

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SUMTER COUNTY  
Court of Common Pleas  
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2019-000610

Stephen Corey Bryant, ..... Petitioner-Respondent,

v.

State of South Carolina, ..... Respondent-Petitioner.

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| 4) Dr. Donna Schwartz (Watts) Maddox Affidavit..... | 4139 |
| 5) SCDC Grievances .....                            | 4141 |

**ATTACHMENT NO. 1**

A. 3501



South Carolina  
Department of  
Juvenile Justice  
Bill Byars, Director

P.O. Box 21069  
Columbia, SC 29221-1069



Mark Sanford  
Governor  
State of South Carolina

November 5, 2004

Pamela M. Crawford, MD  
Behavioral Sciences Division  
PO Box 21398  
Columbia, South Carolina 29201

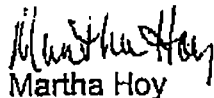
RE: Bryant, Stephen C.

Dear Dr. Crawford:

Enclosed is the record information requested for the individual Stephen Bryant, DOB [REDACTED]/81, SS# [REDACTED]. This information is confidential and intended only for the purpose stated in the authorization and release.

Please let me know if I can be of any further assistance. Phone: 803-896-7537 or Fax: 803-896-9162.

Sincerely,



Martha Hoy  
Interim Forms and Records Manager

Enclosure

## AUTHORIZATION FOR RELEASE OF INFORMATION

I Stephen Cory Bryant authorize and request Department of Juvenile Justice Center and the physicians who attended me while under the care of said Hospital to furnish all medical records or other information regarding my treatment, hospitalization, and/or outpatient care for my condition, including psychological and psychiatric impairment, drug abuse and/or alcoholism, or sickle cell anemia, or acquired immunodeficiency syndrome (AIDS), or tests for or infection with human immunodeficiency virus (HIV) and/or hepatitis.

\*\*\*\*\*

NAME OF AGENCY OR INDIVIDUAL PAMELA M CRAWFORD, MD / SCEDSTREET ADDRESS Behavioral Sciences Division P.O. Box 21398CITY/STATE/ZIP Columbia, SC 29201PURPOSE OF DISCLOSURE Forensic Psychiatric EvaluationDATE OF TREATMENT all recordsINFORMATION NEEDED All mental health notes/evaluation/physical evals  
medical notes

THIS SECTION IS TO BE FILLED OUT WHEN REQUESTING INFORMATION FROM ANOTHER FACILITY:

NAME REGISTERED UNDER AT THE TIME OF TREATMENT Stephen Cory BryantDATE OF BIRTH [REDACTED] SOCIAL SECURITY NUMBER [REDACTED]

This information has been disclosed to you from records whose confidentiality is protected by Federal Law. Federal regulations (42 CFR Part 2) prohibit you from making further disclosure of it without specific written consent of the person to whom it pertains, or as otherwise permitted by such regulations. A general authorization for the release of medical or other information is NOT sufficient for this purpose. This authorization is valid for 60 days.

SIGNATURE [Signature] DATE 10/19/04

THIS SECTION TO BE FILLED OUT IF PATIENT IS UNABLE TO SIGN:

Reason patient is unable to sign: \_\_\_\_\_

SIGNATURE OF OTHER RESPONSIBLE PERSON: \_\_\_\_\_

RELATIONSHIP: \_\_\_\_\_ DATE: \_\_\_\_\_

CONFIDENTIAL

SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE  
PSYCHOLOGICAL EVALUATION

Bryant, Stephen Cory

#137667

May 10, 1996

**Referral Statement:** This student was referred for psychological evaluation as part of the comprehensive evaluation process of the Reception and Evaluation Center. Findings may be used in consultation with social workers or other R & E staff. This report addresses issues of intellectual and academic functioning; personality factors and emotional stability; personal strengths and needs; and services to help change problem behavior and to protect the public.

**Identifying Information:** Stephen Cory Bryant is a 15-year-old White male who was temporarily committed to the R & E Center by the Horry County Family Court on 4/24/96. A psychological evaluation was conducted on 5/9/96 and 5/10/96. No specific referral questions were asked. Note that this youth prefers to be addressed by his middle name, Cory.

**Sources of Information:**

File Information

Behavioral Observations

Clinical Interview

Wechsler Intelligence Scale for Children-III (WISC-III)

Developmental Test of Visual-Motor Integration (VMI)

Peabody Individual Achievement Test (PIAT)

Reading Comprehension

Incomplete Sentences Blank (ISB)

Kinetic Family Drawing (KFD)

Millon Adolescent Clinical Inventory (MACI)

**Background Information:** Due to a scarcity of external sources of information available to R & E regarding this student at the time of evaluation, the following background sketch is based primarily upon the student's self report during clinical interview. Thus, the veracity of self report data is unconfirmed, and reporter bias cannot be ruled out.

Prior to being committed, Cory resided in the town of Garden City, South Carolina. Cory indicated that he had been living with his paternal grandparents for the two to three months preceding his placement at R&E. Prior to that, he had been living with his parents and seven year old brother, Christopher. Cory indicated that his mother, Katherine (38 years old) and his father, William (39 years old) have been married for approximately 16 years. He indicated that he has a half brother, William Bryant, Jr. (20 years old) who currently resides in Pennsylvania. He stated that this brother is a product of his father's previous marriage. Cory stated that he went to live with his grandparents following an argument with his mother in which he became upset because he felt that his younger brother, Christopher, was given more "freedom" and privileges than he was. He stated that he ran away from home and was gone for approximately one week, during which time he lived with friends. Cory indicated that his parents typically discipline him by restricting him to the yard and from associating with friends with whom he has gotten into trouble. He stated that his chores include cutting the grass, taking out the garbage and doing the dishes. Cory stated he does not receive an allowance, but indicated that he often earns money by working with his grandfather by assisting him with

A. 3504



construction work and mowing lawns.

According to Cory, he was involved in therapy at the Waccamaw Mental Health Clinic. He indicated that he stopped his involvement in therapy approximately two to three months ago, and stated that prior to that, he had attended therapy for approximately one year. He indicated that he was seen in therapy by psychiatrist, Dr. Reazoff, several times per month. He stated that over the period of a year, he was treated with Prozac and Ritalin. According to Cory, therapy sessions involved assessing day to day problems, medication checks, and discussing family relationships.

Cory denied any history of marijuana use. He stated that he has tasted beer at the age of 13, but denied using it more than on this one occasion. He indicated that his mother occasionally drinks, but denied that his father drinks. Cory denied any substance abuse within the home. He indicated that he has been smoking cigarettes, "Marlboros" for approximately one year, and states that he smokes five to six cigarettes per day.

Prior to being expelled, Cory stated that he was enrolled at Saint James Middle School. He indicated that he was in the eighth grade. According to Cory, he has been in a self-contained classroom for approximately one year. He indicated this was because of a diagnosis of Attention Deficit Hyperactivity Disorder. Cory indicated that he attends three regular mainstream classes, Science, Math and Social Studies. He stated that he repeated the first grade because, his mother told him, he missed too many days. Cory stated that when he was taking Prozac and Ritalin, he was able to obtain grades of Bs or Cs. He stated that when he went off his medication several months ago, he started to earn Ds and Fs. He stated that his favorite class is Science, and his least favorite class is Social Studies.

Cory stated that he was suspended two or three times during the eighth grade for involvement in fights. He also stated that he was suspended in the seventh grade for fighting. He denied any suspensions prior to the seventh grade. He stated that he was suspended this year following an incident in which he was evidently removed from school grounds by the police after he had run away from home and returned to school. Cory stated that he gets along with some of his teachers well, but with others he has difficulties because they assign too much work. Cory indicated that his future career plans include possibly joining the Coast Guard.

When asked what he likes to do in his free time, Cory indicated that he enjoys building models of helicopters, airplanes and cars. He stated that he also enjoys assisting his grandfather with lawn maintenance. Cory stated that his best friend is a 14 year old girl, who has been his friend for approximately two to three years. He stated that she is "always there to talk to" and that they frequently go to movies together. He denies that they are romantically involved. Cory indicated he has had other friends at his church, who he was involved with in a theatrical production. Cory stated that several months ago, some friends with whom he had associated at a younger age returned to live in his town. He stated that he began to become involved with these friends and subsequently engaged in the delinquent activities for which he has been adjudicated. Cory stated that the last fist fight he became involved in was last year. He denied ownership of any weapons.

one girlfriend for approximately three months when he was 14. He denied any history of physical or sexual abuse, although he indicated he was "paddled" once by his father three or four years ago. He indicated that this resulted in red marks, but denied being hit anywhere other than on the buttocks. Cory indicated that his parents are quite concerned about his recent delinquent activities, and that his father has told him that he is considering moving the family from the trailer park in which they currently live in order to disrupt delinquent relationships between Cory and his peers.

Cory denied any history of major medical illness or surgery. He also denied any history of loss of consciousness or closed head injury. He stated that he is not currently taking any medications, indicating that he stopped taking Prozac and Ritalin approximately two to three months ago.

Cory's history of court involvement dates back to July of 1992 when he indicated that he was charged with arson. He stated that he had been attempting to light a cigarette and had accidentally caught some drapes in his family's home on fire. He stated that a Detective Smiley believed that he had intentionally set the fire. With regard to the fire, Cory made the following statement: "They say I did it in purpose, but I know I didn't." Cory also reported that in September of 1992, he was involved in a burglary in a neighborhood home. He indicated that he and several neighborhood peers broke into a home and destroyed furniture, walls and glass. With regard to this incident, Cory stated "they talked me into it." Cory indicated that the peers with whom he was involved in this episode subsequently moved out of state.

Cory's record reflects an additional burglary charge in 1992, which he indicated he was not familiar with. Cory indicated that he did not engage in any illegal activity between 1992 and 1996. He stated that during that time, the delinquent peers with whom he had associated returned to South Carolina. Charges in 1996 include the burglarizing of a home. Cory stated that he and his peers broke into the home and ate several pizzas, drank sodas and watched television. Cory denied stealing anything from the home. There is also a charge on his record reflecting involvement with a stolen automobile. Cory stated that his peers picked him up in the car and told him they had purchased it with money they had earned from their job. He stated that he was not aware that the car was stolen, and also indicated that he had been dropped off at his home prior to the destruction of the windshield of the car.

Cory acknowledged threatening a teacher at his school, which evidently resulted in a charge appearing on his record. He stated that he had been "playing around with her" and made the comment, "you're dead." His record reflects a charge related to disturbing school, which evidently stemmed from the incident in which he was arrested after returning to school while on the run from home. His record also contains mention of an incident in which he threatened to "put down" a female school bus driver. Several other charges, apparently pending, are evident in Cory's intake history. These include several other burglary charges and an apparent drug charge. Cory became quite upset when he saw these charges on his record, and adamantly denied any involvement in drug use. He indicated it was his understanding that any additional burglary charges against him had been dropped.

his lower lip, which he explained resulted from being kicked in the mouth by a peer at R&E. He indicated that he was also stuck in the head and assaulted by several youths at once. Cory stated that he had been hit by peers at R&E on more than one occasion. As a result, he was moved to a different dorm and brought to the front of the room for his protection. When asked why he thought he was being assaulted, Cory stated, "They don't like people from Myrtle Beach." Cory was oriented in all spheres and symptoms of a mood disturbance or a thought disorder were denied. He denied current or previous suicidal ideation. Cory's speech was clear and reflected a normal range of inflection and prosody. His affect was within normal range and was appropriate to content. Cory cried on more than one occasion, when talking about regret for his behavior, missing his family, and fear of being committed. He answered questions in a polite manner. On abilities tests, he displayed adequate to exceptional effort and diligence. Cory indicated that he typically wears glasses, but only to see at a distance. He indicated that he had no difficulty viewing testing materials. It is believed that the obtained results represent valid estimates of Cory's current level of functioning.

**Test Results and Interpretations:** Cory's intellectual development was assessed with the Wechsler Intelligence Scale for Children-Third Edition (WISC-III). He obtained a Full Scale Standard Score of 93 (32nd percentile). As measured by this test, then, Cory's current level of intellectual functioning falls within the Average range of ability. Cory obtained a Performance Scale score of 99 (47th percentile) and a Verbal Scale score of 90 (25th percentile). The difference between these scores is not statistically significant, suggesting that Cory's cognitive development has been relatively even across domains. His scaled scores are as follow:

Verbal

|               |    |
|---------------|----|
| Information   | 9  |
| Similarities  | 6  |
| Arithmetic    | 6  |
| Vocabulary    | 7  |
| Comprehension | 13 |

Performance

|                     |    |
|---------------------|----|
| Picture Completion  | 9  |
| Coding              | 11 |
| Picture Arrangement | 11 |
| Block Design        | 10 |
| Object Assembly     | 8  |

On a measure of visual-motor integration (VMI), Cory obtained a standard score of 105 with an age equivalency of 15 years, 11 months. This places Cory's score at approximately the 65th percentile in comparison to the performance of others his age. Assessment of Cory's reading comprehension using a standardized educational measure (PIAT) shows him to be reading at the 40th percentile in comparison to his age mates. He appears to be reading at a grade equivalency level of 8.8, with a Standard Scale Score of 96.

Based upon these estimated levels of intellectual functioning, Cory appears to possess an intellectual capacity adequate to the demands of completing high school and college. Vocational and academic counseling may be helpful in assisting Cory in making full use of his potential.

Clinical interview, personality and projective data analysis present a composite picture of Cory as an anxious, introversive youth with poor self control skills.

Cory appears to be struggling with the developmental milestone of adolescence related to the development of a sense of self definition and identity. Cory's confusion related to issues of identity appears to be related to a tendency to assimilate to what he perceives to be the norms of his peer environment. Thus, he may be fully capable of participating with peers in a church theatrical production on one occasion while engaging in burglary or property destruction with a separate group of peers on another occasion.

Cory's inattentiveness and impulsivity may contribute to poor problem solving and a lack of awareness regarding interpersonal interactions. Ostracization by peers at R&E and self-reported few close friendships suggest that the inconsistency in Cory's behavior, together with poor communication skills and inappropriate expressions of agitation and anger, may promote ongoing resentment. Similarly, Cory's difficulties with regard to behavior control may place strains on family relationships, which may in turn promote anxiety, anger, and jealousy. Although Cory denied symptomatology associated with depression, irritability and depressive thinking regarding himself and others are indicative of dysythymia (i.e., a low grade depression).

Cory's poorly developed sense of self and tendency to behave impulsively may lead to the expression of anger and hostility in the face of minor interpersonal provocation. He appears to feel shame with regard to expressions of aggression and hostility, and may defend himself against such feelings by both externalizing the causes of his behavior (ie, delinquent friends, going off of his medication) and minimizing the severity of antisocial acts. Such defenses appear to mitigate Cory's capacity to learn from his behavior.

#### Strengths, Needs, and Services:

##### Strengths:

1. Cory is concerned about his loss of freedom and is motivated to maintain contact with his family.
2. Cory appears to possess the intellectual capability to complete high school and college.
3. Cory responds positively to social reinforcement and adult approval.

##### Needs:

1. To keep his behavior and community activity within legally and socially acceptable limits, and to develop insight and into cause and effect relationships between his thoughts, feelings, and behaviors and the responses of his environment.

##### Services:

1. A safe, nurturing environment to provide structure and guidance. Behavior contracting, explicitly limiting social interactions with peers implicated in previous illegal activity, and to include objective and enforceable consequences, privileges, and incentives logically related to these stipulations. Family therapy to address issues related to communication, limit setting, and altering possible shame-based dynamics.

Bryant, Stephen Cory

#137667

May 10, 1996

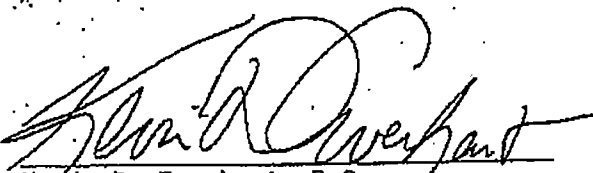
2. Develop problem-solving skills, communication and anger management skills. Optimize self-efficacy and self-esteem. Develop confidence with regard to identity. Develop skills for coping with anxiety and depressive symptomatology.
2. Cognitive behavioral psychotherapy emphasizing the acquisition of increased self-esteem, self-efficacy, and problem solving skills. Cognitive restructuring to develop adaptive self schemata. Anger management training.
3. Obtain an education.
3. School based counseling to provide support in maintaining positive behavior and academic performance. Approach should coordinate psychotherapy of primary therapist with classroom management needs.

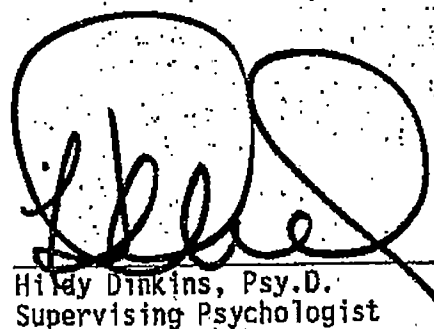
**Diagnostic Impressions:**  
(DSM-IV)

Axis I: 312.8 Conduct Disorder, Adolescent-Onset Type, Severe  
300.4 Dysthymic Disorder  
314.9 Attention-Deficit/Hyperactivity Disorder Not Otherwise Specified, by self-reported treatment history

Axis II: Cluster B Personality Traits

Axis III: No diagnosis

  
Kevin D. Everhart, B.S.  
Clinical Psychology Intern

 Psy.D.  
Hilda Dinkins, Psy.D.  
Supervising Psychologist

SOUTH CAROLINA DEPARTMENT OF JUVENILE JUSTICE  
Psychiatric Evaluation

Bryant, Stephen

#137667

May 21, 1996

Identifying Information:

Cory is a pleasant fifteen-year-old single white male who has been temporarily committed to the Reception and Evaluation Center pursuant to a court order from the Horry County Family Court. There were no specific referral questions to be addressed. Cory has been adjudicated on charges of Assault and Battery, Criminal Domestic Violence, Grand Larceny, Third Degree Burglary, Two Counts of Disturbing School, Two Counts of Running Away, Threatening a Public Official, Malicious Injury to Real Property, and Interfering with the Operation of School. He has no prior appearances before the Family Court.

Sources of Information:

DJJ Psychological Evaluation dated May 10, 1996  
DJJ Client Information Form dated April 25, 1996  
20 Minute Clinical Psychiatry Interview

Attempts were made to get records from the Coastal Carolina Outpatient Division without success. This report is limited by an absence of information from Coastal.

Pertinent Statements:

Cory knows of no problems with his birth, growth, or early development. He lived with his parents until he began running away, at this time he was sent to live with his grandparents. Currently he states he wants to live with his paternal aunt and uncle in Chesterfield where he can help on the farm and stay out of trouble. The psychological report states that Cory was in treatment at the Waccamaw Mental Health Center, however, they state that they have no record of his having been there. Attempts were made to get the records from Coastal Carolina where he was involved in outpatient treatment. However, these records have not been available. He denies any family history of mental problems, physical problems, or problems with substance abuse. He states that he was in self-contained classes because of his temper. He states that he was in three regular classes after being given the diagnosis of Attention-Deficit/Hyperactivity Disorder and treated with Ritalin and Prozac. The veracity of this history cannot be confirmed. Cory admitted to a number of behavior problems including beginning to smoke at 11 to 12 years of age, accidental firesetting, fighting, stealing cars, breaking into places, and running away. He admits to having been depressed approximately three times with the longest episode lasting for approximately one month. He states that this is because he gets into trouble and has broken up with his girlfriend. He states that his girlfriend's parents did not like him and that they moved her out of the state approximately three months ago. He admits to thinking about this at night. He

A. 3510

became tearful when discussing this. He states that his appetite and energy are normal for him. He denies suicidal or homicidal ideas. He stated that he stopped his Prozac and Ritalin when his girlfriend left approximately two months ago because he did not believe anything could help him feel better. He does state that in retrospect the medicine seems to help him control his anger, not lose his temper, and maintain his focus.

When confronted with the apparent future charges against him including a drug charge and an additional burglary charge, he denied all drug and alcohol use and stated that he did not know how these charges could have gotten on his sheet.

#### Mental Status Examination:

In general this is a well-developed well-nourished white male appearing his stated age. He was calm and cooperative with the interview. His affect was generally flat. He was tearful and somewhat slow in his response to questions. His thought process was logical and goal-directed. His thought content was significant for concerns about wanting to go home on probation with his parents and spend the summer with his paternal aunt and uncle. He had discuss this possibility with his parents, who stated that they were not sure if this will work out. His insight into his behavior appeared to be due to his being sent to R&E.

#### Summary of the Psychological Testing:

Cory achieved a Full Scale IQ of 93 with a Performance IQ of 99 and a Verbal IQ of 90, placing him in the Average range of intellectual functioning. The remainder of his testing was in keeping with his IQ. He tended to come across as somewhat anxious and depressed. He tended to come across as having the potential for anger and hostility. He also tended to minimize the severity of his behavior and blame others for his behaviors.

#### Diagnostic Impressions:

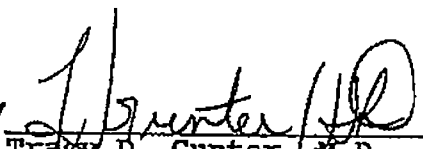
Axis I: Conduct Disorder, Adolescent Onset, Moderate Adjustment Disorder with Depressed Mood Attention-Deficit/Hyperactivity Disorder Not Otherwise Specified by self-report

Axis II: Patient is at significant risk for the development of Antisocial Personality Disorder, but has some good prognostic signs such as the ability to form meaningful interpersonal relationships.

Axis III: No Diagnosis

## Recommendations:

1. Cory needs to be in an environment that can provide with him with structure, supervision, and limits. He needs clear, predictable, and timely reactions by his environment to both his positive and negative behaviors. His family appears unable to provide this containment at this time. Without such containment and redirection, Cory is likely to continue to escalate his behavior.
2. Cory has the ability to reach his goal of finishing school. His behavior is likely to be the thing that gives him the most difficulty. He needs a behavioral contract at school as well. In addition, treatment records should be obtained to verify or refute his history of doing better when he is on Ritalin and Prozac.
3. Cory clearly has some depressive features related to losing his girlfriend and getting caught for his alleged offenses. It is uncertain to me at this time whether this represents exacerbation of an underlying mood disorder, or whether this is due to his being locked up and unable to smoke. He states that he has not gotten major rule infractions in this environment despite being somewhat sad and being away from his family. This makes it unlikely that, even if he has a mood disorder, it accounts for his antisocial behavior. Prozac may be helpful for him in both resolving some of his depressive symptoms and in helping maintain his temper. Given his predilection for antisocial behavior, I would avoid Ritalin in this young man who is likely to abuse or sell it if he becomes aware of its market value. Ritalin is a scheduled drug meaning that it is frequently abused and should be used with caution in this population.

S/   
Tracy D. Gunter, M.D.  
Consulting Psychiatrist

TDG:mdr



**ATTACHMENT NO. 2**

A. 3513

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )

IN THE COURT OF COMMON PLEAS

Stephen Corey Bryant, SCDC #5252, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

C/A No. 2016-CP-43-828  
\*CAPITAL PCR\*

**AFFIDAVIT OF  
KEVIN EVERHART, Ph.D.**

PERSONALLY APPEARED BEFORE ME THE ABOVE STATED AFFIANT WHO  
MAKES THE FOLLOWING SWORN STATEMENT:

1. I, Kevin Everhart, Ph.D., am an Associate Clinical Professor of Psychology at the University of Colorado at Denver. I am Clinical Psychologist, and the Colorado State Board of Psychologist Examiners has licensed me as a Psychologist since 2001. I am also a Clinical Practicum Supervisor of the Doctoral Program in Clinical Health Psychology in the Department of Psychology at the University of Colorado at Denver, in Denver, Colorado. While a graduate student at the University of South Carolina from 1994 through 1998, I participated in a Graduate Teaching Assistantship at the University of South Carolina where I assisted in teaching new graduate students Child Clinical Interviewing/Intellectual Assessment Practicum, Adult Personality and Projective Diagnostic Practicum, and Assessment of Young Children.

In 1993, I began my doctoral training. As part of that training, I administered and interpreted intelligence quotient (IQ) tests, including two years where I administered such tests to minors at the South Carolina Department of Juvenile Justice (DJJ). While at DJJ, I completed, on average, three assessments a week. The assessments were used for treatment purposes and to

assess a juvenile's cognitive capacity. Specifically, part of the function of these tests was to look for signs of intellectual disability.

2. When assessing for intellectual disability, the assessments at DJJ consisted of two steps. First, a juvenile's IQ would be tested. The test used at that time was the Wechsler Intelligence Scale for Children-Third Edition (WISC-III) which was the standard edition in 1996. If the IQ measured at or below 72, then the administrator would move on to the second step. The second step consisted of an adaptive functioning test to look for deficits in certain skill areas, such as communication, self-care, or social skills.

3. While I was a clinical psychology intern, I completed a psychological evaluation of the above named Applicant at DJJ. The assessment took place on May 9 and 10, 1996, when Applicant was fifteen-years-old. I issued a report detailing the findings of my evaluation dated May 10, 1996, which is attached to this affidavit. I recently reviewed my report, including the IQ test results and interpretations, and now reconfirm my earlier findings that there was nothing to indicate Applicant was intellectually disabled.<sup>1</sup>

4. Specifically, all test results and interpretations were significantly above what professional psychologists would expect from someone who is intellectually disabled. Applicant's IQ was assessed using the standard at the time and accepted tested instrument, the WISC-III, and no irregularities were noted in the test or testing. Applicant obtained a Full Scale Standard Score of 93, which fell within the average range of ability. Applicant obtained a Performance Scale Score of 99 and a Verbal Scale Score of 90. Both of these scores fall within the average range and are more than one standard deviation above a score of 72.

Applicant's visual-motor integration (VMI) and reading comprehension (PIAT) scores

---

<sup>1</sup> I have not reviewed the test booklets completed by applicant during his assessment as they are not currently available to me.

were also both at grade level. Specifically, Applicant's VMI standard score was 105 with an age equivalency of fifteen years, eleven months, and his PIAT standard score was 96 meaning he was reading at almost a ninth grade level. Based upon those estimated levels of intellectual functioning, I reported Applicant possessed the intellectual capacity to complete high school and college.

Given such a high IQ score and the other test results, my supervisor and I did not find it necessary to move on to step two in the assessment process as there was nothing to indicate the possibility of a diagnosis of intellectual disability.

5. Applicant also self-reported he was placed in both mainstream and self-contained classes in middle school, and maintained grades of Bs or Cs when taking prescribed medications (Prozac and Ritalin). Those grades were another indication of average intelligence.

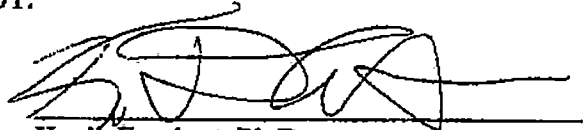
Further, as noted in my report, Applicant indicated he stopped taking the listed medications two to three months prior to being placed in DJJ custody. The consistency in all of Applicant's test results, even while not on prescribed medications, suggest that medications could not likely impact the Applicant's intelligence at the time of his assessment.

6. The assessment was supervised and my report was subsequently reviewed and signed by the supervising psychologist, Hildy Dinkins, Psy.D. The report and all test results were further reviewed by the consulting psychiatrist at DJJ at the time, Tracy D. Gunter, M.D., as part of the department's commitment to the assessment and treatment of juveniles in its custody. Dr. Gunter concurred with the findings that Applicant's IQ score of 93 from the WISC-III indicated he was of average intelligence and the remainder of his testing was in keeping with his IQ.

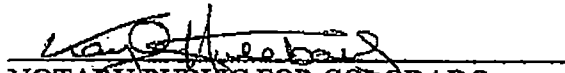
7. I did not reevaluate Applicant during his time at DJJ. The assessment done on

May 9 and 10, 1996, revealed no need to do so as nothing indicated a possibility of a diagnosis of intellectual disability.

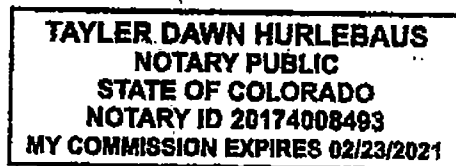
THE AFFILIANT FURTHER SAYETH NOT.

  
Keyin Everhart, Ph.D.

SWORN TO BEFORE ME this 11<sup>th</sup>  
day of August, 2017.

  
NOTARY PUBLIC FOR COLORADO

My commission expires: 02/23/2021



**ATTACHMENT NO. 3**

A. 3518

|                                   |   |                              |
|-----------------------------------|---|------------------------------|
| 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       |
|                                   | ) | *CAPITAL PCR*                |
| Applicant,                        | ) |                              |
|                                   | ) | AFFIDAVIT OF                 |
| v.                                | ) | TRACY D. GUNTER, MD          |
|                                   | ) |                              |
| State of South Carolina,          | ) |                              |
|                                   | ) |                              |
| Respondent.                       | ) |                              |
| _____                             | ) |                              |

PERSONALLY APPEARED BEFORE ME THE ABOVE STATED AFFIANT WHO  
MAKES THE FOLLOWING SWORN STATEMENT:

1. I, Tracy D. Gunter, MD, am a Professor of Clinical Psychiatry in the Division of Forensic Psychiatry of the Department of Psychiatry at the Indiana University School of Medicine in Indianapolis, Indiana, where I am also a clinical supervisor and forensic psychiatrist. I am also an adjunct professor in the area of Neuroscience and the Law at the McKinney School of Law at Indiana University at Indianapolis.

I am licensed to practice medicine in the states of South Carolina and Indiana. I am also a diplomate with the American Board of Psychiatry and Neurology and certified in both General and Forensic Psychiatry.

From July 1, 1995 through December 2, 1996, through my work at the South Carolina Department of Mental Health, I was a contract consultant for the South Carolina Department of Juvenile Justice's (DJJ) Reception and Evaluation Center where I performed pre-sentencing evaluations for adolescents facing adjudication, and treatment planning and services for those already confined at DJJ.

While at DJJ, I worked with a team of psychologists as part of the comprehensive evaluation process. Some juveniles were referred to the team either by court order or identified through testing. The psychologists administered and interpreted intelligence quotient (IQ), achievement, and adaptive function tests which were used to look for signs of intellectual disability. The reports of the results of those tests were one of the sources of information I used as part of my subsequent evaluation of the juveniles. Other sources could include previous mental health or other medical records, and my own interview with the adolescent.

Specific to intellectual disability, I looked at three criteria to evaluate whether a juvenile functioned at grade level or displayed signs of a learning disability, intellectual disability, or other cognitive disorder. The first was the juvenile's education history and time spent in special education classes compared to mainstream classes. Next were the scores on psychological testing. At DJJ, psychologists used the Wechsler Intelligence Scale for Children-Third Edition (WISC-III) which was the standard edition in 1996. Finally I used observations by staff at DJJ as to whether the juvenile functioned similarly to peers, followed officer requests, and adapted to facility life.

2. I saw almost 300 adolescents during my time at DJJ. I made diagnoses of mild mental retardation (now intellectual disability) in 15 cases, borderline intellectual functioning in approximately 60 cases, a learning disability (either specified or unspecified) in about 15 cases, and a cognitive disorder due to a known medical illness or injury in approximately 4 cases. I further diagnosed conduct disorder in 160 cases, attention-deficit/hyperactivity disorder (ADHD) in 64 cases, and an unspecified adjustment disorder in 32 cases.

3. While I was a consultant at DJJ, I completed a psychiatric evaluation of the above named Applicant when he was fifteen-years-old. I issued a report detailing the findings of my



evaluation dated May 21, 1996, which is attached to this affidavit. I recently reviewed my report, including my mental status examination and the IQ test results and interpretations, and now reconfirm my earlier findings that there was nothing to indicate Applicant suffered from mental retardation (no intellectual disability), learning disability, or cognitive disorder.

4. Specifically, Applicant's education history showed that he was in a combination of both self-contained and mainstream classes. Applicant self-reported he was in self-contained classes due to behavioral problems, including his temper. Applicant also self-reported a previous diagnosis of ADHD and treatment with Ritalin and Prozac. Applicant's mainstream classes included science, math, and social studies, which were a combination of verbal and non-verbal classes, and indicated he was performing at grade level and demonstrated an expected command of language. Further, I found Applicant's thought process to be logical and goal-directed during the mental status examination.

Applicant's IQ was assessed using the accepted tested instrument, the WISC-III, and no irregularities were noted in the test or testing. Applicant obtained a Full Scale Standard Score of 93, which fell within the average range of ability. Applicant obtained a Performance Scale Score of 99 and a Verbal Scale Score of 90 which means he was in the average range of intellectual functioning in each domain separately. In my evaluation, I noted the variability in Applicant's scores. For example, Applicant's scores of 6 in Similarities and Arithmetic and 7 in Vocabulary were below average and not surprising given Applicant's history of suspensions and expulsions from school. He had areas of strength in Comprehension with a score of 13 and Coding and Picture Arrangement with scores of 11 (average scaled score is 8-12). Further, there was an absence of a verbal and performance score split in Applicant's assessment, another indication to me of relatively evenly developed average intellectual functioning. Adding support to

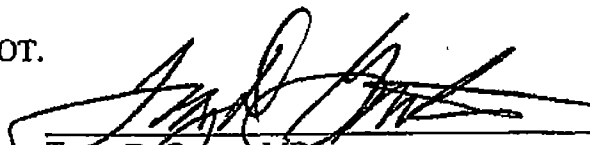
functioning in the average range was his achievement test standard score of 96 in the area of reading comprehension.

Finally, information from staff indicated Applicant functioned similarly to other juveniles in the facility with regard to his activities of daily living. While Applicant was described as ostracized by his peers in the psychological report, this appears to be based on impulsivity and behavioral dyscontrol rather than developmental delay. In fact, at the time I interviewed Applicant I believed he had the ability to develop meaningful relationships and his ability might well mitigate his risk for antisocial personality.

5. My impressions of Applicant at the time were that he suffered from conduct disorder and was at a significant risk for the development of Antisocial Personality Disorder. He also suffered from ADHD and an adjustment disorder. However, there was nothing to indicate to me that Applicant was intellectually disabled and nothing in my evaluation would have led me to do any further testing of him or make a referral to the Department of Disabilities and Special Needs for further evaluation. Based upon my evaluation and the estimated levels of intellectual functioning, I agreed with the testing psychologist that Applicant possessed the intellectual capacity to reach his goal of finishing school.

6. I did not reevaluate Applicant during his time at DJJ. The psychologist's assessment done on May 9 and 10, 1996, and my subsequent psychiatric evaluation on May 21, 1996, revealed no need to do so as nothing indicated a possibility of a diagnosis of intellectual disability.

THE AFFIANT FURTHER SAYETH NOT.

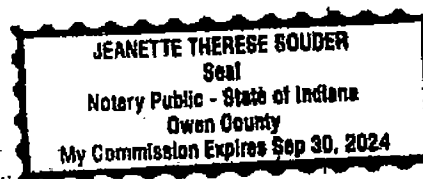
  
Tracy D. Gunter, MD

SWORN TO BEFORE ME this 19 day of July, 2017.



NOTARY PUBLIC FOR INDIANA

My commission expires: 9/30/2024



**ATTACHMENT NO. 4**

A. 3524

recent interview:

- 1) I remember Stephen Cory Bryant.
- 2) He was "sweet and slow."
- 3) I should have failed him but the principal forced us to pass failing students to get them out of school.

App. at 14. In addition, jail records also indicated that in the time Bryant was waiting trial he complained of hearing a dead girl's voice, and that he had head it for at least five years. SCDC Mental Health Records from 10/23/2006. A physician consultation from June 7, 2006, notes that Bryant suffers from pain in his head. That he has an inappropriate affect and suffers from possible head trauma and neurological dysfunction.

**VII. Bryant is Intellectually Disabled so his Execution is Barred by *Atkins v. Virginia* and Bryant's Sixth Amendment Right to the Effective Assistance of Counsel was Violated by Trial Counsel's Inadequate Investigation**

Bryant's sentence of death violates the Eighth Amendment of the United State's Constitution because he suffers from Intellectual Disabilities. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002). Section 44-20-30 of the South Carolina Code defines an intellectual disability by three criteria: "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (Supp. 2011). *State v. Stanke*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 (2013) (applying the definition in the death penalty context); *See Hall v. Florida*, 134 S. Ct. 1986, 1994 (2014) (explaining limitations to the states' definitions).

The only evidence of an intellectual disabilities came from Bryant's expert Dr. Donna Schwartz-Watts. Dr. Schwartz-Watts testified that she saw pictures of Bryant with features that were consistent with fetal alcohol syndrome but did not have enough

information to be sure. PCR 814. Fetal alcohol syndrome is highly correlated with being intellectually disabled. Cite. Dr. Schwartz-Watts also testified that Bryant had significant adaptive deficits and a history of being in special education classes. PCR 832. Dr. Schwartz-Watts testified that Bryant had low IQ scores but testified on cross-examination that Bryant was not mentally retarded because she did not believe the scores were low enough to classify Bryant as intellectually disabled. PCR 837-38.

In an affidavit by Dr. Schwartz-Watts executed for this § 2254 petition, she explains that at the time of her evaluation of Bryant she did not know the following, which she has now been provided by the undersigned:

- a. While pregnant with Bryant, his mother drank alcohol and smoked marijuana.
- b. Bryant was late meeting most of his developmental milestones.
- c. Bryant always had difficulty in school. Six weeks into first grade, his teacher informed his mother that he was not fit for school, could not being to learn how to read, and would fail the first grade. Bryant did fail the first grade.
- d. Bryant only has a Fifth grade education becaust he was simply passed on from grade to grade.
- e. Both of Bryant's fifth grade teachers have confirmed that the school's principal wold not allow them to hold back students in the fifth grade. But for this policy, these teachers absolutely would have retained Bryant in the fifth grade because he could not do the work required, even though he as twelve years old.

App. 12-13. In addition, Dr. Schwartz-Watts now states that she "incorrectly testified that he [Bryant] did not meet the criteria of Intellectual Disabilities." Dr.

Schwartz-Watts admits that "I am not a psychologist, and I have not received any specialized training in assessing someone for Intellectual Disabilities." She further admits that she was not "familiar with the Flynn Effect," which in Bryant's case make his score more likely that he is intellectually disabled. Dr. Schwartz-Watts opines that based on what she knows now, Bryant should receive a "comprehensive evaluation to determine if" he is intellectually disabled, and to determine if he has fetal alcohol syndrome. Dr. Schwartz-Watts also states that Bryant should received neuropsychological testing.

she is not an expert in intellectual disabilities, did not evaluate Bryant for intellectual disabilities, was unaware of issues extant with Bryant's IQ tests, such as the Flynn effect and practice effect, and that Bryant might be intellectually disabled.

Bryant completed the Wechsler Intelligence Scale for Children 3<sup>rd</sup> Edition (WISC III) 3 times over a span of 3 years. He first took the test on 4/28/1993 with a score of 79, then again on 6/6/1994, scoring 86, and one final time on 3/8/1996, scoring 92. While these scores at first blush may seem to indicate that Bryant is above the score for a diagnosis of intellectual disability, there are several factors, unknown to Dr. Schwartz-Watts, that suggest that Bryant's scores are inflated. The standard measure of error is generally considered to be  $\pm 5$ . However, studies suggest that the margins of errors in these IQ tests could be much greater. One study, looking specifically at the WISC III, found that 10.5% of individuals with Intellectual Disability had a change in scores exceeding  $\pm 3$  standard measures of error, a difference of  $\pm 9$  points, after taking the assessment twice over a period of 1 to 4 years.<sup>15</sup> According to the Flynn effect IQ test

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<sup>15</sup> <http://edpsychassociates.com/Papers/WISC3StableDisabled.pdf>

scores change at a rate of approximately 0.3 points gained per year<sup>16</sup> from the time that the test is published. When taking this measure into account Bryant's IQ scores are inflated by 1.2 points on his first attempt, 1.5 on his second, and 2.1 on his third. Because of the practice effect, a study found that Wechsler IQ tests can vary anywhere from 3 to 15 points on retesting.<sup>17</sup> This effect is seen either when the same test is taken within 6 months or when any Wechsler test is taken multiple times over a few years. When taking all of the previously discussed factors into account, it is quite possible that Bryant's true level of functioning lies somewhere between the range of 65 – 75, which would put his functioning squarely within the range intellectual disability.

**VIII. Trial counsel was ineffective for failing to conduct an adequate investigation into Bryant's background, history, character, and mental illness; failing to provide the available information to the mental health experts in order to ensure an accurate and reliable mental health evaluation; and failing to adequately present all the available mitigating evidence in sentencing.**

The sentencing phase is "the most critical phase of a death penalty case," *Smith v. Mullin*, 379 F.3d 919, 939 (10th Cir. 2004), because "avoiding execution [may be] the best and only realistic result possible," *Florida v. Nixon*, 543 U.S. 175, 191 (2004). The sentencing body's possession of the fullest information possible concerning the defendant's life and characteristics is, therefore, essential, to the selection of the appropriate sentence. *Lockett v. Ohio*, 438 U.S. 586 (1978). If the sentencer fails to consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind," an unacceptable risk exists that the death penalty will be imposed in

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<sup>16</sup>

<http://www.acdlaonline.com/zoomdocs/presentations/Tethering%20the%20Elephant%20-%20Flynn%202006.pdf>

<sup>17</sup>

[http://www.forensicpsychologyunbound.ws/OAJFP/Volume\\_1\\_\\_2009\\_files/Ray%202009.pdf](http://www.forensicpsychologyunbound.ws/OAJFP/Volume_1__2009_files/Ray%202009.pdf)



STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS

2016-CP-42-828  
\*CAPITAL PCR\*

Stephen Corey Bryant, SCDC #5252,  
Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,  
Respondent.

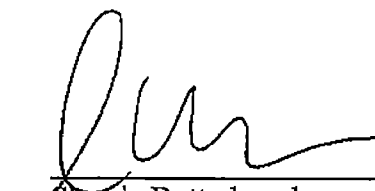
RECORDED  
2017 AUG 18 PM 2:15  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Motion for Summary Judgment** with attachments, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Diana L. Holt  
DIANA HOLT, LLC  
PO Box 6454  
Columbia, SC 29260

E. Charles Grose, Jr., Esq.  
The Grose Law Firm  
404 Main Street  
Greenwood, South Carolina 29646

DATED this 15<sup>th</sup> day of August, 2017.

  
\_\_\_\_\_  
Sherrie Butterbaugh  
Assistant Attorney General

**RECORDED**  
 2017 OCT 26 PM 12:00

THE STATE OF SOUTH CAROLINA      IN THE COURT OF COMMON PLEAS  
 COUNTY OF SUMTER      FOR THE THIRD JUDICIAL CIRCUIT

Stephen Cory Bryant,      JAMES C. CAMPBELL      Case No. 2016-CP-43-828  
                                          CLERK OF COURT  
                                          SUMTER COUNTY, S.C.  
                                          Applicant      )  
                                          vs.      ) **Response in Opposition to State's Motion for**  
                                          ) **Summary Judgment**  
                                          )  
 State of South Carolina,      )  
                                          Defendant.      )  
 \_\_\_\_\_      )

This matter is before the Court on Stephen Cory Bryant motion to amend the scheduling order and the State's Motion for Summary Judgment. This memorandum of law opposed the State's motion for summary judgment and supports Mr. Bryant's motion to amend the scheduling order.

"When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant." *Robertson v. State*, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (quoting *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013)). This Court, therefore, must accept the affidavits of Dr. Donna Maddox, Dr. Caroline Everington, and Dr. George Woods as true. These affidavits support continuing the *Atkins* evaluation.

Pursuant to the order of the South Carolina Supreme Court the Honorable Thomas W. Cooper, Jr. denied the State's motion to dismiss this post-conviction relief ("PCR") action and appointed counsel. S.C. Code Ann. § 17-27-160 sets forth procedures for appointment of counsel and access to investigative and expert services in in capital PCR cases. Once appointed, "[c]ounsel shall be given a reasonable time to confer with the

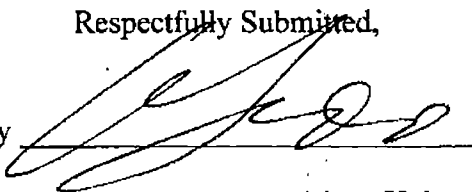
applicant.” Rule 71.1, SCRCP. Our supreme Court “encourage[s] trial courts in PCR cases to use the discretion [the Supreme Court] grant[s] them on procedural matters to find reasonable ways—within the flexibility of our Rules—to reach the merits of substantial issues.” *Mangal v. State*, No. 2016-000610, 2017 WL 4583310, at \*7 (S.C.S.Ct. July 19, 2017). *And see Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016) (vacating order of dismissal in capital PCR case because the Circuit Court abused its discretion in denying defendant’s second motion for additional time to investigate PCR claims).

This Court, therefore, should deny the State’s motion for summary judgement and grant Mr. Bryant’s motion to amend the scheduling order.

IT IS SO MOVED.

Respectfully Submitted,

By



E. Charles Grose, Jr.  
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October 24, 2017

*Attorneys for Stephen Cory Bryant*

THE STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF SUMTER )  
 )  
Stephen Cory Bryant, SCDC # 5252 )  
 )  
Applicant )  
 )  
vs. )  
 )  
State of South Carolina )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

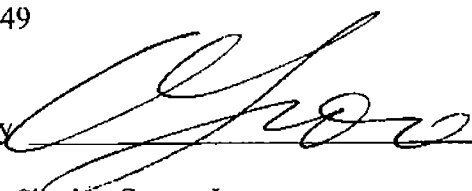
Case No. 2016-CP-43-00828

RECORDED  
2017 OCT 26 PM 12:00  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By

  
E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646  
(864) 538-4466

October 24, 2017  
Greenwood, South Carolina

State of South Carolina )

County of York )

AFFIDAVIT of Caroline Everington, Ph.D.

1. My name is Caroline Everington. I am a Professor Emeritus from Winthrop University in Rock Hill South Carolina. I have PhD in Special Education from the University of New Mexico in Albuquerque, New Mexico, with a concentration in intellectual disabilities; a Masters of Science in Special Education from Peabody College at Vanderbilt University in Nashville Tennessee, with a concentration in intellectual disabilities and behavior analysis; and a Bachelors of Science with Honors in Elementary and Special Education, also from Peabody College.
2. I have spent my entire career focused on intellectual disabilities. Over a thirty year span in higher education, I have taught numerous courses addressing intellectual disabilities to graduate and undergraduate students. I have authored a textbook and twenty three articles/book chapters addressing intellectual disabilities and special needs populations, nineteen of which specifically address intellectual disabilities in the context of the criminal justice system. I am the primary author of the CAST-MR (*Competence Assessment for Standing Trial for Defendants with Mental Retardation*), which was the first specific instrument developed to assess competency to stand trial of criminal defendants with intellectual disabilities and is widely used by forensic evaluators in the United States.
3. For the past twenty-five years, I have been professionally engaged in assessing the role of mental health professionals in criminal cases, particularly with regards to intellectual disabilities. I have focused specially on intellectual disability assessments conducted in

relation to the US Supreme Court ruling in *Atkins V. Virginia*, I have given numerous presentations at national professional conferences on this topic as well as conducted training sessions for psychologists and mental health professionals. I am currently a member of American Psychological Association Division 33 Committee on Intellectual Disabilities and the Death Penalty.

4. I currently hold membership in the American Association on Developmental and Intellectual Disabilities (AAIDD), American Psychological Association (APA), and The American Psychology and Law Society (AP-LS). I have held national office in AAIDD, serving as President of the Legal Process and Advocacy Division and a member of the Legislative and Social Issues Committee. In 2014, I was awarded Fellow status by AAIDD for my meritorious contributions to the field of intellectual disabilities.
5. I have served as an expert witness in intellectual disabilities in death penalty cases for over 25 years. A copy of my CV is attached
6. I have been requested by Mr. Stephen Cory Bryant's defense counsel to supply my preliminary findings regarding Mr. Bryant's adaptive behavior. To date, I have conducted the following: (a) reviewed records from K-12 schools Mr. Bryant attended, Department of Juvenile Justice, South Carolina Department of Corrections and depositions of Horry County School District former teachers; (b) interviewed Mr. Bryant and administered assessments; and (c) interviewed the following family members of the defendant: Shirley Freeman, paternal grandmother, Catherine Bryant, mother, and Terry Lee Bryant Calder, aunt.

7. *Intellectual Disability: Definition, Classification, and Systems of Supports* published by the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2010 defines intellectual disability (mental retardation) as follows: "Intellectual disability is characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. The disability originates before age 18." (p.1)

The *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition*, (DSM-5) (2013)

of the American Psychiatric Association defines intellectual disability as follows:

"Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in the conceptual, social, and practical domains." (p. 33)

8. The inclusion of adaptive behavior as a criterion in defining intellectual disability has been a component of the official American Association on Mental Retardation (now AAIDD) definition for over 50 years (Switzky & Greenspan, 2006). It has been long believed that intelligence scores alone do not provide a complete picture of an individual's functioning. That is, they do not provide a measurement of a person's social and practical skills nor his/her application of learned academic skills necessary for independent functioning (Schalock, 1999). The American Association on Mental Retardation (AAMR) (2002) manual defines adaptive behavior as the "conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." (p. 33). The construct of adaptive behavior spans a wide variety of skills

that enable an individual to meet the expectations of independent functioning for his/her age group.

9. Adaptive behavior is typically assessed through the use of comprehensive, standardized measures of adaptive behavior that are normed on a representative sample of the general population (AAIDD, 2010, p. 49). Information for this type of assessment is obtained through interviews with persons who have known the defendant over a period of time and across settings. Assessment information is triangulated with (a) evidence obtained through a review of the individual's educational, medical, and psychological records as well as social histories and other records and (b) interview and testing of the defendant (AAIDD, 2012). As noted by AAIDD (2010) and AAMR (2002), the assessment of adaptive behavior is based on the person's typical (not maximum) performance, and adaptive behavior should be documented within the context of the community and cultural environment typical of the person's peers. AAIDD defines significant limitations in adaptive behavior as performance on an adaptive behavior measure that is at least two standard deviations below the mean in one of the three adaptive categories – conceptual, social, or practical, or an overall score that is at least two standard deviations below the mean.
10. An accepted comprehensive, measure of adaptive behavior is the *Adaptive Behavior Assessment System, Third Edition (ABAS-3)* (2015). The ABAS-3 is a comprehensive, norm-referenced assessment of adaptive skills needed to effectively and independently care for oneself, respond to others, and meet environmental demands at home, school, work, and in the community, (ABAS-3 Manual, p1). The ABAS-3 contains 11 subtests



Communication, Functional Academics, Self-Direction, Leisure, Social, Community Use, Home Living, Health and Safety, Self-Care, Motor, and Work. The Work subtest is only administered if the individual has sustained employment. In Mr. Bryant's case, it was not administered as he had no sustained employment. In the final scoring, the results from the ABAS-subtests are consolidated to obtain standard scores in conceptual, social, and practical domains, thus providing information for AAIDD 2010 and DSM-5 (2013) definitions.

11. To determine Mr. Bryant's adaptive functioning, three individuals who have known Mr. Bryant in different settings over a period of time were interviewed separately on July 8, 2017. Catherine Bryant, defendant's mother; Shirley Freeman, defendant's grandmother; and Terry Lee Bryant Calder, aunt. The use of two or more respondents provides more comprehensive information. *The Adaptive Behavior Assessment System, Third Edition (ABAS-3)* was administered to his mother and grandmother separately. Because Mr. Bryant's grandmother had the most contact with Mr. Bryant when he lived in Myrtle Beach as a juvenile, ABAS-3 scores were calculated using defendant's age (14) at that time. Her answers reflect her observations during times that he stayed with them. The defendant's mother had contact with Mr. Bryant as an adult and scores were calculated using his age at the time of incarceration, 23. The defendant's aunt provided additional adaptive information.
12. It should be noted that additional interviews on adaptive behavior with former teachers and others are planned to be conducted in the future.

13. ABAS-3 results meet the AAIDD definition of significant limitations in adaptive behavior as the standard scores in one of the three adaptive categories –conceptual, social, or practical--and an overall score fall at least two standard deviations below the mean (approximately 70 or below). For the rating at age 23, scores in all three categories as well as the overall score are not only are two standard deviations below the mean but also fall below the first percentile: General Composite (Overall) 53, Conceptual 54, Social 61, and Practical 56. For age 14, scores in two areas (Conceptual and Social) and the overall score fall two standard deviations below the mean: General Composite 70, Conceptual 70, Social 59, and Practical 81. It should be noted that respondent ratings were very similar between the two raters. The results are different due to the higher expectations for an adult. In other words, while Mr. Bryant had some practical skills at age 14, he did not advance to more complex skills of independent adult functioning.
14. Mr. Bryant was interviewed for 3 hours 45 minutes on May 31, 2017 at Lieber Correctional facility. During the interview, information was gathered from Mr. Bryant on school history, employment, community and independent living, social, and communication skills. The following tests were administered: *Test of Adolescent and Adult Language—Fourth Edition (TOAL-4)*, *The Independent Living Scales (ILS)*, and the Math Computation subtest of *The Wide Range Achievement Test, Fourth Edition (WRAT4)*.
15. Important adaptive skill areas in the conceptual domain are language and communication. Language skills are important not only for successful community functioning, but are also highly correlated with intellectual functioning. To gain

Information on Mr. Bryant's language abilities, the *Test of Adolescent and Adult Language—Fourth Edition (TOAL-4)* was administered. Mr. Bryant received the following composite standard scores General Language 59, Spoken Language 67, and Written Language, 60. All scores are two standard deviations below the mean and fall below the first percentile for an adult.

16. These results indicate that while he may have some surface-level conversational ability, he has significant deficits in understanding and processing language, particularly when the information is grammatically or syntactically complex. His understanding of semantics (word meanings) is very limited and his writing ability is very poor. The ABAS-3 scores (both at age 14 and 23) in the Social Domain show that this language deficit is apparent in everyday life. He has difficulty in comprehension, understanding complex instructions, and relaying complex material with accuracy.
17. To gather additional information on Mr. Bryant's functional application of academic skills (use of academics for independence) the *Independent Living Scales (ILS)* was administered. The ILS does not assess actual performance of those skills and, therefore, is not intended as a definitive measure of adaptive skills. It does provide some information about what the individual knows about topics such as managing money and home/community living. On this instrument, Mr. Bryant received a Full Scale Standard Score of 55, which is in the intellectual disability range.
18. Because Mr. Bryant exhibited some calculation problems during the administration of the ILS, he was given the Math Computation subtest of the WRAT-4. Mr. Bryant's

mathematic skills are at a 4.5 grade level. He received a standard score of 74 on this subtest, which falls in the intellectual disability range.

19. School records show evidence of adaptive deficits in the social and conceptual domains.

He repeated first grade. He was in special education resource and self-contained classes. Academic reports indicate a range of performance. For example, Horry County School District 19996-97 IEP Present Level of Performance at age 15 indicates that he was functioning 3-4 years below grade level. Former Horry County teachers provide some insight into his academic difficulties. Former 5<sup>th</sup> grade teacher Donna Solomon Garrell describes him as "sweet and slow" Fifth grade teacher Joann Poore remembers that he could not do 5<sup>th</sup> grade work. Both teachers indicated that they were required to pass (failing) students to the next grade regardless of their performance.

20. Mr. Bryant was labeled as Emotionally Disturbed and ADHD during his school years.

The fact that he did not receive a diagnosis of intellectual disability during the developmental period does not rule out the presence of a developmental delay. It is very common for persons in the mild intellectual disability range to go undetected, especially when there is a presenting behavioral issue as was the case with Mr. Bryant. From the perspective of the school, the label is less important than the services.

21. Persons with Intellectual disabilities often carry a dual diagnosis of intellectual disability and a comorbid behavioral, emotional and/or psychiatric disorder (Bradley et al, 2007).

In addition, having a diagnosis of ADHD does not rule out intellectual disability.

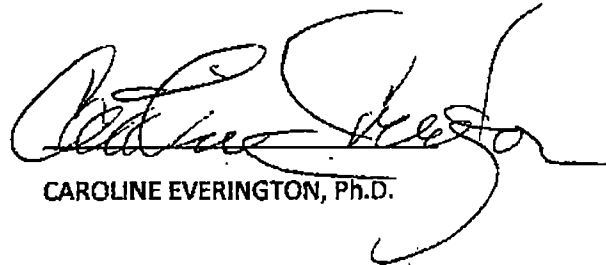
22. Interviews conducted with Mr. Bryant and family members describe behaviors

consistent with intellectual disability (Siperstein & Collins, 2015). His grandmother

described him as "slower to catch on." His aunt said when explaining something to him, "you had to tell him things several times." He is described as a loner with few friends and as having difficulty with social interactions and using good judgment in social situations. His mother indicated that he was unable to live on his own--"He can't make day to day decisions." He never lived independently nor acquired necessary skills for independent living.

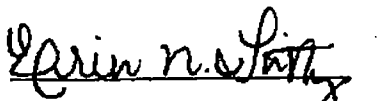
23. In summary, based on my review of records, results of testing administered, and analysis of information gathered from interviews, it is my preliminary opinion, that Mr. Bryant displays significant limitations in adaptive behavior as set forth under AAIDD and DSM-5.

The foregoing 23 paragraphs are true and accurate to the best of my knowledge and to a reasonable degree of scientific certainty.

  
CAROLINE EVERINGTON, Ph.D.

Sworn to and subscribe before me

This 21 day of October,  
2017.

  
Notary Public for South Carolina

My commission expires: 01/01/2026



## **CAROLINE EVERINGTON, PhD, FAAIDD**

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940 Pinecrest Drive  
Rock Hill, SC 29732  
(803) 322-7340

### **Present Position**

**Professor Emeritus**  
Winthrop University, Rock Hill, SC

### **PROFESSIONAL PREPARATION**

**Ph.D., Special Education, Minor: Educational Administration, 1987**  
University of New Mexico, Albuquerque, NM

**M.S., Special Education, 1977**  
Peabody College, Vanderbilt University, Nashville, TN  
Concentration: Mental Retardation and Behavior Analysis  
Administrative Internship: Tennessee Department of Mental Health and Mental Retardation.

**B.S., with Honors, Dual Major: Elementary and Special Education, 1976**  
Peabody College, Vanderbilt University, Nashville, TN  
Elementary concentration: Reading and Language Arts  
Special Education concentration: Learning Disabilities

### **EXPERIENCE**

**Professor, Associate Dean, 2000 to 2016 (retired 2016)**  
Riley College of Education, Winthrop University, Rock Hill, SC

**Associate Professor, 1993-2000**  
Department of Educational Psychology, Miami University, Oxford, OH

**Coordinator, Special Education Program, 1993-96; 1998-2000**  
Department of Educational Psychology, Miami University, Oxford, OH

**Assistant Professor, 1987-1992**  
Department of Educational Psychology, Miami University, Oxford, OH

**Project Assistant, 1986-1987**  
Teachers/Job Developers/Job Coaches in Special Education University of New Mexico, Albuquerque, NM

**Instructor, 1985-1986**  
Department of Special Education, University of New Mexico, Albuquerque, NM

**Research Associate, 1984-1985**  
Department of Special Education, University of New Mexico, Albuquerque, NM  
Educational research for two U.S. Supreme Court Amicus briefs,  
*Bowen v. American Hospital Association*, & *City of Cleburne, TX v. Cleburne Living Center*.

**Practicum Supervisor, 1984-1985**  
Department of Special Education, University of New Mexico, Albuquerque, NM

**Methods/Materials and Behavior Management Specialist, 1981-1984**  
Students with intellectual disabilities and autism spectrum disorders  
Los Lunas Hospital & Training School, Los Lunas, NM

**University of New Mexico Extension Instructor. 1983**

University of New Mexico Division of Continuing Education, Albuquerque, NM.

**Classroom Teacher, 1977-1981**

Los Lunas Hospital and Training School, Los Lunas NM, Adolescents with intellectual disabilities and autism spectrum disorders.

**Conference Coordinator/Facilitator 1978**

Native American Family/Rehabilitation Conference, Albuquerque, NM

**Research Assistant 1977**

Peabody College, Vanderbilt University, Nashville, TN.

Project conducted in public schools on increasing social interaction for students with intellectual disabilities and autism spectrum disorders.

**Peabody College Practicum Supervisor, 1977**

Peabody College of Vanderbilt University, Nashville, TN.

SE 331, *Educational Procedures for the Severely Handicapped*.

**PUBLICATIONS****Books**

Hamill, L. & Everington, C. (2002). *Teaching students with moderate to severe disabilities: An applied approach for inclusive environments*. Upper Saddle River, NJ: Merrill, Prentice Hall

**Journal Articles and Book Chapters**

Everington, C., Macvaugh, G., Salekin, K., & Derning T. (2015) Challenges in assessment of adaptive behavior. In E. Polloway, (Ed) *The Death Penalty and Intellectual Disability*. Washington DC: American Association on Intellectual and Developmental Disabilities.

Salekin, K., & Everington, C. (2015) Competence to stand trial and Miranda. In E. Polloway (Ed) *The Death Penalty and Intellectual Disability*. Washington DC: American Association on Intellectual and Developmental Disabilities

Everington, C. (2014). Challenges in presenting intellectual disabilities to judge and jury. *William & Mary Bill of Rights Journal*, 23, 467-485.

Everington, C. & Olley, J. G. (2008). Implications of Atkins v. Virginia: Issues in defining and diagnosing mental retardation. *Journal of Forensic Psychology Practice*, 8, 1-23.

Everington, C., Notario-Smull, H., & Horton, M. (2007). Can defendants with mental retardation successfully fake their performance on a test of competence to stand trial? *Behavioral Sciences and the Law*, 25, 545-560.

Everington, C. & Luckasson, R. (2007). Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR). *Encyclopedia of Psychology and Law*.

Fulero, S. M. & Everington, C. (2004). Mental retardation, competency to waive Miranda rights, and false confessions. In G. D. Lassiter (Ed). *Interrogations, Confessions, and Entrapment*. New York: Kluwer Academic/Plenum Publishers.

Fulero, S. M. & Everington, C. (2004). Assessing the capacity of persons with mental retardation to waive *Miranda* rights: A jurisprudent psychology perspective. *Law and Contemporary Problems*, 28, 53-69

Everington, C., DeBerge, K., & Mauer, D. (2001). The relationship between language skills and competence to stand trial abilities in persons with mental retardation. *The Journal of Psychiatry and Law*, 28, 475-492.

Poetter, T. S., Everington, C., & Jetty, R. (2001). Democratic curriculum deliberations in action: Preparing school leaders for

inclusion. *The Journal of Curriculum and Supervision*, 16 (2), 162-182.

Everington, C. & Graham, P. (2001). What do we know about national board certified teachers in South Carolina? *Teachers as Leaders*, 3(1), 22-24.

Everington, C. & Fulero, S. (1999). Competence to confess: Measuring understanding and suggestibility in defendants with mental retardation. *Mental Retardation*, 37, 212-220.

Everington, C. & Keyes, D. (1999). Diagnosing mental retardation in criminal proceedings: The critical importance of adaptive behavior. *Forensic Examiner*, 8 (7/8), 31-34.

Stevens, B., Everington, C., & Kozar-Kocsis, S., (1999). Inclusion: What teachers are doing to accommodate for special needs students. *The Electronic Journal of Inclusive Education*, 1(3).

Everington, C. & Stevens, B. (1999). Teacher attitudes, felt competence, and need of support for implementing inclusive educational programs. *Psychological Reports*, 85, 331-338

Everington, C., Hamill, L.B., & Lubic, B. (1996). Restructuring teacher education for inclusion, *Contemporary Education*, LXVII, 52-56.

Fulero, S. & Everington, C. (1995). Assessing competency to waive Miranda Rights in defendants with mental retardation, *Law and Human Behavior*, 19, 533-543.

Everington, C. & Dunn, C. (1995). A second validation study of the competence assessment for standing trial for defendants with mental retardation. *Criminal Justice and Behavior*, 22, 44-59.

Bergen, D. & Everington, C. (1994). Adapting assessment methods for persons with severe disabilities and environmental/emotional abuse. (216-234) In D. Bergen, *Assessment methods for infants and toddlers: Transdisciplinary team perspectives*. Teacher's College Press.

Everington, C. & Stevenson, T. (1994, Spring). A giving experience: The use of community service for training community living skills and promoting integration with individuals with severe disabilities. *Teaching Exceptional Children*. 56-59.

Everington, C. (1990). The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A validation study. *Criminal Justice and Behavior*, 17, 147-168.

Everington, C. & Luckasson, R. (1989). Addressing the needs of the criminal defendant with mental retardation: The special educator as a resource to the criminal justice system. *Education and Training in Mental Retardation*, 24, 193-200.

Everington, C. (1989). The CAST-MR: A resource for forensic evaluators and attorneys for determining competence to stand trial in criminal defendants with mental retardation. *The Advocate*. 11, (4) 38-39.

Everington, C. (1989, fall/winter). Demographic variables associated with competence to stand trial referral and evaluation of criminal defendants with mental retardation. *The Journal of Psychiatry and Law* 627-640.

Spillman, D. M. & Everington, C. (1989). Somatotypes revisited: Has the media changed our perception of the female body image? *Psychological Reports*, 64, 887-890.

### Tests

Everington, C. & Luckasson, R. (1992). *The competence assessment for standing trial for defendants with mental retardation (CAST-MR)*. Worthington, OH: IDS.

Everington, C. (1982). *The Los Lunas curricular system: A criterion-referenced assessment for severely/profoundly handicapped* (4th ed.). Los Lunas, NM: State of New Mexico

Everington, C., Jones, S., Heckert, S., Thomas, C., & Worley, L. (1981). *The Los Lunas curricular system: A*



*criterion-referenced assessment for developmentally disabled individuals.* (3rd ed.). Los Lunas, NM: State of New Mexico.

Everington, C., Jones, S., Heckert, S., & Thomas, C. (1980). *The Los Lunas curricular system: A criterion-referenced assessment for developmentally disabled individuals* (2nd ed.). Los Lunas, NM, State of New Mexico.

Everington, C., & Pierce, T. (1979). *The Los Lunas educational assessment for the severely and profoundly handicapped.* Los Lunas, NM: State of New Mexico.

### **Training Manuals**

Feinstein, C., Everington, C., Derning, T., & Keyes, D. (2002) *Equal justice for people with mental retardation: Individuals with mental retardation in the criminal justice system: A training guide for psychologists.* Temple University, Philadelphia, PA: Institute on Disabilities.

### **HONORS/FELLOWSHIPS**

Presidential Citation for Service to the Community, Winthrop University, April 24, 2012

Presidential Citation for Service to the Community, Winthrop University, April 27, 2010

Community Service Award, Recognition of Exceptional Service, Winthrop University, April 28, 2009.

Harvard Management Development Program, Harvard University, June 2007

Presidential Citation, Recognition of Exceptional Service, Winthrop University, April 28, 2004

Fellow, American Association on Intellectual and Developmental Disabilities (FAAIDD), 2014

Faculty member, National Academy for Equal Justice, 2002-2004 (invited position)

Fellow, American College of Forensic Examiners Institute, 1999-2019

Diplomate, American College of Forensic Examiners Institute, 1996-2019

Certificate of Appreciation for Outstanding Teaching and Academic Work, Alpha Delta Phi and Alpha Xi Delta, Miami University, 1998

Fulbright-Hays Group Study Abroad Award, Brazil, 1990.

