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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

*On Petition for Writ of Certiorari to Sumter County
Court of Common Pleas (Post-Conviction Relief)
The Honorable William P. Keesley, Circuit Court Judge*

CAPITAL CASE

Appellate Case No. 2026-000115

BOBBY WAYNE STONE, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the PCR court err in using the Flynn Effect to lower Bobby Wayne Stone's IQ scores, when there is no authority in South Carolina law supporting the practice and courts nationwide have been divided about whether and how the Flynn Effect should be used in evaluating a claim of ineligibility for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002)?

II.

Did the PCR court err in finding that Stone met his burden of proving intellectual disability by a preponderance of the evidence when only one of Stone's unadjusted IQ scores could even conceivably be taken as an indication his IQ might be below 70, and three other scores indicated that it likely was not? If so, how should a court weigh multiple scores in the context of an *Atkins* evaluation?

III.

Should *Atkins*, and by extension this Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), be revisited to either (a) clarify the class of individuals who are ineligible for the death penalty under any national consensus; or (b) reconsider whether the exemption is truly supported by a national consensus?

IV.

Should this Court's practice of allowing successive actions on free-standing *Atkins* claims be revisited and curtailed?

STATEMENT OF THE CASE

A little more than thirty years ago, Bobby Wayne Stone shot and killed Sergeant Charles Kubala of the Sumter Police Department as Sgt. Kubala was responding to a call reporting gunshots in Ruth Griffith's back yard. *See State v. Stone*, 350 S.C. 442, 444, 567 S.E.2d 244, 245 (2002) (*Stone I*). Kubala suffered gunshot wounds to his right ear and neck, and "died at the scene." *Id.* Stone was convicted of murder, first degree burglary, and a weapons possession violation. *Id.* at 445, 567 S.E.2d at 245. Stone received a death sentence for the murder.

On appeal, this Court reversed Stone's sentence because of three errors by the trial court on sentencing not relevant to this appeal. *See generally Stone I*, 350 S.C. at 448–52, 567 S.E.2d at 247–49. The resentencing jury likewise sentenced Stone to death. *See State v. Stone*, 376 S.C. 32, 35, 655 S.E.2d 487, 488 (2007) (*Stone II*). On appeal, this Court affirmed Stone's second sentence because he had not preserved an alleged error by the resentencing court. *Id.* at 35–36, 567 S.E. 2d at 488–89.

Stone's application for PCR was denied. *See Stone v. State*, 419 S.C. 370, 379, 798 S.E.2d 561, 566 (2017) (*Stone III*). After granting certiorari on questions regarding victim impact evidence, Stone's potential brain damage, and the defense's theory of the case, this Court affirmed the PCR court's denial of relief. *Id.* This Court observed that "Stone does in fact suffer from organic brain damage and significant intellectual impairment," *id.* at 395, 798 S.E.2d at 574, but found that his counsel had not failed to meet "an objective standard of reasonableness" in dealing with this evidence, *id.* at 403–04, 798 S.E.2d at 579. By then, around 21 years had passed since the killing of Sgt. Kubala.

In 2018, Stone filed another application for post-conviction relief; Stone argued in part that he was intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S.

304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) and its progeny, as well as this Court’s decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). (App. pp. 370–74). The *Atkins* PCR court dismissed the other grounds in the second PCR, but allowed Stone to move forward with his claim that he has an intellectual disability. (App. pp. 576–91).

By order dated July 3, filed July 9, 2019, the *Atkins* PCR Court directed the South Carolina Department of Disabilities and Special Needs to conduct an *Atkins* evaluation. (App. pp. 594–604). Subsequently, this Court, along with counsel for the parties, received the DDSN report by the court’s expert, Dr. Alicia V. Hall, Ph.D., on December 2, 2022. (App. pp. 965–79).

Dr. Hall acknowledged in her report that “Mr. Stone’s case presents a complexity that does not lend it to an obvious decision.” (App. p. 976). Ultimately, she concluded that Stone “appears to meet criteria on the first prong” for intellectual disability under South Carolina law, and that he “has met the second prong” as well. (App. p. 976) Dr. Hall deferred to the PCR Court to make a final determination, but shared her “opinion, based on the totality of the data,” that Stone met the criteria under S.C. Code § 16-3-20 (C)(b)(10) (2003)—as the statute says, “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” (App. p. 976; § 16-3-20 (C)(b)(10)).

