes.
Q Okay. Looking at your reports --
A I'm sorry; I lost you there.
Q Okay. Hold on one second.
Looking over on your report on page 8, you mentioned, I think on like the fourth paragraph -- in your report, Dr. Greenspan, on page 8 --
A Yes.

Q Hold on a second.

Okay. In earlier reports -- did you change your report before you came to court today?

A No, I haven't. I barely looked at it, let alone changed it, no.

Q Because the earlier report, it stated -- and you mentioned, "The mere fact that he was given multiple individually administered IQ tests independent of the results is enough to satisfy the developmental criterion." Do you remember writing that?

A Yes, I wrote it, and I believe it.

Q Okay. So independent of the scores, just because he had been administered many tests, that shows he's intellectually disabled?

A No, I didn't say.

Q Okay. What did you mean by that?

A Well, giving an individual IQ test such as the WAIS or the WISC or the Woodcock-Johnson is a very expensive, time-consuming process. It's only done for one reason, and that's because someone's being considered for a diagnosis that would suggest the possibility of intellectual disability or try to get a handle on why they're doing poorly in school, for example.

Q So why did you seek independent results?

A Well, because I was talking specifically, sir, about

Prong 3. I was not saying that the test itself supports Prong 1. I said it supports Prong 3, because it suggests concern. And I defined -- or I described Prong 3 as a continuity of concern. We only give individual IQ tests if there's a concern.

Q Okay. Of course you give the tests when there's concern, but wouldn't the results of those tests be important?

A Well, obviously, they could be important.

Q Okay. And Mr. Terry, during those years in elementary and middle school or high school, he tested at a 92; isn't that correct?

A Yeah, assuming those were valid administrations; I have no reason to think they aren't. But I would have like to have seen the actual reports by the psychologists, and that was not -- I was not able to do that. I'd be more confident in them if I knew how they were administered and who administered them or what their qualifications were. I have seen many cases where, once I have that information, I had reason to question whether it was valid administration.

Q Well, I mean, school psychologists administer those tests; right?

A Well, I don't know that. I didn't see a report from any school psychologist. I chaired the school psychology program at the University of Connecticut. I'm very familiar with school psychologists. I know that some of them are good and

some of them are not so good.
Q Okay. So --
A It's always important to have that kind of information.
Q Okay. So you said you read the school records and you didn't remember seeing the school psychologist's scoring in those records?
A I believe that's true.
Q You don't remember seeing it or you saw it?
A I don't remember seeing it. I may be mistaken.
Q Okay. So the 92 score, where did that come from, if it wasn't from the school psychologist's records?
A Well, I'm assuming it was done by a school psychologist because that's the function of a school psychologist is to administer IQ tests. It's not something that anyone else could do.
Q Right. Of course.
A But some of them have master's degrees. Some of them have what's called a six-year degree -- diploma which is sort of halfway between a master's and a doctorate. Some have doctorates. I have even seen school psychology reports that were done by totally unqualified people.
Q But you have no proof these people were unqualified, do you?
A I don't, no. But that's why you should never put all your emphasis on one test result.

Q Okay. Well, I'm going to move on.

Now, in your report, you mentioned the low levels of learning that Mr. Terry had.

A Yes.

Q Okay. But no one in school diagnosed him as being intellectually disabled; isn't that correct?

A That's true.

Q Okay. They basically defined him as being learning disabled; correct?

A That was the label given to him, yes.

Q Okay. And learning disabled is different than intellectual disability; isn't that correct?

A Learning disabled is, in theory, different, but it's not always properly -- it's not a label that's properly -- always properly given. It's often improperly given.

Q Okay. Well, this is a lot of guesses you're making, Dr. Greenspan. You have no idea or no record showing that it was improperly given, do you?

A Well, it requires normal adaptive functioning, for one thing. And we don't have that here.

Q Well --

A Even in the school years. In that sense, I would question its validity. At any rate, it doesn't mean anything. The question is, does he have intellectual disability during the developmental period, not whether it was properly or

improperly diagnosed in school.
Q Okay. So you're saying that he had adaptive functioning problems in elementary school. Did you talk to any of his teachers?
A No, I did not. I relied ---
Q Okay. Thank you.
A --- for one thing on the Vineland.
Q And you didn't talk to his mother either, did you?
A Briefly, yes.
Q Did you get anything out from her? You didn't, did you?
A No, I didn't find that useful.
Q And you never talked to any of his friends that he grew up with during that time?
A That's true.
Q So you really don't know what kind of adaptive functioning he had back then, do you? He made bad grades pretty much. That's all.
A That's largely true, yes.
Q Okay. And people with learning disabilities usually make bad grades in school. That's why they're put in special education programs; isn't that correct?
A Yes.
Q Okay. And that's what they have diagnosed was Mr. Terry of being, learning disabled. And you can be learning disabled and not be intellectually disabled?

A That's true.
Q Okay. And you are aware he was put in resource classes while he was in school?
A Yes, I'm aware.
Q Okay. And he was also put in special education classes for only English and math?
A Repeat that, please.
Q He was only placed in special education classes for English and math?
A Yes, I believe so.
Q Okay. And the resource class is basically classes at the end of the day to help him with the school work; correct?
A I'm not 100 percent sure about that.
Q All right. Now, in your report, you said, at the age of 14, he stayed at the same level academically, so this reveals brain damage; correct?
A No, in and of itself, it doesn't indicate brain damage. It indicates a failure to learn.
Q Okay. So it could be possible he didn't have brain damage. He just didn't try.
A Well, part of giving a test such as the WRAT is assessing whether the person is making an effort. There's no indication that he did not make an effort.
Q Okay. I'm not talking about --
A So, in that sense, I would say that, at least in terms of

those tests, that he tried.
Q I'm not talking about testing. I'm talking about school work. He didn't rise academically.
A Well, I mean, people give up in school because failure is painful.
Q Excuse me?
A Yes. Effort obviously enters into it. It could -- it could explain why he did poorly. But there's a lot of evidence here that his deficits were not a function of effort.
Q Okay. And you came through from this without speaking to anybody that knew him at that time?
A That's true. Well, other than -- well, the wife.
Q Well, the wife didn't know him in elementary school and middle school, did she?
A I'm sorry?
Q The wife didn't know him in elementary school or middle school, did she?
A Correct.
Q Okay. Now, the first CT scan of Mr. Terry's head was in 1994 at the age of 27, well beyond the developmental period; correct?
A That's true.
Q And when he was younger, I think between the ages of 10 and 14, he was sniffing glue with his brother; is that true?
A Very dangerous thing developmentally for someone to do.

Q Okay. But his score was never reduced during that period between age 11 and age 14, did they?
A I'm sorry? What didn't, sir?
Q His scores never went down between the age of 11 and age 14?
A I think that's true, yes.
Q Okay. Now, in your report, you stated that Mr. Terry was given the Vineland Social Maturity Scale. And, according to you, this is only given when a student is suspected to have ID; isn't that correct?
A Well, it's not given to the student. It's given to a rater.
Q Given to a what? Could you repeat that?
A To rate him on it. It's a third-party rating scale.
Q Okay. And the Vineland Social Maturity Scale is used to measure social maturation in eight areas: Communication, general self-help ability, locomotion, occupation, self-direction, self-eating, self-dressing, and socialization; isn't that true?
A Yes. Those are the sub-scales on it, I believe.
Q Okay. And he was given this test in fifth grade; isn't that true?
A No. He was rated on it. It wasn't given to him.
Q Okay. He was rated on it in fifth grade.
A Yes.

Q My mistake. Okay.

But after this test was given, he was still not diagnosed as intellectually disabled; correct?

A Why do you say that? Certainly the results are supportive of it.

Q But he was not diagnosed by anybody in that school; isn't that correct?

A That's true.

Q Okay. Now, during your deposition -- and I think on direct you say you couldn't really get anything out of Mr. Terry's mother; isn't that true?

A I got too many "don't knows" and it was my clinical judgment that I couldn't rely on her information. That may have been an incorrect and premature conclusion.

Q Okay. You describe her as being shaky, during your deposition?

A Oh, I don't know. I don't know -- or guessing. To me, that's shaky.

Q Okay. And you said that part of your testimony here, you relied on the report given by Dr. Hall; isn't that correct?

A I found a lot of really useful stuff in there, particularly around [indiscernible].

Q Okay. And during your direct, you said something about something mentioned Mr. -- somebody mentioned that Mr. Terry was borderline retarded in school and that was in Dr. Hall's

report?
A I believe it was, yeah. And I have also seen it elsewhere, but I can't tell you where I saw it.
Q Because the only mentioning that I remember seeing regarding retardation is on page 6 where it talks about the school psychologist, Tommy Wicker, recommended that Mr. Terry be -- remain in regular education classes with two periods and a resource room daily. And that's what was given to him; isn't that correct?
A Yes, that's true.
Q Okay. And instead of being placed in a special education resource program, it appears from the record that Mr. Terry was retained in fifth grade. I remember you testified to that, that he got retained in fifth grade; isn't that true?
A Yes.
Q Okay. And it says here, "This seems to confirm Ms. Terry's recollection of her son's evaluation for special education. She recalled a teacher named Fitzgerald, and she was adamant that Gary was a slow learner but was not retarded. She and Ms. Fitzgerald believed that Mr. Terry needed to get more individual attention in class. He appeared to benefit from this attention, and his grades improved, his test scores improved, and he was promoted to the sixth grade the following year."
That is also true? He got promoted the next year to the

sixth grade? He was retained the fifth and then, the next year, he got retained -- moved up to the sixth grade; isn't that correct?

A I believe so.

Q Okay. Now, Dr. Hall's report also mentioned that, as a young boy, Mr. Terry did chores.

A Terry what? I'm sorry?

Q Mr. Terry did chores. He had chores as a young boy. Remember reading that in her report?

A I didn't catch the last word. What did he have?

Q Chores. Chores. I'm a country boy. It's work in the house when you're little. I'm a country boy. That's what we call work.

Mr. Terry had responsibilities as a child for working in the house. Did you remember reading that in Dr. Hall's report from his mother?

A Yes, I believe I did. But I'm not a country boy, so I might call it something else.

Q Okay. And now his mother didn't tell you that Mr. Terry, as a boy, was responsible for washing dishes, sweeping the floor, and he also helped his father with carpentry and mechanics, and he completed these chores independently.

Now, that goes to adaptive functioning, doesn't it?

A That goes with practical adaptive functioning, which I have already testified is the area of great strength for him.

Q Okay. And I don't know if you read this, but Luann also said that Mr. Terry once repaired the victim's washing machine at one time?

A Again, that shows good, practical adaptive functioning.

Q So intelligence also?

A It shows good practical skills. It's an aspect of intelligence. That's not tapped by IQ tests. But I have already testified that he has areas of skill, as do most people with intellectual disability. And practical adaptive functioning is an area of particular competence and skill.

Q Okay. So the fact that he could do his chores, he could do his work as a child during the developmental period, that shows some personal independence, which must be looked at when you determine adaptive functioning; isn't that correct?

A Well, that doesn't really indicate independence. Independence would be -- would not be a mother or someone else telling you what to do.

Q Well, independence would be -- Dr. Greenspan, do you have children?

A Yes, I do. And grandchildren.

Q You have children and grandchildren. Okay.

So you would know how hard it is to get your children to do their chores, to do their work. If they do it independently, then you don't have to make them do it; isn't that correct?

A That's obviously very important. Yes, that's important.
Q And that shows some adaptive functioning when you are able to do things on your own without being asked; isn't that correct?
A Of course.
Q And according to his mother, Mr. Terry, as a child, was able to do that; correct?
A Yes. He had practical skills and that's an aspect of that. Now, I don't know all the context, what the demands were, how difficult those chores were, but certainly that's a positive indication of practicable skill and motivation. And people with intellectual disability often hold jobs, as I have testified and written. They often like doing what I might consider or you might consider menial jobs. It gives them a sense of accomplishment.
Q Okay. Now, in the report, you mentioned something like his mother reported that she was told by a third grade teacher that Gary is borderline retarded.
A Yes.
Q And she didn't tell you this herself, did she?
A No.
Q Okay. As a matter of fact, this information came from notes made by the social worker in his original case. Do you remember reading that?
A Yes. Thanks for clarifying that.

Q Okay. So it wasn't in the school reports, and it wasn't given to you verbally by Mrs. Terry; isn't that correct?
A Yes.
Q Okay. And no -- this third grade teacher, you never got in contact or even know her name; isn't that true?
A No, I don't.
Q Okay. And no school psychologist ever diagnosed Mr. Terry as being intellectually disabled; isn't that correct?
A Not to my knowledge, no.
Q Now, isn't a person that is intellectually disabled easily manipulated?
A That's been a major emphasis in my own writing over the years. And gullibility.
Q All right. Now, you spoke to Mr. Terry's ex-wife Luann?
A I did [indiscernible] at length.
Q You broke up for a little while, Dr. Greenspan. Could you repeat that, please? Could you repeat?
A At length, I talked to [indiscernible].
Q You spoke to her at length? Is that what you are saying?
A Can you hear me?
Q Yes. You said you spoke to her at length? Is that what you said?
A I did talk to Luann, yeah. I talked to her for a while.
Q Okay. And she told you that she first met Mr. Terry at a

bar in Columbia; correct?
A Yeah, you kind of broke up there, Mr. Evans. She told me it was a dance. She met him at a dance.
Q No, I think she said she met him at a bar, and he asked her to dance.
A Well, I may have misunderstood her.
Q Do you remember that?
A No, that's not what I remember.
Q Okay. And at the time, she was a college student and he was a tenth-grade dropout; correct?
A Well, she didn't know that. She thought he was much older.
Q Exactly. He lied to her and told her he was nearly 26 years old but he was only 19; correct?
A Yeah. She fell for it.
Q And she fell for it. So he easily manipulated her. She didn't manipulate him; isn't that true?
A Well, they're not mutually exclusive. You can manipulate people and still be manipulated.
Q Okay.
A But it's true that he did not tell her the truth.
Q Right. And he also wooed her and convinced her to fall in love with him; isn't that correct?
A Well, she entered into a romantic relationship with him.
Q As a matter of fact --

A Whether she fell in love with him, I really can't say.
Q Well, okay. Now, I remember reading -- and you might have read this also in Dr. Hall's reports -- that Luann stated that Terry would sweet-talk her to get his way or bring her flowers when he messed up; isn't that correct?
A Yes. She found him charming and amusing.
Q And that's very manipulative behavior also; isn't that true?
A People with intellectual disability can manipulate. And she describes herself as very naive back then.
Q Okay. Mr. Terry also convinced the woman [indiscernible] to marry him; isn't that true?
A Yeah, which created some real problems for her with her parents.
Q Okay. So it sounds like Mr. Terry does a good job at manipulating women; isn't that correct? They don't manipulate him. He manipulates them; isn't that true?
A Well, he's had a lot of girlfriends, so I assume he has some skill in that department.
Q Okay. He also, while serving his YOA sentence, he attempted to bribe a correctional officer to get back a radio for another inmate. Do you remember reading that in his SCDC file?
A Well, yeah, but not very effectively. Rather ineptly, actually. So that's more supportive of ID than contrary to

it.

Q Okay. Now, you talked about the business Mr. Terry owned at one time; isn't that true?

A The repo, yeah.

Q The repo business.

Now, isn't it true that Mr. Terry started that business and gave flyers to different car companies in Columbia in order to get business repossessing cars?

A I'm assuming that Luann wrote up the flyers and told him what to do. But I don't know that for --

Q You're assuming that, but Mr. Terry is the one that handed out the flyers, so you have absolutely no proof of who created those flyers. It could have been Mr. Terry; isn't that true?

A It could be true, yes.

Q Okay. And beyond that, he's the one that distributed the flyers and got the business. Luann did not do that, did she?

A Well, I don't know if she knew how to do it, but she told me that he had success with one company, but he failed to get other companies.

Q Okay.

A And then, at some point, that company dropped him, and that was the end of the business.

Q Well, I'm going to -- well, we're going to how he lost his business in a minute.

Now, Luann helped him with the paperwork and helped him with the books; isn't that true?
A Yes, I believe that's true.
Q And that's because she's a college graduate and he only had a tenth-grade education; isn't that true?
A Well, she had -- obviously had significant academic skills that he lacked.
Q Okay. But he did the work regarding the repo business; isn't that true?
A Apparently, yes.
Q Okay. And the business failed not because of what Mr. Terry did, but Mr. Terry got injured and he allowed his cousin to run the business and his cousin stole from him; isn't that true?
A I believe something like that happened, yes.
Q Okay. So it wasn't that Mr. Terry was just so intellectually disabled that he wasn't able to run the business. He had a misfortune and trusted the wrong person. That's why he lost the business; isn't that true?
A Well, trusting the wrong person is certainly supportive of an ID diagnosis. But --
Q Oh, really? So everyone, I guess, has intellectual disability because we all have trusted the wrong person at one time or another.
MR. GROSE: Objection. Argumentative.

MR. EVANS: I'm asking a question.

THE COURT: Overruled.

A Many people have, including myself.

BY MR. EVANS:

Q Okay. So -- and you -- of course you're not intellectually disabled, are you, Dr. Greenspan?

A I'd like to think I'm not.

Q Okay. So just because Mr. Terry trusted a family member -- his cousin -- does not prove he's intellectually disabled, does it?

A Of course not. I think you're putting words in my mouth.

Q No, I don't think I am. But I'm going to move on?

MR. GROSE: Objection. That's argumentative.

MR. EVANS: Withdrawn.

MR. GROSE: Move to strike.

MR. EVANS: Withdrawn.

THE COURT: Move on.

BY MR. EVANS:

Q Now, in your supplemental report, you discussed that Dr. Hall mentioned the job that Terry had; however, she failed to mention the menial nature of these jobs and how they ended in failure; isn't that correct?

A I said that, yes.

Q Okay. Now, Mr. Terry dropped out in the tenth grade; correct?

A I'm sorry? What?
Q Mr. Terry dropped out in the tenth grade?
A Yes, after being retained.
Q Okay. You're not going to get any higher-level jobs with only a tenth grade education, would you?
A Usually not, no.
Q Okay. So the menial labor is the only labor you can get with a tenth-grade education; isn't that correct?
A Not necessarily, but certainly for people with ID, that's typically the kind of jobs they do.
Q Okay. So you're going to get a high-level, high-paying job with no high school diplomas nowadays in this country; is that what you're saying?
A Repeat the question, please. Could you repeat that question?
Q So a high-level, high-paying job with no high school diploma in this country; is that what you're saying?
A It's not impossible, but it's unlikely, yes.
Q It's unlikely. Okay.
So usually people with only a tenth-grade education, regardless of their mental status, would get a menial labor job; that those are the only jobs available to people with high school educations -- with no high school education. Isn't that correct, Dr. Greenspan?
A As a general rule, that's probably true, yes.

Q All right. Now, according to SCDC records, Mr. Terry first worked with Piggly Wiggly and he got fired for an argument. Did you ever remember seeing that in his SCDC records?
A Yes. I know he didn't hold jobs very long, except for one with a friend, I believe.
Q Okay. And he worked for Suncliff Amaco as a mechanic. And that was -- you'd have to have some intellect to be able to fix cars, wouldn't you?
A I'm missing some of your words. But, again, practical intelligence is his area of strength, and part of that involves working on cars.
Q Okay. And he also worked at Giant Food World but he quit and moved to Florida; isn't that true?
A What did he do?
Q Worked at Giant Food World. It's a grocery store.
A Yes.
Q As a stocker. And then he quit and moved to Florida. And then he was working for a tree ---
A Okay.
Q --- service, and that's when he got injured, at the tree service.
A Oh, yes.
Q Okay. Now, you're saying earlier that his menial labor jobs revealed -- and that he cannot keep them -- revealed his

intellectual disability? That is your belief?
A I would never say that and I didn't say it.
Q Okay. So you're saying now that it's a possibility that he was not intellectually disabled because he did have menial labor jobs?
A No. Again, I think you're misstating what I said.
Q So what did I --
A People with ID have trouble holding jobs, and that's -- if you look at the history of Mr. Terry's employment history, that's -- I think that's a fair characterization. He never -- he never held a job very long. And that was certainly Luann's impression.
Q Okay. So you ---
A [Indiscernible] any one particular instance to say that that's the basis for diagnosing it. It's just congruent. That's all.
Q Okay. Now, do you remember reading his mother writing in her diary that Mr. Terry cannot keep a job and he needs to grow up?
A Yes, I believe she did say that.
Q Now, isn't it possible he couldn't keep a job because he's just lazy?
A Because he was lazy?
Q Yes?
A Well, I suppose that's possible, yes.

Q Okay. Now, you also wrote in your supplemental report regarding a disagreement with Dr. Hall when Dr. Hall said that her pregnancy on Terry's birth was nonproblematic. Do you remember writing that?

A Yes, I do remember writing that.

Q Okay. And you wrote about -- in your report about Ms. Terry having a kidney disease while pregnant and was likely taking teratogenic medications. Could you pronounce that for me, please?

A "Te-rat-oh-gen-ic."

Q Teratogenic medication. Okay.

A It's a chemical that causes brain -- birth defects.

Q Okay. Now, you did not see any medical records during Mrs. Terry's pregnancy, did you?

A No, that was from testimony by her, I believe.

Q I think this kidney disease came from the same questionnaire about the borderline mental retarded from her social worker; isn't that true?

A Possibly, yes.

Q Okay. So you have absolutely no proof of this kidney disease that his mother had while she was pregnant with Mr. Terry?

A Other than that, no, I don't.

Q And during the deposition, I thought teratogenic was only one drug, but it's several drugs that can cause birth defects;

isn't that true?
A Well, any drug that causes birth defects is teratogenic.
Q Okay. So that means several drugs can cause this, not just one drug; correct?
A Yeah. Alcohol is probably the main one.
Q Well, [indiscernible] alcohol is considered teratogenic drugs also; isn't that true?
A It's probably the main one.
Q Okay. And you have no proof that Ms. Terry took alcohol or drugs during her pregnancy?
A No. And I'm not saying she did. I'm just saying there are very many different ways of causing [indiscernible] in a fetus, including taking of medication.
Q Okay. And teratogenic drugs also included some cancer-fighting medications, some antibiotics. But you have absolutely no idea what drugs Ms. Terry was taking during her pregnancy?
A That's true.
Q Okay. And you are not a medical doctor; isn't that correct?
A That's true.
Q Okay. But I'm sure Ms. Terry's medical doctor would know what drugs could cause birth defects; correct?
A Not necessarily. I mean, information about teratogenic effects has improved, and that was a while -- quite a while

ago. Back then, they didn't know that much about it.
Q But this statement regarding these drugs is totally a guess by you; isn't it?
A Well, I was taking it at face value, the fact that she had kidney disease and that it was a real problem in the pregnancy and that's why I said that Dr. Hall saying it was a perfectly normal pregnancy may be untrue. It may be an overgeneralization.
Q Okay. Well, Mr. Terry was carried to term, wasn't he, according to his mother?
A I'm sorry. Again, I missed --
Q He wasn't born premature, was he?
A No, he wasn't.
Q Okay. And there was no knowledge of any type of birth defects that he had after his birth, is there?
A No. And brain damage is typically something that shows up later.
Q It shows up later when he's in school, isn't it?
A When he's in school, which it did.
Q Okay. Well, he had an IQ of 92 while he was in school, didn't he?
A Yeah, he did. That's the only indication of normal cognitive functioning. There are many indications of abnormal cognitive functioning.
Q Well, not making good grades and being learning disabled,

that's abnormal also, isn't it?
A Absolutely. And many -- many people with LD or labeled LD have brain damage.
Q And many people who are labeled LD just have a learning disability and no brain damage or any type of intellectual disability?
A Well, I would dispute that. I mean, if you look at the history of learning disabilities, which I'm very familiar with, it was always considered a form of minimal brain damage. In fact, that was the term used.
Q Okay. All right. Let's go to the common sense questionnaire. You measured -- part of your measuring of adaptive functioning was the common sense questionnaire that you gave Mr. Terry?
A Yes.
Q And these are, what, 23 scenarios that you told him to see if Mr. Terry knew right and wrong in a particular situation; isn't that true?
A Well, right and wrong implies moral judgment. I'm really -- I think a more accurate way of -- is dumb versus smart.
Q An accurate way of dumb versus smart? Is that what you said?
A Yeah. In terms of understanding possible consequences such as getting arrested or losing a job or developing some

kind of problem or other.
Q And this questionnaire is not done by anybody else in the psychological community; isn't that correct?
A That's largely true, yes.
Q You're the only one that actually does this questionnaire on patients; isn't that correct?
A I think others have used it.
Q Others have used it? Your questionnaire?
A Yes.
I'm sorry; I don't hear anything.
Q I'm looking for something.
A I can't see you, so I have no way of knowing what you're doing.
Q Okay. During your deposition, I asked you, "Is this something used by psychologists in the ordinary course of business or just something that you use in your evaluations?"
And your answer was, "There are some people that know about it, but for the most part, it's mostly me."
A Yes, that's true.
Q Okay. So people know about it but you're the only one that usually uses it; correct?
A Yes.
Q Okay. And only you would get to decide what's right and what's wrong with the person's answer; isn't that true?
A No. I didn't really give you a manual that describes how

it was developed, but I think a consensus of -- I did run it by judges, is the term used.

Q You ran the questionnaire by --

A I didn't -- I'm not the only one who came up with a way of saying this is a good answer and this is a bad answer. I think the average competent adult would pretty much get 100 percent of these correct in terms of knowing whether a particular portrayed course of behavior is good -- is effective or not and understanding why it might be ineffective.

Q Okay. And in your questionnaires, the answer is pretty much black and white. There's no gray in these answers, is there? And your opinion, either it's right or wrong; isn't that true?

A Well, there are two ways of answering. The first one is -- is this okay or not okay. And the second, which is actually probably more important, is why it's not okay, both in terms of if they say it's not okay, why. If they say it's okay, I then follow up and I say, "Well, some people might say it's not okay; why would they say that?"

So I'm not just interested in whether they can give the right or wrong answer but whether they would understand why a course of behavior might be ineffective or dangerous.

Q Okay. Because one of the questions I'm seeing in the questionnaire, you mention that the scenario was, "Sarah is a

parent whose one-year-old child had a bad cold and does not own a vaporizer, so Sarah took her child to the shower to clear up congestion, but the child slipped out of her grasp, hit her head on the edge of the bathtub, and the child seemed pretty injured. Sarah took the child to the emergency room. The doctor said, 'Sarah, how did the child hit her head?' Sarah was afraid that she would be accused for child abuse so she decided to make up a story and told the doctor that her child hit her head against the table while running in the house."

Now, you asked, "What do you think -- what did you think of what Sarah decided to do?"

That's a pretty gray area, isn't it, Dr. Greenspan? Because many parents would lie also; isn't that true?

A Well, a lot of these scenarios are based on real-life cases. In fact, that's based on a case in which -- it was actually a father and then a mother ended up going to jail because it was pretty obvious that -- what had happened.

So I don't think it's a gray area at all.

Q But I'll repeat though: Just because you tell a lie to this woman, because you're afraid you would lose your children, doesn't mean --

A In terms of [indiscernible], that's an ineffective -- I mean, some of these items are better than others. That may be one of the few gray area --

Q You're trying to evade my question. I asked: Just because a parent would lie to a nurse because they are afraid they would lose their children does not mean you were intellectually disabled; isn't that true?
A Well, I'm not evading you and I don't appreciate being accused of that.
Q Well, answer the question, please.
A No, you're right.
Q Okay. And in this --
A [Indiscernible] -- competent people would answer that differently.
Q It's some gray area in that because you have parents that may be afraid to lose their children so they may lie, which is wrong, but there's a reason for that; isn't that correct?
A Well, there's a principle in the development of tests as well as interviews. It's called a Minimax [Indiscernible] Theory of Reliability, and that principle basically is because any one item may be unreliable. That's why I have a lot of items. I have 23 items precisely because I have never draw an inference from only one of them.
Q Okay.
A On the other hand, in the real world, it only takes one really stupid behavior to end up in jail.
Q Okay. Let's talk about stupid behaviors to end up in jail. Is it smart to point a gun at somebody and take their

money? Is that smart?
A Is it smart what?
Q To point a gun at somebody and take their money. Is that a smart thing to do?
A Given the risks involved, no, I would say it's not smart.
Q Okay. Is it smart to break in somebody's house and take items?
A No.
Q Okay.
A I don't think so, but that's my value.
Q Okay. So wouldn't you think that 99 percent of the people who are incarcerated right now is because they did something dumb and stupid?
A And a very large percentage of them have some kind of developmental disability that's never been diagnosed.
Q But not all of them, do they?
A No, I mean, as a rule, people who end up in jail are not the brightest bulbs.
Q Okay. But that doesn't mean they're intellectually disabled. They're just not smart people; isn't that correct?
A Well, there's a continuum, but that's true.
Q Now, when Mr. Terry met you and you talked to him and you gave him these scenarios, did you ever have questions about his intellect?
A About his what?

Q Intellect. Did you question -- have questions to try to find out his intellect, how smart he is?
A Well, obviously, I had questions about it because [indiscernible] question. And that was one way to getting answers is by giving him these scenarios.
Q Okay. Like Dr. Hall asked Mr. Terry about who the current president is and name the presidents in order, to spell the words -- to try to recall three words, to spell the word block backwards. Did you ask any of these type of questions?
A No.
Q Now, traumatic brain injury, you point to that as a possible reason for intellectual disability; correct?
A It's one of the major known causes, yes.
Q Okay. And you mentioned the numerous head injuries that Mr. Terry had during his life?
A Yes.
Q And these included the glue sniffing in 1981 when he was 18 -- 14, excuse me, where he almost killed himself; correct? That happened?
A When he tried to kill himself?
Q No, not when he tried to kill himself. When he almost killed himself at 14 from sniffing glue.
A Yes, I'd say that's a major factor for intellectual disability, yes.

Q Okay. And you talked about the head injury when he fell out of a tree at work in 1985?
A Yes.
Q The motorcycle accident he had in 1986; correct? That happened also?
A Yes.
Q And the bar fight in 1992 when he got hit in the head with a board?
A I believe there were two bar fights that resulted in head injuries, yes.
Q Okay. Now, except for falling out of the tree, all of these events was caused by Mr. Terry's own actions; isn't that true?
A Caused by his own actions?
Q Yes.
A Poor judgment, I would say.
Q But his own actions. He did it to himself.
A Yes. In terms of risk unawareness, there's a hallmark of people with intellectual disability. I couldn't agree more.
Q Okay. There's a hallmark of people just not being very bright either, and it doesn't mean you're intellectually disabled because you made bad decisions; isn't that correct?
A No. I mean, there's a continuum, and a lot of people make bad decisions who are not intellectually disabled but people with intellectual disabilities almost always make bad

decisions.
Q Now, you said earlier that you read the reports and the testimony of Dr. Edward Deysach.
A Yes, I did.
Q And Dr. Deysach was the neuropsychologist who testified in Mr. Terry's original trial.
A Is that a question?
Q Yes. He's the original -- he's the neuropsychologist that testified in the original trial, isn't he?
A Yes.
Q Okay. And Dr. Deysach testified that he reviewed the Charter Rivers records where Mr. Terry had a CAT scan done at that time. Remember reading that?
A Yes.
Q Okay. And Dr. Deysach also said that he did a battery of tests to determine if he's retarded -- was the term they used back in 1996 during his trial. Did you read that part of his testimony?
A I believe I did, yes.
Q Okay. And on page 2006 of the original record, his lawyer asked was Gary Terry retarded, and his answer was, "No. His performance fell in the low to average range but not retarded." Do you remember reading that?
A Yes.
Q So Dr. Deysach, a man who was called by the defense to

testify on Mr. Terry's behalf and did testing on Mr. Terry to make a determination of intellectual disability, said he wasn't intellectually disabled; isn't that true?

A Yes. Presumably he was relying heavily on the IQ data.

Q But you don't know that for a fact. You say he did testing. It could be a battery of tests he'd done. As a matter of fact, he said, "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." He said that.

So a battery of tests presumably is a group of tests, not just one; isn't that correct?

A Well, he didn't give that many tests, to be honest with you.

Q Were you in the courtroom when he testified?

A I looked at his report.

Q You were looking at his report. Okay.

Dr. Deysach [sic], do you know about the book, "The Death Penalty and Intellectual Disability" edited by Edward Polloway?

A Yeah, it's an edited book published by AAIDD, and I am the most prolific contributor to that book with four chapters that I either wrote solely or was first author on.

Q You wrote four chapters. Did you write the first four chapters?

A No, I didn't say the first four. There were four chapters in that book that I either wrote jointly, where I was first author, or solely where I was the only author.
Q Okay.
A They related to all three prongs.
Q Okay. Now, on page 80 of this book, it states, "It should be noted, however, that identification of brain pathology, typically from neuropsychological test results, is not in itself sufficient to establish the diagnosis of ID." Would you agree with that?
A Who wrote that chapter you're quoting?
Q I don't know. It's a chapter in the book.
A Yeah, obviously, I would agree with that.
Q Okay. And your final diagnosis is that Mr. Terry is intellectually disabled; correct?
A Yes, that's correct.
Q Okay. Now, he was evaluated and tested by numerous school psychologists; correct?
A I don't know how many times. I'm sure it was more than one.
Q Okay. And Dr. Deysach tested him also; correct?
A Yes.
Q He was examined at Charter Rivers after he went in for possible -- possible addiction; isn't that correct?
A Yes.

Q Okay. And he was examined by Dr. Hall, who is a psychologist at DDSN; isn't that correct?
A Who is that? I didn't catch the name.
Q Dr. Hall.
A Yes.
Q Okay. And he was also examined by Dr. Decker?
A Yes.
Q None of those doctors diagnose him as being intellectually disabled. You're the only one that diagnosed him as intellectually disabled; isn't that true?
A That's true.
Q Okay. One last thing. You were saying earlier that the Woodcock-Johnson test was more reliable than the WAIS test; isn't that true? Didn't you say that earlier in direct examination?
A I didn't use the word "reliable." I think I -- if I used any word, it would be "valid."
Q More valid. Okay.
A I mean "reliability" is a term of art that refers to things like whether you come up with the same result each time you administer it. Validity refers to whether it's actually measuring what it claims to be measuring.
Q Okay. Now, earlier in your direct, you said that if you're going to give a person a second IQ test, it has to be done past six months; isn't that correct?

A Well, it's not my opinion. That's what's stated in the manual. In fact, many qualified authorities would say it should be more like a year.
Q Okay. And Dr. Hall gave Mr. Terry an IQ test two years after the Woodcock-Johnson test was administered; correct?
A I believe someone else administered it, but she reported on it.
Q Okay. Whoever administered the test at the Department of Disability and Special Needs did it two years after his previous test; correct?
A It was a different test.
Q I was about to ask you that. Didn't you say on direct that you cannot give the same test twice, that you would have to give a different test?
A Yeah, if she had given -- you know, she had given the WAIS -- I mean, if she had given the Woodcock-Johnson, it might have been a problem.
Q Okay. So she couldn't give the Woodcock-Johnson test. She had to give a different test, and so she decided to use the WAIS test; isn't that correct?
A Which is the most widely used, yes.
Q Okay. And so since it was done more than two years after the original test and she did a different test, she pretty much followed procedure, didn't she?
A Yes. But my criticism was not with how many years had

expired. And I wouldn't really call it criticism; it was an observation, because I generally have a lot of respect for her.

Q Okay.

A It was not -- it was [indiscernible] different test, and different tests measure different things, and the construct we're trying to measure here is intelligence. In my opinion, the Woodcock-Johnson does a better job of measuring -- a more valid job of measuring intelligence.

Q And the test that Dr. Deysach gave, he gave this test. It came up with the same score as the WAIS test, didn't it? They both scored a 77.

A Yeah. What I saw [indiscernible] again, it was a report. I didn't see his testimony. But he never gave a score. He just said it was -- he just said it was a low average or something like that. I never -- which is unusual. Normally, you give a score.

Q I'm not talking about -- I'm talking about Dr. Decker. Dr. Decker gave a score of 77; isn't that correct?

A I thought you said Deysach.

Q If I did, I apologize. I mean, all these D's, maybe confused.

Dr. Decker gave a score of 77; isn't that correct?

A On the Woodcock-Johnson, yes.

Q And that was the same score that DDSN came up with? A

77; isn't that true?
A Yes. And then when you correct for Flynn Effect, they're both qualifying scores for ID.
Q All right. Well, let's talk about the Flynn Effect. The Flynn Effect, you normally multiply by .3; isn't that correct?
A Well, there's some dispute as to which number to use. Today, the more likely number is 0.3. Dr. Hall used 0.33 but that would not make much difference.
Q That wouldn't make much difference. Okay.
A I mean, at one time, it was .33 and now it's more likely to be .3.
Q Okay.
A Applied to the date of norming when she used the date of publication, which is two years later.
Q Okay. But the scores he made during the developmental period, even with the Flynn Effect, scores him at a 90. And a 90 is above the threshold to determine intellectual disability; isn't that correct?
A That's true.
Q Okay.
MR. EVANS: Nothing further, Your Honor.
One second. One second.
BY MR. EVANS:
Q A few more questions, Dr. Greenspan. Now, when did you come to your final opinion? Do you remember what date?

A The same date I wrote my report, I believe.
Q So you came to your final conclusion on July 5th?
A Yes.
Q Okay. When did you complete your review of the records?
A Within the two weeks prior to that.
Q Okay. And why did you do a supplemental report?
A Because at the time I wrote my report, I did not have access to Dr. Hall's report. If I had, I would have included that as a part of our report.
Q Okay. But a lot of the information and interview done with her mother is not in your supplemental report, is there?
A No. If anything, reading Dr. Hall's report, it strengthened my opinion.
Q It strengthened your opinion.
A Yes, because she had a lot of really good stuff in there, particularly about Prong 2, adaptive behavior.
Q But you didn't write about the interview she did with her mother in your supplemental report, did you?
A No, I don't think I did. I probably should have.
Q Okay.
THE COURT: Dr. Greenspan, hold tight for just one second.
THE WITNESS: I'm sorry? Could you repeat that?
THE COURT: Hold on for just one second.
Ballpark for me how long do you think you're going to be.

MR. GROSE: About five, ten minutes.

THE COURT: Okay. All right. Let's go ahead and push through.

REDIRECT EXAMINATION

BY MR. GROSE:

Q Dr. Greenspan, can you hear me all right?

A Yes, I can.

Q I think Mr. Evans characterized your supplemental report as a critique of Dr. Hall's report. Do you recall that?

A Yeah. I'd prefer not to call it a critique. It was just a commentary.

Q Well -- and you actually -- I mean, and your supplemental report indicated that there was a lot of things in Dr. Hall's report that you agreed with; is that right?

A I was very thorough. I find her to be a very competent person.

Q And is it fair to say that that part of the thoroughness was the information that she included about her interview with Gary's mother?

A Yes.

Q Okay.

A I found that very useful.

Q All right. Now, they asked you some questions about the work that Gary did around the house when he was a child. Do you recall those questions?

A I believe the word that Mr. Evans used was "chores."
Q Correct.
And the part of Dr. Hall's report that I think he was referring to says that she reported Mr. Terry was responsible for washing dishes, sweeping the floor, making his bed, help his father with carpentry and mechanics, and doing his laundry.
Are people with a mild intellectual disability capable of washing dishes?
A Yes. In fact, that's a common form of employment that they end up doing.
Q Okay. And to suggest that somebody with a mild intellectual disability couldn't do that, that would be a stereotype, wouldn't it?
A Definitely.
Q And sweeping floors, is somebody with a mild intellectual disability able to sweep floors?
A Yes. It's, again, a very common behavior.
Q And to suggest that that means a person does not have an intellectual disability, that would be a stereotype; correct?
A Yes, it would.
Q Making a bed, are people with a mild intellectual disability able to make a bed?
A Yeah. I did a study of why people are fired, and one of them involved a woman who was successful -- people with --

someone with an intellectual disability who was successful as a chamber maid in a hotel who could make the bed. What got her fired was, if somebody stayed in past the check-out time, she would become very anxious, and she would knock on the door and say things like, "Get your ass out of bed." So it was the social intelligence or social adaptive functioning deficit that got her in trouble, not the fact that she couldn't make the bed.

Q And so to suggest that somebody with a mild intellectual disability is not able to obtain and hold a job of this type of nature, that would, again, be stereotyping, wouldn't it?

A Yes. People who, with an intellectual disability, who are fired, it's usually because of social incompetence, not because they can't do the menial job that they end up doing.

Q All right. And in that sentence, there was also reference to helping his father with carpentry and mechanics, and I believe that you testified that Gary has strengths in the practical domain?

A Yes. Now, I know the father was rather cruel and aggressive towards him every time he messed up, but I don't doubt that he could do a lot of things in the practical domain.

Q All right. And there was a lot of questions about the various relationships that Gary had with women. I believe, on direct, we talked about the fact that one of the stereotypes

is that people with a mild intellectual disability are not capable of having romantic relationships. Do you recall that?
A Yes. People with intellectual disabilities often have -- are married or have girlfriends or boyfriends and often are parents and not necessarily effective or competent parents, but it's certainly a role they can play.
Q And the fact that people with an intellectual disability enter into relationships with people who can assist them, that's consistent with the cloak of competency that you talked about earlier; is that fair to say?
A It's a very common phenomenon, yes.
Q As far as Mr. Terry having a business, did you look at that -- the repo business. Did you look at that in the context?
A I'm sorry? What context are you talking about?
Q Well, the context of what he was actually doing.
A I didn't get deep into it, but I understand that, according to Luann, he would do it at night when he didn't really have to interact with people.
Q And did you understand that he had assistance with filling out the paperwork for that business?
A Yes. And I don't doubt that he was probably trained by his -- by the people he worked for as to how to go about doing it properly.
Q All right. The fact that Mr. Terry -- well, was he very

successful in that business?
A He had some jobs, according to Luann, but only with one car dealership, and that went away and the business folded. I understand from Mr. Evans that there were other reasons for that. But the fact is, it was not a successful business.
Q All right. And is Mr. Terry's work history consistent with somebody who has a mild intellectual disability?
A Yes, a very spotty and sporadic work history. That's very typical of people with mild intellectual disability.
Q And Mr. Evans asked you some questions about Mr. Terry being considered to have a learning disability when he was in school. Do you recall those questions?
A Yes, I do.
Q And are people with a mild intellectual disability oftentimes misdiagnosed with a learning disability?
A Very often, yes.
Q And why is that? What can you tell us about that?
A Well, it's a more socially acceptable diagnosis. Part of -- one of the factors that enters into the diagnosis is how parents feel about it. Parents are generally more accepting of a diagnosis like that because intellectual disability implies a form of hopelessness or seriousness. And then part of it is a lack of understanding or sophistication by the people doing the diagnosis.
Q And are parents -- the ordinary parents, are they

typically in a position to understand and diagnose intellectual disability?

A Absolutely not.

Q And would Gary Terry's mother possess the ability to make that diagnosis?

A I would doubt it very seriously, unless she has a degree in special education or school psychology.

Q One of the things that you commented on about Dr. Hall's report had to do with the head injuries and the significance that she attached to them. Could you remind us of the significance of the head injuries in this case?

A Well, the head injuries, in my opinion, are the critical factor that caused him to go from learning disabled, assuming that was a correct diagnosis, to intellectually disabled as they occurred before the end of the developmental period, before the age of 22, and that appeared to result in some decline in his cognitive ability.

Q And that decline in his cognitive ability, is that supported by the records that you reviewed?

A Yes.

Q All right. And, again, it's significant that these traumatic injuries occurred after the two childhood IQ tests that were administered; is that correct?

A Yes.

Q And the type of head injuries we're talking about, what

type of head injuries did Gary have?
A Fell out of a tree on his head and was in a serious car injury and was hit over the head in a bar fight.
Q So these were fairly substantial injuries?
A Yes, I believe so. That showed up later in things like CAT scans and SPECT scans, not to mention performance under psych assessments.
Q And one of the things that you talked about in your original report in regards to the traumatic brain injuries is diagnostic overshadowing. What does that mean?
A Well, if there's something salient going on, we tend to focus on that. I mean, a common example of that would be someone with a brain injury such as autism spectrum disorder but also has emotional disturbance because almost everybody with that condition has emotional issues or attentional issues. And because those things are so salient and because the brain injury is somewhat hidden, the diagnosis tends to be -- to focus on the thing that's salient, in this case, of the emotionally disturbed behavior.
Q And so would it be a mistake to discount the brain injuries that Terry suffered during the developmental period?
A I think it would be a big mistake.
Q Thank you, Dr. Greenspan. That's all I have.
MR. GROSE: I hope I came close to the ten minutes, Judge.

MR. EVANS: Your Honor, if I may, three questions. That's all I have.

RECROSS-EXAMINATION

BY MR. EVANS:

Q Dr. Greenspan, I mentioned the work that Mr. Terry did not because he can do it but he did it independently; isn't that correct?

A You said he was dependable? Is that the word that you used?

Q That he did them independently.

A Yes.

Q Okay.

A Well, we don't know that for sure. Everybody gets training. Everybody gets supervision. Everybody gets some degree of support.

Q Okay. Now, wouldn't it be a stereotype to call someone learning disabled, intellectually disabled? Wouldn't that also be a stereotype?

A I don't understand the question.

Q Would it be a stereotype, if a person is learning disabled, to consider him intellectually disabled? Wouldn't that also be a stereotype?

A Well, it would be an incorrect -- there are two different categories or classifications, but they're made by school psychologists or special educators who may not fully

understand the difference.
Q Okay. And when I asked you about his relationships, I asked you about the manipulation he did with women, not the fact he was in relationships; isn't that true?
A You asked his ability to manipulate people ---
Q Yes.
A --- or his tendency to manipulate people?
Q His ability to manipulate women. That's why I asked you about his relationships. Not the fact that he was in them but his ability to manipulate women. I asked you that.
A Or his tendency to.
Q Right.
And you even say he was good at it; isn't that correct?
A Well, he was good at getting girlfriends.
Q Okay.
A And getting into marriages, yes.
Q All right.
MR. EVANS: That's all, Your Honor.
MR. GROSE: Nothing further.
THE COURT: All right, Dr. Greenspan. Can you hear me okay, sir?
THE WITNESS: Yes, Judge, I can.
THE COURT: Okay. I want to say thank you, number one, for your patience with us today and for being ready to go. I apologize for the technological issues that we had, but I

appreciate your testimony. I know you got on very early on California time and I appreciate that, and you have been on the witness stand almost all day with virtually little to no breaks, so I appreciate that as well and I want to say thank you very much for appearing, and I appreciate your testimony that you have given, sir.

