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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SUMTER COUNTY
COURT OF COMMON PLEAS

The Honorable Thomas W. Cooper, Jr., and The Honorable William H. Seals, Jr.,
Circuit Court Judges
Case No. 2016-CP-43-00828

Stephen Corey Bryant, Petitioner/Respondent,

v.

State of South Carolina, Respondent/Petitioner.

NOTICE OF CROSS-APPEAL

The State of South Carolina hereby cross appeals from the Order of the Honorable Thomas W. Cooper, Jr., dated July 13, 2016, allowing a successive post-conviction relief action on the limited issue of intellectual disability, which was subsequently denied and dismissed by Order of the Honorable William H. Seals, Jr., dated January 3, 2019. The State received Petitioner/Respondent's Notice of Appeal on April 12, 2019, and cross-appeals the original denial of the State's Motion to Dismiss as successive and untimely.

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April 12, 2019.

Other Counsel of Record: E. Charles Grose, Jr., Esquire and Diana Holt, Esquire

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SUMTER COUNTY
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v.

State of South Carolina, Respondent/Petitioner.

PROOF OF SERVICE

I certify that I have served the Notice of Cross-Appeal on Petitioner/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 12, 2019, to counsel at the address below.

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Senior Assistant Deputy Attorney General

SWORN to before me this
12th day of April, 2019.

Brandy H. Rankin
Notary Public for South Carolina.
My Commission Expires: 4-15-23

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRD JUDICIAL CIRCUIT
COUNTY OF SUMTER)	
)	Case No. 2016-CP-43-828
Stephen Cory Bryant,)	
Applicant)	
)	
vs.)	**Order Denying State's Motion to Dismiss**
)	
)	
State of South Carolina,)	
Respondent.)	
)	

This matter came before this Court on June 21, 2016 on the State's motion to dismiss the applicant, Stephen Cory Bryant's, application for post-conviction relief.[1] After considering the pleadings, supporting documentation, and argument of counsel, the Court finds that the State's motion to dismiss should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

On August 18, 2008, Mr. Bryant pled guilty to three counts of murder, armed robbery, two counts of first-degree burglary, second-degree burglary, second-degree arson, assault and battery with intent to kill, possession of a stolen handgun, and threatening the life of a public official. On September 11, 2008, the Honorable Thomas A. Russo found the murder of Willard Tietjen was committed during the commission of an armed robbery and sentenced Bryant to death. The Court imposed additional sentences, including several concurrent life sentences without the possibility of parole. The South Carolina Supreme Court affirmed the convictions and sentences on January 7, 2011. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011).

[1] Mr. Bryant also filed an application for post-conviction relief in Case Number 2016-CP-43-829, and the State's Motion to dismiss that case is addressed by separate order. Additionally, the Court appointed Diana Holt and Charles Grose to represent Mr. Bryant regarding the current state court proceedings.

Mr. Bryant's initial application for post-conviction relief was filed on May 10, 2011. The Honorable R. Ferrell Cothran, Jr. denied post-conviction relief, and the Supreme Court of South Carolina denied Bryant's petition for a writ of *certiorari* to review the lower court's denial on March 4, 2015. The Supreme Court denied the petition for rehearing and issued the remittitur on May 6, 2015. The Supreme Court of the United States subsequently denied Mr. Bryant's petition for a writ of *certiorari* on November 30, 2015. *Bryant v. South Carolina*, 136 S. Ct. 545 (2015).

On June 19, 2015, Mr. Bryant filed motion for stay of execution and for appointment of counsel in the United States District Court for the District of South Carolina so that he could pursue a petition for writ of *habeas corpus*.[2] On June 24, 2015, the Honorable David C. Norton granted the stay of execution for ninety days. Also on June 24, 2015, the Honorable Bristow Marchant appointed Charles Grose and Jon Sheldon[3] to represent Mr. Bryant. By order dated September 18, 2015, Judge Norton extended the stay of execution until January 14, 2016. Pursuant to Judge Norton's order dated January 13, 2016, Mr. Bryant filed his "place holder" petition for writ of *habeas corpus* on January 14, 2016. Also on January 14, 2016, Judge Norton extended the stay of execution until "resolution of Petitioner's *habeas corpus* petition." On April 28, 2016, Mr. Bryant amended his *habeas* petition.

Also on April 28, 2016, Mr. Bryant served two applications for post-conviction relief. The first application alleges his Intellectual Disabilities makes him ineligible for the death penalty. *See Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536

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[2] *Bryant v. Stirling et. al.*, Civil Action Case Number 9:16-cv-01423-DCN-BM.

[3] Mr. Sheldon is admitted to the practice of law in Virginia. The District Court admitted him *pro hac vice* to represent Mr. Bryant.

U.S. 304 (2002); and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). The second application alleges several claims for post-conviction relief that have not been exhausted in state court because of ineffective assistance of prior post-conviction counsel. Contemporaneously with serving these applications for post-conviction relief, Mr. Bryant moved to stay the District Court proceedings pending exhaustion of state remedies.

On May 24, 2016, the State served its motions to dismiss these actions. By written order dated May 31, 2016, the Honorable Costa M. Pleicones, Chief Justice of the South Carolina Supreme Court, assigned this Court for the sole "purpose of hearing and ruling on the motions to dismiss filed by the State." On June 10, 2016, Mr. Bryant filed his memorandums on opposition to the State's motions to dismiss.[4] On June 21, 2016, this Court convened a hearing.

CONCLUSIONS OF LAW

The Supreme Court of the United States observed:

> Our independent evaluation of the issue reveals no reason to disagree with the judgment of the legislatures that have recently addressed the matter and concluded that death is not a suitable punishment for a mentally retarded criminal. We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty. Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life" of a mentally retarded offender.

[4] Mr. Bryant's memorandum in this case incorporated by reference his memorandum in Case Number 2016-CP-43-829.

Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L. Ed. 2d 335 (2002) (internal quotations and citations omitted). *Atkins*, accordingly, held that offenders suffering from Intellectual Disabilities[5] are not eligible for capital punishment.

S.C. Code Ann. § 17-27-20(A)(1) provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

This Court concludes that § 17-27-20(A)(1) authorizes this action. *Atkins's* and *Hall's* prohibition against executing people with Intellectual Disabilities is rooted in prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. The constitutional prohibition against executing people with Intellectual Disabilities presents special considerations, first addressed by our Supreme Court in *Franklin*.[6] For post-*Atkins* trial cases, *Franklin* established a procedure where the trial judge first considers whether Intellectual Disabilities has been for determining Intellectual Disabilities in future capital trial cases. *Franklin* declined to adopt a definition of Intellectual Disabilities "different from the one already established by the legislature in S.C. Code Ann. § 16-3-20(C)(b)(10)" or "establish procedures for cases where the defendant was sentenced to death prior to *Atkins*, [because] such procedures already exist" under the Uniform Post-Conviction Relief Act. 356 S.C. at 278-81, 588

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[5] The terms "Mental Retardation" and "Intellectual Disabilities" are interchangeable. Previous opinions of this Court have employed the term "mental retardation." *See Hall*, 134 S. Ct. at 1990 ("This opinion uses the term "intellectual disability" to describe the identical phenomenon" of mental retardation).

[6] *And see State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006) (reaffirming procedures established in *Franklin*). *Laney* involved a direct appeal of a capital sentence and not a post-conviction relief procedure.

S.E.2d at 606.

Franklin, therefore, did not expressly address the situation where a defendant is sentenced to death after *Atkins* but does not discover he suffers from Intellectual Disabilities until after the conclusion of his post-conviction relief action. The natural extension of *Franklin*, however, allows this action to proceed, and if Mr. Bryant Intellectual Disabilities "is proven, the PCR court will vacate the death sentence and impose a life sentence." *Id.* Because of the unique considerations involved, Mr. Bryant cannot be precluded from raising Intellectual Disabilities at this time in this manner. This procedure is authorized under *Franklin v. Maynard* and the Uniform Post-Conviction Relief Act and has previously been utilized by other courts in our state in *Edward Lee Elmore v. State*, Greenwood County Case Number 2005-CP-24-1205

Relying on *Drayton v.* Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993), the State contends Mr. Bryant "freestanding claim of error cannot be reached" because "[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel." Motion to Dismiss, pp. 12-13. Respondent is mistaken. *Atkins* sets forth a categorical ban under the Eighth Amendment, which is qualitatively different from other kinds of constitutional violations at trial that may be subject to procedural default. The United States Supreme Court has held that the states are *prohibited* by the constraints of the Eighth Amendment from executing persons with mental retardation. *Atkins*, 536 U.S. at 320 (holding that executing the mentally retarded is "excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender'"). Mental retardation is "a condition, the existence of which disqualifies a

person from capital punishment." *Davis*, 611 F.Supp.2d at 474. As such, Mr. Bryant's *Atkins* claim cannot be waived on the basis that his trial counsel failed to raise it. Respondent's argument advances a result whereby the state may circumvent the clear confines of the Eighth Amendment simply because a PCR applicant was further denied the protections of the Sixth Amendment right to the effective assistance of counsel.[7]

Post-conviction relief, moreover, is not limited to claims of ineffective assistance of counsel, but rather extends to any constitutional violation. *See e.g. Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (post-conviction relief granted based on solicitor's failure to disclose impeachment evidence constituted *Brady* violation, and State's failure to correct co-defendant's false testimony at trial). In deciding this motion, the Court took judicial notice of a number of court filings in *Edward Lee Elmore v. State*, *supra*,[8] where a successor post-conviction relief action was utilized to adjudicate Mr. Elmore's

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[7] An analogy demonstrates the error of respondent's argument. In *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court held that the Eighth Amendment bans the execution of individuals who were under age of 18 at the time of the crime. The Court based its holding in *Roper* on much of the same reasoning as in *Atkins*. Going forward, if trial counsel were to fail to discover and raise the argument that a criminal defendant is categorically exempt from the death penalty under *Roper*, respondent would apparently argue that the State could nonetheless execute that defendant, despite the clear Eighth Amendment ban, absent a showing of ineffective assistance of counsel. Such a result would be legally incorrect. And for the same reason, executing a mentally retarded offender absent a showing of ineffective assistance of counsel would likewise be the wrong result.

