Hopkins, Debbie

From: Zelenka, Don
Sent: Friday, May 26, 2017 5:32 PM
To: Hopkins, Debbie
Cc: Emily Paavola (Emily@justice360sc.org); Lindsey S. Vann (lindsey@justice360sc.org); Ed Salter
Subject: William Bell, Jr. - Anderson County Death Penalty Case
Attachments: William Bell - Letter from DZ to SCSCt Shearouse advising that the State is not appealing the Atkins PCR (01360627xD2C78).pdf

Ms. Hopkins –

Attached is a status email placed in the mail by me today. The purpose of the letter is to advise the Court that the State is not appealing the decision of Judge McIntosh finding that Mr. Bell is ineligible for the death penalty due to his determination of mental retardation. The Court in 2003 entered a stay of execution to allow for the PCR action. It appears that the stay is now moot in light of his order vacating the death sentence. If further information is necessary, please advise me.

Sincerely,

Donald J. Zelenka
Deputy Attorney General
South Carolina Office of the Attorney General
P. O. Box 11549
Columbia, S.C. 29211
803-734-3601
FAX – 803-734-4035
dzelenka@scag.gov

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 30 2017
S.C. SUPREME COURT

May 26, 2017

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: William H. Bell, Jr. v. State of South Carolina .
Anderson County Death Penalty Case
2003-CP-04-1857
S.C.D.C Inmate No. 4477
Indictment No. 88-GS-04-1358 (murder)
Status of South Carolina Mental Retardation Post-Conviction Proceedings

Dear Mr. Shearouse:

This pending death penalty sentence was stayed by an Order of this Court on March 18, 2004. The stay was entered to allow resolution of a pending second state post-conviction relief action in which Mr. Bell asserted that he suffered from mental retardation and pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), could not be subject to the death penalty from his March 15, 1989 death sentence in Anderson County by the Honorable Howard Ballenger. After a series of assignments of judges, the matter was eventually assigned to the Honorable R. Lawton McIntosh as presiding judge. An evidentiary hearing on the issue of Mr. Bell's intellectual disability was held on April 18-19, 2016. On November 16, 2016, Judge McIntosh entered an "Order Granting Post-Conviction Relief Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), Vacating Death Sentence." *A copy of the Order is attached.* On December 2, 2016, the Respondent State of South Carolina made a Motion to Alter Or Amend Judgment Pursuant to Rule 59(e), S.C.R.Civ.P.." On April 28, 2017, Judge McIntosh entered an "Order Denying Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), S.C.R.Civ.P." dated April 24, 2017. The Order was received by the Office on May 1, 2017. (*A copy is attached*).

This matter is now final. Under South Carolina law, the State has thirty days from counsel's receipt of the Order on May 1, 2017 until May 31, 2017 to file a notice of appeal. SCACR Rule 203(b)(1). In South Carolina, the standard of review in a

post-conviction relief appeal is whether there is any evidence of probative value to support the PCR judge's findings. If any evidence of probative value is found, the state appellate court must affirm the ruling of the PCR court. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Stated another way, if there is any evidence to support the findings of the PCR judge, those findings must be upheld. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, where there is no evidence of probative value to support the findings of the PCR judge, the ruling will not be upheld. Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993); Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). Further, an appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). However, the state court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000); Lounds v. State , 670 S.E.2d 646, 649 (2008).

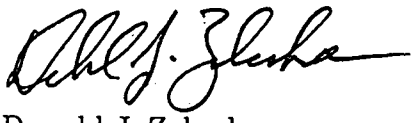
Upon counsel's review of the November 16, 2017 and April 28, 2017 Orders of Judge McIntosh, the State has decided that it is not going to appeal the conclusion that Mr. Bell suffers from mental retardation. This case review was also presented to the Attorney General's Office Criminal Litigation Division Appellate Review Committee consisting of lawyers with prior appellate court clerking experience and senior lawyers. The reason for deciding to not appeal is that there exists some probative evidence in the record, although contested by expert witnesses by the Department of Disabilities and Special Needs, to support the findings by Judge McIntosh under the "any evidence of probative value" standard of review. Further, a review of his order reveals that the state hearing judge placed the appropriate burden of proof upon Mr. Bell, made credibility findings and applied the South Carolina definition of mental retardation as it relates to this issue in alternative fashion. Because an appeal would not be appropriate under the proper standard of review, I have advised the Solicitor of the Tenth Circuit, the Honorable David Wagner, to take steps to have the mandate of a new sentencing proceeding. To the extent other procedural issues were raised within the state court proceeding, the State has chosen to forego those issues at this time in this case, in light of the standard of review based upon Judge McIntosh's alternative findings and conclusions of fact and law. In would note that this conviction is not affected by Judge McIntosh's findings and conclusion.

The conviction arises from the August 31 1988 murder of West Franklin High School Principal Dennis R. Hepler. In August 1988, the crime of murder carried a sentence of life imprisonment or death. Since Mr. Bell is no longer eligible for the

death penalty due to the conclusion of Judge McIntosh, he should be resentenced to a life sentence consistent with Franklin v. Maynard, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003) ("If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence").

By copy of this letter, I am advising opposing counsel of our position in this matter and of this communication with this Court. I am also advising Bart Vincent, the General Counsel of the South Carolina Department of Corrections, of this information and to cooperate with the Solicitor Office of the Tenth Circuit concerning resentencing proceedings in this matter and appropriate custody.

Sincerely,



Donald J. Zelenka
Deputy Attorney General
State of South Carolina

Enclosures: *Bell v State*, 2003-CP-04-1857, *"Order Granting Post-Conviction Relief Pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), Vacating Death Sentence,"* (McIntosh, P.J. , Nov. 18, 2016)

Bell v. State, 2003-CP-04-1857, *"Order Denying Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), S.C.R.Civ.P."* (McIntosh, P.J. dated April 24, 2017

cc: Honorable David R. Wagner, Jr., Solicitor of the Tenth Circuit, PO Box 8002, Anderson, S.C. 29622
Barton J. Vincent, General Counsel of the South Carolina Department of Corrections, 4444 Broad River Road, Columbia, S.C. 29221-1787
Emily C. Paavola, Justice 360, 900 Elmwood Ave,, Suite 200, Cola., S.C. 29201
Lindsey S. Vann, Justice 360, 900 Elmwood Ave,, Suite 200, Cola., S.C. 29201
Mark E. Olive, 320 West Jefferson St., Tallahassee, Florida 32301
Trisha Allen, S. C. Attorney General Office, Victim Advocate

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	
WILLIAM H. BELL, JR. *Applicant,*	Case No.: 2003-CP-04-1857
v.	**ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO RULE 59(e) S.C.R.Civ.P**
STATE OF SOUTH CAROLINA *Respondent.*	

This matter is before the Court on Respondent's Motion to Alter or Amend Judgment Pursuant to Rule 59(e), S.C.R.Civ.P. ("Motion to Alter"). Respondent asks the Court to amend its Order Granting Post-Conviction Relief Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), Vacating Death Sentence ("Order Granting Relief"), which was filed on November 18, 2016. Applicant filed a response to the Motion to Alter and this Court held a hearing on the motion on March 20, 2017 in Allendale County. Applicant was present for the hearing and represented by counsel. The Court has considered each of Respondent's arguments and denies the Motion to Alter based on the following findings of fact and conclusions of law.[1]

I. ADMISSIBILITY OF DR. CULLEY'S REPORT

Respondent asserts the Court erred in finding the 2009 report of Dr. Donna Culley ("Culley Report"), a former psychologist at the South Carolina Department of Disabilities and Special Needs ("DDSN"), inadmissible in this post-conviction relief ("PCR") action. The Court, however, stands by its finding that the report is inadmissible hearsay because the report was offered by

[1] The facts and procedural history of this case are discussed in this Court's Order Granting Relief and need not be recounted in detail in this Order.