Summer Research Appointment and Research Graduate Assistant award, Miami University Faculty Research Committee, 1989.

Certificate of Honor, Passage of Doctoral Comprehensive Examinations with Distinction, 1988.

Honorable Mention Award for Outstanding Teaching Assistant, University of New Mexico, 1986  
(University-wide competition)

Graduate Research Fellowship, National Institute of Justice, 1986-1987.

Challenge Assistantship Award, University of New Mexico, 1986-1987.

Legislatively Endowed Graduate Fellowship, University of New Mexico, 1985-1986.

Graduate Presidential Scholarship, University of New Mexico, 1984-1985.

Exemplary Performance Award, Department of Health and Environment of the State of New Mexico, for outstanding contributions, 1982

Master's Fellowship Award, Bureau of Education of Handicapped, George Peabody College, 1976-77.

Phi Kappa Phi Honors Society, 1986.

Kappa Delta Pi International Honors Society, 1976.

Kappa Delta Epsilon Honors Society, 1976.

## GRANTS

Everington, C. Leach, D., & Graham, B. (2010). *Winthrop transition to college for students with intellectual disabilities*. South Carolina Department of Education, Office of Exceptional Children, Funded \$50,000

Everington, C., and Martin-Delaney, A., (2009), *Winthrop college transition project for students with intellectual disabilities*. College Transition Connection. Funded, \$155,000.

Everington, C. (2003). *Assessment of malingering of competence to stand trial in defendants with mental retardation*, Winthrop Research Council Award, Funded, \$4,118.

Everington, C., & Hawkins, A. (1999) *School-aged children's understanding of the criminal justice system: Implications for competence to stand trial*. Miami University SEAP Research Committee, Funded, \$725.

Bergen, D., Jantzen, A., Everington, C., Angelo, M., Badiali, B. (1997). *Preparing preservice and inservice school administrators for inclusive practices: A collaborative model*. State Superintendent's Task Force on Special Education, Ohio Department of Education. Funded, \$24,521.

Everington, C. (1994). *Preservice preparation for inclusive classrooms*. State Superintendent's Task Force on Special Education, Ohio Department of Education, Funded, \$20,000.

Everington, Ganschow, and Badiali (1994) *Evaluation of interdisciplinary teaming as an approach to special education inclusion*. Miami University SEAP Research Committee, Funded \$470.

Everington & Fulero (1993) *Competence to confess in defendants with mental retardation*. SEAP Research Committee, Miami University, Funded, \$530.

Everington, C. (1992) *Training of competence to stand trial in defendants with mental retardation: A comparison of treatment approaches*. Miami University SEAP Research Committee, Funded, \$306.

Everington, C. (1988). *Assessment of competence to stand trial in criminal defendants with mental retardation*. Miami University Grant to Promote Research and Scholarship. Funded, \$3,200.

Everington, C. (1987). *A validation study of the competence assessment for standing trial for defendants with mental retardation (CAST-MR)*. Miami University Research Challenge Program, Funded, \$1,950.

Blalock, G., & Everington, C. (1986). *Special education paraprofessional training: Preschool and transition*. U.S. Department of Education, Personnel Preparation program, Funded, \$90,000.

Everington, C., Luckasson, R., & Harris, M. (1986). *Competence evaluation for mentally retarded defendants*. The National Institute of Justice, Funded, \$11,000.

Wirth, P., Worley, L., Jones, S., & Everington, C. (1981). *Handicapped educational learning programs: Project H.E.L.P.* E.S.E.A. Title IV-C, Funded \$27,000.

## CONSULTATIONS

**Defendants with Intellectual Disabilities in the Criminal Justice System 1991 to present**  
Expert testimony, educational assessment, and consultation on intellectual disabilities

**Behavioral Intervention Consultation 1989-1994**

Montgomery County Board of Mental Retardation and Developmental Disabilities, Dayton, OH, Consultation on interventions for individuals with severe maladaptive behavior.

**Butler County Integrated Dependent Care and Leisure Time Project 1991**

Butler County Board of Mental Retardation and Developmental Disabilities

**Program Consultation and Staff Training 1987**

Association for Retarded Citizens of Albuquerque, NM.  
adolescents with intellectual disabilities and behavioral difficulties.

**Program Consultation 1985**

Clovis Public Schools, Clovis, NM  
Curriculum assistance for students with intellectual disabilities, autism, and behavioral difficulties.

**Curriculum Development 1985**

Albuquerque Public Schools, Albuquerque, NM

**Curriculum Consultant 1984-85**

Wyandotte County Special Education Cooperative, Kansas City, KS. Assisted in development of *The Curriculum Resource Book for the Severely and Moderately Handicapped*.

**Grant Writer 1983**

Association of California Learning Centers, Los Angeles, CA.

**SELECTED REFEREED PRESENTATIONS**

- Leach, D. & Everington, C. (2013, June). *Outcomes of a postsecondary program serving students with intellectual disabilities*. Poster session at the annual meeting of AAIDD, Pittsburgh, PA.
- Everington, C. & Johnson, L. (2013, October). *Approaches and issues in assessment of dispositions*. A presentation at the annual meeting of the National Network for Educational Renewal, Albuquerque, NM.
- Everington, C. & Martin-Delaney, A. (2012, July). *A college program for persons with intellectual disabilities: Participant outcomes and campus community impact*. International Association for the Scientific Study of Intellectual Disabilities (IASSID) World Congress, Halifax, Nova Scotia.
- Everington, C., & Leach, D., (2010, June). *A transition to college project for students with intellectual disabilities*, American Association on Intellectual and Developmental Disabilities (AAIDD), Providence, RI.
- Everington, C. (2009, February). Using a 3<sup>rd</sup> party electronic data management system. In G. Schroeder (Facilitator), *ISPE Symposium 1, Uneasy alliance: The unit and its 3<sup>rd</sup> party electronic portfolio system*, American Association of Colleges of Teacher Education (AACTE), Chicago, IL.
- Everington, C. Johnson, L., & Green, S. (2008, February). Impact of work samples for assessment of P-12 learning and candidate effectiveness. In G. Schroeder (Facilitator), *Approaching the data quality campaign: The challenge of P-12 data*. Symposium, American Association of Colleges of Teacher Education (AACTE), New Orleans, LA.
- Everington, C. & Green, S. (2007, September). *Using work samples to improve teacher education programs: A five-year longitudinal analysis*. (NCATE invited presentation). Accreditation, Accountability, and Quality: An Institutional Orientation and Professional Development Conference, AACTE/NCATE, Arlington, VA.
- Graham, P. & Everington, C. (2007, September). *Designing and implementing a unit assessment system*. (NCATE invited presentation) Accreditation, Accountability, and Quality: An Institutional Orientation and Professional Development Conference, AACTE/NCATE, Arlington, VA.
- Olley, J. G. & Everington, C. (2007, March) *The measurement of adaptive behavior in Atkins cases*. Off the Witness Stand: Using

Psychology in the Practice of Justice conference, John Jay College of Criminal Justice, CUNY, New York, NY.

- Keyes, D. W. & Everington, C. (2006, May). *Determining the attitudes of regular education professionals toward inclusion of children with mental disabilities in the regular elementary classroom*. The International Summit for the Alliance on Social Inclusion. Montreal, Canada.
- Everington, C. (2006, March) *Assessment of adaptive functioning in death row inmates*. American Psychology and Law Society Annual Conference, St. Petersburg, FL.
- Graham, P. & Everington, C. (2006, January). Winthrop University unit assessment system. In the symposium: *The Data System Imperative: Eight Institutional Scenarios of Successful Information Systems Implementation*. AACTE Annual Conference. Washington, DC.
- Everington, C. & Notario-Smull, H. (2005, March). *Can defendants with mental retardation successfully malingering on at test of competence to stand trial?* American Psychology and Law Society Annual Conference, San Diego, CA.
- Everington, C. & Notario-Smull, H. (2004, June). *Malingering incompetence to stand trial in defendants with intellectual disabilities*. International Association for the Scientific Study of Intellectual Disability 12<sup>th</sup> World Congress, Montpellier, France.
- Everington, C. & Olley, G. (2004, March) *An analysis of forensic psychological evaluations in capital cases: Has Atkins made a difference?* American Psychology and Law Society Annual Conference, Phoenix, AZ.
- Everington, C. & Keyes, (2003, April). Importance of diagnostic accuracy post Atkins. Symposium presentation, *Mental Retardation and the Law: Atkins v. Virginia*. American Psychological Association Annual Conference, Toronto, Canada.
- Dover, W. & Everington, C. (2003, November). *One university's model: The relationship between the unit and special education program area assessment plans*. Council for Exceptional Children, Teacher Education Division (CEC-TED), Biloxi, MS.
- Everington, C. & Hawkins, A. (2002). *Competence to stand trial for juveniles*. American Association on Mental Retardation (AAMR) national conference, Orlando, FL.
- Everington, C. & Hamill, L. (2001). *Applied curriculum: An approach for ALL students in inclusive educational programs*. Council on Exceptional Children national conference. Kansas City, KS.
- Everington, C. & Hawkins, A. (2000). *Competence to stand trial for juveniles: Implications for adolescents and youth with mental retardation*. International Association for the Scientific Study of Intellectual Disabilities 11<sup>th</sup> World Congress, Seattle, WA.
- Everington, C. & DeBerge, K. (1999). *The relationship between language ability and competence to stand trial in persons with mental retardation*. Poster session, American Association on Mental Retardation national conference, New Orleans, LA.
- Hamill, L. & Everington, C. (1998). *Inclusion and reform in Ohio: What some local educators are saying and doing*. American Association on Mental Retardation (AAMR) National conference, San Diego, CA.
- Everington, C. & Keyes, D. (1998). *Diagnosing mental retardation in criminal proceedings: The critical importance of documenting adaptive behavior*. American Psychology and Law Biennial Conference, Redondo Beach, CA.
- Keyes, D., Edwards, W.J., Culter, S., Everington, C., (1997). *Life and death: Death penalty issues in mental retardation*. Panel Presentation, American Association on Mental Retardation Annual Conference, New York, NY.
- Everington, C. (1996). *Preservice teacher training for inclusion: What do we need? How can we do it?* American Association on Mental Retardation Annual Conference, San Antonio, TX.
- Everington, C. (1996). *Confessions and defendants with mental retardation: Measuring suggestibility and understanding of Miranda*. American Association on Mental Retardation Annual Conference, San Antonio, TX.

- Everington, C. & Fulero, S. (1996). *Competence to confess: Measuring understanding and suggestibility in defendants with mental retardation*. American Psychology and Law Society Biennial conference, Hilton Head, SC.
- Everington, C. (1995). *Inclusion at the university: Changes needed in preservice preparation*. American Association for Teaching and Curriculum Second Annual Conference, Atlanta, GA.
- Everington, (1995) *Session chair: Issues for offenders with mental disabilities*. American Psychological Association National Conference, New York, NY.
- Everington, C. & Fulero, S. (1994, October). *Understanding Miranda warnings: A critical issue for adults with mental retardation*. Professional Association on Mental Retardation Annual Conference, Columbus, OH.
- Everington, C. Renner, V. & Smith, J. (1994). *Teacher attitudes and perceived competencies regarding special education inclusion*. Ohio Federation of the Council on Exceptional Children Annual Conference.
- Rylander, J. & Everington, C. (1993). *Assessment for older adults with mental retardation*. Professional Association on Mental Retardation Annual Conference. Columbus, OH.
- Fulero, S., Everington, C., & Keyes, D. (1993). *Symposium: Are they or aren't they? Assessing competencies in defendants with mental retardation*. American Psychological Association (APA) annual conference. Toronto, Canada.
- Everington, C., Wulff, K., & Fulero, S. (1992). *Issues in training competence to stand trial in offenders with mental retardation*. State Mental Health Forensic Directors National Conference, Portland, OR.
- Everington, C. (1992). *A Comparison of leisure pursuits of school-aged children with severe disabilities and their nonhandicapped peers*. American Association on Mental Retardation Annual Conference, New Orleans, LA.
- Everington, C. (1992). *Assessment of competence to stand trial in individuals with mental retardation: A second validation study of the CAST-MR*. American Association on Mental Retardation Annual Conference, New Orleans, LA.
- Valerius, F. Everington, C., Creedon, B. (1991). *Identifying integrated day care and leisure time needs and resources*. The Association for Severe Handicaps (TASH) annual conference, Washington, DC.
- Everington, C. (1991). *Issues facing developing nations in service delivery for persons with mental retardation: A focus on Brasil*. Symposium on International Developments in Mental Retardation. American Association on Mental Retardation annual conference, Washington, DC.
- Everington, C. (1990). *An examination of the relationship between experience with persons with mental retardation and attitudes among secondary students*. Poster Session, AAMR Annual Conference, Atlanta, GA.
- England, K. & Everington, C. (1990). *Simple group simulation activities for encouraging intellectual development in college students*. Second Annual Conference on College Teaching, Lake Arrowhead, CA.
- Everington, C. (1989). *Demographic variables associated with criminal defendants with mental retardation referred for evaluation of competence to stand trial*. American Association on Mental Retardation Annual Conference, Chicago, IL.
- Everington, C. (1988). *Competence to stand trial: A critical issue for persons with mild and severe handicaps*. The Association for Persons with Severe Handicaps (TASH) Annual Conference, Washington, DC.
- Everington, C. (1988) *Measuring competence to stand trial in criminal defendants with mental retardation*. American Association on Mental Retardation (AAMR) National Conference, Washington, DC.
- Everington, C. (1987). *Measuring competence to stand trial*. American Association on Mental Deficiency Annual Conference, Los Angeles, CA.
- Everington, C., & Luckasson, R. (1987). *Criminal defendants with mental retardation: The role of the special educator in the*

*criminal justice system*. The Council of Exceptional Children Annual Conference, Chicago, IL.

- Luckasson, R., Ellis, J., & Everington, C. (1986). *How should the decision of where people with mental retardation live be made?* TASH, Annual Conference, San Francisco, CA.
- Everington, C., & Ringgold, H. (1982). *Instructional programming and curriculum development for severely/profoundly/multiply handicapped adolescents and adults*. The Association for Persons with Severe Handicaps, Ninth Annual Conference, Denver, CO.
- Everington, C., Chairperson. (1981). *Computer assisted curricular assessment systems for the severely and profoundly handicapped: Project descriptions and a microcomputer demonstration*. The Association for Persons with Severe Handicaps, Eighth Annual Conference, New York, NY.
- Everington, C.T., Jones, S., & Worley, L. (1981, October). *Handicapped educational learning programs (H.E.L.P.): A criterion-referenced assessment and data aggregation systems for the severely/profoundly handicapped*. A.A.C.L.D.-C.F.C. Conference, Albuquerque, NM
- Brown, G., Everington, C., & Worley, L. (1981). *L.L.C.S.classification and project H.E.L.P.* The New Mexico State Chapter A.A.M.D.and L.L.H.& T.S. Workshop, Los Lunas, NM.
- Everington, C., Jones, S., & Worley, L. (1981). *Programming for the severely handicapped: An overview of current assessments and curricula*. Los Lunas Hospital and Training School Annual Spring Conference, Los Lunas, NM.
- Everington, C., & Mochel, F. (1980). *A functional classroom approach for training beginning language through total communication with severely and profoundly retarded adolescents*. The Council on Exceptional Children Regional Spring Conference, Roswell, NM.
- Day, R., & Everington, C. (1977). *Using time delay stimulus transfer procedures to teach direction following and object discrimination with severely and profoundly retarded children*. Annual Convention of Midwestern Association of Behavior Analysis, Chicago, IL.

## INVITED PRESENTATIONS

- Everington, C. (2015, April) *Current trends and issues in special education in the United States*. Shanghai Far East School, Shanghai, China.
- Everington, C. (2015, April) *Teacher training in the United States*. Shanghai Far East School, Shanghai, China.
- Everington, C. (2014, March), The challenges of presenting intellectual disabilities to judges and juries. In J. Bellin, moderator, *Atkins on the Ground*. Presentation for *Atkins v. Virginia: A dozen Years Later: Report Card Symposia* sponsored by William and Mary Institute of Bill of Rights Law School and Cornell Law School, Williamsburg, VA.
- Everington, C. (2012, June). Session Moderator: *Atkins Sessions*, AAIDD (American Association on Intellectual and Developmental Disabilities) Conference, Charlotte, NC
- Everington, C. & Leach, D. (2010, October). Winthrop Transition to College project for students with intellectual disabilities. In M. Behrmann (Moderator), *Collaboration with Teacher Preparation Programs*, National State of the Art Conference on Postsecondary Education and Individuals with Developmental Disabilities. George Mason University, Fairfax, VA.
- Everington, C. & Green, S. (2007, September). *Using work samples to improve teacher education programs: A five-year Longitudinal analysis*. (NCATE invited presentation), Accreditation, Accountability, and Quality: An Institutional Orientation and Professional Development Conference, AACTE/NCATE, Arlington, VA.
- Graham, P. & Everington, C. (2007, September). *Designing and implementing a unit assessment system*. (NCATE invited presentation) Accreditation, Accountability, and Quality: An Institutional Orientation and Professional Development Conference, AACTE/NCATE, Arlington, VA.

- Everington, C. (2006, March). *Roundtable Discussion Atkins v. Virginia*. American Psychology and Law Society Annual Conference, St. Petersburg, FL
- Graham, P. & Everington, C. (2005, February). Winthrop University unit assessment system. In symposium: *NCATE accreditation systems*. (NCATE invited presentation). AACTE Annual Conference. Washington, DC.
- Everington, C. (2003, April) *Understanding competence issues and the defendant with mental retardation*. Lehigh and Northampton County ARC, Allentown, PA.
- Everington, C. (2002). *Diagnosing mental retardation: A critical criminal justice issue*. International Association for the Scientific Study of Intellectual Disability, Inaugural Conference of IASSID Europe, Dublin, Ireland.
- Everington, C. (2002) *Competence issues for defendants in the criminal justice system*. Partners in Justice III. Institute on Disabilities, Temple University.
- Everington, C. & Greenblatt, D. (2001) *Presenting and proving mental retardation*. Litigating Mental Retardation in Capital Cases Seminar, North Carolina Academy of Trial Lawyers, Raleigh, NC.
- Luckasson, R. & Everington, C. (2001). *Competence to stand trial for defendants with mental retardation*. Texas Association on Mental Retardation and Region V AAMR, Annual Convention, San Antonio, TX.
- Everington, C. & Schweid, R. (1999). *Criminal justice issues for defendants with mental retardation*. Working with Challenging Populations Conference sponsored by Ohio Department of Mental Health, Cambridge, OH.
- Everington, C. (1999). *Special education preparation for educational administration*. State Superintendent's Task Force on Special Education Annual Conference.
- Everington, C., (1998). *Inclusion: Incorporating ABA into the classroom environment*. Families for Effective Autism Treatment, Cincinnati, OH.
- Everington, C. (1998). *Competence to stand trial in defendants with mental retardation: Evaluation and restoration*. Ohio AAMR Annual conference, Columbus, OH.
- Everington, C. & Ganschow, L. (1995). *Preservice training for inclusion*. State Superintendent's Task Force on Special Education Annual Meeting. Columbus, OH.
- Everington, C. (1993). *Issues on competence for individuals with severe disabilities*. National Association of Social Workers, Cincinnati, OH.
- Everington, C. (1990). *Strategies for promoting integration of severely disabled into mainstream academic settings*. Ministerio da Educacao and Ministerio da Acao Social, Brasilia, Brasil.
- Everington, C. (1990). *Trends in service delivery for persons with severe disabilities in the United States*. Instituto de Helena Antipoff, Rio de Janeiro, Brasil.
- Everington, C. (1990). *Training strategies for individuals with severe disabilities*. Centro Educacao Especial, Belo Horizonte, Brasil.
- Everington, C. (1988). *Parental influence on the IEP*. Oxford Association for Children and Adults with Learning Disabilities, Oxford, OH.
- Everington, C. (1988). *Using the functional analysis approach for addressing maladaptive behavior*, Residential CRF, Connersville, IN.
- Everington, C. (1988). *Issues in competence to stand trial*. Oxford Rotary Club, Oxford, OH.

- Everington, C. (1986). *Baby doe and the US Supreme Court*. Association for Retarded Citizens Conference, Albuquerque, NM.
- Everington, C. (1985). *Behavior management in vocational settings*. Summer Institute: Transition of the Young Disabled Adult. Department of Special Education, University of New Mexico, Albuquerque, NM.
- Everington, C. (1985). *Practical approaches to program evaluation*. Protection & Advocacy Systems Conference, Albuquerque, NM.
- Everington, C. (1985). *The instructional component of the IEP*. Parent Training Representative Conference, Protection & Advocacy Systems for New Mexicans with Developmental Disabilities, Albuquerque, NM.
- Everington, C. (1985). *The individualized education plan*. University of New Mexico Law School.
- Everington, C. (1985). *Behavior management strategies for the classroom*. Esperanza Par Los Ninos., Albuquerque, NM.
- Everington, C., Worley, L., Nunn, D., & Leach, M. (1984). *Behavior management in the classroom: A continuum of approaches*. Deaf/Blind Outreach Spring Workshop. Los Lunas, NM
- Salzberg, C., Dy, E.B., & Everington, C. (1977). *A consultant model for training group home parents to program toward normalization*. Invited presentation, Georgia Retardation Center, Atlanta, GA.

## WORKSHOPS

- Everington, C. (2007). *Mental retardation: Issues in diagnosing mental retardation*. Oregon Federal Public Defender's Office and OCDLA, Death Penalty CLE, Portland, OR.
- Everington, C. & Stallings, E. (2005). *The use of data in higher education*. University of Nevada-Las Vegas Academic Leadership Faculty, Las Vegas, NV.
- Everington, C. (2001). *Issues in evaluation of competence to stand trial for defendants with mental retardation*. Teleconference training provided to forensic evaluators, Brooklyn Developmental Disabilities Services Office, Brooklyn, NY.
- Everington, C. (2000). *Equal justice: Individuals with mental retardation in the criminal justice system: A guide for psychologists*. Partners in Justice: A National Train-the Trainers Session, Washington DC.
- Everington, C. (1999). *Competency evaluations for individuals with mental retardation and developmental disabilities*. Ohio Department of Mental Retardation and Developmental Disabilities, Columbus Developmental Center, Columbus, OH.
- Everington, C. (1999). *Assessment of defendants with mental retardation*. CLE of the State Bar of New Mexico and Behavioral Health Services Division, New Mexico Department of Health, University of New Mexico Law School, Albuquerque, NM.
- Durning, T. & Everington, C. (1998). *Evaluation of defendants with mental retardation*. Sessions for Psychologists, Equal Justice for People with Mental Retardation Training Conference, Harrisburg, PA.
- Everington, C. (1991). *Issues relevant to the capital offender with mental retardation*. Ohio Death Penalty Seminar and Workshop, Columbus, OH.
- Everington, C. (1989). *Offenders with mental retardation: Assisting criminal justice personnel*. American Association on Mental Retardation Annual Conference, Chicago, IL.
- Everington, C. (1989). *Assessing criminal offenders with mental retardation: Strategies for the forensic evaluator*. Shawnee Forensic Center Annual Conference, Portsmouth OH.
- Everington, C. (1989). *Assessment of competence to stand trial in defendants with mental retardation*. South Carolina Department of Mental Retardation, Columbia, SC.
- Everington, C. (1987). *CAST-MR field test participation workshop*. Two-day workshop given to selected staff of: DDA Forensic



Evaluation, Baltimore, MD; Wisconsin Correctional Services, Milwaukee, WI; and Psychiatric Court Clinic, Cleveland, OH.

Everington, C. (1983, February). *The Los Lunas curricular system*. Three-day workshop presented to the staff of Lubbock State Hospital, Los Lunas Hospital and Training School, Los Lunas, NM.

Everington, C. (1982, September). *The Los Lunas curricular system*. Three-day inservice for participants in a national field test. Los Lunas Hospital and Training School, Los Lunas, NM.

Everington, C., Chavez, P., & Ringgold, H. (1982). *Data collection systems for severely handicapped students*. Los Lunas, Hospital and Training School Annual Spring Workshop, Los Lunas, NM.

Everington, C., & Roach, W. (1981, October-November). *Los Lunas curricular systems field test participant inservice*. Three-day workshop presented to staff of A School For Me, Tohatchi, NM and Deming Public Schools, Deming, NM.

## PROFESSIONAL ORGANIZATIONS

American Psychological Association, Division 33, Intellectual and Developmental Disabilities

American Psychology and Law Society

American College of Forensic Examiners

American Association on Intellectual and Developmental Disabilities, (AAIDD), (formerly AAMR), Divisions on Education & Legal Process and Advocacy.

The Academy on Intellectual and Developmental Disabilities

American Association of University Women (AAUW)

International Association for the Scientific Study of Intellectual and Developmental Disabilities (IASSIDD)

## CERTIFICATIONS

Certification, State of New Mexico and State of Tennessee. Areas: Elementary Education and Special Education, mental retardation endorsement.

ADEPT, South Carolina, 2000

Pathwise Teacher Evaluation, Ohio, 1999

Certified Tester, McCarron-Dial Work Evaluation System.

## PROFESSIONAL SERVICE

President, Legal Process and Advocacy Division, American Association of Intellectual and Developmental Disabilities (AAIDD), 2009 to 2013.

Chair, South Carolina Professional Review Committee (PRC), (Appointment, South Carolina State Board of Education), 2006 to 2012.

Executive Board member, Children's Attention Home Charter School, Rock Hill, SC, 2005 to 2009 (Vice Chair, 2007-2009).

PLT Study Committee, (State Committee, invited position), Spring 2008

AAMR Legislative and Social Issues Committee, (National committee, elected position), Three year term: 1998-2001, 2001-2003.

Justice for All Committee, Hamilton County Board of Mental Retardation and Developmental Disabilities, September 1998-2000. (Invited member).

Editor, *Teachers as Leaders: A Celebration of Teaching*, 2000-2006.

Leadership Associate Program, National Network for Educational Renewal, Institute for Educational Inquiry, Seattle, WA, 1999-2000 (National, nominated position).

Advisory Board, Ohio State Superintendent's Task Force on Special Education, 1999-2000, (State committee).

Regional Officer, Teacher Education Division (TED), Ohio Council on Exceptional Children, 1995-96, 1999-2000.

Butler County Board of Mental Retardation and Developmental Disabilities Justice System Advisory Committee, 1997-1998.

Special Issues Reader, *Psychological Reports*, 1995-2000.

Editorial Board, *Criminal Justice and Behavior*, 1992-1998.

Manuscript reviewer, *Criminal Justice and Behavior*, 2000, 2006.

Guest Reviewer, *Journal of Research in Childhood Education*, 2000.

Executive Board member, Residential Alternatives for the Developmentally Disabled, 1990 -1994.

Mental Health & Mental Retardation Probate Court Committee of Hamilton County, 1989-1993.

Ohio Statewide Network on Offenders with Mental Retardation, 1991-1993.

Committee on the Developmentally Disabled Offender, Albuquerque, NM. 1985-86.

Judicial appointment, Bernalillo County Committee on Mentally and Developmentally Disabled Offenders, New Mexico, 1986-87.

New Mexico State Adopted Textbook Committee, Chairperson for Committee on Deaf/Blind, Multiply Handicapped, and/or Physically Impaired, 1982.

Parent Advisory Council, Los Lunas Hospital & Training School, 1980.

## **COURSES TAUGHT**

### **Winthrop University**

SPED 293 Applied Behavior Analysis (ABA) Interventions for Learners with Autism Spectrum Disorders

SPED 281 Introduction to Special Education/Exceptional Learners

SPED 582 Intellectual Disabilities: Characteristics and Needs

SPED 575 Instructional Procedures for Students with Mental Disabilities (MD) and Severe Disabilities (SD)

EDUC 475 Internship in Reflective Practice

EDUC 420 Global Studies in Pedagogy

SPED 391 Principles of Teaching Exceptional Children

SPED 390 Field Experience in Special Education

EDUC 401 Internship I: Understanding Contextual Factors

EDUC 402 Internship II: Assessment and Instruction

### **Miami University**

EDP 496/596 Behavioral Interventions: Theory, Principles, and Techniques

EDP 457/557 Social, Legal, & Educational Issues for Individuals with Mental Retardation

EDP 478/578 Partnerships with Parents of Exceptional Children

EDP 460 Action Research/Problem-Based Seminar in Developmental Differences

EDT 610.A Supervision in a Partner School

EDP 419 Student Teaching: Special Education, all certification areas;

EDT 419 Student Teaching: Elementary Education; Kindergarten; Secondary Education

EDP 459/559 Practicum for At-Risk and Multihandicapped Infants and Children

EDP 101 Psychology of the Learner

EDP 258 Daily Living Skills for Moderately, Severely, and Profoundly Retarded Persons

EDP 458/558 Curriculum and Methods for At-Risk and Multihandicapped Infants and Children

EDP 275 Curriculum and Instruction for the Mentally Retarded

EDP 359 Supervised Public School Practicum for the Multihandicapped

EDP 276 Career and Life-Span Education for Exceptional Individuals

EDP 157 Introduction to Mental Retardation

EDP 620 Graduate Master's Research Supervision

EDP 600 Graduate Independent Readings

EDP 800 Graduate EDS Thesis Supervision

EDP 320 Summer Scholar Independent Research

### **University of New Mexico**

Special Education 204 Introduction to Special Education

Communications Disorders 420 A Transactional Approach to Early Language Training

|                             |   |                                               |
|-----------------------------|---|-----------------------------------------------|
| THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS                  |
|                             | ) | FOR THE THIRD JUDICIAL CIRCUIT                |
| COUNTY OF SUMTER            | ) |                                               |
|                             | ) | Case No. 2016-CP-43-00828                     |
| Stephen Cory Bryant,        | ) |                                               |
|                             | ) |                                               |
| Applicant                   | ) |                                               |
|                             | ) |                                               |
| vs.                         | ) | <b>Declaration of George Woods, Jr., M.D.</b> |
|                             | ) |                                               |
|                             | ) |                                               |
| State of South Carolina,    | ) |                                               |
|                             | ) |                                               |
| Defendant.                  | ) |                                               |
| _____                       | ) |                                               |

George Woods, Jr., being first duly sworn, swears and affirms that the following is true to the best of my knowledge:

I am a licensed physician specializing in neuropsychiatry. I have offices in Oakland, California; Atlanta, Georgia; and Evansville, Indiana. My private practice focuses on neurodevelopmental disabilities, acquired neurocognitive disorders, traumatic brain injury, cognitive impairments secondary to neuropsychiatric disorders, ethnopsychopharmacology, workplace safety, and consultation-liaison psychiatry. My clinical subspecialties are neuropsychiatry and consultation liaison psychiatry, which is the study of psychiatric manifestations of medical diseases, and the assessment of neurodevelopmental disorders. In my clinical practice, I assess and treat persons with a variety of medical problems with psychiatric manifestations. For the last thirty-four years, my practice has been composed of clients with developmental disabilities, traumatic brain injuries, and cognitive impairments secondary to neuropsychiatric disorders. In addition to my clinical practice, I also perform forensic consultations in civil and criminal cases.

I received my medical degree from the University of Utah in 1977. I completed my psychiatric residency at Pacific Medical Center in San Francisco, California, where I was Chief

Resident. The medical training I have undertaken, since my residency, has been geared toward a neuropsychiatric practice that combines an understanding of the relationships among psychiatric disorders, brain dysfunction, metabolic disruption, and endocrine abnormalities. This medical education has been supplemented with training in neuroanatomy and neuropsychological investigation, psychopharmacology, neuroimaging, and other relevant subjects, such as sleep disorders, mental retardation, developmental disability, traumatic brain injury and dysmorphology, which is the study of structural abnormalities often related to developmental disorders.

I completed a fellowship with the American Psychiatric Association and the National Institute of Mental Health in Geriatric Psychopharmacology. During the fellowship, I developed the first medical/psychiatric unit at Pacific Presbyterian Hospital. This unit administered to patients with either medical illnesses that had psychiatric manifestations or psychiatric patients with severe medical illness that could not be treated effectively for their psychiatric symptoms on regular medical units. Many of these patients had neurological impairments, significant drug interactions that required diagnosis and monitoring, or unusual symptom presentations due to the multiple disorders from which they were suffering.

I am a Fellow of the American Psychiatric Association. I am a member of the Northern California Psychiatric Association, the California Psychiatric Association, the American Neuropsychiatric Association, the International Neuropsychological Society, and the American Psychological Association. I am Deputy Chairperson for the Challenging Behavior Specific Interest Research Group (SIRG). I served as Editor for the Challenging Behavior and Mental Health Special Interest Research Group (SIRG) newsletter and currently serve as Associate Editor for the Journal of Practice and Policy for Intellectual Disabilities for IASSIDD. I am the immediate past President of the International Academy of Law and Mental Health (IALMH) and serve on the

Scientific and Executive Committees. I was asked to continue as Secretary General of the IALMH during its amalgamation with the Institute of Ethics, Medicine, and Public Health at the Sorbonne.

I am a lecturer at the University of California, Berkeley – Boalt Hall, School of Law. I teach a course on Law and Mental Health with Jennifer Johnson, Esq. We also teach a continuing education webinar, "Where Mental Health Meets the Law," a comprehensive curriculum that tackles the evolving field of forensic mental health through Thomson Reuters West Legal Education. I am currently on sabbatical from my position as Adjunct Professor at Morehouse School of Medicine in Atlanta, Georgia, where I teach "Clinical Aspects of Forensic Psychiatry" and "Introduction to Geriatric Psychiatry."

I have written about the forensic assessment of neurodevelopmental disorders, intellectual disability, cognitive impairment in the elderly, fetal alcohol spectrum disorder, trauma, financial deception in elderly populations, comorbidity, and the death penalty. I have authored and co-authored chapters in The American Association for Intellectual and Developmental Disabilities treatise on assessing intellectual disability in forensic settings.

I have consulted on neuropsychological tests, such as the Wisconsin Card Sorting Test, Halstead Reitan Battery, the Cognistat, the Montreal Cognitive Assessment Instrument (MOCA), and Delis Kaplan Executive Function System (DKEFS). I have also studied other psychometric instruments, including, but not limited to, the Minnesota Multiphasic Personality Inventory (MMPI-1, 2, and RF), the Millon Clinical Multiaxial Inventory, the Personality Assessment Inventory (PAI), the Rorschach, and instruments measuring effort.

I have completed over forty *Atkins* evaluations in the last nine years.

My qualifications, publications, and expert witness experience are fully set forth in my curriculum vitae, attached hereto as Exhibit A.

After a number of years in development, the American Psychiatric Association announced the publication of the newest DSM in May of 2013. The condition that was formerly referred to as “mental retardation,” in *DSM-IV* is now called “intellectual disability” (intellectual developmental disorder). The disorder characteristics involve impairments of mental abilities that impact adaptive functioning. The *DSM-5* defines intellectual disability as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

- A. 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.
- B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

Under the *DSM-5*, the diagnostic criteria are also to be accompanied by a statement of current severity ranging from mild to profound.

Intellectual functions include reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate tests of intelligence.

For a diagnosis of intellectual disability, the *DSM-5* requires deficits in adaptive functioning. The three adaptive domains are conceptual, social, and practical. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders all influence adaptive functioning. Deficits in adaptive functioning refer to how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. The *DSM-V* also recognizes the importance of understanding the supports utilized by persons with intellectual developmental disorder in attempting to lead an independent life.

Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (i.e., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment. When the administration of standardized testing becomes difficult due to a variety of factors (i.e., sensory impairment, severe behavioral issues), the individual may be diagnosed utilizing clinical judgment.

Adaptive functioning may be difficult to assess in a controlled setting, such as prisons or detention centers. If possible, corroborative information reflecting functioning outside controlled settings should be obtained. For diagnostic purposes, the impairment of at least one domain of adaptive functioning – conceptual, social, or practical – is necessary. The deficit must require ongoing support in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual function, such as reasoning planning, judgment and learning. The onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

The *DSM-5* has moved IQ test scores to associated features. 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). On tests with a standard deviation of 15 and a mean of 100, this results in a score of 65–75 ( $70 \pm 5$ ). Clinical training and judgment are required to interpret test results and assess intellectual performance.

The *DSM-5* endorses neuropsychological testing as an important instrument in understanding cognitive dysfunction. The *DSM-5* recognizes the necessity of applying the Flynn Effect to have accurate IQ scores, while making sure possible artificial IQ and neuropsychological testing enhancements, that may result from the practice effect and brief intelligence instruments, are taken into consideration.

As noted in the Motion for Summary Judgment, the *DSM-5* has moved IQ scores to the associated features. The rationale for this movement is due to the relative instability of IQ testing, as well as IQ testing's limitations in actually determining intellectual functioning.

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks (Greenspan



and Granfield 1992; Harris 2006; Schalock 2011; Yalon-Chamovitz and Greenspan 2005). For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests. (*DSM-5*, p. 37)

The raw data is not available from any of Mr. Bryant's scores; therefore, it is difficult to determine the quality of the scores. The first of these scores was 79, which was obtained when Mr. Bryant was twelve years old. Taking into consideration the Standard Error of Measurement, Mr. Bryant's score was 75-84, which is within the range of Intellectual Disability.

Alan Kaufman, Ph.D., is one of the developers of the Wechsler series of intelligence tests. From 1970 to 1974, Dr. Kaufman worked closely with Dr. David Wechsler on the development and standardization of the Wechsler Intelligence Scale for Children-Revised (WISC-R). In 1979, he wrote, "Intelligent Testing with the WISC-R," which is a landmark publication in the field of the clinical and psychometric interpretation of IQ tests. He also co-wrote the leading text on the Wechsler Adult Intelligence Scale-Revised (WAIS-R), "Assessing Adolescent and Adult Intelligence." His publications are considered among the leading texts on how to interpret Wechsler's scales, including the current fourth editions (WISC-IV and WAIS-IV). He has also written a number of widely-cited articles discussing the practice effects that are built into IQ tests when a person is tested more than once on a Wechsler test, as well the Flynn Effect, the phenomenon that leads to IQ norms becoming outdated at the rate of 3 points per decade.

Dr. Kaufman notes the inherent increase in IQ scores when testing is repeated over time.

The expected increase of about 5 to 8 points in global IQ renders any score obtained on a retest as a likely overestimate of the person's true level of functioning—especially if the retest is given within about six months of the original test, or if the person has been administered a Wechsler scale (any Wechsler scale) several times in the course of a few years. (p. 832)

(Kaufman, A. S. (1994). "Practice Effects." In R.J. Sternberg (Ed.), *Encyclopedia of Intelligence* (Vol. II). New York: Macmillan. pp. 828-833)) Dr. Kaufman reported that the 5-8 point increase is an *average* increase, rather than the maximum increase possible. In 1984, Matarazzo & Herman reported gains twice that large are common in the normal population, while Matarazzo, Carmody, and Jacobs (1980) suggested a gain of 15 points is needed as a rule of thumb from one administration to the next to denote a "significant" improvement in a person's full scale IQ that is not due to practice effect. Kaufman and Lichtenberger suggested a 20-25 point gain was necessary to rule out practice effect in Performance IQ. The overall practice effect of about seven points on Wechsler's Full Scale IQ is merely the average gain. In fact, even gains twice that large are common in the normal population.

The Motion for Summary Judgment chronicles a series of IQ scores from 1993 to 1996. His IQ scores increase each year.

Applicant received IQ scores of 79 on April 28, 1993, 86 on June 6, 1994, and 92 on March 8, 1996. (See CIA No. 9:16-01423-DCN-BM, ECF No. 37, p.70). These scores were taken from applicant's school records which were reviewed by defense experts prior to all previous proceedings against applicant. (p. 12)

The Motion also describes his scores as "above average."

The above-average IQ scores applicant obtained prior to his time at DJJ, and conceded to by applicant in his pending federal habeas action, demonstrate consistency in formal recognized testing instruments over a span of time. (See CIA No. 9:16-01423-DCN-BM (ECF No. 37, p.70; Federal District Court, District of South Carolina)

It incorrectly states that Mr. Bryant's previous IQ scores were above average. The idea that these practice effected scores "demonstrate consistency in formal testing instruments over a span of time" is scientifically unsupported by the literature or clinical practice. Mr. Bryant's IQ scores reflect practice effect, which is the statistical increase in IQ and neuropsychological test scores due to repetitive administration of similar test items.

Mr. Bryant's intellectual functioning tests are difficult to accurately interpret due to the repetitive nature of their administration, leading to significant practice effect. Consequently, the determination of Mr. Bryant's status as intellectually disabled cannot rest upon the practice effect-tainted IQ testing.

The *DSM-5* supports neuropsychological testing to clarify brain function. Neuropsychological testing is much more comprehensive than IQ testing in determining the bridge between brain functioning and adaptive functioning.

Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning. (p. 37)

Neuropsychological testing may be helpful in determining whether standard error of measure is predictive of increased or decreased scoring of adaptive functioning instruments. Mr. Bryant consistently demonstrates deficits in academic functioning, with math scores particularly as his lowest scores. These math scores lend support to Dr. Schwartz's consideration of fetal alcohol spectrum disorder, where math disability has been found to be a frequent neurological find.

Neuropsychological testing has not been completed for Mr. Bryant. Carolyn Everington, Ph.D., is world renowned in assessing and treating intellectual disability. Dr. Everington interviewed Mr. Bryant's mother, his grandmother and his aunt. Her interviews and adaptive functioning testing demonstrated Mr. Bryant's significant adaptive functioning deficits. Testing can provide necessary answers that are currently unavailable, in terms of Mr. Bryant's intellectual functioning and adaptive functioning.

Interviews conducted with Mr. Bryant and family members describe behaviors consistent with intellectual disability (Siperstein & Collins, 2015). His grandmother described him as "slower to catch on." His aunt said when explaining something to him, "you had to tell him things several times." He is described as a loner with few friends and as having difficulty with social interactions and using good judgment

in social situations. His mother indicated that he was unable to live on his own-"He can't make day to day decisions." He never lived independently nor acquired necessary skills for independent living. (Everington report, p. 8)

Additionally, Dr. Everington found enough adaptive functioning deficits to conclude,

These results indicate that while he may have some surface-level conversational ability, he has significant deficits in understanding and processing language, particularly when the information is grammatically or syntactically complex. His understanding of semantics (word meanings) is very limited and his writing ability is very poor. The ABAS-3 scores (both at age 14 and 23) in the Social Domain show that this language deficit is apparent in everyday life. He has difficulty in comprehension, understanding complex instructions, and relaying complex material with accuracy." (Everington report, p. 7)

In summary, based on my review of records, results of testing administered, and analysis of information gathered from interviews, it is my preliminary opinion, that Mr. Bryant displays significant limitations in adaptive behavior as set forth under AAIDD and *DSM-5*. (Everington report, p. 9)

#### **Preliminary Forensic Examination**

During my preliminary examination of Mr. Bryant on March 3, 2017, I observed a white male with significant right facial asymmetry. Mr. Bryant possesses dysmorphic facial features, specifically a misshapen right sided cranium. Neuropsychological testing reported concrete thinking, poor executive sequencing, and limited visual spatial skills, which is consistent with the clinical observations.

Neuropsychological screening demonstrated poor sequencing on the Trail Making Test. On the Cognistat picture test, Mr. Bryant was concrete, unable to understand the story and unable to identify many of the elements in the picture. This is illustrative of right parietal lobe dysfunction, the area of the brain that allows someone to understand the big picture.

His ability to handle abstract thinking was also impaired. When asked what was similar between a banana and apple, he said they were both fruit, which is the correct answer. However,

when asked the similarity between a bicycle and a train, he stated that they both had wheels, which is a concrete answer. The correct answer would be they both are transportation. When asked the similarity between a watch and a ruler, he said they both measured time, which is incorrect.

There are also indications problems with academic functioning and learning. Dr. Everington's assessment revealed a math disability. Mr. Bryant corroborated the findings of neuropsychiatric testing in his report of his history of challenges with math.

### **Forensic Conclusion**

Mr. Bryant's assessment for intellectual disability is incomplete. His IQ scores are impacted by practice effect, which undermines their validity. The neuropsychological screening performed demonstrates poor executive function sequencing, poor ability to see the big picture, math deficits consistent with intellectual disability, and concrete thinking consistent with adaptive functioning interviews with those that knew him best in his developmental years.

Further neuropsychological testing will clarify whether the Standard Error of Measurement adjustment should be toward the lower range of the intellectual function or the higher range of intellectual functioning. Additional neuropsychological testing and neuroimaging also will also determine the cognitive deficits that appear to undermine adaptive functioning.

Their examinations of Dr. Gunter and Dr. Everhart are incomplete because no adaptive functioning examination. Neither doctor is an expert in the field. There was no neuropsychological testing to support or defray the problematic practice effect seen in the IQ testing. Their clinical conclusions are, at best, incomplete. Further examination is necessary to complete a comprehensive and valid intellectual functioning examination.



**George Woods, Jr., M.D., FAPA**

# The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)  
Web: [GroseLawFirm.com](http://GroseLawFirm.com)

October 26, 2017

The Honorable James C. Campbell  
Clerk of Court, Sumter County  
215 North Harvin Street  
Sumter, SC 29150-4974

Re: *Stephen Corey Bryant v. State of South Carolina*  
Case Numbers 2016-CP-43-828

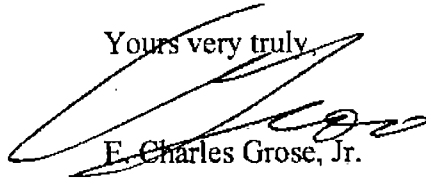
Dear Mr. Campbell:

By letter dated October 24, 2017, I filed Mr. Bryant's response in opposition to the State's Motion for Summary Judgement, along with the Affidavits of Dr. Caroline Everington and Dr. George Woods. Dr. Woods' affidavit was in the form of a Declaration. I enclose a notarized copy of Dr. Woods affidavit for filing. A notarized copy of Dr. Woods' affidavit was provided the Judge Seals and opposing counsel for the hearing on October 25, 2017 at the Kershaw County Courthouse.

Thank you for your attention to this matter. Please let me know if I can answer any questions or provide additional information.

With kindest regards, I am

Yours very truly,



E. Charles Grose, Jr.

cc: Diana Holt, Esquire  
Melody J. Brown, Esquire  
Sherrie Butterbaugh, Esquire

RECORDED  
2017 OCT 30 PM 4:11  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

THE STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Stephen Cory Bryant,

Applicant

vs.

State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2016-CP-43-00828

Declaration of George Woods, Jr.,

RECORDED  
2017 OCT 30 PM 4:11  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

George Woods, Jr., being first duly sworn, swears and affirms that the following is true to the best of my knowledge:

I am a licensed physician specializing in neuropsychiatry. I have offices in Oakland, California; Atlanta, Georgia; and Evansville, Indiana. My private practice focuses on neurodevelopmental disabilities, acquired neurocognitive disorders, traumatic brain injury, cognitive impairments secondary to neuropsychiatric disorders, ethnopsychopharmacology, workplace safety, and consultation-liaison psychiatry. My clinical subspecialties are neuropsychiatry and consultation liaison psychiatry, which is the study of psychiatric manifestations of medical diseases, and the assessment of neurodevelopmental disorders. In my clinical practice, I assess and treat persons with a variety of medical problems with psychiatric manifestations. For the last thirty-four years, my practice has been composed of clients with developmental disabilities, traumatic brain injuries, and cognitive impairments secondary to neuropsychiatric disorders. In addition to my clinical practice, I also perform forensic consultations in civil and criminal cases.

I received my medical degree from the University of Utah in 1977. I completed my psychiatric residency at Pacific Medical Center in San Francisco, California, where I was Chief

Resident. The medical training I have undertaken, since my residency, has been geared toward a neuropsychiatric practice that combines an understanding of the relationships among psychiatric disorders, brain dysfunction, metabolic disruption, and endocrine abnormalities. This medical education has been supplemented with training in neuroanatomy and neuropsychological investigation, psychopharmacology, neuroimaging, and other relevant subjects, such as sleep disorders, mental retardation, developmental disability, traumatic brain injury and dysmorphology, which is the study of structural abnormalities often related to developmental disorders.

I completed a fellowship with the American Psychiatric Association and the National Institute of Mental Health in Geriatric Psychopharmacology. During the fellowship, I developed the first medical/psychiatric unit at Pacific Presbyterian Hospital. This unit administered to patients with either medical illnesses that had psychiatric manifestations or psychiatric patients with severe medical illness that could not be treated effectively for their psychiatric symptoms on regular medical units. Many of these patients had neurological impairments, significant drug interactions that required diagnosis and monitoring, or unusual symptom presentations due to the multiple disorders from which they were suffering.

I am a Fellow of the American Psychiatric Association. I am a member of the Northern California Psychiatric Association, the California Psychiatric Association, the American Neuropsychiatric Association, the International Neuropsychological Society, and the American Psychological Association. I am Deputy Chairperson for the Challenging Behavior Specific Interest Research Group (SIRG). I served as Editor for the Challenging Behavior and Mental Health Special Interest Research Group (SIRG) newsletter and currently serve as Associate Editor for the Journal of Practice and Policy for Intellectual Disabilities for IASSIDD. I am the immediate past President of the International Academy of Law and Mental Health (IALMH) and serve on the



Scientific and Executive Committees. I was asked to continue as Secretary General of the IALMH during its amalgamation with the Institute of Ethics, Medicine, and Public Health at the Sorbonne.

I am a lecturer at the University of California, Berkeley – Boalt Hall, School of Law. I teach a course on Law and Mental Health with Jennifer Johnson, Esq. We also teach a continuing education webinar, "Where Mental Health Meets the Law," a comprehensive curriculum that tackles the evolving field of forensic mental health through Thomson Reuters West Legal Education. I am currently on sabbatical from my position as Adjunct Professor at Morehouse School of Medicine in Atlanta, Georgia, where I teach "Clinical Aspects of Forensic Psychiatry" and "Introduction to Geriatric Psychiatry."

I have written about the forensic assessment of neurodevelopmental disorders, intellectual disability, cognitive impairment in the elderly, fetal alcohol spectrum disorder, trauma, financial deception in elderly populations, comorbidity, and the death penalty. I have authored and co-authored chapters in The American Association for Intellectual and Developmental Disabilities treatise on assessing intellectual disability in forensic settings.

I have consulted on neuropsychological tests, such as the Wisconsin Card Sorting Test, Halstead Reitan Battery, the Cognistat, the Montreal Cognitive Assessment Instrument (MOCA), and Delis Kaplan Executive Function System (DKEFS). I have also studied other psychometric instruments, including, but not limited to, the Minnesota Multiphasic Personality Inventory (MMPI-1, 2, and RF), the Millon Clinical Multiaxial Inventory, the Personality Assessment Inventory (PAI), the Rorschach, and instruments measuring effort.

I have completed over forty *Atkins* evaluations in the last nine years.

My qualifications, publications, and expert witness experience are fully set forth in my curriculum vitae, attached hereto as Exhibit A.

After a number of years in development, the American Psychiatric Association announced the publication of the newest DSM in May of 2013. The condition that was formerly referred to as "mental retardation," in *DSM-IV* is now called "intellectual disability" (intellectual developmental disorder). The disorder characteristics involve impairments of mental abilities that impact adaptive functioning. The *DSM-5* defines intellectual disability as follows:

Intellectual disability (intellectual developmental disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. The following three criteria must be met:

- A. 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.
- B. Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.
- C. Onset of intellectual and adaptive deficits during the developmental period.

Under the *DSM-5*, the diagnostic criteria are also to be accompanied by a statement of current severity ranging from mild to profound.

Intellectual functions include reasoning, problem solving, planning, abstract thinking, judgment, learning from instruction and experience, and practical understanding. Critical components include verbal comprehension, working memory, perceptual reasoning, quantitative reasoning, abstract thought, and cognitive efficacy. Intellectual functioning is typically measured with individually administered and psychometrically valid, comprehensive, culturally appropriate tests of intelligence.

For a diagnosis of intellectual disability, the *DSM-5* requires deficits in adaptive functioning. The three adaptive domains are conceptual, social, and practical. The conceptual (academic) domain involves competence in memory, language, reading, writing, math reasoning, acquisition of practical knowledge, problem solving, and judgment in novel situations, among others. The social domain involves awareness of others' thoughts, feelings, and experiences; empathy; interpersonal communication skills; friendship abilities; and social judgment, among others. The practical domain involves learning and self-management across life settings, including personal care, job responsibilities, money management, recreation, self-management of behavior, and school and work task organization, among others. Intellectual capacity, education, motivation, socialization, personality features, vocational opportunity, cultural experience, and coexisting general medical conditions or mental disorders all influence adaptive functioning. Deficits in adaptive functioning refer to how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. The *DSM-5* also recognizes the importance of understanding the supports utilized by persons with intellectual developmental disorder in attempting to lead an independent life.

Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. Standardized measures are used with knowledgeable informants (i.e., parent or other family member; teacher; counselor; care provider) and the individual to the extent possible. Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment. When the administration of standardized testing becomes difficult due to a variety of factors (i.e., sensory impairment, severe behavioral issues), the individual may be diagnosed utilizing clinical judgment.

Adaptive functioning may be difficult to assess in a controlled setting, such as prisons or detention centers. If possible, corroborative information reflecting functioning outside controlled settings should be obtained. For diagnostic purposes, the impairment of at least one domain of adaptive functioning – conceptual, social, or practical – is necessary. The deficit must require ongoing support in order for the person to perform adequately in one or more life settings at school, at work, at home, or in the community. To meet diagnostic criteria for intellectual disability, the deficits in adaptive functioning must be directly related to the intellectual function, such as reasoning planning, judgment and learning. The onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence.

The *DSM-5* has moved IQ test scores to associated features. 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). On tests with a standard deviation of 15 and a mean of 100, this results in a score of 65–75 ( $70 \pm 5$ ). Clinical training and judgment are required to interpret test results and assess intellectual performance.

The *DSM-5* endorses neuropsychological testing as an important instrument in understanding cognitive dysfunction. The *DSM-5* recognizes the necessity of applying the Flynn Effect to have accurate IQ scores, while making sure possible artificial IQ and neuropsychological testing enhancements, that may result from the practice effect and brief intelligence instruments, are taken into consideration.

As noted in the Motion for Summary Judgment, the *DSM-5* has moved IQ scores to the associated features. The rationale for this movement is due to the relative instability of IQ testing, as well as IQ testing's limitations in actually determining intellectual functioning.

IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real-life situations and mastery of practical tasks (Greenspan

and Granfield 1992; Harris 2006; Schalock 2011; Yalon-Chamovitz and Greenspan 2005). For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests. (DSM-5, p. 37)

The raw data is not available from any of Mr. Bryant's scores; therefore, it is difficult to determine the quality of the scores. The first of these scores was 79, which was obtained when Mr. Bryant was twelve years old. Taking into consideration the Standard Error of Measurement, Mr. Bryant's score was 75-84, which is within the range of Intellectual Disability.

Alan Kaufman, Ph.D., is one of the developers of the Wechsler series of intelligence tests. From 1970 to 1974, Dr. Kaufman worked closely with Dr. David Wechsler on the development and standardization of the Wechsler Intelligence Scale for Children-Revised (WISC-R). In 1979, he wrote, "Intelligent Testing with the WISC-R," which is a landmark publication in the field of the clinical and psychometric interpretation of IQ tests. He also co-wrote the leading text on the Wechsler Adult Intelligence Scale-Revised (WAIS-R), "Assessing Adolescent and Adult Intelligence." His publications are considered among the leading texts on how to interpret Wechsler's scales, including the current fourth editions (WISC-IV and WAIS-IV). He has also written a number of widely-cited articles discussing the practice effects that are built into IQ tests when a person is tested more than once on a Wechsler test, as well the Flynn Effect, the phenomenon that leads to IQ norms becoming outdated at the rate of 3 points per decade.

Dr. Kaufman notes the inherent increase in IQ scores when testing is repeated over time.

The expected increase of about 5 to 8 points in global IQ renders any score obtained on a retest as a likely overestimate of the person's true level of functioning—especially if the retest is given within about six months of the original test, or if the person has been administered a Wechsler scale (any Wechsler scale) several times in the course of a few years. (p. 832)

(Kaufman, A. S. (1994). "Practice Effects." In R.J. Sternberg (Ed.), *Encyclopedia of Intelligence* (Vol. II). New York: Macmillan. pp. 828-833)) Dr. Kaufman reported that the 5-8 point increase is an *average* increase, rather than the maximum increase possible. In 1984, Matarazzo & Herman reported gains twice that large are common in the normal population, while Matarazzo, Carmody, and Jacobs (1980) suggested a gain of 15 points is needed as a rule of thumb from one administration to the next to denote a "significant" improvement in a person's full scale IQ that is not due to practice effect. Kaufman and Lichtenberger suggested a 20-25 point gain was necessary to rule out practice effect in Performance IQ. The overall practice effect of about seven points on Wechsler's Full Scale IQ is merely the average gain. In fact, even gains twice that large are common in the normal population.

The Motion for Summary Judgment chronicles a series of IQ scores from 1993 to 1996. His IQ scores increase each year.

Applicant received IQ scores of 79 on April 28, 1993, 86 on June 6, 1994, and 92 on March 8, 1996. (See CIA No. 9:16-01423-DCN-BM, ECF No. 37, p.70). These scores were taken from applicant's school records which were reviewed by defense experts prior to all previous proceedings against applicant. (p. 12)

The Motion also describes his scores as "above average."

The above-average IQ scores applicant obtained prior to his time at DJJ, and conceded to by applicant in his pending federal habeas action, demonstrate consistency in formal recognized testing instruments over a span of time. (See CIA No. 9:16-01423-DCN-BM (ECF No. 37, p.70; Federal District Court, District of South Carolina)

It incorrectly states that Mr. Bryant's previous IQ scores were above average. The idea that these practice effected scores "demonstrate consistency in formal testing instruments over a span of time" is scientifically unsupported by the literature or clinical practice. Mr. Bryant's IQ scores reflect practice effect, which is the statistical increase in IQ and neuropsychological test scores due to repetitive administration of similar test items.

Mr. Bryant's intellectual functioning tests are difficult to accurately interpret due to the repetitive nature of their administration, leading to significant practice effect. Consequently, the determination of Mr. Bryant's status as intellectually disabled cannot rest upon the practice effect-tainted IQ testing.

The *DSM-5* supports neuropsychological testing to clarify brain function. Neuropsychological testing is much more comprehensive than IQ testing in determining the bridge between brain functioning and adaptive functioning.

Individual cognitive profiles based on neuropsychological testing are more useful for understanding intellectual abilities than a single IQ score. Such testing may identify areas of relative strengths and weaknesses, an assessment important for academic and vocational planning. (p. 37)

Neuropsychological testing may be helpful in determining whether standard error of measure is predictive of increased or decreased scoring of adaptive functioning instruments. Mr. Bryant consistently demonstrates deficits in academic functioning, with math scores particularly as his lowest scores. These math scores lend support to Dr. Schwartz's consideration of fetal alcohol spectrum disorder, where math disability has been found to be a frequent neurological find.

Neuropsychological testing has not been completed for Mr. Bryant. Carolyn Everington, Ph.D., is world renowned in assessing and treating intellectual disability. Dr. Everington interviewed Mr. Bryant's mother, his grandmother and his aunt. Her interviews and adaptive functioning testing demonstrated Mr. Bryant's significant adaptive functioning deficits. Testing can provide necessary answers that are currently unavailable, in terms of Mr. Bryant's intellectual functioning and adaptive functioning.

Interviews conducted with Mr. Bryant and family members describe behaviors consistent with intellectual disability (Siperstein & Collins, 2015). His grandmother described him as "slower to catch on." His aunt said when explaining something to him, "you had to tell him things several times." He is described as a loner with few friends and as having difficulty with social interactions and using good judgment

in social situations. His mother indicated that he was unable to live on his own-"He can't make day to day decisions." He never lived independently nor acquired necessary skills for independent living. (Everington report, p. 8)

Additionally, Dr. Everington found enough adaptive functioning deficits to conclude,

These results indicate that while he may have some surface-level conversational ability, he has significant deficits in understanding and processing language, particularly when the information is grammatically or syntactically complex. His understanding of semantics (word meanings) is very limited and his writing ability is very poor. The ABAS-3 scores (both at age 14 and 23) in the Social Domain show that this language deficit is apparent in everyday life. He has difficulty in comprehension, understanding complex instructions, and relaying complex material with accuracy." (Everington report, p. 7)

In summary, based on my review of records, results of testing administered, and analysis of information gathered from interviews, it is my preliminary opinion, that Mr. Bryant displays significant limitations in adaptive behavior as set forth under AAIDD and *DSM-5*. (Everington report, p. 9)

#### **Preliminary Forensic Examination**

During my preliminary examination of Mr. Bryant on March 3, 2017, I observed a white male with significant right facial asymmetry. Mr. Bryant possesses dysmorphic facial features, specifically a misshapen right sided cranium. Neuropsychological testing reported concrete thinking, poor executive sequencing, and limited visual spatial skills, which is consistent with the clinical observations.

Neuropsychological screening demonstrated poor sequencing on the Trail Making Test. On the Cognistat picture test, Mr. Bryant was concrete, unable to understand the story and unable to identify many of the elements in the picture. This is illustrative of right parietal lobe dysfunction, the area of the brain that allows someone to understand the big picture.

His ability to handle abstract thinking was also impaired. When asked what was similar between a banana and apple, he said they were both fruit, which is the correct answer. However,



when asked the similarity between a bicycle and a train, he stated that they both had wheels, which is a concrete answer. The correct answer would be they both are transportation. When asked the similarity between a watch and a ruler, he said they both measured time, which is incorrect.

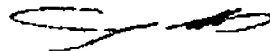
There are also indications problems with academic functioning and learning. Dr. Everington's assessment revealed a math disability. Mr. Bryant corroborated the findings of neuropsychiatric testing in his report of his history of challenges with math.

#### **Forensic Conclusion**

Mr. Bryant's assessment for intellectual disability is incomplete. His IQ scores are impacted by practice effect, which undermines their validity. The neuropsychological screening performed demonstrates poor executive function sequencing, poor ability to see the big picture, math deficits consistent with intellectual disability, and concrete thinking consistent with adaptive functioning interviews with those that knew him best in his developmental years.

Further neuropsychological testing will clarify whether the Standard Error of Measurement adjustment should be toward the lower range of the intellectual function or the higher range of intellectual functioning. Additional neuropsychological testing and neuroimaging also will also determine the cognitive deficits that appear to undermine adaptive functioning.

Their examinations of Dr. Gunter and Dr. Everhart are incomplete because no adaptive functioning examination. Neither doctor is an expert in the field. There was no neuropsychological testing to support or defray the problematic practice effect seen in the IQ testing. Their clinical conclusions are, at best, incomplete. Further examination is necessary to complete a comprehensive and valid intellectual functioning examination.



**George Woods, Jr., M.D., FAPA**

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

CIVIL CODE § 1180

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California

County of Alameda

On 10-24-2017 before me, Zarina Rathod, Notary Public

Date

Here, Insert Name and Title of the Officer

personally appeared George Ward, Jr.

Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature [Signature]  
Signature of Notary Public

Place Notary Seal Above

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**Description of Attached Document**

Title or Type of Document: Declaration Document Date: 10-24-2017

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**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

☐ Corporate Officer -- Title(s): \_\_\_\_\_

☐ Partner -- ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

☐ Corporate Officer -- Title(s): \_\_\_\_\_

☐ Partner -- ☐ Limited ☐ General

☐ Individual ☐ Attorney in Fact

☐ Trustee ☐ Guardian or Conservator

☐ Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

THE STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Stephen Cory Bryant, SCDC # 5252

vs.

State of South Carolina

Defendant.

RECORDED

2018 MAY 11 PM 4:03

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2016-CP-43-00828

**Motion to Amend Application for Post-  
Conviction Relief**

Pursuant to Rule 15, SCRPC and the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et. seq.*, Stephen Cory Bryant moves this Court for an order allowing him to amend his application for post-conviction relief. A copy of the proposed Second Amended Application for Post-Conviction Relief is attached and incorporated by reference.

IT IS SO MOVED.

Respectfully Submitted,

By

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May 9, 2019

*Attorneys for Stephen Cory Bryant*

THE STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

RECORDED

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

2018 MAY 11 PM 4:03

Case No. 2016-CP-43-00828

Stephen Cory Bryant, SCDC # 5252     JAMES C. CAMPBELL  
Applicant     CLERK OF COURT  
SUMTER COUNTY, S.C.

vs.

State of South Carolina

Defendant.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire  
Sherrie Butterbaugh, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
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404 Main Street  
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(864) 538-4466

May 9, 2018  
Greenwood, South Carolina

THE STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

2018 MAY 1 PM 4:03

Case No. 2016-CP-43-00828

Stephen Cory Bryant, SCDC # 5252 JAMES C CAMPBELL

Applicant OF COURT

SUMTER COUNTY, S.C.

**Second Amended Application for Post-  
Conviction Relief**

vs.

State of South Carolina

Defendant.

The applicant, Stephen Corey Bryant, submits the following application for post-conviction relief:<sup>1</sup>

- 1) Mr. Bryant is confined at the Kirkland Correctional Institution.
- 2) The Honorable Thomas A. Russo, presiding judge for the Court of General Session for Sumter County, by special assignment of the South Carolina Supreme Court, imposed the sentences.
- 3) There were not any co-defendants.
- 4) In Sumter County, the State indicted Mr. Bryant for three counts of murder (2006-GS-43-698, 699, 700), two counts of first-degree burglary (2006-GS-43-697, 698), second-degree burglary (2006-GS-43-696), armed robbery (2006-GS-43-699), second-degree arson (2006-GS-43-698), possession of a stolen handgun (2006-GS-43-702), assault and battery with intent to kill (2006-GS-42-701), and threatening the life of a public employee (2006-GS-43-702). In Richland County, the State indicted Mr. Bryant for assault and battery with intent to kill (2004-GS-40-10096).

<sup>1</sup> This pleading is based on SCRCForm5, revised 3/2003, found on the South Carolina Judicial Department Website. Mr. Bryant reserves the right to amend his application as provided by law.

5) On September 11, 2008, Judge Russo sentenced Mr. Bryant to death for the murder of Willard Tietjen. Judge Russo also imposed sentences of life imprisonment without the possibility of parole for each of the two additional counts of murder, life imprisonment without the possibility of parole for each count of first-degree burglary, thirty years for armed robbery, twenty years for each count of assault and battery with intent to kill, fifteen years for second-degree burglary, five years for possession of a stolen handgun, and thirty days for threatening the life of a public employee.

6) These sentences were imposed following Mr. Bryant's guilty plea on August 18, 2008.

7) Mr. Bryant appealed his convictions and sentences to the Supreme Court of South Carolina.

8) 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).

9) Not applicable because Mr. Bryant appealed.

10) (a) Mr. Bryant's sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Intellectual Disabilities. *Hall v. Florida*, 134 S. Ct. 1986 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002); and *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

(b) [Dismissed by Order of Court].

(c) Mr. Bryant's sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder ("FASD"). FASD is present during the developmental period, and people suffering from FASD suffer from impairments to an equal or greater extent as people suffering from

Intellectual Disabilities. In fact, the information concerning FASD was developed during the natural course of investigation of Intellectual Disabilities because the two disorders involve significant overlaps. A categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Hall* and *Atkins, supra*.

(d) In the alternative to 10(c), Mr. Bryant's FASD is evidence of material facts not previously presented to a sentencing authority that should be considered before imposing sentence.