[8] These court documents are (1) Mr. Elmore's Application for post-conviction relief alleging Intellectual Disabilities pursuant to *Atkins v. Virginia*; (2) the State's return and motion to dismiss as barred and untimely and alternatively barred as issue preclusion; (3) Mr. Elmore's return to State's motion to dismiss; (4) the State's reply to return to motion to dismiss; (5) the Honorable J. Mark Hayes, II's order denying State's motion to dismiss; and (6) Judge Hayes' order granting post-conviction relief pursuant to *Atkins v Virginia*, vacating death sentence and remanding to Court of General Sessions for entry of life sentence.

Intellectual Disabilities. Additionally, holding that an *Atkins* claim is subject to procedural default would result in an unnecessary waste of judicial time and resources and, based on a incorrectly applied technicality, the wrongful execution of a person who is Constitutionally ineligible for the death penalty.

This Court, therefore, finds it appropriate for the post-conviction court to address Mr. Brant's *Atkins* claim, and, if appropriate, grant relief by entering an order vacating the death sentence and imposing a life sentence in accordance with *Franklin v. Maynard.*

Therefore, it is ordered that the State's motion to dismiss this action is denied.

IT IS SO ORDERED.

Thomas W. Cooper, Jr.
Presiding Judge by Special Assignment of the South Carolina Supreme Court

July 13, 2016
Manning, South Carolina

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SUMTER	)	
	)	
Stephen Corey Bryant, SCDC #5252,	)	
	)	**C/A No. 2016-CP-43-828**
Applicant,	)	***CAPITAL PCR***
vs.	)	
	)	
State of South Carolina,	)	**ORDER OF DISMISSAL**
	)	
Respondent.	)	
	)	

This matter comes before the Court on application for post-conviction filed May 3, 2016. An evidentiary hearing was convened on October 1, 2018. On October 5, 2018, the undersigned notified all counsel of the ruling. This formal order follows. Applicant has failed to carry his burden of proof for the limited purpose of the above captioned successive post-conviction relief action. He has failed to show he has Intellectual Disability and is exempt from the death penalty. Thus, the application for relief shall be denied and this action is dismissed.

I. PROCEDURAL HISTORY

Petitioner is currently incarcerated in Kirkland Correctional Institution as a safekeeper pursuant to orders of commitment from the Clerk of Court of Sumter County. Petitioner was indicted by Sumter County and Richland County grand juries on multiple charges including three (3) counts of murder. The State sought the death penalty for the murder of Mr. Tietjen in Sumter County.

On August 18, 2008, Petitioner entered guilty pleas to the following crimes: burglary second degree [2006-GS-43-696]; burglary first degree [2006-GS-43-697]; assault and battery with intent to kill [2004-GS-40-10096]; three (3) counts of murder [2006-GS-43-698, 699, 700]; assault and battery with intent to kill [2006-GS-43-701]; threatening the life of a public

employee [2006-GS-43-702]; armed robbery [2006-GS-43-699]; possession of stolen handgun [2006-GS-43-699]; another count of burglary first degree [2006-GS-43-698]; and, arson, second degree [2006-GS-43-698]. (ECF #16-6 at 60-64, PCR App. pp. 1334-38).[1] Judge Russo deferred sentencing on all convictions. (ECF# 16-6 at 110, PCR App. p. 1384).

The sentencing proceeding for the murder of Mr. Tietjen began on September 2, 2008. On September 11, 2008, Judge Russo imposed sentence on all non-capital convictions, and also found beyond a reasonable doubt the existence of the aggravating circumstance, "the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon," then sentenced Applicant to "death by electrocution or lethal injection" for Mr. Tietjen's murder. (ECF #16-5 at 59-63, PCR App. pp. 1047-1051). Applicant appealed.

Direct Appeal

Senior Appellate Defender Joseph L. Savitz represented Applicant on appeal. Appellate counsel presented one issue challenging the exclusion of "testimony that Bryant's aunt had been sexually abused by her father (Bryant's paternal grandfather)...." (ECF #16-6 at 122, PCR App. p. 1396). The South Carolina Supreme Court heard oral argument on November 30, 2010, and, on January 7, 2011, issued an opinion affirming the convictions and sentences. *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011). On January 24, 2011, appellate counsel filed a petition for rehearing. (ECF # 16-6 at 184-185, PCR App. pp. 1458-1459). On February 2, 2011, the Court denied the petition and issued the remittitur. (ECF # 16-6 at 187 and 189, PCR App. p. 1461 and p. 1463). Applicant did not seek further review from the Supreme Court of the United States.

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[1] Dual references appear in this pleading. Respondent presented the state court records with both the ECF#s from the federal filings and the individual document references in the PCR Appeal Appendix and/or other state court documents. This Court references both for ease of finding the key documents.

First PCR Action

Applicant obtained a stay from the South Carolina Supreme Court on March 3, 2011, in order to seek post-conviction relief. (ECF #16-6 at 201-202, PCR App. pp. 1475-1476). In the Order granting the stay, the Court appointed the Honorable R. Ferrell Cothran to preside over the action. (ECF #16-6 at 202, PCR App. p. 1476). Judge Cothran appointed Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq., to represent Applicant. (ECF #16-6 at 203-205, PCR App. pp. 1477- 1479). Counsel filed an initial application on May 10, 2011, followed by amendments filed May 21, 2012, (ECF #16-7 at 44-48, PCR App. pp. 1532-1536), and October 1, 2012, (ECF #16-7 at 144-150, PCR App. pp. 1632-1638).[2] An evidentiary hearing was held October 1-3, 2012. (ECF #16-7 at 151, PCR App. p. 1639). By Order dated December 4, 2012, Judge Cothran denied relief and dismissed the application. (ECF #16-12 at 84-137, PCR App. pp. 2572-2625). Applicant moved to alter or amend. (ECF #16-12 at 138-145, PCR App. pp. 2626-2633). By Order dated February 14, 2013, Judge Cothran denied the motion. (ECF #16-12 at 146-158, PCR App. pp. 2634-2646). Applicant appealed the denial of relief.

On March 28, 2014, Applicant filed a petition for writ of certiorari with the Supreme Court of South Carolina, (ECF #16-34 at 5, PCR Cert. Pet., p. 4), which was supplemented on June 27, 2014, (ECF #16-37). On March 4, 2015, the Supreme Court of South Carolina denied the petition. (ECF #16-39). On May 6, 2015, the Court denied a timely petition for rehearing and issued the remittitur. (ECF #16-41; ECF #16-42). Applicant also sought review of PCR appeal

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[2] On June 11, 2012, the PCR judge heard PCR counsel's concern Applicant was not competent and could not assist counsel in the PCR proceedings. (ECF #16-7 at 49, PCR App. p.1537; ECF #16-7 at 52-53, PCR App. pp. 1540-1541). Judge Cothran resolved to wait for 30 or 60 days before ordering an independent evaluation based upon assertion by Dr. Schwartz-Watts (now Dr. Maddox) that with proper medication Petitioner could improve in as little as two weeks. (ECF # 16-7 at 77, PCR App. p. 1565). The issue resolved without the necessity of further proceedings.

issues from the Supreme Court of the United States. His petition dated September 18, 2015, was denied on November 30, 2015. *Bryant v. South Carolina*, ___ U.S. ___, 136 S.Ct. 545 (2015).

Federal Habeas Action

Applicant filed a federal habeas action after completion of his ordinary state court remedies. C/A No. 9:16-01423-DCN-BM (Federal District Court of South Carolina). That action has been stayed during these proceedings.

Second and Third PCR Actions

On May 3, 2016, Petitioner filed two successive PCR actions in the Sumter County Court of Common Pleas. The instant action, C/A No. 2016-CP-43-828, has the allegation that his "Intellectual Disabilit[y was] not previously identified." (2016-CP-43-828 PCR Application, pp. 2 and 4). The companion case, C/A No. 2016-CP-43-829, alleged ineffective assistance of counsel (related to finding evidence of intellectual disability, mitigation evidence related to same and/or other mitigation evidence, and possible conflict of trial counsel); and, a conflict of interest of post-conviction relief counsel. (C/A No. 2016-CP-43-829 PCR Application, pp. 2-4). On May 25, 2016, the State filed motions to dismiss both actions as successive and time barred. (ECF # 46-5 and 46-6). On May 31, 2016, the Supreme Court of South Carolina appointed the Honorable Thomas W. Cooper, Jr., to rule on the motions to dismiss. Judge Cooper heard argument on the motions on June 21, 2016, in Manning, South Carolina. Judge Cooper appointed Charles Grose, Esq., and Diana Holt, Esq., for representation on the motion. At the conclusion of the hearing, Judge Cooper announced he would grant the motion to dismiss for the ineffective assistance and conflict claims but deny the motion as to the free-standing claim of intellectual disability as a bar to the death sentence.