Respondent without making Dr. Culley available to testify regarding her evaluation and findings. Respondent argues that Judge Williams' "Order for an Evaluation of Applicant for Mental Retardation" makes the Culley Report admissible at any subsequent hearing on Applicant's intellectual disability.[2] Adopting Respondent's argument would be tantamount to allowing Judge Williams to make an evidentiary ruling on the admissibility of the report without knowing the circumstances surrounding the State's offering of the report and in a case where he no longer has jurisdiction. Additionally, Judge Williams' order expressly contemplated and expected that the evaluator who drafted the report would testify regarding the evaluation and the contents of the report at a hearing. The order provided "[t]his Court orders that the examiners designated by the SCDDSN shall be available during the week that any evidentiary hearing is scheduled to testify concerning the evaluation." Contrary to the requirements of Judge Williams' order, the State did not make Dr. Culley available to testify and now asks the Court to admit Dr. Culley's report in lieu of her testimony, denying the Court an opportunity to consider her credibility and Applicant the opportunity to cross examine her about her evaluation. Under these circumstances, this Court declines to admit the Culley Report.

Ultimately, Respondent's arguments regarding the admissibility of the Culley Report make no difference because admitting Dr. Culley's report would not have changed this Court's finding that Applicant is intellectually disabled. Dr. Culley's evaluation of Applicant was not as thorough as Applicant's expert witnesses' evaluations. Dr. Culley did not interview any collateral witnesses

[2] Judge James C. Williams was assigned jurisdiction over this case by the South Carolina Supreme in 2004. The court then rescinded Judge Williams' jurisdiction and assigned jurisdiction to the undersigned in 2010.

who knew Applicant during the developmental period unlike Applicant's experts, who interviewed over twenty witnesses who knew Applicant during that period.[3] She also did not have additional information collected by Applicant's counsel after her evaluation was completed in 2009 and her report (and testimony she may have provided) would have been given less weight even if admitted. The Court, therefore, denies Respondent's Motion to Alter the finding that the Culley Report is inadmissible.[4]

[3] Respondent questions the credibility of two of the over twenty informants interviewed by Applicant's experts, but Applicant's expert testified the information provided by these informants was incredibly consistent. Tr. 164 (the information "was strikingly consistent"). Regarding John Glenn, Applicant's expert testimony demonstrates that Mr. Glenn did not say anything inconsistent with other witnesses and his credibility is not legitimately questionable or material to this Court's determination. *See, e.g.*, Tr. 152 ("Michael DuBose and John Glenn said virtually the same thing, completely separately in time."). Regarding Harold Rice, Dr. Olley discussed Mr. Rice's prior trial testimony in which Mr. Rice testified he tried to teach Applicant things that were relevant to air conditioning. Dr. Olley pointed out that Rice's testimony did not say Applicant was able to learn those things. Tr. 209. Dr. Olley's interview with Mr. Rice revealed that Applicant learned limited things, which were not inconsistent with what Dr. Olley learned from other people who supervised Applicant. Tr. 211. Similarly, Respondent asserts the Court erred in finding that Applicant was "universally described" as a follower. On the contrary, this finding is directly supported by the evidence from the PCR hearing. Dr. Watson testified that Applicant was "universally described as a follower," Tr. 297, and Dr. Olley stated that several people independently and spontaneously used the word follower to describe Applicant. Tr. 158.

[4] Respondent also argued the report is admissible as a statutory exemption to the hearsay rule and that the Confrontation Clause does not apply because this is a civil case. The Court stands by its finding in the Order Granting Relief, but finds that regardless of the applicability of the Confrontation Clause the Culley Report does not change this Court's ultimate conclusion. Even if the Confrontation Clause did not bar admission of the report, it remains inadmissible hearsay. Further, as discussed above, even if Dr. Culley's report was admissible, it would not be entitled to as much weigh as Applicant's expert evaluations because her evaluation was limited and less complete than the evaluation completed by Applicant's experts.

II. CONSIDERATION OF DR. HALL'S TESTIMONY

Respondent asserts the Court erred in finding that Dr. Alicia Hall's testimony at the PCR hearing was an attempt to vouch for Dr. Culley's opinion and that her review in this case was inconsistent with clinical standards for evaluating an individual for intellectual disability and entitled to less weight as a result. It is clear to this Court that Respondent attempted to have Dr. Hall vouch for Dr. Culley's opinion given Dr. Hall's own testimony that she was asked by the State to "[p]repare for court and testify to [Dr. Culley's] report." Tr. 406. Respondent also attempted to enter Dr. Culley's report through the testimony of Dr. Hall, Tr. 362, implicitly seeking to have Dr. Hall present Dr. Culley's opinions to the Court and vouch for them.

Respondent argues the Court failed to afford proper weight to Dr. Hall's testimony given that she is a neutral court examiner. This ignores the fact that the Court must still evaluate the quality and thoroughness of the neutral court examiner's evaluation and is under no obligation to defer to the examiner when, as was the case here, there is ample evidence that calls into question the reliability of her opinion. Dr. Hall testified that she was not doing her own evaluation and if she was, she would have met Applicant and conducted a clinical interview, talked to his parents and other family members, and collected and reviewed as much information as possible about Applicant. Tr. 413-14. All four experts who testified at the hearing (including Dr. Hall herself) agreed that more was required to conduct a clinically sound and reliable evaluation of Applicant's intellectual disability than what Dr. Hall did.[5] At the hearing on Respondent's Motion to Alter,

[5] Additionally, the credibility and reliability of Dr. Hall's testimony at the PCR hearing was undermined by the materially inconsistent testimony she gave in the case of *Brown v. State*. For example, in this case she testified that IQ scores of 71, 74, and 73 were borderline and did not satisfy the intellectual functioning prong, Tr. 435, 482, but in *Brown* she found IQ scores of 72 and 74 satisfied the intellectual functioning prong, Tr. 439.

Respondent conceded that Applicant's experts did more in their intellectual disability evaluations than Dr. Hall. Applicant's evaluating experts independently conducted complete and thorough evaluations and the Court will not amend its order affording greater weight to the testimony of Drs. Olley and Watson than Dr. Hall.

III. ADDITIONAL REQUESTS FOR AMENDMENT

In addition to Respondent's core complaints regarding the Culley Report and the weight afforded to Dr. Hall's testimony, Respondent requests several additional amendments to the Court's order. Respondent asserts (relying on Dr. Hall's testimony) that Applicant "performed OK after he was moved into basic classes until he began consuming alcohol at age 13." Motion to Alter, at 11. Evidence presented at the PCR hearing demonstrates this is simply not true. At the end of sixth grade, the year after Applicant was removed from special education (EMH Classes), his teacher recommended he be placed back in "EMH Resource." Ex. 3, at 64; Tr. 271. In seventh grade, when Applicant began taking basic level classes, he was "promoted to 8th" grade, despite the fact that he failed social studies and received a D in English and math. Ex. 3, at 66; Tr. 272. Several of his teachers discussed the fact that he was socially promoted. Tr. 135-36. This all occurred before Applicant began using drugs and alcohol at the age of 13. Additionally, as the Court noted in the Order Granting Relief, Applicant's experts agreed that academic failure can be a "frustrating experience" and itself often leads to truancy and drug or alcohol use. Tr. 339. The Court will not amend its order addressing Applicant's academic failures.

