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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
The Honorable William P. Keesley, Circuit Court Judge

Appellate Case No. 2026-000115

BOBBY WAYNE STONE, RESPONDENT,

v.

STATE OF SOUTH CAROLINA, PETITIONER.

**APPENDIX
VOLUME 1 OF 2**

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INDEX

ORDER GRANTING POST-CONVICTION RELIEF.....	1
JULY 30-31, 2024 EVIDENTIARY HEARING TRANSCRIPT	24
AMENDED POST-CONVICTION RELIEF APPLICATION.....	369
RETURN TO AMENDED APPLICATION AND MOTION TO DISMISS	375
RESPONSE IN OPPOSITION TO STATE’S MOTION TO DISMISS.....	416
ORDER GRANTING MOTION TO DISMISS IN PART AND DENYING IN PART	576
ORDER FOR ATKINS EVALUATION.....	592
FOLLOW-UP ORDER REGARDING ATKINS EVALUATION.....	605
ADMINISTRATIVE ORDER (RE: ATKINS EVALUATION)	610
NOTICE OF MOTION TO COMPEL PURSUANT TO RULE 37, SCRCP	614
RESPONSE IN OPPOSITION TO THE STATE’S MOTION TO COMPEL	634
ORDER ON RESPONDENT’S MOTION TO COMPEL	640
ORDER ON RESPONDENT’S MOTION TO COMPEL FOLLOWING IN CAMERA REVIEW	646
MOTION TO COMPEL	648
ORDER ON APPLICANT’S MOTION TO COMPEL	655
MOTION TO COMPEL	656
MOTION FOR DATA CERTAIN DETERMINATION FOR FINALIZING DISCOVERY	664
APPLICANT’S TRIAL BRIEF	671
RESPONDENT’S PRE-TRIAL HEARING BRIEF	692
APPLICANT’S POST-HEARING BRIEF.....	709
RESPONDENT’S AMENDED POST-HEARING BRIEF.....	739

APPLICANT’S POST-HEARING REPLY BRIEF	786
JULY 31, 2026, MEMORANDUM ORDER (ANNOUNCING RULING)	808
RESPONDENT’S MOTION TO RECONSIDER, ALTER, OR AMEND	810
APPLICANT’S RESPONSE TO MOTION TO RECONSIDER, ALTER, OR AMEND	823
ORDER ON STATE’S MOTION TO ALTER OR AMEND	832
JULY 30, 31, 2024 EXHIBITS	
APPLICANT’S 1 – CV OF DR. BOYD	834
APPLICANT’S 2 – DR. BOYD’S REPORT	846
APPLICANT’S 3 – APPLICANT’S RECORDS	860
APPLICANT’S 4 – CV OF DR. HALL	919
STATE’S 1 – CV OF DR. VITACCO.....	926
STATE’S 2 – CV OF DR. KRUSE	956
COURT’S 1 – DR. HALL’S REPORT	965

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STATE OF SOUTH CAROLINA
COUNTY OF SUMTER
JAMES G. SYDDELL
CLERK OF COURT
SUMTER COUNTY, S.C.
IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

Bobby Wayne Stone, #5051,
Applicant,

C/A No. 2018-CP-43-1025

v.

State of South Carolina,
Respondent.

**ORDER
GRANTING POST-CONVICTION
RELIEF PURSUANT TO *ATKINS* v.
VIRGINIA, 536 U.S. 304 (2002)**

I. INTRODUCTION

In this post-conviction relief (“PCR”) action, Bobby Wayne Stone (“Stone” or “Applicant”), a death sentenced inmate, alleges that he is a person with intellectually disability and his death sentence violates the Eighth Amendment to the United States Constitution pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). This Court held an evidentiary hearing on the issue of Applicant’s intellectual disability on July 30-31, 2024. At the hearing, both parties presented evidence and post-hearing briefs. A decision was entered in a memorandum order, with Applicant’s counsel instructed to submit a more detailed proposed order. The State then raised certain objections to the proposed order. After careful review of the totality of the evidence, this Court finds that Applicant has satisfied his burden of proof and established by a preponderance of the evidence that he is a person with intellectual disability as defined under South Carolina law and for the purposes of the application of *Atkins* and *Franklin*. Accordingly, Applicant’s death sentence is vacated pursuant to *Atkins* and *Franklin*.

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II. RELEVANT PROCEDURAL HISTORY

Applicant was convicted of murder, burglary, and possession of a weapon during a violent crime. He was sentenced to death in 1997 for the murder of Sergeant Charlie Kubala, a Sumter County police officer. On direct appeal, the South Carolina Supreme Court reversed the death

sentence and remanded for resentencing. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002). Applicant was sentenced to death again on February 27, 2005, and his resentencing was affirmed on direct appeal. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2008). Stone filed a PCR application in 2008, which was denied. *Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017).

On March 31, 2017, Stone moved the United States District Court for the District of South Carolina for a stay of execution so he could pursue a petition for writ of habeas corpus. *Stone v. Stirling*, C/A NO. 2:17-cv-01221-MGL-MGB. On April 10, 2017, the District Court granted the stay of execution. Stone filed a petition for writ of habeas corpus on November 20, 2017, and thereafter amended his petition. The amended petition included a claim for relief pursuant to *Atkins*. The District Court stayed the federal proceedings on September 4, 2018, to allow Stone to first present his Eighth Amendment *Atkins* claim to the state courts.

On June 5, 2018, Applicant filed this PCR application. Applicant raised several claims for relief related to intellectual disability, including a claim that he is a person with intellectual disability, and therefore is ineligible for the death penalty pursuant to *Atkins* and *Franklin*. On July 5, 2018, the State served a Return and Motion to Dismiss (“Return”). The pleading moved

to dismiss this action because it is barred by the statute of limitations and it is successive to the prior post-conviction relief action Applicant filed on April 9, 2008. Further, Applicant’s claim in ground 10 and 11(a) is not a cognizable claim that can be raised in post-conviction relief.

Return, p. 1. Ground 10 and 11(a) alleged Stone’s “death sentence violates the Eighth Amendment” because of his intellectual disability. PCR Application, p. 2. On July 25, 2018, Stone responded to the State’s motion to dismiss. Also on July 25, 2018, Stone amended his PCR application. The State served its Return to Amended Application and Motion to Dismiss on August 24, 2018, which renewed the same grounds for dismissal.

On January 16, 2019, the Honorable Michael G. Nettles convened a hearing on the State’s motion to dismiss this action. On February 20, 2019, Judge Nettles granted, in part, and denied, in

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part, the State's motion to dismiss. Judge Nettles concluded Stone could proceed on his *Atkins* claim (Grounds 10 and 11(a)). Order, Feb. 20, 2019, pp. 5-10. Judge Nettles, however, dismissed Stone's other claims. *Id.*, pp. 10-15.¹

On July 30-31, 2024, an evidentiary hearing was held on the sole issue of whether Stone is a person with intellectual disability. At the hearing, Applicant presented two expert witnesses: Dr. Sara Boyd,² Applicant's evaluator, and Dr. Alicia Hall,³ an evaluator from DDSN appointed

¹ On November 28, 2018, the Supreme Court of South Carolina assigned Judge Nettles jurisdiction to preside over this PCR action. The Supreme Court subsequently assigned the undersigned jurisdiction over this PCR action on May 9, 2019. Judge Nettles resolved the State's motion to dismiss while he had jurisdiction over this action. The undersigned reviewed Judge Nettles order dated February 20, 2019, and concurs with its reasoning. Additionally, other courts have consistently allowed *Atkins* claims to be presented in successive PCR actions, even in cases which were pending on or had completed federal habeas review. *See, e.g., E.g., Order, Terry v. State*, No. 1997-006197 (S.C. Apr. 6, 2022); *Woods v. State*, No. 2019-001713, 2019 WL 6898088 (S.C. Dec. 18, 2019); Order Denying Motion to Dismiss, *Elmore v. State*, No. 2005-CP-24-1205 (S.C. Ct. Comm. Pleas June 18, 2007); Third 120 Day Status Report, *Aleksey v. State*, No. 2015-CP-38-00764 (S.C. Ct. Comm. Pleas June 7, 2017); Order, *Bryant v. South Carolina*, 2016-CP-43-828 (S.C. Ct. Comm. Pleas July 13, 2016); Order Denying Respondent's Motion to Dismiss, *Terry v. State*, 2022-CP-32-00924 (S.C. Ct. Comm. Pleas Dec. 8, 2022).

² Dr. Boyd has a PhD in Clinical Psychology and is board certified in both clinical and forensic psychology. She is a member of the American Psychological Association and the American Association on Intellectual and Developmental Disabilities ("AAIDD"). She has extensive experience working with people with intellectual disability and other developmental disabilities. Dr. Boyd has worked as a caregiver for people with developmental disabilities who require institutionalized support and has conducted over 500 evaluations of whether a person meets the criteria for intellectual disability. She is faculty at the University of Virginia's Institute of Law, Psychiatry, and Public Policy, where she conducts forensic evaluations for the Virginia court system, including evaluations of whether someone is a person with intellectual disability. Dr. Boyd has published extensively on intellectual and developmental disabilities and was selected by Virginia's Department of Behavioral Health to consult with the department about the appropriateness of IQ measures for diagnosing intellectual disability. App. Ex. 1.

³ Dr. Hall has a PhD in Clinical Psychology with specialized training in forensics. She works as a forensic psychologist at the South Carolina Department of Disabilities and Special Needs ("DDSN"), where she focuses on neurodevelopmental disorders and forensic psychology. Dr. Hall has been at DDSN since 2014 and conducted the Court ordered *Atkins* evaluation in this case. At the time of the hearing in this case, the state agency that employs Dr. Hall was named DDSN, but since the hearing concluded, the agency's name has been changed to the Office of Intellectual and Developmental Disabilities at the South Carolina Department of Behavioral Health and Developmental Disabilities ("BHDD-OIDD"). Dr. Hall has conducted over 1000 forensic evaluations while working at DDSN, including at least nine evaluations for *Atkins* proceedings.

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by this Court. Dr. Boyd was qualified as an expert in psychology and intellectual disability. Hrg. at 13. Dr. Hall was qualified as an expert in forensic psychology with a specialty in assessing and diagnosing intellectual disability. Hrg. at 159. Respondent offered the testimony of three witnesses, Dr. Michael Vitacco,⁴ Dr. Kimberly Kruse,⁵ and Elaine Harris (one of Applicant's school psychologists).⁶ Elaine Harris is referred to as "one of Applicant's former teachers."

At the close of the hearing, both Applicant and Respondent requested the ability to obtain the hearing transcript and submit their closing arguments to the Court in post-hearing briefing, which the Court permitted. Hrg. at 344. Stone submitted his post-hearing brief on February 4,

She has also completed continuing education specific to conducting *Atkins* evaluations. Before working at DDSN, Dr. Hall was the chief psychologist at the University of South Carolina's School of Medicine in the Department of Neuropsychiatry and Behavioral Sciences and the chief psychologist at the Developmental Disorders Clinic for the South Carolina Department of Mental Health. App. Ex. 4.

⁴ Dr. Vitacco has a PhD in clinical psychology. He is a professor at Augusta University where he teaches in the schools of Public Health and the School of Medicine's department of Psychiatry and Health Behavior. Dr. Vitacco is also an adjunct professor in clinical psychology for St. John's University and previously taught at Cardinal Stritch University. He is Board certified in forensic psychology and has a forensic consulting practice alongside his teaching responsibilities. He has authored publications about forensic psychology and social media, forensic psychology and mental health law, and the insanity defense. Resp. Ex.1.

⁵ Dr. Kruse has a PhD in clinical psychology and did a post-doctoral fellowship in neuropsychology. She is a neuropsychologist at Prisma Health where, as part of her job responsibilities, she supervises residents for the University of South Carolina School of Medicine in neuropsychiatry and behavioral medicine. Dr. Kruse is the team psychologist for sports teams at the University of South Carolina and contracts with the Department of Veterans Affairs to do compensation and pension examinations. Resp. Ex. 2. Dr. Kruse testified that she has done psychoeducational exams for the Department of Juvenile Justice, "which did involve intellectual functioning and learning disorder." (Tr. 303). Additionally, Dr. Kruse testified to having conducted 500-1,000 IQ tests. (Tr. 304).

⁶ Elaine Harris is a retired school psychologist from the Sumter County School District. Hrg. at 330. Ms. Harris testified about her recollections of school evaluations for special education services in the 1970s when Applicant was a student in the Sumter County School District. Hrg. at 332-341.

2025, the State responded on April 7, 2025,⁷ and Stone replied on May 2, 2025. The Court has considered the full record, including the testimony and exhibits presented at the hearing, and concludes, for the reasons set forth below, that Stone has proved, by a preponderance of the evidence, that he is a person with intellectual disability whose execution is barred by the Eighth Amendment.

III. RELEVANT LEGAL PRINCIPLES

In *Atkins v. Virginia*, the United States Supreme Court found that the Eighth Amendment to the United States Constitution prohibits the execution of people with intellectual disability.⁸ 536 U.S. at 321. In doing so, the Court established a categorical exemption to the death penalty if a person is determined to be intellectually disabled. This categorical exemption recognizes that, as a class, persons with intellectual disability are less morally culpable, and therefore, less deserving of the death penalty. This is because intellectual disability impairs a person’s ability 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). The Court’s holding in *Atkins* is rooted in the class characteristics of persons with intellectual disability, including their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Atkins*, 536 U.S. at 318

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In *Franklin v. Maynard*, the South Carolina Supreme Court established the procedure for determining whether a PCR applicant is intellectually disabled, and therefore, ineligible for the

⁷ On April 29, 2025, the State moved to amend its response. The Court granted the unopposed request on June 9, 2025, and the State served the amended response on June 9, 2025.

⁸ At the time of *Atkins*, the prominent language referred to intellectual disability as mental retardation. Since *Atkins* was decided, the Supreme Court has instructed that the term “intellectual disability” replaces and has the same meaning as what was previously referred to as “mental retardation.” *Hall v. Florida*, 572 U.S. 701, 704–05 (citing *Rosa’s Law*, 124 Stat. 2643).

death penalty. The Court held that the applicable definition of intellectual disability is found in the death penalty statute, which defines that condition as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” 356 S.C. 278–79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)). Thus, the definition of intellectual disability consists of three prongs: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive behavior; and (3) a manifestation of these attributes during the developmental period.⁹

In post-conviction proceedings, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP; *see also Franklin*, 356 S.C. at 280, 588 S.E.2d at 606 (“As with other PCR claims, the applicant must show that he or she is [intellectually disabled] by a preponderance of the evidence”). 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).

IV. LEGAL ANALYSIS AND FACTUAL FINDINGS

In this case, the Court heard evidence from five witnesses, including four expert witnesses

⁹ Since *Atkins* was decided, the Supreme Court and South Carolina courts have consistently relied on the clinical definitions, instructions, and guidelines of both the American Psychiatric Association (“APA”) and the American Association on Intellectual and Developmental Disabilities (“AAIDD”) to inform the court’s analysis of whether the diagnostic and legal criteria for intellectual disability are satisfied. *See, e.g., Atkins*, 536 U.S. at 308 n.3; *Hall*, 572 U.S. at 710; *Moore*, 581 U.S. at 13; Order Finding Defendant Mentally Retarded in *South Carolina v. Pearson*, 96-GS-32-3338; Order Finding of Mental Retardation in *George v. State*, 99-CP-26-1715; 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. Both organizations employ the same three-pronged definition embodied in South Carolina’s death penalty statute and embraced by the South Carolina Supreme Court in *Franklin*.

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and one lay witness. Applicant presented testimony of Dr. Sara Boyd and Dr. Alicia Hall. Both Dr. Boyd and Dr. Hall conducted evaluations of whether Applicant is a person with intellectual disability. Hrg. at 19–20, 159; Court’s Ex. 1. Dr. Boyd and Dr. Hall provided extensive testimony about their evaluations, which included interviews with Applicant, review of records from throughout Applicant’s life, and interviews with various collateral witnesses. Both Dr. Boyd and Dr. Hall opined independently that Applicant meets the diagnostic criteria for intellectual disability. Hrg. at 21, 107, 203, 207; Court’s Ex. 1 at 13.

Dr. Sara Boyd, an expert for Applicant, conducted an intellectual disability evaluation of Applicant. Hrg. at 19–20, 110–111. She reviewed records for Applicant, including school records and other relevant life history records. Hrg. at 19–21, 44. She also reviewed similar records for Applicant’s family members. Hrg. at 44. Dr. Boyd conducted several psychological interviews with Applicant and administered IQ testing on Applicant. Hrg. at 18–19, 52–53, 110. She also conducted several interviews with collateral witnesses as part of her evaluation, including former schoolteachers, school psychologists who evaluated him, his family members, and a childhood friend and coworker. Hrg. at 101–102, 111–112. This Court had the opportunity to observe Dr. Boyd on the stand and had the opportunity to consider the evidence and testimony she presented. The Court finds Dr. Boyd conducted a thorough evaluation in compliance with the diagnostic framework. The Court further finds Dr. Boyd’s opinions and conclusions credible and well-grounded based on the record.

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At the hearing, Applicant also called Dr. Alicia Hall as an expert witness. Dr. Hall, who works at DDSN, was appointed to conduct an evaluation for these proceedings at the State’s request. Order (July 3, 2019); Hrg. at 153, 159. She conducted an intellectual disability evaluation of Applicant, which included reviewing records for Applicant, conducting a psychological interview of Applicant, reviewing the raw data from Dr. Boyd’s IQ testing of Applicant, and

interviewing collateral witnesses as part of her evaluation, including former schoolteachers, school psychologists who evaluated him, his brother, and a childhood friend and coworker. Court's Ex. 1 at 3; Hrg. at 162–163, 167–170. Dr. Hall testified that Applicant's case is the ninth *Atkins* case she has participated in for DDSN, and she is well versed in what is required to meet South Carolina's definition of intellectual disability based on her many years of conducting such evaluations as part of her job at DDSN. Hrg. at 156–158, 264–266. The Court had the opportunity to hear the evidence and testimony from Dr. Hall and observe her on the stand. The Court finds Dr. Hall conducted a thorough evaluation in compliance with the Court's order for an *Atkins* evaluation and in compliance with the diagnostic framework. The Court further finds Dr. Hall's opinions and conclusions credible and supported by the weight of the evidence.

The Court also heard evidence from two expert witnesses presented by Respondent, Dr. Michael Vitacco and Dr. Kimberly Kruse. Dr. Vitacco and Dr. Kruse were qualified as experts in forensic psychology. Hrg. at 288, 305. Neither Dr. Kruse nor Dr. Vitacco administered any testing, interviewed Applicant, or conducted an evaluation of whether Applicant is a person with intellectual disability. Hrg. at 288–289, 298–299, 306, 317, 320.

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Dr. Vitacco reviewed reports authored by Dr. Boyd and Dr. Hall. Hrg. at 289, 298. He was not asked to and did not render an opinion on whether Applicant is intellectually disabled. Hrg. at 289, 298–299. Dr. Vitacco testified that he “was not asked” to evaluate Applicant or to give an opinion regarding intellectual disability in his case. Hrg. at 288–299, 298–99. He further testified that he had not done an *Atkins* evaluation before. Hrg. at 296, 298. He had never met Applicant, reviewed any of the life history records relevant to an intellectual disability determination, or interviewed any collateral witnesses about Applicant. Hrg. at 298–299. The only documents Dr. Vitacco reviewed were reports authored by Dr. Boyd and Dr. Hall. Hrg. at 298–299.

Dr. Kimberly Kruse testified that she was asked to “review records,” and to provide an

opinion on what Applicant's records demonstrated regarding his intellectual functioning. Hrg. at 305–306. She was not asked to conduct a diagnostic evaluation. Hrg. at 305–306. Dr. Kruse opined that based on the records she reviewed, it appears that Applicant could have a non-verbal learning disorder.¹⁰ Hrg. at 306–307, 317–318. Dr. Kruse testified that she had never done an *Atkins* case before. Hrg. at 316. In preparation for her testimony, she looked at some life history records but did not meet or interview Applicant. Hrg. at 306, 317. She also did not conduct any collateral interviews of witnesses about Applicant. Hrg. at 320.

Since neither Dr. Vitacco nor Dr. Kruse interviewed Stone or any collateral witnesses or conducted a comprehensive assessment of whether Stone is a person with intellectual disability, this Court finds that the testimony and opinions of Dr. Boyd and Dr. Hall are more credible. This conclusion is further supported by the fact that both Dr. Boyd and Dr. Hall have significantly more experience in conducting intellectual disability evaluations than do Dr. Kruse and Dr. Vitacco.

I. Significantly Subaverage Intellectual Functioning

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The Court finds that Stone met his burden of proof to satisfy prong one—that he has “significantly subaverage intellectual functioning.” S.C. Code § 16-3-20 (C)(b)(10). A person meets this prong if his or her intellectual functioning, as measured by a comprehensive standardized IQ test, is approximately 75 or less (approximately two standard deviations below the mean, considering the standard error of measurement). *Atkins*, 536 U.S. at 309 n.5 (“It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75”); DSM-5-TR at 42 (describing people with intellectual disability as including those with IQ scores up to “somewhat above 65-75” when adaptive deficits are present). Clinical judgment is important when interpreting IQ test scores and assessing intellectual disability in general. DSM-5-TR at 42. When

¹⁰ For the purposes of the present action, the Court does not need to determine whether Stone has a non-verbal learning disorder. As discussed in Section IV(1), a learning disorder and intellectual disability are not mutually exclusive and people can have comorbid diagnoses.

considering a score obtained on an intelligence test, a court must also consider certain factors that have an impact upon how test scores must be interpreted, such as the standard error of measurement. *Hall*, 572 U.S. at 713–14; *Moore*, 581 U.S. at 13–14.

Another factor that can affect the interpretation of test scores is norm obsolescence, or the Flynn effect, which recognizes that testing norms become outdated over time, and the age of the norms should be taken into account when interpreting an IQ test score.¹¹ The Court recognizes and yields to the expertise of Dr. Hall and Dr. Boyd in accepting that it is proper to consider norm obsolescence or the Flynn effect when evaluating Applicant’s IQ test scores, though in common experience the Court questions the premise that IQ scores for the general population are currently rising. At the hearing, Dr. Hall and Dr. Boyd both testified that they made Flynn adjustments in their evaluations, and the State’s experts agreed it was clinically appropriate to do so. Hrg. at 31–32, 40–42, 176–177, 266, 299–300, 314–315. Moreover, other South Carolina courts have accepted and applied the Flynn effect to the test scores. *See Order Finding Defendant Mentally Retarded, South Carolina v. Pearson*, 96-GS-32-3338 (S.C. Cir. Ct. Gen. Sess. Dec. 14, 2005); Order Granting Post-Conviction Relief Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), Vacating Death Sentence, *Bell v. South Carolina*, 03-CP-04-1857 (S.C. Ct. Comm. Pleas Nov. 16, 2016); Order, *South Carolina v. Brown*, 2011-GS-30-1523 (S.C. Ct. Gen. Sess. Apr. 14, 2016).

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Courts and clinicians both recognize that determining whether an individual has significantly subaverage intellectual functioning requires consideration of more than just assessing an individual’s reported test scores, as “intellectual disability is a condition, not a number.” *Hall*, 572 U.S. at 723; *Moore*, 581 U.S. at 15; *Brunfield v. Cain*, 576 U.S. 305, 316 (2015); Hrg. at 186–

¹¹ As Dr. Boyd and Dr. Hall both explained at the hearing, the Flynn effect research has established that generally, the population’s intelligence rises about 3 IQ points every decade. Hrg. at 31–32, 176. The common practice is to multiply the number of years between when an IQ test was normed by either 0.3 or 0.33. Hrg. at 41. Dr. Boyd and Dr. Hall both applied the Flynn effect in their evaluations of Applicant. Hrg. at 31–32, 40–42, 50–54, 176–177; Court’s Ex. 1 at 10–11.

187. Because of this, assessing intellectual functioning includes more than mere review of IQ scores. As Dr. Hall explained, the clinical standards require looking at someone's "functionality," instead of using a bright cut-off line on an IQ score when assessing someone's intellectual functioning. Hrg. at 186–187; *see also Hall*, 572 U.S. at 719–21.

The evidence established that Applicant was administered four full scale IQ tests throughout the course of his life. All four tests were Weschler intelligence tests, which have been recognized as acceptable full scale IQ tests to accurately and reliably determine someone's IQ as part of an intellectual disability evaluation. *E.g., Hall*, 572 U.S. at 734; Hrg, at 26, 39–40, 175–176, 178–179, 184–185. Applicant's IQ scores, along with the adjustments to account for norm obsolescence are:

- A Weschler Intelligence Scale for Children ("WISC") in 1975. Applicant obtained a full scale IQ score of 86, as reported in a special education services evaluation report. As the test norms were decades out of date given that it was normed in 1949, this score adjusted to about 77.
- A Weschler Intelligence Scale for Children-Revised ("WISC-R") in 1976. Applicant obtained a full scale IQ score of 78, as reported in a special education services evaluation report. As the test was normed in 1975, no score adjustment would be considered necessary.
- A Weschler Intelligence Scale for Children-Revised ("WISC-R") in 1979. Applicant obtained a full scale IQ score of between 69 and 75, as reported in a special education services evaluation report. As the test was normed in 1949, this score adjusted to approximately 67 to 73. This test score resulted in a determination that Stone met the then criteria for Educably Mentally Retarded status.
- A Weschler Adult Intelligence Scale, Fourth Edition ("WAIS-4") in 2017, administered by Dr. Boyd. Applicant obtained a full scale IQ score of 79. As the test was normed in 2007, this score adjusted to between 75 or 76.

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The expert opinions from Dr. Hall and Dr. Boyd are that these scores were significantly subaverage when compared to the population. Hrg. at 56–57, 185–187, 189. As Dr. Hall explained in her report, these scores are "in the range of individuals who have been adjudicated to have

Intellectual Disability.” Court’s Ex. 1 at 13.¹²

In finding Applicant satisfies the intellectual functioning prong, the Court also considered evidence that was presented about Applicant’s special education evaluations and his results from academic achievement testing. Applicant was flagged for assessment for special education services in the third grade. App. Ex. 3 at 50–51; Hrg. at 76, 78–81, 171–172. Applicant was classified as needing special education services then and continued to receive services until he left school after the ninth grade. App. Ex. 3 at 23–26, 50–56; Hrg. at 76–86, 88–89, 171–173. When he was fourteen, his special education classification was changed from learning disability to educable mentally handicapped (“EMH”),¹³ as his results from testing and grades

¹² Respondent’s expert Dr. Kruse testified that she had no reason to question these full scale IQ scores, but in her opinion, based on examining the subtest results from Applicant’s 2017 IQ testing demonstrating lower functioning in perceptual reasoning than in other areas of functioning, Applicant had nonverbal learning disorder. Hrg. at 310–311, 317–318, 320. As was testified to at the hearing, learning disorder and intellectual disability are not necessarily mutually exclusive and people can have comorbid diagnoses. Hrg. at 276–277, 312, 318. *See also* DSM-5-TR at 45 (recognizing learning disorders commonly co-occur with intellectual disability); *Moore*, 581 U.S. at 17 (recognizing that “many intellectually disabled people also have other mental or physical impairments,” and counseling courts that the existence of a comorbid condition “is not evidence that a person does not also have an intellectual disability.”); *Brunfield*, 576 U.S. at 319–20 (“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.”)

¹³ During Applicant’s school years, the classification of educable mentally handicapped was parallel with the diagnostic criteria for intellectual disability. As Dr. Hall testified, to qualify for the educable mentally handicapped classification at school, a student would need to “have below average or sub-average intellectual functioning in conjunction with deficits of adaptive behavior.” Hrg. at 169. She explained that “schools actually call it ‘intellectual disability’ right now.” Hrg. at 173, 196. It was established at the hearing that “educable mentally handicapped” was a designation used by the Sumter County school system to classify students as needing special education supports and services parallel to the kinds of supports and services needed by individuals with mild intellectual disability. Hrg. at 55–56, 169, 173, 180, 196, 217–218. The State believes that this Order overstates evidence about the services Applicant was provided when he was reclassified from having a learning disability to what was at the time called “educable mentally handicapped.” The State notes as an example Dr. Harris’ testimony suggesting there might have been very little difference between the services. (Tr. 339–40).

WPH
#12

demonstrated that he needed more special education support than he was receiving. App. Ex. 3 at 55–56; Hrg. at 55–56, 173, 180.

Applicant’s academic achievement testing results show he was “typically a couple of grades below what would be expected” for someone in his grade level. Hrg. at 57–58, 180–181, 183. Applicant first took academic achievement testing in the third grade when he was nine years old, and where his mental age was commensurate to an eight-year-old on a Slosson Intelligence test and a seven-year-old on a Peabody Picture Vocabulary test. App. Ex. 3 at 50; Hrg. at 178. When he was eleven years old, at a reevaluation for special education services, Applicant’s mental age was commensurate to a nine-year old on a Peabody Picture Vocabulary test and a six-year-old on a Bender Gestalt, and was reading at a second-grade level according to a Wide Range Achievement Test. This all indicated Applicant had low psychological functioning to the school evaluator. App. Ex. 3 at 53. During his second reevaluation for special education services when he was fourteen, Applicant performed “in the slow learner range of functioning” on the Peabody Picture Vocabulary test, his mental age was measured as 8 and a half years old on a Bender Gestalt, and a Wide Range Achievement Test reported that he was reading at a fourth-grade level. App. Ex. 3 at 54–55. Applicant’s final academic achievement testing in the ninth grade showed that his overall academic performance was at a fourth-grade level. Court’s Ex. 1 at 5–6; App. Ex. 3 at 31; Hrg. at 89–90, 174. As Dr. Hall explained, “it is not unusual for you to see this type of progression in kids who have mild ID,” because they grow and mature “at a slower pace than their neurotypical peers.” Hrg. at 183. As the demands grow, “you then can see a significant difference between the functioning.” *Id.* Dr. Hall saw this pattern in Applicant’s academic achievement testing and found it relevant to her prong one analysis. *Id.*

WAC
13

As Dr. Hall articulated in her report, Applicant’s “deficits in intellectual functioning are evidenced by his limited reasoning and problem-solving skills, planning ability, abstract thinking,

judgment, and academic learning, confirmed by multiple academic assessments and standardized intelligence testing (WISC, WISC-R, WAIS-4 and Peabody).” Court’s Ex. 1 at 13. The Court agrees. Applicant’s IQ scores are all approximately two standard deviations below the norm, and other evidence such as his academic achievement testing scores demonstrates intellectual functioning that is significantly below average. Accordingly, based on the totality of the evidence, including the experts’ opinions and testimony, the Court finds that prong 1 is satisfied by a preponderance of the evidence.

2. *Deficits in Adaptive Behavior*

Applicant has met his burden of proof regarding prong 2— deficits in adaptive behavior. The evidence before the Court establishes that Stone has significant deficits in conceptual and practical skills. The evidence also demonstrates deficits in the social domain.

South Carolina’s definition of intellectual disability sets forth the second prong as “deficits in adaptive behavior.” S.C. Code Ann. § 16-3-20 (C)(b)(10). At the hearing, it was established that adaptive functioning looks at a person’s ability to meet the demands of community living independently. Hrg. at 14–15, 60, 186–187; AAIDD-12 at 29. To satisfy this prong, an individual must demonstrate deficits in one of three skill areas of adaptive behavior: conceptual, social, or practical. *Moore*, 581 U.S. at 15–16; AAIDD-12 at 31; DSM-5-TR at 37. Evaluating adaptive behavior looks at a person’s typical behavior in the community without support, and deficits exist when at least one skill area “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. *See also*, DSM-5-TR at 37, AAIDD-12 at 29–31, 38–39, 42. Individuals with intellectual disabilities will typically demonstrate both strengths and limitations in adaptive behavior, and evidence of adaptive strengths may not be used to rule out evidence of adaptive deficits. *Moore*, 581 U.S. at 15; AAIDD-12 at 40; *Brunfield v. Cain*, 576 U.S. 305, 320

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(2015) (“Intellectually disabled persons may have strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.”); Hrg. at 58–59, 99, 190–192.

a. Conceptual Domain

The testimony before the Court described conceptual skills as “basically academic skills.” Hrg. at 60.¹⁴ Individuals with conceptual domain deficits “have difficulty learning academic skills like reading, writing, understanding time and money, things like that, and they need additional support to meet age-related expectations.” Hrg. at 62. Conceptual domain deficits commonly manifest in children as being held back in school or being placed in remedial or special education.

In adults, these deficits commonly manifest as “problems with good judgment, with reasoning, with forecasting consequences,” and might include naiveté and gullibility and problems with “functional academic skills.” Hrg. at 62–63. Evaluating someone’s conceptual domain functioning includes assessing “how they did in school,” but also an evaluator would assess someone’s job history and whether that history included jobs that require someone to “use a lot of academic skills.” Hrg. at 76. As Dr. Hall testified, school records are commonly relied on for *Atkins* evaluations because someone’s “deficits have to be present during the developmental period, and so school records are contemporaneous records that allow us to get an insight into the person's functioning during the developmental period . . . particularly if we're talking about a person who is well outside of the developmental period.” Hrg. at 164. As Dr. Boyd testified, Stone has “longstanding conceptual impairment,” that is apparent from his school records and special education history, and this impairment has continued through his adulthood. Hrg. at 76.

Significant evidence was presented about Applicant’s longstanding academic difficulties.

¹⁴ The DSM-5-TR recognizes the conceptual domain includes “competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations.” DSM-5-TR at 42.

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Applicant struggled to achieve in school from a young age, failing the first grade. App. Ex. 3 at 40–42; Hrg. at 76–77. His grades did not significantly improve after his second time in first grade and, after failing the fourth grade, he was referred for assessment for special education services. App. Ex. 3 at 50–51; Hrg. at 76, 78–80, 171–172. Applicant was classified as a learning disability resource student and placed in resource classrooms for most of his classes, as the special education evaluator was concerned about his “academic functioning,” including “reading” and “math skills,” and his time in resource rooms “would be a time where they strengthen those skills, helped him and reinforced the lessons that he would be learning in his regular classroom setting.” Hrg. at 171–172.

Applicant’s grades did not improve even with the addition of special education services and Applicant was reclassified as an EMH student in the seventh grade, when he was fourteen. App. Ex. 3 at 55–56; Hrg. at 85–86, 179–180. In his reevaluation for special education services in the seventh grade, the evaluator conducted an adaptive functioning assessment which showed Applicant’s adaptive functioning was “generally below the normal range,” with some areas of functioning producing IQ equivalent scores in the 50s, well below the normal range. App. Ex. 3 at 55; Hrg. at 73, 141–142, 181–183. Academic achievement testing at this time consistently reported Applicant was performing at least one to two grades lower than his grade level. App. Ex. 3 at 52–56; Hrg. at 81–82, 179. Despite having access to increased special education services, Applicant still struggled, earning only Ds in eighth grade and primarily Cs and Ds in ninth grade. App. Ex. 3 at 23–26; Hrg. at 88–90, 173. Applicant ultimately dropped out of high school after the ninth grade and went to work doing “relatively menial, physical work,” such as tree trimming up until his incarceration. Hrg. at 90, 173. These jobs were “physically demanding,” but involved the kind of “work that was not reliant on advanced academic skills,” and did not require Applicant to complete “complicated multi-step processes.” Hrg. at 90, 92. Applicant’s final academic testing

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before leaving school indicated he was performing at a sixth-grade level in reading, a third-grade level in language, and a fourth-grade level in mathematics, and a fourth-grade level overall. App. Ex. 3 at 31; Hrg. at 89.

Based on all this information, Dr. Boyd opined that Applicant's conceptual domain functioning is "significantly impaired and has been since at least early childhood." Hrg. at 92. Dr. Hall similarly testified that "consistently, throughout his schooling, [Applicant] had deficits" in the conceptual domain. Hrg. at 174–175, 189. The Court has considered the evidence and agrees, finding that Applicant has significant deficits in his conceptual domain of adaptive functioning.

b. Practical Domain

The testimony before the Court described practical skills as the "daily living skills," including the ability to dress and feed yourself, doing laundry, cleaning yourself and your living environment, making medical decisions, using money to make purchases, and work skills like learning skilled job tasks and meeting the demands of jobs without assistance or supervision.¹⁵ Hrg. at 190–191. Practical domain considerations also include evaluating where a person can "navigat[e] in the community safely," including tasks like, "using public transportation, communication devices, things like that. So, it's very much the sort of living in the community part aside from interacting with other people or having to use academic skills." Hrg. at 93. Because of this, a portion of evaluating adaptive skills includes "looking at not just how are they doing in their day-to-day life . . . [but also] how is this person getting help and how formal or informal has it been." Hrg. at 68. At the hearing, Dr. Boyd and Dr. Hall reported the information they each collected about Applicant's practical domain functioning from interviews with Applicant, the

¹⁵ The DSM-5-TR recognizes 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.

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collateral interviews they conducted, and the extensive record review that was encompassed in their evaluations.

The evidence established that Applicant never lived independently, living between his family home and the homes of his romantic partners. Hrg. at 201. People who knew Applicant as a child or who lived with him as an adult indicated that Applicant relied on other people, namely his mother and romantic partners, for assistance with most of the household tasks, including taking care of “cleaning the house; keeping up with appointments, including his appointments; you know, preparing meals, planning meals, budgeting money. . . [and] housework.” Hrg. at 93–94, 200–202; Court’s Ex. 1 at 12–13. Applicant’s contributions to the household were mowing the lawn and taking care of outside tasks, like repairing things, which he learned to do by observing his stepfather and imitating what he did. Hrg. at 94, 97, 200. An adaptive behavior scale administered when Applicant was fourteen demonstrated his adaptive functioning was “generally below the normal range,” with scores significantly below the normal range of functioning for “independent functioning” and “economic activity.” App. Ex. 3 at 55; Hrg. at 72–73, 141, 181–183.

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Following his departure from school, Applicant held a number of “menial” jobs that largely consisted of “physical” tasks, mostly working trimming trees, which required Applicant to go to the job site where the boss would tell him what to do. Hrg. at 90–92, 229. Applicant was able to obtain employment and contribute monetarily to the household needs. Hrg. at 93–94, 234. He obtained jobs through informal supports, as “he wasn’t somebody who would go . . . fill out a job application and then do an interview and get a job.” Hrg. at 191. Rather, his stepfather “would typically secure some kind of employment for him,” even working for his tree business where he “supervised him with some tasks as well, personally and directly on the job.” Hrg. at 91, 94–95, 194. As Dr. Hall explained, Applicant “would gain employment through a family or a friend, lose that employment, and then require assistance of a family or a friend to get another position.” Hrg.

at 229. On the job, Applicant “was a hard worker,” but was not the kind of employee who would “take initiative, never was assigned a supervisory position, was never a person who would be required to fill out the paperwork or even really interact with the clients. . . [h]is role was strictly laborer.” Hrg. at 192, 194. Applicant also did not manage his finances. He would “bring the money that he made from his jobs home, and then the partner or his mother would manage that money,” as Applicant “didn’t manage a bank account, he didn’t write checks, [and] never had a credit card.” Hrg. at 94–95, 200.

Based on this information, Dr. Boyd opined that Stone had a deficit in his practical domain functioning as he “hasn’t demonstrated the ability to do [the daily tasks of living] without somebody doing them for him.” Hrg. at 93–94. Dr. Hall similarly opined that Stone “had some deficits in practical” skills, although she acknowledged his strong work ethic was a potential relative adaptive strength. Hrg. at 190–192. As Dr. Hall explained, “just because Mr. Stone was a hard worker and took pride in his work, doesn’t negate the deficits that he had.” Hrg. at 192. Additionally, Dr. Hall gathered evidence that Stone had support in the community that allowed him to function, namely in the form of “support from his family and paramours,” without which his functioning would be limited. Court’s Ex. 1 at 13; Hrg. at 250–251. Accordingly, she opined that Stone had practical domain deficits. Hrg. at 192.

Based on this information, the Court finds that it is established by the preponderance of the evidence that Applicant requires significant support, whether formal or informal, to accomplish many daily tasks of living. Accordingly, the Court finds that Applicant has significant deficits in the practical domain of adaptive functioning.

c. Social Domain

The testimony at the hearing established that the social domain includes the many components of social interaction. As Dr. Boyd testified, evaluating a person’s social skills requires

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#19

understanding “what is this person’s social judgment like, do they understand the social rules. . .” and assessing questions like “do they have good judgment about who they’re friends with, do they understand that other people’s motives towards them may not be evident or positive.” Hrg. at 60. As Dr. Hall further explained, this is more than “if they can just have social relationships [be]cause folks on the ID scale tend to be pretty social, but we’re talking about high order social ability so that it’s more than just understanding social norms and social relationships, but can they infer about the quality of social relationships.” Hrg. at 191. This includes an assessment of if “they know when people are taking advantage of them,” as social domain deficits commonly present as “gullibility and vulnerability to manipulation.” Hrg. at 98, 191.

The available evidence demonstrates that Applicant was “a fairly likeable child, that at times it was – you know, he could be outgoing and that he really liked -- like he related to younger kids and was good at playing with them,” and “he did have dating relationships” and friendships, although, “it doesn't sound like they were really the best friendships.” Hrg. at 100. People who knew Applicant as a child described him as “not a good judge of character,” when it came to friendships, and “there were people who he hung around with that would take advantage of him, that would get him to do things that were – they classified as ‘illegal’ or . . . things that could possibly get him into trouble.” Hrg. at 199–200. These people would “mistreat him,” and “would do things to show him that they weren’t trustworthy but he wouldn’t accept it and wouldn’t necessarily pick up on that this is gonna happen again if I continue to make myself vulnerable to it.” Hrg. at 98–99. Friends remember that Applicant would think someone was his friend if they were kind to him and would be loyal to that person. Hrg. at 194. For example, Applicant had some acquaintances who “stole a vehicle of some kind from him,” as a teenager and he continued to spend time with them socially. Hrg. at 99.

Both Dr. Boyd and Dr. Hall considered Applicant’s social judgment and social

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relationships and opined that he had social domain deficits, beginning in at least his adolescence. Hrg. at 74–75, 100, 102, 206, 276. While Dr. Boyd opined that Applicant had some relative strengths in his overall adaptive functioning in the social domain, she recognized that the presence of strengths “is extremely common,” and does not detract from the reality of existing adaptive deficits. Hrg. at 63–65, 75, 99. As she explained, “social skills are where most people with ID try to pick up a little bit of the slack in terms of masking their problems and trying to sort of fly under the radar of detection.” Hrg. at 100. Overall, when considering the convergence of the available evidence, Dr. Boyd opined that despite the existence of some strengths, Stone still had deficits in this domain. Hrg. at 75, 99–101.

Based on this information, the Court finds that Applicant has established by the preponderance of the evidence that Applicant has some deficits in his social domain functioning and some relative strengths. However, the presence of adaptive strengths cannot be used to detract from the existence of adaptive deficits. *Moore*, 581 U.S. at 17. Satisfaction of prong two requires deficits in only one of three domains. Considering each of the areas of adaptive functioning, the Court finds that prong two has been established by the preponderance of the evidence.

Case #21

3. Onset in the Developmental Period

Intellectual disability is a developmental disorder, and the third prong the Court must assess is if a person’s deficits in intellectual functioning and adaptive behavior “manifested in the developmental period.” S.C. Code § 16-3-20 (C)(b)(10). The developmental period is the timespan of a person’s life up to the age of 18 or 22. Hrg. at 17–18, 204, 210–211. The analysis of age of onset does not require an individual to have been diagnosed with intellectual disability during the developmental period; instead, the signs of intellectual disability only need to have manifested in that period. *See Brumfield v. Cain*, 576 U.S. 305, 308–10 (2015); Hrg, at 13–14, 180; App. Ex. 3 at 55–56. However the record evidence in this case indicates a school determination of Applicant’s

intellectual disability, which is conclusive of prong 3.

The Court finds that Stone met his burden of proof regarding this prong of intellectual disability. The evidence before the Court includes Applicant's school records which include information about Applicant's academic performance. Applicant's school records also include several reports of evaluations for special education services. I find it appropriate to give these records weight in the analysis of prong 3 because they are records that were made contemporaneously to Applicant's childhood and were created before the instant offense and at a time when Applicant had no reason to be motivated to have documentation of intellectual disability.

These records document Applicant's consistent academic decline across his childhood, which continued even after Applicant was given special education services. These evaluations reported testing results, including three of Applicant's IQ scores, as discussed above, and the results of an adaptive behavior scale that was administered when Applicant was fourteen. Applicant's standardized score on this adaptive behavior scale was 52 to 59, which is significantly subaverage. App. Ex. 3 at 50–56; Hrg. at 72–73, 181–183. The school records also indicate that when Applicant was fourteen, the school evaluator found it necessary to classify Applicant as educable mental handicapped, which is a school classification for special education services. App. Ex. 3 at 55–56. As Dr. Hall testified, this classification is called intellectual disability today. Hrg. at 180, 196. The evidence before the Court also includes information elicited from collateral witnesses who knew Applicant when he was a child which support the existence of significantly subaverage intellectual functioning and deficits in adaptive behavior when Applicant was in the developmental period. Hrg. at 89, 101–102, 104, 111–112, 134, 167, 194–195, 197–200, 237–238.

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V. CONCLUSION

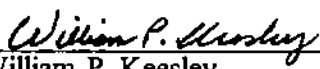
For the reasons discussed above, this Court finds that this is a proper action under the

Uniform Post-Conviction Procedure Act and Applicant is therefore entitled to pursue relief through this action. S.C. Code 17-27-160.

Based on all the evidence submitted, including testimony, records, and reports, this Court finds that Bobby Wayne Stone is a person with intellectual disability, and therefore, he is ineligible for the death penalty.

NOW THEREFORE IT IS ORDERED that Bobby Wayne Stone's death sentence is vacated. This case is remanded to the Court of General Sessions for resentencing in conformity with this Order.

IT IS SO ORDERED.



William P. Keesley
Circuit Court Judge

#23
November 12, 2025.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER)

Bobby Wayne Stone,) C/A No. 2018-CP-43-01025
)
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 Applicant,)
)
 vs.)
)
)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

July 30 - 31, 2024

Sumter, South Carolina

B E F O R E:

The Honorable William P. Kesley, Judge

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Judicial Circuit Court Reporter

I N D E X

<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>		
Case Called/The Court	4		
Certificate Page	345		
(A)- On behalf of the Applicant			
(R)- On behalf of the Respondent			
Direct	Cross-Examination	Redirect	Re-cross
	Dr. Sarah Boyd (A)		
Ms. Major			5,143
Mr. Evans			108,151
	Dr. Alicia Hall (A)		
Mr. Grose			153,263
Ms. Brown			210,281
	Dr. Michael Vitacco (R)		
Mr. Evans			284,300
Mr. Grose			298
	Dr. Kimberly Kruse (R)		
Mr. Evans			301,320
Ms. Major			315
	Ms. Elaine Harris (R)		
Mr. Larrabee			329,343
Ms. Major			341

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EV.</u>
Applicant's 1	CV of Dr. Boyd		13
Applicant's 2	Dr. Boyd's Report	25	
Applicant's 3	Applicant's Records	48	
Applicant's 4	CV of Dr. Hall		167
State's 1	CV of Dr. Vitacco		287
State's 2	CV of Dr. Kruse		304

1 (The following proceedings were held July 30-31,2024.)

2 THE COURT: All right. Let's go on the record on
3 2018-CP-43-01025, *Bobby Wayne Stone vs. The State of South*
4 *Carolina*. Mr. Stone is present with counsel. Are there
5 any matters that I need to take up before we get started
6 from the State?

7 MR. EVANS: No, Your Honor.

8 THE COURT: From the Applicant?

9 MR. GROSE: No, sir.

10 THE COURT: You wish to make an opening statement of
11 any kind?

12 MR. GROSE: I think you have pre-trial briefs from us.
13 I think we're prepared to go straight into testimony.

14 THE COURT: State wish to make any opening statement?

15 MR. EVANS: Same here from the State, Your Honor. We
16 filed pre-trial briefs to the Court.

17 THE COURT: All right. Okay. Then call your witness.

18 MS. MAJOR: Applicant calls Dr. Sarah Boyd.

19 DR. SARAH ELIZABETH BOYD,
20 having been first duly sworn, testifies as follows:

21 COURT CLERK: State your full name and spell your last
22 name for the record, please, ma'am.

23 THE WITNESS: Sarah Elizabeth Boyd. The last name is
24 spelled B-o-y-d.

25 DIRECT EXAMINATION

1 BY MS. MAJOR:

2 Q. Good morning, Dr. Boyd.

3 A. Good morning.

4 Q. You stole my first question. I was gonna ask you to
5 state your name for the record. Can you please tell us
6 what your occupation is?

7 A. I'm a licensed clinical psychologist.

8 Q. And in what capacities have you worked as a -- have
9 you worked as a forensic psychologist before?

10 A. Well, I have a couple of areas of employment since I
11 was independently licensed. One is with Wood Bridge
12 Psychological Associates, which is a group private
13 practice. I left that practice in 2016 to return to being
14 adjunct faculty at the University of Virginia and to start
15 my own private practice, which is called Boyd Forensic
16 Psychology Services.

17 Q. And is that your current employment?

18 A. Yes.

19 Q. Okay. In your employment history, you had any
20 experience working directly with people with intellectual
21 disabilities?

22 A. Yes.

23 Q. Could you please describe that experience?

24 A. Okay. So before I even went to college, I had a job
25 as a care giver. So I took care of folks with

1 developmental disabilities who needed an institutional
2 level of care, meaning they were in a nursing home type of
3 facility, about 30 beds on each wing. Me and usually one
4 or two other people would be responsible for feeding those
5 folks, changing those folks, you know, showering them and
6 doing interventions and activities with them. So that was
7 the most kinda intensive setting that I worked in and that
8 was the first one, but I've also worked in group homes.

9 I've done what's called "respite," where I go into the
10 home and take the person out so their care givers can kinda
11 get a break, and I've worked with folks who were in
12 independent apartment living, meaning it was like a regular
13 apartment building, but some of the buildings were occupied
14 by individuals with developmental disabilities, and people
15 like myself would go in and spend time with them, teaching
16 to do then -- teaching them to do things like pay bills or
17 engage in appropriate leisure activity, go to the movies,
18 you know, work on employment related tasks, basically to
19 help them become more independent. So it wasn't a job
20 where I was so much doing for people, although sometimes
21 that was necessary, the job was just support the
22 individuals to achieve more independence.

23 Q. Thank you. And I know you mentioned that you began
24 some of this work before you went to college, but could you
25 please describe your education and training as a

1 psychologist to the Court?

2 A. Right. So I continued to focus on intellectual and
3 developmental disabilities within the area of psychology.
4 So I have a bachelor's degree in psychology from the
5 University of Illinois. I have two masters degrees: One
6 is in counseling psychology; one is in clinical psychology.
7 Those are from the University of Kentucky. I have a Ph.D.
8 in clinical psychology from the University of Kentucky. I
9 have a graduate certificate in developmental disabilities
10 from the University Center on Excellence for Developmental
11 Disabilities, which is also at the University of Kentucky;
12 and so I completed all of that training specific to just --
13 you know, which included a lot about disabilities; but I
14 also am board certified as a forensic psychologist with the
15 American Board of Professional Psychology. That's a
16 credential that only about four percent of psychologists in
17 the United States have, and I'm licensed to practice
18 psychology. I'm also qualified under PSYPACT to practice
19 in jurisdictions that have adopted that law.

20 Q. Thank you. And you just mentioned that you're board
21 certified. What does it mean to be board certified?

22 A. Well, they're a number of board certifications, and
23 some of them are what are called "vanity certifications"
24 where you basically -- pay your money and it gets your slip
25 that says you have some expertise in some particular area.

1 So having a board certification in and of itself may not
2 matter as much if -- unless you dig into it.

3 So the one that I sought out and qualified for is with
4 the American Board of Professional Psychology. The
5 forensic specialty is one of, as far as I know, only two
6 that are actually recognized by the APA, and the process
7 includes vetting to make sure you're qualified to even try.
8 Then there's an exam that you pass -- well, if you pass --
9 not many people pass that, and then there's a -- you submit
10 work products. So those are reports. The reports I
11 submitted were related to intellectual disabilities, and
12 then you have essentially a defense where three of your
13 board of colleagues meet with you and interrogate you
14 essentially about your reports, and then that oral exam is
15 where they determine if you will actually pass or fail.
16 Most recently, the last couple of rounds of people I've
17 seen go through, about 50 percent or less of the people who
18 actually make it to the oral defense actually pass.

19 Q. Thank you. And you mentioned some of the
20 organizations already, but could you please state, are you
21 a member of any professional organizations?

22 A. Yes. They're listed on my curriculum vitae, but in
23 brief, I'm a member of professional organizations. They're
24 mostly related to developmental disabilities or to the
25 practice of psychology within the American Psychological

1 Association, but I'm also a member of a couple of
2 organizations that are probably less relevant; however,
3 those are related to sexual abuse prevention and treatment.

4 Q. And the ones that are related to intellectual
5 disabilities for the practice of psychology, do you mind
6 just stating those for the record?

7 A. The two primary ones would be my membership in
8 Division 33, which is the division of the American
9 Psychological Association that is focused on intellectual
10 and developmental disabilities. Additionally, I'm also a
11 member of the AAIDD, which is the American Association on
12 Intellectual and Developmental Disabilities.

13 Q. Thank you. And have you done any research or
14 published anything?

15 A. Yes. Again, also listed in my curriculum vitae. The
16 vast majority of what I've published relates to providing
17 care for people with developmental disabilities in a
18 variety of settings.

19 Q. And could you please just describe your experience
20 actually evaluating intellectual disabilities?

21 A. Sure. So most of my experience evaluating
22 developmental disabilities has either occurred in a
23 disability specific context, like special education, or
24 assessing people to ensure that they're still eligible for
25 services that they're supposed to get; and that was more my

1 earlier experience.

2 More recently, I shifted into a 100 percent forensic
3 focus since about 2016, and so during that time most of my
4 work involving people with intellectual and developmental
5 disabilities involves risk assessment of those folks,
6 sometimes civil cases where they've been victims of some
7 kind of abuse or neglect. I do competency evaluations,
8 where I specialize in individuals with intellectual
9 disabilities, and I do a number of other kinds of like
10 special edu -- I still do some special education type
11 assessments. Would it be okay for me to have a glass of
12 water?

13 Q. Yeah.

14 A. Apologize for the delay.

15 (Pouring a glass of water for the witness.)

16 MS. MAJOR: Your Honor, is it okay if I approach to
17 bring her some water?

18 THE COURT: Sure.

19 Q. And if you could give kind of an approximate number
20 how many intellectual disabilities evaluations do you think
21 that you've conducted over the course of your career?

22 A. So actual evaluations, that would be in the hundred
23 at this point, but probably -- I would say less than 1000,
24 but somewhere between maybe 500 and a 1000.

25 Q. And have you previously been qualified to testify as

1 an expert witness in the field of psychology?

2 A. Yes, many times.

3 Q. In what courts have you been qualified before?

4 A. So Federal court and State court. Federal court has
5 been in Virginia, Ala -- and Alabama, and Pennsylvania.
6 State court has been numerous jurisdictions in Virginia,
7 some in Kentucky. Let's see. Florida, Alabama. I believe
8 Georgia, West Virginia. There's a number. I'm not going
9 to be able to remember all of them, but there's been
10 several.

11 Q. So both in State court and in Federal court?

12 A. Yes.

13 Q. Okay. And were any of those prior cases capital
14 cases?

15 A. Yes.

16 Q. And did any of those cases involve issues of
17 intellectual disabilities?

18 A. Yes. In fact, I think the last time I testified in a
19 capital case was an **10:25:4 case.

20 Q. Okay. And have -- another question that I had
21 forgotten to ask before, but do you have any committee or
22 service activity experience in the field of psychology?

23 A. Yes, a couple. So one, I was a member of the
24 Developmental Disabilities Council, which was an advisory
25 council for the State of Kentucky as a graduate student

1 advisory member. Additionally, I was a member of -- so I
2 was one of a few psychologists who were selected by our
3 Department of Behavioral Health -- (clears throat) excuse
4 me -- in disability services in Virginia, and we met to
5 discuss what types of tests should be considered
6 appropriate for inclusion in a sort of master list of
7 acceptable IQ tests that could be used in Virginia, in --
8 specifically in the context of capital cases. So I think
9 there were only about five or less on the committee. We
10 weren't elected or anything like that, but we were selected
11 by the -- I think it was the director of forensic services
12 at that time.

13 Q. Thank you.

14 MS. MAJOR: Your Honor, may I approach?

15 THE COURT: Yes, ma'am.

16 Q. I'm gonna show you what's been marked as Applicant's
17 Exhibit 1.

18 (Ms. Major hands document to the witness.)

19 Q. Does this look like a copy of your most current CV?

20 A. I have updated it since then, but not substantially.
21 I think there was one additional training I may have added
22 onto here that I've done since then that was about an
23 assessment of violence risk in individuals with autism.

24 MS. MAJOR: Your Honor, I'd move to admit Applicant's
25 1 as an exhibit.

1 THE COURT: Any objection?

2 MR. EVANS: No objection, Your Honor.

3 THE COURT: Madam, Court Reporter.

4 Q. And --

5 THE COURT: Wait. You know, give her ...

6 (Marked Applicant's Exhibit No. 1, CV of Dr. Boyd.)

7 Q. And I just --

8 THE COURT: Wait a -- wait a second.

9 MS. MAJOR: Sorry.

10 (Brief pause.)

11 MS. MAJOR: Your Honor, at this time we would move to
12 qualify Dr. Boyd as an expert in psychology of intellectual
13 disability.

14 THE COURT: Any voir dire?

15 MR. EVANS: No voir dire, Your Honor. No objection.

16 THE COURT: She's so recognized. You may continue.

17 MS. MAJOR: Thank you.

18 BY MS. MAJOR:

19 Q. So I want to begin by discussing the clinical
20 standards surrounding intellectual disability. Could you
21 describe what intellectual disability is.

22 A. Disability is a neurodevelopmental disorder --
23 intellectual disability, excuse me, is a neurodevelopmental
24 disorder. That means that it starts during childhood and
25 we expect it to persist throughout a person's life. So

1 it's not something that happens to you as an adult. It's
2 something that you're -- you don't have to be born with it,
3 but it has to start in childhood. Intellectual disability,
4 specifically, is about an impairment of your intellect
5 which is a type of cognition. Cognition is how we reason,
6 how we remember things, how we utilize information with our
7 brains; and with intellectual disabilities impairment, that
8 causes the person to have more difficult living
9 independently, according to whatever their cultural or
10 social standards are at that point in time.

11 So for some people with an intellectual disability
12 now, it means that you're mental ability is significantly
13 lower than the average person, and we define that according
14 to how far away you are from the average. So it's not
15 like, you know, how fast can you run a mile. It has to be
16 less than this amount of time. It's more like how much
17 slower are you than the average person who runs a mile, but
18 it's the mental version of that.

19 It's not enough, though, to just have low test scores
20 on things like IQ tests, which is how we measure that
21 intellectual impairment piece. You also have to have co-
22 occurring impairments and adaptive functioning. Adaptive
23 functioning is that part where we get the person's ability
24 to independently care for themselves in the community. So
25 not in a prison, not in a hospital, not even really in a

1 group home necessarily, but in a community based setting
2 where they have to demonstrate independence in terms of
3 their ability to take care of themselves, navigate the
4 community, do things like use medicine, appropriately cook,
5 clean, you know, those kinds of -- grocery shop, those
6 kinds of things.

7 So they have to also have this impairment. In other
8 words, like a lot of areas of disability, it's not enough
9 to just have something unusual about you, it has to be
10 something that also causes you to have more problems
11 functioning in life in a significant way.

12 So for intellectual disability, or you may hear me
13 call IDD or ID at times, you have those -- not only the low
14 test scores, but you also see that the person is having
15 problems functioning independently in life, that they
16 depend on other people for a lot, and that they don't do
17 well when they don't have those other people around to help
18 them.

19 Lastly, as I mentioned before, there's a requirement
20 to have onset during the developmental period, which we've
21 always thought of as childhood, but our definition as
22 psychologists of childhood have changed a little bit.

23 So we used to say "before age 18," and now we say
24 "before age 22" because we have newer science that says
25 that childhood is actually a little -- and adolescence in

1 particular, is longer than we used to think it was.

2 Q. Thank you. Are there certain organizations that are
3 responsible for developing clinical diagnostic criteria for
4 intellectual disability?

5 A. In the United States, the two primary entities who are
6 developing that criteria are the AAIDD that I mentioned and
7 then there's the diagnostical [phonetic] -- diagnostic and
8 statistical manual from the American Psychiatric
9 Association, which is currently in its fifth addition that
10 they've done text revision. So those are the two that we
11 tend to use most in the United States.

12 There's also a -- the International Classification of
13 Diseases that's utilized internationally, but in terms of
14 what we use in the United States, we primarily focus on
15 AAIDD and DSM-5 definitions.

16 Q. Okay. And the DSM, that's that Diagnostic and
17 Statistical Manual of medical disorders is put out by the
18 APA?

19 A. Yes.

20 Q. And the AAIDD, do they put out the publication that
21 includes their diagnostic criteria?

22 A. Yes. It -- they have that. They also have some
23 guidance. The AAIDD has specifically produced some
24 guidance related to the capital setting as well.

25 Q. And the AAIDD new publication, is that intellectual

1 disability definition diagnoses classification systems of
2 support?

3 A. Yes. So it used to be the green book before, and now
4 it's the purple book.

5 Q. Gonna ask if it was currently called the purple book.
6 And the purple book, is that something that's commonly
7 relied on as being part of the clinical standards for
8 diagnosing ID?

9 A. Yes. I would say for people who specialize in that
10 area, yes.

11 Q. And what are -- I know you mentioned this a little bit
12 when you were discussing what intellectual disability is,
13 but what are the specific diagnostic criteria that have to
14 be met for someone to be diagnosed as ID?

15 A. Well, I've already detailed them, so I won't belabor
16 it, but you have to have an IQ score that's at least
17 roughly two standard deviations below the mean, which
18 currently we formulate as around a 70 on it -- on a current
19 -- on current norms. You also have to have those deficits
20 in adaptive functioning and those also have to be
21 significant.

22 So a lot of times you see that formalize similarly,
23 about two standard deviations below the mean. And then you
24 do see -- there used to be a difference in the age of
25 onset. That had to be before 18, and some situations

1 before 22. Now it's consistently before 22.

2 Q. And have you reviewed any South Carolina law that
3 defined intellectual disability for your work in this case?

4 A. Yes. The language of the law is very, very similar to
5 the diagnostic standard. South Carolina's one of the
6 states that has, like, reasonably good congruence between
7 what the law says and what our diagnostic criteria are
8 clinically.

9 Q. And if I asked if you had reviewed South Carolina Code
10 16-3-20-C(B)-10, would that -- sound like what you've
11 reviewed for your work in this case?

12 A. Frankly, that sounds like gobbledygook to me, and I do
13 not remember the exact number. It's -- that's a hard thing
14 for me to recall, but in my report, I do list the code
15 section and the precise language, so that I don't have to
16 try to memorize it.

17 Q. That is fair. So at some point were you asked to
18 evaluated Mr. Stone, to assess whether he's a person with
19 intellectual disabilities?

20 A. So I was asked to evaluate Mr. Stone to see
21 essentially if there might be a good reason to have him
22 evaluated for intellectual disability. I don't know that
23 it was settled on yet. Certainly, though, a full
24 evaluation would be done when I was initially retained.

25 Q. Do you remember when that was?

1 A. 2017, I believe is when I was retained. That's at
2 least when I started work on this case.

3 Q. Okay. And then at some point, were you asked to do a
4 full evaluation of whether or not he was a person with
5 intellectual disabilities?

6 A. Yes. So there was initial testing that was done and
7 then later on -- well, there's some initial testing that
8 was done. I did a few interviews in 20 -- I believe it was
9 2018, and then a couple of years later, because of the
10 pandemic, it was difficult to do the followup interviews in
11 person. So I went back in 2020, did some additional
12 interviews, and in 2022, I did some more interviews.

13 Q. Okay. And besides -- I know you said you did some
14 testing. What was that testing just generally and we'll
15 get a bit more into it briefly.

16 A. So the testing that I conducted with him initially was
17 just IQ testing.

18 Q. Okay.

19 A. And it was just to see if he would come even -- if it
20 would make sense even to look into adaptive functioning
21 because if you have a score that's very high, then there's
22 really no point in even looking into the adaptive
23 functioning and investing case resources in that.

24 Q. Okay. And besides the collateral interviews that you
25 mentioned that you did for your evaluation, did you look at

1 or consider anything else while you were conducting your
2 evaluation?

3 A. Yes. I had copies of records that are listed in the
4 sources of information section of my report.

5 Q. Okay. And what definition or definitions of
6 intellectual disability did you use for your evaluation?

7 A. Again, it's detailed in my report, but what I describe
8 is the language from South Carolina law, and then I also
9 describe what the DSM-5 criteria, you know, is; and then I
10 also describe what the AAID criteria is, and I provide a
11 table where I compare those in the report.

12 Q. And just generally, those would be those three same
13 diagnostic prongs that you just previously just discussed?

14 A. Yes.

15 Q. Okay. And did you formulate an opinion where the
16 reason -- within a reasonable degree of scientific
17 certainty in your field as to whether or not Mr. Stone is
18 intellectual disabled?

19 A. So I hate the term reasonable degree of psychological
20 or scientific certainty because I've never been able to
21 find a clear definition of what that actually means in the
22 way that I could translate into a degree of competence. So
23 instead I try to just be more specific about my level of
24 confidence.

25 With Bobby Wayne Stone, I've been clear -- I've tried

1 to be clear and I will be clear about each opinion, what
2 degree of confidence I have in it. If there's a reason
3 that I have doubts about something, like if there's another
4 explanation, I'll be clear about it in the report or in my
5 response to a question.

6 In this particular case, in terms of the diagnosis,
7 the specific opinion regarding his diagnosis of
8 intellectual disability, I have a high degree of confidence
9 in that particular opinion. It's consistent with the prior
10 testing that's been done. It's consistent with his past
11 history. It's consistent across numerous interviews, and
12 the -- there's a fair amount of information in educational
13 records which, in my experience, is relatively unusual for
14 somebody at this age where we're trying to go that far
15 back; and so I'm able to give an opinion with more
16 confidence than I would, for example, if somebody had very,
17 very sparse educational records or no educational records.
18 So with all of it together, with respect to the diagnostic
19 opinion, that is a strong opinion.

20 Q. Okay. And what is that diagnostic opinion?

21 A. I believe that he does meet criteria -- clinical
22 criteria for an intellectual disability according to our
23 clinical standards. It's up to the trier of facts to
24 determine if he meets the legal standards. So I don't
25 offer an opinion about that.

1 Q. Okay. And I know you had mentioned a report. Did you
2 prepare a written report to summarize your conclusions or
3 at least your findings in this case?

4 A. Yes. I believe I provided a preliminary opinion early
5 on, and then I produced a full report

6 Q. Okay.

7 MS. MAJOR: Your Honor, may I approach?

8 THE COURT: Yes, ma'am.

9 MS. MAJOR: Thank you.

10 (Ms. Major hands a document to the witness.)

11 Q. And I just handed you what has been marked as
12 Applicant's 2. Does that look like the report that you
13 authored?

14 A. Yes. It appears to be an accurate copy of the 15-page
15 report.

16 Q. Okay.

17 MS. MAJOR: Your Honor, I would move to admit Dr.
18 Boyd's report as Applicant's Exhibit 2.

19 THE COURT: Is there any objection?

20 MR. EVANS: Yes, Your Honor. We would object. We
21 feel that it's hearsay and unnecessary bolstering. If you
22 follow the *Jennings* and *Allegra* cases, won by the Supreme
23 Court and won by the South Carolina Court of Appeals, they
24 basically ruled that any admission of any reports will be
25 unnecessary bolstering of witnesses banned with anything by

1 by the actual witness, Your Honor.

2 And also we would move that it is hearsay. Even
3 though a expert can use hearsay evidence in order to form
4 an opinion, that evidence is not admissible before the
5 Court, Your Honor; and therefore, we would object allowing
6 this report in evidence.

7 If the Court is allowing this report in evidence --
8 she wrote two reports -- we would ask the Court to allow
9 both into evidence because there are some discrepancies in
10 both reports, Your Honor.

11 THE COURT: What's the Applicant's position?

12 MS. MAJOR: Your Honor, these kinds of reports are
13 commonly admitted in capital sentencing hearings and
14 capital post-conviction relief hearings. It is up to Your
15 Honor to consider how much weight and credibility to give
16 the contents of the report, that she will be walking you
17 through, and not only stating the things that are listed in
18 her report; and so for viewing the record, we would argue
19 that it's admissible or at least for your considerations to
20 give what her weight and credibility ---

21 THE COURT: Anything else from the State?

22 MR. EVANS: Nothing else, Your Honor.

23 THE COURT: Mark as identification purposes only. The
24 objection's sustained.

25 (Marked Applicant's 2, Dr. Boyd's report, marked for

1 identification.)

2 THE COURT: Wait a second.

3 (Brief pause.)

4 THE COURT: You may continue.

5 MS. MAJOR: Thank you.

6 BY MS. MAJOR:

7 Q. So I want to walk through your opinions and findings
8 on each of the diagnostic prongs in Mr. Stone's case. I
9 think you mentioned that the first diagnostic prong, is
10 that someone has to have significantly sub average
11 intellectual functioning. What kinds of things are
12 included when you're thinking about intellectual
13 functioning?

14 A. Well, it's what's normally called "intelligence," and
15 the -- there's sort of a lot of philosophical debate about
16 what all of that means, but functionally, an IQ test is
17 measuring the sort of cognitive skills that a person needs
18 at a given point in history, in a given culture, and a
19 given age in order to be able to be relatively successful
20 to navigate the demands of that culture. So an IQ test for
21 us now is focused on things like your fount of knowledge
22 about the world, your ability to reason quickly and
23 accurately with verbally presented information; your
24 ability to recall and reason with non-verbally presented
25 information, like figures and puzzles, things like that.

1 It also looks at your short term working memory and your
2 processing speed.

3 So all of those are things that they don't represent
4 some, like, pure true concept of intelligence that works
5 the same everywhere. It's intended to capture specifically
6 the abilities that are associated with essentially life
7 functioning, educational achievement, occupational
8 achievement, those kinds of things in our culture. So it's
9 both intended to measure intelligence, as in cognitive
10 intellectual ability, but it's important to understand we
11 aren't measuring the whole universe of intelligence. We're
12 focused on particular types of intelligences.

13 Q. And according to the clinical standards, what does an
14 evaluator look for when they are evaluating someone's
15 intellectual functioning?

16 A. Well, you know, usually we would do testing. Now,
17 sometimes it's not possible to do testing for a variety of
18 reasons, but I would say that you would need a pretty good
19 reason to not do the testing; however, there have been
20 situations where I have not been able to do testing. For
21 example, I was meeting with somebody in a group home that
22 didn't speak, and didn't really have a way to non-verbally
23 communicate or communicate otherwise. They can't do an IQ
24 test most of the time. There are some tests that are
25 developed for people who have very, very low intellectual

1 ability, but it's very hard to assess at a certain range
2 reliably. Most the time when you do, it's -- to use an IQ
3 test, the three that are usually promoted as the gold
4 standard tests are the Wechsler Adult and Children
5 measures, the Woodcock-Johnson measures that relate to
6 cognitive ability; and the Stanford-Binet, which is another
7 long -- it's an IQ test that's been around for a long time.