THE WITNESS: Thank you, Your Honor. I appreciate that I don't have to get up at 4 a.m. again.

THE COURT: Okay. All right. Good. Thank you very much. And I'm going to turn off the Webex. Okay, Dr. Greenspan?

THE WITNESS: Thank you, sir.

THE COURT: Thank you.

Okay. All right. What's the plan for tomorrow?

MR. GROSE: We have Dr. Decker as a witness. I think he'll be fairly short.

THE COURT: What is "fairly short"? I'm not holding you to it. I'm just trying to get a ballpark.

MR. GROSE: Half an hour to an hour.

THE COURT: Okay. Do you think about the -- is that about right?

MS. BROWN: I think so.

THE COURT: Okay.

MS. BROWN: I think it's a very focused witness.

We have a witness from DDSN who is [indiscernible].

She'll only be available in the morning, so I just wanted to bring that to everybody's attention.

THE COURT: Okay.

MS. BROWN: So hopefully we can get to her in the morning or not have to reschedule. I actually -- Dr. Hall has graciously said that she could be here tomorrow as well.

THE COURT: All right. And do you have anybody -- is Decker your last witness?

MR. GROSE: Yes, sir.

THE COURT: Okay. All right. Good. All right. So let's plan on that. We'll start at 9:30.

(The above hearing adjourned at 5:31 p.m. until July 18, 2024 at 9:30 a.m.)

* * * *

STATE OF SOUTH CAROLINA	*	COURT OF COMMON PLEAS
	*	
COUNTY OF LEXINGTON	*	TRANSCRIPT OF RECORD

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GARY DUBOSE TERRY,	*	
	*	
Applicant,	*	
	*	
vs.	*	Case No. 2022-CP-32-00924
	*	
STATE OF SOUTH CAROLINA,	*	
	*	
Respondent.	*	

----------x

Hearing Dates:
July 17-18, 2024

ATKINS HEARING - VOLUME II
July 18, 2024

B E F O R E:

The Honorable Robert E. Hood, Presiding Judge

A P P E A R A N C E S:

E. Charles Grose, Jr., Esq.
Allison Franz, Esq.
Attorneys for the Applicant

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Recorded by: DCRP Court Monitor Roderick Fitzgerald
Partial (Webex) for Dr. Greenspan's testimony

Transcribed by: Bobbi Fisher, RPR
SC Official Court Reporter III

I N D E X

E X H I B I T S

(Exhibits on file in Clerk of Court's Office.)

Applicant's Exhibit

No.	Description	ID.	REC'D
1	Dr. Greenspan's C.V.	19	
2	Dr. Greenspan's 7/25/24 Report	123	125
3	Dr. Greenspan's 7/10/24 Report	123	125
5	School Records	86	
7	Richland Memorial Hospital Records	86	
8	Document Regarding Fall out of Tree	346	
9	Emergency Room Records	87	
10	MUSC Neurology Record	87	
11	Richland County Detention Center Record	87	
12	Dr. Hazelton Records	87	
13	Dr. Decker's C.V.	199	200
14	Dr. Decker's Report	211	212

State's/Respondent's Exhibit

No.	Description	ID.	REC'D
1	Dr. Hall's Report	228	
2	Dr. Decker's C.V.	232	232
3	Dr. Hall's C.V.	265	272

P R O C E E D I N G S

(The proceedings recommenced at 9:37 a.m.)

THE COURT: Thank you. Take your seats.

All right. Good morning, everyone. We're on the record in the State of South Carolina. The State is present. Mr. Terry is present. His counsel is present.

Anything we need to take up from the State before we get started?

MR. EVANS: Not at this time, Your Honor.

THE COURT: Okay. From the Applicant?

MR. GROSE: We would just ask that the black box be taken off again.

THE COURT: Oh, yeah. Okay. We can go ahead and take off that black box. That's fine with me. I would appreciate that.

MR. GROSE: Thank you, Judge.

THE COURT: Sure. Thank you for letting me know.

(Pause in the proceedings.)

THE COURT: All right. Okay. Anything else at this time from the Applicant before we get started?

MR. GROSE: No, sir.

THE COURT: Okay. Are y'all ready to call your next witness?

MS. FRANZ: Yes, sir. Dr. Scott Decker.

THE COURT: All right, Dr. Decker. Come on up, please.

And would you swear him, please, Ms. Doyle.

THE CLERK: Hey, how are you?

THE WITNESS: Good. How are you?

THE CLERK: All right. Raise your right hand and put your left hand on the Bible.

DR. SCOTT DECKER

after having been duly sworn, was examined and testified to as follows:

THE CLERK: All right. Take a seat over there. State your full name and spelling of your last name for the record.

THE WITNESS: Scott Decker. D-e-c-k-e-r.

Good morning.

THE COURT: Good morning.

DIRECT EXAMINATION

BY MS. FRANZ:

Q Good morning, Dr. Decker.

A Good morning.

Q Where are you currently employed?

A The University of South Carolina Department of Psychology.

Q And what's your current occupation?

A Excuse me?

Q What's your current occupation?

A Full professor of psychology.

Q And can you describe for the Court the education that you

have?

A I got a doctorate degree in psychology, Ball State University. There, I studied with Raymond Dean, who was a distinguished neuropsychologist. My training included courses in neuropsychology, practicum in neuropsychology, internships in neuropsychology, a post-doc at UIC.

After graduate school -- well, that's the education part, I guess.

Q I'm sorry?

A That's the education part. I was going to tell you about employment as well.

So I taught at -- part of my research -- part of my training was in also neuropsych research where my mentor, Ray Dean, collaborated with Richard Woodcock.

I worked -- after grad school, I actually worked in test -- as a neuropsych test developer to help create the Woodcock-Johnson. I also helped develop the Stanford Binet test and co-authored the Bender-Gastalt test.

And I taught at Roosevelt University, where I taught neuropsychology and research methodology. I taught at Georgia State University in neuropsychology and also biological basis of behavior, and now I teach assessment, cognitive and academic at the University of South Carolina as well as cognitive neuroscience and other neuroscience courses.

THE COURT: Is there a way to turn this mic up,

Ms. Doyle?

THE WITNESS: Yeah, it doesn't sound like it's working.

THE COURT: Is there a way to turn his mic up a little bit?

THE WITNESS: Want me to push a button?

THE COURT: Is it green?

THE WITNESS: I don't know what these buttons do.

(Pause in the proceedings.)

THE WITNESS: I can speak louder, I guess.

THE COURT: Well, you're close to the microphone and I appreciate that. You're already close -- maybe ask [indiscernible] come up here and turn up the volume. All right. Let's keep going.

Ms. Franz, I need you to speak up as well, please.

You're fine. You're close enough to the -- some people never get close; they sit way back here, relaxing. And I can hear you, but I want to make sure that the system is ---

THE WITNESS: I gotcha.

THE COURT: --- is picking you up.

So you're a full professor at U.S.C. You have been a professor at multiple other colleges. You have studied under neuropsychology. You helped in test development. I think that's where you were in your testimony.

THE WITNESS: Yep. Yeah.

THE COURT: Okay.

BY MS. FRANZ:

Q So you would describe yourself as a neuropsychologist?

A Yes.

Q Can you explain a bit about what a neuropsychologist is?

A So a neuropsychologist is a psychologist with special training in the brain behavior relationships with a primary emphasis on clinical applications and understanding how the brain, in different clinical conditions, influence behavior.

Q And you discussed a bit about your employment. Can you explain a bit more about your role in developing the Woodcock-Johnson?

A Sure. So through -- you know, I did research with Raymond Dean as part of neuropsych projects. They were developing a test called the Dean-Woodcock Neuropsych Test. I was doing research on it. They liked what I was doing so they asked me to come and help develop the test at Riverside Publishing, which was a business. And so I was employed there out of grad school specifically to help develop neuropsych tests and cognitive tests. My primary role was to ensure that the tests were reliable and valid.

Q Can you explain a bit more also about what was -- what was involved with developing the Bender-Gastalt?

A On that, I helped supervise kind of the whole project. That involved help coordinating data collection all over the country. That's a national standardization data set. It was

co-normed with the Stanford Binet intelligence test. So that's how I got involved with the Stanford Binet intelligence test.

Most of the time, I just worked closely with the Woodcock-Johnson authors, who, at the time, was Richard Woodcock, Kevin McGrew, and Nancy Mather. We would oftentimes have meetings to discuss research and how to implement research into the tests that we were developing.

Q And are those tests that are typically used by neuropsychologists?

A Yes.

Q And do you do any work currently involving intelligence testing?

A I teach intelligence testing for classes. I'm developing a computerized intelligence test. I do research in intelligence. I do research in looking at brain monitoring to predict intelligence. So yeah.

Q And are you a member of any professional societies or organizations?

A Yes.

Q Which ones?

A American Psychological Association, which I should add, the main accrediting bodies in applied psychology are APA -- American Psychological Association -- and National Association of School Psychologists. My graduate program was accredited

by both.

Our current program is accredited by both, so I'm also a member of National Association of School Psychology and, I don't know, maybe ten others, multiple ones. Division 40 APA Neuropsychology. Division 16 School Psychology. Previously AERA; that's educational measurement. Neurofeedback Society. Child Neuropsychology and others.

Q And have you had any prior experience in administering IQ tests?

A Yes.

Q Approximately how many times would you say you have administered an IQ test?

A Well, if IQ means cognitive test in clinical settings, over -- hundreds. If it also involves cognitive testing or intelligence testing of research cases, thousands.

Q And you teach administration as well?

A I do.

MS. FRANZ: May I approach the witness, Your Honor?

THE COURT: Yes, ma'am.

(Applicant's Exhibit No. 13, Dr. Decker's C.V., was premarked for identification.)

BY MS. FRANZ:

Q I'm going to show you what's been marked as the Applicant's Exhibit 13. Do you recognize that?

A My vitae.

Q Your vitae?
A Yes.
Q And does that summarize your training, education, and professional experiences?
A Probably be updated, but overall, yeah.
MS. FRANZ: Your Honor, at this time, I would move Applicant's Exhibit 13 into evidence, and I'd move to qualify Dr. Decker as an expert in neuropsychology and IQ test administration.
THE COURT: All right. Any voir dire?
MR. EVANS: No voir dire and no objections, Your Honor.
THE COURT: Okay.
MR. EVANS: To either motion.
THE COURT: All right. Very good.
(Applicant Exhibit No. 13 was received into evidence.)
BY MS. FRANZ:
Q Dr. Decker, what were you asked to do in this case?
A I was asked to assess Gary Terry's intelligence using the Woodcock-Johnson test.
Q And were you asked to determine whether Mr. Terry is a person with intellectual disability?
A No.
Q And did you administer an IQ test to Mr. Terry?
A I did.
Q Which test?

A Woodcock-Johnson.
Q And when did you administer that test?
A 2022. Exact date's on the report.
Q And if you remember, approximately how long did you meet with Mr. Terry?
A Around three hours.
Q And did you also review records related to Mr. Terry, including social history, medical, and school records?
A I did. And my primary focus was on any historic data that I could relate to intellectual functioning.
Q So I'd like to start a bit with your work administering the Woodcock-Johnson. And that's one of the tests that you assisted in developing?
A Correct.
Q Are there standardized test administration rules for the Woodcock-Johnson?
A Yes. So the administration of standardized tests, everything has a protocol, so all the questions you ask, everything is very laid out and you follow very specific administration directions for each of the tests. You have to establish what's called basal and ceilings. Basals are the lower level and ceilings are the higher level to understand where to start and discontinue a test.

There are questions -- you have got to know where to stop if it's by page rules. And -- or if it's by performance or by

time. And it requires a lot of practice and kind of memorizing rules, and it has to be done in a very strict, standardized way.

Q Can you explain a bit about why it has to be done in such a strict, standardized way?

A Well, the tests have -- the essential validity of the tests is having the normative sample so that once you do -- once you assess someone's performance, you relate it to how other individuals, either in the same age or grade bracket, would do. And if you don't have strict rules of test administration, it's -- you can get variation in performance and a number of what's called error variance and reliability. But then you can't compare the equivalency of norms.

For instance, like when I worked in test development, we'd collect data of people in every state at every age bracket, and you'd want to be able to have apples-to-apples comparison when you're assessing different people's intelligence so it becomes a standardized measure.

Q And can you explain what the standardized test administration rules for the Woodcock-Johnson are?

A Well, it depends on the test. So each test has different rules. So each test has a different basal and ceiling rule. That is, it has -- each specific test has different starting and stopping points.

So, just to clarify, when we're talking about, like, IQ

or overall ability, it's not one test. It is an assortment of multiple subtests, and the IQ is derived from those performance across multiple subtests.

So because there are different subtests, there are different rules for test administration depending on the test.

Q What do you mean by "each test has different rules"? You mean each subset within the Woodcock-Johnson?

A Yes. So, for example, if you have things that you're showing the person, you would say, "I'm going to show you stuff," versus there's other tests that are purely auditory, so you wouldn't say, "I'm going to show you stuff" if you're only hearing things.

So you have to make sure -- there's standardized procedures to ensure the person understands the directions. Usually, there are practice items so that they understand what they're supposed to do. And then there are rules for, then, how to proceed through the rest of the test.

Tests, unlike modern tests, unlike older tests, are scaled, which means the items are statistically calibrated to provide equal interval measurement. One way of conceptualizing this is all of the data we collect in test development essentially calibrates the item difficulty, so we know statistically exactly how difficult the item is and where it falls on the developmental continuum.

You can think of this as, like, little hurdles. So each

item is like a hurdle, so you don't put a big hurdle next to a small hurdle when people are jumping over it. So you wouldn't put a math item that says 2 plus 2 and then ask a person to do calculus. That's like putting a small hurdle next to a big hurdle.

So what we call scaling is we get statistical estimates of item difficulty so that we can finally measure different dimensions of ability and a higher amount of precision, I think, than previous tests do.

Q Okay. And did you follow those administration rules in the test that you administered?

A I did.

Q And what's the score that Mr. Terry received on the test you administered?

A The General Intellectual Ability, I believe, was 77.

Q And did you apply the Flynn Effect in Mr. Terry's case?

A I did.

Q And what was Mr. Terry's Flynn Effect?

A I believe it was 74.

Q And is that score within the range typically considered for intellectual disability?

A Yes.

Q So, in your professional opinion, is the score that Mr. Terry obtained on the Woodcock-Johnson that you administered a reliable estimate of his intellectual

functioning?
A Yes.
Q And, yesterday, Dr. Greenspan mentioned two IQ tests that were administered to Mr. Terry in childhood. Did you review records of those tests?
A I saw the scores that were reported. I didn't review the actual test record. I believe the overall score was 92. And it was at age 11 and age 14.
Q And you reviewed those results in Mr. Terry's school records?
A I did.
Q And you said that Gary got a 92 on those?
A I believe that's what it was, yeah.
Q What observations, if any, did you make about those IQ test results compared to the Woodcock-Johnson?
A Well, there's a couple of things. One is I looked at those scores but I also looked at multiple scores across his life history, including the academic test that he had even as an early child, all the way until I believe he dropped out of school at age 16.

It's inconclusive of how to relate the current Woodcock-Johnson test to the results of the test of -- the test then, which was the WISC-R. The WISC-R was based on David Wechsler's work in 1974. So it's kind of like comparing 4K high definition televisions to black and white.

What was known about the WISC-R at that time is it had measurement issues. They weren't sure what it measured. It wasn't theory based. So the best you could do is give probably the overall IQ. The overall IQ had a reliability of about .79 versus Woodcock-Johnson measurements today have .97. So it's quite a bit of difference in reliability.

The construct validity where there's multiple studies looking at -- they do what's called factor analysis to try to figure out the dimensions that are being tested -- were inconclusive on the WISC-R. Many of the tests that were included on the WISC-R were dropped in subsequent editions due to measurement problems on the test.

It was insensitive to neurological injuries, so the best evidence I could find was a study by Donders looking at children with traumatic brain injury on the WISC-R. And because of its imprecision, what you get is a kind of blunt instrument where just the overall score is lower and the best guess is, if you had a traumatic brain injury, your overall score would be around 91 or 92, and that was actually consistent with what Gary received.

The reason it's also inconclusive is because it didn't measure a broad range of abilities, so how the history of intelligence has kind of worked is we had these kind of crude instruments, WISC-R included. And then as statistical and measurement instruments became more precise, we were able to

measure abilities with more precision, and the history of intelligence testing has gone from, "Well, we just think we're measuring one thing" into "Well, we're measuring specific dimensions of intelligence," which is essentially what today we call the CHC theory, which is the basis of the Woodcock-Johnson.

Q Could you explain a bit more about the aspects of cognitive functioning that you mentioned the WISC-R has measurement issues with?

A Well, numerous studies were inconclusive of what it was measuring, so we got started thinking it was measuring something that was called freedom from distractability, and then it turned out it wasn't. It was really -- the primary basis is Wechsler just kind of put a bunch of tests together with a variety of questions, and it was developed -- as I explained earlier, we kind of statistically calibrate to put hurdles as test items in an order of difficulty.

At that time, these items were just kind of like, "Well, this seems like a good item. We'll throw this one in. We'll throw this test in." There wasn't a real basis for doing it other than, "Well, maybe it was used by -- in a research study. Maybe it was something Wechsler liked." But that made it difficult to understand exactly what you're measuring other than overall IQ. The overall IQ seemed to be the most reliable part of the test, but it couldn't precisely measure

specific abilities.

They did have VIQ/PIQ. Even the way I was trained was, originally, if you had 20 points between VIQ/PIQ, it was an indicator of brain injury. And then it turned out they found out about 40 percent of typical developing kids also had a split -- 20-point split.

So there was just a number of measurement validity and reliability issues with the test. So when I look at these test scores historically going back, it's kind of like looking through something through a foggy mirror of, like, I'm not sure. So I would have issues with the test and, to me, it's inconclusive.

I don't think you should just solely look at one IQ score, which I think has been said. So I also looked at historic education records. If you look at the continuum of data over time, what would be anomalous is if you see test scores in education that are above the 50th percentile across the life history. If you get an IQ score of let's say even 105 or 110, like all -- any of this could have been information that could have suggested, okay, there's no way there's intellectual impairment. But those records didn't exist. It was a consistent, very low scores. Many of the educational scores were in the lower 10th percentile across the board.

So my review was mainly to, "Well, if I look at my

results, I want to make sure my results are consistent with some of the historic stuff." So if I got an IQ score of 74 but then I found IQ scores and educational scores in the 80th percentile across his -- that would be very anomalous, but I didn't see that in the record.

Q And you mentioned that the WISC-R did not pick up certain aspects of functioning that are sensitive to traumatic brain injuries. Did you review records of brain injuries that happened to Mr. Terry?

A I reviewed events that suggested blunt force trauma to the head on multiple occasions. There were some brain scan records, which I didn't review in detail. Most of my work is in quantitative electroencephalography, and I don't recall one of those being used.

But there was evidence that he had had trauma multiple times, including, I believe, glue-sniffing that was -- could have led to hypoxia or lack of oxygen to the brain. In any of those cases, the most likely deficits -- like, so, if you talk about CHC theory, there's a construct called GS, which is processing speed, which is the most sensitive to general intellectual -- or general brain insult. The Wechsler scores was VIQ/PIQ, so there's not a clear GS on that test.

Another problem would be with the specific looking at the comparing of the neurological insults with the historic records. In addition to the lack of the construct processing

speed, GS specific constructs is -- the WISC-R was criticized for having a large loading of cultural vocabulary. Those are abilities that are oftentimes referred in neuropsych as hold abilities, meaning that they maintain despite head injuries versus other abilities of don't hold, which are more like abstract reasoning, concept formation, analysis synthesis, or what's called NCHC, fluid reasoning.

So those could have had an impact. So he had a history of a number of head injuries, and it could have had an impact on test scores, but if the tests aren't specifically sensitive -- and his score was in line with best guess of what traumatic brain injury in children would be, then it's the best you can say.

Q I think you may have just discussed this a little bit, but could you explain a bit more about, in general, what we know those types of head injuries can do to a person's cognitive functioning?

A Well, you know, with head injury -- if you're -- you know, it's a difficult process to connect a specific type of neurological insult to specific behavorial outcomes when you're looking at historic records. Right?

What the research knows -- and this is also research I do at the university -- is that, usually, traumatic brain injury first result in cognitive processing speed deficits. The most likely reason why is, when you get blunt force trauma to the

head, you have what's called white matter structure. These are heavily myelinated subcortical structures in your brain that facilitate information transmission.

When you get a blunt force trauma, the myelin sheathes of these neurons are injured, and information processing slows down. So, oftentimes, one of the first indicators of any type of head injury is something like reduced processing speed.

Q I am going to --

MS. FRANZ: May I approach the witness, Your Honor?

THE COURT: Yes, ma'am.

(Applicant's Exhibit No. 14, Dr. Decker's Report, was marked for identification.)

BY MS. FRANZ:

Q I'm going to show you what's been marked as Applicant's Exhibit 14. Do you recognize that?

A Results of the evaluation I did.

Q Is that a copy of the report that you did in this case?

A Yes, with all the references I included for Flynn Effect calculations. I was going to say it's a little thicker than my report, but it has the references with Flynn Effects and score calculations with it.

Q Does that accurately summarize the --

A It does.

MS. FRANZ: Your Honor, at this time, I would move into evidence what's marked as Applicant's Exhibit 14, Dr. Decker's

report.

MR. EVANS: Same objection as yesterday. Hearsay and corroboration of his testimony.

THE COURT: And what did I do yesterday? I can't remember.

MR. EVANS: I think --

MS. BROWN: I believe that you let in one report but you kept out other documents.

THE COURT: All the underlying stuff.

MS. BROWN: So underlying documents.

THE COURT: All right. I'll allow this -- and this is your report ---

THE WITNESS: Yes, sir. Yeah, it's my report.

THE COURT: --- in this case, the basis of your testimony today; correct?

THE WITNESS: Yes, as I just spilled water all over it, but...

THE COURT: Okay. We can get another copy of it. That's okay.

THE WITNESS: No, it's fine. I know it by heart.

THE COURT: Are you okay? Do you need anything else?

THE WITNESS: No, I'm good.

THE COURT: All right.

(Applicant's Exhibit No. 14 was received into evidence.)

BY MS. FRANZ:

Q Just, I think, one more question, Dr. Decker.
A Yeah.
Q You mentioned that the Woodcock-Johnson is theory based?
A Correct.
Q Can you explain a bit more about that what means in its relation to the [indiscernible] as well?
A Yeah. So, again, historically, it took time for researchers to understand the measurement of intelligence. The history of intelligence is looking at more differentiated constructs. The number of constructs that have been able to be differentiated in cognitive ability measurements has increased over time.

Originally, with Spearman's research over a century ago, it was proposed that there's general intelligence, which is just one general construct of intelligence, and Cattell said actually verbal abilities are different than performance abilities or visual-motor types of abilities so that got differentiated.

And then there has been more research showing more differentiations of constructs over time. What we call the Cattell-Horn-Carroll theory is the most differentiated abilities that have been reliably discovered and replicated in multiple research studies that's become the consensus of what intelligence assessment constructs should include in clinical assessments.

MS. FRANZ: Court's indulgence, Your Honor.

BY MS. FRANZ:

Q Thank you, Dr. Decker. Please answer any questions the State has.

CROSS-EXAMINATION

BY MR. EVANS:

Q Dr. Decker, good morning.

A Good morning.

Q Now, Dr. Decker, you first met Mr. Terry on January 20th of 2022?

A Yes.

Q Okay. And, at that time, you tested him with this Woodcock-Johnson test?

A Correct.

Q And, at that time, he was suffering from shingles, wasn't he?

A He reported having shingles.

Q Okay. And of course you know shingles is a debilitating virus that causes a rash and it's painful?

A It's painful.

Q Okay. And, also, he had it in his eye -- in his right eye so it obstructed his vision?

A I don't recall at the time, but as part of my assessment, I always do an initial mental status exam and also just to try to identify any factors that might mediate performance and

that was one, that he reported having shingles and pain.
Q In your report on page 1, under "Brief Observation," you stated, "He also complained of right eye facial pain due to shingles and stated it occasionally obstruct -- obscured visitation in his right eye." That's in your report, isn't it?
A Yes.
Q Okay. Now, the Woodcock-Johnson test is a test that you relied on in making the evaluation of his IQ; isn't that correct?
A Correct.
Q That's not the only test that psychologists use?
A Correct.
Q They also use the WAIS test also?
A They do.
Q Okay. As a matter of fact, do you remember talking to Dr. Hill, who was the doctor -- Dr. Hall, excuse me -- the doctor at the Department of Disabilities and Special Needs?
A I don't.
Q You don't remember talking to her?
A Uh-uh. About the results?
Q About your testing -- the original testing.
A Vaguely, yeah. Yeah, yeah.
Q All right. But she tested -- now, you did this test in 2022. She tested him in 2024 using the WAIS test.

A Yeah.
Q And that's a legitimate test, isn't it?
A Yes.
Q Okay. And, as a matter of fact, under protocol, you cannot give the same test twice. You have to give a different type of test; isn't that correct?
A No.
Q That's not correct?
A No.
Q Okay. So she could have given the Woodcock-Johnson test again?
A She could have, yeah. The professional consensus is six months. So this was two years later.
Q But she decided to give the WAIS test, which is a legitimate test also; isn't that correct?
A I -- yes.
Q Now, looking at your report, on page 2, it seemed like every category, he has low average to low except one, that of pattern matching; isn't that correct?
A Yep. Yes.
Q And your final score at that time was 77?
A Yes.
Q Okay. And in your report, you stated, "His lowest performance was on a measure of visual processing speed."
A Mm-hmm.

Q That's true? Okay.

THE COURT: Is that a yes?

THE WITNESS: Yes. Sorry.

THE COURT: That's okay.

BY MR. EVANS:

Q And, also, on page 3, you stated -- on the visual motor measure, you stated in your report, "He was able to copy simple geometric figures but expressed frustration while attempting more complex figures."

A Yes.

Q Okay. So this was a drawing of figures on a sheet of paper or something like that?

A Yes. This is the Bender-Gastalt test.

Q Okay. And he was, at the time, debilitated because of shingles, wasn't he?

A I don't believe he was debilitated.

Q Okay. Well, he had problems seeing out of his right eye; isn't that correct?

A He said he had pain in his face, and that's what I recall, and that there was -- but if he was debilitated in that, he wouldn't be able to even do simple geometric designs.

Q Okay.

A My interpretation of it is, as the geometric designs got more cognitively complex, he had problems with it.

Q Okay.

A But the simple visual stuff, he could do. Does that make sense?
Q Yes, it does.
A Okay.
Q Now, in your report, you also stated that other sub-test scores were low average, "He 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 the shingles virus," you stated that in your report?
A Yes.
Q Okay. So the shingles could have affected his scoring?
A Well, that's why I documented it.
Q Okay. Now, did you read the report of Dr. Hall?
A I did not.
Q Well, Dr. Hall -- well, somebody in her office tested him with a WAIS test of 82. Are you aware of that?
A I am now.
Q Okay. And could it be possible if he was -- and he was completely healthy when he took that test with Dr. Hall. Could it be possible that he could have scored an 82 if he was completely healthy with you on your test?
A If he was completely healthy, could he score an 82? I don't know.
Q Okay. You don't know. But it's possible?

A It's possible. I mean, any score could be possible.
Q So you're not denying it's impossible. You say it's possible. But you don't know if it's possible or not. That's your answer?
A Well, if there were other tests -- so letter pattern matching, which involves visual stimuli, there's also number series which you show a visual -- a page with visual items. He got an 89 on it.

And on visualization, he got a 79, which is higher than the 68. So that also involves visual information processing, but he scored higher on them.
Q Okay. But the lowest portion that he scored on also required visual processing?
A It required quick mental processing with visual stimuli.
Q Okay. And you specifically said in your report the low score could have been as a result of the shingles virus?
A I think it's something that I wanted to document so that people -- you're aware of it.
Q Now, you said that you did a calculation of Flynn Effect on this case?
A I did.
Q When did you do that?
A Within days after the report. After the testing. I'm sorry.
Q Okay. Because it looks to me, on your report, it was

concluded on page 3, but this -- this was added later. I don't know if it was or not, because you said it was done [indiscernible] the testing.

A Yeah. You have to get the test scores first and then do the Flynn Effect. So you have to look at the normative -- the obsolescence of the norms, take what test score you have, and then do the calculation. So you can't do it ahead of time.

Q Okay. Well, I'm not saying do it ahead of time, but it wasn't a major portion -- the Flynn Effect was not a major portion of your original report?

A I just wanted to report the facts.

Q Okay. All right. And you were not asked to make a determination on intellectual disability?

A Correct.

Q And that's because IQ scores -- there's more to an IQ score to make that determination; isn't that true?

A Correct.

Q Okay. And you said you read the school records. Did you read any other records, like the medical records at Charter Rivers or --

A Not in detail. I primarily looked through educational and historic records related to any IQ test scores, any -- I primarily looked at anything that could -- I could say is standardized in any possibly way -- data -- that has any known scientific relation with IQ scores.

Q Okay. And no other doctor, other than Dr. Greenspan, ever diagnosed Terry has intellectual disability?
A I do not see a diagnosis of intellectual disability in any educational records.
Q And in his educational records, do you recall him being diagnosed as being learning disabled?
A I saw that in educational records.
Q Did you read the records or testimony of a Dr. Deysach, who is this neuropsychologist?
A I did not. I did not have access to that information.
Q Okay. So you were never given this information to read his report or his findings?
A I have not -- no.
Q Okay.

MR. EVANS: Beg the Court's indulgence.

I have nothing further, Your Honor.

MS. FRANZ: Just a few, Your Honor.

REDIRECT EXAMINATION

BY MS. FRANZ:

Q Dr. Decker -- and, I'm sorry, I'm going to ask you to do a little math. The State mentioned ---
A I haven't had coffee yet.
Q The State mentioned the score of 82 that Mr. Terry received on the WAIS score.
A Yeah.

Q Can you explain the application of the Flynn Effect on the WAIS score?

A Yeah. So there is a -- it is widely used by -- for adult intellectual assessment; however, its normative base is -- it was published in 2008, so its norm base is probably 2006-2007. So, I don't know -- you do the math; you got a calculator? That's -- was it 11?

THE COURT: Would you like me to give you one?

THE WITNESS: Yeah, well -- okay.

A So you would take the number of years from, let's say, 2007 to the current time period. Again, there are slightly different ways of doing Flynn Effect calculation. It's usually multiply that number by .3. What would it be? Like five?

BY MS. FRANZ:

Q I think that's roughly right.

A So it would be about five score correction. So that would put you at 77, which is exactly what I have.

Q And your score -- what did your score [indiscernible] to?

A 74.

Q And were you aware of -- that Mr. Terry reported having shingles at the time of your test?

A Well, I mean, I do an assessment, and I try to identify any factors that might compromise the results. This includes looking at settings, so I made sure we were in a quiet room

where we couldn't be distracted. I also noticed he was shackles so I thought -- you know, I'm thinking through anything that could possibly impact test scores in any way.

He also -- this is where he first reported, when he was having some trouble concentrating, that he had been hit in the head with a metal object when he was a kid, I think multiple times. And he did report that he had some right-side pain. He, I assume, told me shingles, so I documented all of this in the report, yeah.

I think -- if it were something that was debilitating, his performance or having a high -- any cognitive impact that would question the results, I would have stopped the testing and I wouldn't have included. I think it is an accurate description of his intelligence.

Q So even in light of Mr. Terry reporting that at that time, your testimony was that -- is your testimony still that that score is a reliable estimate of his intellectual functioning?

A Yes. And it's also consistent with the Flynn Effect adjustment of what was recently done, as you just had me calculate on the stand. It's in line with it, yeah.

MS. FRANZ: Court's indulgence, Your Honor.

Nothing further, Your Honor.

MR. EVANS: A few questions on recross.

RECROSS-EXAMINATION

BY MR. EVANS:

Q Dr. Decker, you just said that the Flynn Effect would reduce the score to 77; isn't that correct?

A I did the calculations here on the stand, so I -- I don't want to be under trial, but, like, it should be about five points. There might be decimals behind it, but something like that.

Q And so the score given by Dr. Hall was a 77. Isn't it true the Flynn Effect reduced it to 77; therefore, that means they did the calculations correctly? Wouldn't you say so?

A I can't verify. I have not seen the report. I do not know how they did the calculations. I have not seen this information.

Q Okay. But you just said, out your head, you calculated five-point deduction.

A Yeah.

Q 72 minus 5 is 77 [sic]?

A Yeah.

Q Okay. So --

A I don't know if that's what they had.

Q That's what they had. I'm telling you that's what they had.

A Okay.

Q So the computation was correct; wasn't it?

THE COURT: He's saying assuming [indiscernible] --
A It's in range with what I could just do on the stand, yeah. It's right -- it seems approximately correct.
BY MR. EVANS:
Q Okay. And that's what your original assessment was under the Woodcock-Johnson, that he scored a 77; correct?
A The General Intellectual Ability estimate was 77. Flynn corrected it to 74, yeah.
MR. EVANS: Nothing further.
THE WITNESS: Thank you.
THE COURT: I appreciate you doing math on the witness stand.
THE WITNESS: Yeah. Of all things I prepped for, that wasn't it.
MR. EVANS: Yeah, we're lawyers. We're not good with math.
THE COURT: I know I appreciate having everybody look at you while you're trying to do math. So I --
Any -- is Dr. Decker excused from his subpoena? From the State?
MR. EVANS: No objections, Your Honor.
THE COURT: From the Applicant?
MS. FRANZ: No.
THE COURT: No? He's good to go?
Okay. Thank you, Dr. Decker.

THE WITNESS: Thank you.

THE COURT: Have a nice day, sir.

All right. Any further witnesses from the Applicant?

MR. GROSE: No, sir.

THE COURT: All right. And who do y'all want to call first?

MS. BROWN: May I have one moment to speak to the witnesses?

THE COURT: Yeah, sure. Yeah.

Even kind of stand up, stretch, twist, turn while they talk.

(Pause in the proceedings.)

THE COURT: Are you good to go?

MS. BROWN: One question, if I may.

THE COURT: Okay.

MS. BROWN: I'm going to ask during Dr. Hall's examination -- I want to call Dr. Davis first, but I was going to ask, during Dr. Hall's examination, if you would accept the report from the DDSN and the email to your chambers as a Court exhibit, because I know you have received the report, but we don't have it in the written record, and I would like to put both of those in. And if there is no objection, maybe I could do that first so you can see that, and then, that way, we can refer to it.

THE COURT: Okay.

MR. GROSE: We have no objection to them being a State exhibit.

THE COURT: Okay.

MR. GROSE: It should be State exhibits since they're offering it.

MS. BROWN: And this would be Court Exhibit 1.

MR. GROSE: I thought we were marking it as a State exhibit.

MS. BROWN: I'm sorry. Court Exhibit 1?

THE COURT: Just make it a State exhibit.

MS. BROWN: Okay. I have got two copies if you want those.

THE COURT: That's fine. Is that Dr. Hall's report?

MS. BROWN: Yes.

THE COURT: I have it. I have it with me. Let's mark it as a State exhibit. I have Dr. Hall's report right here.

MS. BROWN: Okay. And I have got the cover letter with it.

THE COURT: I have that too.

MS. BROWN: But not the email. Okay.

THE COURT: I don't know. Let me see your cover letter.

MS. BROWN: June 12th. Well, I think the email is June 12th too.

THE COURT: Yep, what's that I got.

MS. BROWN: Okay. All right. We're good.

THE COURT: Okay.

(State's/Respondent's Exhibit No. 1, Dr. Hall's Report, was marked for identification.)

THE COURT: Okay. Who's next?

MS. BROWN: Your Honor, the State would call Dr. Jessica Davis, please.

THE COURT: All right, Dr. Davis. Come on up and be sworn in, please.

THE CLERK: All right. Raise your right hand. Place your left hand on the Bible.

DR. JESSICA DAVIS

after having been duly sworn, was examined and testified to as follows:

THE CLERK: All right. Please have a seat. State your first name and the spelling of your last name for the record.

THE WITNESS: Jessica Davis. D-a-v-i-s.

DIRECT EXAMINATION

BY MS. BROWN:

Q Good morning, Doctor.

A Good morning.

Q Would you please tell us where you're currently employed and your position.

A I am a Psychologist II at the Department of Disabilities and Special Needs.

Q Okay. And what are your duties within that position that

you have?
A I am a forensic psychologist, so I do court-ordered psychological evaluations; typically pre-trial competency evaluations on folks that are suspected of having an intellectual disability, related disability, or autism disorder.
Q Do you hold any professional licenses for your work?
A I do. I'm licensed with the State of South Carolina as a licensed psychologist.
Q And what kind of continuing education requirements do you obtain for your work?
A Every two years, we require -- I think it's 24 credit hours; I usually go way over that. So I attend conferences and continuing education for cognitive disabilities and forensic work.
Q Would you please review for us your educational background since college.
A Since college? Okay. So I have two bachelor degrees awarded from Coker University: one in psychology, one in criminology. I went straight from undergrad into my clinical doctoral program, which is an APA-accredited university. During my time there, I got a masters in route, and then I graduated with a degree in clinical psychology in 2018.
Q And what exactly is clinical psychology?
A Sure. So clinical psychology is a clinical practice

informed by science. So I'm trained not only as a researcher but also as someone who assesses, diagnoses, and treats individuals with any diagnosis that's found in the DSM-5.

Q Okay. How about giving us a brief summary of your professional employment.

A Sure. So after I graduated with my doctorate degree, I did a residency at a forensic hospital in St. Louis. After that, I went to doing community psychological evaluations. And I was administering IQ tests probably three times a week during that period where I worked there.

Then I was hired at DDSN in 2020, where I have been since there. And then during my graduate training as well, I worked under a neuropsychologist and a neurologist, administering memory batteries, which included IQ tests as well.

Q Okay. And are you a member of any professional organizations specific to psychology?

A I am. I'm a member of APA.

Q And APA is what, for the record?

A The American Psychological Association.

Q And do they have guidelines that you adhere to?

A Yes. Yes.

Q And specialty training. Did you have any specialty training to intellectual disability or IQ testing?

A I did during -- really during my practicums and during my employments. So my specialty training is in forensic

evaluations, so I took ten additional classes during my graduate program, but I essentially created a sub-specialty within that field because they didn't offer it at my program. So that is why I worked under the neuropsychologist and the neurologist for two years during my graduate training, so under their supervision, that's where I got a lot of my consultation and supervision on administering, interpreting, and writing reports relating to intellectual disability.

Q And do you have training on specific tests -- IQ tests that you'll be using?

A I do, yes. We have to take those. Anybody that attends an APA-accredited university has to take those.

Q And the IQ tests that you use have manuals that come with them; is that correct?

A They do.

Q And do you routinely use those manuals as well?

A Yes. You actually have to use the manual to administer the assessment as well.

Q And how many tests have you administered to assess IQ?

A Upwards of 400 probably.

Q Have you ever been qualified as an expert in any court before?

A I have, yes.

Q And what discipline were you qualified to testify in?

A Forensic evaluations relating to intellectual disability

or any related disability.

Q And do you have a current C.V.?

A I do.

MS. BROWN: Your Honor, may I approach the witness?

THE COURT: You may.

MS. BROWN: Beg the Court's indulgence just a moment, please.

(State's/Respondent's Exhibit No. 2, Dr. Davis's C.V., was marked for identification.)

BY MS. BROWN:

Q Dr. Davis, I'm handing you what's been marked as State's Exhibit 2. Would you tell us what that appears to be to you?

A This is my C.V.

Q Does that appear to be current?

A It does.

Q Okay.

MS. BROWN: Your Honor, we'd move to have the Court accept State's 2, the C.V. for Dr. Jessica Davis.

MR. GROSE: No objection.

THE COURT: State's 2 admitted.

(State's/Respondent's Exhibit No. 2 was received into evidence.)

MS. BROWN: Your Honor, based on the testimony that you have heard, we would ask -- and the C.V. and documents listed too for her background -- we'd ask for you to find Dr. Davis

qualified as an expert in psychology and in administering IQ tests.

MR. GROSE: No objection.

THE COURT: Any voir dire?

MR. GROSE: No, sir. No objection.

THE COURT: Okay. All right. Very well. She's qualified. You may move forward.

MS. BROWN: Thank you, Your Honor.

BY MS. BROWN:

Q Dr. Davis, how did you become involve in this particular case?

A Sure. So I am what's considered an early career psychologist. While I have been practicing independently four or five years as a licensed psychologist, I have never done an Atkins case. So as part of my training at DDSN, Dr. Hall was assigned to this case, and she brought me on to essentially observe it so that I can one day do one on my own and she can supervise me on it.

So she was sharing some information with me, and then we kind of discussed the need for additional testing, and she asked if I would do the testing in the case.

Q And so that sort of explains why Dr. Hall was with you at certain steps in the testing; is that correct?

A She didn't have to be there to witness it. She was there because this is her case, and the stakes are pretty high for

this type of evaluation.

Q Okay. And just generally, why do you administer an IQ test? What are you looking for and how are you going to use it?

A So are you asking why any psychologist would administer an IQ test?

Q What's the general background of it?

A In my practice, I have administered IQ tests for many different reasons. One of the reasons is to rule out or rule in an intellectual disability. Other reasons might be because a student is performing well in their classes and their parents want to get them in the gifted program. Other reasons might be because we are looking for a neurocognitive disorder, or dementia, and one of the things that you have to administer with those batteries is an IQ test because you want to rule out whether the deficits we're seeing is intellectual in nature as opposed to neurological in nature.

We also administer IQ tests generally whenever we want to look for ADHD as well, Attention Deficit Hyperactivity Disorder. We want to make sure that, again, what we're dealing with is not intellectual -- any deficits that we're seeing is not intellectual but, again, it's due to another diagnosis.

So there's really a whole host of reasons why we would administer it.

Q And so is it safe to say, Doctor, that people rely on the results for a host of different decisions?
A Absolutely.
Q And we have in the report from DDSN -- the report that Dr. Hall authored -- several IQ tests. And I wanted to ask you the differences between the Wechsler for children test and now the present Woodcock-Johnson, or Wechsler for adults test. Can you tell us a little bit about the differences?
A There really isn't any difference. They're both actually based on the same theory as -- I think it was Dr. Decker was mentioning, they're both based on CHT theory, especially the most recent ones where we are looking at different areas of intelligence that make up the broad umbrella of intelligence. So we are looking at processing speed, working memory, verbal IQ, and performance IQ, so we do look at all of those between the Wechsler and the Woodcock-Johnson.

They are highly correlated, which means they are testing pretty much the exact same things. The individual questions may be different, but overall, the research does suggest that there is good validity in the sense that we are testing what we think we are testing, which is intelligence.
Q Okay. And do you remember reading any reports about different IQ tests with Mr. Terry before you administered your IQ test for Mr. Terry?
A I did review them. Not in depth, though, because it was

not my case. But I do believe that the inconsistencies in the scores and his past scores is what led us to believing that additional testing was necessary.

Q Okay. Do you happen to recall that he was given the Wechsler ---

Am I saying that correctly?

A Wechsler, mm-hmm.

Q --- for children test at age 11 and 14? Do you remember that?

A (No audible response.)

Q So that's a different test than Wechsler for adults; is that correct?

A It is correct, yes, but they are typically based on the same theories, the same indices that we're looking for. So, again, what I said earlier, the verbal intelligence, the perceptual intelligence, processing speed, and working memory. We're looking at the same indices, are they measuring essentially the same things.

Q And there's a different children's test to make it easier to administer for children, more reliable for that result; is that correct?

A That is correct. So what Dr. Decker was saying earlier about the basal and the ceilings, the children's test have easier questions because we are administering them to six-year-olds opposed to 18-year-olds.

Q And we have heard a different term in the courtroom about IQ tests. We also heard WAIS. What do you mean if you say WAIS?

A Sure. So that's the Wechsler Adult Intelligence Scale. So that's the difference between the WISC, which is the Wechsler Intelligence Scale for Children, and the WAIS is the adult version.

Q And in your opinion, Doctor, is one better or more reliable than the other?

A No.

Q Are there differences?

A There are differences.

Q Okay. In reporting scores, for instance, one uses the global scale. I believe that's the Woodcock-Johnson that we have heard about today.

What, if anything, can the Court take away from reporting a global score compared to a full-scale IQ?

A They're essentially the same thing. They're using all of the sub-tests, as Dr. Decker was describing, to calculate the full scale or the global scale. They're essentially the same thing. They weight the exact same indices that I was mentioning earlier.

Q Let me ask you: Did you have any materials to rescore or recheck Dr. Decker's 2022 testing on the Woodcock-Johnson?

A No. I believe that he did not have any of the raw data

or the protocols that he used.
Q And, believe me, I'm not criticizing anybody's math skills, but there can be simple math scoring errors that affect conclusions; can there not?
A Absolutely, mm-hmm.
Q But you couldn't rescore anything. You didn't have any materials at all?
A No.
Q Okay. Was there any evidence of physical limitation or illness at the time that you gave the test to Mr. Terry?
A Not that I can recall. I do know that he has a medical condition that does cause some discomfort every now and again, and we wanted him to make sure -- I believe it was the second time we met with him when we couldn't get his -- the black box off, so to speak, that he indicated that he had not had his pain medicine that day. But I do believe he indicated he had his pain medicine the day that we did the testing.
Q You noted there's no visual problems, however?
A No, and none were reported.
Q Now, would you please tell the Court how you selected the test to administer to Mr. Terry?
A Sure. I'm a big fan of the Wechsler assessments. They are my preference. That is what was really emphasized in my APA accredited university training here recently. So that I feel most comfortable administering and scoring that

assessment over the other ones, although I am trained and I have used the other ones before.