11) (a) The affidavit of Dr. Donna Schwartz-Watts, a copy of which is attached to the original PCR application, is factual support for this application.

(b) [Dismissed by Order of the Court].

(c) The declaration of Dr. George W. Woods, a copy of which is attached to this amended PCR application, is factual support for this ground.

(d) The declaration of Dr. George W. Woods, a copy of which is attached to this amended PCR application, is factual support for this ground.

12) Prior to filing this application for post-conviction relief, Mr. Bryant filed a post-conviction relief application. *Stephen Corey Bryant v. State of South Carolina*, Sumter County Case No. 2011-CP-43-00901. The Court of Common Pleas for Sumter County, the Honorable R. Ferrell Cothran, presiding judge by special assignment of the South Carolina Supreme Court, dismissed this action on December 4, 2012 and denied Mr. Bryant's Rule 59(e), SCRCF motion of February 14, 2003. The Supreme Court of South Carolina denied Mr. Bryant's petition for writ of *certiorari* in an unpublished order on March 4, 2015. *Bryant v. State*, Appellate Case Number 2013-000518. 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, 2016, Mr. Bryant filed a motion for stay of execution and appointment of counsel in the United States District Court for the District of South Carolina. *Bryant v. Stirling*, C/A No. 9:15-mc-00217-DCN-BM. Mr. Bryant filed a petition for writ of *habeas corpus* on January 14, 2016, and will amend it no later than April 28, 2016. Contemporaneously with filing this application, Mr. Bryant will move the District Court to stay his federal *habeas* petition so that he can pursue this remedy in state court.

Contemporaneously with the initial PCR application in this action, Mr. Bryant filed an application for post-conviction relief to raise claims that should have been discovered by Mr. Bryant's post-conviction counsel in Case Number 2011-CP-43-00901. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013) and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). The Honorable Thomas W. Cooper, Jr. dismissed that action, and Mr. Bryant filed a notice of intent to appeal. That appeal is still pending.

13) Please see number 12 above.

14) Mr. Bryant raised the ground set forth in paragraph 10(a) in the federal *habeas corpus* case and moved the District Court to stay his federal *habeas* petition so that he can pursue remedies in state court. The District Court granted the motion to stay.

15) Please see number 14 above.

16) (a) Regarding Grounds 10(a) and 11 (a), Mr. Bryant's Intellectual Disabilities were not previously identified.

(b) [Dismissed by Order of the Court].

(c) Regarding Grounds (10)(c)&(11)(c) and 10(d)&11(d), Mr.



Bryant's FASD was not previously identified and is "evidence of material facts, not previously presented and heard, that requires vacation of the . . . sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4).

17) Prior Counsel:

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(c) Prior Post-Conviction Relief Case:

Melissa J. Armstrong, Esquire<sup>4</sup>

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<sup>2</sup> Mr. Babb, who was relieved as counsel prior to Mr. Bryant's guilty plea and sentencing, is a Retired Member of the South Carolina Bar.

<sup>3</sup> Mr. Savitz is an Inactive Member of the South Carolina Bar.

<sup>4</sup> Ms. Armstrong has resigned from the South Carolina Bar.

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18) Please see number 17 above.

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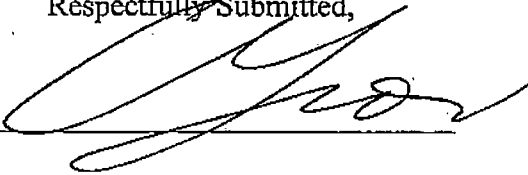
<sup>5</sup> Mr. Sheldon is not a member of the South Carolina Bar. The United States District Court admitted him *Pro Hac Vice* for the purposes of Mr. Bryant's federal *habeas corpus* case.

19) This Court should vacate Mr. Bryant's death sentence and declare him ineligible for the death penalty. In the alternative, this Court should order a new trial where Mr. Bryant can present evidence of his FASD.

20) None other than the convictions and sentences identified in paragraphs 4 and 5 above.

Respectfully Submitted,

By



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May 9, 2019

*Attorneys for Stephen Cory Bryant*

THE STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )  
2018 MAY 11 PM 4:03 )

Stephen Cory Bryant, SCDC # 5252 )  
JAMES C. CAMPBELL )  
CLERK OF COURT )  
SUMTER COUNTY, S.C. )

Case No. 2016-CP-43-00828

vs. )  
)  
)  
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)

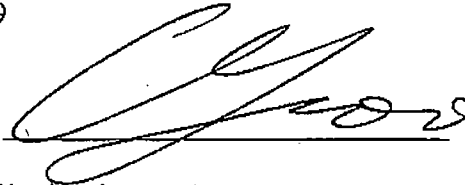
State of South Carolina )

Defendant. )  
)  
)

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire  
Sherrie Butterbaugh, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By



E. Charles Grose, Jr.  
The Grose Law Firm, LLC  
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May 9, 2018  
Greenwood, South Carolina

**G**  
**WW** GEORGE W. WOODS, JR., M.D., L.F.A.P.A.  
A PROFESSIONAL CORPORATION  
DIPLOMATE OF THE AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

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May 8, 2018

Diana Holt, Esq.  
P.O. Box 6454  
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Charles Grose, Esq.  
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404 Main Street  
Greenwood, SC 29646

Re: Steven Corey Bryant (DOB 4/12/1981)

Ms. Holt and Mr. Grose,

You have asked me to perform a neuropsychiatric examination of Steven Bryant, a 37-year-old, white male. In order to complete this examination, I interviewed Mr. Bryant on March 31, 2017. I also consulted with Caroline Everington, Ph.D., Julian Davies, M.D. and Paul Moberg, Ph.D. I also reviewed the documents provided.

### **Summary**

Mr. Bryant has a significant history of sexual abuse by his grandfather, as well as physical abuse by his father. This abuse started when he was very young and was ongoing for years. At the time of his interview with Pamela Crawford, M.D., he recounted this abuse and detailed the sleep disruption and affective dysregulation associated with traumatic stress.

Although Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability, his adaptive functioning scores obtained by Dr. Everington's testing are consistent with someone suffering from mild intellectual disability. Mr. Bryant has the stigmata of Fetal Alcohol Spectrum Disorder (FASD). Dr. Davies noted multiple signs of neurologic disorder. Dr. Moberg documented cognitive deficits consistent with Fetal Alcohol Spectrum Disorder. These findings are supported by Mr. Bryant's social history and his mother's alcohol use.

## **Relevant Social History**

Mr. Bryant's mother acknowledged drinking and using drugs while she was pregnant with him. (Catherine Bryant Declaration, dated 5/23/2016) He was conceived while she and his father were in a drug rehabilitation program. Mr. Bryant experienced developmental delays in motor skills. His mother stated that he was "slow to talk," which is evidence of speech delay. (Catherine Bryant Declaration, dated 5/23/2016)

When he was four or five years old, Mr. Bryant was hit by a car while his family was on a camping trip to Lake Hartsville. His parents did not seek medical treatment. He later sustained a head injury when a maternal aunt "threw Cory headfirst into a wall." Catherine Bryant Declaration, dated 5/23/2016)

His mother's recollection was that growing up Mr. Bryant never really had friends. He never dated.

## **Trauma**

Mr. Bryant comes from a family fraught with multigenerational chemical dependency, mental illness and abuse. His personal trauma history is well-documented. Mr. Bryant's paternal aunt, Terry Caulder, stated her father was a violent, "raging alcoholic." Her father beat everyone in their family; however, Mr. Bryant's father Billy was his primary target. (Terry Caulder Declaration, dated 5/19/2016)

I remember once when Billy was standing near the front door, probably 11-12 years old at the time, and dad just blindsided Billy with a punch to the face that knocked him through the screen door and the glass storm door, splitting and shattering both. (Terry Caulder Declaration, dated 5/19/2016)

As is all too common, Billy continued the cycle of abusive in his family. Ms. Caulder has witnessed Billy "beat the hell out of Cory and his mother (Catherine)." (Terry Caulder Declaration, dated 5/19/2016)

Mr. Bryant reported that he had recurring dreams about beatings he received from his father.

When I was little, my mom was cheating on my dad a lot. And I keep telling him about it. And every time I'd tell him, he'd beat me. Just beat me down and call me a liar.

Every time I look in the mirror, I got to see my chipped tooth from where his rings caused. And in the end, I proved him wrong. And I didn't even get a sorry or an apology or nothing from him. All these damn beatings and shit I went on. (Crawford Interview Transcript, p. 10)

In his interview with Dr. Crawford, Mr. Bryant talked about recurrent thoughts about the sexual abuse he suffered at the hands of his grandfather.

His history of sexual abuse in early childhood left him vulnerable to attacks by predators outside his family. His mother suspected that he had been abused by a male neighbor around the age of twelve. At the age of thirteen, he was raped by an adult while he was in custody.

## **Educational History**

Ms. Anabelle Freeman, Mr. Bryant's first grade teacher, reported after his first six weeks in class that he was going to fail because he could not read and wasn't learning. His mother kept him out of school for several weeks. She returned him to school, but Mr. Bryant was not promoted and repeated the first grade. His teacher in fifth grade was aware that he could not successfully perform fifth grade work, but he was promoted to middle school without merit (Catherine Bryant Declaration, dated 5/23/2016)

Mr. Bryant's attorneys contacted his fifth grade teacher, Joann Poore. She stated that Mr. Bryant was not qualified to be promoted to the next grade; however, there was little teachers could do. She recommended summer school, but he was unable to successfully perform fifth grade work. Another teacher, Donna Solomon Garrell remembered him to be "sweet and slow." She felt Mr. Bryant should have been retained; however, the school's policy was to promote failing students to get them out of the school. Mr. Bryant reported trouble with mathematics. During my interview, he stated, "I can't remember numbers. I can remember names."

Mr. Bryant was expelled at 12 or 13 years of age. (Crawford Interview Transcript, p. 22)

Dr. Schwartz-Watts testified to Mr. Bryant's school failings as well as his impaired developmental stages with walking and talking. Dr. Schwartz-Watts and Dr. Crawford reported Ms. Bryant's significant impairments in adaptive skills, such as academics and social behavior.

Dr. Schwartz-Watts, Dr. Crawford, nor Dr. Everington were qualified to perform neurological examinations nor neuropsychological testing.

## **Neuropsychiatric Mental Status Examination**

### **A. General Description**

#### **1. *General appearance, dress, sensory aids* (glasses, hearing aid)**

Mr. Bryant was dressed in prison garb. He did not use glasses or hearing aids. Mr. Bryant has a significantly misshapened head. The right side of his head is pressed in. Additionally, his philtrum is decreased, as noted by myself and Dr. Davies examination.

2. *Level of consciousness and arousal*

His level of consciousness was intact. He was somewhat hyperaroused, which is consistent with his significant post traumatic stress disorder symptomatology.

3. *Attention to environment*: Mr. Bryant was easily distractible, yet attempted to focus.

4. *Posture* (standing and seated): Posture was good, both sitting and standing

5. *Gait*: Gait was intact.

6. *General demeanor* (including evidence of responses to internal stimuli)

Mr. Bryant was anxious and self-deprecating. He was cooperative. There was no evidence of him responding to internal stimuli.

7. *Response to examiner* (eye contact, cooperation, ability to focus on interview process)

Mr. Bryant maintained good eye contact. He was able to follow the interview, yet clearly had cognitive impairments.

8. *Native or primary language*: English

B. Language and Speech

1. *Comprehension* (words, sentences, simple and complex commands, and concepts)

Mr. Bryant's comprehension was good, although limited. Similar to Dr. Crawford's interview, it took Mr. Bryant several attempts of him saying 12/81 before he was able to give me his complete date of birth, April 12, 1981. He also had some difficulty with three-step commands, as seen in Dr. Moberg's neuropsychological testing and my trails making test, which will be discussed below.

2. *Output* (spontaneity, rate, fluency, melody or prosody, volume, coherence, vocabulary, paraphasic errors, complexity of usage)

His language was spontaneous and fluid. It was normal in volume. His limited vocabulary was simple with no paraphasic errors.

3. *Repetition*

Mr. Bryant was perseverative, meaning he got stuck, which demonstrates a lack of mental flexibility. Dr. Moberg also documented Mr. Bryant's mental inflexibility in his neuropsychological testing.



### C. Thought

#### 1. *Form* (coherence and connectedness)

Mr. Bryant's cognitive processes were coherent, although very, very simple. He did not demonstrate flight of ideas, and his thinking was only minimally tangential.

#### 2. *Content*

Thought content was paranoid, which is consistent with his long history of sexual and physical abuse.

### D. Mood and Affect

#### 1. *Internal mood state* (spontaneous and elicited; sense of humor)

Mr. Bryant remains significantly depressed. He also described anticipatory anxiety, which is an inability to get close to people secondary to the significant trauma he suffered as a child. That trauma was made even greater by his neurodevelopmental disorders, such as brain impairment.

#### 2. *Future outlook*: Mr. Bryant has a realistic future outlook.

#### 3. *Suicidal ideas and plans*: He denies suicidal ideation and plans.

#### 4. *Demonstrated emotional status* (congruence with mood)

His facial features are sad. He displayed very little emotional spontaneity. His affect was consistent with his mood.

### E. Insight and Judgment

#### 1. *Insight*

##### a. *Self-appraisal and self-esteem*

His self-esteem was extremely poor. His self-appraisal was tainted by his impaired adaptive functioning, poor academic skills, limited social and practical skills, sense of isolation.

##### b. *Ability to describe personal psychological and physical status*

Mr. Bryant was able to describe his traumatic personal history and the impact it has had on his life. He understood what his family had done to him and, to some

degree, how it has destroyed his ability to adapt and function. He was less clear about the impact of his cognitive deficits, although he recognized he has significant problems with functional mathematics and with his memory.

## F. Cognition

### 1. *Memory*

#### a. *Spontaneous* (as evidenced during interview)

Spontaneous memory was poor. As noted, he could not report his month, date, and year of his birth; he only noted the date and year. Similarly, he required redirection to complete the trail making, clock design, and cube construction on the Montreal Cognitive Assessment (MOCA).

#### b. *Tested* (incidental, immediate repetition, delayed recall, cued recall, recognition; verbal, nonverbal; explicit, implicit)

Dr. Moberg noted Mr. Bryant demonstrated deficits in facial recognition memory, verbal vigilance, as well as delayed and visual memory.

### 2. *Visuospatial skills*

Visuospatial skills were borderline impaired on Dr. Moberg's Rey Complex Figure Test. Mr. Bryant was able to complete the screening testing of construction of the MOCA cube. Similarly, he completed a MOCA clock test, although he required multiple redirections in order to complete the task. He asked if numbers were needed. He asked about the time at least twice. He also asked about the length of the hands on the clock.

#### 3. *Constructional ability*: Mr. Bryant's constructional ability is grossly intact.

#### 4. *Mathematics* Mr. Bryant was unable to perform serials 7s, but able to perform serial 3s.

#### 5. *Language and Paraphasic Errors*: There were no paraphasic errors.

#### 6. "Executive functions"

Mr. Bryant performed poorly on the MOCA trail making test. He required redirection and still made a sequencing error. Similarly, he also performed poorly on Dr. Moberg's Category Test, a test designed to examine problem solving skills. He scored in the borderline range of functioning. His borderline performance on the Tactual Performance Test reflects not only impaired working memory function, but impaired processing speed. Both working memory and processing speed are crucial to being able to weigh and deliberate, as well as be able to be mentally flexible.

## **Summary of Neuropsychiatric Mental Status and Neuropsychological Functioning**

Mr. Bryant demonstrates poor motor functioning and perceptual impairments consistent with Fetal Alcohol Spectrum Disorder (FASD). He has graphesthesia, which was demonstrated by deficits in finger-tip and palm writing. My examination of his finger tip writing, particularly the right hand, demonstrated an inability to recognize "8," "5," and "3." My findings are consistent with Dr. Moberg's findings, who noted, impairments in fine motor speed for his non-dominant hand and a lack of coordination for both hands. This is consistent with decreased corpus callosum functioning.

Mr. Bryant's olfactory deficits demonstrate impaired frontal lobe/executive function. He performed poorly on the University of Pennsylvania Smell Test. Olfactory function requires an intact frontal lobe.

Mr. Bryant also demonstrated poor facial recognition, a cognitive skill often seen in adolescence that disappears with brain maturity. Dr. Moberg noted that moderately impaired odor identification abilities are also consistent with the finding of aberrant facial morphology on clinical exam. During neurodevelopment, the olfactory system is intimately linked to neuron migration. Forebrain development parallels to facial and limb development. Mr. Bryant's neuropsychological testing reveals a configuration of olfactory impairment, visual memory deficit and mild frontal system dysfunction that is consistent with disruption of these developmental processes in utero.

## **Neurological Examination**

Julian Davies, M.D., performed a neurological examination of Mr. Bryant. Mr. Bryant's social history includes in utero exposure to alcohol. Dr. Davies also noted multiple physical signs which are consistent with alcohol exposure, including unusually short stature in early child. Even as an adult, Mr. Bryant remains in the lowest 10<sup>th</sup> percentile. Mr. Bryant also has some facial features that are indicative of alcohol-related neurodevelopmental disorders. The acquisition of such facial features occurs in a limited period during the first trimester, most often around the 19<sup>th</sup> to 20<sup>th</sup> day. Mr. Bryant had Lip Circularity problems that ranked 5 out of a possible 5 on the University of Washington Lip-Philtrum guide, ranking this sign as the most severe. However, Mr. Bryant's philtrum rank was 3 out of 5. Consequently,

he did not have the complete picture of FASD, which is a common finding. Dr. Davies noted that only 9% of patients studied in his clinic at the University of Washington have clinically significant facial features. Based on the findings of Dr. Davies and Dr. Moberg, Mr. Bryant's diagnosis is Static Encephalopathy, Alcohol exposed.



## **Adaptive Functioning**

Caroline Everington, Ph.D., is a specialist in intellectual and adaptive functioning. On October 21, 2017, she performed an assessment of Mr. Bryant's adaptive functioning and intellectual functioning.

Dr. Everington interviewed Mr. Bryant's mother, his grandmother, and his aunt, and she also administered the Adaptive Behavior Assessment System-3 ABAS, a standardized tool for adaptive functioning. Her composite findings indicate that Mr. Bryant's adaptive functioning is consistent with those of intellectually disabled persons.

ABAS-3 results meet the AAIDD definition of significant limitations in adaptive behavior as the standard scores in one of the three adaptive categories--conceptual, social, or practical--and an overall score fall at least two standard deviations below the mean (approximately 70 or below). For the rating at age 23, scores in all three categories as well as the overall score are not only two standard deviations below the mean but also fall below the first percentile: General Composite (Overall) 53, Conceptual 54, Social 61, and Practical 56. For age 14, scores in two areas (Conceptual and Social) and the overall score fall two standard deviations below the mean: General Composite 70, Conceptual 70, Social 59, and Practical 81. It should be noted that respondent ratings were very similar between the two raters. The results are different due to the higher expectations for an adult. In other words, while Mr. Bryant had some practical skills at age 14, he did not advance to more complex skills of independent adult functioning. (Everington Report, p. 6)

Dr. Everington also interviewed Mr. Bryant and evaluated his adaptive functioning skills. She administered tests of academic function, including the Test of Adolescent and Adult Language-Fourth Edition (TOAL-4), the Independent Living Scales (ILS), and the Math Computation subtest of The Wide Range Achievement Test, Fourth Edition (WRAT4). Mr. Bryant's language scores were not only two standard deviations below the mean, they were in the first percentile. Similarly, his computational skills from the Wide Range Achievement Test, Fourth Edition, were at the 3<sup>rd</sup> and 4<sup>th</sup> grade level, which is again within the intellectual disability range.

Mr. Bryant's functional academics were well below the two standard deviations required for him to meet the intellectual disability standard for impaired adaptive function. Dr. Everington reported that Mr. Bryant could not make day to day decisions and was socially isolated. Dr. Crawford also discussed his social isolation in her interview with Mr. Bryant while probing his sexual history. He stated that his current girlfriend at the time of the interview was his only sexual partner. He ascribed this to shyness and isolation, rather than any moral or religious beliefs.

Mr. Bryant's history is consistent with impaired conceptual and practical domain functioning, which is consistent with the adaptive dysfunction seen in intellectual disability.

## **Equivalence between Fetal Alcohol Spectrum Disorder and Intellectual Disability**

The differential diagnosis between Fetal Alcohol Spectrum Disorder and Intellectual Disability Disorder rests upon the weakest criteria, IQ scores. IQ scores are, at best, poor indicators of intellectual functioning, most commonly correlated to the richness of environmental influences at an early age rather than actual brain functioning. Mr. Bryant's adaptive functioning, supported by the neuropsychological testing, places his day to day functioning squarely in the intellectually disabled range. If Mr. Bryant were a patient in my clinical practice, his IQ score would not dictate his treatment, since his IQ score does not identify the adaptive functioning deficits that require support.

The DSM-5 requires impairments in adaptive functioning and recognizes the importance in understanding the supports utilized by persons with Intellectual Developmental Disorder in attempting to lead an independent life. Deficits in adaptive functioning (Criterion B) refer to how well a person meets community standards of personal independence and social responsibility in comparison to others of similar age and sociocultural background. (Tassé et al., 2012)

IQ testing does not answer the question of how someone functions in society. Mr. Bryant's offenses were, in his mind, predicated upon a sexual approach by each of the victims. Yet, Mr. Bryant's misperceptions are consistent with not only his trauma history, but his impaired executive functioning, his life-long difficulty reading and understanding social cues, and his difficulty effectively weighing and deliberating, especially in new, novel, and stressful situations. His cognitive deficits contributed to his long term isolation and withdrawal from others as much as the trauma he suffered. They were also at play at the time of the offenses, impairing his ability to conform his behavior to the law.

Multiple jurisdictions have recognized the weakness of IQ as an impediment for services provided to both intellectually disabled persons, as well as persons with adaptive functioning deficits consistent with Intellectual Disability, but who have higher IQs. For example, California has utilized the following statutory requirements when providing services through the regional centers:

The fifth category is made up of "conditions similar to mental retardation, or conditions that require treatment similar to the treatment required for individuals with mental retardation." The "similar conditions" and "similar treatment" formulations make it possible in theory for people with a wide range of brain-based conditions that produce adaptive needs similar to those found in people with ID to receive the services to which they are entitled. The legislation does not specifically refer to a too-high IQ as the reason for this Fifth Category loophole, but obviously that is its justification, as is the case with any ID-equivalency provision.

Similarly, Colorado statutes update adaptive functioning deficits as having at least as much ability to impair a person's functioning, thus requiring services, as IQ scores. How a person functions in the community speaks to their needs to a much greater degree than IQ testing.

Colorado revised its eligibility criteria in April 2014 for the usual reason: too many children and adults with brain-based developmental disorders (such as autism) and very significant support needs were being denied service eligibility because of IQ scores over 70. The solution devised is that a developmental disability “means a disability that is manifested before the person reaches 22 years of age, which constitutes a substantial disability to the affected individual, and is attributable to mental retardation or related conditions which include cerebral palsy, epilepsy, autism or other neurological conditions when such conditions result in impairment of general intellectual functioning or adaptive behavior similar to that of a person with mental retardation. (C.R.S. 27-10.5-102 11 (a), as amended).” The innovative thing about this provision is that for ID-Equivalency qualifying purposes, adaptive behavior now has a status equal to that of IQ, and too high IQ score is no longer an impediment to receiving ID services. Mentioning “neurological conditions” is also an important feature. (Greenspan, p.15)

Intelligence Quotient has been found to be limited in its usefulness. *The Diagnostic and Statistical Manual 5 (DSM-5)* has moved IQ scores to associated features and suggests neuropsychological testing as a bridge to functioning.

### **Forensic Conclusion**

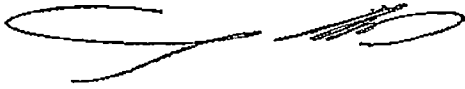
Mr. Bryant has a medical, neuropsychological, and social history consistent with Fetal Alcohol Spectrum Disorder. He also demonstrates long-term adaptive dysfunction which is consistent with and equivalent to the requirements of Intellectual Disorder. There is every indication that he functions as poorly as someone meeting the diagnosis of Intellectual Disorder, including that he has functioned at this level during his developmental period. Clinically, Mr. Bryant would be treated in the same fashion as someone with mild Intellectual disability, although his neuropsychological deficits may require greater intervention, depending upon the cognitive status of the other person.

Mr. Bryant’s adaptive deficits are significant, and outweigh his IQ scores. His IQ scores say little about his ability to function in the world. His adaptive functioning scores on Dr. Everington’s objective testing places him in the Intellectual Disability range of functioning, and his neuropsychological testing supports this poor day to day abilities.

It is my professional opinion, which I hold to a reasonable degree of neuropsychiatric certainty, that Mr. Bryant’s Fetal Alcohol Spectrum Disorder is cognitively, adaptively, and functionally equivalent to Intellectual Disability.

Certainly these neurodevelopmental disorders were present at the time of Mr. Bryant’s offenses, impairing his ability to effectively conform his behavior to the law. His consistent misperception of social cues and difficulty accurately weighing and deliberating under stressful circumstances had led to a life of isolation before the offenses.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 8, 2018.

A handwritten signature in black ink, appearing to read 'George Woods', with a stylized flourish at the end.

George Woods, M.D.

### Sources Cited

Tassé, M. (2012) "Adaptive Behavior Assessment and the Diagnosis of Mental Retardation." *Applied Neuropsychology*.

Greenspan, S., Novick Brown, N., and Edwards, W. (2016) "FASD and the Concept of 'Intellectual Disability Equivalence.'" *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives, International Library of Ethics, Law, and the New Medicine* 63, DOI 10.1007/978-3-319-20866-4

STATE OF SOUTH CAROLINA **RECORDED** IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER 2018 MAY 22 AM 9:16

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.  
Stephen Corey Bryant, SCDC #5252,

Applicant, ) C/A No. 2016-CP-43-828  
vs. ) \*CAPITAL PCR\*  
State of South Carolina, ) MOTION FOR SUMMARY JUDGMENT  
Respondent. )  
\_\_\_\_\_ )

Respondent moves for summary judgment on the claim raised in the post-conviction relief (PCR) application filed by applicant on May 3, 2016. Based on the record before the Court, including the report and affidavit provided by applicant's own expert, respondent submits the claim is without merit and this action should be dismissed as a matter of law.

In support of the motion, respondent would respectfully show the Court:

**Procedural History**

On August 18, 2008, applicant entered guilty pleas to: three counts of murder, two counts of first-degree burglary, second-degree burglary, two counts of assault and battery with intent to kill, threatening a public employee, armed robbery, possession of stolen handgun, and second-degree arson. (App.pp.1334-38).<sup>1</sup>

The Honorable Thomas A. Russo imposed sentence on all non-capital convictions on September 11, 2008, 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," and sentenced applicant to death for Willard Tietjen's murder.

<sup>1</sup> "App." refers to the PCR Appendix prepared for the PCR appeal.



(App.pp.1047-51). Applicant appealed.

The South Carolina Supreme Court affirmed the convictions and sentences in an opinion issued on January 7, 2011. (App.pp.1452-57). On January 24, 2011, appellate counsel filed a petition for rehearing which the Court denied on February 2, 2011, and issued the remittitur. (App.pp.1458-59; p.1461; p.1463). Applicant did not seek further review from the Supreme Court of the United States.

#### *First PCR Action*

Applicant obtained a stay from the South Carolina Supreme Court on March 3, 2011, to seek post-conviction relief. (App.pp.1475-76). An evidentiary hearing began October 1, 2012, before the Honorable R. Ferrell Cothran. (App.p.1639). By order dated December 4, 2012, Judge Cothran denied relief and dismissed the action. (App.pp.2572-2625). Applicant moved to alter or amend pursuant to Rule 59(e), SCRCPP. (App.pp.2626-33). By order dated February 14, 2013, Judge Cothran denied the motion. (App.pp.2634-46).

Applicant appealed the denial of relief and filed a petition for writ of certiorari with the Supreme Court on March 28, 2014. On May 6, 2015, the Court denied a petition for rehearing and issued the remittitur. On June 3, 2015, the Court issued an Execution Notice. Applicant obtained a stay of execution from the United States District Court to pursue federal corpus habeas remedies. Applicant also sought review of PCR issues from the Supreme Court of the United States. The Supreme Court denied applicant's petition for writ of certiorari on November 30, 2015. *Bryant v. South Carolina*, 136 S.Ct. 545 (2015) (mem.).

#### *Federal Habeas Action*

Applicant's federal habeas corpus proceeding is currently stayed while he is pursuing this PCR action in state court. See C/A No. 9:16-01423-DCN-BM (ECF No. 52; Federal District

Court, District of South Carolina). Since the stay was filed on July 26, 2016, the parties have updated the federal court on the status of the state action in three joint reports on January 26, 2017, August 11, 2017, and February 27, 2018, and advised the state action remains pending. (ECF Nos. 57, 58, and 62).

#### *Current PCR Action*

In the current PCR action, respondent filed a motion for summary judgment dated August 15, 2017, and argued the record before the Court, including affidavits attached to its motion, demonstrated applicant could not meet his burden of proving he is intellectually disabled. (Aug. 15, 2017 motion, pp.8-17). Applicant filed a response in opposition to the motion along with his own affidavits on October 24, 2017. The response indicated applicant was continuing to investigate the *Atkins* claim. (Oct. 14, 2014 resp., p.1).

This Court heard arguments from the parties on October 25, 2017. In an order dated October 31, 2017, the Court denied respondent's motion for summary judgment, and amended the scheduling order by separate order.

On April 9, 2018, this Court held a telephone status conference at which time the scheduling order was further amended to provide applicant would provide a copy of the final report from his experts by May 9, 2018, and scheduled the evidentiary hearing for the week of October 1, 2018. Applicant timely filed a report from his expert which respondent received on May 9, 2018. Respondent now moves again for summary judgment.

#### **Argument**

##### *Applicant Cannot Demonstrate He is Intellectually Disabled*

As respondent has maintained throughout the instant action, applicant cannot demonstrate he is intellectually disabled. There has never been a finding by any psychologist or applicant's

own experts of intellectual disability, despite months of evaluations and interviews. The record before the Court, including from all previous proceedings and pleadings and affidavits from the instant action, demonstrate respondent is entitled to summary judgment as applicant cannot meet his burden. *See* S.C. Code Ann. § 17-27-70(c) ("The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); *see also Franklin v. Maynard*, 356 S.C. 276, 279-80, 588 S.E.2d 604, 606 (2003) (noting whether at trial or at PCR, the burden of proving intellectual disability is preponderance of the evidence). Applicant asserts he has a diagnosis of Fetal Alcohol Spectrum Disorder (FASD) and its effects are the functional equivalent of intellectual disability and, as a result, he is ineligible for the death penalty. Such a claim is an extension of *Atkins v. Virginia*, 536 U.S. 304 (2002), that has neither been tested nor proven. Respondent submits the allegation exceeds the limits of this litigation and, because applicant cannot meet the accepted definition of intellectual disability, respondent is entitled to summary judgment as a matter of law.

The Supreme Court of the United States determined people with intellectual disabilities "should be categorically excluded from execution." *Atkins*, 536 U.S. at 318. In *Atkins*, the Court relied on a clinical definition of intellectual 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.* The South Carolina Code defines intellectual disability similarly, which was approved as applicable in the death penalty context by our Supreme Court. *See* S.C. Code Ann. § 44-20-30 (providing the definition of intellectual disability as "significantly sub-average general intellectual functioning

existing concurrently with deficits in adaptive behavior and manifested during the developmental period"); *Franklin*, 356 S.C. at 278-79, 588 S.E.2d at 605 (approving approved the statutory definition as applicable in the death penalty context).

Applicant cannot meet the first prong of the definition of intellectual disability, a fact conceded to by his own experts. All of applicant's IQ scores are significantly higher than 70, even given the standard margin of error. While in the Department of Juvenile Justice (DJJ), a psychological evaluation was completed when applicant was fifteen-years-old to assess his needs and determine if there were any indications of intellectual disability. (DJJ records, p.3).<sup>2</sup> Dr. Kevin Everhart completed the evaluation May 9-10, 1996, and noted applicant self-reported his involvement in therapy prior to his commitment to DJJ, a diagnosis of ADD, and treatment with Prozac and Ritalin. (DJJ records, pp.3-4). Further, applicant reported his mother "occasionally drinks." (DJJ records, p.4).

Regarding school history, Dr. Everhart reported applicant attended mainstream science, math, and social studies classes, as well as some self-contained classes, but had been expelled. (DJJ records, p.4). Applicant stated he maintained grades of Bs and Cs when taking Prozac and Ritalin, but his grades fell when he stopped taking the medication. (DJJ records, p.4). Applicant also admitted to being suspended two or three times during the eighth grade due to fights and told Dr. Everhart he repeated the first grade because his mother told him he missed too many days. (DJJ records, p.4).

Dr. Everhart reported applicant's IQ was assessed using the Wechsler Intelligence Scale for Children-Third Edition (WISC-III), which was the standard in 1996. (DJJ records, p.3; p.6).

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<sup>2</sup> The DJJ records were previously submitted to the Court as an attachment to respondent's motion for summary judgment dated August 15, 2017.

Applicant "displayed adequate to exceptional effort and diligence" on tests and Dr. Everhart opined it was "believed that the obtained results represent valid estimates of [applicant's] current level of functioning." (DJJ records, p.6). Applicant obtained a Full Scale Standard IQ Score of 93, which was within the average range of ability. (DJJ records, p.6). All other test scores also indicated applicant was performing at grade level. (DJJ records, p.6). Based on applicant's level of intellectual functioning, Dr. Everhart reported applicant possessed the intellectual capacity to complete high school and college. (DJJ records, pp.6-7). Dr. Everhart did not make any findings to suggest applicant was intellectually disabled.

The report was reviewed by the consulting psychiatrist at DJJ at the time, Dr. Tracy Gunter. Dr. Gunter reported applicant did not know of any problems with his birth, growth, or early development. (DJJ records, p.9). Regarding applicant's psychological testing, Dr. Gunter reported the Full Scale Score of 93 was in the average range of intellectual functioning and the remainder of his testing was in keeping with his IQ. (DJJ records, p.10). Dr. Gunter agreed with Dr. Everhart that applicant had the ability to reach his goal of finishing school, and agreed nothing in applicant's testing revealed the possibility of a diagnosis of intellectual disability. (DJJ records, p.11).

Both doctors reviewed their reports and reconfirmed their findings in affidavits submitted to the Court with respondent's motion for summary judgment dated August 15, 2017. Dr. Everhart reconfirmed there was nothing to indicate applicant was intellectually disabled, noting all test results and interpretations were "significantly above what professional psychologists would expect from someone who is intellectually disabled." (Everhart affidavit, p.2). Dr. Everhart explained in his affidavit that applicant's IQ score of 93, combined with other scores and school history, indicated an average intelligence. (Everhart affidavit, pp.2-3).

Dr. Gunter reconfirmed her findings there was nothing to indicate applicant suffered from intellectual disability, a learning disability, or cognitive disorder. (Gunter affidavit, p.3). Dr. Gunter explained certain variabilities in some of applicant's scores were not surprising due to his history of suspensions from school and were not due to a low intellectual functioning. (Gunter affidavit, p.3). Information from staff indicated applicant functioned similarly to other juveniles in the facility and any problems were likely due to "impulsivity and behavioral dyscontrol rather than developmental delay." (Gunter affidavit, pp.3-4). Finally, Dr. Gunter reiterated her impressions applicant at the time suffered from conduct disorder and was at a significant risk of developing antisocial personality disorder, but there was nothing to indicate he was intellectually disabled and nothing in her evaluation would have led her to refer applicant for further evaluation. (Gunter affidavit, p.4).

In addition, in the habeas corpus action pending before the federal court, applicant notes results of IQ tests received prior to his time at DJJ. Applicant concedes the scores he received on the WISC-III placed him beyond the general range of concern, plus or minus the standard margin of error. *See* C/A No. 9:16-01423-DCN-BM (ECF No. 37, p.70; Federal District Court, District of South Carolina). Applicant received IQ scores of 79 on April 28, 1993,<sup>3</sup> 86 on June 6, 1994, and 92 on March 8, 1996. These scores were taken from applicant's school records which were reviewed by defense experts prior to all previous proceedings against applicant.

All IQ scores received by applicant prior to the developmental age of eighteen are above that required to meet the definition of intellectual disability. Even recognizing the standard

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<sup>3</sup> Respondent notes the IQ score of 79 – applicant's lowest yet significantly higher than 70 score – was likely a result of having taken the WISC-III in 1993 shortly after the test had been published. *See* James R. Flynn, *Tethering the Elephant: Capital Cases, IQ, and the Flynn Effect*, 12 Psychol. Pub. Pol'y & L. 170, 174 (2006) (noting the WISC-III was normed in 1989 and published in 1991).

margin of error, applicant has IQ scores which place him above the sub-average range of intellectual functioning for *Atkins* to apply. See *Hall v. Florida*, 134 S.Ct. 1986, 1995 (2014) (recognizing IQ scores should be read as a range rather than a fixed number). Despite the clear evidence that applicant cannot be categorically exempted from the death penalty under *Atkins*, applicant attempts to assert he suffers from "impairments" from FASD similar to someone who is intellectually disabled. Applicant contends a categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Atkins*. However, *Atkins* itself rejects that argument. *Atkins* made clear its holding was limited to the intellectually disabled: "[O]ffenders who are not mentally retarded . . . are unprotected by the exemption and will continue to face the threat of execution." *Atkins*, 536 U.S. at 320. The Supreme Court has not expanded the case's narrow holding to any other class and applicant has not cited to any authority recognizing an extension of *Atkins* to include people with FASD and/or developmentally impaired persons. In fact, federal and state courts have consistently declined to extend the ruling to any other class of individuals, such as the mentally ill. See *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012) (noting absence of case law extending *Atkins* to prohibit the execution of those with mental illness); *Carroll v. Sec'y, Dept. of Corr.*, 574 F.3d 1354, 1370 (11th Cir. 2009) (noting there was no decision from the Supreme Court barring the execution of persons with some form of mental illness); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006) (per curiam) (explaining the rule in *Atkins* does not extend to those with mental illness); *Lawrence v. State*, 969 So.2d 294 (Fla. 2007) (declining to extend *Atkins* to mentally ill); *State v. Hancock*, 840 N.E.2d 1032 (Ohio 2006) (declining to extend the holding in *Atkins* to the mentally ill because mental illnesses come in many forms; different illnesses may affect a defendant's moral responsibility or "detrability" in different ways and to different degrees and such an expansion would create an ill-defined

category of murderers who would receive a blanket exemption from capital punishment without regard to the individualized balance between aggravation and mitigation in a specific case); *Lewis v. State*, 620 S.E.2d 778 (Ga. 2005 (declining to extend *Atkins* to mentally ill); *Matheney v. State*, 833 N.E.2d 454 (Ind. 2005) (same).

There remains no finding of intellectual disability even by applicant's own experts. Dr. George Woods (Woods) concedes in his affidavit attached to the second amended application applicant's IQ scores are above those required to meet the criteria for intellectual disability. Dr. Woods also opines applicant demonstrates deficits in adaptive functioning consistent with mild intellectual disability. However, even if Dr. Woods's opinion were true, deficits in adaptive functioning is only one of the three criteria required for a finding of intellectual disability rendering a person ineligible for the death penalty in South Carolina. *See* S.C. Code Ann. § 44-20-30 (defining intellectual disability as "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period"). Applicant cannot meet the statutory definition of intellectual disability and he cannot meet his burden.

Further, the evidence applicant cites to as proof he demonstrates deficits in adaptive functioning was information available to his attorneys throughout the previous proceedings against him, and was brought to the courts' attention through expert testimony, testimony from family members, and the introduction of applicant's mental health history. The mitigation case at sentencing consisted of family history and personal history profiles. Applicant's aunt testified she believed applicant was receiving counseling, and that he indicated to her he wanted to get help. (App.p.788; p.793; p.796). Applicant's mental health history included a review of IQ tests by Dr. Donna Maddox (Maddox), a forensic psychiatrist. (App.pp.806-07). Dr. Maddox



testified her review "basically show[ed] that [applicant] was functioning in the low average range of intelligence" and noted "times where his intelligence testing would be lower," but Dr. Maddox opined those scores were "secondary to [applicant's] not being medicated." Dr. Maddox stated applicant was not intellectually disabled. (App.pp.812-17; pp.836-38).

Dr. Maddox testified she asked applicant's family members if they knew if his mother abused alcohol during her pregnancy because history she obtained through medical records caused concern that perhaps applicant had exposure to alcohol. (App.p.814). Dr. Maddox noted applicant's diagnosis of attention deficit disorder "as a very young child" because "it can be caused by exposure to alcohol" as a fetus. (App.p.814). However, Dr. Maddox stated applicant's aunt, Terry Caulder, said she did not see applicant's mother "abusing any alcohol during her pregnancy." (App.p.814). Specifically, Dr. Maddox testified:

I looked at some pictures of [applicant], a specific picture of when he probably would be about nine or ten years old, and he had some features that would be consistent with that but there's no evidence and I can't say with a reasonable degree of medical certainty that he was exposed to alcohol in utero but there's a question.

(App.p.814). Dr. Maddox also noted applicant's school history included time spent with counselors, "emotionally handicapped classes," and a number of psychological evaluations. (App.pp.815-16).

Dr. Marti Loring (Loring), an expert in trauma, testified she interviewed applicant's mother. (App.pp.926-29; p.942; p.949). Dr. Loring stated some of what she learned from Catherine Bryant included a history of possible drug and alcohol abuse, as well as physical and emotional abuse toward applicant. (App.p.942). Dr. Loring testified, "When one or more family members shared [allegations of alcohol or drug abuse] with me I did accept that," but admitted she did not have records from any psychiatric institutions or rehabilitation clinics to substantiate

the claims. (App.p.974). Dr. Loring testified the abuse led to "incredible disruptions" in applicant's childhood and a child who had an anxious, aggressive, and hostile personality. (App.pp.953-54).

During applicant's first PCR, Dr. Maddox testified applicant's history of mental illness was "a complication from post-traumatic stress disorder. You get intermittent paranoid ideation. Which every time you meet with him that's been an issue. Medications help, but there are many times a day where he becomes very mistrustful of others. Frightened, anxious, acutely paranoid." (App.p.2078).

The record demonstrates applicant's exposure to alcohol as a fetus was a factor considered by Dr. Maddox and Dr. Loring during the original plea proceeding. But critically, that additional circumstance, even if available, is of no moment because this action is focused on intellectual disability.<sup>4</sup> Respondent submits whether applicant meets the criteria for FASD is beyond the scope of this litigation. Regardless, in light of the evidence and testimony presented as mitigation during the sentencing phase at applicant's plea hearing and at his first PCR hearing, respondent submits it is unlikely additional information regarding applicant's difficulty in school, possible exposure to alcohol as a fetus, or further IQ assessments would have led to a different

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<sup>4</sup> As argued throughout this motion, no psychologist has ever found applicant to be intellectually disabled, and neither do his own experts. Because there has never been such a finding, respondent submits there is no need to look for a cause, such as FASD if it could be scientifically linked as causation. *See Lee v. Kelley*, 854 F.3d 544, 546 (8th Cir. 2017) (per curiam) (finding to receive a stay of execution, it was not enough that petitioner show a significant possibility of success of the merits of *some* claim, rather he must show a significant possibility that he will succeed on the merits of a claim that would deprive the state of the authority to execute him) (emphasis in original). Notably, while exposure to alcohol in utero is now considered a possible contributing factor to intellectual disability, at the time of applicant's guilty pleas, the term "fetal alcohol syndrome" did not appear in the DSM-IV-TR. *Garza v. Thaler*, 909 F.Supp.2d 578, 647 (W.D. Tex. 2012). Further, applicant's allegation he suffers from FASD has never been tested or challenged; respondent merely notes, if true, it cannot help in this action.

result in applicant's sentence. The expanded record before the Court, including affidavits from the DJJ doctors and affidavits from applicant's experts none of whom found applicant was intellectually disabled, underscores respondent's earlier argument that this PCR action is both untimely and successive. (Return, pp.7-13). The free-standing claim of intellectual disability was available during applicant's guilty plea and was not raised, an ineffective assistance claim related to the issue was available during applicant's first PCR and was not raised, and there is no evidence to now support a finding that applicant is intellectually disabled. *See McCoy v. State*, 401 S.C. 363, 370, 737 S.E.2d 623, 627 (2013) (holding statutory law permits a successive PCR application "only if the applicant demonstrates a sufficient reason why the claims asserted therein were not asserted previously"). Respondent submits applicant has failed to present a sufficient reason to explain why he failed to raise a claim of intellectual disability in any of the previous proceedings against him.

The evidence before this Court shows applicant does not meet the diagnosis for intellectual disability. Applicant's Full Scale Standard IQ Score at fifteen-years-old was 93 following an assessment using the WISC-III, there were no noted deficits in adaptive functioning, and, in fact, it was noted applicant was able to develop and maintain successful relationships, and, applicant was never diagnosed as intellectually disabled before the age of eighteen. Applicant's mental health history does not demonstrate a below-average intellectual functioning to place him in the category of those categorically exempt from the death penalty under *Atkins*. *See Atkins*, 536 U.S. at 320-21 (holding the categorical exclusion of intellectually disabled persons is narrow in scope).

In light of applicant's report, there is no issue of material fact. Therefore, respondent respectfully moves for summary judgment because there is admittedly insufficient evidence to

support a finding of intellectual disability and because of the procedural bars. *See McCoy*, 401 S.C. at 370, 737 S.E.2d at 627 (noting "PCR claim may ultimately prove to be untimely, successive, or perhaps unsuccessful on the merits" following fact development); *Franklin*, 356 S.C. at 279-80, 588 S.E.2d at 606 (noting whether at trial or at PCR, the burden of proving intellectual disability is preponderance of the evidence); *see also* S.C. Code Ann. § 17-27-70(b) (summary dismissal is allowed "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and not purpose would be served by any further proceedings").

### Conclusion

WHEREFORE, having made its motion for summary judgment, respondent submits applicant is not entitled to relief because the claim is procedurally barred and because the record before the Court, including all affidavits previously submitted, show the claim of intellectual disability must be denied as a matter of law.

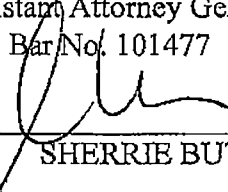
Respectfully submitted,

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May 18, 2018.

RECORDED

2018 MAY 22 AM 9:16

JAMES C. CAMPBELL  
CLERK OF COURT

**C/A No. 2016-CP-43-828**

**\*CAPITAL PCR\***

## CERTIFICATE OF SERVICE

**Respondent.**

By:

MELODY J. BROWN

Senior Assistant Deputy Attorney General  
ATTORNEY FOR RESPONDENT

) REIN THE COURT OF COMMON PLEAS  
 ) FOR THE THIRD JUDICIAL CIRCUIT  
 ) 2018 NOV - 8 PM 2:08  
 ) Case No. 2016-CP-43-00828  
 ) CLERK OF COURT  
 ) SIMPSON COUNTY, S.C.  
 ) **Objections to the State's Proposed Order**

Applicant,

**VS.**

Defendant.

## I. FOUNDATIONAL BASES FOR OBJECTIONS.

**Stephen Cory Bryant does not suffer from an Intellectual Disability as defined South Carolina law.** George Woods, Jr. M.D.'s written report dated May 8, 2018 was provided to both the Court and the State on May 9, 2018. (Exhibit A). In his report, Dr. Woods noted that Mr. Bryant's IQ scores were marginally **\*above\* those required to meet the criteria** for Intellectual Disability ("ID"). He also noted in his report that Dr. Caroline Everington's testing results were consistent with someone suffering from **\*mild intellectual functioning.\*** Clearly, the Court and

<sup>1</sup> As a threshold matter, the procedure followed by this Court risks denying Mr. Bryant an opportunity to have his PCR application adjudicated by a judicial officer. “S.C. Code Ann. §17-27-80 (1976), requires the PCR court to ‘make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.’” *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991). *See also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated the responsibility of drafting the order to the Attorney General’s Office. The reasoning in the proposed order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, §8. In capital cases, our Supreme Court “strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law.” *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). The admonition in *Hall* is consistent with this Court’s responsibility to “safeguard the rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012).

the State were on notice, as of May 9, 2018, that Dr. Woods and Dr. Everington *had eliminated the possibility* that Mr. Bryant met the criteria required for a straight up diagnosis of Intellectual Disability. Contemporaneously with disclosing Dr. Woods report, Mr. Bryant moved to amend his PCR application to allege ineffective assistance of counsel because prior counsel did not discover he suffers from a “related disability” as defined by S.C. Code Ann. § 44-20-30(15),<sup>2</sup> to wit: Fetal Alcohol Spectrum Disorder (“FASD”). In his motion to amend, Mr. Bryant also asserted his “related disability”—FASD—should be a constitutional bar to the death penalty.<sup>3</sup> Unsurprisingly, the State filed a second motion for summary judgment on May 18, 2018 based in

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<sup>2</sup> S.C. Code Ann. § 44-20-30(15) provides:

“Related disability” is a severe, chronic condition found to be closely related to intellectual disability or to require treatment similar to that required for persons with intellectual disability and must meet the following conditions:

- (a) It is attributable to cerebral palsy, epilepsy, autism, or any other condition other than mental illness found to be closely related to intellectual disability because this condition results in impairment of general intellectual functioning or adaptive behavior similar to that of persons with intellectual disability and requires treatment or services similar to those required for these persons.
- (b) It is manifested before twenty-two years of age.
- (c) It is likely to continue indefinitely.
- (d) It results in substantial functional limitations in three or more of the following areas of major life activity: self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living.

<sup>3</sup> Mr. Bryant’s proposed second amended PCR application, at ¶ 16(c), states, “Regarding Grounds (10)(c)&(11)(c) and 10(d)&11(d), Mr. Bryant’s FASD was not previously identified and is ‘evidence of material facts, not previously presented and heard, that requires vacation of the . . . sentence in the interest of justice.’ S.C. Code Ann. § 17-27-20(A)(4).”



large part on Dr. Wood's report holding that Mr. Bryant could not meet the requirements for a diagnosis of ID.

The Court convened a hearing on the parties' respective motions on June 8, 2018. Mr. Bryant did not oppose the State's second motion for summary judgment, but rather argued in favor of his motion to amend. Shortly thereafter, the Court denied the State's motion for summary judgment, but also denied Mr. Bryant's motion to amend his PCR application. The Court's rulings on the two motions presented a puzzle. Counsel were duty-bound to interpret the orders logically and with reasonableness. As a result, undersigned counsel viewed the Court's seemingly contradictory rulings on the two motions to mean the Court wanted a more thorough record on the issues before the Court before dismissing the action. Undersigned counsel were not going to run up expert fees just for completeness of investigation of a matter that was no longer in question. This Court should not endorse a finding to the contrary.

With that explanation in mind and knowing it was settled that Mr. Bryant could not meet ID criteria straight up under South Carolina law, and with the fact that the Court denied Mr. Bryant's motion to amend his PCR application to include FASD, undersigned counsel did not schedule Dr. Julian Davies or Dr. Paul Moberg to come testify at the October hearing concerning their testing related the diagnoses of FASD. Undersigned counsel also directed Dr. Woods and Dr. Everington not to perform any more work on the issue of ID, once it was known ID was not in play. Respectfully, it is apparent from the Court's thoughts concerning the testimony during the October hearing, which the Court provided to the State and the applicant in an email after the hearing, that the Court may have simply misapprehended Dr. Wood's report at the June 8, 2018 hearing. *See Attachment B (emails between Court and counsel).*

The State did the Court no favors with its lengthy examinations of the experts at the October hearing, over several hours' time and about all manner of topics related to investigation, etc. The State really need only to have asked one question of each of the two experts: "Does the applicant suffer from ID as defined by South Carolina law?" The State did not ask that question. It is not as if the State had the justifiably plausible excuse of not asking a question because it didn't know the answer. The State correctly asserted in its May 18, 2018 motion for summary judgment, at p. 5: **"Applicant cannot meet the first prong of the definition of intellectual disability, a *fact conceded to by his own experts.*"** Instead the State employed loaded and irrelevant questions of the experts *ad nauseam*, about all manner of things the experts could have done but did not do regarding their assessments of ID, none of which was relevant given the experts' findings that straight up ID was ruled out regarding Mr. Bryant. Undersigned never expected that having experts *cease work on a settled issue* would cause a Court to hold the experts up to ridicule, and to cast aspersion concerning their ethical integrity and professional character for not having done work that was wholly unnecessary, as the Court did in its post-hearing email to the parties. The State also led the Court to find that the principles of *Stanko v. State*, 402 S.C. 252, 741 S.E.2d 708 (2013) had application to an ID case. They do not, and as will be made clear in Section IV(3) *infra*, the facts of the crime, deliberate and methodical acts during the course of a crime, matter when a defendant is claiming insanity.

By email dated October 5, 2018, this Court requested the State prepare a proposed order. On October 8, 2018, counsel for Mr. Bryant requested a conference call with this Court and counsel. The Court denied that request. A copy of this email string is attached as Exhibit B, *supra*. On October 19, 2018, the State submitted its proposed order. Counsel for Mr. Bryant renewed the request for a status conference or, in the alternative, an opportunity to file objections. This Court

granted Mr. Bryant's request for an opportunity to file objections and offered to convene a hearing to place those objections on the record.

## II. LEGAL AND MEDICAL FRAMEWORK.

The definition of an "intellectual disability" appears three times in the South Carolina Code of Laws. The definition appears twice in Title 44 (Health Code). S.C. Code Ann. § 44-20-30(12) provides, "'Intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-26-10(9) is identical. Using antiquated terminology,<sup>4</sup> S.C. Code Ann. § 16-3-20(C)(b)(10) provides, as mitigation in a capital case:

The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Although the internal numbering scheme has changed, our Supreme Court has recognized "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)." *Franklin v. Maynard*, 356 S.C. 276, 279, fn. 2, 588 S.E.2d 604, 605, fn. 2 (2003).

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<sup>4</sup> In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court held executing someone with "mental retardation" violates the Eighth Amendment. The Supreme Court recognized, "Previous opinions of this Court have employed the term 'mental retardation,'" but *Hall v. Florida* began using "the term 'intellectual disability' to describe the identical phenomenon. 572 U.S. 701, 704 (2014); see also 2011 Act No. 47, § 14(B) ("The Code Commissioner shall substitute the term 'intellectual disability' for 'mental retardation' and 'person with intellectual disability' for 'mentally retarded' in the 1976 Code of Laws at such times as regulations and statutes containing these terms are amended, revised, or republished.")). Whenever possible, Mr. Bryant will use the term "intellectual disability."

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Supreme Court of the United States held executing a person with ID violates the Eighth Amendment to the United States Constitution. In doing so, the Court looked to the clinical definitions of ID:

The American Association on Mental Retardation (AAMR) defines mental retardation as follows: “*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.” *Mental Retardation: Definition, Classification, and Systems of Supports* 5 (9th ed.1992).

The American Psychiatric Association’s definition is similar: “The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.” *Diagnostic and Statistical Manual of Mental Disorders 4* (4th ed.2000). “Mild” mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70. *Id.* at 42–43.

*Atkins*, at 304, fn. 3. The AAMR is now known as the American Association of Intellectual and Developmental Disabilities (“AAIDD”). The AAIDD provides, “Intellectual disability is a disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills.”<sup>5</sup> The AAIDD’s publication, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th Edition) is the current edition of that organization’s guide cited by the Supreme Court in *Atkins*. The AAIDD also publishes the *User’s Guide to Intellectual Disability: Definition, Classification, and Systems of Supports*, 2012 (“AAIDD User’s Guide”), which is relied on by clinicians when diagnosing ID.

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<sup>5</sup> <http://aaidd.org/intellectual-disability/definition> (last viewed Nov. 3, 2018).

The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, also cited by the Supreme Court in *Atkins*, is in its fifth edition ("DSM-5").

Since *Atkins*, the Supreme Court has addressed state procedures for determining whether a person is ineligible for the death penalty because of ID. *Hall v. Florida* held state procedures must follow "established medical practice," 134 S. Ct. at 1995, to determine whether a person is ineligible for the death penalty because of ID. *Hall*, in fact, overruled Florida judicial decisions defining ID "more narrowly" than the medical community. *Id.* 134 S. Ct. at 1994. Next, *Moore v. Texas* reminded states cannot "disregard of current medical standards" when determining whether a person is ineligible for the death penalty because of ID. \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 1039, 1049 (2017). The Court first held Texas' "conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*." *Id.* The Court then held Texas' consideration of Moore's adaptive functioning also deviated from prevailing clinical standards." *Id.* at 1050. The Court pointed out Texas "overemphasized Moore's perceived adaptive strengths" when the proper standard applied by "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Id.* (emphasis supplied by the Court). The Court also held Texas "stressed Moore's improved behavior in prison" even though clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Id.*

### III. DETAILED OBJECTIONS.

As stated in the Foundational Bases for Objections above, undersigned counsel anticipates this Court will ultimately enter an order finding Mr. Bryant failed to meet the burden of proving he suffers from ID. However, the proposed order submitted by the State commits many of the same legal errors addressed by the Supreme Court in *Hall* and *Moore*. The proposed order also misconstrues the testimony offered at the evidentiary hearing. These errors are discussed below:

- 1) Eleven pages of the proposed order recite the facts of the Mr. Bryant's crimes.

Proposed order, pp. 5-16. Later on, the proposed order, at p. 25, states:

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.

After a block quote from *Stanko*, which will be addressed in Subsection IV(3) below, the proposed order, at p. 26, states, "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.'" This analysis directly contracts "established medical practice" and "current medical standards." The *AAIDD User's Guide* provides:

Do not use past criminal behavior or verbal behavior to infer level of adaptive behavior. The diagnosis of intellectual disability is based on meeting three criteria: Significant limitations in intellectual functioning; significant limitations in adaptive behavior as expressed in conceptual, social, and practical skills; and age of onset prior to age 18. The diagnosis of ID is not based on a person's 'street smarts,' behavior in jail or prison, or 'criminal adaptive functioning.'

AAIDD User's Guide, Chapter 3, Table 3.3 Guidelines for Synthesizing Obtained Information, No. 11, p. 20 (Exhibit C). The proposed order, therefore, departs from "established medical practice" in contravention of *Hall* and *Moore*.

- 2) The proposed order states, "The [Supreme] Court has also repeatedly acknowledged that the medical community's clinical standards should inform, but will not dictate, the legal finding under *Atkins*." Proposed order, pp. 17. This statement mischaracterizes the

holdings in *Hall* and *Moore*. See *Moore* at 1049 (“*Hall* indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”). As will be seen throughout these objections, the proposed order departs from “established medical practice” in contravention of *Hall* and *Moore*.

3) The proposed order, at pp. 18, 25-28, inappropriately relies on *Stanko, supra*. *Stanko* did not claim to have ID. Although *Stanko* declined to extend *Atkins*, that case was very different from Mr. Bryant’s case. *Stanko* “presented expert testimony, as part of an insanity defense, that he suffered from central nervous system dysfunction and diminished or lowered function of his brain in the frontal lobe area,” and the State’s expert diagnosed *Stanko* “as having a severe personality disorder.” 402 S.C. at 283-84, 741 S.E.2d at 724-25. An insanity defense necessarily involves consideration of the facts of the crime because the inquiry is whether the person knew the difference between right and wrong at the time of the offense. See S.C. Code Ann. § 17-24-10, *et. seq.*

4) The proposed order, at p. 20, states:

[T]his 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.

After making this statement, the proposed order emphasizes adaptive strengths rather than adaptive deficits. See *Moore*, at 1050 (the proper standard applied by “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.” (emphasis supplied by the Court)).

5) The proposed order, at pp. 20-23, grossly understates the process through which Dr. Woods determined Mr. Bryant suffers from FASD. Dr. Woods’ written report (Exhibit A)

summarized his Neuropsychiatric examination. In addition to consulting Dr. Everington, Dr. Woods consulted Dr. Julian Davies, M.D. and Dr. Paul Moberg, Ph.D., both of whom examined Mr. Bryant. Dr. Woods testified about these consultations at the evidentiary hearing. Dr. Woods relied on the consultations with these two experts to reach the FASD diagnosis. The proposed order does not even acknowledge this testimony or consultations.

6) The proposed order, at p. 20, states:

[T]his 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.

This statement is contrary to the medical and legal requirement to focus on adaptive deficits rather than adaptive strengths. *Moore*, at 1049 (Texas “overemphasized Moore’s perceived adaptive strengths” when the proper standard applied by “the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.”).

7) The proposed order, at p. 21, states, “Dr. Woods highlighted that [Mr. Bryant] had some vulnerabilities and was described by teachers as ‘isolated ad slow’ which Dr. Woods proffered, can indicate an intellectual disability. However, much of the record indicates otherwise, as brought out by the State in cross examination.” As seen, the States’ focus on adaptive strengths, rather than adaptive deficits, is contrary to the medical and legal standards. *See Moore, supra*.

8) The proposed order, at p. 21 (fn. 7), states:

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.

There were two reasons for Dr. Evernigton not conducting additional interviews. First, as Dr. Everington testified during the hearing, many of the witnesses were not available for interviews. Second, as stated in Section I above, once Dr. Woods issued his report (Exhibit A) acknowledging “Mr. Bryant’s IQ scores are marginally above those required to meet the criteria for intellectual disability” and this Court denied Mr. Bryant’s motion to amend his PCR application to allege the FASD claims as a “related disability,” counsel curtailed the investigation. Additional interviews are very likely once Mr. Bryant is able to proceed in a forum where he can further develop this claim, *i.e.* when Mr. Bryant’s case returns to federal court.

9) The proposed order, at p. 22, implies Dr. Woods testified Autism and ID are the same disorder. This is not correct. Dr. Woods gave the example of Kim Peek, a savant diagnosed with Autism, who has significant deficits in adaptive functioning and inspired the character in the Oscar winning movie “Rain Man.” Dr. Woods testified Mr. Peek is an example of someone with related developmental disability. *See* S.C. Code Ann. § 44-20-30(15). Dr. Woods never testified Autism and ID are the same disorder.

10) The proposed order, at p. 22, states, “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 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 or support that conclusion.” Dr. Woods, however, testified Dr. Davies performed a medical exam that included taking measurements. *See* Exhibit A at p. 7.

11) The proposed order, at p. 23, states, “This Court’s finds a lack of thoroughness in the testing and/or documentation” of FASD. As seen in Subsections IV(10) above, this Court

completely overlooks Dr. Woods consultations with Dr. Davies and De. Moberg. The proposed order also overlooks undersigned counsel's decision not to bring these witnesses to the hearing under the present circumstances.

12) The proposed order, at p. 23 (fn. 8), states:

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.

Dr. Woods, in fact, was making the point that FASD is not the same disorder as ID. FASD, as it presents for Mr. Bryant, qualifies as a related developmental disorder. *See* S.C. Code Ann. § 44-20-30(15).

13) The proposed order, at p. 23, states:

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."

As seen, Dr. Woods written report (Exhibit A) acknowledged "Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability." Dr. Woods testimony and written report were consistent with each other. Dr. Woods, however, testified the

DSM-5 has reduced the emphasis on IQ scores. Dr. Woods has authored peer reviewed publications on this topic. See Stephen Greenspan, James C. Harris, and George W. Woods, "Intellectual Disability is "a Condition, not a number": Ethics of IQ cut-offs in psychiatry, human services and law," *Ethics, Medicine and Public Health: A Multidisciplinary Journal*, November 2014 (Exhibit D); Stephen Greenspan and George W. Woods, "Intellectual disability as a disorder of reasoning and judgment: the gradual move away from intelligence quotient-ceilings, *Wolters Kluwer Health*, Lippincott Williams & Wilkins, Vol. 27, No. 2, March 2014 (Exhibit E); and Stephen Greenspan, Harvey Switzky, and George W. Woods, "Intelligence involves re-awareness and intellectual disability involves risk unawareness: Implications of a theory of common senses," *Journal of Intellectual & Developmental Disability*, December 2011 (Exhibit F).

14) The proposed order, at p. 24, states:

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.

This analysis overlooks three key points. First, both Dr. Woods and Dr. Everington ultimately accepted the childhood IQ scores. Second, a contemporaneous IQ test might not reflect Mr. Bryant's IQ prior to age 18. See, e.g., *Blackwell*, 420 S.C. at 142, 801 S.E.2d at 721 ("The court also recognized that Blackwell's recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability."). Third, since Dr. Woods written report

dated May 8, 2018, undersigned counsel has anticipated this Court will ultimately enter an order finding Mr. Bryant failed to meet the burden of proving he suffers from ID.

15) The proposed order, at p. 24-25, discusses the DJJ affidavits of Dr. Everhart and Dr. Gunter. Although pointing out possible deficiencies in these evaluations, Dr. Woods ultimately accepted the IQ test score when he opined, "Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability." The State's cross-examination of Dr. Woods at the evidentiary hearing and this section of the proposed order indicate confusion between and *Atkins* evaluation and the procedure for a court-ordered evaluation for competency to stand trial. See S.C. Code Ann. § 44-23-410(D) ("If the examiners designated by the Department of Mental Health find indications of intellectual disability or a related disability but not mental illness, the department shall not render an evaluation on the person's mental capacity, but shall inform the court that the person is 'not mentally ill' and recommend that the person should be evaluated for competency to stand trial by the Department of Disabilities and Special Needs.").

16) The proposed order, at p. 25, states:

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.

The proposed order, however does not discuss how this analysis pertains to the diagnosis of an "intellectual disability."

17) The proposed order, at p. 26, states:

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.

As seen above, our state *does not* have different definitions for ID in the “criminal context” or the “health context.” S.C. Code Ann. §§ 16-3-20(C)(b)(10), 44-20-30(12), and 44-26-10(9) provide identical definitions. Moreover, neither the General Assembly nor this Court can adopt a definition of “intellectual disability” that is contrary to the medical definition. *See Hall and Moore, supra.*

18) The proposed order, at p. 26, states:

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.

This statement is not factually accurate. Dr. Woods merely testified that the Test of Malingered Memory (TOMM) initially was not normed for people with ID. Projecting this statement on other tests of memory is a gross misrepresentation of the testimony. Additionally, Dr. Woods has acknowledged, “Mr. Bryant’s IQ scores are marginally above those required to meet the criteria for intellectual disability.”

19) The proposed order, at pp. 27-28, states:

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 [Mr. Bryant].

This statement is not correct. Once again, Dr. Woods has acknowledged, “Mr. Bryant’s IQ scores are marginally above those required to meet the criteria for intellectual disability.” Dr. Woods testified about his diagnosis of FASD as a “related disability.”

20) When discussing Dr. Everington’s testimony, the proposed order, at p. 29, discusses “an effort to cherry-pick and/or limit information for the evaluation.” This statement overlooks

the fact that Dr. Everington's role was limited to evaluating adaptive functioning. Dr. Woods was responsible for the overall evaluation and acknowledged, "Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability."

21) The proposed order, at pp. 30-31 states:

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.

These paragraphs are remarkable. On one hand, the proposed order appears to acknowledge *AAIDD User's Guide* prohibition about not using "past criminal behavior to infer a level of adaptive behavior." See Subsection IV(1), including Exhibit C, *supra*. On the other hand, the proposed order commits the very same errors prohibited by *Hall* and *Moore, supra*.