8 Q. And you mentioned that those are kind of the three
9 that are used. Is there a reason that those tests are
10 preferred by clinicians over others?

11 A. Well, most of them have a good long-standing body of
12 research where we can understand not only the test, but
13 also we can look at how the test has changed over time and
14 the accumulating research literature on that.

15 So it's nice when you have a test like the Wechsler,
16 Stanford-Binet, where you can look at not only a good body
17 of literature about how the current version works, but you
18 can also see it change over time.

19 Also, the Supreme Court specifically cited to those
20 three as good tests. So, I think that also bolstered the
21 tendency, particularly of forensic folks, to rely on those
22 measures as opposed to others.

23 There's times that you can use others, like especially
24 if somebody can't talk or can't hear. You know, there's
25 times it is appropriate to -- or can't see, there's times

1 it's appropriate to make modifications, but those are the
2 three that we generally would look to first.

3 Q. And are those three considered to be individually
4 administered psychometrically by culturally appropriate
5 tests to measure IQ scores?

6 A. Well, I mean, they're not only culturally appropriate
7 for everybody ---

8 Q. Yeah. I'm sorry.

9 A. --- but generally speaking, you know, what they look
10 at is, you know, are -- do these tests measure the actual
11 construct? Are they individually administered as opposed
12 to, like, in a classroom when you give everybody the same
13 test; and then are they norm. So, the normed part first
14 who, do we know how people in the general population do on
15 this so we can compare you because like I said, it's not
16 like how fast you can run a mile, it's how much slower you
17 are than the average person runs a mile.

18 So, if the average -- if you don't have a good measure
19 of how fast the average person runs a mile, you're not
20 gonna be able to tell if you're slower, faster, or the same
21 as them. So, we utilize those norming procedures to -- in
22 part because intellectual disability is relative.

23 Q. Okay. And I know that you said earlier that for
24 someone to meet prong one, there -- it's typically
25 understood if, you know, approximately to standard

1 deviations below the median -- or the mean. Is there a
2 range of scores or a score that someone with need to have
3 that to satisfy prong one for intellectual disability
4 diagnosis?

5 A. Yes.

6 Q. And what is that?

7 A. So it's -- is approximately to standard deviations
8 below the mean. So for us, that means about 30 points
9 lower than the average. On IQ -- the Wechsler IQ test 100
10 -- the average is 100. Most people have scores that fall
11 between 85 and 115. The vast majority of people have
12 scores that fall between 70 and 130. So it's really small
13 number of people that are on the tail end, over 130 or you
14 know, below 70. So, we generally look at somewhere around
15 70, plus or minus 5, as where we're starting to get into
16 "this is so low that it's significantly sub-average."

17 Q. Okay.

18 A. In the current version of the DSM, they emphasize not
19 utilizing, like, a bright line to cut off, but they also
20 say that people who have scores that are significantly
21 higher than this range should not be considered for
22 inclusion in the diagnosis of ID.

23 Q. And besides that guidance by the numbers, are there
24 other considerations that have to be taken into account
25 when considering the number a person scores on an IQ test?

1 A. You have to consider the conditions under which the
2 testing was done. You also want to look at did they put
3 forth good effort, or is there a reason to think they may
4 not have, and that could be intentional or not. And you
5 also want to make sure that the norms that you're using are
6 appropriate and valid for that person.

7 So, that could be -- there could be cultural reasons
8 that they aren't appropriate, but currently, I would say
9 the biggest issue that we have is that all of those tests
10 are pretty old, and so the norms that they use are also
11 old, and we know that the community IQ is going up.

12 So, when you try to compare somebody using those
13 outdated norms, what we believe is that they're score will
14 be inflated. In other words, it will be inaccurate and
15 misleading. So, the norms, the time period when the test
16 was norm, and how long ago that was matters, and that's one
17 of the biggest issues that we're dealing with right now is
18 that we're having to make relatively large corrections
19 based on the sort of -- we call it -- "norm obsolescence"
20 is the term.

21 Q. And could you describe what the standard error of
22 measurement is?

23 A. Yes. So because IQ isn't -- like, it's not an organ,
24 you know, we can't measure it like we can measure your
25 brain or your heart or something else. So, we can really

1 only make estimates, and we're basically looking at, you
2 know, for -- if we could have had enumerable opportunities
3 try to measure this thing, what would be the typical kind
4 of error that we might see, and how much error is there.

5 So tests that have a big standard error of less
6 reliable than tests that have smaller standard error. And
7 standard errors usually also used to help calculate -- or
8 can be used to help calculate what are called "competence
9 intervals," where instead of saying, "This is a point
10 number, like, this person's IQ is 73 or 77 or 75," you say,
11 "This person's IQ most likely -- real IQ most likely falls
12 in this range," which is probably a better way to talk
13 about IQ anyway given that it is an estimate; but the
14 standard error of measurement gives us an idea of how big
15 that range needs to be, and there isn't one single standard
16 error of measurement for all tests. Each test is gonna
17 have its own because it relates to the reliability of the
18 measure.

19 Q. And can you describe what practice effect is?

20 A. Practice effect refers to the increase in IQ score
21 that you see when you administer -- it's usually the same
22 version of the test repeatedly to a person. So they'll get
23 practice effects just like any of us would doing a task
24 over and over again, and they can learn some of the
25 material, too.

1 So, the issue with practice effects generally comes in
2 when we have IQ testing that's done close in time together.
3 We usually want at least a year, ideally more like two
4 between test administration because otherwise we can get --
5 we can have that same issue of score inflation, except this
6 time, instead of coming from norm obsolescence, it's coming
7 from practice effects.

8 And this comes up quite frequently in capital cases
9 because we often have several experts who want to see the
10 person and evaluate the person and do their own testing,
11 and that's understandable; but it can create issues when
12 we're doing that testing too close together, and we end up
13 with practice effects.

14 Q. Thank you. And what is the Flynn effect?

15 A. The Flynn effect is -- also it's called "norm
16 obsolescence." Some people don't like that it was named
17 after Flynn, and think other people deserve credit. So, I
18 tend to call it "norm obsolescence," just to not create
19 controversy.

20 But what it refers to is this finding that's been
21 prevalent for decades now that the average IQ in the
22 population is going up. Now, the general estimate that you
23 see is about three points per decade. There's variability
24 there. That's a estimate, but -- or I should say an
25 approximation, but it's roughly about three points for

1 every ten years between when the test was normed and
2 administered. So if I have an IQ test that was normed in
3 2000, and I took it in 2010, then my IQ score on that test
4 is gonna be three points higher than it really should be.

5 So the norm obsolescence refers to the fact of,
6 you know, that these norms change. It's part of the reason
7 why we see tests that get updated and what's called "re-
8 normed" periodically. It's a really costly and difficult
9 process to do, but they have to do it because of the fact
10 that these norms change over time.

11 Currently, our guide -- our authoritative guidance
12 encourages us to utilize a correction in IQ testings. So
13 that's coming from AAIDD and the DSM that say, you know, it
14 is appropriate to make this correction. With that said,
15 there is a new version of the WAIS coming out in September,
16 and once that comes out and we're utilizing that test, we
17 will just be using the current norms because they will be
18 up to date.

19 Q. Thank you. And can you explain what validity is and
20 why it's confirmed to assess validity?

21 A. Well, I'll speak specifically to a narrow type of
22 validity, which is the test validity. Usually when you
23 hear a psychologist talk about somebody taking a test and
24 the validity of the test, what we really mean is how much
25 can we kind of bank on these results being accurate versus

1 influenced by some other factor. You know, a test could be
2 invalid because a person was taking a lot of medication
3 that day.

4 A test could be invalid because they had another
5 person in the room talking with them or even suggesting
6 answers. The test could be invalid because the test
7 administrator held the booklet in a way where they could
8 see the answers. You know, there's different ways in which
9 a test could be invalid.

10 We also look at the validity of somebody's
11 performance, are they accurately representing what they're
12 able to do and then, with that, we're usually looking at
13 faking good, which means trying to make myself seem better
14 than I am; or we're looking at faking bad, where I'm
15 feigning or exaggerating my problems, making -- even making
16 up whole new problems that I don't actually have; and
17 that's all distinct from the -- just the common errors or
18 confusion that we see that's measured by other validity
19 related scales.

20 Q. Thank you. And are there different ways that an
21 evaluator assesses validity during an assessment like the
22 one you conducted in this case?

23 A. Yes. And it's important to be clear that we do use
24 multiple strategies and we should use multiple strategies
25 rather than just relying on one piece of information. But

1 for ID, what I tend to focus on is the history. Most
2 people, if they have an incentive now to say they have an
3 intellectual disability when they don't, it's because
4 there's some kind of what we call "external incentive." So
5 that might be, "Oh, shoot, I'm in trouble and I don't want
6 to be in trouble any more. Maybe if I say I have this
7 disability, you know, I'll get a better arrangement," or
8 something like that, or "they won't believe that I'm
9 guilty," or something like this. You know, those kind of
10 incentives can be really powerful, or if you have somebody
11 that, you know, is trying to sue somebody, get some money,
12 you know, that incentive can be a powerful reason for the
13 person to pretend that they have more problems than they
14 do; and that does happen. So we always have to look at,
15 you know, what are the incentives there.

16 With intellectual disabilities, because it has onset
17 during childhood, we usually have the opportunity to look
18 into a time period when a person had no incentive to try to
19 present in any particular way. Are there exceptions to
20 that? Yes, but on balance, generally true, in childhood,
21 they don't have a lot of incentives to at least try to be
22 worse than they are in terms of their performance of
23 intellectual ability.

24 So one -- really -- big piece is looking at not just
25 how is this person doing now and how did they perform on my

1 testing now, but how did they do as a kid and how much
2 consistency over time in this person, not just in test
3 scores, but also just their functioning, their everyday
4 functioning.

5 So I could see somebody, they could have been really
6 well coached and pass all the tests with flying colors for
7 validity, and then get low scores on an IQ test; but once I
8 start looking at the course of their life and I find out
9 that they went to college and they took forensic psychology
10 classes and they have a forensic accounting degree or
11 something like this, then I would think, "Well, that's not
12 really very consistent with somebody who's had onset during
13 childhood and has been living with these impairments their
14 whole life."

15 So part of it is looking for things that are there
16 that support the diagnosis, but part of it is also looking
17 for things that could be dispositive or very unsupportive
18 or intellectual disability.

19 We do also typically use testing. The problem with
20 the validity testing is that a lot of it is not good for
21 people with intellectual disabilities. They have high
22 false/positive rates, meaning they get identified by the
23 test as faking or exaggerating, when in fact they're just
24 being honest about their difficulties.

25 So it's very challenging -- can be very challenging to

1 assess effort using formal tests. Moreover, we don't have
2 a formal malingering test for malingered intellectual
3 disability. We have things that measure other kinds of
4 malingering -- psychiatric symptoms, memory problems -- but
5 we don't actually have a specific test that we use to
6 measure malingered intellectual disability. So we have to
7 kind of piece things together with our best possible
8 options to try to create a picture of what are the
9 incentives to this person, did they seem to respond to
10 them, is there a historical pattern, and how much
11 convergence is there.

12 Q. Thank you. Did you evaluate if Mr. Stone was
13 malingering either on the testing that you conducted for
14 your evaluation or during the clinical interviews with you?

15 A. When I did the clinical interview with him, I spoke
16 with him, you know, before I started the testing, and he
17 was very clear that he did not want to be thought of as
18 somebody who wasn't, you know, as he put it smart. It
19 wasn't clear he was actually going to meet with me or
20 cooperate with me even in advance, and then also, when I
21 met with his family members, they told me that he had been
22 clear with them that he didn't want to participate in the
23 process and he didn't really want them to talk to me about
24 it, about his difficulties, and when I interviewed him, he
25 was quick to say, you know, "I don't -- I don't -- I think

1 I'm pretty normal," you know, he wasn't saying, "Oh, I've
2 got the -- all these terrible problems and I can't do
3 anything." If anything, he seemed to be more kinda
4 exaggerating the things that he could do.

5 So initially, in that more, like, narrow role, the
6 focus for my evaluation, I didn't have any significant
7 concerns at that time about malingering based on what I had
8 seen. Nothing had raised red flags. Once we went ahead
9 with the full evaluation, I wanted to go ahead and still do
10 effort testing with him, and so I did ultimately administer
11 a measure called the "TOMM," which is a measure of effort,
12 sometimes called malingering measure, but it is a memory
13 malingering test, not an ID malingering test; but there's a
14 research literature on that instrument that says that it
15 can be appropriate to use with this population if you only
16 use Trial 2 and retention. And you would look for other,
17 like, little patterns, like the score going up over the
18 three trials, things like that.

19 So, it's not that these other measures are completely
20 useless, but we do have to take them with a grain of salt
21 with this particular kind of process.

22 Q. And, I think you said the TOMM test memory
23 malingering, could you just say what TOMM as an
24 abbreviation stands for?

25 A. Test of Memory Malingering.

1 Q. Thank you. And you did this in your second interview
2 with Mr. Stone. Were you using it to assess his
3 malingering on the IQ testing that you conducted earlier or
4 for a different purpose?

5 A. Well, I would have still -- I would have still
6 utilized it in terms of my formulation about how accurate I
7 felt the IQ test was, but it wouldn't be like a single
8 determinating -- determining factor. He did fine on the
9 TOMM, and so it wasn't something that pointed to low effort
10 or low validity; but I wanted to make sure that I did give
11 him some kind of an effort assessment at some point in the
12 process.

13 Q. Okay. And I think you said this, but did you find any
14 evidence that Mr. Stone was malingering either on his
15 testing or throughout your evaluative process?

16 A. No. I would say on balance there isn't any
17 information that suggests he's malingering. Not from
18 testing, not from the history, and then if you look at his
19 IQ test scores over time, too, once you account for
20 obsolescence, they also hang pretty close together, which
21 is consistent with that idea that each test is sort of, you
22 know, getting close in terms of an estimate of the actual
23 number; and so they are kind of clustering together, which
24 suggests that, on balance, his true IQ score is somewhere
25 around where those numbers meet.

1 Q. And did you find any evidence -- I already asked that.
2 I'm sorry. Did you form an opinion about whether or not
3 Prong 1 was satisfied in Mr. Stone's case?

4 A. Yes.

5 Q. And what is that opinion?

6 A. His score is close to the cut off, but it, on balance,
7 taken all together, it is significantly sub average
8 intellectual ability. The overall pattern is relatively
9 consistent over time. Like I said, the scores cluster
10 together when you account for normal obsolescence, and --
11 (coughs) excuse me -- that, taken together with the other
12 pieces, supports his diagnosis.

13 With just that prong though, he did do poorly enough
14 on the IQ testing, had significant enough impairment, that
15 it made sense to go ahead with the other steps of the
16 process of evaluation.

17 Q. And I want to walk through some of your evaluation of
18 his -- of prong 1 in Mr. Stone's case. You said you
19 conducted IQ testing on Mr. Stone. When did you conduct
20 that testing?

21 A. 2017.

22 Q. Okay. And which tests did you administer to Mr.
23 Stone.

24 A. The Wechsler Adult Intelligence Scale, Fourth Edition.

25 Q. And why did you select that test?

1 A. It was the best possible option among the tests on
2 which I'm personally trained and familiar at the time, and
3 at that point, it was less -- it was out of date already,
4 but it was less out of date than it is now.

5 Q. And did that test yield a full scale IQ score in Mr.
6 Stone's case?

7 A. Yes.

8 Q. And what were the results of your testing?

9 A. If I'm permitted, I'd like to reference my report so
10 that I make sure my account is accurate.

11 THE COURT: Yes, ma'am.

12 A. Thank you. Okay. His full scale -- so this is before
13 any kind of norm obsolescence correction. Our standard of
14 practice is that we first report what the actual scores
15 were from the test without any corrections to them so that
16 the reader knows here's what the test actually said and
17 then we look at what's the length of time since the measure
18 has been normed and we start making corrections after that.
19 But the starting point is to look at what were the numbers
20 that were actually generated.

21 So for him, for his full scale IQ, that was 79, which
22 falls at the eighth percentile. That means that only about
23 8 percent of other people his age, in the samples for the
24 WAIS, got lower scores.

25 Q. Okay. And did you apply Flynn effect or norm

1 obsolescence consideration to his -- to the results of this
2 test?

3 A. Yes.

4 Q. And why did you apply those?

5 A. That's the standard of practice at present. I -- now,
6 I -- to be clear, the standard -- there are a couple of
7 things the standard of practice doesn't necessarily tell
8 us. It doesn't tell us -- well, it tells us that we should
9 present the original test scores and not hide them.
10 There's no reason to hide those.

11 Secondly, they indicate that you want to use the year
12 the test was normed, not the year the test was published.
13 That's another thing about standard practice; but the third
14 piece of guidance, where they talk about making the
15 correction, where you're gonna basically multiply for every
16 year since the test was normed, between that and now. So
17 let's say it's 10 years. Then you're gonna make a
18 correction of some amount and you're gonna subtract that
19 from the score. A lot of people use .3. I would say that
20 .3 to .33 is absolutely defensible. Some of my colleagues
21 would say that you should actually measure at .2 and .4 and
22 then present that as a range for the correction.

23 There isn't standard guidance with respect to that
24 piece, whether you should use .3 -- 0.31, .32, .33; and
25 there's many boring science reasons that, that is the case,

1 but you know, that part we don't necessarily -- I want to
2 be clear, we don't necessarily have clear guidance about
3 what our standards of practice should be for what number we
4 use.

5 Q. And so what WAIS calculations did you use in Mr.
6 Stone's case?

7 A. Mr. Stone's case, I had an administration date of
8 2017, and the norming year for the WAIS of 2006. Now, I
9 will point out that the 2006 number comes from a Flynn
10 publication in, I believe, 2009 or thereabouts, and that
11 publication by Flynn actually contains an error; and so the
12 -- it was normed in 2006 and 2007, but the technical mid
13 point for the norm is 2007.

14 So, I wouldn't say this is like wrong because these
15 are just estimates, but I want to be clear that my current
16 practice is to use a norming year of 2007 instead of 2006.

17 So, we do about a third of a point, and that
18 correction, you know, adjustment is an estimate. I always
19 want to be real clear. These things are all estimates, and
20 that gets you closer to about 75 or 76 thereabouts.

21 Q. Okay. And did you also have information that Mr.
22 Stone had IQ testing at other points during his lifetime?

23 A. Yes. He had IQ testing and he had academic
24 achievement testing and he had some kind --
25 neuropsychological type evaluation that was done during

1 childhood.

2 Q. Okay. And where would those -- how -- sorry. How
3 many of the IQ tests did you learn about existing during
4 his childhood?

5 A. There were several. I'd have to -- well, there were
6 several type scores. So, that's detailed in my report. He
7 was evaluated before he was the age of 10 using another
8 Wechsler instrument.

9 He was evaluated again in 1976 using another Wechsler
10 instrument, but it was the updated version, and then in
11 1979, he was tested again using that, WISC-R, which is the
12 children's Wechsler measure, and he -- at that one, the
13 score -- only the score ranges are presented as far as what
14 I am aware of, not a point score. So for example, his full
15 scale score was identified as 69 to 75.

16 Q. And where were these scores reported?

17 A. These were in the records from childhood.

18 Q. And are these kinds of childhood records something you
19 would commonly look at in conducting an evaluation for an
20 adult who is intellectually disabled?

21 A. Yes. They're one of the highest priority types of
22 records to seek out.

23 Q. Hold for one second. And these childhood records
24 (indicating), are these school records?

25 A. Yes. That's my recollection.

1 Q. Okay. And you reviewed Mr. Stone's specific school
2 records in your evaluation for this case?

3 A. His records, and then I also had some school records
4 for family members.

5 Q. I'm gonna hand you a packet (handing over a document).
6 Does this look like the school records for Mr. Stone that
7 you looked at in your evaluation in this case?

8 A. Yes.

9 Q. And you relied on these records to form your opinion
10 in this case?

11 A. Yes.

12 MS. MAJOR: Your Honor, I'd move to admit Mr. Stone's
13 school records as Applicant's Exhibit 3.

14 THE COURT: Any objection?

15 MR. EVANS: Yes, Your Honor. I object to these
16 records being admitted. These are also hearsay evidence,
17 not admissible. I think Dr. Boyd can testify to what she
18 saw in the record during her testimony since she used these
19 records to make her final opinion; however, these records
20 are hearsay and not admissible to be introduced into
21 evidence, Your Honor. So, we would object to these records
22 being placed into evidence.

23 MS. MAJOR: Your Honor --

24 THE COURT: Yes, ma'am.

25 MS. MAJOR: -- these records are actually already in

1 the record. They are contained in the PCR appendix, which
2 the State filed. It's attached to his motion to dismiss in
3 this case earlier in 2018, and also, they are evidence
4 that, you know, Dr. Boyd formed her opinion based off of.
5 They don't -- they -- she will be testifying about them and
6 they have that information that she relied on to form her
7 opinion of them.

8 MR. EVANS: She can testify about what she saw in the
9 records; however, the records itself is hearsay evidence.
10 I don't think it should be made part of -- file should be
11 allowed to be introduced into evidence because it's
12 inadmissible and there is actually no hearsay exception to
13 -- on these records; therefore, we will renew our
14 objections in allowing these records to be introduced in
15 evidence, Your Honor.

16 THE COURT: Bear with me, please.

17 MS. MAJOR: I'm sorry, Your Honor. I didn't --

18 THE COURT: I said bear with me, please.

19 MS. MAJOR: Oh. Yes, Your Honor.

20 (Brief pause.)

21 THE COURT: May I see what you're trying to admit?

22 (Documents handed to the Court by the State.)

23 THE COURT: Anything else from the Applicant?

24 MS. MAJOR: We would just reiterate, Your Honor, that
25 these records were already contained in the PCR appendix

1 that the State filed earlier on in this case, and so we
2 would ask that they be admitted.

3 THE COURT: Anything else from the Attorney General?

4 MR. EVANS: We will just renew our objection to the
5 records being allowed in evidence due to them being
6 hearsay.

7 THE COURT: There is a way to get these in, but I
8 don't think there's a foundation at this point. The
9 objection's sustained. Mark them for identification
10 purposes, please, ma'am.

11 (Record documents marked for identification.)

12 THE COURT: All right. We've been going a little over
13 an hour. Is this a good stopping point, or you want to
14 continue for awhile?

15 MS. MAJOR: Whenever it's best for you, Your Honor,
16 we're happy to do.

17 THE COURT: You tell me. I don't know your case. So
18 you tell me. Is this a good stopping point or not?

19 MS. MAJOR: This is a good stopping point.

20 THE COURT: All right. Doctor, during this break,
21 you're not permitted to discuss your testimony with anyone.
22 All right?

23 DR. BOYD: (Nods head, affirmatively.)

24 THE COURT: All right. Ladies and gentlemen, the
25 Court's in recess for 10 minutes. Thank you.

1 (Off the record at 11:04 a.m.)

2 (Back on the record at 11:15 a.m.)

3 THE COURT: Be seated. Thank you very much. All
4 right, Doctor. I need you back up here, please. You're
5 still under oath.

6 (Dr. Boyd returns to the witness stand.)

7 THE COURT: You may continue.

8 MS. MAJOR: Thank you.

9 BY MS. MAJOR:

10 Q. Ms. Boyd, I'm gonna ask you to look at what's been
11 marked for identification purposes as Applicant's Exhibit
12 3. If you could turn to page 50 of Applicant's 3.

13 A. (Complies.)

14 Q. Could you describe what this document is?

15 A. The title of the document is "Summary of Results
16 Psychological Evaluation. "It's signed by Russell Trader,
17 Ph.D., who's identified as a school psychologist.

18 Q. And what dates does it appear -- is -- appears on this
19 document that it seems it was created?

20 A. Well, there are test dates that are provided. I'm not
21 seeing a ...

22 Q. Yes. My apologies. What test dates are on this
23 document?

24 A. Okay. So the earliest is -- looks to be December 12
25 of 1974. Then there's just another one, December 12, 1974.

1 Then there's a December 20, 1974, and the IQ test part was
2 administered in February of -- I'm sorry, did I say 2004? -
3 - 1974, and then there's a WISC, the childhood version of
4 the Wechsler, administered in 1975, in February.

5 Q. And I know we briefly talked about this, but what is -
6 - the WISC is a childhood score or a childhood scale? I'm
7 sorry?

8 A. So the Wix -- WISC, it stands for Wechsler
9 Intelligence Scale for Children, W-I-S-C, and it is the
10 childhood version of the IQ test. It's important to note
11 that this particular test is the original, the first one of
12 those that appears.

13 So it's not a WISC-R or a WISC-3 or anything like
14 that. It's just the original, and that test was published
15 in I believe 1949. It -- the norms presumably reflected
16 before that, but the test was published in 1949. So that's
17 quite a significant lag between when that test was normed
18 and when these results were obtained.

19 Q. And what score was reported for this WISC assessment?

20 A. For the full scale IQ, they reported an 86.

21 Q. Okay. And how old was Mr. Stone at the time this test
22 was administered?

23 A. Nine years old.

24 Q. And in the course of your evaluation, did you learn
25 anything about why this test was administered to Mr. Stone

1 at this time in his life?

2 A. I don't recall if this is a reevaluation. He had had
3 prior evaluations, but I don't -- I don't actually recall
4 why he had this test done.

5 Q. But this is the earliest IQ test that you are aware of
6 from his school in history?

7 A. I believe -- well, I believe so. I believe the 1975
8 is the earliest.

9 Q. Okay. And did you learn anything about the conditions
10 that this testing was conducted under?

11 A. Yes. I interviewed two school psychologists. Elaine
12 Harris is one of them, and I was interviewing them not
13 because they remembered Mr. Stones specifically, but rather
14 to gather information about how IQ testing was done at that
15 time; and what they indicated to me was that the -- during
16 this particular time period -- and I believe they spoke
17 about this particular psychologist, that the way this
18 testing was done was they would have all the students in
19 like a -- like a cafeteria. I can't remember it was a
20 cafeteria or like a basketball -- you know, like indoor
21 space where they would have tables set up for each sub
22 test.

23 So these tests have different types of tests within
24 them. For the WISC, you might have one where you're trying
25 to basically listen to a math problem and answer it. For

1 another one you might be answering questions about words
2 meaning. So each one of those tasks is different.

3 So based on interviewing those other psychologists,
4 what they said was that each one of those tests was a
5 different area of the room, and the students would rotate
6 through and do the testing with different examiners, too,
7 for each sub test, who they indicated to me were graduate
8 students.

9 And that's very significant departure from how the I -
10 - you know, the IQ tests are administered, how they're
11 normed, and on top of that, you know, we do have that
12 guidance that what we should be relying on are our
13 independently administered standardized tests and we would
14 want those to be done in a way that, you know, generally
15 speaking, we would not want that to be of a departure from
16 a standard practice. So they caused me to be somewhat
17 skeptical of some of the -- this earlier testing.

18 Q. And did you consider norm obsolescence for this score
19 on this test?

20 A. I did. I don't believe that I calculated it, but even
21 if we used the publication year instead of the norming
22 year, that's a 26 year difference, and so that's a -- you
23 know, we're talking about at least basically like six --
24 maybe like eight points thereabouts that you -- at least
25 that you would make a correction to that.

1 So, I think the main thing I would emphasize is, you
2 know, that's a big lag. We would be making a significant
3 correction, and the correction would take you to about the
4 mid 70s, probably.

5 Q. And, I know earlier on you've mentioned there were
6 three scores that you had learned -- or three testing -- IQ
7 testing scores that you had learned about during your
8 evaluation. When was the next score in time that you
9 learned about?

10 A. It was not long after this. It was in 1976. At that
11 point, he had a WISC-R, which was the updated version of
12 that measure.

13 Q. And if you turn to page 52, what's marked for
14 identification Applicant's Exhibit 3, is that look like the
15 testing information you received for the 1976 scores?

16 A. Yes.

17 Q. And what kind of record was this test information
18 contained in?

19 A. So this is somewhat similar in terms of how it looks
20 to the other score -- you know, score report. So this is a
21 report by somebody who's indicating here what the test
22 findings are and then just recommendations. So it's not a
23 lengthy history section, there's not much integration, they
24 report these scores.

25 So at this point, he would have been -- in 1976, he

1 had a full scale -- their reporting a full scale IQ of 78.
2 With the updated test that they were using at that time,
3 there would be a small, you know, Flynn adjustment, but not
4 a big one. That's closer to what we would expect.

5 Q. And about how old was Mr. Stone at this time?

6 A. I think he was about 11, perhaps.

7 Q. And for this report, I know you said was in
8 1976, but what was the date of the testing?

9 A. The date for the WISC-R is October 12, 1976.

10 Q. And I think you explained that you learned that
11 because of the norm, the Flynn effect would have been very
12 minimal related to this score. Did you learn anything else
13 about this test score that made it improper or unreliable
14 as a score to consider while evaluating Mr. Stone's
15 intellectual functioning?

16 A. Not -- I don't recall other specific information about
17 this one.

18 Q. And were the results of this testing consistent with
19 the testing that you administered to Mr. Stone?

20 A. Yes, and that's what I was alluding to earlier when I
21 talked about these scores clustering together, you know.
22 The ones that are administered close in time to when they
23 were normed are falling close in time to our adjusted
24 estimates for the tests that were administered at -- with
25 significant norm obsolescence and then that includes the

1 testing that I did in 2017.

2 Q. And I believe you also said there was a test that you
3 learned about in 1979. If you turn to page 55 of what's
4 been marked for identification as Applicant's Exhibit 3,
5 does that look like the testing information that you
6 received?

7 A. Yes. This is the one that was signed by Dr. Harris.

8 Q. And again, could you just describe what kind of record
9 this testing was recorded in?

10 A. It's a two page psychological report that briefly
11 describes what he was referred for, how he behaved during
12 the evaluation, briefly his appearance, and the test
13 results and then what that means for his education, which
14 is -- that section is educational implications and
15 recommendations.

16 Q. And what is the date that it appears that this
17 testing was conducted on?

18 A. It looks like it was probably November 1. Yeah.
19 November 1, 1979, if I'm understanding the date convention
20 correctly. It's listed as 791101.

21 Q. Thank you. And about how old was Mr. Stone at this
22 time?

23 A. 14.

24 Q. And I know you said that this score -- well, first,
25 what kind of test was administered to Mr. Stone at this

1 time?

2 A. This would have been another WISC. It -- at that
3 time, it was the WISC-R. That was the current test that
4 was used at that time.

5 Q. Okay. And I know you said this was reported as a
6 range. Was the range that was reported in this report?

7 A. The full scale IQ was reported to be between 69 and
8 75.

9 Q. And did you apply the Flynn effect to this score?

10 A. I believe -- well, you can. That would -- it wouldn't
11 be a huge adjustment, and it's hard to adjust a range like
12 that without the point; but it would only be a couple of
13 points at most.

14 Q. And what is this score consistent with the testing
15 that you administered to Mr. Stone?

16 A. Yes. And when I say that testing was consistent, it
17 wasn't not just the IQ testing was consistent, but overall
18 the findings even on the other tests administered were
19 relatively consistent.

20 Q. I believe you mentioned that this report also contains
21 the section that's titled "Educational Implications"?

22 A. Yes.

23 Q. Did you learn anything about what implications this
24 testing had on Mr. Stone maybe getting or not getting
25 services at school during this time?

1 A. So the report states pretty clearly in the
2 recommendations section (as read): "At this time, Bobby no
3 longer qualifies for LD resource. He does qualify for EMH
4 resource and a change of placement is necessary."

5 Q. Could you describe what you understand the LD resource
6 to mean?

7 A. So usually when people are talking about resource,
8 they're talking about a resource room where the child is
9 spending some amount of time in the next general education
10 setting and some time in spaces where there are a better
11 student-to-teacher ratios and they're working on particular
12 topic areas to get additional help. So LD is generally
13 standing for learning disability, and those are gonna be
14 students who typically -- they either have average
15 intelligence, you know, don't have intellectual disability,
16 or they have intellectual disability and they have a
17 learning disability, but they've been classified according
18 to the learning disability.

19 EMH is educable mentally handicapped, which is an old
20 term that we don't use anymore, and they use the word
21 educable because they meant essentially these are the
22 people who are worth waste -- you know, just like that
23 anybody else below that is like a waste of energy and money
24 to educate; and obviously that's offensive now. We don't
25 think of kids that way now, but that used to be the

1 distinction was between whether somebody was educable or
2 trainable was sort of what you were looking at.

3 Trainable meant you could get them in a factory, you
4 could teach them to do, like, a rote task over and over
5 again. Educable was more parallel to what we now call
6 "mild intellectual disability," where people could attain
7 an education, we expect they would be able to learn to read
8 or write, they're never gonna be, you know, high achieving
9 or like intellectually talented or anything like that, but
10 the notion was that they're worth investing time and energy
11 in educating them. So that's the educable part.

12 And nowadays, we would consider it to be, you know,
13 depending on the kid, roughly synonymous with mild
14 intellectual disability.

15 Q. Okay. And did you consider all of these three tests
16 that we've just discussed when assessing whether or not Mr.
17 Stone satisfied prong one?

18 A. Yes.

19 Q. Considering all of these scores and your testing as
20 well, how do Mr. Stone's scores compare to the general
21 population?

22 A. Well, they're significantly sub-average. So they are
23 -- but they do kinda -- they do tend to cluster, you know,
24 around this margin, but that's typical for individuals in
25 the capital setting. We're usually seeing, you know,

1 people aren't arguing a lot about the people that are, you
2 know, significantly lower than that.

3 Q. And what other information did you assess when you
4 determining whether or not Mr. Stone satisfied prong one
5 besides his IQ testing?

6 A. Well, I considered his IQ testing, but also the IQ
7 testing that I conducted.

8 Q. Okay. Did you also consider his school performance
9 when assessing whether prong one was satisfied?

10 A. That would go more to prong two and prong three.

11 Q. Okay. And I think you mentioned for this 1979
12 testing or the 1976 testing as well, but were there any
13 other sorts of academic or achievement testing that you got
14 information about Mr. Stone's having completed while he was
15 a kid?

16 A. Yes. He completed academic achievement testing that
17 was reported multiple times in the record, and there were
18 some -- there was some variability with respect to that.
19 There were some other kinds of testing also reflected in
20 his record that related more to, like, neuropsychological
21 functioning; but yeah, there was certainly academic
22 achievement testing. He generally scored below grade
23 level. That was true.

24 There is one that's a significant outlier I will say.
25 I'm not sure what to make of that, where his test scores

1 are really average. Some are even listed as above average.
2 Mistakes happen sometimes. People's test records can get
3 mixed up. I suppose that's a possibility, but that's one
4 that is really different from the others that I saw in the
5 -- in the records, and you know, I don't know what to make
6 of that particular one.

7 On balance though, what we saw was that he was
8 typically at least a couple of grades below what would be
9 expected, and it's also important to note that for some of
10 the early testing that was done, they were comparing him at
11 grade level.

12 So like, the first year that he took the test in first
13 grade, he got a very low score, and then second year he did
14 a little better and you know, he looks like he's performing
15 better, but just keep in mind, we're still comparing the
16 first graders, not to kids his own age.

17 So, it's also important to contextualize the scores
18 that are in the educational record and to make that
19 distinction too between an academic test and what we
20 consider to be intellectual testing.

21 Q. And are these kind of academic testing scores
22 clinically proper to consider as equivalent to full scale
23 IQ scores?

24 A. No. I wouldn't consider them clinically equivalent,
25 but I also wouldn't say they're entirely uninformative, you

1 know. People with intellectual disabilities have strengths
2 that coexist with their weaknesses. There's a lot of good
3 reasons to try to find strengths in people with
4 intellectual disabilities. So you're gonna see some
5 variation.

6 It also can give you a sense of were they benefitting
7 from whatever accommodations they were getting in school
8 because even if a child has an intellectual disability,
9 they should still be making some progress if they're
10 getting the right intervention.

11 Q. And considering all of this information that we've
12 discussed, what is your opinion on whether prong one is
13 satisfied in Mr. Stone's case?

14 A. In my view, he satisfies prong one from a clinical
15 perspective.

16 Q. And did you find evidence that this prong was
17 satisfied during the developmental period?

18 A. Defined as before age 22, yes.

19 THE COURT: Say that again, please.

20 A. Defined as prior to age 22, yes.

21 Q. I'm gonna move on because I feel like we've been
22 talking about IQ testing for awhile and intellectual
23 functioning. So, I'd like to move to talk to you about the
24 second diagnostic prong, which I think you said was that
25 there are deficits in adaptive functioning. And so I'm

1 wondering if you could describe what adaptive functioning
2 is?

3 A. I described it briefly earlier so I won't belabor it,
4 but adaptive functioning refers to an individuals ability
5 to meet the demands of community living as independently as
6 possible, taking into account their age, their culture, and
7 you know, other kinds of important contextual factors.

8 So, it's basically how independently can you take care
9 of yourself in the community.

10 Q. And do those diagnostic -- or the clinical standards
11 define different areas of adaptive functioning?

12 A. Yes. There's a little bit of variability, but usually
13 they're focusing on -- one area is basically academic
14 skills, which are sometimes called "conceptual skills," and
15 then there's like what you might think of as household
16 safety, where you're looking at things like can they cook,
17 can they clean, can they -- you know, a little bit of bill
18 pay is in there; health and safety management, things like
19 that; and then there's a social domain, where you're
20 looking at what is this person's social judgement like, do
21 they understand social rules, you know, those kinds of
22 aspects of the social domain, which may also include, you
23 know, do they have good judgement about who they're friends
24 with, do they understand that other people's motives
25 towards them may not be evident or positive.

1 Q. And does the DSM lay out different examples for what
2 these deficits look like?

3 A. Yes. They lay out not only different examples for
4 what those deficits look like, but there's also a narrative
5 section in the DSM for severity specifier. So, like for
6 the mild range for example, they have these narrative
7 descriptions of, like, this is what a person with mild
8 intellectual disability will sort of look like in this
9 domain, depending on what age they are.

10 MS. MAJOR: Okay. Can I approach, Your Honor?

11 THE COURT: Certainly.

12 MS. MAJOR: And I have a copy for you as well.

13 (Hands documents to the Court and the witness.)

14 Q. And do these -- does this packet look like DSM's
15 description of the different varied levels of these
16 deficits?

17 A. Yes, it does.

18 Q. And I think you talked about mild intellectual
19 disability, but I kinda wanted to walk through what
20 deficits that each of these domains would look like for
21 someone with mild intellectual disability. And I think --
22 the conceptual domains, would you describe kinda what mild
23 conceptual deficits would look like?

24 A. Right. So what the text states is that for very young
25 children, you may not have obvious differences, and that's

1 important because particularly with mild ID, that is often
2 what you find. It's -- it may be less evident when they're
3 little-little because the demands are not as great, but as
4 they start to have to do more, learning to read, write, and
5 socialize in more complex ways, then they're deficits
6 become more evident.

7 Then for school age children and adults, they have
8 difficulty learning academic skills like reading, writing,
9 understanding time and money, things like that, and they
10 need additional support to meet age-related expectations.

11 So, what you would expect to see there is a younger
12 kid. They might consider holding him back or they might
13 get extra assistance, they might do remedial reading, but
14 you're noticing in those early grades, you know, first,
15 second, third grade, thereabouts that they're struggling;
16 and that's because they're now coming up against demands
17 that are more than they can -- than they can meet
18 cognitively.

19 In adults, what you tend to see is that they have
20 problems with good judgement, with reasoning, with
21 forecasting consequences; and they may interact with other
22 people with -- in a social manner that is more like a
23 younger person. So, they may not seem superficially
24 childlike, but they're understanding of the world may be
25 very naive, you know, they may be quite gullible, things

1 like that. They also would typically have poor what we
2 call "functional academic skills." So, you know, it's one
3 thing to do, you know, algebra or whatever. It's another
4 thing to -- when you go to the store and you gotta make
5 sure they gave you the right change back, right? So
6 practical academic skills are more about being able to make
7 make sure you could count your change. And so we do see
8 deficits in those areas in people in the mild range in
9 adulthood.

10 Q. And I think you -- how many areas of deficits in these
11 different adaptive domains does someone need to have for
12 prong two to be satisfied?

13 A. Any more one, but most of the people that I see who
14 have ID have impairments across multiple domains.

15 Q. And I think you mentioned that you should consider
16 adaptive strength. How do you account for apparent
17 adaptive strength while you're conducting an intellectual
18 disability evaluation?

19 A. Well, first of all, you don't treat a strength as
20 something that's dispositive for ID. You can have ID
21 without all of your scores being completely low and being
22 deficit in every area of life. So, we've emphasized the
23 strengths based model in part because, first of all, we
24 need to do public education.

25 Most people, when you talk to them on the street, and

1 you ask them to picture somebody with an intellectual
2 disability, the image that comes to mind, they're
3 prototype, is somebody more, like, moderate to severe level
4 of intellectual disability, maybe somebody who, when they
5 talk, you can't understand too well. Forest Gump kinda
6 comes to mind, you know, when you look at, like, media
7 representations of folks in this range; and that's not, you
8 know -- you know, where there's this sort of -- sort of
9 goofy, obvious quality to the person, and most people in
10 the mild range you can't necessarily tell, certainly not
11 just by looking at them. And so part of the issue is that
12 people in the public, and even psychologists, who don't
13 have a lot of experience with folks who have mild ID will
14 think, "Oh, this person can't have mild ID," more based on
15 their gut feeling of interacting with the person or saying,
16 "Oh, they drove a car. So -- you know, and they can read
17 or write. So I -- that doesn't seem like ID." Well, that's
18 because they're relying on a stereotype, and not the actual
19 clinical criteria here. So we -- that's one of the reasons
20 we focus on strengths.

21 The other reason is because we need to make plans for
22 these folks for their life, and if we completely ignore
23 their strengths, then we're not gonna be able to capitalize
24 on those things; and if want to create a set of services
25 that's responsive to their needs, we also need to create a

1 set of services that responds to their resources.

2 So if the habit has been to go to Grandma's house five
3 days a week in the morning and Grandma helps you know what
4 to do that day, you know, you keep doing that. That's a --
5 that's a -- maybe the strength there is that the person has
6 the interpersonal capacity of a close relationship with
7 their family member.

8 We can build on that strength by creating that natural
9 support. We'll go to Grandma, and Grandma will help orient
10 you to what you need to do this week, what bills are due,
11 what appointments need to be made, things like that.

12 So the strengths base approach isn't just about
13 saying, like, "Oh, isn't it nice, like, it's not all
14 deficits," it is also very much about practical
15 application.

16 Q. Thank you. And how do you assess adaptive behavior
17 and adaptive functioning?

18 A. It can be challenging, especially in these kinds of
19 cases where it's retrospective. The measures that we've
20 used to develop adaptive functioning are almost all based
21 on assessing somebody's current adaptive functioning, not
22 retrospectively, not saying, "Okay. Think back 30 years,
23 40 years," you know, how were they doing then; and that --
24 so the measures aren't really -- you know, we have to -- we
25 have to utilized them if we can, but it's imperfect. And

1 so we always have to be straightforward about the
2 limitations there.

3 The other issue that can come up is that sometimes
4 there's nobody who can actually fill out paperwork, and
5 much of the adaptive functioning assessment we do now is
6 either an interview or it's paperwork that they fill out.

7 So, you can have issues where nobody can read well
8 enough or comprehend well enough to fill that stuff out.
9 So, the approach that we generally take is a significant
10 amount of interviewing, and then once we've done
11 interviews, sometimes it's possible to identify one or more
12 people, you know.

13 My preference is to have a couple of people who can
14 actually fill out the measures. It's just not always
15 possible. So in that case, I'll just do as much
16 interviewing as I possibly can get done.

17 Q. And do the clinical guidelines also encourage record
18 review?

19 A. Yes. So that would be part of the adaptive
20 functioning assessment, but it's not -- you know, it's not
21 often, like, formally integrated into the measures that we
22 use. So like, there's a measure called the "ABAS" that we
23 use to assess adaptive functioning. It doesn't really let
24 you integrate a record, but when you're writing a report,
25 you would do that. You would say, "Here's what these

1 testing results are, but here's also the results of my
2 interviews and any other sources of information that are
3 relevant."

4 Q. And I think you may have touched on this, but do the
5 clinical guidelines give guidance about one of -- one of
6 those standardized measures cannot be used or what you
7 should do?

8 A. Yeah. So there is an emphasis on, you know, basically
9 relying on a -- other sources of information if you can,
10 you know, using interviews; and I think what matters in
11 that is also just the acknowledgment. That's just not
12 always possible, and if we create a situation where we say,
13 "You must always have this questionnaire," then what you'll
14 have is evaluators going out there and handing it out to
15 people who can't read or don't understand and they're gonna
16 give you bad results; and those measures don't have
17 validity scales imbedded in them to tell us if they didn't
18 know the answers. They could literally randomly answer.
19 We wouldn't necessarily know the way that we might on some
20 other kinds of testing.

21 So if everybody's just going out and saying, "We have
22 to do the test every time," you're often gonna get bad
23 results and that's unhelpful. So in that situation, we
24 rely more on interview, and that's what the guidance
25 suggests.

1 Q. And when you're assessing someone's adaptive
2 functioning, do you look at supports that they may or may
3 not have at place -- in place in their lives?

4 A. Yes. So that's part of it is you're looking at not
5 just how are they doing in their day-to-day life with all
6 of their maybe informal or natural supports. That example
7 I gave of going over to Grandma's house and she gives you,
8 you know, reminds you about your doctors appointments or
9 whatever, we would call that a natural or informal support.
10 So part of the analysis is looking at how is this person
11 getting help and how formal or informal has it been.

12 Q. And why do you look at those supports?

13 A. Well, because they tell us about dependency in that
14 person. What do they need to rely on other people for.
15 Sometimes you also get information about how they do when
16 they don't have those supports, and that also gives you
17 information about, you know, what can this person do for
18 themselves.

19 I have had cases where it was helpful to understand
20 the natural supports because the natural supports were
21 actually doing too much for the person. So I've had, like,
22 younger people where it felt like the natural supports are
23 just doing way too much for this person, and we need to
24 back them off; but most of the time you're just looking at
25 it as, you know, what is the evidence that this person

1 already needs help.

2 Q. Okay. And can having natural supports have an affect
3 on whether people may or may not be caught by screening
4 systems that might otherwise flag someone is -- being
5 suspected to have an intellectual disability?

6 A. Absolutely. I would say it's one of the -- that in
7 combination, which is the embarrassment and shame that
8 people feel about the label of what to be mental
9 retardation and is now intellectual disability. I'd say
10 those are two of the biggest barriers, aside from just
11 schools not wanting to know that kids have these
12 disabilities.

13 Q. Thank you. And can you explain what masking is?

14 A. So masking isn't like necessarily something that you -
15 - there's a measure for, but what we used in terms of
16 describing it is that when you have a disability like
17 intellectual disability, you're vulnerable. People are
18 gonna try to get one over on you, they're gonna try to
19 trick you, they're gonna try to get you to do stuff you
20 shouldn't do, they're gonna try to take your stuff, you
21 know, just make fun of you even just for entertainment; and
22 kids with these disabilities learn that very early on, and
23 so they learn they need to try to conceal their impairment
24 as much as they can; and we often refer to that as masking.

25 So masking may come as somebody who looks very

1 agreeable, who just kinda agrees with everything. Yes, of
2 course, you know, and so you don't -- most of us we like
3 being agreed with so much that we don't ask a lot of
4 followup questions. So, that's actually a pretty good way
5 to get along if you don't understand, and you know,
6 frankly, I think if you look around at people, like, who go
7 to another country and you have people -- you'll find
8 yourself nodding to things -- at things you don't
9 understand because that's how you're gonna just progress
10 the conversation.

11 Same things happens with masking. They'll also take
12 on, like, valued social roles. They try to build on the
13 strengths that they have so that they have those buffers
14 and those supports, but masking is fundamentally the
15 individual's efforts to conceal their disability in some
16 way.

17 Q. And is this commonly seen in people with intellectual
18 disability?

19 A. Yeah. The form it takes varies, but I would say it's
20 extremely common except in people who are so impaired that
21 they don't know that they have a disability.

22 Q. And can you describe what clinical judgement is?

23 A. Clinical judgement -- so I specifically refer to
24 unstructured clinical judgement is bad. It is basically
25 guessing. It is your gut feeling about something and then

1 saying that it's a professional judgement because you're a
2 doctor. There isn't much good evidence for unstructured
3 clinical judgement being effective, but structured clinical
4 judgement is something that we do have to utilize; and
5 structured clinical judgement is when we do have to make
6 decisions as clinicians about which way we think the
7 information leans, but we do it in a structured way where
8 we have a pre-formulated set of factors to consider and
9 structure for how we're supposed to come to our
10 conclusions.

11 Q. And is it appropriate to use structured clinical
12 judgement in a diagnostic evaluation for whether or not
13 someone is intellectual disabled?

14 A. Yes. And it's often necessary to do that. You have
15 to make clinical judgements about interviews, about
16 records, sources, testing. I mean, there's all kinds of
17 opportunities for that, and specifically, there's lots of
18 specific guidance that you have to use clinical -- you
19 know, structured clinical judgement in, in some situations
20 involving this particular kind of assessment.

21 Q. And I think we already kind of discussed what adaptive
22 behavior scales are. I know you mentioned the ABAS, but as
23 part of your adaptive functioning assessment of Mr. Stone,
24 did you administer an adaptive behavior scales to any
25 informant or to anyone?

1 A. I was not able to identify anybody who I felt like
2 could do it.

3 Q. Okay. And did you decide that based off the clinical
4 guidelines?

5 A. Yes. So I went and I did my first round of interviews
6 and at that point -- I had copies of the ABAS with me, and
7 I -- if anybody had seemed like they could do it, I would
8 have -- I was ready to do that, and that's been true for
9 most of the interviews. If I thought there was any chance
10 at all that the person might at least be able to provide
11 ratings in some domain, but ultimately, I didn't ask
12 anybody to do one.

13 Q. Okay. And did you have any indication in anything you
14 considered for your evaluation that another psychologist
15 had administered in adaptive behavior scales to Mr. Stone
16 at some point in his life?

17 A. Yes. Dr. Harris, in the 1979 report, indicated that
18 she used a measure that is -- it's sort of like the
19 granddaddy of the ABAS, and it -- it's -- used to be called
20 -- so AAIDD used to be called "AAMR," but before it was
21 called "AAMR," it was called "AAMD." And the "MD" stood
22 for mental deficiency. So a much earlier version of an
23 adaptive functioning measure was administered to him at
24 that time, and it showed that he had very -- quite poor
25 adaptive functioning even lower than I would expected given

1 his intellectual ability.

2 Q. And if you could look at page 55 of what's been marked
3 for identification as Applicant's 3, does that look like
4 the information about the adapt -- the AAMD scale that was
5 administered to him?

6 A. Yes. That information is provided in the last
7 paragraph of the test result section on the first page of
8 the report.

9 Q. And I think you said it showed that he was -- his
10 adaptive functioning was pretty low at that time.

11 A. Yeah. It was quite low. So, they gave an IQ
12 equivalent of 56 and 59 for two of the areas. You know,
13 it's not exactly comparable to IQ, but normally I would
14 expect adaptive functioning to be, you know, at or below
15 the IQ would be most typical for the people that I see.

16 Q. And this was -- was this information you considered
17 while you were assessing Mr. Stone's functioning?

18 A. Yes.

19 Q. Okay. So when you were going about your adaptive
20 functioning assessment for Mr. Stone, I think you mentioned
21 you looked at records. What kind of records did you look
22 at while you were evaluation him?

23 A. The records are listed in the source of information
24 section of my report, but just briefly, I'm looking at my
25 report, on page 2, there were educational records; records

1 from Social Security related to his employment history;
2 records related to the case, the criminal case; some
3 medical records; records from the South Carolina Department
4 of Corrections; affidavits of some expert -- three experts
5 -- sorry -- four experts. Let's see -- med -- and then
6 there were medical and educational records for a few
7 members of his family. I believe that is all I have.
8 Then I -- I think subsequently I might have received some
9 additional records. I believe it was for Tammy. There
10 were school records for her.

11 Q. And who is Tammy?

12 A. Sorry. Mr. Stone's sister Tammy, who I believe may
13 now be deceased.

14 Q. And I think you mentioned that you reviewed some
15 records from -- about him from the South Carolina
16 Department of Corrections. Did you give any weight to Mr.
17 Stone's prison functioning as part of your evaluation?

18 A. No. We're not supposed to.

19 Q. Okay. And why not?

20 A. Because it's not community based functioning. I mean,
21 I would say if I have somebody who's so low functioning
22 that even in the jail or the prison they're saying they
23 can't even put their shoes on or something like that, like,
24 that could be informative, but those environments are so
25 structured, you have so little opportunity to make a

1 decision that you can't really demonstrate impairments.
2 The impairments become a lot more evident in what you might
3 call "permissive environment," an environment where the
4 person has more opportunity to make choices; and so in the
5 community, that's where we base the adaptive functioning
6 assessment on; but it does create an additional challenge
7 because many of the people we see in capital cases have
8 been in prison for many years.

9 Q. And did you form an opinion on whether or not prong
10 two was satisfied in Mr. Stone's case?

11 A. Yes. It was -- it was very clearly satisfied in this
12 case.

13 Q. And with regards to the different domains, do you have
14 an opinion on whether he has deficits in specific domains?

15 A. Yes. So it appears that his -- most impairment was
16 conceptual. Second greatest area of impairment is probably
17 practical, and he did have a significant impairment in the
18 social domain, but he also had some strengths in that area;
19 and so I consider that to be kind of the least impaired
20 area for him.

21 Q. And I'd like to walk through each of the domains with
22 you, and I think you'd said that the biggest deficit you --
23 in your opinion was in his conceptual domains. So I think
24 we're gonna start there.

25 A. Okay.

1 Q. What -- I think you had mentioned this is kind of
2 academic, but what kind of behaviors are you considering
3 when you're evaluating the conceptual domain?

4 A. Well, you would look at things like how they did in
5 school, but you would also look at things like have they
6 had jobs where they had to use a lot of academic skills, is
7 that something where there's evidence that they could do
8 those kinds of things even if it wasn't adulthood; and so
9 the academic records are really important.

10 Q. Okay. And what did you learn about Mr. Stone's
11 adaptive functioning in this domain while you were doing
12 your evaluation?

13 A. So it was -- he has longstanding conceptual
14 impairment. That's evident in the school records, it's
15 evident in his change of placement from learning disability
16 to educable mentally handicapped. It's evident in his
17 formal academic achievement testing, which is a type of
18 testing that over -- that maps on most closely to that area
19 of adaptive functioning.

20 Q. And so, what did you learn when Mr. Stone started
21 school for your evaluation?

22 A. I do not recall, but I think he repeated first grade
23 at least once, maybe twice, and then I believe he may have
24 also repeated fourth grade.

25 Q. And if you could turn to page 40, what's been marked

1 for identification as Applicant's Exhibit 3, can you just
2 describe what this looks like, this record looks like...?
3 This record looks like, sorry?

4 A. I'm sorry. Did you say 43?

5 Q. 40.

6 A. Oh, 40. So this looks to be -- there's a cover sheet,
7 and then it looks like this is the following page of the
8 school record.

9 Q. Okay. And what years does it appear -- what calendar
10 years does it appear that the information relates to?

11 A. Well, it is a little confusing. The latest -- so it
12 says it's for -- it says it looks like it's referring to
13 the 1971, 1972 school year, and in 1971, he was age 6 and
14 in grade 1.

15 Q. Okay. And I think you said that he had to repeat
16 first grade. Could you just describe what his grades were
17 like at this time?

18 A. Mostly Ds and Cs. Looks like there's some B -- there
19 is a -- one B+. Looks like -- but not -- these are not
20 good grades.

21 Q. And so after first grade, did you learn about Mr.
22 Sumter's -- Mr. Stone's family moving?

23 A. I believe I do. I don't have an independent
24 recollection of when that occurred.

25 Q. Okay. But it seems like he only was at this school

1 for first grade.

2 A. Yes.

3 Q. Okay. If you could turn to page 20 of what's been
4 marked for identification as Applicant's Exhibit 3.

5 A. (Complies.)

6 Q. Does this look like information about Mr. Stone being
7 in second grade?

8 A. It is difficult to read, but the date of the entry
9 appears to be August 28, 1973, and he's in grade 2.

10 Q. And could you read the name of the school that he
11 attended? It's hard to read. I'm sorry.

12 A. Well, it says from -- it's a -- it lists two schools.
13 So there is Central as well as Lemira, maybe?

14 Q. Okay. And if you turn to page 22, it's very hard to
15 read. I'm apologizing in advance. Does this look like his
16 grades around third, fourth, and fifth grade?

17 A. Yeah.

18 Q. It might be another copy. (Flipping through pages.)

19 A. It looks like we've got August 1974, '75, '76
20 and '77 here for grading periods.

21 Q. And was this -- this is on Mr. Stone's elementary
22 school?

23 A. Yeah. So it shows third, fourth, and then fourth
24 again for the following year, and then fifth grade.

25 Q. And like -- what did you find important about his --

1 the educational information related to Mr. Stone at this
2 time?

3 A. It's typical for people with intellectual
4 disabilities. Like I said, they'll -- it becomes more
5 evident once they get to be in the early school years and
6 the academic demands start to outpace what the kid can kind
7 of make up for. And so it's typical -- you don't see all
8 the time. It's typical to see pretension in early grades.

9 So being retained in first grade, fourth grade, you
10 know, really you need all that elementary school, barring
11 some kind of reason like the kid had mono and was out of
12 school for six months or something like that. That's very,
13 very consistent with a kid with an intellectual disability.

14 Q. And did you learn anything about Mr. Stone being
15 referred for evaluation for special education services at
16 this time?

17 A. I believe he was.

18 Q. And if you turn to page 50, does that look like the
19 evaluative report for that referral or at about the same
20 time?

21 A. Well, the referral was made -- or the testing was done
22 in late '74 and '75, and these grades were from roughly
23 that same time period as far as when he -- well, he -- I
24 believe he repeated the grade after those test results came
25 in. So maybe he was already struggling, and then they did

1 the testing and subsequent to that, had him repeat the
2 grade possibly.

3 Q. And what kind of services was Mr. Stone applied for
4 around this time?

5 A. I'm sorry. What kind ---

6 Q. What kind of special ed -- education services was he -
7 - were recommended for Mr. Stone at this time?

8 A. I think at that point he was getting the L -- the
9 learning disability resource room.

10 Q. Okay. And I think you said he had this evaluation
11 around when he was in third or fourth grade. How did he --
12 and he had to repeat fourth grade. How did he do in -- the
13 next time he was in fourth grade?

14 A. Not well. The grades are not significantly improved.
15 In fact, I -- he maybe has about the same number of Fs is
16 what it looks like to me. It looks like there's at least
17 two to three each year of those.

18 Q. And was he assessed again for special education
19 services around this time?

20 A. I don't -- I don't -- well, there was like the year
21 later I think was -- and then there was the -- in '76, and
22 then the one after that is in '79.

23 Q. And if you turn to page 50 to -- and 53, does that
24 look like the next year evaluation?

25 A. Yes. This is the one that was conducted at -- I'm not

1 sure if I'm saying it -- Lameer [phonetic], Lemira, when he
2 was in fourth grade.

3 Q. And what recommendations did the school make for Mr.
4 Stone's learning at this time?

5 A. For that one, they said he should work with the LD
6 resource teacher and coordinate specific exercises into
7 regular classroom activities and instruction, meaning that
8 you would come up with activities in the resource room, but
9 then you want to also try to implement that when the child
10 is in the mainstream education setting. So you're
11 transferring some of the things from the resource room over
12 to the mainstream setting.

13 Q. And did this evaluation also include any of that
14 achievement -- academic achievement testing or assessment?

15 A. So they did the WRAT, the Wide Range Achievement Test,
16 W-R-A-T, and that is an achievement test.

17 Q. And what did that testing indicate in terms of how Mr.
18 Stone was performing?

19 A. He was two grade levels below -- so he's in fourth --
20 well, he's in fourth grade, but he's 11 years old; and he
21 was performing at the second grade level in reading and
22 arithmetic according to the report.

23 Q. And was there any other -- were the -- did you learn
24 of any other academic testing that was done at this time
25 that maybe assessed his grade level equivalency in classes?

1 A. So the -- that would be that WRAT.

2 Q. Okay.

3 A. So there -- the -- that second grade reading level.
4 So that's -- they call it a "grade equivalent." So the
5 grade equivalent is 2.5 I think for the reading one, which
6 means, you know, two years... five months.

7 Q. And if you could turn to page 29, does this also look
8 like was -- is this academic testing information that you
9 received while you were evaluating Mr. Stone's conceptual
10 functioning?

11 A. Yes. This is the -- there's a comprehensive test, the
12 CTVS, that covers a number of domains; and then there's a
13 Metropolitan Achievement Test that's identified as being
14 administered in 1974. That would also be an achievement
15 test where you're looking at not how intelligent is a
16 person, but how well can they read, how well can they
17 write, things like that.

18 Q. And did you find anything important from this testing?

19 A. Well, these are -- these are low scores, and it
20 appears that in the third grade year, you know, they're
21 particularly low. You're seeing a lot of scores that are
22 below the 10th percentile, meaning less than 10 percent of
23 his grade or age peers had lower scores. And you can make
24 choices with this where you compare the kid either to other
25 children their age, or you compare to other children in

1 their grade.

2 Q. And what does that 10th percentile scores -- what does
3 that tell you about Mr. Stone's functioning?

4 A. Well, and that's pretty far below average, and it does
5 -- I think the main thing to notice that it doesn't seem
6 like this overall pattern is attributable to something that
7 -- besides intellectual disability. Like I give the
8 example of mono, you know, of I had a child who, you know,
9 maybe moved here from another country and he didn't speak
10 any English at all. There'll be -- you know, there's times
11 you have to offer caveats for some of these
12 interpretations, but for him, there's a lot of consistency
13 in the sense of this is a child who's performing
14 significantly below age level and grade level in multiple
15 domains. He's getting additional help, but then still, as
16 time goes on, he's not really making progress like his
17 peers. He's repeating early grades, and that is all
18 consistent with a child with mild intellectual disability.

19 Q. Thank you. And now I want to talk about middle
20 school. If you'd turn to page 34. Does this look like Mr.
21 Stone's middle school report card?

22 A. Well, it's listed as a permanent record card for
23 middle school and it reflects his grades across a couple of
24 years.

25 Q. And what years were those or what calendar years were

1 those?

2 A. That would be school year '78 to '79, and then school
3 year '79 to 1980.

4 Q. And did you learn anything about what kinds of classes
5 Mr. Stone was in during this time from his record or your
6 interviews?

7 A. Well, they have these markings on -- there's a column
8 that says "level," and so you can see that, like, for
9 example, there's also additional notations like in English,
10 one for 1979 to 1980. You can see it says "Level B" and
11 then there's a notation that says "LD." And the "R", I
12 believe was -- it stands for resource room.

13 Q. And what did you find important about those different
14 levels?

15 A. So, he's getting resource in pretty much exclusively
16 academic areas, reading, arithmetic, language, social
17 studies, and science. He's not getting it for, like, art,
18 music, PE. So -- which is not -- which is not unusual.

19 Q. And did you -- and what does that indicate to you?

20 A. That his challenges were academic as opposed to -- you
21 know, kid is having a lot of volitional issues like they
22 just don't like the subject matters, something like that.
23 A lot of times you'll see that they're not necessarily
24 doing great in art or PE either because they also don't
25 want to do what they're getting told to do in there. And

1 he doesn't have, like, great grades, you know, in those
2 areas, but they're not giving him additional assistance.

3 Q. And did you learn anything about how Mr. Stone
4 went sixth to seventh grade?

5 A. I don't have a recollection of that.

6 Q. On this record, is there any information about how Mr.
7 Stone --

8 A. Oh.

9 Q. -- from sixth to seventh grade ...

10 A. Yeah. It's -- well, there's a notation on here that
11 says "placed seventh."

12 Q. Okay. And so did that indicate that he may not have
13 met the academic achievement to be -- move up to seventh
14 grade?

15 A. They don't give a reason why, but they do cross out
16 "promoted to."

17 Q. Okay. And I think you said this included 1979. Is
18 that when the other IQ testing that we discussed earlier
19 was conducted and Mr. Stone is evaluated again?

20 A. Yes.

21 Q. And if you could turn to page 55 and 56, does this
22 look like it's around the same time that Mr. Stone was in
23 middle school?

24 A. Yes. I believe this would have been just a few --
25 well, I believe, like I said, I think it was November of

1 1979.

2 Q. And again, this is when -- was this when Mr. Stone's
3 special education service recommendation changed?

4 A. Yes. So she -- Dr. Harris indicated that he was
5 functioning more in the EMH range, educable mentally
6 handicapped.

7 Q. Okay. And so did that indicate to you that he would
8 have potentially get more intense special ed services in
9 his classes?

10 A. Yeah. That would be the expectation is that not only
11 would he get more intensive services, but they might also
12 modify some of the academic objectives to include more
13 goals related to -- like vocational practical jobs skills
14 and things like that.

15 Q. And if you could turn to page 38, does this look like
16 -- or I guess could you state what date is the testing on
17 this record -- relates to or calendar year?

18 A. The date that's listed on the transcript is April 7,
19 1981.

20 Q. And does this appear that report results of academic
21 achievement testing that was conducted around that time for
22 in -- that Mr. Stone took?

23 A. Yes. There's a notation that says (as read): "No
24 reading card." I'm not sure what that's about, but they do
25 report test scores from the comprehensive test of basic

1 skills, which is hard to read 'cause it's very small
2 letters; but the acronym is CTBS.

3 Q. And this was around when Mr. Stone was in seventh
4 grade?

5 A. He -- yeah. He would have been around that age. The
6 grade level that's identified here is 7.6.

7 Q. Okay. And what information does this test report
8 about his academic functioning at that time?

9 A. What we're seeing here are scores that are mostly
10 falling into the second and third grade range. He has a
11 couple of outliers. One is sixth grade level of some
12 arithmetic concepts, and a fifth grade level of expressing
13 language ability; but most of the scores are falling in a
14 third grade, second grade, lower fourth grade.

15 Q. And what, if anything, does that tell you about his
16 conceptual functioning?

17 A. Well, he's continuing to show significantly sub
18 average functioning compared to his age mates even with
19 additional assistance.

20 Q. Sorry for all the flipping around. If you could go
21 back to page 30 -- oh, I've got the wrong page number.
22 Give me one second. Did you learn anything about how Mr.
23 Stone finished out middle school?

24 A. I believe he withdrew shortly after he was notified --
25 I want to say maybe there was a -- there was some

1 notification about either changing the placement or
2 something of that nature, and then there was -- shortly
3 after that, that he was withdrawn from school.

4 Q. Did he go to high school at all, or did you learn
5 about him attending high school at all?

6 A. I think the withdrawal date that I have is in the
7 early '80s. I don't -- I don't recall it was the last
8 school he attended, but it is -- well, on the last page, it
9 says the last school was Birchwood High School.

10 Q. And turn to page 26. Does this look like a high
11 school permanent record card with Mr. Stone's name on it?

12 A. I'm sorry. Did you say 26?

13 Q. Yes. Sorry.

14 A. Okay. So we have a high school permanent record card.
15 The date on it is August 3, 1981. It is barely legible.
16 It -- there's a high probability that there are things that
17 are written on the original that I cannot see here.

18 Q. But can you -- can you make out what kinds of classes
19 -- or the class names and the grade information on it?

20 A. Yes.

21 Q. And was this something you considered in your
22 evaluation?

23 A. Yes.

24 Q. And generally, what did you learn about Mr. Stone's
25 high school academic performance?

1 A. Well, the grades are very low. He has some absences
2 though in there, and then the classes are again hard to
3 read, but there's resource room with Ms. Klotze, who I
4 interviewed; English 1, Math lab, inde -- maybe independent
5 art. I'm not sure about that one. It is quite difficult
6 to read. And the section about what -- with the teachers
7 and the dates of the different school rooms is entirely
8 illegible.

9 Q. And if you turn to page 31, does this look like
10 academic achievement testing from around this time?

11 A. Yes. This is from ninth grade. The same measures of
12 comprehensive test of basic skills.

13 Q. And generally, how is -- how did Mr. Stone do on this
14 testing?

15 A. There are a few areas where he's in the bottom
16 quartile as opposed to the bottom, you know, 10 percent or
17 5 percent. He's got -- looks like highest grade level
18 functioning is sixth grade. He had a sixth grade
19 vocabulary perhaps, but then many of the other scores are
20 quite low. So the mechanics of language, expression of
21 language is second grade level. Computation for arithmetic
22 is fourth grade. Application is fifth grade. Concepts is
23 third. So you see a little bit of variability there. He
24 does have some strengths, but the scores are still -- many
25 of the scores -- most of the scores are falling below the

1 10 percentile looks like.

2 Q. And is this inconsistent with how you would expect
3 someone with mild intellectual disability to function
4 academically?

5 A. Yeah. Roughly speaking you would -- in the mild
6 range, you wouldn't expect this from somebody in the
7 moderate range.

8 Q. And I think you mentioned that you'd learned that Mr.
9 Stone dropped out of school in the tenth grade. Did you
10 learn anything about what he did after he left school?

11 A. Worked, I believe.

12 Q. Okay. And did you learn anything about the kinds of
13 jobs that he was doing at that time?

14 A. My understanding is that almost all of his
15 employment's been relatively menial, physical work, as
16 opposed to work that relies on a person using a lot of math
17 skills or reading skills.

18 Q. And what kind of menial or physical work did you learn
19 about?

20 A. Tree service. That was one. That is very difficult
21 work very physically. It can be very physically demanding
22 work, but it doesn't require a lot of math. They're not
23 doing, like, trigonometry to figure out where the trees
24 gonna fall or anything like that. So most of his work was
25 work that was not reliant on advanced academic skills.

1 Q. And did you learn anything about how he got the job
2 that he had after school?

3 A. There was an affidavit at -- I believe the one from
4 Mary Cook, that mentioned that basically, as far as
5 employment's concerned, he wasn't somebody who would go,
6 like, fill out a job application and then do an interview
7 and get a job; but rather that stepfather would typically
8 secure some kind of employment for him, you know, make
9 those arrangements.

10 I don't know if that means that his stepfather filled
11 out any paperwork or anything like that. It sounded like
12 it was somewhat more informal than that, but what was
13 available, in terms of descriptions about how he got the
14 jobs, was that it wasn't a situation where he went and saw
15 an ad in the paper and went and filled out an application
16 on his own and then, you know, did an interview and got the
17 job.

18 Q. And I know you said it -- what you learned is that his
19 jobs did not involve him necessarily having to use high
20 academic conduct. Did you learn anything else about what
21 the day-to-day tasks were like at his jobs?

22 A. Yes. So I spoke with a couple of people. The one I
23 remember best is Frankie Norton, who worked with him in a
24 couple of different places, but I think mostly tree work;
25 and he indicated that the work was basically you -- you

1 know, you went to the cite and the boss told you what to do
2 and you did it, and these weren't complicated multi-step
3 processes.

4 Q. And just to conclude this section, what is your
5 opinion about Mr. Stone's conceptual domain functioning?

6 A. It's significantly impaired and has been for really
7 since at least early childhood.

8 Q. If I can --

9 THE COURT: Ma'am, would you ask that question again.

10 MS. MAJOR: I asked what his opinion -- what her
11 opinion about Mr. Stone's conceptual domain functioning is.

12 THE COURT: Conceptual what?

13 MS. MAJOR: Domain functioning. Sorry.

14 THE COURT: Okay. Thank you. I mumble and I don't
15 speak out loudly, but these two barricades are really
16 blocking me off from hearing you. So, if you could speak
17 up some, I'd appreciate it.