And we also wanted to see how the same test makers -- because the same test makers made the WISC when he was younger. It's good to kind of get the same caliber of testing to kind of compare those scores.

Q Okay. And when you give a test and you score different areas and you get different scores that tell you about different aspects of intelligence or ability. So when you were looking at the breakdown of the individual reporting areas, what, if anything, were you able to detect about Mr. Terry's intellectual function and his testing?

A Sure. So whenever we're looking at the different index scores -- so the verbal intelligence, perceptual intelligence, the working memory, and the processing speed intelligence scores -- we're looking for trends. So, usually, what we see in adults is that IQ scores generally fall within the same areas. So if somebody is scoring 90s, they're generally scoring 90s. So whenever we see deviations from that, we have to look at that.

For Mr. Terry, his verbal intelligence was a strength for him. That was the score of the 90s. His other two scores -- so his perceptional reasoning and the working memory fell -- I believe those were in the 80s.

And then he has a significant weakness in processing

speed, and that was -- or relative weakness, I apologize, in processing speed, which is the only score that he fell in the 70s on.

Q Okay. And I want to go back a little bit to your report, and I don't know if you remember reading this, but there is a sentence that reads, "The full scale IQ -- the FSIQ is usually considered to be a most representative measure of global intellectual functioning." And that's on page 11 of the report.

Now, we just discussed a few minutes ago about reporting a global score compared to a full scale. Do you agree with that sentence?

A With caveats. Whenever there are significant variances within somebody's score, whenever we look at their profile -- so if somebody scores a 70 on their perceptual reasoning score but 100 on their verbal score, the full scale IQ is not going to be the most representative of their true functioning.

Conversely, if somebody has attention problems or they have processing speed problems, which is typically associated with attention, we see that pop up in their processing speed scores or their working memory scores. And so sometimes we will actually drop those scores out so that we can see what their functioning is like without that, because there is a whole host of DSM diagnoses that can impact those other two index scores, so the processing speed and the working memory.

Q So when we say "usually," that's the caveat, because you have got to look at the individual; correct?
A Correct.
Q Okay. And you don't have a full scale in Woodcock-Johnson, but you use that global as a full scale in comparison; is that correct?
A That's correct.
Q Okay. And on your test, the full scale was 82; correct?
A I believe that was correct, yes.
Q And is that low average?
A Yes.
Q And can you tell us what that means? What's low average mean in context of a range of IQ scores?
A Sure. So a score of 100 is considered average. And if we think about this, the vast majority of the population -- upwards of 50 percent of people -- are going to score around the 100 range. But whenever we are looking at the standard scores, we need to look at statistical significance. And whenever we are looking at diagnoses, the statistically significant score for a diagnosis of an intellectual disability usually falls at two standard deviations below the mean. So that is a 70 or below.

When we get a score in the 80s, that means that, compared to the vast majority of folks, there are some deficits, but it's not -- it's still in the population and it happens pretty

frequently, if that makes sense.
Q Okay. And your testing also reflected what's called a 95 percent confidence range. So can you explain that for the Court? What's that 95 percent confidence range and why do you report it?
A Sure. So we report it because there are situational factors that's going to impact everyone on how we test. If we're administered the same test two years from now, three years of now, we may not get the exact same score. So the 95 percent confidence interval is telling you that we are 95 percent confident that, if we were to retest an individual, they would fall within this range of scores.
Q Okay. And the range that you reported was 78 to 86; right?
A That's correct.
Q And 86 is higher than the 82 full scale and closer to average?
A Sure. There are instances where people do better by a couple of points, mm-hmm.
Q And you also reported what you termed a general abilities score, an 86 with a confidence interval of 81 to 91. So what is that score and why is it different?
A Sure. So the GAI, the General Ability Index score is reported -- well, so the GAI is calculated based on the verbal intelligence and the performance intelligence. So as I said

earlier, there's a lot of situational factors -- pain, fatigue, effort. There's a lot of things that can impact how we perform on a test. ADHD is one as well.

So when we see that somebody has deficits in processing speed or working memory and it's statistically significant, what we can do is we can drop those scores out and only calculate the functioning score based on the verbal IQ and the perceptional reasoning IQ.

Q Okay. And what do the manuals or literature tell you about use of the general abilities score as you just explained it to us?

A Sure. So it's appropriate for use whenever we notice that there's a discrepancy between the two main indices that we look at, so the verbal and the perceptional reasoning ones, and whenever we see that there's deficits in working memory or processing speed.

Q Is it appropriate or inappropriate to look at both the full scale and the general abilities score together for a range?

A When you say "for a range," can you explain what you mean?

Q Your full scale score is 82. The general abilities score, 86. Is it appropriate to say somewhere in there it may be a good range as well of actual intellectual functioning?

A I wouldn't use it as a range, but it does tell us some

information. When the GAI is higher than the full scale IQ, it tells us that, one, an individual will likely need pen and paper to do work or they may need additional time; they don't do well on timed tasks. But it suggests that they have the ability to get there if they're provided additional time and that there's less distractions than when they're performing at the best that they can, if that makes sense.

Q And if, hypothetically, someone we know has a learning disability and it has been identified that that individual needs additional time to do his work, would that not, in fact, support more reliability on what you have described, the general ability score of 86, when that person has more time to accommodate a learning disability?

A I wouldn't say that. A learning disability is getting at really specifically academic skills. And while -- while giving additional time may improve their scores on academic skills, they are really truly two totally different -- totally different diagnoses and totally different skills.

So the processing speed is really neurological. It's how fast our brain is understanding information and how fast our brain is responding to information, which can impact our academic performance but it's not mutually exclusive with our academic performance.

Q You make an excellent point; they are two different things.

But if you had a note that it was observed someone does better when he has more time as part of his learning disability, as part of his school records, that supports what you found that, with more time --

MR. GROSE: Objection --

BY MS. BROWN:

Q --- an individual can do better; correct?

MR. GROSE: Objection to the leading question, Your Honor. This is direct examination.

THE COURT: Sustained as to leading.

You can rephrase your question.

BY MS. BROWN:

Q As a hypothetical, if you had a note that someone needed more time because he was treated as a learning disabled student but did better when he had more time to process, would that be consistent with a higher score -- general abilities score when you know someone needs more time to process?

A I think all of that information would be consistent. We see, with the GAI, it is a couple points higher, and we know that that is because of his relative weakness -- or because of a relative weakness in the processing speed and the contextual information that, during academic performances, if they got more time, they performed well, that would be consistent with our findings.

Q Thank you.

And to go back -- and I want to make clear because I asked a question that was sort of convoluted. Learning disability isn't necessarily intellectual dysfunction; you have to look at both things?

MR. GROSE: Objection to leading.

BY MS. BROWN:

Q Is that correct?

THE COURT: Sustained as to leading.

You can answer the question.

A Yes. They are very different. One applies only to the academic setting. While an individual who has an intellectual disability will perform poorly in an academic setting, they're going to perform poorly across the board in their -- in their, you know, employment settings, in their relationships, they're going to need support throughout their life. That's not going to be the same case for somebody who has a learning disability. They're not going to need the same outside support.

When I normally give feedback to folks who do have a learning disability, what I typically say is, "You can learn; it's just we have to teach you in the way that you need to learn" whereas, with an intellectual disability, the ability to learn is not the same as what a typically functioning adult or child would be.

Q Okay. Were you aware that Mr. Terry had a fall from a

tree and some head trauma in his 20s and later a stroke?
A I do believe he reported that during our interviews.
Q And those things perhaps can affect intellectual function; correct?
A They definitely can, and, specifically, I will agree with Dr. Decker; they can impact processing speed.
Q And even with the fall, the head trauma, and a stroke later on -- and some medical difficulties as you noted earlier he had reported to you -- your test showed a full scale IQ of 82.
A That's correct.
Q And Mr. Terry tested twice at a level of 92. And would you agree that's average range?
A I would.
Q Okay. And that's when he was very young; right? 11 and 14?
A Yes.
Q Okay. So, in your professional opinion, how likely is it for an individual to twice score, over a three-year testing period, higher than his capabilities would normally reflect?
A That would be extremely rare, and I have never seen it. It is easier for individuals to get lower scores because, again, effort, fatigue. There's a lot of reasons why we might get lower scores, but it's really hard to fake a higher intelligence, if that makes sense.

Q Okay. Doctor, in your opinion to a reasonable degree of psychological certainty, what is Mr. Terry's current level of IQ function as reflected in the IQ score?

A So he scored in the low average range. As it pertains to his intellectual functioning, I don't think I can give an opinion to that because I didn't do the full evaluation that Dr. Hall did -- reviewing the records, going through the collateral interviews. I can speak to the scores that he obtained.

Q And those are just the numbers given by the test?

A That's correct.

Q That you extract from the responses from the test. Okay.

Nothing to really modify -- nothing to use clinical judgment on in scoring.

A Yes, that's correct.

Q And, also, Dr. Hall noted in her report an application of the Flynn Effect, and she has some numbers reflected in those reports -- in that report on the different tests. Was that a calculation that came from you?

A It was not. I have never actually used the Flynn Effect. It's typical to use the Flynn Effect in Atkins cases only.

Q Okay. And are you familiar with the AAIDD and the DSM-5?

A Yes.

Q What, if anything, do those sources advise you when using the Flynn Effect or considering to use the Flynn Effect?

A Sure. So I have actually had to look at this on other case recently. The AAID [sic] has -- it's only on one page, per my memory, where they're discussing the Flynn Effect. There's really no guidelines on when to use it.

And the DSM essentially allows clinical judgment. You don't have to recalculate IQ scores to diagnose an intellectual disability. And it's not typical to do that in day-to-day clinical work. That's only applied in Atkins cases because of the strict legal definition of an intellectual disability. So the DSM really doesn't give any guidelines on it either because it's just not typical.

Q So when you return reports for somebody trying to seek services, supports, placement in school, or what have you, you don't apply the Flynn Effect?

A I do not apply the Flynn Effect.

Q And Dr. Hall also reported that you gave a Montreal Cognitive Test; is that correct?

A That's correct.

Q Okay. What can you tell us about your conclusions as to that cognitive test?

A Sure. So that is a screener, but it is a pretty thorough screener that's highly correlated with our large memory batteries that we administer and score for neurocognitive disorders, such as a TBI.

And Mr. Terry did exhibit some deficits, specifically in

attention, which is pretty consistent with our IQ score. So if somebody is exhibiting deficits in attention, they're going to exhibit deficits in processing speed as well typically.

He also exhibited some deficits in language, specially language fluency. And per the testimony yesterday, I think that's pretty consistent with what another neuropsychologist said.

And then he also exhibited some deficits in memory.

Q Okay. And since you're here to talk about your test and to explain what the Court can take away from it, is there something else that you would like to explain about the report to this Court that would help the Court in making a determination of where that IQ level is?

A I don't think so.

Q Okay. No further questions. Would you please answer any questions that Mr. Terry's counsel has?

A Sure.

THE COURT: What time do you have to leave?

THE WITNESS: At 11:00.

THE COURT: All right.

Go ahead, Mr. Grose.

CROSS-EXAMINATION

BY MR. GROSE:

Q I believe that you testified that Dr. Hall was present when you administered the IQ test?

A Yes, that's correct.
Q And you're aware that the ADA -- I mean, the APA has a statement against having third-party observers during an IQ test?
A I'm actually not familiar with that. Part of my training is -- we have done those things together.
Q Okay. So you're not aware of that?
A I'm not. Now, if there's a statement, I would be happy to read it. I do know that, like, Dr. Greenspan yesterday mentioned, that it could impact testing, but the only way it would impact testing is if it actually deflated our scores instead of inflated them.
Q But you indicated that you're a member of the APA; correct?
A Yeah.
Q And that you are bound to follow their procedures?
A Yes.
Q Okay. They asked you some questions about the GAI; correct?
A Correct.
Q All right. There's nothing in Dr. Hall's report where she contends using the GAI is appropriate in this case; is that correct?
A I don't believe so. I think she reported both and considered both.

Q All right. But the WAIS 4 administrative manual doesn't mention using GAI to diagnose intellectual disability, does it?

A Well, so the DSM actually states that it has to be -- to diagnose an intellectual disability, there has to be deficits in intellectual functioning that is confirmed by standardized assessments. So we don't use IQ tests, period, to diagnose.

Q Okay. But the manual -- I was asking about the WAIS 4 manual. The WAIS 4 manual -- and we're just talking about getting a score -- that doesn't mention using the GAI; it mentions using the full scale.

A To diagnose?

Q Well, as part of interpreting the results on the IQ test.

A Are you saying that the manual is indicating that we should not interpret the GAI?

Q I'm saying that, when you're reporting somebody's IQ, the GAI is just part of it. When you're doing the GAI, you're excluding parts of the person's intelligence; is that correct?

A That is correct.

Q Okay. All right. And the same with regard to the technical manual; it doesn't mention relying solely on the GAI, does it?

A No, but as clinicians, we shouldn't rely solely on any score.

Q Repeat that. You said, as clinicians, you should not

rely solely on any score?
A Mm-hmm, that's correct.
Q Okay. Are you familiar with the study which examined the implications of using the full scale IQ versus the GAI determination of intellectual disability using the WISC 4 conducted -- or concluded that the GAI should not be used to diagnose ID?
A There's a lot of studies. I would have to look at it and I would have to look at the methodology of the study to determine whether those results can be applied in clinical decision-making.
Q Would you take a look at that.
A Mm-hmm.
Q And just for the record, that's a statement on third-party observers in psychological tests and assessment of framework for decision-making.
A (Reviewing document.) Okay. So this study is about not clinical observers. This is about third-party observers. I'm not considered a third-party observer. I'm considered a clinical observer, and it is part of our practice.

So, in addition, it states that "This statement does not constitute an official policy of the American Psychological Association nor does it purport to dispense legal advice and it is not intended to establish standards of guidelines."

So this is not intended to -- this statement is not

intended to guide clinical practice, nor is it applicable to a training situation.

Q And this was a training situation, wasn't it?

A Where -- where Dr. Hall was present and my involvement in the case?

Q Where it says, "Hints," can you read that?

A It says, "Hints: The observer may be a psychologist or trainee. In such cases, all the same issues and concerns apply."

But, again, this is about --

Q I just asked you to read that.

A Okay.

Q And that's what it says?

MS. BROWN: Objection, Your Honor. I think she should be able to explain her answer.

THE COURT: She can.

You may explain your answer, ma'am.

A Okay. Again, that is about how it's going to impact legal situations. It's not about whether or not it's going to impact the clinical performance of an individual.

BY MR. GROSE:

Q Well, this is an examination that's being used in the legal context; is that correct?

A That's correct.

Q All right. And you have never participated in an Atkins

assessment before now; is that correct?
A That's correct.
Q All right. And this guideline suggests that it should not be done that way; is that correct?
A It does not. It explicitly states that it is not a guideline that should guide clinical practice. That's in the --
Q But this statement is contrary to the practice that you employed in this case; is that correct?
A The practice that was employed in this case is what's taught in every APA-accredited university.
Q And APA-accredited universities -- the statement is that there should not be third-party observers; is that correct?
A That's what that statement says.
Q Okay. And you testified earlier that this is an Atkins situation and the stakes are very high.
A That's correct.
Q Okay.
A Mm-hmm.
Q All right. Now, I want to -- you were the -- an observer during the clinical interview that Dr. Hall did; is that correct?
A That's correct.
Q Do you have your notes from that with you up there?
A I don't.

Q Okay. I'm going to ask you some questions about those notes. Does this appear to be your notes?
A Yes.
Q Okay. And on page 2 of your notes, Dr. Hall asked if Gary Terry ever had a place of his own. And the response was, no, that he always moved in with them.
And so this was -- what they were talking about was going to independent living; correct?
A That's correct.
Q All right. And when it says "them," that he always moved in with the girlfriends; is that right?
A I would have to look back over my notes, but I believe that that's accurate.
Q The notes are right here. Do you have your copy with you here today?
A I don't.
Q Okay.
MS. BROWN: Your Honor, for clarity, I do have copies of notes that both Dr. Hall and Dr. Davis sent to opposing counsel and to the State.
MR. GROSE: And that's what we're --
MS. BROWN: And I'm happy to hand them up.
MR. GROSE: And that's what we're looking at.
THE COURT: All right. You can give her her notes.
A Yes. In the context of that interaction, we were talking

about his ability to live independently with his partners.

Thank you.

BY MR. GROSE:

Q Well, why don't you turn to page 2 of your notes.

A Okay.

Q All right. And look at the same paragraph that I'm looking at.

A Mm-hmm.

Q Can you please read that paragraph into the record?

A Yes. So, "Ever had your own place?"

"No. I always moved with them."

"Find place together or were they always established?"

"They were pretty much established. I would be staying somewhere and they would come there. My name was never on anything."

"Move into a bigger place after started having children?" That was a question.

"Yes, we did."

"Did she find the place or did you help her?"

"She would find the place. We went to look at a few things."

"It was her decision?" That was a question.

And it says, "Yeah. She would do all the paperwork. As long as I had a bed and yard and kitchen, I didn't care."

Q And if you could go over to the top of page 4 of your

notes.
A Mm-hmm.
Q There was a question about "How old were you when you first moved out of the parents' home into your own place"; is that right?
A That's correct.
Q And the answer that he gave was, "I think 18. Moved in with Billy. He was already out of the house. I was staying with Laney and Wesley and all those, helping a friend lay carpet." Is that right?
A That's correct.
Q So he moved directly from his parents' house into his brother's house?
A That's what was reported.
Q Okay. And then going down that page a little further, there was some questions about the marriage -- Gary's marriage with Luann -- to Luann; is that right?
A That's correct.
Q And the question --
MS. BROWN: Your Honor, I'd like to object because this is supposed to be to intellectual testing. These are notes ---
MR. GROSE: This is cross --
MS. BROWN: --- that have to do with second prong. So we are outside the expertise of this particular witness and

outside anything that could affect her testimony. It's not relevant.

MR. GROSE: This is cross-examination, and she was privy to relevant information, and I think it's admissible.

THE COURT: Okay.

BY MR. GROSE:

Q All right. The question was, "Who was responsible for the household?"

A Let me find my place here. "Who was responsible for the household?"

"Luann."

Q All right. And Gary just gave her the money; correct?

A That's correct.

Q All right. And with regard to whether he was involved inside household, he told you that he was not. He just did yard work?

A Yes. He said, "Yes, wasn't involved inside household."

Q And he also said, "I started the business, and I would just hand her money"?

A Yep, that's correct.

Q Okay. And he reported -- I'm looking at page 5 -- that, on two occasions, he tried to get a GED --

MS. BROWN: Your Honor, I'm going to object again because there's nothing impeaching, there's nothing establishing bias, and there's nothing going to IQ testing, and that's purpose of

this witness.

MR. GROSE: But this witness was also --

THE COURT: But aren't you going to ask all the same questions of Dr. Hall? So I don't understand where you're going ---

MR. GROSE: Well, some of these -- some of these --

THE COURT: I don't understand where you're going with that line of questioning. She's not here to give an opinion as to whether or not he's intellectually disabled.

MR. GROSE: Well, some of this is inconsistent with what's in Dr. Hall's report, which has already been marked as an exhibit, No. 1 --

THE COURT: So why can't you ask Dr. Hall that?

MR. GROSE: Because I don't know what Dr. Hall is going to say. She's on the witness stand, and she witnessed statements that were inconsistent.

MS. BROWN: Well, that's -- leans towards pitting, Your Honor, which wouldn't be --

MR. GROSE: That's not leaning towards pitting. I'm not -- I haven't asking her a question about Dr. Hall's report ---

THE COURT: Okay. Let's just go somewhere.

MS. BROWN: Your Honor, may I add one more basis?

THE COURT: No, ma'am.

MS. BROWN: Thank you.

BY MR. GROSE:

Q All right. Anyway, he indicated both times he gave up because the information that the other inmates were trying to teach him just wouldn't stick; is that correct?

A Where are you reading that?

Q I'm in that same spot.

A Okay. "Tried twice to get a GED while locked up and both of them gave up on me." Yes, so he was trying to get help from other inmates.

Q He also told you that most of his classes were special ed?

A Yes, that's correct.

MS. BROWN: Your Honor, that's hearsay as well. I just -- I just want to renew my objection because we still haven't gotten to any impeachment, bias, or anything that would go to --

THE COURT: You haven't even established how it potentially is impeachment.

MR. GROSE: Then I would ask that this witness remain until after Dr. Hall testifies. We were trying to accommodate her, and it would be impeachment then.

THE COURT: All that stuff is in Dr. Hall's report, is it not?

MR. GROSE: Some of this is contradictory. What I'm going through is contradictory to what's in Dr. Hall's report.

THE COURT: It better be. Keep going.

MS. BROWN: Your Honor, impeachment of Dr. Hall would not be necessary unless Dr. Hall is given the opportunity to see what was written and ---

THE COURT: She's going to -- she's going to --

MS. BROWN: --- she admits or denies.

THE COURT: She's going to be given that opportunity.

BY MR. GROSE:

Q On page 7, there were some questions about Gary Terry's business; is that right?

A It's helpful to see your highlights so I know where to go. Yes.

Q And Gary indicated that he had people who would pay the bills for him; is that right?

A Yes.

Q And that Luann would pay the taxes?

A Thank you.

Yes, he said Luann, I think, was paying taxes.

Q And that he needed help to operate the business; is that correct?

A There was context to that in the sense that he said, "It would have been a big mess if I tried to do it, the taxes."

So the question was, "You needed that help to operate the business?"

MR. GROSE: Beg the Court's indulgence for a moment.

That's all I have, Your Honor. Thank you.

THE COURT: Redirect?

MS. BROWN: Yes, sir, Your Honor.

REDIRECT EXAMINATION

BY MS. BROWN:

Q Again, your -- your involvement in this case was limited to the IQ test; correct?

A That's correct.

Q You were asked about conversations and notes from conversations of an interview that Dr. Hall conducted with Mr. Terry; correct?

A That's correct.

Q And you were asked about select portions; correct?

A That's correct.

Q How many pages are the notes that you were shown and referenced in your responses in cross-examination?

A I have 20 pages.

Q So what you said on cross-examination is not the fullness of the notes that are before you; correct?

A I would agree with that.

Q And some of those show, for instance, around page 3, Mr. Terry saying that he learned to weld at age 11. Showed one time and he knew how to do it after that. Also, that he took the blame for something for another sibling so, if we went to jail for it, he was younger, he wouldn't get in quite

as much trouble, showing reasoning. Do you see that in your notes as well?

A There's a lot of text on this page, but I do recall that.

Q Thank you. Thank you.

He said that he was stronger than his brother and tried to take care of him at one time. He was afraid his brother, if he went to prison, was going to kill himself, so he was trying to protect the brother. Do you recall that?

A I do recall that.

Q Okay. And in the marriage, he didn't want to be involved in the household stuff.

A I do believe that's correct.

Q Child-rearing, he would actually, quote, "Throw up," start gagging if he tried to change a diaper. But didn't he also say that he would change a diaper if it was just, in his words, "Number one instead of number two"?

A That's correct.

Q Okay. And that he stayed at a camper at the lake with a friend who was paralyzed from the waist down to help her, not romantically involved, he just helped. She fell out of the chair; he would go to her.

A Yeah, that's correct.

Q Okay. He never lived with his first wife? He says, "Me and Tammy never lived together." And that's a quote on page -- around page 4.

A That's correct. And I think that was my own notes in there about whether that was his first wife. Because, again, I didn't do all of the same.

Q Thank you.

A Mm-hmm.

Q And I won't go through all of it, but I just wanted to establish that there was a lot of information that had to be considered, synthesized, fleshed out. One or two bits of information is not what either of you relied on in making those notes; correct?

A That's correct.

MS. BROWN: No further questions, Your Honor.

THE COURT: Follow-up?

MR. GROSE: Nothing further at this time, Your Honor.

THE COURT: Okay. Thank you.

THE WITNESS: Thank you.

THE COURT: All right. Let's take our morning break. We'll take about a ten-minute break and start back at 11:35. Thank you very much.

MS. BROWN: Your Honor, may I ask the witness to be excused from the subpoena?

THE COURT: Yes, ma'am.

THE WITNESS: Thank you.

(A recess was taken from 11:23 a.m. to 11:38 a.m.)

(State's/Respondent's Exhibit No. 3, Dr. Hall's C.V., was

marked for identification.)

THE COURT: Okay. Who's next?

MS. BROWN: Thank you, Your Honor. The State calls Dr. Alicia Hall, please.

DR. ALICIA HALL

after having been duly sworn, was examined and testified to as follows:

THE CLERK: All right. Have a seat, state your name and spelling of your last name for the record.

THE WITNESS: Alicia, A-l-i-c-i-a, Hall, H-a-l-l.

DIRECT EXAMINATION

BY MS. BROWN:

Q Dr. Hall, please tell us where you're currently employed and your position.

A The Department of Disabilities and Special Needs, and I am the spike (ph) II clinical supervisor.

Q Okay. And what are your duties within that position?

A As clinical supervisor, it's my job to oversee and supervise the forensic department. So I oversee the clinicians we have: Dr. Davis as well as our part-time psychology and our admin staff. But I also complete court-ordered evaluations for competency to stand trial as it relates to individuals who possibly have intellectual disability or some sort of related disability.

Q Okay. Do you hold any special licenses where you work?

A Yes. I'm a licensed psychologist in the State of South Carolina.

Q And, briefly, what qualifications do you have to meet to be licensed in South Carolina?

A You have to have graduated from an APA-approved doctoral program, which I got my doctoral degree in 2003 from the University of South Florida in clinical psychology with a concentration in forensics and child psychology.

You have to have completed a minimum of a 2000-hour internship. And then post-internship, you have to have at least 2000 hours of supervised clinical practice. And then you have to pass the written exam as well as the oral exam.

Q Okay. And is that license renewable or permanent?

A You renew it.

Q And they're continuing education requirements for your role?

A Yes. Every two years, we're required to have accumulated at least 24 hours of continuing education.

Q Would you please review for us your educational background since college.

A My college is Lafayette College in eastern Pennsylvania where my degree was in psychology. I then went to the University -- or, excuse me, Indiana State University in an experimental psychology program. I transferred from there to the University of South Florida, where I got my doctorate in

clinical psychology.

Q And is the end of that training in forensics?

A Yes, in -- like I said before, I had a concentration in forensics at the University of South Florida as part of my doctoral training. I trained under Randy Borum and Norman Poythress both of whom are kind of well-known in the field of forensic psychology.

And then, as part of my internship, I did my internship at William S. Hall in conjunction with U.S.C. School of Medicine, and so I was forensically trained at William S. Hall, both child and adult forensics.

Q Okay. So when you say concentration, that is a track. That's an actual program, almost like a minor; is that correct?

A Yes, that would be akin to a minor.

Q And please explain to us a little bit about forensic psychology practice compared to just psychology practice.

A The major difference is, when you're doing clinical work, you are working for your -- or the identified patient is the person you're working with. That's who you're working for.

In forensics, the identified patient isn't the person that I'm evaluating or the identified client isn't the person I'm evaluating. I'm writing about them, not necessarily for them. So the person -- because all of mine are court-ordered evaluations, the Court is actually the person that I'm writing

for, even though I'm writing about the person who has the charges.

Q And if you would, please give us a brief summary of your professional employment.

A I started off at -- a teacher at the -- well, a research assistant -- research assistant professor at the University of South Carolina School of Medicine in the Department of Neuropsychiatry and Behavior Disorders where, for five years, I was the chief psychologist in the genetic study looking for the genes that contribute to autism spectrum disorders.

Then I moved over to the Department of Mental Health where I was the chief psychologist in the Developmental Disorders Clinic. At that time, I also began to do the juvenile forensics for DMH. And then, in 2010 -- and I did that from about 2006 to about 2010. I began to do adult work in 2008 as well for DMH. And then, in 2010, I moved to the Department of Disabilities and Special Needs.

Q Are you a member of any professional organizations specific to psychology?

A Yes, the APA, the American Psychological Association. I'm a member of Division 41, which is the forensic division APLS. I'm also a member of AAIDD. I'm also a member of INSAR, which is the International Society of Autism Researchers.

Q And when you receive court-ordered evaluations, what are

the courts generally asking you to evaluate these days? Do you do more competency or intellectual disability evaluations?

A Well, the question that DDSN is charged with per state statute is to answer the question of whether or not the person is competent to stand trial and whether or not the person has intellectual disability or related disability that may affect their level of competency. So those are the -- primarily what we see most.

We also do other PCR evaluations. So if someone is appealing where they felt like competency should have been an issue that was not -- and it was not raised, we have asked to participate in those. And then, of course, we do Atkins challenges when they arise.

Q How many intellectual disability evaluations have you conducted? And this is not necessarily Atkins but just the totality of intellectual disability evaluations.

A Probably over a thousand.

Q And do you teach, Dr. Hall?

A I do.

Q And what do you teach and where?

A I teach at the University of South Carolina in the Psychology Department. I'm an instructor. So, currently, I rotate between two classes. In the fall, I teach forensic psychology. In the spring, I typically teach child behavior and mental disorders.

Q Have you been qualified as an expert in any court before?
A Yes.
Q In what discipline have you qualified?
A Clinical and forensic psychology.
Q Have you been qualified as an expert in intellectual disability assessment before?
A Yes.
Q How many times and which courts?
A Here in South Carolina, across the state. I have probably done about eight Atkins cases.
Q In your current role with DDSN, are the majority of your evaluations intellectual disability evaluations during the developmental period or post-developmental?
A We see juveniles and adults, so it's across the life span.
Q And outside of Atkins, just how many post-developmental period evaluations do you think you have done over the last few years?
A It would be hundreds.
Q And how many Atkins evaluations did you say you have done?
A Approximately eight.
Q About eight?
A Yeah. I believe five -- five or six on my own and then three under supervision of our previous director.

Q And you have a current C.V.?
A I do.
Q I would like to show you --
MS. BROWN: May I approach the witness, Your Honor?
BY MS. BROWN:
Q I would like to show you what's marked State's Exhibit 3 and see if that looks familiar to you, please.
A Yes. This is my C.V.
Q Does that look to be your current C.V.?
A Yes.
MS. BROWN: Your Honor, we would move State's Exhibit 3 into the record.
MS. FRANZ: No objection.
THE COURT: All right. State's Exhibit No. 3 is admitted.
(State's/Respondent's Exhibit No. 3 was received into evidence.)
MS. BROWN: If I may approach, Your Honor, I have got copies for you and your clerk.
THE COURT: Oh, thank you. Yes, you may.
BY MS. BROWN:
Q Dr. Hall, on pages 2 and 3, it appears that you have indicated working on evaluations for juvenile and adults, as you had mentioned earlier, and also the traumatic brain injury. So is that correct that you have that experience?

A Yes.
Q Okay. And on page 3, you reference using the "Vin-land" or "Vine-land" test; you'll have to tell me which way that I'm supposed to pronounce that.
A "Vine-land."
Q "Vine-land."
And what is that?
A That is a measure of adaptive functioning.
Q Okay. So when were you first introduced to that concept of adaptive functioning and testing with a standardized instrument?
A In graduate school.
Q And you have used standard instruments since?
A Yes, ma'am.
Q Okay. And on page 4, it looks like you have given lectures at the medical university on advanced forensic psychology?
A Yes.
Q Okay. And what do you mean by "advanced forensic psychology"?
A Annually, I give lectures to the forensic fellows at both University of South Carolina School of Medicine and the Medical University of South Carolina where we talk about the impact of developmental disabilities on forensics and things that they should be looking for when they conduct their

evaluations.

MS. BROWN: Your Honor, based on the testimony and the information cataloged in Dr. Hall's C.V., we would ask the Court to find Dr. Hall qualified as an expert in forensic psychology and in intellectual disability assessment both before and after the developmental period.

THE COURT: Voir dire?

MS. FRANZ: No, no objection.

THE COURT: Okay. So qualified.

MS. BROWN: Thank you, Your Honor.

BY MS. BROWN:

Q Dr. Hall, can you tell us how you became involved in this case initially?

A We received -- we received an order from this Court.

Q And that's the ordinary way you receive a case these days in your current practice; right?

A Yes.

Q All right. And you were not retained by the Applicant?

A No.

Q You were not retained by the Attorney General's Office?

A No.

Q You came in as a neutral examiner?

A Yes.

Q And post-developmental period assessments, how do you begin that backward-looking assessment?

A We need as many records as we can possibly get. So we like to look at medical records; school records; if the person has applied for Social Security, those records; speaking with individuals who knew the Applicant when they were younger. So any informants we can get -- so we like to get as much information as we can.

Q And in this case, who did you receive information from?

A Well, received a wealth of information from Mr. Terry's team. They sent over a lot of records, probably over 10,000 pages probably of information. I also was able to interview Ms. Luann Smith, Mr. Terry's second ex-wife, and his mother, Mrs. Patsy Terry.

Q And did you receive some things from the Attorney General's Office and trial records or that sort of thing?

A Yes. We received his SCDC jacket and as well as the transcript from the trial and the previous appeals.

Q Did you receive anything in the SCDC records that related to Mr. Terry's use of a tablet?

A Yes.

Q And you never placed a time limit on when people can give you information; correct?

A No.

Q And you want as much information as possible?

A As much as possible.

Q From either party; is that --

A Either -- doesn't matter where it comes from.
Q And you created a report for the Court?
A I did.
Q And did you previously provide that report dated June 12th, 2024, to Judge Hood?
A I did.
MS. BROWN: Okay. That report has previously been marked, Your Honor, as State's 1. May I hand that report to the witness?
THE COURT: Yes, ma'am.
BY MS. BROWN:
Q Dr. Hall, State's 1, does that appear to be a copy of your report that you just referenced?
A Yes. Yes, it does.
Q Now, on the first page of your report, you set out your evaluation purpose, and you got "to determine intellectual disability," and the standard being Section 16-3-20(C)(b)(10) of the South Carolina Code.
A Yes.
Q Is that correct?
My question, Dr. Hall: Why not the AAIDD definition or DSM-5?
A Well, in this instance, the order specifically said that that was the basis for the order. So that was the qual- -- what's the word I'm looking for? That was the criteria that

the Court asked us -- the standards -- is the word I'm looking for -- that is the standard the Court asked us to assess Mr. Terry on.

Q And so going back a little bit in your forensic work, you know you got a little bit of the law that you look at and a little bit of clinical practice that you applied?

A Yes.

Q When you look at the law, you look at what has been considered controlling law; is that fair?

A Yes.

Q Okay. And is it your opinion that, in South Carolina, that you should be looking at Section 16-3-20 as your kind of start point -- the question you have to answer is in 16-3-20; is that fair?

A Yes.

Q Okay. What I want to ask you about, the AAIDD -- and you're a member; right?

A Yes.

Q That definition and the definition in DSM-5 is almost the same; is it not?

A Yeah. As Dr. Greenspan testified yesterday, they're nearly identical. I would say the only other difference that he didn't bring out is that the AAID [sic] specifies an IQ score. It says, I believe, anything 75 and below where the DSM does not specify an IQ score when talking about Prong 1.

Q Okay. Well, I want to skip ahead in your report a little bit. On pages 10 to 11, you reference the DSM-5 as setting criteria for intellectual disability, but then you're still using the DSM-5 in context of the question for 16-3-20? Is that a fair statement?

A Yes.

Q Okay. So, basically, all roads lead to the same basic determination that you're going to have to have for a diagnosis of intellectual disability?

A Yes.

Q Okay. First is the inquiry into the intellectual functioning.

A Yes.

Q The second is adaptive behavior limitations; right?

A Yes.

Q And all of that has to be within the developmental periods. Those things -- universally, that's what you're looking at?

A Yes.

Q Okay. And you sat out in the report the purposes of this litigation -- as I said, that 16 through 20 -- but I want to look at that. Is that correct that it doesn't just say "intellectual functioning" or "lower intellectual functioning"? Does it not say "significantly subaverage general intellectual functioning"?

A That is what the State statute says, yes.
Q Okay. Can you conceptualize that for us? What are you looking at for significantly subaverage?
A Usually, that would be -- considered to be two standard deviations below the mean, would be significant subaverage intellectual functioning.
Q And are there other diagnoses with a significant subaverage general intellectual function component?
A Yes. There are people who could have significant impact to their intellectual functioning. So someone has a traumatic brain injury, someone has a stroke, things like epilepsy can affect a person's intellectual functioning.
Q And are there other diagnoses with adaptive behavior limitations as part of that?
A Yes. ADHD, autism spectrum disorder, schizophrenia, depression. Lots of things that we find in the DSM-5-TR can have impact on a person's adaptive functioning.
Q But this specific condition was intellectual disability requires both and that they both have occurred or been present during the developmental period; right?
A Yes.
Q Now, do you interpret the phrase "the developmental period" in a certain way?
A Yes. Prior to the age of 22.
Q And so when you evaluated Mr. Terry, you didn't disregard

anything after age 18; is that right?
A No.
Q What, if any, opinion do you have on injury occurring in the developmental period that decreases intellectual function in a diagnosis of intellectual disability?
A I'm not sure I understand your question.
Q Let me try that again. I even lost myself in it. Okay.
Is it not true that there is -- that some people disagree when that developmental period ends?
A Yes, that is true.
Q And, historically, it's gone from 16 to 18, some now say 22?
A That is true.
Q Okay. But is there an accepted guideline or practice by either the American Psychological Association or the DSM-5 that sets a certain age and says you must look at this?
A I mean, the guideline generally now is accepted to be the age of 22. So anything prior to the age of 22.
Q So you're going by the guidelines ---
A Yes.
Q --- looking at it from 22. Even though Atkins says 18, or maybe some other case law would say 18, you go by 22?
A Yes.
Q Professional norms.
Now, a subset of that question: If something physical

happens before the age of 22 -- as in a head injury, as in a car accident and that sort of thing -- and there is a decrease in function, is there a specific accepted guideline or practice that you have to call that intellectual disability?

A No, you don't have to call that intellectual disability. It really would depend on the level of functioning loss for someone to then say that that would be -- that would qualify as intellectual disability.

Excuse me; I have a bit of a cold.

THE COURT: Want some water?

THE WITNESS: I'm good. I brought plenty of things.

THE COURT: Okay. If you need some water, just -- we can get you some. Just let us know. Okay?

THE WITNESS: Thank you.

THE COURT: Thank you.

A So you are really looking at the amount of functioning loss. So if someone is -- let's say they're 16, they were a neurotypically functioning child or adolescent and they had a head injury and their functioning decreased but they were still functioning in the low average range or what we would call the borderline range, we wouldn't give them a diagnosis of intellectual disability. They would have to be functioning similarly to individuals who have intellectual disability for them to get that diagnosis.

So the diagnosis that they would get instead would be a

neurocognitive disorder, and it would probably be characterized as mild neurocognitive disorder, and that would -- due to a traumatic brain injury, and that would be the appropriate diagnosis.

Q Dr. Hall, in your report, you set out the sources of information, and it appears to me it spanned about two pages, single-spaced? Does that sound about right?

A Yes.

Q Okay. Do you delegate review or do you review all the documents that you have listed?

A No. I review them all.

Q And I notice that you have the record from the trial listed and affidavits from 2012.

A Yes.

Q Those would be things that you would have looked at as well; correct?

A That's correct.

Q And you also interviewed the ex-wife, Ms. Luann Terry -- I believe you mentioned that earlier -- and Applicant's mother, Patricia Terry?

A Yes.

Q But you also spoke to Mr. Terry; right?

A Yes.

Q And it looked to me like you had two dates down there. Can you tell us how you interviewed Mr. Terry? The dates, the

times that you spent with him, just general information on that?

A Yes. I met with Mr. Terry initially on February 28th. Dr. Davis and I met with Mr. Terry where I conducted the clinical interview. We met -- after having that interview with him, we wanted to meet with him again to do some cognitive testing. We were -- we did meet and we spoke to him briefly but we were unable to do some cognitive testing because there was some miscommunication about him being -- having the shackles removed for the testing. So we resolved that issue, and then we met with him again later in April for the testing. I believe that's correct.

Q And how long did you talk to him?

A I think, in total, like three hours in terms of interview, not including the testing.

Q What, if anything, do the forensic psychology guidelines set out about verification of information?

A Well, I mean, that's one of the things that we are charged to do as best as we can is to check and verify information. So that's why you want to have those sources -- as many sources as you possibly can so that you can verify information from your informant and also from the person that you are interviewing.

Q Now, are you aware of Guideline 902 as requesting that sentiment, corroboration and data?

A Yes.
Q Let me ask you: You don't have references to all the information that you read in your report; correct?
A When you say "references," what do you mean?
Q For instance, you don't discuss what happened at the trial?
A Oh, no, I don't.
Q You don't discuss what the social worker found in the 2012 affidavit that you read?
A No.
Q How do you come about incorporating the information that you do incorporate in the formal opinion, the report that you do? How do you go about incorporating it?
A Yeah. In Atkins cases, the things that are related to the crime, I avoid, because those are not going to speak to the issue that I have been charged to deal with. And so I don't -- so what I looked for in the transcript was other mental health professionals who testified. And so I did read the transcript from Dr. Deysach, the neuropsychologist who testified.

And other than that -- because you don't want anything -- to look at anything that may bias my opinion. And so, as the neutral arbiter, I don't want to look at anything -- so I don't know any facts about Mr. Terry's case, his criminal case. I don't know anything about that.

So I only look at information that's going to help me answer the question that I have been charged to answer, and that's if Mr. Terry has an intellectual disability or not.

Q And is some of that selection based on your efforts to corroborate?

A Yes.

Q So if something -- and let me back up. Would you please explain to the Court what we're talking about with corroboration compared to credibility? Are you assessing credibility or are you just looking at points of data that converged?

A Well, you do both. So I'm looking to make sure -- I mean, corroboration also lends to credibility so that when I'm interviewing Mr. Terry, I'm looking at how he's answering the questions. Does he seem forthcoming? Is he avoiding answering questions? Is he offering detail in a way that -- that seems genuine, like he's not pushing an agenda. Is what he's telling me similar to what his mom told me and what his ex-wife told me? Is it similar to the contemporaneous records? I mean, of course, you know, memories fade because we're talking about, you know, 40-odd years ago in terms of the developmental period, but in general, do those things corroborate each other, so yes.

Q And do you find it helpful for that face-to-face communication and interviews?

A Yes.
Q And why is that? What is so persuasive about it that you would rather have face-to-face interviews than over the phone or tele-interviews? What cues do you pick up?
A So much of our communication is non-verbal. So you're looking at facial expressions. You're looking at gestures. You're listening to tone of voice. You're -- so there's so much information that we read in communication that comes with more than just what the person is saying. So oftentime, messages also, in the non-verbals, in that interaction -- so, if at all possible, I do prefer to do interviews face-to-face.
Q And, Dr. Hall, I'm sure you have heard that clinicians and anyone looking at intellectual disability really should avoid stereotypes?
A Yes.
Q And you agree with that?
A Yes.
Q Okay. And stereotypes -- misused stereotypes, that's -- that rests on assumptions; right?
A Yes.
Q Okay. And the DSM and the APA direct not to rely on those assumptions either; right?
A Yes.
Q However, if after consideration of details that you gleaned from interviews, other investigation -- whether it's a

point of work or a manipulation of others or going to college, whatever that point may be -- it's not an assumption at that point; it's data. Correct?

A It becomes part of the diagnostic picture, yes.

Q So, hypothetically, a person who works, like, at an entry-level job could fall anywhere on the intellectual range; right?

A Yes.

Q Could be yes, could be no as intellectual disability. We don't know enough.

A That's true.

Q Okay. But if you interview several people and they say, "Oh, that guy, yeah, he's great. You know, I'm his manager. He comes in. He fills out my reports for me so I don't have to do it, but he wants no responsibility." It's a data point; right?

A Yes.

Q But the fact that he has that job and he holds that job and he helps his manager, tends to say, "Hey, he's got some ability to function more so than a menial job might show."

A Yes.

Q Hypothetically?

A Hypothetically, yes.

Q Okay. Same thing with being married. Just being married doesn't tell you whether somebody is intellectually disabled

or not.
A That's true.
Q But the information, what he does and why he does it, could be a data point; right?
A Could be.
Q Okay. Driving a car, kind of the same thing?
A Yes.
Q All right. Okay. So it's essentially a zero sum result when you reference a data point without any information?
A Yes.
Q Do you agree that the AAIDD and the DSM-5 have recommendations for a consideration of standardized tests?
A Yes.
Q Okay. And evaluators should base diagnoses on both clinical assessment and a standardized test; right?
A Yes.
Q And what are some of the standardized instruments that you use for interviewing or gathering your information?
A The standardized tests we use were the WAIS-R -- excuse me, the WAIS 4, the MoCA, and then we do the test of effort as well. So those are the standardized tests.
And then clinical interviews, the interview that I used for years now in getting background information and clinical interview.
Q And where did you have that -- the kind of clinical

testing questions for interviews?
A DDSN, when I started, had a policy that we all use the same interview because we do have a lot of repeat visitors. And so it would be easier to have a standardized interview form so that you could look from the previous year or two years, how they answered the exact same questions. Because there's no guarantee the same examiner was going to get that case again. And so that's where that -- so it was initially, I believe, developed by a previous head of DDSN Forensics or Clinical Services. And then we have just modified it over the years.
Q And do you have recommended questions from another standardized testing instrument?
A I attended a workshop on Atkins evaluations. I think that was maybe four years ago. I just did one this year. I think that one was four years ago. And that was just an example of some of the questions that could be asked for assessing a person's adaptive functioning.
Q And you said that was a medical or --
A It was a continuing education program.
Q And do you know who recommended using that within that organization?
A It was whoever -- I don't remember who led -- I think it was whoever --
Q And did you know if anybody else used that as well?

A It's not standardized in the way that the Vineland is standardized. This was just a recommendation. I tried it in this case.

Q Was it good for you with getting the results that you should have?

A Would I use it again? With some modifications, yes.

Q Okay. Now, on page 4 of your report, you set out relevant history and you note that Mr. Terry appeared to be a good historian. Could you corroborate some of what he said?

A Yes.

Q And, next, you noted his mother could confirm that he reached his developmental milestones on time. Why is that important, Dr. Hall?

