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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas
Honorable Robert E. Hood, Circuit Court Judge

Appellate Case No. 2025-001760

GARY DUBOSE TERRY, ... PETITIONER,

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Gary Dubose Terry, submits the following in reply to Respondent's Return to his Petition for a Writ of Certiorari.

I. The State's assessment of the merits of Terry's intellectual disability claim contradicts clinical standards.

a. Respondent's arguments on the first prong of the intellectual disability analysis are flawed.

Respondent argues that this Court should uphold the circuit court's finding that Terry did not satisfy Prong 1 of the intellectual disability inquiry because he scored outside of the intellectual disability range on two IQ tests in early adolescence.[1] Return at 11–12, 13. This assertion is incorrect for three reasons.

First, Respondent's argument is legally incorrect on its face. The United States Supreme Court has explicitly held that even if a defendant has obtained an out-of-range score, courts must "continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore v. Texas*, 581 U.S. 1, 15 (2017) (*Moore I*). "Intellectual disability is a condition, not a number," and therefore, Prong 1 must be assessed in light of the totality of relevant evidence, even if an individual has IQ scores outside of the ID range. *Hall v. Florida*, 572 U.S. 701, 722–23 (2014). Consequently, multiple courts have found individuals to be intellectually disabled despite IQ scores in the 80s, or even up to 93.[2] *See* App. 873.

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[1] Respondent asserts that Dr. Greenspan "failed to acknowledge" these two tests. Return at 11. This argument misrepresents the record, which makes clear that Dr. Greenspan considered the scores and discounted them as less reliable and persuasive than Terry's Woodcock-Johnson administered in 2022. App. 103–04 (Dr. Greenspan testifying that he reviewed and considered Terry's 1979 and 1982 IQ tests and "would not rule [intellectual disability] out based on those scores").

[2] For example, in *Hall*, the defendant was found to have intellectual disability despite scores of 71, 72, 73, and 80, and the Supreme Court found Bobby Moore to be intellectually disabled despite scores ranging from the 60s to 78. *Moore v. Texas*, 586 U.S. 133, 142 (2019) (*Moore II*); *Moore I*, 581 U.S. at 24–25; *Hall*, 572 U.S. at 707. The Supreme Court has held that when a defendant has at least one score in the intellectually disabled range, as Terry does, courts must continue the *Atkins* analysis and consider evidence of adaptive functioning. *Moore I*, 581 U.S. at 15.

Second, Respondent, like the PCR court, assumes with no evidence that Mr. Terry's childhood IQ scores are valid and reliable measurements of his intellectual functioning. App. 979. As Dr. Greenspan explained, without any further information regarding how the WISC-Rs were administered, it is impossible to assume anything about whether the test was administered or scored correctly, and thus whether the results are reliable. App. 140–41.

Finally, even assuming that Mr. Terry's childhood IQ scores are valid and reliable, Mr. Terry presented evidence of intervening brain injuries during the developmental period that would have caused and accounted for the decline in his cognitive functioning, which Respondent fails to address. Respondent refers to Dr. Davis's testimony that "it would be 'extremely rare' for an individual to twice test higher than his intellectual abilities should allow," Return at 13–14 (citing App. 247), but this assertion ignores that Terry presented evidence of brain injury in the developmental period that, even assuming the childhood scores were accurate, would have explained the decline in intellectual functioning he demonstrated in adulthood. App. 184, 301; *see also* App. 376, 434. In order to demonstrate intellectual disability, an individual is not required to show that the condition originated at birth—only that it was present during the developmental period. American Association on Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) (AAIDD-11) at 27 ("[E]specially when the etiology of the disability indicates progressive damage (such as malnutrition) or damage related to an acquired disease or injury (such as infection or **traumatic brain injury**), the condition may originate later [than birth]." (emphasis added)).

Respondent further urges this Court to reject Dr. Greenspan's testimony that Terry satisfies Prong 1 because Mr. Terry reported having had shingles at the time that he was administered the Woodcock-Johnson in 2022. Return at 12. However, Dr. Decker testified that he was aware that

Mr. Terry had previously had shingles and he nonetheless determined that the Woodcock-Johnson score was a reliable measure of his intellectual ability. App. 214, 223. Dr. Hall similarly did not dispute Dr. Decker's conclusion that Mr. Terry's Woodcock-Johnson score was valid. App. 317. Dr. Decker further testified that, in his professional opinion, Mr. Terry was not debilitated by illness during the administration of the Woodcock-Johnson. App. 217. All told, there is nothing in the record to support any conclusion that Mr. Terry's Woodcock-Johnson score is not valid.

b. In its analysis of the adaptive functioning prong, Respondent, like the PCR court, relies on incorrect stereotypes of intellectual disability to support its contention that Terry's claim was properly dismissed.