Thereafter, the undersigned was appointed to preside over the action. (Supreme Court Order dated August 1, 2016). Applicant attempted to amend his application on January 12, 2017, but on March 16, 2017, this Court granted Respondent's motion to dismiss the attempted amendment. Applicant moved to amend the application again on May 15, 2018, which this Court denied on July 25, 2018.

Respondent moved for summary judgment on August 18, 2017, and on May 22, 2018. This Court denied the first motion by order filed November 9, 2017, and the second by order filed July 25, 2018.

Thus, the action came to hearing before me on October 1, 2018. Before turning to the evidence received, this Court reviews the facts of the murders, which was part of a larger crime spree that lasted several days in October 2004 in and around the Sumter County area.

II. STATEMENT OF FACTS

The South Carolina Supreme Court set out the general facts of the case in the direct appeal:

> Appellant began a crime spree with a first degree burglary on October 5, 2004. By the time the spree ended eight days later, appellant had committed three murders, assault and battery with intent to kill (ABIK), two more burglaries, and arson. While incarcerated awaiting trial, appellant threatened a correctional officer and subsequently attacked and seriously injured another.
>
> Appellant "cased" isolated rural homes looking for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Appellant burglarized Dennis's home office a day after visiting Dennis's home. He next broke into Ammons' home while no one was there, cutting the phone wires and stealing a pistol and ammunition. Later that same day he shot victim Brown, who was fishing along the Wateree River, in the back.
>
> On October 9, appellant killed an acquaintance (victim Gainey), leaving his body on a rural road, then stole electronics and an

> aquarium from Mr. Gainey's trailer before setting it on fire. Two days later, appellant went to victim Tietjen's home, shot him nine times, and looted the house. Appellant answered several calls made to Mr. Tietjen's cell phone by Mr. Tietjen's wife and daughter, telling both of them that he was the "prowler" and that Mr. Tietjen was dead. He burned Mr. Tietjen's face and eyes with a cigarette. Appellant left two notes on paper and scrawled a message on the wall: "victim number four in two weeks, catch me if you can." On another wall the word "catch" and some letters were written in blood.
>
> Two days later appellant met victim Burgess at a convenience store around 4:30 am. They left together, and less than two hours later, a hunter found Mr. Burgess dead from gunshot wounds on a road bed in a rural area.

State v. Bryant, 390 S.C. 638, 639–40, 704 S.E.2d 344, 344–45 (2011). More fully, the facts of the crimes, as admitted by virtue of the guilty plea, are as follows:

1. The Burglary of the Residence of Robert Dennis on Tuesday, October 5, 2004.

Applicant Bryant walked down the half mile dirt road to the Dennis home and told Mr. Dennis that his truck was stuck at the top of the driveway. Mr. Dennis offers help, and, although uneasy, takes him to the area and extracts the truck out of the bog. (ECF#16-1 at 201-202, PCR App. pp. 189-190). Bryant gives Mr. Dennis the name of "Carlos Bryan" and a false address. Mr. Dennis records a description of Petitioner's truck- a 1990 GMC two-tone blue truck. (ECF #16-6 at 77-78, PCR App. pp. 1351-52); (ECF #16-1 at 203, PCR App. p. 191). The next day, Mr. Dennis left his home office at approximately 4:00 p.m., returning late that night. The day after that, he found that his home office had been burglarized. (ECF #16-1 at 204-206, PCR App. pp. 192-194). His laptop, briefcase, and "a zipper bag with quite a bit of checks, money orders, and some cash" were missing from his office. Entry was made through a window. (ECF #16-1 at 204-205, PCR App. pp. 192-193). A shoeprint was raised outside the window which was sent to SLED. A subsequent search warrant of Applicant's home found a right shoe that

matched the shoeprint. In addition, Mr. Dennis identified Applicant as the visitor after seeing his picture in the newspaper and on television. (ECF #16-1 at 207-208, PCR App. pp. 195-196); (ECF #16-6 at 78-79, PCR App. pp. 1352-53).

2. The Burglary of James Ammons on Friday, October 8, 2004.

James Ammons, like Mr. Dennis, lived in an isolated and remote area outside of Sumter. (ECF #16-1 at 211-212, PCR App. pp. 199-200). The morning of October 8th, Mr. Ammons took his daughter to school and traveled into Sumter for errands. (ECF #16-1 at 216, PCR App. p. 204). Mr. Ammons had allowed a friend, T. J. Hansen, to go deer-hunting on his property. Mr. Hansen's truck became stuck in the mud. Mr. Hansen went to Mr. Ammons' home around 11:30 a.m. for help. He noticed the sliding door was open and entered. He attempted to use the telephone but the telephone was dead. He walked to a neighbor's house to use the phone and call Mr. Ammon's cell phone. (ECF #16-1 at 216-217, PCR App. pp. 204-205); (ECF #16-1 at 223- 228; PCR App. pp. 211-216). Mr. Hanson sees Mr. Ammons driving down the road and waves him over. Then he and Mr. Ammons returned to Ammons' home around 1:30 p.m. (ECF#16-1 at 217, PCR App. p. 205). The phone wires had been cut. The sliding door was open, and the television was off rather than on as Mr. Ammons left it, and his daughter's radio was off. Mr. Ammons went into his bedroom and found that his .40 caliber Smith and Wesson pistol had been stolen along with ammunition and registration papers. He called 911. (ECF #16-1 at 217- 221, PCR App. pp. 205-209); (ECF# 16-6 at 80-81, PCR App. pp. 1354-55).

Subsequently, as a result of an October 13th search, the gun, case, ownership papers and box of ammunition were recovered from Applicant's house. (ECF#16-6 at 81-82, PCR App. pp. 1355-56); (ECF #16-1 at 219-222, PCR App. pp. 207-210). Applicant gave a series of statements claiming the gun was found in a dumpster and then asserted he found it at a home in

Pinewood where he stopped when he was low on gas, slid open the door, and took the gun. (ECF #16-6 at 81-82, PCR App. pp. 1355-56); (ECF #16-1 at 228-229, PCR App. pp. 216-217). In another statement, Applicant admitted to cutting the telephone wires before he entered the home. (ECF #16-6 at 83, PCR App. p. 1357); (ECF #16-1 at 229, PCR App. p. 217).

3. Assault on Clinton Brown in Richland County on October 8, 2004.

Clinton Brown was fishing with an acquaintance at the Billy Tolar Boating Landing off the Wateree River. (ECF #16-1 at 259-262, PCR App. pp. 247-250). Applicant came up to them, spoke to them, then left. The other fisherman left, as well. (ECF# 16-1 at 262-265, PCR App. pp. 251-253). Applicant returned, and came up behind Mr. Brown and shot him in the back. He then left, having offered no assistance. (ECF#16-1 at 265-266, PCR App. pp. 253-254). Mr. Brown, bleeding, initially passed out. When he comes to, he struggled up to his truck and drove to Tuomey Hospital where he remained for over one week. (ECF #16-1 at 266 -267, PCR App. pp. 254-255). (See also ECF #16-1 at 271-274, PCR App. pp. 259-262). The bullet recovered from Mr. Brown ultimately matched the stolen Smith and Wesson. (ECF #16-6 at 85 and 96, PCR App. pp. 1359 and 1370). (See also ECF # 16-5 at 69-73, PCR App. pp. 1057-1061). Applicant admitted the shooting to Roy Lee Lambert the day after the shooting. (ECF #16-1 at 285-288, PCR App. pp. 273-276). Mr. Lambert had bought a knife from him, then saw the gun and offered to find a buyer. Applicant stated, "its got blood on it." (ECF #16-1 at 287, PCR App. p. 275).[3]

[3] Applicant Bryant gave statements asserting that he pulled the trigger and the bullet hit him in the back. (ECF#16-1 at 292-293, PCR App. pp. 280-281). He stated the victim charged him so he fired back with a second shot, but claimed he did not know if it hit him. (ECF#16-1 at 293, PCR App. p. 281).

4. The murder of Cliff Gainey on October 9, 2004.

Unlike the others, Applicant Bryant and Cliff Gainey knew each other. They were co-workers in construction, went fishing together and spent weekends with each other's family. (ECF# 16-6 at 88, PCR App. p. 1362). On October 9, 2004, Applicant picked up Gainey from the mobile home he rented from his boss. They went to a convenience store to buy beer. The purchase is record on the store's camera. They drive off together and later arrived at a location on Bells Mill Road. Applicant shot Mr. Gainey three (3) times, left the body in the open, and drove off. A passerby, William Morton saw a truck with its lights speed away, then he saw the body. After checking vitals he called 911. (ECF# 16-1 at 297-298, PCR App. pp. 285-286). There was no identification on the body and Mr. Gainey remained unidentified for nearly two days. (ECF #16-1 at 302-303, PCR App. pp. 290-291); (ECF #16-1 at 313, PCR App. p. 301). After shooting Mr. Gainey, Applicant returned to the Gainey home. He stole a television, DVD players, VCR, sound system and aquarium. (ECF #16-1 at 329, PCR App. p. 317). Upon leaving, he set fire to the couch. (ECF #16-6 at 88-90, PCR App. pp. 1362-64).

At 8:30, Mr. Gainey's ex-wife Linda Coker, and son, Christopher, arrived at the home and called the fire department. The fire department determined the fire was not accidental and also determined it began prior to 8:25 due to the damage of a clock. (ECF #16-1 at 335-342, PCR App. pp. 323-330). The family had been by previously at 7:30. (ECF#16-1 at 319-323, PCR App. pp. 307-311).