A Well, we look at that because one of the things that we notice with individuals who have intellectual disability is that they start off developing slower than neurotypical peers. So, typically, what you will see is that the gap between a neurotypical child and a child with intellectual disability is significant, but it could be small. But as they continue to grow and develop, the gap widens.

And so individuals with intellectual disability also continue to grow and develop, but they grow and develop at a different pace to their neurotypical peers such that the difference between functioning levels is significant as the age continues.

And so we're looking at early development to see were there any concerns, any delays in early development. If there were, did they get access to treatment that could assist in that. Because there are lots of reasons why kids could get off their typical developmental trajectory. And so, did they get access to -- like, here in South Carolina, we have First Steps or BabyNet, whatever they're called now, but it's the same in every state. Under the age of 3, the State will cover things to help kids get back on their developmental trajectory, so speech therapy, behavorial therapy, occupational therapy, physical therapy, because some kids just need that little extra push and then they get right back on track.

And so we're looking at those things. Did he respond -- was that available to them? Did they respond to those things? Were there early indications that the person was also developmentally delayed?

Q And you had no indication of that?

A No. That was -- according to the school records and Mrs. Terry, there were no concerns early on.

Q All right. And you also noted that his mother shared with you that Mr. Terry could, in fact, do chores around the house. And why is that important to you?

A Again, I was looking at things that would be expected in their family culture in terms of adaptive functioning. And so

when we're looking at -- the piece I was looking at would be considered to be practical or daily living skills. So was he contributing to the household? Did he -- was he learning skills that would help facilitate his independent living when he became an adult and moved out of the home?

And so I was asking about, you know, those kind of -- those basic skills that we all need so that we can live on our own one day.

Q And you mentioned family culture. What did you learn from your interviews about division of work in the household as part of Mr. Terry's own family culture?

A Mom did most of the work. The dad didn't really contribute that much to the in-house upkeep; that was on Mom and the kids, that she delegated services to. So they really had what would be described as a traditional kind of family in terms of gender role assignment.

Q Dr. Hall, have you heard of the term "cloak of competence"?

A Yes.

Q And would you explain that to us, please.

A So cloak of competence is this idea that individuals who are mild ID develop mannerisms that, in order to mask their deficits from other neurotypical folks, that they don't want to stand out or seem dumb. So they'll do things to kind of mask that, to present themselves as higher functioning than

they actually are.

So that could be things like always carrying a book with them. So they may have a book on, you know, neurophysics and you're like -- you know, carrying that with them. Or they may answer questions superficially well but -- and in a general social sense, that helps them get along, but if you scratch the surface, you see that they really do have deficits. They don't quite understand what they're talking about. They get really good at mimicking what they have heard from other people using colloquialisms in the appropriate way, seemingly, but if you ask them, you know, "What does that mean? Can you explain it?" they're unable to explain it.

So it's just a way that they navigate the world in order to not appear as effected as they are.

Q And that's the reason why you do the follow-up questions is to see if you need to remove that cloak, so to speak?

A Yes.

Q Okay. And the investigation, the interviewing, all of the detail -- digging in -- allows you not to stereotype, too; right?

A Yes.

Q And on page 5, you set out educational history, and I believe he dropped out of school around the ninth grade. Why is that important to you?

A Well, we wanted to look at how much exposure he had and

ability to be educated. There are some folks who are undereducated, and so that's going to affect their functioning in society if they didn't have a good basic education.

Q And you also note that Mr. Terry did poorly in early education?

A Yes.

Q As we go further, on page 6, you specifically discuss learning disability. Would you describe learning disability to the Court and explain how that differs from intellectual disability?

A So learning disability is also a disability in how people learn. So, typically, individuals who have a learning disability have an IQ -- well, let me just say: The assessment for a learning disability is looking at their academic functioning. So that could be looking at classroom work. But we also require a standardized test. It would be a standardized test of achievement. And also an IQ test, so a test of intellectual functioning.

So a learning disability is diagnosed when an individual's academic achievement in not commensurate with their intellectual functioning, meaning that their academic achievement is one and a half or two standard deviations below their intellectual functioning. So, typically, individuals who have a learning disorder have an intellectual functioning somewhere in the average range, but their academic

achievement, it could be in one area or multiple areas. It's significantly lower. So they're not able to use that intellectual functioning in terms of their learning style, so they need some accommodations in order for them to be able to fully use their intellectual functioning to learn material.

Q Okay. And I see in your report that you have highlighted a definition or italicized a definition. Where does that come from?

A Oh, this -- that definition is the definition or the criteria that is used by the school system to determine what -- where they're talking about a learning disorder, that's what they're talking about. That's what they're describing.

Q So does that actually come from the Department of Education?

A From the Department of Education.

Q And I think you also noted that Mr. Terry benefitted from classes after he was identified as learning impaired. Why did you think that was important?

A Well, he was -- he remained in -- some classes were general education, and he was in a resource model. So then what they decided was that, instead of putting him in what we would call a self-contained program, which means all of his classes would have been in special education or performed by special education teachers, they felt that he could do the

general education work. What he needed was assistance in that and that the resource model would be a better model for him.

So I think he actually had a mixed model. He had some, if I'm remembering correctly, special education classes and a resource class that would give him the extra support he would need in order to complete his classwork and meet the goals of his IEP. And he benefitted from that.

And so kids who have intellectual disability, are typically not mainstreamed. They may be mainstreamed in what we would call specials or electives, so things like art, gym, home economics, but all their core courses would be in the special education setting.

And so Mr. Terry was maintained primarily in the regular education setting with accommodations and modifications based on his needs and he benefitted from those things.

Q Is it fair to say that, based on your summary and based on the records that you read, that the school system was trying to help Mr. Terry?

A Yes.

Q They were looking at him, testing him, and trying to get him the supports he needed?

A Yes.

Q And when he accepted those supports, he did better?

A Yes.

Q Okay. Now, the psychiatric history that you put on page

8, I believe -- starting on page 8 -- [indiscernible] by admission to Charter Hospital for substance abuse. But there's also some things in there about reported hallucinations and delusions, things like that.

When you interviewed him, did you ask him about that, whether he was experiencing --

A Yes.

Q Okay. What did he tell you?

A No, he denied ever having experienced those things.

Q But when he was admitted into Charter Hospital, wasn't that around the time that he was about to be tried for his crimes?

A Yes.

Q And you noted that the Charter medical notes indicate good intellectual capacity?

A Yes.

Q Dr. Hall, why is that important to you?

A Well, it's just another data point that suggested that Mr. Terry had interacted with a mental health professional and that mental health professional was not concerned about the presence of an intellectual disability.

Q And within that same area of the report, you also noted another medical note from Charter: "Cognitive functions were determined to be intact." What does that mean?

A They were looking at him neurologically and so they were

not noticing any neurological deficits from their interview and interactions with him.

Q And that would have been around the time of his crimes?

A Yes.

Q So past the developmental period, no matter which age group?

A Yes.

Q You also noted he wanted out of Charter Rivers in about a week after being there, I believe. And his reason was that he was there for secondary gain. Can you tell us what that means and why that's important?

A Well, that was the doctor's interpretation, is that Mr. Terry was there because he thought that it would benefit him with the judgment that he had gone in for substance abuse treatment.

Q And can you tell whether he was released after about a week?

A They released him. He went there voluntarily, so he wasn't court ordered, so he could leave when he wanted to, but they just noted that it was, you know, against medical advice. They felt that he still required treatment.

Q And he admitted to you a history of drug use and cocaine. Why is that important to you, Dr. Hall?

A Again, it's just as much information as you can get about a person's history. Significant drug use can affect a

person's cognitive functioning, depending on, you know, what type of drugs they use, how long they use those drugs, if they were poly drug users. All those things could be important in determining the impact on cognitive functioning.

Q And, in your report, you go over the previous psychological evaluations. And starting off -- and this is on page 9, Dr. Hall. Starting off with test at age 11. And that's the Wechsler Intelligence Scale for Children. His reported IQ -- full scale IQ is 92.

Is that a test that you have heard of before?

A Yes.

Q Have you relied on that test before?

A Yes.

Q And then three years later, when he's 14, same test: 92.

A Yes.

Q What, if anything, does that consistency tell you?

A That the tests -- that Mr. Terry, at that time, was testing in the average range and it was consistent from Time 1 to Time 2.

Q And it appears from your report the next test was in 2022 for this action. Mr. Terry was 54, and he had suffered strokes and was then suffering from shingles that affected his vision, and his score was 77. What, if anything, did that 77 tell you?

A That his score was significantly lower than when he was

tested during the developmental period, and that lowering of the score could have been due to some of the brain injuries that he's had. It could have been also resulting from shingles, the pain that he was in because of the shingles. It could be due to motivation. So there are lots of reasons why his score could be less. But I, more than likely, felt that it was commensurate with the type of brain injury he had as an adult.

Q And isn't it true that you attempted to get some information? Did you ever receive any information from Dr. Decker so you could kind of get in there and look at the different portions and even rescore it?

A No. I requested the protocol for everything -- the protocols for everything that Dr. Decker administered, and he informed us that he did not have them available; that they were part of his research files and the files as he was, I believe, moving offices. It may have been inadvertently thrown away or something so he didn't have access to them anymore.

Q But you did request an IQ test be administered for Mr. Terry; right?

A Yes.

Q And Dr. Davis administered that test?

A Yes.

Q And do you remember the score that came back on that one?

A A full scale of 82.
Q Okay. So now you have four scores. And when you look at them, what does that tell you, big picture?
A That Mr. Terry's functioning has decreased subsequent to the head injuries that he incurred in the post-developmental period and -- which is why we also wanted to do that screener -- the cognitive screener for the MoCA because Mr. Terry does have some real and genuine deficits, and those are evidenced by the cognitive testing that we did, the MoCA, and the cognitive testing that was performed by Dr. Decker.
Q So there's no doubt that he has some disability now.
A Yeah, he definitely has some cognitive deficits.
Q But the records, as you saw them, did not support that he had the limited -- substantial limitations --
A During the developmental period, that's correct.
Q And can you explain a little bit how you differentiate between cognitive assessment and intellectual functioning assessment?
A When we're talking about intellectual disability, we're looking at, again, that IQ, that global measure that talks about -- and Dr. Greenspan is correct that the IQ measures that we're really talking about lends to more functioning in terms of academic or occupational functioning, if we're taking it outside of school.
When we're talking about cognitive assessment, we're

looking at a much broader range of brain functioning. So we're looking at high order cognitive abilities, things that do executive functioning. We're looking at the relationship between how the -- it was brain communication of the [indiscernible] ability. We're looking at how quickly a person thinks, how quickly they can access information in terms of memory, how quickly they can learn a piece of information, do a calculation, and come up with a result.

And so all of that is not going to be assessed in an IQ test by itself.

Q Let me ask you, too, in reporting the IQ test the way that you reported it, even with the Flynn Effect applied to some of those scores, the first two are right around 90; correct?

A Yes.

Q Okay. And that's still around the average mark.

A Yes.

Q Okay. And having reviewed the information from all of these different sources, you still have a pretty -- pretty much a leaning toward either average or low average if you're looking at everything; correct?

A Yes.

Q 50 percent of the population is around the 90 to 109 mark; right?

A Yes.

MS. BROWN: And, Your Honor, I have a demonstrative aid that I'd like to hand up to Dr. Hall, if that would be okay. And I shared it earlier with opposing counsel.

A I have it.

BY MS. BROWN:

Q You're ready for me. I appreciate that.

MS. BROWN: And I have a copy for the Court if I could hand that up. It's just a demonstrative aid.

THE COURT: Okay. Thanks.

BY MS. BROWN:

Q Dr. Hall, can you tell us a little bit about this chart that's labeled, "Distribution of IQ Scoring"?

A Right. So the way that IQ score or IQ tests are normed, they're normed so that the scores create a normal distribution so that the highest score -- so that the mean, the median, and the mode are all exactly the same. And so, in terms of an IQ test, that would be 100.

And so if we look at the space up under the curve, that lets you know the percentage of the population -- where the percentage of the population falls.

And so, for IQ tests, the normal range is considered to be 90 to approximately 109, 110, and so that most folks are going to fall under that level, so about half of the population. So most folks are going to fall -- that's why that's the highest point of the curve because most people are

going to fall in that range.
Q So the first scores at age 11, age 14, at 92, no adjustment, fall within the average range?
A Yes.
Q And at the option of applying a Flynn Effect with adjustment, at 11 years old, it's 90.68, according to your calculations?
A Yes.
Q That's still average range; correct?
A Yes.
Q And at 14, with your Flynn Effect adjustment, it's 89.36, which leans heavily, again, towards average; does it not? Right at the cusp?
A It's right in the cusp for the beginning of low average, yes.
Q And so his score in his 50s -- we're talking about the first one administered in 2022, yes ---
A Yes.
Q --- that's going to show some downward trend right there?
A Yes.
Q Even today, he does not, in any test, go to that extremely low period; correct?
A Yes.
Q Is it correct, Dr. Hall, that the DSM-5 reports prevalence of intellectual disability -- true intellectual

disability diagnosed cases could be diagnosed as occurring in approximately 1 percent of the population?

A Yes.

Q So it's a rare occurrence?

A It's a small number in a population.

Q And you also had conclusions about adaptive functioning in your report. One developmental period test was given. You noted that he was behind two years from the chronological age?

A Yes.

Q What does that show you? Why is that important?

A So the -- the school was trying to figure out why Mr. Terry was not performing well in the classes. Right? And this is where, I guess, I disagree with Dr. Greenspan, is that the school was asking, "What is going on with this kid?" And so they're looking at everything that could possibly impact their academic functioning.

So just because they gave the social maturity scale doesn't mean that they were trying specifically to see if he had intellectual disability. They were really trying to get a good understanding of how he was functioning across the board and how that functioning could impact his academic performance.

And so is it that the social maturity scale at the time, if that's delayed, does he need academic -- did it impact his academic functioning such that he would need support so they

could offer social/emotional classes, give him counseling, support him in that way so that they could see an increase in his academic performance.

And so that's why those measures are given because the way the law is written, they have to look at the whole child, because, for special education, there are about 13 different disabilities that are recognized for kids to get access to special education services. So it's not just strictly they're looking at intellectual disability or not; they have a lot of things that they have to cover, which is why they also look at hearing, they look at vision, they look at social/emotional functioning, they look at intellectual functioning, they look at academic functioning. They're really trying to get a whole picture of the child to see where the deficits fall so that the school can augment services to them to augment their education.

Q And without any judgment on this, I believe that the background information that you were given shows that Mr. Terry had a difficult childhood; correct?

A Yes.

Q Would you consider any allegation of physical abuse, any emotional abuse, any lack of support in homework -- doing homework or anything like that, are those all things in the environment that can affect the ability of a child to successfully go through school?

A Yes.
Q But that's not anything to do with intellectual functioning, is it?
A No.
Q And at one point, you said that Mr. Terry married early, and you noted he was ill-equipped to step into the role of a husband.
A Yes.
Q Can that also show immaturity?
A Yes.
Q Can it show a lack of wanting to participate?
A I'm not sure I understand the question.
Q The role of the husband could be interpreted as doing things around the house, and he may not want to; is that correct?
A Yes, he may not want to.
Q Also, he may not want to or think he should?
A Yes.
Q But you didn't just ask him, "Do you do things around the house to help out in the marriage and help your wife maintain the home" or anything like that. You asked him for examples.
A Yes.
Q Okay. And in discussing, did you think -- did you at all ask him about the division of labor at the house?
A Yeah, we talked about that.

Q Tell us a little bit about that, please.
A He really left that up to Luann. Like, that was her domain. He said that he handled the -- you know, the stuff on the outside of the house. So it really mirrored what his mom said about their family growing up and how their family dynamic was and so that he was really modeling what the family dynamic that he grew up in. And so he felt like it was his role to do, like, the manly stuff, like the yard work. I mean, he didn't say "manly." That's my word so let me take that back.

You know, he did the yard work. You know, he brought money into the home and then he gave the money to Luann so that she could, you know, go grocery shopping, you know, do the -- you know, he said occasionally he would prepare a meal or something, but, primarily, he left those responsibilities up to her.
Q What did he tell you about his ability to do laundry?
A I mean, he can do laundry. He knows how to do laundry. It's not a preferred activity but he can do it.
Q [Indiscernible] more to the inside category, so....
A Yeah.
Q It wasn't something culturally he really thought he should be doing.
A Right. And Mom said, you know, that he -- she recalled that he had a favorite pair of jeans that he liked to wear,

and he always made sure that those were clean and ready for him to wear. So when he wanted, you know, to wear his favorite jeans, he would take care of them and make sure that they were presentable.

Q And Mr. Terry also spoke to you a little bit about leaving South Carolina and going down to Florida?

A Yes.

Q And he didn't take his wife with him at that point; is that correct?

A No, no, that's correct.

Q And he had a job down there?

A Yes.

Q What about his comments to you, as you have incorporated in your report, about taking care of his brother?

A He felt a responsibility to take care of his brother. He felt like, in some ways, he was -- I guess emotionally stronger than his brother, able to deal with some things more than his brother could, so he felt like it was his responsibility to step up and take care of his brother in those ways.

Q And, Dr. Hall, you have noted that Mr. Terry does have some cognitive limitations?

A He does.

Q Even today with those issues, including having suffered a stroke, if you take away the third prong, would he meet the

first two prongs for intellectual disability?
A No.
Q But he does have a learning disability?
A Yes.
Q And he continues to have a learning disability, from what you can tell?
A Yeah, that doesn't go away, no.
Q And some [indiscernible] ---
A Yes.
Q --- have increased because of different things that have happened after the developmental period?
A Yes.
Q Okay. But looking at all the evidence that you have from the developmental period, all the evidence that you gathered through interviews, he was not intellectually disabled?
A Yes.
Q Is that an opinion that you hold with a reasonable degree of psychological certainty in line with the practice of forensic psychology?
A Yes.
Q On page 19 of your report, you also said that you -- you have done a lot more, it appears, than what's appeared in the -- what comes into the report itself.
A I only have 16 pages.
Q On page 19, you ask questions of Mr. Terry about abstract

reasoning.

A Oh, you're talking about the interview?

Q Yes.

A I thought you were talking about the report.

Q Well, if I said "report," I was mistaken. I'm sorry about that.

You had said that you had -- let me back up. I will put it in better context. Let's start again, shall we?

A Thank you.

Q When you did your interview and you were going through different things that you were going to ask, you mentioned the guideline.

A Yes.

Q And you were taking notes on the guides that you had.

A Yeah.

Q And around page 19 of the notes, you said that you had asked several questions under abstract reasoning.

A Yes.

Q And I wanted to ask you, why would you ask questions under abstract reasoning?

A It's just -- well, in terms of our -- looking at the person's cognitive functioning, and so we ask questions to try to get at either reasoning ability -- because it also goes into their judgment, you know, are they able to -- also can be used to look at their understanding of social convention, you

know, social standards, appropriate social behaviors. And so those are the things that we kind of get at when we're looking at those questions.

Q And then you asked some other questions about [indiscernible]. You asked some questions -- follow-up questions during the interview. All of those details are not in your report; correct?

A That's correct.

Q But you put in what you thought were salient points, or how did you determine that again?

A Yes. I mean, you could write 50 pages if you include everything, and so I try to put in the things that most speak to the question that needs to be answered and in a way that is useful to the Court.

Q Okay. One of the phrases that you had asked to explain is "what goes around, comes around." Do you recall what that response was?

A I don't recall. I would have to look at my notes to be able to recall directly.

Q Would it sound correct to say what you put out there, you get back?

A Yes, that sounds about right.

Q Does that sound familiar to you?

A Yes.

Q That itself supports to some extent that he understands

consequences; correct?
A Well, it supports that he understands what that term of phrase means. He understands when people are talking about karma, essentially, you know, what that is.
Q And did you understand from him at all that he understood where he is, what's happening, all of that? You're not worried about that at all?
A No. He was oriented, he was alert, and he was present. We didn't have any concerns that there was any type of psychotic process or anything that would make it seem like he wasn't in reality.
Q And he was cooperative?
A Yes, very.
Q And you got as much information as you could from the parties? And you accepted everything?
A Yes.
Q Do you have anything else that you wish to add to your report?
A No.
Q Thank you, Dr. Hall. Would you answer any questions that Mr. Terry's counsel may have.
A Yes.
THE COURT: Let's take a break. Let's go ahead and break for lunch. This is a good time. It's about ten to 1:00, and we'll start back at 2:00.

MS. BROWN: 2:00?

THE COURT: 2:00.

MS. BROWN: Yes, sir.

THE COURT: Dr. Hall, you're not allowed to discuss your testimony with anybody in any way, shape or form during the break. You are allowed to enjoy your lunch break. Go to lunch with whoever you want to but don't talk about your testimony.

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank you, Dr. Hall.

All right. We'll be down until 2:00. Down until 2:00. Thank you.

(A lunch recess was taken from 12:49 p.m. to 2:00 p.m.)

THE COURT: -- is present. Applicant is present.

Dr. Hall, you're still under oath. Do you understand that?

THE WITNESS: Yes, sir.

THE COURT: All right. Thank you, Dr. Hall.

And we're on her cross-examination; is that right?

MS. FRANZ: Yes.

THE COURT: All right. Ms. Franz, whenever you're ready, ma'am.

CROSS-EXAMINATION

BY MS. FRANZ:

Q Good afternoon, Dr. Hall.

A Good afternoon.
Q Dr. Hall, are you familiar with the key cases on intellectual disability from the U.S. Supreme Court, Atkins v. Virginia, Hall v. Florida, and Moore v. Texas?
A Yes.
Q And, in this C.V., it appears that you attended two trainings on intellectual disability in capital cases, and one was about ten years ago in 2014 and one last year in 2023; is that right?
A Yes.
Q Have you ever attended any other trainings on Atkins cases?
A Other than the supervision that I got from my predecessor, no.
Q Have you ever published an article on intellectual disability?
A No.
Q And would it be fair to say, based on your C.V., that the majority of your research has been on autism spectrum disorders?
A Yes.
Q Okay. And your task in this case was -- and I'll quote the first page of your report -- "to evaluate Mr. Terry to determine whether he has an intellectual disability"?
A Yes.

Q And you completed that report on June 12th?
A Yes.
Q Okay. I'd like to just kind of briefly walk through each prong here. So I'll start with Prong 1, and that is significantly subaverage intellectual functioning; right?
A Yes.
Q And isn't it true that a score of approximately 75 or below falls within the intellectual disability range?
A Yes.
Q And you agree that the standard error of measurement needs to be considered in this case?
A Yes.
Q Which is plus or minus five?
A Yes.
Q And Mr. Terry has had a score of 75 or below on an IQ test; is that right?
A I think the lowest was 77, but if you applied the Flynn to that, then, yes, it would fall.
Q And you agree that it's proper to apply the Flynn Effect?
A Yes.
Q And that score falls below 75 when you apply the Flynn Effect?
A On that one test, yes.
Q Now, on that test, I did not see anything in your report offering any reasons that that score might not be valid. So

is it fair to say that your opinion is that that score is valid?

A I mean, even at the time Dr. Decker wrote in the report that there was some issues, but he felt that it was a valid score. So that score is just a snapshot of his functioning on that day, and we have several snapshots across the life span.

Q Okay. And it's true that that score would fall into the range for intellectual disability; right?

A Yes.

Q You discussed in your report some additional IQ scores that Mr. Terry received in childhood; is that right?

A Yes.

Q And those are both WISC-Rs?

A Yes.

Q And you assumed those scores were accurate and reliable?

A Yes.

Q Did you review any of the raw data for those scores?

A No. That was unavailable.

Q And your report says that the WAIS score was administered to Mr. Terry by DDSN?

A Yes.

Q And you did not administer that test result?

A No, I did not.

Q Dr. Jessica Davis administered it?

A Yes.

Q And were you supervising Dr. Davis's administration of the test?
A I trust her to administer the test but I was present.
Q I'd like to talk just briefly about the results of the testing. So the uncorrected score that Mr. Terry obtained on the WAIS score that Dr. Davis administered was an 82; is that right?
A Yes.
Q And, again, you agree that it's appropriate to apply the Flynn Effect in this context?
A Yes.
Q And you measured the Flynn Effect from the year of publication of the WAIS score; is that right?
A Yes.
Q And that year was 2008?
A Yes.
Q And you applied a Flynn Effect correction of 0.33 points per year?
A Yes.
Q Okay. Thank you.
And correct me if my math is wrong, but you calculated 2024 minus 2008, 16 years from the date of publication. 16 times .33 is 5.28. So the Flynn adjusted score is 76.72; is that right?
A Yes.

Q Are you familiar with the AAIDD "Definition, Diagnosis, Classification, and Systems of Supports Manual"?
A Yes.
Q Doesn't that manual say that Flynn correction should be measured from the date the test was normed?
A Yes, I will concede that I should have added, at minimum, a year or, at maximum, two years to this calculation.
Q So that would take an additional roughly .66 --
A .66, yeah.
Q All right. I would like to move on to Prong 2. And Prong 2 is deficits in adaptive behavior; right?
A Yes.
Q And the three main areas of adaptive behavior under the DSM-5 are social, conceptual, and practical?
A Right.
Q And I should have asked this but I believe you might have answered it already: Are you familiar with the DSM-5-TR?
A Yes.
Q Thank you.
And under the DSM-5-TR, you only have to prove adaptive deficits in one of those three areas to meet Prong 2; is that right?
A That's correct.
Q And your report says that Mr. Terry had deficits in social skills in his youth; isn't that right?

A Yes.
Q And the report also says that he has deficits in conceptual skills, specifically with school in his youth?
A Yes.
Q Okay. And those are two different areas of adaptive behavior; right?
A Yes.
Q And your report also says on page 15 that, quote, "The social deficits Mr. Terry exhibited are likely due to his history of significant child abuse"; is that right?
A Yes.
Q Isn't it true that the AAIDD manual states the history of child abuse is actually a risk factor for intellectual disability?
A Yes.
Q Now, for -- in consideration of adaptive behavior, you interviewed Mr. Terry's mother, Patsy, and his ex-wife Luann Smith; is that right?
A That's correct.
Q Did you interview any of Mr. Terry's teachers?
A No.
Q How about any of his friends?
A No.
Q Any of his co-workers?
A No.

Q And your report says that Mr. Terry was rated by his teacher on the Vineland Social Maturity Scale when he was a child?
A Yes.
Q Is the Vineland Scale a standardized measure of adaptive behavior?
A Yes.
Q And your report says that the results of that test indicated that he had a social age of 9.1 years old?
A Yes.
Q And Mr. Terry was 11 years old at the time he took that test; right?
A At the time she rated him, yes, he was 11.
Q And your report says that this score suggests, quote, "That he was having deficits in his social skills as a youngster"; is that right?
A Yes.
Q And deficits in adaptive functioning are not -- or measuring deficits in adaptive functioning are not part of the diagnostic criteria for a learning disability; is that right?
A No, they're not part of the diagnostic criteria, no.
Q Now, you spoke directly to Mr. Terry about his own functioning; right?
A Yes.
Q And you noted in your report that, quote, "Mr. Terry

reported he described his adult life in terms that generally indicated average levels of adaptive functioning"?
A Yes.
Q And you said you're familiar with the term "cloak of competence"?
A Yes.
Q And that's the idea that people with intellectual disability will hide their deficits or exaggerate their strengths to make it seem as though they're less impaired than they actually are?
A Yes.
Q And could that include people with intellectual disability not wanting to share or tell someone about their deficits; is that right?
A That could include that, yes.
Q And could it also include exaggerating their strengths or telling someone that they were capable of doing things that, in reality, they couldn't do; is that right?
A That is correct. But that's why you ask more questions. You try to get beyond the cloak.
Q Well, you also noted on page 5 of your report that Mr. Terry's ex-wife, Luann Smith, stated that Mr. Terry had a need to impress other people?
A Yes.
Q Quote, "He would say he would do things and brag and then

have to get bailed out"; is that right?
A Yes.
Q You also say on page 16 of your report, quote, "Since his incarceration, he has demonstrated he has the adaptive function skills to navigate the system to address his needs"; is that right?
A Yes.
Q Are you familiar with the DSM-5 counseling against reliance on adaptive behavior while in prison?
A Yes.
Q Are you also familiar with the Supreme Court's decision in Moore v. Texas also cautioning against reliance on adaptive strengths developed in a controlled setting such as prison?
A Yes, because people learn how to navigate that system successfully.
Q Now, you note on page 5 of your report that Mr. Terry's mother, Patsy, told you Mr. Terry's father was abusive, and Gary was singled out for abuse, quote, "more than his brothers because it took him longer to catch on when his father was teaching him to do something"; is that right?
A Yes.
Q And on direct, you were also asked about meeting developmental milestones. Isn't it true that Mrs. Terry told you Mr. Terry was slow at talking?
A Yes. And I asked her about what -- like, what she meant

by that. But the age range that she gave me when he started using words actually falls within the typical range, but I wouldn't expect her to know that.

Q But she did say -- she said Mr. Terry was slow at talking. And your notes from that interview say it's slow at both. I would think both means walking and talking; would that be right?

A That's what she said. But, again, the time frame that she gave me, they're actually within the typical time frame.

Q So that's what she told you?

A That's what she told me, yes.

Q And I'd like to talk a little bit about Mr. Terry's academic performance. Your report says that Mr. Terry's elementary score performance on the McGraw Hill comprehensive test of basic skills was, quote, "Consistently below grade level in all of his subjects"; is that right?

A Yes.

Q And on page 5, you noted that Gary struggled with many subjects in school and was in special education in some classes; is that right?

A Yes.

Q And he was placed in special education to address deficits in reading, math, and spelling; is that right?

A Yes.

Q Do you agree with that?

A That's what the records suggested, yes.
Q And you also noted that Gary was strong in mechanical subjects; is that right?
A Yes.
Q And people with intellectual disability have strength and weaknesses; right?
A Yes.
Q So your report also says that Mr. Terry's teacher allowed him to earn extra credit by working on his car?
A That's what Mr. Terry told me, yes.
Q So Mr. Terry used his strength and ability to do mechanical work to help him deal with the deficits that he had in academic skills; is that right?
A I guess he more bartered for assistance for his academic skills.
Q So he's using a strength that he had in one area to make up for a weakness that he has in another area?
A Well, to get support in another area.
Q And your report also says that, "At several points throughout Mr. Terry's school history, he improved when he had special education support but he failed when that support was taken away"; is that right?
A Yes.
Q You also stated on page 5, "Mr. Terry was attempting to complete the GED but was unable to do so"; is that right?

A Yes.
Q And Mr. Terry dropped out of school in the ninth grade?
A Yes.
Q And he was 16 years old at that time; right?
A Yes.
Q Now, is it right that you state on page 16, quote, "Mr. Terry has not met the second prong of the intellectual disability diagnosis"?
A Yes.
Q And one of the reasons that you state to support that conclusion is that Mr. Terry started a business; right?
A Yes.
Q Isn't it true that you also state on page 7 that, quote, "His then-wife Luann completed the paperwork to run the business"?
A Yes.
Q And another of the reasons you state to support that conclusion is that Mr. Terry, quote, "maintained gainful employment"?
A Yes.
Q Isn't it true that Ms. Smith, Mr. Terry's ex-wife, told you that she helped Mr. Terry get jobs and that he found them through word of mouth?
A Yeah, he didn't apply for jobs. He would hear about a job or she would hear about a job, and then they would go

apply for it. He wasn't, like, looking in a newspaper for jobs. But that's how a lot of people get jobs. They hear about places having an opening and then go apply.

Q And isn't it also true that Ms. Smith told you that Mr. Terry only worked sporadically?

A She said that he worked a lot of jobs. I don't remember her saying the word "sporadically," but it could be that she said "sporadically."

MS. FRANZ: May I approach the witness, Your Honor?

THE COURT: Yes, ma'am.

BY MS. FRANZ:

Q I'd like to show you, if I can, a copy of your notes from your interview with Luann.

A Yes.

Q I'd just direct you to the first page, the bottom of the first paragraph. I believe there's a typo there. It looks like it should --

A I have a -- I can't spell, so...

Q That's okay.

A That's probably a typo.

Q It looks like it should say, "She was the primary breadwinner and he worked sporadically"; is that right?

A Yeah, let's say that's what that says.

Q Okay. And your report says on page 16 that one of the reasons for your opinion that Mr. Terry does not meet Prong 2

is that he lived independently; is that right?
A Yes.
Q Isn't it true that Mr. Terry actually told you, when he moved out of his parents' house, he moved right in with his brother Billy?
A Yes, he moved in with his brother.
Q And isn't it also true that he then moved in with Luann when they got married?
A He moved in with Luann, right.
Q And Mr. Terry also told you that where they lived was Luann's decision and his name was never on any paperwork for housing?
A Yes, it wasn't important to him. He left those decisions to her because she was the wife.
Q So isn't it true that Mr. Terry has never actually lived anywhere independently by himself?
A Well, independently doesn't necessarily mean alone, but it's talking about having your own domicile. That could be with a roommate, with a married partner, whatever, but just not being totally and completely -- it doesn't mean you have to do everything on your own. You can do it in partnership with other people.
Q And you also -- your report states on page 14 that Mr. Terry, quote, "Very rarely contributed to the child care, finances, and household chores"; is that right?

A Yes.
Q And isn't it true that Ms. Smith also told you that, if she was sick, she couldn't leave the kids with Mr. Terry; she had to call her parents to take care of the kids? And that was because she didn't think Mr. Terry could recognize that he had to feed the kids unless he himself was hungry?
A Yes.
Q And isn't it also true that Ms. Smith told you that Mr. Terry could not mix his children's baby formula and needed to ask Ms. Smith to test it to make sure it was the right temperature?
A She -- I remember her saying that, if he did make the baby formula, he would bring it to her to test to make sure it wasn't too hot or too cold.
Q And isn't it also true that Ms. Smith told you Mr. Terry did not make or take himself to doctor's appointments? If an appointment was made, Luann or Mr. Terry's mother would make that appointment and take Mr. Terry to the appointment; is that right?
A She said that she would make doctor's appointments, but if he felt like it was anything wrong, he would have had an uncle, who was a doctor, and he would just go see him. But if it required an appointment, then, yes, she would make the appointments.
Q Okay. Now, doesn't the AAIDD manual say that part of

adaptive functioning deficits that are often seen in people with intellectual disability is being gullible, naive, and easily taken advantage of by others?
A Yes.
Q And that could include being scapegoated or blamed for things that others do; right?
A Yes.
Q Isn't it true that Mr. Terry's mother, Patsy, told you that Gary was a follower and that he was naive and easily manipulated?
A Yes.
Q And Patsy also told you that Mr. Terry had a friend who would blame Mr. Terry for things that the friend did?
A Yes.
Q And Mrs. Terry also told you that Mr. Terry didn't understand when people were using him; is that right?
A Yes.
Q And none of that information is discussed in your report; is that right?
A No.
Q And it's also true that Ms. Smith also told you that Gary was easily manipulated by his brother Billy and his cousin Doug?
A Yes. She said that they would -- she felt like they took advantage sometimes.

Q And Luann also said that Mr. Terry didn't know that Billy and Doug were manipulating him at those times?
A No. If I remember correctly, she would try to discuss that with him, but he didn't want to hear it.
Q And he wasn't able to recognize it at that time; is that right? That's consistent with what she told you?
A I guess you could put it that way, yeah.
Q And that information is also not relayed in your report; is that right?
A No, I think I put -- put it in there that she mentioned that he -- under -- when talking about his social deficits.
Q I believe on page 5, your report states, "His need to impress led to a lot of times when he would do things and brag and then have to get bailed out." Is that what you were referring to?
A No. I thought -- that's part of it, but I did -- I thought I had included -- I can't find it.
Q Okay. And didn't Ms. Smith also tell you that Gary's cousin Doug would egg Gary on and convince him to do risky or dangerous things that Gary would do because he wanted to impress Doug?
A Yes.
Q Now, your report states that Ms. Smith was responsible for paying all the bills when she and Mr. Terry were together; right?

A Yes.
Q And that, when he lived with his brother Billy, he also just gave money to Billy to pay the bills?
A Yes.
Q And in your interview with Ms. Smith, you administered a questionnaire; is that right?
A I just asked questions. It's not a formal questionnaire.
Q I have in your notes from that interview are marked as the Patton Informal Adaptive Behavior Inventory; is that right?
A Yes. But this is not like a standardized questionnaire. So I just consider it a list of questions. It's not --
Q Okay. So it's not standardized?
A No.
Q And it's not published?
A No.
Q And it's not peer-reviewed?
A No.
Q And you had said you had never used it before? You just tried it out for this case?
A Yes.
Q And your report says, on page 14, in discussing Mr. Terry's adaptive deficits, that, quote, "Mr. Terry's behaviors are commensurate with his diagnosis of antisocial personality disorder." Now, that diagnosis does not exclude

Mr. Terry from a diagnosis of intellectual disability; correct?

A That's correct.

Q And doesn't the DSM-5-TR recognize that, quote, "Co-occurring neurodevelopmental and other medical and mental conditions are frequent in intellectual developmental disorder"?

A Yes.

Q Okay. Now, I'd like to move on to Prong 3. Is it correct to say that Prong 3 is onset [indiscernible] in the developmental period?

A Yes.

Q And the developmental period is defined as prior to age 22?

A Yes.

Q And that is in the AAIDD manual; is that right?

A AAID [sic], DSM-5-TR, yes.

Q And you conclude in your report that Mr. Terry does not meet the criteria for Prong 3?

A Yes.

Q And your report says that he didn't receive a formal diagnosis during the developmental period?

A No, he didn't.

Q Is it your testimony that a formal diagnosis in the developmental period is required to meet Prong 3?

A It's not required, no. But he was tested during that time period and that diagnosis was not offered at that time.
Q And the AAIDD manual says that, quote, "Disability does not necessarily have to have been formally identified but must have originated during the developmental period" is that right?
A Right. There should be some evidence that it was present, even if it wasn't diagnosed.
Q And isn't it true that you found that individuals in other Atkins cases have met the diagnostic criteria for intellectual disability even though there was no diagnosis of intellectual disability during the developmental period?
A Yes.
Q Now, you mentioned traumatic brain injuries. Are you aware of an incident when Mr. Terry was around 14 years old where he rolled himself in a rug with a tube of glue and passed out?
A I have heard talk of that, yes.
Q Okay. And are you aware of an incident when he was 17 in which he fell out of a tree and landed on his head?
A I thought that happened when he was older. I'm not aware of it happening at 17.
Q Okay. So you're not aware of that?
A No.
Q And are you aware of an incident when he was 19 when he

was in a motorcycle accident and reported headaches afterward?
A Yes.
Q Now, Dr. Davis administered a Montreal Cognitive Assessment to Mr. Terry; is that right?
A Yes.
Q And you pronounce that acronym "moe-cah"?
A "Moe-cah," mm-hmm.
Q And the MoCA measures cognitive impairment?
A Yes.
Q And Mr. Terry scored a 19 out of 30 on that test?
A Yes.
Q Which you reported was indicative of mild cognitive impairment?
A Yes.
Q And cognitive impairment is part of what we're looking at when we say sub-average intellectual functioning; right?
A It's more than just IQ in terms of that cognitive impairment. That's more looking at deficits in particular cognitive abilities. Attention, memory, those kinds of things, so not just word fluency. So it's measuring something different from IQ.
Q And on page 16 of your report, you attribute those cognitive deficits to, quote, "multiple etiologies, including head injuries and physical abuse"?
A Yes.

Q And isn't it true that the AAIDD manual says that head injuries and physical abuse are also risk factors for intellectual disability?
A Yeah, they can be contributors.
Q And isn't it true that the DSM-5-TR also lists traumatic brain injury as a risk factor for intellectual disability?
A Yes.
Q And in your conclusion, you point out the Preventive Procedures Inoculations Form, noting that he was a normal male child in good physical condition; is that right?
A Yes.
Q And that's a vaccination form; right?
A Yes. That was in his school record.
Q And it just lists the shots that a kid gets before he goes to school; right?
A Yes.
Q So you're not claiming that that means someone assessed him for intellectual disability and ruled it out based on that?
A No.
MS. FRANZ: Court's indulgence.
BY MS. FRANZ:
Q Dr. Hall, I'd like to show you what's been proffered as Exhibit 9. Can you take a quick look at that and let me know if you recognize it?

A Yeah, it looks like a medical record talking about migraine headaches.
Q I'd like to direct you to page 4 of that record. And it says on the third line of that record, "HAs since '85. Migraines since back injury"; is that right?
A Let me make sure we're on the right page. Okay, yes.
Q And HAs stands for headaches; is that right?
A Yes.
MS. FRANZ: Nothing further, Your Honor.
THE COURT: Redirect?
MS. BROWN: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MS. BROWN:
Q Doctor, I know you were asked initially about the IQ scores, the IQ testing.
A Yes.
Q And the question was, "Is it appropriate to apply the Flynn adjustment?" And you said it was.
A Mm-hmm.
Q You agree with that; right?
A Yes.
Q But there's no manual that says it's mandatory, is there?
A No.
Q And the social deficits, you were asked about that, and child abuse. And child abuse is a risk factor?

A It is.
Q And it's a risk factor for a lot of things that happen to children. That's a risk factor to a child; correct?
A It's a risk factor for a lot of mental health and developmental issues, yes.
Q It's not causation in any way, shape or form for ID?
A Depends.
Q Well, actually, that's exactly what I'm getting at. It's not "if then, then ID"?
A Is it a one-to-one? No.
Q And you were asked did you interview any friends or co-workers or teachers. Were you provided any information from Mr. Terry's team of a co-worker or friend or teacher that you could interview?
A No.
Q And Mr. Terry reported to you -- and I think you said perhaps his wife also reported -- he liked to impress people. He didn't like for people to look down on him?
A Yes.
Q Correct?
But that doesn't mean that he's intellectually disabled, does it?
A No.
Q Okay. Most people don't like to be looked down upon.
A Right.

Q Okay. And there was some discussion, I think, about your questionnaire, the guide that you had, and you said that it wasn't standardized, it wasn't accepted. But it's used by professionals; correct?

A Yes.

Q And you received that from a professional conference; correct?

A Yes.

Q That was not something you came up on your own with; right?

A No.

Q Okay. And the prison behavior that you mentioned, I want to go back and kind of finesse that a little bit because you were saying that you were aware of more and you were aware of different manuals that say prison behavior, you know, should not normally be accepted.

But isn't it a little bit more narrow than that? You want to make sure that it's his decision, his writing, not a command to go take a shower or that some other inmate wrote a note.

MS. FRANZ: Objection to leading.

BY MS. BROWN:

Q Is that correct?

THE COURT: Sustained as to leading. Rephrase your question.

MS. BROWN: Sure.

BY MS. BROWN:

Q Is that what you mean? What can you tell us about how you look at prison behavior?

A The reason why you want to -- if you look at information from prison is that you don't know for sure if someone assisted the individual with crafting a letter or an email or those kinds of things. So you want to make sure that what you're reading is actually representative of the Applicant's or the defendant's level of functioning.

And I got a wealth of information that was indicative of Mr. Terry's, you know, verbal communication through emails, emails with many family members, with his, I believe, deceased wife. So there was a wealth of information along with his communication to members in the prison about, you know, things that happened that he was disputing or requests that he had. So there was a lot of information.

And typically, what you would find when you have somebody who has assistance doing that, handwriting is different, tone of voice within the -- the communication is different. And so you get a sense that this is not all authored by the same person, and I didn't get that sense.

Q Okay. And you were also asked about your observation that he lived independently. And I believe that you told us that just means -- it doesn't have to be necessarily alone.

A Right.
Q That you have to have your own residence kind of thing?
A Right.
Q And I heard you talk about Billy and I heard you talk about Luann. I did not hear you talk about Florida. What happened to that trip to Florida? Can you tell us? Does that factor into your consideration about living independently?
A Yeah. I mean, he went there for employment. Unfortunately, he had a major accident and was significantly injured. So that didn't particularly pan out well for him so he wasn't in Florida that long because he got injured, if I'm remembering correctly, shortly -- within a couple of months of having been down there.
Q And that was a work injury?
A Work-related injury, yes. And he did not go with -- you know, his wife stayed back. If I remember correctly, I believe the plan was for him to get established, and then she would follow.
Q And you were asked about performance in the sixth grade, that he struggled. And that was part of the struggle that administrators were referencing in all of his school records? Or is that another struggle?
A No, he consistently struggled, which led to the question of what's going on with him, why is he not achieving in the way we think he should be, which is why they then did the

evaluation to determine if he needed special education services. And, like I said, initially, they were like, "Yes, he has a learning disability." And the record is not clear about why they decided to hold him back instead of just promoting him and putting him in special education. But they held him back and gave him some assistance, some resources in the classroom, and he benefitted from those things.

And so being able to demonstrate that a person has those academic struggles but making benefits where he gained, I believe, like a year plus in terms of the measures that they used, in terms of grade level, and that's not something you would see with someone with intellectual disability. That's something you would typically see with a kid who has a learning disability and benefitted from the special education services that were provided for him.

Q Yes, ma'am. Okay.

You were also asked about the reports from Mr. Terry's mother that he was easily led. What age are we talking about where she was reporting that he was easily led? What age was Mr. Terry?

A Teen years.

Q So a child?

A Yeah, a teenager.

Q And didn't you have in your report something about -- or your notes -- something about he would take the blame to

protect others?
A Yes.
Q [Indiscernible] the only one?
A Yes.
Q Is that change of any significance to you?
A I mean, this is something that he willfully and on his own -- at least that's what he suggested -- that he wanted to do, but he felt he was more equipped to take the punishment as opposed to the other person.
Q And I didn't hear any questions about the fact that Mr. Terry told you that he had a disabled friend that he helped.
A Yes.
Q And was there anything in that report that indicated to you that that person was actually a support for him or helped him?
A No, he didn't say anything about that.
Q He was helping ---
A Yes.
Q --- the handicapped individual?
A Yes.
Q Okay. And I want to talk to you a little bit because you were asked to look at just a few little things in your report and in your notes talking about deficits are risk factors or potential areas to explore, but having a risk factor or

potential area to explore or even a weakness itself isn't dispositive. Don't you also have to look at the strengths?
A Yeah, it's not dispositive to have those weaknesses. I think the weaknesses that you would see are things that you would see in kids who have learning disabilities. You would see the weaknesses in social skills in kids who have been abused. So just to say that those are, excuse me, proof positive of ID is not the case because they can be applied to lots of things that kids could experience that could lead to those deficits.
Q And you were also asked about Exhibit 9, which I believe you might still have in front of you.
A Yes.
Q Is there anything there about intellectual disability?
A No.
Q Okay. And in your report, on page 5, you also -- you put in there about your interview with Ms. Terry. Ms. Terry said, "Gary would be slow to get it, but once he got it, he got it."
A Yes.
Q What significance does that hold for you?
A She was demonstrating that Mr. Terry did have a learning disability and that it did take him more time to learn a new skill, but once he learned it, he learned it completely. In fact, she was proud that oftentimes he wouldn't want help. He would want to sit down and figure it out for himself. And she

said that he would just go off and figure it out and then come back and say, "I did it. See? I figured it out." And that was a source of pride in himself and to her.