Respondent repeatedly engages in exactly the error of which it accuses Dr. Greenspan—relying on incorrect stereotypes of intellectual disability.[3] *Contra Moore*, 581 U.S. at 18 (noting that stereotypes of what individuals with an intellectual disability should look or act like "should spark skepticism" and rejecting the Texas appellate court's reliance upon lay stereotypical perceptions of Moore's intellectual functioning including education in normal classrooms, his father's reaction to his academic challenges and his sister's perceptions of his intellectual disabilities). Respondent relies on several stereotypes to assert that Terry cannot have adaptive functioning deficits, including that people with intellectual disability cannot improve their school performance with support, get married, work, or perform basic household chores. *See Moore I*, 581 U.S. at 17–18; AAIDD-11 at 26, 151 (criticizing the "incorrect stereotypes" that people with intellectual disability can "never have friends, jobs, spouses, or children").

[3] Respondent also attacks Dr. Greenspan's credibility on the grounds that he "spoke fully only to Terry and Terry's ex-wife, Louanne," and "failed to make inquiries of people who knew Terry during the developmental period." Return at 11, 14. Not only does this argument misrepresent the record—Dr. Greenspan also spoke to Terry's mother, Patsy—Respondent neglects to address that Dr. Hall, whom Respondent endorses, also interviewed only those same two people. App. 320–21. Dr. Greenspan testified to robust evidence of Mr. Terry's adaptive deficits throughout the developmental period and adulthood, including evidence that he was never able to live fully on his own, struggled in school, could not hold steady employment, and was gullible and easily influenced by others.

First, Respondent asserts that Terry cannot have intellectual disability because his school performance improved when he was given the support he needed.[4] Return at 12 ("[W]ith additional assistance, Terry's school test scores rose."). This assertion relies on a stereotype of people with intellectual disability—that they can never improve academically. To the contrary, people with intellectual disability will show academic or adaptive improvement when given proper support; in fact, the AAIDD recommends additional classroom support as a means to improve academic performance in children with intellectual disability. AAIDD-11 at 194–99 (explaining the utility of accommodated educational practices to "strengthen the likelihood for success in learning" in children with intellectual disability).

Next, Respondent relies on the PCR court's finding that Terry "was good at manipulating others" because he had romantic relationships to assert that Terry cannot be intellectually disabled. Return at 13. In the first place, the circuit court's conclusion that Terry was "good at manipulating others" because he "convince[d] a woman to marry him," App. 981, is simply an unreasonable conclusion to draw from a marriage, but further, and more importantly, is a classic example of reliance on the incorrect stereotype that people with intellectual disability can never be married or engage in romantic relationships. Respondent further argues that Terry could not have adaptive deficits because he "could contribute to the household work" and "learn[] skills," playing on the harmful stereotypes that people with intellectual disability cannot learn to perform tasks in the household or the workplace.[5] Return at 14.

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[4] Respondent asserts (without citation to the record) that Dr. Hall testified that Terry "was on a general education track with assistance rather than 'special education' assignments." Return at 14. To the contrary, Dr. Hall explicitly recognized that Terry "had some . . . special education classes." App. 296; *see also* App. 324.

[5] Respondent asserts that Terry's history of working "blue collar jobs" should be attributed to a learning disability rather than intellectual disability. Return at 13. The existence of a learning disability does not exclude a diagnosis of intellectual disability, and in fact, learning disabilities frequently co-occur with intellectual disability[5], DSM-5 at 40, and individuals with intellectual disability are often misdiagnosed with learning disabilities in school, in part because the latter is viewed as a more "socially acceptable" diagnosis. App. 183. In particular, attention deficit hyperactivity