18 THE WITNESS: Yes, sir.

19 THE COURT: Thank you.

20 BY MS. MAJOR:

21 Q. Okay. I'd like to move on to talk about the practical
22 domain. Just to remind everyone, what kind of behaviors or
23 what kinds of things are you looking at when you're
24 assessing someone's practical domain of adaptive
25 functioning?

1 A. So, this is, I think, what a lot of people would think
2 of when they think of adaptive functioning. So, it tends
3 to be things like: can they cook a simple meal? Can they
4 read a recipe and follow it? If the -- if there's an
5 incident, do they -- you know, where somebody gets hurt, do
6 they know, like, when to seek help? Do they know how to do
7 -- you know, do they know what's first aid versus when to
8 take somebody to the emergency room?

9 It's also about navigating in the community
10 safely. So it could be using public transportation,
11 communication devices, things like that. So, it's very
12 much the sort of living in the community part aside from
13 interacting with other people or having to use academic
14 skills.

15 Q. And I think you said earlier that, in your opinion,
16 Mr. Stone had a deficit in the practical domain?

17 A. Yes.

18 Q. What did you learn about Mr. Stone's adaptive
19 functioning in a practical domain from your evaluation?

20 A. Well, I spoke with other people, and the picture that
21 they painted of him was that he was somebody who tended to
22 rely primarily on women, his mother and then intimate
23 partners. And these were folks who would basically do a
24 lot of the household tasks. So, cleaning the house;
25 keeping up with appointments, including his appointments;

1 you know, preparing meals, planning meals, budgeting money,
2 you know, even things like housework and that kinda thing.
3 And that doesn't mean that he didn't contribute, but what
4 he understood his contribution to be was to bring the money
5 home that he made from his jobs home, and then the partner
6 or his mother would manage that money; and that his view
7 was that his job was to take care of the outside of the
8 house.

9 So, he would focus on things like mowing, and you
10 know, tinkering with things that needed to be repaired or
11 whatever outside the house; and he felt like that was a
12 pretty fair delegation of tasks, but he ultimately didn't
13 live on his own and hasn't demonstrated the ability to do
14 those things without somebody doing them for him.

15 Q. And I think you mentioned earlier to concept of
16 natural supports. Is this the domain where you cited Mr.
17 Stone had natural supports in place?

18 A. Yes. Significant natural supports.

19 Q. And are those, those partners and his mother that you
20 were discussing?

21 A. Yes. I would say even people who did harmful things
22 to him, so his stepfather. At the same time, I think his
23 stepfather was also a natural support. A natural support
24 doesn't have to be the greatest person that ever walked the
25 earth, you know. It's just somebody that helps you in an

1 informal way, and it appears that his stepfather did
2 facilitate, like, employment and supervised him with some
3 tasks as well, personally and directly on the job.

4 Q. Thank you. And you mentioned that Mr. Stone would
5 bring his money home. Did you learn anything about how he
6 managed money?

7 A. Based on the collateral interviews I conducted, he
8 didn't manage a bank account, he didn't write checks,
9 didn't -- never had a credit card as far as I'm aware.
10 Nobody knew of him to ever do that. Nobody could describe
11 the time that he got a loan or filled out paperwork for a
12 loan, that he signed a contract for something like a lease.
13 You know, that kind of information, you know, is a lot of
14 what he hasn't done as opposed to a lot of -- like,
15 affirmative examples of, you know, this is how bad he was
16 at this task. So, it's important to be clear too that part
17 of the -- what I was looking at was what isn't there.

18 Q. And is it inconsistent with having mild intellectual
19 disability to be able to do some things in a practical
20 domain, but have some deficits still?

21 A. Oh, absolutely. And if you can return your attention
22 to a table that you talked about earlier, in the DSM-5,
23 they talk about this in the practical domain, and they say
24 that -- so somebody in the mild range is gonna function a
25 lot like other people their age who don't have intellectual

1 disabilities when it comes to things like, you know,
2 brushing their -- they know how to brush their hair, brush
3 their teeth. They can usually pick out clothes, you know,
4 that kind of -- that kind of basic self care; but they may
5 need some support in complex daily living tasks.

6 So, usually that's things like multi step cooking,
7 paying bills, creating a budget, things like that. Those
8 would be the things that, you know, when I described being
9 a -- we call it "direct service provider," like a
10 caregiver, those were the kinds of things I would help
11 people with was a lot of that -- that kind of thing. And
12 then they also usually need help with banking and money
13 management. They are usually able to engage in recreation
14 and leisure activities, but they're not gonna be the one
15 who organizes the bowling league or keeps track of
16 everybody's golf scores or whatever.

17 So even to the extent they participate in those kinds
18 of activities, you're still not gonna see, you know, a lot
19 of academic skills on display or that kind of thing. They
20 can have competitive employment. They are very under
21 employed as a population, but we think that about 10
22 percent of individuals with mild intellectual disability
23 have competitive employment. Probably it could be a lot
24 more if they weren't facing so many barriers to employment.
25 In other words, it's not all just the deficits themselves

1 that create those barriers, but the main thing I'd
2 emphasize is that it's not accurate to say that if you have
3 ever had a competitive employment, you can't have an
4 intellectual disability.

5 Q. Okay. And in -- I know you cite in your opinion that
6 Mr. Stone had a deficit in the practical domain. Did you
7 see -- in your opinion, is there evidence that this was
8 sustained during the developmental period?

9 A. Yes.

10 Q. Okay. What was that evidence --

11 A. So --

12 Q. -- that you learned about?

13 A. I mean, this -- when he's younger, it's a little bit
14 harder to see. So to be clear, I think this information
15 becomes more clear more towards, like, you know,
16 teenagers/adolescence. Early years, I don't have as much
17 information about, like, how did he learn the -- to do the
18 things that he could do. What he described is that he
19 would spend a lot of time particularly with it -- like,
20 watching his stepfather do things.

21 So he would learn and then imitate things, but you
22 know, he did -- to the extent that he did engage in
23 recreational activities, that gets more into the social --
24 the deficits there I think get more into the social domain,
25 whereas their parents were less about, like, "I don't know

1 how to join a bowling league," and more about, "I've made
2 friends with these people who periodically steal from me,
3 but I keep going back and being friends with them." That
4 kind of behavior would be more in the social context.

5 Q. And actually like to move on to the social domain. So
6 I think you kinda touched on this, but could you just
7 briefly remind us what kinds of things you're looking at
8 when you're evaluating social domain in adaptive
9 functioning.

10 A. It can be really simple things like does the person
11 understand jokes? Do they know that when somebody says,
12 "Hi. How are you," that they don't actually want an
13 answer. They just want you to say, you know, I'm fine.

14 You know, not revealing a whole bunch of personal,
15 private information to somebody you don't know well. So,
16 it's a lot about, like, gullibility and vulnerability to
17 manipulation, and so a lot of that, what you'll see in
18 terms of deficits -- you may see things in the school
19 records where they talk about, you know, the child being
20 bullied or something like that, but it's often not as
21 evident in the school records, unless the teachers offer a
22 written commentary about it. The -- where we see it with
23 him more is, you know, in this context of people said
24 repeatedly that he would make friends with people who
25 would, like I said, mistreat him.

1 One person mentioned that he had -- his friends would
2 -- like, they stole a vehicle of some kind from him, and
3 she said, "But he was partying with them the next weekend."
4 Like he just -- and that those kinds of things would happen
5 over and over again.

6 People would do things to show him that they weren't
7 trustworthy, but he wouldn't accept it and wouldn't
8 necessarily pick up on that this is gonna happen again if I
9 continue to make myself vulnerable to it.

10 Q. Thank you. And I think you said that, in your
11 opinion, Mr. Stone has a relative strength in this domain
12 even though he still has a deficit. Does having the
13 strength mean that somebody cannot also have an adaptive
14 deficit in that domain?

15 A. No, not at all, and I think that's where, like, in --
16 I think that's where there is some judgement, you know.
17 I've -- they're -- I've said a couple of things that could
18 sound contradictory, like, for example, you know, this --
19 strengths coexist with deficits. At the same time I've
20 said, "Well, if I found out they had a forensic accounting
21 degree, I'd find that pretty suspicious, right? So, but
22 there isn't really inconsistency in that because there are
23 some things that I would consider to be dispositive. But
24 the mere fact of a strength at all isn't dispositive for
25 ID, and is extremely common.

1 Q. And I think you talked about this a little bit
2 already, but what did you learn about Mr. Stone's adaptive
3 functioning in the social domain during your evaluation?

4 A. People spoke quite freely about that, but they didn't
5 mention a lot of names of the other people. So, it did
6 make it challenging to track down, you know, this specific
7 incident happened with this particular person; but what
8 people did talk about was that -- you know, that as a kid,
9 he was like a fairly likeable child, that at times it was -
10 - you know, he could be outgoing and that he really liked -
11 - like he related to younger kids and was good at playing
12 with them and that kind of thing.

13 So, you know, and he did have dating relationships,
14 too, and he has -- you know, it doesn't sound like they
15 were really the best friendships, at least in adolescence,
16 but you know, he had friends. He wasn't completely social
17 isolated, and when you have somebody with ID who doesn't
18 have any social strengths at all, that's a terrible
19 situation because the social skills are where most people
20 with ID try to pick up a little bit of the slack in terms
21 of masking their problems and trying to sort of fly under
22 the radar of detection.

23 Q. And did what you learned about Mr. Stone deductive
24 functioning, was it consistent with someone having a mild
25 intellectual disability?

1 A. Yes, absolutely. In fact, I think that if you read
2 that -- there's three columns in the DSM for the severity
3 thing that cover each domain, and I think if you read all
4 the materials about Mr. Stone and then you read those
5 descriptions, you would recognize Mr. Stone in them.

6 Q. And, I just want to make sure I ask this before I move
7 on to prong three, but you mentioned that you interviewed
8 some people. Can you just tell us what -- who were these
9 people you interviewed and what their relationship was to
10 Mr. Stone?

11 A. Okay. I'll have to reference my report because it was
12 several people, but they are listed in my report. So,
13 Omega Golden, who I believe knew him in an education
14 context. She was quite ill. So, I had to interview her by
15 video conference. We tried a couple of times to see her in
16 person, but she was just too ill. Jerry Stone, is his
17 brother. Jerry Stone, also I believe, was diagnosed with
18 educable mentally handicap, similar to mild intellectual
19 disability. I interviewed him in person on January -- or
20 in January 2022, and in July of 2022. I list both Frankie
21 and Tracy Norton, but I mostly spoke to Frankie; however,
22 Tracy was there and she spoke up a couple of times. So, I
23 listed her. I interviewed them in 2022. I interviewed
24 both Drs. Harris, Joseph and Elaine. So, they're two
25 psychologists married to one another, and they were not in

1 good health.

2 So, I went to see them at their house to actually do
3 that interview in person. And then I interviewed Kim
4 Stone, Linda Denise Brotherton, and Melinda. So those are
5 Mr. Stone's family members, and they -- at that point, I
6 did interview them. They were all together in a -- like a
7 trailer when I met with them in 2018; and then Joy Klotze,
8 who was a special education teacher in the school district.
9 She didn't have a lot of specific memories of Mr. Stone,
10 but she was able to provide me with recollections of how
11 the system worked at that time. So I interviewed her in
12 2020 and 2022.

13 Q. Thank you. And just to wrap up this section, can you
14 just remind us what your opinion is on whether or not Mr.
15 Stone satisfies prong two of the diagnostic criteria for
16 intellectual disability?

17 A. I believe he does.

18 Q. And do you believe that there is -- in your opinion,
19 is there evidence that, that prong was satisfied during the
20 developmental period of his life?

21 A. Yes.

22 Q. Okay. And gonna move along to talk about his
23 developmental period, and could -- just as a reminder, what
24 is considered the developmental period in someone's life?

25 A. So we used to say it was under the age of 18. Now

1 what you mostly see is under the age of 22.

2 Q. Okay. And for a person to be intellectual disabled,
3 does there have to be evidence that the deficits in
4 intellectual functioning and adaptive functioning onset
5 during the developmental period?

6 A. Yes. So you don't have to have diagnosis occur during
7 that developmental period, but you need to be able to show
8 that the impairments that you're seeing had onset during
9 that time period, as opposed to something like, you know,
10 you get in a car accident when you're 30, and get a head
11 injury, and get a low score.

12 Q. And how do you assess whether or not this diagnostic
13 prong is satisfied?

14 A. That does tend to be based on interview and review of
15 records. Significantly -- I mean, I do interview the
16 person usually about it, but I don't entirely rely on that.
17 I look for other indications that there was concern,
18 testing, you know, some kind of notice; or if there are
19 collateral sources who can talk about adaptive functioning
20 and usually that's when I'm -- I end up interviewing them
21 about is adaptive functioning and when they knew -- you
22 know, when they noticed things because if there isn't an IQ
23 test score from that time, then I can't ask them what his
24 IQ was then.

25 Q. And did you form an opinion about whether or not prong

1 3 is satisfied in Mr. Stone's case?

2 A. Yes, I believe it is. I think the school records in
3 particular are strongly supportive of it, but the
4 collateral interviews are consistent.

5 Q. I'm just gonna ask you what you saw in the course of
6 your evaluation that led you to believe that prong 3 was
7 satisfied. Is there anything besides the records and the
8 interview information that you felt was relevant?

9 A. Not that I can think of. The only other thing is the
10 absence of something else that would be explanatory. I
11 gave the example of somebody who gets in a car accident
12 when they're 35 and we know they were, you know, they were
13 on the scale of 3 or something for two days. Suddenly
14 their IQ scores are much lower six months after that. Then
15 I would say, "Well, yeah. You -- maybe your IQ test scores
16 are in range, and yes, maybe this person is very impaired,
17 but if we don't have evidence of that in the childhood time
18 period, then we need to consider that it's a strong
19 possibility it's accounted for by the accident in
20 adulthood," which means they would not qualify for an ID
21 diagnosis.

22 Q. And I just want to talk about a couple of more things.
23 I promise I'm nearly done. I know you mentioned that
24 looked at some records related to his family and his
25 upbringing. Why did you consider that information in the

1 course of your evaluation?

2 A. Well, the -- so part of that is trying to figure out
3 who might be able to fill out questionnaires for me. So
4 like, if I know, like, a lot of the family members that I
5 might otherwise rely on; have very, very similar kinds of
6 problems in childhood, then I might lean on an interview
7 for that person as opposed to having them fill something
8 out like that. So it's pretty common for me to use a lot
9 of interviewing.

10 Q. And is there anything in the clinical standards that
11 encourages looking into ideology or risk factors for
12 intellectual disability as part of an evaluation --

13 A. So ---

14 Q. -- for when someone is intellectually disabled?
15 Sorry, I wanted to finish my question.

16 A. It's not necessary. Most cases of intellectual
17 disability, especially mild intellectual disability, are
18 what we call "idiopathic." That means we don't know where
19 it came from. That seems to be changing more in recent
20 years with technology related to genetic testing where
21 we're finding more genetic causes, but still the most
22 commonly we don't know why somebody has an intellectual
23 disability.

24 In my experience, there's often multiple things that
25 could explain it. So knowing about at least possible

1 candidate explanations helps to support the possibility
2 that it actually happened. So if -- the more I see this
3 child was hit in the head, you know, multiple times through
4 childhood, they live next to -- you know, near a super fund
5 site and had an uncle that got poisoned and got, you know,
6 brain damage from that, the more -- the more I see first
7 degree relatives with low IQs, the more I see other family
8 members in special education, the more I see other co-
9 occurring condition, that all points to something
10 potentially genetic for example. So it's -- it does tend
11 to give us information about cause, and that can be
12 informative, but it's not required for the diagnosis.

13 Q. And did you get any information about potential risks
14 factors in Mr. Stone's case --

15 A. Yes.

16 Q. -- were relevant? What was that information?

17 A. There did seem to be significant poverty and
18 deprivation. Probably exposure to toxic substances,
19 including potentially alcohol during mother's pregnancy or
20 in -- or in childhood. You know, there were a number of
21 things that were identified. I think there was another
22 expert who wrote an affidavit that got into more detail
23 about that, but there were a number of factors. I think,
24 in his case, the strongest explanation is probably
25 heritability given that we have several family members who

1 also were in special education, who also were classified as
2 EMH, and who also have -- lived lives that were consistent
3 with, you know, mild -- either mild intellectual disability
4 or somebody who's just one step above that.

5 MS. MAJOR: Your Honor, one moment to consult with my
6 co-counsel.

7 THE COURT: Yes, ma'am.

8 MS. MAJOR: Thank you.

9 (Brief pause.)

10 MS. MAJOR: I have one more question.

11 BY MS. MAJOR:

12 Q. Just to wrap it up, is your opinion that Mr. Stone
13 meets each of the three diagnostic criteria and is a person
14 with intellectual disability?

15 A. Yes.

16 Q. Thank you. Please answer any questions that the State
17 may have.

18 THE COURT: Gonna break for lunch. All right. Ladies
19 and gentlemen, we'll break for lunch until 2:15. So during
20 your break, do not discuss your testimony with anyone,
21 please. I need you back in place at 2:15, please. Thank
22 you.

23 (Lunch break at 1:10pm)

24 (Court resumes at 2:20pm)

25 COURT CLERK: Judge Keesley's presiding.

1 THE COURT: Good afternoon. Is the State ready?

2 MR. EVANS: Yes, Your Honor.

3 THE COURT: Is the Applicant ready?

4 MR. GROSE: Yes, sir.

5 THE COURT: All right. Okay, cross examination.

6 MR. EVANS: Thank you, Your Honor. May it please the
7 Court.

8 CROSS EXAMINATION

9 BY MR. EVANS:

10 Q. Dr. Boyd, my name is Tommy Evans, and I am an
11 Assistant Attorney General at the Attorney General's
12 Office, representing the state. Good afternoon. How are
13 you doing?

14 A. I'm doing fine.

15 Q. Okay. Now, Dr. Boyd, you say you was first contacted
16 by Appellate counsel in 2017?

17 A. Yes, I believe that's correct.

18 Q. And at the time, you knew that they wanted you to give
19 an assessment of Mr. Stone's intellectual disability,
20 correct?

21 A. So, I don't recall if their initial ask was that, but
22 I know that what we ended up talking about -- the reason I
23 say I'm not sure it's them, it might have been me, is that
24 I often will suggest to teams like do your IQ testing
25 first, because if it's not close to an area where it makes

1 sense to do more work, you shouldn't invest your resources
2 that way. I don't recall if they framed it that way or I
3 framed it that way, but the initial task was just to do IQ
4 testing, as opposed to, to diagnose ID.

5 Q. Okay, so you do an IQ test ---

6 A. Yes.

7 Q. --- to assist in the diagnosis of ID. Isn't that
8 correct?

9 A. If it's there, I should clear, I'd say, or clarify,
10 but ---

11 Q. Okay, and at the time, you knew Mr. Stone was on
12 death row, correct?

13 A. Yes, I did.

14 Q. Okay. And do you understand what happens in this
15 case, if the judge determines he is intellectually
16 disabled, he would not be put to death, correct?

17 A. That's my understanding.

18 Q. Okay. And you currently are in -- your office is in
19 Virginia, is that correct?

20 A. Yes.

21 Q. Okay, so you was contacted -- well all the
22 psychologist between South Carolina and Virginia, they
23 decided to contact you?

24 A. I don't know if they contacted anybody else. I just
25 know they did contact me.

1 Q. All right. What is your opinion of the death penalty?

2 A. What kind of opinion are you asking about?

3 Q. Are you for it or against it? What is your opinion
4 about it?

5 A. Oh, well, I would say I'm opposed to the death
6 penalty, broadly speaking.

7 Q. Okay. Of course, you're been compensated for your
8 testimony today. Isn't that correct?

9 A. Yes, I am.

10 Q. Okay. Now, according to your report, you conducted an
11 interview with Mr. Stone on November 9, 2017?

12 A. That sounds correct.

13 Q. Okay. And during this interview, you did an IQ test
14 on Mr. Stone?

15 A. Yes.

16 Q. Okay. But you did not write your report until 2022

17 A. That's correct.

18 Q. So, you didn't let anyone know your findings until
19 five years later?

20 A. Oh no, that's not correct. So, I always have
21 discussions with the teams where I let them know, "here's
22 what the findings are." Sometimes, then there's a period
23 of time where they do something with that; sometimes, they
24 ask me for a report. I would say this is probably a fairly
25 lengthy lag though between when the test was conducted and

1 when it ultimately generated a report.

2 Q. You know Dr. Alicia Hall from the disability -- South
3 Carolina Department of Disability Special Needs?

4 A. Oh, Alicia Hall, yes. Yes.

5 Q. Okay. And you stated in your report that you reviewed
6 her results?

7 A. Yes.

8 Q. Okay. Did you use any of her information, or did you
9 share information with each other?

10 A. No, not, not like reports or our opinions or anything
11 like that. No.

12 Q. Okay, but how about like anything like interviews or
13 any research? Did you all share that information with each
14 other?

15 A. Not research that I remember. But we did conduct some
16 of the interviews in parallel. So some of the interviews I
17 did on my own, and then there was a series of them in 2022
18 that Dr. Hall and I did in parallel. So we were meeting
19 with the same person at the same time, but we each had our
20 own list of questions, and then each one of us would ask
21 our questions, the other one would go next.

22 Q. Now, as part of your evaluation, you interviewed Ms.
23 Omega Golden, who was Mr. Stone's sixth grade teacher,
24 right?

25 A. I'm sorry, what name did you say?

1 Q. Omega Golden.

2 A. Yes.

3 Q. Golden. Okay. And you also stated earlier, you
4 interviewed Jerry Stone, who is Mr. Stone's brother?

5 A. Yes.

6 Q. And also two of his friends: Frankie and Tracy
7 Norton. You interviewed them also?

8 A. Yes.

9 Q. Okay. Elaine Harris and Joseph Harris, who was his
10 school psychologists?

11 A. Yes.

12 Q. Okay. Joy Klotze, who was his special education
13 teacher?

14 A. Yes.

15 Q. Okay. And also Kim Stone, Linda Denise Parrott
16 Brotherton, and Melinda Parrott, who was his family
17 members?

18 A. Yes.

19 Q. Okay. You didn't interview Mary Hunt -- Mary Cook or
20 Michelle Price, who was live-in girl friends -- they lived
21 with?

22 A. That's correct. We made efforts, but there's an
23 affidavit that I ultimately had to rely on for Miss Cook.

24 Q. Now, in your report, you mentioned the AAIDD
25 determination of intellectual disability?

1 A. Yes.

2 Q. And you compared that with definition finding of DSM-
3 5?

4 A. Yes.

5 Q. Okay. Now, of course, Dr. Boyd, you do understand
6 this is a legal proceeding, not a medical proceeding or
7 scientific proceeding?

8 A. Right. That's why I don't give legal opinions.

9 Q. Okay. And you understand that we have to follow the
10 definition of South Carolina law?

11 A. Yes, sir.

12 Q. Okay. And according to Section 16-320 (C),(B) of
13 South Carolina code, it defines intellectual disability as
14 significantly sub-average general intellectual functioning
15 existing concurrently with deficits and adaptive behavior
16 and manifests in the developmental period.

17 A. Yes.

18 Q. That's correct. And according to DSM-5, the
19 definition states that, to find someone that is
20 intellectually disabled three criteria must be met:
21 deficits in intellectual functions, deficits in adaptive
22 functioning, and the onset of an intellectual and adaptive
23 deficits must be found during the developmental period.
24 That's the definition of DSM-5.

25 A. That sounds correct, yeah.

1 Q. So it's very similar to the definition found in South
2 Carolina law?

3 A. Yes.

4 Q. Now, according to DSM-5, under deficits of
5 intellectual functioning, the deficits must be confirmed by
6 both clinical assessments and individualized, standardized
7 intelligent testing. Is that true?

8 A. Yes.

9 Q. Okay. So in order to make an assessment regarding the
10 deficits of intellectual functioning, IQ tests are
11 important?

12 A. Yes, I would say they're important.

13 Q. And Mr. Stone's initial test, he scored 86. Is that
14 correct?

15 A. The 86 -- and you're speaking to his records.

16 Q. Yes.

17 A. Yes, that's my recollection.

18 Q. But you said that those tests were kind of tainted,
19 might have not been done properly, so that might not have
20 been the actual score he made?

21 A. It -- I think probably the word like "possibly", you
22 know what you said, "possibly tainted" is probably the best
23 way to put it. I don't -- I think there's information to
24 cause us to have some doubts about it, but I don't have
25 anything affirmative that makes me say it should be cast

1 out completely. And when you do the correction for norm
2 obsolescence. It falls into line with the other scores.

3 Q. Okay. And the second test he scored a 78?

4 A. I'd have to review my (reviewing notes) --

5 Q. When he was 11.

6 A. I just want to make sure that I'm accurate. Yes. The
7 second time it was a 78.

8 Q. And you tested him in 2017 he scored a 79, correct?

9 A. Yes. In the uncorrected version.

10 Q. Okay. And so now those scores are very similar to
11 each other?

12 A. Yes, I would say so.

13 Q. Okay. And he never tested under 70?

14 A. Not that we know of.

15 Q. Okay. Now, at age 11, Mr. Stone started to have a
16 learning disability, correct?

17 A. He was classified as having a learning disability.

18 Q. And people with learning disabilities are not
19 intellectually disabled?

20 A. So that gets a little complicated. You can have a
21 learning disability, but it wouldn't typically be diagnosed
22 in somebody with an intellectual disability. Historically,
23 like during this time, what you would have looked for is a
24 big difference between his tested IQ and his performance in
25 school. So even if his IQ had been low, like let's say he

1 got a 60 on something, but his academic testing is -- even
2 for reading, let's say it's way, way lower than that. Even
3 you could have an intellectual disability and a learning
4 disability at that time, based on the discrepancy analysis.

5 Q. Okay. So his reading scores could be low. It could
6 be because of his family home situation. That could be the
7 cause of the reading scores to be low, correct?

8 A. There's, yeah, there's a number of factors that could
9 lead to reading scores being low on a given occasion or
10 particular period of time, significant disruptive trauma in
11 the household causing the child to lose sleep, or something
12 like that, illness. That's why we talk about error.

13 Q. So, Mr. Stone's parents have a six great education?

14 A. That sounds correct.

15 Q. Okay, so education was not stressed in the home?

16 A. I don't recall that being the viewpoint that education
17 wasn't important in terms of the family culture, but in
18 terms of how everybody in the family did in school, nobody
19 was high achieving.

20 Q. Okay. And if academics are not stressed, the child's
21 not reading at home or being read to at home, that can
22 affect their overall reading scores, isn't that correct?

23 A. Yeah, we talk about that as enrichment. That can
24 help.

25 Q. And especially if that child is has a learning

1 disability?

2 A. Yeah, it's important.

3 Q. Okay. And at 14, he was found to be educable -- If
4 I'm pronouncing that right, mentally handicapped, correct?

5 A. Yeah.

6 Q. Okay. And you found that the siblings were found that
7 way also?

8 A. Uh... yes, that's my recollection, at least two of
9 them.

10 Q. Okay. Now, the definition of educable mentally
11 handicap in the South Carolina law is (as read): Pupils of
12 legal school age whose intellectual limitations require
13 special classes or specialized education instruction to
14 make them economically useful and socially adjusted. So
15 these people can be educated ---

16 A. Yeah.

17 Q. --- just need special classes. Isn't that correct?

18 A. Yes.

19 Q. Okay. Now, there is nothing in this law that states
20 that these children are intellectual disabled?

21 A. I can't speak to the law. I can only tell you about
22 the psychological and educational definitions of that.

23 Q. Okay, I just read the law. It didn't mention anything
24 about intellectual disability?

25 A. Yeah, to the extent that's a comprehensive reading,

1 you're correct.

2 Q. Okay. And it didn't mention anything about the 3
3 prongs found in DSM-5. Correct?

4 A. No.

5 Q. Now, formerly South Carolina law, a trainable
6 mentally handicapped child of legal school age is somebody
7 with a mental capacity is below that those considerable --
8 excuse me, educable yet make profit by a special type of
9 training to the extent they may become more nearly self
10 sufficient and less burdensome to others. That's
11 trainable, that's the lower burden -- well not lower
12 burden; that's the lower statute than educable, isn't that
13 correct?

14 A. Yes.

15 Q. Okay. So, trainable are people that probably cannot
16 be taught. Would you say that?

17 A. So that's not object -- that's not objectively true,
18 but in that formulation, that's how they thought of it.

19 Yes.

20 Q. Okay. All right. And these are categories for
21 learning and not mental health diagnosis, are they?

22 A. Right. They're related to what kind of education a
23 person should get.

24 Q. And these things are not found DSM-5 or AAIDD?

25 A. You're correct.

1 Q. Okay. Now you administered the TOMM on January 21
2 2020, correct?

3 A. Yeah, that sounds right.

4 Q. Three years after giving the initial test?

5 A. Yes.

6 Q. Okay. Now the TOMM was normally administered prior to
7 the IQ test. Isn't that correct?

8 A. Well, it depends. I don't think that's a bad idea,
9 because if somebody fails it, then you shouldn't go ahead
10 and give the IQ test. And there are neuropsychologists who
11 believe that effort testing should be conducted at the time
12 of each meeting, so that even if you met with somebody
13 twice in the same week, there's practitioners who think you
14 should do effort testing each time.

15 Q. But wouldn't the TOMM show effort -- or like give it?

16 A. Yeah. Because if they're not making effort, then you
17 do the IQ testing, you have a worthless IQ score, and also
18 practice effects now.

19 Q. It could be a lot of facts that could effect an IQ
20 score. A person could be sick?

21 A. Yes.

22 Q. Tired?

23 A. Yes.

24 Q. Or just not care, not interested?

25 A. Yeah, I mean, they could have seen a TV show yesterday

1 on the History Channel and be able to answer questions they
2 couldn't have the day before that. There's all kinds of
3 things.

4 Q. Okay. And that's why the TOMM was normally given
5 before the IQ test. So you can figure those things out
6 prior to the test?

7 A. Well, as I said, I think that's a good idea a lot of
8 the time, particularly if you have significant concerns
9 about malingering.

10 Q. Okay. But given the TOMM three years after the test,
11 is not normal practice, is it?

12 A. Well, I don't, I don't know that I would say it's like
13 abnormal practice. It's it -- I would say it's abnormal
14 how long the time was that I was evaluating him. Yes. I
15 don't think... that. I'm -- I mean, I chose to administer
16 the TOMM. I don't think it was a mistake to administer it
17 later, but if it had been a low score in 2022 and it was
18 invalid, then that would cause me to have to express doubts
19 about the testing that was done earlier, even though the
20 effort testing was done later.

21 Q. Okay. But the TOMM was an effort test to make sure
22 that he has the ability and the effort to take the actual
23 test. Isn't that correct?

24 A. Well, not so much ability. But like, you know, is he
25 trying.

1 Q. Okay. So the only way you know is he trying to take
2 the test, is the day of the test, isn't that correct?

3 A. Well, I mean, not necessarily. You would expect some
4 variability day to day, but you have to look at the whole
5 picture, I think, to be able to get a sense of whether or
6 not somebody's putting forth good effort; and even if they
7 put forth good effort on a particular day, it's still far
8 more helpful to know what's the historical pattern more
9 broadly than just that day.

10 Q. Okay, well, but given the TOMM three years after the
11 actual test, the data is useless, isn't it?

12 A. I wouldn't say it's useless.

13 Q. Well It doesn't tell you his effort on the day of the
14 test, does it?

15 A. It wouldn't have told us his effort on the day in 2020
16 if I'd given him IQ testing then; it would only tell us
17 about evidence for memory malingering specifically.

18 Because, like I said, we don't have one for malingered ID.

19 Q. And you wrote two reports. One was December 23, 2022,
20 and one on April 10, 2023?

21 A. That sounds right.

22 Q. Okay. And your second report mentioned that the TOMM
23 was administered on January 21, 2020?

24 A. That sounds right.

25 Q. So the TOMM was administered before your first report?

1 A. Yes.

2 Q. Okay. However, the administration of the TOMM was
3 not mentioned in the first report?

4 A. You're right.

5 Q. Now, in your first report, you also excluded the
6 findings regarding the neural imaging that was conducted in
7 2011?

8 A. Yes.

9 Q. Okay. You excluded that from the last report?

10 A. I excluded it from the last report?

11 Q. Yes.

12 A. I mean that, that sounds right because I don't see it
13 (indicating) in this one.

14 Q. Is there a reason for that?

15 A. I don't recall the reason.

16 Q. You also excluded from the second report of this
17 statement (as read): Findings like these combined with
18 evidence about prenatal exposure to alcohol serve as part
19 of the documentation that supports the production of a
20 specific diagnosis within the range of particular
21 disorders, patterns of damage that prenatal alcohol
22 exposure known to produce. Why'd you exclude that from the
23 last report?

24 A. I don't remember.

25 Q. Okay.

1 A. I would still -- I mean, that's an accurate statement,
2 though.

3 Q. Okay. Could it be because there was no evidence of --
4 pre-na -- pre -um... it was no of prenatal alcohol
5 syndrome?

6 A. No, that's not correct. I think there was the
7 neuroimaging person suggested that, but there wasn't. I
8 didn't feel there was enough information from family
9 members to say, to confirm something like fetal alcohol
10 effects in him.

11 Q. Now, of course, under South Carolina law and DSM-5,
12 there also must be deficits in adaptive function, correct?

13 A. Yes.

14 Q. And within your report, you mentioned things that you
15 thought reveals deficit adaptive function?

16 A. Yes.

17 Q. But this is only your decision regarding whether or
18 not it's adaptive function or deficits of adaptive
19 function?

20 A. Do you mean it's my judgment?

21 Q. Yes.

22 A. Yes.

23 Q. Okay. You didn't show it to any other doctor? You
24 just made that decision on your own?

25 A. Oh, I see what you're saying. No, I didn't consult

1 with anybody else to come to that determination.

2 Q. Now, on page 11 of your 20 -- 2023 report, you state
3 that Mr. Stone had difficulty training with difficulty
4 trusting people outside the family?

5 A. Yes.

6 Q. Okay. And you also said in your report, on the same
7 page, even with his family, Mr. Stone did not share much
8 concerning his thoughts and feelings?

9 A. That's what they said, yes.

10 Q. Okay. But later, on the same page, in your 2023
11 report, you stated that he was easy to get along with
12 people that he was vulnerable to exploitation.

13 A. Yes.

14 Q. Okay. So he didn't trust people outside his family,
15 but he was vulnerable to exploitation?

16 A. Yes. That's not necessarily inconsistent for somebody
17 with ID.

18 Q. I think it's... Well, isn't that two sides of the
19 same coin?

20 A. No, a lot of people ---

21 Q. You don't trust people but you vulnerable?

22 A. A lot of people think that. But in fact, for example,
23 like very paranoid people are extremely vulnerable. For
24 like, people with schizophrenia are extremely paranoid.
25 They are also very vulnerable because they're not good at

1 figuring out what's accurate and what's not. And people who
2 are low on trust do tend to over invest in the
3 relationships where they do have established trust. And so
4 for him, it's not surprising to me that he both seemed to
5 have difficulty trusting others. Because that's a very
6 natural adaptation that a lot of people with ID have is
7 treating other people with suspicion because they are
8 concerned they're going to try to get one over on them.
9 At the same time that they aren't really able to execute on
10 protecting themselves against that concern, because, as a
11 practical matter, they aren't good at figuring out who's
12 trying to trick them and who's not.

13 Q. So there are some things he didn't even trust his
14 family about? That's in the report.

15 A. Well, it was their perception that he didn't share a
16 lot about his thoughts and feelings. I don't know, you
17 know, what... I don't know if it's accurate to say there
18 was a lot that he was hiding from them without knowing what
19 it was that he was keeping from them, or if it was even
20 intentional. It's hard to say.

21 Q. Now, also, on page 11, in your 2023 report, you
22 mentioned that his sister told him that his car stolen by
23 his friends, but he was back partying with them the next
24 day?

25 A. Yes.

1 Q. Okay. Now that information you got from his sister,
2 not Mr. Stone himself?

3 A. That's right.

4 Q. Okay. So it could be possible he was naked in his car
5 and just didn't tell his sister?

6 A. Or he mischaracterized it to her. Yeah, there's a
7 number of possibilities. I don't have a recording of the
8 conversation.

9 Q. Number of possibilities, but you used this possibility
10 as an assessment of his adaptive functioning. Isn't that
11 correct?

12 A. I incorporated her statements, yes.

13 Q. Okay, even though it could be false?

14 A. Yes.

15 Q. You also stated that his family told you it took him
16 more than one time to get his driver's license.

17 A. Yes.

18 Q. That's not indicative of intellectual disability.

19 Okay. A lot of people take more than one time to get
20 driver's license. Isn't that correct?

21 A. Yes, that's true.

22 Q. Okay. So, that doesn't mean intellectually disabled;
23 that means he failed the drivers test?

24 A. Right. And that's a good example of something where,
25 in and of itself, it's not -- you wouldn't look at that and

1 say, "Oh, this is proof that this person has an
2 intellectual disability". But what you would say is that
3 kind of history is consistent with what you would expect.

4 Q. Okay. And this is your decision? No one else's,
5 correct?

6 A. About the driver's license thing?

7 Q. About this being the sign of adaptive functioning
8 deficits.

9 A. Well, I mean, there's authoritative texts that
10 describe us as, you know, that it's worthwhile to describe
11 and learn about those kind of things.

12 Q. I'm not talking about authority of text. I'm talking
13 about this report and your diagnosis.

14 A. Oh, yes.

15 Q. That's your decision.

16 A. No, you're right about that. Yeah, yeah.

17 Q. All right. You also didn't have a checking account,
18 correct?

19 A. Yes.

20 Q. There are a lot of people without checking accounts.
21 Isn't that true?

22 A. That's true.

23 Q. And that does not prove that he's intellectually
24 disabled? If he doesn't trust banks.

25 A. That's right.

1 Q. Okay. You said he never planned a trip or purchased
2 tickets?

3 A. Yes.

4 Q. Also -- now you said on direct these were people that
5 were poor... Amongst means. Is that correct?

6 A. Yes.

7 Q. Have you talked to their family about any trips they
8 made?

9 A. I don't recall discussing that.

10 Q. Okay, so it's possible that nobody in that family
11 purchased tickets or went on any trips, isn't that correct?

12 A. It's possible.

13 Q. Okay, so that doesn't prove he's intellectually
14 disabled either. He just may not have the funds to
15 purchase tickets and go on trips, isn't that true?

16 A. In and of itself, you're exactly right.

17 Q. You also mentioned he didn't possess a credit or debit
18 card?

19 A. To my knowledge. No, he did not.

20 Q. Okay. A lot of individuals don't use credit cards.
21 Isn't that correct?

22 A. No. Particularly poor people.

23 Q. Correct. And, you also said in your report that he
24 was not capable of signing complex legal documents. Isn't
25 that true?

1 A. Yes.

2 Q. Don't people hire lawyers to read complex legal
3 documents for them?

4 A. They probably should, but many people will sign a
5 lease, or, you know, an agreement to buy a car or something
6 like that, without consulting an attorney.

7 Q. Okay. Does that mean they understand them?

8 A. Not necessarily, or that they even read them.

9 Q. Okay. So that doesn't mean intellectually disabled
10 because he can't understand complex legal documents.

11 A. You're right.

12 Q. Okay. A complex legal document, meaning it's a legal
13 document, that's complex, that is correct?

14 A. Yes.

15 Q. I mean, I'm a lawyer, and there's some legal
16 documents, I don't think I understand. Would that make me
17 intellectually disabled?

18 A. No, that question comes from the questionnaires that
19 we use to assess it. It's one of the things that we ask
20 about because you wouldn't expect that somebody who has an
21 intellectual disability would have been somebody who, you
22 know, signed high level like complicated contracts, parsed
23 them, reviewed them, asked questions about them, and things
24 like that. That -- it's more about that being
25 inconsistent with ID than the absence of it being proof

1 that ID is there.

2 Q. You also reported that his jobs were typical physical
3 menial labor ---

4 A. Yes.

5 Q. --- did not require complex math, reading and writing
6 skills.

7 A. Yes.

8 Q. He completed the 9th grade, isn't that correct?

9 A. I believe that's true.

10 Q. Okay. How many people do you know that have jobs with
11 complex math or writing skills, with only a 9th grade
12 education?

13 A. Well, I'm not an expert on employment rates of --
14 based on education, necessarily. But you would see a
15 typically lower employment rate and lower rate of income in
16 somebody who has less educational attainment.

17 Q. Most people in that rare case need more physical
18 labor?

19 A. Yeah, they're not gonna be qualified to do a lot of
20 other things unless they learn a skill.

21 Q. On page 6 of your 2023, report you mentioned that Mr.
22 Stone did not report records. Mr. Stone did not report and
23 records do not reflect the history of employment that will
24 be unsupportive of an ID diagnosis. For example, working
25 as an accountant profession, writer or engineer.

1 A. Yes.

2 Q. Okay. How many accountants you know that have a 9th
3 grade education?

4 A. Oh, I don't personally know any.

5 Q. Okay, how many engineers you know with a 9th grade
6 education?

7 A. I don't personally know anything.

8 Q. Usually an accountant or engineer will have a college
9 degree, isn't that correct?

10 A. Yes, in my experience.

11 Q. Okay. So, you wouldn't find anyone with a 9th grade
12 education that can work as a professional writer, engineer
13 or accountant, would you?

14 A. That's right.

15 Q. Okay. So that doesn't mean he's intellectually
16 disabled; he just didn't ever have the training or
17 knowledge or education to acquire certain jobs of those
18 that -- those will require it, isn't that right?

19 A. Well, I think it would be fair to say that most of
20 those jobs, you would -- most people would need a -- more
21 than 9th grade education to do them.

22 Q. So, Mr. Stone wouldn't?

23 A. So, Mr. Stone wouldn't be able to do them.

24 Q. Okay. Now, you did write about the fact that he
25 worked at the tree service?

1 A. Yes.

2 Q. Okay, and he got a promotion while he was at the tree
3 service, didn't he?

4 A. I don't recall the promotion.

5 Q. So, you don't remember the fact that he, at first, was
6 picking up branches and stuff, and then he got promoted to
7 actually go up in the tree and cut down natural trees?

8 A. I don't remember that particular detail, but it
9 doesn't surprise me.

10 Q. Okay. And cutting down trees is a very dangerous
11 job, isn't it?

12 A. Extremely dangerous.

13 Q. Okay. And for an employer to trust Mr. Stone to be
14 able to do that wouldn't you think you saw some knowledge
15 into Mr. Stone?

16 A. I've evaluated a lot of people over the years who've
17 done tree work. For some reason, tree work, super popular
18 for people with limited educational backgrounds. Maybe its
19 ---

20 Q. --- limited educational backgrounds?

21 A. Yep. And I see a lot of people with limited
22 educational backgrounds, not just people with ID, but in
23 general. And so I've spoken with those folks about their
24 experience doing tree work, and it sounds to me -- my
25 impression is that it is very, very dangerous. Many people

1 are injured, many people die. My impression is also that
2 many of the employers are relatively unscrupulous and not
3 particularly concerned with the welfare of their employees.

4 Q. Okay. Now on page five of your 2023 reports, you
5 state that the DSM-5 states that "Adaptive functioning
6 refers to how well a person meets community standards or
7 personal, independent and social responsibility in
8 comparison with others of similar age and cultural
9 backgrounds"?

10 A. Yes.

11 Q. Did you talk to any men about the job they do at home?

12 A. Did I talk to -- excuse me. Can you...

13 Q. Any man that lives in same area, same age as Mr.
14 Stone. Did you talk to them about the job they do at home?

15 A. You're asking if I interviewed adult men about their
16 responsibilities in the home?

17 Q. Yes.

18 A. I did interview, and I also witnessed a couple of
19 people in their homes. Specifically, I'm thinking of
20 Frankie and Jerry. And I think briefly, kind of
21 incidentally, a couple of related issues came up to that,
22 but I didn't interview them specifically about their own
23 contributions and their own homes.

24 Q. And the fact that Mr. Stone did the yard work, but the
25 women did the housework. That was the agreement between

1 the two parties. Isn't that correct?

2 A. Well, that's how Mr. Stone framed it. It was that he
3 felt that was an appropriate partition of responsibility.
4 He didn't describe ever having a conversation where it's
5 mutually agreed upon.

6 Q. So, it could be cultural that he doesn't want to do
7 housework, and not the fact that he can't do it?

8 A. It is sometimes cultural. In this case, what other
9 folks indicated was that he was not able to, and that it
10 wasn't that he was lazy or dismissive of the value of the
11 work.

12 Q. Well, did you ever ask somebody, did they try to teach
13 him?

14 A. I believe his mother -- I believe there was
15 information that his mother did try to teach him some
16 things, but I never saw him consistently execute those
17 behaviors in the community as an adolescent or adult,
18 according to the information I gathered.

19 Q. Well of course you didn't interview his mother because
20 his mother was deceased at the time?

21 A. That's right.

22 Q. Okay. So she never told you that she did this?

23 A. Family members spoke about her trying to teach him to
24 be somewhat more independent.

25 Q. Okay. Family members that I'm sure do not want him to

1 die, isn't that correct?

2 A. I believe they do not want him to die, yes.

3 Q. Okay. So family is going to tell you exactly what you
4 want to hear to make sure that he doesn't die, isn't that
5 correct?

6 A. I think that requires an additional leap -- that they
7 would be dishonest with me in order to achieve that end.
8 And I would only be able to speculate about that.

9 Q. Okay. Now, you adjusted his score as quoted by
10 applying the Flynn effect, is that correct?

11 A. I'm sorry, can you repeat your question?

12 Q. You adjusted his IQ score as applied to Flynn effect?

13 A. Yes.

14 Q. Okay. I know it's the -- it's the way you say it.
15 Flynn effect is easier for me, so I'm just gonna call it
16 Flynn effect.

17 A. Sure.

18 Q. Okay. Now that adjustment is done for testing as you
19 stated to address the population norm?

20 A. Yeah.

21 Q. Okay. Is the Flynn effect mandatory?

22 A. I don't think you get in trouble if you don't do it.
23 You know, your colleagues might not like it; or a court
24 might not like it, but you won't get in trouble for it,
25 probably.

1 Q. Okay. So it's strictly up to the examiner to apply
2 the Flynn effect on a test.

3 A. It's recommended, but there isn't -- again, there's no
4 -- nothing to compel people to do it.

5 Q. Now, there have been recent studies that suggested
6 there's a reverse Flynn effect that is possible, isn't that
7 correct?

8 A. There's some research, specifically, mostly limited to
9 Scandinavia, that suggests that at least in some parts of
10 the world, the Flynn effect may either level off or show a
11 reversal.

12 Q. Okay. Now, if you give an IQ test of individuals
13 today, and you gave that same IQ test two years from now,
14 would you apply to Flynn effect?

15 A. I would probably mention it and then say, "This would
16 be such a small correction that it's not probably worth
17 mentioning."

18 Q. All right.

19 A. Or -- sorry, it would be worth mentioning, but not
20 doing the mathematical application.

21 Q. I will address your attention to Defense Exhibit No.
22 3, school records for identification.

23 A. Yes, sir.

24 Q. On page 26, that's his permanent high school report
25 card?

1 A. Yes.

2 Q. Okay. Now, you stated you cannot read the report
3 card?

4 A. It's very hard to read, and I'm certainly not
5 confident that everything that was written on the original
6 document is visible at all on this one.

7 Q. Okay, but it shows he took English lab, math Lab,
8 civics, general science, resources and physical education.

9 A. Yeah, the resources are referring to a resource room,
10 rather than, like a subject area.

11 Q. Okay. And his grades are pretty bad. All Fs, I
12 think, and a B and a C.

13 A. Yeah, there's... it's mostly Fs.

14 Q. Okay. But if you look at days absence in English, he
15 was 16 days. I think in math lab, he missed 9. He missed
16 23 days in civics, 14 days in general science, 9 in
17 physical ed -- I mean, excuse me, in resource and physical
18 ed missed 16 days.

19 A. Yes. I think I mentioned that in my earlier
20 testimony.

21 Q. All right. So it could be possible his scores,
22 correct me, his grades are so bad because he just didn't go
23 to school?

24 A. Certainly, that's possible, or that there's a
25 contribution from both that you have a child who's

1 impaired, and on top of that, they're not getting all the
2 remediation that they need because they're not attending
3 school consistently. So it could be a combination.

4 Q. But the two classes that he went to school are
5 resource -- he made a B -- he made Bs. In the math lab he
6 made two Cs. And those are the one he went to school --
7 went to class the most. Isn't that true?

8 A. Right. Well, the resource room is the, you know, the
9 special education setting, so we would expect him to do a
10 little better in there.

11 Q. But he also made Cs in math because he went to class?

12 A. It looks like, well, I can't say why he got a C. He
13 had an F initially, and then it looks like it became a C.

14 Q. Okay. You also mentioned he went to Birchwood High
15 School?

16 A. I'm sorry, which high school?

17 Q. Birchwood.

18 A. Oh, yes. Yes.

19 Q. And, do you understand that, that is the high school
20 for the Department of Juvenile Justice?

21 A. No. I did not know that.

22 Q. Okay, and ---

23 A. May I say something -- excuse me. The team might
24 have informed me, but at least I have forgotten it.

25 Q. And then that type of setting is more structured than

1 his regular home, wasn't it? You would suspect that in a
2 department of correction situation?

3 A. Yeah, an institutional setting would be more
4 structured.

5 Q. Okay. And more than likely, an institutional setting,
6 he is forced to go to class?

7 A. Yes.

8 Q. Okay. And his grades, even though they are remedial
9 grades, in Birchwood he made all Cs and a B in economics.

10 A. Can you direct my attention to a particular page?

11 Q. I'm on page 59, last page of the school records.

12 A. Yes, it looks like it's mostly Cs and then one B.

13 Q. Okay, so if he goes to class, he can do the work?

14 A. I don't know that we could draw that conclusion. I
15 think ---

16 Q. He made Fs not going to class. He made Cs and Bs
17 going to class. I think that's the conclusion you can
18 draw, because he's doing better when he went to class.

19 A. Well, only -- so, if you take those two in isolation,
20 that might look pretty compelling, but if you look at the
21 overall pattern. There's times that he's -- when he's
22 younger, in particular, when he is attending school more
23 consistently and his grades are still quite poor, is that
24 academic achievement is still quite poor. And what we find
25 with those kids too is that they as they get older and

1 school becomes even more difficult, and other people are
2 noticing how impaired they are, they're less motivated to
3 go to school. So even the absences for a child with
4 disabilities are often related to the disability.

5 Q. And his home life and his home structure wasn't good
6 when he was younger, was it?

7 A. No, it was not.

8 Q. Okay. So while in Birchwood, he's not home, isn't he?

9 A. Yes, if he's in residence.

10 Q. And he did better in school while he was at
11 Birchwood, isn't that correct?

12 A. Well, he, I would say he got better grades in school.

13 You know what I -- what would be ---

14 Q. Fs are better than Cs. Cs are better than Fs aren't
15 they?

16 A. Yes. But they don't necessarily reflect more
17 achievement of actual skills, right. That's just a grade.

18 Q. Okay. So it could be he did better in school because
19 he wasn't living at home, and his grades were bad because
20 his home life, but not because he's intellectual disabled?

21 A. I wouldn't make that characterization, but I do think
22 it's fair to say that home life certainly can contribute to
23 a child's problems in school, and that it likely did
24 contribute to his problems in school.

25 Q. I want to draw your attention to page 55 of his school

1 records.

2 A. (Complies.)

3 Q. Now, you mentioned AAMD?

4 A. Yes, sir.

5 Q. That was given to him. Now, according to this, and
6 I'm going to show the AAMD scores, it said that, "The AAMD
7 indicated adaptive functioning generally below normal range
8 ---

9 A. Yes.

10 Q. --- "only numbers and time, vocational activity and
11 responsibility were in normal range. Independent
12 functioning and economic activity were his lowest scores."

13 A. Yes.

14 Q. So, these scores on here were his lowest that he
15 received on this test?

16 A. Yes, they didn't even report the other ones that were
17 in the average range.

18 Q. And he was 14 when he took this test. Isn't that
19 correct?

20 A. If that's what's identified on the report.

21 Q. And you said yourself on direct these scores were
22 surprising to you because his IQ was higher than these
23 scores would reflect.

24 A. It's not unusual to see adaptive functioning scores
25 that are significantly lower than IQ, but usually what I

1 look -- what I would be surprised by is one that's much
2 higher than the IQ.

3 Q. If I could remember, on direct you said you were
4 surprised his scores were this low?

5 A. These are very low scores. I'm surprised that he
6 would have scores that low in those areas, and the other
7 ones would be in the normal range, but that's what's
8 reported in the report.

9 Q. Could it be the score was so low because of effort; he
10 just didn't try?

11 A. It's a possibility. I don't think it's likely, but
12 it's a possibility.

13 Q. Now, you've mentioned in your report, you read the
14 report of Dr Hall. Isn't that, correct?

15 A. Yes.

16 Q. Okay, and Dr. Hall, on page 7 of her report mentioned
17 that Mr. Stone told her he smoked marijuana from 14 in the
18 report. You haven't seen that?

19 A. That sounds correct. I don't have a copy of her
20 report in front me.

21 Q. But you never mentioned his drug use in the report,
22 whatsoever?

23 Q. No, I didn't think it was causal or explanatory with
24 respect to the ID.

25 Q. Okay. But doesn't marijuana affect your brain

1 activity?

2 A. Yes.

3 Q. That's why you smoke it, right?

4 A. Well, I don't -- I mean, that's why people smoke it.

5 Q. Yes. Okay.

6 MR. EVANS: I beg the Court's indulgence.

7 THE COURT: Yes.

8 MR. EVANS: No further questions, Your Honor.

9 THE COURT: Anything else for the Applicant?

10 MS. MAJOR: May I have five minutes or so?

11 THE COURT: When we leave for five minutes you can't
12 discuss your testimony.

13 THE WITNESS: Thank you, Your Honor.

14 (A brief break was taken at 3:40pm - 3:50pm.)

15 THE COURT: Are you ready, Madam Court Reporter?

16 COURT REPORTER: I'm ready.

17 THE COURT: All right. Go ahead, please.

18 REDIRECT EXAMINATION

19 BY MS. MAJOR:

20 Q. Hi again, Dr. Boyd, I promise I'm not going to ask you
21 questions for nearly as long as I did this morning. I just
22 have a couple of questions. Earlier in Mr. Evans's
23 questioning to you, he asked whether or not there was an IQ
24 score from Mr. Stone's history that was below 70. Can you
25 remind me, was there one that was presented as a range

1 score?

2 A. Right ---

3 MR. EVANS: Your Honor, I think she's leading.

4 THE COURT: A leading question suggests an answer.

5 Overruled. Go ahead, answer the question if you know it.

6 A. So earlier in the testimony, what I described was that
7 there was a score that was not reported as a single score.
8 So, I don't have a single point score that's been reported
9 that falls below 70; however, for that last testing that
10 was done in 1979 they didn't report a point score.
11 However, the range that they reported, I believe, started
12 at below 70 at 69 or thereabouts, so the range encompassed
13 it. There's no point score that's reported that falls
14 below 70.

15 Q. Okay, thank you. And I believe that Mr. Evans asked
16 you about these other considerations that you have to take
17 into account about a person's mental status or if they're
18 feeling sick at the time of your testing. Did you consider
19 those things that you administered to Mr. Stone's IQ
20 testing in 2017?

21 A. Yes, I spoke to him and did the interviewing prior to
22 the testing, where I asked him questions like, "How well
23 did you sleep? Do you take any medication? Have you taken
24 it today? Do you wear glasses? Do you wear hearing aids? Do
25 you have them? Have you been sick recently?" You know, I do

1 ask about those kinds of things, and then you also just
2 look for things like, do they seem to be trying? Do they
3 persist when things get difficult? What's their general
4 attitude towards testing? And so in that sense, I didn't
5 have concerns about those factors at that time based on my
6 observations, or anything that he reported to me.

7 Q. Thank you. Mr. Evans asked you a lot of questions
8 about specific pieces of information that you had reported
9 about Mr. Stone's adaptive functioning, kind of one off's.
10 He asked you about his driver's license and things that you
11 learned that you could or couldn't do. Is it important
12 when you are evaluating someone's adaptive functioning to
13 look at things in isolation or the whole picture of what
14 you're learning about their adaptive functioning?

15 A. Certainly different pieces of information are going to
16 be weighted differently, but you're looking for not only
17 what is the overall pattern, but you're looking at what is
18 the overall pattern across time, across settings and across
19 sources of information. In other words, are the
20 educational records telling me a similar story to the IQ
21 testing results that I got and are reflected in the
22 records? Is that similar, congruent or divergent from what
23 witnesses are saying about the person. So you do take it
24 all into account. That doesn't mean that every piece of
25 information has the same weight, but you do take it all

1 into account.

2 Q. And could you briefly discuss what goes into your
3 decisions about whether or not to rely on information that
4 you receive from collateral interviews, say family members
5 or other people that you talk to, whether evaluating
6 someone's adaptive functioning?

7 A. Well, first of all, I would say that a lot of people
8 assume that people's family members in a high stakes
9 situation are only going to say nice things about them, but
10 some of the meanest things I've ever heard have been from
11 people's own mothers. So for -- it's not always true that
12 they are saying nice things about the person, and even when
13 they're trying to be helpful, that can actually be a
14 problem, because in my experience, doing adaptive
15 functioning testing, one of the issues is that the
16 families, yes, they don't want their family member to be
17 executed, but what they think that means is that they need
18 to make him look like as good of a guy as they possibly
19 can. They had no problems. They never did anything mean
20 to anybody. You know, that he was like a good student. You
21 know, sometimes they're trying to paint this really good
22 picture of the person, and that can be challenging, because
23 I don't need to know about the good things. I'm trying to
24 find out about what he struggled with, and the families
25 often don't want to tell me that, because they think that

1 that makes their family member look bad, and that tends to
2 be more of an issue in the families where the where other
3 family members are impaired or not as well educated, and so
4 really that can, you know, I understand the concern that
5 they're going to say things to protect their family member,
6 but even when they're trying to do that, they're not often
7 shaping the information in a way that's going to make the
8 person more likely to get an ID diagnosis. They're often
9 inadvertently reducing the probability that the person's
10 adaptive functioning deficits are going to be noted and
11 reported and revealed.

12 Q. And I just have one last area of questioning for you.
13 I believe, right at the end of his cross examination, Mr.
14 Evans drew your attention to page 59 of what's been marked
15 for identification as Applicant's Exhibit 3, which is Mr.
16 Stone's school records?

17 A. Yes.

18 Q. And Is there information on that page about what year
19 Mr. Stone attended Birchwood High? Or Birchwood High
20 School? Sorry.

21 A. The commitment date is identified as December 6, 1982,
22 so that would have been when he entered the Department of
23 Youth Services. And it says the withdrawal date is March
24 4, 1983.

25 Q. Thank you. And at the bottom is there information

1 about what curriculum Mr. Stone was coded into while he was
2 at Birchwood?

3 A. It says curriculum one.

4 Q. And above that is there information about what "the
5 one" refers to in terms of what the curriculum is coded as?

6 A. So there's a curriculum code that's provided about
7 halfway down the page above the grading scale code, and it
8 states that the remedial that curriculum one is a remedial
9 curriculum, and there are a couple of levels before there's
10 a regular curriculum, and then there's a GED or college
11 prep curriculum that is a level three.

12 Q. And what would you think that remedial would refer to
13 in terms of the level of academics that he was
14 participating in?

15 MR. EVANS: Your Honor, I object to that it's
16 speculation. I don't think she's an expert in education to
17 make that assessment.

18 THE COURT: You wish to be heard?

19 MS. MAJOR: He opened the door to this when he was
20 questioning her on cross examination, and also she's, you
21 know, testified like pretty extensively about her history
22 and experience working with people who are intellectually
23 disabled in a lot of contexts, which includes special
24 education, outside of her work on Mr. Stone's case.

25 MR. EVANS: I never asked her any questions about the

1 definition of a particular type of special ed. class or
2 remedial class. I asked her, was he in the type of classes
3 that he was in according to the records that she testified
4 from. So, I didn't open the door to that question, Your
5 Honor, and I don't think she had the expertise to answer
6 that question. That's all speculation, Your Honor.

7 MS. MAJOR: I think he questioned her at length about
8 the grades and these courses. And was open to ask her for
9 some context about what those courses were.

10 MR. EVANS: Well, I asked her about information that
11 was in the record that she read. I didn't ask her what
12 type of classes it meant that she took. I didn't ask her,
13 "Well, does remedial class do this, does special ed class
14 do that." I just asked her what kind of classes he was in.

15 THE COURT: The witness may testify of her own
16 personal knowledge if she's speculating as to what it
17 means, she can't say. But the objection is overruled with
18 that instruction. I know what remedial means. Y'all can
19 move on.

20 MS. MAJOR: I have one final question. If I could
21 turn you ---

22 THE COURT: Do you want her to answer it?

23 MS. MAJOR: Okay.

24 BY MS. MAJOR:

25 A. My answer was not gonna be substantially different

1 from the judge's. So I'm fine with that.

2 Q. Okay. My final question is, if you can turn to page
3 58, in Applicants 3. And firstly, does this look like
4 another record from Birchwood High?

5 A. Yes. It's signed by the same individual.

6 Q. Okay. And is this something you considered in your
7 evaluation?

8 A. Yes.

9 Q. And does it provide any information about what kind of
10 programming Bobby or Mr. Stone should have received during
11 his time at Birchwood High?

12 A. Well, it just states what they recommended. So, they
13 recommended a vocational program, which during that time
14 period that's similar to, you know, when I was speaking
15 about the difference between educable and trainable. So
16 trainable would be more of a vocational type of tract where
17 you're just learning skills that you can repeat over and
18 over again, as opposed to becoming educated. So they're
19 talking about shifting him away from academic achievement
20 goals and more toward practical work skills.

21 Q. And is being shifted away from academic work to
22 practical skills inconsistent with someone having an
23 intellectual disability?

24 A. No, not at all. In fact, it's very common for... even
25 today, for kids to have the academic objectives modified

1 because they just can't reach the standard academic
2 objectives. We don't shift them into vocational programs
3 so much anymore, but we do modify the objectives.

4 MS. MAJOR: No further questions, Your Honor.

5 THE COURT: Re-cross?

6 MR. EVANS: Yes, sir, Your Honor.

7 RE-CROSS EXAMINATION

8 BY MR. EVANS:

9 Q. Dr. Boyd, I call your attention to page 8 of the 2023
10 report.

11 A. Yes.

12 Q. If you look at the third full paragraph. It states
13 that (as read), "In 1979 Mr. Stone was again tested using
14 the WISC-R ---

15 A. Yes.

16 Q. --- and his results were reported as a competence
17 interval. The full scale scores interval was 69 to 75
18 which suggests index score about 71. So in your opinion,
19 he didn't score under 70 that test either?

20 A. Well, that's an estimate. I don't know what the exact
21 number would be. We'd have to go back and look at the
22 manual for the WISC-R to figure that out. That's just an
23 estimate, and without a point score, what I would say is,
24 there's no point score reported in the record that's under
25 70. But there is a score interval that contains a 70 and a

1 69; that's the best I can tell you about that.

2 Q. I want to turn your attention to page 58 of the school
3 records from Birchwood High.

4 A. Yes.

5 Q. Okay, now you know it's the state's enrolled in
6 special education, and the answer is "no"?

7 A. Correct.

8 Q. Okay. And it recommended him get a vocational
9 program. He only had a ninth grade education at this
10 point. Isn't that correct?

11 A. Yes.

12 Q. Okay. So it would be safe to assume that they
13 wouldn't recommend him to go to college. When you only
14 have a ninth grade education. Isn't that correct?

15 A. Well, I don't know that I can speak to how they made
16 that determination.

17 Q. Okay. But he only had a ninth grade education at this
18 point?

19 A. That's my understanding.

20 MR. EVANS: Nothing further, Your Honor.

21 THE COURT: Thank you, Doctor. You may step down.

22 THE WITNESS: Thank you. Your Honor.

23 THE COURT: Call your next witness.

24 MR. GROSE: May Dr. Boyd be released, Your Honor?

25 THE COURT: Any objections?

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MR. EVANS: No objections.

THE COURT: You're free to go. Thank you.

THE WITNESS: (Complies.)

DR. ALICIA V. HALL,

having been first duly sworn, testifies as follows:

COURT CLERK: Step around, please, ma'am.

(Ms. Hall complies.)

COURT CLERK: State your full name and spell your last name for the record, please, ma'am.

MS. HALL: Alicia, A-l-i-c-i-a, V as in Victor, Hall, H-a-l-l.

DIRECT EXAMINATION

BY MR. GROSE:

Q. Dr. Hall, can you tell us where you're employed.

A. At the Department of Disabilities and Special Needs.

Q. And what is your position at the Department of Disabilities and Special Needs?

A. I am a clinical supervisor in the Department of Clinical Services.

Q. And how long have you been in that position?

A. Officially since April, but I've been acting since December 2022.

Q. All right. And in order to have that position, do you have any specialized training and education?

A. Yes. I have a doctorate in clinical psychology, and I

1 completed my internship, which I specialized in child
2 behavioral disorders and forensic psychology.

3 Q. And if I could, could you go back and summarize from
4 college, summarize your education for Judge Keesley, up
5 through your Ph.D.?

6 A. Oh, I have a bachelors degree from Lafayette College.
7 I attended the University -- oh, Indiana State University,
8 which was a masters in experimental psychology; and I got a
9 doctorate in clinical psychology from the University of
10 South Florida.

11 Q. And after that, did you engage in any internships or
12 anything?

13 A. Yes. As part of my doctoral training, we're required
14 to complete a year of internship of specialized training,
15 and I completed my internship. It was a joint effort
16 between Department of Mental Health, specifically William
17 S. Hall Psychiatric Institute, and the University of South
18 Carolina School of Medicine, in the Department of
19 Neuropsychiatry and Behavioral Disorders.

20 Q. Okay. And after you completed your internship, what
21 is your employment history up to the present?

22 A. Upon completion of my internship, I began working at
23 the University of South Carolina School of Medicine in the
24 Department of Neuropsychiatry and Behavioral Sciences. I
25 was the chief psychologist and I managed a grant that was

1 looking for the genes that contribute to autism spectrum
2 disorders. So my job was in fact to do diagnostic testing,
3 which included IQ testing, testing of adaptive functioning,
4 as well as testing for autism spectrum disorders. So
5 autism specific diagnostic testing, like the ADAS and ADI.
6 Then I moved to Department of Mental Health where I became
7 chief psychologist in the Developmental Disorders Clinic.
8 So at that clinic, we specialized in the diagnosis and
9 treatment of individuals with neurodevelopmental disorders.
10 So that included autism spectrum disorders, intellectual
11 disability, certain genetic disorders, and so it was also a
12 training clinic.

13 So I supervised both psychiatric residents and
14 psychiatry -- psychology interns. That was in 2006. In
15 2010, I moved full time to forensics, and were I strictly
16 did forensic evaluations for competency to stand trial in
17 children and adults; and then in 2014, I moved over to
18 Department of Disabilities and Special Needs, again doing
19 forensic evaluations.

20 Q. And do you have any specialized training in order to
21 do forensic evaluations?

22 A. Yes. As a graduate student at the University of South
23 Florida, my concentration was in -- which is considered
24 like a minor -- was in forensics. My internship, we did
25 six month rotation in adult forensics, and a six month

1 rotation where part of it was juvenile forensics, and then
2 of course my continuing in the -- continued after becoming
3 licensed is, I focus on both neurodevelopment disorders and
4 forensic psychology. So I keep up with the standards
5 through my continuing education.

6 Q. All right. And if you could tell the Court a little
7 bit about what the requirements are for continuing
8 education.

9 A. So to be a licensed psychologist in the State of South
10 Carolina, you are required to get 24 hours of continuing
11 education every two years -- well, essentially 12 hours a
12 year; and so I do that because I want to keep my license in
13 good standing.

14 Q. Okay. And of course your license is in good standing?

15 A. Yes.

16 Q. And where are you licensed as a psychologist?

17 A. Here in the State of South Carolina.

18 Q. Now, it sounds like you've conducted numerous forensic
19 examinations over the years?

20 A. Probably over 1000.

21 Q. Okay. And if you could, tell the Court what types of
22 forensic examinations you conduct.

23 A. For the Department of Disability Special Needs and the
24 Department of Mental Health, all of our evaluations are
25 court ordered. So we are neither hired by the Solicitor

1 nor the Defense. So essentially we are -- we act as
2 amicus. So we are friend to the Court. So our job is to
3 help the judge determine or make a good decision about
4 whether or not someone's competent to stand trial, whether
5 or not -- at DMH, we also did criminal responsibility
6 evaluations. We also do PRC evaluations. That could be
7 competency, it could be Atkins. We do -- but everything we
8 do the only way I get involved from the Department of
9 Disabilities and Special Needs is if I am court ordered to
10 do so.

11 Q. And through the course of your career, have you done
12 evaluations to determine whether somebody meets the
13 diagnostic criteria for an intellectual disability?

14 A. Yes.

15 Q. And about how many of those evaluations do you think
16 you've conducted?

17 A. Well, when we do our competency to stand trial, the
18 way South Carolina statute is set up we have to answer the
19 question, one, does the person have an intellectual
20 disability or related disability; and the second question
21 we must answer is that person's competent to stand trial.
22 So the majority of the evaluations I've completed that has
23 been a question that needed to be answered.

24 Q. Okay. And have you been requested by the Court to
25 conduct evaluations under *Atkins vs. Virginia*?

1 A. Yes.

2 Q. And approximately how many of those evaluations have
3 you conducted?

4 A. Independently six; and then under supervision, three.

5 Q. Okay. All right. I'm gonna hand you what's been
6 marked as Applicant's Exhibit 4 for identification, and ask
7 if you could take a look at that.

8 A. (Complies.) Yes. This is my curriculum vitae.

9 MR. GROSE: Your Honor, at this time I would move
10 Applicant's No. 4, her curriculum vitae, into evidence.

11 THE COURT: Any objection?

12 MS. BROWN: No objection, Your Honor.

13 THE COURT: Mark 4 in evidence, Madam Court Reporter,
14 please.

15 BY MR. GROSE:

16 Q. Dr. Hall, have you ever been qualified --

17 THE COURT: Wait -- wait a second.

18 MR. GROSE: I'm sorry.

19 (Applicant's Exhibit No. 4, Dr. Hall's CV, marked
20 in evidence.)

21 THE COURT: Okay.

22 Q. Dr. Hall, have you ever been qualified as an expert in
23 court?

24 A. Yes.

25 Q. Approximately how many times?

1 A. 20, 25.

2 MR. GROSE: At this time, Your Honor, I would offer
3 Dr. Hall as an expert in forensic psychology with a
4 specialty in assessing and diagnosing intellectual
5 disability.

6 THE COURT: Voir dire?

7 MS. BROWN: None, Your Honor.

8 THE COURT: Any objection?

9 MS. BROWN: No objection.

10 THE COURT: She's so recognized. You may continue.

11 BY MR. GROSE:

12 Q. Were you asked by the Court to do an Atkins evaluation
13 for Bobby Stone?

14 A. Yes.

15 Q. Okay. And can you explain to the Court the procedures
16 that you followed in doing an Atkins evaluation?

17 A. Right. So we -- the order usually comes into our
18 legal department and Legal lets me know that we have an
19 order for an Atkins evaluation and she'll ask what do I
20 need to begin the process.

