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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the Lexington County
Court of Common Pleas

Appellate Case No. 2025-001760

GARY DUBOSE TERRY, ... PETITIONER,

v.

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

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Petitioner Gary Dubose Terry respectfully petitions this Court to rehear its decision denying his petition for a writ of certiorari. The petition presented substantial questions concerning the constitutional prohibition against executing individuals with intellectual disability and the reliability of the proceedings in which Terry's *Atkins* claim was adjudicated.

Terry's petition presented several consequential errors that warrant this Court's consideration. The PCR court rejected substantial evidence of intellectual disability by departing from accepted clinical standards, discounting valid IQ testing without evidentiary support, and failing to account for evidence that Terry's intellectual and adaptive deficits manifested during the developmental period, and the PCR court's verbatim adoption of the State's proposed order and its refusal to reconstruct a materially incomplete transcript further undermine confidence in the result. Thus, the Court's decision not to grant certiorari on this issue represents a departure from

established federal law governing *Atkins* claims, including *Hall v. Florida*, 572 U.S. 701 (2014), and *Moore v. Texas,* 581 U.S. 1 (2017). Because these issues concern whether Terry is constitutionally eligible for execution at all, this Court should reconsider its order denying certiorari, grant Terry's petition, and order full briefing and oral argument.

I. The Court's denial of review overlooks the PCR court's erroneous application of the clinical and constitutional standards governing intellectual disability claims, in violation of *Moore v. Texas* and *Hall v. Florida*.

The central issue in Terry's petition is whether the PCR court properly applied the standards governing ID under *Atkins* and its progeny. It did not. The evidence presented at the PCR hearing established substantial support for all three diagnostic criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset during the developmental period. *See* S.C. Code § 16-3-20(c)(b)(10). Importantly, while the experts offered competing opinions on the question of whether Terry is a person with intellectual disability, only Terry's expert, Dr. Stephen Greenspan, complied with accepted clinical practice in reaching his conclusions. However, the PCR court rejected the opinions of Terry's expert in favor of the opinions of the State's evaluators, whose evaluation did not align with accepted clinical standards.

Denial of certiorari in this case is incompatible with the level of scrutiny that this Court has afforded similar capital claimants. For example, this Court granted certiorari and heard oral argument in the case of Bayan Aleksey, another death row inmate raising an *Atkins* claim in a successive petition for post-conviction relief who had been denied relief in the circuit court. Aleksey and Terry made similar arguments for certiorari in this Court, including that the circuit court had violated *Moore* and *Hall* by crediting expert testimony that did not comport with accepted medical standards and that the circuit court's signing of a proposed order drafted by the State, with no or minimal changes, violated the petitioner's due process rights. *See* Petition for a

Writ of Certiorari, *Aleksey v. State*, No. 2024-000140; *Aleksey v. State*, 448 S.C 62, 930 S.E.2d 304 (2026). Importantly, however, this Court's prior decision in *Aleksey* does not resolve all of the questions presented here. As discussed further below, Terry has raised unique questions pertaining to the need to reconstruct the record due to the use of a digital recording system at his hearing and the PCR court's disposition of the unique evidence of intellectual disability that he presented.

Similarly, in *Alkebulanyahh v. State*, this Court granted death row inmate Abdiyyah ben Alkebulanyahh's petition for a writ of certiorari to resolve questions related to whether Alkebulanyahh would be permitted to proceed with a successive application for post-conviction relief involving the qualifications of his initial post-conviction relief attorneys. *Alkebulanyahh v. State*, No. 2019-000529, *reversed and remanded by Alkebulanyahh v. State*, Op. No. 2023-MO-012 (remanding to the circuit court for an evidentiary hearing). Finally, in *State v. Finklea*, this Court granted the State's petition for a writ of certiorari and heard oral argument to resolve questions related to the circuit court's findings of ineffective assistance of trial counsel and whether the circuit court had failed to consider the totality of the evidence adduced at the hearing pursuant to *Wong v. Belmontes*. *State v. Finklea*, No. 2019-001104, *cert. dismissed as improvidently granted by State v. Finklea*, Op. No. 2024-MO-019 (Jul. 31, 2024).