The PCR court held an evidentiary hearing regarding Stone’s claim on July 30–31, 2024. Stone attended, along with his counsel Rosland Major, Esq., and Charles Grose, Esq. The State of was represented by Melody J. Brown, Senior Assistant Deputy Attorney General, with Assistant Attorneys General Tommy Evans, Jr., and R. Brandon Larrabee. The Court heard from four experts in the mental health field, and a former school psychologist in a school district where Stone attended.

The *Atkins* PCR Court first heard from Stone’s expert, Dr. Sarah Boyd, who was found qualified as an expert in the psychology of intellectual disability. (App. p. 36). She testified that she gave Stone an IQ test to assist in the diagnosis of intellectual disability. (App. p. 132). In Stone’s IQ score on that test was 79. (App. p. 138). Dr. Boyd testified that, according to records, Stone’s initial IQ test score was 86. (App. p. 137). This test was given before he was 10 years old. Dr. Boyd testified that this test was “possibly tainted” (App. p. 137–38). A second test more than a year later showed he scored 78. (App. p. 138; p. 853). At the age of 14, Stone was once again given an IQ test, which produced a score within a range of 69–75. (App. p. 174, 853).

Dr. Hall also testified, saying she had applied the “Flynn Effect”¹ to Stone’s scores, though she testified that it was “best practice” in *Atkins* cases, but that questions remain about its application in “clinical settings.” (App. p. 281). Further, Dr. Hall conceded that when the American Association on Intellectual and Developmental Disabilities manual references application of the Flynn Effect, it also acknowledges the limitations and lack of conclusion. (App. p. 282).

The State called Dr. Michael Vitacco who was found qualified as an expert in the field of forensic psychology. (App. p. 311). Dr. Vitacco considered the methodology of the forensic psychologists who found Stone intellectually disabled. (App. p. 311–12). He expressed concerns with some of the methodology used to diagnose Stone. (App. pp. 312–20).

Dr. Kimberly Kruse also testified. Dr. Kruse was found qualified as an expert in the field of forensic psychology. (App. p. 328). Dr. Kruse was asked to provide an opinion on intellectual functioning. (App. p. 328–29).

¹ The Fourth Circuit explained that the theory behind the Flynn Effect “posits that IQ scores rise over time and that IQ tests that are not “re-normed” to adjust for rising IQ levels will overstate a testee’s IQ.” *Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005).

Dr. Kruse testified that Applicant had a non-verbal brain disorder. (App. p. 329–30). This affects the non-verbal aspects of learning, or anything that does not involve language vocabulary. (App. p. 330). It can implicate the ability to “see the big picture or the whole of something versus the details.” (App. p. 330). Kruse testified that a non-verbal learning disorder is different than an intellectual disability. (App. p. 330).

Dr. Kruse also testified about Applicant’s previous IQ scores as found in his school records. (App. p. 331). Stone’s scores dropped between age 11 and age 14; Dr. Kruse attributed this to Stone’s difficulty in the educational environment caused by Stone’s difficult home setting. (App. p. 332).

In Dr. Kruse’s opinion Stone had a learning disability and did not have an intellectual developmental disorder. (App. p. 335). Moreover, even applying confidence intervals, his scores still fall above the cut off. (App. p. 335).

As for the Flynn Effect, Dr. Kruse testified that it could be used on the first test given to Stone. (App. pp. 337–38). Dr. Kruse testified that there was no reason to apply the Flynn Effect to his second test, and in that case the score was well above the cut off for intellectual developmental disorder. (App. pp. 337–38). In her opinion, Stone did not meet the criteria for being intellectually disabled. (App. p. 338).