Connecting Applicant to the murder was the positive comparison of the shell casings at the scene, the convenience store video with Gainey, and the results of the search warrant of Petitioner's home where the television, DVD players, VCR, sound system and aquarium were found. (ECF#16-1 at 348-349, PCR App. pp. 336-337). Further, Applicant's girlfriend, Judy

Justice, had been given a key from Applicant that was the key to Gainey's mobile home. (ECF#16-1 at 349-350, PCR App. pp. 337-338).

Applicant also gave a statement claiming he threw the wallet into a dumpster, showed a weapon to the victim, and took the items from the Gainey home. (ECF#16-6 at 90-91, PCR App. pp. 1364-65); (ECF #16-1 at 352-356, PCR App. pp. 340-344). In his last statement, Applicant admitted shooting Mr. Gainey after Mr. Gainey urinated then turned toward him. He stated: "I started freaking out." (ECF#16-1 at 356, PCR App. p. 344).

5. The murder of Willard Tietjen on Monday, October 11, 2004. (Capital Count).

Between 11:00 a.m. and 5:30 p.m., Willard Tietjen, a disabled 62 year old, was murdered in his home. He lived with his wife, Mildred, in a remote and isolated ranch house. (ECF#16-6 at 92-93, PCR App. pp. 1366-67). Mr. Tietjen, suffering from a bad heart condition and early onset of Alzheimer's, was a man of habit who stayed around his home due to his conditions. (ECF #16-2 at 51-52, PCR App. pp. 426-427); (ECF #16-2 at 98, PCR App. p. 473). His wife, who left for work after breakfast, called her husband in the afternoon but could not reach him. (ECF# 16-6 at 93; PCR App. p. 1367); (ECF #16-2 at 57-59, PCR App. pp. 432-434). On October 11th, Mr. Tietjen spoke around 11:00 a.m. with a friend, Robert Summers. (ECF#16-6 at 94, PCR App. p. 1368); (ECF#16-2 at 109-111, PCR App. pp. 484-486). (See also ECF 16-2 at 58-59, PCR App. pp. 433-434). Subsequently, without apparent forced entry, Applicant Bryant entered the Tietjen home. In his statement, Applicant explains he knocked on the door, asked for help because his truck had broken down, and Mr. Tietjen invited him inside. (ECF #16-6 at 94, PCR App. p. 1368). Ultimately, Applicant shoots Mr. Tietjen nine (9) times. (ECF #16-6 at 94, PCR App. p. 1368). He then went through Mr. Tietjen's wallet and took cash and some cards. (ECF #16-6 at 94, PCR App. p. 1368). He threw some cards around the living

room floor, and pulled Mr. Tietjen's masonic ring off his finger. Applicant methodically went through each room in the house looking for items to steal. (ECF #16-6 at 94-95, PCR App. pp. 1368-1369). He took power tools, a knife, a medallion, a jug of change, hand tools, a bag to carry them in, walkie-talkies, cell-phone, silver certificates, jewelry, an ammo box, and other items. (ECF #16-6 at 95, PCR App. p. 1369). Applicant also took a drink from the refrigerator, smoked cigarettes, and smoked a cigar. (ECF #16-6 at 95, PCR App. p. 1369). In addition, he wrote a note,[4] and went on the computer. (ECF #16-6 at 95, PCR App. p. 1369). Applicant is still in the home when Mrs. Tietjen made her daily call to check on her husband. (ECF #16-2 at 60, PCR App. p. 435). She tried to reach Mr. Tietjen on the land line, then calls his cell phone. Applicant answered and stated, "T.J. is dead." and admitted to her that he had killed Mrs. Tietjen's husband. (ECF #16-6 at 95, PCR App. p. 1369); (ECF #16-2 at 61-62, PCR App. pp. 436-437). She terminated the call then called 911. She called her husband cell phone number again, and Applicant Bryant again answers. He stated, "I told you T.J. is dead, and don't call again." (ECF #16-2 at 63, PCR App. p. 438); (ECF #16-3 at 171-172, PCR App. pp. 659-660); (ECF #16-3 at 210, PCR App. p. 698). Mr. Tietjen's daughter, Kimberly Dees, also calls the cell phone and Applicant again admits killing her father. (ECF #16-2 at 102-103, PCR App. pp. 477-478). Kimberly's husband, Robert Dees, also calls, and the same inculpatory statement is given. (ECF #16-6 at 95, PCR App. p. 1369); (ECF #16-2 at 106-107, PCR App. pp. 481-482). These calls occur between 5:15 and 5:30 p.m. Law enforcement was called after. (ECF #16-2 at 99; PCR App. p. 474); (ECF #16-2 at 106-107, PCR App. pp. 481-482).

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[4] The contents of one note/letter stated: "No more sick computer porn for this sick f____. By the way, just keeping my promise to all. P.S. good luck finding me. LMFAO." The note also stated "I find it funny, victim number five in two weeks." (ECF#16-3 at 28-30, PCR App. pp. 516-518).

Forensic testing connected the shell casings and bullets from the Tietjen scene with the stolen handgun. (ECF #16-6 at 96, PCR App. p. 1370). Applicant Bryant's DNA was found on cigarette material within the house – one sample was from a partially smoked cigarette retrieved from the right eye of the victim. (ECF #16-3 at 106-107, PCR App. pp. 594-595). His DNA is also matched to that on an ankle sock. (ECF #16-3 at 107, PCR App. p. 595). Handwriting analysis determines the note is consistent with Applicant's writing. (ECF #16-6 at 96, PCR App. p. 1370); (ECF #16-3 at 95, PCR App. p. 583). A videotape from a local Bi-Lo store showed him using the change machine. (ECF #16-6 at 96, PCR App. p. 1370); (ECF #16-3 at 74-75, PCR App. pp. 562-563); (ECF #16-3 at 81, PCR App. p. 569). Items of stolen property were also recovered and connected to Applicant Bryant. (ECF #16-3 at 58-64, PCR App. pp. 546-552). Applicant sold the stolen knife to Roy Lambert – the same individual who heard Applicant admit to shooting Mr. Brown – and he turned it into police. (ECF #16-1 at 286-288, PCR App. pp. 274-276); (ECF #16-3 at 84-85, PCR App. pp. 572-573).

Applicant Bryant also gave inculpatory statements. (ECF #16-3 at 119-127, PCR App. pp. 607-615). He admitted the Tietjen robbery and taking items while still armed. He described acts done within the house and laid claim as the sole perpetrator. He then carried law enforcement to locations where he had deposited items. He admitted having conversations with the Tietjen family. (ECF #16-6 at 97, PCR App. p. 1371).

Mrs. Tietjen testified that her husband told her Friday, October 8th, a man came by the house looking for Kimberly Smith. She said her husband tried to assist the person with the use of the telephone book. (ECF #16-2 at 55-56, PCR App. pp. 430-431). When she had returned home on the 8th, she saw a truck in the driveway that she had assumed was a deer-hunter's truck.

She recalled it to be a GMC and similar color to a photograph of the truck identified as Applicant's. (ECF #16-2 at 55-56, PCR App. pp. 430-431).

Dr. Joel Sexton, the forensic pathologist, testified about the extensive injuries to Mr. Tietjen. (ECF #16-1 at 121, PCR App. p. 109). The victim had nine (9) gunshot wounds and burns to the eyes and his beard. (ECF #16-1 at 120-125, PCR App. pp. 108-113). Two of the shots to the head were fatal. (ECF #16-1 at 124, PCR App. p. 112).

6. The murder of Christopher Burgess on Wednesday, October 13, 2004.

At approximately 1:30 a.m., thirty-five (35) year old Christopher Burgess rode a bicycle to the Foxville Road area in Manchester Forest. (ECF # 16-7 at 184, PCR App. p. 1372). He came upon Officer Benjamin Stiles and then continued toward the mall. (ECF # 16-1 at 357-360, PCR App. pp. 345-348). Around 4:20 a.m., Mr. Burgess ended up at a convenience store, the Kangaroo Market Express, where he is seen on video with Applicant Bryant. (ECF # 16-1 at 365, PCR App. p. 353, Exhibit 103). Towanda Govan, an employee, knew both Burgess and Applicant by their coming into the store. (ECF # 16-1 at 363, PCR App. p. 351). On that date, Govan recalled "Chris" coming in first and Applicant came in later. She saw them shake hands. (ECF # 16-1 at 364, PCR App. p. 352). She recalled that it was around 4:20 a.m. (ECF #16-1 at 366-367, PCR App. pp. 354-355). Mr. Burgess left with Applicant after putting his bike into Applicant's truck. (ECF #16-6 at 98, PCR App. p. 1372). They eventually end up in the Foxville Road area. Similar to the Gainey incident, Bryant shot Mr. Burgess and left the unconcealed body in the road bed. Around 6:15 a.m., a deer hunter, Tony Jackson, saw the body in the roadway and called 911. (ECF # 16-1 at 370-372 and 377, PCR App. pp. 358-360; p. 365).

Mr. Burgess had two (2) gunshot wounds - one through his left cheek that entered his brain and a second through his back that went through his heart and exited. (ECF # 16-6 at 99, PCR App. p. 1373). The removed bullet and shell casing matched the stolen handgun. (ECF #16-6 at 99, PCR App. p. 1373). As noted, the videotape of the convenience store showed Applicant and Burgess together. Items that had been previously seen by law enforcement in Applicant's truck during an interview before this incident are found at the scene. (ECF #16-6 at 99-100, PCR App. pp. 1373-1374). Mr. Burgess' bicycle is recovered from the truck when the warrant is served. (ECF #16-6 at 100, PCR App. p. 1374).