Q In fact, she said at one point her son would always figure it out?

A Yes.

Q So that was a consistency.

Dr. Hall, with everything that you have heard today and the discussions that we have had, is it still your opinion that Mr. Terry is not intellectually disabled?

A Yes. I think he has cognitive deficits, but I don't believe that they rise to the level that is commensurate with an individual who'd have intellectual disability.

Q Thank you, Dr. Hall.

MS. BROWN: No further questions, Your Honor.

THE COURT: Ms. Franz?

MS. FRANZ: Briefly, Your Honor.

RECROSS-EXAMINATION

BY MS. FRANZ:

Q Dr. Hall, you did apply the Flynn Effect in this case; right?

A I did.

Q And you're not required to prove causation to make a diagnosis of ID; is that right?

A That is correct.

Q And the State mentions some prison communications that Mr. Terry had made that you reviewed.
A Yes.
Q You don't know whether he wrote those communications or somebody did it for him; right?
A Can I say 100 percent? No.
Q And you don't know whether he wrote the grievances either; right?
A Can I say 100 percent? No.
Q And you don't know whether any of the emails were written with spell check assistance; right?
A Well, spell check assistance is part of the package, so yes, I'm assuming that.
Q So you would say, yes, they were written with spell check?
A Yeah.
Q But, regardless, the fact remains that the both the DSM and Moore v. Texas say not to rely on adaptive behavior in prison; right?
A Right. Not openly rely on them, yes.
(Applicant's Exhibit No. 8, Document Regarding Fall out of Tree, was marked for identification.)
BY MS. FRANZ:
Q And I'm going to ask you to look at one more exhibit, Dr. Hall, which was proffered as State's Exhibit 8. I'm

sorry; Applicant's Exhibit 8.

Dr. Hall -- and I would just direct you to the second line of that record. First, do you recognize that record as one that you reviewed?

A Yes.

Q And on the second line of that record, does it say, "Patient for historian very indifferent. Wife supplied most of history. States have fallen in '85 from tree"; is that right?

A Yes.

MS. FRANZ: Court's indulgence.

At this time, I would move what's been marked -- proffered as Applicant's Exhibit 8 into evidence.

MS. BROWN: Objection on hearsay, and it has not been fully interpreted. I mean, it looks like a 23 -- he was 23 at the -- I'm not really sure exactly what it is. It's hearsay and difficult to read on top of that.

THE COURT: Sustained.

MS. BROWN: And there was no reliance on it, so it shouldn't come in under the expert cross-examination.

MS. FRANZ: Can be admitted for impeachment, Your Honor.

THE COURT: I don't know what you're impeaching her on. She said she wasn't sure at what age he fell out of the tree. I mean, does the report say 1985?

MS. FRANZ: Yes, sir.

THE COURT: Okay.

MS. BROWN: Actually, the report says that somebody said '85. It's hearsay on hearsay.

THE COURT: It's not even a medical report.

MS. BROWN: No, sir.

THE COURT: It's not a doctor --

MS. FRANZ: For purposes of review, would you like to...

THE COURT: Yeah, I mean, it's not some doctor's report where he went to the hospital after he fell out of a tree; right?

MS. FRANZ: No, sir.

MS. BROWN: Not for diagnostic purposes.

THE COURT: Do you know what his date of birth is?

MS. FRANZ: 12/1/67.

THE WITNESS: '67.

THE COURT: Yeah, that's not admitted.

MS. FRANZ: Nothing further, Your Honor.

THE COURT: Okay. Thank you, Dr. Hall. You can step down.

MS. BROWN: May I ask that Dr. Hall be excused from her subpoena?

THE COURT: Yes, ma'am.

MS. BROWN: Thank you.

THE COURT: Thank you, Dr. Hall. I appreciate you.

THE WITNESS: Thank you.

THE COURT: And does the State wish to call any further witnesses?

MS. BROWN: We have no further witnesses, Your Honor.

THE COURT: Okay. And does the Applicant wish to call any in reply?

MR. GROSE: No, sir. I think we would just like to talk with you about next steps.

THE COURT: Okay.

MR. GROSE: What we typically do in a lot of these cases is we order the transcripts, and once we get the transcripts, I'll supply the Court with a post-hearing briefing, and we'd [indiscernible] to do that.

THE COURT: Okay. And what's the State's thought on that?

MS. BROWN: I think that that would work, Your Honor. We do generally prefer not to have simultaneous briefing so we can respond to their brief maybe 30 days after they file.

THE COURT: You mean their order?

MS. BROWN: I'm sorry?

THE COURT: You mean the order?

MS. BROWN: If we're doing post-hearing briefs, if Your Honor would like post-hearing briefs --

THE COURT: Oh, post-hearing briefs.

MS. BROWN: When we get the transcript, if perhaps you could consider Applicant's brief being due in 30 days from

transcript and then ours 30 days from theirs, that may be [indiscernible] briefing for you.

MR. GROSE: We would agree with that with the caveat that, whenever the transcript comes in, there may be a lot of stuff going on in the 30 days and we might need to --

THE COURT: You just need to communicate with me.

MR. GROSE: Yes, sir. Okay.

THE COURT: All right. So let's -- Ms. Brown, would you write up, like, a Form 4 that says we conducted a hearing yesterday and today and that y'all are going to order the transcripts. And then 30 days after receipt of that, the Applicant's briefing is due and then 30 days after receipt of that, the State's or Respondent's briefing is due.

You can put a caveat in there, if that comes and you're in the middle of three trials, you know, or that if comes and something is going on -- and that's for either side, because I know you're all busy -- you just need to let me know. I'm happy to work with you on time frames. It's when lawyers just stop communicating with me that the law clerk starts to have a panic. So if something happens and it doesn't look like that's going to work, just let me know. I'm happy to work with you and come up with a reasonable alternative to that. Does that make sense?

MR. GROSE: Yes, sir. Thank you.

THE COURT: All right. And I'm going to put one thing on

the record about yesterday, just so that we're --

We're on the record; right, Rod? Rod?

Okay. So yesterday when we did Dr. Greenspan, which we basically did Dr. Greenspan all day yesterday, we opened up my virtual -- so this is for whoever is writing the transcripts. Okay?

So they're going to have to get the virtual hearing from my virtual courtroom for all day yesterday and what the court reporter Rod has from -- Rod Fitzgerald -- Roderick Fitzgerald has from the digital court reporting system here in Lexington to be able to create a transcript of what Dr. Green [sic] said yesterday.

So for -- you know, nothing was -- today is Thursday the 18th. Nothing was done virtual for today. So, for today, to type up the transcript, they're just going to need the digital court reporting systems from the live courtroom in Lexington to create that transcript. But for Dr. Greenspan yesterday, we're going to need to make sure that they have both. Okay?

Anything else from the State?

MS. BROWN: Nothing from the State, Your Honor.

THE COURT: Anything else from the Applicant?

MR. GROSE: No, sir, thank you.

THE COURT: Okay. I do want to say to all the attorneys and to their witnesses -- the witnesses have probably left because they were probably ready to get out of here -- but I

know you-all did a lot of work and a lot of crunch-time work, especially over the past few weeks, to be ready to go today and to process through that, and I much appreciate that extra work, and I appreciate everybody being respectful and professional with each other and prepared to go. That is -- the more and more -- the older I get, the less and less I see of that, so it is much appreciated to have professional, competent, and courteous lawyers in front of me. So I appreciate that and all of you doing that so thank you very much.

Just let me -- give me -- why don't you just communicate with us when they get a time frame of when the transcript will be due just so -- we're going to send a note to the Supreme Court that says we have conducted this hearing, we're waiting on transcripts and briefings, and then we'll -- and then there will be a final order just so they know what's going on.

MR. GROSE: Well, what usually happens is -- and we can get the request out, if not today, tomorrow, but what usually happens is is they have 60 days to produce the transcript.

THE COURT: Right.

MR. GROSE: And sometimes that can be extended. So what I would propose -- and this is what we do on appeals -- is we'll let you know when it's ordered, and if there's any extension on the transcript ---

THE COURT: Just let me know.

MR. GROSE: -- we'll let you know.

THE COURT: Perfect.

MR. GROSE: And when it's received, we'll give you the information. And, that way, you'll be able to track this.

THE COURT: Awesome. Great. And just an email is sufficient just to kind of keep me in the loop, so...

Is all that good, Ms. Brown?

MS. BROWN: Yes, sir.

THE COURT: Ms. Franz? Mr. Evans?

MR. EVANS: Yes, sir.

THE COURT: Okay. Thank you-all very much. Appreciate your hard work.

MR. GROSE: Thank you.

(The proceedings concluded at 2:48 p.m.)

CERTIFICATE OF TRANSCRIBER

CASE NAME/NUMBER: Gary Terry v. State

2022-CP-32-00924A

DATE OF HEARING: 07-17-24/07-18-24

COURT REPORTER/MONITOR: DCRP Roderick Fitzgerald

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I, Bobbi Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information, and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

_/s/ Bobbi Fisher_____

Bobbi Fisher, RPR and Certified Transcriber

Date Submitted: 11/3/24

NOTE: PURSUANT TO RULE 607(h)(1)(B), SCACR, "A COURT REPORTER SHALL RECEIVE THE FEE OF $1.00 PER PAGE FOR FURNISHING A COPY OF A PREVIOUSLY PREPARED TRANSCRIPT." ALL REQUESTS FOR COPIES OF THE ATTACHED TRANSCRIPT (FORM 800) FROM OPPOSING PARTY OR NON-PARTIES MUST BE SENT TO THIS REPORTER AT BFISHER@SCCOURTS.ORG.

Exhibit 3

JUSTICE 360 ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM

900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201

OFFICE 803.765.1044
WWW JUSTICE360SC.ORG

December 30, 2024

Ms. Bobbi Fisher, RPR
Via email at bfisher@sccourts.org

Re: *Terry v. State of South Carolina*, No. 2022-CP-3200924

Dear Ms. Fisher:

On November 3, 2024, you provided us with a transcript of the post-conviction relief evidentiary hearing in the above-captioned case, which took place on July 17 and 18, 2024, in Lexington County. Upon reviewing the transcript, which is 354 pages, we have identified 201 "indiscernible" notations where testimony is missing. In addition to missing testimony, many of the "indiscernible" notations appear in arguments by counsel or rulings by the Court, rendering them largely incomprehensible in multiple parts of the transcript.

Pursuant to S.C. App. Ct. R. 607 and the Court Reporter Manual (page 18), we are requesting that you provide us with a copy of the audio recording from this hearing so that we may, to the extent possible, provide you and Court Administration with more specific requests for corrections of any inaccuracies.

Thank you in advance for your attention to this matter. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Allison Franz
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
allison@justice360sc.org

E. Charles Grose, Jr.
The Grose Law Firm
404 Main Street
Greenwood, SC 29646
(864) 538-4466
charles@groselawfirm.com

cc: The Honorable Robert Hood

Court Administration
Melody J. Brown, Esq.
Tommy Evans, Esq.

Exhibit 4

Gmail

Allison Franz <allison@deathpenaltyresource.org>

Transcript - Gary Terry v. State (7/17-18/2024)

Holmes, Tammie <tholmes@sccourts.org> Mon, Dec 30, 2024 at 3:47 PM
To: "allison@justice360sc.org" <allison@justice360sc.org>
Cc: Charles Grose <charles@groselawfirm.com>, "Fisher, Bobbi" <bfisher@sccourts.org>

Good afternoon Ms. Franz.

We do not release the audio or video of hearings, the written transcript is the official record of the court. If you have an issue with a transcript, you may file a formal challenge of the transcript as stated below.

A. Challenge Procedures

When a party has concerns about the accuracy of a transcript, the party must submit his or her challenge in writing to the court reporter and copy the Court Reporting Section Management at transcripts@sccourts.org with the word CHALLENGE in the subject line. The challenge may also be submitted by postal mail to: SC Court Administration, Transcript Challenge, 1220 Senate St. Suite 200, Columbia, SC 29201. The written challenge must include the following:

1. **Their name and contact information;**
2. **Date of the court proceeding;**
3. **Case name and caption;**
4. **Court reporter name;**
5. **Name and contact information of opposing counsel/parties; and**
6. **A list of items that specifically identifies what the party is disputing, such as page and line numbers. It is not acceptable to say the whole transcript is being challenged.**

Upon receipt of a challenge to the accuracy of a transcript, the Court Reporting Section Management will respond to the challenger in writing and copy the court reporter and the other parties. The Court Reporting Section Management will then review the record and submit their findings to the challenger, the court reporter, and the other parties. Any inaccuracies will be corrected and the pages forwarded to the challenger at no cost.

Respectfully,

Tammie M. Holmes

Court Reporter Manager

South Carolina Judicial Branch

1220 Senate Street, Ste. 200

Columbia, SC 29201

tholmes@sccourts.org

803-734-1825

From: Fisher, Bobbi <bfisher@sccourts.org>
Sent: Monday, December 30, 2024 3:11 PM
To: Holmes, Tammie <tholmes@sccourts.org>
Subject: Fw: Transcript - Gary Terry v. State (7/17-18/2024)
Importance: High

Please see the attached email and letter.

When I submitted this transcript to Mr. Grose, I explained to him the reason for the numerous indiscernible marks:

1. They had a witness on Webex while counsel and the judge were in the courtroom. The Webex audio quality was very poor and there were technical issues with the Webex. I used the Webex recording PLUS the in-courtroom DCRP recording to create the record.

2. One of the mics was dead and the other mics were very low. The DCRP monitor did not notice this until 11:14, at the first break.

If I'm remembering correctly, this was a death penalty hearing/motion. I will let you handle this request since they are requesting the audio.

Kind Regards,

Bobbi Fisher, RPR

Ms. Bobbi Fisher, Stenographer

South Carolina Official Court Reporter III (Horry County)

NCRA Registered Professional Reporter (RPR)

DCRP Transcription Team

The message is intended exclusively for the individual or entity to which it is addressed. This communication may contain information that is privileged, confidential or otherwise exempt from disclosure. If you are not the named addressee, you are not authorized to read, print, retain, copy

or disseminate this message. If you have received this message in error, please contact me immediately and delete all copies of this message.

From: Ali Franz <allison@justice360sc.org>
Sent: Monday, December 30, 2024 2:55 PM
To: Fisher, Bobbi <bfisher@sccourts.org>
Cc: Charles Grose <charles@groselawfirm.com>
Subject: Transcript - Gary Terry v. State (7/17-18/2024)

Dear Ms. Fisher,

[Quoted text hidden]
[Quoted text hidden]

2024 12 30 Terry Letter to Court Reporter.pdf
148K

Exhibit 5

JUSTICE 360 ADVANCING EQUALITY IN THE CRIMINAL JUSTICE SYSTEM

900 ELMWOOD AVENUE
SUITE 200
COLUMBIA, SC 29201

OFFICE 803.765.1044
WWW JUSTICE360SC.ORG

January 15, 2025

Ms. Bobbi Fisher, RPR
Via email at bfisher@sccourts.org

Re: *Gary Terry v. State*, No. 2022-CP-32-00924

Dear Ms. Fisher:

Please accept this letter as a formal challenge to the transcript of the post-conviction relief evidentiary hearing in the above-captioned case, which took place on July 17 and 18, 2024, in Lexington County. We received the transcript on November 3, 2024. Upon reviewing the transcript, which is 354 pages, we have identified 201 "indiscernible" notations where testimony is missing. In addition to missing testimony, many of the "indiscernible" notations appear in arguments by counsel or rulings by the Court, rendering them largely incomprehensible in multiple parts of the transcript.

On December 30, 2024, we sent an email to you requesting a copy of the audio recording of the transcript so that we could better identify potential corrections. On the same day, we received a response from Tammie Holmes informing us that a copy of the audio recording would not be provided. Consequently, attached is a list of each place in the transcript where testimony, argument, or court rulings are missing, or where corrections are otherwise necessary. Proposed corrections are provided where possible, but in the vast majority of cases, it is not possible to propose a correction without access to the audio recording.

Per Ms. Holmes' email, the following required information is included:

1. Requesting counsel's name and contact information

   Allison Franz
   Justice 360
   900 Elmwood Ave., Suite 200
   Columbia, SC 29201
   (803) 765-1044
   allison@justice360sc.org

   Charles Grose
   The Grose Law Firm
   305 Main Street
   Greenwood, SC 29646
   (864) 538-4466
   charles@groselawfirm.com

2. Date of the court proceeding: July 17 and 18, 2024

3. Case name and caption: *Gary Terry v. State of South Carolina*, No. 2022-CP-32-00924

4. Court reporter name: Bobbi Fisher

5. Name and contact information of opposing counsel/parties:

   Melody J. Brown, Esq.
   Tommy Evans, Esq.
   S.C. Attorney General's Office
   PO Box 11549
   Columbia, SC 29211

6. A list of items that specifically identifies what the party is disputing, such as page and line numbers:

Notations of "digital recording technical difficulties" are noted in the table below where they appear. In addition, the following misspellings appear in the transcript *passim*:

- Louanne Smith's name is misspelled throughout the transcript as "Luann."
- "Bender-Gestalt" is misspelled throughout the transcript as "Bender-Gastalt."

Page	Line	Currently Reads	Should Read
5	2	"[Digital recording technical difficulties.]"	--
5	4	"COURT MONITOR: [Indiscernible.]"	??
5	7	"Mr. Franz"	"Ms. Franz"
5	11	"MR. GROSE: [Indiscernible]."	??
5	13-14	"[Indiscernible] pre-trial exhibits."	??
5	14-15	"And I have two copies; one for [indiscernible] one for your law clerk."	"one for you and one for your law clerk"
5	16	"And we will also have this morning a motion to exclude [indiscernible] Dr. Greenspan."	??
5	18	"We'd ask [indiscernible] hand that up at this time."	"We'd ask to hand that up"
5	18-19	"[Indiscernible] to opposing counsel might be the simplest way to approach this."	??
5	22-24	"Dr. Greenspan will give testimony [indiscernible] and of course, as an	??

		expert, we would be entitled to voir dire."	
6	1	"So, Your Honor, [indiscernible] are the motions."	??
6	3	"[Digital recording technical difficulties.]"	--
6	5	"MS. BROWN: Yes, sir."	"MS. FRANZ"
6	7-8	"[Indiscernible] told me that last week [indiscernible]."	??
6	9-10	"The clerk asked us this morning [indiscernible] witnesses going to be testifying virtually [indiscernible]."	??
6	14	"COURT MONITOR: [Indiscernible]."	??
6	16	"COURT MONITOR: [Indiscernible]."	??
6	23	"With all the time we have [indiscernible]."	??
6	24-25	"And they have no court reporter [indiscernible]."	??
7	1	"MR. GROSE: [Indiscernible]."	??
7	5-7	"How is he going to [indiscernible]? That's what I'm asking Rod. Is there a [indiscernible] to record it?"	??
7	8	"[Digital recording technical difficulties.]"	--
7	9	"[Indiscernible] pipe in his speaker through one of these microphones and everybody in here leaves their microphones on, do you think that will work?"	??
7	12	"[Digital recording technical difficulties.]"	--
8	10	"UNIDENTIFIED SPEAKER: [Indiscernible]."	??
8	12-13	"UNIDENTIFIED SPEAKER: We went before the [indiscernible]."	??
9	7	"THE WITNESS: [Indiscernible]."	??
9	12	"THE WITNESS: I can hear you; it's just [indiscernible]."	??
9	21	"THE WITNESS: [Indiscernible]."	??
10	2	"MS. FRANZ"	"MS. BROWN"
10	20	"MS. FRANZ"	"MS. BROWN"
12	22-24	"And then I went to Nebraska where I was [indiscernible; technical difficulties] --- "	??

13	1-2	"--- in Colorado where I was affiliated with University of Colorado Medical School. And now [indiscernible]."	??
13	9	"and also worked at Boycetown (ph) at a research center"	"worked at Boys Town at a research center"
15	4-6	"I was more available than I would have been otherwise, and so I often [indiscernible] and asked to consult"	??
19	16-18	"Then I would proffer Applicant's Exhibit No. 1 at this time and a copy for the court reporter, a copy for the Court and your law clerk [indiscernible]."	??
19	23	"[Digital recording technical difficulties.]"	--
19	24	"THE COURT: [Indiscernible] exhibit [indiscernible]?"	??
20	5	"And Mr. Evans, [indiscernible]."	??
20	6	"MR. EVANS: [Indiscernible], Your Honor."	??
21	22-24	"and he's going to testify or prepared to testify about documents he reviewed [indiscernible] I don't even know [indiscernible] from something he reviewed"	??
22	8-9	"I assume they're not going to offer any witnesses here [indiscernible]."	??
22	20	"MR. EVANS: Your Honor, [indiscernible]."	??
22	24	"[Digital recording technical difficulties.]"	--
25	21	"Well, I would [indiscernible] fairness [indiscernible]."	??
26	4	"A: [Indiscernible]."	"A: Yes."
27	11	"A: [Indiscernible]."	??
27	18-19	"[Indiscernible] testify in all of them."	"I did not testify in all of them."
28	23	"A: [Indiscernible]."	??
29	14-15	"I have no recollection [indiscernible]. [Indiscernible] my opinion and often I do agree."	??
29	20	"Completely [indiscernible], sir."	??
30	5-7	"Dr. Greenspan serves as an expert in cases of this sort across the country and [indiscernible] the man's	"and such service demands an impeccable professional reputation."

		impeccable professional reputation."	
30	13	"A: [Indiscernible]. Yes. I said yes."	??
30	17	"Mr. Grouse"	"Mr. Grose"
33	8-9	"I think he's lapsing into an opinion [indiscernible] testimony, if you allow the testimony."	??
33	10-11	"THE COURT: [Indiscernible] qualifications [indiscernible]."	??
33	14-17	"THE COURT: No, they went directly to reliability factors that counsel just said he had to go through so if you have something to ask him about his qualifications or the testimony [indiscernible]."	??
34		"And so the common sense questionnaire basically presents 24 or 25 scenarios in which someone is portrayed [indiscernible] but coming up with a solution."	??
34	17	"MR. GROSE"	"THE COURT"
34	25	"[Indiscernible] score [indiscernible] neurological test."	??
35	20	"A: [Indiscernible]."	??
35	23-25	"Structured [indiscernible] and I'm structuring around an ability or an issue that's generally not evaluated"	??
38	18-20	"And by adaptive [indiscernible] are referring to how someone views various stressful and potentially dangerous situations."	"And by adaptive intelligence we are referring to"
39	13-16	"THE COURT: All right. Let me hear your argument as to qualifications and admissibility under -- well, the test for determining the admissibility [indiscernible] evidence under [indiscernible]."	??
39	17-19	"Your Honor, [indiscernible] mentioned Jones earlier, and the Court ruled [indiscernible] Jones and State v. Council."	
39	20-25	"those publications and peer-reviewed [indiscernible] by application of the method, the type of evidence involved in the case, quality control procedures to ensure reliability and consistency of the	??

		method recognized scientific [indiscernible] procedures"	
40	1-3	"Our basic argument is, first of all, [indiscernible] nobody else used it [indiscernible] actual results are totally determined by [indiscernible]."	??
40	3-4	"And he [indiscernible] with the knowledge of whether or not something is common sense."	??
40	6-7	"Common sense to him is definitely probably different than common sense [indiscernible] in this case."	"than common sense to Mr. Terry in this case"
40	7-9	"But [indiscernible] determine [indiscernible]. We don't see that in that [indiscernible]."	??
40	10-15	"THE COURT: So as far as the -- the way my brain kind of processes through this [indiscernible], just so you understand the framework that [indiscernible], it's kind of step number one is we have [indiscernible], per Council, we have to go through will the evidence assist the trier of fact if he's qualified, and is the underlying [indiscernible] reliable. "	??
40	16-19	"You're really focusing in on Factor 3, [indiscernible] triggers and [indiscernible] factors of qualification [indiscernible] criminal in doing, is this the practice in the field."	??
40	25	"UNIDENTIFIED MALE: Yes, sir."	"MR. GROSE"
41	1-2	"the second prong [indiscernible] DSM-5."	??
41	2-4	"Adaptive functioning must be shown that [indiscernible] to do that, according to DSM-5, only by questioning an individual but also [indiscernible]."	??
41	5-8	"Also [indiscernible]. [Indiscernible] did not do that, to force his wife -- he was forcing -- his wife was forced by [indiscernible] Mr. Terry, but also [indiscernible] his mother."	??

41	10-11	"He said in the deposition that [indiscernible] talk to me [indiscernible]."	??
41	12-13	"Also, Your Honor, he relied on that questionnaire [indiscernible]."	??
41	14	"THE COURT: [Indiscernible] questionnaire?"	??
41	16-18	"It was [indiscernible] reliable [indiscernible] somebody else would be using it in the country."	??
41	21-22	"for it to be used [indiscernible] deficits of adaptive functioning"	??
41	24-25	"that is a major factor in determining whether somebody [indiscernible]."	??
42	2-3	""Standardized measures are used for knowledge or [indiscernible]. Parent or other family members, teacher, counselor, provider.""	"Standardized measures are used with knowledgeable informants, e.g., parent or other family member, teacher, counselor, provider"
42	4-6	"And it's [indiscernible] -- there's no source or information [indiscernible]"	??
42	9-10	"that has not been done in this case in order to make a determination on [indiscernible] functioning"	"to make a determination on adaptive functioning"
42	12-13	"especially [indiscernible] because the methods he used are not reliable"	??
42	18	"Yes, Judge. [Indiscernible]."	??
42	18-19	"And I think we don't have any issue on the first prong, [indiscernible]."	??
42	19-20	"The issue on the third prong [indiscernible]."	??
42	22-23	"there's a [indiscernible] judgment now [indiscernible] instruments to determine"	??
42	24-25	"It's not [indiscernible]."	??
42-43	25-1	"Dr. Greenspan did talk to Mr. Terry's mother and Mr. Terry's ex-wife, so [indiscernible]."	??
43	2-4	"Dr. Greenspan will testify about his review of [indiscernible], which was [indiscernible] diagnosis as to Prong 1 and Prong 2."	??
43	6-7	"I will also note that, you know, if they're trying to make a common sense questionnaire [indiscernible]."	??
43	8-10	"Dr. Greenspan is not [indiscernible] something that is not a structured	??

		interview where he needs this [indiscernible] assessment."	
43	11-14	"I would just note [indiscernible], that [indiscernible] call Dr. Hall from DDSN, and [indiscernible] of SCDDSN competency to stand trial instrument that she used."	??
43	15-17	"Patton Informal Adaptive Behavior Inventory, Adaptive Behavior [indiscernible] questionnaires as [indiscernible]."	??
43	17-19	"I would be [indiscernible] say those are instruments that are structured interviews"	??
43	19-21	"particularly the competency to stand trial [indiscernible] that's ever been published in the scientific literature [indiscernible]."	??
43	22-24	"if not all of those [indiscernible] goes to the weight of the evidence and not the admissibility of [indiscernible]."	??
44	9-10	"I think that the Court needs to focus on more [indiscernible] decision"	??
44	14-15	"The actual measures used by DDSN -- that's a state agency, Your Honor -- [indiscernible]."	??
44	15-19	"That's something that you as the other individual can decide to [indiscernible] questionnaire [indiscernible] and totally determination about the common sense from this questionnaire [indiscernible] Dr. Greenspan and no one else."	??
44	20-21	"we [indiscernible] differ in that determination."	??
44	22-23	"The defendant's common sense may be different [indiscernible], so how can he make that kind of determination [indiscernible]?"	??
44	24-25	"Just for clarification, [indiscernible]."	??
45	2-4	"Well, I had reviewed [indiscernible] – the only reason that I bring that up	??

		is they do refer to a Supreme Court [indiscernible] Court of Appeals"	
45	7-8	"there was testimony there's no requirement that any adaptability of your scale [indiscernible]."	??
45	9-10	"[Indiscernible] in regards to [indiscernible] DSM-5 and AAIDD manual."	??
45	16	"Watson v. [Indiscernible]."	??
46	7-9	"talks about accommodations and [indiscernible] application on the internal procedures [indiscernible]."	??
46	18-19	"He clearly has, you know, interview [indiscernible] Mr. Terry's."	??
46	22-24	"you know, I think that the common sense questionnaire is fair game for cross-examination [indiscernible]"	??
47	4-6	"when I think that you've demonstrated common sense in asking about the [indiscernible]."	??
47	15-16	"but I don't know that that's the only thing [indiscernible] in his opinion."	??
47	25	"[Indiscernible] move past this."	??
48	2-3	"THE COURT: Yeah, we're going to admit that [indiscernible]."	??
50	1	"THE DEFENDANT"	"THE APPLICANT"
50	6	"THE DEFENDANT"	"THE APPLICANT"
51	22	"MS. FRANZ: Yeah, [indiscernible]."	??
59	13-15	"that Flynn [indiscernible] should always be made in any case when diagnosing intellectual disability."	"that the Flynn adjustment should always be made"
61	10-11	"the possibility that there's some learning [indiscernible]"	??
66	7	"based on an I-score"	"based on an IQ score"
69	17-18	"And that's pretty much [indiscernible] see the disorder."	??
74-75	25-1	"And very often you have [indiscernible] of cases."	??
76	9-11	"the focus was on very low-level behavior -- [indiscernible] bathroom by himself or dress himself."	"can he go to the bathroom by himself"
76	23-25	"And that's why the importance of social awareness has kind of	??

		[indiscernible] much more than in the past."	
77	20-22	"you would never see any testing or testimony by a neuropsychologist [indiscernible] specialty within clinical psychology."	"by a neuropsychologist with a specialty within"
77	23-24	"It's almost always the case that a neuropsychologist and neuro[indiscernible] are used."	??
79	20	"to make sense what's there"	"to make sense of what's there"
82	11	"[Indiscernible] educational achievements"	??
89	12	"MS. FRANZ"	"MS. BROWN"
93	19	"[Indiscernible] the mother had a bad day or not"	"I don't know if the mother had a bad day or not"
98	21	"one of two"	"one or two"
99	4-5	"Well, I think it's equally [indiscernible] valid as a measure of intelligence."	??
99	18-19	"And part of the problem with IQ tests, for the most part, [indiscernible] based on any real definition of what intelligence is"	"for the most part, the Wechsler scales are not based on any real definition"
99	24-25	"the [indiscernible] who gave the Woodcock-Johnson also gave the Woodcock-Johnson"	??
102	25	"[Indiscernible] and brain damage also"	??
103	15-16	"there are many cognitive [indiscernible] of Prong 1 besides IQ."	"many cognitive indicators of Prong 1"
104	1-2	"they're anomalous in the sense that [indiscernible] with other cognitive evidence."	??
104	19-20	"The only evidence from the school years that might be used to dispute [indiscernible]."	??
106	20-21	"I suggested that we're [indiscernible] the conceptual really should be a Prong 1 issue."	??
107	1-2	"area of great deficiency as reflected in being held back and just generally failing [indiscernible]."	??
112	17-19	"the mom -- and this is in Dr. Hall's report -- [indiscernible] mildly retarded."	??

112	20	"she certainly qualified as a diagnostician"	"she certainly doesn't qualify as a diagnostician"
114	10-12	"very often they're in cahoots with a more competent confederate who may have [indiscernible] but is more likely to understand the consequences"	??
118	3-4	"but they may come up with a different answer -- a different [indiscernible]."	"a different answer – a different score"
120	9-11	"they're [indiscernible] to maintain the friendship by doing whatever they're asked to do."	??
123	23	"MR. GROSE"	"MR. EVANS"
132	8	"Not in terms of a [indiscernible], no."	??
133	4-5	"Yeah. I -- I received [indiscernible] right after I [indiscernible] report and that's why it's a later date."	"I received Dr. Hall's report right after I completed my report"
146	21-22	"I found a lot of really useful stuff in there, particularly around [indiscernible]."	??
151	16	"I did [indiscernible] at length."	"I did speak to her at length."
151	19	"At length, I talked to [indiscernible]."	"At length, I talked to Louanne."
153	11-12	"Mr. Terry also convinced the woman [indiscernible] to marry him; isn't that true?"	??
159	14-15	"[Indiscernible] any one particular instance to say that that's the basis for diagnosing it."	??
161	6-7	"Well, [indiscernible] alcohol is considered teratogenic drugs also; isn't that true?"	??
161	11-13	"I'm just saying there are very many different ways of causing [indiscernible] in a fetus, including taking of medication."	??
166	23-24	"In terms of [indiscernible], that's an ineffective – I mean, some of these items are better than others."	??
167	10-11	"[Indiscernible] -- competent people would answer that differently."	??
167	16-17	"It's called a Minimax [Indiscernible] Theory of Reliability"	??

169	3-4	"Well, obviously, I had questions about it because [indiscernible] question."	??
176	5-6	"It was not -- it was [indiscernible] different test, and different tests measure different things"	"it was a different test"
176	13	"What I saw [indiscernible] again, it was a report."	??
188	25	"We have a witness from DDSN who is [indiscernible]."	??
196	11-12	"maybe ask [indiscernible] come up here and turn up the volume."	??
213	5-6	"Can you explain a bit more about that what means in its relation to the [indiscernible] as well?"	??
220	2-3	"because you said it was done [indiscernible] the testing."	"it was done after the testing"
222	19	"what did your score [indiscernible] to?"	"what did your score Flynn to?"
223	1-2	"he was shackles"	"he was shackled"
225	1	"THE COURT: He's saying assuming [indiscernible] – "	??
297	1-2	"starting on page 8 -- [indiscernible] by admission to Charter Hospital for substance abuse."	??
302	4-5	"it was brain communication of the [indiscernible] ability."	??
308	20	"[Indiscernible] more to the inside category, so...."	??
310	8	"And some [indiscernible] ---"	??
312	4-5	"And then you asked some other questions about [indiscernible]."	??
333	9-11	"Is it correct to say that Prong 3 is onset [indiscernible] in the developmental period?"	"Prong 3 is onset in the developmental period"
343	3	"[Indiscernible] the only one?"	??
349	11-12	"I'll supply the Court with a post-hearing briefing, and we'd [indiscernible] to do that."	??
350	1-2	"that may be [indiscernible] briefing for you."	??

Should you have any questions or need any further information, please do not hesitate to contact me. Thank you in advance for your attention to this matter.

Sincerely,

Allison Franz
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
allison@justice360sc.org

Charles Grose
The Grose Law Firm
305 Main Street
Greenwood, SC 29646
(864) 538-4466
charles@groselawfirm.com

cc: Tammie Holmes
South Carolina Court Administration
Court Reporting Section Management
The Honorable Robert Hood
Melody Brown, Esq.
Tommy Evans, Esq.

Exhibit 6

Gmail

Allison Franz <allison@deathpenaltyresource.org>

CHALLENGE - Terry v. State, No. 2022-3200924

3 messages

Ali Franz <allison@justice360sc.org> Wed, Jan 15, 2025 at 4:14 PM
To: bfisher@sccourts.org, tholmes@sccourts.org
Cc: transcripts@sccourts.org, Charles Grose <charles@groselawfirm.com>

Dear Ms. Fisher and Ms. Holmes,

Pursuant to previous emails, please find attached a challenge to the transcript of the evidentiary hearing held on July 17-18, 2024 in the above-captioned case. If you have any questions or need further information, please let us know.

Thank you,

Ali Franz

--
Allison Franz
Staff Attorney, Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044

Terry v. State - Transcript Challenge.pdf
4699K

Fisher, Bobbi <bfisher@sccourts.org> Fri, Jan 17, 2025 at 12:33 AM
To: Ali Franz <allison@justice360sc.org>, "Holmes, Tammie" <tholmes@sccourts.org>
Cc: Transcripts <transcripts@sccourts.org>, Charles Grose <charles@groselawfirm.com>

Dear Ms. Franz:

Thank you for your email regarding the transcript in this case. I completely understand your frustration and will do everything I can to help with this transcript. I have requested the DCRP audio files and the Webex/witness file to be sent to me again so that I can review your suggested corrections against the audio. I'll listen to the entire thing once again to see if there is anything else I'm able to discern from the audio and look at your suggestions to see if I'm able to hear those words.

Also, thank you so much for your note re: my error on the spelling for Bender-Gestalt. I had it in my steno dictionary that way and have corrected it.

Re: the spelling of Louanne's name, I have not confirmed but my guess is that the court monitor did not get the correct spelling in his log notes, if there was any spelling at all, but this will be corrected.

In your letter, it was stated on page 2 that I was the "court reporter" for this case; however, I am the transcriber, not court reporter. I was not present in the courtroom and am only working with files that were prepared by the DCRP Court Monitor, who I believe was Roderick Fitzgerald.

I also wrote this to Mr. Grose when I emailed the transcript to him:

NOTE: There were several technical issues with this recording that I wanted to advise you about, which resulted in numerous indiscernible marks throughout the transcript:

1. The Webex connection with Dr. Greenspan cut in and out and/or was hard to understand at times.
2. While on Webex, the DCRP was also recording to capture the in-courtroom audio (objections, motions); however MIC A2 was "blown out"/severe feedback and the other mics were turned down extremely low. This made hearing audio quite a challenge. The court monitor realized this at some point in the morning, and at the 11:14 a.m. break, the court monitor resolved the issue with the MIC A2.
3. Unfortunately, DCRP does not run a backup recording so we only have the one audio file. In this case, I did use the Webex recording and went back through it again with the DCRP audio to fill in spots on Dr. Greenspan's testimony.

Also, on page 10-11 of the transcript, you can see where the Court was already noting that trying to take the witness via Webex was going to be an issue:

THE COURT: All right. So y'all mute yourselves and then I'm going to talk to Dr. Greenspan.
MS. FRANZ: Your Honor, the only problem that we have is we can't hear. Is there a way to control volume otherwise?
THE COURT: No. That's why this whole thing doesn't work. That's why you're supposed to be in the privacy of your office with a set of headphones on so you can hear. So you're going to--
Ms. Doyle, can you go over there and make sure...
You're going to be able to hear the questioning and me. It's going to be him that you can't hear. It's still going to be a bunch of feedback, but it won't record that way.
This isn't the way it's supposed to be done, so....
Okay. All right. Dr. Greenspan, can you hear me?
THE WITNESS: Yes, sir.
THE COURT: Okay. And I'm going to need you to speak up or get closer to the microphone. Okay?
THE WITNESS: Yes, I was.
THE COURT: Yeah, like, do you have a microphone or anything like that that's available to you?
THE WITNESS: Afraid not. I need to buy one, but at the moment, I don't have one.
THE COURT: Okay. You're going to need to speak up significantly.
THE WITNESS: Okay. I'll try to do that.

Give me a week or two to go through the audio/Webex files again to see if I can discern anything else, and I will get back with you. Thank you so much for your patience.

Kind Regards,

Bobbi Fisher, RPR

Ms. Bobbi Fisher, Stenographer
South Carolina Official Court Reporter III (Horry County)
NCRA Registered Professional Reporter (RPR)
DCRP Transcription Team

From: Ali Franz <allison@justice360sc.org>
Sent: Wednesday, January 15, 2025 4:14 PM
To: Fisher, Bobbi <bfisher@sccourts.org>; Holmes, Tammie <tholmes@sccourts.org>
Cc: Transcripts <transcripts@sccourts.org>; Charles Grose <charles@groselawfirm.com>
Subject: CHALLENGE - Terry v. State, No. 2022-3200924

[Quoted text hidden]

Fisher, Bobbi <bfisher@sccourts.org> Tue, Jan 28, 2025 at 9:12 PM
To: Ali Franz <allison@justice360sc.org>, "Holmes, Tammie" <tholmes@sccourts.org>
Cc: Transcripts <transcripts@sccourts.org>, Charles Grose <charles@groselawfirm.com>

Dear Ms. Franz & Mr. Grose:

I wanted to give you both an update on the progress of the challenge to the transcript of Gary Terry v. State. I worked on it several hours over this past weekend and realized that I was still missing the WebEx afternoon portion for the doctor's testimony so I had to wait for that to be sent to me yesterday (Monday). I am now in a jury trial this week and have not had a chance to review that portion, but it looks like our trial should be ending tomorrow so my hope is to have this to you by Friday.

I have created a very large spreadsheet with the page/line, item, your suggestion, the corrected transcript item/action taken along with timestamps for both the DCRP in-courtroom recording and the WebEx hearing in case further review is warranted. The in-courtroom microphones were an issue as well as a choppy WebEx recording. I can isolate channels on the DCRP in-court mics, but some of the mics are dead and/or blown out, so some portions were super hard to hear or were absolutely inaudible. I was able to further isolate the mic channels on some of the entries at some points and was able to capture the words, but there is still a lot missing (about 120 indiscernible marks, by my last count). You'll be able to see in the "Action Taken" section why there is an [indiscernible] mark as well so that you'll have clarification.

Anyway, my goal is to have this spreadsheet as well as the corrected/amended transcript over to you on/by Friday. Thank you for your continued patience.