Finally, the State called Dr. Elaine Harris to testify. Dr. Harris was a school psychologist in Sumter School District 17, where Applicant attended school. (App. p. 330). Dr. Harris began her employment in 1977 (App. p. 353). She retired as a psychologist in 2015. (App. p. 361). Dr. Harris administered one of the IQ tests to Applicant during these school years. (App. p. 355). Dr. Harris testified that at the time of testing, as the law was interpreted, Applicant qualified as being in the educable mentally handicapped range because of his full-scale IQ, even though Applicant had

some areas in the average range. (App. pp. 359–60). Dr. Harris stated that since that time, the definition for being intellectually disabled had been refined. Dr. Harris stated during her testimony, “In this particular instance he would not have been found as ID.” (App. p. 362).

The PCR court granted relief. (App. p. 1–23). In its order, the court lowered some of Stone’s IQ scores to account for the Flynn Effect as part of its consideration of whether Stone met the intellectual functioning prong of the *Atkins* review. (App. pp. 11–12). The court later denied the State’s motion to alter or amend its judgment. (App. pp. 832–33).

STANDARD OF REVIEW

Certiorari Review

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR.

Atkins Claims

The lower court’s “ruling regarding an *Atkins* determination will be upheld on appeal if supported by the evidence and not against its preponderance.” *State v. Blackwell*, 420 S.C. 127, 143, 801 S.E.2d 713, 722 (2017). Where the ruling “is unsupported by evidence or controlled by an error of law,” the ruling should be reversed. *Id.*, at 136, 801 S.E.2d at 722.

ARGUMENT

Courts have struggled to apply the United States Supreme Court’s decision in *Atkins v. Virginia* and the cases that follow it for years now. See *Hamm v. Smith*, 608 U.S. —, —, 146 S. Ct. 1251, 1264 (2026) (Thomas, J., dissenting from dismissal of certiorari as improvidently granted) (contending that “*Atkins* has bred only confusion and absurdity”); *id.* at —, 146 S. Ct. at 1285 (Alito, J., dissenting from dismissal of certiorari as improvidently granted) (arguing the Court “should have used this case to bring clarity to our *Atkins* doctrine”); *Moore v. Texas*, 586 U.S. 133, 143, 139 S. Ct. 666, 672 (2019) (Roberts, C.J., concurring) (holding that the Court’s instructions to lower courts in a previous decision “lacked clarity”). Stone’s case highlights two questions for this Court regarding how South Carolina courts should consider claims of intellectual disability under *Atkins*. First, whether courts should use the “Flynn Effect” to lower a defendant’s IQ when making an *Atkins* determination; and second, how courts should consider multiple IQ scores under the intellectual functioning prong of *Atkins*.

The Law Under Atkins and Its Progeny

Without unnecessarily belaboring the issue, a brief recap of the United States Supreme Court’s journey on intellectual disabilities and the death penalty will help in focusing the issues.

The roots of the Court’s intellectual disability jurisprudence took hold in *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). In that case, a splintered Court found that no national consensus had developed to bar the execution of people with intellectual disabilities. *Id.* at 334, 109 S. Ct. at 2955. But a different majority—both included Justice O’Connor—found that jurors had to be informed that they could consider intellectual disability as a mitigating factor in determining the sentence. *Id.* at 328, 109 S. Ct. at 2952.

The Court changed course in *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002). There, the majority found that in the 13 years following *Penry*, “a national consensus has developed against” allowing people with intellectual disabilities to be sentenced to death. *Id.* at 316, 122 S. Ct. at 2249. The Court appeared to peg the definition of intellectual disability as somewhere around 70 or perhaps 75. *See Atkins v. Virginia*, 536 U.S. at 309 n.3, 122 S. Ct. at 2245 n.3; *id.* at 309 n. 5, 122 S. Ct. at 2245 n.3.² But the consensus essentially ended there. “Not 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.” *Id.* at 317, 122 S. Ct. at 2250. As a result, the Court found, the states should determine how to make sure that defendants with intellectually disabilities were not executed. *Id.*

The next major case the Court considered regarding intellectual disability was *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014).³ There, the majority cautioned against rigid distinctions based on IQ scores, in part because of the “standard error of measurement” included in each score. *See id.* at 712–13, 134 S. Ct. at 1995. While rejecting state laws that established an IQ of 70 as a strict cutoff, the Court also noted that “the analysis of multiple

