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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Honorable William P. Keesly, Circuit Court Judge

CAPITAL PCR

Appellate Case No. 2026-000115

THE STATE, PETITIONER

v.

BOBBY WAYNE STONE,RESPONDENT.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

P. SANDERS LINKER
Assistant Attorney General

Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0918

ATTORNEYS FOR PETITIONER

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ARGUMENT

I. Stone's issue preservation argument is unavailing; and he otherwise fails to cite sufficient legal authority defending the PCR court's use of the Flynn Effect to arbitrarily reduce individual IQ scores to his benefit

Stone argues that the State's question presented as to the PCR court's reliance on the Flynn Effect is procedurally barred, citing the State's lack of objection to expert testimony regarding the Flynn Effect. (Return at 11). Petitioner contends that this issue can be resolved by simply citing the State's Rule 59(e) motion clearly challenging the PCR court's use of the Flynn Effect. (*See* App. 812–817). Appellant's issue preservation argument ignores what the State is actually challenging in this case—the issue presented is not whether experts were permitted to *testify* regarding the Flynn Effect, but rather whether the PCR court was permitted to utilize the Flynn Effect to arbitrarily reduce Stone's individual IQ scores where such a practice has not been legally accepted in this state and others.

Accepting such an argument would require seriously stretching the issue preservation rules, leading to the sort of “gotcha” game our courts have rejected in prior cases. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (warning that issue preservation “is not a ‘gotcha’ game aimed at embarrassing attorneys or harming litigants” and as such, procedural bar should be applied only when issue “clearly is unpreserved.”); *id.* at 333, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part) (“[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.”).

First, both parties thoroughly briefed the propriety or validity of the Flynn Effect before and after the hearing, and the State specifically asked the PCR court to disregard the Flynn Effect in its post-hearing brief. (*See* App. 681–682, 701–702, 720, 772, 780–781, 799–803). Then, the State clearly raised the issue of the PCR court's reliance on the Flynn Effect in the Rule 59(e)

motion challenging the PCR court's grant of *Atkins* relief, and the PCR court ruled on the issue in its denial of said motion. (*See App.* 832–833). Accordingly, this issue is preserved for review.¹

On the merits, Stone argues no error by the PCR court in considering the Flynn Effect since it is widely accepted clinical practice and the PCR court considered the Flynn Effect alongside Stone's un-adjusted scores and other evidence of subaverage intellectual functioning. This argument is unavailing. A decision that relies on a legally unsound analysis is a decision that is controlled by an error of law and is thus an abuse of discretion. *See State v. Blackwell*, 420 S.C. 127, 136, 801 S.E.2d 713, 718 (2017). Contrary to Stone's position, the PCR court's use of the Flynn Effect was critical to its determination of intellectual disability since before the adjustment of his IQ scores, Stone's lowest score was in a range between 69 and 75 (arguably at or above the cutoff when considering confidence intervals) and all of his other unadjusted scores were above 75. By applying the Flynn Effect to arbitrarily reduce Stone's individual IQ scores, the PCR court impermissibly tipped the scale in Stone's favor. Moreover, Stone's citation to other non-binding decisions of other circuit courts utilizing the Flynn Effect is unconvincing where this Court has not had the opportunity to fully address the propriety of the Flynn Effect or its specific use to individually reduce IQ scores.²

This Court should grant the petition and clarify that the Flynn Effect cannot be used to lower individual IQ scores when evaluating an *Atkins* claim.

¹ Petitioner also notes that Stone never argued in his Response to the State's Rule 59(e) motion or in his post-hearing briefing generally that the State failed to preserve this issue by failing to object to expert testimony regarding the Flynn Effect. This should be quite telling.

² This Court did recently discuss the Flynn Effect in a footnote but specifically found that "the application of the Flynn effect is not dispositive here." *Aleksey v. State*, 448 S.C. 62, 69, n.5, 930 S.E.2d 304, 307, n.5 (2026). Thus, this Court has yet to address the Flynn Effect on its merits.