While conceding that the test may not be conclusive, Respondent asserts the Court should have placed greater weight on Applicant's score on the 1976 administration of the Slosson Intelligence Test. This Court finds, however, reliance on the Slosson score is inappropriate in

evaluating Applicant's intellectual functioning. All three of Applicant's experts agreed the Slosson is a short-form screening test that does not provide a full scale IQ score. Tr. 28; Tr. 101; Tr. 268. Dr. Hall supported her reliance on the Slosson, reasoning "[t]here is good research to suggest that Slosson is highly correlated with the Wechsler Scales." Tr. 374. Such reasoning is belied by the fact that Applicant was administered a Wechsler Scale on the same day, by the same evaluator, and scored a 72 – versus an 83 on the Slosson. Ex. 4, at 1-2. All of the testifying experts (including Dr. Hall) agreed the Wechsler Scales are the "gold standard" for intelligence testing, and therefore, this Court properly relied upon the Wechsler test and will not amend its order.

Finally, Respondent disputes this Court's finding that the Vineland test administered to Applicant in 1979 was not credible. The finding, however, is fully supported by the evidence presented at the PCR hearing. Dr. Olley testified the score of 101 on the 1979 Vineland was inconsistent with other evidence of Applicant's adaptive functioning at the time. Tr. 123. Just three years earlier, Applicant's score on the 1976 Vineland was 70. According to Dr. Watson, "it would be very unusual" for such an increase to be accurate. Tr. 258. He further explained that any benefits Applicant derived from being in EMH classes do not account for the increased Vineland score. *See* Tr. 322. This Court's determination that the second administration of the Vineland was not credible is therefore supported by the evidence and will not be amended.

CONCLUSION

Applicant is intellectually disabled and has proven his intellectual disability by a preponderance of the evidence. Applicant presented overwhelming evidence that he is intellectually disabled, including the opinions of two highly qualified experts in the field who conducted thorough evaluations. This Court considered all of the evidence presented by

Respondent and is not persuaded by its arguments. For the reasons stated above, the Court DENIES Respondent's Motion to Alter or Amend the Judgment.

IT IS SO ORDERED.

BY: _____
Honorable R. Lawton McIntosh

4-24, 2017.
Walterboro, SC

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
WILLIAM H. BELL, JR. *Applicant,*	)	Case No.: 2003-CP-04-1857
v.	)	**ORDER GRANTING POST-CONVICTION RELIEF PURSUANT TO *ATKINS V. VIRGINIA*, 536 U.S. 304 (2002), VACATING DEATH DEATH SENTENCE**
STATE OF SOUTH CAROLINA *Respondent.*	)	

I. INTRODUCTION

In this post-conviction relief ("PCR") action, William H. Bell, Jr. ("Applicant"), a death sentenced inmate alleges, pursuant to the South Carolina Supreme Court decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), that he is intellectually disabled and his death sentence thus violates the Eighth Amendment to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Hall v. Florida*, 134 S. Ct. 1986 (2014). This Court held a hearing on the issue of Applicant's intellectual disability on April 18-19, 2016. Additional evidence was entered into the PCR record through sworn affidavits and exhibits. After careful review of the totality of the evidence, this Court finds, by a preponderance of the evidence, that Applicant is intellectually disabled. Accordingly, Applicant's death sentence is vacated pursuant to *Atkins* and *Franklin*.

II. RELEVANT PROCEDURAL HISTORY

Applicant was convicted of murder and armed robbery and sentenced to death in 1989 for the shooting death of Dennis Hepler, the principal of an elementary school in Anderson County, South Carolina. *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991). Applicant's conviction and

sentence were upheld on direct appeal and in state and federal post-conviction proceedings. Applicant timely filed a successive Application for Post-Conviction Relief pursuant to *Atkins v. Virginia* on June 18, 2003. Respondent filed a return on August 29, 2003. On July 8, 2004, the Supreme Court of South Carolina appointed Judge James C. Williams, Jr. to have jurisdiction over the case, and on September 16, 2004, Judge Williams appointed counsel to represent Applicant. On August 21, 2006, Judge Williams issued an Order for an Evaluation of Application for Mental Retardation, which ordered the South Carolina Department of Disabilities and Special Needs ("DDSN") to conduct an evaluation of Applicant to determine whether he is intellectually disabled.

On May 18, 2010, the South Carolina Supreme Court rescinded Judge Williams' jurisdiction and assigned the undersigned to this action. A hearing on the sole issue of Applicant's intellectual disability raised in the pending PCR Application was held in Anderson County on April 18 and 19, 2016. At the hearing, Applicant presented three expert witnesses: Marc J. Tasse,

Ph.D.,[1] John Gregory Olley, Ph.D.,[2] and Dale G. Watson, Ph.D.[3] Dr. Tasse was qualified as an expert in intellectual disability and testified about the definition of intellectual disability and "clinical practice or standards for making a determination of intellectual disability." PCR Hr'g Tr. 13-14, Apr. 18, 2016 [hereinafter Tr.]. Dr. Tasse was not asked to, and did not, perform an evaluation of Applicant; he offered no opinion regarding Applicant's intellectual disability. *See* Tr. 14. Dr. Olley and Dr. Watson were qualified as experts in intellectual disability, Tr. 83, 228,

[1] Dr. Tasse has a Ph.D. in psychology and did a post-doctoral fellowship in intellectual psychometrics. Over the course of his career, Dr. Tasse has conducted more than two hundred intellectual disability assessments of children and adults to determine appropriate referrals based on their disabilities. Dr. Tasse is a fellow of the American Association on Intellectual and Developmental Disabilities ("AAIDD"), the American Psychological Association, and the International Association for Scientific Studies of Intellectual Disabilities. Dr. Tasse is a coauthor of the tenth and eleventh editions of the AAIDD (formerly American Association on Mental Retardation, AAMR) terminology and classification manuals. He is a professor of psychology and psychiatry, and director of the Nisonger Center (a center for excellence in developmental disabilities), at Ohio State University. He teaches, and has previously taught, students in the area of intellectual and developmental disabilities and in psychometric testing. Tr. 7-12.

[2] Dr. Olley has a Ph.D. in psychology with an emphasis in intellectual disability. He is a fellow of the American Psychological Association Division 33 (the division on intellectual disability) and a former president of that division. He is a member of the AAIDD. Dr. Olley has written approximately fifty articles on intellectual disability and has evaluated several hundred people for intellectual disability beginning with evaluations he conducted in graduate school in 1966. He is currently a psychologist and clinical professor at the University of North Carolina, Chapel Hill, where most of his work is at the Carolina Institute for Mental Disabilities. Tr. 80-83.

[3] Dr. Watson has a Ph.D. in clinical psychology and has extensive experience working with people with intellectual disabilities and the assessment of intellectual disability. Over the course of his career, Dr. Watson has evaluated individuals for intellectual disability in order to determine appropriate services and for the Contra Costa County courts. He is a member of the American Psychological Association (the Neuropsychological and the Intellectual Disability Divisions), the National Academy of Neuropsychology and the AAIDD. Dr. Watson teaches a graduate level course at The Wright Institute, in Berkeley, California on IQ and academic skills testing and has published articles on intelligence testing. Tr. 222-28; Dale G. Watson, Ph.D. CV, Exhibit 34.

and both evaluated Applicant. Tr. 84, 229. Dr. Olley and Dr. Watson provided extensive testimony regarding their evaluations, which included interviews of Applicant, interviews of various collateral witnesses, and review of records relating to Applicant's intellectual abilities. Both Drs. Olley and Watson opined that Applicant is intellectually disabled. *See* Tr. 87, 229.