In Applicant's statements, he admitted shooting Mr. Burgess with the Smith and Wesson, knew the location, and described the body. (ECF # 16-6 at 100; ECF #16-2 at 1-4, PCR App. p. 1374; pp. 376-79). He indicated in his statements that Mr. Burgess started making demands where he wanted Applicant to take him which, he stated, "pissed me off." He also stated he feared the victim would take his truck from him, so he reached under the seat, grabbed the gun and shot him. (ECF #16-2 at 3-4, PCR App. pp. 378 – 379).

Continued Violence in Detention

After incarceration for the above described crimes, Applicant Bryant continued to inflict injury and generally perpetuate his violence and/or threats of violence:

7. **Threatening the life of Correctional Officer Thornwell Joe Jones at the Sumter-Lee Regional Detention Center on March 9, 2005.**

On March 9, 2005, Correctional Officer Cpl. Thornwell Jones and a nurse were passing out food trays and medication to the inmates. (ECF #16-6 at 101, PCR App. p. 1375). When they arrived at Applicant's cell, he declared: "I'm coming out of my cell when you open the door and I'm going to F____ you up." (ECF #16-6 at 102; ECF# 16-2 at 8, PCR App. p. 1376;

p. 383).[5] They open the door and Applicant appeared - hands balled up and ready to fight. (PCR App. pp. 383-384). The officers took it seriously and Applicant finally stood down without striking the officer. (ECF #16-6 at 101-102; ECF #16-2 at 8-9, PCR App. pp. 1375-1376; pp. 383-384). Jones testified that he did not have problems with him after that date. (ECF # 16-2 at 12, PCR App. p. 387).

8. The assault with intent to kill Correctional Officer Larry Justice on October 26, 2005.

On October 26, 2005, Officer Larry Justice was in the process of retrieving dinner trays at the Sumter-Lee Regional Detention Center maximum security area. (ECF #16-2 at 17-18, PCR App. pp. 392-93). He approached Applicant's cell and Applicant placed his tray in the bag. (ECF #16-2 at 17, PCR App. p. 392). At that point Applicant sucker punched Justice multiple times. The officer's head is knocked against a wall and he fell to the ground. (ECF #16-2 at 18 and 38, PCR App. p. 393; p. 413). Applicant Bryant kicked and beat Officer Justice on the face and chest. (ECF #16-6 at 103; ECF #16-2 at 38-39, PCR App. p. 1377; pp. 413-14). Another officer witnessed this and called for assistance. (ECF #16-2 at 38-41, PCR App. pp. 413-416). Applicant then withdrew and went into this cell. (ECF #16-2 at 41-42, PCR App. pp. 416-417). Officer Justice suffered a broken eye socket, broken nose, crushed sinus bones and a brain aneurysm. (ECF #16-6 at 103; ECF #16-2 at 19-21, PCR App. p. 1377; pp. 394-96). He has not worked since the incident. (ECF #16-2 at 26, PCR App. p. 401). He suffers headaches, nosebleeds, and he is required to walk with a cane to control his balance. (ECF #16-6 at 103;

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[5] During the hearing, Jones testified Applicant stated: "... when I open his door he was going to come out and go to my f_____g ass because he ain't got nothing to lose." (ECF #16-2 at 11, PCR App. p. 383).

ECF #16-2 at 20-21, PCR App. p. 1377; pp. 395-96). (See ECF #16-12 at 88-96, PCR App. pp. 2576-2584).

III. DISCUSSION

The scope of this action is limited by the prior Order of Judge Cooper and the prior orders of this Court. The question is whether Applicant has shown, by a preponderance of the evidence, that he has Intellectual Disability, and is exempt from the death penalty. *Franklin v. Maynard*, 356 S.C. 276, 279-80, 588 S.E.2d 604, 606 (2003) (applicant has the burden of proving Intellectual Disability by a preponderance of the evidence).

This Court has had the opportunity to review the record and has heard the testimony and considered other evidence adduced at the post-conviction relief evidentiary hearing. This Court specifically notes that it has had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly.

After considering Applicant's and Respondent's positions, the testimony at the evidentiary hearing, and reviewing the record, I find that I must deny the application for post-conviction relief. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code § 17-27-80 (1985).

Intellectual Disability

In its June 20, 2002 opinion in *Atkins v. Virginia,* 536 U.S. 304, 122 S. Ct. 2242 (2002), the Supreme Court of the United States held that intellectually disabled defendants are exempt from capital punishment.[6] In *Atkins*, the Court relied on a clinical definition of intellectual

[6] Respondent has maintained throughout the action that this particular action is barred by the statute of limitations and the prohibition against successive applications, as the issue was available both at the time of the plea and at the time of the first PCR action. Judge Cooper previously ruled upon that position and this Court does not revisit Judge Cooper's ruling. The

disability that required sub-average intellectual functioning and significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen, the developmental age. *Id.*, 536 U.S. at 318. The Court left to the individual States, however, the task of establishing the process for determining whether a defendant is subject to the exemption. *Id.*, 536 U.S. at 317. The Court has also repeatedly acknowledged that the medical community's clinical standards should inform, but will not dictate, the legal finding under *Atkins*. *Hall v. Florida*, 572 U.S. 701, 134 S. Ct. 1986, 2000 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.").

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), our Supreme Court "establish[ed] procedures implementing the *Atkins* decision." The Court found:

> We find it inappropriate to create a definition of mental retardation different from the one already established by the legislature in S.C.Code Ann. § 16-3-20(C)(b)(10) (2003) (mental retardation is a statutory mitigating circumstance). [FN 2] Section 16-3-20(C)(b)(10) defines mental retardation as: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." Altering this definition is a matter for the legislature.
>
> [FN 2] S.C.Code Ann. § 44-20-30(11) (2002) (under the South Carolina Mental Retardation Act) and § 44-26-10(11) (2002) (under the Act dealing with the rights of mental retardation clients) define mental retardation the same as § 16-3-20(C)(b)(10).

356 S.C. at 278–79, 588 S.E.2d at 605. *See also* S.C. Code Ann. § 44-20-30 (providing the definition of intellectual disability as "significantly sub-average general intellectual functioning

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Court notes, however, Respondent asserted its continued reliance on the procedural bars and expressed it was not waiving that reliance by virtue of its participation in the evidentiary hearing. This Court accepted Respondent's position as preservation of Respondent's reliance on the procedural bars.

existing concurrently with deficits in adaptive behavior and manifested during the developmental period").

The determination of the exemption is tied specifically to the condition of Intellectual Disability. Our Supreme Court has rejected an expansion of *Atkins* to other allegations of "brain dysfunction." *State v. Stanko*, 402 S.C. 252, 285, 741 S.E.2d 708, 725 (2013). The failure to show "sub-average intellectual function" with adaptive function deficits, within the developmental period, will prevent finding the defined condition exits. *Id.*, at 287, 741 S.E.2d at 726.

The Supreme Court of South Carolina has again recently, in *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017), *cert. denied*, 138 S. Ct. 985, 200 L. Ed. 2d 263 (2018), reiterated the standard this Court must apply:

> Our General Assembly has defined "mental retardation" to mean "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2015). While this Court has strictly adhered to this statutory definition, it has recognized that the USSC in *Atkins* "relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen." *State v. Stanko*, 402 S.C. 252, 286, 741 S.E.2d 708, 726 (2013).

420 S.C. at 139, 801 S.E.2d at 719.

This Court is guided by *Franklin*, *Stanko*, and *Blackwell*. In applying the relevant standard legal framework as set out in these cases, and given the lack of credibility and/or confidence in the opinions rendered by Applicant's experts in this litigation, this Court finds Applicant failed in his burden of proof.

The "Significantly Subaverage General Intellectual Functioning" Prong

"Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate, psychometrically sound tests of intelligence." DSM-5 at p. 37. This first diagnostic criteria for showing Intellectual Disability may be supported by evidence of: "Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing." DSM-5 at p. 33. A finding of significant limitation in intellectual functioning is uniformly required in making a diagnosis of Intellectual Disability. See DSM-5, supra. See also American Association on Intellectual and Developmental Disabilities (AAIDD), *Intellectual Disability: Definition, Classification, and Systems of Supports* 5 (11th ed. 2010) ("Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This disability originates before age 18.").

Applicant cannot meet the first prong of the definition of Intellectual Disability. All of Applicant's IQ scores are significantly higher than 70, even given the standard margin of error – which this Court considered though Applicant's experts did not explain its specific application during the evidentiary hearing – with Applicant's final pre-age 18 score of 93, from a professionally administered and reviewed test, being well above the 70 guideline. *Hall,* 572 U.S. 701, 134 S. Ct. at 1995 (rejecting a firm cutoff of 70 without consideration of standard error of measure finding: "The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range."). See also DSM–5, at 37 ("Individuals with intellectual disability have scores of approximately

two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).... [T]his involves a score of 65–75 (70 ± 5)").

Given that Applicant has failed to carry his burden of proof on this first prong, his evidence on adaptive functioning need not be considered. *Moore v. Texas,* 581 U.S. ___, ___, 137 S. Ct. 1039, 1050 (2017) ("... we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits."); *Hall,* 134 S. Ct. at 2001 ("This Court agrees with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits."). However, this Court has considered the testimony on the investigation and evaluation of adaptive functioning and finds the investigation lacking and the opinion not credible. This is most specifically so for its avoidance of evidence which may tend to, when unexplained or explored, undermine support for weaknesses and/or connection to the required significantly sub-average general intellectual functioning.