II. Again, Stone’s issue preservation argument is unavailing; and he continues to disregard or sideline multiple IQ scores resting above the *Atkins* cutoff—scores which the PCR court similarly discounted, instead relying on a single IQ score range arguably supporting Stone’s claim of intellectual disability

Stone argues that this issue is not preserved for review since the State never offered or suggested a specific method to the PCR court to evaluate Stone’s multiple IQ scores. (Return at 15). Petitioner contends that Stone again misconstrues the issue presented. The issue is not whether the PCR court erred in failing to utilize a specific method to assess multiple IQ scores, but whether the PCR court erred in finding that Stone met his burden of proof on intellectual disability when only one of his IQ scores could conceivably be taken as an indication that his IQ *might be below 70, and as a corollary*, whether the PCR court erred by failing to consider the importance of Stone’s multiple IQ scores *above 70*. This issue is not one of analytical form but rather one of substance—does Stone’s multiple IQ scores above 70 support a finding that he met his burden of proof on intellectual disability? Petitioner contends the answer was and remains no. *See Hamm v. Smith*, 608 U.S. 278, 334 (2026) (Alito, J., dissenting) (addressing similar argument and noting: “[I]t was not Alabama’s burden to explain why Smith’s IQ scores disqualified him from *Atkins* relief. Rather, Smith has the burden of proving that his scores establish an IQ of 70 or less using some defensible method. . . . Alabama has consistently maintained that Smith fails to satisfy this burden given his scores. . . . The District Court held otherwise only by engaging in unsound analysis, and Alabama has objected to that analysis at every stage of the litigation since.”) (citations omitted).

On the merits, Stone argues that the PCR court properly evaluated Stone’s IQ scores together with other evidence of deficits in adaptive functioning (mostly evidence regarding Stone’s struggles in school) to conclude that Stone met his burden on prongs one and two of the *Atkins/Franklin* framework. Petitioner contends that the PCR court’s discounting of multiple IQ

scores contradicting Stone's claim of intellectual disability compounded the error of its reliance on Stone's alleged evidence of deficits in adaptive functioning. Such evidence, Petitioner contends, was only marginally supportive of Stone's claim of intellectual disability and was weak evidence when faced against the multiple IQ scores above the *Atkins* cutoff, even when considering confidence intervals. Moreover, such evidence was subject to the same overly flexible and flawed expert analysis that demonstrated confirmation bias more than it showed actual evidence of intellectual disability. By failing to properly consider these multiple IQ scores in a legally defensible manner, the PCR court overly relied on the one IQ score range arguably supporting Stone's claim of intellectual disability, and then further erred in relying on weak evidence of deficits in adaptive functioning.

This Court should grant the petition to determine whether the PCR court erroneously discounted multiple IQ scores disproving Stone's claim of intellectual disability (thereby shifting the burden of proof), and to clarify that multiple IQ scores must be evaluated together using some legally defensible method.

III. Stone’s argument that *Atkins* is clearly settled and thus binding is undercut by the rule’s unworkability, its failure to provide States with meaningful guidance, and the lack of safeguards from everchanging views in the medical profession and other “soft” sciences

Stone argues that because *Atkins* and subsequent cases constitute clearly settled and binding federal law, the Supremacy Clause prohibits this Court from reconsidering those decisions. He also argues that *Atkins*’s approach is workable, as evidenced by decisions in other South Carolina circuit courts. These arguments are unavailing. While it is true that the Supremacy Clause prohibits this Court from making a decision that is clearly contrary to a decision of the United States Supreme Court, “[t]he *Atkins* Court *promised* that it would allow *States* to define mental retardation. It admitted that there was ‘serious disagreement’ about ‘determining which offenders are in fact retarded.’” *Hamm*, 608 U.S. at 304 (Thomas, J., dissenting) (quoting *Atkins v. Virginia*, 536 U.S. 304, 317 (2002)) (emphasis added). However, in practice, that promise has been undercut by ever-shifting views in the relevant professional communities and by decisions eroding the state’s ability to define a workable class of people exempted from execution due to intellectual disability. Disagreements regarding the Flynn Effect and the issue of multiple IQ scores only further show the lack of workability in the current *Atkins* framework.³ Other prudential reasons warrant a revisitation of *Atkins* as well.⁴

³ See *Hamm*, 608 U.S. at 336 (Alito, J., dissenting) (“It is likewise difficult for courts to develop objective, judicially manageable standards for evaluating intelligence that do not turn on IQ. Without clear IQ criteria, *Atkins* proceedings will be little more than battles of experts, with one side saying that the defendant’s intellectual functioning is ‘significantly subaverage,’ and the other saying that it is not. *Whether a defendant lives or dies will hinge on which expert a judge finds more credible.*”) (emphasis added, citations omitted).