Respondent offered the testimony of Dr. Alicia Hall,[4] an evaluator for DDSN. Dr. Hall was qualified as an expert in forensic psychology and intellectual disability assessment. Tr. 359. Dr. Hall testified that she reviewed records relating to Applicant and his trial and initial post-conviction proceedings. Tr. 363-64. Dr. Hall did not conduct any testing, evaluate or interview Applicant, or interview any collateral witnesses. Tr. 366-67. Dr. Hall opined that Applicant does not meet the diagnostic criteria for intellectual disability. Tr. 368.

Respondent also offered as an exhibit the report of Donna Culley, Ph.D., a former evaluator for DDSN, which contained Dr. Culley's 2009 opinion that Applicant is not intellectually disabled. Dr. Culley did not testify at the hearing and Applicant objected to the admission of Dr. Culley's report. This Court heard argument on the report's admissibility and took the issue under advisement, making the report a court exhibit.[5]

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[4] Dr. Hall has a Ph.D. in clinical psychology. She was previously employed by the South Carolina Department of Mental Health as the chief psychologist in the development clinic and she currently works for DDSN where she evaluates criminal defendants for intellectual disability. Dr. Hall is an instructor at the University of South Carolina in abnormal child psychology. She is, or has been, a member of the International Society of Autism Researchers, the AAIDD, and the American Psychological Association (Division 33, dedicated to developmental disorders, and Division 41, the American Society of Law and Psychology). She holds a psychology license in South Carolina. Tr. 353-58.

[5] As discussed in Section IV.B below, the Court now finds the 2009 report from Dr. Culley is not admissible. As is also discussed below, this Court would still conclude that Applicant is a person with intellectual disability if the report were part of the totality of the evidence.

At the close of the hearing, both Applicant and Respondent made closing arguments. The Court has considered the full record, including the testimony and exhibits presented at the hearing, and makes the following findings.

III. RELEVANT LEGAL PRINCIPLES

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.[6] *Atkins*, 536 U.S. at 321. 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. Recently, 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.

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 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. 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)

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[6] The Supreme 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*, 134 S. Ct. at 1990 (citing Rosa's Law, 124 Stat. 2643).

significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and, (3) a manifestation of these attributes during the developmental period.

Since *Atkins*, the Supreme Court has emphasized that the legal determination of intellectual disability "is informed by the medical community's diagnostic framework." *Hall*, 134 S. Ct. at 2000. The *Atkins* court cited two professional organizations for their definitions of intellectual disability – the American Association on Mental Retardation ("AAMR"), which is now known as the American Association on Intellectual and Developmental Disabilities ("AAIDD"), and the American Psychiatric Association's ("APA") Diagnostic and Statistical Manual of Mental Disorders ("DSM").[7] *Atkins*, 536 U.S. at 308 n.3; *see also Hall*, 134 S. Ct. at 1998. 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*.

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 mentally retarded 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).

[7] At the time of *Atkins*, the relevant publication from the American Psychiatric Association was the Fourth Edition, the DSM-IV-TR. In 2013, the American Psychiatric Association released the next edition, the DSM-5. The DSM-IV-TR and DSM-5 both define intellectual disability using the same three prongs as the South Carolina statute.

IV. LEGAL ANALYSIS AND FACTUAL FINDINGS

A. *Assessment of Intellectual Disability*

An assessment of whether an individual has an intellectual disability requires a determination of whether the person (1) has significantly subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) whether the first two limitations were present during the developmental period. Dr. Tasse testified the only way to rule in or out a diagnosis of intellectual disability is "by vigorous assessment of [the individual's] intellectual functioning and adaptive behavior and determining whether or not [deficits] occurred during the developmental period." Tr. 59-60.

A person meets the sub-average intellectual functioning component if his or her IQ 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 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition."). To determine an individual's IQ score for the purposes of the intellectual functioning prong requires consideration of "comprehensive tests of intellectual functioning." Tr. 27. Dr. Tasse testified, and Drs. Olley and Watson agreed, certain types of intelligence tests should be relied on, specifically tests that are "robust comprehensive tests," are administered individually, and "have strong norms." Tr. 27. Examples of these types of tests are the Wechsler scales,[8] the Stanford-Binet, and

[8] Other courts have identified the Wechlser scales as the gold standard for intelligence testing. *See e.g., Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007) ("Rivera scored a 68 on the Wechsler Adult Intelligence Scales (WAIS-III) IQ test, a test which both parties agree is the best full-scale IQ test available in English."); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D. La. 2011)

the Woodcock-Johnson. Tr. 27. To the contrary, evaluators should avoid relying on screening or brief measure tests and tests that are administered to a group rather than individually. Tr. 28. Courts have also found, when testing IQ, it is inappropriate to use "noncomprehensive screening or group IQ tests." *See, e.g.,*; *Allen v. Wilson*, No 1:01-cv-1658, 2012 WL 2577492, at *4 (S.D. Ind. 2012); *Howell v. State*, No. W2009-02426, 2011 WL 2420378, at *16 (Tenn. Crim. App. June 14, 2011).

When evaluating a score obtained on an intelligence test, one must also consider certain factors that can affect test scores. One such factor is the standard error of measurement ("SEM"). As the Supreme Court explained in *Hall*:

> The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. . . . Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and the analysis of multiple IQ scores jointly is a complicated endeavor.

134 S. Ct. at 1995. Accounting for the SEM, when an individual's IQ score is 75 or below, the Court must consider the intellectual functioning prong satisfied and review the remaining two prongs of the intellectual disability diagnosis. *Id.* at 1996.

Another factor that could affect an IQ score is the practice effect, which "occur[s] when the same intelligence test[] is administered to the same person in a short amount of time." Tr. 34. Due to the re-administration of the test, the individual's score might increase, not because of a gain in intellectual functioning but because of a comfort level with the administration and tasks on the

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("Psychologists use IQ testing to measure intelligence and the WAIS–III is a gold standard for this testing.").

test. Tr. 34. All four experts who testified agreed that practice effects were likely to increase an IQ score on a test re-administered within a short amount of time. *See* Tr. 34, 95-96, 266-67, 430-31. Accordingly, clinical standards recommend not administering the same IQ test to the same person within one year. Tr. 34.

A final factor that might affect IQ scores is the Flynn Effect, or aging norms, which is the accepted scientific phenomena that IQ scores among the general population increase over time, at a rate of .31 points per year or 3 points per decade. Tr. 36, 479. All of the experts who testified agreed that the Flynn Effect should be taken into account when evaluating Applicant's IQ scores. *See* Tr. 36, 93-97, 266, 378.