² *See Atkins*, 536 U.S. at 309 n. 3 (observing “‘Mild’ mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70.”); *id.* at 309 n. 5 (“an IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.”); *see also* American Association on Intellectual and Developmental Disabilities (“the AAIDD”), *The Death Penalty and Intellectual Disability* (2014) (“Variability of IQ Test Scores” by Stephen Greenspan and J. Gregory Olley, describing the “conventional upper limit of 70–75”); PCR testimony of Dr. Alicia Hall (testifying that “significant cognitive deficits or intellectual deficits” equates to levels that are “at least two standard deviations below th[e] mean of 100, which would be 70 or below”; however, the level “can actually go up to about 75 and still meet criteria for intellectual disability because their adaptive functioning is so impaired”) (App. p. 209).

³ In between, the Court decided in *Tennard v. Dretke* that a defendant did not have to show a “nexus” between the intellectual disability and the criminal act to be protected by *Atkins*. 542 U.S. 274, 287, 124 S. Ct. 2562, 2571–2572, 159 L. Ed. 2d 384 (2004).

IQ scores jointly is a complicated endeavor” and cautioned that “even a consistent score is not conclusive evidence of intellectual functioning.” *Id.* at 714, 134 S. Ct. at 1995–96. Even so, the court found, an IQ score was still “of considerable significance” to the evaluation. *Id.* at 723, 134 S. Ct. at 2001. As a result, the court held that “when a defendant's IQ test score falls within the test’s acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *Id.*

In 2017, the High Court took up *Moore v. Texas*, 581 U.S. 1, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (*Moore I*). Here, the Court cast *Hall* as holding that “a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70.” *Moore I*, 581 U.S. at 12, 137 S. Ct. at 1048. While finding that its previous decisions didn’t “demand adherence to everything stated in the latest medical guide,” the Court still held that those decisions did not “license disregard of current medical standards.” *Id.* at 13, 137 S. Ct. at 1049. In dissent, Chief Justice Roberts argued in a footnote that the precise issue of how to deal with multiple scores was still open, and that a phrase in the majority opinion “cannot be read to call into question the approach of States that would not treat a single IQ score as dispositive evidence where the prisoner presented additional higher scores.” *Id.* at 34 n.1, 137 S. Ct. at 1061 n.1.⁴

In South Carolina, an *Atkins* inquiry is guided by this Court’s decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Handed down shortly after *Atkins*, the decision laid out the standard state courts must use in evaluating claims that a defendant has an intellectual disability and, as a result, is not eligible for the death penalty. The Court first declined to define

⁴ In *Moore II*, the Court again rejected the Texas courts’ approach, finding that the new holding was mostly a rehash of the decision the Court had found unacceptable in *Moore I*. 586 U.S. 133, 139 U.S. 666, 203 L. Ed. 2d 1 (2019). Chief Justice Roberts concurred while noting that the instructions the Court issued to lower courts in *Moore I* still “lacked clarity.” *Id.* at 143, 139 U.S. at 672–73.

intellectual disability differently than the General Assembly had. *See id.* at 278–79, 588 S.E.2d at 605. The Court then explained the burden of proof for an Atkins determination. “The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence.” *Id.* at 279, 588 S.E.2d at 606.

I. This Court should grant the petition for writ of certiorari because the PCR court erred when it used the Flynn Effect to lower Stone’s IQ scores, when there is no authority in South Carolina law supporting the practice and courts nationwide have been divided about whether and how to use the Flynn Effect in Atkins evaluations.

In finding that Stone has an intellectual disability and is ineligible for the death penalty, the PCR court artificially lowered Stone’s IQ scores by applying the Flynn Effect—then could only find one that falls into the range of intellectual disability. This is a truncated and unreliable view. This Court should grant the petition for writ of certiorari and clarify that there is not sufficient consensus for South Carolina courts to apply the Flynn Effect in this way.

Only this Court can definitively establish whether South Carolina courts should use the Flynn Effect alter IQ scores when considering *Atkins* petitions. As mentioned in the PCR court’s order, at least three South Carolina circuit courts have already considered the Flynn Effect in similar cases. (App. 10). So far, this Court has not weighed in on the Flynn Effect.⁵ This case provides that chance.