22) The proposed order, at p. 31, states,

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. 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.

This statement reflects a common stereotype some members of society have about people with an intellectual or development disability. The *AAIDD User's Guide*, at p. 25 (Exhibit C), recognizes "most individuals or groups who are perceived as different on some basis are stereotyped based on the perceiver's mental model or image of such persons or groups." The *AAIDD User's Guide* cautions "a number of incorrect stereotypes can interfere with justice" and must be dispelled. *Id.* at 26. One of the incorrect stereotypes that must be dispelled is that "[p]ersons's with ID cannot get a driver's license, buy cars, or drive cars." *Id.* Applying incorrect stereotypes violates *Hall* and *Moore, supra*.

23) The proposed order, at pp. 31-32, states, "Respondent questioned Dr. Everington about grievances submitted by Applicant, one concerning a requested statement of funds in his money account with the Department of Correction." Considering behavior in prison is contrary to acceptable medical practices. *See Moore* (Texas "stressed Moore's improved behavior in prison" even though clinicians "caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is.").

24) The proposed order, at p. 32, cites 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). A copy of this law review article is attached as Exhibit G. This

law review article actually discusses how state deviations from accepted clinical standards unjustly excludes people from the protections of *Atkins*.

25) The proposed order, at p. 35, states:

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.

As seen, Dr. Woods acknowledged, "Mr. Bryant's IQ scores are marginally above those required to meet the criteria for intellectual disability." Rather, Dr. Woods was testifying about his diagnosis of FASD, which for Mr. Bryant is a "related disability" pursuant to S.C. Code Ann. § 44-20-30(15). Likewise, Dr. Everington did not did not opine Mr. Bryant has ID, but rather a related developmental disability.

#### IV. CONCLUSION.

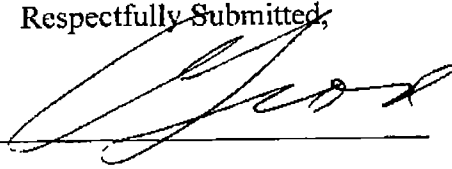
Ever since Dr. Woods' written report dated May 8, 2018, undersigned counsel has anticipated this Court will ultimately enter an order finding Mr. Bryant failed to meet the burden of proving he suffers from ID. Mr. Bryant did not oppose the State's second motion for summary judgment, but rather moved to amend his application to allege ineffective assistance of counsel because prior counsel did not discover he suffers from a "related disability"—FASD—as defined by S.C. Code Ann. § 44-20-30(15) and to assert a constitutional bar to the death penalty. This Court's order does not recognize these realities. Mr. Bryant's objections to the State's proposed order can be avoided by the Court adopting an order simply finding Mr. Bryant failed to meet his burden of proving he has ID. Such a course would also remove Mr. Bryant's absolute need to appeal the erroneous proposed factual findings concerning Dr. Woods and Dr. Everington.



Resolving this litigation in this manner, instead, would allow the parties to continue the FASD investigation and further develop the facts in federal court.

Respectfully Submitted,

By



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November 5, 2018

*Attorneys for Stephen Cory Bryant*

THE STATE OF SOUTH CAROLINA )  
 COUNTY OF SUMTER )  
 Stephen Cory Bryant, SCDC # 5252 )  
 Applicant )  
 vs. )  
 State of South Carolina )  
 Defendant. )  
 \_\_\_\_\_ )

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 J. T. CAMPBELL  
 CLERK OF COURT  
 SUMTER COUNTY, S.C.  
 Case No. 2016-CP-43-00828

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

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November 5, 2018  
 Greenwood, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

Stephen Corey Bryant, SCDC #5252,

Applicant,

vs.

State of South Carolina,

Respondent.

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IN THE COURT OF COMMON PLEAS

J. BELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

C/A No. 2016-CP-43-828

\*CAPITAL PCR\*

REPLY TO OBJECTIONS  
TO PROPOSED ORDER OF DISMISSAL

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, this Court notified all counsel of the ruling, and requested the State submit a proposed order. The State submitted a proposed order on October 19, 2018. Applicant Bryant made objections to the proposed order on November 5, 2018, and the Court called for a brief reply on November 9, 2018. This reply follows.

*Summary of the Reply to Objections*

Respondent submits that none of the objections have merit. Bryant's position evidences remorse at having received an unfavorable ruling. However, Bryant brought the narrow action over Respondent's continued objection. Bryant is not entitled to simply present whatever testimony he chooses without challenge or contest. Nor is he entitled to present evidence on points he thinks may be favorable in a separate federal action, under a separate claim. He submits that he was obligated to present something on Intellectual Disability due to the Court's rulings on Respondent's motion for summary judgment and Bryant's motion to amend. It is illogical to suggest Bryant was forced to hearing – Bryant could at any time have withdrawn and sought dismissal of the action or simply returned to federal court. See Rule 41(A), SCRPC; Rule

40(j), SCRCF. Respondent submits the objections and evidence before the Court show Bryant focused on a condition other than Intellectual Disability throughout this litigation. That was not the purpose of this litigation. As to Bryant's objections on diagnostic criteria, he is confusing concepts of intellectual functioning with evaluation of adaptive functioning. His own experts considered the areas separate and distinct. Further, he misconstrues the case law. Bryant's errors in logic, legal holdings and factual premises render his objections meritless.

In support of its position in reply, Respondent would respectfully show the Court:

1. Applicant Bryant 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)). Respondent Warden in the federal action asserted that Bryant could not show Intellectual Disability. Even so, Respondent offered, at that time, to waive a procedural bar, and have the matter considered in federal court. Specifically, Respondent Warden argued that Bryant could not meet the first prong of Intellectual Disability given IQ testing on recognized instruments, and offered an intermediate step to allow "qualified personnel to opine whether [Bryant] could be found intellectually disabled." (C/A 9:16-cv-01423-DCN-BM, Entry No. 47 at 77 (Return and Memorandum of Law in Support of Motion for Partial Summary Judgment and Request for Order of Discovery).<sup>1</sup> Bryant objected, arguing the State court had exercised jurisdiction over the *Atkins*<sup>2</sup> claim; that the State court would authorize funding; and that the State court may allow a forum to establish "favorable state court factual determinations" to utilize in federal habeas review or create a conflict within factual findings should both actions

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<sup>1</sup> Mr. Grose and Ms. Holt represented Mr. Bryant in the state action. Mr. Grose and Jonathan Sheldon, Esq., of Virginia, represent Mr. Bryant in federal habeas. Ms. Holt is, or at least was, an investigator in that action, but is not appointed counsel in the federal matter.

<sup>2</sup> *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002),

continue with differing results. (See C/A 9:16-cv-01423-DCN-BM, Entry No. 50 (Reply to Response in Opposition to Stay)). The District Court stayed the action. It remains stayed at this time.

2. Respondent's initial motion to dismiss Bryant's claim he was Intellectually Disabled as successive and time barred was denied. Respondent thereafter moved for summary judgment on the issue. In Bryant's October 24, 2017 response in opposition to Respondent's first summary judgment motion in this State action, Bryant submitted affidavits from Dr. Woods and Dr. Everington. Bryant argued he was entitled to continue investigation because those "affidavits support continuing the *Atkins* evaluation." (Response in Opp. to State's Motion for Summary Judgment, p. 2). Dr. Woods submitted in his affidavit that "Bryant's assessment for intellectual disability is incomplete. His IQ scores are impacted by the practice effect, which undermines their validity." (Response in Opp. To State's Motion for Summary Judgment, Attachment, Woods Affidavit at 11). By May 8, 2018, Dr. Woods reversed his preliminary opinion to find the "IQ scores are marginally above those required to meet the criteria for intellectual disability...." (June 12, 2018 Tr. p. 3). At the June hearing on Respondent's motion for summary judgment and Bryant's motion to amend, Bryant argued there would be evidence of a "related disability" that would fall under the general health statute related to Intellectual Disability. (June 12, 2018 Tr. pp. 4-6). The State moved for summary judgment because the later report concluded Bryant was not Intellectually Disabled. The State argued:

...There is an opinion, and that opinion hasn't been accepted, tested or found to be credible, but we do know this from it. Even if it is true - - even if it is true, it proves our point that there is no evidence, and still no evidence today, of a diagnosis of intellectual disability. ...

(June 12, 2018 Tr. p. 14-15).

Bryant argued that he wanted to amend the motion to submit evidence of fetal alcohol

exposure effects. Bryant argued:

They did in their response make a comment that they had not had opportunity an [sic] to test Dr. Woods' reports and conclusions and the opinions of the other expert that - - experts that Dr. Woods relied on in reaching those. That is, in fact, what we're asking for. At this point, Your Honor has more information before you than any other judge that has considered Mr. Bryant's case with regard to his functioning, deficits and his adaptability and what is going on with him that affects his ability to live a life like the rest of us and had a role in these unfortunate crimes.

If you give us what we're asking for, which is an amended application, we then will be in a position where we can give you both - - both sides can give you the information that you need to evaluate Dr. Woods' opinion. But for the purpose of this motion, as they did in their pleading and in their argument, we believe you have to accept Dr. Woods' conclusions as true for determining whether or not the discovery rule applies and whether or not the amendment is proper.

(June 12, 2018 Tr. p. 14-15). This Court denied both motions.

3. The evidentiary hearing was held October 1, 2018. Applicant presented three witness: Dr. Woods, Dr. Everington, and Dr. Maddox. At the end of the October 1, 2018 hearing, Applicant moved to amend his application to conform to the evidence. Applicant argued: "I would, under Rule 15, move to conform the pleadings to evidence for the amendment that we had previously offered and you that ruled on...." (Oct. 1, 2018 Tr. p. 209).

4. Bryant now argues that his counsel understood that the Court only "wanted a more thorough record on the issues before the Court before dismissing the action," and counsel did not wish to "run up expert fees" to continue the Intellectual Disability investigation. (Objections, p. 3). He also asserts, again based on his understanding the hearing would be limited, that he "did not schedule Dr. Julian Davies or Dr. Paul Moberg to testify at the October hearing concerning their testing related to the diagnosis of FASD." (Objections, p. 3). That is contrary to his scope of the presentations during the hearing which often rounded back to or referenced FASD, and the motion to amend at the hearing. Bryant specifically moved "under

Rule 15, move to conform the pleadings to evidence for the amendment that we had previously offered....” (Oct. 1, 2018 Tr. p. 209). While Bryant may harbor regret on his selected strategy, his argument that he was unfairly wounded by surprise is not credible.

5. Bryant also argues that he was simply attempting to gain a ruling that he was not Intellectually Disabled and did not expect:

...the State [to pose] loaded and irrelevant questions of the experts *ad nauseam*, about all manner of things the experts could have done but did not do regarding their assessments of ID, none of which was relevant given the experts’ findings that straight up ID was ruled out regarding Mr. Bryant. Undersigned never expected that having experts cease work on a settled issue would cause a Court to hold the experts up to ridicule, and to cast aspersion concerning their ethical integrity and professional character for not having done work that was wholly unnecessary, as the Court did in its post-hearing email to the parties. ...

(Objections, p. 4).<sup>3</sup> He even goes so far as to pose the question he prefers the State would have asked: “The State did the Court no favors with its lengthy examinations of the experts at the October hearing, over several hours’ time and about all manner of topics related to investigation, etc. The State really need [sic] only to have asked one question of each of the two experts: ‘Does the applicant suffer from ID as defined by South Carolina law?’ The State did not ask that question.” (Objections, p. 4).

Of course, had Bryant’s counsel taken this advice for their presentation, there would have been little need for expansive cross-examination. Bryant’s presentation from Dr. Woods spans 42 pages in direct, redirect in 8, and the presentation from Dr. Everington spans 28 pages, with 4 in redirect. To place this in context, the entire transcript – start to finish – is 211 pages. Further, Bryant presented Dr. Maddox who did not conduct any evaluation for this action. Her direct

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<sup>3</sup> Bryant’s phrasing alone leads to a conclusion his basis for seeking redress is not firm. To paraphrase, he doth protest too much. See William Shakespeare, *Hamlet* act 3, sc. 2 (“The lady doth protest too much, methinks.”). Additionally, the disrespectful tone does not serve him well.

spans 9, with no cross or redirect. There was certainly more attempted by Bryant in the October 1, 2018 hearing than meeting the narrow issue recognized by the Court that Bryant now asserts was the only focus of their presentation. (*See also* Oct. 1, 2018 Tr. p. 4, noting pre-hearing, "... we had two motions to amend the application, and we just want the record to reflect that while you denied those ... we're doing this hearing subject to our right to appeal those at a later time.").

Even so, Bryant's arguments apparently lobby for credibility to be assumed, bias to be overlooked, and evidence admitted without challenge. He correctly noted a lengthy cross-examination showing the multiple limitations in the investigation and presentation. That is fair and effective impeachment. He cites to no case law, court rule, or other provision that allows him leverage over or cover from cross-examination. Respondent suspects there could be none if the system is honored in respecting the rights of all parties.

6. Bryant contends his successive PCR counsel "stopped" his experts' investigation on Intellectual Disability, yet Bryant apparently pursued opinions and testing on fetal alcohol exposure effects. This is curious in three distinct ways. First, Dr. Everington did not supply that reason in her response as to why interviews were not completed:

Q You indicated in your affidavit of October 21, 2017 that additional interviews with former teachers and others are planned to be conducted in the future. You shared with us you only had those two sources, besides Mr. Bryant. Why would you want to interview other people?

A I wanted to interview the teachers to find out more about his functioning in the school system, and from what I understand, they were not available. One of the teachers that had written the declaration moved out of the state and were not available.

Q What about other family members; brothers, for instance, did you ask to interview anyone else?

A I would have to go back and look at the communication from that time



period.

(Oct. 1, 2018 Tr. p. 190). Second, neither of his expert witnesses testified that they were unable to render an opinion due to PCR counsel instructing them to discontinue their evaluations. In fact, when Dr. Woods was questioned about inclusion of Dr. Everington's initial affidavit in his report, he responded, "I didn't see anything after that date that made me question her conclusions." (Oct. 1, 2018 Tr. p. 117). Third, FASD was not a condition that was to be litigated. The present strategy for objections is in tension with the investigation as shown and the presentation at the evidentiary hearing.

7. Respondent submits Bryant's strenuous protests are in response to significant impairment to evidence that he had hoped to gain possible benefit from when returning to federal habeas. That is not a proper objection to the proposed order. For instance, Bryant complains the proposed order "grossly understates the process through which Dr. Woods determined Mr. Bryant suffers from FASD ... Dr. Woods also consulted with Dr. Julian Davies, M.D. and Dr. Paul Moberg, Ph.D., both of whom examined Mr. Bryant," and also complains the proposed order does not "acknowledge this testimony or consultation." (Objections, p. 8). That would be correct since FASD was not a condition litigated. Bryant may not avoid the denial of his motion to amend by requesting additional fact finding on a condition not contemplated by the restrictions of the litigation by way of objection to the proposed order.

8. Bryant's urging of this Court to reject *Stanko* as only going to insanity is also incorrect. (See Objections, p. 9). The Court in *Stanko* spoke in terms of considering an expansion of the *Atkins* exception. *State v. Stanko*, 402 S.C. 252, 285, 741 S.E.2d 708, 725 (2013). Our Supreme Court has set out:

... 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.

*Id.*, 402 S.C. at 287–88, 741 S.E.2d at 726–27 (emphasis added).

Here, the proposed order reflects: “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.*” (Proposed Order, p. 26). This is directly relevant to the offered “related condition” evidence Bryant offered at the hearing and his failure specifically to meet the first prong of Intellectual Disability. As the proposed order language notes: “... Dr. Woods’ opinion is clouded by a push to accept a ‘functional equivalent’ of Intellectual Disability in another condition.” (Propose Order, p. 28).

9. Bryant’s reliance on *Moore* is misplaced as the questions concerning the facts of the extended crime went to evidence of intellectual functioning, not adaptive functioning. (See Objections, p. 10). In *Moore v. Texas*, 581 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1039 (2017), the Supreme Court focus in granting relief was on inappropriate evaluation of the adaptive functioning prong specifically. The proposed order correctly separates the two. Bryant is incorrect in failing to do so. In fact, in redirect of Dr. Woods, Bryant elicited the difference from his own expert:

...Intellectual disability, parentheses, intellectual developmental disorder is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits and conceptual, social and practical domains. The following three criteria must be met: 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.

Those areas are really what we call executive functioning. The ability to reason, problem solve, effectively plan, have abstract thinking. The abstract thinking was captured in the 1996 testing with similarities, which is one of his lowest scores. Academic learning was captured in a 1996 testing with the mathematic score, again, one of his lowest scores. And DSM-5 confirms both clinical assessment and individualized standardized intelligence testing.

B, deficits in adaptive functioning that result in failure to meet developmental and social culture standards for personal independence and social responsibility without ongoing support - - so support means everything - - without ongoing support, the adaptive deficits limit functioning in one or more activity of daily life. Communication, we know that Mr. Bryant had problems in terms of communication. Social participation, he was isolated. Independent living, he never lived alone. Across multiple environments such as home, school, work and community.

(Oct. 1, 2018 Tr. pp. 130-131).

Bryant can hardly claim surprise at this distinction.

10. Bryant's objection to findings regarding consideration of the facts of the crime is again based on his incorrect application of *Moore*, confusing research and consideration of intellectual functioning with evaluation of adaptive functioning. It is also based upon a misinterpretation of the *Stanko* opinion's rejection of an extension of *Atkins*, as discussed above. Moreover, that is not the reason given by his expert:

Q Did you consider the facts of the crime not adaptive functioning, but for evidence of intellectual function?

A You don't consider the facts of the crime, and *the reason you don't is that you would become a factfinder in that process*, because any time that you are looking - - if you are delving into adaptive functioning, you would have to talk to people that were involved in the crime. You would have to become a part of that, which is inappropriate for determining adaptive functioning or for the role of someone who is doing that. *You can look at a broad scope and a history of criminal behavior indicates some difficulty in following rules and making judgments and those kinds of things*, but there is a professional consensus that if you look at the AAIDD, in particular, and most of the scholars in the area, they say that

you don't consider the facts of the crime.

(Oct. 1, 2018 Tr. p. 190). (emphasis added). (See also Oct. 1, 2018 Tr. pp. 118-119, Dr. Woods also denying that he reviewed facts of crime as evidence of intellectual function, finding that the facts would not go to “developmental disability”).

The language of the proposed order carefully sets out that it is not simply the fact of the crime, but “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.” (Proposed Order, p. 27). It is also reflective of why any offered extension should not be applicable. 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*)).

In compliment and support of this finding, Dr. Woods explained — upon questioning by Bryant on redirect — why individuals with disabilities are often in the criminal justice system:

... Because of their impaired ability to control their behavior, that is one reason. Because of vulnerabilities that often we find them being followers rather than leaders, and that is not the case in this particular one, but you do find people with brain impairments and intellectual disabilities being over represented in the criminal justice system.

(Oct. 1, 2018 Tr. p. 129).

The experts consistently avoided that which did not fit into the diagnosis they were pursuing, and the extension of the exemption that Bryant continued to pursue. The criticisms leveled are correct and warranted. Further, the criticisms go directly to scope of investigation to make the opinions actually offered by Bryant's experts at the evidentiary hearing. Bryant's objections are unfounded.

11. All objections not specifically addressed in this reply are adequately resolved by reference to the responses above. Again, the individual objections are directly traced to Bryant's errors in logic, legal holdings and factual premises.

#### *Conclusion*

The Objections should be overruled. Bryant's objections lack merit and are refuted by the transcript of record. Moreover, Bryant should not be rewarded for maintaining an action on a claim he knows was not supported by the facts. If Bryant truly did not want presentation of anything other than a narrow opinion he does not have Intellectual Disability he could have asked that narrow question and conducted his presentation of evidence differently. Neither should he be rewarded with an order that addresses FASD as that was not a condition that needed to be litigated in this narrow action. Bryant's desire to obtain something favorable for use in his federal court action is not a proper basis for granting an amendment or adding unnecessary

findings to the order. Bryant's criticisms and condemnations of the Court and the State are unfounded.

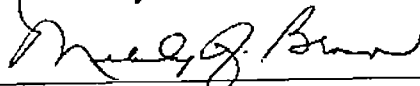
Respectfully submitted,

ALAN WILSON  
Attorney General

DONALD J. ZELENKA  
Deputy Attorney General

MELODY J. BROWN  
Senior Assistant Deputy Attorney General

SHERRIE BUTTERBAUGH  
Assistant Attorney General

BY:   
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COUNSEL FOR RESPONDENT

November 20, 2018.

STATE OF SOUTH CAROLINA ) RECORDED IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

2018 NOV 27 PM 1:58

Stephen Corey Bryant, SCDC #5252, )  
Applicant, )  
vs. )  
State of South Carolina, )  
Respondent. )

C/A No. 2016-CP-43-828  
\*CAPITAL PCR\*

CERTIFICATE OF SERVICE

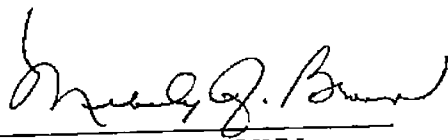
I, Melody J. Brown, do hereby certify that on this date, I served the Respondent's Reply to Objections to Proposed Order of Dismissal in the foregoing action on Applicant Bryant by depositing to each of his attorneys one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

E. Charles Grose, Jr., Esq.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646

and to

Diana L. Holt, Esq.  
Diana Holt, LLC  
P.O. Box 6454  
Columbia, SC 29260-6454

This 20th day of November, 2018.

By: 

MELODY J. BROWN

Senior Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER )  
RECORDED )  
2019 JAN 14 P 4:24 )

Stephen Cory Bryant,

Case No. 2016-CP-43-00828

Applicant,

Rule 59(e), SCRPC Motion

vs.

State of South Carolina,

Defendant.

Pursuant to Rule 59(e), SCRPC, Stephen Cory Bryant moves this Court for an order altering or amending its order, filed on January 4, 2019, dismissing his application for post-conviction relief ("PCR"). In addition to the grounds set forth in Mr. Bryant's Objections to the State's Proposed Order, dated November 5, 2018, which are incorporated into this motion by reference, as if set forth fully and verbatim, this motion is based on the following grounds.

1) On January 9, 2017, Mr. Bryant amended his PCR application to allege:

10(b) S.C. Code Ann. § 16-3-20, which requires a judge to sentence the defendant following a guilty plea, violates the Sixth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment, because a judge rather than a jury finds facts required for imposition of a death sentence. *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016).

11(b) S.C. Code Ann. § 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Bryant his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

Mr. Bryant argued *Hurst* "is a constitutionally binding decision from the Supreme Court of the United States that can be raised in this PCR application pursuant to S.C. Code § 17-27-45(B)." This Court erred in its order dated March 13, 2017 dismissing this claim. Since this Court's order, the Attorney General's Office has acknowledged, in other litigation, that this issue is a "clear"



legal issue, that “is not fact bound,” in need of a ruling on the merits from the Supreme Court of the United States that would “bring finality to a federal question that is being litigated simultaneously” in multiple cases. Brief in Opposition to Petition for Writ of *Certiorari*, *Madhi v. South Carolina*, SCOTUS Case No. 18-6110, pp. 22-23.<sup>1</sup> See also *Jerry Inmon v. State of South Carolina*, Case No. 2012-CP-39-00918. This Court, accordingly, should reconsider its order, allow the amendment, and rule on the merits.

2) On May 9, 2018, Mr. Bryant moved to amend his PCR application to allege:

10(c) Mr. Bryant’s sentence of death violates the Eighth Amendment of the United States Constitution because he suffers from Fetal Alcohol Spectrum Disorder (“FASD”). FASD is present during the developmental period, and people suffering from FASD suffer from impairments to an equal or greater extent as people suffering from Intellectual Disabilities. In fact, the information concerning FASD was developed during the natural course of investigation of Intellectual Disabilities because the two disorders involve significant overlaps. A categorical ban on imposing the death penalty on people suffering from FASD is a natural extension of *Hall* and *Atkins*, *supra*.

10(d) In the alternative to 10(c), Mr. Bryant’s FASD is evidence of material facts not previously presented to a sentencing authority that should be considered before imposing sentence.

This motion to amend was supported by the affidavit of Dr. George Woods. Mr. Bryant argued his “FASD was not previously identified and is ‘evidence of material facts, not previously presented and heard, that requires vacation of the . . . sentence in the interest of justice,’” citing S.C. Code Ann. § 17-27-20(A)(4). By written order dated July 22, 2018, this Court denied this motion to amend. Denying this motion was error. See *Mangal v. State*, 421 S.C. 85, 95-96, 805 S.E.2d 568, 573 (2017) (reminding the bench and bar that our state’s procedural rules allow for liberal amendments to pleadings when no prejudice results to the opposing party) (citing *Simpson*

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<sup>1</sup> The Supreme Court of the United States docket and pleadings can be found at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-6110.html> (last viewed Jan. 12, 2019).

*v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Harvey v. Strickland*, 350 S.C. 303, 566 S.E.2d 529 (2002); and Rule 15, SCRCP). The evidence presented at that evidentiary hearing further supports this amendment, but this Court denied Mr. Bryant's motion to amend to conform the pleadings to the evidence pursuant to Rule 15, SCRCP. The failure of prior post-conviction counsel to investigate, develop, and present evidence of Mr. Bryant's FASD was influenced by our Supreme Court's departure from the provisions of S.C. Code Ann. § 17-27-160, allowing PCR judges the discretion to continue capital PCR cases based on "good cause," and long standing state court practice where PCR judges exercised that discretion. Mr. Bryant's prior PCR case was one of three capital cases where the South Carolina Supreme Court issued orders requiring the PCR cases to be resolved within one year. *See Order, State v. Bryant*, dated March 3, 2011, a copy of which is attached. The other two cases are *State v. Starnes* and *State v. Torres*.<sup>2</sup> The initial PCR cases are still pending in both *Starnes* and *Torres*.<sup>3</sup> Not only did our Supreme Court unreasonably limit Mr. Bryant's initial PCR case, but prior post-conviction counsel unreasonably limited their investigation by not having the Supreme Court's unreasonable limitation removed or preserving this issue for appellate

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<sup>2</sup> A copy of the order dated March 1, 2011 in *Starnes* is attached. Counsel does not have a copy of the Supreme Court's order in *Torres*, but a copy of a transcript dated February 8, 2013, in *Dickerson v. State*, Case No. 2012-CP-10-03216, pp. 59-61, is attached where the Attorney General's Office acknowledged the one-year provision was deleted in *Torres*.

<sup>3</sup> *See* Public Index in *Starnes v. State*, Case No. 2011-CP-32-00830 (found at <https://publicindex.sccourts.org/Lexington/PublicIndex/CaseDetails.aspx?County=32&CourtAgency=32002&Casenum=2011CP3200830&CaseType=V&HKey=107667952849011947559811099716886110905555861228990118104486876103698351681224869501167274497881> (last viewed Jan. 13, 2019)) and *Torres v. State*, Case No. 2011-CP-42-01851 (found at <https://publicindex.sccourts.org/Spartanburg/PublicIndex/CaseDetails.aspx?County=42&CourtAgency=42002&Casenum=2011CP4201851&CaseType=V&HKey=6847122881161214766112759012182471135011811710287122487947826999725787519811382106105105107839810211377> (last viewed Jan. 13, 2019)). Copies of the Public Index for these cases are attached.

review. *See Winkler v. State*, 418 S.C. 643, 795 S.E.2d 686 (2016) (Circuit Court abused its discretion in denying defendant's second motion for additional time). This Court, accordingly, should reconsider, allow the amendment, allow further investigation of Mr. Bryant's FASD,<sup>4</sup> and convene an additional evidentiary hearing.

3) Finally, in his objections to the State's proposed order and during the hearing on these objections, Mr. Bryant objected to the State being allowed to draft the order for this Court. Mr. Bryant further requested this Court to draft its own order. Mr. Bryant has statutory and constitutional rights for this Court to draft its own findings of fact and conclusions of law. "S.C. Code Ann. §17-27-80 (1976), requires the PCR court to 'make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.'" *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); *see also Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992). This Court did not do that, but rather delegated the responsibility of drafting the order to the Attorney General's Office. The reasoning in the proposed order is entirely that of an advocate and not an independent judicial officer, which violates the separation of powers. S.C. Const. Art. I, § 8. In capital cases, our Supreme Court "strongly encourage[s] PCR judges to draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004).<sup>5</sup> The admonition in *Hall* is consistent with this Court's responsibility to "safeguard the

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<sup>4</sup> This Court's order of dismissal, at p. 28, recognizes Mr. Bryant "may suffer from some form of FASD or associated condition, and may have an impaired brain." During the evidentiary hearing, in order drafted for this Court, and during the hearing on Mr. Bryant's objections to the State's proposed order, the State pointed out areas of additional investigation for Mr. Bryant to further develop evidence of his FASD. Once this Court grants the motion to amend, Mr. Bryant will complete this additional investigation.

<sup>5</sup> If an appeal becomes necessary, then Mr. Bryant will request our Supreme Court make this strong encouragement mandatory.

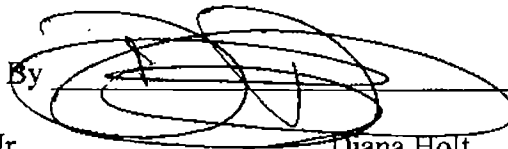
rights of litigants.” *State v. Langford*, 400 S.C. 421, 429, 735 S.E.2d 471, 475 (2012). This Court asked very few questions during any of the hearings in this case and at times seemed confused.<sup>6</sup> For example, this Court was under the mistaken impression that the that the hearing on December 21, 2018 on Mr. Bryant’s objections to the proposed order was a hearing on a motion to reconsider the order of dismissal, which had not been singed at that point. The Attorney General’s Office corrected this error on its own initiative without any direction for the Court. See emails between court and counsel dated December 21 and 28, 2018, copies of which are attached.

### CONCLUSION

For the foregoing reasons, the Court should withdraw the order of dismissal, allow Mr. Bryant to amend his PCR application, allow further investigation of the FASD claim, and convene a new evidentiary hearing.

Respectfully Submitted,

By



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January 14, 2019

*Attorneys for Stephen Cory Bryant*

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<sup>6</sup> At the conclusion of the evidentiary hearing, after the record was closed, this Court informed counsel that the mother of a family member drank a martini every day while pregnant with the family member, but the family member excelled academically and did not have FASD. Respectfully, Mr. Bryant worries whether the Court was biased, and perhaps stereotypes entered into the decision-making process. Perhaps the Court doesn’t recognize FASD as a valid diagnosis. FASD is based on science and medicine and has been a diagnosable disorder for decades.

1475

## **The Supreme Court of South Carolina**

The State, Respondent,  
v.  
Stephen Corey Bryant, Petitioner.

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### **ORDER**

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Petitioner was convicted of three murders, first and second degree burglary, assault and battery with intent to kill, and threatening the life of a public employee. He was sentenced to death on one murder, received concurrent life sentences for the other two, and terms of years for the other crimes. State v. Bryant, 390 S.C. 638, 704 S.E.2d 344 (2011). Petitioner's petition for rehearing was denied on February 2, 2011.

Petitioner now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not contest the request for a stay.

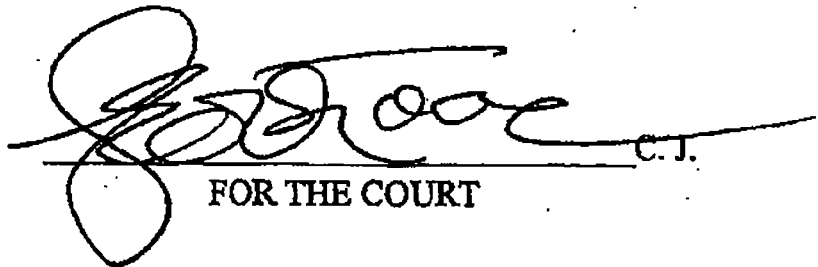
The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of

A. 3653

1476

Execution in Capital Cases. The Honorable R. Ferrell Cothran, Jr. is hereby assigned to the PCR action petitioner intends to file. Judge Cothran shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. Judge Cothran shall conduct a hearing on petitioner's desires regarding counsel within thirty days of the date of this order. In addition, absent an extension of time by this Court, a final hearing shall be held and a final order issued in this matter within one year of the date of this order.

IT IS SO ORDERED.

  
C. J.  
FOR THE COURT

Columbia, South Carolina

March 3, 2011

A. 3654

# The Supreme Court of South Carolina

The State,

Respondent,

v

Norman Starnes,

Petitioner

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## ORDER

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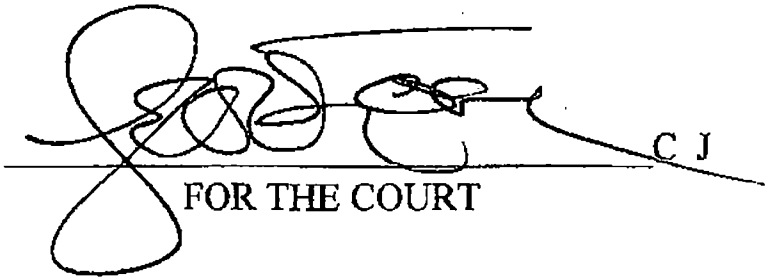
Petitioner was convicted of two counts of murder and was sentenced to death. This Court affirmed the convictions and sentence. State v. Starnes, 388 S C 590, 698 S E 2d 604 (2010). The United States Supreme Court denied certiorari on February 22, 2011. Starnes v. South Carolina, 2011 WL 589232 (U S S C Feb 22, 2011)(No 10-858).

Petitioner now seeks a stay of execution, pursuant to In re Stays of Execution in Capital Cases, 321 S C 544, 471 S E 2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not contest the request for a stay.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases. The Honorable Alexander Macauley is hereby

assigned to the PCR action petitioner intends to file Judge Macauley shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled Judge Macauley shall conduct a hearing on petitioner's desires regarding counsel within thirty days of the date of this order In addition, absent an extension of time by this Court, a final hearing shall be held and a final order issued in this matter within one year of the date of this order

IT IS SO ORDERED



C J  
FOR THE COURT

Columbia, South Carolina

March 1, 2011

cc Appellate Defender Elizabeth A Franklin-Best  
Senior Assistant Attorney General S Creighton Waters  
The Honorable Alexander S Macaulay  
Motte L Talley, Esquire



1 STATE OF SOUTH CAROLINA } COURT OF COMMON PLEAS NONJURY  
2 COUNTY OF CHARLESTON }

3  
4 WILLIAM O. DICKERSON, 6030 }  
5 Applicant, } TRANSCRIPT  
6 versus } OF  
7 STATE OF SOUTH CAROLINA, } RECORD  
8 Respondent. } 2012-GS-10-3216

9  
10  
11 February 8<sup>th</sup>, 2013  
12 St. George, South Carolina

13 B E F O R E:

14 THE HONORABLE EDGAR W. DICKSON, Judge.  
15

16 A P P E A R A N C E S:

17 E. CHARLES GROSE, JR., and ELIZABETH A. FRANKLIN-BEST  
18 ESQ.  
Attorneys for the Applicant

19 MELODY J. BROWN and BENJAMIN J. McDONALD  
20 ASSISTANT ATTORNEY GENERALS  
21 Attorneys for the State

22  
23 HARRY DOT WALKER  
24 Circuit Court Reporter

25 Transcribed by Pamela E. Green, Circuit Court Reporter

1 STATE OF SOUTH CAROLINA } COURT OF COMMON PLEAS NONJURY  
2 COUNTY OF CHARLESTON }

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14 THE HONORABLE EDGAR W. DICKSON, Judge.

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16 A P P E A R A N C E S:

17 E. CHARLES GROSE, JR., and ELIZABETH A. FRANKLIN-BEST  
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21 Attorneys for the State

22  
23 HARRY DOT WALKER  
24 Circuit Court Reporter

25 Transcribed by Pamela E. Green, Circuit Court Reporter

1 under 17-27-160.

2 And, Your Honor, I can speak a little bit more about  
3 some of these concepts, but that's our basic position.

4 THE COURT: Okay. Thank you, ma'am.

5 All right.

6 MR. GROSE: If I could just make a couple of responses  
7 about three points.

8 THE COURT: Okay.

9 MR. GROSE: One -- and I don't think this issue's gonna  
10 get to Federal Court because I think that this Court and our  
11 Supreme Court have a way of dealing with them, but---

12 THE COURT: And that's not my concern anyway.

13 MR. GROSE: Right.

14 But part of it is we have to look at the procedure in  
15 the State cause the procedure in the State has to be applied  
16 fairly and consistently. And, so, that's why we were trying  
17 to bring you some of that information.

18 She mentioned two cases that the Supreme Court had put  
19 in the, I guess the initial granting the stay, assigning the  
20 judge, and scheduling that had a year time frame. Those  
21 year time frames also had language, as I understand them,  
22 where those cases can be continued. She mentioned the  
23 Bryant case and they had a hearing.

24 She also mentioned the Starnes case. I know that  
25 Starnes is, is still pending. Starnes, I don't know what

1 the scheduling is on that, but it's still pending.

2 And then there's also the Torres case that initially I  
3 think had that order, and some of this is maybe just local  
4 legend and local lore, and you can only probably find out  
5 the answer to this quicker than the lawyers could. But our  
6 understanding is, is that Judge Cole, who's assigned to that  
7 case, called the Supreme Court and said this year thing is  
8 not realistic, will you take it out, and they took it out.  
9 And since then, Mr. Dickerson's case, his stay and your  
10 assignment and this case, are all past the time where the  
11 Court was putting that year timetable into it, and I think  
12 that -- I think that what the Court was trying to do, and I  
13 certainly don't want to act like I have any inside knowledge  
14 because I don't, I think that what they were trying to do  
15 is, is have the Trial Courts exercise more supervision over  
16 these cases because you can find some examples out there  
17 where I think everybody would agree that things fell through  
18 the cracks and they lasted for too long.

19 But I think that also in their views of fundamental  
20 fairness and everything realized that they, they couldn't  
21 put those drop dead dates on it and take that discretion  
22 away from the Trial Court.

23 And the final point I would want to make is she said  
24 we're not hearing the motion to continuance, and, and the  
25 order that we're gonna get to you next week is gonna have a

1 request for an expert, and I think he's gonna tell us what  
2 we need to do. And once we have that information we'll be  
3 in a position where we can tell you what we think is a  
4 reasonable date subject to, you know, real world  
5 considerations that we're all gonna have to, to deal with  
6 because that's what our profession has to do.

7 THE COURT: Well, that's what I have to deal with all  
8 the time is real world considerations.

9 MR. GROSE: Yeah.

10 THE COURT: Okay. Okay. All right. All right.  
11 Only -- and I think that concludes -- oh, let's -- Mr.  
12 McDonald.

13 MR. McDONALD: Just very quickly, Judge Dickson. I'm  
14 actually lead counsel on Mr. Torres case --

15 THE COURT: Okay.

16 MR. McDONALD: -- on behalf of the State. There was  
17 nothing that occurred in terms of any sort of arguments  
18 about the one year language. I had heard speculation that  
19 there may of been a health issue involved.

20 I can't tell you why or if Judge Cole went to the  
21 Supreme Court or what happened. But all I know is that it  
22 did change. I don't know if that's a reflect on the, on the  
23 view of the one year language at all.

24 THE COURT: Okay. And let me, let me, you know, let me  
25 tell y'all. Every case is, depends on how that case goes.



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### Norman Starnes VS State of South Carolina

|                      |               |                   |                                           |                    |            |
|----------------------|---------------|-------------------|-------------------------------------------|--------------------|------------|
| Case Number:         | 2011CP3200830 | Court Agency:     | Common Pleas                              | Filed Date:        | 02/28/2011 |
| Case Type:           | Common Pleas  | Case Sub Type:    | Post Convict Rel 500                      | File Type:         | PCR        |
| Status:              | PCR           | Assigned Judge:   | Clerk Of Court C P, G S, And Family Court |                    |            |
| Disposition:         |               | Disposition Date: |                                           | Disposition Judge: |            |
| Original Source Doc: |               | Original Case #:  |                                           |                    |            |
| Judgment Number:     |               | Court Roster:     |                                           |                    |            |

### Case Parties

Click the  icon to show associated parties.

| Name                                                                        | Address                                                                          | Race | Sex | Year Of Birth | Party Type          | Party Status | Last Updated |
|-----------------------------------------------------------------------------|----------------------------------------------------------------------------------|------|-----|---------------|---------------------|--------------|--------------|
| Eppes, Frank L.                                                             | PO Box 10066 Greenville SC 29603                                                 |      |     |               | Other Party to Case |              | 03/15/2016   |
| <input checked="" type="checkbox"/> Franklin-Best, Elizabeth Anne(Inactive) | 900 Elmwood Avenue Suite 200 Columbia SC 29201                                   |      |     |               | Plaintiff Attorney  |              | 03/18/2016   |
| <input checked="" type="checkbox"/> Holt, Diana L.                          | Diana Holt, LLC PO Box 6454 Columbia SC 292606454                                |      |     |               | Plaintiff Attorney  |              | 03/15/2016   |
| <input checked="" type="checkbox"/> Jensen, J Christopher                   | Cowan Liebowitz & Latman, P.C. 1133 Avenue of The Americas New York NY 100366799 |      |     |               | Plaintiff Attorney  |              | 03/18/2016   |
| <input checked="" type="checkbox"/> LaMotte, Kathy(Inactive)                | 34 Wall Street Suite 608 Asheville NC 28801                                      |      |     |               | Plaintiff Attorney  |              | 11/24/2014   |
| <input checked="" type="checkbox"/> Leddy, Thomas Micah(Inactive)           | 1522 Lady Street Suite B Columbia SC 29201                                       |      |     |               | Plaintiff Attorney  |              | 03/15/2016   |
| <input checked="" type="checkbox"/> Salter, W. Edgar III                    | South Carolina Attorney General's Office PO Box 11549 Columbia SC 29211          |      |     |               | Defendant Attorney  |              | 07/06/2018   |
| <input checked="" type="checkbox"/> Simon, Alphonso Jr.                     | PO Box 11549 Columbia SC 292111549                                               |      |     |               | Defendant Attorney  |              | 08/22/2012   |
| <input checked="" type="checkbox"/> Starnes, Norman                         |                                                                                  |      |     |               | Plaintiff           |              | 07/17/2012   |
| <input checked="" type="checkbox"/> State of South Carolina                 | 140 Stoneridge Dr Ste 650 Columbia SC 29210                                      |      |     |               | Defendant           |              | 12/06/2016   |

### Actions

| Name                    | Description                        | Type   | Motion Roster | Begin Date       | Completion Date | Documents                                                                             |
|-------------------------|------------------------------------|--------|---------------|------------------|-----------------|---------------------------------------------------------------------------------------|
| Starnes, Norman         | Order/Scheduling Order             | Order  |               | 07/05/2018-15:35 |                 |  |
| Starnes, Norman         | Second Amended Application for PCR | Filing |               | 10/10/2016-13:13 |                 |  |
| State of South Carolina | Motion/Summary Judgment            | Motion |               | 08/29/2016-10:57 |                 |  |
| Starnes, Norman         | Scheduling Order                   | Order  |               | 08/01/2016-16:06 |                 |  |
| Starnes, Norman         | Scheduling Order                   | Order  |               | 08/01/2016-16:02 |                 |  |
| Starnes, Norman         | Form Order                         | Order  |               | 03/07/2016-12:36 |                 |  |

|                     |                                                             |        |  |                  |                  |                                                                                     |
|---------------------|-------------------------------------------------------------|--------|--|------------------|------------------|-------------------------------------------------------------------------------------|
| Starnes, Norman     | Order Substituting Counsel                                  | Order  |  | 11/05/2014-08:12 |                  |  |
| Starnes, Norman     | Protective Order by Consent                                 | Order  |  | 07/31/2013-00:00 |                  |                                                                                     |
| Starnes, Norman     | Order/Substitution Of Counsel                               | Order  |  | 03/28/2013-09:32 |                  |                                                                                     |
| Starnes, Norman     | Supplement in Support of Motion to Quash or Modify Subpoena | Filing |  | 09/19/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Letter/Letter (Re: pro hac vice-J Christopher Jensen)       | Filing |  | 07/20/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Motion/Motion Filing Fee                                    | Motion |  | 07/17/2012-11:50 |                  |                                                                                     |
| Starnes, Norman     | Demand for Disclosure of Evidence                           | Filing |  | 07/17/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Verification for Application Pro Hac Vice                   | Filing |  | 07/17/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Applicant's Response to State's Motion for Protective Order | Filing |  | 04/11/2012-00:00 |                  |                                                                                     |
| Eppes, Frank L.     | Motion/Quash                                                | Motion |  | 03/30/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Motion/Quash Subpoena R Ghent                               | Motion |  | 03/29/2012-00:00 |                  |                                                                                     |
| Starnes, Norman     | Motion/Protective Order                                     | Motion |  | 03/29/2012-00:00 | 07/31/2013-00:00 |                                                                                     |
| Starnes, Norman     | First Amended Application for PCR                           | Filing |  | 07/06/2011-00:00 |                  |                                                                                     |
| Starnes, Norman     | Exhibit                                                     | Filing |  | 04/29/2011-00:00 |                  |                                                                                     |
| Simon, Alphonso Jr. | Return, Motion to Dismiss and Motion for Summary Judgment   | Filing |  | 04/25/2011-00:00 |                  |                                                                                     |
| Starnes, Norman     | Order Appointing Counsel                                    | Order  |  | 03/25/2011-12:19 |                  |                                                                                     |
| Starnes, Norman     | Application/PCR                                             | Filing |  | 02/28/2011-15:50 |                  |                                                                                     |

**Financials**

| Summary                      |                |                            |                       |                  |        |
|------------------------------|----------------|----------------------------|-----------------------|------------------|--------|
| Fine/Costs:                  | \$25.00        | Total Paid for fine/costs: | \$25.00               | Balance Due:     | \$0.00 |
|                              |                |                            |                       |                  |        |
| Costs                        |                |                            |                       |                  |        |
| Description                  | Cost Code      | Amount                     | Charge Action         | Disbursed Amount |        |
| Motion/Order Filing Fee \$25 | MOTION         | \$25.00                    |                       | \$25.00          |        |
|                              |                |                            |                       |                  |        |
| Payments                     |                |                            |                       |                  |        |
| Payment Date                 | Receipt Number | Entered By                 | Transaction Type Code | Payment Amount   |        |
| 07/17/2012                   | 156121         | amarin                     | PY                    | \$25.00          |        |



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### Andres Torres VS State Of South Carolina

|                      |               |                   |                                           |                    |            |
|----------------------|---------------|-------------------|-------------------------------------------|--------------------|------------|
| Case Number:         | 2011CP4201851 | Court Agency:     | Common Pleas                              | Filed Date:        | 04/22/2011 |
| Case Type:           | Common Pleas  | Case Sub Type:    | Post Convict Rel 500                      | File Type:         | PCR        |
| Status:              | PCR           | Assigned Judge:   | Clerk Of Court C P, G S, And Family Court |                    |            |
| Disposition:         |               | Disposition Date: |                                           | Disposition Judge: |            |
| Original Source Doc: |               | Original Case #:  |                                           |                    |            |
| Judgment Number:     |               | Court Roster:     |                                           |                    |            |

### Case Parties

Click the icon to show associated parties.

| Name                                                        | Address                                                           | Race | Sex | Year Of Birth | Party Type          | Party Status | Last Updated |
|-------------------------------------------------------------|-------------------------------------------------------------------|------|-----|---------------|---------------------|--------------|--------------|
| <input checked="" type="checkbox"/> Dudek, Robert Michael   | PO Box 11589 Columbia SC 29211                                    |      |     |               | Plaintiff Attorney  |              | 02/17/2014   |
| <input checked="" type="checkbox"/> Ehles, William Harry II | 310 Mills Ave., Ste. 201 Greenville SC 29605                      |      |     |               | Other Party to Case |              | 06/11/2014   |
| State Of South Carolina                                     |                                                                   |      |     |               | Defendant           |              | 04/25/2011   |
| <input checked="" type="checkbox"/> Tessier, Troy A.        | PO Box 728 44 East Camperdown Way (29601) Greenville SC 296020728 |      |     |               | Other Party to Case |              | 01/03/2013   |
| <input checked="" type="checkbox"/> Torres, Andres          | Lieber Correctional Intitution Pob 205 Ridgeville SC 29472        |      |     |               | Plaintiff           |              | 04/09/2014   |

### Associated Cases

| Agency           | Case #        | External | Relationship | Description                                          | Case Filed Date | Disposition Date | Case Status | Disposition            |
|------------------|---------------|----------|--------------|------------------------------------------------------|-----------------|------------------|-------------|------------------------|
| General Sessions | 2007GS4202773 | N        | PCRC         | The State of South Carolina VS Andres Antonio Torres | 06/13/2007      | 10/23/2008       | Appeal      | Trial Guilty           |
| General Sessions | 2007GS4202774 | N        | PCRC         | The State of South Carolina VS Andres Antonio Torres | 06/13/2007      | 10/14/2008       | Dismissed   | Dismissed Not Indicted |
| General Sessions | 2007GS4202775 | N        | PCRC         | The State of South Carolina VS Andres Antonio Torres | 06/13/2007      | 10/23/2008       | Appeal      | Trial Guilty           |
| General Sessions | 2007GS4202776 | N        | PCRC         | The State of South Carolina VS Andres Antonio Torres | 06/13/2007      | 10/23/2008       | Appeal      | Trial Guilty           |
| General Sessions | 2007GS4202777 | Y        | PCRC         |                                                      |                 |                  |             |                        |
| General Sessions | 2007GS4202778 | Y        | PCRC         |                                                      |                 |                  |             |                        |
| General Sessions | 2008GS4200880 | N        | PCRC         | The State of South Carolina VS Andres Torres         | 03/03/2008      | 10/23/2008       | Appeal      | Trial Guilty           |
| General Sessions | 2008GS4204677 | N        | PCRC         | The State of South Carolina VS Andres Torres         | 08/11/2008      | 10/23/2008       | Appeal      | Trial Guilty           |

### Actions

| Name | Description | Type | Motion Roster | Begin Date | Completion Date | Documents |
|------|-------------|------|---------------|------------|-----------------|-----------|
|------|-------------|------|---------------|------------|-----------------|-----------|



|                         |                                                               |        |  |                  |  |                                                                                     |
|-------------------------|---------------------------------------------------------------|--------|--|------------------|--|-------------------------------------------------------------------------------------|
| Torres, Andres          | Service/Certificate Of Service and Appl.Post Merits Hearing   | Filing |  | 04/05/2016-15:30 |  |  |
| Torres, Andres          | Service/Proof Of                                              | Filing |  | 02/25/2016-13:39 |  |  |
| Torres, Andres          | Filing States Post Hearing Brief                              | Filing |  | 02/25/2016-13:39 |  |  |
| Torres, Andres          | Service/Certificate Of Service                                | Filing |  | 12/30/2015-14:13 |  |                                                                                     |
| Torres, Andres          | Filing of Applicants Amended Post Merits Hearing Brief        | Filing |  | 12/30/2015-14:11 |  |                                                                                     |
| State Of South Carolina | Service/Certificate Of Service                                | Filing |  | 12/21/2015-14:54 |  |                                                                                     |
| Torres, Andres          | Filing/Applicant's Post Merits Hearing Brief                  | Filing |  | 12/21/2015-14:53 |  |                                                                                     |
| State Of South Carolina | Service/Certificate Of Service                                | Filing |  | 11/16/2015-10:34 |  |                                                                                     |
| Torres, Andres          | Applicants First Motion to Extend the Time for Filing         | Filing |  | 11/16/2015-10:33 |  |                                                                                     |
| Torres, Andres          | Filing/Filing Of Evidence Management Info & Exhibit Sheets    | Filing |  | 06/30/2015-14:55 |  |                                                                                     |
| Torres, Andres          | Filing/Filing Of Evidence list                                | Filing |  | 06/29/2015-16:08 |  |                                                                                     |
| Torres, Andres          | Service/Proof Of Service                                      | Filing |  | 06/13/2014-16:06 |  |                                                                                     |
| State Of South Carolina | Memo/Memo Regarding Respondent's Request to Contract          | Filing |  | 06/13/2014-16:05 |  |                                                                                     |
| State Of South Carolina | Service/Certificate Of Service                                | Filing |  | 06/09/2014-11:15 |  |                                                                                     |
| Torres, Andres          | Memo/Applicants Memorandum Regarding Dr. Merlin G Butler      | Filing |  | 06/09/2014-10:37 |  |                                                                                     |
| State Of South Carolina | Letter/Letter                                                 | Filing |  | 05/06/2014-12:08 |  |                                                                                     |
| State Of South Carolina | Letter/Letter                                                 | Filing |  | 05/02/2014-07:36 |  |                                                                                     |
| State Of South Carolina | Service/Certificate Of Service                                | Filing |  | 04/28/2014-15:35 |  |                                                                                     |
| Torres, Andres          | Memo/Corrected Memo in Support of Application of PCR          | Filing |  | 04/28/2014-15:34 |  |                                                                                     |
| Torres, Andres          | Service/Proof Of Service                                      | Filing |  | 04/14/2014-13:48 |  |                                                                                     |
| State Of South Carolina | Response to Applicants Motion to Amend the Application for    | Filing |  | 04/14/2014-13:47 |  |                                                                                     |
| Torres, Andres          | Service/Proof Of Service                                      | Filing |  | 04/14/2014-13:47 |  |                                                                                     |
| State Of South Carolina | Response to Applicants Memorandum in Support of the Applicant | Filing |  | 04/14/2014-13:45 |  |                                                                                     |
| Torres, Andres          | Return to Applicants Motion for Summary Judgment              | Filing |  | 04/11/2014-14:45 |  |                                                                                     |
| Torres, Andres          | Affidavit/Affidavit of Clay T. Allen                          | Filing |  | 04/10/2014-13:48 |  |                                                                                     |
| Torres, Andres          | Service/Certificate Of Service                                | Filing |  | 04/10/2014-13:47 |  |                                                                                     |
| Torres, Andres          | Memo/Memo in Support                                          | Filing |  | 04/10/2014-13:47 |  |                                                                                     |
| State Of South          | Certificate Of Mailing                                        | Filing |  | 04/07/2014-10:03 |  |                                                                                     |

|                         |                                                              |                                   |               |                     |                  |
|-------------------------|--------------------------------------------------------------|-----------------------------------|---------------|---------------------|------------------|
| Carolina                |                                                              |                                   |               |                     |                  |
| Torres, Andres          | Second Amended Application For PCR                           | Filing                            |               | 04/07/2014-10:01    |                  |
| Torres, Andres          | Applicant Memo in Support of His Motion to Amended           | Filing                            |               | 04/07/2014-09:58    |                  |
| Torres, Andres          | Applicants Motion to Amend                                   | Filing                            |               | 04/07/2014-09:56    |                  |
| Torres, Andres          | Corrected Memo in Support of Motiobn For Summary Judgment    | Filing                            |               | 03/21/2014-10:03    |                  |
| Torres, Andres          | Memo/Memo in Support of Motion for Summary Judgment          | Filing                            |               | 03/20/2014-10:55    |                  |
| Torres, Andres          | Summary Judgment Motion                                      | Filing                            |               | 03/20/2014-10:55    |                  |
| State Of South Carolina | Service/Affidavit Of Service                                 | Filing                            |               | 02/14/2014-08:15    |                  |
| Torres, Andres          | Amended/Second Amended PCR                                   | Filing                            |               | 02/14/2014-08:12    |                  |
| Tessier, Troy A.        | Service/Certificate Of Service                               | Filing                            |               | 08/08/2012-14:53    |                  |
| Ehles, William Harry II | Service/Certificate Of Service                               | Filing                            |               | 08/08/2012-14:53    |                  |
| State Of South Carolina | Memo/Memo in Support                                         | Filing                            |               | 08/08/2012-14:52    |                  |
| State Of South Carolina | Return                                                       | Filing                            |               | 08/08/2012-14:52    |                  |
| Torres, Andres          | Motion/Amend Application                                     | Motion                            |               | 07/06/2012-00:00    | 07/06/2012-00:00 |
| State Of South Carolina | Cert Of Service xs 2 Donald J Zelenka/Brendan J McDonald     | Filing                            |               | 07/06/2012-00:00    |                  |
| Torres, Andres          | Amended/First Amended Application for PCR                    | Filing                            |               | 07/06/2012-00:00    |                  |
| Torres, Andres          | Motion/Motion For continuance and status conference          | Motion                            |               | 07/15/2011-16:15    | 07/15/2011-00:00 |
| State Of South Carolina | Service/Certificate Of Service                               | Filing                            |               | 07/15/2011-16:15    |                  |
| Torres, Andres          | Motion/corrected Motion For continuance and status conferenc | Motion                            |               | 07/13/2011-15:16    | 07/13/2011-00:00 |
| State Of South Carolina | Service/Certificate Of Service                               | Filing                            |               | 07/13/2011-15:17    |                  |
| Torres, Andres          | Letter/Letter to judge                                       | Filing                            |               | 07/13/2011-15:16    |                  |
| Torres, Andres          | Motion/Continuance                                           | Motion                            |               | 07/11/2011-00:00    | 07/11/2011-00:00 |
| Torres, Andres          | Service/Certificate Of Service                               | Filing                            |               | 07/11/2011-00:00    |                  |
| Torres, Andres          | Filing/Filing Of Return and Memorandu of Law in Support      | Filing                            |               | 05/19/2011-15:55    |                  |
| Torres, Andres          | Post Conviction Relief                                       | Filing                            |               | 04/22/2011-10:49    |                  |
| <b>Financials</b>       |                                                              |                                   |               |                     |                  |
| <b>Summary</b>          |                                                              |                                   |               |                     |                  |
| <b>Fine/Costs:</b>      | <b>\$150.00</b>                                              | <b>Total Paid for fine/costs:</b> | <b>\$0.00</b> | <b>Balance Due:</b> | <b>\$150.00</b>  |

| Costs                               |                |            |                       |                  |
|-------------------------------------|----------------|------------|-----------------------|------------------|
| Description                         | Cost Code      | Amount     | Charge Action         | Disbursed Amount |
| SCJD Filing Fee Proviso \$50 / \$25 | SCJDPV         | \$50.00    |                       | \$0.00           |
| Civil Filing Fee State 56%          | CVFFST         | \$56.00    |                       | \$0.00           |
| Civil Filing Fee County 44%/100%    | CVFFCN         | \$44.00    |                       | \$0.00           |
| Payments                            |                |            |                       |                  |
| Payment Date                        | Receipt Number | Entered By | Transaction Type Code | Payment Amount   |
| None                                |                |            |                       |                  |

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**Subject:** RE: Motion Bryant PCR  
**Date:** Friday, December 28, 2018 at 10:14:42 AM Eastern Standard Time  
**From:** Melody Brown  
**To:** Seals, William Law Clerk (Christopher Kinon), Sherrie Butterbaugh, Charles Grose, Diana Holt  
**Attachments:** Bryant, Stephen Corey. Proposed Order Overruling Objections to Proposed Order (01858465xD2C78).DOCX, Bryant, Stephen Corey. Proposed Order Overruling Objections to Proposed Order (01859065xD2C78).PDF, Letter to Judge Seals law clerk. Bryant, Stephen Corey. Proposed Order Overruling Objections to Proposed Order (01859070xD2C78).PDF

Dear Mr. Kinon:

Hope you are having a pleasant holiday season.

Attached is a proposed order (in Word and PDF) as requested in your email below. I captioned the order as "overruling objections" instead of reconsideration as the objections were being heard at the hearing, but I am more than happy to change whatever the Judge would direct that I change. I am also providing a paper copy to you and opposing counsel via U.S. mail going out today. Attached is a scanned courtesy copy of the cover letter dated today. As always, if you should need anything further, please do not hesitate to contact me.

Sincerely,

Melody J. Brown  
Senior Assistant Deputy Attorney General  
Capital and Collateral Litigation Section  
Office of the Attorney General, State of South Carolina  
Post Office Box 11549  
Columbia, South Carolina 29211-1549  
P 803-734-6305  
F 803-734-4035  
[mbrown@scag.gov](mailto:mbrown@scag.gov)

**From:** Seals, William Law Clerk (Christopher Kinon) [mailto:wsealslc@sccourts.org]  
**Sent:** Friday, December 21, 2018 2:40 PM  
**To:** Melody Brown; Sherrie Butterbaugh; Charles Grose; Diana Holt  
**Subject:** Motion Bryant PCR

Good Afternoon,

It was a pleasure seeing you all at the hearing today. Judge Seals hereby denies Mr. Bryant's Motion to Reconsider heard today. His Honor requests the State prepare a short Order for his review. I hope everyone has a safe trip back to their destinations and a nice holiday season.

Best,

*Chris Kinon*  
Law Clerk to the Honorable William H. Seals, Jr.

Circuit Court Judge, At-Large, Seat 6  
Chief Administrative Judge, 15<sup>th</sup> Circuit, Common Pleas  
103 North Main Street  
Marion, South Carolina 29571  
Ph: (843) 423-0446 | Cell: (843) 340-0892 | Fax: (843) 423-0535

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

THE STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

Stephen Cory Bryant, SCDC # 5252

vs.

State of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

RECORDED

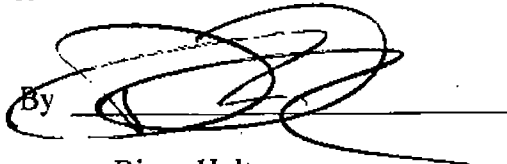
2019 JAN 14 P 4:25

Case No. 2016-CP-43-00828

Applicant: JAMES V. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire  
Sherrie Butterbaugh, Esquire  
S.C. Attorney General's Office  
PO Box 11549  
Columbia, SC 29211-1549

By 

Diana Holt  
S.C. Bar Number 7079  
Diana Holt, LLC  
Post Office Box 6454  
Columbia, South Carolina 29260-6454  
Phone: 803-782-1663  
Email: DianaHolt@dianaholtllc.com

January 14, 2019  
Columbia, South Carolina

# The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

RECORDED  
E. Charles Grose, Jr.  
Phone: 864-538-4466 Fax: 864-538-4405  
E-mail: [charles@groselawfirm.com](mailto:charles@groselawfirm.com)  
Web: [GroseLawFirm.com](http://GroseLawFirm.com)

JAN 28 2019  
SUMTER COUNTY, S.C.

January 28, 2019

The Honorable William H. Seals, Jr.  
Circuit Court Judge  
103 North Main Street  
Marion, SC 29571

Re: *Stephen Corey Bryant v. State of South Carolina*  
Case Number 2016-CP-43-828

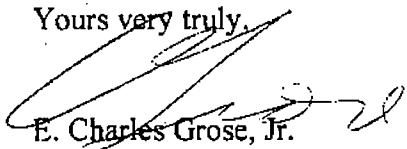
Dear Judge Seals:

Enclosed, as supplemental authority, please find a copy of *Williams v. Stirling*, Case No. 18-2 (4<sup>th</sup> Cir. filed Jan. 28, 2019), which is relevant to Ground 2 in Mr. Bryant's Rule 59(e), SCRCP.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

  
E. Charles Grose, Jr.

cc: Diana Holt, Esquire  
Melody J. Brown, Esquire  
Sherrie Butterbaugh, Esquire  
Clerk of Court, Sumter County

A. 3671

**PUBLISHED**

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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**No. 18-2**

CHARLES CHRISTOPHER WILLIAMS,

Petitioner – Appellee,

V.

**BRYAN P. STIRLING**, Director, South Carolina Department of Corrections;  
**WILLIE D. DAVIS**, Warden of Kirkland Correctional Institution.

**Respondents – Appellants,**

and

JOSEPH MCFADDEN, Warden of Lieber Correctional Institution.

**Respondent.**

FEDERAL REPUBLIC OF GERMANY,

**Amicus Supporting Appellee.**

Appeal from the United States District Court for the District of South Carolina, at Greenville. J. Michelle Childs, District Judge. (6:16-cv-01655-JMC)

Argued: October 31, 2018

Decided: January 28, 2019

Before NIEMEYER, AGEE and DIAZ, Circuit Judges.

A. 3672



Affirmed by published opinion. Judge Agee wrote the opinion, in which Judge Niemeyer and Judge Diaz joined.

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**ARGUED:** Melody Jane Brown, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. Seth C. Farber, WINSTON & STRAWN LLP, New York, New York, for Appellee. Alice Tsier, WHITE & CASE LLP, New York, New York, for Amicus Curiae. **ON BRIEF:** Alan Wilson, Attorney General, Donald J. Zelenka, Deputy Attorney General, Alphonso Simon Jr., Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellants. William Harry Ehliess, II, Greenville, South Carolina; Teresa L. Norris, Charleston, South Carolina, for Appellee. Owen C. Pell, Amity Boye, WHITE & CASE LLP, New York, New York, for Amicus Curiae.

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AGEE, Circuit Judge:

After shooting and killing his former girlfriend, Charles Christopher Williams was convicted by a South Carolina jury of kidnapping, murder, and possession of a firearm during a violent crime. He was sentenced to death for the murder. After exhausting state remedies, Williams petitioned the United States District Court for the District of South Carolina for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied or stayed all of Williams' claims, except Ground Six, which asserted a claim of ineffective assistance of counsel resulting from trial counsel's failure to investigate potentially mitigating evidence of Fetal Alcohol Syndrome ("FAS"). On this ground, the district court granted Williams' petition and the State now appeals. For the reasons that follow, we affirm the judgment of the district court.

I.

On the morning of September 3, 2003, Williams entered a Greenville, South Carolina grocery store where his former girlfriend, Maranda Williams, worked. He confronted her, then forced her into a store office, where he held her at gunpoint for approximately 90 minutes. During this period she called 911 and hostage negotiators tried to convince Williams to release her. She eventually attempted to escape, but Williams pursued her, shooting her four times and killing her. Upon hearing the shots, law enforcement officers entered the store and apprehended Williams. Following his arrest, Williams gave a statement in which he confessed to the crimes for which he was

later charged. In February 2005, a Greenville County, South Carolina, jury convicted Williams of kidnapping, murder, and possession of a firearm during a violent crime.

At trial, Williams was represented by attorneys William Nettles and John Mauldin, both of whom were experienced in capital cases. Nettles had handled approximately five death penalty cases through trial and sentencing, as well as a handful of post-conviction relief cases. Mauldin had overseen “close to a dozen [capital cases] to verdict” and worked on nearly three times as many cases after a death notice had been filed. J.A. 493–94.

In preparation for the penalty phase, Nettles and Mauldin assembled a defense team that included, among others, social worker Jan Vogelsang, clinical neuropsychologist Dr. James Evans, clinical psychiatrist Dr. Robert Richards, neurologist Dr. David Griesemer, and forensic psychiatrist Dr. Seymour Halleck. As part of the investigation, Vogelsang gathered information about Williams’ upbringing. She interviewed Williams’ father, who told her that he had observed Williams’ mother, Daisy Huckaby, drinking while pregnant, though he was unable to provide any additional details. Vogelsang also interviewed Williams’ sister, who recalled that Huckaby drank while pregnant with Williams, but could not say how much. (The record indicates that Vogelsang either failed to ask Huckaby about her drinking or that Huckaby denied drinking while pregnant.)