South Carolina's definition of mental retardation refers without elaboration to "deficits in adaptive behavior." S.C. Code Ann. § 16-3-20(C)(b)(10). The *Atkins* opinion refers to "significant limitations in adaptive skills such as communication, self-care, and self-direction." *Atkins*, 546 U.S. at 318. The 1992 AAMR definition requires limitations in two (2) or more of the following ten (10) applicable skill areas:

- Communication
- Self-care
- Home living
- Social skills
- Community use
- Self-direction
- Health and safety
- Functional academics
- Leisure
- Work

American Association of Mental Retardation: Definition, Classification, and Systems of Support 22(10th ed. 1992)[hereinafter AAMR 1992 Manual]. The American Psychiatric Association's phrasing of the adaptive functioning requirement in the DSM-IV-TR was virtually identical. *See* Diagnostic and Statistical Manual of Mental Disorders 41 (4th Ed. TR 2000) [hereinafter DSM-IV-TR. More recently, the AAMR updated both the name of their organization and its definition

of adaptive functioning. The current definition contains three general categories of adaptive functioning – conceptual, social, and practical skills – into which the prior ten (10) collapse,[9] and requires significant limitations in one of these three areas.[10] Tr. 18. American Association on Intellectual and Developmental Disabilities, Intellectual Disability: Definition, Classification, and Systems of Supports 5 (11th ed. 2010) [hereinafter AAIDD 2010 Manual]; Tr. 16-18. Dr. Tasse testified that the newer, three category definition refers to "the same thing [as the older definition], just a better conceptualization of that behavior." Tr. 18.

AAIDD and the DSM recommend assessing adaptive behavior by using standardized scales, which provide a standardized score of an individual's adaptive behavior skills.[11] *See* Tr. 38. Such scales "should be used in conjunction" with additional information "to corroborate the standardized test," such as school records, employment records, medical records, and a social and family history. Tr. 40. When no person is available to complete a standardized scale,[12] a clinician must consider multiple sources, including interviews with teachers, employers, spouses,

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[9] According to Dr. Tasse, conceptual skills encompass communication, functional academics, self-direction, and safety; social skills encompasses social skills and leisure; and practical skills encompasses self-care, home living, community use, work and health.

[10] The DSM-5 uses the same three domains used by the AAIDD, conceptual, social, and practical. Diagnostic and Statistical Manual of Mental Disorders 33 (5th Ed. 2013) [hereinafter DSM-5].

[11] These scales, which are administered to a person who knew the individual being evaluated, ask the informant to describe the typical behavior of the individual across the various domains of adaptive behavior. Tr. 39.

[12] Dr. Tasse testified that it is common, especially in criminal cases where the individual has been incarcerated, for clinicians to be unable to complete a standardized adaptive behavior scale due to lack of a family member who can complete the scale, because the family members are deceased, have trouble recalling required information, or themselves have mental health issues. Tr. 42.

neighbors, and friends along with records, such as school, employment, driving, and medical records, to get a comprehensive picture of the person's adaptive behavior skills. Tr. 41

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. Tr. 42. This analysis requires evidence that an individual's deficits in intellectual functioning and adaptive behavior "were present before the age of eighteen." Tr. 42. The analysis of age of onset does not require an individual to have been diagnosed with intellectual disability before age 18; instead the signs of intellectual disability need only have manifested before that age. *See Brumfield v. Cain*, 135 S. Ct. 2269, 2274 (2015); Tr. 43. This assessment is completed by interviewing people and obtaining records from the developmental period. Tr. 43.

B. *Credibility Findings*

In this case, three experts offered an opinion on whether Applicant is intellectually disabled. Dr. Olley, an expert for Applicant, conducted an intellectual disability evaluation. He reviewed records for Applicant, including birth records, school records, psychological evaluation records, employment records, and the records from Applicant's criminal proceedings. Tr. 84, 114-15. He also reviewed similar records for Applicant's immediate family members. Tr. 168-69. Dr. Olley interviewed Applicant on two occasions. Tr. 86. Dr. Olley also interviewed twenty-one individuals, and reviewed affidavits from additional individuals, who knew Applicant, including family members, teachers, employers, friends, and neighbors. Tr. 140. This Court finds Dr. Olley conducted a thorough evaluation in compliance with the diagnostic framework described above and finds Dr. Olley's opinions and conclusions credible.

Dr. Watson, another expert for Applicant, also conducted a full intellectual disability

evaluation. Dr. Watson reviewed the same records reviewed by Dr. Olley. Tr. 230. In reviewing Applicant's IQ scores, Dr. Watson reviewed the raw data for all but one (which was unavailable due to the death of the evaluator) of Applicant's prior IQ tests and rescored those tests. Tr. 265. He interviewed Applicant on two occasions. Tr. 283. Dr. Watson personally interviewed six, and reviewed the affidavits of fifteen, people who knew Applicant. Tr. 302, 305. This Court finds Dr. Watson conducted a thorough evaluation in compliance with the diagnostic framework described above and finds Dr. Watson's opinions and conclusions credible.

Dr. Hall testified for Respondent and offered an opinion on whether Applicant is intellectually disabled. She reviewed the records reviewed by Dr. Olley and Dr. Watson, but she did not interview Applicant or any other people who knew Applicant. Tr. 366-67. Dr. Hall admitted that she did not interview Applicant or people who knew him because she "wasn't doing [her] own evaluation," but was merely "reviewing all the information that was provided to see if [her] opinion concurred with the opinion that was submitted by Dr. Culley." Tr. 412. This Court finds that Dr. Hall's review of the records was not consistent with the diagnostic framework for a reliable evaluation for intellectual disability. Indeed, Dr. Hall testified that she was not doing an intellectual disability evaluation.[13] Tr. 412. This Court, therefore, affords less weight to her opinions and conclusions.

At the hearing, Respondent offered as an exhibit Dr. Donna Culley's Diagnostic Evaluation report ("Culley Report"), dated July 17, 2009. After hearing arguments of counsel at the hearing,

[13] Dr. Hall testified that if she were doing her own evaluation, she would have met Applicant and conducted a clinical interview, talked to his parents and other family members, and collected and reviewed as much information as possible about Applicant. Tr. 413-14.

reviewing the record, and considering the legal principles detailed below, this Court finds Dr. Culley's report is not admissible, nor is her opinion on whether Applicant is intellectually disabled.

On August 21, 2006, Judge Williams's "Order for an Evaluation of Application for Mental Retardation" was filed, ordering an evaluation by DDSN. Judge Williams' order provided, *inter alia*, that the examination was to be "conducted at a time and place designated by the examiners, with reasonable prior notice to Mr. Bell'[s] . . . appointed counsel."[14] The Order further provided "[t]his Court orders that the examiners designated by the SCDDSN shall be available during the week that any evidentiary hearing is scheduled to testify concerning the evaluation. . . ."

Counsel for Applicant timely objected to the introduction of the Culley Report. Applicant's objection is sustained. Judge Williams' Order clearly envisions that the examiner from DDSN would be present and testify regarding Applicant's evaluation. Dr. Culley was not present at the hearing. Dr. Culley was Applicant's only examiner from DDSN.