The United States Supreme Court has acknowledged the existence of the Flynn Effect—but not in a favorable way. The majority appears at best ambivalent, calling it “the so-called Flynn Effect—a controversial theory involving the inflation of IQ scores over time[.]” *Dunn v. Reeves*,

⁵ The Court recently discussed the Flynn Effect briefly. *See Aleksey v. State*, — S.C. —, — n.5, — S.E.2d —, — n.5, 2026 WL 1408902, at *2 n.5 (S.C. May 20, 2026). In *Aleksey*, this Court did not determine whether the Flynn Effect could be applied because it found the alterations would not have been dispositive.

594 U.S. 731, 736, 141 S. Ct. 2405, 2408, 210 L. Ed. 2d 812 (2021) (per curiam). In its decision, the Supreme Court also noted that the Alabama Court of Criminal Appeals had “specifically addressed” one expert’s “reliance on the Flynn Effect, reiterating that this approach ‘has not been accepted as scientifically valid by all courts’ and was ‘not settled in the psychological community.’” *Id.* at 736–37, 141 S. Ct. at 2409 (quoting *Reeves v. State*, 226 So.3d 711, 744 (Ala. Crim. App. 2016)).

The High Court is hardly alone in its skepticism, at least when it comes to applying the Flynn Effect. One justice of the Louisiana Supreme Court argued that while the effect is a “widely accepted” observation, how to use it in court is a different matter. *State v. Dunn*, 41 So. 3d 454, 477 (La. 2010) (Knoll, J., additionally concurring).

What is not widely accepted is whether the Flynn effect should be applied to *individual IQ* scores. As noted above, Flynn observed a population wide increase of approximately 0.3 points per year. It does not follow that the IQ score of every single individual member of the population increases by the same amount.

Id. Justice Knoll also observed that “there is some evidence the application of Flynn’s formula to individual scores is limited primarily to defense psychologists in capital cases” *Id.* at 478. *See also United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360, 370 (D.P.R. 2013) (“The Flynn Effect is sufficiently controversial as to be unreliable.”). More to the point, at least one federal appeals court has specifically rejected the suggestion that *Hall* requires using the Flynn Effect. *See Postelle v. Carpenter*, 901 F.3d 1202, 1212 (10th Cir. 2018) (“*Hall*, like *Atkins*, ‘says nothing about application of the Flynn Effect to IQ scores in evaluating a defendant’s intellectual disability.’” (quoting *Smith v. Duckworth*, 824 F.3d 1233, 1246 (10th Cir. 2016))).⁶

⁶ While the Fourth Circuit allows the Flynn Effect to be used, it doesn’t always require it to be applied as it was here. *See Walker v. True*, 399 F.3d 315 (4th Cir. 2005). In *Walker*, the court faulted a district court for rejecting out of hand evidence regarding the Flynn Effect. But the *Walker*

Nor are experts unanimous. As recently as 2017, an article by a board-certified forensic psychologist and a board-certified neuropsychologist argued that “[s]ubtracting IQ points based on the Flynn effect is not an accepted practice within psychology.” Leigh D. Hagan & Thomas J. Guilmette, *The Death Penalty and Intellectual Disability Not So Simple*, CRIM. JUST. (Fall 2017), at 21. Instead, Hagan and Guilmette argued, practitioners should discuss whether factors like the Flynn Effect could have an impact on an IQ test result. *Id.*

The controversy is hardly beside the point. Our courts are supposed to consider scientific evidence once it has been established—not when it is still a topic of discussion. “Courts of law are not in the business of endorsing one side or the other in a scientific controversy. Instead, we look to ground our decisions on reliable sources.” *Jimenez-Bencevi*, 934 F. Supp. at 370; *cf. State v. Council*, 335 S.C. 1, 19, 515 S.E.2d 508, 517 (1999) (requiring courts to consider whether scientific evidence should be admitted under Rule 702, SCRE, based on factors like “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures”).