All told, this Court regularly grants certiorari to review circuit court decisions in capital post-conviction relief cases. While certiorari remains, of course, a matter of discretion, this Court's decisions to grant certiorari frequently in capital cases appropriately reflect the "heightened need for reliability and rationality in the determination of whether an individual should be sentenced to death" that the United States Supreme Court has recognized under the Eighth Amendment. *California v. Ramos*, 463 U.S. 992, 1021 (1983) (citing *Woodson v. North Carolina*, 428 U.S. 289, 395 (1976) (plurality opinion); *Lockett v. Ohio*, 483 U.S. 586, 604 (1978) (recognizing the

"qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"); *Gardner v. Florida*, 430 U.S. 349, 359 (1977)). Even in cases like *Finklea*, where the Court ultimately dismissed the writ as improvidently granted, the Court has recognized that the stakes in capital cases are too high to issue decisions without full briefing and oral argument. The interest in reliability is especially high where, as here, a claim invokes a categorical bar to execution. *Atkins v. Virginia*, 536 U.S. 304 (2002). Full briefing and oral argument are crucial to enable this Court to fully consider the merits of Terry's claims and ensure a reliable decision based on a thorough and complete record.

II. This Court should grant certiorari to address the question of whether relief is proper when the circuit court's proposed order process in a capital case does not meet the requirements set forth in *Lindsey v. State*.

This Court addressed circuit courts' practice of requesting and signing party-drafted orders in *Lindsey v. State*, upholding the circuit court's adoption of the State's proposed order upheld adoption of the State's order only because the judge explained, in detail, that he had reviewed the proposed order and that it reflected his own view of the case. 447 S.C. 93, 924 S.E.2d 104 (2025). As discussed in Terry's petition for a writ of certiorari, the proposed order process in his case differed significantly from *Lindsey*, most notably that the order contained glaring errors that would have been obvious on even cursory review, and that the PCR court, unlike the court in *Lindsey*, made no statements suggesting independent consideration.

Since *Lindsey*, capital PCR courts have continued to follow the practice of requesting party-drafted orders and signing them with negligible changes or none at all. *See, e.g.*, Order Regarding Proposed Order Process, *Starnes v. State*, No. 2011-CP-32-830 (Nov. 9, 2026) (attached as Exhibit A); *Winkler v. State*, No. 2011-CP-26-3907, Transcript of Status Conference Jun. 26, 2026 (attached as Exhibit B). Rather than strongly encouraging judges to write their own orders

in capital PCR cases, *Lindsey* has exacerbated the problem by leading judges to believe that they do not need to meaningfully engage with the facts, law, and arguments because it will be sufficient to simply assign a winner and review that party's order. *See, e.g.*, *Winkler* Status Conf. Tr. at 5 (trial court noting that "I was going to write the order, and then they came out with the Supreme Court decision that basically said I didn't have to write the order").

Reliance on party-drafted order is particularly problematic in capital cases, where relief is now virtually impossible to obtain in federal habeas corpus proceedings. *See Burr v. Jackson*, 19 F.4th 395, 407 (4th Cir. 2021) (noting "serious problems" with reliance on party-drafted orders, which "are particularly pronounced when the state court adopts the State's proposed order in a capital case, where the need for an adversarial process and a neutral arbiter is at its zenith."). In federal habeas, a petitioner must show that the state PCR Court's factual determinations and legal conclusions were not just wrong, but were so wrong, so manifestly objectively unreasonable, that "all fairminded jurists" would agree that the state court decision finding no constitutional error was off the mark. *Dunn v. Reeves*, 594 U.S. 731, 739–40 (2021).[1] This means that the PCR judge is, in most cases, the last court to engage in anything approaching *de novo* review in cases where a person's life is literally at stake.

It is clear that this issue will continue to arise in capital cases, and this Court should grant certiorari now to resolve the question of whether relief is proper where PCR courts, unlike the

[1] Although the federal courts have consistently criticized the practice of adopting party-drafted orders, no court has concluded that it frees the petitioner from these requirements. *See, e.g.*, *Longworth v. Ozmint*, 377 F.3d 437, 443 n.1 (4th Cir. 2004) (stating "we 'do not applaud'" the practice, but "the state court's decision still merits the deferential review required by § 2254(d)"); *Campos v. Jackson*, 2025 WL 1530483, *3 (D.S.C. May 29, 2025) (holding same). Federal courts reviewing state court decisions will be "especially deferential to the state PCR court's findings on witness credibility, and . . . will not overturn the court's credibility findings unless its error is stark and clear." *Mahdi v. Stirling*, 20 F.4th 846, 892 (4th Cir. 2021).

court in *Lindsey*, make no statements indicating that the order is the product of independent judicial review.