The defense team experts assessed Williams for neurological and psychological issues. Following an evaluation, Dr. Evans concluded that Williams suffered neurological impairments as the result of frontal lobe damage and, consequently, had

learning difficulties. Dr. Richards examined Williams and diagnosed him with bipolar and obsessive-compulsive disorder. Finally, following an MRI and neurological exam the week prior to the trial, Dr. Griesemer reported that, though there were some cognitive issues, Williams' MRI showed a normal brain.

During the penalty phase,<sup>1</sup> defense counsel presented mitigating evidence of Williams' troubled childhood—including his mother's alcoholism—as well as his mental illness and difficulties in school. To this end, counsel presented testimony from Williams' father and sister; Williams' first grade teacher; a co-worker of Daisy Huckaby; and their experts, including Dr. Richards, who testified about his diagnoses, and Dr. Halleck, who opined that Williams suffered from major depressive disorder and obsessive-compulsive disorder but was able to, with difficulty, conform his behavior to

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<sup>1</sup> Under South Carolina law, juries in capital cases consider guilt and sentencing in separate proceedings. S.C. Code Ann. § 16-3-20(A), (B). Once a jury has determined a defendant's guilt, South Carolina law instructs that “the jury . . . shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment[.]” *Id.* § 16-3-20(B).

Jurors face two questions at sentencing. As an initial matter, they must decide whether the State has proven beyond a reasonable doubt the existence of any statutory aggravating factor. If the jury fails to agree unanimously on this point, it does not make a sentencing recommendation. Rather, the trial judge sentences the defendant to either life imprisonment or a mandatory minimum term of 30 years' imprisonment. But if the jury unanimously finds a statutory aggravating factor, it must recommend either death or life imprisonment without the possibility of parole. *Id.* § 16-3-20(A)-(C); *see also Shafer v. South Carolina*, 532 U.S. 36, 40-41 (2001).

Mitigating circumstances include “[t]he capacity of the defendant to appreciate the criminality of his conduct” and “subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior.” S.C. Code Ann. § 16-3-20(C)(b)(6), (10). Aggravating circumstances include the commission of the murder during the performance of any number of other crimes, including kidnapping. *Id.* § 16-3-20(C)(a)(1)(b).

the requirements of the law. Moreover, through his cross-examination of the state psychiatrist, Nettles elicited additional mitigation testimony, including information about Williams' trouble with his parents' divorce, Huckaby's alcoholism, Williams' difficulty in school, and his untreated attention deficit disorder. In turn, the State alleged a single aggravating factor: "Murder was committed while in the commission of kidnapping." J.A. 809.

On the second day of penalty phase deliberations, the jury sent a note to the trial court stating it was deadlocked nine to three in favor of death. Williams moved for a mistrial but the trial court denied the motion and instead gave an *Allen*<sup>2</sup> charge. The jury resumed its deliberations and, after three hours and 45 minutes, returned a sentence of death. The Supreme Court of South Carolina affirmed Williams' convictions and death sentence, *State v. Williams*, 690 S.E.2d 62 (S.C. 2010), and the United States Supreme Court denied his petition for a writ of certiorari, *Williams v. South Carolina*, 562 U.S. 899 (2010).

In November 2010, Williams filed a petition for post-conviction relief in the Greenville County, South Carolina Circuit Court ("PCR court"), asserting errors that included trial counsel's failure to investigate signs that Williams suffered from FAS—namely, evidence of Huckaby's drinking during her pregnancy and Williams' corresponding brain damage. In January 2013, the PCR court held an evidentiary hearing at which three FAS experts testified on Williams' behalf. Dr. Richard Adler, a forensic

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<sup>2</sup> *Allen v. United States*, 164 U.S. 492 (1896).

psychologist, diagnosed Williams with Partial Fetal Alcohol Syndrome, a form of FAS. Neuropsychologist Dr. Paul Connor testified that his assessment of Williams indicated severe functional impairments and damage to the corpus callosum, all consistent with or symptomatic of FAS. Finally, Dr. Natalie Novick Brown, a forensic psychologist, concluded that Williams' executive functions—including “self-regulation” and “behavior control”—were impaired due to FAS, leading to behavioral difficulties, including impulse control problems and coping skills equivalent to those of a nine year old. J.A. 588. All three experts acknowledged that at the time of the trial in 2005, a widely recognized protocol to forensically assess FAS in the criminal justice context had not yet been fully developed, but that individual practitioners had been addressing FAS and had developed a framework for diagnosing the condition and treating its symptoms.<sup>3</sup>

Trial counsel also testified, but neither could recall a mitigation investigation into FAS, or why such an investigation was not conducted. Mauldin testified that although FAS awareness had become much more prevalent in the years since Williams' trial, the issue “certainly existed well before” the 2003 American Bar Association Guidelines for

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<sup>3</sup> Williams is a dual German and U.S. citizen. As the brief of amicus curiae Federal Republic of Germany points out, at the time of trial, FAS was a well-defined medical condition. The diagnosis of prenatal alcohol exposure had evolved to encompass, by the time of trial, assessing certain facial and neurological abnormalities. Such diagnoses were used to address, among other issues, permanent deficits exhibited by FAS patients in socialization, communication, motor, and daily living skills. In 2007, a protocolized approach for assessing FAS in the criminal justice context was developed.

the Appointment and Performance of Defense Counsel in Death Penalty Cases.<sup>4</sup> J.A. 500. The commentary in these Guidelines designated FAS as a potentially mitigating factor to be investigated by counsel in capital cases. He further acknowledged that, in hindsight, several issues should have indicated a potential FAS diagnosis for Williams when he was preparing for trial. First, Mauldin testified that he had reports in his files that indicated Huckaby drank during her pregnancy. Mauldin acknowledged that at the time of the trial, such drinking should have signaled a potential FAS issue for him. With this information about Huckaby's drinking, he should have, as a first step, directed a neurologist to conduct whatever testing would have been necessary to determine whether Williams was affected by FAS. Nonetheless, Mauldin testified, "I honestly cannot say why [Huckaby's drinking] wasn't a red flag for me eight years ago." J.A. 500. "[A]s extraordinary as that seems," he continued, "I can't explain why there was no discussion or follow-up on that." J.A. 512. Second, Mauldin testified that the developmental delays and learning problems exhibited by Williams were issues he should have associated with FAS. Finally, Mauldin also explained that some of the follow-up information the defense team experts were seeking was of the type he should have associated with FAS. Specifically, Mauldin testified that at the time of the trial he was aware of the correlation between a significantly smaller head circumference at birth and FAS and knew that Dr. Richards, as of August 2004, had become interested in potential brain damage and had

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<sup>4</sup> ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003), *reprinted in* 31 Hofstra L. Rev. 913 (2003) ("ABA Guidelines").

requested records containing the circumference of Williams' head at birth and recommended an MRI of Williams' brain. Nonetheless, Mauldin was unable to explain why the records were not produced to Dr. Richards, or why an MRI was not conducted until the week prior to the beginning of the trial in February 2005, rather than in August 2004.

Nettles testified that he was aware of the ABA Guidelines mandating investigation of mitigating evidence, including personal, family, and medical history, as part of penalty phase preparations.<sup>5</sup> But he could not remember at what point he developed an "understanding" of FAS. J.A. 465. He did recall that the subject of Huckaby's drinking came up, but testified that he was focused on it as evidence of Williams' difficult childhood, not of FAS. He also recalled some evidence of neurological damage. Nonetheless, he did not recall any discussion about FAS or FAS being considered as a potentially mitigating factor.

In denying Williams' petition, the PCR court concluded:

[T]his Court finds that trial counsel had evidence that [Williams'] mother drank during pregnancy, and that trial counsel was aware of the resulting complications, including brain damage. Trial counsel also had evidence that [Williams] possibly suffered brain damage, based on Dr. Evans' reports. Trial counsel presented this information, along with other mitigation evidence, to the defense experts. Considering all of the information it had available and in consultation with its experts, trial counsel developed a cogent strategy to present mitigation evidence—including evidence of the mother's alcohol addiction—but also *made a*

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<sup>5</sup> Specifically, when asked if he was "familiar . . . [with] the American Bar Association Guidelines for Performance of Defense Counsel in Death Penalty Cases" and Guidelines outlining the "need[] to explore medical history, including . . . prenatal and birth trauma," Nettles responded: "Right." J.A. 462–63.



*strategic decision* not to present to the jury evidence of brain damage or a diagnosis of Fetal Alcohol Syndrome (*though trial counsel was unable to articulate the reasons for that strategic decision*). Instead, trial counsel's strategy was to present mitigation evidence regarding [Williams'] troubled childhood and his [other disorders], as diagnosed by defense experts.

J.A. 665 (emphases added). Finally, the PCR court also found that, even if Williams had presented evidence of FAS to the jury, it was unlikely that the jury would have returned a different sentence. The PCR court based its conclusion in part on a survey of eight jury verdicts from other jurisdictions demonstrating that defendants are sentenced to death in spite of mitigating evidence of FAS or organic brain damage. The South Carolina Supreme Court dismissed Williams' petition for writ of certiorari, *Williams v. South Carolina*, No. 2016-MO-012, 2016 WL 1458174 (S.C. Apr. 13, 2016), as did the United States Supreme Court, *Williams v. South Carolina*, 137 S. Ct. 1812 (2017).

After initiating habeas proceedings in the district court in November 2016, Williams filed an amended § 2254 petition in February 2017, asserting 15 grounds for relief, of which only the first six are at issue on appeal. Ground One asserted that the trial court's *Allen* charge was improperly coercive. Ground Two asserted that the State elicited prejudicial testimony from its forensic psychiatrist by asking her if she became involved only in cases in which "the death penalty may be considered." Compare J.A. 23–25, with J.A. 276. Grounds Three and Four asserted that trial counsel failed to properly object to a series of allegedly prejudicial comments made during the State's closing argument. Ground Five asserted that trial counsel was ineffective for failing to assert Williams' right to seek assistance from the German government under the Vienna Convention on Consular Relations based on his German citizenship. And of particular

importance to this appeal, Ground Six asserted Williams was denied effective assistance of counsel after trial counsel failed to investigate evidence of FAS.

The case was referred to a magistrate judge, who recommended the petition be granted as to Ground Six, and that Williams' death sentence be vacated as a result. The magistrate judge concluded that the PCR court's finding that trial counsel "made a strategic decision" was unreasonable given that this finding was directly contradicted by trial counsel's PCR testimony. *Compare* J.A. 885, *with* J.A. 665. The magistrate judge also concluded that Williams established prejudice: because the State put forward only one aggravating factor and "the jury was deprived of powerful [mitigating] evidence," a reasonable probability existed that the jury would have returned a life sentence had this additional mitigating evidence been presented and credited by the jury. J.A. 888. Finally, the magistrate judge also recommended granting summary judgment to the State as to Grounds One through Five and Seven through Ten, and dismissing without prejudice Grounds Eleven through Fifteen.<sup>6</sup>

The district court adopted the magistrate judge's recommendations as to Grounds One through Ten, including granting the petition as to Ground Six. The district court also granted Williams a stay as to Grounds Eleven through Fifteen, pending exhaustion of

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<sup>6</sup> Grounds Seven through Ten asserted an assortment of due process and ineffective assistance of trial and appellate counsel claims. Grounds Eleven through Fifteen also asserted trial and appellate counsel were ineffective for failing to investigate and/or present other mitigating evidence. None of these claims are at issue in this appeal and we do not consider them.

those claims in state court. Consequently, the district court vacated the death sentence and “suggest[ed]” a resentencing trial. J.A. 959.

The State filed a timely appeal as to Ground Six.<sup>7</sup> This Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

## II.

28 U.S.C. § 2254(a) provides that a federal district court “shall entertain an application for a writ of habeas corpus” filed by a state prisoner “only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” Generally speaking, before filing a § 2254 petition, a petitioner must exhaust all state court remedies. *Id.* § 2254(b); *see also Jones v. Sussex I State Prison*, 591 F.3d 707, 712–13 (4th Cir. 2010) (explaining that § 2254’s exhaustion requirement means that a state prisoner must have first presented his claim before every available state court).

Once a state prisoner has exhausted his claims in state court and filed a federal habeas petition, “[i]f a state court has already resolved the merits of a claim for post-conviction relief, a federal court may not grant a writ of habeas corpus [under § 2254]

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<sup>7</sup> The first five issues are raised in Williams’ response brief as additional grounds for providing relief. Accordingly, Williams was not required to file a cross-appeal on these issues. *See Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (noting, in the context of a § 2254 proceeding, “[a]n appellee who does not take a cross-appeal may urge in support of a decree any matter appearing before the record, although his argument may involve an attack upon the reasoning of the lower court,” so long as appellee’s theory does not “enlarge[e] his own rights” or “lessen[] the rights of his adversary”) (internal quotation marks omitted)).

unless the state court's decision" meets the requirements of § 2254(d). *Byrum v. Ozmint*, 339 F.3d 203, 206 (4th Cir. 2003). Specifically, § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d) further "require[s] us to limit our analysis" of the state PCR court's decision "to the law as it was 'clearly established' by [the Supreme Court] at the time of the [PCR] court's decision." *Wiggins v. Smith*, 539 U.S. 510, 520 (2003).

Under § 2254(d)(1), such a decision is "contrary to" Supreme Court precedent "if the state court applie[d] a rule that contradicts the governing law set forth in" Supreme Court cases, or "confront[ed] a set of facts that are materially indistinguishable from a [Supreme Court decision] and nevertheless arrive[d] at a result different from [that] precedent." *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). A decision is an "unreasonable application" of clearly established Supreme Court precedent if the PCR court "correctly identifie[d] the governing legal rule but applie[d] it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08. "In order for a federal court to find a state court's application of [Supreme Court] precedent unreasonable, the state court's decision must have been more than incorrect or erroneous. The state court's application must have been objectively unreasonable." *Wiggins*, 539 U.S. at 520–21 (internal

citation and quotation marks omitted); *see also Harrington v. Richter*, 562 U.S. 86, 103 (2011) (“[A] state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

Alternatively, a state prisoner may be granted relief pursuant to § 2254(d)(2) if the PCR court decision’s was based on a factual determination “sufficiently against the weight of the evidence that it is objectively unreasonable.” *Winston v. Kelly*, 592 F.3d 535, 554 (4th Cir. 2010). As with legal conclusions, “[f]or a state court’s factual determination to be unreasonable under § 2254(d)(2), it must be more than merely incorrect or erroneous.” *Id.* (internal citation omitted).

This Court’s review is de novo when a federal district court’s habeas decision is based on the state court record. *Gray v. Branker*, 529 F.3d 220, 228 (4th Cir. 2008). State court factual determinations are presumed correct and may be rebutted only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Upon review, we conclude that the PCR court’s determination of Williams’ Ground Six ineffective assistance claim involved both an unreasonable application of federal law clearly established by Supreme Court precedent at the time of the PCR hearing, and an unreasonable determination of the facts in light of the record before it. Consequently, as described in greater detail below, we affirm the district court’s grant of habeas corpus relief under § 2254.

### III.

In Ground Six of his petition, Williams contends that his attorneys' performance during the penalty phase violated his Sixth Amendment right to effective assistance of counsel. A prisoner petitioning for habeas relief based on ineffective assistance of counsel must meet two components: "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins*, 539 U.S. at 521 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We address each in turn, mindful that on appeal our inquiry is limited to whether the PCR court's ineffective assistance determination was contrary to or an unreasonable application of Supreme Court precedent or an objectively unreasonable factual determination.

A.

1.

The district court determined that defense counsel were deficient at the sentencing phase because of their failure to investigate evidence indicating that Williams had FAS. To establish deficient performance, a petitioner must demonstrate that counsel's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The performance inquiry here focuses on the standard of reasonableness related to counsel's duty to investigate mitigating evidence for sentencing in a capital case. *Strickland* does not require investigation of every conceivable line of mitigating evidence but does impose "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete

investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Id.* at 690–91.

Review of trial counsel’s investigation is considered “from counsel’s perspective at the time,” *id.*, and the professional norms then prevailing. *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010). A “well-defined norm” at the time of Williams’ trial provided “that investigations into mitigating evidence ‘should comprise efforts to discover *all reasonably available* mitigating evidence.’” *Wiggins*, 539 U.S. at 524 (internal citation omitted) (applying norm to a trial that occurred in 1989). “[A reviewing] court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.” *Id.* at 527.

In turn, “[p]revailing norms of practice as reflected in the American Bar Association standards and the like are guides to determining what is reasonable[.]” *Strickland*, 466 U.S. at 688. With respect to investigating mitigating evidence in preparation for the penalty phase of capital proceedings, the ABA Guidelines at the time of trial noted that a defendant’s psychological history and mental status could “explain or lessen the client’s culpability for the underlying offense[.],” and therefore should be considered as part of the mitigation investigation. ABA Guidelines § 10.11(F)(2), *reprinted in* 31 Hofstra L. Rev. at 1056. Commentary to § 10.11 explained that expert testimony concerning “the permanent neurological damage caused by fetal alcohol syndrome” could “lessen the defendant’s moral culpability for the offense or otherwise support[] a sentence less than death.” *Id.* at 1060–61; *see also id.* at 956–57 (noting, with respect to § 4.1, that because “the defendant’s psychological and social history and

his emotional and mental health are often of vital importance to the jury's decision at the punishment phase," the defense team should include at least one person qualified to screen for mental or psychological defects so as to "detect the array of conditions (e.g., post-traumatic stress disorder, *fetal alcohol syndrome*, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance" (emphasis added)). Furthermore, the 2003 Fourth Circuit case *Byrum*—which was decided about 18 months *before* Williams' sentencing—also recognized FAS could be a mitigating factor in a capital case. 339 F.3d at 209–10 (describing that trial counsel's investigation of potential mitigating evidence indicated that the defendant's mother had not abused alcohol during her pregnancy, which, coupled with "the absence of any evidence of organic brain dysfunction, [led] trial counsel [to] conclude[] that they did not have a sufficient factual basis to present FAS as evidence in mitigation").

2.

We note at the outset that most of trial counsels' decisions and actions on issues unrelated to FAS *did* bear the hallmarks of effective assistance: trial counsel had experience in capital cases; counsel consulted with numerous experts in developing a mitigation case; and counsel spent a significant amount of time developing mitigation arguments. *See id.* at 205–11 (listing similar factors to bolster conclusion that counsel's performance was not deficient). But as *Wiggins* makes abundantly clear, an inadequate investigation into potentially mitigating evidence can be, by itself, sufficient to establish deficient performance. 539 U.S. at 534.



Here, counsel's investigation into potentially mitigating evidence of FAS failed to meet an objective standard of reasonableness. By counsel's own PCR-court admission, their failure to further investigate signs of FAS fell below the then-current standard for mitigation investigations: both attorneys acknowledged they were aware of the mitigating value of neurological defects at the time of Williams' sentencing—with Mauldin *specifically* testifying that he was aware at the time of the importance of FAS as a potential mitigating factor—yet they failed to investigate this issue. Mauldin noted that he *should* have been aware of the issue because the evidence of Williams' brain damage and Huckaby's alcohol consumption during her pregnancy, as well as Dr. Richards' request for medical records concerning the circumference of Williams' head at birth and an MRI, should have alerted counsel to this issue at the time of sentencing. But, as Mauldin testified, he was unable to explain why this information did not raise a red flag: "I wish I could say I connected that, but I did not. . . . I really don't have an explanation for why I was missing those kinds of indicators." J.A. 519. As he further stated, "I am dumbfounded about why a certain course of action did not occur [as the result of being aware of Huckaby's drinking during her pregnancy]. . . . [I]t is unexplainable to me." J.A. 525. Mauldin was similarly unable to explain why, despite awareness of Huckaby's drinking, counsel did not even consider whether Williams had FAS. Nettles' testimony confirmed Mauldin's: despite numerous indicators of FAS, they did not consider whether to pursue that evidence.

Consequently, because there was no recognition of a potential FAS diagnosis by trial counsel, there was no further exploration of FAS as a potential mitigating factor.

And because there was no further exploration, there was *necessarily* no opportunity for counsel to make a strategic decision about whether or not to further develop the FAS evidence or present it in mitigation. Rather, the investigation here was deficient for the same reasons that *Wiggins* found counsel's investigation to be deficient: the lack of an informed decision regarding mitigating evidence. In *Wiggins*, there was evidence of a Maryland death row inmate's alcoholic mother and his problems in foster care. Despite this evidence, counsel failed to follow up on these leads for potentially mitigating evidence. 539 U.S. 525. The Supreme Court concluded that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background." *Id.*

A comparison to our analysis in *Byrum* also highlights the deficiencies in trial counsel's investigation here. In *Byrum*, this Court affirmed a district court's denial of a § 2254 petition, concluding that trial counsel's failure to present mitigating FAS evidence did not amount to deficient performance. 339 F.3d at 211. The Court held that counsel's failure to develop FAS evidence was reasonable in light of two factors: first, there was no indication that the birth mother drank during her pregnancy (specifically, the birth mother denied abusing alcohol during her pregnancy and her records contained no contrary evidence); and second, there was no evidence of organic brain damage or FAS, particularly in the test results evaluated by the defense team. *Id.* at 210 ("Based upon [the] investigation and the absence of any evidence of organic brain dysfunction, trial counsel concluded that they did not have a sufficient factual basis to present FAS as

evidence in mitigation.”). Consequently, trial counsel did not fall short of “well-defined norms requiring the discovery of *all reasonably available* mitigating evidence,” nor did they “abandon their investigation at an unreasonable juncture.” *Id.* (internal quotation marks omitted).

In contrast to *Byrum*, both of these red flags were present here. First, although evidence of Huckaby’s drinking during pregnancy was mixed, there was sufficient evidence of alcohol abuse that Vogelsang flagged it for general concern. Second, there was evidence of Williams’ brain damage, including impairment of the front lobe. Furthermore, even though evidence of brain damage led Dr. Richards to suggest ordering an MRI of Williams’ brain and to request medical records of Williams’ head circumference at birth—information often correlated with a FAS diagnosis—the team failed to provide the medical records or to obtain the MRI until the week prior to trial. Consequently, evidence of FAS was reasonably available, but counsel failed to connect the indicators suggesting further investigation. And given that FAS evidence was widely acknowledged to be a significant mitigating factor that reasonable counsel should have at least explored—as outlined in the ABA Guidelines and caselaw at the time, and by counsel during their PCR testimony—counsel’s actions were deficient. To the point, because counsel failed to conduct *any* investigation despite the red flags, their conduct fell well short of the conduct *Byrum* concluded would have actually been deficient: abandoning *an* investigation into FAS “at an unreasonable juncture.” 339 F.3d at 210; *see also Wiggins*, 539 U.S. at 527–28 (“[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing

strategy impossible.”); *Strickland*, 466 U.S. at 690–91 (“[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”).

An investigation into FAS evidence would also have been substantively different from the defense team’s investigation into other mental illnesses and behavioral issues because FAS could have established both *cause and effect* for Williams’ criminal acts whereas the other mitigation evidence went more to effects on behavior. That is, FAS evidence could have provided to the jury evidence of an overarching neurological defect that *caused* Williams’ criminal behavior. See ABA Guidelines, 31 Hofstra L. Rev. at 1060–61 (“If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense, counsel may wish to show the combination of factors that led the client to commit the crime.”); *id.* at 1061 (“[I]t is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly mitigating factors.”). Without the information on FAS, the jury could have assumed that Williams was an individual who—despite a challenging childhood, learning disabilities, and other mental health issues—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.

Of course, counsel would not have been required to present evidence of FAS. Indeed, counsel may have concluded, after investigating and considering FAS as a mitigating factor, that it was an unsound strategy to present this information to the jury because, for example, it could indicate future dangerousness. But that analysis can justify

a decision only after a reasonable investigation into FAS. Here, counsel did not collect any FAS evidence or consider its resulting import as part of the mitigation strategy.

3.

But, as noted earlier, it is not enough for us to determine that trial counsel failed to meet the *Strickland* standard for performance. In the § 2254 context, we must also determine whether the district court erred in concluding the PCR court's determination was "contrary to, or involved an unreasonable application of," Supreme Court caselaw or was based on "an unreasonable determination of the facts." 28 U.S.C. § 2254(d). The State contends that the district court failed to afford the appropriate deference to the PCR court's determination—based on "competing evidence of what the defense team knew, and what the defense team did"—and that counsel made a reasonable strategic decision in preparing a mitigation case that excluded presentation of a FAS diagnosis. Opening Br. 31.

We disagree. Applying the correct standard here, we conclude that the PCR court's determination that the investigation was not deficient involved both an unreasonable application of the law and an unreasonable determination of the facts.

As an initial matter, the PCR court's application of *Strickland* and its progeny to the present case was objectively unreasonable. 28 U.S.C. § 2254(d)(1). In reaching its conclusion, the PCR court confused a strategic decision not to further develop FAS evidence after *some* investigation into its potential mitigating value—which could have complied with *Strickland*—with a complete failure to investigate the FAS evidence for any potential mitigating value, a failure that plainly falls below an objective standard of

reasonableness. As *Wiggins* concluded, *even if* trial counsel “would not have altered their chosen strategy” of presenting other mitigating factors, “counsel were not in a position to make a reasonable strategic choice . . . because the investigation supporting their choice was unreasonable.” 539 U.S. at 536. “[T]his case is therefore distinguishable from our precedents in which we have found limited investigations into mitigating evidence to be reasonable.” *Id.* at 525. Consequently, even under the highly deferential standard afforded to the PCR court, that court’s conclusion was unreasonable: “In deferring to counsel’s decision not to pursue a mitigation case despite their unreasonable investigation, the [state court] unreasonably applied *Strickland*.” *Id.* at 534. In short, the PCR court could not reasonably find trial counsel made a strategic decision in accord with *Strickland* where counsel was unaware of the decision.

The PCR court’s determination of the facts was also objectively unreasonable. 28 U.S.C. § 2254(d)(2); *see also Harrington*, 562 U.S. at 100. Specifically, the PCR court relied on the factual assumption that trial counsel made *a* strategic choice not to present the FAS evidence. But, as recounted above, it was impossible for trial counsel to have made a strategic choice because there was no investigation into FAS. Both Nettles and Mauldin testified repeatedly that FAS was never considered, while Vogelsang also testified that nobody ever ruled out FAS. Therefore, counsel could not, as the PCR court found, have made a choice between mitigation strategies. Rather, “[t]he record of the actual sentencing proceedings underscores the unreasonableness of counsel’s conduct by suggesting that their failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment.” *Wiggins*, 539 U.S. at 526.

Additionally, the PCR court erroneously assumed that a lack of an established protocol assessment of FAS in the forensic context meant that FAS was not a widely understood condition at the time of trial; in fact, the ABA Guidelines at the time flagged FAS as a potentially mitigating factor, and trial counsel testified they were sufficiently aware of FAS such that certain issues that arose during their investigation should have triggered an investigation into a possible FAS diagnosis. *See also Moore v. Texas*, 518 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1039, 1049 (2017) (“[B]eing informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”). The PCR court’s reliance on this factual determination to reach the conclusion that trial counsel made a strategic decision to exclude FAS evidence underscores the unreasonableness of the PCR court’s decision.

\* \* \* \*

For these reasons, we agree with the district court that the PCR court erred in concluding that Williams had failed to establish deficient performance of counsel.

B.

This does not end our inquiry either, however, because Williams must also establish that the PCR court’s prejudice determination was contrary to or an unreasonable application of Supreme Court precedent, or an objectively unreasonable factual determination. 28 U.S.C. § 2254(d).

## 1.

To establish *Strickland* prejudice, Williams was required to demonstrate “a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

Furthermore, “[i]n assessing prejudice, [the Court] reweigh[s] the evidence in aggravation against the totality of available mitigating evidence.” *Wiggins*, 539 U.S. at 534. Specifically, the Court evaluates *both* the evidence adduced at trial and in the state PCR proceedings.

## 2.

The PCR court concluded that no prejudice occurred because the addition of FAS evidence “would have ‘merely resulted in a ‘fancier’ mitigation case, [with] no effect on the outcome of the trial.’” J.A. 667. This conclusion by the PCR court was based in part on a survey of jury verdicts in other jurisdictions demonstrating “that defendants are often sentenced to death in spite of evidence offered in mitigation that the defendant had fetal alcohol syndrome or organic brain damage.” J.A. 668. Along the same lines, the State argues that Williams cannot establish prejudice because a main indicator of FAS (Huckaby’s drinking), as well as two FAS-related or FAS-like symptoms (Williams’ mental illnesses and learning disabilities) were already before the jury. Consequently, the State argues, the addition of a diagnosis of FAS would not have changed the outcome. The State also contends that even if FAS evidence had been presented, any mitigation value would have been undercut by it simultaneously suggesting future dangerousness to



the jury. See *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (concluding FAS evidence is “double-edged” because “although it might permit an inference that [a defendant] is not as morally culpable for his behavior, it also might suggest that he, as a product of his environment, is likely to continue to be dangerous in the future” (internal quotation marks and alteration omitted)).

“When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 466 U.S. at 695. We conclude that Williams has established prejudice: had the FAS evidence been presented, there was a *reasonable probability* that, given the balance of aggravating and mitigating factors, the jury would have returned a different sentence. First, as discussed previously, the FAS evidence was different from the other evidence of mental illness and behavioral issues because it could have established *cause and effect* for the jury—specifically, a FAS diagnosis could have provided to the jury evidence of a neurological defect that *caused* Williams’ criminal behavior. Without this information, the jury could have assumed that Williams was an individual who—despite challenges in his home life, education, and mental health—was generally responsible for his actions, and therefore would have assigned greater moral culpability to him for his criminal behavior.<sup>8</sup>

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<sup>8</sup> Of course, as noted previously, FAS is only *one* of a number of factors a jury may consider, along with any other mitigating evidence. The presentation of this evidence does not predetermine a lesser sentence for Williams. In fact, as the State (Continued)

At the PCR hearing, experts testified that FAS impaired Williams' judgment, as well as his ability to control his impulses and consider the consequences of his actions. This could have been persuasive mitigating evidence for a jury—particularly a deadlocked one—considering the death penalty, and could have been outcome-determinative because of how it framed a defendant's culpability, particularly in comparison to the other mitigating factors submitted for the jury's consideration. See *Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005) (linking brain damage caused by FAS and petitioner's capacity to appreciate the criminality of his conduct).

Further, the State only presented one aggravating factor: that the murder occurred in the commission of a kidnapping. Consequently, had this solitary aggravating evidence been weighed against the totality of the mitigating evidence presented during both the penalty phase and the PCR proceedings, there is a reasonable probability the jury would have determined the balance of factors did not warrant a death sentence.

The district court thus correctly determined that Williams had established *Strickland* prejudice.

3.

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correctly notes, a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury. Consequently, we also cannot presuppose FAS evidence must be presented or will prevail in any further proceedings. We conclude only that *if* counsel had chosen to present this evidence, the jury *may have* returned a different verdict. Nothing in this opinion should be taken to conclude that counsel, after a proper investigation, is compelled to present FAS evidence in another sentencing proceeding.

We also agree with the district court's conclusion that the PCR court's prejudice determination involved an unreasonable application of clearly-established law. 28 U.S.C. § 2254(d)(1). As an initial matter, we note that, by relying on the survey of jury verdicts, the PCR court failed to examine the facts of this case in view of the *Strickland* requirements and instead made a generalized assessment unrelated to the case before it. Relatedly, the PCR court's failure to reweigh the totality of the available mitigation evidence against the aggravating evidence in *this specific* case is evidenced by two additional points. *See Williams*, 529 U.S. at 397–98. First, although the mitigation evidence may have been mixed, it was error for the state court to fail to “entertain [the] possibility” that the mitigating FAS evidence could have “alter[ed] the jury’s selection of penalty” because it “might well have influenced the jury’s appraisal of [the defendant’s] moral culpability.” *Id.* at 398. As discussed above, the mitigating FAS evidence here could have been significant for the jury because it could have established cause and effect, thereby diminishing Williams’ culpability. The evidence’s significance is further heightened here given that the jury was initially deadlocked on whether to impose the death penalty. Second, as outlined previously, the aggravating evidence was minimal. When compared to the totality of the mitigating evidence, it is clear that the PCR court assigned unreasonable weight to the sole aggravating factor.

Given the aggravating and mitigating evidence in the context of this particular case, it is evident that the presentation of the FAS evidence would have resulted in, at a minimum, a reasonable probability of a different sentence, even if it did not guarantee

one. This is all the law requires. As a result, the district court properly found that the PCR court's prejudice determination was unreasonable.

IV.

Finally, Williams argues the district court erred in granting summary judgment to the State on Grounds One through Five. Because we affirm the district court's grant of summary judgment to Williams as to Ground Six, we do not address these issues further.

V.

For the foregoing reasons, we affirm the district court's judgment.

*AFFIRMED*

STATE OF SOUTH CAROLINA ) **RECORDED** IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER 2019 FEB -5 AM 9:32

Stephen Corey Bryant, SCDC #5252, )  
Applicant, ) C/A No. 2016-CP-43-828  
vs. ) \*CAPITAL PCR\*  
State of South Carolina, )  
Respondent. )  
**RESPONSE IN OPPOSITION TO  
APPLICANT'S RULE 59 MOTION**

Applicant filed a Rule 59(e), SCRCP on January 14, 2019. On January 22, 2019, this Court called for a response from the State. Respondent now submits its response in opposition and would respectfully show the Court:

1. Applicant first incorporates all the arguments offered in the objections to the proposed order. (Motion, p. 1). These objections were fully addressed in the reply to the objections filed November 27, 2018, and this Court's subsequent order filed January 7, 2019. Applicant has offered no change of circumstances or law to necessitate the Court revisit the ruling. Respondent relies on the prior ruling of the Court.

2. Applicant next alleges error in not allowing him to amend his successive application to include a claim challenging the constitutionality of the murder statute pursuant to *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016). (Motion, p. 1). More correctly, he apparently challenges this Court's granting of Respondent's motion to dismiss Applicant's attempted amendment by order filed March 16, 2017. This Court found the limits of Applicant's successive action was controlled by Judge Cooper's order allowing only the claim of Intellectual Disability to go forward, and also found, in the alternative, that the claim was without merit in this factual situation. (Order filed March 16, 2017 at pp. 1-3). Since this Court issued the order

granting Respondent's motion to dismiss the attempted amendment, the District Court of South Carolina has rejected a similar challenge to the state statute in a separate capital guilty plea case, *Mahdi v. Stirling*, No. CV 8:16-3911-TMC, 2018 WL 4566565, at \*40–43 (D.S.C. Sept. 24, 2018) (Pages 84-89 of the original order are attached and incorporated by reference). Applicant alleges that the Attorney General's Office has acknowledged "this issue is a 'clear' legal issue, that 'is not fact bound,'" (Motion, pp. 1-2), and that is most certainly correct – it simply is not in his favor. Like the District Court in *Mahdi*, this Court has critically ruled, albeit in the alternative, that *Hurst* is not applicable where there is a waiver of a jury. (Order filed March 16, 2017 at pp. 2-3). See *Mahdi v. Stirling*, No. CV 8:16-3911-TMC, 2018 WL 4566565, at \*43 (D.S.C. Sept. 24, 2018) ("Given Mahdi's voluntary waiver and admission to the relevant facts, judicial sentencing did not violate Mahdi's Sixth Amendment rights. See *Blakely v. Washington*, 542 U.S. 296, 303, 310, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) (holding that under *Apprendi*, a judge may impose any sentence authorized "on the basis of the facts ... admitted by the defendant" and noting "nothing prevents a defendant from waiving his *Apprendi* rights") (Motion Attachment, numbered p. 88). Accordingly, Mahdi's constitutional challenge to South Carolina's death penalty statute fails on the merits."). It is not clear how Applicant reasons that either the State's position in the Mahdi litigation that this claim is clearly not meritorious as a matter of law, or, for that matter, the District Court's ruling that the claim is not meritorious, somehow necessitates reconsideration of the order dismissing the attempt to amend. Respondent submits Applicant has not presented the Court with any cause to reconsider the ruling. *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully

consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.”) (emphasis in original).

3. Applicant also asks the Court to reconsider the denial of his motion to amend the application, and his motion to amend to conform to the evidence after the evidentiary hearing, with a claim his death sentence “violates the Eighth Amendment” and alleges “he suffers from Fetal Alcohol Spectrum Disorder” as support for the claim. (Motion, p. 2). Though not exceedingly clear, it appears he attempts to argue ineffective assistance of initial PCR counsel as cause as to why the claim was not previously raised. (Motion, p. 3). First, though, he cites to no case that holds such a claim is cognizable and/or accepted. Respondent has found none, and, in fact, has found only those that reject that such a condition, if proven, provides a bar to capital punishment. *See, for example, Soliz v. Davis*, No. 17-70019, 2018 WL 4501154, at \*8 (5th Cir. Sept. 18, 2018) (district court rejecting claim “that his death sentence violated his Eighth Amendment” noting “Soliz had cited no Supreme Court decision barring the execution of people with FASD.”). He cannot even show that such evidence would have a resulting mitigation effect. *See Sells v. Stephens*, 536 F. App’x 483, 495 (5th Cir. 2013) (“the trial court heard testimony from both sides concerning Sells’s psychological evaluations and dysfunctionality, and so it is doubtful that Sells would have derived any mitigating benefit merely by linking that diagnosis to fetal alcohol syndrome. Moreover, we have previously found that evidence of fetal alcohol syndrome-related deficiencies is not necessarily beneficial to a criminal defendant” due to possible suggestion defendant will continue to be dangerous).<sup>1</sup> Further, the South Carolina

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<sup>1</sup> Applicant has also submitted *Williams v. Stirling* as a type of additional authority for his Rule 59 motion. *Williams* involves an investigation claim presented though his initial PCR proceedings and has no bearing on amendments or successive applications. To the extent Applicant wishes to cite to the case for the mitigation value of FASD, there is little support afforded where the opinion has the candid footnote:

Supreme Court reaffirmed in its 2016 *Roberston* opinion that ineffective assistance of PCR counsel is not a *per se* reason to allow a successive and time barred application. *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016) (finding change in federal law on procedural default analysis did not modify the long standing rule from *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90”). *See also Williams v. Ozmint*, 380 S.C. 473, 480, 671 S.E.2d 600, 603 (2008) (“Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.”); *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for

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Of course, as noted previously, FAS is only *one* of a number of factors a jury may consider, along with any other mitigating evidence. The presentation of this evidence does not predetermine a lesser sentence for Williams. In fact, as the State correctly notes, a FAS diagnosis can be a double-edged sword, given that it may also indicate future dangerousness to the jury. Consequently, we also cannot presuppose FAS evidence must be presented or will prevail in any further proceedings. We conclude only that *if* counsel had chosen to present this evidence, the jury *may have* returned a different verdict. Nothing in this opinion should be taken to conclude that counsel, after a proper investigation, is compelled to present FAS evidence in another sentencing proceeding.

*Williams v. Stirling*, No. 18-2, 2019 WL 332975, at \*10 (4th Cir. Jan. 28, 2019). It certainly does nothing to support his claim that it exempts him from execution. Even so, the issue remains one of amendment. Again, Applicant shows no cause to reconsider the sound decision denying amendment in these circumstances. *See Elam, supra*.

A last observation, Applicant asserts by footnote that the Court may have a bias or misunderstanding of FASD. FASD as a claim was not a part of the litigation. There could be no bias on the scope or impact of any evidence regarding FASD as a claim. At any rate, the type of claim does not factor into the ability to amend under the statute or general rules of amendment.



a successive PCR application under § 17-27-90.”). It is worthy to note that none of the cases cited refer to successive and untimely applications. (See Motion, pp. 2-3, citing *Mangal, Simpson and Harvey v. Strickland*). But again, Respondent submits Applicant has not presented the Court with any cause to reconsider the ruling denying amendment. *See Elam, supra*.

4. Lastly, Applicant asks the Court to reconsider its process in requesting a proposed order from Respondent. (Motion, pp. 4-5). Applicant concedes that it is not mandatory that a circuit court judge draft his own order in capital PCR actions. (Motion, pp. 4-5). Further, as this Court has previously found in denying the objections, the process has been guided from the Court’s first email to the parties announcing the ruling; transparent in what was presented to the Court; and objections have been allowed, heard and considered. There is simply no credible assertion to be made that this Court abdicated its duty to make its own determination in this matter. Further, the process has been followed in other recent capital cases, for example *Inman v. State*; C/A No.: 2012-CP-39-918, proposed orders due March 11, 2019 (Ms. Holt and Mr. Grose representing Mr. Inman); *Finklea v. State*, C/A 2010-CP-32-5067 (Applicant’s Proposed Order Granting Post-Conviction Relief submitted April 2, 2018 by Ms. Holt). It is inconsistent to assert here that the process may never be used. Moreover, as Applicant proves in his Rule 59 motion, the State has always underscored that any changes would be made at the direction of the court, and would be happy to facilitate any changes. It is the Court’s order when adopted. Applicant’s allegations to the contrary are wholly without merit.

WHEREFORE, for all the foregoing reasons, Respondent respectfully requests this Court deny the Rule 59 motion.

Respectfully submitted,

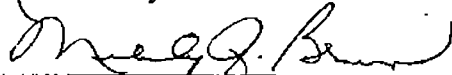
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February 1, 2019.  
Columbia, South Carolina.

hearing. Thus, the court finds no reason to expend additional judicial resources and upend the finality of the state court's determination. Accordingly, the court denies Mahdi's request for an evidentiary hearing on Ground Two.

***GROUND THREE & FOUR – CONSTITUTIONALITY OF SOUTH CAROLINA'S***

***DEATH PENALTY STATUTE***

In Ground Three, Mahdi claims South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20, is unconstitutional because it automatically precludes jury sentencing following a guilty plea.<sup>36</sup> Although this claim was not presented in Mahdi's original PCR application, Mahdi asserts it is appropriate for habeas review because the United States Supreme Court's decision in *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016), established a new constitutional rule requiring jurors to make all factual findings necessary for imposition of the death penalty and that rule applies retroactively to Mahdi's sentence. Respondents contend *Hurst* did not create a new rule of constitutional law, but was an application of *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital sentencing scheme.

The court previously addressed this issue in its order denying Mahdi's motion to stay (ECF No. 91) and agreed with Respondents, finding "[t]he holding in *Hurst* was not a significant change

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<sup>36</sup>Mahdi first presented this claim in his second PCR application as an independent ground, arguing that the United States Supreme Court's decision in *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016), announced a new rule of constitutional law that applied retroactively to his death sentence. Mahdi contends the second PCR court decided this claim on the merits. But, Respondents assert the second PCR court dismissed the claim as time-barred and improperly successive on adequate and independent state law grounds. The court will not decide this procedural dispute, but instead addresses this ground on the merits.

in the law as the Supreme Court simply applied prior precedent, its holdings in *Ring* and *Apprendi*,<sup>37</sup> to Florida's capital sentencing statutes." (ECF No. 91 at 4); *see also Hurst*, 136 S.Ct. at 621–22 (granting certiorari "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*" and analyzing Florida's statute under *Ring*'s framework). In addition, the court found the holding in *Hurst* did not apply retroactively. (ECF No. 91 at 4–5 (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding that "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *United States v. Sanders*, 247 F.3d 139 (4th Cir. 2001) (holding the new rule announced in *Apprendi* not retroactively applicable to cases on collateral review); *Tyler v. Cain*, 533 U.S. 656, 663 (2001) (holding that a "new rule of constitutional law" is "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court holds as much). Mahdi has not provided the court with reason to alter these findings.

Further, the court finds South Carolina's capital sentencing procedures have not violated Mahdi's constitutional rights. In *Ring*, the Supreme Court found that Arizona's capital sentencing structure violated the Sixth Amendment right to a jury trial in capital prosecutions. Under Arizona's statute, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required" to impose the death penalty. *Ring*, 536 U.S. at 588. Applying its reasoning from *Apprendi*, the Court found that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" a defendant has a right to submit those factors to a jury for

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<sup>37</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

determination. *Id.* at 609. Thus, *Ring* established that when a defendant exercises his right to a jury trial on a capital offense, he is entitled to have a jury determine any aggravating factors necessary to impose a death sentence.

In *Hurst*, the Court applied its reasoning in *Ring* to Florida's capital sentencing scheme. In Florida, "[a] person who ha[d] been convicted of a capital felony [would] be punished by death" only if an additional sentencing proceeding "result[d] in findings by the court that such person [would] be punished by death." Fla. Stat. § 775.082(1) (2010) (amended 2016). Under this statute, if a jury convicted the defendant of a capital felony, a sentencing judge would conduct an evidentiary hearing before the jury and the jury would issue an "'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Hurst*, 136 S.Ct. at 620 (citing Fla. Stat. § 921.141(1)–(2) (2010) (amended 2016)). "Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, [would then] enter a sentence of life imprisonment or death." Fla. Stat. § 921.141(3) (2010) (amended 2016). Thus, although the court afforded some weight to the jury's recommendation, "[l]ike Arizona at the time of *Ring*, Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Hurst*, 136 S.Ct. at 622. Because this procedure allowed a judge to increase a defendant's maximum penalty based on his own factfinding, the Court held *Hurst*'s sentence violated the Sixth Amendment. *Id.*

The South Carolina Supreme Court has distinguished South Carolina's statute from Arizona's (and Florida's) because, in South Carolina, "a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty." *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004). Thus, if a capital defendant in South Carolina exercises his right to a jury trial, a jury must

determine both his guilt and sentence. However, if a capital defendant pleads guilty, and waives his right to a jury trial, *Ring* is not applicable. *See id.* (finding *Ring* “did not involve jury-trial waivers and is not implicated when a defendant pleads guilty” under South Carolina’s death penalty statute); *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (discussing a challenge to Virginia’s capital sentencing scheme, which is functionally equivalent to South Carolina’s,<sup>38</sup> and finding *Ring* did not hold “that a defendant who pleads guilty to capital murder and waives a jury trial under the state’s capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors”).

During his colloquy with Judge Newman, Mahdi expressed, under oath, an understanding of his right to a jury trial and sentencing; what that trial and sentencing would require, including the State’s burden of proof; the nature of the charges against him and possible sentences, including death; and that if he pled guilty, Judge Newman would determine his sentence, not a jury. (*See App. A003219–32*). Along with waiving his right to a jury trial (*App. A003227*), Mahdi expressly and voluntarily waived his right to jury sentencing (*App. A003225*). In addition, Mahdi admitted to the facts of the crime as stated by the Solicitor. (*App. A003233–43*).

Mahdi argues that, although he pled guilty to grand larceny and second-degree burglary and admitted to the relevant facts, in order to find the related statutory aggravating circumstances and impose the death penalty, Judge Newman had to find the additional fact that Mahdi murdered Captain Myers while committing these crimes with the use of a deadly weapon. (*ECF No. 75 at 31*).

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<sup>38</sup>Under Virginia’s capital sentencing scheme, when a defendant is charged with a death-eligible offense, the trial court first submits the issue of guilt or innocence to a jury. If the defendant is found guilty, then the same jury decides the penalty. However, if a defendant pleads guilty and waives his right to a jury determination of guilt, a judge conducts the sentencing proceeding alone and determines the existence of any aggravating factors. *See Va. Code Ann. § 19.2-257*.

However, Mahdi specifically admitted to this fact during his guilty plea:

**THE COURT:** And did you, on or about July 18th, 2004, at around the same time and date as the murder, enter the building belonging to James B. Myers and Amy Tripp Myers without their consent, with intent to commit a crime therein? And while in the building or during the immediate flight or leaving the building, were you armed with a deadly weapon? And did you cause physical injury, including the killing of Mr. Myers with the pistol during this same burglary?

**DEFENDANT MAHDI:** Yes, sir, Your Honor.

**THE COURT:** And did you steal the officer's - - the 2003 Dodge Ram truck in the possession of the officer and owned by the City of Orangeburg?

**DEFENDANT MAHDI:** Yes, sir, Your Honor.

(App. A003243-44).

Mahdi also asserts *Hurst* requires jurors to consider “statutory and non-statutory mitigating factors, the specific circumstances of the crime, [and] the character of the defendant.” (ECF No. 75 at 32). This argument misses the central holding of *Apprendi*, *Ring*, and *Hurst* — juries must find facts necessary to *increase* a defendant’s penalty. These cases do not address mitigation.

Given Mahdi’s voluntary waiver and admission to the relevant facts, judicial sentencing did not violate Mahdi’s Sixth Amendment rights. See *Blakely v. Washington*, 542 U.S. 296, 303, 310 (2004) (holding that under *Apprendi*, a judge may impose any sentence authorized “on the basis of the facts . . . admitted by the defendant” and noting “nothing prevents a defendant from waiving his *Apprendi* rights”). Accordingly, Mahdi’s constitutional challenge to South Carolina’s death penalty statute fails on the merits.

In Ground Four, Mahdi asserts his trial counsel were ineffective for failing to challenge the

constitutionality of South Carolina's death penalty statute under *Apprendi*, *Ring*, and *Blakely*.<sup>39</sup> Having found South Carolina's death penalty statute constitutionally sound under these standards, the court finds trial counsel were not ineffective for failing to raise a meritless claim.<sup>40</sup> Accordingly, Mahdi is not entitled to habeas relief on Grounds Three or Four.<sup>41</sup>

### ***GROUND FIVE, SIX, & SEVEN – THE GUILTY PLEA***

In Grounds Five, Six, and Seven, Mahdi contends he involuntarily pled guilty due to trial counsel's bad advice (Grounds Five and Six) and that trial counsel were ineffective in failing to object to Judge Newman allegedly penalizing Mahdi for initially exercising his right to a jury trial (Ground Seven).<sup>42</sup> The Sixth Amendment's guarantee of effective assistance of counsel applies with

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<sup>39</sup>Mahdi raised this ground in his initial PCR application and, pursuant to *Austin v. State*, 409 S.E.2d 395, in his second PCR application and asserts he can overcome any procedural default under *Martinez v. Ryan*. (ECF No. 75 at 36-37). Because the court decides this claim on the merits, it will not address the parties' procedural arguments.

<sup>40</sup>This is especially true given the state of the law at the time of Mahdi's trial. In the two years prior to Mahdi's trial, the Supreme Court of South Carolina decided three cases expressly finding the death penalty statute constitutional and noting *Ring* was not implicated when a capital defendant pled guilty. See *State v. Crisp*, 608 S.E.2d 429, 432-33 (S.C. 2005); *State v. Downs*, 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood*, 607 S.E.2d 57, 61 (S.C. 2004).

<sup>41</sup>In addition, the court denies Mahdi's request for an evidentiary hearing on these grounds. The court sees no basis for a hearing on these record-based claims that turn on legal interpretation and Mahdi has failed to show that his claims in Grounds Three and Four rely on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court" or that "the facts underlying the claim[s] would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense" or would have imposed the death penalty. § 2254(e)(2)(A)(I), (B). Further, regarding Ground Four, Mahdi raised this ground in his original PCR application, had a full opportunity to present any supporting evidence at the PCR evidentiary hearing, and has not alleged the discovery of any new facts since that hearing.

<sup>42</sup>Mahdi raised Grounds Five and Seven in his initial PCR application and in his second application pursuant to *Austin v. State*, 409 S.E.2d at 395. He only raised Ground Six in his second application. Because the court decides these claims on the merits, it will not address the parties'



STATE OF SOUTH CAROLINA )  
COUNTY OF SUMTER )

2019 FEB -3 AM 9:33

J. C. CAMPBELL

Stephen Corey Bryant, SCDC #5252, )

Applicant, )

vs. )

State of South Carolina, )

Respondent. )

C/A No. 2016-CP-43-828

\*CAPITAL PCR\*

CERTIFICATE OF SERVICE

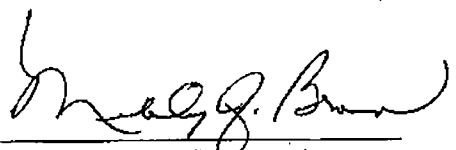
I, Melody J. Brown, do hereby certify that on this date, I served the Respondent's Response in Opposition to Applicant's Rule 59 Motion in the foregoing action on Applicant Bryant by depositing to each of his attorneys one copy of the same in the United States mail, first-class postage prepaid, and addressed as follows:

E. Charles Grose, Jr., Esq.  
The Grose Law Firm, LLC  
404 Main Street  
Greenwood, SC 29646

and to

Diana L. Holt, Esq.  
Diana Holt, LLC  
P.O. Box 6454  
Columbia, SC 29260-6454

This 1<sup>st</sup> day of February 1, 2019.

By: 

MELODY J. BROWN

Senior Assistant Deputy Attorney General

ATTORNEY FOR RESPONDENT

THE STATE OF SOUTH CAROLINA  
COUNTY OF SUMTER

Stephen Cory Bryant,

vs.

State of South Carolina,

Defendant.

RECORDED

2019 FEB 12

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2016-CP-43-00828

JAMES D. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Reply to State's Response to Rule 59(e),  
SCRCP Motion

Stephen Cory Bryant replies to the State's response in opposition to his Rule 59(e), SCRCP motion.

1) *Hurst v. Florida*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 616 (2016) "is a constitutionally binding decision from the Supreme Court of the United States that can be raised in this PCR application pursuant to S.C. Code § 17-27-45(B)." Even after the United States District Court ruling in *Mahdi v. Sterling*, the State acknowledged this claim is in need of a ruling on the merits from the Supreme Court of the United States that would "bring finality to a federal question that is being litigated simultaneously" in multiple cases. Brief in Opposition to Petition for Writ of *Certiorari*, *Madhi v. South Carolina*, SCOTUS Case No. 18-6110, pp. 22-23.<sup>1</sup>

2) Mr. Bryant's second motion to amend his PCR application added the allegation that his diagnosis of Fetal Alcohol Syndrome ("FASD") is a constitutional bar to the death penalty and "evidence of material facts not previously presented to a sentencing authority that should be considered before imposing sentence." See Proposed Second Amended Application for Post-

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<sup>1</sup> The Supreme Court of the United States docket and pleadings can be found at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-6110.html> (last viewed Jan. 12, 2019).

Conviction Relief, ¶¶ 10(c), 10(d), 11(c) & 11(d).<sup>2</sup> The State argues, “Though not exceedingly clear, it appears [Mr. Bryant] attempts to argue ineffective assistance of initial PCR counsel as cause as to why the claim was not previously raised.” Let there be no doubt, initial PCR counsel were ineffective for not discovering this claim. The State, however, does not address the contribution of the judicial system, resulting from the unreasonable scheduling limitations, to the failure to discover that claim. Under these circumstances, this Court should not punish Mr. Bryant for his prior counsel’s deficiencies. “[I]t is unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge” necessary to identify, investigate and develop a FASD claim. *Robertson v. State*, 418 S.C. 505, 517, 795 S.E.2d 29, 35 (2016). Additionally, it is well within this Court’s equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009) (equitable tolling of the PCR limitations period may be applied where “circumstances preventing a petitioner from making a timely filing were both beyond the petitioner’s control and unavoidable despite due diligence”); *see also McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013) (discovery rule applies to PCR actions).

3) The State’s response, at pp. 3-4 (fn. 1), acknowledges *Williams v. Stirling*, Case No. 18-2 (4<sup>th</sup> Cir. Jan. 28, 2019), but the State attempts to minimize that holding. This Court should allow the amendment so that this claim can be fully developed in state court without the need for the federal intervention seen in *Williams*.

---

<sup>2</sup> The proposed amended PCR application further argued:

Regarding Grounds (10)(c)&(11)(c) and 10(d)&11(d), Mr. Bryant’s FASD was not previously identified and is “evidence of material facts, not previously presented and heard, that requires vacation of the . . . sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4).

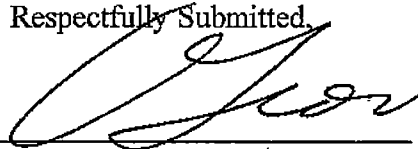
4) Finally, the State continues to resist the notion that PCR judges should draft their own orders. Currently, our Supreme Court encourages PCR judges to draft their own orders. On appeal, Mr. Bryant plans to ask our Supreme Court to make it mandatory. *See* S.C. Code Ann. §17-27-80 (1976); *see also* *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992); and *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991).

### CONCLUSION

For the reasons set forth in Mr. Bryant's Rule 59(e), SCRCP motion and this reply, this Court should withdraw the order of dismissal, allow Mr. Bryant to amend his PCR application, allow further investigation of the FASD claim, and convene a new evidentiary hearing.

Respectfully Submitted,

By



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February 8, 2019

*Attorneys for Stephen Cory Bryant*

THE STATE OF SOUTH CAROLINA )

COUNTY OF SUMTER )

Stephen Cory Bryant, SCDC # 5252 )

Applicant )

vs. )

State of South Carolina )

Defendant. )

IN THE COURT OF COMMON PLEAS  
FOR THE THIRD JUDICIAL CIRCUIT

Case No. 2016-CP-43-00828

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire  
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February 8, 2019  
Greenwood, South Carolina

STATE OF SOUTH CAROLINA)  
COUNTY OF SUMTER )

COURT OF COMMON PLEAS

STEPHEN C. BRYANT )  
PETITIONER, )

v. )

TRANSCRIPT OF RECORD

16-CP-43-828

16-CP-43-829

STATE OF SOUTH CAROLINA, )  
\_\_\_\_\_  
RESPONDENT. )

June 21, 2016  
Manning, South Carolina

**BEFORE :**

THE HONORABLE THOMAS W. COOPER, JR., JUDGE

**APPEARANCE :**

E. CHARLES GROSE, JR., ESQ.  
DIANE HOLT, ESQ.  
Attorneys for the Petitioner

MELODY L. BROWN, ESQ.  
DONALD J. ZELENKA, ESQ.  
Attorneys for Respondent

FRANCES B. RAY, RPR  
Circuit Court Reporter

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(There were no exhibits submitted.)

1 MR. GROSE: Your Honor, before we start  
2 would it be okay if we had Mr. Bryant's hands  
3 loosened up for the hearing, or the black box at  
4 least?

5 THE COURT: Let me ask the custodians how  
6 they feel about that. They're the ones who are in  
7 charge. If it's okay with them I will allow it; if  
8 it's not, I won't.

9 THE DEPUTY: Yes, sir, there's a black  
10 box.

11 THE COURT: Okay, can you release one of  
12 his hands then?

13 MR. GROSE: Thank you.

14 (Pause.)

15 THE COURT: We're here today on the  
16 State's motion to dismiss two applications of  
17 post-conviction relief in cases number  
18 2016-CP-43-828 and 829 to overly generalize 828, 6  
19 — to overturn Mr. Bryant's sentence of death as  
20 violative of the Eighth Amendment of our United  
21 States Constitution. 829 alleges ineffective  
22 assistance of counsel and seeks the same end as 828.  
23 That's a gross overgeneralization, but nonetheless,  
24 that's what gets us here today. The State has filed  
25 motions to dismiss both of those applications for



1 PCR. Mr. Grose has filed these applications, but  
2 has not formerly been appointed as his attorney in  
3 these cases. Mr. Grose and Ms. Holt are here today  
4 on his behalf seeking appointment as his attorney at  
5 the very least for today's motion, and beyond that  
6 to the extent that it's within the jurisdiction of  
7 this court granted.

8 Mr. Bryant, would you please stand and  
9 raise your right hand, let me put you under oath.  
10 WHEREUPON,

11 **STEPHEN C. BRYANT,**  
12 having been duly sworn by the Court, testified as  
13 follows:

14 THE DEFENDANT: Yeah.

15 THE COURT: Have a seat. Mr. Bryant, you  
16 understand that Mr. Grose and Ms. Holt have asked to  
17 be appointed as your attorneys to represent you in  
18 these proceedings, do you understand that?

19 THE DEFENDANT: Yeah.

20 THE COURT: Do you wish to have them  
21 represent you in this proceeding?

22 THE DEFENDANT: Yeah.

23 THE COURT: Will you agree to cooperate  
24 with them as your attorneys in these proceedings?

25 THE DEFENDANT: Yeah.

1 THE COURT: Mr. Grose, Ms. Holt, is there  
2 any further inquiry that you want me to make of  
3 Mr. Bryant regarding the appointment process?

4 MR. GROSE: No, sir. I would just want to  
5 place on the record, just as a followup to the  
6 emails yesterday, the reason that we asked for him  
7 to be able to waive appearance today was more out of  
8 comfort because being in restraints for a long  
9 period of time can get quite painful, not for any  
10 other reason or lack of willingness to be here and  
11 participate.

12 THE COURT: I understand.

13 MR. GROSE: Thank you.

14 THE COURT: As I indicated to you in my  
15 email in response and raising issues which Ms. Brown  
16 raised, I think, appropriately in her response that  
17 I needed assurance of Mr. Bryant and looked like the  
18 affidavit was not gonna work in time, that he wish  
19 for you all to represent him in this proceedings and  
20 just to get that potential issue out of the way and  
21 put it to rest. If Mr. Bryant chooses not to remain  
22 here during the arguments of the motions, as I  
23 indicated to you, I'm not gonna insist he remain.  
24 I'll let these folks take him back to Lieber if, —  
25 unless there's some objection from either you all or

1 from the State.

2 Ms. Brown, do you have any questions or  
3 any arguments regarding the appointment process?

4 MS. BROWN: No, sir. As long as it's  
5 limited to the purposes of this hearing, we have no  
6 objection.

7 THE COURT: All right, thank you. I will  
8 therefore appoint Mr. Grose and Ms. Holt to  
9 represent Mr. Bryant in these proceedings. If I had  
10 the jurisdiction to do it beyond these proceedings,  
11 I would. I recognize that the order of the Chief  
12 Justice which appoints me here appears to put some  
13 limits on what I can and cannot do, inhibited only  
14 by those restrictions if they are applicable to the  
15 matter of appointment. I will, I will not  
16 transgress beyond this. I recognize, however, that  
17 depending upon the outcome today, surely Mr. Bryant  
18 is going to need counsel to represent him if the  
19 motions to dismiss are denied in whole or in part.  
20 If the motion to dismiss are granted, he's gonna  
21 need lawyers to represent him as well, and certainly  
22 I don't want to get so called in jumping over the  
23 procedural hurdles that we slow down the process  
24 just for the sake of having them slowed down, all  
25 right.

1           Are there any other preliminary matters  
2 before we begin, Ms. Brown or Mr. Zalenka? You all  
3 are the moving parties on the motion so I'll hear  
4 from you first, and Mr. Grose, Ms. Holt in response.  
5 But I've read the things that you've sent me and  
6 done a little research and not as much as you all  
7 have done so I'm prepared now to hear the arguments  
8 beginning, Ms. Brown, with you on behalf of the  
9 State.

10           MS. BROWN: Thank you, Your Honor, may it  
11 please the Court. We have moved to dismiss both  
12 successive and barred by the statute of limitations.  
13 Your Honor, I'd like to start today with precedent  
14 from 1991, Aice versus State, and in particular,  
15 this provision from Aice. "Therefore, as long as it  
16 was possible to raise the argument in its first PCR  
17 application an applicant may not raise it in a  
18 successive application." That was echoed as well in  
19 the 2008 case of Graham versus State. It's also  
20 echoed in the statute of limitations, specifically,  
21 17-27-45(c), which requires actual discovery of  
22 facts or when facts could have been ascertained by  
23 exercise of reasonable due diligence. So the bottom  
24 line is, everything that is offered to you in these  
25 two applications was available for the first PCR.

1           The plea occurred in August of 2008.  
2   Sentencing was in September of 2008. The PCR was in  
3   May, filed May of 2011. Atkins versus Virginia was  
4   issued in June 2002, Franklin v. Maynard, November  
5   2003. On the face of these documents, anything  
6   related to an MR claim, of course, would have been  
7   available not just for the prior PCR, but also for  
8   the plea and the sentencing proceedings. Now there  
9   is a suggestion of ineffective assistance of counsel  
10   claim; but I would point out without getting into  
11   the merits of that claim because we don't need to go  
12   there, we just need to know whether it was  
13   available, it doesn't really make out ineffective  
14   assistance counsel claim.

15           What Mr. Bryant has offered at this point  
16   is akin to ineffective assistance of experts which,  
17   of course, is not a Sixth Amendment claim. I have  
18   attached document number 5 to the return which shows  
19   a portion of sentencing proceeding at page 813. We  
20   have Doctor Schwartz-Watts referencing Doctor Marty  
21   Warren's work in that and that would have been  
22   background work. Attachment 5814 we have Doctor  
23   Schwartz-Watts referencing a concern about possible  
24   alcohol exposure for the fetus. These are things  
25   that definitely not only were available, but were in

1 the realm of thought during sentencing and certainly  
2 available for PCR.

3 Now there's also offered conflict, Your  
4 Honor. There seems to be no attachment to this  
5 argument of conflict to either trial plea counsel or  
6 PCR counsel. It has to do with a third party that  
7 did not represent Mr. Bryant. But anyway, the  
8 documents that I submitted, particularly the  
9 sentencing proceeding, showed that Mrs. Bryant, of  
10 course, disclosed the connection.

11 Your Honor, the State of South Carolina  
12 has provided Mr. Bryant with his one PCR as a matter  
13 of right. We provided him funding. We provided him  
14 counsel. He pursued an appeal from his PCR and even  
15 pursued review by the United States Supreme Court.  
16 Now he has filed not just one, but two successive  
17 applications, and it's his burden to show sufficient  
18 cause to overcome the very strong, well established  
19 procedural bars. And Your Honor, he comes to you  
20 not with a new fact and not with new case law, but  
21 with a request for Your Honor to create an exception  
22 just because this is a capital case. Your Honor,  
23 that would fold our particular system. It would  
24 cause an unending realm of review. But again, our,  
25 our statute does not allow for this successive and

1 untimely action.

2 Now Your Honor, I did want to spend a few  
3 minutes, what if the claims are barred. If this  
4 Court finds the claims are barred statute of  
5 limitations and successive is barred, then what  
6 happens? Your Honor, Mr. Bryant is already  
7 presently in federal habeas. In federal habeas Mr  
8 Bryant can ask for certain issues to be reviewed if  
9 they were reviewed in state court. They can be  
10 reviewed under deferential standards in federal  
11 habeas. If they were not presented in state court  
12 they can still be reviewed under a procedural  
13 default analysis so there is an opportunity for this  
14 to go forward and Mr. Bryant is, in fact, pursuing  
15 federal habeas at this time.

16 As far as the State, there is always the  
17 possibility for state habeas. Our supreme court has  
18 heard several capital cases when issues were not  
19 able to be reached through post-conviction relief,  
20 process. Butler, Luke Williams versus State, and  
21 the language in there will confirm that it couldn't  
22 go through PCR because of successive and untimely  
23 nature of the issues being presented so there are  
24 still remedies that are available.

25 And briefly I wanted to touch on the other

1 actions. Both parties, I believe, have pointed out  
2 too that there are several actions, capital cases,  
3 that have come back from federal court and attempted  
4 successive applications. Your Honor, I think the  
5 big take away from this is there are multiple cases  
6 that are stayed, nothing is going forward. There's  
7 been no recognition of any type of an exception to  
8 allow these cases to go forward on a merits hearing.  
9 In fact, one case, John Richard Wood, has already  
10 been dismissed. It is pending a formal written  
11 order, but it has been dismissed. Your Honor, I  
12 think there has been a suggestion that we may want a  
13 stay in this case as well. I'm not sure that's been  
14 fully argued so I would like to keep argument on  
15 that and respond if that becomes an issue in today's  
16 proceeding.