The State argues that Judge Williams's Order in and of itself, without more, makes Dr. Culley's evaluation admissible. The Court disagrees. The report is clearly hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. The sole issue in this PCR proceeding is whether or not Applicant has an intellectual disability, and therefore, is not a candidate for capital punishment. Clearly, Dr. Culley's evaluation addresses this primary

[14] Judge Williams's order also provided that "[t]his order does not give either counsel the right to attend or participate or interfere in this Court ordered evaluation unless requested to do so by the designated examiners, unless, authorized to do so by further Court Order." Judge Williams' Order cited *State v. Hardy*, 283 S.C. 590, 325 S.E.2d 320 (1985), to support his above-quoted prohibition against counsel being present during the examination.

issue. Further, the report violates Applicant's Sixth Amendment right of confrontation to the extent he would not have the opportunity to cross-examine Dr. Culley.[15]

Dr. Alicia Hall was the only witness to appear on behalf of Respondent. Dr. Hall was stipulated to be an expert in forensic psychology and is employed by DDSN. However, Respondent is not allowed to introduce Dr. Culley's evaluation and findings in the record through Dr. Hall. Although it is true that an expert may base their opinion on inadmissible evidence under Rule 703, SCRE, the Rules do not provide that inadmissible evidence thereby becomes admissible. *Allegra, Inc. v. Sculley*, 400 S.C. 33, 46-47, 733 S.E.2d 114, 122 (Ct. App. 2012), *Jones v. Doe*, 342 S.C. 53, 62, 640 S.E.2d 514, 519 (Ct. App. 2006). Respondent presented no further grounds to justify admission of Dr. Culley's evaluation beyond Judge Williams' Order.

Further, a party may not use an expert to vouch for the credibility of the opinion of another expert. *State v. Berry*, 413 S.C. 118, 127, 775 S.E.2d 51, 55 (Ct. App. 2015); *State v. Kromah*, 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). Nor may an expert "merely serve[] as a conduit to introduce the results" of another expert's testing. *State v. McCray*, 413 S.C. 76, 90-91, 773 S.E.2d 914, 921-22 (Ct. App. 2015). In this case, Respondent tried to vouch for the credibility of Dr. Culley's written opinion by having Dr. Hall adopt them as her own. However, Dr. Hall testified

[15] This Court finds the Confrontation Clause is applicable in this PCR proceeding, which takes the place of a pretrial *Atkins* hearing due solely to the fact that Applicant was sentenced to death prior to the *Atkins* decision. In the pretrial context, confrontation rights would clearly apply. *Cf. Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986) (plurality opinion) ("[I]f the Constitution renders the fact or timing of his execution contingent upon establishment of further fact, then that fact must be determined with the high regard for the truth that befits a decision affecting the life or death of a human being. Thus, the ascertainment of a prisoner's sanity as a predicate to lawful execution calls for no less stringent standards than those demanded in any other aspect of a capital proceeding. Indeed, a particularly acute need to guarding against error inheres.").

that she had not met with Applicant or any other witnesses that may reveal information concerning Applicant's social history, education, work or other important areas concerning his adaptive functioning. Dr. Hall testified that she reviewed the materials provided by Applicant (or available to her) which, along with Dr. Culley's evaluation, was sufficient to enable her to issue an opinion. While Dr. Hall's opinion is admissible, Dr. Culley's is not. The Court further finds that even if the Culley Report was admissible, it would not change this Court's conclusion that Applicant is intellectually disabled because Dr. Culley did not interview any collateral witnesses who knew Applicant during the developmental period, and Applicant's expert testimony and supporting documentary evidence was more persuasive and credible.

C. *Applicant is Intellectually Disabled*

a. *Intellectual Functioning*

Beginning at age seven, Applicant's IQ has been tested seven times. Applicant's first IQ test was prompted by his second grade teacher who referred him for psychological services, noting "slow learner, poor retention."[16] Tr. 117. The school administered a Wechsler Intelligence Scale for Children – Revised ("WISC-R") and Applicant received a full scale IQ score of 72. This, and other psychological testing completed at the same time, resulted in Applicant being placed in an educable mentally handicapped, or special education, class. Tr. 243. In compliance with federal law, Applicant received additional psychological testing, including an IQ test, three years later when he was ten years old in fifth grade. The school again administered a WISC-R and Applicant

[16] Dr. Olley and Dr. Watson both testified it was significant that Applicant was referred for testing at such an early age. Dr. Olley said second grade is "a pretty early time in a child's educational history for a teacher to be concerned enough to refer a person for testing that might result in special education." Tr. 92. Dr. Watson agreed second grade "is early to be referred." Tr. 239.

received a full scale IQ score of 76. After these two IQ tests administered during the developmental period, Applicant took five additional IQ tests, all Wechsler scales, over the course of his criminal and post-conviction proceedings. A complete listing of all Applicant's IQ scores are in the table below.

Applicant IQ Scores				
Test Date	**Age**	**Test Type**	**Reported IQ**	**Flynn Corrected IQ**
5/13/1976	7	WISC-R	72	71
4/19/1979	10	WISC-R	76	74
12/2/1988	20	WAIS-R	76	73
3/2/1989	20	WAIS-R	78*	75*
9/24/2004	36	WAIS-R	70	62
7/1/2009	40	WAIS-III	76	72
3/7/2014	45	WAIS-IV	71	69

* Score affected by practice effect

All of the experts agreed Applicant's March 1989 WAIS-R score was likely inflated due to the practice effect because Applicant took the identical test approximately four months before in December of 1988. Tr. 95-96 (Dr. Olley noting the practice effect "raises the risk that this small increase in attained score is not really a true reflection of his intelligence . . . but simply a reflection of the fact that [he]'s taken this test so many times"); Tr. 266-67 (Dr. Watson noting "practice effect is going to be a factor[;] it's likely going to inflate the score result"); Tr. 430. Dr. Hall determined that the March 1989 testing was invalid due to the practice effect and disregarded the test score altogether. Tr. 430-31. This Court finds the March 1989 WAIS-R score was likely inflated by the practice effect.[17] Even ignoring the practice effect, however, the Court notes that

[17] The Court does not find the score is invalid, but considers the likely inflation due to the practice effect in reviewing the IQ scores.

the March 1989 WAIS-R administration falls within the significantly subaverage range.

All of the experts who testified agreed with the Flynn applications noted in the table above. Tr. 93-97, 266, 378. This Court finds application of the Flynn effect is warranted in this case to account for the fact that Applicant's IQ scores were obtained on tests years after the tests were normed to the general population. *See South Carolina v. Pearson*, No. 96-GS-32-3338 (S.C. Cir. Ct. Dec. 14, 2005) (noting the Flynn effect "is an accepted scientific phenomenon . . . based on the fact that scores on standardized measurements of intelligence have been rising steadily during the last century); DSM-5 at 37. Accordingly, Applicant's IQ scores range from 62 to 75, each falling within the intellectual disability range and satisfying the intellectual functioning prong of the diagnosis.[18]

b. *Adaptive Behavior*

Assessing adaptive behavior, either under the older definition requiring for two deficits in

[18] Dr. Hall relied on a Slosson Intelligence Test administered to Applicant at age seven, on which he obtained an IQ score of 83. Tr. 105, 374. This Court, however, does not consider the Slosson Intelligence Test an appropriate test for diagnosis of intellectual disability because it is a short-form screening test, which does not provide a full scale IQ score. *See* Tr. 28 (Dr. Tasse noting the Slosson is "a narrow band test in that it provides really only a verbal . . . IQ score. . . . It would not qualify as a comprehensive testing of intelligence."); Tr. 101 (Dr. Olley noting "It is a screening test, not intended to be used for diagnostic purposes."); Tr. 268 (Dr. Watson noting "The Slosson is . . . not a full-range IQ test [and] has been roundly criticized as psychometrically just not very well developed."). It is also informative that the gold-standard Wechsler scale administered at the same time as the Slosson resulted in a full-scale IQ score of 72. The Court, thus, disregards the Slosson score. *See Com. v. DeJesus*, 58 A.3d 62, 77 (Pa. 2012) ("The court agreed with appellee's experts that his early results within the average range on the Slosson test did not merit much weight in light of the inconsistency of the scores, the 'general obsolescence' of the test, and its unsuitability for diagnostic and forensic purposes.").

ten skill areas,[19] as other South Carolina courts have done,[20] or the more recent definition requiring deficits in one of three skill areas,[21] the Court is persuaded that Applicant's evidence establishes deficits in adaptive functioning.