Finally, Respondent urges the Court to accept the PCR court's determination that Terry was "good at practical adaptive functioning" because he "was able to fix things" and therefore cannot have adaptive functioning deficits. Return at 12–13. This argument is flawed for several reasons. First, even if the PCR court found that Terry did not show deficits in practical functioning, prong 2 requires deficits in only one of the three areas of adaptive functioning (conceptual, social, and practical). *Moore*, 581 U.S. at 15; AAIDD-11 at 41–42; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013) (DSM-5) at 33. Both Dr. Hall and Dr. Greenspan found that Terry has deficits in at least two of those areas—conceptual and social—and that those deficits were present during the developmental period. App. 107, 320; *see also* App. 432 (noting that the results of the Vineland indicated that Terry "was having deficits in his social skills as a youngster"), 434 ("Mr. Terry demonstrated deficits in conceptual skills as a youngster"). Second, contrary to the Supreme Court's directives, all of these arguments emphasize Terry's adaptive strengths over his adaptive deficits. Individuals with intellectual disability frequently have areas of relative strengths alongside their limitations, and both the Supreme Court and the medical community recognize that courts should not rely on such strengths to rule out an intellectual disability diagnosis. *Moore I*, 581 U.S. at 10, 16 (noting requirements from the AAIDD and DSM that the intellectual disability "inquiry should focus on deficits in adaptive functioning" (internal quotation marks omitted)); AAIDD-11 at 47; DSM-5 at 33, 38.

disorder (ADHD) is one of the disorders that co-occurs most frequently in individuals with intellectual disability. DSM-5 at 40.

II. The errors in the PCR court's order, adopted verbatim from Respondent's proposed order, make clear that the PCR court did not conduct a meaningful review.

Respondent's reliance on *Lindsey v. State*, 447 S.C. 93, 924 S.E.2d 104 (2025) misses the point of Terry's claim. Even under this Court's existing precedent permitting the adoption of party-drafted proposed orders in limited circumstances, the record here fails to demonstrate the meaningful judicial review required by *Lindsey*, *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004), and *McCullough v. State*, 320 S.C. 270, 464 S.E.2d 340 (1995).[6]

South Carolina courts permit adoption of proposed orders only when the judge has meaningfully reviewed the findings and ensured the order reflects the court's "own findings." *McCullough*, 320 S.C. at 272, 464 S.E.2d at 341. Likewise, *Fishburne* emphasized that a PCR judge must "carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised," provide opposing counsel an opportunity to identify deficiencies, and ensure the order contains appropriate findings and conclusions before adopting it. *Id*. at 427 S.C. at 516, 832 S.E.2d at 589.

Lindsey reinforces—not weakens—that argument. Respondent invokes *Lindsey* as though it held that a PCR court may simply sign a party's proposed order verbatim. It did not. Rather, the *Lindsey* court upheld the party-drafted order in that case because the PCR court affirmatively demonstrated meaningful judicial review by "purposefully le[aving] in [typographical] errors" and making handwritten corrections to "prove it read the order," and stating the proposed order

[6] Terry maintains that the verbatim adoption of party-drafted proposed orders in capital PCR proceedings raises serious constitutional concerns. Because this case can be resolved under this Court's existing precedent requiring meaningful judicial review, the Court need not reach that broader question here.

reflected its own view after substantial review. *Id*. at 125, 924 S.E.2d at 121. On that record, this Court concluded the order represented the PCR court's own findings.

Here, by contrast, the PCR court signed the proposed order without correction, even signing an order still labeled "Respondent's Proposed Order of Dismissal." App. 957. The order also contains numerous typographical errors, incomplete sentences, and other defects that further demonstrate the court's failure to conduct any sort of meaningful review of Respondent's proposed findings. Respondent points to the judge's initials and generalized statements indicating review, Return at 19, but mere adoption of a party-drafted order wholesale is insufficient.[7] Although Respondent points to the PCR court's generalized statement that it "thoroughly considered the matter and though it may adopt language submitted in either the briefing or proposes orders or both, the undersigned confirms that he has intentionally adopted the same upon much thought, reflection, and consideration," App. 958, this boilerplate language is not a substitute for the meaningful judicial review required. The obvious errors underscore the concern that the order was signed without the PCR court's independent evaluation of Respondent's proposed findings or modification of them to reflect its own assessment of the evidence.