⁴ Consider, for example, the tension of *Atkins* with the historical meaning of the Eighth Amendment. See *id.* at 315 (Thomas, J., dissenting) (“*Atkins*’s rejection of ‘the historical meaning of the [Eighth] Amendmen[t],’ . . . has denied the justice governments have given to murder victims from time immemorial, . . . [a]nd it degrades the mildly intellectually disabled by putting them ‘on a level with . . . infants, imbeciles, and domestic animals’—those who cannot ‘have known better.’”) (cleaned up, citations omitted); *id.* at 336–37 (Alito, J., dissenting); Meghan J. Ryan, *The*

This Court should grant the petition to lay the groundwork for a re-evaluation of *Atkins* and *Franklin* to consider what class of individuals is covered by the exemption. Guidance is needed through clearly established, standard criteria—especially in the area of *Atkins*’ first prong. Should the “national consensus” still exist, then identification of those exempted under *Atkins* and *Franklin* should not depend on the changing winds of soft science and expected opinions of litigation-focused experts such that reliability—a foundation of capital proceedings—is lost.

Death of the Evolving Standards of Decency, 51 FLA. ST. U. L. REV. 255, 256–304 (2024) (describing SCOTUS’ recent retreat from “evolving standards of decency” doctrine in favor of originalist understanding of Eighth Amendment, noting how fully adopting an originalist understanding of the Eighth Amendment would abrogate *Atkins* and similar cases).

IV. Stone’s argument regarding successive PCR actions based on *Atkins* fails to adequately address the fact that such a claim was unequivocally available for him in his first PCR action

Stone argues this Court should decline to grant the petition on this issue on the basis that this Court has previously allowed successive freestanding *Atkins* claims to go forward and that, given this Court’s prior treatment of similarly situated applicants, denying Stone an opportunity to litigate his claim would be inconsistent with this Court’s practices and would result in the troubling consequence of an intellectually disabled person being executed. He also argues there is “no evidence” that this exception to the general prohibition on successive PCR actions is being used frivolously or for purposes of delay.

Respectfully, again, these arguments are unavailing as they completely fail to address the undisputed fact that *Atkins* was available as a possible remedy to Stone in his first PCR action and it was undisputed that qualified counsel made a detailed investigation into Stone’s mental health. In such a case, the equitable reasons underlying why a successive PCR action would be allowed for purposes of pursuing *Atkins* relief are simply not present here. *See, e.g., Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016) (“All applicants are entitled to a full and fair opportunity to present claims *in one PCR application.*”) (quoting *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999)) (emphasis added); *In re Bowles*, 935 F.3d 1210, 1215–16 (11th Cir. 2019) (reviewing request for successive habeas action where *Atkins* “could have [been] included . . . in [the] original habeas” noting that the petitioner “cannot now rely on [*Atkins*] as a ‘new’ rule of constitutional law” because by then, the “the rule [was] no longer new.”). While remedial efforts could explain a brief suppression of the application of well-established statutory bars, such as successiveness and timeliness, at this time there should be no need to extend that grace any further.

Accordingly, this Court should grant the petition on this issue to at minimum clarify that successive freestanding *Atkins* claims should not be allowed where such a claim was available to a death-sentenced inmate in their first PCR action. Furthermore, this Court should grant the petition to reevaluate whether this practice should even continue in the present day where *Atkins* has been available as possible relief for over two decades.

CONCLUSION

WHEREFORE, Petitioner reaffirms its desire for this Court to grant certiorari to address these serious issues of law.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

P. SANDERS LINKER
Assistant Attorney General

BY: s/ P. Sanders Linker
P. Sanders Linker
S.C. Bar No. 107688

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-0918

ATTORNEYS FOR PETITIONER

Columbia, South Carolina
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