21 Q. When you say "she," is that your general counsel.

22 A. Yeah. General counsel ---

23 Q. Okay.

24 A. --- is a woman. So she will ask what I need to start
25 the process and so I'll send her a list of records and

1 individuals I would like to interview to begin the process.

2 And so she does the primary communication between the

3 Applicant's defense team and the agency.

4 Q. And if you could, do you have a copy of your report in
5 front of you?

6 A. No.

7 Q. Okay. Well, in your report, you reference South
8 Carolina code section 16-3-20(C)(b)10.

9 A. Yes.

10 Q. All right. Why do you reference that?

11 A. Because that is the statute for South Carolina that
12 identifies -- or defines intellectual disability, and that
13 is the statute that is on the Atkins order. So that is
14 what I have to answer to.

15 Q. Okay. And in the section you report on purpose of the
16 evaluation, in a difference -- in addition to referencing
17 that section, you also reference the *Atkins* case and
18 *Franklin vs. Maynard* case from South Carolina; is that
19 right?

20 A. That is correct.

21 Q. All right. And what is your understanding of the
22 definition that the South Carolina code uses for an
23 intellectual disability?

24 A. The diagnosis -- or the state statute defines
25 intellectual disability as having sub average intellectual

1 functioning; having co-occurring deficits in adaptive
2 functioning and you must have those deficits present, both
3 intellectual and adaptive functioning, during the
4 developmental period.

5 Q. Okay. And now, if we actually go and look at that
6 code section, it uses the term "mental retardation." Is
7 that a term that has fallen out of use?

8 A. Yes.

9 Q. And can you explain that.

10 A. The term began to be used by lay people in a
11 pejorative way. So it wound -- so the term began to have a
12 negative connotation to it, instead of when we were using
13 it in the clinical term, it just meant mentally delayed,
14 right, because retardation is a slowing of a process.

15 In this case, we'll be talking about a slowing of
16 development, and so because lay folks began to use it to
17 tease and speak ill of people in our population, we wanted
18 another term that would actually be more accurate as well
19 than rather an antiquated term like mental retardation.

20 So I believe the State statute became official in
21 South Carolina either 2010 or 2011, that when you look at
22 DDSN and what defines us, if you look at the competence to
23 stand trial statute, or any of the health and services
24 statute, the term is intellectual dis -- disability.

25 Q. Dr. Hall, I'm going to hand you what's been pre-marked

1 as Applicant's Exhibit No. 5.

2 A. Yes. You gave me one last week. So I didn't think I
3 had to bring it this day.

4 Q. Huh?

5 A. Y'all gave me one last week. So I didn't think I had
6 to bring it today.

7 Q. Okay.

8 (Mr. Grose hands a document to the witness.)

9 A. Yes. This looks like my complete report.

10 Q. Okay. When you said your "complete report," that's
11 the one you did for Bobby Wayne Stone?

12 A. Yes.

13 Q. And the one that has been sent to Judge Keesley in
14 this case?

15 A. Yes.

16 Q. Okay. You mentioned earlier that you reviewed or that
17 you typically receive records in a case. Does your report
18 list the records that you received in Mr. Stone's case?

19 A. Yes, it does. On page 2, it lists all the records
20 that I received.

21 Q. Okay. And can you --

22 A. Well, it starts on the first page actually. So the
23 bottom of page 1, continuing onto page 2.

24 Q. All right. And what type of records did you review
25 with regards to Bobby Stone?

1 A. I reviewed part of the legal record. So part of the
2 appeals record. I reviewed his PCR application. I
3 reviewed medical records, school records, Social Security
4 disability records, records from South Carolina Department
5 of Corrections. There was both medical records and school
6 records of Mr. Stone's immediate family. So mom, dad, and
7 siblings. I reviewed those, and there were some affidavits
8 that were related to the earlier criminal process that I
9 also were able to review.

10 Q. One of the things that is listed in your report, on
11 the very top of page 2, is raw psychological data from
12 Sarah Boyd, Ph.D.

13 A. Yes.

14 Q. What is that?

15 A. So I requested -- once I learned that Dr. Boyd had
16 done psych testing or in -- testing, I requested copies of
17 the actual protocols. So now a report from her, not a
18 summary from her, the actual -- copies of the actual
19 protocol so that I might actually look at the answers that
20 he gave and re-score it myself.

21 Q. Okay. And did you -- you received that. Did you
22 follow through with that process you just talked about?

23 A. I did.

24 Q. Okay. The school records, are school records the type
25 of records that you ordinarily rely on in an Atkins

1 evaluation?

2 A. Yes.

3 Q. And why is that?

4 A. Because the deficits have to be present during the
5 developmental period, and so school records are
6 contemporaneous records that allow us to get an insight
7 into the person's functioning during the developmental
8 period, you know, particularly if we're talking about a
9 person who is well outside of the developmental period.

10 Q. Okay. And did you find Mr. Stone's school records to
11 be of value to you during this evaluation?

12 A. Yes, they were helpful. Some were difficult to read
13 because they're older, but yes, they were helpful.

14 Q. Okay. Your report also listed, on page 1, that you
15 had an interview with Mr. Stone?

16 A. Yes.

17 Q. All right. And what's the importance of having an
18 interview with Mr. Stone?

19 A. It gets -- I can speak with him, get his perspective,
20 ask him questions, assess his adaptive functioning. It
21 also gets a good insight into his presentation. I can ask
22 him questions about how he's thinking, in terms of a mental
23 status, to make sure I don't see any things that would be -
24 - may affect his cognition, but are not due to intellectual
25 disability. So I'm looking for things like psychotic

1 processes, depression, anxiety, those things that may
2 affect -- or may affect testing scores and those kinds of
3 things.

4 Q. All right. And what was your impression when you met
5 with Mr. Stone?

6 A. Mr. Stone -- he answered my questions, but we did have
7 some contentious behavior as I asked him particularly
8 issues that would be related to adaptive functioning. He
9 was very guarded, very concerned about looking low
10 functioning, looking stupid, if I'm just gonna put it
11 plainly. So I would have to ask him a question -- that's a
12 thing I noticed that I would ask a question, and then I
13 would have to rephrase it, sometimes using more concrete
14 language for him to understand what I was asking; and then
15 there were other times, once I got him to understand what I
16 was asking, he did not want to answer the question. He
17 would say, "Oh, well, everybody knows that," or -- so to
18 give you an example, we were talking about how would a
19 person go about living independently, getting their own
20 apartment, that kind of thing; and it was really a struggle
21 to get him to answer that question. And once he answered
22 it, he still only gave me a superficial answer. It was
23 very boom, boom, boom, but he couldn't give me details that
24 would demonstrate that he truly understood how to go about
25 the process.

1 Q. And what does that signal to you?

2 A. Individuals who have some cognitive deficits often
3 will present themselves in a way what we call "cloak of
4 competence," so that they -- some people refer to it
5 nowadays as "masking," but they really try to hide their
6 deficits so they'll present as being more competent than
7 they actually are; and one of the ways they do that would
8 be to try to avoid answering a question or try to condole
9 you to get you to change the subject into something so that
10 they -- you don't see their limitations.

11 Q. Okay. And that term "cloak of competence --
12 competency," is that something that you use or is that
13 something that's accepted in the psychological community?

14 A. No. It's accepted in the psychological community. It
15 was first written about in the 1960s or '70s as this idea
16 that particularly folks who have deficits will do things so
17 that other people don't understand the depths or their
18 deficits. So it's a way of protecting themselves.

19 Q. Okay. And you saw evidence of that in your interview
20 with Mr. Stone?

21 A. Yes.

22 Q. Was that one occasion or more than one occasion?

23 A. It was several occasions.

24 Q. Okay. In addition to Mr. Stone, did you interview any
25 other witnesses?

1 A. Yes. I interviewed Omega Golden, who was Mr. Stone's
2 sixth grade teacher. I interviewed Joy Klotze, who was his
3 special education teacher. I interviewed Mr. Stone's
4 brother, Jerry Stone. I interviewed his friends, Frankie
5 and Tracy Norton; and then I interviewed Doctors Elaine
6 Steele and Joseph -- Elaine Harris and Joseph Harris, both
7 are whom are retired school psychologists.

8 Q. And as part of your evaluation, did you attempt to get
9 a sense of Mr. Stone's family history?

10 A. Yes.

11 Q. And what is the purpose of doing that?

12 A. Well, we want to look at if -- well, it's twofold.
13 One, I wanted to see if I can get a sense of Mr. Stone's
14 early developmental history to see if he showed and
15 deficits or lags in development. It's also important to
16 get a sense of the family culture, what type of environment
17 he was growing up in because those things can impact our
18 academic functioning; and so that's why it's important to
19 kinda begin to get that early picture of what his life was
20 like.

21 Q. And do you do that just be interviewing people or is
22 there other things that you would do?

23 A. Well, it's from interview, it's from records, from
24 interviewing the person that I'm writing about. Yeah.

25 Q. Okay. I notice on page 2 of your report that you list

1 Mr. Stone's family records that you reviewed.

2 A. Yes.

3 Q. And what were those records?

4 A. So I got school records that consisted of actual
5 academic records, but then special education records. So
6 psycho ed -- reports for his brother, Mr. Jerry Stone.
7 School records for his sisters, Melinda and Tammy Stone.
8 There were medical records for his mother Maybelle Stone.
9 There were medical records for his father Bobby O. Stone
10 that also were reviewed.

11 Q. And let's start with Mr. Bobby O. Stone who's the
12 Applicant's father.

13 A. Yes.

14 Q. What did those records tell you about Mr. Stone's
15 father?

16 A. So the records indicate that all of the family have
17 intellectual deficits. So the records that I reviewed from
18 -- at the time, it was the sanatorium, the South Carolina
19 Sanatorium. Those records indicated that Mr. -- senior,
20 I'm just gonna say, Mr. Bobby O. Stone, they described him
21 as not having too much intelligence or education. They
22 gave him a -- not what we would call a formal IQ test, but
23 a group administered IQ test. So -- and they also gave him
24 tests of his intellectual skill -- or excuse me, of his
25 academic skills in terms of math and reading, and those

1 were on the third grade level.

2 Q. So as an adult, he was on a third grade level?

3 A. Yes.

4 Q. Okay. You also had some records regarding Mr. Stone's
5 older sister, Melinda Stone?

6 A. Yes.

7 Q. What did you find significant about those records?

8 A. Yes. She received special education services where
9 she was classified as a student with an educable mentally
10 handicap, and so she was in self-contained classes for
11 individuals who required special education services.

12 Q. And what is an educable mentally handicap mean?

13 A. So it's a classification that the schools use to
14 determine or identify students who have below average or
15 sub-average intellectual functioning in conjunction with
16 deficits of adaptive behavior. So the schools currently
17 call it educably mentally handicapped intellectual
18 disability.

19 Q. Okay. You have records from Tammy Stone I think you
20 said?

21 A. Yes.

22 Q. And what significance did you find in Tammy Stone's
23 records?

24 A. Yeah. It was very similar to Melinda and also Jerry.
25 They were all identified very early on as having deficits

1 in adaptive functioning and intellectual ability. So they
2 were all serviced with special education.

3 Q. Okay. And were they all designated educable mentally
4 handicapped?

5 A. Yes. Uh-huh.

6 Q. Okay. And I think you alluded to this already, but
7 you did have Jerry Stone's records in order to review those
8 as well.

9 A. Yes.

10 Q. Okay. All right. Now, you also had school records
11 for Bobby Stone himself; is that correct?

12 A. That's correct.

13 Q. And could you describe to the Court generally what
14 those records included?

15 A. They included report cards -- or grades. I should say
16 grades, not report cards, but like transcripts. They
17 included psycho educational testings. So testing that you
18 would give to either be determined eligible for special
19 education services. Federal law requires that students,
20 who are in special education, be reevaluated every three
21 years. So I had his tri-annual evaluations. I also had
22 things that let me look at attendance, and I think I said -
23 - and grades, and also the testing that all kids do in
24 terms of academic functioning. So every year, students
25 would be tested to determine what grade level they were on;

1 and so in South Carolina, at the time they were using the
2 California Test of Basic Skills at one point, and so I had
3 those tests as well.

4 Q. Okay. How far did Bobby Stone go in school?

5 A. Ninth grade.

6 Q. Okay. And were you able to kind of evaluate Bobby
7 Stone's performance from the first through ninth grade
8 overall?

9 A. Yes. So from his grade reports and also the testing,
10 he was consistently performing below his same age peers.

11 Q. Okay. What can you tell -- in your report, you made
12 some notations regarding the period from the fourth grade
13 to the seventh grade. What can you tell the Court about
14 that?

15 A. So when he -- so in the fourth grade is when he was
16 initially identified as requiring special education
17 services, and he was initially identified as being learning
18 disabled; and at that, he was maintained in the general
19 classroom with resource class. So resources will pull up
20 class that will allow students to get extra attention for
21 whatever, like, learning disability. You can have learning
22 disability in reading, you can have it in math, writing,
23 listening skills. So... really depends on what area that
24 learning disability is in. Mr. Stone's learning disability
25 was more academic functioning. So reading and kind of math

1 skills, and so he -- resource would be a time where they
2 strengthen those skills, helped him and reinforced the
3 lessons that he would be learning in his regular classroom
4 setting.

5 Q. And you mentioned the term "learning disability." Can
6 you explain what that is?

7 A. A learning disability is when there's a discrepancy
8 between a kid's intellectual functioning and their academic
9 ability. And so depending on the age, the school districts
10 will set that difference either at one standard deviation
11 or a standard deviation and a half difference between a
12 person's intellectual functioning and their score on an
13 achievement test. So for example, if a kid score on their
14 IQ test they have a full scale of 100, but they get an
15 achievement test and their reading comprehension is at 75,
16 that would be significant enough for them -- that
17 difference would be significant enough for them to meet
18 criteria for a learning disability.

19 Q. Now, you mentioned that people are reassessed every so
20 many years?

21 A. Yes. That's mandated by Federal law.

22 Q. All right. Was Mr. Stone reassessed when he was in
23 seventh grade?

24 A. Yes.

25 Q. And what did you learn about -- from the records did

1 you learn about that reassessment?

2 A. So at that point, his classification was changed from
3 learning disability to educably mentally handicapped.

4 Q. All right. And I believe you testified earlier and
5 your report states that, that's now the term for
6 intellectual disability?

7 A. Yes.

8 Q. Okay. Now, after about the sixth grade, was Mr.
9 Stone's education consistently poor or his performance
10 consistently poor?

11 A. Yes.

12 Q. And what can you tell the Court about that?

13 A. Well, when you looked at his grades, but -- as well as
14 the standardized testing that each student would receive,
15 he was consistently more than a grade below his peers. So
16 in fact, by the time we get to his sixth grade, in read --
17 or what they call "language," his skills were second grade
18 level; in math, they were third grade level; and social
19 studies was only one grade behind, which is fifth grade
20 level; but for this basic academic functioning, he was at
21 least three or more grade levels below his peers at that
22 time when he was in sixth grade.

23 Q. And I think that you said that the highest grade that
24 Mr. Stone completed was the ninth grade?

25 A. I believe that is correct.

1 Q. And again, on page 4 and 5 of your report, you have
2 the results from a California Test of Basic Skills?

3 A. Yes.

4 Q. What is that test?

5 A. So this is a test that's given nationally, and it's
6 administered to kind of assess where children are in terms
7 of their academic achievement. So how well they've learned
8 the information that they've been taught over the course of
9 a school year. And so it looks at reading, language, math,
10 and social studies, spelling, and also science.

11 Q. Okay. And is that an IQ test or something different?

12 A. No. That would fall under an academic achievement
13 test.

14 Q. Okay. And when Mr. Stone was administered the
15 California Test of Basic Skills in the ninth grade, what
16 did you find significant about that?

17 A. So again, his scores, in all areas -- reading,
18 language -- were at least three or more grades below. So
19 he was -- so for example, his reading was determined to be
20 at 6.2, which would be akin to a neurotypical child who's
21 been in the sixth grade for two months. So that's the
22 level he was reading at.

23 Q. Okay. And what significance do you draw from that?

24 A. That he was definitely having deficits in his academic
25 areas, which is commiserate with individuals who have an

1 intellectual functioning.

2 Q. Now, there was -- in the school records, there was a
3 number of tests administered over the years; is that right?

4 A. Are you talking about in terms of him being tested as
5 part of his tri-annual testing, or you mean just in
6 general?

7 Q. Just in general.

8 A. Yes. Just in general, there were lots of -- kids get
9 lots of tests.

10 Q. Okay. If you turn to page 7 or your report, you have
11 a section there on previous psychological evaluations.

12 A. Yes.

13 Q. All right. And it looks like the first one that you
14 identify in your report was at age nine, in 1975 --

15 A. Yes.

16 Q. -- is that right?

17 A. Yes.

18 Q. All right. What tests were administered to Bobby
19 Stone in 1975?

20 A. The Weschler Intelligence Scale for Children. He also
21 got a Slosson Intelligence Test and a Peabody Picture
22 Vocabulary Test.

23 Q. Okay. And can you explain what the Weschler
24 Intelligence Scale for Children is?

25 A. Yes. That is one of the gold standard tests of

1 intelligence. It is for kids between the ages of 6 and 16.
2 It has been standardized and normed so that you can take
3 the score that you get and compare that to the same age
4 peers of the person that you're testing.

5 Q. And what was Bobby Stone's results on that test?

6 A. So on this test he was in the below average range
7 because he got a score of 86.

8 Q. Okay. And what is the Flynn effect?

9 A. So the Flynn effect is this -- well, I hate saying
10 "norm obsolescence" 'cause I can't say it either. So --
11 but it's this idea that as generations continue,
12 generations get smarter; and we've estimated that if you
13 look at the IQ test, they get smarter about three points
14 every decade. So the fact that you give the test with a --
15 that was normed, you know, 5, 10 years ago, the student's -
16 - the IQ test is gonna be artificially inflated because you
17 been taking into account the fact that folks are getting
18 smarter.

19 So the Flynn suggested that in order to make sure that
20 the IQ isn't overinflated, that you do a correction. So,
21 you do a calculation to correct so that the full scale that
22 you present is actually more accurate to the person's
23 functioning.

24 Q. And is the Flynn effect something that's accepted in
25 the scientific community?

1 A. Yes.

2 Q. All right. And have you used the Flynn effect in
3 other Atkins evaluations that you've done?

4 A. Yes. It's really considered to be best practice in
5 Atkins evaluations, and so I try to do best practices.

6 Q. Okay. And with regard to the WISC score in 1975, did
7 you do a Flynn adjustment in that case?

8 A. I did.

9 Q. And what did -- what was the score after it was
10 adjusted under best practices?

11 A. His score was reduced to -- let me get to the page --
12 a 77.

13 Q. All right. And you mentioned the Slossen Intelligence
14 Test?

15 A. Yes.

16 Q. And what is that?

17 A. That's a -- that's different than a WISC. It's not
18 considered a gold standard intelligence test, but it is a
19 test that typical schools will use because the purpose of
20 special education is kind of to identify what areas could
21 be affecting a kid's academic performance, and so they want
22 to make sure they look at the child in full. And so they
23 gave Mr. Stone several tests to make sure they were
24 covering all areas before they determined if he needed
25 special education services. So they gave the WISC and then

1 they backed up with the Slosson, which is more of a -- can
2 be individually administered, but it's usually group
3 administered test.

4 Q. Okay. And what's the Peabody Picture Vocabulary Test
5 you also mentioned?

6 A. Yes. So Peabody is a test -- a very simple test where
7 you are asking -- you show kids pictures and you ask them
8 to identify a word from the picture; and so it really
9 measures their vocabulary.

10 Q. And did those two tests, the Slosson Intelligence Test
11 and the Peabody Picture Vocabulary Test, do they compare
12 somebody's chronological age with their mental age?

13 A. Yes. You get a standardized score, you get a mental
14 age, and you get a -- and you say what their chronological
15 age is.

16 Q. All right. In 1975, at age nine, what did that tell
17 you about Bobby Stone?

18 A. So according to the Slosson, when Mr. Stone took the
19 test, he was nine years, three months old; but the Slosson
20 put his mental age or he was functioning similarly to a kid
21 approximately a year younger, eight years, two months; and
22 in the Peabody test, his mental age was two years younger.
23 So seven years, two months.

24 Q. Okay. And about 18 months later, in October of 1976,
25 when Bobby Stone was 11, was there additional testing that

1 you discovered in school records?

2 A. Yes. He was tested with the newest version of the
3 Weschler Intelligence Test, which would be the Weschler
4 Intelligence Scale for Children, Revised; and then they
5 gave the Peabody again.

6 Q. Okay. And what was the -- Mr. Stone's results on the
7 WISC-R in 1976?

8 A. His full scale was 78.

9 Q. Okay. And did you do a Flynn adjustment for that
10 test?

11 A. No, because that test came out in 1975, and so it
12 would be really a menial or small adjustment.

13 Q. All right. And with the Peabody Picture Vocabulary
14 Test, it was administered in 1976, what did that tell you?

15 A. Again, Mr. Stone's functioning was approximately two
16 years behind. So it was consistent from the previous
17 testing from when he was nine.

18 Q. All right. Then in 1979, Mr. Stone was -- what --
19 well, let me ask you this: In -- when he was 14, in 1979,
20 did you find any other testing in the school records?

21 A. Yes. As part of his tri-annual assessment, he was
22 tested again using the Weschler -- the WISC revised; and
23 his -- for some reason, they didn't put -- report the
24 actual score. They reported a competence interval, and so
25 his full scale was somewhere between 69 and 65.

1 Q. Sorry. 69 and ...?

2 A. 75. Excuse me.

3 Q. Okay. And what is the significance of that being in
4 that range, 69 to 75?

5 A. At that time, there was indication that his
6 classification, in terms of special education, changed.
7 It's -- he no longer met criteria for learning disability.
8 He then met criteria, classification as a student who was
9 educally mentally handicapped. So again, what we now call
10 intellectual disability.

11 Q. All right. And was that WISC-R, did you do a Flynn
12 adjustment on that?

13 A. I did. And so because I didn't have one score. I
14 just did -- I -- excuse me, I did the range for each, and
15 so the new range, according to Flynn, would be
16 approximately 67 to 73.

17 Q. Okay. The Peabody Picture Vocabulary Test, was that
18 administered again?

19 A. Yes.

20 Q. And what did you find significant with regards to
21 that?

22 A. Again, Mr. Stone's -- consistently has been below his
23 same age peers, and so the classification -- they didn't do
24 an age or a chronological -- or excuse me -- a mental age
25 estimate. They described him as being in the slow learner

1 range.

2 Q. And what significance do you place on that?

3 A. So again, that's showing that Mr. Stone had deficits
4 in his vocabulary at that time, at such that they weren't -
5 - he wasn't just a little behind. He was significantly
6 behind his peers.

7 Q. And there was a -- in 1979, at age 14, there was a
8 wide range in achievement tests if it was administered?

9 A. Yes.

10 Q. What is the wide range of achievement tests?

11 A. It is a standardized test of achievement. So this is
12 a test again that has been standardized and normed so that
13 the results that you get you can compare them to the
14 individual that you was -- that you were testing, same age
15 peers, so that these numbers mean something related to the
16 general population of kids who are 14, if we're testing 14
17 year olds.

18 Q. And what was the significance of Bobby Stone's results
19 on this particular test?

20 A. Yes. So they showed that in the -- he would have been
21 in the ninth grade at this time. In math, he was
22 performing in a third grade level; reading was a fourth
23 grade level; and spelling was a second grade level.

24 Q. Also in 1979, Bobby Stone was administered the AAMD,
25 Adaptive Behavioral Scales?

1 A. Yes.

2 Q. What is that?

3 A. So this is a measure of adaptive functioning. It was
4 the first measure that was put out I believe by what's now
5 called the "AAIDD." So this is a rating scale. So an
6 informant completes these scales about Mr. Stone.

7 Q. Okay. So that's not something Mr. Stone would do
8 himself?

9 A. No. It wasn't administered to him, it was -- an
10 informant was giving information about him.

11 Q. Well, why do you use an informant instead of asking
12 Mr. Stone?

13 A. So at the time, and even now, it was believed that in
14 order to assess somebody's adaptive functioning, you want
15 to be able to see what they could do; and who could be able
16 to answer these questions more accurately would be like a
17 teacher or a parent, someone who spent a lot of time with
18 the student that was being evaluated. And also because,
19 you know, people don't like to present themselves as
20 impaired, and so there was some concern at the time that
21 individuals wouldn't be able to accurately describe what
22 their limitations were; and so it was believed that it was
23 best to get that information from people who knew the kids
24 that you were testing best.

25 Q. When you look at these test results from 1975 through

1 1979, what kind of conclusion did you draw from looking at
2 the big picture, so to speak?

3 A. Right. So it is not unusual for you to see this type
4 of progression in kids who have mild ID or -- you know, or
5 kids who are right on the -- a cusp of intellectual
6 disability so that I think there's a misnomer that we
7 believe that individuals who have intellectual disability
8 don't grow and mature, and in fact, they do. They just do
9 it at a slower pace than their neurotypical peers.

10 So what you typically see would be a small difference
11 when they're younger, and as the neurotypical peers
12 continue to grow and develop at a typical pace, you're
13 gonna see a -- more distance between the ability -- or the
14 difference between what the neurotypical peers can do and
15 the deficit that you see an individual with intellectual
16 disability.

17 So it's not unusual for someone who has mild ID to be
18 relatively close to their neurotypical peers, and then once
19 demands -- whether they be social, academic, related to
20 self-care -- become beyond the person's development, you
21 then can see a significant difference between the
22 functioning of their neurotypical peers in comparison to
23 what the person with intellectual disability can do.

24 Q. And did you see that pattern here?

25 A. Yes.

1 Q. Okay. Earlier you -- I asked you about the materials
2 that you considered, and you said that you had
3 considered Dr. Boyd's IQ test --

4 A. Yes.

5 Q. -- results, and not just the results. You have the
6 raw data?

7 A. Yes.

8 Q. Okay. And did you review the raw data?

9 A. I did.

10 Q. Did you score it yourself?

11 A. I did.

12 Q. All right. And what IQ test was that, that Dr. Boyd
13 administered?

14 A. She administered the Weschler Adult Intelligence
15 Scale, fourth edition.

16 Q. Okay. And can you explain what that test is?

17 A. Well, again, it's a gold standard test of
18 intelligence. The Weschler Scales, the Stanford-Binet, and
19 the Woodcock-Johnson Competent -- Johnson Cognitive 'cause
20 there's also a Woodcock -- there's lots of Woodcock test.
21 Those are really considered to be tests that we would feel
22 comfortable using to determine if someone has intellectual
23 disability. They're well -- the Weschler and Standford-
24 Binet are the older -- the oldest IQ tests. So they're
25 both well researched, and we feel comfortable using those.

1 So ...

2 Q. Okay. And Dr. Boyd administered this test in 2017,
3 when Bobby Stone was 52 years old. What's the purpose of
4 doing a test like the WAIS-4 at that age?

5 A. You want to look at -- while the diagnosis is a
6 historical one for someone who's never been diagnosed
7 before or when we're asking the question, you still want to
8 look at the person's current level of functioning. So it's
9 not unusual, as part of your assessment, to give an IQ
10 test.

11 Q. Okay. And what did you find significant about the
12 2017 WAIS-4?

13 A. All right. So that his full scale was still 79. So
14 it was still significantly low.

15 Q. All right. And did you do a Flynn adjustment for
16 that?

17 A. I did.

18 Q. All right. And what was -- what was the result or
19 what was the score after adjusting it for a Flynn?

20 A. 76.

21 Q. Okay. And what's the significance of that?

22 A. So all of the testing that Mr. Stone has had were
23 consistent. So when you adjust it for Flynn, the 1975,
24 '79, and 2017 scores were all -- hung close together, and
25 could be considered within the range for intellectual

1 disability.

2 Q. Okay. And why can those be considered within the
3 range for intellectual disability?

4 A. So now -- while the definition or how we used to think
5 about intellectual disability was that when we looked at
6 that first prong, intellectual functioning, we believed
7 that you had to have at least two standard deviations below
8 the mean. So IQ scores are normed and standardized so that
9 the mean median mode are 100, and the standard deviation is
10 15. So when we're saying that people have significant
11 cognitive deficits or intellectual deficits, we're saying
12 they're at least two standard deviations below that mean of
13 100, which would be 70 or below because that's two standard
14 deviations.

15 We now understand that having that strict bright red
16 line as the Supreme Court described it may in fact make us
17 misdiagnose these. So that we needed to be more flexible
18 and consider that there's a range of folks who score,
19 according to the AAIDD, can actually go up to about 75 and
20 still meet criteria for intellectual disability because
21 their adaptive functioning is so impaired.

22 And so it's not having -- being tied to that I -- to
23 that number 'cause what also the things that we saw was
24 that people got so hung up on the number that they were
25 giving people the diagnosis at the time of mental

1 retardation without doing the other prongs. So if a kid
2 tested low, they would just get slapped with that clinical
3 diagnosis rather than look at the functionality, how well
4 can that person independently navigate their community
5 successfully, how many supports do they need in order to be
6 successful in the community.

7 Q. All right. This approach that you're talking about,
8 this understanding of intellectual disability, is that
9 accepted under the clinical standards?

10 A. So now it is, yes.

11 Q. Okay. And when we're talking about the clinical
12 standards, what do you look to, to identify the clinical
13 standards?

14 A. So there's really two books that we use. One, is the
15 DSM-5, currently the text revision, so the TR; and then
16 it's the AAIDD has put out a manual that looks at
17 specifically intellectual disabilities, developmental
18 disabilities, and what diagnostic criteria are available
19 there. So I think they -- book came out in 2010, and then
20 they recently came out with another recent book, and I
21 think that was, like, couple of years ago.

22 Q. Is that this book here (indicating)?

23 A. Yes. It was green, now it's purple.

24 Q. I gotcha. Okay. And how do the definition of
25 intellectual disabilities in the DSM-5-TR, how does that

1 compare with the South Carolina code section?

2 A. They're very similar.

3 Q. Okay. And the definition of intellectual disability
4 that's in the purple book, the AAIDD manual, how does that
5 compare with the South Carolina definition?

6 A. They're very similar except the only difference is
7 that the AAIDD actually gives a number in terms of -- they
8 say 75 -- and IQ -- a full scale IQ of 75 or below, whereas
9 the South Carolina standard nor the DSM-5-TR actually issue
10 a number, an IQ score where the start -- which would be the
11 start of the intellectual disability.

12 Q. Okay. Using the South Carolina definition as well as
13 the DSM-5-TR and the AAIDD definition, did you form an
14 opinion as to whether or not Bobby Stone meets the
15 diagnostic criteria of a person with an intellectual
16 disability?

17 A. I did.

18 Q. And what is that opinion?

19 A. That he meets criteria for intellectual disability.

20 Q. All right. And if I could, I'd like to walk you
21 through the three prongs. The first prong, can you remind
22 us what that is?

23 A. That is deficits in intellectual functioning.

24 Q. All right. And why is it -- in your opinion, why is
25 it that Bobby Stone meets the criteria for prong one?

1 A. Well, we can see consistently, throughout his
2 lifetime, he has had scores within the ID range on
3 intellectual or IQ tests, as well as his academic
4 functioning was significantly below his same age peers.

5 Q. So looking at that first prong, you're not just
6 looking at the IQ score. You're looking at a little bit
7 more than that?

8 A. Yes, a little bit more. You know, the DSM says that
9 we should have an IQ testing to support that, but you're
10 also looking at -- you can look at academic testing, those
11 kinds of things as well, the person's functioning to -- or
12 reach that that's the diagnosis that's appropriate or at
13 least that they meet that first prong of the diagnostic
14 criteria.

15 Q. Okay. And can you remind us what the second prong is?

16 A. So the second prong is deficits in adaptive
17 functioning.

18 Q. Okay. And what is your opinion regarding Bobby Stone
19 meeting the criteria of the second prong?

20 A. So he has -- so DSM defines the -- adaptive
21 functioning in three areas -- conceptual, practical, and
22 social -- and Mr. Stone we saw definitely has conceptual
23 deficits and conceptual is described as more like academic,
24 like, school kinds of stuff. So consistently, throughout
25 his schooling, he had deficits in that area.

1 When we look at practical, from my interviews and also
2 -- from my collateral interviews and interviews with him,
3 and the AAMR, adaptive functioning manager deficit -- shows
4 that he had deficits across the life span in adaptive
5 functioning. And he had some strengths as well, but he
6 definitely has deficits. And the DSM-5 only requires there
7 to be deficits in one area; and I would say he had deficits
8 in conceptual, he had some deficits in practical, and he
9 also had some deficits in social functioning.

10 Q. Could you kind of explain what the conceptual domain
11 is? Can you elaborate a little bit on what the practical
12 domain is?

13 A. Yes. So I like to say practical domain is what people
14 call, like, daily living skills. So the things that you
15 are required to do when you adult to take care of yourself.
16 So can you organize your time, pay bills, keep your hygiene
17 together. Can you cook, clean, do laundry. Then it's the
18 higher order kinda stuff 'cause folks with intellectual
19 disability can do those things, you know, sometimes with
20 support, sometimes they can learn it sufficiently to do --
21 to be independent in those things; but then you look at
22 things like manage their money, manage their time, look at
23 in terms of being able to make appointments; if they've --
24 required to take medication, to be able to take the
25 medication on their own; know when they're supposed to take

1 it, how much they're supposed to take.

2 And then deficits in social functioning is just --
3 again, not if they can just have social relationships
4 'cause folks on the ID scale tend to be pretty social, but
5 we're talking about high order social ability so that it's
6 more than just understanding social norms and social
7 relationships, but can they infer about the quality of
8 social relationships? Do they know when people are taking
9 advantage of them or do -- are they rather naive or
10 gullible. And so that's what we're looking at when we're
11 looking at high order social relationships.

12 Q. All right. And of these three domains, the
13 conceptual, practical, and social, in order to meet the
14 criteria for prong two, how many of those domains does a
15 person have to have deficits in?

16 A. Both the AAID and the DSM-5-TR say they only have to
17 have deficits in one area.

18 Q. And you found Mr. Stone had deficits in more than one
19 area?

20 A. Yes.

21 Q. Okay. And was that all three areas?

22 A. Deficits in all three.

23 Q. All right. Now, in your report, on page 11, you have
24 a statement in here that (as read): "Mr. Stone has
25 potential strengths, adaptive functioning, particularly in

1 practical skills domain. But by definition, according to
2 the AAIDD, those cannot outweigh significant limit -- or
3 limitations."

4 A. Yes.

5 Q. All right. Can you kind of unpack that statement of
6 what you're trying to tell us there?

7 A. So when we're looking at a person who has intellectual
8 disability, I think people have the stereotype that folks
9 are gonna be low functioning in everything, that they're
10 not gonna have any strengths, and that's just not what this
11 population presents like.

12 So you can have someone who has relatively good skills
13 in one area. Like, Mr. Stone is a hard worker. He got
14 pride out of being a good worker, hard worker going to
15 work. When talking to Frankie, who is a friend and a co-
16 worker, he describes Mr. Stone as a good worker, a hard
17 worker.

18 So that's a strength, but just because Mr. Stone was a
19 hard worker and took pride in his work, doesn't negate the
20 deficits that he had. So we're really looking at not
21 whether or not somebody can do something, but we're looking
22 at the deficits that they have in comparison to their same
23 age peers. So being a hard worker is not dispositive,
24 doesn't rule out intellectual disability.

25 Q. Okay. A little while ago, when we were going through

1 the school tests and we spent some time talking about the
2 AAMD, Adaptive Behavioral -- Behavior Scales --

3 A. Yes.

4 Q. -- and you mentioned them again. Is that the only
5 thing that you rely on on -- in determining whether Bobby
6 Stone meets prong two?

7 A. No. Not -- that's not the only thing. So it was my
8 interview with Mr. Stone, it was my collateral interviews
9 with his family and friends, with his special education
10 teacher. So those were those things.

11 Q. Okay.

12 A. It was their Social Security disability records -- or
13 not disability. Social Security employment records ---

14 Q. What are those?

15 A. Social Security provided a list of all the places Mr.
16 Stone worked, how he worked there, what the approximate pay
17 was or how much he earned while he was in those
18 employments. And so all of those were more manual labor
19 type jobs that were relatively short lived.

20 Q. And was that employment history consistent with Bobby
21 Stone being a person with an intellectual disability?

22 A. Yes.

23 Q. All right. You mentioned, I think earlier interviews
24 with Frankie and Tracy Norton, that you did in July of
25 2022?

1 A. Yes.

2 Q. Was there anything about those interviews that you
3 found significant with regards to prong two, the deficits
4 in adaptive functioning?

5 A. Well, Mr. Norton -- I was asking him about -- excuse
6 me -- Mr. Stone's work history, what type of worker he was;
7 and he was very forthcoming in terms of saying that, you
8 know, he got to work on time, he was a hard worker;
9 however, he never would -- he was just a worker. So he
10 didn't take initiative, never was assigned a supervisory
11 position, was never a person who would be required to fill
12 out the paperwork or even really interact with the clients
13 of the -- I can't remember if it was landscaping or tree
14 service company that they worked together at; but that
15 would not be his role. His role was strictly laborer. So
16 he would provide -- he would do the work and do the work
17 well, but he was not any way responsible for any paperwork
18 or interaction with the clients.

19 Q. You also interviewed Joy Klotze, K-l-o-t-z-e, retired
20 special education teacher.

21 A. Yes.

22 Q. What did you find significant about that interview?

23 A. I remember correctly she really didn't have that great
24 of a memory of Mr. Stone. She remembered Jerry Stone
25 better. So from her, it was really about getting an

1 understanding of how special education was operating at
2 that time, how kids -- you know, what the expectations was,
3 what kind of academic -- how rigorous the academic work was
4 at that time during -- in special education courses. So
5 she was really helping me understand what the school
6 environment was like.

7 Q. And you mentioned the interview with Jerry Stone?

8 A. Yes.

9 Q. And you also had school records on Jerry Stone?

10 A. Yes.

11 Q. And the school treated him as a person with an
12 intellectual disability?

13 A. Yes, they classified him ---

14 MS. BROWN: Objection --

15 A. --- as ---

16 MS. BROWN: -- to characterization.

17 A. He ---

18 THE COURT: Hold just a moment. Yes, ma'am?

19 MS. BROWN: Objection to characterization. He was
20 actually labeled as handicapped I believe, not as
21 intellectual disabled. So I would object to the
22 characterization made.

23 THE COURT: Mr. Grose.

24 MR. GROSE: I'll rephrase, Your Honor.

25 THE COURT: Okay. Thank you.

1 BY MR. GROSE:

2 Q. I believe that earlier you testified that Mr. Jerry
3 Stone was identified as educable mentally handicapped by
4 the schools?

5 A. Yes.

6 Q. And what does educable mentally handicapped mean?

7 A. So again, it is when a student has sub-average or
8 significant intellectual functioning paired with deficits
9 in adaptive functioning.

10 Q. So that's what we now call intellectual disability.

11 A. Yes. The schools actually call it "intellectual
12 disability" right now.

13 Q. Okay. I'm sorry. Say that again?

14 A. The schools actually call it "intellectual disability"
15 right now.

16 MS. BROWN: Objection, Your Honor. That's outside her
17 area of expertise.

18 MR. GROSE: I don't think that's the case. I think
19 she is -- has been qualified as an expert. If they want to
20 question her about that understanding what the educable
21 mentally handicapped/intellectual disability is, I think
22 it's well within her expertise.

23 THE COURT: Anything else, Ms. Brown?

24 MS. BROWN: Yes, sir. You've heard testimony today
25 that there are statutes that govern teaching and education

1 that have different definitions than the psychological
2 definition that we're talking about, intellectual
3 disability. So we maintain our objection.

4 THE COURT: Overruled.

5 MR. GROSE: Thank you, Your Honor.

6 MS. BROWN: Thank you.

7 THE COURT: Go ahead.

8 BY MR. GROSE:

9 Q. All right. So you did interview Jerry Stone.

10 A. Yes.

11 Q. And what did you find significant about that
12 interview?

13 A. Mr. Jerry Stone was very forthcoming about his
14 brother. He's significantly younger than Mr. Stone, the
15 Applicant; and so while he could not describe, like, Mr.
16 Stone's romantic relationships, he could remember certain
17 things, but what really he impressed upon was that he is as
18 successful as he is today because of the mistakes that his
19 brother made. So he was example of what not to do, and Mr.
20 Jerry Stone is living quite well. He's married, working
21 full time. So he has intellectual disability, but he's --
22 has built a life for him that's good -- a good one.

23 Q. You interviewed Omega Golden who's a, I believe, sixth
24 grade teacher?

25 A. Yes.

1 Q. And what did you find significant about that?

2 A. She had concerns about if his classification was
3 correct. She thought that he definitely needed special
4 education. She thought he needed a little bit more than
5 learning -- what would be serviced under learning
6 disability. She thought he was a nice kid, but she was
7 concerned that he probably needed more support than he was
8 getting.

9 Q. And you interviewed Elaine Harris and Joseph Harris,
10 who were school psychologists that were retired?

11 A. Yes.

12 Q. Okay. And what did you find significant about that?

13 A. So they were really helpful and they -- again,
14 understanding what was going on around special education,
15 how kids were getting into special education. And so they
16 expressed some concerns about some testing by a particular
17 school psychologist, one of which who tested Mr. Stone;
18 that he was making standardization, that he was using the
19 school students to train graduate students, which that in
20 itself, nothing is wrong with that. That's how we get
21 training is we practice on real, live people, but it was
22 how they were doing it. That he was set up in the
23 gymnasium, different tables, and the kids would do round
24 robin testing, which totally invalidates standardization of
25 the WISC test.

1 Q. And was that the first set of testing that Mr. Stone
2 had?

3 A. Yes.

4 Q. Okay. And even with those concerns, did you still see
5 that consistency over time during the school age testing?

6 A. Yes.

7 Q. Okay. Were you able to learn anything about Mr.
8 Stones' relationships with other people, whether you were
9 able to interview all of those people or not?

10 A. Yes. We had two -- my recollection is correct, we had
11 two appointments with his former live-in girlfriend, Mary
12 Cook. The first time she cancelled. The second time we
13 showed up, and she wasn't home. So I wasn't actually able
14 to interview her. So I had to rely on an affidavit, and
15 she was -- the interview notes -- yeah. I think I had to
16 rely on the affidavit that she had submitted previously.
17 So I wasn't able to talk to her, but I was able to speak to
18 Frankie and Tracy Norton who were friends of Mr. Stone to
19 try to get at what his social relationships were like.

20 Q. And what did you learn about Mr. Stone's -- Bobby
21 Stone's social relationships?

22 A. Well, in terms of his friendships, both Mr. and Mrs.
23 Norton recall that he was not a good judge of character,
24 that there were people who he hung around with that would
25 take advantage of him, that would get him to do things that

1 were -- they classified as "illegal" or just not kinda --
2 you know, things that could possibly get him into trouble;
3 and Frankie in particular recalled on multiple occasions,
4 you know, saying, "Hey, you know, man, you know, maybe you
5 shouldn't hang out with that person. They don't seem to be
6 your real friend." But it was his recollection that if
7 somebody was, you know, nice to him, Mr. -- to Mr. Stone,
8 that he would think that, that person was their friend, and
9 he would be kinda loyal to that person.

10 Q. Okay. Did you -- were able to learn anything about
11 Mr. Stone's romantic relationships that you found
12 significant?

13 A. Yes. From Ms. Cook's affidavit and then from speaking
14 with Frankie and Johnny, he was able to -- and even Mr.
15 Stone acknowledged that he was able to get in several
16 romantic relationships. I was able to ask him about a
17 romantic relationship that he had for a long time, but I'm
18 blanking on the young lady's name; but she was considered
19 his common law wife according to the records in the SCDC.
20 So he was able to get into those relationships, and his
21 sole responsibility was to be provider. That's how he saw
22 himself as being able to work, and then bring money into
23 the household; and the women in his relationships would be
24 responsible for everything else. Oh, he also did the yard
25 work. He said the outside of the house was his domain.

1 Q. All right. And you said earlier that Bobby Stone was
2 a hard worker?

3 A. Yes.

4 Q. And that was a strength, and he viewed himself as a
5 provider. How was he as far as managing money and other
6 types of living skills?

7 A. He really relied on the women in his family to do
8 that. So if it wasn't his live-in girlfriend, then it
9 would be his mom or his sister. There was a lot of -- I
10 would say that Mr. Stone never really lived independently.
11 He would go from his family home to the woman's home, then
12 back to the family home when that relationship did break
13 down. There was -- I believe it was Ms. Cook who moved
14 into the family home, and while they were in the family
15 home, you know, Mom still did most of the, you know,
16 cooking and cleaning and that kind of stuff for both he and
17 Ms. Cook. And so there wasn't anything that I could find
18 where he independently would do those kind of practical
19 skills.

20 Q. And is that consistent with a person with an
21 intellectual disability?

22 A. Yes.

23 Q. And can that be explained simply by saying that's the
24 division between roles between a man and a woman?

25 A. I mean, that would be, I guess, a simple way to think

1 of it. There are people who operate in very traditional
2 roles and that's the way they choose to live their life.
3 The difference would be capacity. So I was never able to
4 establish that Mr. Stone actually had the capacity to do
5 those things independently.

6 Q. Okay. Now, when you were making these assessments
7 about adaptive skills that we're talking about, do you look
8 at one point of data in isolation?

9 A. No. It's the whole picture.

10 Q. Okay. I've heard the term sort of the convergence of
11 the data?

12 A. Yeah.

13 Q. What does that mean?

14 A. So, I think about it as, you know, we get so much
15 information, so all these data points. So, we're getting
16 them together to look at does the data suggest the presence
17 of intellectual disability, since that's the diagnosis
18 we're looking at, or does the data suggest that, yes, this
19 person could have cognitive deficits, but they're -- but
20 learning disability in this case would be the more accurate
21 descriptor; and for Mr. Stone, I -- to be honest, I -- this
22 was a complex case.

23 Q. Why is that?

24 A. Because he has -- there's data to suggest that he has
25 intellectual disability, there's data to suggest that some

1 things don't quite fit intellectual disability; but when
2 you look at that convergence, when you look at the data all
3 together, the preponderance of the evidence, so that 51/49,
4 comes out; and my clinical judgement for a positive for
5 intellectual disability.

6 Q. And what is the rule of clinical judgement in
7 diagnosing intellectual disability?

8 A. Well, clinical judgement is what we use in terms of
9 being able to understand and interpret the data. So it's
10 about, you know, our education, our experience. So as a
11 more seasoned examiner, you know, my clinical judgement is
12 gonna be different than someone who is a new psychologist,
13 right, because I have more experience. And so, you know,
14 we are charged to use our clinical judgement in conjunction
15 with what the data is telling us.

16 Q. All right. And when you use your clinical judgement
17 in this case, what does the data tell you?

18 A. So in this case, the data point to the presence of an
19 intellectual disability.

20 Q. One of the things that I've not really asked directly
21 is about the age of onset, prong 3 --

22 A. Yes.

23 Q. -- of the diagnosis. Can you explain again briefly
24 what prong three and age of onset means?

25 A. Right. So we're just -- it's just making sure that

1 when we talk about someone or diagnose them with
2 intellectual disability, we're talking about deficits that
3 were present during childhood. So it's not something that
4 was acquired later on in life, right. So there are things
5 that could happen to a person that would make them function
6 similarly to a person with intellectual disability. So
7 that could be a head injury, it could be a stroke, it could
8 be certain dementia, schizophrenia. So there's lots of
9 things that affect cognitive functioning. So a person
10 could have significant deficits in both cognition and -- or
11 intellectual functioning and adaptive behaviors.

12 So when we're talking about neurodevelopmental
13 disorders, an ID is a neurodevelopmental disorder, we're
14 talking about deficits that are present during the
15 developmental period. So these are -- these are things
16 that were -- exist, they were not acquired.

17 Q. And so under the clinical standards, what is the
18 developmental period?

19 A. So it's -- the developmental period is any period
20 prior to the age of 22.

21 Q. Okay. And what's your opinion with regard to prong
22 one as to whether or not that was present during the
23 developmental period?

24 A. Yes. We have, you know, contemporaneous data to
25 suggest that there were intellectual deficits during

1 the developmental period.

2 Q. And when you say "contemporaneous date," are you
3 talking about the school records?

4 A. Yes.

5 Q. And I want to show you Applicant's Exhibit 3. Is --
6 are those the school records that you reviewed?

7 A. Yes.

8 Q. All right. And did you have any reason to doubt the
9 reliability of those records?

10 A. No.

11 Q. And are those records over 20 years old?

12 A. Yes.

13 MR. GROSE: Your Honor, at this time I'd move
14 Applicant's Exhibit 3 into evidence as an exception to the
15 hearsay rule for ancient records.

16 MS. BROWN: We object, Your Honor. There's been no
17 authentication of that as a limitation to ancient document.

18 THE COURT: You have anything else, Mr. Grose?

19 MR. GROSE: There's -- the limitation is, is whether
20 or not they're reliable and there's been nothing offered
21 that they're not reliable, Your Honor.

22 THE COURT: Bear with me a moment, please.

23 (Brief pause.)

24 THE COURT: All right. My understanding of
25 authentication is that the document is what it purports to

1 be. This the same document I looked at earlier?

2 MR. GROSE: Yes, sir.

3 THE COURT: The objection's overruled. Mark it in
4 evidence, please. How much longer you think this witness
5 is gonna be?

6 MR. GROSE: Two to three minutes.

7 THE COURT: Okay.

8 COURT REPORTER: You said, mark this as ...?

9 THE COURT: Three in evidence.

10 (Marked Applicant's 3, document, in evidence.)

11 BY MR. GROSE:

12 Q. All right. Dr. Hall, with regard to the age of onset
13 for prong two, the deficits and adaptive functioning, what
14 is your opinion on that regarding Mr. Stone?

15 A. So from interview as well as the school records, so
16 there's -- clearly deficits in conceptual and deficits in
17 social functioning were present during the developmental
18 period.

19 Q. And that's confirmed by the records that were actually
20 generated in the developmental period?

21 A. Yes, sir.

22 Q. Okay. Do you still have your report up there in front
23 of you?

24 A. Yes.

25 Q. What exhibit number was that?

1 A. 5, Applicant's 5.

2 Q. And what was the date of that report?

3 A. December 1, 2022.

4 Q. And I believe you testified that, that's the report
5 that's been provided to the Court?

6 A. Yes, it is.

7 Q. And does that summarize your conclusions that Bobby
8 Stone meets the diagnostic criteria of a person with
9 intellectual disability?

10 A. Yes, it does.

11 Q. And have all the opinions that you expressed here
12 today been to a reasonable degree of clinical certainty?

13 A. Yes.

14 Q. And are the opinions expressed in your report also to
15 a reasonable degree of clinical certainty?

16 A. Yes.

17 MR. GROSE: Your Honor, at this time I'd move Dr.
18 Hall's report into evidence.

19 MS. BROWN: We object, Your Honor, hearsay based on
20 *Jennings* and *Allegra*. We also object because it seems to
21 be redundant, cumulative, and could potentially attempt to
22 fill in gaps in the presented testimony and you wouldn't
23 have the opportunity to pass on the credibility; however,
24 Your Honor, with that said, this was reports evaluation.
25 The report has already been submitted to you separately as

1 of December the 1, 2022. We, of course, cannot object to
2 that becoming a Court's exhibit since it's already part of
3 your record, what you've already received, Your Honor. We
4 do object to it as an exhibit.

5 THE COURT: All right. Mr. Grose, you have anything
6 else?

7 MR. GROSE: No, sir.

8 THE COURT: Do y'all have a clean copy of it?

9 MR. GROSE: That should -- the -- that exact copy
10 should be clean -- or we do. Yes, sir.

11 THE COURT: (To court reporter) Can you change it to a
12 Court's exhibit?

13 COURT REPORTER: Yes.

14 THE COURT: She says she can change it. Mark it as a
15 Court's exhibit.

16 (Marked Applicant's Exhibit No. 5, Dr. Hall's report,
17 as Court's Exhibit No.1.)

18 MR. GROSE: At this time, I don't have any further
19 questions.

20 THE COURT: Yes, sir.

21 MR. GROSE: No further questions.

22 THE COURT: Doctor, can you be here tomorrow?

23 THE WITNESS: Yes, sir.

24 THE COURT: Do you -- can you do your cross in 15
25 minutes or so?

1 MS. BROWN: I can get a good start, Your Honor. I
2 don't believe I can finish though, but I don't mind
3 starting if you want to break it up.

4 THE COURT: Well, the problem is we're only taking,
5 far as I remember, five minute break the whole afternoon,
6 and that was just for some folks. So I don't want to leave
7 everybody in here without some kind of break. This -- a
8 lot longer than I normally go. Court's in recess 'til 10
9 a.m. Don't discuss your testimony with anyone overnight,
10 please, ma'am.

11 MR. GROSE: Your Honor, can we take -- can Mr. Stone
12 waive his presence for the rest of the hearing? That would
13 be his preference. No fault of anybody. The
14 transportation is uncomfortable and the black box. He's
15 not had it on here in the courtroom today, but just in
16 going back and forth. That would be his preference if Your
17 Honor's willing.

18 THE COURT: No, sir. That's denied. Thank you.
19 Court's in recess 'til 10 a.m.

20 (Whereupon, the hearing will resume 10 am the next
21 morning.)

22 **July 31, 2024**

23 (Whereupon, the 2nd day began at 10:00 a.m.)

24 THE COURT: State ready to proceed with the witness?

25 MS. BROWN: Yes, Your Honor.

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(Dr. Hall returns to the stand still under oath.)

CROSS-EXAMINATION

BY MS. BROWN:

Q. I'd like to begin at the conclusion of your report, and the first line in your conclusion reflects (as read): "Mr. Stone's case presents a complexity that does not lend it to an obvious decision."

A. Yes.

Q. And I believe that you referenced in your direct testimony that, that's still your opinion that this is a difficult case?

A. Yes.

Q. Okay. Not easily resolved.

A. No.

Q. Right? And clinical psychologists often disagree. In fact, they disagree a good bit about what certain facts and circumstances in a given case lead them to conclude.

A. Yes.

Q. Okay. And you testified yesterday that clinical definitions are occasionally modified over time.

A. Yes.

Q. Is that right? Okay. In fact, the age for the developmental period historically was somewhere under 18. It was 18 at the time of Atkins, right?

A. Yes.

1 Q. And now it's 22 according to the clinical standards,
2 right?

3 A. Yes.

4 Q. Okay. And clinical judgement, that's a interpretation
5 of responses received essentially --

6 A. Based --

7 Q. -- is that fair?

8 A. Yeah. Based on your education, experience, those
9 things.

10 Q. You have certain guideposts in certain cases, right?

11 A. Yes.

12 Q. But it's still gonna be an individual decision --

13 A. Yes.

14 Q. -- from the clinician -- okay. And yesterday you
15 indicated a number for IQ is not exactly dispositive.

16 A. Yes.

17 Q. And I ---

18 (Cell phone GPS goes off.)

19 THE COURT: Hold -- hold --

20 GPS SYSTEM: In 600 feet.

21 THE COURT: Hold on a second.

22 GPS SYSTEM: Turn left on North Main Street. Then
23 turn left.

24 THE COURT: It wasn't giving me any of this coming
25 down here.

1 (All laugh.)

2 THE COURT: Went around me elbow to get here. All
3 right. I apologize. Hold on a second. Usually it's my
4 Apple watch that starts talking. Let me make sure it's --
5 I pulled it up to make sure it was off, and I was wrong.

6 (Brief pause.)

7 THE COURT: Go ahead, Ms. Brown, and hopefully I won't
8 interrupt you again.

9 MS. BROWN: Thank you, sir.

10 BY MS. BROWN:

11 Q. Dr. Hall, yesterday I thought that you'd referenced
12 *Hall vs. Florida* when you were talking about IQ scores?

13 A. Yes.

14 Q. And I just wanted to revisit that for a minute because
15 as I understood your response to one of the questions, you
16 said that now you kinda look at a range and that, that was
17 supported by *Hall vs. Florida*.

18 A. Well, just not having that hard red line.

19 Q. Okay.

20 A. The psychological community was already at the point
21 where we were looking at a range of scores, and *Hall* just
22 kinda indicated that, yes, that is correct, even in a legal
23 sense --

24 Q. Uh-huh.

25 A. --- that you don't, you know, have one number and

1 that's the hard bright red line.

2 Q. Uh-huh. And just for clarification, you practice
3 forensic psychology. So you're looking at case law as it
4 would affect your opinion, right? You're not giving a
5 legal opinion ---

6 A. No. I'm not giving a legal opinion, right.

7 Q. Okay. And are you aware that *Hall* was limited to the
8 standard error of measurement?

9 A. Yes.

10 Q. Okay. So if -- when you're talking about the range,
11 you're talking about application of the standard error of
12 measurement for the individual test given.

13 A. Yes.

14 Q. Okay. And that actually varies from test to test
15 according to the manuals, correct?

16 A. It does.

17 Q. But I think it's kind of colloquial... plus 5, minus
18 5; is that fair?

19 A. Again, because of the gold standard test. So that
20 would be that with the Weschler Scales in this case.

21 Q. Okay. And on your report, Dr. Hall, you've listed a
22 lot of sources of information, and I think you told us in
23 other -- at other times that it's your practice to read
24 everything.

25 A. Yeah. I go through everything ---

1 Q. Okay.

2 A. --- as much as I can.

3 Q. Whatever's given to you, you read.

4 A. Yes.

5 Q. Okay. You don't delegate that task to anybody.

6 A. No.

7 Q. And you receive information -- whoever wants to give
8 you information you'll receive that.

9 A. Yes.

10 Q. All right. And I know that you received a good bit of
11 information about and from the 2008 PCR action.

12 A. Yes.

13 Q. That's the one prior to this one. Did you read any
14 orders with credibility findings that came out as a result
15 of the 2008 PCR action?

16 A. No, I did not see that. I'm very careful about what I
17 read in terms of the PCR actions. I don't want to -- as I
18 said before, I try to avoid things that are about the case
19 itself --

20 Q. Uh-huh.

21 A. -- so that I don't bias myself with the facts of the
22 case because those things have -- don't have anything to do
23 with the question at hand. So I look for specific things
24 in the PCR, other mental health professionals have
25 testified or --

1 Q. Uh-huh.

2 A. -- those are kind of the things that I look for within
3 the P -- I don't read the full, like, you know, 15,000
4 pages or whatever it is.

5 Q. And as a good point of clarification 'cause I kinda
6 wanted to zero in. There were some opinions --

7 A. Uh-huh.

8 Q. -- from health professionals in the PCR, and do you
9 think that would have been helpful to know their opinions
10 and know how the Court considered their opinions?

11 A. It can be.

12 Q. So with the limitation that you just expressed, that
13 you try to stay away from, as I understand, the facts of
14 the crime --

15 A. Yes.

16 Q. -- but that's what you're staying away from.

17 A. Yes.

18 Q. Did you read any other transcripts from sentencing or
19 PCR or even look at an opinion from a PCR appeal?

20 A. I did not read the opinion from the initial PCR
21 appeal. I did read the sentencing -- or I guess the
22 decision for the sentencing. So I know what the charges
23 were.

24 Q. Oh, okay --

25 A. -- but nothing more detailed than that.

1 Q. Okay. While in light of the decision that you had to
2 make here on the information that you had, would it
3 surprise you to know that our state Supreme Court reviewed
4 in detail the evidence that was presented in the prior PCR
5 and that would have included -- and this is a quote from
6 the opinion -- quote, "Difficult family structure led to
7 problems with school and employment," end quote.

8 MS. BROWN: And for the Court's edification, that's
9 the PCR appeal opinion, 419 South Carolina 370 at 402 to
10 404.

11 A. No. I think I agree with that, that there was some
12 difficulty in the family that could impact Mr. Stone's
13 schooling and his behavior as an adult.

14 Q. Uh-huh. And since you haven't been advised of the
15 prior ruling, it's gonna be kinda of a long entry to the
16 question, but you likely don't know that the Social Worker
17 who testified in sentencing phase interpreted records just
18 as the records that you were provided with the educational
19 background, grades, and that sort of thing; and she
20 testified that -- to a learning disability, but she in fact
21 testified -- and again, this is in our state Supreme Court
22 opinion -- quote, "No documentation of mental retardation,"
23 end quote. Would that have been something that you wanted
24 to see that expert's opinion and how she arrived at that?

25 A. It's not -- I mean, she's speaking to what's in the

1 record and the records that I reviewed. So that's not
2 incorrect that there's a documented learning disability
3 from school, the school did not identify him in terms of
4 what we now call -- well, what was called then mental
5 retardation because that's not a term the school would use.

6 Q. Uh-huh.

7 A. The school used educable mentally handicapped. That
8 was their term. So it wouldn't have been in the record --

9 Q. Uh-huh.

10 A. -- that he was found to be mentally retarded.

11 Q. Okay. So the level that this -- the educators were
12 using, to your knowledge had to do with how they were gonna
13 place him and how they were going to help him to learn ---

14 A. Right. So schools do not diagnose. So mental
15 retardation is a clinical diagnosis. So at the time, the
16 schools had to come up with -- 'cause even school
17 psychologists, without certain other training, can't give
18 clinical diagnoses. So they have their own set of
19 disabilities and words that they use to describe those
20 things. Even though they may mean the same things, they
21 don't want to give the diagnosis of mental retardation. So
22 they've used educably mentally handicapped, educably
23 mentally disabled, mental disability, mentally disabled;
24 and now they use intellectual disability, although the
25 clinical diagnosis is intellectual developmental

1 disability. So it's still different than what you would
2 see in the DSM.

3 Q. Uh-huh. Okay. Okay. And there are certain children
4 who are at a certain level where they would have to be
5 diagnosed to perhaps get the support they need or a group
6 home that they would need to go to if they're not
7 manageable in school?

8 A. Right. So they would get a clinical diagnosis if they
9 met criteria, but the classification that you get in school
10 is so then you can get access to school services.

11 Q. Okay. And you shared with us through your report that
12 you spoke with Mr. Stone, and you believed him to be a good
13 historian?

14 A. Yes.

15 Q. Right. And as I understand it, most people with
16 intellectual disability who have some hesitation in relying
17 on what they are reporting as to their functioning, whether
18 it is intellectual functioning or whether it's adaptive
19 functioning. There's some hesitation to rely on that?

20 A. It can be. It depends on what level we're talking
21 about. Folks with mild ID can be accurate informants of
22 their life experience and their abilities and limitations,
23 yeah.

24 Q. Uh-huh. And I want to drill down on that a little bit
25 because they can be accurate, and you, as a professional,

1 are not just gonna take what is being said at face value.

2 You look at other things to corroborate, right?

3 A. Yes.

4 Q. And that's how you come up with a decision whether
5 it's actually -- he's actually a good historian or not a
6 good historian; is that ---

7 A. Yes.

8 Q. --- fair?

9 A. That's fair.

10 Q. Okay. And he told you that as he was growing up, he
11 did a lot of work around his home, right?

12 A. I don't -- well, he talked about that they all had
13 responsibilities in the home.

14 Q. Uh-huh.

15 A. Yeah.

16 Q. And it was pretty hard work, the examples that he gave
17 you.

18 A. Yes.

19 Q. Cutting wood, gardening, things that took a lot of
20 intense labor and time.

21 A. Yes.

22 Q. Okay. So he did that not for himself. He was helping
23 his parents at that time, right?

24 A. Yes.

25 Q. Yeah. Okay. And are you aware of the reports that

1 Mr. Stone was protective of his sisters, attempting to
2 protect them from potential abuse in the home?

3 A. No.

4 Q. Okay. You're aware that he had tried to protect
5 others and help them with money and that sort of thing. I
6 believe he said to you that he had loaned money out even
7 though he didn't get it back 'cause he was trying to help
8 other people?

9 A. Yes, he did tell me that.

10 Q. Okay. On page 5 of your notes -- do you have a copy
11 of your notes with you by chance?

12 A. No.

13 Q. Okay. Well, I'll read you this, and if you need a
14 copy to refresh your recollection, you let me know.

15 A. Uh-huh.

16 Q. Okay? On page 5 of your notes, you included that Mr.
17 Stone said by the time he was an adult, he could do what he
18 wanted, and there weren't any restrictions. So he's kinda
19 going back to at home, he had a lot of chores and they were
20 pretty intense chores. You remember that part of the
21 conversation?

22 A. I do. He was just sharing that, you know, as an
23 adult, he could, you know, make more decisions for himself,
24 at least he felt like he was making more decisions for
25 himself.

1 Q. And that's consistent, is it not, with not really
2 wanting to work at the house and do a whole lot for upkeep;
3 decided he just didn't want to do that anymore?

4 A. Okay.

5 THE COURT: I'm sorry. What was that?

6 A. Yeah. It could be, yes. I mean, some people don't
7 like chores. So you know, they'd rather do something else
8 than wash dishes. So yes.

9 Q. Okay. And when Mary Cook lived with Mr. Stone, she
10 said that she did the inside chores, like cooking and
11 cleaning; and noted that that was the way that his parents'
12 home had been run; that his mother cooked for him, and the
13 women did the other chores like laundry?

14 A. Yes.

15 Q. So you got at least two sources saying that, that was
16 sort of a -- if you'll accept this phrasing of a type of a
17 cultural acceptance for him, that, that was the condition
18 of work and that's what was expected. Is that a fair
19 statement?

20 A. Yes.

21 Q. But he also shared with you he didn't just go home,
22 expect everything to be done. He did work outside, right?

23 A. Yes.

24 Q. And he worked on cars or other things that needed to
25 be fixed?

1 A. Yes.

2 Q. So he did have some responsibilities that he would
3 work at?

4 A. Yes.

5 Q. Okay. And in discussing his upbringing, you stated
6 that he told you that his mother made sure that he could
7 cook?

8 A. Yes.

9 Q. You remember that? And I was just wondering, did you
10 ask him what he cooks or how he cooks or did he use his
11 recipes or anything like that?

12 A. I'll need to look at my notes, but I don't recall us
13 getting deep into the types of things that he cooked. I
14 know we didn't talk about recipes. I may have asked him,
15 like, what kinds of things he could cook.

16 Q. Okay. Anything that you recall that he might have
17 said in regard to that question?

18 A. No, I don't recall anything.

19 Q. Well, that could be potentially helpful if he could
20 describe, for instance, a very complex recipe that he knows
21 from off the top of his head or ---

22 A. Yes. That would be ...helpful.

23 Q. And isn't it true that limited intellectual function,
24 or any kind or impairments with intellect, often show up as
25 patterns in a family?

1 A. I'm not sure I understand your question.

2 Q. Okay. I think you'd testified in your direct that you
3 look for limited function in other family members to see if
4 there are any patterns, and often some type of intellectual
5 disability or dysfunction will show up in other members of
6 the family.

7 A. Yes.

8 Q. Okay. Is that correct? Okay.

9 A. Yeah.

10 Q. And isn't it also true, especially with immediate
11 family, that environmental factors are gonna be shared as
12 well.

13 A. Yes. What we call "intellect" is a combination of
14 heritable genes and that interaction with the environment.

15 Q. Okay. And you told us that Mr. Stone was forthcoming
16 about his history, and isn't it true that he reported that
17 there were no diagnoses of mental retardation in any of his
18 family members that he was aware of?

19 A. Yes, that's what he said.

20 Q. Okay. And in your direct testimony, you referenced
21 Mr. Jerry Stone?

22 A. Yes.

23 Q. And that's Mr. Bobby Wayne Stone's brother, right?

24 A. Yes.

25 Q. And I thought you might have said that he had been

1 diagnosed as intellectually disabled. Do you have a record
2 that shows he was actually diagnosed as intellectually
3 disabled?

4 A. If I said that, I misspoke. He was classified as
5 educably mentally handicapped in school.

6 Q. Okay. And as was his sister, correct?

7 A. Yes.

8 Q. And they were all in the same household.

9 A. Yes.

10 Q. So if one had less support than needed to do well in
11 academics, chances are the other two didn't as well.

12 A. It would be a fair statement.

13 Q. Okay. And you might have -- you might have answered
14 this, but are you aware that there's a South Carolina
15 statute that actually defines the handicap that we're
16 talking about, educable handicap, and a second --
17 secondary, which is actually more advanced, and needs more
18 support. Are you aware of that statute?

19 A. I'm aware of the school definition. Not the state
20 statute.

21 Q. Okay. May I show you a copy real quick?

22 A. Yes.

23 MS. BROWN: And Your Honor, this is 59-21-510, South
24 Carolina Code 59-21-510, definitions. May I approach about
25 the witness, Your Honor?

1 THE COURT: Yes, ma'am.

2 (Ms. Brown hands document to the witness.)

3 Q. Dr. Hall, I'm gonna show you a copy of 59-21-510, and
4 ask you to review paragraphs 2 and 3; and you do not have
5 to read that out loud, but if you wouldn't mind just
6 reviewing that real quick and I'm gonna ask you a question
7 or two.

8 A. (Complies.) Yes.

9 Q. Okay. Does that reflect what you were sharing with us
10 earlier, that the education officials, administrators have
11 their own definition of what educable mentally handicapped
12 would be?

13 A. Yes.

14 Q. Okay. And that does not reflect the three prongs that
15 you are required to consider and find for a diagnosis?

16 A. Right. So this is the definition each school
17 district, in response to this definition as well as the
18 Federal IDEA laws, come up with how they are to assess
19 that; and each school assesses it similarly to what you
20 find in the clinical setting. They do an IQ test, they
21 have to test some sort of adaptive functioning. They're
22 also gonna look at the whole child just to make sure that
23 they're not missing anything else. So they do vision, they
24 do behavioral measures, they do hearing. So they really
25 look at the whole child, and once they have their data

1 collected, then they look at, you know, the seed book --or
2 what I used to call "the red book," but it's not red
3 anymore -- to determine which classification, if any, the
4 child needs.

5 Q. And I think I heard you say it -- you know, that it
6 could be a hearing issue as well, right?

7 A. Right. Which is why they test all the kids hearing
8 when they are first questioned about whether or not they
9 may need special education services.

10 Q. And Mr. Jerry Stone had an -- a hearing issue --

11 A. Yes.

12 Q. -- correct? And Mr. Bobby Wayne Stone also had a
13 neurological issue vision related, right?

14 A. Yes.

15 Q. Okay.

16 MS. BROWN: And if I may, Your Honor, I'm gonna pick
17 up my document real quick so that doesn't accidentally get
18 in the record. Thank you.

19 Q. Okay. Want to go back a little more, explore a little
20 more of the environment as we were talking about earlier.

21 You're not aware of the social worker's testimony, but she
22 -- I'll just give you a overview for our question here.

23 Mr. -- excuse me, Ms. Oehler -- and that's O-e-h-l-e-r -- a
24 social worker's testified at sentencing, and she did a
25 comprehensive study of the family?

1 A. Uh-huh.

2 Q. And she concluded and testified that there was not a
3 good home environment conducive to learning, which is sort
4 of what we were picking up on with the opinion.

5 A. Yeah.

6 Q. Now, she also testified specifically that sometimes
7 even the children would not get a good night's sleep. They
8 would go to school sleepy, and that school records
9 confirmed that Mr. Bobby Wayne Stone would frequently fall
10 asleep in his classes. Did you see any indication of that
11 in the records that you were provided?