Dr. George Woods

Applicant presented Dr. George W. Woods, Jr. Without objection from Respondent, this Court qualified Dr. Woods as an expert in clinical and forensic psychiatry. Dr. Woods explained he specializes in neuropsychiatry which is the study of the brain and how the brain impacts behavior. Dr. Woods used several methods to evaluate Applicant's neurological ability. The first method Dr. Woods used to evaluate Applicant was to look at Applicant's appearance, where he determined Applicant's facial structure indicates Applicant suffers from a Fetal Alcohol Spectrum Disorder (FASD). The second method used by Dr. Woods to evaluate Applicant was

to speak with Applicant, whereby he opined the Applicant has some issues with verbal fluency. The third method used by Dr. Woods was the Luria Test, to determine if Applicant has frontal lobe issues. Dr. Woods found Applicant has dysmorphology, meaning he has disfigurement of the facial tissue and structure.

Dr. Woods testified Applicant suffered from physical and sexual abuse by his family, however, the abuse did not cause much, if any, of Applicant's developmental or frontal lobe issues. Dr. Woods distinguished between environmental and organic causes, though he stated both can be part of the overall picture. Dr. Woods' theory of Applicant's intellectual disability appears to be based mainly upon Applicant's mother's alcohol use during pregnancy. As to the level of intellectual functioning, Dr. Woods indicates and opines that Applicant suffers, as a result of Fetal Alcohol Spectrum Disorder ("FASD"), low language, intellect, and math skills. He relies upon information from Dr. Caroline Everington, Ph.D., to determine actual adaptive functioning deficits.[7] Dr. Woods explained that people may have brain impairments due to FASD, yet can have no significant intellectual impairments as measured by standard IQ testing. Dr. Woods gave an example of the cinematic character in "Rainman" as an individual with a seemingly high IQ for recollection of facts and obscure knowledge, but one who was severely functionally impaired. Additionally, Dr. Woods highlighted that Applicant had some vulnerabilities and was described by teachers as "isolated and slow," which Dr. Woods proffered, can indicate an intellectual disability. However, much of the record indicates otherwise, as brought forth by the State in cross examination.

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[7] While addressing Dr. Everington's assessment below, this Court notes a grave concern over Dr. Woods reliance on an incomplete "report" from Dr. Everington. The "report" Dr. Woods referenced was actually an initial affidavit submitted in Applicant's response in opposition to the first motion for summary judgment in this matter. The affidavit clearly notes the opinion as "preliminary" and indicates additional interviews were scheduled.

As a first point, the character in "Rainman" was a portrayal of a gentleman with Autism. "Autism is a lifelong developmental disability, affecting both verbal and nonverbal communication as well as social comprehension and social interaction. It is not a mental illness, per se, nor is it simply mental retardation." Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals,* 43 Fam. Ct. Rev. 582 (2005). On cross-examination, Dr. Woods reviewed the index to the DSM-5 with counsel for Respondent. Intellectual Disability is one of the Neurodevelopmental Disorders listed, as is Autism Spectrum Disorder, but they are clearly not the same disorder. Dr. Woods agreed the DSM-5 sets out specific diagnostic criteria for Intellectual Disability. (See also Response In Opposition to Motion for Summary Judgment, Woods Affidavit of October 26, 2017, p. 4).

As a second point, most of Dr. Woods' testimony centered on his opinion about FASD, with the indication his testing results on hand number tracing and olfactory testing were consistent with his theory. Further, he opined he received reports on testing by others that showed motor skills deficiencies and abnormality in lip circularity and philtrum, again being consistent with his theory of FASD. Dr. Woods also reported that Applicant was of short stature. For the lip circularity and philtrum analysis, Dr. Woods admitted only one picture was considered, as opposed to an array to ensure accuracy and lack of deficiency in the picture angle or presentation, and also admitted that no actual measurements would be presented or explained to consider along with that one picture to show support for the conclusion. Further still, he admitted that while Applicant is of short statute, he was unaware of whether he was of short stature compared to the rest of his family. He also claimed that genetics would not have any

connection to the physical attribute which this Court finds particularly specious. This Court finds a lack of thoroughness in the testing and/or documentation.[8]

Third, Dr. Woods opined that there is support for finding some individuals with FASD can have IQ testing scores of a higher level than what is commensurate with their actual functional ability. Dr. Woods agreed that Applicant had tested at a level, during his formative years, that would place him beyond what is generally accepted for demonstrating "significantly subaverage general intellectual functioning." *See Blackwell, supra.* In particular, Applicant scored a 93 in May 1996 in testing at the Department of Juvenile Justice ("DJJ"). Dr. Woods repeatedly downplayed the importance of IQ testing for determining intellectual functioning, yet he agreed that IQ testing is the typical vehicle for determining the level of intellectual functioning. (See also Response in Opposition to Motion for Summary Judgment, Woods Affidavit of October 26, 2017, p. 4). He agreed the DSM-5 references IQ testing. He also agreed that the American Association on Intellectual and Developmental Disabilities, of which he is a member, recognizes: "One way to measure intellectual functioning is an IQ test. Generally, an IQ test score of around 70 or as high as 75 indicates a limitation in intellectual functioning."

Applicant's lowest score was 79, from an April 28, 1993 test, which Dr. Woods initially, by affidavit in opposition to Respondent's motion for summary judgment, applied the standard error of measurement of plus/minus five points for a range of 75-84, with all other tests showing a significant increase in ability – a 86 in June 6, 1994 testing, and 92 in March 8, 1996 testing,

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[8] The diagnosis of FASD is not critical to this litigation, but the credibility of Dr. Woods is critical. Thus, FASD is discussed to the extent necessary to show the limitations in Dr. Woods' testimony. As Dr. Woods conceded in his testimony, FASD is not the same as the diagnosis of Intellectual Disability, and is, in fact, not actually listed as a specific diagnosis in the DSM-5. If following the DSM-5, a limitation associated with fetal alcohol exposure would be termed a "neurodevelopmental disorder associated with prenatal alcohol exposure" under the "other specified neurodevelopmental disorder" section of the DSM-5.

and finally a 93 in May 9-10, 1996 evaluation. (See also Response in Opposition to Motion for Summary Judgment, Woods Affidavit of October 26, 2017, pp. 7-8). Further, he agreed there are ways to ensure accuracy, including consideration of the Flynn Effect (though he admitted literature exists that suggests the Flynn Effect is only used in legal settings and not clinical settings), the Practice Effect, culturally appropriate testing, physical limitations consideration, and testing environment. He, in fact, discussed some of those in his affidavit, (see Response in Opposition to Motion for Summary Judgment, Woods Affidavit of October 26, 2017, pp. 6-9), and on cross examination; yet, during his hearing testimony, he did not apply either in his ultimate conclusion, and, instead, opined that clinical judgment and neurological testing could, and in this case should, supplant valid test scoring.

In complete contrast, Dr. Everington testified that she has stated that IQ testing should be the first step in any evaluation of Intellectual Disability. Further, she testified she has recommended contemporaneous testing, but did not do so here because that was Dr. Woods' area to develop.

One of the ways to defray lingering doubt on the conditions of the test, and the appropriateness of the test, or even present ability, would be to give an IQ test. This was not done for this litigation. The scores – particularly the 93 – simply cannot be discounted enough to fall in the accepted range for consideration of Intellectual Disability, or, at least Applicant has failed to carry his burden of proof to demonstrate how they can be within fair clinical limitations.

On cross-examination, Respondent presented Dr. Woods with affidavits of Applicant's DJJ examiners. While Dr. Woods attempted to show a reason to discount the DJJ testing, his testimony was not credible on these points. For example, he first testified that he had not seen the affidavits, then testified he did. He testified that the test was not named, but then conceded

the test was named. He testified that the intellectual disability assessment was not complete, but then conceded the evaluation was to determine if further evaluation by the Department of Disability and Special Needs was necessary. In a final analysis, this Court find Dr. Woods could not credibly point out any problems with the examinations. Additionally, again on cross examination, Dr. Woods did not recall high school level work but was confronted with the DJJ personal affidavits (Dr. Everhart and Dr. Gunter) that both opined that Applicant could complete high school. DJJ records show Applicant was "reading at a grade equivalency level of 8.8...." (Motion for Summary Judgment, Attachment p. 6, DJJ records). This again shows a lack of knowledge, and consideration, of the background evidence available in this case.

Dr. Woods' opinion also is negatively affected by failing to consider neuroimaging, or even reviewing the prior reports which were interpreted as normal. Though he discussed thinning in the brain structure, Dr. Woods inexplicably did not pursue additional imaging to confirm and/or show such brain damage. Dr. Woods did not explain or address the prior normal findings at all.

Additionally, Dr. Woods admitted he never considered the facts of the crime in his evaluation as to evidence of intellectual functioning or even in his estimate of possible malingering. The DSM-5 suggests IQ testing results "are approximations of conceptual function but may be insufficient to assess reasoning in real-life situations." Dr. Woods admitted the crimes were "horrible," but failed to consider the extended criminal episode, multiple murders and burglaries, including Applicant's alleged knowledge of computers and ability to access historical search history, and avoidance of police during the investigation, as possible indicators – consistent with the multiple IQ test results – of intelligence beyond that associated with Intellectual Disability. Our Supreme Court has set out:

> Appellant's alleged mental abnormalities do not demonstrate an inability to communicate or care for himself adequately, or sub-average intellectual functioning. Instead, his above average intelligence, and behavior before and after the Victim's murder, demonstrate an ability to formulate and execute deliberate plans. *See Enmund v. Florida*, 458 U.S. 782, 799, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (holding that capital punishment can only serve as deterrent when murder is the result of premeditation and deliberation). Thus, his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person. *See Atkins*, 536 U.S. at 319–20, 122 S.Ct. 2242 (analyzing the mental capabilities of intellectually disabled offenders). There is simply no justification for finding Appellant's alleged condition similar to those individuals who may not be executed lawfully.