17 THE COURT: All right. Ms. Brown, the —  
18 let's lay aside the 829, which is the ineffective  
19 assistance claim as I understand it, and talk about  
20 828 which addresses the Eighth Amendment issues  
21 under Atkins. I don't think I'll get any argument  
22 if — but I may, I've been wrong on that issue  
23 before — to assume that Atkins versus Virginia  
24 creates an absolute bar to the execution of a  
25 mentally retarded or Atkins refers to them as



1 mentally retarded. We've changed the name, of  
2 course, in the statute case law since. But do you  
3 agree or disagree that Atkins v. Virginia creates an  
4 absolute bar to the execution of someone who is in  
5 the —

6 MS. BROWN: I agree it's an exemption,  
7 Your Honor. It does not speak to how that claim is  
8 raised, how it's litigated, or any procedural bars  
9 to it.

10 THE COURT: You mean in Atkins?

11 MS. BROWN: Yes, sir.

12 THE COURT: I really think the evaluation  
13 of the issue reveals no reason to disagree with the  
14 judgment of the legislature that have, or  
15 legislatures, that have recently addressed them and  
16 concluded that death is not a suitable punishment  
17 for mentally retarded criminal. We're not persuaded  
18 that the execution of the mentally retarded  
19 criminals measurably advance or deterrent or for  
20 retributed purpose of the death penalty.

21 "Construing and applying the Eight Amendment in the  
22 light of our revolving standards of decency would  
23 therefore conclude that such punishment is  
24 successive and that the Constitution places a  
25 substantive restriction on the State's power to take

1 a life of a mentally retarded offender." Does that  
2 leave much wiggle room?

3 MS. BROWN: I'm sorry, what was the  
4 question?

5 THE COURT: Does that leave much wiggle  
6 room when you're getting to the argument of mentally  
7 retarded?

8 MS. BROWN: Oh, absolutely, Your Honor,  
9 for several reasons, not only in proof of mental  
10 retardation as Atkins tells us. Everybody who  
11 claims to be mentally retarded is not —

12 THE COURT: Well, I think that's where  
13 most of the argument lies really; isn't it? It's  
14 whether proof of the standard preponderance of the  
15 evidence has been met and proving someone's actively  
16 retarded.

17 MS. BROWN: Right. And Your Honor, it  
18 doesn't speak to, as I mentioned before, how the  
19 State's provide a procedure to establish whether  
20 someone is mentally retarded. In this case we have  
21 Franklin versus Maynard which divided our way of  
22 approaching mental retardation claims and to  
23 essentially pre-Atkins, post-Atkins, pre-Franklin,  
24 post-Franklin. And where we have a problem in this  
25 case is that we were always post-Franklin, we were

1 always post-Atkins. So if anything, we are guided  
2 by the Pareto decision out of fourth circuit which  
3 they had a similar procedural issue. There, claim  
4 was not raised when it should have been raised in  
5 state court; and what happened, I think, is very  
6 important to our discussion here. As I mentioned  
7 earlier, Mr. Bryant is already in federal habeas.

8 THE COURT: Right.

9 MS. BROWN: So there are always  
10 opportunities to look at cause for the default or  
11 something to that effect. And, Pareto, the fourth  
12 circuit looked at cause and prejudice and possible  
13 fundamental fairness to see if the claim could be  
14 reached over the procedural bar. That's pretty much  
15 saying that that procedural bar will always hold  
16 because it is a state created bar on procedure when  
17 you have to raise the claim because the State is not  
18 trying to cut off remedies. The State is trying to  
19 funnel remedies into a timely, timely heard action;  
20 and when we don't have those rules, these issues are  
21 never heard timely.

22 THE COURT: And you're right, and I can  
23 appreciate that, and I, of course, have dealt with  
24 successive PCR on many occasions in the past 43  
25 years and — 44 years, and I appreciate the need for

1 some finality in the process in setting up those  
2 particular bars. Franklin v. Maynard, of course, as  
3 I read the case was a, set up a procedural process  
4 to go through, not a substantive process; is that  
5 true?

6 MS. BROWN: That's true.

7 THE COURT: I'm talking about the  
8 substantive, whether or not a mentally retarded  
9 person can be put to death.

10 MS. BROWN: Uh-huh. And they just relied  
11 completely on the statutory provision already  
12 present.

13 THE COURT: All right, okay. Thank you,  
14 ma'am.

15 All right, Mr. Grose, Ms. Holt.

16 MR. GROSE: Thank you, Your Honor, may it  
17 please the Court. I think as a threshold matter, I  
18 mean, you hit on something that's very important.  
19 It's the fact that under Atkins, and of course we've  
20 had Hall versus Florida since then, the Eighth  
21 Amendment is a bar if the factual basis for the  
22 Court to find that there is intellectual  
23 disabilities is proven. And we have in this case,  
24 while we are in federal court we're the ones who  
25 have first discovered this issue. It's not just a

1 matter of the experts; it's also the matter of what  
2 the lawyers and their teams of fact investigators  
3 and mitigation investigators failed to do in order  
4 to marshal that information to the experts to  
5 actually get to a recommendation which we now have,  
6 that this condition should be looked into further.

7 THE COURT: As I understand sort of as a  
8 part of that agreement, Doctor Schwartz-Watts'  
9 affidavit was that one of Mr. Bryant's relatives,  
10 perhaps an aunt whom she did talk with and got some  
11 information about, was not able to tell her directly  
12 about the use of alcohol by Mr. Bryant's mother when  
13 she was pregnant with him and it raised a specter of  
14 fetal alcohol syndrome; but the lawyers or somebody  
15 had put her in touch with those people. Whether she  
16 asked the right questions or got the right answers  
17 seems to be where that narrow issue hinges. Am I  
18 missing something there?

19 MR. GROSE: I think it's a little bit more  
20 in depth than that, and the reason — I know from  
21 your reputation that you presided over a number of  
22 capital cases both at trial and post-convictions so  
23 you're familiar with the types of resources they go  
24 into for investigation, applicability at the trial  
25 phase certainly, but all throughout the proceedings

1 of the American Bar Association guidelines. And  
2 when you actually get into the ground work of how to  
3 put together a team and put together an  
4 investigation, it, you have to go to some of these  
5 people, particularly family members, more than once.  
6 And sometimes you have to do it over and over and  
7 over again, allow them to become more comfortable  
8 with you because they're revealing some of the most  
9 intimate secrets for them personally and for their  
10 families and sometimes it's difficult to get them to  
11 do that. And so just putting an expert in touch  
12 with somebody without having laid that ground work  
13 is not following the best practices, and it's not  
14 being put together in effective investigation. And  
15 it's not really just that narrow issue; it's because  
16 the correlation between fetal alcohol syndrome and  
17 intellectual disabilities is there. One doesn't  
18 necessarily cause the other; but you know, when  
19 you're dealing with what's happening to somebody  
20 prior to the fact they're born, you're definitely in  
21 the time frame of the developmental period before  
22 they reach age 18 and so that's a consideration for  
23 that prong when you're actually getting to the  
24 merits of an Atkins claim.

25 THE COURT: Okay. In looking at, in

1 comparing I should say, Doctor Schwartz-Watts', now  
2 Doctor Schwartz-Watts Maddox — and I'll say this,  
3 Doctor Schwartz-Watts has testified in my courtroom  
4 numerous occasions and I hold her to be probably the  
5 premier forensic psychiatrist that testified before  
6 me during my 15 years as a full time judge. She  
7 hasn't come back before me the meantime. And so I  
8 know of her intelligence and her energy in dealing  
9 with these matters. But when I look at the  
10 testimony, re-read that, we all have read her  
11 testimony at trial or in earlier PCR — I'm not sure  
12 which, I just got the — and I compare it to the  
13 affidavit that's attached to the petitions in this  
14 case, she indicated that you all had furnished her  
15 with information that she did not know before the  
16 sentencing hearing or the PCR hearing following  
17 that. And primarily one of those was that if his  
18 mother drank alcohol, smoked marijuana, while she  
19 was pregnant, that he was late meeting most of his  
20 developmental milestones. If you read her testimony  
21 you probably blame, there's some suspicion in that  
22 regard, that he's had difficulty in school. I think  
23 her testimony reflected at least some of that. I'm  
24 not sure whether the testimony talked about his  
25 fifth grade education at that point in time or the

1 holdback principles of that. And that she  
2 incorrectly testified that he didn't meet the  
3 criteria for intellectual disabilities stating that  
4 among other things she was not familiar with the  
5 Flynn defect. Well, folks, let me tell you, the  
6 lack of familiarity with the Flynn defect is  
7 ineffective assistance, then we're talking about  
8 being flooded with PCR applications. As I  
9 understand the Flynn effect, it means that IQ scores  
10 are going up in the population every ten years and  
11 they're adjusting the mean upward and raising the  
12 scores upward. And so I suppose inferentially I  
13 would gather from that that Mr. Bryant looks like  
14 that he had some problems or following that up with  
15 trend but actually they're not getting any smarter  
16 than they were before. It kind of locks in. I  
17 guess that's what it means. But if it's not, don't  
18 try to correct me, I'm already lost enough in going  
19 into that branch of it.

20 But nonetheless, the point of her  
21 affidavit seems to be that she's raising the specter  
22 of an intellectual disability now. I guess  
23 depending upon whether an examination, using that  
24 information would reveal. As Ms. Brown has said,  
25 some or most of that information was available



1 earlier, but was not either taken advantage of or  
2 somehow or another was missed, or whatever the case  
3 might have been, at least it didn't get into the  
4 record. But it was all there. It was there in the  
5 wings somewhere and that, and that the Aice case and  
6 those other cases that she cited then create an  
7 absolute one year statute of limitation. Can you  
8 deal with that?

9 MR. GROSE: Yeah, well, I think that they  
10 overstate the significance of the Aice case because,  
11 you know, it does leave open the door for successive  
12 PCRs.

13 THE COURT: Right.

14 MR. GROSE: It admittedly and probably  
15 does bar a lot, and you probably see that during the  
16 typical PCR term of court.

17 THE COURT: Right.

18 MR. GROSE: When you look at what's been  
19 done in this state before, we've provided you with a  
20 number of pleadings from the Edward Lee Elmore case  
21 which taking out of the equation the pre-Atkins,  
22 post-Atkins, Elmore still had a statute of  
23 limitations problem that they tried to assert.

24 THE COURT: That's right.

25 MR. GROSE: And you know, Judge Hayes

1 allowed that to go forward. And when you — I'm  
2 sorry, Judge Mark Hayes, allowed that to go forward.  
3 And when you look at, when you sort of look at the  
4 pleadings in the case similar arguments were raised  
5 in that case that are being raised here now. And  
6 Judge Hayes thought that, you know, that factual  
7 development was necessary. You look at his order,  
8 he left open the possibility for either party to  
9 approach the Court if new information came to light  
10 that changed the need for continuing the factual  
11 development. Whether it was addressed in the order  
12 or not, one of the things that was argued in the  
13 pleadings was what kind of prejudice that there  
14 would be to the State. And the main thing that  
15 they're arguing is, is finality of the judgments;  
16 but when we're in a territory where it's an absolute  
17 bar to the death penalty, I think that raises the  
18 stakes and changes the equation quite substantially.  
19 This is, I think, the type of a claim that the  
20 exceptions were meant to, meant to be used for. But  
21 even so, whether it was available or not available,  
22 you know, the discovery rule has also been applied  
23 to PCR actions as one of the exceptions; and it  
24 wasn't until we got into federal court when we did  
25 some additional investigation that it was

1 discovered.

2 I don't know if you've been through an  
3 Atkins hearing before; I've been through one. It  
4 takes a lot of preparation. Experts have to do a  
5 lot of work. A lot of information needs to be  
6 provided to the Court in both lay and expert  
7 testimony. It's not, it's not a clear up or down  
8 call because —

9 THE COURT: Right.

10 MR. GROSE: —there's so many things that  
11 have to be, have to be taken into account. You  
12 know, one of the things that we want to bring to  
13 your attention, we do have a declaration that we  
14 want you to consider; but we would like to approach  
15 you off the record about it at a side bar because of  
16 the sensitive matters that are involved in it but I  
17 think this also speaks to some of what was going on  
18 during the first PCR.

19 THE COURT: All right, if counsel will  
20 approach.

21 (WHEREUPON, counsel approached the  
22 Bench for an off-the-record discussion.)

23 THE COURT: Mr. Grose, focusing again on  
24 the 828 Eighth Amendment action, am I  
25 oversimplifying too much when I refer to it in that

1 way?

2 MR. GROSE: I don't think so. I mean, the  
3 Eighth Amendment's an absolute bar; and despite the  
4 arguments that they make, we think that's a  
5 constitutional ground that can be asserted in  
6 post-conviction.

7 THE COURT: Is what you're seeking in that  
8 particular action a determination as to whether or  
9 not Mr. Bryant is actually mentally retarded?

10 MR. GROSE: Yes, sir.

11 THE COURT: And can I assume from that  
12 that if that action were to go forward it would  
13 focus obviously on the retardation 'cause that's,  
14 that's all that your petition refers to?

15 MR. GROSE: It would. It would  
16 necessarily take into account some factual  
17 development that might include the fetal alcohol  
18 syndrome as it relates to the MR, not as it relates  
19 to separate mitigation.

20 THE COURT: All right. You raised the  
21 issue a few moments ago whether I conducted a Atkins  
22 hearing or not. I think I had two of them so far.  
23 One of them involved Ellis Franklin as a matter of  
24 fact. Franklin versus Maynard was not the only  
25 Franklin base in the Reporters. There's another one

1 called Franklin versus Catoe. I have some passing  
2 familiarity with that; I was the trial judge. I was  
3 PCR judge on that and granted PCR. For the failure  
4 of him to be advised before, before the end of the  
5 penalty phase that he had the absolute right to make  
6 a final argument to the jury, as well as to testify.  
7 I thought that that was an absolute bar in those  
8 days because that's what all the case law said. But  
9 supreme court ordered, one, said I was wrong, and so  
10 they reversed this case. And then it came back  
11 after Atkins at some point in time after Atkins for  
12 me to determine whether or not he was, in fact,  
13 mentally retarded. That was still the language  
14 then; I think it was changed in 2011. And so I did  
15 conduct that. In that case the issue was not so  
16 fuzzy because the State had, experts had actually  
17 conceded during trial that he was mentally retarded  
18 and never been much of a real issue until Atkins  
19 came. And so I'm aware of the depth that some of  
20 those things have to go into in order to determine  
21 that issue. I wanted to be sure that my thoughts in  
22 that regard were correct from reading the  
23 application, but nowhere in there is there raised a  
24 question of his guilt or his innocence, simply his  
25 degree of culpability and punishment that would

1 result from it.

2 All right, Mr. Grose, anything further?

3 MR. GROSE: I do want to touch on the  
4 Robertson case for a moment. They brought it up in  
5 their pleadings.

6 THE COURT: Right.

7 MR. GROSE: I think that for a lot of  
8 reasons that we've been talking about with regard to  
9 the intellectual disabilities issue, Robertson  
10 really doesn't, is not gonna speak to us because I  
11 think that we should be allowed to go forward  
12 regardless of what our supreme court does with  
13 Robertson. But they, the State does acknowledge  
14 that there are a number of other post-conviction  
15 cases in South Carolina that are currently pending  
16 right now. Most of them are either directly stayed  
17 or effectively stayed because of the Robertson's  
18 case. I think some of them have actually — and I  
19 could be wrong — but some of them have actually  
20 allowed for factual development, but the funding  
21 mechanism from what I hear has not been put in place  
22 to do that. Robertson was argued last fall, I  
23 believe, in October. You have in the, one of our  
24 pleadings, a statement of what the issue is. The  
25 briefs are available online. If you wanted them I

1 could get those for you. But it — what is gonna  
2 happen, what is gonna be decided in Robertson has to  
3 do with the complexity between the federal  
4 government and the state governments on how these  
5 unexhausted claims are going to proceed. All of  
6 these other cases like Mr. Bryant's case are in  
7 federal court, and the — with the exception of  
8 Mr. Bryant's case, the federal court has stayed the  
9 habeas proceedings to allow the State to determine  
10 whether they're gonna exhaust the remedies. We have  
11 made that same motion in Mr. Bryant's case. The  
12 State asked for an extension which is not expired,  
13 in order to be able to respond to that motion, so  
14 it's not reached the adjudication point yet but that  
15 will be happening sometime during this summer.

16 In all of the cases that have been stayed  
17 in State court, post-conviction judges have been  
18 assigned I believe in most, if not all of them,  
19 counsel has been assigned. Robertson, of course, is  
20 in the supreme court. Only one of them, which  
21 they've referenced, has been decided on a summary  
22 judgment motion. All the rest of them are  
23 effectively stayed. And I wish I could read tea  
24 leaves and say what our court is going to do. I  
25 know that they've had it under consideration for a

1 long time, a lot longer than they have some cases  
2 under consideration, not as long as they've  
3 considered others in the past; so that tells me that  
4 whatever they're doing, they're being careful about  
5 it. And there's a number of different results that  
6 could come out of Robertson that would allow all of  
7 which we've raised in Mr. Bryant's case and what  
8 these other applicants have raised to go forward.  
9 And so, like I said, I think that the intellectual  
10 disabilities Atkins claim should be allowed to go  
11 forward regardless of Robertson because I think  
12 that's allowed under our procedures. I think we  
13 meet the criteria for that. I don't think Roberts  
14 is going to do anything to change that.

15           You know, the best course of action may be  
16 to stay the remaining allegations until we know what  
17 our supreme court is gonna do in Robertson, and  
18 that'll give you and the other circuit judges  
19 assigned to these other cases much more guidance  
20 about what to do. That is essentially an argument  
21 that we make in one of the pleadings, but I just  
22 wanted to make sure that that was on the record as a  
23 possible option for Your Honor to consider. I do  
24 have some of the orders staying it in other cases.  
25 I'm not certain that there's a written order in all



1 of the cases. The Attorney General's Office would  
2 probably be in a better position to know what that  
3 is. I can either provide you copies of what I've  
4 got or email them to you after we get back, whatever  
5 you would prefer.

6 THE COURT: I'll let you know if I need  
7 them.

8 MR. GROSE: Okay, all right.

9 THE COURT: Ms. Brown said, of course, you  
10 got federal habeas back up. This is not the end of  
11 the day if these PCRs are dismissed. You still have  
12 a chance to raise those issues in federal habeas.  
13 What is your response to that?

14 MR. GROSE: Well, I have several responses  
15 to that. I think the preference is for them all to  
16 be able to be addressed in State court.

17 THE COURT: Right.

18 MR. GROSE: And the reason that all of  
19 these other cases have been stayed was for allow for  
20 the exhaustion in state court 'cause we're really,  
21 while we're dealing with a federal constitutional  
22 bar, we are still dealing with how South Carolina  
23 manages its death penalty.

24 THE COURT: Right.

25 MR. GROSE: And the other thing that I

1 would say is we already, we already have a model for  
2 this. I mean, we have the Elmore case. Elmore,  
3 they tried to force that issue in the federal  
4 habeas. The, ultimately the federal courts stayed  
5 the Elmore proceedings to allow Judge Hayes to make  
6 that determination, which he ultimately did. And  
7 you know, initially a light sentence was imposed;  
8 but then there was other subsequent federal  
9 litigation after that so. You know, I think it,  
10 while that is a possibility, I think that both the  
11 federal government and South Carolina would prefer  
12 to adjudicate it in State court. Certainly South  
13 Carolina has an interest in doing that so.

14 THE COURT: All right.

15 MR. GROSE: And if they're done with that  
16 declaration I'd like to hand that up.

17 THE COURT: Hand that up and let me look  
18 at it.

19 MR. GROSE: Okay.

20 THE COURT: Give me just a minute to look  
21 at this.

22 MR. GROSE: Yes, sir.

23 THE COURT: And then, Ms. Brown, I'll hear  
24 from you.

25 MS. BROWN: Yes, sir.

1 (Pause.)

2 THE COURT: All right, thank you.

3 Ms. Brown.

4 MS. BROWN: Yes, Your Honor. Sometimes it  
5 is helpful to compare and contrast cases, especially  
6 when we have a relatively new matter that the Court  
7 is dealing with, and Your Honor has only heard from  
8 Mr. Bryant's counsel about an Elmore case. Now the  
9 Elmore case was pre-Atkins.

10 THE COURT: Right.

11 MS. BROWN: When they reference exceptions  
12 to the statute of limitations successiveness, there  
13 are some exceptions out there. They're not  
14 identified by opposing counsel, but I would suggest  
15 to you that Franklin establishes that exception.  
16 Some things are not successive because it was a new  
17 rule of law, so much to our new fact argument.

18 THE COURT: Right.

19 MS. BROWN: Now there's another case where  
20 this MR issue has been raised in post-conviction  
21 relief, Kevin Mercer out of Lexington County.  
22 Mr. Mercer's case was post-Atkins, post-Franklin.  
23 In that case counsel attempted to raise two issues,  
24 an ineffective assistance of counsel claim for  
25 failure to present evidence of intellectual

1 disability and a free standing claim. There was  
2 testimony by an expert who said in his opinion based  
3 on information he had, he thought Mr. Mercer may  
4 have intellectual disability. The PCR judge found  
5 ineffective assistance of counsel and sent it back  
6 'cause under Franklin you go back and have that  
7 pretrial determination. There is not a free  
8 standing claim. That's why it's so important to  
9 look at pre-Atkins and post-Atkins because  
10 procedurally the State of South Carolina handles it  
11 differently. We, of course, are far into  
12 post-Atkins at this time, and these actions are  
13 successive.

14           Now there have been some arguments this  
15 morning about assumption and investigation and who  
16 did what and when and where; but what we do know and  
17 we don't have to look any further than the  
18 transcript, is the fact that both plea counsel and  
19 PCR counsel had a very well respected medical  
20 professional on the team. And they also had, at  
21 least the plea counsel had, Doctor Lori Marty, I'm  
22 sorry, Marty Lori, to look into family history, to  
23 look into records and that, again, goes back to our  
24 ineffective assistance of experts, if anything at  
25 all, but certainly not counsel. Was counsel

1 reasonable to rely on experts? I think we can all  
2 agree counsel is reasonable to rely on especially  
3 well established well known experts.

4 Now, Your Honor, there's also been  
5 requests today for a state proceeding because it's a  
6 preference. Your Honor, I think we would have to  
7 identify whose preference that would be because the  
8 State certainly has a procedure in place under  
9 Franklin, and we would suggest that these actions of  
10 course are time barred and successive and should be  
11 dismissed.

12 THE COURT: All right.

13 MS. BROWN: Thank you, Your Honor.

14 THE COURT: Thank you, Ms. Brown. All  
15 right.

16 MR. GROSE: If I could respond briefly.

17 THE COURT: I was gonna — I have a  
18 question I want to ask you, Mr. Grose. I'm gonna  
19 give Ms. Brown the last word because she's the  
20 moving party. Do you agree with Ms. Brown that  
21 there is no free standing claim and that if you  
22 don't have an ineffective assistance claim, then you  
23 do not have a claim under the Eighth Amendment?

24 MR. GROSE: I do not agree with that.

25 THE COURT: Okay.

1           MR. GROSE: I would liken it to some  
2 extent to another bar on the death penalty which is  
3 executing juveniles, the Roper v. Simmons case. I  
4 think that, of course that's a lot easier to  
5 determine over now; but if you had somebody who was  
6 on the gurney and then it was discovered that they  
7 were excluded because of that bar, I don't think  
8 that anybody would argue with a judge stopping that  
9 proceedings and barring the death penalty. And I  
10 think that's the same here. Our post-conviction  
11 statute, if you look at it, allows to bring any  
12 constitutional violation. Ineffective assistance of  
13 counsel is the most common one. There's also a  
14 number of grounds of prosecutorial misconduct that  
15 can be brought at post-conviction which would be a  
16 separate constitutional violation, and I think that  
17 the Atkins bar to the death penalty allows it to be  
18 asserted.

19           And when you think in terms of -- they  
20 talk about the Mercer case, and there's a couple of  
21 things I want to say on that. First of all, we did  
22 raise that. That is in Doctor Schwartz-Watts'  
23 affidavit. She missed that diagnosis in that case  
24 too. And I've used Doctor Schwartz-Watts, now  
25 Doctor Maddox. I have high respect for her too; but

1 she's not the expert that I would put in the case to  
2 do the MR evaluation, and her training and her  
3 expertise is in a different area. And I can tell  
4 you next week I'm trying a case in Laurens County  
5 that was formerly a capital case where doctor, then  
6 Doctor Schwartz-Watts consulted with us; but when we  
7 decided that the client was probably intellectual  
8 disabled, we brought in a team of experts  
9 specifically for that. So I would bring that to the  
10 Court's attention.

11 I would also bring to the Court's  
12 attention, I can't disagree with what they said has  
13 happened procedurally in Mercer; but you really have  
14 to question whether that's dividing it into two  
15 parts like that is really efficient use of judicial  
16 court resources when it all could be done in one  
17 proceeding and we think our statute allows it.

18 THE COURT: All right, thank you.  
19 Ms. Brown, you got the last word.

20 MS. BROWN: Yes, Your Honor. Speaking of  
21 the last word, the supreme court always has the last  
22 word; and in this case if there's a bar to a  
23 post-conviction relief action, whether it's statute  
24 of limitations or successiveness, there is always  
25 the possibility to seek the original writ of habeas

1 corpus in the supreme court. That is always  
2 available.

3 THE COURT: All right.

4 MS. BROWN: And that is -- there's no time  
5 limit on that and it can go forward based on the  
6 showing that they make at that point. And the other  
7 thing I wanted to underscore a bit is that the  
8 federal court in Mercer also considered whether just  
9 the diagnosis alone would meet his burden of proof;  
10 and they said, no, there's a state writ to be  
11 available because you were given the opportunity to  
12 go forward under Franklin and have that initial  
13 determination so it wasn't accepted by either our  
14 state court or federal court.

15 And Your Honor, just to kind of wrap it  
16 up, it's not easy to remember sometimes when we talk  
17 about mental retardation and intellectual  
18 disability. It's not simply a medical issue. The  
19 Atkins prohibition speaks to a legal determination.  
20 Professionals can come in and have an opinion on  
21 mental retardation; courts may reject it.  
22 Professional opinions may differ so what we're  
23 talking about is a legal determination which places  
24 it squarely in the procedure that we're asking the  
25 Court to look at and to dismiss under successiveness



1 and statute of limitations.

2 THE COURT: True, a legal determination,  
3 but not a determination made by the law in a vacuum,  
4 right?

5 MS. BROWN: Uh-huh.

6 THE COURT: I mean, it relies upon these  
7 other things.

8 MS. BROWN: Oh, I think it's informed by  
9 the medical community; it's just not controlled by  
10 it.

11 THE COURT: I understand.

12 MS. BROWN: Yes, sir.

13 THE COURT: I understand. When I read the  
14 definition of intellectual disability, as I said, it  
15 tracks the same language of mental retardation till  
16 they changed the law in 2011. "Significantly  
17 subaverage general intellectual function existing  
18 concurrently with deficits and adaptive behavior and  
19 manifested during the development period." You  
20 know, the only thing in there that's really, really  
21 concrete and objective is whether these things were  
22 manifested during the developmental period. Who  
23 decides whether it's significant, where does  
24 subaverage come? I've read the Ellis reports and  
25 his evaluations and things of that nature and

1 realize that you can send people to look at those  
2 things and find different conclusions as a result.  
3 "General intellectual functioning existing  
4 concurrently with deficits and adaptive behavior."  
5 I'm sure that the experts who view those things have  
6 specific, well, much more specific meaning than they  
7 do to some person like me who just looks at it and  
8 just sees a mirage adjectives and adverbs thrown  
9 together here in some sort of half hazard fashion.

10 I dealt with, I dealt with a similar  
11 definition for two years. It's called opportunity  
12 to receive a mentally adequate education which had  
13 almost as many subjective things as that does; but  
14 still, that begs the question, it still is a  
15 definition that the statute has adopted and now is  
16 our definition. And of course, if the, if the  
17 expert testimony can meet that legal definition,  
18 then by preponderance of the evidence and there it  
19 is. I only say that, Ms. Brown, because to say that  
20 from the legal perspective we rely heavily upon what  
21 the medical, psychological, and psychiatric  
22 community have to say about it.

23 MS. BROWN: Sure.

24 THE COURT: Folks, I'm gonna stand down  
25 now for a few minutes. You're not gonna be held in

1 suspense about this. You have been good enough to  
2 give me this information, and I have read it and I  
3 have studied it and you have argued it very  
4 eloquently here today. We have victims here today  
5 who deserve at least to know what the next step in  
6 this is going to be, and I'm sure they think this is  
7 eternible having had to sit through trial and  
8 through post-conviction proceeding already and  
9 perhaps even more than that. I'm not unmindful of  
10 the strain which these proceedings place on the  
11 families of victims. Death is different. It's  
12 different to victims, it's different for defendants,  
13 and that's the reason we have to spend the time on  
14 it that we're spending here today.

15 Let's reconvene at, in 15 minutes. When I  
16 read what you have briefed so thoroughly and  
17 researched what you have briefed so thoroughly, I  
18 obviously did not wait until today to start my  
19 thought process on this. And so, and I've heard —  
20 some of my thought processes have been affirmed;  
21 some of them have not been by what I've heard today.  
22 But it's not going to take me long to tell the  
23 difference and to announce a ruling in this for you  
24 all and if I'm not back out here at 11:00, that's in  
25 15 minutes, that doesn't mean it's taking me 15

1 minutes to reach my decision, folks. It means it's  
2 gonna take me that long to sketch it out and put it  
3 in some sort of coherent fashion. We'll be in  
4 recess for 15 minutes.

5 (WHEREUPON, a recess was taken from the  
6 proceedings.)

7 THE COURT: I want to emphasize again, the  
8 fact that it has taken me 15 minutes to jot down  
9 this ruling does not mean I have made my decision in  
10 these weighty issues in a mere 15 minutes. I was  
11 appointed by the Chief Justice on May 31st to hear  
12 these matters and to rule in a timely manner. I  
13 began receiving emails almost immediately, Ms. Brown  
14 first and Mr. Grose, and the materials which are in  
15 this notebook were received in a timely manner and  
16 I've had a chance to look at them since this time;  
17 and so, as I said earlier, my thought process in  
18 this case began long before today. I say that not  
19 to derogate the importance of the arguments or the  
20 persuasive nature of the arguments of both sides in  
21 this case because I suppose we have in this room  
22 more experts in this field and are gathered in most  
23 proceedings like this, and that's the way it should  
24 be because these are important issues.

25 As to cause of action number 829, the

1 ineffective assistance cause of action, the motion  
2 to dismiss is granted. I agree with Ms. Brown that  
3 the failure to discover whatever it was in Mr.  
4 Bryant's background was not the fault of the  
5 attorneys, but perhaps of the experts who had access  
6 to the same people for the most part that Doctor  
7 Schwartz-Maddox refers to in her affidavit. She has  
8 referred to most of those in her trial or PCR  
9 testimony, family members, who would have been  
10 competent to address all of the issues raised in  
11 that petition long before this action was brought.

12 For that reason I find that not only does  
13 the cause of action not state cause of action  
14 against the attorneys as such, but it is time barred  
15 and there's no reason why these strict time bar  
16 should not be applied in this particular cause of  
17 action citing Aice and other cases. And Ms. Brown  
18 asked me to prepare the appropriate order reflecting  
19 most of the issues that were raised in your motion  
20 in that regard.

21 MS. BROWN: Yes, Your Honor.

22 THE COURT: As to cause of action number  
23 829, the Eighth Amendment issue dealing with the  
24 intellectual disability, the motion to dismiss is  
25 denied. I conclude that Atkins versus Virginia

1 establishes an absolute bar to the execution of a  
2 person with an intellectual disability. Now I  
3 realize, as Ms. Brown has suggested, that there are  
4 no real absolutes in the law; there are always  
5 exceptions and loopholes for everything. But I  
6 guess the only real absolute in the law is a death  
7 penalty, death is absolute. And for that reason I  
8 think that the procedural aspects of our law have to  
9 be liberally construed in favor of one who is under  
10 a sentence of death notwithstanding statute of  
11 limitations and successive applications, so that the  
12 issue of intellectual disability can be fully  
13 explored. Doctor Schwartz-Watts earlier said that  
14 he had no intellectual disability. In her affidavit  
15 she said she'd made a mistake. That is something  
16 that needs to be explored. And so I conclude that  
17 the substantive bar against execution of one under  
18 an intellectual disability outweighs the procedural  
19 requirements of the law. I use the word outweighs.  
20 I do not use the word removes the procedural  
21 requirements because there has to be some structure.  
22 Everyone is entitled to finality, the victims and  
23 the defendant alike. It is my hope that this matter  
24 will proceed in a timely manner limited to the sole  
25 issue of whether or not Mr. Bryant suffers an

1 intellectual disability or does not, and that will  
2 be dispositive of the issue. I have no authority to  
3 set up a procedure in this case as Judge Hayes did  
4 in the Elmore case just because gave me the  
5 authority to hear this solely for the purpose of  
6 hearing and ruling on the motion to dismiss filed by  
7 the State. I have no authority beyond that.

8 I hope that my appointment of counsel will  
9 survive, although that's a matter of procedure that  
10 I will have to leave somebody else. I was simply  
11 ordered to rule on the motion and I've done so. Mr.  
12 Grose, I ask that you prepare an appropriate order  
13 in this regard.

14 MR. GROSE: Yes, sir.

15 THE COURT: Thank you, ladies and  
16 gentlemen.

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18 \* \* \* END OF REQUESTED TRANSCRIPT OF RECORD \* \* \*  
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**C E R T I F I C A T E   O F   R E P O R T E R**

STATE OF SOUTH CAROLINA)  
COUNTY OF FLORENCE )

I, FRANCES B. RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Third Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 8th day of September, 2016.

*Frances B. Ray*

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FRANCES B. RAY, RPR



In The Court of Common Pleas

2016-CP-43-828

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B E F O R E:

A P P E A R A N C E S:

Mr. Donald J. Zelenka, Esquire  
Ms. Melody J. Brown, Esquire  
Attorneys for Defendant

A. 3761

## I N D E X

WITNESSESPAGE

(NO WITNESSES INTRODUCED DURING HEARING)

(NO EXHIBITS INTRODUCED DURING HEARING)

1 THE COURT: Zelenka and Brown, have I got it right?

2 MRS. BROWN: That's right.

3 THE COURT: All right. I'm ready whenever you are.  
4 Who would like to help me out with the schedule.

5 MRS. BROWN: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MRS. BROWN: The first matter, I have brought today  
8 paper copies as you requested the records from prior  
9 proceedings. This would include the plea at issue, the  
10 first PCR, the first PCR appeal, federal *habeas*, which is,  
11 you know, stay at the moment, and the success of  
12 applications and I can hand that up at the end of the  
13 proceeding, if that would be okay with you?

14 THE COURT: That would be fine.

15 COURT REPORTER: Ask her to speak up.

16 MRS. BROWN: We requested the hearing today, Your  
17 Honor - - -

18 THE COURT: The reporter asked that you speak up a  
19 little bit. She's like me she's hard of hearing.

20 MRS. BROWN: We'll do. Your Honor, we're here today  
21 from the Supreme Court's order of August 1<sup>st</sup> directive to  
22 create a scheduling order. And we requested the hearing  
23 because we had a couple of things we would request to be  
24 built in to the order that you would issue.

25 First of all, setting that hearing date, we submit

1       that's controlled by statute 17-27-160, Paragraph C. This  
2       would be the status conference after the return, in this  
3       case, after the order on the motion to dismiss. So it  
4       would be hundred and eighty (180) days at the maximum at  
5       this time out of good caution for a continuance. So that  
6       would work out to, the week of February 27, 2017,  
7       initially. Your Honor, we are going to ask for four  
8       different things. (1) a date for discovery; (2) a date to  
9       resolve any discovery issues; (3) a status conference and  
10      date for motions for summary judgment, if any, (4) and then  
11      finally the actual hearing date scheduled in February. A  
12      few you considerations for Your Honor. Discovery of  
13      course, is automatic in these capital cases and I haven't  
14      filed the standard interrogatories or request yet because I  
15      thought it would be better to come to court today and see  
16      if we can just work something out. But the federal *habeas*  
17      is still pending so until we complete litigation here,  
18      other litigation is stalled. So I would submit to you that  
19      this should become a priority to complete this litigation  
20      as narrowly focused litigation, Your Honor. This is not a  
21      situation where we're going have investigation and new  
22      claims and that sort of thing, it's intellectual  
23      disability. And opposing counsel has been already  
24      investigating this matter and has been at least since  
25      January for purposes of the federal *habeas* and actually

1       used some fruits of that investigation for the amended  
2       petition filed back in April of this year. And we're not  
3       starting on a clean slate, we already have some  
4       investigation there and, particularly, for discovery we're  
5       requesting that all Atkins materials be turned over within  
6       thirty (30) days. Now, this would be everything from the  
7       federal habeas, everything from the plea which would  
8       include mental health, mitigation, social history, and  
9       specifically, Your Honor, and in the federal litigation  
10      they have disclosed three IQ test, one of 79; one, 86; and,  
11      one, 92. These are all standardized test recognize  
12      instruments. We would like those test and when they were  
13      given and information on those test. That's one reason  
14      that we submitted it in the federal action and we would  
15      submit here, probably it's going to support a motion for  
16      summary judgment from us. That's why we're asking for  
17      summary judgment date. But all of this has already been  
18      disclosed, additional investigation. So what we would  
19      suggest, Your Honor, if you would be so inclined, is  
20      discovery due to us Monday, October 3<sup>rd</sup>. Motions related  
21      to discovery filed no later than November 2<sup>nd</sup>. A status  
22      conference for December 2<sup>nd</sup>. And if either party wishes to  
23      file a motion for summary judgment the motion has to be  
24      filed on that date, December 2<sup>nd</sup>. The responding party to  
25      have thirty (30) days to respond. A status conference for

1 Monday, January 23<sup>rd</sup> and sort of as a catchall, Your Honor,  
2 an evidentiary hearing tentatively scheduled to begin the  
3 week of Monday, February 27<sup>th</sup>.

4 THE COURT: Anything further?

5 MRS. BROWN: No, sir, not at this time.

6 THE COURT: All right.

7 MRS. BROWN: Thank you, sir.

8 THE COURT: And Ms. Holt and Mr. Grose, is that  
9 okay with you two?

10 MR. GROSE: I'm sorry?

11 THE COURT: Is that okay with you, everything that  
12 you're hearing?

13 MR. GROSE: Not really.

14 THE COURT: what do you propose?

15 MR. GROSE: Well, it's just not a very realistic  
16 time table and, you know, she is right, she hasn't sent us  
17 any discovery motions, requesting to produced,  
18 interrogatories, in this case and, of course, the Rules of  
19 Civil Procedure apply and discovery would be ongoing. I'm  
20 actually surprised that some of the materials that she's  
21 talking about, they don't already have because some of  
22 these materials were things that, what were obtained by the  
23 State here in the original prosecution that have come to us  
24 in those regards. So we will get with them and talk about  
25 what we have and what's available now. But where we are

1 and she's correct, that this is not happening in a vacuum  
2 that there has been work that has been done on this  
3 already. The work that has been done, much of that, that  
4 was done in the federal *habeas* has already been turned over  
5 to them as part of uphold we did in the federal *habeas* case  
6 but what's important is, you know, an Atkins claim of a  
7 procedure is heavily investigative intensive some of which,  
8 a lot of which has already been done but it's also  
9 intensive with the use of the experts and while we have  
10 been able to interview Dr. Donna Schwartz-Watts, now Dr.  
11 Maddox, with regard to her testimony in the original  
12 sentencing hearing and in the post conviction hearing and  
13 while she has been able to review some additional  
14 information and has given an affidavit which I believe you  
15 have a copy of because it's attached to the pleadings with  
16 the PCR application. If you don't I can get that for you.

17 THE COURT: I don't have a copy of anything.

18 MR. GROSE: Okay.

19 THE COURT: Except Justice Pleicones' order  
20 appointing me to hear this case.

21 MR. GROSE: Well, I think she said that those  
22 documents are here and, if not, I can get those for you.

23 THE COURT: Thank you.

24 MR. GROSE: But, essentially, what Dr. Maddox has  
25 said is after reviewing additional information that she

1 believes that there should be a thorough assessment to  
2 determine whether Mr. Bryant suffers from intellectual  
3 disabilities. While we have had access to investigative  
4 services in the federal case, we have not had access to  
5 investigative services and one of the things that Mrs. Holt  
6 and I, I mean, expert services, one of the things that Mrs.  
7 Holt and I want to do is after this hearing is over, is  
8 talk with you about what we need with regards to funding to  
9 be able to move that forward. I have no problem within the  
10 next thirty (30) days getting with them and, you know,  
11 talking about what we have at this point. I can tell you  
12 that just with the schedules of experts and things like  
13 that and, you know, it's very unlikely that we're going to  
14 be able to have reports to give to them, you know, within  
15 thirty (30) days. The statutory time table of the hundred  
16 and eighty (180) days is intended to be flexible. They  
17 always come to court and ask for everything to be done in  
18 an hundred and eighty (180) days but the reality is, is  
19 that none of these cases even more focus one just on Atkins  
20 has never been done in a hundred and eight (180) days. So  
21 I think that under our three branches of government you  
22 certainly have a lot of discretion and authority as far as  
23 managing the schedule and I think that also includes that  
24 it cannot be strictly dictated by statute as far as, you  
25 know, that would be, you know, why I can set goals that



1 ultimately relies on what you determine is necessary for  
2 this case. So I would just submit to you that I think  
3 there could be an initial exchange of discovery within  
4 thirty (30) days but that's not going to be the completion  
5 of the discovery. And the ---

6 THE COURT: When do you think the completion of  
7 discovery should be?

8 Well, that's going to be -- that's kind of difficult  
9 to say because -- because we're going to need -- that's  
10 going to depend on some of the experts. Mrs. Holt wants to  
11 address ---

12 MRS. HOLT: May I, Your Honor? I've done some  
13 several of these and so the reality of these cases is they  
14 usually require four experts. I don't know if the State is  
15 going to request an evaluation by DDSN or not. DDSN, of  
16 course, Your Honor, knows the body that determines and  
17 deals with people who suffer from intellectual disabilities  
18 whether there are in prison or out of prison. And so, I  
19 did the mitigation, investigation, for the federal *habeas*.  
20 I barely got the tip of the iceberg and it was just right  
21 there, there was enough right there to convince Judge  
22 Cooper that we should go forward. But there's so much work  
23 to be done and realistically, Your Honor, and I know the  
24 State will not be able to disagree, these cases, these  
25 Atkins cases take two to three years. It would be the

1       shortest one I've ever seen and that is with the judges  
2       pushing them and pushing them along. There just is not so  
3       much we can do, candidly. I can give you an example and in  
4       Mr. -- Elmore versus State that Atkins PCR took three  
5       years. They've just had a hearing in the matter of William  
6       Bell versus State from Anderson. That PCR initiated in  
7       2003 and it just got a ruling this year in favor of Mr.  
8       Bell. We're not on the William Bell spectrum of things by  
9       any means. But I think it's also important for, Your  
10      Honor, to know that if there is a finding of intellectual  
11      disability for Mr. Bryant, that we will not go back into  
12      federal court. We will resolve the case without going back  
13      to federal court. So there is no delaying that case. The  
14      judge, the federal judge in that case has said you guys do  
15      what you need to do, once the State, you know, take their  
16      full bite of the apple and they declined to -- they  
17      declined to hear the Atkins case preferring, that, Your  
18      Honor, the State get to determines the facts of it.

19           THE COURT:       They have too much to do as you can  
20      see.

21           MR. GROSE:       And just to add another example, we  
22      both worked on a pretrial case, State versus Benny Brown,  
23      and that crime happened in 2011 and it was late '15 when we  
24      - no late '14, when we began the Atkins hearing in that  
25      case. Now, it was slowed down a little bit because we had

1 a change in elected solicitors. And so once, you know, one  
2 lost on primary and another one was coming in, there was a  
3 delay but with ---

4 (Whereupon, Mrs. Holt said something to Mr. Grose off the  
5 record)

6 MR. GROSE: Right. And that's - - yeah, with  
7 relatively minimally contested evidence but a lengthy  
8 record that had been spread out over several hearing dates  
9 and it took Judge Addy approximately thirteen (13) months  
10 for the conclusion of the hearing to be able to go back and  
11 review everything and get to a ruling. So there's just  
12 lots of layers of things that make it complicated. The  
13 ongoing investigation, the use of experts, the unknown as  
14 to whether or not they're going to request the DDSN  
15 evaluation and then having to work with their schedule and  
16 things that have to be discovered.

17 THE COURT: Taking that into account, I have to get  
18 a scheduling order in place to the Chief Justice within  
19 sixty (60) days of the date of the order. Mrs. Brown who  
20 has given me a proposal, why don't you give me a proposal?

21 MRS. HOLT: Your Honor, I think it's also -- just  
22 so that you'll understand we're not just sitting here  
23 twiddling our thumbs. We have two -- we have a capital PCR  
24 that will start in November. We're under protection for  
25 that. A capital PCR that is supposed to start the week of

1 Labor Day and I imagine they're going to try to get another  
2 -- my last -- my third capital PCR murder in between those  
3 so that's unheard of, three capital PCR in there. So I  
4 didn't want you to ---

5 THE COURT: I understand. Just give me some dates.  
6 Give me some proposed dates.

7 MR. GROSE: All right. I would say a year for the  
8 experts to do their work and then we don't know what  
9 they're going to do. The way a lot of these things are  
10 handled, we do our work and we present a lot of stuff, and  
11 then they do stuff and present to us and so I'm trying to  
12 factor in the fact that they'll need some time. So I would  
13 say a year for the experts and another hundred and eighty  
14 (180) days after that for the hearing. And with the  
15 understanding that there may be, I mean, the statute  
16 contemplates that things may have to be amended.

17 THE COURT: So you think, in total, a year and a  
18 half.

19 MR. GROSE: Eighteen months for the hearing would  
20 be, I think, a good try. Well, we'll just have to be in  
21 constant communication with, Your Honor, about what's going  
22 on and what needs to be done.

23 THE COURT: All right. Mrs. Brown, what do you say  
24 to that?

25 MRS. BROWN: Your Honor, they're absolutely right,

1 we always ask to go by the statute. The statute is there as  
2 a guidance. Now there is good cause shown ---

3 (Whereupon, the court reporter had to stop the hearing due  
4 to training coming through town)

5 COURT REPORTER: Sorry about that.

6 THE COURT: All right. Go ahead.

7 MRS. BROWN: Thank you, Your Honor. There is a  
8 provision in the statute already for a continuance to be  
9 granted for good cause. But I do think that we should try  
10 to, at least, get here the statutory requirements. And if  
11 good cause should arise then the argument is made and, Your  
12 Honor, determines what amendments should be made, if any,  
13 to the scheduling orders. Your Honor, Mr. Grose mentioned  
14 today that testing was turned over in the federal *habeas*.  
15 It was only disclosed so I just wanted us all to get on the  
16 same page. I would like to have the test so I can get  
17 information from that and so forth. So I need the  
18 documentation for the disclosure of the information that's  
19 available. Your Honor, they're absolutely right that there  
20 has been incredible delay in capital cases. It is  
21 legendary. I'm not going to tell you it's not, otherwise.  
22 But in this case, we have two distinguishing features, (1)  
23 is that we have the federal court that has stay all the  
24 allegations, every action, and has required six (6) months  
25 for reporting. So we had to do a status report in six (6)

1 months, end of January of next year. I would like to be  
2 able to say, that you've gotten discovery and we're going  
3 forward. As you may have picked up, we offered to go  
4 forward in federal court and they wanted to return to State  
5 court. So we have that six (6) month status report because  
6 of the litigation in federal court that's stayed and is  
7 waiting for us. The other thing, Your Honor, is that, we  
8 can't by other cases that have had incredible delay for  
9 various reasons. And the only thing that I can go by on  
10 that, Your Honor, is the Rules of Professional Conduct we  
11 have Rule 3.2, this is on Page 110 of South Carolina Rules  
12 of Court Book and the comment and I think this applies  
13 here. There's a time to request continuances but it's not  
14 justification and this is a quote, "it's not justification  
15 that similar conduct is often tolerated by the bench and  
16 bar. The question is whether the lawyers asking in good  
17 faith of continuances essentially and that's what we're  
18 saying. Other cases may have had delays. Other cases may  
19 have had issues. But we do have some distinguishing  
20 features here and again the issue is narrow, the material  
21 is already there, and we would like to get -- now, other  
22 cases were mentioned, Your Honor, and I just don't think  
23 it's relevant to get into the details of William Bell and  
24 other things that had extraordinary things happened and  
25 multiple changes in counsel, but my co-counsel here is

1 familiar with that and if you're interested in details I'm  
2 sure that Mr. Zelenka could address it for you.

3 THE COURT: Any reply to that?

4 MR. GROSE: Yeah, well, I just wanted to clarify  
5 something. The records where we've obtained the prior IQ  
6 test from, are records that were available to both the  
7 State and to the defense in the initial trial of the case.  
8 There are in the materials that we have, consent forms  
9 given to the South Carolina Law Enforcement Division and  
10 Dr. Pam Crawford who was the state expert at the time by  
11 Mr. Bryant to obtain the very records that we found those  
12 in. And while those that come to us through counsel down  
13 the line and it's a little bit hard to tell exactly how  
14 they originally got it in their file. It appears that they  
15 got them from the solicitor. So that's why I say that I'm  
16 a little bit surprised that they don't have from the prior  
17 PCR that the Attorney General's Office was involved in that  
18 they don't have these materials. I take their word that  
19 they don't, but I'm a little surprised and we'll work to  
20 get that for you. The, as far as, making reference to  
21 other cases all I know to go on is experience and, you  
22 know, I have one that I've done myself. I've looked at  
23 others that have been done on the Atkins issue and I can  
24 just tell you that based on experience a six (6) month time  
25 frame to have a hearing is not realistic and I don't think

1       that even with -- I just don't think you're going to find  
2       where that's been done before or find that, that's really  
3       capable of being done. And we, you know, this is an issue  
4       about eligibility for the death penalty and the three cases  
5       that we've mentioned, one has actually been released from  
6       incarceration. He's a free man now as a result of other  
7       issues. The other two, Mr. Bell and Mr. Brown, were both  
8       found to be intellectual disabled and not eligible for the  
9       death penalty. One of the problems that has already built  
10      into this case and nobody in this room has anything to do  
11      with it, is there was a very brief period where our Supreme  
12      Court experimented with giving the post conviction judges  
13      in a capital case, a year to do everything and get to the  
14      order. And Mr. Bryant's case was one of the ones that was,  
15      -- his was one of the ones that was on the fast track and  
16      while there was a continuance because of some issues about  
17      his lack of competency due to some other mental health  
18      issues that he has. It still, of all those cases, it  
19      proceeded through as quick as any of those cases where our  
20      Supreme Court did that and one of the reasons and this is  
21      in one of the, we filed two applications and Judge Cooper  
22      said that one could not go forward. The one that has been  
23      assigned to you is going forward, but there has been prior  
24      ineffective assistance of counsel, was why these claims  
25      were not explored including in that prior post conviction



1 and we think part of that was trying to rush to have prior  
2 post conviction through to quickly. And so we don't want  
3 to see Mr. Bryant keep getting hit with that, you know, the  
4 same problem of everything being rushed to quickly and not  
5 get a proper determination as to whether or not he's  
6 eligible for the sentence that currently they've given to  
7 him.

8 THE COURT: All right. I'll tell you what, let me  
9 take it under advisement and I'll draft the scheduling  
10 order based on what you all have said. Anything else?

11 MRS. BROWN: Yes, Your Honor, one thing. We object  
12 to an *ex parte* communication for funding request. We relied  
13 on Thames versus State. Note one, which says that, that is  
14 not applicable to these proceedings so it would not be  
15 proper to hold any kind of discussion of fact finding that  
16 you would necessarily need for funding request. I would  
17 candor, Your Honor, this has been an issue that has not  
18 been specifically addressed head own in a capital case.  
19 The footnote in Thames speaks to the fact that there's a  
20 difference between the criminal trial and civil proceedings  
21 and, of course, a non-capital cases, the State is allowed  
22 to not only be there for the discussion but participate in  
23 the discussion and that's very clear in the Thames case.  
24 We have had it arise as a secondary issue, an emergency  
25 writ to the Supreme Court in capital cases, probably about

1 a year ago now and the Supreme Court expressed they had  
2 already addressed that in Thames and that an *exparte*  
3 communication was not appropriate and that's the Stanko  
4 case. It was also raised as a freestanding claim and  
5 recently, just a few months ago, in the case that Mr. Grose  
6 is involved in as well and the Court didn't take, so we did  
7 not have a ruling on that one. So the only thing we can go  
8 by, the language in the statute that doesn't seem to  
9 incorporate the *exparte* communications that would be  
10 available for criminal trial and the footnote in Thames. ,  
11 Thames, the Supreme Court, states Supreme Court case that  
12 specifically addresses *exparte* communications so it's not  
13 available in post conviction relief.

14 THE COURT: Mr. Grose, you want to reply to that?

15 MR. GROSE: The only order that addresses this  
16 issue head on is the order of Judge Alexander McCauley in  
17 State versus, excuse me, Inman versus South Carolina which  
18 is a case that me and Mr. Zelenka and Lee Mavery from the  
19 Attorney General's Officer are involved in. Judge McCauley  
20 ruled that *exparte* does pertain or does apply in capital  
21 post conviction proceedings. It's a very thorough order.  
22 It's the only order that has analyzed the issues. Mr. Made  
23 Mr. Mavery and Mr. Zelenka sought to appeal that order to  
24 the South Carolina Supreme Court and they allowed it to  
25 remain standing. And as Judge McCauley pointed out their

1 position is based on footnotes in Stanko, relying on a  
2 footnote in Thames interpreting a statute that hadn't been  
3 inactive when the issue arose in Thames because the capital  
4 PCR statute hadn't even been inactive when the case in  
5 controversy arose intense. It was inactive about the time  
6 Thames was decided but the ruling that was being addressed  
7 occurred before the statute and Thames is not a capital  
8 case so it wouldn't be interpreting the capital provision  
9 anyway. So that caused delay to some extent in the Inman  
10 case and, you know, this is one of those issues that I  
11 didn't know that they were going to bring this up here  
12 today because they didn't file -- I mean, they bring it up  
13 in other cases but I thought Judge McCauley's order might  
14 have put this issue to rest. We came here today hoping to  
15 kinda give you a heads up about, you know, again talk about  
16 the experts that we need in order to do this. This, if you  
17 decide to take this issue under advisement which is your  
18 discretion to do, then we're gonna want to get you a copy  
19 of Judge McCauley's order to look at and then we're going  
20 to have to schedule another time ---

21 THE COURT: I'm gonna deny the motion right now.

22 MR. GROSE: Okay. I'll sit down. Thank you.

23 THE COURT: Anything else?

24 MR. BROWN: No, Your Honor. We would just -- I  
25 know you said you deny the motion but I do want to point

1 out that Judge Culbertson passed a rule of contrary and  
2 Judge Cooper has ruled contrary to that, they do not allow  
3 *ex parte* because you are the fact finder and that's the  
4 essence of it and that's what's in Thames and I wanted that  
5 clarified because it sounded like this was controlling when  
6 there's actually more prescient to the contrary.

7 THE COURT: All right. Thank you very much.

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: Anything else?

10 MR. GROSE: No, sir.

11 THE COURT: All right. I'll take it under  
12 advisement and issue an over. Hopefully, we can get it  
13 done. Sounds good.

14 (CONCLUSION OF THE HEARING ON SEPTEMBER 1, 2016)

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CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Dillon County, South Carolina, on the 1<sup>st</sup> day of September, 2016.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

Lisa S. Carter

Circuit Court Reporter

December 14, 2016

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State of South Carolina ) Court of Common Pleas  
County of Horry ) 2016-CP-43-00828

Stephen Corey Bryant )  
vs. ) Transcript of Record  
State of South Carolina )

February 22nd, 2017  
Conway, South Carolina

BEFORE:

Honorable William Seals, Judge.

APPEARANCES:

E. Charles Grose, Esq.  
Diana L. Holt, Esq.  
Attorneys for the Applicant

Melody J. Brown, Esq.  
Attorney for the State

Teresa J. F. Bautz, RPR  
Official Court Reporter

## E X H I B I T S

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NO. DESCRIPTION

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No exhibits submitted.

Exhibits retained by Clerk of Court.

1 (The hearing commenced at approximately  
2 10:30 a.m.)

3 THE COURT: Good morning. This is the State's  
4 motion; is that correct?

5 MS. BROWN: Yes, sir, it is.

6 THE COURT: I'm ready to go when you are.

7 MS. BROWN: Thank you, Your Honor, may it please  
8 the Court.

9 THE COURT: Sure.

10 MS. BROWN: Applicant filed an amendment to the  
11 application on January 12th of 2017. And we moved to  
12 dismiss by motion filed January 18th, 2017. Within the  
13 amended application, Applicant intends to raise one  
14 additional claim, and that is challenging the  
15 constitutionality of 16-3-20, pursuant to the Sixth  
16 Amendment, Fourteenth Amendment and adding versus  
17 Florida.

18 Your Honor, he also attempts to retain a right to  
19 amend further in this action. And the problem with  
20 this and the basis for the motion to dismiss is that  
21 this is a different proceeding. It is not a PCR  
22 action, it's a matter of right.

23 Judge Cooper has allowed one allegation to go  
24 forward on intellectual disability. The statute  
25 requires, and this is the post-conviction relief



1 statute, requires an Applicant to make a showing to go  
2 forward, totally different than the one PCR action as a  
3 matter of right. 17-27-90, 17-27-45 governs a set of  
4 actions and actions filed in a timely fashion. None of  
5 these allegations, we submit, are timely filed and they  
6 are successive.

7       However, Judge Cooper at this time has allowed  
8 intellectual disability to be developed. We still have  
9 the right to move to dismiss, it's excessive and  
10 statute of limitations even on that one. But that is  
11 the very limited scope of the litigation at this time.  
12 Therefore, amendment is not proper.

13       Now, our Supreme Court has recently reaffirmed the  
14 statutory deadline in Robertson versus State. And  
15 also, I think there's some language in Robertson that  
16 is helpful in this situation. And that is the Court  
17 remanded for an evidentiary hearing on allegations of  
18 ineffective assistance of PCR counsel based on PCR  
19 counsel's qualifications. That was the narrow issue  
20 that was allowed to go back. And the Supreme Court  
21 shows that -- that type of description of the issue,  
22 the narrow issue going back.

23       Even if you are granted an evidentiary process on  
24 a successive application, Your Honor, it is limited to  
25 the issue that the Court allows to go forward. And

1 that's where we are here, we're talking intellectual  
2 disability. We still need to develop the records of  
3 who knew what, when and where. We may still move to  
4 dismiss. That's allowed under the PCR statute as well.  
5 But we are narrowly focused on intellectual disability.

6 I did want to add, too, even looking at Hurst,  
7 Hurst was not new rule of constitutional law that would  
8 somehow trigger a new limit of the statute of  
9 limitations. The Supreme Court was quite clear they  
10 granted certiori on the issue of whether Ring would  
11 invalidate the Florida death sentencing procedures.

12 Ring is a 2002 case. No new grounds, nothing that  
13 would prompt a new one-year statute of limitations.  
14 And factually, it couldn't apply here; not only are we  
15 not talking about the Florida system, we're not talking  
16 about a jury trial. Hurst was only describing a  
17 situation where a jury trial was granted. It was  
18 requested, it was obtained. And then there was a  
19 problem with how much the jury was allowed to do  
20 actually at sentencing.

21 Here, we have a right, we have a guilty plea. We  
22 have somebody who had a known waiver. He knew exactly  
23 what the judge would be sentencing him under our state  
24 statute had he -- if he chose to do a guilty plea,  
25 which he certainly did. So there would be no

1 application.

2       So new start to the statute of limitations, and  
3 certainly something that could have been brought up, at  
4 the very least, to Judge Cooper to allow him to look at  
5 that and determine whether it should go forward. We  
6 retain the right to move to dismiss, and we would ask  
7 for this Court to limit the action to the issue that  
8 Judge Cooper has allowed to go forward.

9       That would be it, Your Honor.

10       THE COURT: Be glad to hear from you.

11       MR. GROSE: Judge, I think the argument that she  
12 made, you know, it is critical to look at the Uniform  
13 Post Conviction Relief Act. And under 17-27-20, it  
14 creates a general right for people to claim that their  
15 conviction or sentence violates the constitution of the  
16 laws to be able to bring an act.

17       And then Section 17-27-45 (B) creates a one-year  
18 provision that she alluded to but did not go into any  
19 great detail that when a Court whose decisions are  
20 binding on the Supreme Court of this state or the  
21 Supreme Court of this state holds that the Constitution  
22 of the United States or the Constitution of South  
23 Carolina or both imposed on a state criminal  
24 proceedings a substantive standard not previously  
25 recognized or a right not in existence at the time of

1 the state court trial, if the standard or right is  
2 intended to be applied retroactively, an application  
3 under this character may be filed no later than one  
4 year after the date which the standards of the right  
5 was determined to exist.

6 And then, Section 17-27-90 of the Uniform Post  
7 Conviction Relief Act creates rights for filing  
8 supplemental or amended applications. As a threshold  
9 matter, this is, I think, a very narrow procedural  
10 issue. I don't think the Court needs to get into  
11 whether this particular claim is a successive claim. I  
12 guess, maybe you have to give a cursory view of whether  
13 it's time barred.

14 The application was filed on -- the amended  
15 application was filed on January 11th. Hurst was  
16 filed, decided by the US Supreme Court, on  
17 January 12th, of 2016, so we're within the year statute  
18 of limitations for Hurst.

19 The question really comes down to, you know,  
20 whether Hurst is -- you know, breaks new constitutional  
21 ground. And I think the argument is a little bit -- I  
22 don't know that it's perhaps very complicated, but it  
23 is a little bit more detailed than what has been  
24 presented here today or in the pleadings.

25 I think the first place to look is that Ring

1 versus Arizona, no doubt that was decided in 2002. The  
2 question is, what was exactly the issue that was before  
3 the Supreme Court in the United States in Ring. And if  
4 you look at the opinion, it says, the question  
5 presented is whether the aggravating factor may be  
6 found by a judge is Arizona law specifies to whether  
7 the Sixth Amendment jury trial guarantee which is made  
8 applicable to the States to the Fourteenth Amendment  
9 requires that the aggravating factor be determined --  
10 factor determination be entrusted to the jury.

11 And then, there is footnote four in Ring, which  
12 says that Ring's claim is tightly delineated. He  
13 contends only that the Sixth Amendment required jury  
14 findings on the aggravating circumstances asserted  
15 against him.

16 Further down in the footnote, the Court says that  
17 Ring makes no Sixth Amendment claim with respect to  
18 mitigating circumstances. And then a little bit  
19 further down in the footnote, nor does Ring argue that  
20 the Sixth Amendment required the jury to make ultimate  
21 determination whether to impose the death penalty.

22 I think as the Court's aware, and it often gets  
23 broken down in voir dire when everybody is trying to  
24 make certain that the potential jurors understand the  
25 procedures, first there has to be a trial to determine

1 whether somebody is guilty of murder or not guilty of  
2 murder. If they're not guilty of murder, it ends right  
3 there. There may be other crimes that they're charged  
4 with the indictment that could serve as the basis for  
5 aggravating factors.

6 Then we go into the next stage. And granted, if  
7 there's other crimes that are found to have been  
8 committed that are listed in the statute, the State may  
9 have a head start in determining those aggravating  
10 factors. But it still requires a finding by the jury.

11 For example, in this case there was one  
12 aggravating factor that Judge Russo found which was  
13 that the murder was committed during the commission of  
14 a robbery while armed with a deadly weapon. So there  
15 is that additional determination. Granted, the State  
16 may have a head start, but there is that additional  
17 determination.

18 Then, the jurors have to also consider whether or  
19 not any statutory or nonstatutory mitigating  
20 circumstances exist. And then after having considered  
21 all of that, they have to decide whether the death  
22 penalty is appropriate. So there's really four  
23 findings, the guilt of murder, the existing of an  
24 aggravating factor, at least a consideration and  
25 findings to mitigate the circumstances, and the

1 decision whether or not to impose the death penalty.

2       In Ring, the way the Court discussed Ring and  
3 discussed the issue that was presented, the only issue  
4 there was whether or not a judge could determine the  
5 existence of an aggravating circumstance. In Arizona,  
6 here, as under the Florida scheme in Hurst, the  
7 determination of an aggravating circumstance just  
8 determines whether or not the defendant is eligible for  
9 the death penalty. Whether or not the death penalty is  
10 to be imposed requires, you know, two additional  
11 considerations or determinations.

12       When you look at Ring -- I'm sorry, when you look  
13 at Hurst, Hurst actually goes beyond Ring and deals  
14 with these other determinations. It says, Ring points  
15 out that Florida does not require the jury to make the  
16 critical findings necessary to impose the death  
17 penalty. So at this point we've moved beyond  
18 eligibility, we're looking at imposition.

19       The Court points out, it is true that in Florida  
20 the jury recommends a sentence but has not made  
21 specific factual findings with regards to the existence  
22 of mitigating or aggravating circumstances. And the  
23 recommendation is not binding on the trial judge. And  
24 the jury does not make the additional finding as to  
25 whether to impose the death sentence.

1       So I guess to a certain extent there was an issue  
2 in Hurst as to whether or not that eligibility  
3 requirement for the death penalty, the aggravating  
4 factor, the existence of the aggravating factor. But  
5 Hurst went further and said that the Sixth Amendment  
6 jury trial right requires the jurors to make the  
7 determination as to whether or not mitigating  
8 circumstances exist and whether or not the death  
9 penalty should be imposed.

10       So based on that analysis, we believe that Hurst  
11 is a new constitutional decision. We have filed within  
12 one year. We believe the statute, post-conviction  
13 relief statute, allows Mr. Bryant to bring this claim  
14 as a matter of right.

15       The Court is probably already aware that while  
16 Mr. Bryant pleaded guilty, he did want a jury to  
17 conduct sentencing, that there was pre-plea litigation,  
18 an attempt at an interlocutory appeal to the State  
19 Supreme Court. At that particular point, I think our  
20 Court had only dealt with Ring and regarding the  
21 determination of the aggravating factor.

22       And I'm well aware of the Blakely decision which  
23 does allow, you know, excuse the jury finding in  
24 situations where the defendant has admitted to the  
25 facts. And, you know, in this case there was some



1 discussion at the very beginning of the sentencing  
2 hearing as to what the State's obligation was with  
3 regard to proving beyond a reasonable doubt the  
4 existence of the aggravating circumstance, even though  
5 Mr. Bryant had already pleaded guilty to that.

6 But like I said earlier, that gives the State a  
7 head start. Mr. Bryant pleaded guilty to murder, he  
8 pleaded guilty to elements of the robbery. There was a  
9 factual scenario that was presented to the judge that,  
10 you know, he agreed to -- you know, in order for the  
11 judge to make that determination as to whether or not  
12 to accept the pleas, whether that satisfies the  
13 requirement under Ring and Blakely for him having --  
14 Mr. Bryant having admitted to the existence of an  
15 aggravating factor, that was not entirely clear at  
16 trial.

17 And I do acknowledge that the State has a head  
18 start in all of that. But then, we -- after Hurst we  
19 have the two additional determinations, which is the  
20 jury considering the mitigating circumstances and  
21 making the decision whether to impose the death  
22 penalty.