Kind Regards,

Bobbi Fisher, RPR

Ms. Bobbi Fisher, Stenographer
South Carolina Official Court Reporter III (Horry County)
NCRA Registered Professional Reporter (RPR)
DCRP Transcription Team

From: Ali Franz <allison@justice360sc.org>
Sent: Wednesday, January 15, 2025 4:14 PM
To: Fisher, Bobbi <bfisher@sccourts.org>; Holmes, Tammie <tholmes@sccourts.org>
Cc: Transcripts <transcripts@sccourts.org>; Charles Grose <charles@groselawfirm.com>
Subject: CHALLENGE - Terry v. State, No. 2022-3200924

Dear Ms. Fisher and Ms. Holmes,
[Quoted text hidden]
[Quoted text hidden]
[Quoted text hidden]

Exhibit 7

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
GLOBAL	Luann			NO SPELLING FROM COURT MONITOR	**Louanne**	Louanne	Corrected spelling throughout; transcriber unaware of correct spelling; log notes did not reflect spelling
GLOBAL	Bender-Gastalt				**Bender-Gestalt**	Bender-Gestalt	TRANSCRIPTION ERROR; corrected
5/2	[Digital recording technical difficulties]						remains; to let reader know the audio is not clear
5/4	COURT MONITOR: [Indiscernible]	9:45:54					remains; can't hear monitor/mic A2 buzzing/other mics volume is extremely low, not even registering on EQ and fuzzy
5/7	"Mr. Franz"	9:46:10			**MS. FRANZ**	MS. FRANZ:	TRANSCRIPTION ERROR; corrected
5/11	MR. GROSE: [Indiscernible]	9:46:19		NAME SPELLED "GROSS" ON LOG NOTES		MR. GROSE: I don't believe so, from my perspective anyway.	turned back on Mic A2 only; I can hear him through this mic over buzzing
5/13-14	[indiscernible] pre-trial exhibits	9:46:24				We had filed a pre-trial exhibit.	turned back on Mic A2 only; I can hear her through this mic over buzzing
5/14-15	And I have two copies: one for [indiscernible] one for your law clerk	9:46:24			**one for YOU AND one for**	And I have two copies: one for Your Honor and one for your law clerk	turned back on Mic A2 only; I can hear her through this mic over buzzing
5/16	And we will also have this morning a motion to exclude [indiscernible] Dr. Greenspan	9:45:39				to exclude testimony from Dr. Stephen Greenspan	turned back on Mic A2 only; I can hear her through this mic over buzzing
5/18	We'd ask [indiscernible] hand that up at this time	9:45:45			**ask TO hand up**		remains; I can't hear her. She might have been walking towards the bench, away from mic. Had to turn off Mic A2 again; sounds like a jet engine
5/18-19	[Indiscernible] to opposing counsel might be the simplest way to approach this	9:46:51					remains; I can't hear her. She might have been walking towards the bench, away from mic. Had to turn off Mic A2 again; sounds like a jet engine
5/22-24	Dr. Greenspan will give testimony [indiscernible] and of course, as an	9:46:51					remains; I can't hear her. She might have been walking towards the bench, away from mic. Had to turn off Mic A2 again; sounds like a jet engine
6/1	So, Your Honor, [indis] are the motions	9:47:29					remains; I can't hear her. She might have been away from mic. Had to turn off Mic A2 again, sounds like a jet engine.
6/3	[Digital recording technical difficulties]						remains; to let reader know the audio is not clear
6/5	MS. BROWN: Yes, sir.				**MS. FRANZ**	MS. FRANZ	Corrected; no speaker ID on log note; can't see on Webex
6/7-8	[Indis] told me that last week [ind]	9:34:45					remains; I can't hear. Mic A2 remains off.
6/9-10	The clerk asked us this morning [ind] witnesses going to be testifying virtually [ind]	9:34:40					remains; I can't hear. Mic A2 remains off.
6-14	COURT MONITOR: [Indiscernible]	9:48:10					remains; I can't hear. Mic A2 remains off.
6/16	COURT MONITOR: [Indiscernible]	9:48:22					remains; I can't hear. Mic A2 remains off.
6/23	With all the time we have [ind]	9:48:54					remains; I can't hear. Mic A2 remains off.
6/24-25	And they have no court reporter [ind]	9:48:55					remains; I can't hear. Mic A2 remains off.
7/1	MR. GROSE: [Indiscernible]	9:49:04				I've also -- when I've done trials [ind]	partially corrected; I can't hear. Mic A2 remains off.
7/5-7	How is he going to [ind]? That what I'm asking Rod. Is there a [ind] to record it?	9:49:23					remains; I can't hear. Mic A2 remains off.
7/8	[Digital recording technical difficulties]						remains; to let reader know the audio is not clear
7/9	[Ind] pipe in his speaker through one of these microphones...	9:49:59					remains; I can't hear. Mic A2 remains off.
7/12	[Digital recording technical difficulties]						remains; to let reader know the audio is not clear
8/10	UNIDENTIFIED SPEAKER: [ind]	10:01:40					remains; I can't hear. Possibly not behind mic.All Channels On
8/12-13	UNIDENTIFIED SPEAKER: We went before the [ind]	10:01:43					remains; I can't hear. Possibly not behind mic.All Channels On
9/7	THE WITNESS: [Ind]	10:03:12					remains; I can't hear. Speaking on Webex; can't hear. All Channels On
9/12	THE WITNESS: I can hear you; it's just [ind]	10:03:27					remains; I can't hear. Speaking on Webex; can't hear. All Channels On
9/21	THE WITNESS: [Ind]	10:04:17					remains; I can't hear. Speaking on Webex; can't hear. All Channels On
10/2	MS. FRANZ			NO SPEAKER INFO	**MS. BROWN**	MS. BROWN	Corrected; no speaker ID on log note; can't see on Webex

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
10/20	MS. FRANZ			NO SPEAKER INFO	**MS. BROWN**	MS. BROWN	Corrected; no speaker ID on log note; can't see on Webex
12/22-24	And then I went to Nebraska where I was [ind; tech difficulties]	10:09:14	21:00	NO LOG NOTES BEING TAKEN DURING THIS TIME FROM 10:07:39 to 10:58:27			remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze/disappeared. Mr. Grose says, "We lost you on this end. Can you go back and go forward?"
13/1-2	-- in Colorado where I was affiliated with University of Colorado Medical School. And now [ind]	10:09:35	21:32				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze/disappeared. Mr. Grose says, "We lost you on this end. Can you go back and go forward?"
13/9	and also worked at Boycetown (ph) at a research center	10:10:05	21:50		**Boys Town**	Boys Town	Corrected; spelling was unknown to transcriber; nothing in log notes to indicate
15/4-6	I was more available than I would have been otherwise, and so I often [ind] and asked to consult	10:13:30	0:25:22			am asked to consult	remains; I can't hear. Speaking on Webex. All Channels On. **Mic A2 feedback insentifies at 10:13:56; had to turn off Mic A2. Was able to hear it on Webex**
19/16-18	Then I would proffer Applicant's Exhibit No. 1 at this time and a copy for the court reporter, a copy for the Court and your law clerk [ind]	10:23:36	0:35:44				remains; I can't hear. Mic A2 remains off. Steps away from screen on Webex; can't hear
19/23	[Digital recording technical difficulties]						remains; to let reader know the audio is not clear
19/24	THE COURT: [Ind] exhibit [ind]	10:24:09	0:36:02				remains; I can't hear. Now ALL MICS ARE DEAD except for Mic A2, which has serious feedback. Cannot hear judge at all.
20/5	And Mr. Evans, [ind]	10:24:09	0:36:22			All right. Mr. Evans, are you doing it?	remains; I can't hear. Now ALL MICS ARE DEAD except for Mic A2, which has serious feedback. Can hear judge on Webex for this one.
20/6	MR. EVANS: [Ind], Your Honor	10:24:09	0:36:24				remains; I can't hear. Now ALL MICS ARE DEAD except for Mic A2, which has serious feedback. Can't hear Mr. Evans on Webex.
21/22-24	and he's going to testify or prepared to testify about documents he reviewed [ind] I don't even know [ind] from something he reviewed	10:26:29	0:38:20				remains; I can't hear. Mr. Evan's mic A1 is loud when he speaks but mic is not picking up all words. Mic A2 turned off; still has serious feedback. Can't understand him on Webex either.
22/8-9	I assume they're not going to offer any witnesses here [ind]	10:26:53	0:38:43				only Mic A1 and A2 active and he's not coming in clear on either mic. Can't understand on Webex either.
22/20	MR. EVANS: Your Honor, [ind]	10:27:42	0:39:30				remains; I can't hear. Mr. Evan's mic A1 is loud when he speaks but mic is not picking up all words. Mic A2 turned off; still has serious feedback. Can't understand him on Webex either.
22/24	[Digital recording technical difficulties]						remains; to let reader know the DCRP audio is not clear
25/21	Well, I would [ind] fairness [ind]	10:33:53	0:45:48				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze/disappeared
26/4	A: [Ind]	10:34:19	0:46:13		**A: Yes.**		remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze. I did not hear counsel's suggested word so I cannot put this in the transcript.
27/11	A: [Ind]	10:36:47	0:48:32				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze/disappeared
27/18-19	[Ind] testify in all of them	10:37:15	0:49:04		**I did not testify in all of them**		remains; I can't hear. Speaking on Webex; can't hear. All Channels On. I did not hear counsel's suggested words so I cannot put this in the transcript.
28/23	A: [Ind]	10:39:15	0:51:02				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex froze. Answer inaudible.
29/14-15	I have no recollection [ind]. [Ind] my opinion and often I do agree.	10:40:21	0:52:06				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Mr. Evans even says, "You have to repeat everything you just said because I didn't get a word of it." Webex distorted/froze.
29/20	Completely [ind], sir.	10:40:45	0:52:30				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex skipped words.
30/5-7	Dr. Greenspan serves as an expert in cases of this sort across the country and [ind] the man's	10:41:24	0:53:13		**and such service demands an impeccable**	and such service demands impeccable	corrected. I could hear him on A1 mic only, isolating all other channels, and understand using counsel's suggested words. Transcriber heard "the man's" and not "demands."

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
30/13	A: [Ind] Yes. I said yes.	10:41:43	0:53:33				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex skipped words.
30/17	MR. GROUSE				**Mr. Grouse**	(Any follow-up) Mr. **Grose**?	TRANSCRIPTION ERROR; corrected
33/8-9	I think he's lapsing into an opinion [ind] testimony, if you allow the testimony.	10:46:11	0:58:07				remains; I can't hear. Mr. Evan's mic A1 is loud when he speaks but mic is not picking up all words. Mic A2 turned off; still has serious feedback. Can't understand him on Webex either.
33/14-17	THE COURT: No, they went directly to reliability factors that counsel just said he had to go through so if you have something to ask him about his qualifications or the testimony [ind]	10:46:30	0:58:34			or the testimony to -- as to his being reliable, then ask it.	Isolating only Judge's mic, I can barely hear this correction. Webex skipped words; judge mic not picking up on Webex very well
34	And so the common sense questionnaire basically presents 24 or 25 scenarios in which someone is portrayed [ind] but coming up with a solution	10:48:48	1:00:20				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Can't understand on Webex; completely lost the witness at this point. After this answer, The Court says, "I don't think he heard your question." Mr. Evans says, "I lost him on my screen."
34/17	MR. GROUSE				**THE COURT**	THE COURT:	TRANSCRIPTION ERROR; corrected. The Court was telling Mr. Grose that they lost connection on Webex
34/25	[Ind] score [Ind] neurological test.	10:50:03	1:01:53				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Can't understand on Webex, words skipping
35/20	A: [Ind]	10:51:33	1:03:24				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Mr. Grose says, "We lost you for a second. Can you start over your answer, please?"
35/23-25	Structured [Ind] and I'm structuring around an ability or an issue that's generally not evaluated	10:51:59	1:03:53				remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex skipped words.
38/18-20	And by adaptive [Ind] are referring to how someone views various stressful and potentially dangerous situations	10:57:45	1:09:33		**by adaptive intelligence we are**		remains; I can't hear. Speaking on Webex; can't hear. All Channels On. Webex skipped words.The attorney's suggestion is reasonable but since I did not hear the word, I cannot put in transcript.
				****** LOG NOTES RESUME; IN-COURT ARGUMENTS** JUDGE ASKS MONITOR "ARE WE UP?"**			
39/13-16	THE COURT: All right. Let me hear your argument as to qualifications and admissibility under -- well, the test for determining the admissibility [Ind] evidence under [Ind]	10:58:57	1:10:47 - MUTED			admissibility of scientific evidence under [702??? not sure]	Judge is barely coming through on Judge Mic. WEBEX MUTED
39/17-19	Your Honor, [Ind] mentioned Jones earlier, and the Court ruled [Ind] Jones and State v. Council	10:59:14	MUTED	LOG NOTE ONLY READS @ 10:59:14 AM = EVANS-ARGUMENT; common sense questionnaire, results determined by opinion of, major tool			Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
39/20-25	those publications and peer-reviewed [Ind] by application of the method, the type of evidence involved in the case, quality control procedures to ensure reliability and consistency of the method recognized scientific [Ind] procedures.	10:59:14	MUTED				Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
40/1-3	Our basic argument is, first of all, [Ind] nobody else used it [Ind] actual results are totally determined by [Ind].	10:59:14	MUTED			determined are totally determined by an opinion of the doctor.	Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
40/3-4	And he [Ind] with the knowledge of whether or not something is common sense	10:59:14	MUTED				Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
40/6-7	Common sense to him is definitely probably different than common sense [Ind] in this case.	10:59:14	MUTED		**sense to Mr. Terry in this case**		Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times WEBEX MUTED
40/7-9	But [Ind] determine [Ind]. We don't see that in that [Ind].	10:59:14	MUTED				Remains. Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
40/10-15	THE COURT: So as far as the -- the way my brain kind of processes through this [Ind], just so you understand the framework that [Ind], it's kind of step number one is we have [Ind], per Council, we have to go through will the evidence assist the trier of fact if he's qualified, and is the underlying [Ind] reliable.	11:00:00	MUTED	LOG NOTE ONLY READS @11:00: 27AM - COURT-The way my brain, is this the practice, licensed to be psychologist		and is the underlying **facts** reliable.	Corrections made after listening to ONLY Judge Mic; very hard to hear, low volume, static, some words garbled. WEBEX MUTED
40/16-19	You're really focusing in on Factor 3, [Ind] triggers and [Ind] factors of qualification [Ind] criminal in doing, is this the practice in the field.	11:00:00	MUTED			You're really focusing in on Factor 3, **which then** triggers into the **Jones** factors of qualification, peer review, is this what they're normally doing, is this the practice...	Corrections made after listening to ONLY Judge Mic; very hard to hear, low volume, static, some words garbled. WEBEX MUTED
40/24	UNIDENTIFIED MALE: Yes, sir.			NO SPEAKER IN LOG NOTES	**MR. GROSE**	MR. GROSE	TRANSCRIPTION ERROR: Nothing in log notes to indicate which male speaker. Will use attorney's suggestion.
41/1-2	the second prong [Ind] DSM-5	11:01:18	MUTED				Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/2-4	Adaptive functioning must be shown that [Ind] to do that, according to DSM-5, only by questioning an individual but also [Ind]	11:01:18	MUTED	LOG NOTE READS @11:01:28- Dr. Hall, relied on that questionnaire, somebody else would use it in this country, that is an amazing factor, page 37, mental health eval, interpreted using, not reliable		but also speaking to ** that know him, like his parents or anybody that's raised him, his wife. Also counselors and also teachers and also other medical providers.	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/5-8	Also [Ind]. [Ind] did not do that, to force his wife -- he was forcing -- his wife was forced by [Ind] Mr. Terry, but also [Ind] his mother.	11:01:18	MUTED	(Same log note)		** did not do that, to force his wife -- he was forcing -- his ex-wife was forced by ** Mr. Terry, but also never spoke to his mother.	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/10-11	He said in the deposition that [Ind] talk to me [Ind].	11:01:18	MUTED	(Same log note)		He said in the deposition that she couldn't talk to me **. However, Dr. Hall did.	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/12-13	Also, Your Honor, he relied on that questionnaire [Ind].	11:01:18	MUTED	(Same log note)		relied on that questionnaire substantially	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/14	THE COURT: [Ind] questionnaire?	11:02:15	MUTED	NO LOG NOTE			Judge Mic seemed to cut out after first syllable of first word, sounded like "timea...." and then I heard the word "questionnaire." WEBEX MUTED
41/16-18	It was [Ind] reliable [Ind] somebody else would be using it in the country.	11:02:19	MUTED	(Same log note)			Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Can't hear this word. WEBEX MUTED
41/21-22	for it to be used [Ind] deficits of adaptive functioning	11:02:36	MUTED	(Same log note)		used to show deficits	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. WEBEX MUTED
41/24-25	That is a major factor in determining whether somebody [Ind].	11:02:53	MUTED	(Same log note)			Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Can't hear this word. WEBEX MUTED
42/2-3	Standardized measures are used for knowledge or [Ind]. Parent or other family members, teacher, counselor, provider.	11:03:05	MUTED	(Same log note)	**used with knowledgeable informants, e.g., parent or other family member, teacher**	knowledgeable informants, parent...	Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Used attorney's suggestion and agree with change. WEBEX MUTED
42/4-6	And it's [Ind] -- there's no source or information [Ind]	11:03:19	MUTED	(Same log note)			Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Can't hear this word. WEBEX MUTED
42/9-10	that has not been done in this case in order to make a determination on [Ind] functioning	11:03:33	MUTED	(Same log note)	**determination on adaptive functioning**		Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Can't hear this word. WEBEX MUTED
42/12-13	especially [Ind] because the methods he used are not reliable	11:03:46	MUTED	(Same log note)			Only using A1 Mic for Mr. Evans. Words are coming in and out; very unclear at times. Can't hear this word. WEBEX MUTED
42/18	Yes, Judge. [Ind]	11:03:58	MUTED	LOG NOTE READS @11:04:08- GROSS, issue is on 3rd prog, more into DSN, just wrong and not true, Dr. Greenspan will testify about his review, also note that, Dr. Hall from DDSN, comptency to stand trial, goes to weight, instruments for structured interviews		Judge Hood, I think under the ** cite ** vs. **. And I think we don't have any issue on the first prong (proxy??). The issue is on the third prong (proxy??). And I wanted to go a little more into the DSM in interpreting scores because, as Mr. Evans just argued, there's a ** judgment now ** instruments to determine.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
42/18-19	And I think we don't have any issue on the first prong, [Ind].	11:03:58	MUTED	(Same log note)		SEE ABOVE	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
42/19-20	The issue on the third prong [Ind]	11:03:58	MUTED	(Same log note)		SEE ABOVE	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
42/22-23	There's a [Ind] judgment now [Ind] instruments to determine	11:03:58	MUTED	(Same log note)		SEE ABOVE	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
42/24-25	It's not [Ind]	11:04:33	MUTED	(Same log note)		It's not true.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
42-43/25-1	Dr. Greenspan did talk to Mr. Terry's mother and Mr. Terry's ex-wife, so [Ind]	11:04:44	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
43/2-4	Dr. Greenspan will testify about his review of [Ind], which was [Ind] diagnosis as to Prong 1 and Prong 2.	11:04:53	MUTED	(Same log note)		review of school records, which was ** developmental period ** his diagnosis...	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
43/6-7	I will also note that, you know, if they're trying to make a common sense questionnaire [Ind]	11:05:07	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
43/8-10	Dr. Greenspan is not [Ind] something that is not a structured interview where he needs this [Ind] assessment.	11:05:20	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
43/11-14	I would just note [Ind], that [Ind] call Dr. Hall from DDSN, and [Ind] of SCDDSN competency to stand trial instrument that she used.	11:05:39	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE WEBEX MUTED
43/15-17	Patton Informal Adaptive Behavior Inventory, Adaptive Behavior [Ind] questionnaires as [Ind]	11:06:04	MUTED	(Same log note)		questionnaires as ** version.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
43/17-19	I would be [Ind] say those are instruments that are structured interviews.	11:06:11	MUTED	(Same log note)		I would believe she would say	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
43/19-21	particularly the competency to stand trial [Ind] that's ever been published in the scientific literature [Ind]	11:06:21	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
44/9-10	I think that the Court needs to focus on more [Ind] decision	11:07:06	MUTED	LOG NOTE @11:06:52 - EVANS-Focus on more, state agency, determination of the common sense		And, also, I think that the Court needs to focus on the Moore decision. In the Moore decision, the Supreme Court stated that "must assess not only, one, whether the expert's method is reliable, but also, two, whether the substance of the expert's testimony is reliable."	Only using A1 mic for Mr. Evans. Words are coming in and out; very unclear at times. Changed transcript to reflect updated words. WEBEX MUTED
44/14-15	The actual measures used by DDSN -- that's a state agency, Your Honor -- [Ind]	11:07:21	MUTED	(Same log note)			Only using A1 mic for Mr. Evans. Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
44/15-19	That's something that you as the other individual can decide to [Ind] questionnaire [Ind] and totally determination about the common sense from this questionnaire [Ind] Dr. Greenspan and no one else.	11:07:21	MUTED	(Same log note)			Only using A1 mic for Mr. Evans. Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
44/20-21	we [Ind] differ in that determination	11:07:48	MUTED	(Same log note)		That is something that we all differ when we make that determination	Only using A1 mic for Mr. Evans. Words are coming in and out; very unclear at times. Changed transcript to reflect updated words. WEBEX MUTED
44/22-23	The defendant's common sense may be different [Ind], so how can he make that kind of determination [Ind]?	11:07:57	MUTED	(Same log note)			Only using A1 mic for Mr. Evans. Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
44/24-25	Just for clarification, [Ind]	11:08:04	MUTED	LOG NOTE @11:08:06 - GROSS - 2 things for clarification		Just for clarification, the Moore decision in the **.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
45/2-4	Well, I had reviewed [Ind] -- the only reason that I bring that up is they do refer to a Supreme Court [Ind] Court of Appeals.	11:08:20	MUTED	LOG NOTE @11:08:24 - GROSS - Refer to a supreme court		the only reason that I bring that up is they keep referring to a Supreme Court ** Court of Appeals.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
45/7-8	there was testimony there's no requirement that any adaptability of your scale [Ind]	11:08:42	MUTED	(Same log note)		that any adaptive behavior scale be ** as Dr. Greenspan testified to **	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
45/9-10	[Ind] in regards to [Ind] DSM-5 and AAIDD manual	11:08:42	MUTED	(Same log note)			Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. NO CHANGE. WEBEX MUTED
45/16	Watson v. [Ind]	11:09:05	MUTED	LOG NOTE @11:09:04 - COURT-RULING - standard before the court, case law, 1. w, 2 expert witness, 3 cited in GSN 5, 4 focussing in on, sole basis of his opinion, fair game, 15yr old child, his use of the common sense, 702 in counsel and Jones			Only using Judge Mic. Words are coming in and out; very unclear at times. NO CHANGE WEBEX MUTED
46/7-9	talks about accommodations and [Ind] application on the internal procedures [Ind]	11:10:25	MUTED	(Same log note)		and peer review, prior application on the internal procedures, and consistency of the method.	Only using Judge Mic. Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words WEBEX MUTED
46/18-19	He clearly has, you know, interview [Ind] Mr. Terry's	11:11:16	MUTED	(Same log note)		interviewed and spoken with Mr. Terry.	Only using Judge Mic. Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words WEBEX MUTED
46/22-24	you know, I think that the common sense questionnaire is fair game for cross-examination [Ind]	11:11:31	MUTED	(Same log note)		cross-examination on the fact that no one elses it...	Only using Judge Mic. Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words WEBEX MUTED
47/4-6	when I think that you've demonstrated common sense in asking about the [Ind]	11:12:02	MUTED	(Same log note)			Only using Judge Mic. Words are coming in and out; very unclear at times. NO CHANGE WEBEX MUTED
47/15-16	but I don't know that that's the only thing [Ind] in his opinion	11:12:39	MUTED				Only using Judge Mic. Words are coming in and out; very unclear at times. NO CHANGE WEBEX MUTED
47/25	[Ind] move past this	11:13:11	MUTED	LOG NOTE @11:13:10 - GROSS - There was an objection to admitting		Before I move past this, there was an objection to admitting Exhibit 1 as the C.V.	Only using A1 and A2 mics (A2 mic is distorted). Words are coming in and out; very unclear at times. Changed transcript to reflect the updated words. WEBEX MUTED
48/2-3	THE COURT: Yeah, we're going to admit that [Ind]	11:13:24	MUTED	LOG NOTE @11:13:31 - COURT-Talking to Greenspan. (Did they admit an exhibit?? Nothing was indicated in the log notes)			Only using Judge Mic. Words are coming in and out; very unclear at times. NO CHANGE WEBEX MUTED
				****10 MINUTE BREAK-MIC A2 FIXED**MR. GROSE HAS SCREEN AT HIS TABLE NOW TO ACCESS WEBEX; I CAN NOW HEAR WEBEX BETTER**			
50/1	THE DEFENDANT:				**THE APPLICANT:**	THE APPLICANT:	Transcript corrected
50/6	THE DEFENDANT:				**THE APPLICANT:**	THE APPLICANT:	Transcript corrected
51/22	MS. FRANZ: Yeah, [Ind]	11:31:39	MUTED				Ms. Franz not behind microphone. Did not pick up her words. WEBEX MUTED
59/13-15	that Flynn [Ind] should always be made in any case when diagnosing intellectual disability	11:51:47	2:03:35		**adjustment**		WEBEX skipped; cannot hear word. Webex skipped word (s)
61/10-11	the possibility that there's some learning [Ind]	11:55:38	2:07:34				learning curve?? occurring? can't confirm
66/7	based on an I-score	12:05:05	2:17:10		**IQ score**		Confirmed he said, "an I-score". NO CHANGE MADE.
69/17-18	And that's pretty much [Ind] see the disorder	12:11:52	2:23:41				WEBEX skipped; cannot hear word
74-75/25-1	And very often you have [Ind] of cases	12:21:53	2:33:44				WEBEX skipped; cannot hear word
76/9-11	the focus was on very low-level behavior -- [Ind] bathroom by himself or dress himself	12:24:36	2:36:25		**can he go to the bathroom by himself**		WEBEX skipped; cannot hear word
76/23-25	And that's why the importance of social awareness has kind of [Ind] much more than in the past	12:25:45	2:37:30				WEBEX skipped; cannot hear word

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
77/20-22	you would never see any testing or testimony by a neuropsychologist [Ind] specialty within clinical pscyhology	12:27:24	2:39:20		**with a**		WEBEX skipped; cannot hear word
77/23-24	It's almost always the case that a neurophsychogist and neuro[ind] are used	12:27:45	2:39:36				WEBEX skipped; cannot hear word
79/20	to make sense what's there	12:31:29	2:43:20		**to make sense OF what's there**	to make sense **OF** what's there	TRANSCRIPTION ERROR: Corrected with attorney's suggestion
82/11	[ind] educational achievements	12:36:30	2:48:22				Can't understand what he says here.
89/12	MS. FRANZ				**MS. BROWN**	MS. BROWN	TRANSCRIPTION ERROR: Corrected with attorney's suggestion
93/19	[ind] the mother had a bad day or not	12:56:04	3:08:00		**I don't know if**		WEBEX skipped; cannot hear word
				NEW WEBEX PM VIDEO			
98/21	one of two	3:02:12	15:45		**one OR two**		I'm still hearing "one OF two points" on the WEBEX. No change made.
99/4-5	Well, I think it's equally [ind] valid as a measure of intelligence	3:02:45	16:12				WEBEX skipped; cannot hear word
99/18-19	And part of the problem with IQ tests, for the most part, [ind] based on any real definition of what intelligence is	3:03:47	17:19		**the Wechsler scales are not**		WEBEX skipped; cannot hear word
99/24-25	the [ind] who gave the Woodcock-Johnson also gave	3:04:25	17:56				WEBEX skipped; cannot hear word
102/25	[ind] and brain damage also	3:10:22	0:24:00				Long pause before he begins this answer. WEBEX skipped. Three times on this page, they seemed to lose connection. Witness was talking so it picked it up in the middle of his sentence.
103/15-16	there are many cognitive [ind] of Prong 1 besides IQ	3:12:10	0:25:42		**indicators**		WEBEX skipped; cannot hear word
104/1-2	they're anomalous in the sense that [ind] with other cognitive evidence	3:13:05	0:26:33				WEBEX skipped; cannot hear word
104/19-20	The only evidence from the school years that might be used to dispute [ind]	3:14:35	0:28:11				WEBEX skipped; cannot hear word
106/20-21	I suggested what we're [ind] the conceptual really should be a Prong 1 issue	3:18:15	0:31:50				WEBEX skipped; cannot hear word
107/1-2	area of great deficiency as reflected in being held back and just generally failing [ind]	3:18:50	0:32:20				WEBEX skipped; cannot hear word
112/17-19	the mom -- and this is in Dr. Hall's report -- [ind] mildly retarded	3:29:25	0:43:10				WEBEX (Hard to hear to confirm. Sounds like it skips over a word.)
112/20	she certainly qualified as a diagnostician	3:29:58	0:43:27		**certainly DOESN'T QUALIFY**	but, you know, she's hardly qualified as a diagnostician	WEBEX (Hard to hear)
114/10-12	very often they're in cahoots with a more competent confederate who may have [ind] but is more likely to understand the consequences	3:33:49	0:47:19				WEBEX garbled words; hard to hear
118/3-4	but they may come up with a different answer -- a different [ind]	3:40:43	0:54:14		**score**		WEBEX skipped; cannot hear word
120/9-11	they're [ind] to maintain the friendship by doing whatever they're asked to do	3:45:10	0:58:50				WEBEX skipped; cannot hear word
123/23	MR. GROSE				**MR. EVANS**	MR. EVANS:	TRANSCRIPTION ERROR: Corrected with attorney's suggestion
132/8	Not in terms of a [ind], no	4:05:40	1:19:15				WEBEX skipped; cannot hear word
133/4-5	Yeah. I -- I received [ind] right after I [ind] report and that's why it's a later date	4:06:55	1:20:28		**Dr. Hall's report - completed my**	I received her report	WEBEX skipped; cannot hear word. Using counsel's suggestions, I can hear most of this (the word "report" is cut off at "repo...") The other IND mark, I can't understand it; it skipped
146/21-22	I found a lot of really useful stuff in there, particularly around [ind]	4:28:17	1:41:50				WEBEX skipped; cannot hear word

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
151/16	I did [ind] at length	4:35:38	1:49:10		**speak to her**		WEBEX skipped; cannot hear word. Next Q starts with: You broke up for a little while. Could you please repeat that?
151/19	At length, I talked to [ind]	4:35:55	1:49:34		**Louanne**		WEBEX skipped; cannot hear word; connection in and out
153/11-12	Mr. Terry also convinced the woman [ind] to marry him; isn't that true?	4:38:25	1:51:55			...convinced the woman, **while he's on death row**, to marry him	TRANSCRIPTION CLARIFICATION: "While he's on death row"
159/14-15	[ind] any one particular instance to say that that's the basis for diagnosing it	4:45:53	1:59:25				OVERLAPPING CONVERSATION with the question, can't hear him
161/6-7	Well, [ind] alcohol is considered teratogenic drugs alo; isn't that true?	4:48:14	2:01:44				OVERLAPPING CONVERSATION with the question, can't hear him
161/11-13	I'm just saying there are very many different ways of causing [ind] in a fetus, including taking of medication.	4:48:35	2:02:05				WEBEX skipped; cannot hear word
166/23-24	In terms of [ind], that's an ineffective -- I mean, some of these items are better than others.	4:23:27	2:10:38				WEBEX garbled words; OVERLAPPING CONVERSATION, cannot understand words
167/10-11	[ind] -- competent people would answer that differently.	4:57:43	2:11:14				OVERLAPPING CONVERSATION with the question, can't hear him
167/16-17	It's called a Minimax [ind] Theory of Reliability	4:58:02	2:11:33				Can't understand what he says here; audio skips
169/3-4	Well, obviously, I had questions about it because [ind] question.	4:59:54	2:13:28				WEBEX skipped; cannot hear word
176/5-6	It was not -- it was [ind] different test, and different tests measure different things.	5:10:42	2:24:17		**it was A different test**	It was not -- it was a -- it was a different test	TRANSCRIPTION ERROR: Witness stuttered over words.
176/13	What I saw [ind] again, it was a report.	5:11:10	2:24:45				Can't understand what he says here. (which??)
				THIS CONCLUDES THE WEBEX WITNESS			
188/25	We have a witness from DDSN who is [ind]	5:30:37				who has informed me that she'll only be available	TRANSCRIPTION CORRECTION
				DAY 2 OF THE HEARING			
196/11-12	maybe ask [ind] come up here and turn up the volume	9:43:18					JUDGE MIC FADED OUT - Can't hear him; they were adjusting mics
213/5-6	Can you explain a bit more about that what means in its relation to the [ind] as well?	10:08:17					ATTORNEY DROPPED VOICE; NOT PICKED UP BY MICROPHONE
220/2-3	because you said it was done [ind] the testing	10:17:25			**it was done AFTER the testing**	after you had done the testing	TRANSCRIPTION CORRECTION - hard to hear; accepting attorney suggestion
222/19	what did you score [ind] to?	10:21:24			**what did your score FLYNN to?**		ATTORNEY DROPPED VOICE; can't understand the word
223/1-2	he was shackles	10:21:54			**he was shackled**	he was IN shackles	TRANSCRIPTION CORRECTION; missed word "in"
225/1	THE COURT: He's saying assuming [ind]	10:24:25				He's saying assuming that that's what they had.	TRANSCRIPTION CORRECTION; judge's mic faded in and out
297/1-2	starting on page 8 - [ind] by admission to Charter Hospital for substance abuse	12:24:53		NO LOG NOTE RELATED			can't understand. Sounds like "appears dominated by admission to Charter Hospital," but can't confirm. NO CHANGE
302/4-5	it was brain communication of the [ind] ability.	12:33:20		NO LOG NOTE RELATED			could not understand witness, sounds like "brain communication of the formatoric ability."
308/20	more to the inside category, so...	12:43:13				more into the "inside the home" category	TRANSCRIPTION CORRECTION: Picked up the word by isolating only Mic A2
310/8	And some [ind] --	12:45:13				and some deficits	TRANSCRIPTION CORRECTION: Picked up the word by isolating only Mic A2
312/4-5	And then you asked some other questions about [ind]	12:47:15					ATTORNEY DROPPED VOICE; can't understand the word (presents? residents? residence? presence?)
333/9-11	Is it correct to say that Prong 3 is onset [ind] in the developmental period	2:21:05			**is ONSET IN THE**	Prong 3 is onset in the	TRANSCRIPTION CORRECTION: Just remove the [ind] mark. Appears correct without it.
343/3	[ind] the only one?	2:35:34				protect others -- A. Yes -- later on in life?	TRANSCRIPTION CORRECTION: Witness cut off answer mid-sentence. Isolated audio to fix this.

Pg/Line	Item	BIS DCRP	WEBEX VIA FTW	Digital Monitor's Log Notes Reflect	Attorney Suggestion	Corrected Transcript Now Reads:	Action Taken
349/11-12	I'll supply the Court with a post-hearing briefing, and we'd [ind] to do that	2:44:15					DOOR SLAMMED - can't hear word, even isolating mics
350/1-2	that may be [ind] briefing for you	2:44:54				that may be a full briefing	NOT CLEAR but sounds like "full briefing"

Exhibit 8

Exhibit 8 to Applicant's Motion to Reconstruct the Record was the revised transcript of the post-conviction relief evidentiary hearing. The revised transcript is already included in full at the beginning of this Appendix (pages 1–354) and therefore is not reproduced here.

Exhibit 9

Gmail

Allison Franz <allison@deathpenaltyresource.org>

Terry v. State, 2022-CP-32-00924

Ali Franz <allison@justice360sc.org> Wed, Jul 10, 2024 at 5:50 PM
To: "Hood, Robert E. Law Clerk (Mackenzie Catanzaro)" <rhoodlc@sccourts.org>, "Hood, Robert E. Secretary (Jeanne-Marie Bolin)" <rhoodsc@sccourts.org>
Cc: Charles Grose <charles@groselawfirm.com>, Melody Brown <MBrown@scag.gov>, "Tommy Evans, Jr." <tommyevansjr@scag.gov>

Good afternoon all,

Attached please find the Applicant's pre-trial brief in the above-captioned case. In addition, Applicant anticipates calling Dr. Stephen Greenspan remotely via Webex, as he lives in California. The State has been informed and has not objected to Dr. Greenspan appearing remotely.

Thank you,

Ali Franz

--
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Columbia, SC 29201
(803) 765-1044

App. Pretrial Brief - Terry v. State.pdf
224K

ALAN WILSON
ATTORNEY GENERAL

March 3, 2025

The Honorable Lisa Comer
Lexington County Clerk of Court
205 East Main Street, Suite 128
Lexington, South Carolina 29072

Re: Gary Dubose Terry, #5054 v. State of South Carolina
C/A No: 2022-CP-32-924

Dear Ms. Comer:

Please find enclosed Respondent's Return and Motion to Dismiss in the above-referenced matter. Please file these documents with your Court and return the stamped copy in the enclosed self-addressed stamped envelope.

Sincerely,

s/Tommy Evans, Jr.
Tommy Evans, Jr.
Assistant Attorney General

/TE
Enclosure

cc: The Honorable Robert E. Hood (Via email and US Mail)
E. Charles Grose, Jr., Esquire (Via email and US Mail)
Hannah M. Freedman, Esquire (Via email and US Mail)
Victim Advocacy Division (Hand Delivery)

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Gary Dubose Terry, #5054	)	2022-CP-32-00924
Applicant,	)	
v.	)	**RETURN AND MOTION TO DISMISS**
State of South Carolina,	)	
Respondent.	)	

This response to Applicant's motion to reconstruct the record filed on February 18, 2025. Applicant requests that the record from the post-conviction relief evidentiary hearing held on July 17, 2024, be reconstructed due to the fact some parts of the record were noted as "indiscernible" in one witness's testimony. Respondent objects. Respondent submits that the record is clear regarding the testimony given and all the portions that were deemed "indiscernible' were either repeated by the witness or can easily be deciphered to its full meaning. Additionally, Respondent submits that Applicant has failed to show any prejudice as the witness's report was admitted into evidence. Respondent provides the following argument against this motion.

1. Applicant states that the hearing was recorded using a Digital Courtroom Recording Package (DCRP), and stenographer Bobbi Fisher transcribed the hearing based on the recording obtained on the DCRP system. She relayed to the parties that early in the hearing the microphones were "blown out" or "turned down extremely low." She presented a completed transcript to the parties that included 201 "indiscernible" notations. Applicant contends this rendered the transcript unusable.

2. Respondent submits that a reconstruction is not necessary. First, over half of these "indiscernible" messages could be found during voir dire of the witness, Dr. Stephen Greenspan. Each of these indiscernible" messages could be deciphered to make a determination of what was said during testimony. Second, the findings and diagnoses that are in the witness's report were allowed into evidence over the Respondent's objection. During the Respondent's

objections, Applicant informed this court that the report is not different from Dr. Greenspan's testimony. (Attachment #1, T. p. 124 l. 6-7). Therefore, any question raised regarding Dr. Greenspan's testimony, or his opinion, can be easily answered by reviewing this report. There is no confusion within this record and no need for reconstruction.

3. Respondent also submits that Applicant never argues any prejudice due to the "indiscernibles" in the record. Generally, an Applicant is required to demonstrate specific prejudice flowing from an incomplete record, See *State v. Ladson,* 373 S.C. 320, 324, 644 S.E. 2d 271, 273 (2007). "It is the applicant's duty to demonstrate the prejudice results from the state of the record. *Id. Quoting, State v. Williams*, 227 Conn. 101, 629 A.2d 402, 406 (1993). There is no mention of any prejudice to Applicant in the motion and none could logically be found given the report accepted into evidence.

CONCLUSION

The motion should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

March 3, 2025

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Gary Dubose Terry, #5054, Applicant, v. State of South Carolina, Respondent.	)	2022-CP-32-924 *Capital PCR Action* AFFIDAVIT OF SERVICE

1. I am counsel for Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following attorneys via email and by depositing same in the United States mail, postage prepaid:

E. Charles Grose, Jr., Esquire
305 Main Street
Greenwood, South Carolina 29646
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Hannah Freedman, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
hannah@justice360sc.org

DATED this 3rd day of March 2025.

s/Tommy Evans, Jr.
Tommy Evans, Jr.
Assistant Attorney General

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 2022-CP-32-00924 (*Capital PCR Action*) **ORDER** (DENYING MOTION TO RECONSTRUCT THE RECORD)

The captioned action is a capital post-conviction relief proceeding. Applicant's only claim is that he is intellectually disabled and exempt from execution. *See Atkins v. Virginia,* 536 U.S. 304 (2002). An evidentiary hearing was held July 17-18, 2024, in the Lexington County Courthouse. At the conclusion of the hearing, the court announced it would receive post-hearing briefing after receipt of the transcript. The parties subsequently received the transcript. However, on February 18, 2025, Applicant moved to reconstruct the record asserting that certain portions of the proceedings cannot be interpreted by the court reporter. (*See* Motion ¶ 8).

The State opposed the motion, arguing the areas of concern referenced by Applicant in his motion could be determined by context or were not necessary to the resolution of the claim. The State also submitted as to the Webex testimony from Dr. Stephen Greenspan that this court admitted the doctor's report which could also be reviewed, noting that Applicant's counsel, at the hearing, conceded the report was the same as the doctor's testimony, (*see* Tr. 124).

This court further heard argument on the parties' positions via a Webex hearing held on March 11, 2024. Following the March 11, 2024, hearing, and in considering the arguments of the

parties, this court thoroughly reviewed the entirety of the amended transcript.[1] Based on that careful review, the court denies the motion. While there are still "indiscernible" notations within the transcript, they are not included in nor do they impact any pivotal testimony, and their meaning can be easily discerned from the context of the transcript. Therefore, the motion to reconstruct the record is DENIED.

This Court further orders that the Applicant is to submit his post-hearing brief within 15 days from the date of this order. The State shall have 15 days from the date of Applicant's filing of their post-hearing brief to submit a Response. Both parties shall have 45 days from the date of the State's Response to submit proposed orders.

IT IS SO ORDERED this 20 day of March, 2024.

R. E. Hood

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

Lancaster, South Carolina.

[1] Applicant's counsel previously requested the court reporter review certain items, and the court reporter provided an amended transcript after that review. (*See* Motion ¶¶ 6, 7). This court reviewed the amended transcript as provided by Applicant for purposes of determining whether reconstruction of any portion of the hearing was necessary.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Gary Dubose Terry, Applicant,	Case No. 2022-CP-3200924
vs.	**APPLICANT'S POST-HEARING BRIEF**
State of South Carolina, Respondent.	

INTRODUCTION

Applicant, Gary Dubose Terry, by and through undersigned counsel, respectfully submits the following Post-Hearing Brief in Support of Applicant's Application for Post-Conviction Relief ("PCR"), which raises a claim that warrants relief.[1] Specifically, the evidence presented at the PCR evidentiary hearing before this Court demonstrates that Mr. Terry is a person with intellectual

[1] This Brief was drafted on the basis of a materially incomplete record. The July 17-18, 2024 evidentiary hearing was recorded by DCRP. The court reporter who produced the transcript of the hearing is not the same court reporter who operated the DCRP equipment during the hearing. The court reporter producing the transcript identified "technical issues with this recording that I wanted to advise you about, which resulted in **numerous** indiscernible marks throughout the transcript" (emphasis original). The transcript was 354 pages, and Mr. Terry identified 201 "indiscernible" notations where testimony is missing. In addition to missing testimony, many of the "indiscernible" notations appear in arguments by counsel or rulings by the Court, rendering them largely incomprehensible in multiple parts of the transcript.

On January 15, 2025, counsel submitted a formal transcript challenge to Ms. Fisher and Court Administration, detailing each of the 201 "indiscernible" notations, in addition to other transcription errors, and proposing corrections where possible. In response to the transcript challenge, Ms. Fisher worked extensively to address the "indiscernible" notations and fill in gaps wherever possible. On January 29, 2025, Ms. Fisher provided counsel with a corrected transcript and a spreadsheet detailing the corrections that she had made. Even after Ms. Fisher's extensive work, 163 "indiscernible" notations remain in the corrected version of the transcript. Specifically, there are multiple instances in the transcript in which questioning of other witnesses and argument by counsel, along with rulings by the Court, are "indiscernible," evidently due to the difficulties with the microphones inside the courtroom. The details of the problems with recording the hearing are set forth more fully in Applicant's Motion to Reconstruct the Record, filed on February 18, 2025, which this Court denied on March 20, 2025.

disability, and this Court should grant post-conviction relief pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002).

STATEMENT OF THE CASE

Mr. Terry was convicted of murder, first-degree burglary, first-degree criminal sexual conduct, and malicious injury to a telephone system and sentenced to death by a Lexington County jury. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (Mar. 13, 2000). On direct appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. *Id.* Mr. Terry subsequently sought post-conviction relief and federal habeas corpus relief, which were denied. *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (Aug. 29, 2011); *Terry v. Stirling*, 142 S. Ct. 745 (Jan. 10, 2022).

Mr. Terry filed the instant successive application for post-conviction relief on March 21, 2022. The application raises a single ground for relief, which is that his "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." *See Atkins v. Virginia*, 536 U.S 304 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (defining mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.").

LEGAL STANDARDS

South Carolina Code section 17-27-20(A) establishes the bases on which individuals may seek post-conviction relief. Two of these articulated grounds are relevant here: First, relief can be sought if the convicted individuals can establish "[t]hat the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;" S.C. Code § 17-27-20 (A)(1); second, a claim for relief can arise when "there exists evidence of material

facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code. § 17-27-20(A)(4).

Mr. Terry's claim for relief involves *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, addressing intellectual disability in the context of capital cases (discussed in Section I below).

GROUND FOR RELIEF

Mr. Terry alleges that he is a person with intellectual disability and that the Eighth Amendment therefore bars his execution. The following sections address the standards for determining intellectual disability, the evidence presented at the PCR evidentiary hearing demonstrating he is a person with intellectual disability, and a discussion of the legal bases for granting relief.

I. Legal and Clinical Standards for Intellectual Disability

Individuals with intellectual disability are categorically ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). This categorical exemption recognizes that, as a class, persons with intellectual disability are less morally culpable and therefore less deserving of the death penalty. The United States Supreme Court held in *Atkins*, and has reaffirmed in a series of decisions since creating the categorical bar in 2002, that executing individuals with intellectual disability "contravenes the Eighth Amendment, for to impose the harshest of punishments on [these defendants] violates his or her inherent dignity as a human being" because people with intellectual disability are less able to make "calculated judgments," to "control impulses," and "to abstract from mistakes and learn from experience." *Atkins*, 536 U.S. at 316–20; *Hall v. Florida*, 572 U.S. 701, 708–09 (2014). While the United States Supreme Court left to the states "the task of developing appropriate ways

to enforce the restriction on executing the intellectually disabled," that discretion is "not unfettered" and "must be informed by the medical community's diagnostic framework." *Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (quoting *Hall*, 572 U.S. at 719). When assessing intellectual disability, the states and courts cannot disregard current medical standards in favor of older clinical standards or lay stereotypes about intellectually disabled people. *Moore*, 581 U.S. at 13, 18–20; PCR Hrg. Tr. pp. 72–74 (stereotypes about intellectual disability frequently result in mistakes in diagnosis), 180–82 (noting common stereotypes of people with intellectual disability).

South Carolina has defined 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) (2018). This definition comports with the medical community's generally accepted definition of intellectual disability identifying three required diagnostic criteria: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period.[2] *Hall*, 572 U.S. at 710; *Atkins*, 536 U.S. at 308, n. 3; *Moore*, 581 U.S. at 1; *State v. Blackwell*, 420 S.C. 127, 139 801 S.E.2d 713 (2017); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003); APA, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition

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[2] Dr. Stephen Greenspan testified at the PCR hearing about the definition of intellectual disability and the clinical standard for assessing intellectual disability. Dr. Greenspan is a psychologist, with a PhD in psychology with an emphasis on developmental psychology and developmental disabilities. PCR Hrg. Tr. p. 12; App. Ex. 1, p. 1. Dr. Greenspan is a lifetime fellow of the American Association of Intellectual and Developmental Disabilities, App. Ex. 1, p. 1, a former president of the Academy on Mental Retardation, *id.*, and the most cited authority on intellectual disability in the DSM-5, the DSM-5-TR, and the 11th edition of the AAIDD manual. PCR Hrg. Tr. pp. 14, 17. This Court qualified Dr. Greenspan as an expert in psychology with a specialization in diagnosing intellectual disability. PCR Hrg. Tr. pp. 19, 47.

Mr. Terry also offered testimony from Dr. Scott Decker, a neuropsychologist with a PhD in school psychology and neuropsychology, App. Ex. 13, p. 1, and the State offered testimony from Drs. Alicia Hall and Jessica Davis, both psychologists with DDSN.

Text Revision 38 (2022) ["DSM-5-TR"]; American Association on Intellectual and Developmental Disabilities, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 1, 13 (12th ed. 2021) ("AAIDD-12"). Intellectual disability must be proven by a preponderance of evidence at a hearing. *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (citations omitted). A preponderance of the evidence means "'proof which leads the [trier of fact] to find that the existence of the contested fact is more probable than its nonexistence.'" *State v. Grooms*, 343 S.C. 248, 254 n. 5, 540 S.E.2d 99, 102 n.5 (2000) (quoting 2 McCormick on Evidence § 339, 5th ed. 1999 (alteration in original).

II. Mr. Terry's Background

Mr. Terry exhibited impaired intellectual and adaptive functioning beginning in early childhood. App. Ex. 2 p. 8. His cognitive deficits were evident early on from his consistent and "dramatic school failure." PCR Hrg. Tr. p. 106. Mr. Terry was repeatedly assessed for and placed in special education services and "noted by his teachers for his slowness and inability to learn." App. Ex. 2 p. 8. Mr. Terry struggled throughout his school years, repeated the fifth grade, and was placed in special education from fifth grade through ninth grade, when he dropped out of school. PCR Hrg. Tr. p. 100; State's Ex 1 p. 6. On academic standardized testing, Mr. Terry was "very impaired across the board intellectually or academically." PCR Hrg. Tr. p. 100; *see also* App. Ex. 2 p. 5. For example, Mr. Terry's performance on the McGraw-Hill Comprehensive Test of Basic Skills (CTBS), which he was administered in grades two through five, was similarly "consistently below grade in all of his subjects." State Ex. 1 p. 5. Consequently, Mr. Terry repeated the fifth grade and was enrolled in special education classes. PCR Hrg. Tr. p. 100, 157; State Ex. 1 p. 5. When Mr. Terry's school attempted to remove him from the special education program and return him to general education, "Mr. Terry's transition to the general education setting was

unsuccessful" and he was returned to the special education program. State's Ex. 1 p. 6. Further, as Dr. Hall noted, Mr. Terry's learning difficulties were not limited to the classroom—he was frequently singled out for abuse by his father "more than his brothers because it took him longer to catch on when his father was teaching him to do something."[3] State's Ex. 1 p. 5; PCR Hrg. Tr. p. 323.