State v. Stanko, 402 S.C. at 287–88, 741 S.E.2d at 726–27.

The behavior here certainly is consistent with what the standardized testing showed – Applicant does not meet the first prong – "his behavior in this case stands at the opposite end of the spectrum from the behavior of an intellectually disabled person." *Id.*

Dr. Woods admitted that he was not aware of nor did he consider the definition that South Carolina has for Intellectual Disability in a criminal context, nor was he aware of law in other jurisdictions specifically guiding determinations of Intellectual Disability in these circumstances. He did not review *Franklin, Stanko,* or *Blackwell.* A forensic psychiatrist, by definition, is required to address the interface between mental status and the legal system. As such, the forensic psychiatrist must have an understanding of the law at issue. Dr. Woods admittedly had no understanding of the South Carolina law at issue. His ability to put a medical opinion in any context for the legal determination this Court must make was severely limited.

Further, the DSM-5 also acknowledges malingering, in particular, when one is attempting to avoid legal consequences. Dr. Woods testified that malingering tests are not "normed" for the intellectually disabled, and described the malingering tests as memory tests. Yet, Dr. Woods testified he gave a memory test to determine, in part, his opinion on intellectual ability. Further,

he gave no indication of the consideration of the basic consistencies of the higher IQ test scores – supporting a range of intelligence greater than that associated with intellectual disability – in regard to malingering.

Again, it is troubling to this Court that Dr. Woods did not review any of the facts of the case – crime and investigation – during his evaluation. In particular, it is troubling because the facts and investigation of this particular crime spree revealed copious amounts of information on Applicant's intellectual functioning at the specific time of the crime, which this Court considers to be consistent with the results of the higher IQ tests and level of functioning. *See Stanko, supra. See also Atkins*, 536 U.S. at 320, 122 S. Ct. 2242 (in discussing the reason for the specific exemption of the mentally retarded now Intellectual Disability, "...it is the same cognitive and behavioral impairments that make these defendants less morally culpable—for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses—that also make it less likely that they can process the information of the possibility of execution as a penalty..."); *Hall,* 572 U.S. 701, 134 S. Ct. at 1993 ("... those with intellectual disability are, by reason of their condition, likely unable to make the calculated judgments that are the premise for the deterrence rationale. They have a 'diminished ability' to 'process information, to learn from experience, to engage in logical reasoning, or to control impulses...'" and "A further reason for not imposing the death penalty on a person who is intellectually disabled is to protect the integrity of the trial process. These persons face 'a special risk of wrongful execution' because they are more likely to give false confessions, are often poor witnesses, and are less able to give meaningful assistance to their counsel....") (quoting *Atkins*). Overall, it appears Dr. Woods did not evaluate the totality of the

facts – medical or historical – when forming his opinion and instead, for lack of a better term, "cherry picked" those facts favorable to the Applicant.

Case law points out accepted medical standards should be used in evaluations. *See Moore, supra; Hall, supra.* The DSM-5, which Dr. Woods used as a basis for some of his opinions, sets out that IQ tests are uniformly accepted measurements of intellectual functioning. This Court finds Dr. Woods' opinion is not credible as it fails to follow the clinical standards uniformly accepted as to IQ testing and interpretation of such testing. This Court agrees that clinical judgment may be used in interpreting the testing, but Applicant has not shown clinical support for completely setting aside all results from accepted testing instruments. Further, Dr. Woods' opinion is clouded by a push to accept a "functional equivalent" of Intellectual Disability in another condition.[9] While Applicant may suffer from some form of FASD or associated condition, and may have an impaired brain, this Court does not believe Applicant met his burden of proof that he possesses an intellectual disability consistent with the specific condition at issue. It is only that condition that is the basis of this litigation and only that condition that needs to be proven. *Stanko, supra.* It appears to the Court, based on the information presented, that Applicant does not have an intellectual disability as defined under 44-20-30, and *Franklin, Stanko,* and *Blackwell,* to qualify for the *Atkins* exemption.

Dr. Caroline Everington

As previously referenced, this Court need not consider the evidence of adaptive functioning given the failure to show evidence supportive of Intellectual Disability's first prong. *Moore v. Texas, supra., Hall, supra.* However, portions of the testimony presented will be

[9] On cross-examination, Dr. Woods admitted testifying similarly in regard to another capital case in this state related same to another separate condition, again advocating an expansion of *Atkins*. This shows a bias to his testimony that does not aid his credibility.

briefly addressed as the evidence is consistent with and supportive of the credibility finding noted above, in particular an effort to cherry-pick and/or limit information for the evaluation. Case law indicates that in performing an analysis of adaptive functioning, there should be ample evidence of background from "early childhood" to "contemporaneous accounts...." *United States v. Wilson*, 170 F. Supp. 3d 347, 375 (E.D.N.Y. 2016). *See also United States v. Wilson,* 920 F. Supp. 2d 287, 302 (E.D.N.Y. 2012) ("'[r]ecords regarding a defendant's ... criminal history ... can be quite illuminating regarding historical adaptive functioning,' Gilbert S. MacVaugh III and Mark D. Cunningham, *Atkins v. Virginia: Implications and Recommendations for Forensic Practice,* J. of Psych. & Law, Vol. 37, at 162 (2009)"). This type of specific and detailed background information and consideration of clearly available information on criminal history was sorely missing from Dr. Everington's evaluation.

Without objection by Respondent, this Court qualified Dr. Everington as an expert in intellectual disability, with a concentration on intellectual disability as it pertains to the criminal justice system. Dr. Everington met with Applicant for approximately 4 hours, interviewed him, and conducted three tests. She further stated she examined some records from school, DJJ, and probation records. She indicated she interviewed and/or administered tests to three family members. (See also Response in Opposition to Motion for Summary Judgment, Everington Affidavit of October 21, 2017, p. 8-9). Dr. Everington agreed with Respondent, in order to make a proper evaluation for Intellectual Disability in *Atkins* litigation, that it is best to take a complete examination\history of the Applicant. She agreed that more information is better with regards to the formation of her opinion. She agreed that IQ test were necessary to an Intellectual Disability evaluation.

However, Dr. Everington did not obtain a transcript from the plea in order to evaluate the plea and facts. Thus, she could not factor into her opinion the premeditation and complexity of Applicant's crimes. For example, the actual crimes were over the course of a week within a 5 mile radius, leaving three people dead and a fourth wounded. Dr. Everington never factored into her analysis the complexity and scope of the crimes Applicant committed, admitted and for which he pleaded guilty. She never analyzed the intelligence, effort, premeditation, time, and discipline that went into the most chilling murder of Willard Tietjen. This is particularly important when determining if additional exploration needed to be made for actual functioning limitations, especially language and reasoning deficits. The record reflected that before the murder, Applicant spoke with Mr. Tietjen for hours about religion and the Masons before murdering him in a most brutal manner. The details of Mr. Tietjen's murder, along with all the other facts surrounding the crimes, were not evaluated by Dr. Everington to determine if Applicant has significant sub-average general intellectual functioning. It would appear to this Court, based on the facts of the crimes alone that the Applicant does not suffer significant sub-average general intellectual function. Yet, this did not raise a red flag to Dr. Everington at all, as she failed to consider the facts of the crime and Applicant's actions in and around that time.

Dr. Everington agreed with Respondent that facts of criminal behavior are generally not used as evidence of adaptive functioning, which this Court does not dispute, but when questioned if she considered the vast amount of information on the crime spree as evidence of intellect, she testified she did not consider the facts as to intellect as that was not her job or assignment. She responded the intellectual function determination was for Dr. Woods, whose opinion she found most informative and persuasive. This position suffers from the same deficiency demonstrated

in Dr. Woods' opinion – Applicant's experts consistently avoided that which did not fit into the diagnosis they were pursuing.

Additionally, the artificial separation between experts also damages credibility as to the adaptive functioning. The DSM-5 requires "the deficits in adaptive functioning must be directly related to the intellectual impairments...." DSM-5 at p. 38. Dr. Everington, an expert in intellectual disability, repeatedly turn away from information that may undermine, or at least call into question, the efficacy of the information she receives in consideration of the second prong, adaptive functioning – both from independent records which she admits should be available (but she did not look for or request), to prison grievances that would shed some light on the areas of finance and cleanliness, to the facts of the investigation and crimes that spanned multiple days. For example, Dr. Everington did mention she was somewhat aware of the use of a truck during some of the crimes, but did not investigate or request any driving records. As Respondent pointed out, information must be analyzed in the specific circumstance. If the driving records show a series of tickets, failure to use a seatbelt, or multiple accidents, the records may be supportive of Applicant's position, if not, they may be supportive of Respondent's position. The failure to look, however, is damaging to Applicant's position.[10] Again, Dr. Everington admitted recalling that a truck was involved in some of the crimes, which would logically give notice that this may be a line of records to consider. She did not. As another example, Respondent questioned Dr. Everington about grievances submitted by Applicant, one concerning a requested

[10] This Court also considered that Dr. Woods' testimony that the DJJ evaluation would not suffice as an adequate evaluation for intellectual disability due to a dearth of information and consideration on adaptive functioning. It would appear contradictory to accept this adaptive functioning evaluation which Dr. Everington considered "preliminary" and incomplete in her initial affidavit submitted in the response in opposition to Respondent's motion for summary judgment.

statement of funds in his money account with the Department of Correction. Again, this may be supportive or unsupportive of Applicant's position, but the failure to investigate is decidedly hurtful to Applicant's position. Dr. Everington even testified that "triangulation" of information was most desirable to ensure the most reliable result in making her opinion, but repeatedly omitted investigation into readily identifiable sources.