12 A. Not in the records I was provided.

13 Q. And of course, if he's falling asleep, that's not
14 conducive to learning either.

15 A. No, it's not.

16 Q. Okay. And Ms. Oehler also testified that the mother
17 provided for the children, she worked very long hours, hard
18 work, but she lacked the ability to be a good role model
19 and that affected Mr. Stone's ability to develop coping
20 skills and to develop his life skills. Would you agree
21 with that?

22 A. I know she worked hard and she worked outside of the
23 home, but I didn't have a lot of information about her.

24 Perhaps Ms. Ohlee --

25 Q. Oehler.

1 A. -- Oehler had more information than I was...
2 So that would cause me to speculate to have to answer that
3 question. I can agree that I know that Mrs. Stone worked
4 out of the home and she had difficult jobs, but I can't say
5 what her mothering was like.

6 Q. Uh-huh. Okay. Fair enough. Fair enough. But you
7 have indicated in your testimony and your report that Mr.
8 Stone's family didn't particularly put an emphasis on
9 formal education?

10 A. Yes.

11 Q. But they did put an emphasis on hard work?

12 A. Yes.

13 Q. Okay. And Mr. Stone engaged in hard work from when he
14 was a child?

15 A. Yes.

16 Q. And he also continued hard work as an adult --

17 A. Yes.

18 Q. -- right? And he found satisfaction in his work, I
19 think you told us yesterday.

20 A. Yes.

21 Q. Okay. And particularly with the tree service; isn't
22 that right?

23 A. Yes.

24 Q. And he went to work on time, showed up where he's
25 supposed to be?

1 A. Yes.

2 Q. Okay. And he completed that work?

3 A. Yes.

4 Q. And there was no indication she knew that he had to be
5 told four and five times how to do something. He completed
6 his work in what was given to you, correct?

7 A. Yes.

8 Q. Okay. And you assessed, however, on page 11 --- your
9 report is what I'll be talking about -- that he was only
10 able to maintain employment with assistance, and my
11 question is, Dr. Hall, doesn't the fact that he did so well
12 at the tree service, doesn't that tend to be intention with
13 the assessment that he had to have assistance to maintain
14 employment?

15 A. Well, what I meant by that was that he would gain
16 employment through a family or a friend, lose that
17 employment, and then require assistance of a family or a
18 friend to get another position.

19 Q. But he stayed with the tree service a good bit.

20 A. Yeah. He was back and forth with the tree service.

21 Q. And I think you mentioned that he didn't fill out
22 applications or anything like that?

23 A. Yes.

24 Q. But isn't it true that he also told you that he did
25 some construction work and it was sort of, quote/unquote,

1 "under the table"?

2 A. Yes.

3 Q. Okay. So he didn't tell you that he had people giving
4 him that. He said that he obtained construction work under
5 the table?

6 A. Yes. He -- again, he worked under table for some
7 construction.

8 Q. Okay.

9 A. But those jobs typically are word of mouth as well.

10 Q. That's just common, isn't it?

11 A. Yes.

12 Q. Okay. And you were able to speak with a friend, Mr.
13 Frankie Norton?

14 A. Yes.

15 Q. Mr. Norton spoke very highly of Mr. Stone, didn't he?

16 A. He did.

17 Q. And they had been friends it appeared to be for a good
18 while?

19 A. They've known each other a good while, yes.

20 Q. Yeah. Okay. And no evidence that Mr. Norton was
21 leading him astray in some way when they were working
22 together?

23 A. No. No evidence of that.

24 Q. They seemed to have a good relationship?

25 A. Yes.

1 Q. Mr. Norton would still be friendly with Mr. Stone if
2 he saw him today --

3 A. Yes.

4 Q. -- according to what he said in his interview ---

5 A. Yes.

6 Q. --- right? Okay. And Mr. Norton also reported that
7 Mr. Stone wanted to be the "nice guy." Do you remember
8 that from the interview?

9 A. Yes.

10 Q. Okay. And from that, you extrapolate that he might be
11 easily led, and I wondered what convinced you that being
12 nice or wanting to be nice, the nice guy, what convinced
13 you that, that was a data point that supported that he was
14 easily led?

15 A. Because even individuals who want to be the nice guy
16 are self-protective. So they won't keep putting themselves
17 in positions where they can be taken advantage of. So
18 there's a sense of gullibility that you have in individuals
19 with intellectual disability, and that just spoke to me
20 that Mr. Stone was really operating more gullible than
21 trying to protect himself and saying I can still understand
22 that you can be a nice person, but not have to be walked
23 over.

24 Q. Uh-huh. And it's also you can be a nice person just
25 'cause you're a nice person?

1 A. Yes.

2 Q. And sometimes you kinda expect that people will take
3 advantage of you just because you're not doing that and
4 getting anything back from them?

5 A. Yes.

6 Q. Okay. And are you aware that Mr. Stone had a very
7 lengthy criminal history before the murder in this case?

8 A. Yes.

9 Q. Okay. And are you aware that he was actually stealing
10 at a very young age?

11 A. Yes.

12 Q. Okay. And Mr. Cantalawn [phonetic], did you read that
13 investigative report from Mr. Cantalawn?

14 A. I'm terrible with names. So, I can't say ---

15 Q. Okay.

16 A. --- if I read it or not.

17 Q. Do you recall reading the passage that even as a kid,
18 Mr. Stone continued to steal?

19 A. Yes.

20 Q. Okay. So that was something that he was doing way
21 before adulthood --

22 A. Yes.

23 Q. -- was stealing?

24 A. Yes.

25 Q. And that continued?

1 A. Yes.

2 Q. Are you aware that he was diagnosed with an antisocial
3 personality disorder?

4 A. I don't remember reading that, but it wouldn't be
5 surprising.

6 Q. Okay. And sometimes, with an antisocial personality
7 disorder, people manipulate others often?

8 A. They can. Uh-huh.

9 Q. And sometimes they will want to appear as a good guy
10 and a fall guy so that they don't appear to be antisocial?

11 A. Well, they want to appear to be the good guy, not so
12 they don't appear antisocial. I'm not -- that's -- I'm not
13 sure what you -- what you mean by that question.

14 Q. Uh-huh.

15 A. But it is a useful tool to present yourself as a nice
16 guy.

17 Q. Uh-huh. Okay. And individuals with intellectual
18 disability tend to be followers?

19 A. Yes.

20 Q. By and large, correct?

21 A. Yes.

22 Q. Okay. But Mr. Stone was more of a loner, was he not,
23 kept to himself and his family?

24 A. Yes. That's what he said.

25 Q. Okay. And did you see any evidence in any other

1 crimes that he had committed where he was duped or led or
2 pushed into a situation by another person?

3 A. Just from what I had, I didn't have details about that
4 crime. So I don't know if there were co-defendants with it
5 or those kinds of things. So I can't answer that question.

6 Q. Were you aware that testimony at sentencing supported
7 that on the day of the murder, he was catching rides from
8 other people, going buying beer, and he was by himself?

9 A. I do believe I read that.

10 Q. Okay. So that was not -- so then he was being pushed
11 in the events leading up to that day that you're aware of.

12 A. Not that I'm aware of, no.

13 Q. Okay. And he provided financially for his
14 girlfriends. I think you mentioned that was something he
15 was very proud of.

16 A. Yes.

17 Q. Okay. And he maintained employment so he could do
18 that?

19 A. Yes. He always wanted to have a job.

20 Q. And he also stole?

21 A. Yes.

22 Q. And he would steal some things that he was working on,
23 the auto parts for instance, right?

24 A. Yes.

25 Q. Okay. And that didn't have to do with anybody else?

1 That's what he was working on.

2 A. Yeah. That would be for his hobby.

3 Q. Okay. And some of the information that you received
4 and relied on came through I believe it was Mr. Norton
5 again, when he was talking about the relationship Mr. Stone
6 had with Ms. Price?

7 A. Yes.

8 Q. Does that ring a bell? Okay. So that's somebody
9 outside looking in, right?

10 A. Yes.

11 Q. Okay. And that may or may not be accurate, but a
12 better source would be the two people in the relationship,
13 wouldn't it?

14 A. Yes.

15 Q. Okay. Would you be surprised to know that Mr. Stone
16 was taught to use a debit card, an ATM machine?

17 A. No. That's a skill that lots of folks would -- are
18 taught how to use.

19 Q. Okay. And would you be surprised to know that he was
20 taught to write a check, all the things that you had to do
21 to write a check out?

22 A. No. That's a skill that people, especially our age,
23 are -- were taught.

24 Q. Uh-huh. And it's not surprising that he would have to
25 be taught later in life because he came from a very

1 disadvantaged background?

2 A. No, that's not surprising.

3 Q. Not surprising? Okay. And it's kinda similar to some
4 of the other information that you received that once he was
5 taught to cook, he could cook and he was very proud of
6 that.

7 A. Right. And people with intellectual disability mild
8 can learn how to cook and be ---

9 Q. Uh-huh.

10 A. -- you know, successful at operating a stove and
11 cooking.

12 Q. Uh-huh. And as you've said before, with the cloak of
13 competence or masking. Sometimes it's a zero sum. You
14 don't know whether somebody -- just because somebody can
15 write a check out, whether he's intellectual disabled or
16 not, you don't know -- you don't know until you dig down a
17 little bit, right?

18 A. Correct.

19 Q. So you're looking for patterns?

20 A. Yes.

21 Q. That helps you, right?

22 A. That helps.

23 Q. And if you had information that he can do something at
24 the house, whether it's writing a check or cooking or what
25 have you and he's doing that independently, that militates

1 in favor of not being intellectual disabled. Not gonna be
2 dispositive, but it's a data point, correct?

3 A. It's a data point that's important to look at, but as
4 you said, you would have to go deeper.

5 Q. Uh-huh.

6 A. So being able to write a check is relatively easy.
7 Was the account always balanced or were there checks
8 written that bounced a lot. So you would have to know more
9 information than just that he could write a check.

10 Q. Okay. And you -- and you're looking for patterns
11 though?

12 A. Yes.

13 Q. So when he is taught in a certain way things that he
14 didn't know and didn't learn from his childhood and he gets
15 it, that shows that he does learn.

16 A. Well, folks with intellectual disability do learn.

17 Q. Absolutely. Absolutely. And Ms. Golden indicated in
18 her interview that once she showed him how to do things,
19 what was expected of him, Mr. Stone got it. He could do
20 it.

21 A. Yes. She did say that.

22 Q. So one of these -- one thing you could take from this
23 pattern that he's shown things he doesn't know how to do
24 and then he can do that and he does it consistently, like
25 cooking or schoolwork with Ms. Golden helping him, guiding

1 him with those supports, that shows that he can learn it is
2 given to him in a particular way.

3 A. Yes, but it -- and that's also not dispositive of him
4 having intellectual disability.

5 Q. And I understand. There are -- there's some people
6 where this would show an ability to learn though.

7 A. Yes.

8 Q. Right? And there's some people it just shows an
9 avoidance. They just don't want to put the effort in,
10 right?

11 A. Yeah. I would agree with that.

12 Q. And then there's also people who just need extra
13 support?

14 A. Yes.

15 Q. Okay. There isn't any question that Mr. Stone
16 struggled academically in school, right? We've got those
17 records.

18 A. Yes.

19 Q. Okay. But isn't it true that the history is also a
20 little bit mixed?

21 A. Meaning mixed.

22 Q. Okay. Well, in your report, at around page 4 --

23 A. Uh-huh.

24 Q. -- you were talking about Mr. Stone having that
25 learning disability and then moving almost down if I think

1 -- if I remembered your testimony regarding to educable
2 mentally handicapped by -- was it grade 7?

3 A. Yeah.

4 Q. Is that correct?

5 A. He was reclassified, yes.

6 Q. All right. And then you talked a little bit about
7 terrible reports in grade nine.

8 A. Yes.

9 Q. And then you said he withdrew?

10 A. Yes.

11 Q. But we also have what he did in DJJ.

12 A. Yes.

13 Q. And ---

14 A. When he was in re -- remedial courses, yes.

15 Q. Uh-huh. And in DJJ, in that facility, he did rather
16 well, didn't he?

17 A. In those remedial courses, and unfortunately, we don't
18 know what constituted those courses. So you would have to
19 know more information. Just by virtue that they were
20 remedial, they weren't on grade level. So that we can't
21 extrapolate.

22 Q. But that would help him if he does have this learning
23 disability though?

24 A. It would help him if he had intellectual disability as
25 well.

1 Q. And he'd be scoring better because he's learning more
2 at that point?

3 A. Well, he's completing the work that's given to him in
4 a way that was satisfactory for the teacher.

5 Q. Uh-huh. And there are other elements. Like we were
6 talking about the environment not long ago, there are other
7 elements to school, too. Are you aware that in the records
8 that you were pointing to, ninth grade and before, there
9 were a lot of absences?

10 A. Yes.

11 Q. And that's going to hurt the ability to learn, isn't
12 it?

13 A. Yes.

14 Q. And of course, when he got to DJJ, he couldn't be
15 absent, right?

16 A. No, he could not.

17 Q. Not very easily. We'll say that. And he had support
18 in his class and he did well.

19 A. Yeah. He did okay. Yes.

20 Q. Okay. Even a B -- and what did he get a B in? Do you
21 remember that by any chance?

22 A. I...

23 Q. I think it's maybe in your report, but is it
24 economics?

25 A. Yeah. I believe it was the economics ---

1 Q. Okay.

2 A. --- course. Yeah.

3 Q. And one thing I did not see in your report, and please
4 correct me if I missed it, I didn't hear in your testimony
5 was the fact that Mr. Stone went to a series of different
6 schools.

7 A. Yes.

8 Q. Were you aware of that?

9 A. Yes.

10 Q. Okay. And he actually, in elementary school, had how
11 many moves? Three or four?

12 A. Three. Yeah, the family moved ---

13 Q. He had --

14 A. --- quite often.

15 Q. He started in Johnsonville, right?

16 A. Uh-huh.

17 Q. Then he when to Central. Then he went to Lemira.
18 Then to Eastern Elementary, and then in middle school, I
19 have that he went to Bates; does that sound ---

20 A. Uh-huh.

21 Q. --- familiar? And then to Manchester.

22 A. Yes.

23 Q. Okay. That's a lot of movement for a child trying to
24 learn, isn't it?

25 A. That is a lot of moving.

1 Q. Okay. And logically, would it not impact a child with
2 a learning disability even more so than the average child?

3 A. Yes. It ---

4 Q. Okay.

5 A. --- could.

6 Q. Okay. And talking about that, you know, the support
7 that when he does get the support, he can kinda get into
8 the academic classes a little bit, he received some good
9 marks along and along, like, fourth grade?

10 A. Yes.

11 Q. Average marks. I won't say good, I'll say average --

12 A. Yes.

13 Q. -- 'cause he got some Cs, right?

14 A. He got some Cs.

15 Q. I thought it was interesting, in grade four, that he
16 got a C in reading, a C in health and safety, and a B in
17 conduct. So he wasn't acting out in grade four that you
18 could tell from the records, was he?

19 A. Not from what I could tell, no.

20 Q. Okay. All right. And it shows some improvement when
21 he gets some support, too.

22 A. Yes. He required support.

23 Q. Okay. All right. And grade four is when you see a
24 report of the major problems in visual motor coordination--

25 A. Yes.

1 Q. --- correct? Okay. And that's neurological process,
2 right?

3 A. Yes.

4 Q. Okay. And that's addressed differently than just like
5 plain remedial or if you're a grade or two behind and you
6 need to catch up. That's gonna be addressed differently
7 because it's a neurological process; is that correct?

8 A. Yes. They're gonna do some accommodations for ---

9 Q. Okay.

10 A. --- for him.

11 Q. And going back a minute to Mr. Stone being a good
12 historian and you know that there's gonna be, with some
13 intellectual disability folks, this ability to -- or need
14 to mask. And to have that cloak of competence you were
15 talking about. That's where your interviews and that's
16 where your interviewing techniques help to either pull that
17 cloak off or see through it and make sure that he's not
18 masking.

19 A. Yeah.

20 Q. Is that a fair statement. Okay.

21 And you testified I thought yesterday that Mr. Stone, to
22 you, appeared to be masking some, that he didn't want to
23 embrace his limitations?

24 A. Yes.

25 Q. Okay. But in your notes, you jotted down that he told

1 you he didn't have any confidence in school?

2 A. Yes.

3 Q. Do you remember that?

4 A. Um-hum.

5 Q. Doesn't that appear to be embracing his limitations a
6 bit? He's not throwing it off saying, "Oh, no. I could've
7 done it if I wanted to. I didn't have any confidence in
8 anything I do."

9 A. I mean, yes, he was forthcoming that, you know, he
10 didn't have confidence in his ability to schoolwork; but
11 when I was talking about masking, I was talking about
12 really what -- how he navigated the world, not academic
13 stuff.

14 Q. Okay. Okay.

15 A. That's where we got into the bit of contention, just
16 for clarification.

17 Q. Okay. Well, we're gonna talk a little bit more about
18 how he -- he told you what he was doing on a functioning
19 level ---

20 A. Right.

21 Q. --- more towards prong two, right?

22 A. Right.

23 Q. Okay. And he said about living independently he never
24 wanted to. "It just puts more work on me." Isn't that a
25 direct quote?

1 A. Yes.

2 Q. "It just puts more work on me".

3 A. Yes.

4 Q. And he had told you that he did a lot of work at the
5 house when he was young ---

6 A. Yes.

7 Q. --- and when he got to an adult, he didn't have to do
8 that?

9 A. Yes.

10 Q. Okay. That's pretty consistent. And on page 5 of the
11 report, you said you asked him how to safely remove a tree?

12 A. Yes.

13 Q. And I think when you were talking about that
14 yesterday, you said that he didn't really give you a lot of
15 details.

16 A. I was talking about the apartment yesterday, apartment
17 hunting.

18 Q. And I did want to ask you about that, too; but as far
19 as removing the tree, not a lot of detail there either?

20 A. Not -- I don't know how to remove a tree. So ---

21 Q. I got you.

22 A. --- it did not appear to me ---

23 Q. Yeah.

24 A. --- to be very -- as much information ---

25 Q. I got you.

1 A. --- as I would want to have about removing a tree.

2 Q. Right.

3 A. So yes.

4 Q. It was difficult to gauge.

5 A. It was difficult for me to gauge if that was ---

6 Q. I got you.

7 A. --- you know, how you remove a tree.

8 Q. Okay. And you did ask him about the steps to get an
9 apartment.

10 A. Yes.

11 Q. That's on page 11 of your report.

12 A. Yes.

13 Q. And you attributed his hesitancy in wanting to provide
14 details to the fear of the appearance inadequacy.

15 A. Yes.

16 Q. But you had two perceptions in that: One, that he was
17 hesitating; and two, that he was doing that to not appear
18 inadequate.

19 A. Yes. That was the sense that -- 'cause it was a
20 change in how he answered questions. I think that he was
21 comfortable answering. He was much more forthcoming in
22 answering, but any little press that I gave him, it was
23 much more difficult to get answers from him. So there was
24 -- it was a change in that presentation that made me think
25 that this was where I was beginning to pierce the mask ---

1 Q. Mm-hum.

2 A. --- and get up under the presentation that he was
3 having that he has 'cause he does not want to be perceived
4 as having intellectual disability.

5 Q. Okay. Okay. Well, let me -- let me back up a little
6 bit because you were focused on whether he was trying to
7 mask, but isn't it true that he could have had another
8 reason for hesitancy, such as the fact that he's been in
9 SCDC for many, many years and may not have wanted to talk
10 about the outside world?

11 A. That's possible.

12 Q. Okay. But let's -- and then let's look at the other
13 part of it, the details that he gave you. I think in your
14 report you mentioned about the deposit or turning on the
15 lights?

16 A. Yes.

17 Q. Okay. All right. Well, what he told you, none of
18 that was wrong, correct?

19 A. No, it's not wrong.

20 Q. Not wrong. Okay. So what else were you kinda looking
21 for at that point? When you're writing your report, you
22 say, "This is what he told me," did -- were you thinking I
23 need to -- I need to flush out. I need to say what he
24 didn't say here, there, and beyond?

25 A. Right. So after going -- getting him to ask the

1 question, I posed it as if he was giving it, like, to a
2 person who's looking for their first apartment.

3 Q. Uh-huh.

4 A. And I asked him to be as detailed as possible 'cause
5 this person has no idea how to get an apartment.

6 Q. Uh-huh.

7 A. And so he didn't reach the level of complexity that a
8 neurotypical person would give, "Oh, this is your first
9 time" ---

10 Q. Uh-huh.

11 A. --- "of getting an apartment. This is how you go
12 about doing it." Giving, you know, talking about things
13 about, you know, the neighborhood, not just the process of
14 getting the apartment, which is also important, but other
15 things that you may want to consider when you're picking a
16 place to live.

17 Q. Mm-hum.

18 A. And so he just gave me the bear minimum is what I
19 could get from him, and as I said before, that's really the
20 time when I -- when I would kinda press to get more
21 information from him to clarify, so that I could get
22 understanding of what he understood in his functioning,
23 that's when I would get more push back.

24 Q. But you -- it seems to me that you asked him from a
25 couple of different angles, but he actually did give you

1 more information that's not in the report; and that's on --
2 I think in -- on page 3 of your notes, in response to what
3 he would do if he had to -- if he was released from prison.

4 A. Um-hum.

5 Q. You remember that?

6 A. Yeah.

7 Q. It seemed like a very open-ended question from your
8 notes. Is that a correct observation?

9 A. It was an open-ended question.

10 Q. Okay. And he said, "Has to get a job."

11 A. Um-hum.

12 Q. "Depends on where he's at." He thought he would get a
13 camper, stay with his brother 'til he could get a place of
14 his own. Determine how much is needed for the deposit and
15 the first month's rent. Get the lights turned on. Get
16 furniture and clothes. Balance your budget. Go to the
17 light company. That's pretty complete answer, isn't it?

18 A. Those are, again, the steps that he understood, but in
19 conversation with him, you couldn't get -- well, you know,
20 what would be expected at the -- you know, the light
21 company. How would you go about getting a place to get a
22 camper or ---

23 Q. Uh-huh.

24 A. --- being able to know where you could put a camper
25 and those kinds of things. And so that's where I got stuck

1 in difficulty with him, and it, as you said, could be that
2 this brought up feelings for him that he didn't want to
3 answer. That is possible. Could be that he was tired of
4 talking to me.

5 Q. Um-hum.

6 A. Because although the pages are numbered, we bounce
7 around.

8 Q. Oh, I --

9 A. So --

10 Q. Okay.

11 A. -- you know, but at the time, my interpretation of
12 that was that here's -- I do see that's he's struggling
13 with answering these questions.

14 Q. Okay. And you reported that even though he said that
15 he thought that the -- that somebody else should do inside
16 work and that women had inside work responsibilities ---

17 A. Um-hum.

18 Q. --- and he didn't want extra responsibility, you
19 indicated in your report clearly he could not manage
20 successfully in the community. Clearly's a bit strong when
21 he has a plan if he were to be released. Even if it's not
22 sophisticated, he has a plan getting a camper 'til he can
23 figure out a place for a permanent home. That's kinda
24 thinking ahead a little bit, isn't it?

25 A. Yeah. My clearly, that word was that when he was in

1 the community, there was not a time when he did not require
2 the assistance of other people to be successful.

3 Q. Is it also very that didn't -- instead of getting
4 required, that he didn't have to go without assistance?

5 A. That's true because the family around him offered him
6 scaffolding or support, yes.

7 Q. Okay. Okay. And talking about digging down a little
8 bit, driving?

9 A. Um-hum.

10 Q. And like you were saying yesterday, the fact that
11 somebody has a license maybe intellectual disabled, maybe
12 not?

13 A. Yes.

14 Q. You gotta dig down, right?

15 A. Yes.

16 Q. One thing that was not included in your report and I
17 wanted to ask you about, you have it in your notes that he
18 candidly said he did not pass the driving test the first
19 time, right?

20 A. Yes.

21 Q. And he also said he let his driver's license lapse,
22 right?

23 A. Yes.

24 Q. But he -- the driver's license lapsed because he was
25 incarcerated, correct?

1 A. Yes.

2 Q. He couldn't go and get it?

3 A. He could not.

4 Q. Okay. And he also reported that while he failed the
5 driver's test, what he said was he failed the driving test,
6 according to the notes, not the permit test?

7 A. Yes.

8 Q. So that's a little bit different, isn't it? When the
9 driving test being actually driving the car, the permit
10 test generally being taking the written test, correct?

11 A. Yes.

12 Q. Okay. That would be kinda interesting to know in the
13 report, wouldn't it? Would you normally put that in, or
14 would you not normally put that in?

15 A. I didn't -- you know, here's my advice: People in
16 South Carolina drive terribly. So it was not my -- unusual
17 to hear people say they didn't pass the driving portion of
18 the test the first time.

19 Q. I see.

20 A. Yes.

21 Q. Okay. And he also told you that he recently had a
22 health scare on death row, right?

23 A. Yes.

24 Q. And he was diagnosed with hypertension?

25 A. Yes.

1 Q. And he was concerned because there are heart
2 conditions in his family?

3 A. Yes.

4 Q. Right? And he resolved to take it upon himself to get
5 healthier, to make sure that he interacted with his doctors
6 and physicians, and he did so successfully, correct?

7 A. Yes. He followed his doctor's instructions to the
8 letter as far as my understanding.

9 Q. Okay. And in fact, he also told you that even though
10 death row's very restrictive, there's not a lot that you
11 can take from that because, you know, they tell you when to
12 take a shower, they tell you when to exercise ---

13 A. Um-hum.

14 Q. --- that sort of thing.

15 A. Right.

16 Q. There are some things you do have some control over,
17 and he volunteers to go clean another inmate's cell as that
18 inmate's unable to do so?

19 A. Yes.

20 Q. Okay. Again, he's helping other people which is a
21 very positive thing to do, correct?

22 A. It is, but it's not dispositive for ---

23 Q. Not dispositive.

24 A. --- ID.

25 Q. And you note that his cognitive function, when you

1 interviewed him, appeared within normal limits.

2 A. Yes. In terms of that mental status exam.

3 Q. Okay.

4 A. Yes.

5 Q. And attention and concentration appeared normal?

6 A. Yes.

7 Q. Okay. I do want to ask you about one question that
8 you have in your notes you set out. You asked him what to
9 do if he saw smoke?

10 A. Yes.

11 Q. Do you remember that part of it?

12 A. Yes.

13 Q. Okay. And the notes reflect he said, "Leave" --

14 A. Yeah.

15 Q. -- right? "Report it."

16 A. Um-hum.

17 Q. But do not yell "fire because if someone dies, you're
18 legally responsible."

19 A. Yes.

20 Q. That's a very detailed response to that question,
21 isn't it?

22 A. It is.

23 Q. Okay. And you did note that he used -- he reported
24 that he used drugs for decades?

25 A. Yes.

1 Q. Especially marijuana.

2 A. Yes.

3 Q. And marijuana can dull the senses, right?

4 A. Yeah. It has some effects.

5 Q. May effect intellect?

6 A. Motivation --

7 Q. Motivation.

8 A. --- yeah. I'm not aware of effecting intellect, but I
9 would have to look it up.

10 Q. Okay. You testified yesterday about the California
11 Achievement Test --

12 A. Yes.

13 Q. -- and that would have been, like, a high school level
14 testing, correct?

15 A. I think they gave it multiple times, but --

16 Q. Okay.

17 A. Yeah.

18 Q. I thought yesterday you spent a good bit of time on
19 the results from around age 14?

20 A. Yes.

21 Q. Does that sound familiar?

22 A. Yes.

23 Q. Okay. And in his teens, he was using marijuana,
24 right?

25 A. Yes.

1 Q. So that, as you said, affects motivation?

2 A. It can.

3 Q. And may not be giving a lot to that test for the
4 results to come out any better.

5 A. Well, we don't know if he used when he was taking that
6 test.

7 Q. But we do know that he was cutting school a lot.

8 A. Yes.

9 Q. And he admits to using marijuana heavily starting in
10 his teens?

11 A. Yes.

12 Q. Okay. And okay. Even with the head injuries in life
13 later, after age 22, I think you can tell as well; and with
14 that consistent drug use that he admits in anticipation of
15 this proceeding, he took a IQ test and his full scale was
16 79.

17 A. Yes.

18 Q. So with all those extra things after the developmental
19 period, his IQ score is still 79. So with a 95 percent
20 competence, you have in your report the range is 75 to 83.

21 A. Yes. That would be the competence integral.

22 Q. And that's when he's testing at age 52?

23 A. Yes.

24 Q. Okay.

25 A. But that's out -- without the correction.

1 Q. And we'll -- we'll get to that one, too. But
2 generally speaking ---

3 MR. GROSE: Your Honor, if she wanted to finish that
4 answer, I'd request that she be allowed to finish that
5 answer.

6 THE COURT: You want to be heard?

7 MS. BROWN: I thought she'd finished her answer.

8 THE WITNESS: I had finished.

9 MS. BROWN: She did.

10 THE COURT: All right. Pose your next question.

11 BY MS. BROWN:

12 Q. Going back to the IQ being 79, with a 95 percent
13 competence range, that calculates as 75 to 83.

14 A. Yes.

15 Q. At age 52. Okay. So you can't generally, as a rule,
16 test better than your intellect will allow, correct?

17 A. That is correct.

18 Q. Okay. And that doesn't fall to the level that DSM-5
19 suggest one look at for prong one, right?

20 A. Yes. That would be outside.

21 Q. Okay. All right. And you do acknowledge the Flynn
22 effect?

23 A. Yes.

24 Q. But even with Flynn effect as you have calculated, it
25 doesn't go 70 or below.

1 A. No.

2 Q. Okay. And you offered yesterday that the best
3 practice is to apply the Flynn effect, correct?

4 A. Yes.

5 Q. But you qualified it the best practice in Atkins
6 cases.

7 A. Yeah. There's -- again, you know, some folk believe
8 that it should be applied in clinical settings, and some
9 folks believe that it's not appropriate for clinical
10 settings. So I was just acknowledging that, as a field, we
11 are still -- try to figure out what it is; but in terms of
12 Atkins evaluation, it is part of best practices.

13 Q. Okay. And do you know if the WAIS manual instructs
14 that the Flynn effect be accounted for?

15 A. I do not believe it's in the manual.

16 Q. Okay. And the DSM-5 doesn't make it mandatory?

17 A. Does not make it mandatory, no.

18 Q. It says you may consider ---

19 A. It says you may.

20 Q. --- Flynn effect and practice effect?

21 A. Uh-huh. Yes.

22 Q. Okay. Okay. And would you agree with me it's not
23 generally applied to testing for, like example, school
24 placement or support or social security?

25 A. That is correct.

1 Q. Okay. So very narrow to Atkins cases. You find that
2 a little odd when it's not applied for when a child may
3 need services or support or government intervention in some
4 way, and only when all it can do is bar a death penalty?

5 A. As I said, there are some folks in our field who do
6 apply Flynn in all areas. So whether the child's seeking
7 services for clinical diagnoses, but I would say as a
8 field, we said, "Yes, definitely in Atkins cases," and as a
9 field, we are not -- made it best practice yet ---

10 Q. Um-hum.

11 A. --- to apply the Flynn effect in seeking a diagnosis
12 of clinical services.

13 Q. Okay.

14 A. Which is why the DSM says "may" 'cause we haven't as a
15 field gotten a definitive answer on that yet.

16 Q. Okay. And isn't it true that the -- drawing a blank
17 on the resources. It's AAIDD?

18 A. Yes, ma'am.

19 Q. Okay. Isn't it true that when that manual references
20 the Flynn effect, it also references the limitations, much
21 like you're saying, we -- that you haven't come to a
22 conclusion on it yet?

23 A. Yes.

24 Q. And doesn't it reflect that even though they're
25 suggesting a best practice would be to use it, that you

1 don't know exactly how much to discount or if it reverses
2 over time or exactly if it's a linear kind of increase? A
3 lot of options about what ---

4 A. Well, I think --

5 Q. --- could affect it, correct?

6 A. How to calculate it, I think we're pretty clear on
7 that.

8 Q. Um-hum.

9 A. The issue of the reverse Flynn effect, we don't have a
10 lot of data on that yet. So to -- so since we don't have a
11 lot of data on that yet, I really can't say for sure that
12 that is a construct that is valid.

13 Q. Um-hum.

14 A. We just have I think some research from -- I want to
15 say one of the Scandinavian countries. It's alluding me
16 because I looked it up after you told me about it. It's
17 alluding me right now.

18 Q. I understand.

19 A. But that was all that I was able to find.

20 Q. Okay. Does this sound familiar as a portion of the
21 AAIDD manual talking about the Flynn effect (as read):
22 "There are also data suggesting that the Flynn effect may
23 not be a purely linear function of time, and that the
24 impact of the effect may asymptote or even reverse"? And I
25 hope that I've said that right. A-s-m-p-t-o-t-e (sic).

1 A. Yes.

2 Q. -- or even reverse.

3 A. That is ---

4 Q. Does that sound right?

5 A. That it's in the book, yes.

6 Q. Okay. So I think maybe, you know, as you're -- you're
7 saying it'd be the way of calculating the .3 that may be
8 fairly standard for people who use the Flynn effect?

9 A. Yes.

10 Q. But what I was asking is, isn't it true there's some
11 data out there that it may not be linear. It may not be
12 per year. It may not increase.

13 A. Yes.

14 Q. Okay.

15 A. Now I understand your question. Thank you.

16 Q. It's kind of a complicated question. I probably
17 should've given you a little bit more background, but thank
18 you. Okay. So you've testified of your review of the
19 information from school records show approximate borderline
20 range, and there's consistency there with the other
21 testing?

22 A. Yes.

23 Q. And that's consistent with most recent testing?

24 A. Yes.

25 Q. 79.

1 A. Yes.

2 Q. Okay. And there's some school grades that are lower,
3 some that are higher when there are supports for his
4 learning disability; is that fair?

5 A. Well, some of them, the supports, were also when he
6 was classified as educable mentally handicapped. So I
7 would say given supports in general, whether they were in
8 the LD setting or the EMH setting, we saw improvement.

9 Q. And there seems to be a correlation when he is
10 actually in school, he does better.

11 A. When he has access to those supports, yes.

12 Q. We know when he's not interested in participating when
13 he's having problems, like he did in ninth grade, he
14 doesn't do as well.

15 A. Yes.

16 Q. Okay. And low effort doesn't always show on the test
17 results as you see in a school record.

18 A. Yes.

19 Q. Okay. But there was no low effort detected on the
20 test that he took at age 52.

21 A. Well, the school records, the psychologist do indicate
22 if they think it's a valid -- or if there was anything that
23 would affect the scores.

24 Q. Uh-huh.

25 A. And so there was nothing in there that suggested he

1 put in low effort.

2 Q. Uh-huh. And achievement tests may be a little bit
3 different though, right? Isn't that what we were talking
4 about with California?

5 A. Oh. Okay. You're talking about the achievement test.
6 Yeah. 'cause that's a group test ---

7 Q. Yes.

8 A. --- and no one's monitoring or -- you know, it's not
9 an interaction like an IQ test. So yes.

10 Q. Okay.

11 A. You do -- you can't measure effort ---

12 Q. And most --

13 A. --- on that.

14 Q. -- recent IQ could be, could be legitimately as high
15 as 83.

16 A. Yes.

17 Q. Thank you.

18 MS. BROWN: No further questions, Your Honor.

19 THE COURT: Redirect?

20 MR. GROSE: Thank you, Your Honor. May it please the
21 Court.

22 THE COURT: Yes, sir.

23 REDIRECT EXAMINATION

24 BY MR. GROSE:

25 Q. Dr. Hall, Ms. Brown asked you some questions about

1 some of the specific data that you reviewed in this case.

2 A. Yes.

3 Q. With regards to any of her questions, has your opinion
4 changed?

5 A. No.

6 Q. And you consider Mr. Hall to be a person who needs to
7 -- I'm sorry, Mr. Stone --

8 A. I think, "My daddy's here?"

9 Q. -- Mr. Stone to be a person who meets the diagnostic
10 criteria for intellectual disability.

11 A. Yes.

12 Q. All right. Ms. Brown also asked you some questions
13 about the Flynn effect.

14 A. Yes.

15 Q. And she asked you questions about doing Atkins
16 evaluations.

17 A. Yes.

18 Q. And I think you shared with us yesterday that this is
19 not the first Atkins evaluation that you've done.

20 A. No, it's not.

21 Q. I don't recall the number, but you've done more than a
22 dozen either together or with somebody else?

23 A. The total would be eight or nine.

24 Q. Okay.

25 A. Yeah.

1 Q. Okay. All right. And we went through some of your
2 training and education, but have you been to any trainings
3 on doing Atkins evaluations?

4 MS. BROWN: Your Honor, I'm gonna object for scope.

5 MR. GROSE: Your Honor, she asked about doing Atkins
6 evaluations and suggested that she wasn't doing them
7 properly; and so I think this is relevant.

8 MS. BROWN: I didn't challenge any --

9 MR. GROSE: You -- she -- yeah, she did challenge ---

10 THE COURT: Hold it. Defense.

11 MS. BROWN: No, sir. I didn't challenge any
12 qualification of the fact that Dr. Hall had conducted
13 several capital Atkins evaluations in this state.

14 THE COURT: You need to put anything else on the
15 record?

16 MR. GROSE: No, sir.

17 THE COURT: The objections over -- overruled.
18 Continue. There were questions about the Atkins
19 evaluation. I think what was asked was enough to go under
20 what you're asking now.

21 MR. GROSE: All right.

22 BY MR. GROSE:

23 Q. And have you been to any specialized trainings on
24 Atkins evaluations?

25 A. Yes.

1 Q. And can you tell the Court what those were.

2 A. In 2014, I went to one that was put on by the American
3 -- what are the letters -- the American Association of
4 Forensic Psychologist. That is the board certifying group.
5 And then last year I went to -- I think it was also put on
6 by AAFP -- went to one last year that dealt with Atkins,
7 particularly in light of DSM-5 and the changes.

8 Q. All right. And do -- in those courses, what is the
9 consensus about applying the Flynn effect?

10 A. That it's something that should be done.

11 Q. She asked you some questions about the AAIDD manual,
12 the purple book.

13 A. Yes.

14 Q. If I could, I'd like to show you page 42, in
15 particular that bullet point -- whoops, sorry.

16 A. That's okay.

17 (Brief pause.)

18 A. Okay.

19 Q. And what does that portion of the manual tell us with
20 regards to applying the Finn effect -- Flynn effect?

21 A. That it is best practices, that you are to use the
22 Flynn effect in Atkins cases.

23 Q. All right. If you just -- I'll get that back in a
24 second. Just set it down.

25 A. (Complies.)

1 Q. In some of the answers to Ms. Brown's questions, you,
2 at one point, said -- referred to scaffolding -- I'm
3 probably not saying that very well -- and support.

4 A. Yes.

5 Q. Can you elaborate on what you meant by that?

6 A. So scaffolding is the type of support that you need as
7 you are building a person to independence. So it's taken
8 from construction actually, so that when you're building a
9 building, right, you have to put scaffolds around it until
10 the building is able to stand on its own. And so when we
11 are teaching people new skills or teaching them in school,
12 we scaffold them, we give them support until they can
13 demonstrate that they can do that independently, and folks
14 with intellectual disability can gain skills and do things
15 independently. Some of them may still require some
16 support, and so you may never be able to take all the
17 support away. So because the depth and breadth of folks
18 with ID vary depending on the level of severity or even
19 within what we consider to be mild, there's varying
20 presentation. So some folks who are mild ID may be able
21 to, you know, work, cook their food, keep their home clean,
22 you know, watch children; but may still need some supports
23 in terms of balancing their budget, doing more advanced,
24 you know, type of things that assist with independent
25 living. So that's what that term means.

1 Q. And then did you see evidence of the scaffolding or
2 support in what Mr. Stone was functioning in, in the
3 community?

4 A. So in the community, the only evidence I was able to
5 gather was that he always relied on other people to help
6 him navigate.

7 Q. All right. And sorta picking up on that, if you go to
8 page 12 of your report --

9 A. Yes.

10 Q. -- and in the third paragraph, under diagnostic
11 summary and conclusions, you have a sentence in there that
12 says (as read): "While he couches it as he did not want to
13 do these chores, his friends and former live-in girlfriends
14 were unsure if he was unable to complete the task." What
15 did you intend to communicate with that sentence?

16 A. So part of Mr. Stone's presentation is that he would
17 readily tell you that he didn't want to do something and
18 that's why he didn't do it. So it was important for me to
19 try to figure out people who knew him, if they had observed
20 him actually doing those things 'cause the thing about
21 adaptive functioning is not necessarily a person knows how
22 to do something, it's will they do it regularly and
23 consistently, that they establish that behavior. So it's
24 not like I saw you do it one time, so I know you can do it,
25 right? It's that they use that skill consistently in order

1 to successfully navigate their independence or navigate,
2 you know, the world around us. And so none of the people
3 that I spoke with, nor the affidavits that I read, could
4 definitively say -- or even known definitive -- could
5 suggest that he could do these things consistently and
6 regularly with -- independently.

7 Q. If I could turn you to page 9 of your report,
8 specifically the section at the top, Behavioral
9 Observations, Mental Status Examination.

10 A. Yes.

11 Q. And is it fair to say that this goes specifically to
12 your observations of Mr. Stone when you saw him on May 23
13 of 2020?

14 A. Yes.

15 Q. All right. And Ms. Brown asked you about him being a
16 good historian. What do you -- when you use that term in
17 an evaluation like this, what do you mean by appeared to be
18 a good historian?

19 A. That he was able to give you historical information
20 about himself. So that he was able to talk about his
21 childhood, you know, where he went to school, his work
22 history, those types of things.

23 Q. Okay. And she asked you some questions about the
24 mental status examination, and I guess you referenced that
25 in that first paragraph under behavioral observations?

1 A. Yes.

2 Q. And what exactly is the mental status exam and its
3 purpose?

4 A. So a mental status exam is a series of questions that
5 we ask to determine -- to get a quick sense of functioning
6 of the person. So we're looking to see if they are alert,
7 to see if they are aware of the situation, like, why
8 they're there; if they are aware -- or present in reality.
9 We're looking to see if they have any mood symptoms that
10 could interfere with the questions or with the interview.
11 We're also looking at things like judgements. It's just a
12 sense of questions to make sure that the interview that you
13 get is grounded in reality, and there are no cognitive or
14 mental health symptoms that could be tainting the
15 information that you're getting.

16 Q. For example, you ruled out hallucinations.

17 A. Yes.

18 Q. Okay. And on -- there's a second paragraph in your
19 behavioral observation section. If you would, would you
20 please read that second paragraph into the record.

21 A. (As read): "It is important to note that during the
22 interview, Mr. Stone would become annoyed when required to
23 give more than superficial answer. He appeared very
24 concerned about appearing less capable than his peers.
25 When the examiner posed questions he did not know, multiple

1 times Mr. Stone would, let's just say sigh, and say, "I
2 don't know what to tell you," or "I don't understand the
3 question." This is not to suggest that he's trying to
4 present himself as more impaired, but rather how he
5 attempts to mask his deficits. This allows him to protect
6 his self-esteem and is indicative of his deficits in the
7 social/emotional coping skills."

8 Q. All right. Is that something that's typical of a
9 person with an intellectual disability?

10 A. You can find folks who have ID who present in that
11 way.

12 Q. And bear with me for just a second.

13 (Brief pause.)

14 I'm having a hard time finding the page, but you had a part
15 in your report regarding malingering.

16 A. Yes.

17 Q. And what can you tell or report about your conclusions
18 regarding malingering or lack thereof?

19 A. Yeah. Nothing -- I was not concerned about
20 malingering in this case. So it's on page 11, at the
21 bottom.

22 Q. Yes, ma'am. Thank you.

23 A. So I was able to look at the raw data from Dr. Boyd's
24 testing. My interactions with Mr. Stone -- and so I wasn't
25 concerned about him malingering, and in fact, the WISC --

1 or excuse me -- the WAIS-4 has some built-in malingering.
2 I guess I would say it's a validity indicator that's kinda
3 embedded in the test, and so, you know, he did not have
4 poor effort based on that embedded validity measure. So I
5 was confident that he was presenting what I was getting
6 from him and from the data was valid.

7 Q. And did you have any reason -- well, let me preface
8 that question. Yesterday we talked about school records
9 and the childhood testing, including the IQ testing.

10 A. Yes.

11 Q. Did -- without going through all of those again, did
12 you have any reason to doubt the validity of any of those
13 testing?

14 A. No. There was nothing in that testing that suggested
15 -- with the exception of what I learned about when he was
16 initially tested, that one psychologist who totally
17 regularly broke standardization -- nothing in the other
18 later testings suggested that those were not valid scores.

19 Q. Okay. There was some questions about the DSM-5-TR. I
20 think that you mentioned at one of the seminars that you
21 went to on Atkins, discussed some of the updates through
22 the DSM-5; is that right?

23 A. Yes.

24 Q. Okay. Does DSM-5 give some guidance with regard to
25 how to consider prong one with prong two, the adaptive

1 functioning?

2 A. Yes.

3 Q. And what is that?

4 A. A person has to meet all the criteria, but we aren't -
5 - again, we are charged with understanding that prong one
6 is not the most important prong, that it really needs to be
7 all of them; and if you're gonna give a little bit more
8 weight to anything, it's gonna be the functionality. That
9 prong two is gonna be important because if a person tests
10 slightly outside the range for ID, but cannot change that
11 that intellect and translate that into successful
12 functioning 'cause their adaptive deficits are so poorly,
13 then that's an important thing to take into account.

14 Q. Okay. Ms. Brown asked you some questions about
15 patterns within families and environmental factors and even
16 adolescent drug use.

17 A. Yes.

18 Q. In order to make a diagnosis of intellectual
19 disability, is it necessary to determine the cause of the
20 intellectual disability?

21 A. No, it's not.

22 Q. Okay. Are there risk factors that we look at or that
23 you look at more specifically in your field that are trends
24 with people that have intellectual disability?

25 A. I mean, there's things that we look at. Of course

1 we're gonna do -- take into account, you know, family
2 history, you know, affects of poverty; but intellectual
3 disability, the kids who are in an unenriched environment
4 that you would find in poverty, right, we take that into
5 account, but their performance in adaptive functioning and
6 intellectual functioning still needs to be sub-average in
7 order to get the diagnosis. So just because you're poor
8 doesn't mean that you will have intellectual disability.
9 So you can have a poor kid who has intellectual disability,
10 and a poor kid who doesn't have intellectual disability.

11 Q. Right. And I understand that, but that poverty in
12 childhood as a risk factor, that would still occur during
13 the developmental period; would that be fair to say?

14 A. Well, yeah.

15 Q. Okay. And there were some questions about marijuana
16 use as a teenager and whether that might affect somebody's
17 cognitive skills. If that occurred during the
18 developmental period -- I mean, as a teenager, that would
19 still be in the developmental period.

20 A. It would still be in a developmental period.

21 Q. Okay. And she asked you some questions about specific
22 skills that Mr. Stone has shown over time.

23 A. Yes.

24 Q. And a number of those skills -- yesterday you talked
25 about the different domains, the conceptual, practical, and

1 the social domains.

2 A. Yes.

3 Q. A number of the skills that she talked about were in
4 the practical domain; is that correct?

5 A. Yes.

6 Q. And can you give us some examples of what she asked
7 you about were in the practical domain?

8 A. Well, she asked me about working, his -- you know,
9 cutting wood, assisting other people, those kinds of
10 things.

11 Q. Okay. And in fact, in your report, on page 11, in the
12 second full paragraph, you stated that Mr. Stone has some
13 potential strengths in adaptive functioning, particularly
14 in practical skills domain, but by definition according to
15 the AAIDD, these cannot outlay significant limitations; is
16 that right?

17 A. Yes.

18 Q. All right. And so can you remind us do people with an
19 intellectual disability have relative strengths?

20 A. Yes, they do.

21 Q. Okay. And then -- and you acknowledge that with Mr.
22 Stone.

23 A. Yes.

24 Q. Okay. The -- some of the educational stuff that was
25 asked about, which domain does that come in?

1 A. That would be conceptual.

2 Q. All right. And did you find that Mr. Stone had
3 significant deficits in the conceptual domain?

4 A. Yes.

5 Q. All right. And was that present in the school
6 records?

7 A. Yes.

8 Q. And was that confirmed by your interviews --

9 A. Yes.

10 Q. -- and the records that you reviewed?

11 A. Yes.

12 Q. And how 'bout the social domain. Did he have deficits
13 there?

14 A. Yes.

15 Q. And was that shown by the school records --

16 A. Yes.

17 Q. -- and the interviews that you did --

18 A. Yes.

19 Q. -- and the records that you reviewed?

20 A. Yes.

21 Q. There was some question about other diagnoses. I
22 think learning disorder and antisocial personality
23 disorder. Can people with an intellectual disability, can
24 they have other comorbid diagnosis?

25 A. Yes.

1 Q. And what do we mean by "comorbid"?

2 A. Meaning that they meet criteria for more than one
3 diagnoses.

4 Q. Okay. And I think in some of your answers you talked
5 about sort of the, I guess, evolution of some of the terms
6 and what we've learned about intellectual disability
7 providing resources in schools?

8 A. Yes.

9 Q. And she showed you a statute section?

10 A. Yes.

11 Q. Do you know if that's been amended since Bobby Stone
12 was in school one way or the other?

13 A. I don't -- I would imagine that it has been because
14 those are no longer the terms that schools use. So I
15 imagine current statute would reflect what -- how currently
16 schools classify kids.

17 Q. All right. And you don't know if she showed you the
18 current statute or the statute that was in effect in the
19 1970s.

20 A. No, I have no idea.

21 Q. Okay. Now, sometimes, you know, there -- there were
22 some questions about, "Well, he missed school. He just
23 didn't like school." Is it -- have there been times where
24 or is it -- let me rephrase that question. Did you take
25 those considerations into account in reaching your

1 conclusion?

2 A. Yes. Because being undereducated does not necessarily
3 mean someone is low IQ.

4 Q. And it -- has there been times in the history of our
5 state where people have missed the diagnosis of
6 intellectual disability because ---

7 MS. BROWN: Objection.

8 Q. --- what he's ---

9 MS. BROWN: Relevance.

10 MR. GROSE: That is directly relevant.

11 THE COURT: What was -- finish your question.

12 Q. Well, the suggestions been made that --

13 THE COURT: Well, what -- finish your question.

14 MR. GROSE: Okay.

15 Q. Have there been times where people have missed the
16 diagnosis in children of intellectual disability, and just
17 attributed it to laziness or lack of effort?

18 THE COURT: And your position is, Ms. ---

19 MS. BROWN: Relevance, Your Honor. Whether any
20 particular case has an issue or not is independent of any
21 fact or circumstance of the diagnosis in Mr. Stone's case.

22 MR. GROSE: I think she's an expert. She can deal
23 with answer -- that's not really hypothetical, but it's
24 within the -- her knowledge.

25 (Brief pause.)

1 THE COURT: Does it relate to some misdiagnosis in
2 this case?

3 MR. GROSE: No. I think that the State was suggesting
4 that she made a misdiagnosis because Mr. Stone had poor
5 attendance or didn't put forth a good effort or was lazy.
6 And so this is in response to the questions -- the
7 suggestions that they made, and I wanted Dr. Hall to be
8 able to respond to those extenuations.

9 MS. GROSE: Your Honor, I ---

10 THE COURT: The question as posed; the objection's
11 sustained.

12 MR. GROSE: Okay. All right.

13 BY MR. GROSE:

14 Q. Ms. Brown had asked you some questions about school
15 attendance or lack of effort regarding Mr. Stone in school.
16 Do you consider -- did you consider that in making your
17 diagnosis?

18 A. Yes.

19 Q. And what is your response to the suggestion that Mr.
20 Stone is just lazy or just didn't want to go to school?

21 MS. BROWN: Objection. Mischaracterization.

22 THE COURT: I can't get into that. I have to weigh
23 the evidence, but I can't get into deciding whether
24 something's characterized one way or another. You wish to
25 be heard any further?

1 MR. GROSE: No, sir.

2 THE COURT: Ms. Brown, wish to be heard any further?

3 MS. BROWN: No, sir.

4 THE COURT: Go ahead.

5 BY MR. GROSE:

6 Q. You can answer the question.

7 A. That was excitement. Can you repeat the question?

8 Q. Well, the suggestion that Mr. Stone, his school
9 performance was just because he didn't attend or just
10 because he was lazy and didn't put forth the effort, what's
11 your response to that?

12 A. Oh. I took into account that, you know, there were
13 gaps in attendance, and it's not unusual for folks who
14 struggle in school to avoid it; and so to me that was part
15 of the suggestion that he was struggling in school and that
16 was difficult for him. So he chose not to continue. So
17 that's not outside of what you find in people who have
18 intellectual disability who weren't in environments that
19 were particularly supportive.

20 Q. Okay.

21 MR. GROSE: I beg the Court's indulgence for a moment.

22 THE COURT: Yes, sir.

23 (Brief pause.)

24 MR. GROSE: Thank you, Dr. Hall. That's all the
25 questions I have at this time.

1 THE COURT: Re-cross.

2 MS. BROWN: Thank you, Your Honor.

3 RE-CROSS EXAMINATION

4 BY MS. BROWN:

5 Q. You were just asked about a suggestion that Mr. Stone
6 was lazy. Did you consider Mr. Stone lazy?

7 A. Not at all.

8 Q. No. And he did a lot work that he was very proud of.

9 A. Yes.

10 Q. Right. So it's not a suggestion that he's lazy, that
11 he decides he doesn't want to attend school or that he
12 wants to do marijuana or that he wants to turn to a life of
13 crime. That's not lazy, is it?

14 A. No.

15 Q. Okay. You were asked about your perception of Mr.
16 Stones' intent or motivation. You read into the record
17 second paragraph on page 9, and that's exactly what you had
18 said before. Your impression was that he was attempting to
19 mask.

20 A. Yes.

21 Q. That's not a change, is it?

22 A. No.

23 Q. No. Okay. That was just your impression, but other
24 people could have different impressions or he could have
25 different motivation.

1 A. True.

2 Q. Okay. And I'd like to end where we began, back at
3 your conclusion page, please, ma'am.

4 A. Yes.

5 Q. Page 12 of the report. You were also asked on
6 redirect a little bit about Atkins and how Atkins flows
7 into your conclusion here. Atkins is, of course, a legal
8 case.

9 A. Yes.

10 Q. The clinical definitions and the clinical profession -
11 - professional standards, they inform, but they don't
12 dictate what we're doing in this proceeding, correct?

13 A. That is correct.

14 MR. GROSE: Objection. Calls for a legal conclusion.

15 THE COURT: Overruled.

16 Q. And that is actually in your report.

17 A. Yes.

18 Q. And you concede that this is your opinion. Other
19 professionals may disagree, and the Court will have to take
20 all the information into consideration.

21 A. Definitely.

22 MS. BROWN: No further questions, Your Honor. Thank
23 you.

24 THE COURT: Thank you, Doctor. You may step down.

25 Court's in recess for 10 minutes.

1 THE WITNESS: Am I excused, Your Honor?

2 THE COURT: Any objection to the witness being
3 excused?

4 MS. BROWN: No, sir.

5 THE COURT: You're free to go. Thank you very much.

6 THE WITNESS: Thank you.

7 (Whereupon, the witness stepped down from the stand.)

8 MR. GROSE: Mr. Stone rests.

9 THE COURT: Okay. We need to wait on Ms. Brown?

10 MR. EVANS: She had to call the office about a
11 decision that came down by the Supreme Court today. So we
12 can proceed.

13 THE COURT: Be happy to give y'all a few minutes if
14 you need it.

15 MR. EVANS: I think we -- I think next witness --
16 ready for the next witness.

17 THE COURT: Okay. All right. Call your witness,
18 please.

19 MR. EVANS: The State would call Dr. Michael Vitacco
20 to the stand, please.

21 THE COURT: Come around, please.

22 (The witness complies.)

23 DR. MICHAEL VITACCO,
24 having been first duly sworn, testifies as follows:

25 COURT CLERK: State your full name, please, sir.

1 THE WITNESS: Michael Vitacco.

2 COURT CLERK: And spell your last name.

3 THE WITNESS: V, as in Victor, - i-t-a-c-c-o.

4 DIRECT EXAMINATION

5 BY MR. EVANS:

6 Q. Okay. Good morning, Dr. Vitacco. How you doing
7 today?

8 A. Good morning.

9 Q. Dr. Vitacco, where do you currently work?

10 A. I am a professor in school public health at Augusta
11 University. I'm a full professor adjunct in the Department
12 of Psychiatry and Health Behavior at Augusta University. I
13 also have a small consulting private practice where I do
14 forensic evaluations.

15 Q. Okay. And Doctor, what are your job responsibilities?

16 A. In the School of Public Health, I am responsible for
17 teaching, conducting research, supervising students. I
18 teach both in the School of Public Health as well as the
19 School of Medicine. For my consulting practice, I do
20 various cases for -- in the State of Georgia, South
21 Carolina, North Dakota, Wisconsin.

22 Q. And do you currently have a license or certifications?

23 A. I am licensed to practice psychology in the four
24 states I mentioned. I also am Telehealth, which allows me
25 to practice psychology in any state that has that

1 reciprocity. I am also board certified in forensic
2 psychology by the American Academy of Professional
3 Psychology.

4 Q. Okay. Are you a member of any associations?

5 A. Member of the American Psychology and Law Society, as
6 well as the International Forensic Mental Health
7 Association.

8 Q. Okay. And could you tell the Court about your
9 education.

10 A. Sure. I have a bachelor's degree in psychology from
11 the University of Wisconsin Oshkosh. I have a masters and
12 a Ph.D. in clinical psychology from the University of North
13 Texas. I completed my internship in clinical psychology
14 and forensic psychology in a program administered by the
15 University of North Carolina School of Medicine, which was
16 currently sponsored by the United States Department of
17 Justice, and I completed a fellowship in forensic
18 psychology at the University of Massachusetts School of
19 Medicine, in their Department of Psychiatry, in forensic
20 psychology.

21 Q. And could you tell the Court about any prior faculty
22 positions that you had, sir.

23 A. Well, addition to the faculty positions at Augusta
24 University, I am also a adjunct professor currently at St.
25 Johns University in New York, and I also worked at a school

1 in Milwaukee as an adjunct faculty named Cardinal Stritch,
2 in their masters program in clinical psychology.

3 Q. And you were -- you actually have a book under
4 publication right now?

5 A. I edited a published book on social media and the law
6 in forensic psychology. I also have a book under contract
7 with Oxford University Press dealing with the insanity
8 defense, and have published about 120 other papers and book
9 chapters in the field of forensic psychology and mental
10 health law.

11 Q. Okay. And how many -- have you ever testified in
12 court ---

13 A. I have.

14 Q. How many times have you testified?

15 A. I haven't kept track over my career, but it's probably
16 close to 100 at this point.

17 Q. Okay. Those were civil or criminal trials?

18 A. Primarily criminal, but some civil as well.

19 Q. Okay. And ever been denied acceptance in a particular
20 field as an expert?

21 A. In the field of forensic psychology, no. I've never
22 been denied qualifications as an expert.

23 Q. Okay. And have you given IQ tests in your profession?

24 A. I have.

25 Q. How many times?

1 A. 40 or 50.

2 Q. Okay.

3 (Mr. Evans hands documents to the witness.)

4 Q. Dr. Vitacco, I show in this case Exhibit 1. Do you
5 recognize that?

6 A. Yes.

7 Q. And could you tell the Court what that is.

8 A. Appears to be a copy of my curriculum vitae.

9 Q. Okay. Is that a recent copy?

10 A. It's from February of 2024. There's been a couple of
11 additions since then, but it's relatively recent.

12 Q. Okay.

13 MR. EVANS: Your Honor, at this time, I would like to
14 enter State's Exhibit No. 1, the curriculum vitae of Dr.
15 Vitacco, into evidence.

16 THE COURT: Any objection?

17 MR. EVANS: Also at this time ---

18 THE COURT: Oh. Hold on a second. Any objection?

19 MR. GROSE: I'm sorry. No objection.

20 THE COURT: Mark 1, in evidence, please.

21 MR. EVANS: Also at this time ---

22 THE COURT: Wait a second.

23 MR. EVANS: --- I would like to offer Dr. Vitacco --
24 excuse me.

25 (Brief pause.)

1 THE COURT: Mark 1 in evidence, please.

2 COURT REPORTER: Yes, sir.

3 MR. EVANS: Also, Your Honor, I'd like to offer ---

4 THE COURT: Wait a second.

5 (Marked State's Exhibit No. 1, CV of Dr. Vitacco, in
6 evidence.)

7 THE COURT: Okay. Now, Mr. Evans.

8 MR. EVANS: Thank you, Your Honor. At this time, I'd
9 like to offer Dr. Vitacco as an expert in the field of
10 forensic psychology.

11 THE COURT: Voir dire?

12 MR. GROSE: No, sir.

13 THE COURT: He is so recognized. Thank you very much.

14 MR. EVANS: Thank you, Your Honor.

15 BY MR. EVANS:

16 Q. Now, Dr. Vitacco, when were you first contacted by our
17 office?

18 A. As I best recall, it was January of 2023.

19 Q. Okay. And what were you asked to do when we contacted
20 you?

21 A. Well, initially it was more like there was
22 considerations for a -- several things that I might do.
23 Ultimately, it was just to consider the methodology of the
24 other two psychologists and how they rendered their
25 opinion.

1 Q. You were never asked to give an opinion regarding
2 intellectual disability, were you?

3 A. Ultimately I was not asked to do that. That's
4 correct.

5 Q. And do you remember what records that you reviewed in
6 order to prepare for this testimony?

7 A. The primary records I reviewed were the three reports
8 that were proffered by the other two experts.

9 Q. Okay. And do you have any concerns about the
10 methodology used by doctors -- Drs. Boyd and Hall?

11 A. I do.

12 Q. And the -- what are those concerns?

13 A. There were several. First of all, was the shared data
14 and the shared interviews that were conducted, and second
15 of all, have to do with the evaluation and assessment of
16 adaptive functioning; and of course, kinda related to all
17 that was the issue with the test of memory malingering, how
18 that was integrated into the report and the rationale
19 behind its use and ultimate integration.

20 Q. Okay. What do you feel was wrong with the methodology
21 by Drs. Hall and Boyd in sharing information?

22 A. Well, I think often what happens is -- and this is
23 very common. It's something called "Groupthink". You get
24 into an idea where you're sharing information and sharing -
25 - as you share data, you develop those opinions together.

1 They spoke about -- which I knew about from reading the
2 reports, that the interviews were done together. The IQ
3 testing was only done by Dr. Boyd and relied upon solely by
4 Dr. Hall in forming her opinion. She indicated during her
5 testimony that she considered herself -- I think the word
6 was amicus psychologist, meaning "friend of the Court,"
7 suggesting that she was completely objective and neutral,
8 but she relied very much on the data provided to her by Dr.
9 Boyd.

10 She said she re-scored the test, but from a IQ test,
11 there are several sub scales that cannot be re-scored or
12 scored unless you're actually with the individual you're
13 administering the test to.

14 Q. Okay. Now, Dr. Boyd -- the two reports, what was your
15 concern about that?

16 A. Well, first of all, I was unclear why she authored a
17 second report. There were some relatively significant
18 changes, especially related to the integration of the TOMM
19 in the 2023 report that was not present in the 2022 report,
20 and that is especially clear; but since she administered
21 the test I believe in 2020 or 2021. So she would have had
22 access to it.

23 Notably, Dr. Hall -- and this goes to, again, sharing
24 data, Dr. Hall was aware or at least appeared to be aware
25 in her report that the test of memory malingering was

1 given. She referenced it based on a conversation she had,
2 even though it was not included in Dr. Hall's original --
3 or Dr. Boyd's original report. Then, in 2023, in the
4 second report, now there's a discussion of the test of
5 memory malingering which came from out of nowhere.

6 The other issue was that it was administered -- the IQ
7 test was administered in 2017. The test of memory
8 malingering was given over 800 days later. That is so far
9 away from best practices and standardization. I -- in my
10 30 years of clinical forensic practice, I've never seen
11 such a thing, and the rationale for that still -- even
12 after listening to the testimony yesterday, I still do not
13 understand it.

14 Q. Okay. When is the TOMM usually given?

15 A. It's using -- it's given contemporaneously at that
16 time you are doing your interview and your testing, so you
17 can get a look at that individual's performance on that day
18 in question.

19 Q. Okay. So what is wrong by doing -- doing the TOMM 800
20 days after the test?

21 A. It provides you no information about the individual's
22 effort in that day in question. It -- again, so we're
23 talking over two years. Response, response style, and
24 effort is not static. It changes over time, it is dynamic;
25 and therefore, even as Dr. Boyd indicated, that was why

1 most psychologists will give effort testing on the day in
2 question that they're doing cognitive testing or
3 neuropsychological testing. The fact that it was -- it was
4 not done at that time and then sort of suggested that that
5 was okay is not accurate.

6 Q. Now, you would agree that before a person is
7 diagnosed as intellectually disabled, there has to be some
8 deficiencies of adaptive functioning.

9 A. Absolutely.

10 Q. Okay. And exactly what is adaptive functioning?

11 A. Well, it's been talked about a lot the last day and a
12 half, but it really has to do with those three components
13 and individual's ability to manage their life outside of a
14 facility and, within the community, how they get by in the
15 community on their own.

16 Q. Okay. And what was concern that you had with the
17 methods Dr. Boyd used to make the determination of adaptive
18 functioning?

19 A. Well, the biggest thing I thought was almost at some
20 point just unfair bar. She spoke about how, like, in his
21 employment, he wasn't using mathematical skills, reading
22 skills, similar to I believe the exact words were engineer
23 and lawyer were in the report; and a lot of folks don't do
24 those things and does not make them have an intellectual
25 development disorder. The second issue -- and this is just

1 as big -- is I think a lot of the issues indicated that
2 were deficits in adaptive functioning may not actually be
3 deficits.

4 Q. Why do you say that?

5 A. Well, let's consider the fact of somebody that was
6 maybe that he was easy to get along with and easily
7 gullible and people would come and take his car and they
8 stole his car and that seemed to be okay. That on its face
9 sounds like an issue. On the other hand, we don't know
10 because it was not discussed why someone was taking the
11 car. Were they taking his car to acquire illicit
12 substances, to get marijuana, to use -- to go get alcohol.
13 Was the car returned. Was somebody going to work and
14 coming back. There's all sorts of things that -- and
15 questions that could have been answered to dig deeper into
16 that, that at least was not discussed in the report, that
17 would have provided very, very important contextual
18 information, and that was just one example.

19 Q. Okay. Dr. Boyd also talked about the adaptive
20 functioning questionnaire that someone would -- may not be
21 able to fill it out. What is your perception regarding
22 that and the family's ability to assist Mr. Boyd -- I mean,
23 Mr. -- the ...

24 A. Mr. Stone.

25 Q. Mr. Stone.

1 A. Correct. Well, it was kind of a contrast, right. She
2 says that they were unable to fill out the questionnaire,
3 but yet she relied on them strongly for making opinions
4 related to adaptive diagnostics; and she certainly could
5 have dug in deeper with those questionnaires, but -- so
6 instead, there are too impaired to fill out a
7 questionnaire, but yet they're appropriate to provide her
8 with adequate information regarding his overall functioning
9 developmentally and currently. Those two things just, in
10 my opinion, did not really jive in a way that made a lot of
11 sense.

12 Q. Do you think Dr. Boyd's opinion was objective?

13 A. I do not.

14 Q. And why is that?

15 A. I think, again, she looked for the things that she
16 wanted to look for --

17 MR. GROSE: He's pitting the witness. We would
18 object.

19 THE COURT: You wish to be heard?

20 MR. EVANS: Excuse me?

21 THE COURT: Do you wish to be heard?

22 MR. EVANS: Yes. I don't think he's pitting
23 witnesses. I think that he's making an opinion regarding
24 the work that Dr. Boyd has done in this case.

25 THE COURT: One witness can't say whether the other

1 witness is telling the truth. If it's couched in terms of
2 something other than that, he may ask the question.

3 MR. GROSE: Okay.

4 BY MR. EVANS:

5 Q. What is your opinion regarding romantic partners and
6 Dr. Boyd's assessment on that?

7 A. Well, my opinion was, again, it wasn't -- it wasn't --
8 it wasn't explored enough because -- and I think it was
9 pointed out even by Dr. Hall, that in individuals in
10 relationships, whether they're married, paramours, whatever
11 the case may be, is work roles tend to be defined. So the
12 fact that somebody was the primary income earner versus
13 someone who was taking more care of the -- inside the home
14 versus the individual who was working on the outside of the
15 house, I think that says very, very little ultimately about
16 someone and their diagnosis of intellectual development
17 disorder. More to the point, if that's the criteria, there
18 are a lot of individuals in our society today that have
19 very similar arrangements, especially -- and again, this is
20 no judgement, but if you look at people of maybe my
21 generation and older, that's very, very -- it's not
22 atypical.

23 Q. Okay. Now, did you read the report of Dr. Hall?

24 A. I did.

25 Q. Okay. Now, Dr. Hall relied on the voir dire of Dr.

1 Boyd. Was is your concern about that?

2 A. Well, my concern is that, again, that she presented
3 herself as a amicus witness, and she would have had ample
4 opportunity to conduct independent cognitive testing as
5 part of her task of making the determination whether Mr.
6 Stone met the criteria one of a intellectual development
7 disorder.

8 Q. Now, let's talk about the Flynn effect. Of course,
9 you are aware of the Flynn effect.

10 A. I am.

11 Q. Okay. Do you normally use the Flynn effect when you
12 do testing?

13 A. I don't.

14 Q. Okay.

15 A. But I want to be very clear. I often -- and I have
16 not done Atkins evaluations.

17 Q. Okay.

18 A. So I just want to be very up front and honest about
19 that. I have not been asked to ever do those.

20 Q. Okay. And the Flynn effect is normally just used in
21 Atkins evaluations.

22 A. As best as I understand it, and even where the
23 literature talks about it, that is where the primary area
24 of the Flynn effects use are.

25 Q. Okay. Now, are you aware that there's some studies

1 how the Flynn effect actually reversing?

2 A. There's been a recent meta-analysis that suggested
3 that and it was in a Scandinavian country, but there was
4 also another meta-analysis that indicated I believe with a
5 more international and included the United States that it
6 is slowing, and again, how that applies to people -- that --
7 - that's why it's controversial is that people use it and
8 yet it always lowers the IQ that's received, but it is
9 controversial and even individuals who conduct Atkins
10 evaluation it is not always used.

11 Q. So would you have followed the protocol used by Dr.
12 Hall and Dr. Boyd in making a determination?

13 A. I think that's a -- that's a complicated question.
14 The issue was not the overall protocol it -- as much -- it
15 was the issue as how it was used, how these data were
16 shared, how these data were not independently corroborated.
17 So I think it -- part of it was the overall framework of
18 the evaluation was appropriate. What, in my opinion, was
19 inappropriate was these joint effort when you're then
20 suggesting you're an independent expert and you're an
21 independent expert.