In Stone’s case, the PCR court’s legal error in using the Flynn Effect to reduce the IQ scores—despite this evidence arguably not even being admissible in South Carolina—was critical

Court was dealing with a motion to dismiss (that was essentially converted to a motion for summary judgment), and the Fourth Circuit found that the district court should not have resolved a factual issue in favor of the moving party despite “relevant evidence” about the Flynn Effect. *See id.* at 322–23. The Fourth Circuit sometimes requires district courts to hear evidence about the Flynn Effect, but not necessarily to use it. *See Winston v. Kelly*, 592 F.3d 535, 557 (4th Cir. 2010) (requiring district court to “decide *whether to consider* [a petitioner’s] proffered evidence concerning the Flynn effect and SEM” (emphasis added)). *See also Dunn*, 41 So. 3d at 476 (Knoll, J., additionally concurring) (noting that “the *Walker* court did not require the district court to accept the Flynn effect as true, but merely ordered it to ‘consider the persuasiveness of Walker’s Flynn Effect evidence’ on remand”).

to its determination of whether Stone has an intellectual disability. Again, the PCR court found that Stone's lowest score—unadjusted for the Flynn Effect—was in a range between 69 and 75. (App. 11). Before the adjustment, the other scores were not just above 70, they were all above 75, and some by a good bit—the court also considered IQ scores of 86, 78, and 79. (App. 11).

The State recognizes that under current precedent, an IQ score is not dispositive of intellectual disability. *See Hall v. Florida*, 572 U.S. at 723, 134 S. Ct. at 2001 (“Intellectual disability is a condition, not a number. Courts must recognize, as does the medical community, that the IQ test is imprecise.” (internal citation omitted)). But South Carolina law is equally clear that an individual must show “significant subaverage general intellectual functioning . . . manifested during the developmental period” to be found to be ineligible for the death penalty under *Atkins*. *See State v. Blackwell*, 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017) (quoting South Carolina Code Ann. § 16-3-20(C)(b)(10) (2015)). And even in *Hall*, the High Court observed that IQ scores are “of considerable significance, as the medical community recognizes.” 572 U.S. at 723, 134 S. Ct. at 2001.

Because of its error in applying the Flynn Effect, the PCR court made its decision on Stone's petition while considering the wrong numbers. Because this Court has never endorsed the application of the Flynn Effect to reduce scores, and because the theory is still regarded with skepticism by some courts, the PCR court abused its discretion in relying on the effect to lower Stone's scores. *See Blackwell*, 420 S.C. at 136, 801 S.E.2d at 718 (“An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law.”). This Court should grant this petition and clarify that the Flynn Effect should not be used to lower test scores when evaluating a petition for relief under *Atkins*.

II. This Court should grant the petition for writ of certiorari because the PCR court erred in finding that Stone met his burden of proving intellectual disability by a preponderance of the evidence when only one of Stone’s unadjusted IQ scores could even conceivably be taken as an indication his IQ might be below 70.

The PCR court found that Stone had an intellectual disability despite the remarkable consistency in his IQ scores. Because of that, the court found that *Atkins* applied to Stone’s case in the face of the preponderance of the evidence. *See Blackwell*, 420 S.C. at 140, 801 S.E.2d at 720 (“[A] trial judge’s ruling regarding an *Atkins* determination will be upheld on appeal if supported by the evidence and not against its preponderance.”). This Court should grant the petition to clarify how multiple scores are to be considered under South Carolina law.

In this case, by failing to consider the importance of Stone’s multiple IQ scores above 70, and in some cases well above 70, the PCR court tilted the field toward Stone. After all, this Court held in *Franklin* that Stone had the burden to “show that he . . . is [intellectually disabled] by the preponderance of the evidence.” 356 S.C. at 280, 588 S.E.2d at 606.

As with all burdens of proof, it is difficult to numerically represent a preponderance of the evidence. But while it is not the strictest standard in law, it is not a formality. *See* PREPONDERANCE OF THE EVIDENCE, Black’s Law Dictionary (12th ed. 2024) (“The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.”). This Court has defined the term this way: “A preponderance of the evidence is evidence which convinces the fact finder as to its truth.” *Pascoe v. Wilson*, 416 S.C. 628, 640, 788 S.E.2d 686, 693 (2016).