Mr. Terry similarly exhibited impaired adaptive functioning from an early age, which persisted into adulthood. His social impairment was illustrated by his "incredibly bad judgment in all areas of his life in the social domain." PCR Hrg. Tr. p. 107. Specifically, Mr. Terry demonstrated gullibility and social vulnerability, two hallmarks of deficits in the social domain, as both a child and an adult. PCR Hrg. Tr. pp. 108, 151. Mr. Terry's mother, Patsy, recalled that Mr. Terry was overly influenced by friends as a child and got into trouble as a result. PCR Hrg. Tr. pp. 108–09, 330; App. Ex. 2 p. 7. Dr. Hall acknowledged that, according to Patsy, Mr. Terry's childhood friends would scapegoat him for things that they would do, which resulted in Mr. Terry getting in trouble, and Mr. Terry did not understand when other people were using him. PCR Hrg. Tr. pp. 330–31. Mr. Terry was socially isolated as a child— Mr. Terry's mother noted that he did not have many friends in his youth, PCR Hrg. Tr. p. 120, and Mr. Terry's fifth-grade teacher, in referring Mr. Terry for evaluation, noted that Mr. Terry was "withdrawn from the rest of the class." State Ex. 1, p. 6. Dr. Hall further noted that, according to Mr. Terry's ex-wife, Louanne, Mr. Terry "had few genuine friends." State Ex. 1 p. 14.

Mr. Terry was rated in school on the Vineland Social Maturity Scale, a measure of adaptive deficits, when he was 11 years old and in the 5th grade. App. Ex. 2 p. 7; PCR Hrg. Tr. pp. 111,

[3] As Dr. Hall noted, Mr. Terry has a history of severe and extensive childhood abuse by his father and siblings, which, according to the AAIDD, is a risk factor for intellectual disability. PCR Hrg. Tr. p. 320; AAIDD-11 at 66.

112. Mr. Terry was scored in the ID range as functioning about three grades below his age, indicating severely impaired adaptive functioning. App. Ex. 2 p. 7; PCR Hrg. Tr. pp. 111, 112.

To make matters worse, Mr. Terry suffered a number of neurological injuries prior to age 22 that exacerbated his already-existing cognitive deficits. Specifically, Mr. Terry reported a history of sniffing glue throughout childhood and adolescence, a head injury from a fall from a tree at age 17, and a motorcycle accident in 1986 at age 19, all of which likely caused brain damage. PCR Hrg. Tr. p. 144, 157, 169–70, 185, 209.

As a result of these neurological injuries, while Mr. Terry was "anything but normal" during childhood, App. Ex. 2 p. 8, he became more impaired as he emerged into adolescence and adulthood. *Id.*; PCR Hrg. Tr. p. 184 (Dr. Greenspan: "The head injuries, in my opinion, are the critical factor that caused him to go from learning disabled, assuming that was a correct diagnosis, to intellectually disabled as they occurred before the end of the developmental period, before the age of 22, and that appeared to result in some decline in his cognitive capacity."). The cumulative impact of Mr. Terry's head injuries was evident even in his teenage years. In 1982, at age 14, Mr. Terry was administered the Bender-Gestalt, a visual-motor measure that indicates the presence of brain damage. Mr. Terry scored on a "very impaired level" that is "strongly indicative of brain damage," consistent with other evidence of impaired intellectual functioning that Dr. Greenspan reviewed. PCR Hrg. Tr. p. 102; App. Ex. 2 p. 5. Further, Mr. Terry's performance on neuropsychological testing conducted by Dr. Robert Deysach in 1997 was "strongly indicative of brain damage." PCR Hrg. Tr. p. 103. Dr. Hall similarly recognized that Mr. Terry's history of head injuries and substance use may have affected Mr. Terry's cognitive functioning. State's Ex. 1 p. 16; PCR Hrg. Tr. p. 301.

After suffering multiple brain injuries, Mr. Terry's cognitive and adaptive impairments persisted into adulthood. Mr. Terry was never able to live fully on his own, relying on family members or romantic partners to support him. PCR Hrg. Tr. pp. 109, 257–58, 328. Like many people with intellectual disability, Mr. Terry had structures of support to help him function in the community, including his romantic relationships. PCR Hrg. Tr. pp. 109–110, 328. His ex-wife, Louanne, was responsible for all the household chores and for taking care of their children, and was the primary breadwinner in the family. PCR Hrg. Tr. pp. 109, 259, 328; State Ex. 1 p. 7. In fact, Louanne could not trust Mr. Terry to take care of their children, even for something as simple as remembering to feed them or being able to test the temperature of a bottle of formula. PCR Hrg. Tr. p. 329. Louanne handled the family's living arrangements and finances. PCR Hrg. Tr. pp. 257, 259, 332; State Ex. 1 p. 7. Louanne was also responsible for scheduling Mr. Terry's medical appointments—if Mr. Terry needed to go to the doctor, he relied on Louanne to make an appointment for him. PCR Hrg. Tr. p. 329. When Mr. Terry lived with his older brother, Billy, he similarly was not responsible for handling finances and instead simply turned any money he made over to Billy to pay the rent and utilities. State Ex. 1 p. 15; PCR Hrg. Tr. p. 332.

Mr. Terry's history of employment similarly indicated deficits in adaptive functioning. A history of employment does not rule out a diagnosis of ID,[4] App. Ex. 3 p. 3, and all of Mr. Terry's jobs ended in failure, all involved menial labor, and he struggled to stay employed in any one job for long, all of which is consistent with an intellectual disability diagnosis. PCR Hrg. Tr. pp. 183;

[4] Dr. Hall pointed to Mr. Terry's attempts to address his needs in the prison system as evidence that Mr. Terry did not have deficits in adaptive functioning. State's Ex. 1, p. 16; PCR Hrg. Tr. p. 323. However, both the DSM-5 and *Moore v. Texas* state that reliance on adaptive strengths developed in prison is improper because prison is a structured, controlled environment. *Moore v. Texas*, 581 U.S. 1, 16 (2017); DSM-5 at 38; AAIDD-11 User's Guide 20 (counseling against reliance on "behavior in jail or prison").

App. Ex. 3, p. 3; State's Ex. 1 p. 7. As Dr. Greenspan explained, Mr. Terry had "a very spotty and sporadic work history," which is "very typical of people with mild intellectual disability." PCR Hrg. Tr. p. 183. Dr. Hall further acknowledged that Mr. Terry worked "sporadically" and he needed help from Louanne to secure any jobs that he did have. PCR Hrg. Tr. pp. 326–27. While Mr. Terry reported having a car repossessing business, State's Ex. 1 p. 7, PCR Hrg. Tr. p. 326, Louanne was the one who in fact took care of all the paperwork and financial work for the business, while Mr. Terry's role was limited to the straightforward task of picking up the car he was told to repossess. PCR Hrg. Tr. pp. 109, 110, 262, 326; State's Ex. 1 p. 7. As Dr. Greenspan explained, Mr. Terry would complete that work at night, "when he didn't really have to interact with people," PCR Hrg. Tr. p. 182, and Mr. Terry admitted in his interview with Dr. Hall and Dr. Davis that the business "would have been a big mess if I tried to do . . . the taxes." PCR Hrg. Tr. p. 262. Even with Louanne's help, the repossessing business ended in failure when Mr. Terry made the mistake of trusting his cousin to run the business and his cousin stole from him—another indicator of intellectual disability. PCR Hrg. Tr. pp. 155, 183; State's Ex. 1 p. 7.

III. Mr. Terry presented evidence proving that he is a person with intellectual disability.

The evidence presented at Mr. Terry's PCR hearing demonstrates that he is a person with intellectual disability. At the PCR hearing, Dr. Stephen Greenspan, after reviewing a wide range of records documenting Mr. Terry's intellectual and adaptive functioning, opined that Mr. Terry meets the criteria for a diagnosis of intellectual disability under the South Carolina statute, the DSM, and the AAIDD. PCR Hrg. Tr. p. 84.

a. Prong 1: Subaverage Intellectual Functioning

The evidence presented at the PCR hearing establishes that Mr. Terry has significantly subaverage intellectual functioning and satisfies Prong 1 of the intellectual disability diagnosis.

Prong 1 is assessed in light of the totality of the relevant evidence. Because "intellectual disability is a condition, not a number," *Hall*, 4572 U.S. at 722–23; PCR Hrg. Tr. pp. 32, 66, a diagnosis of intellectual disability does not turn solely on a defendant's strict IQ score.[5] *Moore*, 581 U.S. at 15; PCR Hrg. Tr. p. 66. Rather, courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore*, 581 U.S. at 15; PCR Hrg. Tr. p. 66 ("You should always evaluate for both Prong 1 and Prong 2, even if the scores on Prong 1 fall above this very arbitrary 75 plus or minus number."). Thus, when assessing whether a defendant meets the subaverage intellectual functioning prong, courts should consider the nature of the test, the method by which the test was administered, and other factors that may affect the validity of the IQ scores.[6] PCR Hrg. Tr. p. 66 ("there are all kinds of possible explanations" for score variations, including "possible corruption on the part of an evaluator or

[5] Courts have found that an individual was intellectually disabled despite having IQ test scores in the 80s, or even up to 93. *See, e.g.*, *Pruitt v. Neal*, 788 F.3d 248, 253–54, 270 (7th Cir. 2015) (finding the defendant intellectually disabled with IQ scores of 52, 76 and 93); *United States v. Wilson*, 170 F. Supp. 3d 347, 363, 392 (E.D.N.Y. 2016) (finding the defendant intellectually disabled with reported IQ scores of 84, 78, 78, 70, 80, 84, 76 and 80); *Branch v. Epps*, 844 F. Supp. 2d 762, 772–73 (N.D. Miss. 2011) (finding the defendant intellectually disabled with reported IQ scores of 68, 84, 68 and 60); *People v. Superior Court*, 155 P.3d 259, 261, 267–69 (Cal. 2007) (finding the defendant intellectually disabled with reported IQ scores of 81, 92, 78 and 77); *Pennsylvania v. Gibson*, 925 A.2d 167, 170–71 (Pa. 2007) (finding the defendant intellectually disabled with reported IQ scores of 67, 81 and 74); *Nixon v. State*, No. SC15-2309, 2017 WL 462148, at *1 (Fla. Feb. 3, 2017) (holding that an IQ score of 80 is not dispositive of a finding of significantly subaverage intellectual functioning).

[6] Dr. Scott Decker testified at the PCR hearing about the importance of adhering to strict and standardized guidelines in IQ test administration, as well as to his administration of the Woodcock-Johnson IV to Mr. Terry. Dr. Decker is a neuropsychologist, with a PhD in school psychology and neuropsychology. App. Ex. 13 p. 1. He has developed multiple intelligence assessments, including the Woodcock-Johnson, Stanford-Binet, and Bender-Gestalt. PCR Hrg. Tr. p. 195. This Court qualified Dr. Decker as an expert in neuropsychology and IQ test administration. PCR Hrg. Tr. p. 200.

incompetence"), 202 (explaining the importance of adhering to "strict, standardized" rules of test administration to ensure that scores are valid).

In determining whether Prong 1 is satisfied, both the standard error of measurement and the Flynn Effect must be considered. The standard error of measurement for IQ tests is considered to be up to five points on either side of the IQ score. AAIDD-11 at 36; Simon Whitaker, *Error in the Estimation of Intellectual Ability in the Low Range Using the WISC-IV and WAIS-III*, 48 Personality and Individual Differences 517, 517 (2010). This error means that the true IQ score of an individual who obtains a score of 70 on a test can lie anywhere between the range of 65 to 75. AAIDD-12 at 35-36; DSM-V at 37. As the United States Supreme Court explained, the standard error of measurement is "a statistical fact, a reflection of the inherent imprecision of the test itself." *Moore,* 137 S. Ct. at 1049; *Hall*, 572 U.S. at 713.

The Flynn Effect is the widely-recognized phenomenon that IQ scores increase roughly 0.33 points per year as IQ tests age and test norms become obsolete. AAIDD-11 at 37; AAIDD-11 User's Guide at 23; DSM-5 at 37; *see also United States v. Hardy*, 762 F. Supp. 2d 849, 858 (E.D. La. 2010). There is a consensus among practitioners that IQ scores obtained with older tests must be corrected for norm obsolescence. AAIDD, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports 123 (12th ed. 2021) (AAIDD-12); AAIDD-11 at 37 ("[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."); Randy G. Floyd et al., "Theories and Measurement of Intelligence," in L.M. Glidden et al. eds., APA HANDBOOK OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: FOUNDATIONS (2021). Flynn correction requires that IQ scores be adjusted downward approximately 0.33 points for every year after a test has been normed. For example, if a person

obtains a score of 70 in 2020 on an IQ test that was normed in 2010, the score should be corrected to 66.7 (0.33 x 10 years = 3.3; 70 – 3.3 = 66.7).[7] AAIDD-12 at 42.

There are a variety of other factors regarding the administration of an IQ test—including when the test was normed and released for use, whether the appropriate testing instrument was used, whether the test was properly administered and scored, and so forth—which must be evaluated by an experienced expert using appropriate clinical judgment. *See Hall*, 572 U.S. at 722–23 (courts "must afford these test scores the same studied skepticism that those who design and use the tests do, and understand that an IQ test score represents a range rather than a fixed number."). The WISC-R is especially problematic in terms of score reliability. *See* Stephen D. Truscott et al., *WISC-R Subtest Reliability Over Time: Implications for Practice and Research*, 74 PSYCH. REPORTS 147, 154 (1994) ("[A]lthough some stability exists for some of the subtest scores over time, stability is not sufficient for diagnosis, program planning, or decision making," particularly for children with intellectual disability).

Here, both IQ testing and other testing results demonstrate that Mr. Terry meets the criteria for Prong 1. In 2022, Dr. Scott Decker administered the Woodcock-Johnson IV, one of three gold-

[7] The purpose of correcting for the Flynn Effect "is not to correct for possible changes in actual intelligence in an individual or subgroup but rather to ensure that all individuals (regardless of their demographics) are measured by the same yardstick when being compared to an arbitrary (70 or 75) general population diagnostic criterion." *United States v. Hardy*, 762 F. Supp. 2d 849, 858 (E.D. La. 2010) (quoting Stephen Greenspan, *Flynn-Adjustment is a Matter of Basic Fairness: Response to Roger B. Moore, Jr.*, Psychol. Mental Retardation & Dev'l Disabilities, Vol. 32, No. 3 at 8 (2007) (S-29)). Clinicians have recognized the elevated importance of the Flynn Effect in cases involving a possible intellectual disability diagnosis because people with intellectual disability may be particularly susceptible to the Flynn Effect. *Hardy*, 762 F. Supp. 2d at 859 (citing Caroline Everington & J. Gregory Olley, *Implications of Issues in Atkins v. Virginia, Defining and Diagnosing Mental Retardation*, 8 J. Forensic Psychol. Practice 1, 7 (2008), and Tomoe Kanaya et al., *The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses*, 58 AM. PSYCHOL. 778, 787 (2003)); *see also* Tomoe Kanaya et al., *The Rise and Fall of IQ in Special*

standard IQ tests, to Mr. Terry. PCR Hrg. Tr. p. 204; App. Ex. 14; David Freedman, *Cognitive and Functional Assessment: A Practitioner's Guide to Testing*, Federal Death Penalty Resource Counsel 54 (Mar. 2019) (describing WJ-IV as one of the three dominant, comprehensive, and nationally normed IQ tests which meet the current psychometric criteria for reliability and validity currently in use). Mr. Terry's obtained IQ score was adjusted per the requisite Flynn effect, resulting in a full-scale IQ score of 74, with a 95% confidence interval of 69 to 79. PCR Hrg. Tr. p. 204; App. Ex. 14. Mr. Terry's score on this test "includes the range of scores that extend two standard deviations below the mean, which is typically considered as a diagnostic threshold for intellectual disability." App. Ex. 14 p. 6. "Based on behavioral observations during testing and consistency in test performance," Dr. Decker concluded that Mr. Terry put forth good effort and that his score was a valid indicator of his intellectual ability. App. Ex. 14 p. 2; PCR Hrg. Tr. p. 205.

Dr. Greenspan testified that Mr. Terry's performance on other academic achievement testing was also "very supportive of a diagnosis of ID" with respect to Prong 1.[8] PCR Hrg. Tr. pp. 99–100. As discussed above, Mr. Terry's performance on standardized testing during his school years (the WRAT and the CTBS) was consistently below grade level and indicative of intellectual impairment. PCR Hrg. Tr. pp. 100, 102; *see also* App. Ex. 2, p. 5. Moreover, his performance on neuropsychological testing in adulthood indicated the presence of brain damage, which exacerbated his intellectual impairment. PCR Hrg. Tr. p. 103; App. Ex. 2 p. 6. Traumatic brain injuries are likely to result in deficits in cognitive processing speed—the measures on which Mr. Terry scored lowest on both the Woodcock-Johnson and the WAIS-IV. PCR Hrg. pp. 211, 247;

[8] It is not necessary for a clinician to personally administer an IQ test to conclude that a person meets the criteria for Prong 1 of an intellectual disability diagnosis. PCR Hrg. Tr. p. 79.

App. Ex. 14 p. 2; State Ex. 1 p. 11. Further, the DSM-5-TR recognizes traumatic brain injury as a risk factor for intellectual disability. DSM-5-TR at 44; PCR Hrg. Tr. p. 336.

b. Prong 2: Deficits in Adaptive Functioning

The second element of a diagnosis of intellectual disability is deficits in adaptive behavior. Adaptive behavior refers to typical activities of everyday living in a community setting and considers a person's typical behavior in the community without support. *See* PCR Hrg. Tr. p. 62 (adaptive behavior refers to how a person "function[s] in the community or in their family or in their peer group"); AAIDD-11 at 45 (defining adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives"). In order to show deficits in adaptive behavior, an individual must demonstrate significant deficits in one of three skill areas of adaptive behavior: conceptual, social, or practical. *Moore*, 581 U.S. at 15; AAIDD-11 at 41–42; DSM-V at 33. PCR Hrg. Tr. pp. 63, 64, 105, 107, 319; AAIDD-12 at 31; DSM-5-TR at 37. Conceptual skills involve, among other things, "competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations." DSM-5-TR at 42; *see also* PCR Hrg. Tr. p. 63. The social domain involves "awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment." DSM-5-TR at 42; *see also* PCR Hrg. Tr. p. 63. Lastly, the practical domain involves "learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization." DSM-5-TR at 42; *see also* PCR Hrg. Tr. p. 63. Adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed for the person to perform adequately across multiple environments, such as home, school, work, and community." DSM-5-TR at 42.

In addition to a careful review of all available data, the clinical guidelines strongly recommend that, whenever possible, adaptive behavior be assessed with standardized scales. Such tests provide an objective, norm-referenced method for evaluating an individual's functioning. AAIDD-12 at 38-39, 47; DSM-5-TR at 42. The availability of a standardized instrument to measure adaptive behavior can greatly improve the reliability of an intellectual disability assessment.[9]

Standardized adaptive behavior scales are administered to someone who knows the subject well and who has had an opportunity to observe their behavior closely. The informant is asked to describe typical behavior across various domains and the scores are then compared to a normed set of data, in much the same way that IQ tests examine an individual's performance compared to the general population. The AAIDD recommends the use of several such tests, including the Vineland Scale, which is a well-established instrument that meets "contemporary standards for standardization, reliability, and validity."[10]

As discussed in Section II, Mr. Terry demonstrated deficits in all three areas of adaptive functioning, beginning in the developmental period. With respect to the practical domain, Mr. Terry was never able to live fully on his own, and his romantic partners were responsible for managing the household, handling finances, and taking care of their children. PCR Hrg. Tr. pp. 109, 257–59, 328–29. He struggled to maintain employment, all of his jobs involved menial labor, and all ended in failure. PCR Hrg. Tr. p. 183; App. Ex. 3 p. 3; State's Ex. 1 p. 7. In the conceptual domain, Mr. Terry struggled throughout his school years, was placed in special education, and was

[9] Marc J. Tassé, *Adaptive Behavior Assessment and the Diagnosis of Mental Retardation in Capital Cases*, 16 Applied Neuropsychology 117–18 (2009).
[10] J. Gregory Olley, *Adaptive Behavior Instruments*, in *The Death Penalty and Intellectual Disability* 189 (Edward A. Polloway ed., 2015); *see also* AAIDD-12 at 31.

unable to complete his GED even after his incarceration. Finally, in the social domain, Dr. Greenspan testified that Mr. Terry was "severely, if not profoundly, impaired," and Dr. Hall similarly recognized Mr. Terry's social deficits. PCR Hrg. Tr. pp. 107, 319–20; State Ex. 1 p. 14. Mr. Terry was gullible and easily influenced as both a child and an adult, and "had few genuine friends." PCR Hrg. Tr. pp. 107–09, 151; State Ex. 1 p. 14. Finally, in accordance with guidelines recommending the use of a standardized instrument to measure adaptive behavior, Mr. Terry was rated on the Vineland Social Maturity Scale, a gold-standard test to measure adaptive functioning, in elementary school and scored in the intellectually disabled range. App. Ex. 2 p. 7; PCR Hrg. Tr. pp. 111, 112.

c. Prong 3: Onset in the Developmental Period

The final prong of the intellectual disability diagnosis is onset in the developmental period, which is defined as prior to the age of 22. PCR Hrg. Tr. pp. 53, 55, 65, 333. "The developmental onset criterion requires there be a 'continuity of concern' about the individual extending back into the developmental period. It does not require that the individual had been labeled as having ID (or having qualifying scores) during that period[.]" App. Ex. 2 p. 8.

Mr. Terry presented evidence of a continuity of concern surrounding his intellectual and adaptive functioning beginning in early childhood. App. Ex. 2 p. 8. The fact that Mr. Terry was tested for impairment in school and placed in special education indicated that his teachers saw him as impaired during the developmental period. PCR Hrg. Tr. p. 101. Mr. Terry was repeatedly assessed for and placed in special education services and "noted by his teachers for his slowness and inability to learn." App. Ex. 2 p. 8. As Dr. Greenspan explained, because administering an IQ test is a "very expensive, time-consuming process," "[i]t's only done for one reason" when an individual is performing poorly—to assess the possibility of intellectual disability. PCR Hrg. Tr.

p. 138. Further, intellectual disability cannot be ruled out by failure to diagnose it during the developmental period, even if testing is administered. App. Ex. 3 p. 2; PCR Hrg. Tr. pp. 333–34.

Mr. Terry's adaptive functioning deficits also originated in the developmental period, as evidenced by his history of academic failure and lack of friendships in childhood. PCR Hrg. Tr. p. 120. Further, Dr. Hall explained that in childhood, Mr. Terry was singled out for abuse by his father "more than his brothers because it took him longer to catch on when his father was teaching him to do something." State's Ex. 1 p. 5; PCR Hrg. Tr. p. 323.

Finally, as discussed in Section II, Mr. Terry's already-existing cognitive and adaptive deficits were exacerbated by brain injuries sustained during the developmental period. PCR Hrg. Tr. pp. 184, 301; App. Ex. 2 p. 8; State Ex. 1 p. 16. A diagnosis of intellectual disability is proper in cases where a traumatic brain injury suffered during the developmental period sufficiently impairs a person's cognitive functioning. App. Ex. 2 p. 9.

IV. The State's argument that Mr. Terry is not a person with intellectual disability is flawed.

At trial, the State presented the testimony of Dr. Alicia Hall, who evaluated Mr. Terry and testified that Mr. Terry is not a person with intellectual disability. Dr. Hall's conclusions with respect to each prong of the intellectual disability diagnosis are flawed in the following respects.

a. Dr. Hall incorrectly concluded that Mr. Terry does not satisfy Prong 1.

Dr. Hall relied on unreliable and problematic IQ testing to conclude that Mr. Terry does not meet the criteria for Prong 1 of the intellectual disability diagnosis. State Ex. 1 p. 15. Specifically, Dr. Hall relied most heavily on two administrations of the WISC-R in Mr. Terry's adolescence. Mr. Terry was administered the WISC-R at age 11 and age 14 and received a score of 92 on both tests. PCR Hrg. Tr. pp. 104, 205; State Ex. 1 p. 9. Dr. Hall also cited the results from the WAIS-IV administered in April 2024 by Dr. Jessica Davis, with Dr. Hall in the exam

room as an observer, on which Mr. Terry received a Flynn-adjusted score of 76 (with a 95% confidence interval of 71 to 81).[11] PCR Hrg. pp. 234–35, 241, 317–18; State Ex. 1 pp. 1, 13. These scores are less reliable indicators of Mr. Terry's intellectual functioning than the Woodcock-Johnson test administered by Dr. Decker for multiple reasons.

With respect to the WISC-R, research indicates that scores for the WISC-R for children with intellectual disabilities do not meet accepted reliability standards, particularly subtest scores. Stephen D. Truscott et al., *WISC-R Subtest Reliability Over Time: Implications for Practice and Research*, 74 PSYCH. REPORTS 147, 153 (1994); PCR Hrg. Tr. p. 206 (the WISC-R had "measurement issues" and was unreliable because it was not clear that the test measured what it purported to measure). "[A]lthough some stability exists for some of the subtest scores over time, stability is not sufficient for diagnosis, program planning, or decision making." *Id.* at 154. "Transitory shifts" in WISC-R scores make the chance for error too high to interpret the scores with any reliability. *Id.* at 154–55. The WISC-R was especially unreliable for children with brain injuries, like Mr. Terry, because it could not accurately measure intelligence affected by traumatic brain injury, meaning that scores were inaccurate because the test could not adequately account for their impairment. PCR Hrg. Tr. p. 206.

Moreover, Dr. Greenspan testified that Mr. Terry's WISC-R scores during his school years similarly could not be used to rule out intellectual disability, partly because Mr. Terry suffered brain injuries since those tests were administered that likely affected his cognitive functioning. PCR Hrg. Tr. p. 104. Thus, even taking those scores at face value, despite a number of medically

[11] As Dr. Hall acknowledged on cross-examination, she did not apply the Flynn Effect correctly in her report. She applied the Flynn Effect from the date of publication of the WAIS-IV (2008), rather than the year of norming (2007). Consequently, Mr. Terry's corrected score on the WAIS-IV would be a 76. PCR Hrg. Tr. pp. 118, 319.

sound reasons not to do so, Dr. Greenspan explained that the scores would not rule out a diagnosis of intellectual disability based on Mr. Terry's brain injuries in the developmental period which occurred after the testing and subsequent qualifying score on the Woodcock-Johnson. PCR Hrg. Tr. p. 104.

Finally, Mr. Terry's score on the WAIS-IV is less reliable than his score on the Woodcock-Johnson because the WAIS-IV was administered by Dr. Davis, with Dr. Hall in the room as an observer. State Ex. 1 p. 1; PCR Hrg. Tr. pp. 234–35, 241, 317. The American Psychological Association (APA) strongly discourages the presence of third-party observers, even clinical observers, during IQ tests because tests are not normed in situations involving observers and the presence of an observer can affect the examinee's performance. PCR Hrg. Tr. pp. 119, 253–55. The APA particularly advises against using third-party observers when an IQ test is being administered for legal purposes. PCR Hrg. Tr. p. 254.

b. Dr. Hall incorrectly concluded that Mr. Terry does not satisfy Prong 2.

In order to satisfy Prong 2, an individual must demonstrate deficits in only one of the three areas of adaptive behavior—conceptual, social, and practical. *Moore*, 581 U.S. at 15; AAIDD-11 at 41–42; DSM-V at 33. PCR Hrg. Tr. pp. 63, 64, 105, 107, 319; AAIDD-12 at 31; DSM-5-TR at 37. Dr. Hall recognized that Mr. Terry has deficits in at least two of those areas—conceptual and social—and that those deficits were present during the developmental period. PCR Hrg. Tr. p. 320; State Ex. 1 pp. 14 (noting that the results of the Vineland indicated that Mr. Terry "was having deficits in his social skills as a youngster"), 16 ("Mr. Terry demonstrated deficits in conceptual skills as a youngster"). Nonetheless, Dr. Hall concluded that Mr. Terry did not meet the criteria for Prong 2 of an intellectual disability diagnosis. State Ex. 1 p. 16. Dr. Hall's reasoning supporting this conclusion is flawed on a number of counts.

i. Dr. Hall failed to account for the "cloak of competence" and relied too heavily on Mr. Terry's self-report of his adaptive behavior.

As Dr. Hall acknowledged, individuals with intellectual disability often attempt to compensate for their limitations through behaviors that mask their disability, a pattern of behavior known as the "cloak of competence." ROBERT B. EDGERTON, THE CLOAK OF COMPETENCE: STIGMA IN THE LIVES OF THE MENTALLY RETARDED 158–59 (1st ed. 1967); PCR Hrg. Tr. pp. 109–10, 292–93 (Dr. Hall: "The cloak of competence is this idea that individuals who are mild ID develop mannerisms that, in order to mask their deficits from other neurotypical folks, that they don't want to stand out or seem dumb. So they'll do things to kind of mask that, to present themselves as higher functioning than they actually are."). Often, individuals will "mask their deficits and attempt to look more able and typical than they actually are." *United States v. Hardy*, 762 F. Supp. 2d 849, 854–55 (E.D. La. 2010). "It has long been recognized in the field that one of the most commonly encountered characteristics of individuals who have intellectual disability is their intense motivation to mask their limitations." James W. Ellis, Caroline Everington, & Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in *Atkins* Cases, 46 Hofstra L. Rev. 1305, 1367 (2018); *see also* AAIDD-11 at 51–52 ("[P]ersons with higher IQ scores are more likely to mask their deficits and attempt to look more able and typical than they actually are."). Quite simply, there is such an intense stigmatization of individuals who are labeled as intellectually disabled that such individuals will go to tremendous lengths to hide their intellectual and functional deficits and present themselves as functioning normally, which may make intellectual disability difficult to detect. *Id.* at 1367–68; AAIDD-11 at 52 ("'[M]ental retardation' has been a particularly stigmatizing and pejorative label that leads most individuals with this label to fight hard not to be identified as 'MR.'"). Higher-IQ individuals with intellectual disability "frequently present a mixed competence profile. They typically have a history of academic failure and marginal social

and vocational skills." *Hardy*, 762 F. Supp. 2d at 854–55 (quoting Robert L. Schalock et al., *User's Guide: Mental Retardation Definition, Classification and Systems of Supports—10th Edition* 18 (AAIDD 2007)). Moreover, people with intellectual disabilities "typically have a strong acquiescence bias or a bias to please that might lead to erroneous patterns of responding." *Id.* Thus, it is important not to rely on the self-report of a person who may have intellectual disability regarding his level of functioning or things he can or cannot do. *See* PCR Hrg. Tr. pp. 110, 293, 322.

With respect to adaptive behavior in particular, Dr. Hall relied on her opinion that Mr. Terry "described his adult life in terms that generally indicated average levels of adaptive functioning." State's Ex. 1 p. 14; PCR Hrg. Tr. p. 322. However, she simultaneously acknowledged the dangers of relying on the self-report of someone suspected of having an intellectual disability, who would be likely to try to hide behind the cloak of competence to mask their deficits or exaggerate their strengths, including by telling someone they were capable of doing something they could not do. PCR Hrg. Tr. p. 322.

ii. Dr. Hall relied on stereotypes of what people with intellectual disability can or cannot do.

Stereotypes of what individuals with an intellectual disability should look or act like "should spark skepticism." *Moore*, 581 U.S. at 18 (rejecting the Texas appellate court's reliance upon lay stereotypical perceptions of Moore's intellectual functioning including education in normal classrooms, his father's reaction to his academic challenges and his sister's perceptions of his intellectual disabilities); PCR Hrg. Tr. pp. 72–74, 180–82. In *Moore v. Texas*, the Supreme Court cautioned against relying on stereotypes to exclude individuals from a diagnosis of intellectual disability. The *Moore* Court affirmed the well-accepted principle that laypeople often believe that individuals are *not* intellectually disabled based on common mis-impressions or

stereotypes. *Moore*, 581 U.S. at 17–18; AAIDD-11 at 26, 151 (criticizing the "incorrect stereotypes" that persons with intellectual disability can "never have friends, jobs, spouses, or children"); PCR Hrg. Tr. pp. 72–73 (noting that it is not possible to tell whether a person has intellectual disability by looking at them, and that people with intellectual disability are frequently not globally impaired), 180–82 (noting that, contrary to popular misconceptions, people with intellectual disability are often able to hold jobs, perform common chores such as sweeping or making beds, or have romantic relationships). Incorrect—but widely held—stereotypes about people with intellectual disability include that they (1) "look and talk differently from persons from the general population"; (2) "are completely incompetent and dangerous"; (3) "cannot do complex tasks"; (4) "cannot get driver's licenses, buy cars, or drive cars"; (5) "do not and cannot support their families"; (6) "cannot romantically love or be romantically involved"; (7) "cannot acquire vocational and social skills necessary for independent living"; and (8) "are characterized only by limitations and do not have strengths that occur concomitantly with the limitations." *Id.*; *United States v. Roland*, 218 F. Supp. 3d 470, 480 (D.N.J. 2017); *see also* PCR Hrg. Tr. pp. 72–73, 180–82.

Contrary to this guidance, Dr. Hall relied on a number of stereotypes concerning what people with intellectual disability can or cannot do to conclude that Mr. Terry does not meet the criteria for Prong 2. State Ex. 1 pp. 15–16. Specifically, Dr. Hall concluded that Mr. Terry could not have deficits in adaptive behavior because he engaged in romantic relationships, was sporadically employed, could clean, cook, and do laundry "on occasion," performed yard work, and completed household chores as a child. PCR Hrg. Tr. pp. 291–92, 309, 310; State Ex. 1 pp. 15–16. None of these behaviors exclude Mr. Terry from a diagnosis of intellectual disability.

iii. Dr. Hall improperly considered Mr. Terry's adaptive behavior in prison.

Dr. Hall pointed to Mr. Terry's attempts to address his needs in the prison system as evidence that Mr. Terry did not have deficits in adaptive functioning. State Ex. 1 p. 16; PCR Hrg. Tr. p. 323. However, the DSM-5, the AAIDD manual, and the Supreme Court have all recognized that reliance on adaptive strengths developed in a structured, controlled environment, such as a prison, is improper. *Moore*, 581 U.S. at 16 (cautioning against reliance on adaptive strengths developed in prison); AAIDD-11 at 47 ("[T]his is a critical distinction between the assessment of adaptive behavior and the assessment of intellectual functioning, where best or maximal performance is assessed."); PCR Hrg. Tr. p. 323. Clinicians widely acknowledge that it is not appropriate to analyze an individual's adaptive functioning based off of behavior in prison. *Moore*, 581 U.S. at 16; DSM-5 at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g. prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."); AAIDD-11 at 20 (counseling against reliance on "behavior in jail or prison").

iv. Dr. Hall conflated signs of intellectual disability with other mental disorders and Mr. Terry's history of risk factors for intellectual disability.

Dr. Hall erroneously attempted to explain away Mr. Terry's symptoms of ID as indicators of other disorders that are not mutually exclusive of, and can co-occur with, intellectual disability. First, Dr. Hall attributes behavior that otherwise indicates deficits in adaptive functioning, such as his difficulties maintaining romantic relationships, to his antisocial personality disorder diagnosis from 1994. State Ex. 1 p. 14. Even assuming that diagnosis was correct, the existence of another mental disorder or even a personality disorder is not evidence that a person does not also have an intellectual disability. *Moore*, 581 U.S. at 17; *Brumfield*, 135 S. Ct. at 2280 (noting that the

diagnostic criteria for intellectual disability do not include an exclusion criterion; therefore, the diagnosis should be made regardless of and in addition to the presence of another disorder); PCR Hrg. Tr. pp. 332–33 (a diagnosis of antisocial personality disorder does not exclude Mr. Terry from a diagnosis of intellectual disability). Mental health professionals recognize that many individuals with an intellectual disability also have other mental or physical impairments (referred to as co-morbid), such as depressive and bipolar disorders. *Moore*, 581 U.S. at 17; PCR Hrg. Tr. p. 333; DSM-5-TR at 45 ("Co-occurring mental, neurodevelopmental, medical and other physical conditions are frequent in intellectual developmental disorder, with rates of some conditions (e.g. mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population"); *see also* AAIDD 12 at 103; AAIDD-11 at 58–63.

Similarly, Dr. Hall disregarded the impact of Mr. Terry's trauma history, a record of academic failure, family poverty, impaired parenting, and childhood abuse and suffering on his intellectual functioning. Such factors are considered by the medical community to be "risk factors" for intellectual disability, not reasons to eliminate a diagnosis. PCR Hrg. pp. 71, 320, 336; *Moore*, 581 U.S. at 11 (rejecting the lower court's finding of "alternative causes" for Moore's adaptive functioning deficits, including "an abuse-filled childhood, undiagnosed learning disorders, multiple elementary-school transfers, racially motivated harassment and violence at school, and a history of academic failure, drug abuse, and absenteeism"), 16–17 ("Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination."); DSM-5 at 39; AAIDD-11 at 59–60 ("[A]t least one or more of the risk factors [described in the manual] will be found in every case of" intellectual disability), 66 (identifying postnatal risk factors for intellectual disability). *See also* PCR Hrg. Tr. at pp. 71, 320,

336 (identifying glue sniffing, childhood or other physical abuse, and head injuries as risk factors for intellectual disability).

While Dr. Hall recognized that Mr. Terry had a history of severe and extensive abuse by his father and siblings in childhood, and that Mr. Terry was singled out for abuse by his father "more than his brothers because it took him longer to catch on when his father was teaching him to do something," State Ex. 1 p. 5; PCR Hrg. Tr. pp. 320, 323, she disregarded the impact of those factors on Mr. Terry's intellectual functioning. PCR Hrg. Tr. pp. 306–07. Such history is both a risk factor for and indicator of intellectual disability, not reasons to exclude a diagnosis. PCR Hrg. Tr. p. 320, AAIDD-11 at 66. Dr. Hall similarly recognized that Mr. Terry's history of head injuries and substance use, both of which occurred during the developmental period, may have affected Mr. Terry's cognitive functioning. State Ex. 1 p. 16; PCR Hrg. Tr. p. 301. A diagnosis of intellectual disability is proper in cases where a traumatic brain injury suffered during the developmental period sufficiently impairs a person's cognitive functioning. App. Ex. 2 p. 9.

Finally, Dr. Hall attempted to explain away Mr. Terry's poor school performance, an indication of deficits in both intellectual functioning and the conceptual domain of adaptive functioning, by attributing it to a learning disability, exclusive of intellectual disability. State Ex. 1 p. 15; PCR Hrg. Tr. p. 310. Just as with other types of mental disorders, the existence of a learning disability does not exclude an individual from a diagnosis of intellectual disability. While learning and intellectual disabilities are often confused, the two disorders are fundamentally different: Intellectual disability is a neurodevelopmental disorder that profoundly affects an individual's actual intelligence, while a learning disability interferes with an individual's academic achievements but does not necessarily reflect intellectual deficits. DSM-5 at 31, 32; PCR Hrg. Tr. pp. 186–87, 244, 294. It is especially important to avoid using a diagnosis of a learning disability

to exclude an individual from a diagnosis of intellectual disability because learning disabilities frequently co-occur with intellectual disability.[12] DSM-5 at 40. Moreover, people with intellectual disability are frequently misdiagnosed with a learning disability, particularly in school, in part because a learning disability is considered a more "socially acceptable" diagnosis. PCR Hrg. Tr. p. 183.

c. Dr. Hall incorrectly concluded that Mr. Terry does not satisfy Prong 3.

Finally, despite recognizing that Mr. Terry's deficits were present during the developmental period and that his adolescent brain injuries likely impacted his functioning, Dr. Hall concluded that Mr. Terry does not meet the criteria for Prong 3, onset in the developmental period. State Ex. 1 p. 16. Dr. Hall relied on Mr. Terry's adolescent WISC-R scores to opine that he did not satisfy Prong 3 while simultaneously noting that he demonstrated deficits in adaptive behavior "as a youngster." *Id.* Contrary to Dr. Hall's opinion, the age of onset prong also does not require that a defendant show deficient IQ scores (or any IQ scores) before the age of twenty-two. *See* PCR Hrg. Tr. pp. 333–34; *United States v. Roland*, 218 F.Supp.3d 470, 478 (D.N.J. 2017); *Nicholson v. Branker*, 739 F. Supp. 2d 839, 857 (E.D.N.C. 2010); *State v. Covington*, 2019 WL 368915, at *3 (Sup. Ct. N.V. Jan. 22, 2019). Similarly, the clinical consensus is clear that intellectual disability need not have been diagnosed during the developmental period; instead, the signs of intellectual disability need only have *manifested* before that age. AAIDD-11 at 27 ("disability does not necessarily have to have been formally identified but must have originated during the developmental period"); PCR Hrg. Tr. pp. 333–34; *see also Brumfield*, 135 S. Ct. at 2274; *Blackwell*, 420 S.C. at 172, 801 S.E.2d at 737; *Oats v. State*, 181 So. 3d 457, 469 (Fla. 2015).

[12] In particular, attention deficit hyperactivity disorder (ADHD) is one of the disorders that co-occurs most frequently in individuals with intellectual disability. DSM-5 at 40.

CONCLUSION

For the reasons stated above, this Court should grant post-conviction relief, finding that Mr. Terry is a person with intellectual disability and ineligible for the death penalty, and remand for resentencing.

Respectfully submitted,

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April 3, 2025.

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Gary Dubose Terry, *Applicant*, vs. State of South Carolina, *Respondent*.	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT Case No. 2022-CP-3200924 **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of Applicant's Post-Hearing Brief was served via email, this 3rd day of April 2025, upon the following at the email address provided in the Attorney Information System:

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Gary Dubose Terry, #5054	)	C/A No. 2022-CP-32-00924
	)	(Capital PCR)
Applicant,	)	
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

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April 18, 2025
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INTRODUCTION

An evidentiary hearing in the captioned capital post-conviction relief (PCR) matter was held on July 17-18, 2024, to receive testimony and evidence on the sole issue before the Court: whether Applicant, Gary Dubose Terry, 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 evidence supports he 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.

The Applicant failed on the very first prong. The IQ tests given during the developmental period show scores of 92 at the age of 11 and another 92 at the age of 14. (PCR Tr. p. 299). And, being tested for this action by Dr. Scott Decker, a neuropsychologist, the Applicant received a full-

[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).

scale score of 77, which, even adjusted downward using the controversial *Flynn* effect,[2] was according to the Court's expert, at the lowest, 74. (PCR Tr. p. 204.). Moreover, the score is suspect because at the time of his examination the Applicant was suffering from shingles. (PCR Tr. p. 214). In his report Dr. Decker stated, "He 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 having shingles could have effected his scoring. (PCR Tr. p. 218). Even so, the *Flynn* effect 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. Moreover, Dr. Alicia Hall of the South Carolina Department of Disabilities and Special Needs (DDSN) conducted an evaluation as the court's expert, and as part of that evaluation, an I.Q. test was administered by Dr. Jessica Davis also of DDSN and the Applicant's full scale score was 82. (PCR Tr. p. 241). Applicant simply cannot credibly show a score within the generally accepted range of 70 to 75 for mild levels of intellectual disability.[3]

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[2] 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).

[3] *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.");

Simply, having failed in the first prong, no further evaluation is necessary. If the Court should evaluate the argument for finding adaptive functioning deficits, the record shows he fails to make a credible case. Notably, this is the most subjective prong of the analysis. *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."). Applicant's fails as he often relies on generalities or unsupported background facts. That should not be considered credible. But again, the Court need not go to this prong as the first prong is not met.

In sum, Applicant has not shown he is exempt from capital punishment under *Atkins*. Relief should be denied. [4]

ALLEGATION FOR POST-CONVICTION RELIEF

The only matter that is currently before this court is whether the 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).

DISCUSSION

The history of this action reveals that the claim of intellectual disability, or mental retardation as it was referred to when this case was initially called for trial on September 15 1997, was rejected by the Applicant's initial trial expert, Dr. Robert E. Deysach. Dr. Deysach testified

[4] The Court ordered that a proposed order be submitted on May 19, 2025 (the 45-day period ends on a Sunday). At that time the Respondent will include the Procedural history, Guilt and Penalty phase of trial, and offer more expansive proposed findings. For this brief, Respondent points to the most dispositive matter in summary form.

that the Applicant's "performance fell in the low average range but not retarded" (App. Vol. 5 p. 2006). The Applicant was I.Q. tested at the age of 11 and 14 both times receiving a score of 92 well above the threshold that requires a person to be considered intellectually disabled. The Applicant has failed to reveal with credibility a score within the generally accepted range of 70 to 75 for mild levels of intellectually disability during the developmental period.[5] Applicant has failed to show this initial determination was wrong. Applicant still does not show he is intellectually disabled; he never has been and certainly cannot become so now. The sentence of death should remain in place, and his application for relief denied.

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).[6]

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

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[5] *See Atkins,* 536 U.S. at 309 n.3 (observing "Mild' retardation is typically used to describe people with a low IQ level of 50-55 to approximately 70,"); *Id.,* at 309 n.5 ("an I.Q. between 70 and 75 or lower … is typically considered the cutoff IQ score for the intellectual function prong of 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 Stephan Greenspan and J. Gregory Olley, describing the "conventional upper limit 70-75"); PCR Tr. p. 243 testimony of Dr. Jessica Davis, "the statistically significant score for a diagnoses of an intellectual disability usually falls at two standard deviations below the mean. So that is 70 or below.

[6] 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.

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. *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[7] It also

[7] 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,

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).

In *Blackwell*, our Supreme Court noted that 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 U.S. at

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). *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.