22 Q. Okay. But Dr. Boyd was hired by the Defense.

23 A. Dr. Boyd was hired by the Defense.

24 Q. Okay.

25 MR. EVANS: Nothing further, Your Honor.

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THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. GROSE:

Q. And Dr. Vitacco, you were hired by the Attorney General's Office.

A. Yes.

Q. Okay. And I think that you testified earlier that you never conducted an Atkins evaluation?

A. That's correct.

Q. Never been asked to conduct an Atkins evaluation?

A. That's correct.

Q. That as part of your -- that your involvement in this case included reading the reports of Dr. Boyd?

A. And Dr. Hall, correct.

Q. And Dr. Hall. Yes. You have not interviewed Bobby Stone, have you?

A. No.

Q. Never even met Bobby Stone?

A. That's correct.

Q. All right. You've not conducted any collateral interviews in this case.

A. That's correct.

Q. And you just testified that the only records that you looked at are the two reports?

A. Three ---

1 Q. Three reports. My mistake. The three reports from
2 the two experts.

3 A. Yes, sir.

4 Q. Okay. And I think you also testified that you've not
5 been asked to make a diagnosis in this case?

6 A. That's correct.

7 Q. And so nothing that you say here today should be
8 construed as making that diagnosis?

9 A. Yes, that's correct.

10 Q. Okay. And I think that, you know, you testified in
11 the -- in your deposition that personally you wouldn't use
12 the Flynn effect, but it's a judgement call.

13 A. That's correct.

14 Q. And you didn't have any criticism of either of the
15 experts for using it or how they used it?

16 A. That's correct.

17 Q. Okay. And with regard to the Flynn effect, you're
18 aware that it's mentioned in the purple book?

19 A. AAIDD?

20 Q. Yes.

21 A. Yes.

22 Q. And then the AAID manual, the purple book, is not
23 limited to just Atkins cases, is it?

24 A. It is not limited to Atkins cases, but again, there
25 seems to be -- that where there's a disconnect as it seems

1 that in clinical settings, in school settings that I'm very
2 familiar with, that the Flynn effect is often not applied -
3 - applied at all. It seems to take issue in Atkins
4 evaluations.

5 Q. Okay. But you would agree that the purple book is not
6 limited to just Atkins cases.

7 A. As best as I understand that, that's correct.

8 Q. And the DSM-5-TR is not limited to just Atkins cases.

9 A. That's correct.

10 MR. GROSE: That's all the questions I have at this
11 time, Your Honor.

12 THE COURT: Redirect.

13 MR. EVANS: Redirect, Your Honor?

14 THE COURT: Yes.

15 REDIRECT EXAMINATION

16 BY MR. EVANS:

17 Q. Dr. Vitacco, the DSM-5 doesn't put that there is best
18 practice to use the Flynn effect, does it?

19 A. Well, the DSM-5 only mentions the Flynn effect as --
20 the new text revision on -- I think on one occasion, and it
21 uses the word "may."

22 MR. EVANS: Nothing further, Your Honor.

23 MR. GROSE: No re-cross.

24 THE COURT: Okay. Thank you, Doctor. You may step
25 down.

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THE WITNESS: Thank you.

MR. EVANS: May Dr. Vitacco be excused, Your Honor?

THE COURT: Any objection?

MR. GROSE: No objection.

THE COURT: No objection. You're free to go, Doctor.

Thank you, sir.

THE WITNESS: Thank you, Your Honor.

(The witness exits the stand.)

THE COURT: Call your next witness.

MR. EVANS: State would call Dr. Kimberly Kruse to the stand.

THE COURT: Would you come around, please.

(The witness complies.)

KIMBERLY KRUSE,
having been first duly sworn, testifies as follows:

COURT CLERK: State your full name and spell your last name for the records, please, ma'am.

THE WITNESS: Kimberly Kruse.

DIRECT EXAMINATION

BY MR. EVANS:

Q. Good morning, Dr. Kruse.

A. Good morning.

Q. Okay. Dr. Kruse, where do you currently work?

A. I work at Prisma Health. I'm chief neuropsychologist there, and I have some other things I do. Would you like

1 for me to go into those?

2 Q. I can go into it.

3 A. Okay.

4 Q. And tell the Court your educational background.

5 A. I completed my undergraduate degree at the University
6 of Central Florida. I was a major in psychology, double
7 major -- or double minor -- I'm sorry -- in Spanish and
8 sociology; and then I went on to complete my doctoral
9 degree at the American School of Professional Psychology
10 Tampa University; and then did my subsequent training
11 internship residency training at Johns Hop -- it's a Johns
12 Hopkins affiliate program through the John L. Gildner
13 Regional Institute in Maryland. Then I did my post-
14 doctoral training for neuropsychology at Prisma Health,
15 which was formerly Palmetto Health.

16 Q. Okay. And currently in what capacity do you work in -
17 - work at Prisma Health?

18 A. I'm currently chief neuropsychologist and it's along
19 side the University of South Carolina School of Medicine.
20 I'm a professor in the Department of Neuropsychiatry and
21 Behavioral Medicine.

22 Q. Okay. Are there any other employments that you
23 currently work at right now other than Prisma Health?

24 A. I have privileges with MUSC, the Medical University of
25 South Carolina. I perform neuropsychological consultations

1 with them, and I also am team neuropsychologist for the
2 Gamecocks, University of South Carolina Gamecocks, where I
3 do evaluations, psychoeducational evaluations or
4 evaluations after sports injuries; and I am with the V.A.
5 as well. I do compensation and pension exams.

6 Q. Okay. Do you -- are you a member of any professional
7 associations?

8 A. I am.

9 Q. Which associations are those?

10 A. So I've been involved with American Psychological
11 Association, the South Carolina Psychological Association;
12 and I've done some work with the South Carolina Bar
13 Association, but I'm not a member.

14 Q. Could you tell the Court about any prior employment
15 experiences you have.

16 A. Prior. I did work with the Department of Juvenile
17 Justice, where I did psychoeducational exams, which did
18 involve intellectual functioning and learning disorder; and
19 I was employed in those previous internship positions where
20 I performed the same tasks.

21 Q. Okay. Have you ever testified in court before?

22 A. I have.

23 Q. How many times?

24 A. 50 times or so. It's hard to estimate.

25 Q. Were those -- were those both civil and criminal

1 courts?

2 A. Correct.

3 Q. Have you ever been denied testifying as an expert in a
4 particular field?

5 A. No.

6 Q. And have you ever conducted an IQ test?

7 A. I have.

8 Q. How many -- how many you believe you've conducted?

9 A. Again, I don't have a specific list. Between 500 and
10 a 1000 times. Many.

11 THE WITNESS: Excuse me, Your Honor. May I have a --
12 or someone -- a cup...

13 THE COURT: Yes.

14 (Brief pause.)

15 Q. Dr. Kruse, I'll show you State's Exhibit 2. Do you
16 recognize this?

17 A. I do.

18 Q. Okay. What is that?

19 A. My curriculum vitae.

20 Q. Is that current?

21 A. It is. I need to update some continuing education,
22 and also I was a keynote speaker with the Bar Association
23 this last year, which is not on there; but other than that,
24 there's been no changes.

25 Q. Okay.

1 MR. EVANS: Your Honor, at this time, I'd like to
2 enter State's Exhibit No. 2, the curriculum vitae of Dr.
3 Kruse, into evidence.

4 THE COURT: Any objection?

5 MS. MAJOR: No objections, Your Honor.

6 THE COURT: Mark 2 in evidence, please, ma'am.

7 (Marked State's Exhibit No. 2, CV of Dr. Kruse, in
8 evidence.)

9 MR. EVANS: Also at this time, Your Honor, I'd like to
10 enter -- of offer Dr. Kruse as an expert in forensic
11 psychology.

12 THE COURT: Voir dire?

13 MS. MAJOR: No objection, Your Honor.

14 THE COURT: She is so recognized. Thank you.

15 MR. EVANS: Thank you, Your Honor.

16 BY MR. EVANS:

17 Q. Dr. Kruse, do you remember when you were contacted to
18 participate in this case?

19 A. I do.

20 Q. When was that?

21 A. January 24, 2024.

22 Q. Okay. And you were contacted by our office; is that
23 correct?

24 A. Correct.

25 Q. Okay. And what were you asked to do regarding this

1 case?

2 A. To review records and provide an opinion on
3 intellectual functioning.

4 Q. Okay. You were never asked to do a diagnosis, were
5 you?

6 A. No.

7 Q. Okay. And do you remember what records you reviewed
8 in order to form your opinion?

9 A. I reviewed the ones I had provided to you all --
10 anyway, you provided to me. I have a list of them. In
11 general, the warden's jacket, I have the reports of the
12 doctors that testified, as well as school records. I have
13 some affidavits from private investigator interviews with
14 family or close -- close ones to Mr. Stone. I have some
15 written statements or written requests that were done by
16 Mr. Stone just over the years in prison. I have the list
17 if you'd like for me to read from it.

18 Q. That's okay.

19 A. Okay.

20 Q. Now, you never performed any tests on Mr. Stone.

21 A. I did not.

22 Q. Okay. And you've never interviewed him.

23 A. I have not.

24 Q. Okay. You have previously said in your
25 deposition that Stone has what you believe is a non-verbal

1 brain disorder. Could you explain what that is?

2 A. It's as simple as it sounds. It's the non-verbal
3 aspects of learning. So anything that's not involving
4 language vocabulary. So more so visual spacial skills,
5 perceptual reasoning, being able to see the big picture or
6 the whole of something versus the details.

7 Q. Okay. And during your deposition, you also stated
8 that Dr. Harold Morgan diagnosed Mr. Stone as being --
9 having an antisocial personality disorder. Can you explain
10 what that is?

11 A. Correct. Antisocial personality disorder is actually
12 not what it sounds like. It's not someone who is avoiding
13 people. That's a different diagnosis. Antisocial
14 personality disorder is one that involves a pattern of
15 maladaptive behaviors over years that ignore social norms
16 or rules, tend to break laws, have difficulty with
17 impulsivity, someone who is possibly going to lack empathy
18 at times, and someone who might be out to get things for
19 themselves. It doesn't negate that there may be other
20 times that, that's not going on, but it's a general pattern
21 of behavior that's observed over years.

22 Q. And non-verbal learning disorder is different than
23 intellectual disability; is that correct?

24 A. Correct. They are not synonymous.

25 Q. Okay. And do you agree with Dr. Morgan's diagnosis of

1 antisocial personality disorder?

2 A. Based on what I'm able to glean from the records and
3 also that he had performed an exam that is well known and
4 did support the diagnosis, yes.

5 Q. Okay. And that is different than intellectual
6 disability also?

7 A. Correct.

8 Q. Okay. Now, of course the DSM-5 implies showing
9 deficits in intellectual functioning; is that correct?

10 A. For ...

11 Q. Intellectual disability you must have deficit of
12 intellectual functioning.

13 A. Correct.

14 Q. And how is that measured, deficit of intellectual
15 functioning?

16 A. By the test that we have all heard at length here, in
17 the court -- the Weschler tests are a best practice used,
18 the WAIS and the WISC. Psychometrically substantiated
19 tests.

20 Q. Okay. And do you know the four tests that Mr. Stone
21 was given?

22 A. I do.

23 Q. Okay. Do you know the scores of the tests?

24 A. Yes. Roughly. I don't want to speak without the
25 reports in front of me, but yes.

1 Q. He was given an 86 and then 78 and then -- 65 and
2 79 and then another 79, and he had a drop in scores between
3 11 -- when he was 11 and 14. Can you explain that?

4 A. Well, I -- my opinion on that would be I can't imagine
5 an individual or a patient of mine if I were evaluating
6 someone who would not have some degree of difficulty,
7 particularly in an educational environment, whether
8 concurrently living in quite a difficult setting, falling
9 asleep at school, missing school, moving it seems like
10 maybe eight, nine schools over the course of his
11 educational career. I would estimate that he would have --
12 certainly have a decrease in -- if it was a measured score,
13 that, that would be reflected in his school records at that
14 time.

15 Q. And his vocabulary level dropped also. Would you
16 explain what could be the purpose of that?

17 A. Sure. So you don't tend to see intellect from --
18 fluctuate over time, and what we've heard in testimony and
19 what we've seen in the records is there's a lot of
20 variability in Mr. Stone's performance. When we see that,
21 it's best explained usually by behavior or something else
22 that's going on versus and intellectual or an organic cause
23 in intellectual impairment. We don't have an intellectual
24 status that changes over the years unless there's a
25 significant brain insult or something like that, and in

1 those cases, it would align with that type of incident.

2 Here we have a lot of variability in someone who, again,
3 had a lot of life interference.

4 Q. Okay. Did you read Dr. Boyd's report?

5 A. I did.

6 Q. Did you check her -- the scores he made on her IQ
7 test?

8 A. I had requested raw data. Dr. Boyd went to many ---

9 Q. I'm not meaning any raw data. I mean did you -- did
10 you read the scores --

11 A. Oh. Yes, of course.

12 Q. -- in her report?

13 A. Yes. I'm sorry.

14 Q. I'm gonna show you what's marked as Applicant's
15 Exhibit No. 2, and those are the scores of his IQ test.
16 This is page 9 of 14. Now, the only score that was low on
17 the IQ test is perceptual reasoning; isn't that correct?

18 A. Correct. That's the lowest score.

19 Q. Okay. And can you explain what is perceptual
20 reasoning?

21 A. It aligns with what I had described about a non-verbal
22 learning disorder perception. So how one perceived the
23 environment and then how one is able to reason with it.

24 It's a -- very much a non-language based measure.

25 Typically for individuals that are right handed, this would

1 involve the right hemisphere.

2 Q. Okay. Does this low score reveal intellectual
3 disability?

4 A. So any time you have a disparity in index scores, as
5 someone as an evaluator or as the doctor in a case like
6 this, it's important to be able to explain why it's there.
7 So when we look at intelligence or cognitive functioning,
8 most people are not just even across the board. A lot of
9 people have variability, but there is something called
10 "esthetically significant variability," and that's what we
11 see here. If you look at the 15 percent competence
12 interval that we've all discussed and it's been applied,
13 there's more than a 20 point gap between his highest index
14 score and his lowest and that equates to learning disorder.
15 Fortunately, it sounds like maybe for a little bit of time
16 in the fourth grade, someone was able to identify that, and
17 he did get that term added onto him; but that's what I see
18 here. That's what -- that's the way you would describe
19 this data.

20 Q. Okay. At 14, he was diagnosed with being atypical
21 mentally handicapped. Could you explain what is that?

22 A. Sure. So it's a term used in the school systems.
23 It's classifying someone that might have learning
24 difficulties, but that they can learn. And so that's how
25 they place them in supportive environments versus the other

1 term, which would be educable training handicapped. That
2 would go into a setting of it being more vocational or
3 basic task driven versus general learning.

4 Q. Can you go from being a learning disabled to being
5 intellectually disabled and in like a three-year span, like
6 Mr. Stone was tested and diagnosed?

7 A. You can have a learning disorder and intellectual
8 developmental disorder. I guess if someone -- you would
9 not have a decline in organic cognitive functioning, no.
10 You would not expect to see that unless there had been,
11 again, some type of acute brain insult; but you can have
12 both, but both -- they're not synonymous with each other.

13 Q. And in your opinion, do you feel that he had a
14 learning disability or was intellectual disabled?

15 A. I believe he has a learning disability.

16 Q. And can you say why you believe he has a learning
17 disability?

18 A. The scores show that he did not have an intellectual
19 developmental disorder.

20 Q. Okay.

21 A. Even when applying competence intervals, I'm sure
22 we'll discuss the Flynn effect.

23 Q. Yes.

24 A. His scores fall above the cut off.

25 Q. Okay. Did you notice that the TOMM was done two years

1 after the actual IQ test was done?

2 A. I did.

3 Q. Okay. And can you explain exactly what the TOMM is?

4 A. This is something I do with my residents. I can.

5 It's confusing. It's called the "test of memory

6 malingering," which is a horrible term. It's actually --

7 it was developed by a man named TOMM TOMM. It's a very odd

8 -- very odd situation. It is a test of effort and it can

9 pick up malingering, but it's meant to guide the person

10 administrating the testing on how to proceed next. So it's

11 kind of a gauge on how well can this person participate

12 with what we're about to do. It doesn't -- if someone does

13 not do well, it doesn't mean they're necessarily

14 malingering. It could be because they're very depressed,

15 they can't provide the amount of effort necessary. There's

16 many reasons, but it's a validity test that's administered

17 prior to a bat -- testing battery.

18 Q. So it's normally administered prior to, not two years

19 after.

20 A. I've never seen that done before except for in this

21 case.

22 Q. Okay. It was -- if was given two years after, are the

23 results reliable?

24 A. I'm not sure what it would be measuring. It would not

25 apply to anything done previously. Certainly not to years

1 before.

2 Q. Okay. Now, in reading the records and looking at the
3 report, did you find deficits in adaptive functioning for
4 Mr. Stone?

5 A. I found the opposite. I think there's many examples
6 of Mr. Stone performing well across domains. He had
7 sustainable relationships, long-term relationships. He
8 drove a car. He was promoted in a job position. He chose
9 to live with people and do certain tasks in the home, which
10 I don't find atypical of -- I -- I mean, as I think Dr.
11 Vitacco had discussed, that's very common. I think there's
12 many things that we can find to help support his abilities
13 in those areas.

14 Q. Okay. And let's talk about the Flynn effect. Do you
15 apply the Flynn effect on your tests?

16 A. I do not. I will say this, I do think there's a place
17 for the Flynn effect in certain instances. For example,
18 the first IQ test that was performed on Mr. Stone was --
19 there was a large span there. I think the Flynn effect can
20 be used to gauge someone's performance in a case like that,
21 but only that first case and -- first test; and in that
22 test, if you apply it, his scores are still within range.
23 In the other case, and especially the second time the test
24 was performed, I think we all agree, everyone who's
25 testified up here, and I agree as well, there actually is

1 no reason to apply the Flynn effect in that case; and in
2 that case, the score is well above the cut off for
3 intellectual developmental disorder and that is before the
4 developmental period lapsed.

5 Q. Okay. So the Flynn effect is not mandatory. It
6 doesn't have to be applied.

7 A. No. It is not mandatory.

8 Q. And within the degree of medical certainty, what is
9 your opinion regarding the intellectual disability of Mr.
10 Stone?

11 A. He does not meet criteria for it.

12 Q. Okay. And how did you come to this conclusion?

13 A. There's a preponderance of data to support that.

14 Q. To support that he's not intellectual disabled.

15 A. Correct.

16 Q. Okay.

17 MR. EVANS: Beg the Court's indulgence.

18 THE COURT: Yes, sir.

19 (Brief pause.)

20 MR. EVANS: No further questions.

21 THE COURT: Cross-examination.

22 MS. MAJOR: Yes, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. MAJOR:

25 Q. Hi, Dr. Kruse.

1 A. Hi, Ms. Brown.

2 Q. I ---

3 A. I'm sorry. Ms. Major.

4 Q. I'm gonna ---

5 A. I apologize.

6 Q. I'm gonna go back a little bit. So I know at the
7 beginning you have talked a bit about your background and
8 the work that you've done in court, and I think you said --
9 you testified that you have testified in both civil and
10 criminal cases, but earlier in your deposition, you said
11 you've only testified in two criminal cases; is that right?

12 A. Yes.

13 Q. And I think you also said that only one of those was a
14 capital case.

15 A. Correct.

16 Q. And in that capital case, it did not involve issues of
17 whether or not the person was ineligible for the death
18 penalty, because of Atkins ---

19 A. Correct.

20 Q. So you've never done an Atkins case before?

21 A. I have not until now.

22 Q. And I think that -- I want to go back to
23 where you just ended with Mr. Evans. So I think you said
24 earlier on the stand here today that you are not offering a
25 diagnosis about whether or not Mr. Stone is a person with

1 intellectual disability?

2 A. Correct.

3 Q. And -- but you said your opinion is that he did not
4 meet the diagnostic criteria, and I think you said that you
5 had not met him before, and so you've never clinically
6 interviewed him; is that right?

7 A. That's correct.

8 Q. Okay. And you actually have never seen him before
9 until today -- or I guess yesterday when you came to court.

10 A. Yes.

11 Q. And I think you said you're a member of the APA; is
12 that right?

13 A. I've been a member of the APA. I'm not currently
14 actively enrolled in the APA.

15 Q. Okay. And at your deposition, I think you said that
16 as part of your license you are -- so you're not currently
17 actively a member of the APA? Sorry. I wanted to go back
18 to that ---

19 A. No. I'm a member of the APA Trust, which is our -- I
20 think we're all members of that.

21 Q. Okay. Then -- so I think you said on the
22 stand that you think that Mr. Stone's performance in school
23 and the history that you had gleaned from the record which
24 is all you've kinda looked at in this case, besides the
25 reports and testimony you're heard, it appears to you that

1 he has a non-verbal learning disorder; is that right?

2 A. Yes.

3 Q. Is that a diagnosis that is recognized in the DSM-5-
4 TR?

5 A. That exact diagnosis, no. It falls under specific
6 learning disability which is a diagnosis, but it is not
7 listed as a diagnosis in itself, if that makes sense.

8 Q. But it's not something that clinicians have found
9 diagnostic criteria for that specific definition?

10 A. Correct.

11 Q. Okay. And I think you mentioned that you also saw
12 indications from Mr. Stone's record that he has an
13 antisocial personality disorder?

14 A. Yes. A pattern of antisocial personality traits, yes.

15 Q. But there's nothing -- is there anything in the DSM-5-
16 TR for either intellectual disability or antisocial
17 personality disorder that indicates that they could not be
18 comorbid diagnoses?

19 A. No, there's not.

20 Q. And then I think that you discussed a little bit about
21 the TOMM with Mr. Evans, and I think you said it's an
22 effort testing that's done to assess the validity of some
23 sort of assessment that's going on.

24 A. Correct.

25 Q. And so it doesn't necessarily look only at testing.

1 It could be used to look at other effort that's being put
2 into -- that's being evaluated?

3 A. Right. Psychometrically.

4 Q. Okay. And then you also talked a little bit about Mr.
5 Stone's IQ testing, and the testing that was done with Dr.
6 Boyd; and I think you said that they are, you know,
7 differences in the index scores that you saw and thought
8 were significant.

9 A. I did.

10 Q. And -- but that to you indicated that the score
11 overall would not be something that would necessarily be
12 properly considered intellectual functioning for -- the
13 variance should be more attention to when diagnosing
14 intellectual disability?

15 A. Yes. Yes. If you're looking at the overall set of
16 scores, you must explain discrepancies.

17 Q. And are you aware of the purple book?

18 A. I am.

19 Q. And I believe you said at your deposition that this is
20 considered the clinical -- one of the things that she
21 considered in best practices when evaluating intellectual
22 disability.

23 A. Yes.

24 Q. And so are you aware of the section -- the chapter
25 about diagnosing intellectual disability in this book?

1 A. Yes.

2 Q. Okay. And are you familiar with the part of that
3 chapter that says -- she, when discussing concerns about
4 discrepancies and IQ testing, it says (as read): "There's
5 no reason to question the validity of the full scale IQ
6 even in individual cases where there is a significant
7 factor or part score variability?"

8 A. Correct. And I'm not questioning the validity of the
9 full scale IQ.

10 Q. Okay. And I think you also said that, you know, from
11 looking at the records, in your opinion, there wasn't
12 necessarily evidence of adaptive functioning deficit; is
13 that correct?

14 A. Correct. I think there's evidence of the opposite.

15 Q. But you didn't necessarily conduct -- you didn't
16 conduct interviews or know the contents of the interviews
17 that Dr. Boyd and Dr. Hall conducted; is that right?

18 A. No. I just have what I had with what the records
19 list, correct.

20 MS. MAJOR: That's all the questions I have. Thank
21 you.

22 THE WITNESS: Thank you.

23 THE COURT: Redirect.

24 MR. EVANS: Yes, Your Honor.

25 REDIRECT EXAMINATION

1 BY MR. EVANS:

2 Q. Non-verbal learning disorder is actually a learning
3 disability. That's what you said previously.

4 A. Correct.

5 Q. And Mr. Stone was diagnosed as having a
6 learning disability at one time.

7 A. He was.

8 Q. Okay. Now, antisocial personality disorder does not
9 defeat intellectual disability you can have both; is that
10 correct?

11 A. Correct.

12 Q. Okay. But also antisocial personality disorder will
13 defeat things like gullibility and things of that nature
14 because you are the type of person, you said earlier, that
15 only cares about yourself and do not have the ability to
16 conform to the law and things of that nature; is that
17 correct?

18 A. I wouldn't say it didn't defeat that. I mean, I
19 think, you know, these are terms that we use that are man-
20 made terms to describe a variety of people, and so I will
21 not -- I couldn't testify that it would defeat any one
22 characteristic; but it certainly would suggest that when
23 interpreting behavior or even when hearing someone's
24 information about how they perceived an individual, you
25 might consider that -- as I stated before, that pattern of

1 behavior to be a driving factor of what you're
2 interpreting, if that makes any sense.

3 Q. Yes.

4 A. Okay.

5 MR. EVANS: Beg the Court's indulgence.

6 THE COURT: Yes, sir.

7 (Brief pause.)

8 MR. EVANS: We have nothing further.

9 THE COURT: Anything further of the witness?

10 MS. MAJOR: No, Your Honor.

11 THE COURT: Thank you, Doctor. You may step down.

12 (The witness complies.)

13 MR. EVANS: Can Dr. Kruse be excused?

14 THE COURT: Any objection?

15 MS. MAJOR: No, Your Honor.

16 THE COURT: You're free to go. Thank you. All right.

17 So I can plan, I got a list of five witnesses for the
18 State; two testified, the two doctors. There's Elaine
19 Harris who's a school psychologist, and when is she gonna
20 testify?

21 MR. LARRABEE: She can testify today, Your Honor, but
22 she is remote. So it might take some time to set that up.

23 THE COURT: Michelle Bailey Price.

24 MR. EVANS: Ms. Price won't be testifying.

25 THE COURT: Will not?

1 MR. EVANS: No, sir.

2 THE COURT: Omega Golden. Is that the lady -- is that
3 the person who ...

4 MR. LARRABEE: She will also not be testifying, Your
5 Honor.

6 THE COURT: So we just have one more?

7 MR. EVANS: Yes.

8 THE COURT: All right. I don't think what I'm about
9 to talk about needs to be on the record. We'll put
10 whatever we need on the record later, but before I declare
11 us to be recess, so I can determine what time to have
12 everybody back -- all right. So Ms. Harris is gonna --
13 she's in Spartanburg; is that right?

14 MR. LARRABEE: Yes, Your Honor.

15 THE COURT: And is -- how is it that she's gonna
16 testify?

17 MR. LARRABEE: By Webex, Your Honor.

18 (A brief recess was taken from 1:45pm -1:49pm)

19 THE COURT: Thanks, be seated. All right, we're back
20 on the record for Stone versus State. Stone's present with
21 counsel. Do y'all have something you need to tell me?

22 MR. GROSE: Yes. Before we proceed, could we ask that
23 the black box be removed? He's not been in it today or
24 yesterday up until lunch break.

25 THE COURT: Yes. Please, if he didn't use it today

1 or yesterday. Y'all excuse me a minute. Let me take this
2 (indicating to a phone call.)

3 (A brief pause.)

4 THE COURT: Is there something else we need to put on
5 the record?

6 MS. MAJOR: No, we don't.

7 THE COURT: Do y'all have something you want to put on
8 the record?

9 MR. LARRABEE: Yes, Your Honor. If it would be easier
10 for Your Honor, for the opposing counsel, we can resume the
11 witness testimony tomorrow. I know that you weren't
12 necessarily prepared on doing it with Webex today.

13 THE COURT: Hold on. Hold on just a minute.

14 (Preparing computer for Webex testimony.)

15 Ms. Harris is talking. I couldn't hear what she said. Go
16 ahead.

17 MR. LARRABEE: Yes, Your Honor. We were just going to
18 flow to the quick possibility of doing this testimony
19 tomorrow. I know the Court was not necessarily prepared
20 to go forward with Webex this afternoon. And so if it
21 would be more convenient, we could actually do this
22 tomorrow and that will allow Your Honor to be in a more
23 comfortable setup and position.

24 THE COURT: Well, I've got it setup and if we can go
25 forward, I'd rather go forward right now. And the main

1 reason is... I'm not gonna belabor this. But y'all know
2 the situation with my wife. She was in the hospital; she's
3 got an appointment tomorrow. I've made arrangements for
4 somebody to drive her but... I prefer to be there with her
5 to hear what the doctor says. But I can come tomorrow if I
6 need to.

7 MR. LARRABEE: We're prepared to go forward.

8 THE COURT: Did the Applicant consent to do this by
9 Webex?

10 MR. GROSE: Yes, sir.

11 THE COURT: And the State consents to do this by
12 Webex?

13 MR. LARRABEE: Yes, sir.

14 THE COURT: All right. Here's what's happened and
15 y'all tell me if this changes your opinion in anyway.
16 Judge McFadden has given me his computer. So, the
17 courtroom is open; my law clerk's got it open from her
18 house. So if you log into my courtroom. You should see it
19 open.

20 The only thing is going to be different is, I'm listed
21 as Judge McFadden. I see Miss Harris is already there
22 (indicating). I mean, she doesn't have a camera on, but
23 it's...

24 MR. LARRABEE: Ms Harris. Do you have a camera
25 available to you? Ms. Harris, can you hear me?

1 THE WITNESS: Oh, good, okay.

2 MR. LARRABEE: Do you have a camera on? I mean, can
3 you -- do you have a camera you can use?

4 THE WITNESS: It says it's "a camera". Then it says
5 "adjustment", my video automatically select Camera. Yeah,
6 I'm seeing my own image right now. So... okay.

7 MR. LARRABEE: At the bottom and see if -- is there a
8 stop or a start video button at the bottom?

9 THE WITNESS: Yes, that's what I need to hit?

10 MR. LARRABEE: Yes.

11 THE WITNESS: Okay.

12 MR. LARRABEE: There we go.

13 THE WITNESS: Oh good.

14 (Whereupon, the following witness testified via Webex
15 on camera.)

16 THE COURT: All right, now, are we going to use the
17 Webex recording procedure?

18 THE WITNESS: Yes.

19 THE COURT: Ask her to stop talking.

20 MR. LARRABEE: Ms. Harris, can you mute yourself for
21 just a moment?

22 THE WITNESS: Yes, I can.

23 MR. LARRABEE: The judge is trying to figure out some
24 things. Thank you.

25 THE COURT: Are we going to use the Webex recordings

1 procedure where a transcriptionist would do the transcript
2 from the Webex recording. Or do y'all want the court
3 reporter to try to take it down as we go along?

4 MR. GROSE: I think we'd be fine with the Webex. Can
5 the Court Reporter incorporate the Webex transcript into
6 her...?

7 COURT REPORTER: Yeah, I can do that.

8 MR. GROSE: Okay.

9 THE COURT: I'll just have to move down there, I think
10 (moving to sit next to the Court Reporter). What do y'all
11 want?

12 MR. GROSE: Whatever is the easiest.

13 COURT REPORTER: Yes, whatever is easier.

14 THE COURT: Because of the nature of this, I would
15 rather the Court Reporter try to take it down. And we've
16 always got the -- the Webex is going to automatically
17 record everything, and AI is going to print a transcript,
18 but it's not going to be accurate, 100 percent.

19 (All laugh.)

20 They haven't learned how to interpret my mush mouth yet.

21 (Laughter.)

22 I'm going to try to move this down there. Okay.

23 COURT REPORTER: Okay.

24 And I asked you all an email -- my law clerk said to
25 remind you that you really need to have -- to be muted when

1 you're not talking, and if you have the ability to use
2 earphones, that's very helpful for the feedback.

3 MR. LARRABEE: Your Honor, how would you like me to
4 proceed? Would you like me to do the questioning from the
5 podium still?

6 THE COURT: If the court reporter can hear you, yeah.

7 COURT REPORTER: Yes.

8 MR. LARRABEE: Can I come down this way (indicating)?

9 COURT CLERK: Yes, sir. Yes, sir.

10 THE COURT: Mr. Grose, you got a camera on.

11 MR. GROSE: (Nodding affirmatively.)

12 THE COURT: Okay, all right. We're gonna go on the
13 record. I'm getting feedback... Gonna go on the record on
14 2018-CP-43-01025, Bobby Wayne Stone versus the State, the
15 parties have agreed to allow the witness to testify by
16 Webex, based on the exposure to COVID. Are you Elaine
17 Harris, ma'am?

18 THE WITNESS: Yes, sir.

19 THE COURT: Ms Harris, I need for you to speak
20 distinctly. The court reporter here is going to take down
21 what you say. We've also got the Webex, the system is
22 recording everything, too. So if you don't hear anybody,
23 or you have a problem hearing anyone, let us know, all
24 right.

25 THE WITNESS: Okay. I'm getting some feedback, an

1 echo.

2 THE COURT: Some of that's going to stop as soon as I
3 start talking -- stop talking. Okay. If you still get
4 echo, you let me know.

5 THE WITNESS: Thank you.

6 THE COURT: All right. What's been agreed upon is
7 that the Court Reporter is going to take down the
8 testimony, but if there's any issue, we have the Webex
9 recording procedure that will be used.

10 DR. ELAINE HARRIS,
11 having been first duly sworn, testifies as follows:

12 THE COURT: And your name is Elaine, E-l-a-n-e?

13 WITNESS: E-l-a-i-n-e.

14 THE COURT: I'm sorry. Last name Harris, H-a-r-r-i-s?

15 WITNESS: Yes, sir.

16 THE COURT: Okay. I'm going to ask you to -- I
17 believe Mr. Larrabee, he's going to question you. So, Mr.
18 Larrabee will be asking you some questions. I'm going to
19 mute my microphone now. All right.

20 WITNESS: Yes, sir.

21 DIRECT EXAMINATION

22 BY MR. LARRABEE:

23 Q. Ms. Harris, can you hear me?

24 A. Yes, I can.

25 Q. Okay, and just for the record, where do you live

1 currently?

2 THE COURT: Wait a minute. Wait a minute, she's...
3 Y'all are picking up me. Try again. We're just gonna have
4 this feedback.

5 BY MR. LARRABEE:

6 Q. Let's try this again. Ms. Harris, can you hear me?

7 A. Yes, I can.

8 Q. Okay. And just state for the record where you live
9 currently?

10 A. 155 Megan Drive, and that's in Moore South Carolina.

11 Q. And what is your occupation?

12 A. I'm currently retired.

13 Q. Previous to retirement?

14 A. I worked as a school psychologist for Spartanburg
15 School District Six. I was also sometimes an adjunct
16 professor at Converse University.

17 Q. And did you ever work in a school district?

18 A. Yes, I did. I worked for Sumter 17.

19 Q. And what year?

20 A. Let's see it was 1970, hold on, 1977 I started in late
21 August, August 29th.

22 Q. Okay. So, you had knowledge of the procedures in
23 Sumter County, from 1977 forward, correct?

24 A. As well as I can remember then. Yes.

25 Q. Okay. Not necessarily before 1977?

1 A. No.

2 Q. Okay. Now, as a school psychologist, did you ever do
3 IP testing?

4 A. Yes

5 Q. Okay, tell me a little bit about what was your
6 understanding of what arena testing was?

7 A. Arena testing was a format that some districts in
8 South Carolina, perhaps other places, would use as a way to
9 quickly evaluate a relatively large number of students -- I
10 had heard up to perhaps 30 at a time, and it was done
11 almost as in an arena. You would have different stations,
12 and the student would go from one to another, to another,
13 to another, and they would be administered one or two sub
14 tests or different tasks, and then the people administering
15 these tasks could have had a variety level of training.

16 Some could be students who are working on their school
17 psych degree. They may or may not have been even having
18 that kind of background. The information was given over to
19 a school psychologist who would then combine scores.

20 Q. Okay. And, would a practitioner generally indicate
21 somehow whether there was arena testing, if it was done?

22 A. You would hope they would, but I could not guarantee
23 that would happen.

24 Q. Now, did you personally administer that test?

25 A. Never.

1 Q. Okay, and was that the standard practice in Sumter
2 County in 1977 when you started?

3 A. No, not in Sumter 17. I cannot speak for what happened
4 in Sumter County, District 2.

5 Q. Okay. In 17 -- I'm sorry. Let me make sure I have it
6 on my list. Do you remember testing in Sumter 17?

7 A. To the best of my recollection and knowledge it was
8 not, the practice was -- is one that is general, even at
9 that time, people kind of frowned on it.

10 Q. Okay. Have you been presented recently with a copy of
11 the psychological report that you did on Bobby Wayne Stone?

12 A. Yes. Yes, this is a reevaluation review.

13 Q. And just for reference for the Court, this is State's
14 55 and 56 of Applicant's Exhibit 3. Ms. Harris, can you
15 look at the second page of that (indicating) and tell me
16 who signed it?

17 A. I signed that -- along at that time, I was what they
18 call a Level 1, I'm beyond that now. And Level 1s were --
19 had to have their reports co-signed by someone who was a
20 psychologist too, and that would have been my supervisor,
21 Dave Evans.

22 Q. Okay, and so this would have been the report that you
23 would have prepared?

24 A. Yes.

25 Q. What was the date of this report? Do you know?

1 A. And looking back, it was November 1, 1979.

2 Q. Okay. And what was the indication of what Mr. Stone's
3 report was?

4 Q. It was in the -- it was below average, and we didn't
5 report for whatever reason. That was Mr. Evans's his
6 policy -- his practice. So the full scale was somewhere
7 between 69 and 75 which is below average to well below
8 average.

9 Q. Okay. Is that the reason -- or what is the reason
10 that you guys did not report it as a single number?

11 A. You would have to ask Mr. Evans, and he,
12 unfortunately, is no longer with us. I think it was just a
13 general policy that they had adopted.

14 Q. Okay, I want to look at a couple of the things on this
15 report. You talk -- there's a point in here, which it
16 says, verbal skills were below the normal range except
17 arithmetic and comprehension ---

18 A. Mm-mm (affirmative).

19 Q. --- and performance skills were below the normal range
20 except picture arrangement and object assembly which were
21 8s and 9s. What is the scale of this?

22 A. Okay, the scale it -- the WISC-R, is an individually
23 administered IQ test, and what you obtain from it is a full
24 scale verbal. You also get a verbal and a performance or
25 non verbal score on it. Each of those areas, the verbal

1 and the non verbal are broken down into six different sub
2 tests. And on the sub tests, dead on average would be 10,
3 and the average range generally goes between seven up to 13
4 or eight to 12, depending on how restrictive you want to
5 be, the scale goes up to 19, and all the way down to one,
6 one being very -- a lot of difficulties functioning; 19 is
7 you blew the top out of it.

8 Q. Okay, so would numbers between, I think you said, 7
9 and 13 or either 12, are these considered normal? In the
10 normal range?

11 A. Yes. Yes, they would.

12 Q. Okay. I also note that you wrote on here that his IQ
13 has dropped considerably; his verbal scores have dropped
14 considerably.

15 A. Mm-mm (affirmative).

16 Q. What are some reasons that, that might happen, other
17 than intellectual disability or other cognitive factors?
18 Any other reasons that that might happen?

19 A. Well, we're assuming that the original testing and
20 mine were valid of the administrations. I have a lot of
21 faith in scores because I had nearly 40 years experience,
22 and my scores generally weren't in line with other
23 psychologists.

24 Now, there are other reasons, as I said, assuming the
25 scores were valid for the first time, we would start to

1 look at a number of things -- young children, well, he's in
2 middle school here. We start looking at the possibility of
3 any kind of emerging emotional, particularly psychiatric
4 problems. Will start making the IQ drop. There are
5 certain illnesses, although that's unusual, but not medical
6 issues, but there are some medical issues sometimes. The
7 other thing we look at now, and we didn't look at so much
8 then, is the possibility of trauma, and particularly
9 sustained trauma will start to dull cognition.

10 And trauma can be anything from violence to being
11 exposed not having a good diet, being exposed to
12 environmental toxins. That list goes on and on.

13 Q. And is trauma something that people both with and
14 without intellectual disability might experience in
15 childhood?

16 A. Anyone could. Yes.

17 Q. I want to look at your recommendation, on the second
18 page, and it says (as read): at this time, Bobby no longer
19 qualifies for LDD resource. He does qualify for EMH
20 resource and a change of placement is necessary. Can you
21 kind of break it down for those of us who aren't
22 psychologists. What does that mean?

23 A. Okay. Now, I always thought to put in the codicil
24 here that this time you got to remember, in 1975 we had
25 Public Law 94-142 passed, which required states to begin to

1 identify and serve certain handicapping conditions, and
2 each state had the burden on them to define how they were
3 going to do this.

4 So South Carolina, as well as many other states, we
5 were kind of floundering around and trying out different
6 things. These were written up. They were not, I don't
7 want to call them guidelines, because they had the effect
8 of law, we were required to administer the WISC-R. Okay,
9 it's not a judgment call. At that time, the learning
10 disability category in South Carolina was rather
11 convoluted. It required you to have a specific profile on
12 the WISC-R, and if you didn't have one of the three
13 profiles, we could not call you learning disabled. So I
14 would suggest at this time that Bobby's profile on the
15 WISC-R did not meet those LD guidelines, because I would
16 have continued him as LD -- as learning disabled. Now also
17 at that time, our guidelines for educably mentally
18 handicapped, which we now call intellectually disabled,
19 were pretty wide open. They more relied on the DSM, but
20 not entirely because we're evaluating for school purposes,
21 and we looked at full scale IQ, not the breakdown of
22 scores.

23 Today, because we have a good deal more understanding
24 of intelligence, we would be looking at those individual --
25 those strengths and weaknesses in the scores. But at that

1 time, how those -- that law was interpreted, he qualified
2 as having in the educably mentally handicapped range
3 because of the full scale IQ, even though I would be the
4 first to point out, he had some areas in the average range.

5 Q. And did you say that -- did I hear you correctly, you
6 said that you did not follow the DSM criteria ---

7 A. Okay, the DSM -- the State, this is the State's
8 decision. DSM primarily looks at full scale IQ, it does
9 not break it down into strengths and weaknesses and looking
10 for other things a person can do. It also puts some weight
11 on adaptive behavior, actually putting more weight on that
12 sometimes. It also does not look at achievement. Because
13 we're an academic setting, we also look at achievement.
14 Since that time, we have refined our definition for
15 intellectually disabled, and we need to seek pervasive
16 below average functioning on everything. You cannot have
17 these little splinter strengths that something else is
18 going on. And we would have to find another avenue if the
19 committee felt this student needed to continue in services.

20 Q. So, talk a little bit about the connection between
21 educably mentally handicapped and intellectually disabled.
22 I think you were just speaking to that some ---

23 A. Yeah.

24 Q. Is that essentially the same term that was used back
25 then?

1 A. Yes. The law was changed. There was a court case
2 called Rosa's -- Rosa's Law, and apparently, whatever state
3 Rosa was in, they were using the term retardation, which a
4 lot of us find very uncomfortable to use this for anyone.
5 And so the federal law moved in, and we changed it to
6 intellectually disabled, and that replaced -- in South
7 Carolina, it replaced -- we had three levels of mental
8 disability or mentally handicapped: Educable, trainable
9 and severe profound. Now, everyone who is significantly
10 below average is intellectually disabled.

11 Q. Okay. How did the standards change you addressed it a
12 little bit from -- well first of all, when did you retire
13 as a psychologist?

14 A. 2015.

15 Q. Okay. And between 1979 and 2015 how did the standards
16 for educably mentally handicapped, and eventually
17 intellectually disabled, change?

18 A. Okay. I could not tell you the time frame on this. I
19 would say certainly by the 80s. We were becoming aware
20 that by using just the full scale IQ; we were over placing
21 black males into the program. So there was clearly some
22 kind of discriminatory practice going on that nobody was
23 comfortable with that was not in their best interest. And
24 so, we began to rethink how we were looking at intelligence
25 for this population.

1 Q. Okay, so what -- in your -- from your understanding,
2 would it be correct to say that just because someone was
3 educably mentally handicapped in 1979, that under the
4 standards when you retired they would have been found
5 intellectually disabled?

6 A. In this particular instance, I, I -- he would not
7 have been found as ID. If I got scores like this on
8 someone, I would be looking more -- going back to the
9 original possibility of a learning disability, if I had
10 again these scores. So, I would not consider him under --
11 as the practices, the program, the way we switched to
12 looking at it as we gained more understanding. School
13 psych was a relatively new field when I entered into it.
14 So but then we grew a lot, and I think I also acquired a
15 lot more skills with what I was doing and understanding but
16 we did move to make it rather difficult to qualify as
17 intellectually disabled.

18 Q. Was there a significant difference between the
19 resources you would have gotten -- your LD resource or any
20 other resources at the time?

21 A. Probably almost nothing in terms of differences.
22 Since he was in resource programming, Mr. Stone would have
23 been going to regular classes for the bulk of the day. He
24 would have gone to all the -- what we call special art,
25 music, PE what have you. And but for this document doesn't

1 say how much that's the IEP committee, individuals can go
2 to a resource classroom for one, two or up to three
3 periods, depending on how much support the IEP committee
4 feels is appropriate, and they often with a number of
5 districts in a class you would have a mix of students with
6 mild handicapping conditions, including you would have
7 children who were intellectually disabled, learning
8 disabled, possibly students who are mildly emotionally
9 impaired also would be going into the same setting, and
10 they would be getting their individualized instruction from
11 a special education teacher.

12 Q. Ms. Harris, do you remember who else you have spoken
13 to other than myself, of course, about this case?

14 A. Vaguely, there were two very nice ladies who came...
15 at that time they came to visit, I think I shared with you,
16 my husband was seriously ill, and they actually came and
17 connected with me at the restorative care facility, where,
18 at that time he spent his first 60 days in that facility.
19 We were trying to get him well enough to come home, which
20 he did. And then there were some other issues, and he went
21 back for over 100 days.

22 Q. Do you remember what you told them?

23 A. Uh, not specifically. I mean, pretty much what I hope
24 -- I told them, what I'm sharing with you.

25 Q. Okay. And you mentioned your husband was, was, in

1 medical care at that time. What was your state of mind at
2 that time?

3 A. I would say, somewhat preoccupied and concerned, as if
4 anyone would be with a seriously ill family member.

5 Q. Okay. That's all the questions I have for you right
6 now. Please, answer any questions the Defense has.

7 THE COURT: Cross?

8 MS. MAJOR: Yes, just briefly, Your Honor.

9 CROSS-EXAMINATION

10 BY MS. MAJOR:

11 Q. Good afternoon, Miss. Harris -- Ms. Harris. I just
12 have a couple of questions for you based off of what you
13 talked about.

14 A. Please, can you speak up. I'm gonna try to put the
15 speakers on a little bit here.

16 Q. Yeah, sorry.

17 A. I'm having a little trouble hearing you.

18 Q. Can you hear me now?

19 A. Yes, I can. It's much better. Thank you.

20 Q. Sorry, I had the headphones on and every time it was
21 connecting to the microphone. I just had to ask questions
22 a couple of brief questions about what you talked about
23 earlier with Mr. Larrabee. I think, if it's right, my
24 understanding about the evaluation that you discussed that
25 was for educational placement purposes, not for diagnostic

1 purposes, is that right?

2 A. It's educational diagnostic purposes. It -- but again,
3 my primary job was to see if they fit the guidelines for
4 school based services.

5 Q. So, we're only looking at what might or might not help
6 a certain student in the class for the purposes of what
7 their learning?

8 A. Anytime I would do an evaluation on a student,
9 because, again, school psychologist employed by the
10 district, we are looking at, what do we need to do in terms
11 of helping a student academically. That's always what it
12 comes down to.

13 Q. And, along with that, the only document in Mr. Stone's
14 case that you've been provided for your testimony today was
15 what was in that evaluation, is that right?

16 A. That's what I remember. I don't remember if the two
17 ladies that came to see me had an older evaluation, the
18 original evaluation, because again, this being a
19 reevaluation. It tells me there was an older evaluation.

20 Q. But there was the 2 page document that Mr. Larrabee
21 talked about that you've seen recently?

22 A. Yes, ma'am.

23 Q. Had you not had this evaluation would you still
24 recommend that the change of placement for Mr. Stone may or
25 may not have been more intense than like he was previously

1 classified as just learning disabled?

2 A. Right. It was, it was again, he would have continued
3 in Resource Services.

4 MS. MAJOR: Nothing further, Your Honor.

5 THE COURT: Redirect?

6 MR. LARRABEE: Yes.

7 REDIRECT EXAMINATION

8 BY MR. LARRABEE:

9 Q. This was the only report that you prepared about Mr.
10 Stone. Is that correct?

11 A. Yes, to the best of my knowledge.

12 MR. LARRABEE: Court's indulgence for a moment.
13 Nothing further, Your Honor.

14 THE COURT: Recross?

15 MS. MAJOR: No, Your Honor.

16 THE COURT: Thank you. Thank you, Ms. Harris. You can
17 log out now. Did she hear me (indicating)? Ms. Harris,
18 you can log out now, thank you.

19 THE WITNESS: And thank you, sir. Appreciate you
20 allowing me to do it in this way. We're about over the
21 COVID, but it's still kind of dicey here, so thank you,
22 sir.

23 THE COURT: Yes. Ma'am.
24 Rebecca, you can log out, too.

25 LAW CLERK: Yes, sir, thank you.

1 THE COURT: Thank you very much. Hope you feel better.

2 LAW CLERK: Thank you.

3 THE COURT: Anything further from the State?

4 MR. EVANS: Your Honor, at this time the State rests.

5 THE COURT: Any reply?

6 MR. GROSE: No, sir.

7 THE COURT: Do you all wish to make any type of
8 closing argument or submit briefs, or?

9 MR. GROSE: What we would like to do, a second
10 suggestion. We would like to get a transcript of this
11 hearing and then have a period of time after we received
12 the transcript to submit post hearing briefs. That's what
13 I've done in other hearings similar to this.

14 THE COURT: The State's position?

15 MR. EVANS: The State's position is all we would want,
16 is 30 days after the date that we've submitted to meet the
17 deadline of the meeting the deadline of briefs.

18 THE COURT: All right, it's granted. Thank you all
19 very much. I appreciate your professionalism and
20 everybody's respect for the Court. Court's adjourned.

21 (Off the record at 3:30 p.m.)

--- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED BRANDI BERRY, CERTIFIED
VERBATIM COURT REPORTER FOR THE FIFTH JUDICIAL CIRCUIT
OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT
THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE
TRANSCRIPT OF RECORD OF ALL THE PROCEEDINGS HAD AND
EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED
CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR
SUMTER COUNTY, SOUTH CAROLINA, ON THE 31ST DAY OF
JULY, 2024.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.

/S/Brandi J. Berry, CVR

SUMTER, SOUTH CAROLINA

JULY 31, 2024

July 25, 2018

The Honorable James C. Campbell
Sumter County Clerk of Court
215 N. Harvin Street
Sumter, SC 29150

RECORDED
2018 JUL 26 PM 1:02
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

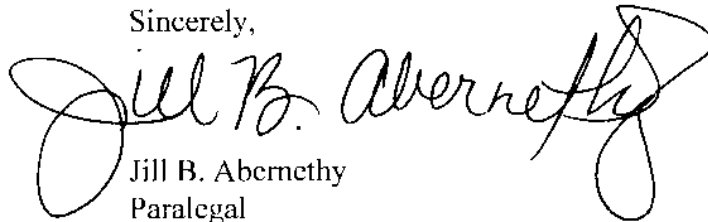
RE: *Bobby Wayne Stone v. State of South Carolina*

Dear Mr. Campbell :

Please find enclosed for filing, with certificate of service, the original and one copy each of Applicant's Amended Application for Post-Conviction Relief and Applicant's Response in Opposition to State's Motion to Dismiss in regards to the above captioned case. Please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact this office.

Sincerely,



Jill B. Abernethy
Paralegal

cc: Alphonso Simon, Jr.
Charles Grose, Esq.

RECORDED

2018 JUL 26 PM 1:02

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SUMTER)
)
 BOBBY WAYNE STONE, SK 5051)
 Applicant,)
 v.)
))
 THE STATE OF SOUTH CAROLINA.)
 Respondent.)
 _____)

JAMES G. CAMPBELL
 CLERK OF COURT IN THE COURT OF COMMON PLEAS
 SUMTER COUNTY, S.C. Case No.: 2018-CP-43-1025

AMENDED APPLICATION
 FOR POST-CONVICTION RELIEF

1. Place of Detention: Kirkland Correctional Institution, Columbia, South Carolina.
2. Sentencing court: Sumter County Court of General Sessions.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:
 - (a) Murder: 96-GS-43-698
 - (b) Possession of a Weapon During the Commission of a Violent Crime: 96-GS-43-0698
 - (c) Burglary in the First Degree: 96-GS-43-0698
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) Sentenced on January 28, 1997 as follows:
 - (i) Murder: Death
 - (ii) Possession of a Weapon During the Commission of a Violent Crime: Five Years
 - (iii) Burglary in the First Degree: Thirty Years
 - (b) Resentenced on February 27, 2005 as follows:
 - (i) Murder: Death
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.

- 8. Appeals:
 - (a) The Courts to which applicant appealed:
 - (i) The South Carolina Supreme Court.
 - (b) The result in each Court to which applicant appealed:
 - (i) Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded.
 - (ii) Death sentence upon remand affirmed.
 - (c) The date of each result:
 - (i) Convictions affirmed; sentences affirmed in part; death sentence reversed and remanded on July 15, 2002.
 - (ii) Death sentence on remand affirmed on December 20, 2007.
 - (d) Citations of any written opinion or orders entered pursuant to such results:
 - (i) 567 S.E.2d 244 (S.C. 2002)
 - (ii) 655 S.E.2d 487 (S.C. 2007)

9. Not applicable.

10 & 11. GROUND S FOR RELIEF WITH SUPPORTING FACTS

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

10(b) Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during his capital trial.

11(b) Supporting Facts: Trial counsel failed to investigate and present evidence that Applicant is intellectually disabled, including evidence that Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, rendering him ineligible for capital punishment. Trial counsel failed to present this evidence at a pretrial hearing and at any point throughout his capital trial. Trial counsel’s performance was deficient and prejudicial. *Strickland v. Washington*,

466 U.S. 668 (1984); *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

- 10(c) Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the guilt-or-innocence phase of his capital trial.
- 11(c) Supporting Facts: Trial counsel’s performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Counsel’s acts or omissions include a failure to retain a forensic pathologist, crime scene reconstruction expert and other similar expert assistance to prove that the facts and circumstances of the crime were consistent with an accident theory.
- 10&11(d): There is 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. Specifically, advancements in technology such as computer aided design software, 3-D printing and other advancements in similar fields, which are now available for crime scene reconstruction, demonstrate that the facts and circumstances of the crime, including the measurements of the crime scene, the trajectories of the bullets, and other physical information likewise support applicant’s position that the homicide was an accident. These scientific technologies were not available at the time of applicant’s trial and therefore the conclusions drawn from their use constitute material facts not previously presented and heard.
12. Applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the Sumter County Court of General Sessions, an appeal the denial of his application for post-conviction relief to the State Supreme Court, a petition for writ of certiorari to the United States Supreme Court. Applicant has filed a petition for a writ of habeas corpus in federal court.
13. Applicant filed a PCR application in the Sumter County Court of Common Pleas, Case No. 2008-CP-43-905, on April 7, 2008. The trial court denied post-conviction relief; this decision was affirmed on appeal. *Stone v. State*, 798 S.E.2d 561, 575-79 (S.C. 2017). Applicant filed a petition for writ of certiorari to the United States Supreme Court on August 24, 2017, raising two grounds for relief. The petition was denied on October 30, 2017. *Stone v. South Carolina*, 138 S. Ct. 392 (2017).
14. The grounds set forth above have not been previously presented to this or any other court, state or federal.

15. Not Applicable.
16. These grounds were not raised at trial because trial counsel ineffectively failed to raise them and/or the facts in support were not available. These grounds were not raised in applicant's initial PCR proceeding because initial PCR counsel ineffectively failed to raise them.
17. Applicant was previously represented by counsel.
18. Counsel:

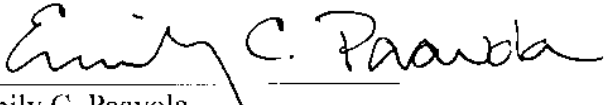
Applicant was represented at trial by Cameron B. Littlejohn, Jr., 1720 Main Street, Suite 202, Columbia, SC 29201, and James H. Babb, Sumter, SC. He was represented on direct appeal by Joseph L. Savitz, III, Columbia, SC. Applicant was represented in his initial PCR proceeding by Robert Lominack, Columbia, SC, and John Blume, Cornell Law School, 159 Charles Evans Hughes Hall, Ithaca, New York. Applicant was represented in his appeal from the denial of PCR by John Blume and Emily Paavola.

19. Applicant seeks relief from his convictions and sentences.
20. Applicant is not under sentence from any other court.

Respectfully submitted,

Emily C. Paavola
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
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E. CHARLES GROSE
Grose Law Firm
404 Main Street
Greenwood, SC 29646
(864) 538-4466

BY: 
Emily C. Paavola

July 25, 2018

STATE OF SOUTH CAROLINA

RECORDED

COUNTY OF SUMTER

2018 JUL 26 PM 1:02 IN THE COURT OF COMMON PLEAS
Case No.: 2018-CP-43-1025

BOBBY WAYNE STONE, SK 5051

JARRELL E. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Applicant,

CERTIFICATE OF SERVICE

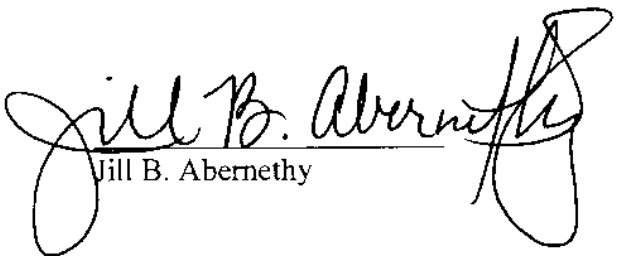
v.

THE STATE OF SOUTH CAROLINA.

Respondent.

The undersigned hereby certifies that a copy of Applicant's Amended Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 25th day of July, 2018, upon the following:

Alphonso Simon
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy



RECORDED

2018 JUL 30 PM 2:54

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

ALAN WILSON
ATTORNEY GENERAL

July 27, 2018

The Honorable James C. Campbell
Sumter County Clerk of Court
Sumter County Judicial Center
215 North Harvin Street
Sumter, South Carolina 29150-4974

Re: Bobby Wayne Stone, #5051 vs. The State of South Carolina
Capital Case: C/A No. 2018-CP-43-1025

Dear Mr. Campbell,

On July 5, 2018, our office mailed for filing the Respondent's *Return and Motion to Dismiss*, with attachments. As per my assistant's telephone call today with Ms. Yow of your office, it is our understanding that the Return has not been filed, and it may not have been received by your office.

Please find enclosed two copies of the cover letter and the Return and Motion to Dismiss, along with a self-addressed stamped envelope. An electronic copy of the attachments to the Return is enclosed on a disc. A second paper copy will be forwarded next week. Please clock-stamp and return one copy to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Senior Assistant Attorney General

AS:dmd
Enclosures

cc: Emily C. Paavola, Esq.
E. Charles Grose, Jr., Esq.



RECORDED

JUL 09 PM 2:55

JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

ALAN WILSON
ATTORNEY GENERAL

July 5, 2018

The Honorable James C. Campbell
Sumter County Clerk of Court
Sumter County Judicial Center
215 North Harvin Street
Sumter, South Carolina 29150-4974

Re: Bobby Wayne Stone, #5051 vs. The State of South Carolina
Capital Case: C/A No. 2018-CP-43-1025

Dear Mr. Campbell,

Enclosed for filing is Respondent's *Return and Motion to Dismiss*, with attachments, which we submit for filing in your office. Also enclosed is a copy of the Return and Motion to Dismiss along with a self-addressed stamped envelope. Please clock-stamp and return the copy to me in the envelope provided.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Emily C. Paavola, Esq. (w/encls., together with DVD containing attachments)
E. Charles Grose, Jr., Esq. (w/encls., together with DVD containing attachments)

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

Bobby Wayne Stone, #5051,

Applicant,)

v.)

The State of South Carolina,)

Respondent.)
_____)

RECORDED
INDEXED
2018 JUL 30 PM 2:55
JAMES S. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.
CIA No. 2018-CP-43-1025

RETURN AND MOTION TO DISMISS

(Capital Case)

Respondent, above-named, hereby makes Return to the application for post-conviction relief ("APCR"), filed by Bobby Wayne Stone ("Applicant") on June 5, 2018. This APCR stems from a murder conviction, a first degree burglary conviction, a possession of a weapon during the commission of a violent crime conviction, and a death sentence.

Respondent respectfully moves to dismiss this action because it is barred by the statute of limitations and it is successive to a prior post-conviction relief action Applicant filed on April 9, 2008. Further, Applicant's claim in Ground 10 and 11(a) is not a cognizable claim that can be raised in a post-conviction relief action. In support of this Return and Motion, Respondent would show this Court the following:

I. Procedural History¹

Applicant, Bobby Wayne Stone ("Applicant"), is confined in the South Carolina Department of Corrections (SCDC) as the result of his Sumter County conviction and death sentence for the murder of Sumter County Sheriff Deputy Charlie Kubala and for

¹ Appendix citations in this Return are to the Appendix and Supplemental Appendix filed in the appeal from the first PCR Action, which are also attached to this Return.

his convictions for first-degree burglary and possession of a weapon during the commission of a violent crime.

During the August 1996 term, the Sumter County Grand Jury indicted Applicant for murder, first degree burglary, and possession of a weapon during a violent crime (96-GS-43-0698). (App. 2098-99). The State gave notice of intent to seek the death penalty, and served its Notice of Evidence in Aggravation. (App. 2097). The trial judge in the original case was the Honorable R. Markley Dennis, Jr. (App. 1-270; Supp. App. 1-1006). Applicant was represented at the first trial by Cameron B. Littlejohn, Jr., Esquire and James H. Babb, Esquire; Solicitor Wade S. Kolb prosecuted the original case for the State. Id.

Trial began before Judge Dennis and a jury on January 23, 1997, and on January 26, 1997, Applicant's jury convicted him of all charges. (Supp. App. 922-23). The sentencing phase of his trial began on January 27, 1997. (Supp. App. 925). On January 28, 1997, Applicant's jury found the existence of two aggravating factors and recommended a sentence of death. (App. 265-66). Judge Dennis sentenced Applicant to death for murder, to a consecutive thirty (30) years for first degree burglary, and to five (5) years consecutive to both of the counts for possession of a weapon during the commission of a violent crime. (App. 269-70).

A timely Notice of Appeal was filed and served on January 31, 1997. Following briefing and oral argument, the South Carolina Supreme Court affirmed the guilt phase result but reversed the sentencing phase and remanded for resentencing. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). (See Attachment Nos. 3-6).

The Honorable Howard P. King handled the resentencing proceeding. (App. 2256-3911). Applicant was again represented by Mr. Babb and Mr. Littlejohn; the case was prosecuted by Solicitor Kelly Jackson and Assistant Solicitor Dudley Saleeby. Id. Jury selection began in the resentencing proceeding on February 22, 2005. (App. 2256). At the conclusion of the presentation of evidence at the sentencing hearing, Judge King submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of burglary in any degree.
- (2) Murder of a local law enforcement officer during or because of the performance of his official duties.

(App. 3606-10, 3914). The following mitigating factors were submitted to the jury:

- (1) The murder was committed while the defendant was under the influence of a mental or emotional disturbance.
- (2) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
- (3) The mentality of the defendant at the time of the crime.
- (4) Any non-statutory mitigating circumstance.

(App. 3617-18, 3914).

On February 27, 2005, the jury found the existence of the aggravator relating to the murder of a law enforcement officer and recommended a sentence of death. (App. 3630). The judge so sentenced Applicant. (App. 3636-37).

A timely notice of appeal was filed and served. Chief Appellate Defender Joseph L. Savitz, III, of the South Carolina Office of Appellate Defense, represented Applicant

on appeal from the resentencing. On September 6, 2007, Savitz filed a Final Brief of Appellant, in which he raised the following issue:

The trial judge committed reversible error by permitting the victim's widow to testify that she had attempted suicide when she learned - from a message left on her answering machine - that the Supreme Court had reversed Stone's death sentence and "they were going to retry this case over again," as this testimony introduced an arbitrary factor into Stone's resentencing, in violation of S.C. Code Section 16-3-25-(C)(1).

(App. 3920-36). The State, represented by Assistant Attorney General S. Creighton Waters, filed a Final Brief of Respondent. (App. 3937-68).

Following oral argument, the South Carolina Supreme Court issued an opinion on December 20, 2007 affirming the death sentence. State v. Stone, 376 S.C. 32, 655 S.E.2d 487 (2007). (App. 3969-71). Applicant subsequently filed a Petition for Rehearing on January 4, 2008. (App. 3972-75). The Petition was denied on January 23, 2008. (App. 3976-77). The Remittitur was also issued on January 23, 2008. (Attachment No. 7).

Applicant subsequently filed a post-conviction relief action. During the action and at the evidentiary hearing, Applicant was represented by John H. Blume, Esquire and Robert E. Lominack, Esquire. During the post-conviction relief action, Applicant raised the following issues:

10(a): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the guilt or innocence phase of his capital trial.

11(a): Supporting Facts: For the reasons set forth below, trial counsel's performance during the guilt or innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) Counsel failed to object to the prosecutor's improper and prejudicial closing argument, in which the prosecutor repeatedly asserted that Applicant did not dispose of his gun prior to arrest so that he could kill more police officers. (Trial Tr. Vol. 4, 844-47, January 27, 1998). Counsel thus failed to preserve for appeal whether the improper arguments violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law.

2) Counsels' failure to secure the assistance of appropriate crime scene and other experts prevented the defense team from adequately corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

3) Counsel failed to object to the prosecution's racially discriminatory use of its peremptory challenges. See Batson v. Kentucky, 476 U.S. 79 (1986).

4) Counsel failed to object to the presence of numerous law enforcement officers present in the courtroom throughout applicant's trial.

5) Counsel failed to object to the use of shackles on applicant. These shackles were visible when applicant was in the courtroom as well as when he was being transported from the jail to the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

10(b): Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution during the sentencing phase of his capital trial.

11(b): Supporting facts: For the reasons set forth below, trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) Counsel failed to properly object to the victim's widow's testimony and thus preserve for appeal all available grounds on which such testimony violated the Sixth, Eighth, and Fourteenth Amendments and the corresponding provisions of the South Carolina Constitution and South Carolina law. During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence.

(R. at 1090-92). See State v. Stone, 655 S.E.2d 487, 488-89 (S.C. 2007).

2) Counsel failed to object to extensive victim impact testimony regarding the effect of the victim's death on law enforcement in Sumter County generally and on various law officers in particular. (R. at 835-41, 1095-1104.) This evidence included testimony alleging, inter alia, that the sheriff's office brings all of its law enforcement trainees to the victim's gravesite during their orientation. (R. at 840-41.) Such testimony was outside the scope of proper victim impact evidence, and counsel's failure to lodge an appropriate objection was unreasonable and prejudicial.

3) Counsel failed to present evidence during the resentencing proceedings of applicant's prior cooperation with law enforcement, including that applicant had previously provided information to law enforcement regarding certain other criminal activities.

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

5) Counsel failed to object to the presence of numerous law enforcement officers in the courtroom throughout the resentencing trial.

6) Counsel failed to conduct an adequate voir dire, thus allowing the erroneous and prejudicial qualification of potential jurors who were predisposed to sentence the applicant to death or were otherwise legally unqualified to serve. Counsel also failed to ask adequate questions to determine whether many jurors were (or were not) qualified to serve on a capital jury.

7) Counsel failed to secure the assistance of appropriate crime scene and other experts. The failure to secure this necessary expert assistance prevented the defense team from adequately

corroborating applicant's statement regarding the nature of the homicide and from rebutting the prosecution's theory that applicant "ambushed" and "executed" the victim.

10(c): Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 4 of the South Carolina Constitution during the appellate proceedings.

11(c): Supporting Facts: For the reasons set forth below, appellate counsel's performance during the sentencing phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984).

1) During the resentencing proceeding, the victim's widow testified that she attempted to commit suicide upon learning that the South Carolina Supreme Court had reversed Applicant's original death sentence. (R. at 1090-92). Counsel objected, and the trial court overruled the objection. (R at 1105-06). Appellate counsel failed to properly raise this claim on direct appeal. Rather than argue the issue consistent with the objection at trial, appellate counsel based the appellate claim on a different legal argument. The South Carolina Supreme Court held that the claim as formulated by appellate counsel was not preserved for review. See State v. Stone, 655 S.E.2d 487, 488 89 (S.C. 2007).

10(d): Applicant's conviction and sentence were obtained in violation of the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.

11(d): Supporting Facts: Several errors at trial violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Those errors include, but are not necessarily limited to, the following:

1) The trial court erred by refusing to approve funding for a jury selection expert in violation of Applicant's right to expert assistance. See Ake v. Oklahoma, 470 U.S. 68 (1985).

2) The presence of numerous armed officers in the courtroom during both phases of the trial violated the applicant's right to a fair trial.

10(e): Applicant's conviction and death sentence were obtained in violation of the Fifth and Sixth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting Facts: The state forced applicant to wear shackles when being transported to the courtroom and also once inside the courtroom. See Deck v. Missouri, 544 U.S. 622 (2005).

(App. 4005-08).

The evidentiary hearing was held on April 23-24, 2012 and on August 10, 2012. (App. 4075-4505). Applicant was present and was represented by Mr. Blume and Mr. Lominack.² The State was represented by Senior Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Alphonso Simon. Both parties submitted post-trial briefs. (App. 7112-258).

On May 2, 2013, the PCR Court filed its Order dismissing the Application for Post-Conviction Relief. (App. 7259-90). Applicant filed a Motion to Alter or Amend Judgment on May 10, 2013. (State App. 7291-301). The State also filed a Motion to Alter or Amend Judgment on May 17, 2013. (State App. 7302-05). A hearing on the motions was convened by the PCR Court on August 2, 2013. (App. 7306-38). Applicant was present and was presented by Mr. Blume and Ms. Paavola. Id. The State was represented by Mr. Zelenka and Mr. Simon. Id. On August 14, 2013, the PCR Court filed its Amended Order, again denying the application for post-conviction relief. (App. 7339-70).

² At the conclusion of the hearing on August 10, 2012, Emily Paavola, Esquire, was appointed to represent Applicant in place of Mr. Lominack during the remainder of the post-conviction relief proceedings. (App. 4501-02, 7110-11).

Applicant subsequently filed a Notice of Appeal on September 17, 2013. (App. 7371-72). Applicant filed his Petition for Writ of Certiorari. In the Petition, Applicant raised the following arguments:

- I. Whether Petitioner's right to effective assistance of counsel during the guilt-or-innocence phase of trial was violated as a result of:
 - (A) trial counsel's failure to secure necessary expert assistance to support the accident theory of the case; and,
 - (B) trial counsel's failure to object to the solicitor's improper statements in closing argument that Petitioner was planning to kill more police officers at the time of his arrest?
- II. Whether Petitioner's right to effective assistance of counsel was violated during the penalty phase as a result of:
 - (A) trial counsel's failure to investigate and present evidence of Petitioner's low intellectual functioning and brain damage;
 - (B) trial counsel's failure to support the accident theory of the case; and
 - (C) trial counsel's failure to object to inadmissible victim impact evidence?
- III. Whether Petitioner's right to effective assistance of counsel was violated during the appellate proceedings?
- IV. Whether Petitioner was prejudiced as a result of the cumulative effect of counsel's multiple deficient acts and omissions?

(Attachment No. 14). Respondent filed its Return to the Petition for Writ of Certiorari.