That means the inquiry in front of the PCR court in the first instance was to find that Stone proved by the “greater weight of the evidence” that his lowest score was more reflective of his

intellectual ability than his higher ones. He had to provide reasons that the one score that unquestionably (if marginally) placed him in the vicinity of an *Atkins* claim was more accurate than the other three.

It is true that in *Hall*, the United State Supreme Court held that “multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.” 572 U.S. at 714, 134 S. Ct. at 1995–96. But it is also true that the High Court itself has not weighed in on how multiple scores should be evaluated—though some justices want to.

The Supreme Court initially granted a petition for the writ of certiorari dealing with multiple test scores, though in that case all the scores were above 70. *See Hamm*, 608 U.S. at —, 146 S. Ct. at 1264 (Thomas, J., dissenting). And the Court eventually dismissed that grant of certiorari as improvidently granted. But four justices at least partially joined a dissent by Justice Alito saying that the Court should deal with the issue. And the likelihood that the Supreme Court’s silence will last indefinitely seems low. *See id.* at —, 146 S. Ct. at 1284 (“If this Court continues to shy away from opportunities to provide workable doctrine, we should not be surprised if petitions asking us to overrule *Atkins*, *Hall*, and *Moore* arrive at our doorsteps soon.”).

The principal dissent in *Hamm* laid out at least three ways courts should consider multiple scores—whether by a calculation known as the composite score, use of the median score, or hearing expert testimony about the “central tendency” of a set of scores. *See id.* at —, 146 S. Ct. at 1277.

Any one of these approaches provides a reasonable way to evaluate whether a defendant's IQ is 70 or below in *Atkins* cases involving multiple scores. And when a court using a reasonable method concludes that a defendant's “true” IQ is above 70, it may reject an *Atkins* claim solely on that ground.

Id. Critically, the dissent held that the state’s failure in that case to offer up a specific method was not determinative because “it was not Alabama’s burden to explain why Smith’s IQ scores disqualified him from Atkins relief.” *Id.* at —, 146 S. Ct. at 1283

A grant of certiorari in Stone’s case would allow this Court to determine how a state court should consider multiple scores in an Atkins evaluation and then, if necessary, remand this case for a new evaluation under that standard. Given that opportunity, this Court should grant the petition.

III. This Court should grant certiorari to consider clarifying what class of individuals is covered by *Atkins*, as incorporated into state law by *Franklin v. Maynard*, or to find whether the national consensus found in *Atkins* truly exists.

Finally, this Court should grant certiorari to lay the groundwork for a re-evaluation of *Atkins* and, by extension, *Franklin*.

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, 122 S. Ct. at 2261, 2262–63 (Scalia, J., dissenting). The dissent also recognized that, when considering the standards of society for the purposes of the Eighth Amendment, the Court needed to be mindful of “the peril of discerning a consensus where there is none.” *Id.* at 345–347, 122 S. Ct. at 2263–2264. 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,”⁷ yet the legal system is based on the ability of judges or juries to consider the facts of each case. *Id.* at 349, 122 S. Ct. at 2265. The dissent also questioned the majority’s reasoning on culpability, deterrence, excessive punishment, and “special risks” the majority referenced. *Id.* at 349–52, 122 S. Ct. at 2265–67. The dissent further correctly

⁷ This is the term that was used at the time.

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 353–54, 122 S. Ct. at 2267–68. 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 *Hall* that “[u]nder our modern Eighth Amendment cases, what counts are our society’s standards—which is to say, the standards of the American people—not the standards of professional associations, which at best represent the views of a small professional elite.” 572 U.S. at 731, 134 S. Ct. at 2005 (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 I*, 581 U.S. at 28–29, 137 S. Ct. at 1057–58 (Roberts, C.J., dissenting). The dissent highlighted “the lack of guidance . . . offer[ed] to States seeking to enforce the holding of *Atkins*.” *Id.* at 29, 137 S. Ct. at 1058.

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. Virginia*” in the previous decision “lacked clarity,” *Moore II*, 586 U.S. at 143, 139 S. Ct. at 672 (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, 139 S. Ct. at 673.