This is not to say the prison grievances for actions inside the facility or facts of the crime will "override" other evidence of intellectual disability. See, for example, *Moore,* at 1053 (reversing case allowing non-medical factors to override all clinical definitions); AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 20 (2012) ("The diagnosis of [intellectual disability] is not based on the person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'"). However, to ignore the type of extensive criminal behavior, which here evidenced extended interaction with at least one victim and demonstrates computer skills which, at the least, should be investigated, reflects poorly on the assessment of the information readily available. *See* John H. Blume et. al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases,* 18 Cornell J.L. & Pub. Pol'y 689, 725 (2009) ("...in assessing criminal conduct including the facts of the crime, courts must ask what relevance criminal conduct has to the adaptive behavior determination. This requires careful consideration of whether the stressed strengths involved in the criminal activity actually correlate to the asserted deficits and the level of detail of adaptive limitations provided by the defendant's evidence. Courts must also ensure that strengths are not wrongly given dispositive weight by careless use of stereotype."). The evidence of the limited investigation did not stop there.

Dr. Everington also did not obtain, request, or analyze Applicant's work records or talk with any of his employers. Dr. Everington also did not know Applicant had "the where with all" to file a worker's compensation claim, and that a former employer filed a restraining order against Applicant. She did, however, recognize Applicant could use an ATM, and, as referenced above, had a driver's license and drove a truck. She indicated Applicant could not fill out a check because she gave him a blank check during her brief time with him and he did not comply. She did not obtain or request any bank record, or, for instance, automobile insurance payment records, that could lend support to whether he could indeed fill out a check. Dr. Everington did not realize or factor into her decision that none of Applicant's school records reflect any type of intellectual disability. She did not know that while in prison he filed a complaint against the correction facility for missing funds on his financial records. She did not obtain or request his IRS records. She further did not know that while in prison he filed a complaint not only on his behalf, but also on behalf of other inmates, for being shorted their allotted hygiene supplies. Dr. Everington recognized that Applicant had enough intelligence to play games on the computer, but did not know or factor into her decision that Dr. Maddox had analyzed him as "computer savvy" during her testimony in previous hearings. (See ECF#16-9 at 83, PCR App. p. 2071). Furthermore, like Dr. Woods, Dr. Everington was not aware of the prior neurological tests that were negative. (See Respondent's PCR Exhibit 4 (Maddox Report entered in prior PCR proceedings); see also ECF#16-9 at 63, PCR App. p. 2051). In short, many of the above factors appear to this Court to contradict significant sub-average intelligence. To this Court, the above reflects intelligence, math skills, as well as leadership skills, that should have been critically considered.

Further still, Dr. Everington did not interview, or attempt to interview, applicant's brother or any other individuals from his past (other than the family members referenced above) in making her findings. This is especially curious as Dr. Everington essentially rested on consideration of work she had previously termed preliminary and incomplete in her affidavit submitted in the response in opposition to Respondent's motion for summary judgment. She had specifically noted in her prior affidavit that other interviews were scheduled or would be scheduled. (See also Response in Opposition to Motion for Summary Judgment, Everington Affidavit of October 21, 2017, p. 5). They were not.

Dr. Everington's explanation in her redirect that individuals with disabilities also exhibit strengths, while true, simply presupposes the condition instead of critically assessing the available evidence. *See generally United States v. Davis,* 611 F. Supp. 2d 472, 492 (D. Md. 2009) ("The Court believes that the AAMR 2002 manual, the *User's Guide,* and Dr. Olley's series of articles reflect a relative consensus that the best way to retroactively assess a defendant's adaptive functioning is to review the broadest set of data possible, and to look for consistency and convergence over time. It is with this in mind that the Court has evaluated the testimony and evidence presented on this issue in the present case."). This is of little help or guidance to the Court which is tasked not simply in reviewing clinician's opinions and standards, but how that information informs a legal opinion. *See, e.g., Moore,* 137 S. Ct. at 1048 ("...'the views of medical experts' do not 'dictate' a court's intellectual-disability determination" however, "determination must be 'informed by the medical community's diagnostic framework,'") (citing *Hall, supra.*). But again, and critically, the assessment here goes in the opposite direction – Applicant failed to show a significant limitation in intellectual functioning along with deficits in adaptive functioning; rather, he has shown the totality of the evidence

supports the lack of sub-average intellectual functioning, and the limited (and questionable) adaptive functioning deficits evidence is not persuasive. It appears to this Court that perhaps Dr. Woods and Dr. Everington simply ignored Applicant's IQ scores during his formative years, along with the totality of all the facts that appear applicable to a searching and multilayer investigation and diagnosis generally associated with *Atkins* evaluations. Perhaps these facts were contrary to the opinion they were offering for their client. But is clear to this Court, there are significant weaknesses in the *Atkins* investigation and basis for the opinions given. *See United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 216 (D.P.R. 2013) (reviewing list of failures to investigate in an adaptive behaviors analysis as basis for finding a failure to carry the burden of proof).

In summary this Court does not find Dr. Everington's testimony persuasive or credible. This court finds Dr. Everington's evaluation significantly lacking in relevant information and critical assessment needed to form an opinion.

IV. CONCLUSION

This Court finds and concludes that Applicant has not carried his burden of showing significantly sub-average general intellectual functioning. Relief is denied. This Court also finds Applicant has not presented credible evidence of deficits in adaptive function as a result of significant limitations in intellectual functioning. Consequently, because neither is credibly and sufficiently shown, he has failed to show onset within the developmental period.

V. OTHER MOTIONS AND PENDING MATTERS

Motion to Amend to Conform to the Evidence

This Court previously heard Applicant's request to amend his application to include an *Atkins*-like claim based on possible FASD evidence. (Motion to Amend, dated May 9, 2018, and Attachment). He sought to allege that his "impairments" are "equal or greater" than individuals who are Intellectually Disabled. Id. He conceded he sought an "extension" of *Atkins*. Id. Further, he sought to allege any evidence going to possible FASD was new and required hearing. Id. By Order dated July 22, 2018, this Court denied the motion to amend. Further, this Court specifically set out that only evidence of the specific condition of Intellectual Disability would be received and considered. (Order Denying Second Motion to Amend, dated July 22, 2018, at pp. 4-5). At the conclusion of the hearing on October 1, 2018, Applicant moved again to amend his application. He argued he was moving to amend to "conform" to the evidence.

Rule 15(b) of the South Carolina Rules of Civil Procedure, allows for amendment "to conform to issues tried by express or implied consent but not raised in the original pleadings." There could be no express or implied consent to trial on issues that this Court has found cannot be litigated. Further, Respondent did not consent, nor could its consent be implied. To the contrary, Respondent maintained its objections throughout the proceedings and specifically before the start of the evidentiary hearing. Further still, as noted, this Court has previously ruled on the motion to amend and denied that motion. Applicant is, essentially, requesting reconsideration but offers no change of circumstance regarding the procedural bars. To the extent it is merely a reconsideration request, the Court denies reconsideration, and reaffirms it prior ruling the attempted amendment is procedurally barred.

Lastly, "[a] rule of civil procedure may not limit the provisions of a statute." *Marichris,*

LLC v. Derrick, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009). *See also* Rule 71.1, SCRCP ("The South Carolina Rules of Civil Procedure shall apply *to the extent that they are not inconsistent with the Act.*") (emphasis added). This Court has found the offered amendments are time barred pursuant to S.C. Code § 17-27-45 and barred as improperly successive pursuant to S.C. Code § 1 7-27-90, and that Applicant failed to show any qualifying exception to those procedural bars. (Order Denying Second Motion to Amend, dated July 22, 2018). Applicant cannot rely on a motion to conform to the evidence under the civil rules when the statutory procedural bars prevent the litigation. Respondent has properly relied upon those bars, and the Court's prior ruling which enforces the procedural bars that provides Respondent the right to rely on those statutory bars, so as not to be forced into litigation of claims and allegations that the statute prohibits.

For all these reasons, the motion to amend is denied.

Objection to Testimony from Dr. Donna Maddox

Respondent objected to the testimony from Dr. Maddox who was the forensic psychiatrist retained both in the initial sentencing proceedings and during the first PCR proceedings. This Court allowed the testimony to consider if any of the offered evidence would be relevant and admissible. Upon reflection, this Court finds the information is not relevant and is not admissible. The testimony Applicant wished to present does not go to the narrow issue presented in this action. To the contrary, it would appear the offered testimony goes only to claims that were procedurally dismissed, barred, and/or to amendments that were not allowed. It is therefore irrelevant and not accepted or considered.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief is DENIED; and,

2. Having failed in his burden of proof, Applicant is NOT exempt from capital punishment under *Atkins v. Virginia*, and his death sentence will NOT be modified.

IT IS SO ORDERED this 3 day of January, 2019.

The Honorable William H. Seals, Jr.
Circuit Court Judge

Marion, South Carolina.