(Attachment No. 15). Applicant then filed a Reply. (Attachment No. 16). By Order filed July 23, 2015, the South Carolina Supreme Court granted the Petition for Writ of Certiorari on all but two questions presented. (Attachment No. 17). Applicant subsequently filed a Brief of Petitioner and a Reply Brief of Petitioner, and the State filed its Brief of Respondent. (Attachment Nos. 18, 19, 20). Oral argument was heard by the

South Carolina Supreme Court on March 23, 2016. The South Carolina Supreme Court filed a published opinion affirming the PCR Court's order of dismissal on February 8, 2017. (Attachment No. 21). Both parties filed petitions for rehearing. (Attachment Nos. 22, 23). Applicant also filed a Reply to the State's petition for rehearing. (Attachment No. 24). By Order filed March 29, 2017, the South Carolina Supreme Court denied both petitions for rehearing. (Attachment No. 25). On that date, the South Carolina Supreme Court also filed a modified published opinion, again affirming the PCR Court's order of dismissal. (Attachment No. 26). The Remittitur was issued on March 29, 2017. (Attachment No. 27).

Applicant subsequently sought review in the United States Supreme Court. He filed a Petition for Writ of Certiorari on August 24, 2017. (Attachment No. 32). The State filed a Brief in Opposition. (Attachment No. 33). Applicant filed a Reply to Brief in Opposition on October 11, 2017. (Attachment No. 34). By Order filed October 30, 2017, the United States Supreme Court denied the Petition for Writ of Certiorari. (Attachment No. 35).

Petitioner also currently has pending a petition for federal habeas corpus pending in the United States District Court for the District of South Carolina. C/A No. 2:17-cv-01221-MGL-MGB. On March 31, 2017, Applicant filed in federal court a Motion for Stay of Execution and Appointment of Counsel. (Attachment No. 36). After a response was filed, the Honorable Mary Geiger Lewis, United States District Judge, issued an Order granting a stay of execution to last for ninety days after appointment of counsel, and requesting further briefing from the parties regarding appointment of counsel on April 10, 2017. (Attachment No. 37). After said briefing, on May 4, 2017, Judge Lewis filed

an Order Granting Petitioner's Motion for Appointment of Counsel as Modified. (Attachment No. 38). In the Order, Emily Paavola, Esq., John Blume, Esq., and John Warren, Esq. were appointed to represent Applicant in the federal habeas action.³

The stay of execution expired. An execution notice was filed by the South Carolina Supreme Court on November 6, 2017. (Attachment No. 39). On November 20, 2017, Applicant filed a new Motion for Stay of Execution in the United States District Court. (Attachment No. 40). Applicant also filed his initial petition for federal habeas corpus relief. After further briefing, Judge Lewis granted the motion for a stay of execution, which will last until the federal habeas action is completed. (Attachment No. 40).

On March 26, 2018, Applicant filed his final petition for writ of habeas corpus. (Attachment No. 41). A supplement to the final petition was filed by Mr. Shoemake, serving as independent Martinez⁴ counsel, on March 29, 2018. (Attachment No. 42).

The following documents are attached to this Return:⁵

1. Appendix, the Honorable Michael G. Nettles, Circuit Court Judge (fifteen volumes)
2. Supplemental Appendix, the Honorable Michael G. Nettles, Circuit Court Judge (two volumes)
3. Final Brief of Appellant, first direct appeal
4. Final Brief of Respondent, first direct appeal
5. South Carolina Supreme Court Opinion, first direct appeal

³ Derek Shoemake, Esq., has since been appointed to represent Applicant as independent counsel in substitution of John Warren.

⁴ Martinez v. Ryan, 566 U.S. 1, 132 S. Ct. 1309 (2012).

⁵ Whenever possible, the copies of the documents attached are printed from the copies filed with the United States District Court in the pending federal habeas action.

6. Remittitur, July 31, 2002
7. Remittitur dated January 23, 2008
8. South Carolina Supreme Court Order filed February 21, 2008
9. Return, Motion to Dismiss, and Motion for Summary Judgment to Application for Post-Conviction Relief, 2008-CP-43-905
10. Amended Return to Application for Post-Conviction Relief, 2008-CP-43-905
11. Return, Motion to Dismiss and Motion for More Definite Statement to Third Amended Application for Post-Conviction Relief, 2008-CP-43-905
12. PCR Evidentiary Hearing Transcript, 2008-CP-43-905
13. Applicant's Post-Trial Brief; 2008-CP-43-905
14. Petition for Writ of Certiorari
15. Return to Petition for Writ of Certiorari
16. Petitioner's Reply
17. South Carolina Supreme Court Order dated July 23, 2015
18. Amended Brief of Petitioner
19. Brief of Respondent
20. Petitioner's Reply Brief
21. South Carolina Supreme Court published Opinion filed February 8, 2017
22. Petition for Rehearing or, in the Alternative, Motion to Stay Issuance of the Remittitur
23. Respondent's Petition for Rehearing
24. Reply to Respondent's Petition for Rehearing
25. South Carolina Supreme Court Order filed March 29, 2017

26. Modified South Carolina Supreme Court published Opinion filed March 29, 2017
27. Remittitur filed March 29, 2017
28. Pages 3912, 3913, 5875 and 5914 from Volume 12 of the Appendix
29. Missing pages from first trial transcript in Appendix
30. Pages from second trial transcript in Appendix
31. Transcript of portion of jury voir dire from second trial
32. Petition for Writ of Certiorari
33. Brief in Opposition
34. Reply
35. United States Supreme Court letter Order
36. Motion for Stay of Execution and Appointment of Counsel
37. United States District Court Order granting stay of execution
38. United States District Court Order appointing counsel
39. Execution Notice filed November 6, 2017
40. Motion for Stay of Execution filed in United States District Court on November 20, 2017
41. United States District Court Order granting stay of execution
42. Final Petition for Writ of Habeas Corpus
43. Supplement to Petition for Writ of Habeas Corpus

II. Statement of Facts

It is undisputed that Petitioner shot and killed Sumter County Sheriff's Deputy Charlie Kubala.

On the evening of February 26, 1996, Mary Ruth McLeod visited her mother Ruth Griffith at her Sumter home. They heard knocking at the back door, and Ruth pulled the curtain back on the door and saw Petitioner. (Supp. App. 229-32, 259-60; App. 2941-42). Ruth told her daughter Petitioner was outside and she did not want him in her home. McLeod went outside and accosted Petitioner, telling him to go home. Petitioner initially headed towards a little shed in Griffith's backyard. After further prompting, he headed back through the woods. As Petitioner walked away, McLeod saw that he had something under the back of his jacket. She walked to the edge of the woods to make sure he was going home, and she saw Petitioner standing there, holding a shotgun across his arms, and staring back at the house. She noted Petitioner's eyes were glazed; he walked a little bit off balance; and he was holding what appeared to be a beer can. (Supp. App. 232, 264-65, 279; App. 2942-46, 2969-71).

McLeod went back inside and called 911, and Sergeant Charlie Kubala responded to Ruth's house. Kubala reported arriving at the scene at 6:06 p.m. McLeod told Kubala what happened, and they walked to the edge of the woods where Petitioner had gone. Petitioner was nowhere to be seen. Sgt. Kubala told the women to call him if they had any more trouble. (Supp. App. 232-33; App. 2946-48).

Shortly after McLeod left, Ruth heard gunshots in her backyard. At 6:47 p.m., she called her neighbor Landrow Taylor, who also had heard shooting and promptly responded. Taylor called 911 close to 7:00 p.m. (Supp. App. 232-34, 281-82; App. 2948-49).

Ruth and Taylor then heard someone jiggle the door handle to Ruth's car, which was parked right outside her bedroom window. They called 911 again at 7:02 p.m. As

the two cowered in the living room, they heard someone banging on the rarely-used side door. The light on the porch was off, and it was dark. Taylor hollered, "What are you trying to do back there?" There was a moment of silence but the beating started back. (Supp. App. 234-38, 255-56, 267-73, 283-84).

Meanwhile, Sergeant Kubala reported arriving back at the scene. Taylor went out onto the front porch and motioned to the deputy, who walked around the corner of the house. Taylor went back inside the house. The dispatcher radioed Kubala about another call, but Kubala replied that he was busy. (Supp. App. 284-86; App. 3063-65, 3085-86).

Taylor and Ruth heard someone shout, "Halt!" or "Hold it!," followed immediately by three or four gunshots. As Taylor ran back out onto the front porch, Deputy John Prince came pulling up in his cruiser. Taylor saw a flashlight and walkie-talkie lying on the ground, and yelled at Prince that Kubala was around the side of the house. Meanwhile, Ruth called 911 to report the officer down. (Supp. App. 240-42, 285-87; App. 3065).

Deputy Prince shined a flashlight, saw Kubala, and ran to his side. Kubala was laying face up and bleeding profusely from his mouth and neck. His gun lay near the fingertips of his right hand, and off the fingertips of his right hand was his walkie talkie, from which the radio transmissions were clearly audible. His flashlight lay between his body and his right arm. Deputy Prince rolled Kubala over to clear an airway, but another gunshot rang out and Prince sought cover by the corner of the house. (Supp. App. 287-90, 299-301; App. 3066-67, 3069-71).

Other officers and EMS arrived shortly thereafter. Because Prince had heard another shot, the police cleared a nearby shed and the surrounding area. EMS found the victim not breathing and without a pulse. Although he was wearing his protective vest, Sergeant Charles Kubala of the Sumter County Sheriff's Department died at the scene from one gunshot that entered his right ear, and another that entered his neck. (App. 3068, 3087-88, 3183-92).

Police processed the scene and collected various items of evidence confirming that Petitioner murdered Sgt. Kubala. The pistol recovered from under Petitioner at the time of his arrest was an extremely accurate target pistol which fired powerful .22 "long rifle" ammunition. The weapon was found with five rounds in its clip and a shell casing lodged in the ejection port. SLED conclusively matched this gun to two bullet fragments and one bullet taken from Sgt. Kubala's body. The .22 pistol also matched to three spent .22 cartridge cases found on the side porch as well as other casings found in the nearby woods. Kubala's 9mm service pistol, on the other hand, was found fully loaded and had not been fired. (App. 3091, 3202, 3229-32, 3279, 3285-97).

Leaning up against the wall of the side porch was a single-shot .410 shotgun, with a live shell inside and its hammer cocked back in the firing position. This shotgun was conclusively matched to a spent .410 shell casing found in the woods near Ruth's house. (App. 3202, 3212, 3280-82).

The screen door to that side porch had three holes which appeared to be from bullets. The screen around these holes not only tested positive for lead but also was microscopically consistent with holes made from bullets SLED test fired through the screen door with Petitioner's .22 pistol. Ruth had nailed a board to cover a broken

window pane on the door inside the screen porch that leads into the main house itself. After the incident, this board was knocked out and was hanging loosely from only one nail. (App. 2954-60, 3109-12, 3209-18, 3259, 3264-70).

A knife was found in Petitioner's coat pocket. Tests taken shortly after arrest indicated gunshot residue on the palm and back of Petitioner's right hand, as well as the presence of lead on Petitioner's left palm and sleeve. The victim had lead on his right palm; however, this only likely indicated handling of a weapon. The victim's shirt did not have any gunshot residue, which indicated Kubala was not hit by a close range shot. (App. 3249-52).

After he was apprehended, Petitioner gave a statement to law enforcement. He admitted to being at Ruth's place earlier in the day. Petitioner claimed that as soon as he entered Ruth's backyard, a woman he did not know came out of the house "raising cane" at him and telling him to get off the property. Petitioner returned to the woods, and found and paid David, who left. Petitioner then walked around the woods shooting the guns and finishing off the beer. Around dark he decided to return to Ruth's.

Petitioner walked up the steps to the little screen porch, set down the shotgun, but kept the .22 in his right hand. He admitted he started beating on the inside door, which broke because he hit it too hard. Petitioner then heard a man's voice yelling outside the house, and as he turned, the gun went off. Petitioner ran into the woods. In his statement, Petitioner claimed the gun only went off once, and he never saw the deputy or his patrol car. (App. 3160-69).

Petitioner denied ever firing the gun again after he ran off the porch. He also claimed he did not know what was going on even though he hid in the woods for hours surrounded by police officers with a helicopter overhead. (App. 3160-69).

In regards to sentencing, Petitioner's extensive prior record was admitted. In 1985, Petitioner was convicted on seven indictments for breaking into a motor vehicle, larceny, housebreaking, grand larceny, housebreaking, grand larceny, breaking into a motor vehicle, petty larceny, breaking into a motor vehicle, grand larceny, breaking into a motor vehicle, grand larceny, and grand larceny. For all of these crimes he received a youthful offender sentence not to exceed six years, and Petitioner was paroled in 1985. (App. 2908-19).

In 1987, Petitioner pled guilty to two counts of second-degree burglary and two counts of grand larceny on one indictment, and second-degree burglary and grand larceny on another indictment. For those crimes, Petitioner received a total active sentence of twenty years plus five years probation. (App. 2908-19).

Petitioner was paroled in June 1993 after serving approximately five years. He faced substantial time if his parole was revoked. A witness noted that Petitioner's conditions of parole and probation precluded him from possessing firearms, using controlled substances, drinking alcohol to excess, or otherwise violating the law. Petitioner violated all of those conditions on February 26, 1996. (App. 2919-23).

The State presented Sgt. Kubala's family members, fellow officers, and friends who universally testified that he was a young, bright, and energetic officer who devoted much time to his community, including the Explorers, the YMCA, and the Special Olympics. Kubala's mother, father, and widow described the trauma of losing Sgt.

Kubala, particularly on his widow and children. Captain Hobbs and Major Metts, both close friends with Sgt. Kubala on the force and particularly affected by the loss of their comrade in the line of duty, also testified. (App. 2900-07, 3093-100, 3309-67).

The defense's sentencing phase case

Petitioner first called social worker TeAnne Oehler, who described Petitioner's upbringing – in particular the poverty and his mother's affair with the allegedly abusive and drunk Wesley Miles. Oehler theorized this upbringing led to his poor performance and frequent troubles with the law, which began with an arrest for stealing a car. She concluded that these factors about Petitioner's upbringing affected his judgment and decision making. (App. 3391-414). On cross, Oehler admitted she believed Petitioner had anti-social personality disorder and a problem with authority figures, and admitted Petitioner's extensive history of burglary and theft. (App. 3426-30).

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

Ruth Griffith's sister-in-law Mary Wilson testified at the first trial, and her testimony was read into the record. She stated her daughter Michelle was living with Griffith at some point in the 90s and Petitioner would visit her there. She also stated Petitioner did some work for Griffith, and some times all of them would go out to a honky tonk. Supposedly, Griffith admitted drinking beer and smoking marijuana with Petitioner. (Supp. App. 626-34). On cross, Wilson admitted it was prior to 1987 that this occurred. (Supp. App. 638). Wilson's testimony from the first trial's sentencing

phase was also read into the record, during which she described Wesley Miles's drinking problem. (Supp. App. 639-41).

Psychopharmacologist Dr. Andrew Morton described the effects of Petitioner's drinking on his brain, and on his judgment and decision making. (App. 3485-509).

Former warden James Aiken stated that Petitioner would easily adapt to prison, despite his commission of some infractions. The defense asked Mr. Aiken to describe what Petitioner's life in prison would be like, at which point he stated that Petitioner would be in the company of many dangerous people, and that Petitioner was relatively old and vulnerable to violent and sexually aggressive inmates. Mr. Aiken also was allowed to testify that regardless of whether Petitioner was good in prison or bad in prison, SCDC could safely contain him "under the gun" for the rest of his life. (App. 3522-36).

III. Allegations in this Application for Post-Conviction Relief

Applicant asserts as follows:

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

10(b) Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the guilt-or-innocence phase of his capital trial.

11(b) Supporting Facts: Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. See Strickland v. Washington, 466 U.S. 668 (1984). Counsel's acts or omissions include a failure to retain a forensic pathologist, crime scene reconstruction expert

and other similar expert assistance to prove that the facts and circumstances of the crime were consistent with an accident theory.

10 & 11(c): There is 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. Specifically, advancements in technology such as computer aided design software, 3-D printing and other advancements in similar fields, which are now available for crime scene reconstruction, demonstrate that the facts and circumstances of the crime, including the measurements of the crime scene, the trajectories of the bullets, and other physical information likewise support applicant's position that the homicide was an accident. These technologies were not available at the time of applicant's trial and therefore the conclusions drawn from their use constitute material facts not previously presented and heard.

IV. Motion to Dismiss

Respondent moves to dismiss this action for the following reasons:

A. This Application for Post-Conviction Relief is untimely.

This Application for Post-Conviction Relief should be dismissed because it is untimely. South Carolina Code Ann. § 17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Pelouquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute). The Applicant was convicted on January 26, 1997 and sentenced to death on January 28, 1997. His sentence was reversed after his first direct appeal. He was sentenced to death after a new sentencing hearing on February 27, 2005. His sentence was affirmed in an opinion filed December 20, 2007, and his petition for rehearing was denied on January 23, 2008. The remittitur

was also issued on January 23, 2008. The Applicant did not seek certiorari from the United States Supreme Court. The Applicant was therefore required to file his application before January 23, 2009. This application was filed on June 5, 2018,⁶ 3,420 days, or nine years, four months, and thirteen days after the statutory filing period expired.

Applicant cannot show that the Application is timely based upon an argument of recently discovered facts. S.C. Code § 17-27-45 also states:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

In Ground 10 and 11(c), Applicant asserts "advancements in technology such as computer aided design software, 3-D printing and other advancements in similar fields, which are now available for crime scene reconstruction, demonstrate that the facts and circumstances of the crime, including the measurements of the crime scene, the trajectories of the bullets, and other physical information likewise support applicant's position that the homicide was an accident." (Application, p. 3). Respondent submits this contention is insufficient to render this Application timely. First, the claim relies upon measurements from the crime scene and information that was available at the time of trial. It does not rely upon evidence of material facts that were not previously

⁶ "A proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place." S.C. Code Ann. § 17-27-40 "It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer. Fox v. Union-Buffalo Mills, 226 S.C. 561, 86 S.E.2d 253 (1955)." Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

presented or previously available for presentation. Second, Applicant has not specifically identified the type of software and advancements that he relies upon as support for this claim, or when the "advancements in technology" relied upon became available. Absent a showing that Applicant could not reasonably ascertain the information from this newer technology until within the last year, Respondent submits this application is untimely.⁷

Altogether, Respondent submits these claims could have been ascertained and raised by the Applicant through his counsel in the first PCR action. Thus, he cannot show that this Application is timely. This application should be dismissed.

B. This Application is successive to a previously properly filed Application.

This Application for Post-Conviction Relief should be dismissed because it is successive to PCR Action the Applicant initiated on April 9, 2008. South Carolina Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were

⁷ Respondent would also note that to the extent Applicant relies upon advances in technology that were available during the pendency of his first PCR action, this claim would also be barred as successive as it could have been discovered and presented in the prior PCR action.

not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

In Aice, the South Carolina Supreme Court expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not." Id.

While the Court in Aice recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as Aice urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." Id. at 451, 409 S.E.2d at 394. Thus, "the contention that prior PCR counsel was

ineffective is not per se a 'sufficient reason' allowing for a successive PCR application under § 17 27 90." Id. at 451, 409 S.E.2d at 394.

The Court further explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See Butler v. State, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish.** For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17 27 90. This Court has implied such a holding in the past. See Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id. at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in Aice indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Aice, 305 S.C. at 450 52, 409 S.E.2d at 394 95. The Court concluded as follows:

We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the Austin and Aice cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to

effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, Austin stands harmonized with the instant case.

Id. at 452, 409 S.E.2d at 395.

While there are exceptions to the rule, Applicant has not shown they are applicable here. For instance, while successive PCRs are allowed for belated direct appeals where a person did not fairly get their "one bite at the apple," see Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant could not seek such review in state court here because he has already clearly litigated his direct appeal in this case. In another situation, the South Carolina Supreme Court heard a successive application, but only because it was one of the "rare cases" where "so many procedural irregularities occurred during the course of [the inmate's] judicial process that he has not received due process." Washington v. State, 324 S.C. 232, 478 S.E.2d 833, 835 (1996). There is no evidence Applicant's process in the first PCR action on the whole was so broken that he did not receive due process. To the contrary, the procedural history is clear Applicant had one full bite at the apple on both direct appeal and PCR in which multiple claims were preserved through the process. While it is true that in Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008), the South Carolina Supreme Court included a footnote in which it noted that a successive PCR had been granted by the trial court because of inadequate PCR counsel. However, Williams was before the state supreme court on state habeas and not on any successive PCR, and the footnote was merely dicta about what happened in a different portion of the proceedings.

Finally, Applicant cannot rely upon an assertion that PCR counsel was ineffective to contend the action is not successive. In Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016), the South Carolina Supreme Court held an applicant is not entitled to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel. 418 S.C. at 516, 795 S.E.2d at 34. In this case, Applicant appears to assert the claims in this action were not presented in the prior action because prior PCR counsel was ineffective. Under Robertson, this argument provides no avenue for relief by way of a successive PCR action.

Furthermore, unlike Robertson, Applicant has not attacked the qualifications of his original PCR counsel under S.C. Code Ann. § 17-27-160 or the Order appointing counsel, whereas Robertson attacked both. There is no question that PCR counsel in Applicant's first PCR action were qualified under S.C. Code Ann. § 17-27-160(B). See Orders dated May 13, 2008, November 7, 2008, and December 31, 2012.⁸ Since Applicant has not asserted that counsel was not qualified under S.C. Code Ann. § 17-27-160(B), and Applicant cannot show that counsel was not properly qualified under the statute, Applicant is not entitled to a hearing similar to the limited hearing afforded Robertson.

Here, Applicant has not shown there is sufficient reason why any of the grounds presented in this application were not presented in his prior PCR action. Thus, this application for post-conviction relief should be dismissed because it is successive to the application that was filed in April 2008.

⁸ Copies of these Orders are attached to this Return and Motion to Dismiss as Exhibit 1.
Page 27 of 31

C. Applicant's claim under Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002), is not a cognizable claim for post-conviction relief.

In his first claim in the Application, Applicant asserts his death sentence violates the Eighth Amendment of the United States Constitution because he is intellectually disabled, citing to Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). This claim is not a cognizable claim for post-conviction relief.

In Franklin v. Mayard, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court addressed how the issue of intellectual disability (then mental retardation) should be handled at the trial level after the United States Supreme Court's decision in Atkins.

Regarding the procedures to be used in making the mental retardation determination in post-Atkins cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. Cf. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)⁴ (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. See S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006).

The procedures outlined by the South Carolina Supreme Court show that an Eighth Amendment claim asserting that a death sentence would constitute cruel and unusual punishment because the defendant is intellectual disabled can only be properly raised before the trial court in post-Franklin trials. Stone's re-sentencing hearing was post-Franklin, commencing over one year after the Franklin opinion was issued. Since this Eighth Amendment claim was a matter that could have been raised at trial, but was not done so by Applicant's trial counsel, Applicant is not entitled to relief upon his freestanding claim regarding intellectual disability. Simmons v. State, 264 S.C. 417, 422-23, 215 S.E.2d 883, 885-86 (1975)(issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (same); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983) (same); Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); S.C. Code Ann. § 17-27-20(b) ("This remedy[PCR] is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction.").

Consequently, for all the foregoing reasons, Respondent hereby moves for summary dismissal of the action as time barred and successive. S.C. Code § 17-27-70 (b) (summary dismissal may be allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the application is not entitled to post-conviction relief and no purpose would be served by any further proceedings...."); S.C. Code § 17-27-70 (c) (summary disposition allowed if "no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."). Further,

Respondent moves the claim in Ground 10 and 11(a) be dismissed because it is not a cognizable claim for post-conviction relief in this action.

CONCLUSION

Each and every allegation in the Application that is not hereinabove expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be denied and dismissed.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Senior Assistant Attorney General
(Bar No. 74713)

SHERRIE BUTTERBAUGH
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: 

ATTORNEYS FOR RESPONDENT

July 5, 2018.

Exhibit No. 1

STATE OF SOUTH CAROLINA)
)
COUNTY OF SUMTER)

BOBBY WAYNE STONE, SK5051)
Applicant,)
VERSUS)
)
STATE OF SOUTH CAROLINA)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
2008-CP43-905

ORDER APPOINTING COUNSEL
(Death Penalty Case)

The above referenced matter was instituted by the Applicant by the filing of his application for Post Conviction Relief following his conviction on the charges of murder, burglary in the first degree, and possession of a weapon during the commission of a crime of violence. The State noticed the Defendant that it would be seeking the death penalty in connection with the murder charge, and following his conviction, the Applicant was, in fact, sentenced to death in connection with the conviction of murder.

By Order dated February 21, 2008, the undersigned was assigned by the South Carolina Supreme Court to handle all matters relating to the Post Conviction Relief Application, which the Applicant intended to file. The Applicant filed his application for Post Conviction Relief on April 9, 2008, and the State is in the process of preparing its Return.

Section 17-27-160(B) of the South Carolina Code of Laws, as amended, provides that an indigent applicant, if they so desire, is entitled to be represented by two (2) counsel, one of whom must have previously represented a death sentenced inmate in State or Federal Post Conviction Relief proceedings or be death penalty qualified, pursuant to Section 16-3-26(B) of the South Carolina Code of Laws, as amended. The Court has contacted Robert E. Lominack, who is death penalty qualified and has served as lead counsel in prior death penalty cases to serve as lead counsel in this matter, as well as James A. Brown, Jr., to serve as second counsel. Each of these gentlemen

has consented to serve as counsel for the Applicant and is hereby so appointed.

The Applicant has stated that he would like to have Mr. John H. Blume serve as one of his counsel in this matter. The Applicant states that he has a pre-existing positive working relationship with Mr. Blume and that Mr. Blume is somewhat familiar with the facts of the Applicant's case and has agreed to serve if so appointed. The Court explained to the Applicant that there were other factors which needed to be considered beyond the Applicant's desires in this matter, and that the Court had certain concerns about simply appointing Mr. Blume in this matter because of his teaching obligations as a professor of law at Cornell Law School in Ithaca, New York. The Court advised the Applicant that he would consider a Motion for substitution of counsel, when a record could be made in the matter, following a hearing on any application for the substitution of counsel.

A discussion arose between counsel for the State and counsel for Applicant as to whether or not there could be ex parte requests with respect to the appointment of experts in a Post Conviction Relief matter. It is the position of Applicant's attorneys that the same is proper, and it is the position of the State's attorneys that such is not allowed in Post Conviction Relief matters. The Court advised the State to file a Motion in connection with the matter as to limiting any such ex parte requests.

The Court also advised the parties that it would like to have a status conference in approximately sixty (60) days. At the time that the Court sets the status conference, it will also hear any Motions in connection with the State's Motion to limit ex parte contacts, as well as any Motion for Substitution of Counsel.

IT IS SO ORDERED.

JOHN M. MILLING, Presiding Judge

Darlington, South Carolina.
May 13, 2008.



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

JOHN M. MILLING
JUDGE

88 PUBLIC SQUARE
POST OFFICE DRAWER 519
DARLINGTON, SOUTH CAROLINA 29540-
0519
TELEPHONE: (843) 393-4063
FAX: (843) 393-1281
E-MAIL: jmilling@sccourts.org

May 13, 2008.

Honorable James C. Campbell
Clerk of Court
141 North Main Street
Sumter, South Carolina, 29150.

Re: Bobby Wayne Stone v. State
2008-CP43-905

Dear Mr. Campbell:

Enclosed herewith is the original Order in the above matter, which Judge Milling has prepared and signed. We would greatly appreciate your filing this in your offices. By copy of this letter and the Order by email, we are providing a copy to the attorneys of record and advising them that this is being filed in your Offices.

Thank you for your assistance in this matter.

Sincerely,

Susan B. Bridgers,
Secretary to Judge Milling
Enclosure
cc: by email
robertlominack@mac.com
jimbrownlaw@hargray.com
agcwaters@ag.state.sc.us
john@blumelaw.com

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STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

BOBBY WAYNE STONE, SK 5051
Applicant,

v.

THE STATE OF SOUTH CAROLINA.
Respondent.

JAMES L. BELL
CLERK OF COURT
SUMTER COUNTY

IN THE COURT OF COMMON PLEAS
CA No. 08-CP-43-905

ORDER

CERTIFIED TRUE COPY
OF ORIGINAL FILED
Wanda L. Jeff
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter comes before the Court upon motion of the Applicant to substitute John H. Blume as counsel for James A. Brown, Jr. A hearing was held on April 11, 2008 and this Court appointed Robert E. Lominack and James A. Brown, Jr. to represent Applicant. At that time, Applicant expressed his desire to have Mr. Blume represent him due to a pre-existing positive working relationship, Mr. Blume's knowledge regarding the facts of Applicant's case, and Mr. Blume's experience in capital post-conviction cases. Based on the facts set forth in Applicant's motion, I hereby grant Applicant's motion.


~~IT IS THEREFORE ORDERED that John H. Blume is appointed as counsel for Applicant.~~

1 *[Signature]*

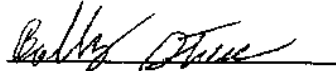
and James A. Brown, Jr. is relieved as counsel.

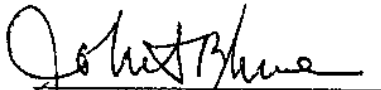
AND IT IS SO ORDERED.

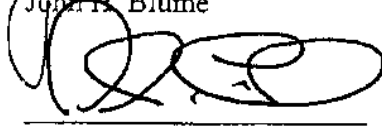
November 7, 2008 *JM*
Miller, et al.

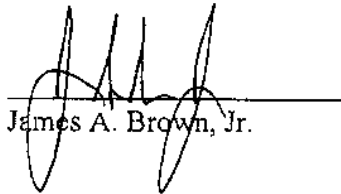

Honorable Judge John M. Milling

WE CONSENT:


Bobby Wayne Stone


John H. Blume


Robert E. Lominack


James A. Brown, Jr.

2 

STATE OF SOUTH CAROLINA)
)
 County of Sumter)
)
 Bobby Wayne Stone, #5051,)
 Applicant,)
)
 vs.)
)
 State of South Carolina,)
 Respondent.)

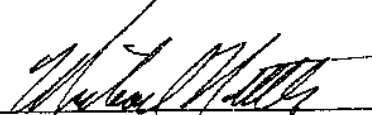
IN THE COURT OF COMMON PLEAS
 Case No. 08-CP-43-905
**ORDER GRANTING SUBSTITUTION OF
 COUNSEL**

This matter comes before the Court upon Applicant's motion to substitute Emily C. Paavola as counsel in place of Robert Lominack. This Court finds that Mr. Lominack is no longer engaged in the full-time practice of law, but has taken a new career as a high school teacher, and he therefore requests to be relieved of his duties in this matter. This Court further finds that Ms. Paavola has previously been involved in this case. She is very familiar with the files and facts of the case and has a positive, pre-existing working relationship with Applicant. Ms. Paavola has substantial experience in capital post-conviction cases and has been appointed as counsel in at least six other capital PCR cases in South Carolina. Finally, this Court finds that Applicant consents to the substitution of Ms. Paavola in place of Mr. Lominack, as evidenced by his affirmative consent under oath at an evidentiary hearing in Florence, South Carolina, on August 10, 2012.

IT IS THEREFORE ORDERED that Robert Lominack is relieved as counsel and Emily C. Paavola is substituted as counsel for Applicant effective August 10, 2012.

IT IS FURTHER ORDERED that Ms. Paavola shall be compensated for her time and reasonable expenses incurred in this matter after August 10, 2012, at the same rate that was previously approved for Mr. Lominack in an *ex parte* funding order dated December 11, 2008.

AND IT IS SO ORDERED.



Michael G. Nettles
Circuit Court Judge

December 31, 2012.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the ***Return and Motion to Dismiss***, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire
Justice 360
900 Elmwood Ave., Ste. #200
Columbia, SC 29201

Charles Grose, Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

RECORDED
2018 JUL 30 PM 2:56
JAMES L. CAMPBELL
CLERK OF COURT
SUMNER COUNTY, SC

This 5th day of July, 2018.



ALPHONSO SIMON, JR.

RECORDED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER 2018 JUL 26 PM 1:02 Case No.: 2018-CP-43-1025

BOBBY WAYNE STONE, SK 5051)
Applicant,)
JAMES C. CAMPBELL)
CLERK OF COURT)
SUMTER COUNTY, S.C.)

v.)

THE STATE OF SOUTH CAROLINA.)
Respondent.)

RESPONSE IN OPPOSITION TO STATE’S MOTION TO DISMISS

Applicant, Bobby Wayne Stone, through undersigned counsel, submits this response in opposition to Respondent’s Return and Motion to Dismiss (hereafter, “Motion to Dismiss.”).¹ Respondent argues that the Application for Post-Conviction Relief (“PCR”) should be summarily dismissed because it is impermissibly successive and time-barred. Respondent also argues that Stone’s freestanding claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, is not a cognizable claim for post-conviction. Respondent is mistaken. Stone is entitled to pursue the present PCR action for the reasons set forth below.

I. RELEVANT LEGAL PRINCIPLES.

A. INTELLECTUAL DISABILITY

In *Atkins v. Virginia*, the United States Supreme Court found that the Eighth Amendment to the Constitution prohibits the execution of persons with mental retardation. *Atkins*, 536 U.S.

¹ Undersigned counsel note that they have not been appointed to represent Stone in these proceedings. He is entitled to the appointment of two post-conviction counsel, at least one of whom must be statutorily qualified. S.C. Code Ann. § 17-27-160(B). Both undersigned counsel are statutorily qualified to represent an applicant in a capital post-conviction case because they have previously served as lead counsel in multiple capital PCR proceedings. Accordingly, Stone moves for undersigned counsel to be appointed to represent him in the remainder of his proceedings before this Court.

at 321.² The Court held that “by definition, [intellectually disabled persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. In *Hall v. Florida* the Supreme Court reaffirmed that because “[n]o legitimate penological purpose is served by executing a person with intellectual disability,” they are not eligible for “the law’s most severe sentence.” *Hall*, 134 S. Ct. at 1992-93; *see also*, *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017).

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court held that the State’s definition of intellectual disability is found in the death penalty statute, which defines that condition as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” *Id.* at 278-79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)). Thus, the definition of intellectual disability consists of three prongs:

- (1) subaverage intellectual functioning;
- (2) limitations in adaptive functioning; and,
- (3) a manifestation of these attributes before age 18.

The first prong requires an individual to display sub-average intellectual functioning. A person meets the sub-average intellectual functioning component if his or her IQ is approximately 75 or less. *Atkins*, 536 U.S. at 309 n.5; *Hall*, 134 S. Ct. at 1995, 2001; *Moore*, 137 S. Ct. at 1049; *see also*, *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (relying on *Hall* to find unreasonable a state court’s conclusion that a score of 75 precluded an intellectual disability finding).³ The

² The Court has since instructed that the term “intellectual disability” replaces and has the same meaning as what was previously referred to as “mental retardation.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citing Rosa’s Law, 124 Stat. 2643).

³ The Wechsler Adult Intelligence Scales (WAIS) IQ test has been repeatedly identified as the “gold standard” for accurately and reliably determining intelligence. *See e.g.*, *Rivera v.*

second prong requires significant deficits in at least one of three areas of adaptive behavior: conceptual, social and practical skills. American Association on Intellectual Disabilities and Developmental Disorders (hereafter, “AAIDD”) 2010 Manual 5; Diagnostic and Statistical Manual of Mental Disorders 33 (5th Ed. 2013). Finally, because intellectual disability is a developmental disorder, the third prong of the definition is onset during the developmental period, which is typically considered prior to the age of eighteen.⁴

B. POST-CONVICTION PROCEDURE

South Carolina adopted the Uniform Post-Conviction Procedure Act (hereafter, the “PCR Act”) in 1969. *See* S.C. Code Ann. § 17-27-10 to -160, as amended. Its purpose is to provide convicted persons with a comprehensive mechanism to raise any unresolved and previously unmentioned questions of fact or law relevant to their convictions or sentences. *See* S.C. Code Ann. § 17-27-20(a); *see also*, Larry W. Yackle, POSTCONVICTION REMEDIES § 4, at 3 (1981 & Supp. 1993) (discussing purpose of state post-conviction review). According to the South Carolina Supreme Court, the PCR Act was “designed to incorporate all rights available under federal habeas corpus.” *Finklea v. State*, 273 S.C. 157, 158, 255 S.E.2d 447, 447-48 (1979); *see also*, *Harvey v. South Carolina*, 310 F.Supp. 83, 85 (D. S.C. 1970) (The PCR Act “affords all the protections contemplated by our founding fathers. It is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to federal review of state convictions”).

Quarterman, 505 F.3d 349, 361 (5th Cir. 2007); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D. La. 2011).

⁴ The analysis of age of onset does not require an individual have been tested or diagnosed with intellectual disability before age 18; instead the signs of intellectual disability need only have *manifested* before that age. *See, e.g., Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015); *Oats v. State*, 181 So. 3d 457, 469 (Fla. 2015); *Nicholson v. Branker*, 739 F. Supp. 2d 839, 857 (E.D.N.C. 2010).

The PCR Act provides that post-conviction review is available to “[a]ny person who has been convicted of, or sentenced for, a crime and who claims, [*inter alia*], that 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 Ann. § 17-20-10(a)(1). Post-conviction is also the appropriate forum for review of a claim that “the sentence exceeds the maximum authorized by law.” S.C. Code Ann. § 17-20-10(a)(3).

II. PROCEDURAL HISTORY.

Stone was convicted and sentenced to death in January 1997, for the shooting death of a Sumter County Sheriff Deputy. On direct appeal, the South Carolina Supreme Court reversed the death sentence and remanded for resentencing. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002). Stone was resentenced to death on February 27, 2005. He was represented at both trials by Cameron B. Littlejohn, Jr. and James H. Babb. Stone’s second sentencing proceeding took place after the United States Supreme Court decided *Atkins*. 536 U.S. 304 (2002). Littlejohn and Babb did not investigate or present evidence that Stone suffers from intellectual disability.

Stone’s death sentence was affirmed on direct appeal. *State v. Stone*, 376 S.C. 32, 655 S.E.2d 487 (2008). He was represented throughout his PCR proceedings by John H. Blume and Robert E. Lominack. No *Atkins* claim was raised in Stone’s initial PCR action. On appeal from the denial of post-conviction relief, Stone was represented by John Blume and Emily Paavola. The South Carolina Supreme Court affirmed the lower court’s denial of post-conviction relief, *Stone v. State*, 419 S.C. 370, 798 S.E.2d 561 (2017), and Blume and Paavola were appointed by the United States District Court for the District of South Carolina to represent Stone in his federal habeas corpus proceedings. In addition, the federal court appointed a third attorney to serve as “*Martinez*” counsel, to investigate whether or not initial PCR counsel provided

ineffective assistance by failing to raise any substantial ground for post-conviction relief.⁵ Derek Shoemake is presently serving as Stone's *Martinez* counsel. On March 29, 2018, Shoemake notified the federal district court that his investigation uncovered evidence that Stone suffers from intellectual disability. *See* Request for Relief Pursuant to *Martinez v. Ryan*, attached here as Exhibit A. Shoemake outlined the progress of his *Atkins* investigation up to that point in time and attached a report from Dr. Sara E. Boyd, Ph.D, a licensed clinical psychologist, who stated that her administration of the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) measured Stone's full-scale IQ at 74. Shoemake also asserted that he had uncovered additional evidence (some of which was developed with technology that was not previously available) to support Stone's argument that the shooting in this case was an accident. These claims were not previously raised at any point in Stone's state court proceedings. Thus, on June 5, 2018, undersigned counsel filed a second-in-time PCR Application on behalf of Stone in an effort to exhaust these claims.⁶ Respondent argues that the application should be summarily dismissed, without an evidentiary hearing, resources and investigative tools to develop the facts of these claims, or (presumably) the appointment of counsel. Respondent's motion to dismiss should be denied.

III. ARGUMENT.

A. Standard of Review.

Motions to dismiss are controlled by Rule 12, SCRPC. The South Carolina Supreme Court has explained the standard as follows:

⁵ In *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that a state procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance of counsel if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

⁶ Derek Shoemake is not qualified to serve as lead counsel in a capital PCR action. Moreover, he is not currently available to represent Stone in his state court proceedings.

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief. When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. . . . Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.

Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (internal citations and quotations omitted).

B. STONE QUALIFIES AS A PERSON WHO MAY INSTITUTE PCR PROCEEDINGS.

Relying on *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), Respondent argues that the PCR Application should be dismissed as impermissibly successive. Motion to Dismiss pp.24-25. In *Aice*, the South Carolina Supreme Court observed that successive PCR applications generally should not be entertained ““unless the court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplemental or amended application.”” *Id.* at 450, 409 S.E.2d at 394 (emphasis in original) (quoting S.C. Code Ann. § 17-27-90). The Court held, however, that there are exceptions to the general rule, including ““when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.”” *Id.* at 451, 509 S.E.2d at 394.

In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court invoked this exception and permitted a successive PCR application to go forward because of the ineffective assistance of initial PCR counsel and various other procedural irregularities. *Id.* at 235-36, 478 S.E.2d at 834-35. The Court has also applied similar exceptions in other cases. For example, in

Case v. State, 277 S.C. 474, 289 S.E.2d 412 (1982), the Court held that a “unique” combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding. The Court later noted that under these circumstances it was “highly doubtful” that Case would have been able to raise the appropriate arguments in his initial PCR. *Aice*, 305 S.C. at 451, n.1, 409 S.E.2d at 394, n.1; *see also Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel). In *Robertson*, the Court held that the “[p]etitioner’s allegation that he was denied a state-created right to qualified counsel constitutes a ‘sufficient reason’ to permit a successive PCR application under section 17-27-90.” 418 S.C. at 516; 795 S.E.2d 29, 35 (2016). Thus, the general rule disfavoring successive PCR applications is not unqualified.

Atkins’s and *Hall’s* prohibition against executing people with Intellectual Disabilities is rooted in prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. Article I, Section 15 of the South Carolina Constitution also bars cruel and unusual punishment and, therefore, prohibits executing people with Intellectual Disabilities. Stone, therefore, qualifies as a person who may institute a post-conviction relief action.

Respondent contends Stone’s freestanding *Atkins* claim cannot be reached because “[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.” Motion to Dismiss, p. 29. Post-conviction relief, however, is not limited to claims of ineffective assistance of counsel, but rather extends to any constitutional violation. *See e.g. Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (post-conviction relief granted based on solicitor’s failure to disclose impeachment evidence constituted *Brady* violation, and State’s failure to

correct co-defendant's false testimony at trial).

The constitutional prohibition against executing people with Intellectual Disabilities presents special considerations, first addressed by our Supreme Court in *Franklin*.⁷ For post-*Atkins* trial cases, *Franklin* established a procedure where the trial judge first considers whether Intellectual Disabilities has been established. *Franklin* declined to adopt a definition of Intellectual Disabilities “different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10)” or “establish procedures for cases where the defendant was sentenced to death prior to *Atkins*, [because] such procedures already exist” under the Uniform Post-Conviction Relief Act. 356 S.C. at 278-81, 588 S.E.2d at 606.

Franklin, therefore, did not expressly address the situation where a defendant is sentenced to death after *Atkins* but does not discover he suffers from Intellectual Disabilities until after the conclusion of his post-conviction relief action. The natural extension of *Franklin*, however, allows this action to proceed, and if Stone’s intellectual disability “is proven, the PCR court will vacate the death sentence and impose a life sentence.” *Id.* Because of the unique considerations involved, Stone is not precluded from raising Intellectual Disabilities at this time in this manner.⁸

C. AT LEAST THREE OTHER COURTS IN SOUTH CAROLINA HAVE ALLOWED APPLICANTS TO PURSUE *ATKINS* CLAIMS IN A SECOND PCR ACTION.

Under similar circumstances, the Honorable J. Mark Hayes allowed Eddie Elmore to seek

⁷And see *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006) (reaffirming procedures established in *Franklin*). *Laney* involved a direct appeal of a capital sentence and not a post-conviction relief procedure.

⁸ Undersigned counsel believe Stone is entitled to pursue a freestanding *Atkins* claim in the same manner as Elmore, Bryant and Aleksey, discussed in section C. below. However, out of an abundance of caution, Stone is filing today an amended PCR application including, in addition to his freestanding claim, the ground that his trial counsel were ineffective for failing to raise an *Atkins* claim at trial.

post-conviction relief even though his Intellectual Disability was identified outside the statute of limitations. This Court can take judicial notice of the following pleadings from Mr. Elmore's case, certified copies of which are attached to this pleading as Exhibits B through G:

1. Application for post-conviction relief alleging Intellectual Disabilities pursuant to *Atkins v. Virginia*;
2. State's return and motion to dismiss as barred and untimely and alternatively barred as issue preclusion;
3. Mr. Elmore's return to State's motion to dismiss;
4. State's reply to return to motion to dismiss;
5. Judge Hayes' order denying State's motion to dismiss; and
6. Judge Hayes' order granting post-conviction relief pursuant to *Atkins v Virginia*, vacating death sentence and remanding to Court of General Sessions for entry of life sentence.

The State did not appeal Judge Hayes' order finding Mr. Elmore ineligible for the death penalty because of his Intellectual Disabilities.

Similarly, two additional capital PCR applicants -- Bayan Aleksey (2015-CP-38-764) and Stephen Cory Bryant (2016-CP-43-828) -- discovered evidence of their intellectual disabilities *after* their federal habeas petitions had been filed, and both filed second-in-time PCR applications in state court raising their *Atkins* claims. Judge Doyet A. Early, III, allowed Aleksey's freestanding *Atkins* claim to go forward over the State's objection that the application should be dismissed as successive and untimely. The Aleksey case currently remains pending and is proceeding toward an evidentiary hearing. Likewise, Bryant filed a second-in-time PCR application raising a freestanding *Atkins* claim, and Judge Thomas W. Cooper, Jr. issued a written order denying the State's motion to dismiss the claim and finding that an *Atkins* claim is not subject to procedural default. *See* Order Denying State's Motion to Dismiss in *Bryant v.*

South Carolina, 2016-CP-43-828 (July 13, 2016), attached here as Exhibit H. There is no meaningful distinction between this case and *Elmore*, *Aleksey*, or *Bryant*, and Stone should be permitted to litigate his *Atkins* claim.

Moreover, Stone's position is that evidence in support of his accident theory argument is "newly discovered" because it was collected with technology that did not previously exist. Respondent does not offer any legal support for its position that this allegation is insufficient to constitute "newly discovered" evidence, and this appears to be an open question of law for this Court to decide. To the extent the parties dispute when the evidence could have first been discovered, that is a question of fact that should be resolved after a hearing.

D. STONE'S CLAIMS ARE TIMELY.

Respondent argues that Stone's PCR Application is barred by the statute of limitations set forth in S.C. Code Am. § 17-27-45(A). *See* Motion to Dismiss, pp. 21-23. The one-year statute of limitations does not apply to successive PCR applications permitted under one or more exception. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one "fair 'bite' at the apple."). The South Carolina Supreme Court's policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR application. The court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Robertson*, 418 S.C. 505, 795 S.E.2d 29 (2016); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). Additionally, it is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may

be applied where “circumstances preventing a petitioner from making a timely filing were both beyond the petitioner’s control and unavoidable despite due diligence”).

CONCLUSION

For all of the reasons set forth above, this Court should deny the Motion to Dismiss.

Respectfully submitted,

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BY: 
Emily C. Paavola

July 25, 2018

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BOBBY WAYNE STONE	)	Case No. 2:17-cv-01221-MGL-MGB
<i>Petitioner,</i>)	
)	
v.)	
)	
BRYAN P. STIRLING, Commissioner,)	
South Carolina Department of Corrections,	)	<u>CAPITAL CASE</u>
and JOSEPH MCFADDEN, Warden,)	
Lieber Correctional Institution,)	
)	
<i>Respondents.</i>)	
_____)	

REQUEST FOR RELIEF PURSUANT TO *MARTINEZ V. RYAN*

Petitioner Bobby Wayne Stone, through undersigned counsel appointed pursuant to *Martinez, v. Ryan*, 566 U.S. 1, 10 (2012), request that this Court grant him relief as discussed more thoroughly below.¹

I. PROCEDURAL POSTURE OF *MARTINEZ* CLAIMS

A. Appointment of Current Counsel

This case provides a novel procedural posture. Petitioner initially requested that this Court appoint John Blume and Emily Paavola as counsel for his habeas proceedings in federal court. (*See Mot. to Appoint*, ECF No. 1, March 31, 2017.) However, at least Mr. Blume represented Petitioner in both his post-conviction relief (hereinafter “PCR”) proceedings and the appeal of those proceedings. Thus, Petitioner requested that his PCR counsel also serve as his federal habeas

¹ On March 26, 2018, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody (hereinafter “Habeas Petition”). (*See Habeas Petition*, ECF No. 73, March 26, 2018.) The Habeas Petition goes through a brief background of the facts and circumstances of Petitioner’s case, and thus the undersigned counsel will not repeat the same.

counsel. In doing so, Petitioner sought to waive his right under *Martinez* for a review and investigation as to whether his PCR counsel was ineffective, a claim normally raised by distinct federal habeas counsel.

On May 4, 2017, this Court granted Petitioner's request to the extent it appointed Mr. Blume and Ms. Paavola as federal habeas counsel. (*See* Order on Mot. to Appoint, ECF No. 13 at 1, May 4, 2017.) In an abundance of caution and to protect Petitioner's rights, the Court appointed John L. Warren, then an associate with Simmons Law Firm, LLC, to serve as Petitioner's counsel to conduct a *Martinez* review and investigation. (*Id.* at 5.)

During the course of his work on this matter, Mr. Warren was offered and accepted a federal clerkship, necessitating his removal and substitution of *Martinez* counsel. Thus, in December 2017, the Court appointed the undersigned counsel to represent Petitioner in the *Martinez* review and investigation. (*See* Order of Substitution, ECF No. 61 at 2, Dec. 2, 2017.) At the time new *Martinez* counsel was appointed, the final habeas petition was due March 29, 2018. The undersigned counsel takes the position that he is to brief the Court on the investigation of, and raise, any *Martinez* claims by this date as well.

B. Summary of *Martinez* Investigation and Review

The undersigned, in addition to the various experts appointed in this matter, have conducted a thorough review of Petitioner's case in light of *Martinez*.

The undersigned reviewed the record in the case considering the standards articulated by *Martinez*,² researched the viability of all potential claims, and discussed the case with the various experts and investigators examining potential *Martinez* issues. Specifically, three individuals were brought in to examine the case:

² Although the undersigned conducted his own *Martinez* review, he also discussed the case with Mr. Warren, who had conducted his own *Martinez* review before being relieved as counsel in the case.

- (1) Patti Rickborn, mitigation specialist. Ms. Rickborn is located in Columbia, South Carolina and served as an in-house investigator for the Richland County Public Defender's Office for several years prior to starting a private practice firm that specializes in murder and capital mitigation work. Ms. Rickborn has worked on 36 capital cases at all procedural stages.
- (2) Francis "Jay" Jarvis, forensic consultant. Mr. Jarvis is the principal scientist with Arma Forensics, LLC. Prior to establishing Arma Forensics, he worked in the field of forensic firearms identification with the Georgia Bureau of Investigation, Division of Forensic Sciences. During his 32-year career, he has examined evidence in more than 5,000 firearms-related cases and testified as a forensic expert in numerous matters.
- (3) Dr. Sara Boyd, licensed clinical psychologist. Dr. Boyd has a Ph.D. in Clinical Psychology from the University of Kentucky. Dr. Boyd has extensive academic and clinical experience with intellectual disability. she has a graduate certificate in Developmental Disabilities, meaning she took two years of additional graduate school coursework specific to assessment and treatment of developmental disabilities, including intellectual disabilities. She has also researched and presented on the topic of adaptive functioning in adults with intellectual disabilities. Additionally, she has performed adaptive functioning assessments for the purpose of establishing eligibility for services, for state courts, and in capital cases involving claims pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). She has specifically provided reports in the capital cases of *Commonwealth of Kentucky v. Michael St. Clair*, Nos. 91-CR-00207-002 AND 92-CR-00002-002 and *Commonwealth of Virginia v. Russell Ervin Brown, III*, No. CRI13000230. Dr. Boyd also provides forensic evaluation training to mental health professionals through her affiliation with the Institute of Law, Psychiatry, and Public Policy at the University of Virginia, including training related to assessing intellectual disabilities (which includes assessment of adaptive functioning) in the forensic context.

As part of her mitigation investigation, Ms. Rickborn met with Mr. Stone, and re-interviewed every living and available member of Mr. Stone's family to include, but not limited to, Linda Parrott, Jared Allen Stone (siblings) and his Aunt Julia Turner in an effort to find any new or additional information relating to mitigating circumstances in Mr. Stone's case. Ms. Rickborn was also able to procure the name of Mr. Stone's best friend from childhood as well as a former girlfriend. Ms. Rickborn was also able to speak with an additional Aunt of Mr. Stone, who kept Mr. Stone when he was a small child. Ms. Rickborn also examined the record in the case, and researched the possibility of additional statements taken the night of the incident.

During his investigation, Mr. Jarvis, visited the crime scene at 817 Taylor Street on March 19, 2018. With the owner's consent, he was able to investigate both the inside and outside of the home, take numerous measurements, and photograph various portions of the crime scene. Mr. Jarvis spent several hours visiting and questioning Mr. Stone to walk through his version of events. Mr. Jarvis also reviewed numerous case records, including but not limited to, trial testimony, witness statements, photographs, and forensic reports.

Dr. Boyd met with Mr. Stone for approximately three and a half hours and administered, and later scored, an intellectual ability test she performed on Mr. Stone. Mr. Stone's testing behavior indicated good effort and there were no modifications to the standard testing procedures. According to Dr. Boyd, the results appear to be a valid representation of his intellectual functioning. Dr. Boyd also discussed the mitigation evidence with Ms. Rickborn to determine what further testing would be appropriate considering Mr. Stone's IQ test.

II. STANDARD OF REVIEW

Generally, federal courts lack jurisdiction to review procedurally defaulted federal claims. *See, e.g., Maples v. Thomas*, 565 U.S. 266, 280 (2012) ("a state prisoner's habeas claims may not be entertained by a federal court when (1) a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement, and (2) the state judgment rests on independent and adequate state procedural grounds.") (internal quotations omitted.) There is, however, an exception to this rule. A federal court may consider the merits of a procedurally defaulted claim if the petitioner shows "cause for the default and prejudice from a violation of federal law." *Martinez*, 566 U.S. at 10 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).) Under *Martinez*, a procedural default by state PCR counsel in failing to effectively raise a claim

of trial-counsel IAC is excused if there is “cause” for the default. In *Trevino v. Thaler*, ___ U.S. ___, 133 S. Ct. 1911 (2013), the Court explained its holding in *Martinez* as follows:

We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find ‘cause,’ thereby excusing a defendant’s procedural default, where (1) the claim of ‘ineffective assistance of trial counsel’ was a ‘substantial’ claim; (2) the ‘cause’ consisted of there being ‘no counsel’ or only ‘ineffective’ counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the ‘initial’ review proceeding in respect to the ‘ineffective-assistance-of-trial-counsel claim’; and (4) state law *requires* that an ‘ineffective assistance of trial counsel [claim] . . . be raised in an initial-review collateral proceeding.

Id. at 1918 (quoting *Martinez*, 132 S. Ct. at 1318-19, 1320-21) (emphasis in original.)

Of the four factors articulated by the Court in *Trevino*, the third and fourth are clearly satisfied here for those otherwise barred claims as it is undisputed that South Carolina law requires prisoners to reserve claims of ineffective assistance of trial counsel for state collateral review, which therefore serves as the initial review proceeding for such claims. *Al-Shabazz v. State*, 527 S.E.2d 742, 747 (S.C. 2000.) Thus, this Court must determine whether: (1) Mr. Stone’s claims of ineffective assistance of trial counsel are “substantial”; and, (2) whether appointed counsel in the initial-review collateral proceeding “was ineffective under the standards of *Strickland v. Washington*.” *Martinez*, 566 U.S. at 14. With respect to whether Mr. Stone’s claims are “substantial,” the Court wrote in *Martinez* that a prisoner must:

demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has *some merit*. *Cf. Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue.)

Id. at 1318-19 (emphasis added.) Under the standard for issuing a certificate of appealability, which the Court incorporated in its definition of substantiality, “a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been

resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Miller-El*, 537 U.S. at 336 (internal quotations omitted.) Thus, a claim is “insubstantial” if “it does not have any merit or . . . is wholly without factual support.” *Martinez*, 566 U.S. at 16. Whether PCR counsel was ineffective under *Strickland* requires the Court to determine whether: (1) counsel’s performance fell below an objective standard of reasonableness; *Strickland*, 466 U.S. at 687-88; and, (2) there is a “reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

III. SUMMARY OF *MARTINEZ* CLAIMS

As a result of the investigation and review as outlined above, and in light of the legal standard set forth under *Martinez*, Petitioner asserts the following *Martinez* claims.

A. **Martinez Claim 1: Failure to Raise an *Atkins* Claim**

Trial counsel was ineffective for failing to raise a claim of intellectual disability pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002). Because this claim was not raised by PCR counsel in the initial collateral proceeding, it is procedurally defaulted for purposes of federal review. *See, e.g., Maples*, 565 U.S. at 280. However, because PCR counsel was ineffective for failing to present this constitutional claim to the PCR court, Petitioner can show cause for any default and prejudice from a violation of federal law, and this claim is still reviewable by this Court. *Martinez*, 566 U.S. at 10.

1. *Supporting Facts*

As briefed thoroughly in his Habeas Petition, Petitioner’s trial counsel had substantial information that Mr. Stone had brain damage and low intellectual functioning. (See Habeas Petition, ECF No. 73, at 14.) The record is similarly bereft of any effort by trial counsel to investigate

whether, or argue that, Mr. Stone suffered from intellectual disability (hereinafter (“ID”). This was despite the information in trial counsel’s possession, or readily available to trial counsel, that Mr. Stone had been documented as having an IQ that fell within the range of ID. (Supp. App. 1012.)

Inherently, this information was also available to PCR counsel. Although PCR counsel raised the ineffectiveness of trial counsel to present the mitigation evidence related to Petitioner’s low intellectual functioning, PCR counsel did not argue that trial counsel was ineffective by not investigating or raising the issue of Mr. Stone’s ID. In fact, the issue of whether Mr. Stone was ID came up during the PCR hearing during the examination of Dr. James R. Merikangas, a psychologist, but not enough investigation had been conducted for him to render an opinion as to Mr. Stone’s ID:

Q: Okay. Sir, you made a statement about mental retardation. I just want to make sure I understand that. You're saying the defendant is not mentally retarded based upon your assessment of him, is that correct?

A: Not exactly.

Q: Please explain.

A: Now, we don't have the evidence that would prove mental retardation, because I don't have his adaptive living scales identified and carried out. We know he has intellectual deficiency and was in special classes all through grade school and beyond. But I don't have enough information to make that assessment. . . .

(App. 4137.)

However, investigation by trial counsel – and by extension PCR counsel as to trial counsel’s effectiveness – would have revealed that Mr. Stone was in an IQ range subject to an ID diagnosis. Dr. Boyd met with Mr. Stone on November 9, 2017, for approximately three hours and thirty minutes. At that time, she conducted intellectual ability (IQ) testing, using the Wechsler

Adult Intelligence Scale, Fourth Edition (WAIS-IV). Pursuant to Dr. Boyd's testing, Mr. Stone obtained a Full Scale IQ score of 74, with a General Ability Index score of 72. (*See* Boyd Report, attached as Exhibit A.) As Dr. Boyd will testify, both of these scores are significantly subaverage, falling into the 4th and 3rd percentiles, respectively (meaning that fewer than 4% of similarly-aged adults obtained lower score). Even without taking corrective measures into account (and consequently adjusting Mr. Stone's score by about - 3.3 points), his IQ results fall within the range required for making a diagnosis of ID.

Further, Mr. Stone's records, which were available to trial counsel and PCR counsel, indicate low adaptive functioning in the community before he was 18. As specifically discussed in his Habeas Petition, Mr. Stone's childhood records reveal that he consistently struggled with academic failure and had very low psychological functioning. (*See* Habeas Petition, ECF No. 73, at 15.) In fact, he was specifically diagnosed as Educably Mentally Handicapped, a diagnosis akin to ID. (Supp. App. 1013.) Additionally, with Ms. Rickborn's mitigation investigation recently concluded, Dr. Boyd was able to discuss the general contours of Mr. Stone's poor adaptive functioning. Accordingly, Dr. Boyd concurs that substantial questions have been raised regarding Mr. Stone's adaptive functioning and she is performing the requisite testing to provide further confirmation of Mr. Stone's ID.³

³IQ testing is the first of three criteria for a diagnosis of ID. The other two components are 1) adaptive functioning in the community, and 2) onset during the developmental period. The remaining two criteria are assessed via record review and collateral interviews with individuals who can provide observations of Mr. Stone's degree of independent functioning in the community, including his ability to work, perform practical academic skills, socialize, and manage health and safety. The undersigned received Dr. Boyd's final report regarding Mr. Stone's IQ on March 25, 2018, and Dr. Boyd was only recently able to discuss the matter with Ms. Rickborn to determine the viability of moving forward with adaptive functioning testing.

2. *Ineffectiveness of Trial Counsel was Substantial*

Trial counsel's ineffectiveness in not raising Mr. Stone's ID and claim pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), was substantial.

In *Atkins*, the Supreme Court ruled that a person convicted of a capital offense is ineligible for the death penalty if they have a diagnosis of what was then termed "mental retardation," and is now referred to as ID. A diagnosis of ID requires an IQ score of 75 or less combined with significant deficits in adaptive functioning skills prior to the age of eighteen. *See Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014); S.C. Code Ann. § 16-3-20(C)(b)(10); INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 36 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010); Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) (American Psychiatric Association) at pp.41-42.

As an initial matter, trial counsel was ineffective for not investigating and presenting Mr. Stone's *Atkins* claim, and that ineffectiveness prejudiced Mr. Stone. The Fourth Circuit has squarely held that "[c]ounsel's lack of diligence in pursuing [an intellectual disability] defense contravened their duty to investigate to make defensible professional decisions qualifying as 'informed legal choices.'" *Winston v. Pearson*, 683 F.3d 489, 505 (4th Cir. 2012). Additionally, trial counsel's failure to raise an *Atkins* claim prejudiced Mr. Stone. The prejudice here is plain: a successful *Atkins* claim would have been a complete bar to the death sentence imposed upon Mr. Stone. *Id.* at 504 ("Had the court concluded that he was mentally retarded, *Atkins* would have barred imposition of a death sentence as contrary to the Eighth Amendment's prohibition on cruel and unusual punishments.")

Further, this ineffectiveness was substantial as the *Atkins* claim plains has some merit. *Martinez*, 566 U.S. at 16. Specifically, (1) Mr. Stone's final sentencing occurred in 2005, years

after *Atkins* had been decided; (2) trial counsel overlooked records outlining Mr. Stone's mental deficiency and never pursued an *Atkins* claim or other claim of mental defect in the underlying proceeding; (3) Dr. Boyd has found the Mr. Stone's IQ is within the range required for making a diagnosis of ID; and (4) Mr. Stone's records reveal poor adaptive functioning prior to the age of 18.

3. *PCR Counsel was Ineffective*

Based on the undersigned counsel's investigation of PCR counsel's performance, PCR counsel's conduct fell below an objective standard of reasonableness because the record does not reveal any strategic reason for failing to investigate Mr. Stone's potential *Atkins* claim or for failing to present a claim for trial counsel's ineffectiveness in examining or raising Mr. Stone's intellectual disability.

Mr. Stone was further prejudiced by PCR counsel's failures because, as the record below in conjunction with Dr. Boyd's findings show, had PCR counsel produced the evidence subsequently developed by undersigned *Martinez* counsel, there is at least a reasonable probability that the outcome of the PCR proceeding would have been different. Thus, the Court may hear Mr. Stone's *Martinez* claim.

B. Martinez Claim 2: Crime Scene Issue

PCR counsel raised numerous legitimate challenges regarding the State's crime scene experts and trial counsel's lack thereof. Nonetheless, they did allege that trial counsel was ineffective when they allowed a theory to go forward that Mr. Stone had crouched on the porch to ambush Officer Charles Kubala. This failure amounted to ineffective assistance of counsel which allows Petitioner to show cause for any default and prejudice.

I. Supporting Facts

From the dawn of this case, Mr. Stone has been unwavering in his stance that the shooting was an accident. (*See* App. 3157, 4467.) According to Mr. Stone, it was dark on the porch when Mr. Stone heard a noise, turned, and the gun went off in his hand. (*Id.*) The State, in contrast, contended that Mr. Stone intentionally shot Officer Kubala. Specifically, the State claimed during the trial that Mr. Stone was lying in wait to ambush Officer Kubala:

[He] saw Stone crouching there, aiming at him . . . Bam Bam Bam.
Folks, it was an intentional act.

(*Supp. App.* 847.) Yet trial counsel did not present any evidence to support their theory of an accidental shooting, and specifically never contradicted, or objected to, the State’s contention that Mr. Stone was crouched or in a squatting position waiting to ambush Officer Kubala.

At the PCR hearing, the State doubled down on their crouching ambush theory, including through Officer Ira Parnell, the State’s expert in firearms:

Q: What did -- shots being fire in the part of the door, would that have been consistent with somebody squatting?

A: It could be. It's a little lower than you would normally note in a standing position. But, here again, the distance we're talking about is more consistent, in my opinion, with being – not standing bolt upright but being at least slightly squatting anyway, if not completely squatted.

(*App.* 4441; *see also* *App.* 4428 (eliciting testimony from the prosecution at the PCR hearing that “you can squat down in there, and nobody could see you coming around”).)

PCR counsel did offer their own homicide reconstruction and firearms expert, Wayne Hill, as evidence that trial counsel was ineffective for failing to support their accidental shooting theory. (*See* Habeas Petition, ECF No. 73, at 38–39.) However, although it was discussed at trial and delved into during the PCR hearing, Mr. Hill did not address whether it was possible that Mr.

Stone shot from a squatted, or crouched, position. Further, although Mr. Hill examined numerous documents in the case, he never visited Mr. Stone to discuss the case. (App. 4272–73.)

If Mr. Hill spoken with Mr. Stone, he would have been alerted to the squatting issue and have been able to address it. Mr. Jarvis, the forensic expert retained by *Martinez* counsel, spent hours interviewing Mr. Stone and discussing the case with him. It was critical to Mr. Jarvis that he speak with Mr. Stone, to include the fact the he was the only living witness of the event.

Mr. Jarvis's investigation showed that the evidence indicated that Mr. Stone could not have been squatting, or crouching, when the gun went off. Mr. Jarvis's measured bullet trajectory angle of approximately 4.6 degrees downward indicates the muzzle of the pistol would have to be located just over 30 inches from the floor of the porch. According to Mr. Jarvis, this is consistent with the shooter standing and holding the pistol close to waist height; if the shooter was in a crouched position, the pistol could not be extended outward to create a sight picture as the shooter's arm length plus the length of the barrel would have placed the muzzle of the pistol near or in direct contact with the screen, leaving noticeable gunpowder and primer.⁴

2. *Ineffectiveness of Trial Counsel was Substantial*

In addition to the reasons articulated in Ground Four of the Habeas Petition, which are further supported by Mr. Jarvis's investigation, trial counsel was also ineffective for failing to object to the State's theory that Mr. Stone was crouching and lying in wait for Officer Kubala. The failure to object to this characterization, or to call an expert to rebut it, was both particularly unreasonable and extremely prejudicial where Mr. Stone's alleged crouching is what the State explicitly used to argue Mr. Stone possessed the requisite intent. (*See* Supp. App. 847.) There is no

⁴Mr. Jarvis's investigation bolstered Mr. Hill's contention that the evidence in the case supports Mr. Stone's accidental discharge theory and his investigation showed that the examination and data collected during the trial was inadequate.

reasonable professional judgment that supports trial counsel's failure to limit its response to this damning accusation. *See Wiggins v. Smith*, 539 U.S. 510, 533 (2003). This failure is also substantial. Reasonable jurists could certainly debate whether challenging a key piece of evidence to prove criminal intent would have resulted in a different outcome. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

3. *PCR Counsel was Ineffective*

Although PCR counsel, and by extension their experts, had access to the witnesses and information available to Mr. Jarvis, the record does not reveal any strategic reason for failing to challenge the State's theory that Mr. Stone crouched down in order to ambush Officer Kubala. The conduct particularly fell below an objective standard of reasonableness here, as PCR counsel's expert never interviewed Mr. Stone and did not address the crouching theory even though it was discussed in detail by the State at the PCR hearing. Additionally, this ineffectiveness prejudiced Mr. Stone. As discussed previously, there is at least a reasonable probability that challenging such a critical theory – and the evidence underpinning that theory – would have altered the outcome of the PCR proceeding.

C. Martinez Claim 3: Residual Claims

Based on the undersigned's review of this matter, none of the claims made in the Habeas Petition are procedurally barred from review by this Court. However, to the extent the State argues, and the Court accepts, that any of these grounds were not properly preserved by PCR Counsel, Petitioner would reserve his right to allege that PCR Counsel was ineffective in not taking the necessary steps to preserve those issues and that those claims would be subject to review of this Court under *Martinez*.

IV. CONCLUSION

As discussed herein, Petitioner has alleged meritorious claims of ineffective assistance of trial counsel that, although procedurally defaulted, are still reviewable by this Court under *Martinez* because of PCR counsel's own ineffectiveness. At a minimum, there are at least multiple issues of disputed material fact that this Court must resolve, and Mr. Stone requests an evidentiary hearing for the purpose of proving facts to establish cause and prejudice to excuse his procedural default.⁵

Respectfully Submitted,

/s/ Derek A. Shoemake
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Attorney for Petitioner

Columbia, South Carolina
March 29, 2018

⁵In the event this Court orders an evidentiary hearing, the undersigned would request additional counsel to continue to pursue these claims and for the purposes of conducting any necessary discovery, preparing for any hearings, and appearing for any hearings. The undersigned counsel would be willing to provide names of qualified counsel willing to assist in this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BOBBY WAYNE STONE)
Petitioner,)
)
v.)
)
BRYAN P. STIRLING, Commissioner,)
South Carolina Department of Corrections,)
and JOSEPH MCFADDEN, Warden,)
Lieber Correctional Institution,)
)
Respondents.)
_____)

Case No. 2:17-cv-01221-MGL-MGB

CERTIFICATE OF SERVICE

I, Derek A. Shoemake, hereby certify that I have this date served Petitioner's Request for Relief Pursuant to *Martinez v. Ryan* in the above-captioned case upon counsel for Respondents via ECF.

s/ Derek A. Shoemake

March 29, 2018

Exhibit A



March 25, 2018

Derek Shoemake, Esq.
 Simmons Law Firm
 1711 Pickens Street
 Columbia, South Carolina 29201

Re: *Bobby Wayne Stone IQ Test Results*

Mr. Shoemake,

At your request, I write to provide the results of my November 9, 2017 administration of the Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV). Full results are contained in the following tables, and include Full Scale IQ, General Ability Index, Verbal Comprehension Index, Perceptual Reasoning Index, Working Memory Index, Processing Speed Index, and individual subtest scores:

Composite Score Summary

Scale	Sum of Scaled Scores	Composite Score	Percentile Rank	95% Conf. Interval	Qualitative Description
Verbal Comprehension	16	VCI 74	4	69-81	Borderline
Perceptual Reasoning	17	PRI 75	5	70-82	Borderline
Working Memory	15	WMI 86	18	80-94	Low Average
Processing Speed	14	PSI 84	14	77-94	Low Average
Full Scale	62	FSIQ 74	4	70-79	Borderline
General Ability	33	GAI 72	3	68-78	Borderline

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 Merrifield, VA 22116-3867

APP. P.444

B.W.S. Psychological Testing Results

March 25, 2018

Page 2 of 2

Verbal Comprehension Subtests Summary

Subtest	Raw Score	Scaled Score	Percentile Rank	Reference Group Scaled Score	SEM
Similarities	24	9	37	10	1.04
Vocabulary	11	3	1	4	0.73
Information	5	4	2	5	0.73

Perceptual Reasoning Subtests Summary

Subtest	Raw Score	Scaled Score	Percentile Rank	Reference Group Scaled Score	SEM
Block Design	24	6	9	6	0.95
Matrix Reasoning	8	5	5	4	0.95
Visual Puzzles	7	6	9	5	0.85

Working Memory Subtests Summary

Subtest	Raw Score	Scaled Score	Percentile Rank	Reference Group Scaled Score	SEM
Digit Span	21	7	16	6	0.73
Arithmetic	12	8	25	9	0.90

Processing Speed Subtests Summary

Subtest	Raw Score	Scaled Score	Percentile Rank	Reference Group Scaled Score	SEM
Symbol Search	20	6	9	5	1.56
Coding	55	8	25	7	1.20

Respectfully submitted,



Sara E. Boyd, Ph.D.
Licensed Clinical Psychologist

Exhibit B

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS

C/A No. 05-²⁴~~32~~-CP-- 1205

Edward Lee Elmore)
Applicant,)

APPLICATION FOR POST-CONVICTION RELIEF PURSUANT TO *ATKINS v. VIRGINIA*, 536 U.S. 304 (2002)

V.)