23 My contention, our contention, Mr. Bryant's  
24 contention, is that even if you decide in the State's  
25 favor that the guilty plea and the factual basis was

1 enough to relieve the Sixth Amendment jury  
2 determination as to the existence of the aggravating  
3 factor, at that point all that Mr. Bryant was eligible  
4 for, really all that could be imposed, without  
5 additional findings was a life sentence; that the  
6 additional findings after that had to include the  
7 consideration, the findings regarding the mitigating  
8 circumstances and the decision as to whether the unique  
9 circumstances of that case and the character of this  
10 particular defendant justified imposing the death  
11 penalty.

12 And so, after Hurst we have, I think, an entirely  
13 new ball game than what we had, you know, just at the  
14 end of the decision at Ring.

15 THE COURT: All right.

16 MR. GROSE: And I'd be happy to answer any  
17 questions Your Honor might have.

18 THE COURT: All right. You want to briefly reply  
19 to that?

20 MS. BROWN: Yes, sir, Your Honor. I would point  
21 out just procedural and substantive issues.  
22 Procedurally first, there was reference to 17-27-20 and  
23 the allegation that you can make that a situation  
24 violates the Constitution. I would point out that in  
25 Franklin, the Supreme Court talked about the interplay

1 of the successive bars and time bars of allowing  
2 someone to go forward on a new constitutional rule.  
3 Franklin, of course, referenced Atkins which is the  
4 issue that we're on here. But what that tells us is  
5 that these bars still apply even if you go under and  
6 you fall under a violation of the constitutional law.

7 17-27-45, the constitutional law at issue that  
8 would allow a restart of the one-year statute of  
9 limitations has to be determined to have been a new  
10 break in that substantive standard and that that  
11 substantive standard is going to be applied  
12 retroactively. And there's nothing that has been  
13 presented today that would support those two necessary  
14 findings to allow you a new start of the one-year  
15 statute of limitations.

16 And I believe we have a disagreement on when the  
17 application to amend was actually filed. According to  
18 the Sumter County Clerk of Court's website, it was  
19 filed on January the 12th, putting in January the 12th.  
20 I've got a recorded copy. Well, they have the -- and,  
21 again, I think this is a misunderstanding.

22 THE COURT: Yes, you can approach.

23 MS. BROWN: Sumter County apparently has two  
24 separate dates on that. But the clerk's index shows  
25 the 12th. And that would actually been 366 days if

1 that is the controlling file date. But it doesn't  
2 matter because it doesn't restart the one-year statute  
3 of limitations.

4 Now, what is very interesting in the argument that  
5 was presented to you today, you heard a lot about what  
6 the jury finds and what the jury must find to comply  
7 with the Sixth Amendment. The entire problem with  
8 putting that logic into this situation is there was not  
9 a jury trial. Applicant was never denied the right to  
10 a jury trial, he waived that right. And we're not  
11 talking about trotting on new ground particularly with  
12 whether Hurst even informed this type of situation.  
13 Florida has been faced with that.

14 And on the -- in note four on page six, there's a  
15 motion to dismiss, I make reference to a Florida case  
16 that's Mullins versus State, 2016. And this particular  
17 quote is very informative. We need not extensively  
18 consider the implications of Hurst to determine that  
19 Mullins cannot avail himself of relief pursuant to  
20 Hurst. Hurst said nothing about whether a defendant  
21 could waive the Sixth Amendment right to jury fact  
22 finding and sentencing and procedures as recognized by  
23 Ring. It is not something that can be imposed in a  
24 guilty plea proceeding especially here where the State  
25 requires the judge to make the determinations. We are

1 not talking Sixth Amendment at that time, we're talking  
2 waiver. So Hurst cannot apply in this situation.

3 And, Your Honor, there was no mention of future  
4 amendments. And, again, we're asking this Court to  
5 make the limitation so that we will not have to address  
6 future amendments and allow this case to be narrowly  
7 focused on the intellectual disability issue that Judge  
8 Cooper found could be addressed in extra proceedings.

9 That would be it, Your Honor. Thank you very  
10 much.

11 THE COURT: You can reply in the same amount of  
12 time she did.

13 MR. GROSE: I'll probably use a little bit less.  
14 On the issue of filing the application, I had initially  
15 overnighted that. And I had checked the clerk's  
16 website and it had not been filed. I unexpectedly --  
17 you know, I live in Greenwood -- but I unexpectedly had  
18 a client incarcerated in Sumter that led me to the  
19 clerk of the court to review records on his case. And  
20 the -- my documents were actually sitting in the  
21 clerk's office in a pile to be filed. I had  
22 Mr. Bryant's documents. And, anyway, the date stamp  
23 clearly reflected that it was filed on the 11th, and  
24 that's what happened.

25 And we do acknowledge that the statute applies.

1 But I don't think that under Franklin or any of the  
2 other successive cases you have to look at the  
3 successive -- well, Franklin is not a successive case,  
4 Franklin is within a year of the determination. I  
5 don't think you have to look at the rules on  
6 successiveness here.

7 I don't think there's, you know, any doubt from  
8 the United States Supreme Court that something like  
9 this that affects a sentence of this importance, life  
10 or death, would be applied retroactively. You look at  
11 the determination, for example -- granted, it was an  
12 age limit case -- but you look at the determination of  
13 Miller versus Alabama, they certainly applied that  
14 retroactively, I don't think. As important as some of  
15 this is and with Hurst being, you know, essentially an  
16 eight to one decision, Justice Pryor concurred that he  
17 would have gone further than the majority. I don't  
18 even think that argument requires that much time.

19 With regard to the last issue I want to address,  
20 with regards to the waiver of a jury trial, as far as  
21 guilt, innocence and sentencing, there's a whole host  
22 of federal cases like Blakely and Booker applying the  
23 federal sentencing guidelines that say that even though  
24 you've waived your right to a jury trial when there's  
25 an enhancement in sentencing, the judge can't make

1 those additional findings unless they are admitted to  
2 or found by the jury. I think that the argument is a  
3 red herring.

4 THE COURT: Okay. Let me take a look at it today,  
5 and I will e-mail my ruling today.

6 MS. BROWN: Thank you, Your Honor, appreciate it.

7 THE COURT: And I don't need these if you want to  
8 take them back.

9 MS. BROWN: Thank you, sir.

10 MR. GROSE: Thank you, judge.

11 THE COURT: Thank you. See you next time.

12 (The hearing concluded at approximately  
13 10:55 a.m.)

14 (End of Transcript of Record)

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## 1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA )  
4 COUNTY OF HORRY )

5

6 I, TERESA J.F. BAUTZ, Official Court  
7 Reporter for the Fifteenth Judicial Circuit of the  
8 State of South Carolina at the time of the foregoing  
9 proceeding, do hereby certify that the foregoing is a  
10 true, accurate and complete Transcript of Record of the  
11 proceedings had and evidence introduced in the trial of  
12 the captioned case, relative to appeal, in the Court of  
13 Common Pleas for Horry County, South Carolina, on the  
14 19th day of May, 2019.

15

16 I FURTHER CERTIFY that I am neither of  
17 kin, counsel nor interest to any party hereto.

18

19

20

*S/Teresa J. F. Bautz*

21

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TERESA J.F. BAUTZ, RPR  
Official Court Reporter

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1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**

2 COUNTY OF SUMTER ) CASE NO.:2016-CP-43-00828

3 MOTION TO RECONSIDER

4 -----  
5 April 20, 2017

6 **BEFORE:** The Honorable William Seals

7 -----  
8 STEPHEN COREY BRYANT,

9 Plaintiff,

10 vs.

11 STATE OF SOUTH CAROLINA,

12 Defendant.  
13 -----

14  
15 **APPEARANCES:**

16  
17 E. Charles Gose, Esq.  
Diana L. Holt, Esq.  
18 Attorneys for the Plaintiff.

19  
20 Melody J. Brown, Esq.  
(Attorney General's Office)  
21 Attorney for the Defendant.

22  
23 Official Court Reporter  
Natalie Dahl, RPR  
24  
25

## P-R-O-C-E-E-D-I-N-G-S

THE COURT: Good morning. I'm ready when you are.

MR. GROSE: Thank you, Your Honor. May it please the Court. First, we appreciate you scheduling this hearing. We want to make sure that this issue is something that -- well, at least a record we create about this issue, something that is complete. In some respects, I think it is pretty complete record, but we did want to make certain that certain things have been considered.

One of the things that we point out in our Rule 59(e) motion is the reliance on Rule 15 with very little discussion of the uniform post-conviction relief action. Of course, our position is the avenue that we think this claim comes into court is under the section that provides, you know, the Court to consider when an applicant raises at a new constitutionally controlling decision. So we think that the issue of whether or not the amendment is allowed ultimately turns on that issue, that if it is a new binding constitutional decision, that Mr. Bryant has a matter of right to bring it under the post-conviction relief statute.

Going to that, in the order in Paragraph 3, and

1 also in Footnote 3, the Court concluded that Hurst  
2 versus Florida is merely an application of Ring. So  
3 when we're looking at Ring, we're also looking at  
4 Apprendi, Blakely and other cases involved in that.

5 We had a lot of discussion at the last hearing  
6 about what we believe to be an important distinction  
7 between Ring and Hurst. Ring, like Apprendi, had to  
8 do with whether or not a defendant was eligible for a  
9 certain punishment, and before the defendant could be  
10 eligible, then the jury had to make those factual  
11 findings. We believe that Hurst is a significant  
12 difference from Ring because Ring was expressly  
13 limited to the finding of the aggravating  
14 circumstances or aggravating factor, whereas Hurst  
15 also applies to consideration of mitigation and the  
16 decision whether or not to impose the death penalty.  
17 Courts in other states actually referred to the Hurst  
18 requirement as the aggravation/mitigation weighing  
19 element. Of course, South Carolina is not a weighing  
20 state, so kind of barring on that, it would be, you  
21 know, the aggravation/mitigation consideration. So we  
22 think that that is, you know, a significant -- a new  
23 significant development that something is -- that was  
24 not necessarily mandated by Ring.

25 If, as the Court has found, that Hurst is just a

1 mere application of Ring, then I think that would, you  
2 know, trigger an analysis of the cases in South  
3 Carolina applying Ring to our death penalty procedure.  
4 There was no discussion of those cases in the Court's  
5 order. They were discussed in Footnote 3 of the  
6 State's motion to dismiss. We think this is  
7 important, because if it is just a mere application of  
8 Ring, while we disagree with our supreme court's  
9 interpretation of Ring in our capital setting, that  
10 line of cases, you know, would be controlling. If  
11 Hurst is a new constitutional decision that is  
12 binding, than those cases cited in Footnote 3 of the  
13 State's brief would have to be analyzed in context of  
14 the new law and wouldn't necessarily -- or a new  
15 decision and wouldn't necessarily be controlling.

16 Also in Paragraph 3 of the order, Your Honor  
17 states that Mr. Bryant did not choose a jury trial, he  
18 instead chose to plead guilty. On page 3 of the 59(e)  
19 motion, we pointed out that, you know, Mr. Bryant did,  
20 in fact, want to plead guilty and have a jury  
21 sentencing. We wanted to make certain that the Court  
22 was aware of that. I believe that those pleadings  
23 were probably in the package of materials -- rather  
24 large package of materials that was provided to you by  
25 the Attorney General's Office at the beginning of the

1 case. Those -- that interlocutory appeal was  
2 dismissed by the supreme court, but it is, you know,  
3 some significant evidence of what Mr. Bryant's, you  
4 know, desires were at the time, so we wanted to make  
5 sure that you were aware of those.

6 We also think that that issue goes to this new  
7 requirement set forth by Hurst, because to the extent  
8 that the supreme court considered the briefing in  
9 Mr. Bryant's interlocutory appeal, that was based on  
10 the decisions in the state court at the time, which  
11 included the ones that the State cited in Footnote 3  
12 of its order. So if Hurst is considered a new issue  
13 -- I mean a new decision that is binding, then to some  
14 extent with regard to Mr. Bryant's desires, that would  
15 have to be taken into account.

16 Also, in connection with the ideal that  
17 Mr. Bryant chose to plead guilty and did not proceed  
18 or want a jury trial, the State argues in Paragraph 7  
19 of its motion that Bryant was aware of the precise  
20 issue waived. They cite to the guilty plea  
21 transcript. When you go back and look at the guilty  
22 plea transcript, it's a little confusing in some  
23 respects as to what rights were actually being  
24 discussed. I think we mentioned at the last hearing,  
25 you know, that there was a suggestion by Judge Russo

1 that the guilty plea was going to automatically be a  
2 finding of an aggravating factor that would limit the  
3 sentencing range to life or death and exclude the  
4 possibility of a 30-year sentence to life. There was  
5 a lengthy discussion at the beginning of the  
6 sentencing hearing as to whether or not the State  
7 still beared the burden of proof to prove the  
8 aggravating factor. While we acknowledged that the  
9 guilty plea to the armed robbery is probably a head  
10 start in that direction, there is still a requirement  
11 of that finding.

12 So when you look at the guilty plea transcript,  
13 you also see that Judge Russo makes remarks to  
14 Mr. Bryant in the colloquy about he would have had a  
15 right, if he had not had pled guilty, to have jury  
16 sentencing, but since the judge would be sentencing,  
17 he would consider the existence of aggravating factors  
18 instead of a jury making those considerations. But  
19 there was no contemporaneous discussion with  
20 Mr. Bryant that the Sixth Amendment requires -- that  
21 that part of what he was waiving was a jury -- his  
22 right to have a jury to make those findings; rather,  
23 it was merely an application of the South Carolina  
24 statute that once Mr. Bryant chose to plead guilty, it  
25 was automatic that the judge makes the finding.

1 But even more significant to our Hurst argument  
2 is the fact that there was absolutely no discussion in  
3 the guilty plea with regard to Mr. Bryant's  
4 Sixth Amendment right that is reportedly being waived,  
5 that he also had the right of a jury to make the  
6 findings of fact with regard to the mitigating  
7 circumstances, and then the additional Sixth Amendment  
8 right for a jury to make a decision after considering  
9 the aggravating factors and the mitigating factors,  
10 whether or not to impose the death penalty.

11 One of the reasons that I think we want to be  
12 very cautious about the record that we create, at  
13 least from the lawyers on Mr. Bryant's behalf, is  
14 because Hurst is still relatively a new decision. The  
15 courts around the country are beginning to struggle  
16 with it, and oftentimes there is sort of a lag with  
17 the trial courts and appellate courts interpreting  
18 exactly what the United States Supreme Court means.  
19 There has been some cases -- for example, in  
20 Alabama -- saying that Hurst is just a mere  
21 application of Ring and, therefore, it has no effect  
22 on its judicial override procedure. There are other  
23 cases that I have already alluded to that talk about  
24 the new element, the Hurst element of the  
25 aggravating/mitigating considerations and how those

1     interplay together.  Florida -- partly as a matter of  
2     state law, to some extent -- has applied Hurst  
3     retroactively, which gives some indication that it  
4     might be ultimately viewed as a new constitutionally  
5     binding decision.  Delaware also has looked at Hurst,  
6     and some of the justices have concluded that it is  
7     probably a new decision and have applied it  
8     retroactively.  I will acknowledge that both of those  
9     courts also had that issue turned to some extent on  
10    state law grounds, but I think it is important to note  
11    that this is still a dynamic situation and we don't  
12    know where the dust is going to settle on that.

13         Also, with the idea of where the dust is going to  
14    settle, the Court should also be aware of a case  
15    called Class versus United States.  It is a case -- if  
16    my memory of looking at the pleadings yesterday is  
17    correct -- was decided -- not decided, but the United  
18    States Supreme Court granted cert to consider that  
19    case the day before we had the last hearing in this  
20    case.  The State in their pleading had made the  
21    argument that Mr. Bryant expressly waived any right to  
22    challenge the constitutionality of South Carolina's  
23    death penalty statute.  The issue that is presented in  
24    Class is whether a guilty plea inherently waives a  
25    defendant's right to challenge the constitutionality



1 of his statute of conviction. So there is going to be  
2 the potential if Class comes out and says that the  
3 guilty plea -- the statute can still be challenged,  
4 then that is also going to be a decision that is  
5 directly contrary to the record in Mr. Bryant's case  
6 where Judge Russo did have a discussion that there was  
7 going to be a waiver of the right to challenge the  
8 constitutionality of the statute.

9 The State argues in their pleadings that a guilty  
10 plea waives all but jurisdictional challenges, and our  
11 supreme court certainly seems to have followed that  
12 line of reasoning with the conditional plea and some  
13 of the other arguments about a defendant's right to  
14 appeal. The argument that is being presented in Class  
15 has to do with the fact that you can factually admit  
16 to the violation of the law, but that does not  
17 necessarily preclude your right to challenge where the  
18 statute is unconstitutional on its face or  
19 unconstitutional as applied to that particular  
20 defendant.

21 So if the supreme court were to reverse the DC  
22 circuit in Class, then we'll have a situation with a  
23 new decision that we think also has some -- at least  
24 some interplay -- if it is not in lock step, at least  
25 interplay -- with the argument that we make with

1 regard to Hurst.

2 As I read the United States Supreme Court docket  
3 with regard to Class, you know, the cert petition has  
4 been granted. Neither party has filed a brief at this  
5 point, so it may be, you know, I would guess with the  
6 extensions already out into the summer, that we're  
7 looking for the October term of this year before that  
8 case is argued. So we wanted to call that to Your  
9 Honor's attention as part of this hearing, not  
10 necessarily as part of the Hurst argument, but as  
11 something else on the horizon that may have  
12 application to Mr. Bryant.

13 THE COURT: All right. Ms. Brown.

14 MS. BROWN: Thank you, Your Honor. I can just  
15 start with Hurst real quickly. Hurst, of course, by  
16 its own terms said it was applying Ring to a Florida  
17 statute. The Florida statute had a provision that a  
18 judge had to make certain findings in a jury trial  
19 setting; that was an issue. Now, we look at Florida  
20 and how this is being applied, which I believe I heard  
21 earlier this morning, it is being applied  
22 retroactively to Ring, because it is a Ring decision.  
23 It is a decision on the cases affecting Florida cases  
24 from Ring until Hurst. That is the only retroactivity  
25 connected with that. I think that is important

1 because Florida is the one that has the direct impact  
2 from Hurst, and they have to deal with it and had to  
3 determine it, and there is a tremendous split.

4 As we have in the order, Your Honor, you've made  
5 reference to the Mullins case that we pointed out,  
6 Mullins v. State. Since that order came out, there  
7 was another Florida case, Wright v. State, decided  
8 March 16, 2017, applying Mullins. Again, Hurst  
9 doesn't speak to waiver. It doesn't speak to a jury  
10 plea context, so it is not applicable in the least.

11 Applicant brought himself under the authority of  
12 the judge for these proceedings. The record is  
13 absolutely replete with references that his counsel  
14 explained it to him. They went through many -- I  
15 think they called it tenders of guilty plea, or  
16 something like that, many drafts in the record from  
17 the first PCR hearing. This was absolutely knowingly  
18 and intelligently entered, and that is really not a  
19 consideration in this. It was raised before in the  
20 PCR, and of course our focus is narrow, which brings  
21 me to my comments about the statute and Rule 15. In  
22 the order, you found, of course, this is a proceeding  
23 that stems from the successive application. It is not  
24 the first PCR as a matter of right.

25 I agree that the PCR act encourages amendments;

1 it certainly does. It wants everything in one action,  
2 and one appeal, just like our supreme court reaffirmed  
3 in Robinson. That is where we have the difference  
4 here. We are only proceeding on the one ground that  
5 according to the statute, Judge Cooper found it could  
6 go forward; that is it. That is why it is so narrow.

7 The order, I think, accurately reflects that you  
8 have to consider whether Rule 15 would be applicable,  
9 because we have 71.1 in our civil rules saying that we  
10 are not inconsistent. These rules are applicable. So  
11 I believe the order goes through and talks about the  
12 successive nature of the action, the proceedings under  
13 the one allowed ground. Rule 15 does not save it, and  
14 the bottom line is that Hurst is not applicable in a  
15 guilty plea setting. So we ask the motion to  
16 reconsider to be denied.

17 THE COURT: I am going to deny the motion.

18 MR. GROSE: Can I make one comment with regard to  
19 the Mullins decision?

20 THE COURT: Sure.

21 MR. GROSE: If you actually go back and look at  
22 that decision, the Florida Supreme Court noted that  
23 the Florida procedure allowed someone to plead guilty  
24 and then also have jury sentencing, which the South  
25 Carolina procedure doesn't. So it is not -- I would

1 just say it is not applicable, with that addition,  
2 because that was in response to something she brought  
3 up.

4 THE COURT: You want to prepare me a short order?

5 MS. BROWN: Yes, sir, I would be glad to.

6 MR. GROSE: Thank you, Your Honor.

7 (Whereupon, the proceedings concluded.)  
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## 1 CERTIFICATE OF REPORTER

2 State of South Carolina)

3 County of Horry )

4  
5 I, Natalie Dahl, Official Court Reporter for the  
6 State of South Carolina, do hereby certify that the  
7 foregoing is a true, accurate and complete Transcript  
8 of Record of the evidence introduced in the hearing of  
9 the above-captioned case in the Court of Common Pleas  
10 for Sumter County, South Carolina, on the 20th day of  
11 April, 2017.

12 I do further certify that I am neither of kin,  
13 counsel, nor interest to any party hereto.

14  
15 July 22, 2019

16  
17 \_\_\_\_\_  
18 Natalie Dahl, RPR

19 Court Reporter  
20  
21  
22  
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|--------------------------|---|-----------------------|
| STATE OF SOUTH CAROLINA  | ) |                       |
|                          | ) | COURT OF COMMON PLEAS |
| County of Kershaw        | ) | 2016-CP-43-828        |
|                          | ) |                       |
| STEPHEN COREY BRYANT,    | ) |                       |
|                          | ) |                       |
| APPLICANT,               | ) |                       |
|                          | ) |                       |
| vs.                      | ) | TRANSCRIPT OF RECORD  |
|                          | ) |                       |
| STATE OF SOUTH CAROLINA, | ) |                       |
|                          | ) |                       |
| RESPONDENT,              | ) |                       |

October 25, 2017  
Camden, South Carolina

BEFORE:

THE HONORABLE WILLIAM H. SEALS, JR., JUDGE.

APPEARANCES:

E. CHARLES GROSE, ESQ.  
DIANA L. HOLT, ESQ.  
Attorneys for the Applicant

SHERRIE BUTTERBAUGH, ASSISTANT ATTORNEY GENERAL  
Attorney for the State

KAREN AMBROZIAK  
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)



1 THE COURT: I think it's your motion, the State's  
2 motion; is that correct?

3 MR. GROSE: I think the first motion is our motion --

4 THE COURT: Okay.

5 MR. GROSE: -- which was the motion to extend the  
6 scheduling order, and then they filed their motion for  
7 summary judgment. I mean, we'll go in whatever order you  
8 want to go in, but I just want to make sure that was  
9 clear.

10 THE COURT: What order do you think will be most  
11 appropriate, or does it matter?

12 MS. HOLT: Your Honor, we would suggest going with  
13 the motion for summary judgment. That was presented in  
14 anticipation of the last scheduling order, and then of  
15 course, depending on what the outcome of this motion would  
16 be, we could take up rescheduling at the appropriate time.

17 THE COURT: Is that okay with you, Mr. Grose?

18 MR. GROSE: Yes, sir.

19 THE COURT: All right. I'll be glad to hear from  
20 you.

21 MS. HOLT: Your Honor, we will have Sherrie  
22 Butterbaugh present the motion for your consideration.

23 THE COURT: All right. Yes, ma'am.

24 MS. BUTTERBAUGH: May it please the Court. We are  
25 here today on the State's motion for summary judgment that

1 was filed August 15th, 2017, and it's the State's position  
2 that an evidentiary hearing in this case is not necessary  
3 on the claim of intellectual disability.

4 Even viewing the evidence in the light most favorable  
5 to the Applicant, there remains no evidence in the record  
6 before the court that the Applicant is intellectually  
7 disabled.

8 The previous proceedings, the expanded record which  
9 includes the affidavits from the doctors who fully  
10 assessed the Applicant while he was in the developmental  
11 period, which these are the doctors that were at DJJ,  
12 there just remains no intellectual disability diagnosis.

13 I think it's important that we spend a little bit of  
14 time -- because we are talking about an issue of material  
15 fact, we spend a little bit of time talking about these  
16 records at DJJ. These records were considered in all of  
17 the previous proceedings against the Applicant.

18 You have them considered during his guilty plea,  
19 again at sentencing and again at his first Post Conviction  
20 Relief action.

21 Nothing in the affidavits that were produced by  
22 Applicant in opposition to this motion disputes the record  
23 that there was no diagnosis of intellectual disability  
24 during the development period which is important here  
25 before the age of 18.

1       At DJJ, a full evaluation was done of the Applicant  
2       to assess his needs. That included appropriate treatment  
3       for him if that was necessary, and they were also looking  
4       for the possibility of intellectual disability. This was  
5       done May 9th and 10th, 1996 when the Applicant was 15  
6       years old. This was the proper time to assess the  
7       Applicant.

8       Again, this was prior to the age of 18. He was 15  
9       years old. We are not -- we were not looking back as we  
10      are trying to do now.

11      We were specific -- the doctors were specifically  
12      looking for those signs of intellectual disability, and  
13      they found nothing to indicate that that was a  
14      possibility, that diagnosis was a possibility.

15      First, you had Dr. Everhart who assessed the  
16      Applicant. He was a psychologist. His evaluation which  
17      was an interview type setting with the Applicant, we  
18      talked to him where the Applicant, Mr. Bryant,  
19      self-reported that he was in therapy, had been in therapy.

20      He had a diagnosis of ADD. Possible depression, had  
21      been treated with Prozac and Ritalin. He self-reported  
22      that he had smoked; that he had tasted beer, and that his  
23      mother occasionally drank.

24      He talked about his school history at that time, 15  
25      years old. He was in some mainstream classes which

1 included science, math, and social studies.

2 He also had some self-contained classes due to some  
3 of his ADD problems and school disruptions. When he was  
4 properly medicated, he was able to maintain grades of B's  
5 and C's.

6 He had been suspended for fighting. He repeated  
7 first grade. His mom had told him that it was because he  
8 had missed too many schools -- or school days, excuse me.  
9 His IQ was also tested using the WISC 3 which was the  
10 standard in 1996.

11 Dr. Everhart reported that he had adequate to  
12 exceptional effort and diligence on these abilities tests.  
13 This was a valid estimate of his current level of  
14 functioning.

15 His full scale standard score was a 93 which was  
16 average. His visual and motor integration which was the  
17 VMI and his reading comprehension were both at grade  
18 level, and Dr. Everhart opined that he had the  
19 intellectual capacity to finish school but that he  
20 probably needed some kind of counseling which would help  
21 him to give him that structured finish.

22 But again, nothing that Dr. Everhart found led him to  
23 believe that there was a possibility of a diagnosis of  
24 intellectual disability.

25 Dr. Gunter, who was the consulting psychiatrist at

1 DJJ, reviewed those findings, said that Applicant had no  
2 reported problems with birth, growth or early development;  
3 that there were medications he reported that he took that  
4 helped control his anger and maintain his focus.

5 She did say that he was at significant risk of  
6 developing antisocial personality disorder, and he had the  
7 demonstrated ability to have meaningful, interpersonal  
8 relationships because he talked about his girlfriend. He  
9 talked about wanting to live with his paternal aunt and  
10 uncle and work on their farm and to stay out of trouble.

11 She reviewed these intellectual -- his IQ testing and  
12 found his intellectual functioning was in the average  
13 range. The remainder of his testing which was his reading  
14 comprehension, his visual motor integration was in keeping  
15 with his IQ.

16 Again, she also found that he had the ability to  
17 finish school, but that he needed structure and  
18 supervision to do so. And nothing revealed the  
19 possibility of a diagnosis of an intellectual disability.

20 Now, both of these doctors who are experts in their  
21 field, they continued to work in clinical psychiatry and  
22 clinical psychology, juvenile justice, forensic  
23 psychiatry.

24 They reconfirmed those findings through the lens of  
25 modern standards. I think that's important to think about

1 that. They evaluated him during the developmental period.  
2 They're the only two doctors to have done so. They did a  
3 full assessment, a full evaluation, and reconfirmed their  
4 findings that there was nothing to indicate to them that  
5 he was intellectually disabled.

6 Dr. Everhart, again, all test results and  
7 interpretations were significantly above what professional  
8 psychologists would expect from someone who was  
9 intellectually disabled.

10 His IQ combined with the reading comprehension and  
11 visual motor skills and his school history indicated an  
12 average intelligence and a capacity to finish school.

13 Dr. Gunter, there was nothing to indicate  
14 intellectual disability. Nor as a psychiatrist was there  
15 anything to indicate to her that there was a learning  
16 disability or a cognitive disorder.

17 The very abilities in some of his scores -- which if  
18 you look at some of the scores, some of his vocabulary and  
19 some of his verbal scores were a little bit lower, but  
20 that was not surprising given the fact that he had been  
21 suspended, had some days out of school.

22 So that's not surprising for her to see those types  
23 of things. That is not an indication of intellectual  
24 disability. That is just a function of the fact that he  
25 had been in and out of school.

1           Some information from the DJJ staff where he kind of  
2 felt ostracized from some of his peers, that was not  
3 because of a developmental delay. That was because he had  
4 impulse control issues.

5           So again, these doctors -- why this is important,  
6 these doctors did a multidimensional review of Mr. Bryant.  
7 They went behind his IQ score of 93, and what the DSM-V  
8 tells us is that these doctors, these clinicians used  
9 their clinical training and judgment to look behind this  
10 number and to look at their intellectual functioning.

11           This was -- this assessment was done when he was 15  
12 years old. This was not litigation between the parties.  
13 This was done for his benefit. This evaluation was done  
14 to treat him, to help him, and this was done after he had  
15 been adjudicated for problems.

16           These -- this IQ score that was done when he was 15  
17 was in keeping and was consistent with his other IQ scores  
18 that were done at various times while he was also in  
19 school.

20           The first one was done while he was -- was in 1993  
21 where he scored 79. Again in 1994, an 86; and then in  
22 March of 1996 where he had a 92.

23           All of the evidence in the record before the Court is  
24 consistent and in keeping with these IQ scores. He had a  
25 low average to an average IQ, and he was not

1     intellectually disabled.

2             Even looking at I think Applicant's affidavits that  
3     they have submitted, they're fairly -- they do not create  
4     this issue of material fact.

5             Donna Schwartz-Maddox added, she is conceding she is  
6     not the one that -- who would be diagnosing him as  
7     intellectually emotionally disabled because she is a  
8     psychiatrist.

9             These factors that she discusses where it's the  
10    mother possibly drank when she was pregnant, that was  
11    something that was discussed and considered by the judge  
12    during sentencing. That's already part of the record.

13            She talked to the aunt about it. Dr. Loring talked  
14    to the mother about it and other family members about it,  
15    so these are things that were already considered in prior  
16    proceedings against the Applicant.

17            Everington's affidavit, you know, these deficits in  
18    intellectual -- or excuse me, deficits in adaptive  
19    functioning, those -- those are not inconsistent with the  
20    findings of DJJ either.

21            You have someone who -- with Dr. Everhart, he  
22    specifically noted in his report that, you know, that Mr.  
23    Bryant admitted problems with certain peers which hits  
24    with the social skills.

25            He was struggling with a milestone of adolescence,



1 development of self. That's the social skills.  
2 Conceptual which is another area of adaptive functioning,  
3 literacy, self-direction.

4 He earns money by -- he had earned money by working  
5 for his grandfather, and he had problems in school. All  
6 of these deficits that she discussed are not inconsistent,  
7 so it does not create that issue of material fact.

8 Dr. Woods, again, this idea of the practiced effect  
9 does not create an issue of material fact because the  
10 State submits that all of these tests were done a year  
11 apart except for the two that were done in '96, and those  
12 scores were almost identical.

13 So there would not be any type of practice effects at  
14 play here. So it remains the State's position that there  
15 is no material fact here. These are not competing  
16 affidavits.

17 The record is clear. There was no diagnosis of  
18 intellectual disability during the developmental period.  
19 There hasn't been -- procedurally, again, all of this was  
20 raised in the previous proceedings, so this is a  
21 successive action.

22 This is something that, you know, I think we can get  
23 to the statute of limitations where under -- considering  
24 these affidavits before you right now, you know, I think  
25 the -- I think the expanded record underscores this --

1 this plan that these could have been raised; that this  
2 claim of intellectual disability could have been raised  
3 previous to today.

4 Do you have any questions?

5 THE COURT: Not yet.

6 All right. Let me hear from you, Mr. Grose.

7 MR. GROSE: Yes, sir.

8 A lot of what you just heard has already been argued,  
9 decided, and rejected by Judge Cooper when he decided to  
10 let this application for Post Conviction Relief go  
11 forward.

12 This is not an issue of whether or not additional  
13 mitigation should have been presented in front of Judge  
14 Russo.

15 This is an issue about whether or not Mr. Bryant is  
16 eligible for the death penalty, and it does center on a  
17 determination of whether or not he has an intellectual  
18 disability, but a lot of the arguments that they just made  
19 about things that were in the record, including this very  
20 diverse range of IQ scores that were in the record, are  
21 all things that they presented to Judge Cooper, and Judge  
22 Cooper allowed this action to go forward, and he allowed  
23 to it go forward in such a way that we would -- following  
24 the procedure the Supreme Court said, Your Honor was  
25 appointed, and -- and we've had funding for experts to be

1 able to look into this.

2 Also, most everything that they talked about goes to  
3 the weight of the evidence. The standard is pretty clear  
4 at this point whether you're applying a standard under the  
5 statute or you're applying the summary judgment standard.  
6 Everything has to be looked at in a light most favorable  
7 to Mr. Bryant.

8 Critically here is the fact that we're not done with  
9 the evaluation. The scheduling order always contemplated  
10 that it could be amended if it was necessary.

11 In fact, Your Honor's initial inclination was to  
12 extend it without a hearing until they said that they were  
13 going to bring this motion, and then we, of course,  
14 scheduled the hearing.

15 The evaluation that was done at DJJ was tainted  
16 evaluation and Dr. Woods talks about that at length in his  
17 affidavit.

18 He talks about the practice effect, and he talks  
19 about information that's specific to the WISC-3 which was  
20 the test that was administered at the time, the one that  
21 was the standard of care to be administered at the time.

22 What we're looking at and what Dr. Woods is looking  
23 at and what Dr. Everington is looking at, to us it appears  
24 that the greater weight of the evidence actually falls in  
25 favor of diagnosing Mr. Bryant with an intellectual

1 disability.

2 George Woods, you know, indicates that additional  
3 neuropsychological testing needs to be done. We have  
4 started that, but our expert on that has to come back a  
5 second time and be able to -- to finish that.

6 The information that Dr. Everington has come up with  
7 certainly creates issues about adaptability that was  
8 present during the developmental period. And one thing I  
9 didn't really anticipate, they would spend some time  
10 talking about some of the school records today.

11 We actually have one, if not two, affidavits from  
12 school teachers talking about how the administration had  
13 put pressure on them to pass people along through school.

14 Those affidavits are in the record in the federal  
15 habeas case, and Ms. Holt and I were just talking about  
16 they might not be in the record in front of Your Honor.  
17 So we can get those to you by email today so that you'll  
18 -- so that you'll be able to look at them.

19 But of course, the State has had those affidavits for  
20 probably more than a year when they were filed with -- in  
21 that action, and those affidavits specifically stated that  
22 Mr. Bryant wasn't able to do, you know, fifth grade work.  
23 So we can get those to Your Honor.

24 We think the issue before the Court -- we think the  
25 State summary judgment motion is premature. As we said,

1 you know, based on Judge Cooper's ruling where a lot of  
2 these same arguments were made, he ruled that this case  
3 would be able to go forward.

4 Once the case goes forward, you know, that kicks in,  
5 you know, appointment of counsel. I think that Judge  
6 Cooper initially appointed me and Ms. Holt and then you  
7 reaffirmed that appointment.

8 Under our rules for Post Conviction Relief in South  
9 Carolina, particularly in capital cases, our system  
10 provides for funding mechanism.

11 Our Rule 71.1 talks about there has to be sufficient  
12 time to confer with the client. I don't think that means  
13 just to huddle up in a corner and confer with the client.  
14 I think that means to do the things that are necessary to  
15 investigate the claim.

16 Just this summer in the Mangel (phonetic) case, our  
17 Supreme Court reaffirmed the ideal that the Rules of Civil  
18 Procedure in our Post Conviction proceedings are meant to  
19 be interpreted in a way by the circuit courts that allow  
20 for the development of the claims prior to an evidentiary  
21 hearing.

22 Mr. Mangel's problem was he didn't do the things  
23 prior the hearing to do that. That's why he lost, but  
24 they reaffirmed that procedure.

25 And if you look just to 2016, and you look at the

1 Winkler case -- and we've talked about the Winkler case in  
2 some of the other hearings, but when you look at the  
3 Winkler case when that got to the Supreme Court, they  
4 ruled that, you know, there wasn't the access to the  
5 funding and the expert resources in order to develop the  
6 claim.

7 Now, granted it was a different type of claim than  
8 intellectual disability, but it still had to do with the  
9 type of claims that are unique to capital cases.

10 Winkler is in an ironic way sort of a sister case, a  
11 brother case of Corey Bryant's case in that it was a  
12 period of time when for whatever reason our Supreme Court  
13 was experimenting with scheduling orders from that level  
14 to try to expedite the proceedings. Those scheduling  
15 orders happened in both Mr. Winkler's case and  
16 Mr. Bryant's case as well as some other cases.

17 What we have -- what we have kind of determined --  
18 unfortunately but ironically, we determined that that  
19 procedure of trying to expedite things did not work.

20 I mean, Mr. Winkler's case is now back in the circuit  
21 court for him to be able to continue to investigate the  
22 claim that he didn't have an opportunity to do the first  
23 time.

24 Mr. Bryant's PCR was rushed, and now we're back, you  
25 know, in the circuit court pursuant to Judge Cooper's

1 order with an opportunity to investigate a claim that  
2 wasn't investigated the first time.

3 So we think procedurally you shouldn't even get to  
4 their motion today; that we should just be allowed more  
5 time to develop this, and I think that once we get through  
6 the process, it appears that we're moving in a direction  
7 where our experts will be able to make that diagnosis of  
8 intellectual disability, but as Dr. Woods point out in his  
9 affidavit, we needed more information.

10 This is important because the United States Supreme  
11 Court in the case of Hall vs. Florida has talked about  
12 need for the Court's reviewing Atkins claims to apply the  
13 scientifically reliable procedures following a thorough  
14 and scientifically reliable investigation, and that's all  
15 we're asking you to do.

16 We're not asking you to rule that he has intellectual  
17 disabilities today. We're asking you to give us the  
18 opportunity to complete our investigation and to present  
19 that information to Your Honor so that you could make, you  
20 know, a decision, you know, at that particular time.

21 And I want to go back to one of the things that they  
22 said because this is something that can be kind of  
23 misleading sometimes. There's a misconception out there  
24 that you can't have intellectual disabilities unless the  
25 diagnosis is made in childhood.

1       The criteria is actually that you have to have the,  
2       you know, the deficits in intellectual functioning. You  
3       have to have the adaptive deficits, and it has to be  
4       present during the developmental period.

5       Some people are diagnosed with that during their  
6       teenage years. Some people are not. It doesn't mean that  
7       they didn't have it in their teenage years.

8       Also, some of the things that they're talking about,  
9       you know, as far as, you know, Mr. Bryant's ability to  
10      form a relationship with a girlfriend, people with  
11      intellectual disabilities have relationships. They have  
12      children.

13      People with intellectual disabilities have jobs. The  
14      only job that they pointed to is being able to make money  
15      working for your grandfather which is -- in and of itself  
16      might be evidence of an intellectual disability.

17      The point is a lot of this goes to the weight of the  
18      evidence. Some of it goes to stereotypes about  
19      intellectual disabilities that have been debunked, and  
20      ultimately this is -- is premature, and we would ask  
21      consistent with Judge Cooper's order, consistent with Rule  
22      71.1, consistent with our capital PCR statute, consistent  
23      with Winkler, consistent with Mangel that you amend the  
24      scheduling order and allow us to have time to continue  
25      developing these claims so that we can present them to



1 Your Honor so that you can make the findings of facts and  
2 determine what weight to assign to the evidence.

3 THE COURT: All right. Would you like to briefly  
4 respond to that?

5 MS. BUTTERBAUGH: Yes, Your Honor. I think the first  
6 thing I'd like to respond is that Winkler and Mangel --  
7 first, that was -- they're in their first PCR.

8 So I think when he is saying that Mr. Bryant's first  
9 PCR was rushed and that's why we're here on a successive  
10 PCR, I don't know that that's necessarily a finding that  
11 Judge Cooper had.

12 So I think under McCoy, because we have had an  
13 expanded record and we have had the opportunity to now  
14 submit affidavits to you announce the affidavits to you on  
15 this motion for summary judgment.

16 I think under McCoy which says that a PCR claim,  
17 which is what we're here on, the successive action may  
18 ultimately prove to be untimely successive or perhaps  
19 unsuccessful on the merits following fact development.

20 That's ultimately what the State is arguing; that  
21 after this latest fact development, after these affidavits  
22 have been submitted to you that it's ultimately proving to  
23 be a successive action and outside of the statute of  
24 limitations because this was a claim that could have been  
25 brought, probably brought, during sentencing.

1           It was something that could have been brought in his  
2 first PCR action and was not. So that's ultimately, I  
3 think, what we're kind of -- what we're arguing to bottom  
4 line it for you, I think, because that's what the State's  
5 argument is.

6           THE COURT: I'll tell you what. I'm going to take it  
7 under advisement, at least for a little while.

8           Go ahead and let me hear from you in regards to this  
9 case.

10          MR. GROSE: I was just going to say even under --

11          MS. HOLT: In regards to scheduling order.

12          MR. GROSE: Okay. In regards to scheduling, we had  
13 submitted some time frames in our motion. We had things  
14 scheduled for experts to come back in and do some more  
15 work, and we can keep Your Honor posted through status  
16 reports if you want on how -- how that's going.

17          I think we had asked to extend -- re-extend the  
18 motion deadline to February, and I think by the first of  
19 the year we'll -- we'll know where we are, and if anything  
20 is left to be done, we'll be able to tell you what that  
21 is.

22          THE COURT: All right, sir.

23          Any reply to that?

24          MS. HOLT: May I speak, Your Honor?

25          THE COURT: Yes, please.

1 MS. HOLT: Your Honor, we would disagree with the  
2 schedule that's put forth. We would move to expedite.  
3 This has already been before the court for an extended  
4 period of time.

5 We had a federal habeas that is stayed pending  
6 resolution of this particular state action, so we have  
7 several courts that are waiting for us, you're waiting for  
8 us, Federal Court is waiting for us.

9 We do believe this is successive. I think that  
10 everything that you've heard today has proven that it's  
11 successive. It's also beyond statute of limitations.

12 That's going to be a definitive ruling, so we would  
13 of course, like to have that ruling before we could speak  
14 intelligently about a schedule, but we would request an  
15 expedited schedule if it does go to that, Your Honor, to  
16 allow us time to finish gathering this information.

17 It looks pretty complete at this point, as Your Honor  
18 has already received from opposing counsel affidavits.  
19 That work has already been done, and we of course, have  
20 been here for quite a long time in circuit court.

21 So I just wanted to put on the record depending on  
22 your court's -- the Court ruling today, we would most  
23 likely do a motion to expedite so perhaps we could finish  
24 at least by the end of the year.

25 THE COURT: All right. Is the only thing that you're

1 waiting for is to hear from Dr. Woods as to what he needs  
2 or she needs?

3 MR. GROSE: It's a -- a he.

4 THE COURT: He.

5 MR. GROSE: We -- he is waiting in part for more  
6 neuropsychological testing. Some of that has been  
7 started. We have that scheduled for him to come back.

8 We -- our expert had a death in the family, and we  
9 were working to get him back in. I'd have to check to see  
10 his schedule, but we can get him back in.

11 Dr. Everington, as she set forth in her affidavit,  
12 also needs to do some additional work. We also have  
13 Dr. Reschly from Vanderbilt who is an expert, and how we  
14 have used him in the past in the -- he is the one that's  
15 schedule to come, I think.

16 We've been talking to -- we were trying to get him  
17 scheduled. He normally comes in and follows behind  
18 Dr. Everington after she has identified some of the  
19 witnesses and interviews them again. He'll probably need  
20 to make two visits to South Carolina, and he will be doing  
21 that soon.

22 You know, with regard to scheduling, you know,  
23 unfortunately this is not the only case I have. I wish it  
24 was.

25 You know, I have got, you know, three jury trials

1 scheduled between now and February. A lot of this can go  
2 on, but if they're asking to get an evidentiary hearing in  
3 by the end of year, I just don't see how it can happen  
4 with the jury trial scheduled.

5 THE COURT: All right. Would you like to respond?

6 MS. HOLT: Well, Your Honor, it sounds like a lot of  
7 it depends on whether we can get people in, and I think  
8 that's going to depend on facts as they develop before the  
9 end of year, but our position would remain that we should  
10 be able to finish this by the end of the year.

11 THE COURT: All right. Let me think on it. I'll let  
12 you know something.

13 MR. GROSE: All right. Thank you, Judge.

14 MS. HOLT: Thank you.

15 (Whereupon, the proceedings were concluded.)  
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CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA       )  
                                          )  
COUNTY OF KERSHAW            )

I, Karen Ambroziak, Official Court Reporter for the  
5th Judicial Circuit of the State of South Carolina, do  
hereby certify that the foregoing is a true, accurate and  
complete Transcript of Record of the proceedings had and  
evidence introduced in the trial of the captioned case,  
relative to appeal, in the Court of Common Pleas for  
Kershaw County, South Carolina, on the 25th day of  
October, 2017.

May 8, 2019

Karen Ambroziak

Karen Ambroziak, RPR  
Circuit Court Reporter

STATE OF SOUTH CAROLINA)

**TRANSCRIPT OF RECORD**

COUNTY OF HORRY ) CASE NO.:2016-GS-43-00828

June 12, 2018

**BEFORE:** The Honorable William Seals

STEPHEN COREY BRYANT,

Applicant/Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

**APPEARANCES:**

E. Charles Grose, Jr., Esq.

Diana Holt, Esq.

For the Applicant/Petitioner.

Melody Brown, Esq.

For the Respondent.

Court Reporter:

Natalie Dahl, RPR

## P-R-O-C-E-E-D-I-N-G-S

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THE COURT: We have two motions. Who would like to go first?

MR. GROSE: We filed ours first, that is usually how I go, unless you have another preference.

THE COURT: That's fine with me. I do not. If you will state your names for the record.

MR. GROSE: My name is Charles Grose and Diana Holt, and I'll give you a card after the hearing. All this time sitting here and I didn't think about it.

THE COURT: And he represents Stephen Corey Bryant.

MR. GROSE: The first motion that was filed is Mr. Bryant's motion to amend his PCR application. And from a procedural standpoint, I know that Your Honor is aware that you have come into this case several stages down the line, and as I know that they are going to point out, we had a hearing before Your Honor was assigned in front of Judge Cooper where he authorized us to proceed to investigate whether or not Mr. Bryant has an intellectual disability under the Atkins and Hall and Franklin v. Maynard line of cases, and we did that. Under Hall, of course -- Hall versus Florida -- you have to apply well-established scientific procedures and standards in order to



1 determine whether or not someone has an intellectual  
2 disability. An intellectual disability is just one  
3 type of a developmental disability. There are other  
4 developmental disabilities that significantly impairs  
5 someone. Your Honor should have -- it was attached to  
6 our proposed amended application and motion, you  
7 should have Dr. George Woods' report from May 8th of  
8 2018 where, you know, Dr. Wood sort of pulled  
9 everything together that we've done through a pretty  
10 thorough investigation into the intellectual  
11 disabilities. I know on Page 1 he says that  
12 Mr. Bryant -- his IQ scores are marginally above those  
13 required to meet the criteria for intellectual  
14 disability, but he goes on to talk about all of the  
15 evidence of Mr. Bryant's deficits and adaptive  
16 functioning, which is a component of an intellectual  
17 disability diagnosis. He also goes through and pulls  
18 together what our other experts have done with regard  
19 to Fetal Alcohol Syndrome. Fetal Alcohol Syndrome or  
20 exposure to alcohol prior to birth can be something  
21 that leads to an intellectual disability. It also can  
22 be something that leads to different types of -- the  
23 alcohol exposure can lead to different types of  
24 developmental exposure, in this case, Fetal Alcohol  
25 Syndrome.

1 I would like to call Your Honor's attention to  
2 Section 44-20-30 of the South Carolina Code. If I can  
3 hand this up?

4 THE COURT: Yes, sir.

5 MR. GROSE: This is the portion of our code of  
6 laws that deals with the Department of Disabilities  
7 and Special Needs and how, as a society, we care for  
8 people who have developmental disabilities. You  
9 probably noticed in Dr. Woods' report he referred to  
10 practices and standards of care in other states,  
11 including California, where he has a clinical  
12 practice. The section of the California Code of Laws  
13 that I believe he was referring to is Section 45-12  
14 that deals with their developmental disabilities.  
15 Every state seems to have a statute -- at least all  
16 the ones I have looked at seems to have statutes that  
17 deal with developmental disabilities; the federal  
18 government does as well.

19 When you look at 44-20-30, Paragraph 12 provides  
20 the definition of intellectual disability and  
21 provides, essentially, the same definition that  
22 appears in the portion of the code dealing with  
23 capital punishment in South Carolina. But then you go  
24 to Paragraph 15 and it deals with related  
25 disabilities, and it says, a related disability is a

1 severe, chronic condition found to be closely related  
2 to intellectual disability or to require treatment  
3 similar to that required for persons with intellectual  
4 disability and must meet the following conditions.  
5 The first condition, Subparagraph A, lists some  
6 diagnoses that are not applicable, and then it says,  
7 Or any other condition other than mental illness found  
8 to be closely related to intellectual disability  
9 because this condition results in impairment of  
10 general intellectual functioning or adaptive behavior  
11 similar to that of purposes with intellectual  
12 disability and requires treatment or services similar  
13 to those required for these persons.

14 Subsection B is a requirement that it manifests  
15 before age 22. Subsection C is likely to condition  
16 indefinitely. D results in substantial functional  
17 limits in three or more of the following areas of  
18 major life activity: Self-care, understanding the use  
19 of language, learning, mobility, self-direction and  
20 capacity for independent living.

21 I think Dr. Wood's report covers the criteria  
22 listed in Section 15 of the code, but in order to make  
23 certain of that, I corresponded with him in  
24 anticipation of this hearing, provided him a copy of  
25 this section and he did confirm that Corey meets the

1 criteria -- Corey Bryant -- for a related disability  
2 under this section of the code.

3 Why this is important -- I know Your Honor is  
4 familiar with the Atkins lines of cases because we've  
5 discussed those at other hearings, and that is  
6 certainly why we are here today. The Atkins line of  
7 cases is of course very closely associated with the  
8 Roper line of cases beginning with Roper v. Simmons  
9 where a juvenile is unconstitutional -- it is  
10 unconstitutional for a juvenile to receive a death  
11 penalty. And then Graham and Miller and our case in  
12 South Carolina of Aiken versus Buyers, which I'm sure  
13 you are familiar with those because of all of the  
14 Aiken v. Buyers resentencing cases. Those two threads  
15 when you look at the United States Supreme Court  
16 jurisprudence are closely aligned, and sometimes I try  
17 to oversimplify things to help me understand it. What  
18 it really comes down to is our courts in South  
19 Carolina and the United States Supreme Court have told  
20 us that what happens in childhood matters. It makes a  
21 huge difference.

22 In the Roper, Miller, Aiken line of cases, you  
23 cannot impose the death penalty or life sentence  
24 because the child is still in the developmental period  
25 going certainly past age 18 and still into the 20's,

1 but someone who commits a crime under age 18, because  
2 they are a child and still developing, has a  
3 tremendous capacity for rehabilitation.

4 The Atkins line of cases also deals with the  
5 developmental period. You know, essentially, what it  
6 is saying is that something has happened to this child  
7 prior to age 18. That is not the child's fault. It  
8 is something that they carry with them for the rest of  
9 their life and, therefore, that is the type of  
10 mitigation, type of condition that makes it  
11 unconstitutional to execute that person for even the  
12 most horrible of crimes.

13 Well, Fetal Alcohol Syndrome is just like an  
14 intellectual disability in the sense that it has to  
15 not only occur in the developmental period, but it  
16 begins prior to birth. Our society has debated, you  
17 know, when life begins and all of that, but everybody  
18 agrees that what happens prior to birth is important.  
19 I think everybody is pro-child in the sense that what  
20 happens to that child before birth is not that child's  
21 responsibility. With Fetal Alcohol Syndrome, that  
22 affects that person's ability to function in life and  
23 will continue forever and ever and ever, and like an  
24 intellectual disability, it is not their fault.

25 An intellectual disability is one type of

1 development disability, and Fetal Alcohol Syndrome is  
2 another type of development disability. From the  
3 medical standpoint -- and you have Dr. Woods' report.  
4 Dr. Woods says that because of Corey's adaptive  
5 functioning that is similar to an intellectual  
6 disability that if he was seeing Corey in his clinical  
7 practice, he would have to treat him with the same  
8 standard of care that he does for an intellectual  
9 disability patient.

10 In some ways, what has happened to Corey's brain,  
11 and his brain may be more damaged based upon the  
12 evidence we discovered than a lot of people who have  
13 an intellectual disability. Dr. Woods, towards the  
14 end of his report, talks -- begins to talk about how  
15 Corey suffering from Fetal Alcohol Syndrome, how that  
16 would affect and impair his ability and would also  
17 affect how he interpreted social clues and  
18 interactions with other people that we believe --  
19 sadly -- but we believe played an important role in  
20 the crimes that he committed.

21 You also have -- you should have two affidavits  
22 from Dr. Donna Maddox, formerly Dr. Swartz-Watt, as  
23 well as her trial testimony in this case. At trial,  
24 she did make a passing reference to the fact that  
25 there was reason to believe that Corey might have been

1 exposed to alcohol before he was born, but she did not  
2 make a diagnosis of Fetal Alcohol Syndrome. She  
3 didn't have all of the information she needed for  
4 that. When you look at the transcript at the end, the  
5 only diagnosis she made was Post-traumatic Stress  
6 Disorder.

7 The first affidavit you should have from her was  
8 attached to the post-conviction relief application  
9 that started the state court proceedings where she  
10 said the intellectual disability and Fetal Alcohol  
11 Syndrome should be investigated based on information  
12 that was provided to her. She's given another  
13 affidavit. It is not notarized, but I'll get a  
14 notarized copy for the file. She and her husband, I  
15 believe, were traveling this week. But, you know,  
16 that affidavit does state that, you know, what  
17 Dr. Woods has presented is different -- a different  
18 diagnosis than what she made at trial, and if she had  
19 the same information that is now available, she, too,  
20 would have diagnosed Corey with having this  
21 developmental disorder.

22 So what does this all mean? We have two claims  
23 that we want to add to Corey's application for  
24 post-conviction relief. The first one is we believe  
25 that these related disabilities, and in particular,

1 Fetal Alcohol Syndrome, are the type of conditions  
2 that is consistent with the Atkins line of cases,  
3 consistent with the Roper line of cases that would  
4 make it unconstitutional to impose the death penalty  
5 on someone with Fetal Alcohol Syndrome.

6 If Your Honor disagrees with that, we also  
7 believe that this is the type of information that a  
8 sentencing authority, whether it be a trial judge or a  
9 jury, because we still believe Corey should have been  
10 entitled to a jury trial in this case, that this is  
11 information that the sentencers should be entitled to  
12 consider before imposing the death penalty. We  
13 believe that our post-conviction procedure statute  
14 allows the Court to consider information that has not  
15 been considered before that, in fairness, you ought to  
16 be considered.

17 I anticipate two things from the State, perhaps  
18 more. But, one, they will say if this is something he  
19 had before birth, that's something that could have  
20 been presented in the first trial. Two, they probably  
21 will offer a narrow interpretation of the Robertson  
22 case law that has come out in the last couple of  
23 years. I think Your Honor has to reject both of  
24 those, and here is why. Under our post-conviction  
25 jurisprudence, including Robertson, we don't hold the



1 applicant to having identify something that is outside  
2 of their knowledge and expertise to do it. In  
3 Robertson, while they say we are not going to open a  
4 new category for state courts to consider Martinez  
5 claims, Robertson did get a hearing on his claim as to  
6 whether or not his lawyers were qualified or not  
7 qualified to represent him in post-conviction. That  
8 is something that should have been known, should have  
9 been discovered when those lawyers were appointed, but  
10 you couldn't hold Mr. Robertson to that standard  
11 because he is not a lawyer and didn't have the  
12 knowledge to do that.

13 It is the same with the Atkins line of cases and  
14 Fetal Alcohol Syndrome. This is a condition that  
15 Corey had. It is not his fault that he had it. It is  
16 not easy to discover. It requires a very extensive  
17 social history investigation and medical examinations  
18 and diagnosis in order to get to it. And it is not  
19 appropriate to hold him to the standard that he should  
20 have known that when it is, in fact, you know, all of  
21 the lawyers that have gone before those of us who  
22 represent him now that should have found it and  
23 discovered all of this.

24 Again, it is in a very unique category of cases  
25 that raise the constitutional prohibition against

1 imposing the death penalty. These cases are  
2 different, and we want to get it right. That is why we  
3 believe we should be allowed to amend the application  
4 and proceed on these two claims. Thank you.

5 THE COURT: Response?

6 MS. BROWN: May it please the Court. Your Honor,  
7 we are here on two motions, and some of what I say,  
8 some of these comments, actually go to my motion for  
9 summary judgment and response in opposition to the  
10 motion to amend. The motion to amend, Your Honor, is  
11 for the amendment to add a different exemption than  
12 the exemption that was pursued, and also to make some  
13 type of hybrid argument for  
14 PCR-counsel-ineffective-mitigation-wasn't-heard,  
15 something along those lines.

16 Your Honor, to respond -- actually, to present  
17 our motion for summary judgment and to respond to  
18 motion to amend, I want to go back a little bit to  
19 give us a little context so I can refer back to that  
20 context within our conversation today.

21 This is a 2008 plea at the beginning of the  
22 criminal proceedings. Atkins was decided in June of  
23 2002. Our case law Franklin decided in 2003. We're  
24 talking about an exemption that existed prior to the  
25 entry of the initial plea and the sentence. There is

1 a 2011 PCR, 2014 PCR appeal. Applicant has already  
2 had his full round of state remedies and he came back  
3 seeking successive applications.

4 Judge Cooper, as we heard today, allowed  
5 Applicant, over our objection at the time of the June  
6 hearing and the initial hearing in this case, to go  
7 forward on one portion of what was alleged, and that  
8 was an Atkins claim. An Atkins claim is a claim of  
9 mental retardation now known as intellectual  
10 disability. It is not a group of conditions. It is a  
11 specific condition, mental retardation now known as  
12 intellectual disability. What is important is not  
13 just that July 13, 2016 order by Judge Cooper saying  
14 you can go forward on that distinct and limited claim,  
15 but it is also the companion case that Judge Cooper  
16 also heard. By order of July 7, 2016, Judge Cooper  
17 granted our motion to dismiss on the accompanying  
18 ineffective assistance of counsel claims, failure to  
19 properly investigate mitigation, failure to properly  
20 present, and there is other claims. For our purposes,  
21 I'm going to concentrate on those two claims.

22 That separate action was appealed, and that  
23 appeal was denied. Supreme court found there was no  
24 arguable basis for making the argument that the  
25 procedural bars were improperly applied. No arguable

1 basis to go forward on the appeal.

2 Now what we have here with this motion to amend  
3 is sort of backtracking to those allegations that are  
4 already found to be time barred and successive. By  
5 your order, Your Honor, of March 13, 2017, you  
6 recognized narrowness of this action and denied  
7 another amendment. Again, it is a very specific  
8 Atkins claim, very specific, very limited.

9 So, Your Honor, we made another motion for  
10 summary judgment earlier and we did that on the  
11 record, this is what happened, there was testimony at  
12 the plea, not mentally retarded. We had a very  
13 unusual situation where a capital defendant was  
14 actually considered -- his mental functioning  
15 considered prior to the age of 18. Two doctors  
16 confirmed that he did not meet the criteria for that  
17 specific diagnosis, intellectual disability, formerly  
18 known as mental retardation. We moved for summary  
19 judgment and that was denied, Your Honor, because, as  
20 I understand it, there was still investigation  
21 ongoing.

22 So now we came to the point of time where a  
23 report has been submitted to you. There is an  
24 opinion, and that opinion hasn't been accepted, tested  
25 or found to be credible, but we do know this from it.

1 Even if it is true -- even if it is true, it proves  
2 our point that there is no evidence, and still no  
3 evidence today, of a diagnosis of intellectual  
4 disability. That, Your Honor, gets us to the point  
5 where there is no issue of material fact. The very  
6 limited function of this particular proceeding has  
7 been met, and that is why we move again for summary  
8 judgment.

9 I do want to put some things on the record  
10 because we were talking earlier a little bit about the  
11 DDSM 2430 that was handed up to you. There was no  
12 argument that this somehow flows into an Atkins  
13 analysis. It is a statute; I admit that. It does say  
14 it was amended over time. I don't know what was  
15 amended, when, where or anything like that. But that  
16 is not what we need to go to. What we need to go to  
17 is is this gentleman, the Applicant, an intellectually  
18 disabled, and the doctors agree, he cannot meet the  
19 criteria; therefore, we are entitled to summary  
20 judgment. We are entitled to summary judgment not  
21 only because he can't satisfy the one narrow issue he  
22 was allowed to go forward on, but also because these  
23 other issues are time barred and successive.

24 I would like to point out that 17-27-90 is a  
25 successive limitation. It starts out with all grounds

1 that would otherwise be available under this chapter  
2 must be raised at the proper time, in the proper form.  
3 All grounds. So there is a limitation. It is not  
4 simply that it would be cognizable under the general  
5 statute. You have to raise it timely, and you have  
6 one opportunity to present any issues that you wish in  
7 post-conviction relief. We are past that time. There  
8 has been no due process issue, no denial of process.  
9 He's had his opportunity. He's been in state court.  
10 State has afforded him counsel. State has afforded  
11 him appeals. So there is no problem with applying the  
12 procedural bar.

13 I want to take a moment to talk about procedural  
14 bars in general. Procedural bars bring balance to  
15 this process. They focus litigation. It is fairness.  
16 It is not simply slamming the door shut on an issue.  
17 It is fairness, balance, bringing finality to some of  
18 the proceedings. That finality is incredibly  
19 important, not only for the sovereign State of South  
20 Carolina to punish crimes, but for victims waiting for  
21 justice. So procedural bars are not simply against an  
22 applicant. Procedural bars uphold the system, and  
23 that is what we're asking this Court to do, to apply  
24 these procedural bars.

25 Your Honor, he, himself, also wants to point

1 out -- I believe that Applicant's counsel pointed to  
2 some of the comments made in the plea sentencing  
3 testimony from Dr. Swartz-Watt. I went back and  
4 looked at that before we came in to argue. There are  
5 a couple of things sort of to underscore. It shows  
6 the difference in how this hasn't been developed.  
7 What I would like the Court to take away from the  
8 conversation is that we're not saying that this is an  
9 absolute condition and that this is an absolute issue  
10 that could be presented. It is not. The only thing  
11 we're saying with this report is that it shows that  
12 there is not an issue of material fact.

13 Consider that on Attachment 6 of our motion to  
14 dismiss -- this is also the Appendix Page 837 --  
15 Dr. Swartz-Watt -- now Dr. Maddox -- said there is no  
16 organic brain damage. She said, quote, A perfectly  
17 normal neurological exam, end of quote. She said she  
18 looked into it; it wasn't there. What we have is a  
19 little bit of contest in the evidence before you, but  
20 on a point that doesn't matter. The point that does  
21 matter is that there is no diagnosis of intellectual  
22 disability. We all agree. This is subject to summary  
23 dismissal, and we ask for judgment to be entered in  
24 our favor on the procedural bars specifically, and the  
25 lack of evidence on the one narrow issue, which he

1 could have gone forward according to Judge Cooper's  
2 order. Thank you, Your Honor.

3 THE COURT: All right. Yes, sir.

4 MR. GROSE: On the issue of finality, you know,  
5 Mr. Bryant has been convicted of these crimes, and to  
6 the extent that those convictions are still being  
7 challenged in federal court, we've said before -- and  
8 we would say again -- that we can bring finality to  
9 this almost immediately if Mr. Bryant was resentenced  
10 to life in prison without the possibility of parole.  
11 The other challenges in federal court would go away.  
12 That has been our position, really, since we've come  
13 back into the state court proceedings. So if that is  
14 the finality that they seek, we can give that to them.

15 But on the issues of procedural bars, there is a  
16 due process issue of fundamental fairness here,  
17 because while the general rule is one application for  
18 post-conviction relief present all claims and that is  
19 your only opportunity, there are a number of  
20 exceptions to that rule, and one of those exceptions  
21 is the discovery rule. I think that the discovery  
22 rule for a plaintiff in a civil case and for someone  
23 who has been convicted and sentenced in criminal court  
24 rises to a due process issue as far as access to the  
25 courts. This is undeniably something that was not



1 known until we completed this evaluation. So under  
2 the discovery rule which rises to due process, and  
3 under the discovery rule which has been recognized as  
4 an exemption to the procedural bars and  
5 post-conviction, and under the PCR statute that allows  
6 Your Honor to consider matters that should be  
7 considered that are new and under fundamental  
8 fairness, we believe we get passed those procedural  
9 bars and are allowed to present this.

10 They did in their response make a comment that  
11 they had not had opportunity an to test Dr. Woods'  
12 reports and conclusions and the opinions of the other  
13 expert that -- experts that Dr. Woods relied on in  
14 reaching those. That is, in fact, what we're asking  
15 for. At this point, Your Honor has more information  
16 before you than any other judge that has considered  
17 Mr. Bryant's case with regard to his functioning,  
18 deficits and his adaptability and what is going on  
19 with him that affects his ability to live a life like  
20 the rest of us and had a role in these unfortunate  
21 crimes.

22 If you give us what we're asking for, which is an  
23 amended application, we then will be in a position  
24 where we can give you both -- both sides can give you  
25 the information that you need to evaluate Dr. Woods'

1 opinion. But for the purpose of this motion, as they  
2 did in their pleading and in their argument, we  
3 believe you have to accept Dr. Woods' conclusions as  
4 true for determining whether or not the discovery rule  
5 applies and whether or not the amendment is proper.

6 As far as the section of the South Carolina code  
7 that we cited, 44-20-30, and Subparts 12 and 15,  
8 regarding intellectual disability and related  
9 disability, they indicated that did not go into an  
10 Atkins claim, and if that is how they interpreted it,  
11 maybe I didn't articulate that well. I think that  
12 this statute -- and other statutes like it, from a  
13 federal government and other states -- represent a  
14 national consensus that people with developmental  
15 disabilities are treated differently under our capital  
16 punishment scheme than anyone else that doesn't have  
17 those developmental disabilities. I think it  
18 represents a national consensus, not only that  
19 people with an intellectual disability are entitled to  
20 that, but also people with relative disabilities are  
21 entitled to it. This is something that has been  
22 evolving for decades, if not longer. While they point  
23 out that Atkins was a very narrow holding, so was  
24 Roper. When Roper was decided, you could say that  
25 just applies to children, not to people who have

1 developmental disorder before they turned 18 years of  
2 age. As we know, the appellate courts decide just the  
3 issue that is in front of them. So when you look at  
4 what has been evolving with regard to developments and  
5 science and medicine and the consensus that developed  
6 there, the law naturally lags a little bit behind  
7 science and medicine because they have to figure out  
8 things before we can present that in the courtroom to  
9 make legal decisions about and rules of law.