And again, in *Hamm*, Justice Thomas argued that “*Atkins* is egregiously wrong, unworkable, and has created no legitimate reliance interests.” 608 at —, 146 S. Ct. at 1271

(Thomas, J., dissenting). And the principal dissent by Justice Alito seemed to suggest that a reconsideration of *Atkins* could not be ruled out. *See id.* at —, 146 S. Ct. at 1285 (“If this Court continues to shy away from opportunities to provide workable doctrine, we should not be surprised if petitions asking us to overrule *Atkins*, *Hall*, and *Moore* arrive at our doorsteps soon.”).

As Justice Scalia alluded to in his *Atkins* dissent, the recognition of an exemption to the death penalty for people with intellectual disabilities 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 definitive clarity (if not simplicity). As it stands, precedent has continued to reflect the difficulty in determining which defendants fall under the exemption, and calls for expansion of the exemption abound. A 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 reconsidered. Respondent respectfully suggests that the indications in the case law warrant a revisiting of the *Atkins* exception.

IV. This Court’s practice of allowing successive actions on free-standing *Atkins* claims should be revisited and curtailed.

The State initially moved to dismiss this claim as untimely and the action as improperly successive. (App. pp. 375–407). The State maintains that the PCR judge erred in denying the State’s motion to dismiss the claim as improperly successive and untimely.

Respectfully, there appears to be no basis for declining to apply the statutory procedural bars that exist to channel all available claims into one timely action. *See, e.g., Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) (“All applicants are entitled to a full and fair

opportunity to present claims in one PCR application.”) (quoting *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)). While some leeway may have been considered equitable nearer the decision in *Atkins*, the exemption is far from new at this point. See *In re Bowles*, 935 F.3d 1210, 1215–16 (11th Cir. 2019) (reviewing request for successive habeas action where *Atkins* “could have [been] included . . . in [the] original habeas” noting that the petitioner “cannot now rely on [*Atkins*] as a ‘new’ rule of constitutional law” because by then, the “the rule [was] no longer new”). If an issue is truly missed, or qualified PCR counsel are not appointed, a remedy remains available in PCR. *Robertson, supra*.

This claim should have been denied as untimely and improperly successive. There is no question that *Atkins* was available for Stone’s first PCR action. Nor is there a question that qualified counsel made a detailed investigation into Stone’s mental health.

Delay and lack of evidence supportive of the condition have been demonstrated in some cases litigated under the exception. For example, in *State v. Terry*, an inmate did not raise an *Atkins* claim until after exhaustion of all ordinary state and federal remedies. This Court, citing the possibility of exemption from execution, granted a stay and allowed the litigation. (See Appellate Case No. 1997-006197). After having relief denied, Terry is now currently on appeal. (Appellate Case No. 2025-001760). Additionally, Stephen Corey Bryant was allowed additional proceedings over the State’s objection adding a multi-year delay. Bryant eventually conceded that he would not be able to offer evidence to prove the condition but argued that he should have been able to amend the successive action on a new theory. (See Appellate Case No. 2019-000610 (appeal from May 2016 PCR action concluding June 2021)). In *Aleksey*, the inmate’s federal habeas action was stayed in 2015 to seek a successive action, but Aleksey had “IQ score[s] from the developmental

period . . . well above the range associated with the intellectual disability (96, 82, and 90 (Tests # 1–3)). *Aleksey v. State*, 2026 WL 1408902, at *8 (S.C. May 20, 2026).

These cases are in tension with the *Franklin* decision and fail to make even a *prima facie* case that evidence exists that could support a determination of intellectual disability. Like *in favorem vitae*, whatever reason underpinned the initial exception, that exception has been shown to have “become counterproductive to the administration of justice in some instances.” *State v. Torrence*, 305 S.C. 45, 60, 406 S.E.2d 315, 324 (1991) (Toal, J., concurring in result and writing for the majority on the issue). This broad exception based on mere assertion of the potential claim should be abolished. At the very least, some restriction should be in place to ensure only potentially meritorious claims could be litigated under restrictive timeframes.

CONCLUSION

This Court can help provide clarity to trial and PCR courts about how complicated *Atkins* determinations should be made. The petition for a writ of certiorari should be granted so that the Court can deliver that guidance.

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