The order also contains substantive factual findings that are unsupported by the record, further suggesting that it was adopted without independent judicial scrutiny. *See generally Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985) (recognizing that findings drafted by the prevailing party often contain "overreaching and exaggeration" making meaningful judicial review essential). Specifically, the order assigned "no weight" to Dr. Decker's Woodcock-Johnson

[7] Throughout its Return, Respondent repeatedly attributes findings and credibility determinations to "the PCR court," "the lower court," and "the PCR judge," while citing appendix pages from Respondent's proposed order rather than the order ultimately signed by the court. *See, e.g.*, Resp. Br. at 11–16 (citing proposed-order pages while describing what "the PCR judge found," "concluded," or "determined"); *see also* Resp. Br. at 14–15 (citing both versions for the same propositions). These citations indicate substantial overlap between the two documents and underscore concerns arising from wholesale adoption of a party-drafted order.

score. Return at 20. Respondent attempts to justify that finding by identifying reasons the PCR court *could* have found that score "not persuasive", Return at 20. However, the PCR court went far beyond considering the score "not persuasive"—it "rejected [the score] out of hand" and found it was entitled to "no weight," even though Dr. Decker testified the score was valid, App. 205, 396, and Respondent's own expert treated the score as valid in her analysis, App. 317. This type of unsupported factual finding is precisely the sort of "internal evidence" the United States Supreme Court has recognized may indicate that a judge did not independently review a party-drafted order. *Jefferson v. Upton*, 560 U.S. 284, 292–94 (2010).

These concerns are paramount in capital litigation, where heighted reliability is required. *See Woodson v. North Carolina*, 428 U.S. 280, 303–04, 305 (1976) ("Because of that qualitative difference [between a death sentence and any other term of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case"). It also reflects the extraordinary deference later afforded to PCR findings on appeal. Where credibility determinations are involved, the PCR court "gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). The ability to insert unsupported credibility determinations is particularly problematic in this case where the proposed order made credibility findings regarding the expert witnesses that are contrary to the record and which the PCR court did not make itself.[8]

[8] In other contexts, appellate courts have failed to recognize credibility determinations that were not specifically approved by the trial/hearing judge. *McGahee v. Alabama Dept. of Corrections*, 560 F.3d 1252, 1260 (11th Cir. 2009) (in denying a *Batson* motion, the trial court did not assess the prosecutor's proffered reasons for strikes and thus the court was "unable to tell which of the several reasons asserted by the prosecutor were relied on by the trial court and thus it refused to credit any particular assertion by the prosecutor").

The problem is particularly significant here because Terry raises an *Atkins* claim, which, if granted, would make him categorically exempt from the death penalty. *See Atkins*, 536 U.S. 304. The United States Supreme Court has stressed that courts should avoid any procedure that may create "an unacceptable risk that persons with intellectual disability will be executed," *Hall*, 572 U.S. 701. Adopting Respondent's proposed order—drafted by an adversarial party seeking imposition of the death penalty in Terry's case—heightens that risk in a case where the accuracy and independence of the court's findings are critical. In a case where reliability is paramount, the record raises substantial doubt that the findings below were the product of the PCR court's own independent judgement. As such, certiorari should be granted.

III. Respondent misstates the circumstances of Dr. Greenspan's testimony and understates the resulting prejudice from the transcript deficiencies.

Respondent argues that the transcript is sufficient because the missing portions can be discerned from context. Return at 21. However, Respondent does not (and cannot) identify what testimony, arguments, or rulings are reflected by the missing passages. The remaining 163 "indiscernible" notations occur throughout expert testimony, legal argument, and court rulings, including proceedings involving Dr. Greenspan, whose opinions the PCR court ultimately rejected as lacking credibility.[9] *See* App. 840–42, 845–53, 983. Where the court's final ruling rests heavily on criticisms of an expert witness, omissions occurring during the proceedings addressing that witness's qualifications and methodology cannot be disregarded because meaningful appellate

[9] Respondent accuses Terry of "supris[ing]" the court by failing to provide adequate notice that Dr. Greenspan would be testifying remotely. Return at 20–21 n.12. To the contrary, Terry notified both Judge Hood and opposing counsel one week prior to the hearing that Dr. Greenspan would need to appear remotely (which would have been enough time to arrange for in-person testimony if counsel had been notified that remote testimony would be problematic). App. 857. As counsel for Terry explained at the PCR hearing, Dr. Greenspan appeared remotely to avoid traveling to the hearing from California both because he had recently had a bout of severe illness and in order to save the court the expense of paying for Dr. Greenspan's travel. App. 8, lines 14–15 (testimony marked indiscernible). Since the introduction of WebEx for court proceedings, remote testimony for a variety of reasons has become routine in capital post-conviction hearings, and given that Terry provided adequate notice of Dr. Greenspan's remote testimony, any technical difficulties in the proceedings cannot be fairly attributed to Terry.

review cannot rest upon assumptions about what likely occurred. Respondent's assertion that any omissions can simply be inferred from context, Return at 21, only underscores the need for reconstruction.