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 and Weight

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

Respondent submits this Court should not give any significant weight to Applicant's offered experts based on specific errors, bias and lack of accurate and/or meaningful support. On the other hand, Dr. Hall and Dr. Davis gave credible and supported testimony showing the Applicant cannot meet his burden of proof.

Applicant's Experts

The first person the Applicant called to testify was Dr. Stephen Greenspan, who was found qualified as an expert in psychology with a specialization in diagnosing intellectual disability.[8] (PCR Tr. p. 19). 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 the Applicant and his ex-wife Louanne. (PCR Tr. p. 130). Dr. Greenspan admitted that he was not able to get anywhere with the Applicant's mother; however, Dr. Hall was able to have a good interview with her. (PCR Tr. p. 131). However, Dr. Greenspan admitted never speaking with the Applicant's teachers, childhood friends, or any of his previous doctors. (PCR Tr. p. 132).

Dr. Greenspan acknowledged that this was a legal proceeding and not a medical proceeding. (PCR Tr. p. 133). And 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). However, the definition of intellectual disability in the DSM-V is very similar to South Carolina law. And in the DSM-V states 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. Dr. Greenspan admitted that IQ testing is important in being able to assess intellectual functioning.

During the developmental period the Applicant submitted to two IQ test. One at age 11 in which he scored a 92 and one at age 14 in which he also scored a 92. Since both of these tests were

[8] The Respondent challenged the methods used by Dr. Greenspan as one not recognized in the psychological community. Although the Respondent did not object to Dr. Greenspan's qualifications, the Respondent did object to the methods used and moved for the Court to not allow him to testify. This motion was denied. (PCR Tr. pp. 45-47).

well above the threshold allowed to be considered to be intellectually disabled the Applicant does not satisfy the first prong, therefore, cannot be determined intellectually disabled. When these scores were raised to the attention of Dr. Greenspan, he admitted that these scores were not mentioned in his report; however, they were mentioned in Dr. Hall's report. (PCR Tr. p. 136). These scores were likely not mentioned in Dr. Greenspan's report because they distinctly undermine his diagnosis. A diagnosis of intellectual disability cannot occur because according to the definition, all the prongs must be met prior to a diagnoses; and the Applicant fails the first prong. 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. (PCR Tr. p. 139). However, these were tests given by school psychologist. There has been no evidence submitted these tests were not properly given or the scores are not valid.

Dr. Greenspan also testified that he believed that the Applicant had problems with adaptive functioning. However, he made this determination having not spoken to his mother, teacher, or any of his friends that he had during the developmental period. (PCR Tr. p. 142). During his testimony Dr. Greenspan admitted that he did not know what kind of adaptive functioning the Applicant had during the developmental period. Only thing he knew that he made bad grades, which is common with someone with a learning disability. (PCR Tr. p. 142). The Applicant was never diagnosed as having intellectual disability while he was in school.

During his direct testimony, Dr. Greenspan mentioned that somebody stated that the Applicant was borderline retarded. (PCR Tr. p. 147) However, he was mistaken. Dr. Greenspan apparently misinterpreted a portion of Dr. Hall's report. Dr. Greenspan then admitted that he was discussing a school psychologist Tommy Wicker who recommended that the Applicant remain in regular education classes and be placed in the resource room daily. (PCR Tr. p. 147). The 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. Frizgerald believed that the Applicant needed to get more individual attention. And Applicant benefited from this one on one attention because all of his test scores improved and he was promoted to the sixth grade. (PCR Tr. pp. 147-148). Dr. Greenspan was totally mistaken regarding any teacher stating that the Applicant was mentally retarded. To the contrary, there was a teacher advocating he was not. And, also critically, once the Applicant had more resource classes his grades improved, supporting that he was not in fact intellectually disabled.

Because the Applicant could go his work as a child with no assistance, and was able to fix things Dr. Greenspan admitted that he was good at practical adaptive functioning. (PCR Tr. p. 149). There was evidence that the Applicant was not easily manipulated which is a sign of intellectual disability, but was good at manipulating others. He first met his wife when he was a high school drop- out 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 the Applicant "charming and amusing." (PCR Tr. p. 153). Applicant also convince a women to marry him while he was on death row. (PCR Tr. p. 153). Dr. Greenspan admitted that the Applicant had a lot of girlfriends, that he had some skill in that department. (PCR Tr. p. 153).

The Applicant also had a successful repo business that he started himself. This business was successful until he got injured and relied on his cousin to manage the business. And his cousin stole from him. (PCR Tr. p. 155). So the failure of the business was not due to any decision made by the Applicant other than trusting a family member who ended up stealing from. This is

something that many people have done, unfortunately, but is not indicative a personal failing of any kind in general business acumen or skill.

Dr. Greenspan also discussed the menial jobs that the Applicant had. He worked at two grocery stores, at a gas station as a mechanic and for a tree service. These are the only jobs that someone with only a tenth-grade education will be able to get. A person without an education will not be qualified for a high paid, high-level job.

Dr. Greenspan also discussed his questionnaire where during his examination he would ask questions that are in certain scenarios where the person would had 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 their child being taken. (PCR Tr. p. 167). And unlike Dr. Hall, Dr. Greenspan never asked questions to determine the Applicant's intelligence. (PCR Tr. p. 169).

During his testimony, Dr. Greenspan was reminded that the Applicant was tested twice in school, during trial by Dr. Deysach who determined that Applicant is not intellectually disabled, Dr. Hall, and Dr. Decker, and at Charter Rivers when he went in as an inpatient, and none of these physicians ever diagnose the Applicant as being intellectually disabled. The only person that made this determination was him. (PCR Tr. p. 174).

Dr. Greenspan's lack of precision and omission of the prior diagnoses and testimony makes his diagnoses non-believable; his conclusions simply lack credibility.

The Appellant also called to testify Dr. Scott Decker who was found qualified as an expert in neuropsychology and IQ test administration. (PCR Tr. p. 200). Dr. Decker was not ask to make

a determination as to whether the Applicant was intellectually disabled. (PCR Tr. p. 200). Dr. Decker administered the Woodcock-Johnson IQ test. And the Applicant's final score was a 77. However at the time he was taking the test the Applicant was suffering from Shingles. In his report Dr. Decker wrote that the Applicant "complained of right eye facial pain due to shingles and stated it occasionally obstruct – obscured vision in his right eye."[9] (PCR Tr. p. 215) Also Dr. Decker stated in his report that, "[H]e 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 effected 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.

The Court's Experts

The Court ordered that the Applicant be examined by the Department of Disabilities and Special Needs. The Applicant was administered an IQ test by Dr. Jessica Davis. Dr. Davis was found qualified as an expert in psychology and administering IQ tests. (PCR Tr. p. 233). Dr. Davis administered an IQ test and this time the Applicant did not have any visual problems. (PCR Tr. p. 238). The range that Dr. Davis reported was 78 to 86. (PCR Tr. p. 242). With a full-scale score of 82. (PCR Tr. p. 243). Dr. Davis also stated that the Applicant tested previously and scored a 92 which is in the average range. (PCR Tr. p. 247). This test was administered when he was 14, *i.e.,* during the developmental period. Dr. Davis also testified that it is extremely rare that a person tested, *twice*, higher than their capabilities. She has, in fact, never seen it happened before. (PCR

[9] The transcript states "visitation" however, that should be a typo the actual statement is vision.

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 really hard to fake a higher intelligence level. (PCR Tr. pp. 247-248).

The last person to testify was Dr. Alicia Hall also of the Department of Disabilities and Special Needs. Dr. Hall found 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 examined over 10,000 pages of records and she interviewed Ms. Louanne Smith the Applicant's second wife and his mother Mrs. Patsy Terry. (PCR Tr. p. 275). She also examined the SCDC jacket and the trial transcript and his previous appeals. (PCR Tr. p. 275). She also interviewed the Applicant. Dr. Hall testified that having menial labor or being married does not make you intellectually disabled. (PCR Tr. p. 287). Further, 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). The 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 the Applicant while in school 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 his medical notes indicate good intellectual capacity. (PCR Tr. p. 297). The Applicant interacted with a mental health professional and that professional was not concerned about the presence of intellectual disability. (PCR Tr. p. 297).

Consider the first prong in particular, Dr. Hall testified that starting at age 11 the Applicant was given the Wechsler Intelligence Scale for Children and had a full scale of 92. This was a test that she has heard of and has relied on before. (PCR Tr. p. 299). Three later years later at the age

of 14 he was given the same test and once again tested at 92. (PCR Tr. p. 299). This told Dr. Hall that the 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 that the Applicant has some cognitive defects presently. (PCR Tr. p. 301).

Dr. Hall stated that even with the Flynn effect 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). Even with Flynn effect the two scores at age 11 will be 90.68 and at 14 89.36 which is considered average. (PCR Tr. p. 304). Dr. Hall also considered the difficult childhood that the Applicant had. Any type of abuse or a lack of support for homework, can affect the ability of a child to successfully go through school. (PCR Tr. p. 306-307). Which has nothing to do with intellectual functioning. (PCR Tr. p. 307).

When asked about the work he had do at the house when he was married, Applicant explained that his wife did the work inside the house, he did the outside work. He brought money home from work and gave 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).

Dr. Hall believes that even if you took away the third prong the Applicant would still not meet the first two prongs for intellectual disability. (PCR Tr. p. 310). Applicant, though, continues to have a learning disability. (PCR Tr. p. 310). However, looking at all the evidence during the developmental period reveals that the Applicant is not intellectually disabled. (PCR Tr. p. 310).

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

Suggestion to Revisit Atkins

Respondent previously briefed the issue of revisiting *Atkins,* and again urges the Court to consider that position.

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).[10] 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. *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

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[10] 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).

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 by a preponderance of the evidence that he is intellectually disabled. Relief should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 18, 2025
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON Gary Dubose Terry, Applicant, vs. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT Case No. 2022-CP-3200924 **APPLICANT'S POST-HEARING REPLY BRIEF**

Applicant, Gary Dubose Terry, makes the following arguments in reply to Respondent's Post-Hearing Brief submitted on April 18, 2025.[1]

I. Respondent's arguments with respect to Prong 1 are incorrect.

The State alleges that post-conviction relief must be denied because "having failed in the first prong, no further evaluation is necessary." Br. Resp't at 4. This argument is incorrect on three counts. First, Mr. Terry did not fail the first prong—he presented credible evidence of a qualifying IQ score. Second, Respondent's assertion that an IQ score above the qualifying threshold ends this Court's intellectual disability inquiry, Br. Resp't at 11–12, has been squarely refuted by the Supreme Court. Finally, Respondent's analysis of Prong 1 rejects clinical standards that have been recognized as mandatory by both courts and medical experts, including Dr. Hall.

a. Mr. Terry presented credible evidence of an IQ score in the intellectual disability range.

Mr. Terry's score of 74 on the Woodcock-Johnson IV administered by Dr. Decker falls within the qualifying range for a diagnosis of intellectual disability. Dr. Decker opined that, in his professional judgment, Mr. Terry's Woodcock-Johnson score was a valid and reliable measure of

[1] Respondent noted in its brief that it believed proposed orders would be due on May 19, 2025. The Court's scheduling order dated March 20, 2025 directed that proposed orders be submitted 45 days from the date of Respondent's brief. Respondent's brief was submitted on April 18, 2025, which means that the parties would have 45 days from that date, until Monday, June 2, 2025, to submit proposed orders.

Mr. Terry's intellectual functioning. Respondent contends that this score is unreliable because Mr. Terry reported having had shingles at the time that the Woodcock-Johnson was administered. Tr. p. 214; App. Ex. 14 p. 1. However, Dr. Decker testified that he was aware that Mr. Terry had previously had shingles and he nonetheless determined that the Woodcock-Johnson score was a reliable measure of his intellectual ability. Tr. p. 214, 223. Dr. Hall similarly did not dispute Dr. Decker's conclusion that Mr. Terry's Woodcock-Johnson score was valid. Tr. p. 317. Dr. Decker further testified that, in his professional opinion, Mr. Terry was not debilitated by illness during the administration of the Woodcock-Johnson. Tr. p. 217. All told, there is nothing in the record to support Respondent's assertion that Mr. Terry's Woodcock-Johnson score is not valid. Br. Resp't at 3, 15.

b. Multiple courts, including the United States Supreme Court, have established that an IQ score above the ID-qualifying threshold does not end the ID inquiry.

Respondent contends that Mr. Terry cannot be intellectually disabled because he scored outside of the intellectual disability range on two IQ tests in early adolescence. Br. Resp't at 11–12. This assertion is incorrect for three reasons.

First, Respondent's argument is legally incorrect on its face. The United States Supreme Court has explicitly held that even if a defendant has obtained an out-of-range score, courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore v. Texas*, 581 U.S. 1, 15 (2017) (*Moore I*). "Intellectual disability is a condition, not a number," and therefore, Prong 1 must be assessed in light of the totality of relevant evidence, even if an individual has IQ scores outside of the ID range. *Hall v. Florida*, 572 U.S. 701, 722–23 (2014). Consequently, multiple courts have found individuals to be intellectually disabled despite IQ scores in the 80s, or even up to 93. *See* Br. App. at 10 n. 5.

For example, in *Hall*, the defendant was found to have intellectual disability despite scores of 71, 72, 73, and 80, and the Supreme Court found Bobby Moore to be intellectually disabled despite scores ranging from the 60s to 78. *Moore v. Texas*, 586 U.S. 133, 142 (2019) (*Moore II*); *Moore I*, 581 U.S. at 24–25; *Hall*, 572 U.S. at 707. As further discussed in Section II, *infra*, the Supreme Court has held that when a defendant has at least one score in the intellectually disabled range, as Mr. Terry does, courts must continue the *Atkins* analysis and consider evidence of adaptive functioning. *Moore I*, 581 U.S. at 15.

Second, Respondent assumes with no evidence that Mr. Terry's childhood IQ scores are valid and reliable measurements of his intellectual functioning. Br. Resp't at 12. As Dr. Greenspan explained, without any further information regarding how the WISC-Rs were administered, it is impossible to assume anything about whether the test was administered or scored correctly, and thus whether the results are reliable. Tr. pp. 140–41.

Finally, even assuming that Mr. Terry's childhood IQ scores are valid and reliable, Mr. Terry presented evidence of intervening brain injuries during the developmental period that would have caused and accounted for the decline in his cognitive functioning, which Respondent fails to address. Mr. Terry is not required to "show this initial determination was wrong," as Respondent asserts. Br. Resp't at 5. Mr. Terry presented evidence of brain injury in the developmental period that, even assuming the childhood scores were accurate, would have explained the decline in intellectual functioning he demonstrated in adulthood. Tr. pp. 184, 301; App. Ex. 2 p. 8; State Ex. 1 p. 16. In order to demonstrate intellectual disability, an individual is not required to show that the condition originated at birth—only that it was present during the developmental period. AAIDD-11 at 27 ("[E]specially when the etiology of the disability indicates progressive damage (such as malnutrition) or damage related to an acquired disease or injury (such as infection or

traumatic brain injury), the condition may originate later [than birth]." (emphasis added)). Similarly, contrary to Respondent's assertion that Mr. Terry cannot be intellectually disabled because he was not diagnosed with intellectual disability in school, Br. Resp't at 12, neither clinicians nor courts require that intellectual disability be diagnosed in childhood, only that the symptoms originated in the developmental period. *See, e.g.*, AAIDD-11 at 27 ("disability does not necessarily have to have been formally identified but must have originated during the developmental period"). Mr. Terry has made this showing.

c. Respondent's argument rejects clinical guidelines.

Finally, contrary to Respondent's arguments, the Supreme Court has cautioned that judicial determinations of intellectual disability "must be informed by the medical community's diagnostic framework." *Moore I*, 581 U.S. at 12–13 (quoting *Hall*, 572 U.S. at 719). This includes the use of the Flynn Effect. There is broad consensus within the medical and scientific community that the Flynn Effect must be used to correct for norm obsolescence in older IQ tests, *contra* Br. Resp't at 3. AAIDD, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports 123 (12th ed. 2021) (AAIDD-12); AAIDD-11 at 37 ("[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."); Randy G. Floyd et al., "Theories and Measurement of Intelligence," in L.M. Glidden et al. eds., APA HANDBOOK OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: FOUNDATIONS (2021); Tr. pp. 98, 316; State Ex. 1 p. 13. Moreover, Dr. Hall, whom Respondent claims is "credible," Br. Resp't at 17, applied the Flynn Effect herself and recognized that Flynn correction is "supported by the AAIDD." State Ex. 1 p. 13; *contra* Br. Resp't at 15 (ignoring Dr. Hall's application of the Flynn Effect).

II. Respondent's arguments with respect to Prong 2 are incorrect.

Respondent makes a number of incorrect arguments regarding Prong 2 that are contrary to both clinical guidelines and established caselaw. As an initial matter, as discussed in Section I, Respondent's argument that this Court should not consider evidence of adaptive deficits because Respondent does not believe Mr. Terry has satisfied Prong 1 is incorrect. If there is a valid score in the ID range, the court must continue the analysis and assess Prong 2. *Moore I*, 581 U.S. at 15.

Respondent urges this Court to reject Dr. Greenspan's testimony to Mr. Terry's adaptive deficits because Dr. Greenspan did not interview Mr. Terry's teachers or childhood friends, and based his intellectual disability diagnosis on interviews with Mr. Terry's mother and ex-wife. Br. Resp't at 11. However, Respondent neglects to address that Dr. Hall, whom Respondent endorses, also interviewed only those same two people. Tr. pp. 320–21. Dr. Greenspan testified to robust evidence of Mr. Terry's adaptive deficits throughout the developmental period and adulthood, including evidence that he was never able to live fully on his own, struggled in school, could not hold steady employment, and was gullible and easily influenced by others.[2]

Respondent incorrectly asserts that Mr. Terry cannot be intellectually disabled because his academic performance improved when he was placed in "more resource classes" and received "more individual attention." Br. Resp't at 13. This assertion relies on a stereotype of people with intellectual disability—that they can never improve academically. To the contrary, people with intellectual disability will show academic or adaptive improvement when given proper support; in

[2] Respondent's challenges to Dr. Greenspan's credibility illustrate the prejudice to Mr. Terry of litigating this case on the basis of the currently-existing trial record. While testimony is missing throughout the transcript (and Respondent itself notes a typo in a quote from the transcript, Br. Resp't at 13, n.9), much of the "indiscernible" notations in the transcript raised in Applicant's Motion to Reconstruct the Record come from Dr. Greenspan's testimony, voir dire, and arguments and rulings on the admissibility of his testimony. Without a reconstructed record, it will be difficult for any reviewing court to assess the merits of either party's arguments on the experts' credibility.

fact, the AAIDD recommends additional classroom support as a means to improve academic performance in children with intellectual disability. AAIDD-11 at 194–99 (explaining the utility of accommodated educational practices to "strengthen the likelihood for success in learning" in children with intellectual disability).

Further, Respondent improperly relies on several other stereotypes of what people with intellectual disability can or cannot do, such as getting married, performing chores, and working. *Moore I*, 581 U.S. at 17–18; AAIDD-11 at 26, 151 (criticizing the "incorrect stereotypes" that people with intellectual disability can "never have friends, jobs, spouses, or children"). Specifically, Respondent argues that the fact that Mr. Terry was married means that he "was good at manipulating others." Br. Resp't at 13. In addition to the fact that this is simply an unreasonable conclusion to draw from a marriage, it is a classic example of the improper reliance on stereotypes of people with intellectual disability. Respondent also contends that Mr. Terry cannot be intellectually disabled because he "could go [sic] his work as a child with no assistance, and was able to fix things," briefly worked repossessing cars before his cousin stole from him. Br. Resp't at 12. Lastly, Respondent argues that Mr. Terry's history of working "menial jobs," including "at two grocery stores, at a gas station as a mechanic and for a tree service," was solely a product of his low education level[3] rather than a sign of intellectual disability. This argument misses the forest for the trees: The reason Mr. Terry had only a ninth-grade education, and therefore could only obtain jobs at that education level, is that he was too intellectually impaired to progress further—a sign of intellectual disability. Contrary to the Supreme Court's directives, all of these arguments emphasize Mr. Terry's adaptive strengths over his adaptive deficits. *Contra Moore I*, 581 U.S. at

[3] Respondent asserts that Mr. Terry had a tenth-grade education. Mr. Terry in fact dropped out of school before completing the ninth grade, when he was sixteen years old. Tr. pp. 293, 294; State Ex. 1 p. 5.

10, 16 (noting requirements from the AAIDD and DSM that the intellectual disability "inquiry should focus on deficits in adaptive functioning" (internal quotation marks omitted)); AAIDD-11 at 47; DSM-5 at 33, 38.

Respondent further contends that "[a]ny type of abuse or a lack of support for homework can affect the ability of a child to successfully go through school. Which has nothing to do with intellectual functioning." To the contrary, AAIDD and the DSM recognize that childhood abuse and a lack of parental support are risk factors for intellectual disability, and thus bear heavily on both intellectual and adaptive functioning. DSM-5 at 39; AAIDD-11 at 60 (identifying "child abuse and neglect," "impaired parenting," and "inadequate family support," among others, as risk factors for intellectual disability). Similarly, the Supreme Court has recognized that such factors are "cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Moore I*, 581 U.S. at 16–17. Respondent's dismissal of Mr. Terry's abusive childhood, poverty, and lack of parental academic support as "alternative causes" of his adaptive functioning deficits, *id.* at 11, is squarely at odds with both clinical guidelines and the Supreme Court's holdings.

Finally, Respondent argues that Mr. Terry cannot be intellectually disabled because he was not diagnosed with intellectual disability in school. Br. Resp't at 12. To the contrary, neither clinicians nor the courts require that intellectual disability be diagnosed in childhood, only that symptoms originated in the developmental period. AAIDD-11 at 27.

III. *Atkins* is good law, and the Eighth Amendment bars Mr. Terry's execution.

Respondent cites a number of dissenting opinions—but no binding law—in its attempt to convince this Court that *Atkins* should be "revisited." Respondent's argument appears to be that the standard for determining intellectual disability is so unclear that it cannot be followed. To the

contrary, South Carolina courts have routinely and consistently applied the clinical guidelines and South Carolina's statutory definition of intellectual disability to determine whether a capital defendant is intellectually disabled. Following *Atkins*, the Supreme Court of South Carolina defined intellectual disability in *Franklin v. Maynard*, 356 S.C. 276, 278–79, 588 S.E.2d 604, 605 (2003).[4] The Court found the definition previously established by the Legislature in South Carolina Code section 16-3-20(C)(b)(10) complied with the *Atkins* decision to prevent the execution of intellectual disability. *Id.* at 278–79, 588 S.E.2d at 605. Both the Legislature and the South Carolina Supreme Court adopted a definition of intellectual disability consistent with the clinical definitions of the American Psychiatric Association (APA) and the American Association of Intellectual and Developmental Disabilities (AAIDD), which also provide the framework for diagnosing a person with intellectual disability.

Accordingly, circuit courts in South Carolina tasked with determining if a capital defendant is a person with intellectual disability have ably applied the statutory definition by following the instructions and guidelines of the APA and AAIDD. *See, e.g.*, Order Finding Defendant Mentally Retarded in *South Carolina v. Pearson*, 96-GS-32-3338; Order Granting Post-Conviction Relief in *Franklin v. South Carolina*, 96-CP-45-117, Order Granting Post-Conviction Relief in *Elmore v. South Carolina*, 05-CP-24-1205; Order Granting Post-Conviction Relief in *Simmons v. South Carolina*, 05-CP-18-1368; Order Granting Post-Conviction Relief in *Bell v. State*, 03-CP-04-1857; Order Finding Defendant Intellectually Disabled in *State v. Brown*, 2011-GS-30-152. This approach was confirmed by the Supreme Court of the United States in *Hall* and *Moore*, which explicitly require courts determining intellectual disability "must be informed by the medical

[4] In fact, even Chief Justice Roberts, in the *Moore* concurrence Respondent cites, recognized that "it is easy to see" when a state court's intellectual disability analysis fails to give effect to the promise of *Atkins*. *Moore II*, 586 U.S. at 143 (Roberts, C.J., concurring).

community's diagnostic framework." *Moore I*, 581 U.S. at 12–13 (quoting *Hall*, 572 U.S. at 719). The approach has been workable for the courts in South Carolina and does not warrant revisiting *Atkins*.

CONCLUSION

For the foregoing reasons and the reasons stated in Applicant's post-hearing brief, this Court should find that Mr. Terry is a person with intellectual disability and hold that his execution is prohibited by the Eighth Amendment.

[signature block appears on following page]

Respectfully submitted,

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May 2, 2025.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
Gary Dubose Terry, *Applicant*,	)	Case No. 2022-CP-3200924
vs.	)	**CERTIFICATE OF SERVICE**
State of South Carolina, *Respondent*.	)	

The undersigned hereby certifies that a copy of Applicant's Post-Hearing Reply Brief was served via first-class United States mail, postage prepaid, this 2nd day of May 2025, upon the following at the addresses provided in the Attorney Information System:

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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* **RESPONDENT'S PROPOSED ORDER OF DISMISSAL**

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*), c*ert. 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.

[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 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 postconviction 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.,

[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

[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

[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

[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

[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

[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

[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 convince 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]

[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 repo 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.

[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]

[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 _____day of _____ , 2025

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

_____, 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)	
)	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.

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(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 FOR THE ELEVENTH JUDICIAL CIRCUIT
Gary Dubose Terry, Applicant,	)	Case No. 2022-CP-3200924
vs.	)	**MOTION TO ALTER OR AMEND JUDGMENT**
State of South Carolina, Respondent.	)	

Applicant, Gary Dubose Terry, moves this Court pursuant to Rule 59(e), SCRCP, to alter or amend its Order denying post-conviction relief ("Order"), filed on July 1, 2025, and received by counsel for Applicant on July 2, 2025. By signing an order drafted by the Office of the Attorney General without making any substantive changes, this Court has adopted an Order that contains legal errors and factual findings that are not supported by, or are contrary to, the record. Mr. Terry maintains that he is entitled to relief, as described in detail in his post-hearing brief and on reply, on all claims not explicitly waived in his brief. This Motion to Alter or Amend does not waive any claims addressed in Mr. Terry's post-hearing briefing.

PROCEDURAL HISTORY

This matter involves Gary Terry's capital post-conviction relief (PCR) application, which was assigned to this Court by order of the South Carolina Supreme Court. Order, *State v. Terry*, No. 1997-006197 (Apr. 6, 2022). Mr. Terry raised a single claim for relief: that he has intellectual disability and is therefore categorically ineligible for the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). The evidentiary hearing took place on July 17–18, 2024. Counsel for Applicant received the transcript of the evidentiary hearing on November 14, 2024, submitted a formal challenge to the transcript on January 15, 2025, and filed a Motion to Reconstruct the Record on February 18, 2025. On March 20, 2025, this Court denied Applicant's Motion to Reconstruct the Record and set the

schedule for submission of post-hearing briefing and proposed orders by both parties. Applicant filed his post-hearing brief on April 7, 2025, Respondent filed a post-hearing brief on April 18, 2025, and Applicant filed a reply brief on May 2, 2025. Both parties submitted proposed orders on June 2, 2025. This Court signed the State's proposed order denying post-conviction relief on June 27, 2025, and the order was received by counsel for Applicant on July 2, 2025. This motion follows.

ARGUMENT

I. The Court's verbatim adoption of the State's proposed order violates S.C. Code § 17-27-160 and contravenes the directives of the South Carolina Supreme Court.

On March 20, 2025, this Court issued a scheduling order directing both Applicant and Respondent to submit post-hearing briefing and that "[b]oth parties shall have 45 days from the date of the State's Response to submit proposed orders." Order, *Terry v. State*, No. 2022-CP-32000924 (Mar. 20, 2025). Both parties submitted proposed orders on June 2, 2025. On June 27, 2025, this Court signed Respondent's proposed order verbatim.[1]

In capital PCR cases, S.C. Code § 17-27-160(D) requires that "the hearing judge in writing shall make specific findings of fact and state expressly the judge's conclusions of law relating to each issue." S.C. Code § 17-27-80 similarly requires a PCR court to "make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." *See also* Rule

[1] A copy of Respondent's proposed order is attached to this motion as Exhibit A. In comparing the Court's Order with Respondent's proposed order, only the following changes were identified:

- The Court italicized the words "his expert" on page 15.
- The Court changed the word "repo" to "repossession" on page 26.
- The Court removed extra spaces between two sentences on page 28.

These cursory changes cannot support a conclusion that the Court carefully considered each proposed order in light of the record evidence and "render[ed] an independent judicial judgment." *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004).

52(a), SCRCP ("[T]he court shall find the facts specially and state separately its conclusions of law thereon."). Although it may be appropriate in non-capital cases for the prevailing party to draft a proposed order,[2] the Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This admonition is consistent with South Carolina law, which requires that courts, not parties, perform the critical function of objectively assessing the evidence and law in PCR cases, and formulating even-handed conclusions based on the exercise of sound, independent judgment.[3] *See* S.C. Code §17-27-160(D).

Since *Hall*, the Supreme Court has remanded three capital cases for orders that comply with sections 17-27-80 and 17-27-160. *Inman v. State*, 439 S.C. 97, 100, 886 S.E.2d 204, 206 (2023) ("the PCR court erred in failing to address Inman's remaining PCR claims as required by S.C. Code Ann. § 17-27-80); *Simmons v. State*, 416 S.C. at 592-93, 788 S.E.2d at 225 (holding the PCR court erred in failing to make specific findings of fact and rulings of law on each issue raised by the petitioner despite granting PCR on one issue); *Lindsey v. State*, No. 2012-206087 (S.C. Sept. 30, 2014) (vacating order drafted by the State due to "the frequency and severity of the

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[2] *See Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019) (outlining the procedure for collaborative "preparation and finalization of a [non-capital] PCR order").

[3] The Supreme Court of South Carolina's disapproval of this practice is consistent with a nationwide consensus. Adoption of a party's proposed findings is widely condemned because it represents "an abandonment of the duty and the trust that has been placed in the judge," *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 n.4 (1964) (quoting Judge J. Skelly Wright in *Seminars for Newly Appointed United States District Judges* 166 (1963)), and leads instead to judgments that are self-evidently "not the original product of a disinterested mind." *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1284 (7th Cir. 1977); *see also, e.g., Shaw v. Martin*, 733 F.2d 304, 309 n.7 (4th Cir. 1984) ("The adoption of one party's proposed findings and conclusions is a practice with which we have expressed disapproval on a number of occasions.").

drafting errors in the Order of Dismissal" and reminding of the "Court's admonishments to PCR judges in *Pruitt* [*v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992)]"). Thus, this Court should draft its own order ruling on his claims for post-conviction relief rather than relying on a party to draft proposed findings of fact and/or conclusions of law.

II. The Order adopts incorrect applications of the law of *Atkins* and its progeny, as well as the clinical guidelines governing intellectual disability diagnosis.

a. Courts may not reject the clinical guidelines of the medical community in making *Atkins* determinations.

As an initial matter, the Order mischaracterizes the role that clinical standards must play in the Court's *Atkins* determination. Order at 10 ("[T]he [United States Supreme] Court has been equally clear that clinical opinions neither dominate nor control the decision to be made under the Eighth Amendment." (citing *Hall v. Florida*, 572 U.S. 701, 721 (2014)), 11, 12 n.5. This ignores the Court's explicit directive that a court's discretion to enforce the ban on executing people with intellectual disability is "not unfettered" and "must be informed by the medical community's diagnostic framework." *Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (quoting *Hall*, 572 U.S. at 719).

Further, the Order's reliance on the dissent in *Ex parte Segundo* (by a lone judge, from a *per curiam* opinion granting *Atkins* relief) is misplaced. Order at 12 n.5 (quoting *Ex parte Segundo*, 663 S.W.3d 705, 712–13 (Tex. Crim. App. 2022) (Newell, J., dissenting)). This dissent, which the Court cites to support the proposition that "[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*," *id.*, is neither a binding nor an accurate statement of the law of *Atkins* and its progeny. To the contrary, the Supreme Court has consistently established that the *Atkins* inquiry must be informed by medical guidelines and consensus,

including the change and evolution of that consensus over time, and courts may not disregard current medical standards in favor of older clinical standards or lay stereotypes about intellectually disabled people. *Moore*, 581 U.S. at 13, 18–20; PCR Hrg. Tr. pp. 72–74 (stereotypes about intellectual disability frequently result in mistakes in diagnosis), 180–82 (noting common stereotypes of people with intellectual disability).

b. Prong 1: Intellectual Functioning

The Order makes a number of errors in its analysis of the first prong of intellectual disability, intellectual functioning. The Order gives "no weight" to the score of 74 that Mr. Terry obtained on the Woodcock-Johnson IV administered by Dr. Scott Decker because Mr. Terry reported having had shingles at the time that the test was administered. Order at 27. However, Dr. Decker testified that he was aware that Mr. Terry had previously had shingles and he nonetheless determined that the Woodcock-Johnson score was a reliable measure of his intellectual ability. Tr. p. 214, 223. Dr. Hall similarly did not dispute Dr. Decker's conclusion that Mr. Terry's Woodcock-Johnson score was valid, and treated the Woodcock-Johnson score as valid in her analysis. Tr. p. 317. Dr. Decker further testified that, in his professional opinion, Mr. Terry was not debilitated by illness during the administration of the Woodcock-Johnson. Tr. p. 217. All told, there is nothing in the record to support a finding that Mr. Terry's Woodcock-Johnson score is not a valid estimate of his intellectual ability.

Further, the Order's analysis of Mr. Terry's childhood IQ scores is flawed, and it fails to account for the effects of Mr. Terry's brain injuries on his intellectual functioning. The Order assumes with no evidence that Mr. Terry's childhood IQ scores are valid and reliable measurements of his intellectual abilities. Order at 23 ("[N]o evidence demonstrates that [the childhood] tests were not properly given or that the scores are not valid."). As Dr. Greenspan

explained, without any further information regarding how the WISC-Rs were administered, it is impossible to assume anything about whether the test was administered or scored correctly, and thus whether the results are reliable. Tr. pp. 140–41.

Even assuming that Mr. Terry's childhood IQ scores are valid and reliable, Mr. Terry presented evidence of intervening brain injuries during the developmental period that would have caused and accounted for the decline in his cognitive functioning, which the Order fails to address. Tr. pp. 184, 301; App. Ex. 2 p. 8; State Ex. 1 p. 16. In order to demonstrate intellectual disability, an individual is not required to show that the condition originated at birth—only that it was present during the developmental period. AAIDD-11 at 27 ("[E]specially when the etiology of the disability indicates progressive damage (such as malnutrition) or damage related to an acquired disease or injury (such as infection or **traumatic brain injury**), the condition may originate later [than birth]." (emphasis added)). The Order finds Dr. Greenspan unreliable on this point because Mr. Terry's childhood IQ scores were not included in Dr. Greenspan's report, Order at 23, 24, but ignores Dr. Greenspan's testimony that he considered those scores and determined that, even if the scores were accurate, Mr. Terry's brain injuries in the developmental period would explain his decline in intellectual functioning. Tr. p. 184; *see also* Tr. p. 301; App. Ex. 2 p. 8; State Ex. 1 p. 16.

Finally, the clinical consensus on intellectual disability and intelligence testing includes the consideration of the Flynn Effect. The Order finds that the "Flynn effect is [not] generally accepted or even reasonable or necessary to apply." Order at 30 n.15. To the contrary, there is broad consensus within the medical and scientific community that the Flynn Effect must be used to correct for norm obsolescence in older IQ tests, *contra* Br. Resp't at 3. AAIDD, Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports 123 (12th ed. 2021)

(AAIDD-12); AAIDD-11 at 37 ("[B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score."); Randy G. Floyd et al., "Theories and Measurement of Intelligence," in L.M. Glidden et al. eds., APA HANDBOOK OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES: FOUNDATIONS (2021); Tr. pp. 98, 316; State Ex. 1 p. 13. Moreover, Dr. Hall, whom the Order finds "credible," Order at 31, applied the Flynn Effect herself and recognized that Flynn correction is "supported by the AAIDD." State Ex. 1 p. 13; *compare* Order at 28 (ignoring Dr. Hall's application of the Flynn Effect). Further, in addressing *Atkins* issues, South Carolina courts have consistently relied on the clinical definitions, instructions, and guidelines of the APA and AAIDD, including application of the Flynn Effect, in compliance with the Supreme Court's instruction in *Hall* and *Moore*. *See, e.g.*, Order Finding Defendant Mentally Retarded in *South Carolina v. Pearson*, 96-GS-32-3338; Order Granting Post-Conviction Relief in *Bell v. State*, 03-CP-04-1857; Order Finding Defendant Intellectually Disabled in *State v. Brown*, 2011-GS-30-1523.

c. Prong 2: Adaptive Deficits

The Court's analysis of the second prong of intellectual disability, adaptive behavior, is similarly replete with errors. Specifically, the Court relies on stereotypes of intellectual disability, mischaracterizations of hearing testimony, and rejection of clinical guidelines to reach the conclusion that Mr. Terry does not satisfy Prong 2.

i. The Order improperly relies on stereotypes of people with intellectual disability.

In its analysis of Mr. Terry's adaptive behavior, the Order improperly relies on inaccurate stereotypes of what people with intellectual disability can and cannot do, such as getting married, performing chores, showing academic improvement, and working. Both the AAIDD and the

United States Supreme Court have cautioned against reliance on such stereotypes. *Moore I*, 581 U.S. at 17–18; AAIDD-11 at 151 (criticizing the "incorrect stereotypes" that people with intellectual disability can "never have friends, jobs, spouses, or children"). First, the Order notes, as support for its conclusion that Mr. Terry is not intellectually disabled, that "once Applicant had more resource classes his grades improved." Order at 25. This assertion relies on a stereotype of people with intellectual disability—that they can never improve academically. To the contrary, people with intellectual disability will show academic or adaptive improvement when given proper support; in fact, the AAIDD recommends additional classroom support as a means to improve academic performance in children with intellectual disability. AAIDD-11 at 194–99 (explaining the utility of accommodated educational practices to "strengthen the likelihood for success in learning" in children with intellectual disability).

Further, the Court finds that the fact that Mr. Terry was married means that he "was good at manipulating others." Order at 25. In addition to the fact that this is simply an unreasonable conclusion to draw from a marriage, it is a classic example of the improper reliance on the stereotype that people with intellectual disability can never get married. *Contra* AAIDD-11 at 151 (criticizing the stereotype that people with intellectual disability cannot have spouses). The Order further asserts that Mr. Terry cannot be intellectually disabled because he "could do his work as a child with no assistance, and was able to fix things," and briefly worked repossessing cars before his cousin stole from him, relying on the incorrect stereotypes that people with intellectual disability cannot work or learn skills. Order at 25, 26. The Order also ignores the record evidence that Mr. Terry was unable to maintain that business by himself: Louanne was the one who in fact took care of all the paperwork and financial work for the business, while Mr. Terry's role was limited to the straightforward task of picking up the cars he was told to repossess. Tr. pp. 109,

110, 262, 326; State's Ex. 1 p. 7. As Dr. Greenspan explained, Mr. Terry would complete that work at night, "when he didn't really have to interact with people," PCR Hrg. Tr. p. 182, and Mr. Terry admitted in his interview with Dr. Hall and Dr. Davis that the business "would have been a big mess if I tried to do . . . the taxes." Tr. p. 262. Even with Louanne's help, the repossessing business ended in failure when Mr. Terry made the mistake of trusting his cousin to run the business and his cousin stole from him—demonstrating gullibility, another indicator of intellectual disability. Tr. pp. 155, 183; State's Ex. 1 p. 7; AAIDD-12 at 30.

Lastly, the Order dismisses Mr. Terry's history of working "menial jobs," including "at two grocery stores, at a gas station as a mechanic and for a tree service," as solely a product of his low education level[4] rather than a sign of intellectual disability. Order at 26. This argument misses the forest for the trees: The reason Mr. Terry had only a ninth-grade education, and therefore could only obtain jobs at that education level, is that he was too intellectually impaired to progress further—a sign of intellectual disability. Contrary to the Supreme Court's directives, the Order emphasizes Mr. Terry's adaptive strengths over his adaptive deficits. *Contra Moore I*, 581 U.S. at 10, 16 (noting requirements from the AAIDD and DSM that the intellectual disability "inquiry should focus on deficits in adaptive functioning" (internal quotation marks omitted)); AAIDD-11 at 47; DSM-5 at 33, 38.

ii. The Order mischaracterizes the testimony of Dr. Hall.

With respect to Dr. Hall, the Court found that "Dr. Hall's testimony showed that she was not influenced by stereotypes either for or against intellectual disability." Order at 28–29. The record clearly demonstrates that this is not accurate. The record shows that Dr. Hall relied on a

[4] The Order asserts that Mr. Terry had a tenth-grade education. Order at 26. Mr. Terry in fact dropped out of school before completing the ninth grade, when he was sixteen years old. Tr. pp. 293, 294; State Ex. 1 p. 5.

number of stereotypes of people with intellectual disability in reaching her conclusions. Specifically, Dr. Hall concluded that Mr. Terry could not have deficits in adaptive behavior because he engaged in romantic relationships, was sporadically employed, could clean, cook, and do laundry "on occasion," performed yard work, and completed household chores as a child. PCR Hrg. Tr. pp. 291–92, 309, 310; State Ex. 1 pp. 15–16. None of these behaviors exclude Mr. Terry from a diagnosis of intellectual disability. *See* Applicant's Post-Hearing Brief at 21–22.

In addition, the Order mischaracterizes Dr. Hall as having testified that Mr. Terry was never placed in special education. Order at 29. However, to the contrary, Dr. Hall testified that her review of Mr. Terry's school records indicated that Mr. Terry was placed in special education classes to address deficits in reading, math, and spelling. Tr. pp. 296, 324–25. Dr. Greenspan similarly testified that Mr. Terry was placed in special education classes. Tr. p. 101.

Further, the Order notes that "Dr. Hall questioned Applicant for examples and did not leave the information at surface or face value." Order at 31–32. However, the record demonstrates that Dr. Hall credited much of what Mr. Terry told her without confirmation, and sometimes even credited Mr. Terry's self-report over statements from Louanne and Patsy that contradicted it. *See, e.g.*, Tr. pp. 326–29. While the Court faults Dr. Greenspan because he "admitted never speaking with Applicant's teachers, childhood friends, or any of his previous doctors," Order at 23, the Order ignores the fact that Dr. Hall did not speak to any of these people either, and offers no explanation for why that fact should render Dr. Greenspan's testimony incredible but have no bearing on Dr. Hall's.

Dr. Hall's reliance on Mr. Terry's self-report is particularly problematic in light of the well-recognized fact that individuals with intellectual disability attempt to hide behind a "cloak of competence," presenting themselves as more capable than they actually are. *United States v.*

Hardy, 762 F. Supp. 2d 849, 854–55 (E.D. La. 2010) (noting that individuals with intellectual disability will "mask their deficits and attempt to look more able and typical than they actually are"); AAIDD-11 at 51–52. Dr. Hall herself recognized the dangers of relying on the self-report of someone suspected of having an intellectual disability, who would be likely to try to hide behind the cloak of competence to mask their deficits or exaggerate their strengths, including by telling someone they were capable of doing something they could not do. Tr. p. 322.

iii. The Order improperly dismisses risk factors for intellectual disability.

The Order finds that Mr. Terry's childhood abuse and lack of family support "has nothing to do with intellectual functioning." Order at 30. To the contrary, AAIDD and the DSM recognize that childhood abuse and a lack of parental support are risk factors for intellectual disability, and thus bear heavily on both intellectual and adaptive functioning. DSM-5 at 39; AAIDD-11 at 60 (identifying "child abuse and neglect," "impaired parenting," and "inadequate family support," among others, as risk factors for intellectual disability). Similarly, the Supreme Court has recognized that such factors are "cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Moore I*, 581 U.S. at 16–17.

d. Prong 3: Onset During the Developmental Period

Finally, the Court incorrectly applies the requirements of Prong 3, relying on the fact that Mr. Terry was not diagnosed with intellectual disability while in school. Order at 24. Neither clinicians nor courts require that intellectual disability be diagnosed in childhood, only that the symptoms originated in the developmental period. *See, e.g.*, AAIDD-11 at 27 ("disability does not necessarily have to have been formally identified but must have originated during the developmental period"). In fact, as Dr. Greenspan testified, at the time that Mr. Terry was growing up, schools were loathe to diagnose a student with intellectual disability because of the stigma

associated with the diagnosis. *See* Tr. p. 183. Instead, students with intellectual disability were diagnosed with learning disabilities, as Mr. Terry was. *Id.* (explaining that a learning disability is considered a more "socially acceptable" diagnosis). Further, while the Court recognizes that Mr. Terry "was given a maturity scale test in fifth grade," the Order ignores that Mr. Terry scored in the intellectually disabled range on that test, the Vineland Social Maturity Scale. Tr. pp. 112, 321.

III. The Court improperly relies on trial testimony without consideration of its context.

The Order relies heavily on testimony from Mr. Terry's 1997 trial, which took place before *Atkins* was decided and "considers this information very persuasive." Order at 15–22. The Order's reliance on Mr. Terry's trial testimony is problematic for a number of reasons. First, the fact that Terry's trial counsel elicited testimony that Terry tested in what was then described as the "low average range" of intellectual functioning is not inconsistent with a claim that Terry is a person with intellectual disability. In 1997, it was not uncommon to describe a person with an obtained IQ score (i.e., an IQ score that was unadjusted for standard error of measurement or for the Flynn Effect) in the low 70s as being of low-average or "borderline intellectual functioning." *E.g.*, J. David Smith, *Mental Retardation as Educational Construct: Time for a New Shared View?*, 32 ED. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 167, 170 (1997) (noting that the 1992 AAMR revision called for a score of "approximately 70 to 75 or below" and that the 1992 revision eliminated the different categories of what was then known as mental retardation (internal quotation marks omitted)). Without the raw data or at least a test score, it is not possible to know whether the 1997 trial testimony was consistent or inconsistent with Terry's present claim that he is a person with intellectual disability.

Moreover, Mr. Terry's trial took place in a legal era in which a diagnosis of intellectual disability carried a fundamentally different weight than it does today. Terry's trial was conducted