Jon E. Ozmint, Director)
SC of Dept. of Corrections,)
et al,)
Respondents.)

2005 SEP 27 PM 4: 53

FILED COMMON PLEAS
24TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

1. Petitioner is detained at Lieber Correctional Institution, (LCT-Campbell-Thicket Road) P. O. Box 205, Ridgeville, South Carolina 29742.
2. Petitioner was convicted and sentenced in the Greenwood County Court of General Sessions.
3. None.
4. 84 GS-24-314; Murder, Criminal Sexual Conduct First Degree, Burglary.
5. (a) Murder - Death by Electrocution, February 28, 1987.
(b) April 2, 1984: Criminal Sexual Conduct, First Degree, 30 years
(c) April 2, 1984: Burglary - 40 years, consecutive.
6. Applicant was found guilty by a jury after a plea of not guilty.
7. Yes.
8. (a)
 - (i) The Applicant appealed his convictions and sentence to the South Carolina Supreme Court.
 - (ii) The Applicant sought review in the United States Supreme Court.

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

- (b)
 - (1) Elmore I Reversed.
Elmore II Affirmed.
Elmore III Affirmed.
 - (2) Elmore II- Remanded
Elmore III- Cert. Denied

- (c)
 - (1) November 1, 1983
May 16, 1985
August 21, 1989
 - (2) 1986
June 11, 1990

- (d)
 - (1) *State v. Elmore*, 308 S.E.2d 781 (S.C. 1983).
State v. Elmore, 332 S.E.2d 752 (S.C. 1985).
State v. Elmore, 386 S.E.2d 769 (S.C. 1989).
 - (2) Elmore II: 476 U.S. 1101 (1986).
Elmore III: 496 U.S. 931 (1990).

9. N/A

10. & 11. Grounds for Relief and Concise Statement of Supporting Facts.

Ground A

Applicant may not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that it violates the Eighth and Fourteenth Amendments to execute someone who suffers from mental retardation. Mental retardation is established when a person has significantly sub-average general intellectual functioning, concurrently with deficits in adaptive functioning, both manifesting during the developmental period. See *Atkins*, supra, 122 S.Ct. at 2252; *Perry v. Lynaugh*, 492 U.S. 302, 307-09, n.1 (1989). On information and belief, Mr. Elmore suffers from mental retardation. Records, reports from family members and teachers, intelligence testing scores, and the opinions of one

or more mental health experts support this diagnosis. Thus, Mr. Elmore may not be executed.

12.

(a) No

(b) Both

(c) No

(d) Yes

13.

(a)

(1) Post-Conviction

Claim A. Applicant was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

Claim B. Applicant was denied the effective assistance of counsel, in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution, as a result of counsel's poor performance at the sentencing phase of his trial.

Claim C. Applicant was denied Due Process of law guaranteed by the Fourteenth Amendment to the United States Constitution by the trial court's charge to the jury on reasonable doubt during the guilt phase of Applicant's trial.

Claim D. Applicant's conviction and death sentence were secured as a result of the State's failure to disclose that the testimony of James Gilliam regarding an alleged "jailhouse confession" by the applicant was false. The State's failure to reveal this exculpatory and material evidence violated applicant's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina Law.

Claim E. Applicant was denied the right to a fair trial and the right to counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Law as a result of the "snitch" testimony of James Gilliam.

Claim F. Because jurors who sentenced applicant to death engaged in premature deliberation during applicant's re-sentencing trial, in violation of state law, applicant was deprived of his right to a fair trial guaranteed him by the South Carolina Constitution and the Sixth, Eighth and Fourteenth

Amendments to the United States Constitution.

Claim G. Because the Eighth Circuit Solicitor's Office has utilized its discretion to seek the death penalty in a racially discriminatory manner, applicant's death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim H. Because Applicant's was indicted by a grand jury from which African-Americans have been intentionally and systematically excluded in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments under the United States Constitution have been violated.

Claim I. Applicant was deprived of the assistance of counsel and a fair trial guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina law because the state falsified evidence, testified falsely, and withheld material, exculpatory evidence related to fingerprints found at the crime scene.

Claim J. There exists evidence of material facts not previously presented or heard which require the vacation of Mr. Elmore's conviction and death sentence in the interest of justice as provided by South Carolina law and in accordance with the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Claim K. Because the state falsified evidence, presented false evidence, and withheld material, exculpatory evidence related to hair found on the victim's body and other hair allegedly found at the crime scene, applicant was deprived of the assistance of counsel, a fair trial, and Due Process of law, guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law.

Claim L. Because the state failed to disclose payments it made to material witnesses, applicant was deprived of the assistance of counsel, of the ability to confront witnesses against him, and of Due Process of law, rights guaranteed by South Carolina law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim M. Because the state failed to disclose that James Holloway was a suspect in Mrs. Edwards' death, applicant was deprived of his rights to the assistance of counsel, to Due Process of law, to confront witnesses against him, and to a fair trial, guaranteed by South Carolina law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim N. Because the cumulative effect of the numerous Due Process violations arising from the State's failure to disclose material and exculpatory

information could have affected the jury's verdict, applicant was deprived of rights guaranteed him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Claim O. Applicant was denied his Sixth and Fourteenth Amendment rights to counsel as a result of a conflict of interest arising from trial counsel's racial animus.

Claim P. Because a member of the jury that found applicant guilty engaged in improper third-party contact after being selected as a juror with a person who served as a juror at applicant's first trial, applicant was deprived of his right to a fair trial guaranteed him by the South Carolina Constitution and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

(2) Petition for writ of certiorari and Petition for Rehearing.

QUESTION ONE

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Deprived of the Assistance of Counsel, a Fair Trial, and Due Process of Law, Rights Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina Law Because the State Falsified Evidence, Presented False Evidence, and Withheld Material, Exculpatory Evidence Related to Hair Found on the Victim's Body and Other Hair Allegedly Found at the Crime Scene?

QUESTION TWO

Whether the Lower Court's Conversion of a Hearing on Petitioner's Motion for Summary Judgment into a Final Hearing Was Prejudicial Error, And Deprived Petitioner of Due Process of Law and Other Rights Guaranteed Him by the Sixth, Eighth, and Fourteenth Amendments and South Carolina Law?

QUESTION THREE

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner, A Death-Sentenced Person, has an Absolute Right to DNA Testing that Could Materially Undermine Reliability of and Confidence in His Conviction and Death Sentence Under Rights Guaranteed By The Fifth, Sixth, Eighth, and Fourteenth Amendments and South Carolina Law?

QUESTION FOUR

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing

Whether Petitioner was Deprived of a Fair Trial Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law because the State Falsified Evidence, Testified Falsely, and Withheld Material, Exculpatory Evidence Related to Fingerprints Found at the Crime Scene?

QUESTION FIVE

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner's Conviction and Death Sentence Were Secured as a Result of the State's Failure to Disclose that the Testimony of James Gilliam Regarding an Alleged "Jailhouse Confession" by Petitioner was False. The State's Failure to Reveal this Exculpatory and Material Evidence Violated Petitioner's Rights Guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina Law?

QUESTION SIX

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Denied the Right to a Fair Trial and the Right to Counsel in Violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina Law as a Result of the "Snitch" Testimony of James Gilliam?

QUESTION SEVEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Deprived of His Right to the Assistance of Counsel, to Due Process of Law, to Confront Witnesses Against Him, and to a Fair Trial, Guaranteed by South Carolina Law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Because the State Failed to Disclose that James Holloway was a Suspect in Mrs. Edwards' Death?

QUESTION EIGHT

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Deprived of the Assistance of Counsel, of the Ability to Confront Witnesses Against Him, and of Due Process of Law, Rights Guaranteed by South Carolina Law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Because the State Allowed a False Impression to go Uncorrected and Failed to Disclose Payments it Made to Material Witnesses?

QUESTION NINE

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Deprived of Rights Guaranteed Him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina Law Because the Cumulative Effect of the Numerous Due Process Violations Arising From the States's Failure to Disclose Material and Exculpatory Information Could have Affected the Jury's Verdict?

QUESTION TEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner Was Deprived of His Right to a Fair Trial Guaranteed Him By the South Carolina Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution Because a Member of Petitioner's Jury Engaged in Improper Third-Party Contact With a Juror From Petitioner's First Trial and, Subsequently, With a Bailiff?

QUESTION ELEVEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner Was Deprived of His Right to a Fair Trial Guaranteed Him by The South Carolina Law and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Because Jurors Who Sentenced Petitioner to Death Engaged in Premature Deliberations?

QUESTION TWELVE

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Denied the Effective Assistance of Counsel at the Guilt Phase of His Trial in Violation of South Carolina Law and the Sixth and Fourteenth Amendments to the United States Constitution?

QUESTION THIRTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Denied His Sixth and Fourteenth Amendment Right to Counsel As a Result of a Conflict of Interest Arising From Trial Counsel's Racial Animus?

QUESTION FOURTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner Was Denied the Effective Assistance of Counsel at the sentencing Phase of His Trial in Violation of South Carolina Law and the Sixth and Fourteenth Amendments to the United States Constitution

Because of Poor Performance by Petitioner's Counsel?

QUESTION FIFTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner's Death Sentence Was Obtained in Violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Because the Eighth Circuit Solicitor's Office Has Utilized Its Discretion to Seek the Death Penalty in a Racially Discriminatory Manner, and This Court Should Remand the Matter to the Lower Court Because It Erroneously Held that This Claim was Noncognizable in Post-Conviction Proceedings?

QUESTION SIXTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights Under the United States Constitution Have Been Violated Because Petitioner Was Indicted by a Grand Jury From Which African-Americans Have Been Intentionally and Systematically Excluded?

QUESTION SEVENTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Petitioner was Denied a Fair Trial and Due Process of Law Guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and South Carolina Law as a Result of The Trial Court's Charge to the Jury on Reasonable Doubt During the Guilt Phase of Petitioner's Trial.

QUESTION EIGHTEEN

Whether The Lower Court Erred In Failing to Consider Relevant Facts Properly and to Apply Properly The Relevant Legal Standard in Assessing Whether Mr. Elmore's Conviction and Death Sentence Should Be Vacated in the Interest of Justice as Provided by South Carolina Law and in Accordance with the Fifth Sixth, Eighth and Fourteenth Amendments to the United States Constitution Because There Exists Evidence of Material Exculpatory Facts Not Previously Presented or Heard?

(3) Federal Habeas Corpus Action.

- I. The State violated Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when he was indicted by a grand jury from which African Americans were systematically excluded.

- II. The State used its peremptory strikes in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution.
- IV. Petitioner was deprived of his right to a fair trial guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when jurors engaged in premature deliberations.
- V. The State presented false and misleading testimony and withheld exculpatory information regarding the "snitch" testimony of James Gilliam in violation of Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights.
- VI. Petitioner was deprived of the assistance of counsel, of the ability to confront witnesses against him, and of Due Process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when the State allowed a false impression to go uncorrected and failed to disclose payments it made to material witnesses.
- VII. The State withheld material, exculpatory evidence regarding hair found on the victim's body in violation of Petitioner's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
- VIII. The State presented false evidence and counsel provided ineffective assistance regarding hair allegedly found at the crime scene in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.
- IX. The State presented false and misleading testimony and withheld exculpatory, material information and counsel provided ineffective assistance regarding fingerprints found at the crime scene, in violation of Petitioner's rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
- X. Petitioner received ineffective assistance of counsel regarding evidence related to time of death in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
- XII. Petitioner was denied the effective assistance of counsel with regard to his alleged "statement" to police in violation of his Sixth, Eighth, and Fourteenth Amendment rights.
- XIII. Cumulative errors at Petitioner's trial deprived him of Due Process of

Law in violation of the Fourteenth Amendment to the United States Constitution.

- XIV. The trial court refused to allow Petitioner to introduce evidence regarding previous counsel's inadequate investigation of and failure to develop evidence that Petitioner was not guilty of the crimes charged in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
- XV. Petitioner was denied the effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights when counsel failed to investigate or present powerful mitigating evidence at the sentencing phase.
- XVI. Counsel failed to challenge the State's criminal sexual conduct aggravating circumstance in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
- XVII. Cumulative errors at Petitioner's sentencing proceeding deprived him of Due Process of Law in violation of the Fourteenth Amendment to the United States Constitution.
- XVIII. Petitioner's death sentence violates the Eighth Amendment to the United States Constitution because he is mentally-retarded.

(b)

- (1) Greenwood County Court of General Sessions, Greenwood, S.C.
- (2) South Carolina Supreme Court, Columbia, S.C.
- (3) United States District Court, District of South Carolina.

(c)

- (1) Relief Denied in Its Entirety.
- (2) *Certiorari* Granted; Grant of *Certiorari* Dismissed as Improvidently Granted; Petition for Rehearing Denied.
- (3) Pending.

(d)

- (1) May 17, 2001

14. Yes.

15. (a) All grounds, except the ground set forth in paragraph 9, have been previously presented to this or any other Court, State or Federal.

(b) See preceding responses, *supra*.

16. This ground was not previously asserted because it relies on a change in the law announced by the United States Supreme Court in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002) (decided June 20, 2002). See S.C. Code § 17-27-45(B) (allowing claims based on a change in the law to be filed within "one year after the date on which the standard or right was determined to exist"). Even though the Applicant did not file within the one year window of time provided by § 17-27-45(B), Applicant respectfully submits that because a finding of mental retardation is an absolute constitutional bar to the execution of one who is found to be mentally retarded, see *Atkins, supra*.

Applicant asserts he is not foreclosed from raising this issue at this time, because a miscarriage of justice would otherwise result. S.C. Code Ann. 1976 § 17-27-20(a)(4). Importantly, the statute of limitations period should have been tolled because Applicant was in state court on his first post conviction relief application during the whole time period. This application, in Applicant's rather unique position, is not foreclosed by case law or statute. Moreover, since there has not been a PCR hearing in any of the cases that were filed after *Atkins, supra*, and *Franklin, et.al. v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (S.C. 2003) and since, on information and belief, the Department of Disabilities and Special Needs ("DDSN") has not yet performed even one evaluation of similarly situated applicants. Therefore, there is no prejudice to the State, because nothing would have been different if Applicant file this claim earlier.

The S.C. Supreme Court issued a decision instructing the trial courts on how to proceed in such cases, in *Franklin, et.al. v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (S.C. 2003), specifically requiring a hearing at which a court should receive testimony from expert witnesses and other evidence. no prejudice. Applicant requests appointment of counsel listed below, most of whom have represented Applicant for numerous years.

17. & 18. Applicant was previously represented by counsel.

Trial:

At arraignment and trial, applicant was represented by Mr. Geddes Anderson, Greenwood, SC; Mr. John F. Beasley, P.O. Box 741, Greenwood, SC 29646; and Mr. Billy J. Garret, P.O. Box 1115, Greenwood, SC 29648.

Direct Appeal:

On direct appeals to the South Carolina Supreme Court and on petitions for writs of certiorari in the United States Supreme Court, applicant was represented by David Bruck, South Carolina Office of Appellate Defense, 9th Floor, 1122 Lady Street, Columbia, SC 29201; John H. Blume and Franklin W. Draper, P.O. Box 11311, Columbia, SC 29211.

Post-Conviction Relief and Petition for Writ of *Certiorari*:

J. Christopher Jensen, CLL, 1133 Avenue of Americas, NY, NY 10036
Diana Holt, Diana Holt, LLC, P.O. Box 6454, Columbia, SC 29260
John Blume, Cornell Law School, 112 Myron Taylor Hall, Ithaca, NY 14853
Barry Scheck, Innocence Project, 55 Fifth Avenue, NY, NY 10003

Federal Petition for Writ of Habeas Corpus and Appeal:

J. Christopher Jensen, CLL, 1133 Avenue of Americas, NY, NY 10036
Diana Holt, Diana Holt, LLC, P.O. Box 6454, Columbia, SC 29260
John Blume, Cornell Law School, 112 Myron Taylor Hall, Ithaca, NY 14853
Marta K. Kahn, P.O. Box 65871, Baltimore, MD 21209

19. Applicant seeks the vacation of his death sentence.
20. No.

Respectfully submitted,

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Cowan, Leibowitz & Latman, PC
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BY:


DIANA HOLT
Counsel for Applicant

September 26, 2005
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

VERIFICATION

County of)

I, Edward Lee Elmore, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Edward Lee Elmore

SWORN to and subscribed before me this 23rd
day of September, 2005

[Signature] (L.S.)
Notary Public

My Commission Expires: 1-31-05

FILED
2005 SEP 27 PM 4: 54
SOUTH CAROLINA
CHATTANOOG, S.C.

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

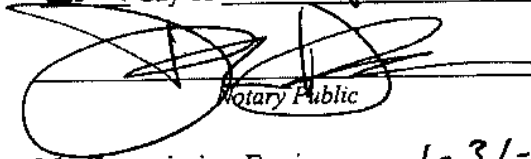
Edward Lee Moore

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Edward Elmoury
Applicant

SWORN or affirmed to and subscribed before me this
23rd day of September, 2005


Notary Public

My Commission Expires: 1-31-2015

2005 SEP 27 PM 4: 54

FILED
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD)

C/A No. 05-²⁴32-CP-- 1205

Edward Lee Elmore)

Applicant,)

v.)

Certificate of Service

Jon E. Ozmint, Director)

SC of Dept. of Corrections,)

et al,)

Respondents.)

2005 SEP 27 PM 4: 53

FILED IN THE COURT OF COMMON PLEAS GREENWOOD, S.C.

I certify that I have served Applicant's PCR Application pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), by delivering a copy to Respondent, on September 26, 2005, by depositing a copy in the U.S. MAIL, postage paid, and addressed to his attorney of record, Donald J. Zelenka, Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, South Carolina 29211.

By:



Diana L. Holt
DIANA HOLT, LLC
P.O. Box 6454
Columbia, S.C. 29260
(803) 782-1663

Exhibit C

STATE OF SOUTH CAROLINA)	
	)	COURT OF COMMON PLEAS
COUNTY OF GREENWOOD)	
Edward Lee Elmore, #4293	)	05-CP-24-1205
)	
Applicant,)	
	)	RESPONDENTS RETURN AND
v.	)	MOTION TO DISMISS APPLICATION AS
	)	BARRED AS UNTIMELY
State of South Carolina,	)	AND ALTERNATELY BARRED
	)	AS ISSUE PRECLUSION
Respondent.	)	FROM 90-CP-24-1404
)	

The Respondent,¹ above-named, hereby make a Return and Motion to Dismiss to the state post-conviction relief application filed on September 27, 2005. For reasons set forth below, Respondents assert that the claim must be dismissed and application denied as first, barred as untimely under the statute of limitations, Section 17-27-45, S.C. Code Ann. (1976), and second barred because the claim is refuted by the Applicant own evidence in the earlier action.

I.

In the present application, Elmore, through current federal habeas corpus counsel, Diana L. Holt, J. Christopher Jensen, John Blume and Marta Kahn make a second state post-conviction relief application, alleging:

¹In the application, Elmore asserts as Respondents "Jon E. Ozmint, Director SC of Dept. Of Corrections, et al." as Respondents. This is incorrect. Pursuant to amended South Carolina Rules of Civil Procedure, Rule 71.1(c), this action must be styled in the following manner:

(c) Independent Action. An application filed under the Act is an independent civil action which should be separately filed and indexed by the clerk of court. The caption in all post-conviction relief actions shall read: *Full Name and Prison number (if any) of Applicant v. State of South Carolina.*

As amended, April 27, 2004.

ATTEST: COPY
Angela Woodhurst
 ANGELA WOODHURST
 CCCP AND GS
 GREENWOOD COUNTY
 S.C.

GROUND A

Applicant may not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held that it violates the Eighth and Fourteenth Amendments to execute someone who suffers from mental retardation. Mental retardation is established when a person has significantly sub-average general intellectual functioning, concurrently with deficits in adaptive functioning, both manifesting during the developmental period. See *Atkins*, supra. 122 S.Ct. At 2252; *Penry v. Lynaugh*, 492 U.S. 302, 307-09, n. 1(1989). On information and belief, Mr. Elmore suffers from mental retardation. Records, reports from family members and teachers, intelligence testing scores, and the opinions of one or more mental health experts supports this diagnosis. Thus , Mr. Elmore may not be executed.

II.

Elmore, through the same counsel, raised this same substantive claim for the first time in the pending federal habeas corpus action, *Elmore v. Ozmint*, 4:04-22310 as ground XVIII (18) in their petition filed on July 5, 2005. The Respondents made a Return and Motion for Summary Judgement inn federal court on September 6, 2005 requesting that the matters including his newly asserted mental retardation claim be dismissed. In response to Respondents' motion, Elmore responded to the federal court on September 26, 2005 that he was simultaneously filing this state PCR application in Greenwood raising this claim. In his September 26, 2005 response in federal court, without citations or records, Elmore contended:

- A. His difficulties with intellectual functioning were demonstrated throughout his school records asserting:
1. He repeated first grade and was still in second grade at age 9.
 2. In third grade, at nearly age 12, Petitioner's IQ was measured as 58 by the Peabody Picture Vocabulary Test and 72 according to the Slosson Intelligence Test.
 3. Prior to his trial in 1983, he scored a 71 on an IQ test administered by the State

Hospital.

- B. Elmore claimed deficits in adaptive functioning were demonstrated by;
1. His difficulties in communicating demonstrated throughout the record (no cites);
 2. Elmore has never lived independently;
 3. Elmore has never held a job requiring more skills than a house painter;
 4. He has difficulty solving problems; and
 5. He has difficulty remembering when major events in his life occurred. (Citing App.p. 1846, 1851).²

III.

In this allegation, Elmore, for the first time in State Court, claims that since he is mentally retarded. Based on this assertion, he further asserts that pursuant to the recent decision in Atkins v. Virginia, 536 U.S. 304 (2002), his 1987 death sentence cannot be carried out. Respondents submit that review of the three trial proceedings, the entire post-conviction relief proceeding,

²App.p. 1846 involves a reference to Dr. Jonathan Venn's earlier state PCR testimony wherein he testifies as a *defense* expert in psychology that Elmore's testing "indicate that Elmore has an I.Q. of seventy-five, which is in the borderline range of intellectual functioning . . . a low score Mr. Elmore is not mentally retarded, but he's just a notch above being mentally retarded." and that Elmore's performance on the Halstead- Reitan Neuropsychological Battery revealed that "his performance is consistent with an individual who operates at a very low level of intelligence. He has a lot of difficulty solving problems, remembering and figuring things out."

App.p. 1951 again refers to Dr. Venn's examination as an expert witness for the defense when he testified that in his interview with Elmore, "he could not remember what grades he had repeated in school. He told me that he had finished the 8th grade and gone on to the ninth grade, which the school records show is not true. It is also evident from records of the South Carolina Department of Mental Health, where Elmore was a patient in 1982, that his poor memory is also evident in those records. He told them he had gone to the ninth grade, which wasn't true. Also that Elmore's father died when he was two years old. Dr. Venn opined that he has a very poor memory and that he was not able to remember accurately. Dr. Venn also stated that he had done a test for "memory malingering", but concluded that he was not trying to pretend that he had a memory problem.

including the PCR appeal reveal that the Petitioner has never presented this constitutional claim for relief in any matter in state court, but more importantly claim before that Elmore was not mentally retarded through their own experts.

A. Is This A Successive Application for Post-Conviction Relief ?

The question of whether this is a successive application must be addressed. As noted previously, this issue was never sought to be raised as a claim. However, in the PCR appeal before the South Carolina Supreme Court, the Petitioner's current federal habeas and prior PCR counsel relied upon Atkins in their Brief of Petitioner at pages 60, 66, before the South Carolina Supreme Court but not for the proposition that his own execution was prohibited by the U.S. Constitution or Atkins.

South Carolina has established a procedure since Atkins was decided. In Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604, 606 (2003), the court established that :

A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. [FN7] See S.C.Code Ann. §§ 17-27- 20(a) and -160 (2003). As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. See, e.g., Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993) (competency for execution). If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence.

Franklin at 606. The Supreme Court specifically held that an applicant was not barred from raising the mental retardation issue in a second PCR application. See S.C.Code Ann. § 17-27-45(B) (2003) (when court whose decisions are binding upon this Court holds United States Constitution imposes upon state criminal proceedings substantive standard not previously recognized or right not in existence at time of state court trial, and if standard or right is intended

to be applied retroactively, PCR application may be filed).

B. The Application Must Be Barred As Untimely under Section 17-27-45.³

Respondents submit that even if the general issue can be raised under *Atkins* and *Franklin*, the application, like any other constitutional claim raised in state PCR must be timely made. The record reveals that Elmore has not prevailed attempted to raise this "same constitutional claim" in state court at any time prior to September 27, 2005. At no time after either *Atkins* or *Franklin* was decided did Elmore seek to present a second PCR application until September 27, 2005 contemporaneously with its response to the state's response to his federal habeas application in federal court. At no time did he attempt to *timely* file the action in state court within the statutory limitations period set out in the PCR Act, Section 17-27-45(b) within

³§ 17-27-45. Filing procedures for post conviction relief applications.

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, **an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.**

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter ***within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.***

(Emphasis added).

one year after discovery of the constitutional claim.⁴ Instead, Elmore waits until after the statutory period has run in state court to present the matter for the first time in federal court.⁵ The application must be dismissed.

C. The Applicant Is Bound By His Prior Evidence From His Own Experts In 1995 That He Is Not Mentally Retarded.

Respondents respectfully submit that he is procedurally barred under the unique circumstances from raising this claim(or relitigating) the issue of Elmore's mental status. In the 1990 state PCR proceeding, certain salient factual issues were developed. First, there was never any conclusion by a state witness that Elmore presently suffered under mental retardation. To the contrary, Elmore's expert witness, Dr. Jonathan Venn opined, within his area of expertise that he had a diagnostic impression that the only mental disorder Elmore had was "borderline intellectual functioning." He stated that the Wechsler Adult Intelligence Test was administered a few months earlier by Dr. Denis Keyes⁶ and that he reviewed the results which indicated Elmore had

⁴ As noted previously, the Applicant is relying upon materials and testimony presented in the earlier PCR action to support his claim. Implicitly, Applicant was aware of these facts at the time of the prior testimony in 1995.

⁵ In his pleading, Elmore is relying upon the testimony presented at the 1995 PCR proceeding. Atkins was decided on June 20, 2002. **He had until June 20, 2003 to file another PCR asserting this claim under Section 17-27-45.** Further, if we assume that the decision date of Franklin v. Maynard, supra. was the trigger date, Elmore had until December 3, 2004 to file this matter. If the trigger date was one year from when his when certiorari was denied on July 12, 2004 or September 20, 2004 when the rehearing was denied and remittitur issued. Under any of these theories, his September 27, 2005 application dated September 26, 2005 was untimely. It must be noted that the statute of limitations in state PCR matters is not tolled by the filing of a federal habeas corpus action. Green v. State, 353 S.C. 29, 576 S.E.2d 182 (2003).

⁶Denis Keyes is a certified school psychologist, a Ph.D. in special education, and a professor of special education at the College of Charleston. U.S. v. Webster, 392 F.3d 787, 793, n. 10 (5th Cir 2004). See Dennis W. Keyes, William J. Edwards & Timothy J. Dering, Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant, 22 Mental &

an I.Q. of 75 which is in the borderline range of intellectual functioning. App.p. 1845-46. He unequivocally stated as the defense specialist that "this is a low score. Mr. Elmore is not mentally retarded, but he is just a notch above being mentally retarded." App.p. 1846. On cross-examination by the Respondents, Dr. Venn stated that "I do not consider him to be mentally retarded. App.p. 1853, ll. 21- 1854, l. 4. ⁷

Extraordinarily, the Petitioner, in his application rely upon the same expert testimony of Dr. Venn to support the claim he concluded did not exist with Mr. Elmore - mental retardation. Respondents respectfully submit that the Petitioner should be procedurally barred from asserting this claim in federal court in habeas corpus where he presented evidence in the state court

Physical Disability L.Rep. 529, 530-31 (1998) (comparing definitions of mental retardation given by the American Association on Mental Retardation and the American Psychiatric Association); Denis Keyes, William Edwards & Robert Perske, People with Mental Retardation Are Dying, Legally: At Least 44 Have Been Executed, 40 Mental Retardation 243, 243-44 (2002); Caroline Everington & Denis W. Keyes, Mental Retardation, 8 THE FORENSIC EXAMINER 31, 34 (1999); Denis W. Keyes et al., "Mental Retardation and the Death Penalty: Current Status of Exemption Legislation," 21 Ment. & Phys. Dis. L. Rep. 687 (1997). He has been declared a specialist in mental retardation. Washington v. Johnson, 90 F.3d 945 (5th Cir 1996). Keyes, has appeared on ABC's 20-20 and as a guest expert on CNN Presents OnLine conference. He is a Fellow of the American Association on Mental Retardation. 22 Mental & Physical Disability L. Rep. 529, *537.

Dr. Keyes website has a plethora of information about his area of expertise.
<http://www.cofc.edu/%7Ekeyesd/indexold.htm> .

⁷ In the Brief of Petitioner, Elmore made reference to a measurement of Elmore's I.Q. at the State Hospital of 71 and generally asserted without reference that school records revealed a much lower I.Q. Brief of Petitioner, p. 63, n. 79. Two factors must be recognized. Dr. Venn testified that he had reviewed school records in rendering his opinion. App.p. 1842, ll. 7-18, p. 1844, ll. 16-17.

The March 16, 1982 Report of the State Hospital reported : "... He was of dull normal intelligence with an IQ of 71 but possibly he is able to function at a higher level. . . Report, March 16, 1982.

proceeding that Elmore was not, in fact, mentally retarded. The record reveals that at the time of the 1995 PCR hearing, Elmore was tested by Denis Keyes, an expert in the determination of mental retardation according to various courts, and his testing was additionally relied upon by Dr. Venn to report no mental retardation.⁸

Respondents submit that he must be procedurally barred from raising this claim under concepts of res judicata, issue preclusion and collateral estoppel.

The doctrine of res adjudicata (or res judicata) in the strict sense of that time-honored Latin phrase had its origin in the principle that it is in the public interest that there should be an end of litigation and that no one should be twice sued for the same cause of action." First Nat'l Bank v. United States Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945). Under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action. Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992); Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct.App.1996); Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct.App.1993).

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between these parties. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999); Rogers v. Kunja Knitting Mills, U.S.A., 336 S.C. 533, 520 S.E.2d 815 (Ct.App.1999). Res judicata prevents a

⁸ Based upon this extraordinary reversal of course claim from the earlier state PCR proceeding, Respondents request contemporaneously the disclosure of Dr. Keyes written report, opinion and testing, if in existence at this time, of his 1991-1995 testing of Elmore or other documents and reports, in addition to his school records in discovery.

litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of South Carolina, Inc. v. Pub. Serv. Comm'n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); accord Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). "Res judicata is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. Res judicata ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues." James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996).

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J.A.

To establish res judicata, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); Rogers, 336 S.C. at 537, 520 S.E.2d at 817; Owenby v. Owens Corning Fiberglas, 313 S.C. 181, 437 S.E.2d 130 (Ct.App.1993). Even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct.App.1992).

Collateral estoppel differs from res judicata. This distinction is explained in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984):

The doctrines of res judicata and collateral estoppel are ... two different concepts. A final judgment on the merits in a prior action will conclude the parties and their privies under the doctrine of res judicata in a second action based on the same claim as to issues actually litigated

and as to issues which might have been litigated in the first action. Under the doctrine of collateral estoppel, ... the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues "actually and necessarily litigated and determined in the first suit."

Id. at 369 n. 1, 315 S.E.2d at 190 n. 1.

4
10
"Under the doctrine of collateral estoppel, once a final judgment on the merits has been reached in a prior claim, the relitigation of those issues actually and necessarily litigated and determined in the first suit are precluded as to the parties and their privies in any subsequent action based upon a different claim." Richburg v. Baughman, 290 S.C. 431, 434, 351 S.E.2d 164, 166 (1986); see also State v. Bacote, 331 S.C. 328, 330, 503 S.E.2d 161, 162 (1998) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or different claim."); McNaughton-McKay Elec. Co. of N.C. v. Andrich, 324 S.C. 275, 482 S.E.2d 564 (Ct.App.1997) (noting that collateral estoppel will bar relitigation of an issue that was actually litigated and necessary to the outcome of the prior lawsuit). A party may assert nonmutual collateral estoppel to thwart relitigation of a previously litigated issue unless the party sought to be precluded did not have a full and fair opportunity to litigate the issue in the first proceeding, or unless other circumstances justify providing the party an opportunity to relitigate the issue. Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct.App.1998).

The factors to consider in determining whether the defense of collateral estoppel exists and whether the issues were actually litigated in the first suit include: whether privity exists, whether the doctrine is used offensively or defensively, and whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action. Pye v. Aycock, 325 S.C. 426, 480 S.E.2d 455 (Ct.App.1997). The party asserting collateral estoppel must prove that the issue was actually litigated and directly determined in the prior action and that the matter or fact directly in issue was necessary to support the first judgment. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001); Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct.App.1984). Only a party to a prior action or one in privity with the party can be precluded from relitigating an issue on the basis of offensive collateral estoppel. Carrigg, 347 S.C. at 80, 552 S.E.2d at 770.

There are numerous exceptions to the application of res judicata and collateral estoppel. In Pye, the court adopted the Restatement (Second) of Judgments section 28, which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61.

In Beall v. Doe, the court adopted section 29 of the Restatement (Second) of Judgments:

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212
A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

- (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Beall, 281 S.C. at 371, 315 S.E.2d at 190-91.

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Respondents submit the conclusions in the first PCR action by the concession buy the defense experts that Elmore was not mentally retarded as a matter of fact act as collateral estoppel to the claim that he is mentally retarded. See Koon v. State, 358 S.C. 359, 364-365, 595 S.E.2d 456, 459 (2004) ("Because petitioner previously litigated and lost this argument before the Court of Appeals and on certiorari to this Court, *petitioner should be precluded from making the same argument in his Austin brief.* Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281 (2003) (collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action); Doe v. State, 294 S.C. 125, 363 S.E.2d 106 (1987). However, because the precise issue litigated did not involve subject matter jurisdiction, *and because the State failed to raise collateral estoppel as an affirmative defense in its brief, we have addressed the issue on the merits.*")⁹

⁹ Res judicata includes the related concepts of claim preclusion and issue preclusion. Issue preclusion "forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation." Sedlack v. Braswell Servs. Group, Inc., 134 F.3d 219, 224 (4th Cir.1998) (internal quotation

Here, the issue of Elmore's mental retardation was settled by the defense testimony in the initial PCR. He should be equitably estopped by ignoring his own evidence that Elmore is not mentally retarded to support his new claim that he is mentally retarded. This dichotomy cannot simultaneously exist in the Applicant's case. He must be bound by his 1990 presentation. His allegation must be denied where Elmore's own evidence rejected the existence of mental retardation.¹⁰

Since Elmore was determined by the defense experts in 1995, he gains no entitlement under Atkins to a new sentence. The exceptions to issue preclusion do not apply in Elmore's case:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;

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This has no applicability to Elmore's situation. Elmore would have benefitted by a determination in 1995 that he was, in fact, mentally retarded in his 1990 PCR action and if the court had not so determined, could have appealed on that matter, as it related to counsel failure to present mitigating evidence in support of allegation 9(b).

marks and citation omitted). Claim preclusion bars claims in later litigation arising from the same cause of action as an earlier case in which final judgment on the merits has been entered. It is broader, extending to claims that were not but "might have been presented" in the earlier case. In re Varat Enters., Inc., 81 F.3d 1310, 1315 (4th Cir.1996). Both doctrines serve to limit relitigation of issues settled in separate, prior litigation.

¹⁰It must be recognized that the issue of whether Elmore was mentally retarded was before the PCR court in 1990-1995 because evidence of mental retardation was a mitigating factor as a matter of state law and defense counsel's failure to present the claim could have supported a claim of ineffective assistance of sentencing counsel. See State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979); State v. Middleton, 295 S.C. 318, 368 S.E.2d 457 (1988); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998).

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

Although the Atkins issue is one of law, its applicability to those determined to be mentally retarded is a fact. If the PCR court had determined that Elmore was in fact mentally retarded, this fact may have barred relitigation on the claim. Here, though the defense experts in 1995, after reviewing school records and psychological tests of Elmore concluded that he was not mentally retarded - the defense own retained experts - one the specialist in the state for such determinations, Dr. Denis Keyes. The tests to determine MR have not changed since 1995 and the result in 1995 would have supported the defense position at that time. The actions were substantially related.

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

This exception plainly has no applicability to Elmore. As noted above, at the first PCR action, Elmore was evaluated by two experts in the field; Dr. Denis Keyes, a national expert on mental retardation, and Dr. Jonathan Venn who reviewed and relied upon Dr. Keyes testing.

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

This exception has no applicability. The burden remains on Elmore to prove by a preponderance of the evidence.

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons

not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or © because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

The applicant may claim that prior to Atkins, his incentive to get a determination of mental retardation increased because a finding, if supported by the evidence, would now preclude a death sentence, whereas before, at most, it would allowed for a new sentencing proceeding where such evidence would have been admitted as mitigation. However, the incentive to develop and determine the existence of a significant mitigation factor of mental retardation was the same - to undermine confidence in the determination of the death penalty. Had either Dr. Keyes or Dr. Venn opined in 1995 that Elmore was mentally ill, it would have been more powerful and probative for the Applicant than the opinion that he was not mentally retarded but did not a low I.Q. To suggest otherwise undermines the Court's decision in Atkins. Elmore had the opportunity to litigate and investigate the existence of his MR.

Respondents agree that Franklin allows for the Atkins issue to be raised in a new PCR action, but it does not similarly require re-litigation of the existence of mental retardation where the defense affirmatively disproved its existence in 1995. His suggestion otherwise is without merit. The Applicant has failed to make a prima facie showing of mental retardation. The Application must be dismissed. ¹¹

IV.

¹¹ As stated, the Respondents are filing discovery requests this date in the form of interrogatories and motion to produce. Further, in anticipation of a denial of the motion, Respondents are requesting an evaluation to be performed as soon as practicable by the South Carolina Department of Developmental Disabilities and Special Needs.

Each and every allegation contained within the Petition not hereinbefore either expressly admitted, qualified or explained is hereby denied.

WHEREFORE, having made Return, the Respondents request that the Petition be denied and dismissed.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
ID No. 4425

ATTORNEYS FOR RESPONDENTS

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#17
January 27, 2006

APPENDIX A

Prior Proceedings

The Petitioner, Edward Lee Elmore, # SK 4293, is on safe keeping status in the Lieber Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenwood County.

A. The 1982 "Burnett" Trial and Appeal.

The Petitioner was indicted at the March 1984 term of the Court of General Sessions for Greenwood County for murder, first degree criminal sexual conduct, assault with intent to commit criminal sexual conduct, housebreaking, armed robbery, larceny and burglary. He was represented by John F. Beasley and Geddes Anderson, Esquires, both of the Greenwood County Bar. The State filed a timely notice of its intention to seek the death penalty. On April 17, 1982, the case was called to trial before the Honorable E.C. Burnett, jr, Presiding Judge. On April 17, 1982 he was found guilty of murder, criminal sexual conduct in the first degree, and burglary with a recommendation of mercy and not guilty of armed robbery and larceny. On April 19, 1982, following a separate sentencing hearing before a jury, the jury found the existence of statutory aggravating circumstances of murder was committed while in the commission of criminal sexual conduct in the first degree and murder was committed while in the commission of physical torture. The jury recommended a sentence of death. Judge Burnett sentenced Elmore to death for murder.

Elmore made his appeal to the South Carolina Supreme Court. On appeal, he was represented by David I. Bruck of the South Carolina Bar. In the Brief of Appellant, Bruck raised the following issues on appeal:

QUESTIONS PRESENTED

- i. Did the trial judge err in trying appellant where no hearing had been held to determine his competency to stand trial?
- ii. Did the trial judge err in overruling appellant's motion to disqualify the jurors Chalmers and Pinson?
- iii. Did the trial judge err in disqualifying the juror Covington on the basis of his statements indicating opposition to the infliction of capital punishment, where these statements did not make unmistakably clear that the juror would have automatically voted against the death penalty regardless of the evidence presented?
- iv. Did the trial judge's instructions on the presumption of malice from the use of a deadly weapon violate appellant's constitutional right to have the state bear the burden of proving each element of the offense charged beyond a reasonable doubt?

- v. Does the trial judge's failure to charge the jury on the law of alibi require that a new trial be granted?
- vi. Did the trial judge err by entering the jury room and instructing the jury in appellant's absence during deliberations on both his guilt or innocence and his punishment?
- vii. Did the solicitor's cross-examination of appellant at the penalty phase of his trial deny him a fair determination of his sentence?
- viii. Did the trial judge violate S.C. Code § 16-3-20 and the Eighth Amendment by sentencing appellant to death on the basis of a jury finding of Criminal Sexual Conduct in the First Degree, where this offense is not among the statutory aggravating circumstances authorized by law as bases for imposition of the death penalty?
- ix. Did the trial judge err in defining the statutory aggravating circumstance of physical torture so broadly as to encompass nearly every case of murder?
- x. Did the trial judge's supplemental instructions to the jury during deliberations at appellant's sentencing deny appellant a fair determination of his sentence?

The Petitioner's original convictions were reversed, death sentence vacated and the matter remanded for a new trial by the South Carolina Supreme Court. State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983).

B. The 1984 "Moore" Trial and Appeal.

After the remand, Elmore was re-indicted at the March 1984 term of the Court of General Sessions for murder, criminal sexual conduct in the first degree and burglary. His trial began before the Honorable James E. Moore, Resident Judge and a jury on March 23, 1984. He was represented by his earlier trial counsel, Geddes Anderson and John Beasley. He was convicted as charged on March 31, 1984. A sentencing hearing was held. On April 2, 1984, the jury found statutory aggravating factors and recommended a death sentence. Judge Moore sentenced Elmore to death on that date.

The Petitioner made another appeal to the South Carolina Supreme Court. In this appeal, he was represented by his prior appellate counsel, David Bruck, and trial counsel. In the Brief of Appellate, Bruck presented the following issues for review:

QUESTIONS PRESENTED (Moore)

- i. Did the trial judge violate Witherspoon v. Illinois by disqualifying the juror Bennetta B. Harris on the basis of her opposition to capital punishment?

- ii. Did the trial judge err in admitting appellant's statements made during custodial interrogation after he had been warned that anything he said could be used "for or against" him, and in failing to instruct the jury concerning its duty to determine whether the statements had been obtained in a manner consistent with appellant's Fifth and Sixth Amendments rights?
- iii. Did the trial judge's instructions to the jury at the start of the sentencing hearing that it was not concerned with appellant's guilt or innocence, and his instruction that the jury was not to be governed by sympathy in its sentencing decision, have the effect of violating appellant's Eighth Amendment right to have the sentencing authority consider any aspect of the record before it as a basis for imposition of a sentence of less than death?
- iv. Does the erroneous exclusion of appellant's entire prison record from the sentencing jury's consideration require that a new trial be granted?
- v. Was the constitutional prohibition against double jeopardy violated by the resubmission of a statutory aggravating circumstance that was submitted to, but not found by, the sentencing jury at appellant's first trial?

On May 16, 1985, the South Carolina Supreme Court affirmed by the South Carolina Supreme Court. State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985).

The United States Supreme Court thereafter granted the Petitioner's Petition for a Writ of Certiorari, vacated the judgment and sentence of death and remanded for reconsideration in light of Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). Elmore v. South Carolina, 476 U.S. 1101, 106 S.Ct. 1942 (1986). The South Carolina Supreme Court then remanded this matter for a new sentencing phase trial.

C. The 1987 "Traxler" Resentencing Proceeding and Appeal.

The Petitioner then filed a motion for change of venue from Greenwood County which was granted by the Honorable William Traxler. The case was called for resentencing trial on February 23, 1987 in Newberry County, South Carolina. The Petitioner was represented by Billy J. Garrett and Geddes Anderson after Mr. Beasley was removed as counsel. The jury found the existence of two statutory aggravating circumstances: murder was committed while in the commission of criminal sexual conduct in the first degree and murder was committed while in the commission of physical torture. 1987 Tr.p. 1451, 1472. At the conclusion of the sentencing phase trial, the jury on February 28, 1987 recommended that the Petitioner be sentenced to death. Judge Traxler sentenced the Petitioner to death on that same date.

The Petitioner filed a timely notice of intent to appeal. The case and exceptions contained eight (8) exceptions. He was represented in the appeal by former counsel Bruck and

trial counsel Garrett and new appellate counsel John Blume. In particular, they raised the following issues:

QUESTIONS PRESENTED

- i. Did the solicitor exercise his peremptory challenges in a racially discriminatory manner?
- ii. Did the solicitor's closing argument deprive appellant of a fair and reliable determination of the appropriate punishment?
- iii. Did the trial court err in refusing to permit appellant's counsel at this resentencing trial to introduce evidence regarding prior counsel's inadequate investigation?
- iv. Did the trial court err in refusing to replace juror Mattie Jones with the alternate juror, Lottie Bates?
- v. Did the trial court err in the qualification of jurors Annie Johnson and Grace Watkins?

On November 23, 1987, the Brief of Appellant was filed. On December 23, 1987 the Brief of Respondent was filed. On August 21, 1989, the South Carolina Supreme Court issued its Opinion affirming the Petitioner's sentence of death. *State v. Elmore*, 300 S.C. 130, 386 S.E.2d 769 (1989). The Petitioner thereafter filed a Petition for Rehearing which was denied by the South Carolina Supreme Court on December 15, 1989.

The Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court on April 16, 1990. The Respondent filed its Brief in Opposition to the Petition on May 18, 1990. The Petition for Writ of Certiorari was denied by the United States Supreme Court on June 11, 1990.

D. The State Post-conviction Relief Proceedings, Elmore v. State, 90- CP- 24-1004.

The Petitioner, through appellate counsel Bruck, made an application for post-conviction relief in the Court of Common Pleas on December 13, 1990. Respondents made Return on February 4, 1991. Further amendments were made in pleadings dated or received on February 23, 1995, February 24, 1995, February 27, 1995, and October 30, 1995. On February 27, 1995, a hearing was convened in Greenwood County before the Honorable J. Ernest Kinard, Presiding Judge. The Petitioner was present and represented by court-appointed counsel, J. Christopher Jensen of New York, New York, Diana Holt and Tony Miles of the Post Conviction Defender Organization of South Carolina. Respondents were represented by Donald J. Zelenka and Salley W. Elliott of the South Carolina Attorney General's Office. The hearing was held from February 27, 1995, until March 4, 1995. Post-hearing evidence was presented by depositions. Each party filed post-hearing briefs in the matter dated October 30, 1995, (Applicant), and March 21, 1995, (Respondents). On July 22, 1996, argument on the parties' positions was held before Judge

Kinard. On November 29, 1996, Judge Kinard entered his initial order denying state post-conviction relief in its entirety. An amended order denying relief was entered June 30, 1997.

The matter was appealed to the South Carolina Supreme Court. After an initial petition for writ of certiorari was made, a limited remand was made to the Court of Common Pleas due to a joint motion based upon the discovery of material previously believed by the parties to be lost. Orders denying relief upon remand were entered by Judge Kinard on February 21, 2001 and May 18, 2001.

The Petitioner made another petition for writ of certiorari to the South Carolina Supreme Court on January 7, 2002. In the Petition, Elmore raised the following questions presented:

PETITIONER'S QUESTIONS PRESENTED

- I. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of the assistance of counsel, a fair trial, and due process of law, rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law because the state falsified evidence, presented false evidence, and withheld material, exculpatory evidence related to hair found on the victim's body and other hair allegedly found at the crime scene?
- II. Whether the lower court's conversion of a hearing on Petitioner's motion for summary judgment into a final hearing was prejudicial error, and deprived Petitioner of due process of law and other rights guaranteed him by the Sixth, Eighth, and Fourteenth Amendments and South Carolina law?
- III. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner, a death-sentenced person, has an absolute right to DNA testing that could materially undermine reliability of and confidence in his conviction and death sentence under rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments and South Carolina law?
- IV. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of a fair trial guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law because the state falsified evidence, testified falsely, and withheld material, exculpatory evidence related to fingerprints found at the crime scene?
- V. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner's

conviction and death sentence were secured as a result of the state's failure to disclose that the testimony of James Gilliam regarding an alleged "jailhouse confession" by Petitioner was false. The state's failure to reveal this exculpatory and material evidence violated Petitioner's rights guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and South Carolina.

- VI. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was denied the right to a fair trial and the right to counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law as a result of the "Snitch" testimony of James Gilliam?
- VII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of his right to the assistance of counsel, to due process of law, to confront witnesses against him, and to a fair trial, guaranteed by South Carolina law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the state failed to disclose that James Holloway was a suspect in Mrs. Edwards' death?
- VIII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of the assistance of counsel, of the ability to confront witnesses against him, and of due process of law, rights guaranteed by South Carolina law and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the state allowed a false impression to go uncorrected and failed to disclose payments it made to material witnesses?
- IX. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of rights guaranteed him by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law because the cumulative effect of the numerous due process violations arising from the state's failure to disclose material and exculpatory information could have affected the jury's verdict?
- X. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of his right to a fair trial guaranteed him by the South Carolina Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because a member of Petitioner's jury engaged in

improper third-party contact with a juror from Petitioner's first trial and, subsequently, with a bailiff?

- XI. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was deprived of his right to a fair trial guaranteed him by the South Carolina law and the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because jurors who sentenced Petitioner to death engaged in premature deliberations?
- XII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was denied the effective assistance of counsel at the guilt phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution?
- XIII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was denied his Sixth and Fourteenth Amendment right to counsel as a result of a conflict of interest arising from trial counsel's racial animus?
- XIV. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was denied the effective assistance of counsel at the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution because of poor performance by Petitioner's counsel?
- XV. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner's death sentence was obtained in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the Eighth Circuit Solicitor's Office has utilized its discretion to seek the death penalty in a racially discriminatory manner, and this Court should remand the matter to the lower court because it erroneously held that this claim was noncognizable in post-conviction proceedings?
- XVI. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment rights under the United States Constitution have been violated because Petitioner was indicted by a Grand Jury from which African-Americans have been intentionally and systematically excluded?

XVII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Petitioner was denied a fair trial and due process of law guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and South Carolina law as a result of the trial court's charge to the jury on reasonable doubt during the guilt phase of Petitioner's trial?

XVIII. Whether the lower court erred in failing to consider relevant facts properly and to apply properly the relevant legal standard in assessing whether Mr. Elmore's conviction and death sentence should be vacated in the interest of justice as provided by South Carolina law and in accordance with the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because there exists evidence of material exculpatory facts not previously presented or heard?

Petition for Writ on Certiorari, p. viii-x. The Respondents made a Return to the petition on July 2, 2002. On June 10, 2003, the South Carolina Supreme Court granted the petition for writ of certiorari and ordered further formal briefing. Briefs were submitted by the Petitioner on September 7, 2003 and by the Respondents on January 22, 2004. Oral argument was held before the South Carolina Supreme Court on May 27, 2004. On July 12, 2004, the South Carolina Supreme Court entered its written order that the petition for writ of certiorari was dismissed as improvidently granted.

The Petitioner made a petition for rehearing. The petition for rehearing was denied on September 20, 2004. No petition for writ of certiorari from this PCR action was made to the United States Supreme Court.

CERTIFICATE OF SERVICE

I, **Lonetta B. Brawley**, hereby certify that I have served the *Respondents Return and Motion to Dismiss Application as Barred as Untimely* and the *Respondent's Motion for an Evaluation of Applicant for Mental Retardation* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

J. Christopher Jensen, Esquire
Cowan, Liebowitz & Latman, P.C.
1133 Avenue of the Americas
New York, NY 10036-6799

Diana L. Holt, Esquire
Post Office Box 6454
Columbia, SC 29260

This 27th day of January, 2006.

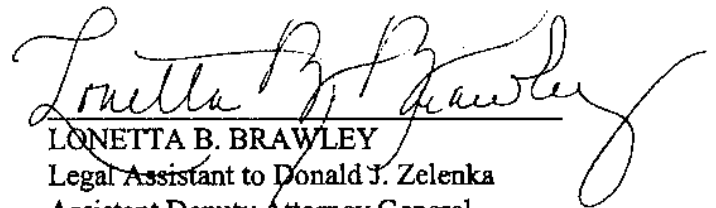

LONETTA B. BRAWLEY
Legal Assistant to Donald J. Zelenka
Assistant Deputy Attorney General

Exhibit D

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENWOOD)

IN THE COURT OF COMMON PLEAS
05-CP-24-1205

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, S.C.
2006 NOV 22 AM 11 01SS

DEATH PENALTY CASE

EDWARD LEE ELMORE,)
Applicant,)

v.)

RETURN TO STATE'S MOTION TO DISMISS

STATE OF SOUTH CAROLINA,)
Respondent.)

On September 27, 2005, Edward Lee Elmore filed a post-conviction relief action in this Court seeking to have his death sentence vacated on the grounds that he is mentally retarded and thus categorically ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002). Respondent filed a Motion to Dismiss on two grounds. First, Respondent argues that Elmore's motion for a hearing on his mental retardation was untimely, and thus the State may execute Elmore whether he is retarded or not. Second, Respondent argues that Elmore has already been found not to be mentally retarded, and thus he may not "re-litigate" the issue. Respondent is wrong on both grounds.

I. South Carolina's Statute of Limitations Can and Must Be Equitably Tolloed to Prevent the Execution of a Mentally Retarded Person in Violation of *Atkins v. Virginia*.

A. Procedural History

Mr. Elmore has been diligently litigating his case in state post-conviction proceeding since the conclusion of his third trial. At the time *Atkins* was decided on June 20, 2002, his post-conviction petition had been the subject of seven years of litigation. He had already had a bearing

ATTEST A TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S. C.

on his claims, his post-conviction petition had been denied by the circuit court, and a petition for writ of certiorari was pending before the South Carolina Supreme Court. On June 10, 2003, prior to the one year anniversary of *Atkins*, the South Carolina Supreme Court agreed to review his case. Given the relative rarity of grants of certiorari in post-conviction relief actions, there was ample reason to believe that Mr. Elmore would be granted a new trial.

When the Supreme Court dismissed Mr. Elmore's petition for certiorari and subsequently denied rehearing, Mr. Elmore remained eager to have his rights vindicated and proceeded to the next forum available to him - the federal courts. He filed his petition for a writ of habeas corpus only nine months later.

B. Mr. Elmore is Entitled to Equitable Tolling

Respondent says that Mr. Elmore should be executed despite his mental retardation. Mr. Elmore contends this cannot be the result that the South Carolina Supreme Court intended. Following the Supreme Court's decision in *Atkins*, the South Carolina Supreme Court decided *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), in which it set forth the definition of mental retardation that should be used in determining whether current or potential death row inmates may be legally subject to death. *Id.* at 278-9, 605. The *Franklin* court also indicated that the procedure for those already under sentence of death would be to bring a successive post-conviction relief petition under S.C. Code Ann. §17-27-45(B) (2003), which allows for successive petitions following the creation of a new right, such as that announced in *Atkins*. *Id.* at 280, 606 n.7. Although the statute does indicate that under ordinary circumstances this right must be exercised within one year, the court made no reference to the application of the statute of limitations in a case

in which the claim at issue categorically exempts the applicant from the death sentence.¹ Because a strict application of the statute of limitations in this case would result in the execution of a mentally retarded person in violation of the Eighth Amendment, Elmore contends the statute should be equitably tolled. See, *G & P Trucking v. Parks Auto Sales Service & Salvage*, 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003) (“[A] statute of limitations...is subject to certain counter-assertions, such as waiver, tolling, and estoppel.”)

The question of whether Mr. Elmore will be afforded equitable tolling comprises two separate issues: whether the statute *can* be tolled and whether the statute *should* be tolled. Mr. Elmore submits that both questions resolve in his favor.

1. The Statute of Limitations Can Be Tolled

First, it is clear that S.C. Code Ann. §17-27-45(B) can be tolled, because the South Carolina Supreme Court has acknowledged that very possibility. In *Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001), the State raised a timeliness defense to a post-conviction petition. The South Carolina Supreme Court held that fairness required that the applicant be appointed counsel to argue he was entitled to equitable tolling of S.C. Code Ann. §17-27-45(B). Obviously, the Court would not have ordered the appointment of counsel to argue this issue before it if equitable tolling would not have been available as a matter of law. In *Mackey v. State*, 357 S.C. 666, 595 S.E.2d 241 (2004), the applicant claimed that he was wrongly convicted because the charges on which he was tried had been

¹Moreover, *Franklin* is silent as to how Mr. Elmore, whose petition for certiorari to the Supreme Court was pending at the time *Atkins* was decided, would have raised an *Atkins* claim in this posture. He likely could not have amended his pending petition for certiorari to include a claim that had not been subject to fact-finding in the circuit court. It is equally unclear whether he could have filed a successive post-conviction application in the circuit court while his original application was still pending before the South Carolina Supreme Court.

nol proseed and he was never re-indicted. The circuit court dismissed his application because he had filed beyond the statute of limitations. *Id.* at 667, 242. The South Carolina Supreme Court reached the issue on the merits, thereby implying the availability of equitable tolling, and reversed.

Second, the United States Supreme Court allows for equitable tolling of the analogous federal statute placing a statute of limitations on the filing of federal petitions for habeas corpus. *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Other states also allow for equitable tolling of similar statutes of limitation. *See, Washington v. Littlefair*, 51 P.3d 116 (Wash. 2002) (statute of limitations on filing collateral attacks on criminal judgments is subject to equitable tolling).

Finally, South Carolina courts allow for equitable tolling in other contexts. For example, in a personal injury case, the court held that SCRCP 6(b) permitted enlargement of SCRCP 40(j)'s one year limitations period for "good cause." *Maxwell v. Genez*, 350 S.C. 563, 567 S.E.2d 496 (Ct. App. 2002).

2. *The Statute of Limitations Should Be Tolloed*

Mr. Elmore is entitled to equitable tolling. The South Carolina Supreme Court has not articulated what factors should be considered when determining whether to allow equitable tolling in the post-conviction context, but the courts have done so in the more traditional civil context. In a tort action, for example, the court set out the following factors to guide courts in determining when statutes of limitations should be tolled:

- the extent of the delay in movant's filing;
- whether the movant has a meritorious claim; and
- the extent of prejudice to the opponent of the tolling.

Wham v. Shearson Lehman Brothers, Inc., 298 S.C. 462, 465, 381 S.E.2d 499, 501-502 (Ct.

App.1989). Under this kind of analysis, Mr. Elmore should receive the benefit of equitable tolling.

a. Mr. Elmore has filed his claim under *Atkins* within a reasonable time

Mr. Elmore has diligently pursued his rights. As indicated previously, Mr. Elmore has been diligently litigating his case in state post-conviction proceedings since the conclusion of his third trial. On the one year anniversary of *Atkins*, Mr. Elmore's case was being reviewed by the South Carolina Supreme Court. Given the relative rarity of grants of certiorari in post-conviction relief actions, there was ample reason to believe that Mr. Elmore would be granted a new trial. Had he been granted a new trial, then the most appropriate forum in which to resolve his claim of mental retardation would have been the state trial court. When certiorari was dismissed, Mr. Elmore pressed his case into federal court within months. It cannot be said that he "sat on his rights" in a manner that should exempt him from equitable tolling. *See, e.g., Sutton v. State*, 351 S.C. 644, 606 S.E.2d 779 (2004) (equitable tolling not afforded to applicant who missed statute of limitation by five years).

b. Mr. Elmore is likely to be found mentally retarded

In *Atkins*, the Supreme Court held that mental retardation is established when a person has significantly sub-average general intellectual functioning, concurrently with deficits in adaptive functioning, both manifesting during the developmental period. *Id.* at 320-21; *Penry v. Lynaugh*, 492 U.S. 302, 307-09, n.1 (1989).

I.Q. tests administered before and after Mr. Elmore's trials indicate that he has significantly subaverage intellectual functioning. All I.Q. tests indicate Mr. Elmore has an IQ of 75 or below, not even taking into account the Standard Error of Measurement or the Flynn effect. *See discussion infra*

at pp. 8-9. Mr. Elmore scored a 59 I.Q. in elementary school. His I.Q. was measured at 71 when assessed by the State Hospital shortly after his arrest, when he was twenty-three years of age, and was measured at 75 in post-conviction proceedings.

Mr. Elmore failed and repeated both the first and second grades. He failed and repeated the third grade *twice*. He finally dropped out of school during fifth grade. He tried and failed to resume his education in the eighth grade, but gave up after just ten days. He was also unsuccessful in his attempt to obtain a GED. Never found to be a discipline problem, Mr. Elmore was simply incapable of tackling the difficulty level of the course work required by even a third grade curriculum.

School records and other information indicate that Mr. Elmore also has significant deficits in adaptive functioning. He has never lived independently and has never held a job more skilled than that of house painter or yard man. He has difficulty solving problems and difficulty remembering when major events in his life occurred.

Both his intellectual and adaptive functioning deficits began well before his 18th birthday.

c. Respondent will not be prejudiced by equitable tolling

Respondent does not allege precisely what prejudice will befall him should this court depart from the strict application of the statute of limitations and offer Mr. Elmore a forum to litigate his ineligibility for the ultimate sanction. In fact, it is likely that Mr. Elmore's delay in filing will actually result in a faster resolution of this case. Had Mr. Elmore filed a second state post-conviction application raising his *Atkins* claim while his first post-conviction application was pending before the South Carolina Supreme Court, his case would be in the exact same procedural posture. Not a single one of the post-*Atkins* state successor PCR applications has been resolved. The Department of Disabilities and Special Needs has only completed one of the mental retardation evaluations and

there have not been any evidentiary hearings in any of the cases.

At no time in these proceedings has the Respondent argued that Mr. Elmore has acted in bad faith with regard to the litigation of his *Atkins* claim. Had delay been Mr. Elmore's intent, he would have filed an *Atkins* claim on June 20, 2003, the last possible moment under the one year statute of limitations, at which point the proceedings would have ground to a halt, and he would not be in federal court now. Instead, Mr. Elmore, intent on vindicating his rights, proceeded into federal court with two and one half months left in the year he was allotted under the AEPDA.

D. Failure to Grant Equitable Tolling Will Result in a Fundamental Miscarriage of Justice

If the South Carolina courts have allowed for equitable tolling in civil actions involving car accidents, it is hard to believe they would refuse to do so where the possible consequence is a wrongful execution. In many ways, the federal doctrine of procedural default operates similarly to a statute of limitations in that both preclude judicial consideration of a potentially meritorious claim. In the analogous procedural default context, the United States Supreme Court has held that federal courts must hear even procedurally defaulted claims if failure to do so would result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478, 485, 495 (1986). A miscarriage of justice would result if an individual was executed who was actually innocent of the death penalty in that he was excluded from the class of people that is eligible for that penalty. *See, Sawyer v. Whitley*, 505 U.S. 333, 347 (1992).

Exceeding a statute of limitations cannot change the static fact that persons who are mentally retarded are categorically ineligible for the death penalty. The closest parallel is to juveniles. Age, like mental retardation, is a static condition. It does not change based on when evidence in support

is presented. If a death row inmate came to this Court with proof that he was 17 years old or younger at the time of the offense, this Court would not and could not turn him away because the issue had not been raised earlier. While there may be a distinction in the type of proof that is required, there is no conceptual difference in the absolute nature of the bar. In the face of an adequate threshold showing that a petitioner is a person who is mentally retarded, the doctrine or application of untimeliness has no place.

As Mr. Elmore has demonstrated, this Court has the authority to grant Mr. Elmore equitable tolling of the statute of limitations on his *Atkins* claim. This Court should do so because Mr. Elmore has not attempted to abuse the process, Respondent would not be prejudiced, and in some ways has actually been advantaged by Mr. Elmore's course of action, and Mr. Elmore is mentally retarded and can prove it if he is granted a hearing. Most importantly, however, the consequence of refusing to equitably toll the statute of limitations is that a mentally retarded man who is ineligible for the death penalty could be sent to his death anyway, without having been afforded a forum to litigate the issue. Surely this concern should outweigh the State's interest in a strict application of procedural rule from which it derives absolutely no benefit.

II. Mr. Elmore Is Not Prevented by Civil Procedure Preclusion Doctrines from Litigating His Mental Retardation

Respondent claims that Mr. Elmore may not litigate his mental retardation now, because Dr. Jonathan Venn, Mr. Elmore's expert in state post-conviction proceedings, opined that because Mr. Elmore's most recent IQ score was 75, he was "a notch above mentally retarded." Respondent's argument must fail.

Dr. Venn's evaluation was not, and was not intended to be a diagnostic work-up of mental

retardation. In post-conviction, Mr. Elmore claimed that he had received ineffective assistance of counsel at his resentencing trial, because counsel had failed to investigate and present evidence of various cognitive deficits to the jury. As Mr. Elmore's post-conviction petition was filed seven years before the United States Supreme Court decided *Atkins*, Mr. Elmore a technical diagnosis of mental retardation was not relevant – Mr. Elmore only sought to demonstrate overall deficits that might have resonated with the jury deciding his fate. Thus he *did not seek* to prove that he was mentally retarded.²

As a result, Dr. Venn did not account for the Standard Error of Measurement [SEM], when characterizing Mr. Elmore's 75 IQ score as "a notch above mentally retarded." A true assessment of mental retardation must take the SEM into account. Both the American Association of Mental Retardation and the American Psychological Association note that IQ tests have a standard error of measurement of plus or minus five points. Thus, an individual who scored 75 or below on an IQ test may be mentally retarded.

Moreover, because it was not germane to the purpose of his post-conviction evaluation, Dr. Venn also did not account for the Flynn Effect. The Flynn Effect explains the tendency of an individual's IQ score to rise over time, even though his level of functioning remains constant. "In other words, as time passes and IQ test norms get older, people perform better and better on the test, raising the mean IQ by several points within a matter of years. Once a test is renormed, which typically happens every 15-20 years, the mean is reset to 100, making the test harder and 'hiding' the previous gains in IQ scores." Tomoe Kanaya et al., *The Flynn Effect and U.S. Policies: The*

²Contrary to Respondent's allegation, mental retardation was not a mitigating factor at the time of any of Mr. Elmore's trials. Thus, failure by counsel to present evidence of this mitigating factor could not have been a claim. (*See* Motion to Dismiss at 14).

Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses, American Psychologist 778, 778 (Oct. 2003). The Flynn Effect is particularly relevant where an individual's scores fall close enough to the range indicating subaverage intellectual functioning that accounting for the artificial inflation of the Flynn Effect might push an individual's scores directly into the subaverage range.³ The United States Court of Appeals for the Fourth Circuit recognized the relevance of the Flynn Effect in *Walker*, 399 F.3d at 323, and ordered the district court to consider evidence of the Flynn Effect in its resolution of a capital defendant's mental retardation claim.

Finally, as Dr. Venn was not expressly evaluating Mr. Elmore for the presence of mental retardation, he did not make findings regarding adaptive functioning as required by South Carolina law. See, *Franklin*, 356 S.C. at 279, 588 S.E.2d at 605.⁴

Respondent is incorrect that Mr. Elmore's level of mental retardation was conclusively established at trial.⁵ Nonetheless, Respondent seeks to toss out the kitchen sink of civil procedure preclusion doctrines in order to prevent Mr. Elmore from developing and presenting a proper and accurate assessment of his mental retardation.

A. Res Judicata

³Accounting for the SEM and the Flynn Effect are now standard and expected in mental retardation evaluations, thus there has been substantial evolution in the methods involved in the diagnosis of mental retardation, contrary to Respondent's assertions. (Motion to Dismiss at 15).

⁴Dr. Venn filed an affidavit in Mr. Elmore's federal habeas corpus proceedings stating expressly that he was not asked to and did not perform a complete mental retardation assessment. Another expert, Dr. George Woods, filed an affidavit making clear that when Mr. Elmore's IQ scores are adjusted to account for the SEM and the Flynn Effect, and when his deficits in adaptive functioning are considered, Mr. Elmore is mentally retarded.

⁵Applicant is intrigued to hear, however, that Respondent believes that any fact or opinion uttered by one of his experts is considered conclusively established. If this was the case, however, Mr. Elmore should have prevailed on one of his other many claims.

According to the South Carolina Supreme Court, *res judicata* “requires that three elements be met: 1) a final, valid judgment on the merits, 2) identity of the parties, and 3) the second action must involve matters properly included in the first suit.” *Stone v. Roadway Express*, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006). Mr. Elmore’s case does not satisfy these requirements. As Mr. Elmore has demonstrated, the issue of his mental retardation was not litigated and was not properly included in the first suit, because the right Mr. Elmore seeks to enforce under *Atkins* did not exist at the time. He did not raise it as a claim and it was not assessed by his expert. Thus, there was not, and could not have been, a final, valid judgment on the issue.

B. Collateral Estoppel

“Collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action.” *Stone*, 367 S.C. at 580 627 S.E.2d at 697 (quoting *Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281 (2003)). Mr. Elmore’s *Atkins* motion does not fall within this rubric, either. Applicant did not raise a constitutional claim regarding his mental retardation – no such claim was available. Thus, the issue was not litigated or directly determined.

C. Exceptions to Preclusion

Even if *res judicata* and/or collateral estoppel applied, each is subject to numerous exceptions that apply in Mr. Elmore’s case. For example, preclusion will not operate if “the party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.” *Pye v. Aycock*, 325 S.C. 426, 437, 480 S.E.2d 455, 460-1 (Ct. App. 1997) (adopting the Restatement (Second) of Judgments §28 (1982)). That is the case here, where Mr. Elmore’s mental retardation would exempt him from the death penalty under *Atkins*, which was not