Finally, Respondent contends that Terry has failed to demonstrate prejudice under *State v. Ladson*, 373 S.C. 320, 325–26, 644 S.E.2d 271, 274 (Ct. App. 2007) (recognizing reconstruction is required when an incomplete transcript prevents meaningful appellate review). Return at 21–22. But Terry's claim is not that he is prejudiced by isolated missing words or phrases, standing alone—he is prejudiced by the inability to conduct meaningful appellate review of a decision that turned largely on competing expert opinions and credibility determinations. Respondent not only ignores Terry's arguments as to why the incomplete record was prejudicial to him, but also effectively requires Terry to identify the significance of testimony that was never preserved to demonstrate prejudice. *See* Return at 21–22.

Because the transcript deficiencies permeate testimony involving the very expert testimony the PCR court later rejected and bear directly on the court's credibility determinations and ultimate resolution of Terry's *Atkins* claim, certiorari should be granted.

IV. Respondent's additional sustaining grounds should be rejected.

Respondent offers two additional reasons to deny certiorari, both of which are flawed. First, the State asserts that the circuit court should have dismissed this action as successive and untimely, and that this Court should deny certiorari for the same reason. Return at 16. However, as Respondent concedes in footnote 7, this Court has regularly allowed *Atkins* claims to be brought as successive post-conviction relief actions outside of the ordinarily prescribed timeline for such claims. *See* Return at 17 n.7 (citing *Bryant v. State*, No. 2019-000610; *Aleksey v. State*, No. 2024-000140; *Woods v. State*, No. 2019-001713). In the twenty-five years since *Atkins* was decided,

there have been six other cases in which this Court allowed *Atkins* claims for post-conviction relief that would otherwise have been procedurally barred. *See Bryant*; *Aleksey*; *Woods*; *Stone v. State*, No. 2018-CP-43-01025; *Elmore v. State*, No. 2005-CP-24-1205; *Bell v. State*, No. 2003-CP-04-1857. Terry's claim is no different.

Second, Respondent encourages this Court to "revisit" the *Atkins* exemption, citing a number of dissenting opinions but no binding law. Return at 18. Respondent's argument appears to be that the standard for determining intellectual disability is so unclear that it cannot be followed. To the contrary, South Carolina courts have routinely and consistently applied the clinical guidelines and South Carolina's statutory definition of intellectual disability[10] to determine whether a capital defendant is a person with intellectual disability.[11] This approach was confirmed by the Supreme Court of the United States in *Hall* and *Moore*, which explicitly require courts determining intellectual disability "must be informed by the medical community's diagnostic framework." *Moore I*, 581 U.S. at 12–13 (quoting *Hall*, 572 U.S. at 719). The approach has been workable for the courts in South Carolina and does not warrant revisiting *Atkins*. Respondent's argument effectively asks this Court to overrule United States Supreme Court precedent, and thus should be rejected.

CONCLUSION

For the reasons stated above and in Petitioner's Petition for a Writ of Certiorari, the circuit court's conclusions were fundamentally flawed and this Court should grant certiorari to correct these errors.

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[10] S.C. Code § 16-3-20(C) (defining intellectual disability); *Franklin v. Maynard*, 356 S.C. 276, 278–79, 588 S.E.2d 604, 605 (2003) (finding that § 16-3-20(C) complies with *Atkins*).

[11] *See, e.g.*, Order Finding Defendant Mentally Retarded in *South Carolina v. Pearson*, 96-GS-32-3338; Order Granting Post-Conviction Relief in *Franklin v. South Carolina*, 96-CP-45-117, Order Granting Post-Conviction Relief in *Elmore v. South Carolina*, 05-CP-24-1205; Order Granting Post-Conviction Relief in *Simmons v. South Carolina*, 05-CP-18-1368; Order Granting Post-Conviction Relief in *Bell v. State*, 03-CP-04-1857; Order Finding Defendant Intellectually Disabled in *State v. Brown*, 2011-GS-30-152.

Respectfully submitted,

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