Applicant's deficits in functional academics are well documented in his school records and the expert interviews with Applicant's school teachers. As described above, by second grade, Applicant was identified as needing special attention in school and was referred for psychological assessment. His teacher at the time noted that he was already receiving individual attention and working with a special reading teacher, but was still struggling and already well behind his grade level in reading abilities. Tr. 238-40. As a result of the psychological testing, including an IQ test, Applicant was placed in special education classes for the Educable Mentally Handicapped ("EMH classes"). Tr. 243. Applicant continued to perform below grade level while in EMH classes, reading two levels below grade level and not knowing how to use coins or tell time to the half hour in the fourth grade. Tr. 127, 130, 262. Despite his continued academic troubles, Applicant was moved out of the resource program after fifth grade and continued to do poorly in school. Tr. 131. Multiple teachers believed Applicant should have remained in EMH classes and that the school district failed him by removing him in fifth grade. Tr. 214, 277.

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[19] Communication, self-care, home living, social skills, community use, self direction, health and safety, functional academics, leisure, and work. *See* AAMR 1992 Manual at 22; DSM-IV-TR at 41.

[20] *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.

[21] Social, conceptual, and practical. *See* AAIDD 2010 Manual at 5; DSM-5 at 33.

In middle and high school, Applicant was placed in basic classes, which were described by the teachers as "a simpler curriculum that . . . in many ways [] accomplish[ed] what special education would have accomplished." Tr. 132. Basic classes were a "survival curriculum" that emphasized "things such as filling out a job application, reading signs in the community, reading a menu . . . [t]hings that [the students] may be able to use in a very simple job." Tr. 134. Even in these basic classes, Applicant did not perform well. Several of Applicant's teachers told Dr. Olley they believed Applicant was "socially promoted" and his records show that he had poor grades and failed some basic classes, which was surprising to some of the teachers because of the low requirements of students in the basic classes. Tr. 135-36. Applicant's teachers also said that Applicant was not in basic classes or performing poorly due to behavior problems; rather, it was because "his academic ability was so low." Tr. 136; Affidavit of Marilyn Fronczkiewicz ¶ 4, Ex. 35; Affidavit of Daisy Rice ¶ 5, Ex. 35.

In ninth grade, a teacher completed a South Carolina Basic Skills Assessment Program Cumulative Record for Applicant, marking his abilities in a variety of school related skills such as reading, writing, and math. The teacher made a note of "basic instruction needed" in "majority of items." Tr. 136-38; Exhibit 3, at 77. Similarly, in tenth grade, the same form was filled out again, noting "basic instruction needed" in "almost everything." Tr. 138; Exhibit 3, at 86. Finally, in twelfth grade, Applicant dropped out of school.

Respondent's attempts at the hearing to minimize Applicant's academic deficiencies as resulting from poor attendance or drug and alcohol use are unavailing. As Applicant's experts point out, academic failure can be a "frustrating experience" that often leads to truancy and drug or alcohol use. Tr. 339. This is consistent with the record in this case in light of the fact that

Applicant's poor academic performance predates any significant truancy problem or his beginning to use drugs and alcohol. *See* Tr. 212, 460-62.

Applicant's deficiencies were apparent outside of the school environment in his work experiences. Applicant's first work experience was in middle school after the "school system early on identified [Applicant] as someone who would have difficulty with work and would need some work experience and skills starting pretty early on." Tr. 141. Applicant received several work assignments through the Job Training Partnership Act and his school. During his school years, Applicant did custodial work at the school district over the summer, he stocked shelves and unloaded deliveries at the Dollar Store, and he was a dishwasher at one or two restaurants. Tr. 141-44, 291. Applicant received positive reviews at these jobs that did not require any skill or sophistication. Tr. 142, 144. Applicant's custodial supervisor noted none of the jobs "demanded anything difficult and all the students were able to do them." Tr. 142. Another supervisor reported that the work was simple at the Dollar Store and there was nothing to learn. Olley Report, at 13, Exhibit 33. Positive reviews in these jobs merely indicated Applicant had a good attitude, showed up, and followed instructions. Tr. 144. The reviews did not mean that he could do something sophisticated. Tr. 144.

After withdrawing from high school, Applicant went into the Job Corps, but did not last long being away from home. Tr. 145. Witnesses told Dr. Olley that it was a "difficult transition to make, being away from home." Tr. 145. Applicant then worked with some people in his neighborhood. One such job was for a man named Harold Rice who hired teenagers in the neighborhood (where he and the Bell family lived) to work with him in his heating and air conditioning business. Tr. 146. Mr. Rice employed Applicant to do very basic tasks, including

cleaning up, using a screwdriver to tighten bolts, and assist Mr. Rice by bringing tools or parts to him. Tr. 146. Mr. Rice said Applicant could not do more difficult tasks and would not have been able to perform tasks Mr. Rice taught to students at the local technical college. Tr. 147. Applicant also worked for a family friend with some other boys his age installing septic fields. Tr. 148. At that job, they attempted to teach Applicant how to use a level for several weeks, but he could not do so. Tr. 148. Instead, Applicant's job tasks were limited to getting parts and tools for the other workers on the job. Tr. 148.

Applicant's experts noted that, while Applicant was generally thought of as a good worker, he was only doing manual labor or low-skill jobs, which did not require much decision making. Tr. 292-93. Their review of the employment records and interviews with friends and family also revealed that Applicant never independently obtained a job; each job he had was obtained through the school, a friend, or a neighbor. Tr. 147-48, 292. One of Applicant's childhood and adolescent friends does not believe Applicant would have been capable of filling out an application properly or doing work "without a person showing him exactly what to do and supporting him on the job." Affidavit of Sherman Guyton ¶ 9, Exhibit 35.

Similarly, those who knew Applicant did not believe he would have been able to live independently, demonstrating deficits in home living. Tr. 150. Applicant never lived on his own and, after his parents separated, bounced from place to place, staying with friends, relatives, or his sister. Tr. 151. Applicant did not make plans in advance for where he would stay, but instead, would show up spontaneously. Tr. 151. One family Applicant stayed with regularly was the DuBose family. Tr. 151. The family had children Applicant's age who were expected to do chores at the home. Tr. 151. They attempted to teach Applicant similar chores, but had a hard time

teaching him simple things, like making a bed so that both sides of the sheets were equal. Tr. 151. Applicant also could not learn to use the riding lawnmower. Tr. 151-52. Mrs. Dubose reported Applicant "was not able to do more complex chores because he had difficulty understanding instructions and had to have things explained to him more than once." Girtha DuBose Affidavit ¶ 6, Exhibit 35. Mrs. DuBose believed that her sons went behind Applicant and completed his chores to meet her expectations. *Id.*

When asked about Applicant's ability to cook, Mrs. DuBose recalled Applicant attempting to boil eggs, putting the eggs on the stove, forgetting about them and walking away, causing damage to the home and eventual cancelation of the family's homeowners insurance because it happened multiple times. Tr. 153, 284-85. Applicant was able to drive a car, but he never pumped his own gas and was not able to learn how to change a tire. Tr. 283-84. Once, at seventeen years old, he was asked to wash the car and did so with a bar of soap and a rag. Tr. 284. Because of these deficits, several of Applicant's friends independently told the experts that they thought Applicant would not be able to live alone without the assistance of a wife. Tr. 152, 284.