III. The Court should grant certiorari to address problems related to the digital court reporting system used in Terry's hearing that will doubtless arise in future cases.

Terry's PCR hearing was conducted using a digital court reporting system, without a live court reporter. Due to difficulties with the recording system, Terry's 354-page transcript contained 163 "indiscernible" notations, even after extensive work by the transcriptionist to correct it, in addition to numerous notations indicating "digital recording technical difficulties." *E.g.*, App. 5–7, 461.

South Carolina's digital court reporting program was introduced in response to an ongoing shortage of court reporters and had been installed in 31 courtrooms statewide by the end of 2020. S.C. Supreme Court, Administrative Order, *Re: Digital Courtroom Recorder Project Pilot Program* (Jan. 17, 2018); S.C. Judicial Branch, FY 2021–22 Budget Hearing Presentation 3. Since then, the program has continued to expand and shows no signs of slowing down. By March 2022, 46 digital courtrooms were operating in 33 counties, and as of 2026, the availability of court reporters in South Carolina remained on a steady decline.[2] *See S.C. Judicial Branch, 2021 Annual Report* (May 11, 2022).

The heightened interest in reliability of capital cases counsels in favor of granting certiorari in this case for two reasons. First, the fact that the record below is incomplete underscores the importance of full briefing and argument before this Court before a decision is issued on the merits of Terry's claims. While it is not possible to conduct a complete appellate review absent a full

[2] 2026 Bureau of Labor Statistics data indicate that South Carolina has only 2.51 court reporters per 100,000 residents, a 41.7% decrease over the preceding decade. *See* Carl Smith, *Map: These States Face a Shortage of Court Reporters* (Aug. 28, 2026), https://www.governing.com/map-of-the-day/map-these-states-face-a-shortage-of-court-reporters.

reconstruction of the record, as explained in further detail in Terry's petition for a writ of certiorari, briefing and argument is especially crucial to assist this Court's review where recording issues hamper review of the lower court record.

Second, these problems with the new digital recording system are not unique to Terry's hearing.[3] The continued expansion of digital reporting in response to the shortage of traditional court reporters means that more proceedings across the state will depend on this technology to preserve the record. Terry's experience demonstrates the serious consequences that can result when the system fails to adequately capture a proceeding. As this new technology continues to be added to more courtrooms across the state, similar problems will doubtless arise in future cases. Thus, this Court should grant certiorari to address this question now, particularly in light of the heightened need for reliability that the United States Supreme Court has recognized in capital cases. *See, e.g.*, *Woodson v. North Carolina*, 428 U.S. 289, 395 (1976).

CONCLUSION

Because individuals with intellectual disability are categorically ineligible for execution, these errors warrant this Court's review. Terry respectfully requests that the Court grant rehearing, withdraw its order denying certiorari, grant the petition for a writ of certiorari, and remand for further proceedings consistent with the governing constitutional and clinical standards. At a

[3] *See, e.g.*, Motion to Remand, *State v. Thorstenson*, App. Case No. 2024-000049 (Jun. 11, 2025) (moving to remand to reconstruct portions of the appellant's trial transcript, which was digitally recorded, where the digital recording system failed to record portions of the jury charge) (Exhibit C); Order, *State v. Thorstenson*, No. 2024-000049 (Ct. App. Jul. 30, 2025) (granting motion and remanding for reconstruction) (Exhibit D); Motion for Abeyance and Remand of Appellant's Trial, *State v. Gunn*, App. Case. No. 2024-001358 (Ct. App. Apr. 9, 2025) (similarly, moving to remand for reconstruction where the digital recording system failed to record portions of the transcript and resulted in numerous "unintelligible" notations) (Exhibit E); Order, *State v. Gunn*, No. 2024-001358 (May 30, 2025) (granting motion and remanding for reconstruction (Exhibit F).

minimum, the Court should remand for reconstruction of the PCR hearing record or, if reliable reconstruction is not possible, a new evidentiary hearing.

Respectfully submitted,

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