Applicant's experts also noted deficits in self-direction. Applicant was universally described as a follower, even following people younger than him. Tr. 297. Applicant had difficulty with decision making and never had a plan for where he saw his life going. Tr. 161, 297. His friends said that Applicant had difficulty initiating activities and basically went along with others. Tr. 297. Applicant also did not take initiative in obtaining jobs and did not get himself to and from work, but received rides from people like Mr. Rice. Tr. 160-61, 297.

Friends described Applicant's communication and social skills as deficient. His conversation was childlike and lacked sophistication. Tr. 295. Applicant could carry on a

conversation, but not one of any seriousness. Tr. 157, 295. Friends had to alter their conversational level to bring it down to Applicant's level in order for him to understand the topics and language used. Tr. 157. Applicant's teachers also described him as quiet. Tr. 295. One said he was so quiet that she remembered him for that particular reason. Tr. 296.

Socially, Applicant was well liked, but he was gullible and often chose the wrong people as his friends. Tr. 154, 298-99. One of Applicant's friends said that Applicant had "zero" social judgment about other people. Tr. 156. Dr. Olley testified that Applicant's decision to associate with the individuals who became his co-defendants was evidence of deficient social judgment. Tr. 156. Applicant had difficulties picking up on social cues, such as when his joking had gone too far. Tr. 154-55. He was also very dependent on his aunt and sister who were both a year older than Applicant and supported him while in school. Tr. 155. Applicant's dependence on his sister manifested when he enrolled in a home economics class with his sister because he was insecure about being in classes alone. Olley Report, at 11, Exhibit 33.

Dr. Watson testified that he investigated Applicant's use of community services and discovered that Applicant never had a checking or savings account, never had a credit card, never went to a bank or post office, never paid a bill, never used public transportation other than taking the school bus with friends under adult supervision, and never drove outside of his own neighborhood. Tr. 286-88. When Applicant needed to cash a check from his work, he did so by going with his sister to a store that sold wigs, buying something small, and cashing the check. Tr. 287. Applicant never cashed a check in a bank. Tr. 287. Applicant failed drivers' education and never registered to vote, despite the fact that doing so was taught as part of his high school civics class. Tr. 290.

None of the testifying experts were able to complete a standardized measure of adaptive behavior due to the lack of suitable informants for the measures. Dr. Olley and Dr. Watson testified that they independently attempted to complete an adaptive behavior scale with the witnesses they interviewed but discovered none of them knew or remembered Applicant across the various domains in order to complete the full scale. Tr. 110-11, 303-04. However, after Applicant was first placed in EMH classes, the school administered the Vineland Social Maturity Scales ("Vineland") to Applicant's special education teacher and Applicant obtained a score of 70, which is in the range of intellectual disability on an adaptive behavior scale. Tr. 119-20. Dr. Olley testified this score was consistent with other information he gathered from the school records and his interviews. Tr. 120.

The school administered a second Vineland when Applicant was in fifth grade, which resulted in a score of 101. Tr. 123. This second administration of the Vineland did not record who served as the informant. Tr. 124. Dr. Olley testified that he did not credit this score because "it is completely incongruent with everything else that we know about how [Applicant] was doing at that time." Tr. 123. Dr. Olley found in "pretty implausible" that Applicant's score would increase by two standard deviations in three years for no apparent reason. Tr. 124. Dr. Watson explained that Applicant's placement in special education classes could not account for such an increase because the Vineland tests adaptive functioning and special education focused on academic skills, so they are "two different domains" and "unlikely to be related." Tr. 322. Dr. Watson found this significant increase, from the second to the fiftieth percentile, would be very unusual and Applicant's school records were not consistent with such an increase. Tr. 258. Dr. Olley also interviewed the school psychologist who oversaw the psychological testing. Tr. 124. She reviewed

the Vineland scores and said the second Vineland score should not be considered. Tr. 124-25. Both Dr. Olley and Dr. Watson agreed an additional problem with the administration of the second Vineland was the failure to record information about the informant. Tr. 124, 258. This Court agrees with Applicant's experts and finds the second administration of the Vineland not credible due to the lack of recorded informant and the fact that the score is inconsistent with the deficits in adaptive functioning already discussed.

Based on the foregoing, the Court finds Applicant has significant deficits in adaptive behavior. Upon review of the expert testimony and all the records, affidavits, and transcripts offered in this proceeding, this Court finds Applicant has significant deficits in seven of the ten domains of adaptive functioning considered in other South Carolina *Atkins* cases: functional academics, work, home living, self-direction, social, communication, and community use. These deficits collapse into the current three domain conceptualization of adaptive behavior found in the AAIDD and DSM definitions and this Court finds Applicant has significant deficits in all three: conceptual, social, and practical skills. *See* Tr. 18. Applicant has thus proven by a preponderance of the evidence that he has significant deficits in adaptive functioning and satisfies the second prong of the intellectual disability analysis under South Carolina law.

c. *Age of Onset*

A review of the evidence presented at the hearing establishes there can be no dispute as to whether Applicant's deficits in intellectual functioning and adaptive behavior had an on-set prior to age eighteen. Regarding intellectual functioning, Applicant had two pre-eighteen IQ tests, each within the intellectual disability range. Additionally, as Applicant's experts testified, "[g]enerally speaking . . . intellectual functioning is fairly static and stable as a construct." Tr. 43. The post-

eighteen IQ scores are therefore informative regarding Applicant's intellectual functioning during the developmental period. Tr. 43-44.

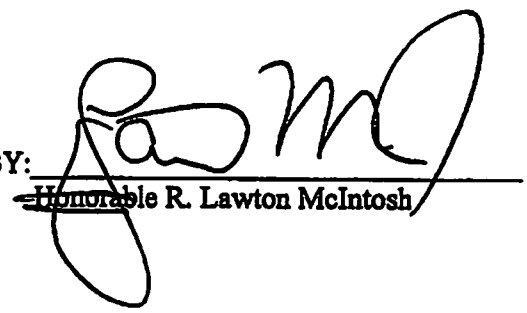
Deficits in adaptive behavior were also clearly present during the developmental period. Applicant was incarcerated for the instant offense at age twenty and all of the informants who Applicant's experts interviewed knew Applicant prior to his incarceration. The records reviewed by the experts and admitted at the hearing were similarly created prior to Applicant's incarceration. As a result, nearly all of the evidence of adaptive deficits came from the developmental period, before Applicant turned eighteen. All of his school records and teachers provided information prior to the time Applicant withdrew from high school at age seventeen. Applicant's family members and friends also offered early childhood and adolescent examples of Applicant's deficits. Dr. Olley interviewed multiple employers about Applicant's deficits in the work domain of adaptive behavior, who observed Applicant's work deficits beginning in junior high school, within the developmental period. Applicant has, therefore, carried his burden and proven by a preponderance of the evidence that his intellectual disability manifested prior to the age of eighteen and that he is intellectually disabled.

V. CONCLUSION

Based on all the evidence presented, including testimony, records, and affidavits, this Court finds that Applicant is intellectually disabled, and thus, he is ineligible for the death penalty pursuant to *Atkins*.

NOW THEREFORE IT IS ORDERED that William Bell'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.

BY: 
Honorable R. Lawton McIntosh

11-16, 2016.

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