10 While Atkins only applied to intellectual  
11 disabilities, the reasoning for extending it to Fetal  
12 Alcohol Syndrome Disorder is the same reasoning that  
13 applied in Atkins, and maybe even a little bit more,  
14 because with an intellectual disability, that can be  
15 something that develops after birth. Fetal Alcohol  
16 Syndrome is something that starts before birth, in  
17 utero. So when you look at it from that perspective,  
18 what we're asking for, as far as a bar to capital  
19 punishment for Fetal Alcohol Syndrome, is a natural  
20 extension or evolution of the Roper and Atkins line of  
21 cases and is certainly something that should be  
22 presented.

23 We can sit here and nitpick some of  
24 Dr. Swartz-Watt's testimony, but the bottom line is  
25 that she said on two occasions that there was

1 information that I did not have available to me that  
2 should be investigated and information that, had I  
3 known, would have affected my opinion. Certainly, she  
4 would be a witness and could testify at the hearing  
5 that we're asking Your Honor to allow us to have. We  
6 can put all of that on the record and you will then  
7 have, for the first time in this litigation, all of  
8 the information that is relevant to make an  
9 individualized determination as to what Corey Bryant's  
10 sentence should be for these horrible crimes.

11 THE COURT: Last word, if you would like to have  
12 it.

13 MS. BROWN: Thank you. The discovery rule was  
14 mentioned. I would like to point out 17-27-45(c),  
15 that it is not just discovery of the facts, it is the  
16 one year after the date when the facts could have been  
17 ascertained by the exercise of reasonable diligence.  
18 So we're right back to the procedural bars for the  
19 timing and failure to produce any information or make  
20 allegations in the prior PCR proceeding.

21 Also, 17-27-90, the Court must find that the  
22 Applicant has produced sufficient reason why this  
23 claim was not presented before. Again, we have run  
24 into the same problem that we originally discussed,  
25 and that is that Judge Cooper denied the ability to go

1 forward on ineffective assistance of counsel on  
2 investigation and presentation. It was denied. It  
3 was appealed, and that too was final.

4 So what we have now is a request for you to  
5 absolve this Applicant of the process and absolve him  
6 of his burden of proof. If this was new material that  
7 otherwise would not fit into the PCR statute under  
8 State v. South, the capital case, he would to show the  
9 Caskey factors, but no mention of that. It's because  
10 we can't get over from the PCR structure. The PCR  
11 structure is there, again, to make sure that  
12 everything is marshaled at one time and one  
13 opportunity to do so.

14 He's also asking you to set aside Judge Russo's  
15 sentence. Remember, this is Judge Russo who held the  
16 sentencing proceeding, considered this and imposed a  
17 sentence of death. It is not up for negotiation. It  
18 is Judge Russo's considered opinion. Those are the  
19 only comments we have on rely, we otherwise rest on  
20 our argument previously made. Thank you.

21 THE COURT: All right. I'll think about it and  
22 let you know.

23 MS. BROWN: Thank you.

24 (Whereupon, the proceedings concluded.)  
25

1  
2  
3  
4 CERTIFICATE OF REPORTER  
5

6 State of South Carolina)

7 County of Horry )  
8

9 I, Natalie Dahl, Official Court Reporter for the  
10 State of South Carolina, do hereby certify that the  
11 foregoing is a true, accurate and complete Transcript  
12 of Record of the proceedings had and evidence  
13 introduced in the matter of the captioned case,  
14 relative to appeal, in the Court of General Sessions  
15 for Horry County, South Carolina, on the 12th day of  
16 June, 2018.

17 I do further certify that I am neither of kin,  
18 counsel, nor interest to any party hereto.  
19

20 June 19, 2018

21  
22   
23 Natalie Dahl, RPR.24 Court Reporter  
25

1 STATE OF SOUTH CAROLINA) **TRANSCRIPT OF RECORD**  
 2 COUNTY OF SUMTER ) CASE NO: 2016-CP-43-0828

3 -----  
 4 **B E F O R E:** The Honorable William Seals  
 5 October 1, 2018  
 6 -----

7 STEPHEN COREY BRYANT,  
 8 Petitioner/Applicant,

9 vs.

10  
 11 STATE OF SOUTH CAROLINA,  
 12 Respondent.

13 -----  
 14 APPEARANCES:

15 E. Charles Grose, Jr., Esq.  
 16 Diana Holt, Esq.  
 17 For the Petitioner/Applicant.

18  
 19 Melody Brown, Esq.  
 20 Sherrie Butterbaugh, Esq.  
 21 For the Respondent.

22  
 23  
 24 Court Reporter:  
 25 Natalie Dahl, RPR

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P-R-O-C-E-E-D-I-N-G-S

THE COURT: Call your case.

MS. HOLT: If you would approve the black box coming off?

THE COURT: Fine with me, if it's fine with you.

MS. BROWN: Stephen Corey Bryant versus State of South Carolina. It is a Sumter post-conviction relief action, Case No. 2016-CP-43-828. We are here for an evidentiary hearing. Based on the procedural history of this case, Respondent has requested to place a few ongoing objections on the record before we proceed. In particular, the first objection is that Respondent has asserted and maintains that this action is subject to procedural bars. It is barred by the Statute of Limitations and it is barred as improperly successive. We do not waive the right to rely on those procedural bars by being here today and participating in the hearing.

The second is that Respondent has previously inserted that it is also entitled to summary judgment without the necessity of the hearing as Applicant has conceded that there is no diagnosis of intellectual disability. Respondent also previously provided affidavits of doctors who had considered prior

DR. WOODS - DIRECT EXAMINATION BY MR. GROSE

1 evaluation at DDSN and saw that that was not necessary.  
2 So Respondent does not waive its position by appearing  
3 and participating in the hearing. We understand that  
4 today the sole issue will be whether there is a  
5 diagnosis of intellectual disability and the evidence  
6 is supposed to follow the definition most recently  
7 discussed in State versus Blackwell. Thank you, Your  
8 Honor.

9 THE COURT: Okay. Anything you all would like to  
10 place on the record before we begin?

11 MR. GROSE: Just that on behalf of Mr. Bryant we  
12 had two motions to amend the application, and we just  
13 want the record to reflect that while you denied  
14 those, we're not -- we're doing this hearing subject  
15 to our right to appeal those at a later time.

16 THE COURT: All right. I understand.

17 All right. If you would like to call your first  
18 witness.

19 MR. GROSE: I'll call Dr. George Woods.

20 (GEORGE WOODS, having been duly sworn,  
21 testified as follows:)

22 DIRECT-EXAMINATION

23 BY MR. GROSE:

24 Q State your full name for the record.

25 A George W. Woods, Junior.

1 Q And, Dr. Woods, what is your profession?

2 A I'm a physician. I specialize in  
3 neuropsychiatry.

4 Q And if you would, for the Court, would you please  
5 summarize your educational background beginning with  
6 college?

7 A Sure. I went to Westminster College in Salt Lake  
8 City, Utah; graduated in 1969. I then went to the  
9 University of Utah Medical Center and I graduated in  
10 1977. I then did a medical internship at Alameda  
11 County General Hospital, which is Hyland Hospital, in  
12 Oakland, California. I then did a psychiatric  
13 residency at Pacific Medical Center in San Francisco,  
14 California. I was chief resident my last year. I then  
15 did a fellowship with the National Institute of Mental  
16 Health and the American Psychiatric Association in  
17 geriatric psychopharmacology.

18 Q And you said that you specialize in  
19 neuropsychiatry?

20 A That's correct.

21 Q And could you explain what neuropsychiatry is?

22 A Sure. Neuropsychiatry is the study of the brain  
23 and how it impacts behavior. It is really more focused  
24 toward the medical and neurological aspects of brain  
25 behavior rather than the psychological aspects.

1 Q Okay. And would you summarize your employment  
2 history?

3 A Sure. I have a private practice since about  
4 1983, and I specialize in what we call developmental  
5 disorders, as well as geriatric psychiatry. So areas  
6 such as Fragile X Syndrome, which is a genetic disorder  
7 intellectual disability. What we call PANDAS, a  
8 pediatric autoimmune disease, sarcoidosis that affects  
9 the brain, different kinds of neurological or immune  
10 disorders that impact functioning and impact  
11 psychiatric symptoms. I've done that since about 1983.  
12 I also have a forensic practice.

13 Q And could you tell the Court about your forensic  
14 practice?

15 A Sure. My forensic practice is both criminal and  
16 civil. I testify in about 11 percent of the cases that  
17 I consult on. In my civil practice, it is both  
18 plaintiff and defense. In my criminal practice, it has  
19 been primarily defense work.

20 Q And have -- is your -- in your forensic practice  
21 you said you have testified. Have you been qualified  
22 as an expert to testify in courts before?

23 A Yes, I have.

24 Q In state courts and federal courts?

25 A States and federal.

1 Q And what states have you testified in?

2 A California, South Carolina, Wyoming, Washington,  
3 Missouri, Texas, North Carolina, Louisiana, New York,  
4 New Jersey, Vermont, Massachusetts, Ohio, Arizona, New  
5 Mexico, Oklahoma, Georgia.

6 Q A long list?

7 A Idaho. 34 years, yes.

8 (Applicant's Exhibit 1 marked.)

9 Q (MR. GROSE) I'll hand you Applicant's Exhibit 1.  
10 Do you recognize that?

11 A Yes, I do.

12 Q Now, the version that I have might be a little --  
13 well, what is it?

14 A This is an older version of my curriculum vitae.

15 Q And would you be able to tell us sort of what has  
16 been updated on that since then?

17 A Sure. This is 2017. Since then, I was the  
18 president of the International Academy of Law and  
19 Mental Health based in Montreal, Canada. I did two  
20 years as the president, and after that, I became the  
21 secretary general of the same organization, as we join  
22 with the Institute of Public Policy, Mental Health and  
23 Ethics, Savon, Paris. So I'm currently in that  
24 position. I teach at -- this may be in here because  
25 I've been there for five years, but I teach at the

1 University of California, Berkeley, in the law school.  
2 I teach a course on mental health and the law. I'm a  
3 2018 recipient of the extinguished alumni for the  
4 University of Utah Medical Center, which I received  
5 just this week, actually. I have written two more  
6 chapters in books, one on noncognitive aspects of  
7 developmental disorders, which will be published in a  
8 paper of 2019, and another chapter on neuro --  
9 significance -- the increased significance of  
10 neuroscience and the law, which will be published in  
11 about two weeks. I think that those are the -- I  
12 retired from the associated editor of the Journal of  
13 Public Policy and Practice in Intellectual  
14 Disabilities. I also retired as the deputy chairperson  
15 of the International Association with a Specialized  
16 Study of Intellectual and Developmental Disabilities.  
17 Special Interest Research Group, I've been the deputy  
18 chairperson for that for about four years. I was  
19 recertified by the International Association for the  
20 Specialized Study of Developmental Disorders as an  
21 academy instructor. I was recertified in 2018. That's  
22 a certification that allows you to teach specific  
23 areas. My particular area was problem behaviors for  
24 the International Academy.

25 I think those are the major transitions.

1 MR. GROSE: I offer Applicant's 1 into evidence.

2 MS. BROWN: No objection.

3 THE COURT: Applicant's 1 is in evidence.

4 (Applicant's Exhibit 1 admitted.)

5 Q (MR. GROSE) Are your other publications listed  
6 in your CV?

7 A Yes.

8 Q And as part of your writing, have you written  
9 about developmental disorders?

10 A Yes, I have.

11 Q And do you have any board certifications?

12 A I'm board certified in psychiatry.

13 MR. GROSE: At this time, Your Honor, I would  
14 offer Dr. Woods as an expert in clinical and forensic  
15 neuropsychiatry with a specialty in developmental  
16 disorders.

17 THE COURT: Any objections?

18 MS. BROWN: No, sir. No objections and no voir  
19 dire.

20 THE COURT: Motion granted.

21 Q (MR. GROSE) Did Ms. Holt and I ask you to  
22 consult with us regarding Stephen Corey Bryant?

23 A Yes.

24 Q And as part of that, did you review materials?

25 A I did.

1 Q What materials did you review?

2 A I reviewed a history of Mr. Bryant's family life.  
3 I reviewed medical records of Mr. Bryant. I reviewed  
4 school records of Mr. Bryant. I reviewed  
5 neuropsychological testing performed by Dr. Paul  
6 Moburg. I consulted with Dr. Lauren Davies, who is a  
7 pediatric neurologist at the University of Washington  
8 who specializes in developmental disabilities, and  
9 Fetal Alcohol specifically. I reviewed I believe Mr.  
10 Bryant's work history. I reviewed the transcript of  
11 the courts. I reviewed evaluations done by previous  
12 psychiatrists. I reviewed an interview by Dr. Pamela  
13 Crawford, 2004, I believe. I reviewed a report by  
14 Dr. Schwartz. I reviewed an affidavit by Dr. Caroline  
15 Everington. I interviewed Mr. Bryant in 2017. I also  
16 administered a Montreal Cognitive Assessment, which is  
17 a screening instrument for cognitive disorders. I  
18 reviewed Dr. Everington's adaptive functioning. I  
19 reviewed the relevant research on developmental  
20 disability. I reviewed the limited classification  
21 systems of the Diagnostic and Statistical Manual, as  
22 well as AAIDD. I reviewed more comprehensive diagnoses  
23 of the Comprehensive Textbook of Psychiatry by Kaplan  
24 and Sadock. I reviewed several of the articles that I  
25 had written on intellectual disability, specifically



1 the articles that I had co-written with Dr. Steven  
2 Greenspan -- hold up one second. If you could wait one  
3 second.

4 Q Okay.

5 (A brief pause in the proceedings.)

6 A Article from 2014, "Intellectual Disability as a  
7 Judgment Disorder, The Gradual Move Away from IQ  
8 Ceilings." The article "Intellectual Disability  
9 Co-morbid Disorders and Differential Diagnosis"; that  
10 was 2015. There is one other article, 2015, "Social  
11 Incompetence of Fetal Alcohol Spectrum Offenders."  
12 There was one other article that I reviewed with  
13 Dr. Jim Harris -- oh, 2012, "Intelligence Involves Risk  
14 Awareness and Intellectual Disability Involves Risk  
15 Unawareness"; that was 2012. That was, I believe,  
16 everything that I reviewed.

17 Q (MR. GROSE) Okay. Now, you mentioned reviewing  
18 a lot of records about Mr. Bryant?

19 A Yes.

20 Q What is the importance of doing that?

21 A The past -- oh, I also reviewed declarations of  
22 his mother and others. It is important to understand  
23 the environment and the familial and genetic makeup of  
24 someone in order to get a sense of who they are today  
25 and how that exactly plays to their current behavior

1 and when you are trying to reach an appropriate  
2 diagnosis.

3 Q You mentioned that you conducted an assessment of  
4 Mr. Bryant?

5 A Yes.

6 Q Where did you do that at?

7 A I did that at prison -- I don't recall the name.

8 Q Leiber Correctional?

9 A That's correct.

10 Q When you are called upon in a case like this to  
11 conduct an assessment, what procedures do you follow  
12 for the assessment?

13 A Well, the first thing I do, which I'm not trying  
14 to be facetious, but I look at the client. I really  
15 try to look at them carefully and determine if there  
16 are any physical manifestations that are fairly  
17 obvious. You can gain a lot by just looking at someone  
18 and looking at them carefully.

19 Secondly, I really try to listen to not only what  
20 they are saying, but the quality of their language.  
21 For example, in talking with Mr. Bryant, you ask his  
22 date of birth and he does a very interesting thing that  
23 he did also with previous psychiatric and psychological  
24 -- he only would -- he gave the year and the date,  
25 12/'81. That may seem like a very, very small thing,

1 but it really is a problem with verbal fluency, a  
2 specialized area of the brain that tells you that  
3 something is not working quite correctly. Most people  
4 are used to saying January 3, 1948, like in my case,  
5 and yet you start to pick up these little cues that  
6 lets you know that there may be a problem that is  
7 cognitive, not just psychological, but actually has  
8 something to do with how the brain works. So you  
9 listen to them. Certainly, you do an interview and try  
10 to get an understanding of social history and context,  
11 but listening to them is very, very important.

12 The third thing I try to do is really very simple  
13 screening evaluations. These are neurological  
14 evaluations that tell you whether there are significant  
15 cognitive problems, significant neurological problems.  
16 For example, one of the things that I did with  
17 Mr. Bryant was a LUIRA's three-step test.

18 Q I'm looking at the court reporter, if you could  
19 spell that.

20 A L-U-I-R-A. It is a very simple -- you ask  
21 someone to put their hand down and do the sequence of  
22 palm, side of hand, fist. Palm, side of hand, fist.  
23 Palm, side of hand, fist. You have them do that and  
24 you have them do it as quickly as they can. Once they  
25 get it, you have them do that as quickly as they can.

1 What that really reflects -- if they have difficulty  
2 doing it -- is they have problems with the front part  
3 of their brain, frontal lobe. It is another way of  
4 looking at brain function. I also did other testing  
5 with Mr. Bryant that we'll talk about more. But this  
6 is really the way that I try to approach. It is a much  
7 more physical examination. I do what is called  
8 neuropsychiatric mental status, which includes a  
9 physical examination, as well as just asking specific  
10 questions.

11 Q What does that examination entail?

12 A Entail totally?

13 Q Yeah.

14 A Well, in a neuropsychiatric examination you are  
15 not just looking for things like hallucinations or  
16 hearing voices, that type of thing. You are really  
17 looking for medical, physical problems that manifest in  
18 psychiatric disorders. So you are really looking to  
19 see if there are neurological physical problems that  
20 are wrong with a person that may, in fact, manifest  
21 into some other types of behavior. So you'll do the  
22 typical test of memory and other tests that are done in  
23 a psychiatric examination, but in addition to that,  
24 you'll do more physical examinations. For example, I  
25 did a test -- because of Mr. Bryant's mother's history

1 of drinking and because of -- and you look at  
2 Mr. Bryant and you can see very clear signs of what we  
3 call Dysmorphology. Dysmorphology are bones that are  
4 not developed properly. So as a child grows -- if  
5 you'll just give me a moment to explain. As a child  
6 grows, the bones of their face and entire body  
7 obviously grow as well. If a mother is drinking only a  
8 short period, doesn't mean a lot of alcohol  
9 necessarily, but only a short period, typically between  
10 the 17<sup>th</sup> and 20<sup>th</sup> day of pregnancy, you may see  
11 signs of facial problems. Those facial problems are  
12 what we call dysmorphology. The face is not developed  
13 properly. So you see those much better as a child,  
14 because as a person grows up, those bones tend to  
15 change to some degree. We have photographs that shows  
16 that dysmorphology successfully.

17 Even in Mr. Bryant, at the time I saw him in 2017  
18 -- excuse me, I apologize -- there were signs of  
19 dysmorphology. The right side of his head is shaped  
20 differently than the left side of his head. His eyes  
21 are smaller and, therefore, they look like they are  
22 wider apart. They are not really wider apart, they are  
23 just smaller. So these are the kinds of things that  
24 you do in a neuropsychological/neuropsychiatric  
25 evaluation. Because we have the history of his mother

1 drinking during pregnancy, there is a thick fiber  
2 between the left side of the brain and the right side  
3 of the brain called the corpus callosum, and that is  
4 like a communicating wire. It's like a telephone wire  
5 that provides information between the right side of the  
6 brain and the left side of the brain. Because it goes  
7 between the right side and the left side of the brain,  
8 and because the brain develops from the midline -- when  
9 a child is growing, when a fetus is growing, it grows  
10 from the midline out. So it doesn't just grow up; it  
11 grows from the midline up. So if there are any  
12 problems in that first trimester, you will see them in  
13 the midline. You will see them in the face in the  
14 first trimester. In the second trimester, you'll see  
15 them in the chest perhaps. In the third trimester you  
16 might see them in the genitalia. The most sensitive is  
17 the first trimester in the face. So if a body is  
18 growing out from the midline, that corpus callosum may  
19 well get impacted, and that corpus callosum is what we  
20 call notchy. If you look at it on an MRI, you will see  
21 a notch or misshape of the corpus callosum. The way  
22 you test for that, because you can't see that in  
23 someone as they grow, the way you test for that is by  
24 what we call number writing on a person's palm. What  
25 you do is you have them close their eyes, hold their

1 hand out and you write numbers on their hand. Why do  
2 you do that? Because if I close my eyes and write an  
3 eight on my right palm, it goes up my arm, crosses --  
4 because you identify numbers on the left side of the  
5 brain, so it crosses through the corpus callosum, that  
6 person identifies it in their visual memory -- left  
7 temporal lobe -- they articulate it in their left basic  
8 area, and they say that is an eight.

9 If you draw a seven, it goes up their arm, across  
10 the corpus callosum, visualize it in their left  
11 temporal area, articulate it in their left area and say  
12 that is a seven. Similarly, if you do it on the  
13 left-hand side, it stays on the same side. So it  
14 really gives you an opportunity to test whether that  
15 corpus callosum is working effectively or not.

16 In Mr. Bryant, in doing these kinds of  
17 examinations, it became clear that he had impairment of  
18 his corpus callosum. How do you test -- what does that  
19 mean? As we talk later in terms of functional  
20 academics, it will become clear.

21 Q With regard to your examination of Mr. Bryant at  
22 Leiber, is there anything else significant that we  
23 should talk about?

24 A I think his history of trauma is significant.  
25 Mr. Bryant has a significant history of physical trauma

1 and sexual trauma that dates back to at least six years  
2 of age, seven years of age. The reason I didn't say  
3 that initially was because trauma doesn't necessarily  
4 lead to neurological problems. It can over time impact  
5 the right lobe, but because this was more about his  
6 developmental disability, in my opinion.

7 Q Okay. Let's do this. When we talk, you sort of  
8 divide things into categories. If we could focus on  
9 Mr. Bryant's genetics and his prenatal and perinatal  
10 periods; is there any significance you found in your  
11 overall evaluation?

12 A Yes. Mr. Bryant's mother and father met in a  
13 drug rehab program. Mr. Bryant's mother acknowledges  
14 heavy drinking and heavy drug use. The drug use is  
15 important being alcohol use is probably the most  
16 devastating. We see a history of symptoms and  
17 presentations in Mr. Bryant that are consistent with  
18 Fetal Alcohol Spectrum Disorder, and I'll talk more  
19 about those later. But, certainly, that history of  
20 drinking, of slow development. His mother describes  
21 him as talking more slowly, developing more slowly,  
22 always being below the tenth percentile in terms of  
23 stature. These are the ways in which you look at  
24 developmental disorders. These are the ways in which  
25 you look at Fetal Alcohol. Children that have Fetal



1 Alcohol are most often small in stature. They tend to  
2 develop slowly. They actually most often do not have  
3 intellectual impairments, but they have brain  
4 impairments. So they don't have -- they may not have  
5 IQ impairments. About 45 percent of children with  
6 Fetal Alcohol have relatively low to normal IQs, but  
7 their brains don't work well. There is a significance  
8 between the two I'll discuss later. We see these with  
9 Mr. Bryant.

10 We also see Mr. Bryant, as I mentioned already  
11 the significance of the first trimester, facially  
12 manifestations of dysmorphology.

13 Q We also talked about, you know, some  
14 environmental factors that impacted Mr. Bryant; would  
15 the trauma fall into that?

16 A Yes. The reason why the trauma is important is  
17 because if you have a vulnerability, you know, to  
18 diabetes, is it better for you to be born into a family  
19 of bakers, or a family of nutritionists? Of course  
20 vulnerabilities doesn't always mean you will live out  
21 those vulnerabilities, but if you have a vulnerability  
22 to a brain disorder or cognitive disorder, and then on  
23 top of that you are born into a family with significant  
24 violence, significant lack of support, significant  
25 trauma, those really are added synergistic and don't

1 provide you with the type of support that one might  
2 need. We see that in Mr. Bryant and his academic  
3 career. We see him doing very poorly in school.  
4 Eventually, by the time he's 12 years of age, he still  
5 is in the fifth grade. I believe he failed the first  
6 grade, perhaps one other grade. We see these  
7 significant brain impairments.

8 Now, what is important here -- and I just want to  
9 draw these connections as we go along -- we see  
10 Mr. Bryant doing poorly in math in school. In other  
11 areas, he did better. We see him doing very poorly in  
12 math. If you recall me doing the test called  
13 Graphesthesia, G-R-A-P-H-E-S-T-H-E-S-I-A.

14 Q And in the courtroom we see you drawing on your  
15 hand?

16 A Right.

17 Q That is drawing the numbers?

18 A Yes. Again, he couldn't pick up numbers. So we  
19 see a math problem in school. We see him having  
20 difficulty picking up numbers and visual memory. And  
21 as you will see with the testing that Dr. Everington  
22 did, he has problems with functional mathematics. We  
23 has problems with math. So these are the internal  
24 consistencies that one wants to look at when one is  
25 looking at is there a developmental disability.

1 Q Just going back to the trauma for a second, can  
2 you summarize what Mr. Bryant's history of trauma is?

3 A Sure. Mr. Bryant began to experience sexual  
4 trauma from his grandfather around the age of six by  
5 declarations that I've reviewed. His grandfather had a  
6 history of sexual predatorship. He sexually molested  
7 his own daughter for years. He sexually molested other  
8 people in the community without being punished for his  
9 behavior. His father was extraordinarily violent to  
10 Mr. Bryant, but his father himself had been beaten by  
11 his grandfather. This was the paternal grandfather  
12 that was also the sexual predator. There is some  
13 indication that Mr. Bryant had been sexually molested  
14 by others, then his father as well, which reflects a  
15 vulnerability that one sees in developmentally disabled  
16 persons.

17 Q You mentioned some of Mr. Bryant's schooling.  
18 Did we see a pattern of isolation in his childhood, in  
19 his youth?

20 A Mr. Bryant describes a pattern of isolation and,  
21 certainly, declarations -- one of the teachers  
22 described him as "sweet and slow." Another teacher  
23 described him as being isolated, not really a part,  
24 having very few friends. Obviously, he failed two  
25 grades before finally dropping out at 12 years of age.

1 I believe he just made it to the fifth grade by that  
2 time. So we do see this sense of isolation and sexual  
3 isolation. Mr. Bryant himself was not involved in  
4 active sexual behavior until he was in his late teens,  
5 early 20s.

6 Q And is there any significance to this isolation?

7 A Yes. The isolation is really a function of the  
8 multiple ways in which we see Mr. Bryant not being able  
9 to make social contact. When we talk about  
10 developmental disability and adaptive functioning, in  
11 particular, we look at three areas: The conceptual  
12 area, which is language, functional academics and we  
13 look at the social area: Are people able to make  
14 connections? Are they able to get along with others?  
15 Are they able to have friends and develop  
16 relationships? And we look at it in the practical  
17 area: Are they able to work? Are they able to handle  
18 their business? This is true not only -- this is true  
19 regardless whether it is intellectual or developmental.  
20 It is where they really come together. So the  
21 isolation -- the degree of isolation really speaks to  
22 the limited social component of his adaptive function.

23 Q And you mentioned -- you talk about adaptive  
24 functioning and you mentioned Dr. Everington before?

25 A That's correct.

1 Q And you had reviewed Dr. Everington's affidavit?

2 A I did.

3 Q And, of course, Dr. Everington's conducted her  
4 own assessment of Mr. Bryant?

5 A That's correct.

6 Q As well as performed some testing of her own?

7 A That's correct.

8 Q And are those the types of things that you rely  
9 on in your practice?

10 A Yes. In this case, Dr. Everington -- I think  
11 because of her depth of experience and expertise --  
12 went beyond just the adaptive functioning. She did  
13 testing of independent living. She did testing of  
14 mathematics and broad reading, what we call the Wide  
15 Range Achievement Test. So she did testing that really  
16 -- and she did a number of interviews, more interviews  
17 than certainly I did.

18 Q And as a result of that, did that inform you as  
19 far as Mr. Bryant's adaptive functioning?

20 A Yes. Well, it provides me an objective. I mean,  
21 I can read it. I can see it. Actually, a clinical  
22 expertise, someone seeing people who have developmental  
23 disabilities, not just in a forensic setting, but  
24 treated people that have developmental disabilities;  
25 that is really enough. But to also have someone with

1 Dr. Everington's expertise to be able to test and to  
2 show them Mr. Bryant's adaptive deficits, functional  
3 academics, poor academic function, particularly in  
4 math, isolation, that these really meet a statistical  
5 limit that is required. It's very, very poor.

6 Q Do you have an opinion as to whether or not  
7 Mr. Bryant has significant deficits in his adaptive  
8 function?

9 A Based on the clinical information I reviewed, as  
10 well as Dr. Everington's objective testing, I do.

11 Q And what is that opinion?

12 A It is my professional opinion that Mr. Bryant  
13 does have -- meets the criteria for developmental  
14 disability as well as intellectual disability in his  
15 adaptive functioning.

16 Q Okay. Now, other than Dr. Everington, there was  
17 other people, other medical professionals that were  
18 consulted?

19 A That's correct.

20 Q And one of them you mentioned was Dr. Paul  
21 Moburg?

22 A That's correct.

23 Q And he is a neuropsychologist?

24 A He's a neuropsychologist and professor of  
25 dysmorphology and neurology at the University of

1 Pennsylvania.

2 Q You reviewed the testing that he did?

3 A Yes, I did.

4 Q And can you describe to the Court the testing  
5 that he did and what significance you placed on that?

6 MS. BROWN: Objection. I believe he can testify  
7 to the results reported to him, but not what was done  
8 and how.

9 Q (MR. GROSE) Did you actually review his data?

10 A Yes, I did.

11 Q And are you trained in reviewing the data on  
12 neuropsychological testing?

13 A I am, but not in administering it.

14 Q So someone else administers and then you can  
15 interpret the data?

16 A Someone else can administer and interpret, but I  
17 can -- I've taken neuropsychological testing and the  
18 specific test that he gave.

19 Q And can you testify about that from the  
20 perspective of your training and experience?

21 A Yes.

22 Q And based on that, can you tell us what you found  
23 significant in the test that Dr. Moburg provided?

24 MS. BROWN: Same objection as to the test and the  
25 opinion. But the results I believe would be in his --

1 THE COURT: Okay.

2 Q (MR. GROSE) You may proceed.

3 A And I can talk just about the results, no  
4 problem. Dr. Moburg did specialize tests of Fetal  
5 Alcohol. In order to do these tests, you use a special  
6 program -- first of all, you take a really good camera  
7 and you take pictures of Mr. Bryant's face, and then  
8 you run those pictures through a specialized algorithm  
9 that examines his eyes, what we call the philtrum,  
10 which is this area (indicates), P-H-I-L-T-R-U-M. It is  
11 above the lip. The circularity of the lips themselves,  
12 the width of the eyes and the shape of the cranium.

13 So you run these through a pretty sophisticated  
14 algorithm that Dr. Moburg has and you can compare that  
15 to a series of other people that have not only Fetal  
16 Alcohol, but other types of developmental disorders.  
17 Dr. Moburg did that and found that -- also, Dr. Moburg  
18 and Dr. Davies found -- he found that Mr. Bryant's eyes  
19 were about .26 standard deviations small. It used to  
20 be historically that people thought that folks that had  
21 Fetal Alcohol Syndrome had wide eyes in this area here,  
22 it was too wide. This is called the palpebral fissure,  
23 P-A-L-P-E-B-R-A-L, but now we know that it is not that  
24 this is wide, it is that the eyes are small. Mr.  
25 Bryant's eyes are small giving him a widened palpable



1 fissure. The examination for the philtrum showed that  
2 Mr. Bryant's philtrum measured -- from one to five, one  
3 being there is no sign, five being most severe --  
4 Mr. Bryant's philtrum was a five, which is most severe.  
5 His lip circularity, which is another test of Fetal  
6 Alcohol, first trimester of Fetal Alcohol impairment,  
7 was a three out of five. So it was not as severe as  
8 the philtrum, so Dr. Davies and Dr. Moburg described  
9 Mr. Bryant as having what is called a statistic  
10 encephalopathy alcohol related. Encephalopathy is an  
11 impairment of the brain. "Statistic" means that it  
12 won't go away.

13 Dr. Moburg also did a test called Greens Smell  
14 Test. The Greens Smell Test is a test of smell. It is  
15 that you have 30 different things and smell these  
16 different things. Based upon the Greens Smell Test, he  
17 determined Mr. Bryant had what's called microsomia,  
18 M-I-C-R-O-S-O-M-I-A. Microsomia is an impairment of  
19 the first cranial nerve, the olfactory nerve. The  
20 olfactory nerve -- actually the smell nerve -- goes up  
21 into the nose, but it really connects to the bottom of  
22 your brain, right here (indicates) in the bottom of  
23 your brain, the interior surface of the frontal lobe.  
24 This is another example of frontal lobe problems and  
25 also another example of midline deformities.

1 Q And midline goes back to the first trimester?

2 A Yes. So now we have these things lining up. We  
3 have these math things, a brain problem, the corpus  
4 callosum, testing that says his math doesn't work, we  
5 have graphesthesia, the same test saying that his math  
6 doesn't work. In the frontal lobe, where we have  
7 executive functioning, being able to weigh and  
8 deliberate, sequence behavior -- effectively sequencing  
9 one's behavior. We have a smell test that says it is  
10 not working properly. We have a Nebraska Luria Test  
11 that says it is not working properly. We have  
12 Dr. Moburg doing neuropsychological testing, the  
13 category tests, for example, that says, wow, frontal  
14 lobes are not working properly.

15 So we have these steps both in terms of Fetal  
16 Alcohol and brain functioning that takes us from what  
17 we hear on declarations, mother being a drinker, what  
18 we see in his face, what we see in his motor function,  
19 what we see in his neuropsychological testing, and it  
20 all adds up.

21 Q Sort of everything converges?

22 A That's correct.

23 Q Is there anything else with regards to what Drs.  
24 Davies and Moburg did that you found significant?

25 A I think that is it.

1 Q Now, this morning we used the terms  
2 "developmental disorder" a good bit. Can you describe  
3 to the Court, generally, what a developmental disorder  
4 is?

5 A Sure. Your Honor, developmental disorder is a  
6 disorder that occurs during the period of birth,  
7 gestation. It is not something that occurs after a  
8 child is born. It is not an acquired disorder. It has  
9 to occur sometime between the period that the child is  
10 actually developing. There are certain -- I should  
11 take that back. There are certain kinds of disorders  
12 that can develop as a child grows, but those are really  
13 not what we're talking about here.

14 You can have a multiple of development disorders,  
15 neuro-developmental disorders, and here that is what  
16 we're talking about. We're talking about developmental  
17 disorders that have to do with the brain. You can have  
18 developmental disorders that have to do with muscles,  
19 for example, or you can have developmental disorders  
20 that have to do with carbohydrates, but what we're  
21 talking about are developmental disorders that have to  
22 do with the brain, so they are neuro-developmental  
23 disorders.

24 Q Okay. And did you diagnose Mr. Bryant with  
25 developmental disorders?

1 A Yes.

2 Q What is that?

3 A It's my opinion -- I would be with Dr. Moburg  
4 that Mr. Bryant has a statistic encephalopathy  
5 secondary to alcohol, alcohol related  
6 neuro-developmental disorder. It is really a Fetal  
7 Alcohol Spectrum.

8 Q Could you explain what you mean by Fetal Alcohol  
9 Spectrum?

10 MS. BROWN: Object, just to preserve my objection  
11 as originally stated.

12 THE COURT: I understand.

13 A Sure. Like all developmental disorders or  
14 psychiatric disorders, this disorder occurs on a  
15 spectrum. So as I mentioned to you, Your Honor, the  
16 lip circularity is only three of five. So Mr. Bryant's  
17 face is not a classic face of Fetal Alcohol, but  
18 classic face only occurs in about 9 percent of the  
19 population that is diagnosed with Fetal Alcohol. So it  
20 occurs in a large spectrum.

21 What Mr. Bryant does have are the -- I'm going to  
22 say four, so I better get four. There is the  
23 dysmorphic problems, there is the short stature,  
24 there's the brain impairment and one he doesn't have is  
25 ears, railroad ears. So that is one that he does not

1 have.

2 Q (MR. GROSE) You mentioned earlier executive  
3 functioning. What is executive functioning?

4 A Executive functioning is a specialized function  
5 of the human being that allows us to effectively weigh  
6 and deliberate, effectively sequence our thinking and  
7 our behavior to effectively understand social cues,  
8 understand context. If I can give you a quick example  
9 of how it happens. You folks may not be television  
10 viewers, but a few years ago there was a show called  
11 "Are You Smarter Than a Fifth Grader." This show,  
12 which seemed to be kind of this show about getting  
13 adults to look like fools all the time with kids, was  
14 actually a neurologically derived show. Because from  
15 five to about ten you learn how to do math, you learn  
16 how to do 50 states, capitals of states. You learn  
17 these kinds of things, because that is what the brain  
18 can handle. So you learn these basic kinds of things.

19 But starting around ten years old to about 12  
20 years old, and after that, because your frontal lobes,  
21 your executive functioning, starts to grow, you start  
22 to be able to do word problems. So if you have a car  
23 coming at 60 miles an hour and another at 30 miles an  
24 hour, where are they going to meet? These problems  
25 require working memory. You have to hold it in your

1 mind, understanding the concept of two cars moving, and  
2 that is because that frontal lobe is beginning to grow.  
3 That frontal lobe is beginning to work and handle more  
4 abstract issues. That is the part of the brain that  
5 doesn't work well in Mr. Bryant. That's part of the  
6 brain of understanding and picking up cues, and that is  
7 the part of the brain really reflective in  
8 Dr. Everington's impairment of adaptive functioning.

9 Q And did that impairment to Mr. Bryant's brain and  
10 his deficits in adaptive functioning, did that -- did  
11 you see how that played out in the crimes he was  
12 charged with and convicted of?

13 A I did see that as well as the traumatic  
14 association.

15 Q Can you explain that to the Court?

16 A Mr. Bryant explained to me often having -- not  
17 having a memory of the offenses. He knew that he had  
18 done them. He took responsibility for them, but often  
19 having -- not having a complete memory of the behaviors  
20 that he -- of things he had done. This reflects two  
21 things. Number one, the disassociation that one sees  
22 in trauma, but also the impaired memory problems that  
23 you see in the functioning. I did not go into depth  
24 with Mr. Bryant about the offenses because that was not  
25 my role.

1 Q All right. There has been a question about  
2 whether Mr. Bryant has an intellectual disability?

3 A Yes.

4 Q And are you familiar with what the diagnostic  
5 criteria for intellectual disability is?

6 A Yes.

7 Q Can you explain that to the Court?

8 A The diagnostic and statistical manual requires  
9 subaverage intellectual functioning. It no longer has  
10 the IQ number in the criteria. That is now in  
11 associated features. High impairments in adaptive  
12 functioning, and that normally we reach the -- two  
13 standard deviations below normal, and these must have  
14 occurred within the developmental period. Prior, it  
15 used to be before age 18, but now it is in the  
16 developmental period.

17 Q Now, you mentioned IQ scores and how that used to  
18 be a criteria in the DSM-5?

19 A Yes.

20 Q Can you sort of describe how that IQ score and ID  
21 has evolved over time?

22 A Yes. I think that the classic example is -- for  
23 any of you that have -- I hope this is not too much  
24 media, but for any of you who are movie fans, there was  
25 a movie maybe 15 years ago with Dustin Hoffman,

1 Rainman. Rainman was a story of Kim Peek. That was a  
2 young man who now died from Salt Lake City, Utah. Kim  
3 Peek was a savant. He could memorize almost anything.  
4 He could give you the dates of the temperature back in  
5 the tenth century. He had an IQ of about 83, however,  
6 Mr. Peek couldn't button his shirt. He couldn't find  
7 his way around Salt Lake City. As I may have  
8 mentioned, I went to school at the University of Utah,  
9 and Kim Peek and his father was very well-known at the  
10 University of Utah. Mr. Peek was very, very concerned  
11 about Kim because in spite of this stroke of genius and  
12 an IQ at 83, he knew that Kim could not take care of  
13 himself and was really concerned what was going to  
14 happen. Mr. -- so Mr. Peek was intellectual, perhaps,  
15 but was developmentally disabled and as much as equally  
16 disabled as anyone that was intellectually disabled  
17 that may have had an IQ that was lower.

18 What we found over time is that intellectual --  
19 that IQ doesn't really capture brain functioning. So,  
20 certainly, the older tests, IQ doesn't really capture  
21 brain functioning because brain function is really  
22 being able to -- as we talked about today -- weigh and  
23 deliberate, sequence behavior. There is very little in  
24 IQ testing that speaks to those issues.

25 The DSM-5 has started to move away from relying



1 upon intellectual testing as one of the criteria. It  
2 doesn't mean that it doesn't suggest that a  
3 standardized IQ test is very, very important. If you  
4 look at the DSM-5, it says specifically that if you  
5 have a question about IQ testing -- like if you only  
6 have one IQ test -- then you should do  
7 neuropsychological testing really to understand how the  
8 brain works.

9 In this case, we did neuropsychological testing  
10 and the neuropsychological testing showed Mr. Bryant to  
11 have significant defects and borderline defects in  
12 multiple areas. So we're moving away from intellectual  
13 disability -- I mean intellectual testing as a criteria  
14 for a diagnosis of intellectual developmental disorder.  
15 The other thing -- quickly.

16 Q Yeah, go ahead.

17 A If you'll notice as well, the DSM-5 also used  
18 intellectual developmental disorder as their new name  
19 instead of mental retardation or intellectual  
20 disability. So it is really capturing the fact that  
21 this is a disorder. It's a developmental disorder that  
22 may have some intellectual functioning.

23 Q In some of your writings you refer to the DSM-5  
24 as a transitional document?

25 A That's right.

1 Q What do you mean by that?

2 A Well, it is a classification system. First of  
3 all, it's not really a -- it's not really a  
4 comprehensive textbook. It is really a classification  
5 system. The DSM-5 is a transition from the old  
6 thinking of previous DSMs, where IQ was really a  
7 criteria, to newer thinking where IQ is really less a  
8 criteria. We know that there are problems with it.

9 There is a Flynn effect where we know -- which is  
10 accepted by the United States Supreme Court -- where we  
11 know that you have to make these adjustments in IQ  
12 testings. There is questions what we call "G," which  
13 is this essence of intellect, which is now only being  
14 captured in intellectual tests. So there is  
15 significant problems with IQ testing, whereas adaptive  
16 functioning tells you this person can't make it in the  
17 community.

18 Q Now, can you discuss how intellectual disability  
19 and Fetal Alcohol Syndrome Spectrum Disorder are -- if  
20 there is any relation between the two of them? And  
21 that may be a poor way to ask that question.

22 A Oh, no. No. No. You know, one of the things  
23 about the way that intellectual disability has been  
24 identified in the past is the cognitive factor was  
25 unimportant, because we didn't know. In 95 percent of

1 the people that meet the criteria for intellectual  
2 disability, we didn't know what the factor was. Some  
3 people may have Down Syndrome. Some people may have  
4 Trisomy 34. Some people may have Tay-Sachs Disease,  
5 but we didn't know in 95 percent of the cases.

6 In about 47 percent of the cases of Fetal Alcohol  
7 people have dull normal IQs, anywhere between from 85  
8 to 90. So it's not each and every person that is along  
9 that spectrum that has -- that meets the criteria, but  
10 what they do have are impairments. We see different  
11 venues -- we see the Supreme Court of Canada that  
12 acknowledges Fetal Alcohol. We certainly see Colorado  
13 looking at Fetal Alcohol and developmental  
14 disabilities. Even the statutes here in South  
15 Carolina, although it doesn't speak to Fetal Alcohol,  
16 it certainly speaks to developmental disability.

17 Q Okay. And you mentioned a statute of South  
18 Carolina; is that 44-20-30?

19 A Yes.

20 Q And I ask you to look at the definition section  
21 of what is termed as a "related disability"; is that  
22 what you are talking about?

23 A Yes.

24 Q Can you explain what is meant by the term  
25 "related disability"?

1     A     Yes.  According to this statute, related  
2     disability --

3           MS. BROWN:  Objection, Your Honor.  Calls for a  
4     legal conclusion.

5           THE COURT:  Sustained.

6     Q     (MR. GROSE) Did I ask you to determine whether  
7     or not Mr. Bryant met the diagnostic criteria set  
8     forth for related disability?

9     A     Yes.

10    Q     And one of those diagnostic criteria has to do  
11    with a condition, other than mental illness, found to  
12    be closely related to intellectual disability because  
13    his condition results in impairment of general  
14    intellectual functioning or adaptive behavior similar  
15    to that of persons with intellectual disability and  
16    requires treatment or services similar to those  
17    required for these persons?

18    A     Yes.

19    Q     And does Mr. Bryant meet the criteria for that?

20    A     The important factor here is the "or."  It says,  
21    Because this condition results in impairment of general  
22    intellectual disability or adaptive behavior.  So it is  
23    not an "and"; it is an "or."  Because it is an "or,"  
24    you can look at adaptive behavior.  It says right there  
25    that you can look at general intellectual functioning,

1 but you don't have to because you can look at adaptive  
2 behavioral that is similar to that of persons with  
3 intellectual disability. That is exactly what we have  
4 in this case, someone that has adaptive behavior  
5 similar to that of persons with intellectual disability  
6 and certainly requires treatment or services similar to  
7 those required for those persons.

8 Q And I want to come back to that in a minute.  
9 Looking at Criteria B, that it is manifested before the  
10 age of 22 years; does Mr. Bryant meet that criteria for  
11 a related developmental disorder?

12 A Yes.

13 Q And the third criteria is that it is likely to  
14 continue indefinitely; does Mr. Bryant meet that  
15 criteria?

16 A He specifically meets this criteria, and this is  
17 what I mentioned earlier where Dr. Moburg and  
18 Dr. Davies made the diagnosis of statistic  
19 encephalopathy. This is a disorder that will not  
20 improve. It is hard to say whether it will get worse,  
21 but it won't improve.

22 Q And then the fourth criteria is that it results  
23 in substantial functional limitations in three or more  
24 of the following areas of major life activity and those  
25 are: Self-care, understanding and use of language,

1 learning, mobility, self-direction and capacity for  
2 independent living. Does Mr. Bryant meet that  
3 criteria?

4 A Yes. We discussed Mr. Bryant's difficulty with  
5 understanding use of language. Dr. Everington did  
6 specific tests, tests of adult and adolescent language,  
7 which found Mr. Bryant to be very, very low. We  
8 discussed the issue of his math and learning, what we  
9 would call "functional academics." Mr. Bryant never  
10 lived alone until he came into the jail cell. His  
11 capacity for independent living was impaired. So he  
12 meets at least three of those criteria.

13 Q When we were talking about the first criteria  
14 about the type of treatment that is required, you have  
15 a clinical practice?

16 A I do.

17 Q Do you treat people with developmental disorders?

18 A Yes.

19 Q Do you treat people with Fetal Alcohol Syndrome?

20 A Yes.

21 Q And do you treat people with intellectual  
22 disabilities?

23 A I do.

24 Q If you were to treat Mr. Bryant in your clinical  
25 practice, what type of treatment would be appropriate?

1 MS. BROWN: Objection. Exceeds the scope of the  
2 litigation.

3 THE COURT: I tend to agree.

4 MR. GROSE: Well, what the answer is ultimately  
5 going to be is that he requires the same type of  
6 treatment as someone with an intellectual disability,  
7 and I think that is relevant to the scope of the  
8 litigation.

9 MS. BROWN: It doesn't go to diagnosis, which  
10 would be the basis of the exemption.

11 THE COURT: Sustained.

12 MR. GROSE: May I proffer?

13 THE COURT: You may.

14 Q (MR. GROSE) If you could proffer your answer,  
15 please.

16 A Yes. The treatment I would give someone like  
17 Mr. Bryant in this case would consist of two things.  
18 First of all, occupational therapy. Occupational  
19 therapy would really help him in his daily functioning.  
20 There is a group that I use called Rehab Without Walls.  
21 We would go to his environment, home, what have you and  
22 try to teach him how to cook, clean, how to do things  
23 that he needs to do from day to day and do them  
24 effectively.

25 I would also do cognitive remediation. Cognitive

1 remediation is really a brain-based treatment that --  
2 if I can give you a quick example of something that is  
3 very simple. You take a string and put color beads on  
4 the string and you have the person hold the string and  
5 they start out at the farthest color bead and have them  
6 focus on it for ten seconds. Relax. Focus on it for  
7 ten seconds. Relax. You have them come up so it helps  
8 the eye convergence. This helps them focus. You are  
9 really trying to retrain their brain in certain ways to  
10 allow them to read better. We would focus on his math  
11 skills and see if we could get his math skills up to  
12 get him functioning better in the world. Those are the  
13 things from a neurological point of view.

14        Depending upon his psychological/psychiatric  
15 manifestations, we might treat him with certain  
16 medications, but those are things we do to work with  
17 his body.

18        Q        Okay. And does Mr. Bryant function in society,  
19 or is his functioning similar to someone with  
20 intellectual disability?

21        A        Before he came into the system, the answer is,  
22 yes.

23        Q        Can you elaborate on that?

24        A        Mr. Bryant was very isolated. He did poorly in  
25 school. He did -- in some ways Mr. Bryant's



1 functioning was worse than the potential person with  
2 intellectual disability. His academic functioning in  
3 terms of math was extremely poor. He dropped out of  
4 school in the 12<sup>th</sup> grade (sic). He did a job, but  
5 the job functioning was very, very low. He never left  
6 home. He was socially isolated and emotionally  
7 isolated. All of those are consistent with someone who  
8 has intellectual disability.

9 A person with intellectual disability can do a  
10 lot of things. They can work, drive and often have  
11 relationships and get married. They can maintain  
12 certain jobs. These are things that Mr. Bryant was not  
13 able to do. So they are consistent. I'm not saying it  
14 reflected it, but they were consistent.

15 Q And at least as far as the adaptive functioning  
16 criteria for intellectual disability, would Mr. Bryant  
17 meet that?

18 A Yes. When you look at the testing, Mr. Bryant  
19 was often in the first percentile of the adaptive  
20 functioning, both in terms of the clinical interview as  
21 well as the testing that Dr. Everington did. Extremely  
22 poor.

23 MR. GROSE: This might be a good point to take a  
24 break.

25 THE COURT: All right. Let's take ten minutes.

1 (A recess was taken.)

2 (Applicant's Exhibit 2 marked.)

3 THE COURT: Thank you. Yes, sir.

4 Q (MR. GROSE) I'll show you what is marked as  
5 Applicant's No. 2; do you recognize that?

6 A Yes.

7 Q What is that?

8 A This is my report for this case.

9 MR. GROSE: Your Honor, I move Applicant's No. 2  
10 into evidence.

11 THE COURT: Any objections?

12 MS. BROWN: Yes, sir. We object because it is  
13 accumulative to his in-court testimony. It contains  
14 inadmissible hearsay. There is also a problem with  
15 improper bolstering and vouching, particularly upon  
16 the completeness of other people's work, which is  
17 referenced within that report. It also contains, of  
18 course, conclusions and observations that the witness  
19 has testified to in court and, of course, subject to  
20 cross-examination. I rely on Allegro versus Skully,  
21 409 S.C. 392, and also State versus Jennings, 394 S.C.  
22 473. I do have copies for the Court if you would like  
23 for me to hand those up.

24 THE COURT: Out of curiosity, why do we need it  
25 if we have his live testimony?

1           MR. GROSE: For whatever assistance it might give  
2 the Court when you are reviewing this later and maybe  
3 don't have the benefit of the live testimony.

4           THE COURT: Only problem is to properly rule on  
5 her objection, I would have to read that whole thing  
6 and take a look and see if it is bolstering and  
7 hearsay and all of that stuff. I don't know if you  
8 want me to pause for a half hour and read it, or are  
9 you okay with going forward with his testimony, which  
10 is hopefully everything you need to offer anyway?

11          MR. GROSE: Well.....

12          THE COURT: I can do it either way.

13          MR. GROSE: I'll leave it up to the Court.

14                (A brief pause in the proceedings while Ms.  
15 Holt and Mr. Grose confer.)

16          MR. GROSE: I would suggest that Your Honor take  
17 it under advisement and rule on it after you had an  
18 opportunity to look at it without holding up things.

19          THE COURT: How about that?

20          MS. BROWN: Yes, sir.

21          THE COURT: That sounds good. Thank you.  
22 Anything else?

23          MR. GROSE: Nothing.

24          THE COURT: Cross-examination.

25          MS. BROWN: Thank you, Your Honor.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1

2

## CROSS-EXAMINATION

3

BY MS. BROWN:

4

Q I'm not sure whether to say good afternoon or  
5 good morning. I think we're right on the cusp, but  
6 hello, Dr. Woods.

7

A How are you this morning?

8

Q I'm Melody Brown with the Attorney General's  
9 Office. I believe we've met before.

10

A Yes.

11

Q In a capital case in Spartanburg, correct?

12

A I believe so. I don't recall.

13

Q I was notably the one not cross-examining you, if  
14 that helps.

15

Dr. Woods, you testified earlier today that you  
16 testify generally in about 11 percent of the cases you  
17 work on?

18

A That's correct.

19

Q What about the criminal cases?

20

A Those are the criminal cases.

21

Q They are all criminal cases?

22

A Yes.

23

Q You mentioned you had civil cases as well?

24

A Correct. Most of my cases are criminal cases.

25

Q They are? Okay. And what about specifically the

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 cases you worked on in South Carolina?

2 A In terms of the percentage?

3 Q Yes, sir. First of all, how many capital cases  
4 have you had in the State of South Carolina?

5 A I think, perhaps, five or six.

6 Q And all the cases you have been associated with  
7 in South Carolina, you actually testified in, correct?

8 A I don't think so.

9 Q What would the percentage be? A little more or a  
10 little less than 11 percent?

11 A I would say probably would be -- closer to  
12 20 percent perhaps, 25 percent.

13 Q You most recently testified in Spartanburg back  
14 in 2014 in the Andre Torres case?

15 A Yes.

16 Q And that had an issue on genetics, a genetic  
17 diagnosis, correct?

18 A As I recall.

19 Q And, there, you said that there were intellectual  
20 disabilities akin to intellectual disability of the  
21 diagnosis, correct?

22 A Say it again.

23 Q You testified in Mr. Torres' case that Mr. Torres  
24 had limitations similar to intellectual disability?

25 A Yes.

DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q And that was because of genetics?

2 A That's correct.

3 Q In your opinion?

4 A In my opinion.

5 Q Yes, sir. Well, in this case -- you generally  
6 get a referral question, right?

7 A Yes.

8 Q And you did in this case as well?

9 A That's correct.

10 Q And when did you get that referral?

11 A Must have been months before I saw him, so  
12 sometime in 2017, perhaps earlier than that.

13 Q What was the question?

14 A The question usually is to evaluate Mr. -- the  
15 person I'm seeing in terms of either intellectual  
16 disability or cognitive functioning.

17 Q Did that ever change or did you request that it  
18 change from intellectual disability to something else?

19 A I don't recall that it ever changed.

20 Q Let's talk about intellectual disability. You  
21 don't have to have an identifiable cause to diagnose  
22 intellectual disability, correct?

23 A That's correct..

24 Q Okay. And often you cannot even determine a  
25 cause of the intellectual disability?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A 95 percent.

2 Q And the cause doesn't necessarily affect the  
3 level of limitation?

4 A That's correct.

5 Q There may be some overlap, but there is no  
6 dictated level?

7 A That's correct.

8 Q For instance, if you have a traumatic brain  
9 injury before the age of 18, you can have a limitation  
10 that was either mild, moderate, severe, profound?

11 A That's correct.

12 Q And if you have a genetic abnormality that  
13 affects limitation or function, it could be mild, could  
14 be profound?

15 A Correct. If you don't mind, if you had a  
16 traumatic brain injury, that is more difficult because  
17 typically intellectual disability is a  
18 neuro-developmental or developmental disorder.

19 Q But isn't that age of 18 pretty critical, if you  
20 have the injury before age 18?

21 A Actually, the age of 18 is not critical. The  
22 developmental period is critical, and that is why you  
23 have seen the DSM-5 go away from the age of 18. The  
24 age of 18 was actually -- there is no statistical  
25 support for that. It was a made-up number that was

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 developed by the AAMR, unfortunately. Over time, we've  
2 come to move far away from that number.

3 Q Wouldn't you agree that most clinicians look at  
4 age 18?

5 A I would not agree. If they looked at the DSM-5,  
6 they would certainly see that it does not say age 18.

7 Q Well, they would look at the DSM-5 -- there are  
8 other guidelines to go by as well, and statutes. You  
9 referenced statutes here today. Sometimes it is  
10 legislative, what you look at, correct?

11 A Well, this statute says 22, for example.

12 Q Is it a criminal statute?

13 A No, it's not. This is the code of -- Chapter 20,  
14 Injuries Act, Article 1, General Provisions. These are  
15 the Code of Laws of South Carolina. So this is through  
16 the definition of disability. But the statutes --  
17 there are statutes that, of course, reference 18, but  
18 they are outdated.

19 Q Would you say clinicians generally like some kind  
20 of guidance?

21 A If it's accurate guidance, yes. 18 is not  
22 accurate.

23 Q Well, if someone went by 18, would you say that  
24 was inaccurate or just their opinion?

25 A No. I would say that they are probably using



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 dated statutes, as well as dated criteria.

2 Q Of course if that is what the statute said, that  
3 is what the clinician would be bound to if they were  
4 applying it in a legal case, correct?

5 MR. GROSE: Objection. Calls for legal  
6 conclusion. I refer the Court to Hall versus Florida.

7 MS. BROWN: It's actually a forensic psychiatry  
8 question because it is an application --

9 THE COURT: Ask it again.

10 MS. BROWN: Let me see if I can remember exactly  
11 how I phrased it, Your Honor. If I may rephrase it?

12 THE COURT: You may.

13 Q (MS. BROWN) In your profession, when you are  
14 practicing forensic psychiatry, you have to be guided  
15 by the law, you are applying what you know in  
16 psychiatry to the framework that the law provides,  
17 correct?

18 A That's correct.

19 Q So it's not always discretionary?

20 A It's not always discretionary, but it's always  
21 important if the law is inaccurate to make that clear  
22 to the finder of fact.

23 Q You would think that that is your role to make it  
24 clear to the finder of fact that the law is inaccurate?

25 A Well, for example, if we were today to say that

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 intellectual disability were to be defined by a statute  
2 that says age 18, it would be important for me to  
3 know -- for the trier of fact to know that that was  
4 true for the Diagnostic and Statistical Manual 4. That  
5 is no longer true. Actually, in certain jurisdictions  
6 that is true. That is what I meant. I certainly  
7 wouldn't be correcting the trier of fact, but making  
8 that point clear.

9 Q Well, you mentioned several times in your direct  
10 testimony the DSM-5?

11 A Correct.

12 Q And you said that that is guidance for  
13 psychiatrists?

14 A It is a classification system.

15 Q And it has diagnostic criteria?

16 A That's correct.

17 Q And it sort of puts disorders in a type of order  
18 that a psychiatrist can use?

19 A Yes.

20 Q And psychiatrists would use this as their  
21 language. If one is talking about this particular  
22 diagnosis, another psychiatrist knows it is because of  
23 this diagnostic criteria?

24 A That is what it is designed to do.

25 Q If I could mark a document for identification and

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 have you take a look at it.

2 (Respondent's Exhibit 1 marked.)

3 Q I'm handing you a document entitled at the top  
4 "DSM-5 Classification." Does that look familiar to  
5 you?

6 A Yes, it does.

7 Q Is that something you have reviewed before?

8 A Yes.

9 Q And does that start with neuro-developmental  
10 disorder?

11 A Yes, it does.

12 Q How many pages do you have there?

13 A One, two, three.

14 Q And it goes through -- the last page is  
15 "Schizophrenia Spectrum and Other Psychotic Disorders";  
16 is that correct?

17 A That's correct.

18 Q Does that appear to be all of the index for the  
19 neuro-developmental disorders as reflected in the  
20 DSM-5?

21 A Yes.

22 Q Is that something that you normally use in your  
23 profession?

24 A Actually, I don't really use the DSM, but I'm  
25 familiar with it.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q Is it generally accepted within the medical  
2 community?

3 A Yes.

4 MS. BROWN: Your Honor, I move to admit that.

5 MR. GROSE: No objection.

6 THE COURT: State's 1 is in evidence without  
7 objection.

8 (Respondent's Exhibit 1 admitted.)

9 Q (MS. BROWN) Under "Neuro-developmental Disorder"  
10 is "Intellectual Disabilities," correct?

11 A Actually, "Intellectual Development Disorder."  
12 The title is "Intellectual Disability," but this  
13 particular specific disability is Intellectual  
14 Developmental Disorder.

15 MS. BROWN: Your Honor, I neglected to say I have  
16 a copy for the clerk and law clerk if you would like  
17 me to hand that up?

18 THE COURT: Sure.

19 MS. BROWN: Excuse me.

20 Q (MS. BROWN) If we could go back to the index of  
21 neuro-developmental disorders.

22 A Yes.

23 Q That is sort of the broad chapter?

24 A Correct.

25 Q The global heading?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

- 1 A That's correct.
- 2 Q And then there are conditions listed under that  
3 global heading?
- 4 A Correct.
- 5 Q And what is that first condition?
- 6 A "Intellectual Developmental Disorder,  
7 Intellectual Disability, parentheses, Intellectual  
8 Development Disorder."
- 9 Q So you have that disorder and you have "Global  
10 Delay" and "Unspecified Intellectual Disorder," that is  
11 underneath "Intellectual Disabilities," correct?
- 12 A Yes. "Unspecified Intellectual Disability,  
13 Intellectual Developmental Disorder," correct.
- 14 Q And global developmental delay generally under  
15 the age five; that doesn't apply here?
- 16 A Correct.
- 17 Q And unspecified intellectual disability, that can  
18 be used for over the age of five, but you don't have  
19 all of your testing or results? There is some  
20 inability to get that --
- 21 A That's correct.
- 22 Q -- through deafness or something?
- 23 A That's correct.
- 24 Q So that doesn't apply?
- 25 A That's correct.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q So the only diagnosis that could apply in this  
2 particular case would be "Intellectual Disability," in  
3 parentheses "Intellectual Developmental Disorder"?

4 (A brief pause in the proceedings.)

5 A Well, if you are trying to apply it, that's  
6 correct.

7 Q And you say in a strict reading of the diagnostic  
8 criteria for intellectual disability, the evidence here  
9 does not meet that disorder?

10 A In a strict reading of the DSM-5, that's correct.

11 Q So you have not diagnosed this individual with  
12 intellectual disability, correct?

13 A No. Developmental disorder.

14 Q Developmental disorder okay. Well, I want to  
15 back up, and if I could, refer you back to the index I  
16 just handed up. That broad chapter on  
17 neuro-developmental disorders, you have several  
18 disorders that are listed there. We've just talked  
19 about intellectual disability; that is one?

20 A Sure.

21 Q But you have communication disorders, and there  
22 are five associated disorders such as stuttering, that  
23 sort of thing, correct?

24 A Correct.

25 Q And then there is also within the same section

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Autism, Autism Spectrum Disorder?

2 A That's correct.

3 Q And Attention Deficit with five specifiers as  
4 well?

5 A That's correct.

6 Q Specific learning disorder with three specifiers,  
7 and motor disorders with five?

8 A That's correct.

9 Q And that even includes Tourette Syndrome?

10 A That's correct.

11 Q So all of these are related, if we want to say  
12 that, because they are all under the chapter, correct?

13 A Well, they are all neuro-developmental disorders.  
14 I'm not sure that I would say that they are related,  
15 but they are all under the same category. That doesn't  
16 necessarily imply a relationship.

17 Q But you will agree with me they've been grouped  
18 together?

19 A They've been grouped together.

20 Q And then at the very end -- and this is the last  
21 page of the exhibit that I handed up to you -- there is  
22 other developmental disorders?

23 A Yes.

24 Q Now, we won't talk about the second section.

25 That is that unspecified -- usually like an emergency

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 situation, something like that?

2 A Yes. That's correct.

3 Q But let's look at the first one. That is, "Other  
4 Specified Neuro-developmental Disorder;" are you  
5 familiar with that disorder?

6 A I am.

7 Q And you can conclude that when the full criteria  
8 is not met, correct?

9 A That's correct.

10 Q So one of the examples that the DSM-5 gives is  
11 Neuro-developmental Disorder associated with prenatal  
12 alcohol exposure?

13 A Yes.

14 Q Are you familiar with that -- okay. So a  
15 clinician strictly following the DSM-5 for recording  
16 their opinion would list the finding you have in your  
17 report as to a fetal alcohol connection as a  
18 neuro-developmental disorder associated with alcohol  
19 exposure, correct?

20 A Yes.

21 Q Okay. Fetal Alcohol Syndrome is not listed in  
22 the DSM-5, is it?

23 A Fetal Alcohol Syndrome is actually listed, but it  
24 is under alcohol-related neuro-developmental disorders  
25 rather than Fetal Alcohol. That is an old name, just



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 like Mental Retardation.

2 Q And spectrum disorder, that is not listed --  
3 nothing is listed as a diagnosis when it comes to  
4 exposure to alcohol?

5 A No. No. That is not correct. It is an alcohol  
6 related neuro-developmental disorder.

7 Q Alcohol related, but it is not a Fetal Alcohol  
8 diagnosis?

9 A If it's a neuro-developmental disorder and it is  
10 alcohol related, it is a Fetal Alcohol diagnosis. That  
11 is what alcohol -- that is what "fetal" would mean,  
12 neuro-developmental. So if it is an alcohol related  
13 neuro-developmental disorder, it's a fetal alcohol  
14 related disorder.

15 Q So you have to make that extra connection?

16 A Yes.

17 Q But the specified disorder of intellectual  
18 disability is listed, you don't have to make another  
19 connection to get there, correct?

20 A Well, it's no different. I mean, alcohol related  
21 neuro-developmental disorder -- maybe I spoke too  
22 quickly -- is all you need to do. If it is alcohol and  
23 prenatal, it is Fetal Alcohol. It is just -- the  
24 connection is one that you are making intellectually  
25 rather than neurologically, and there is no difference

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 between an intellectual developmental disorder and  
2 alcohol related neuro-developmental disorder, from a  
3 clinical point.

4 Q Would you agree with me that if you have a  
5 diagnosis of Fetal Alcohol Syndrome, and people would  
6 agree that you have Fetal Alcohol Syndrome, which is a  
7 little outside, but you want to make that connection to  
8 the DSM-5 -- let's just do this as a hypothetical --  
9 Fetal Alcohol Syndrome, you could connect it to a  
10 specific learning disorder?

11 A Yes.

12 Q Or a motor disorder?

13 A Yes.

14 Q Or an attention deficit disorder?

15 A Not necessarily attention deficit, but certainly  
16 to the unspecified or alcohol related, but not to  
17 attention deficit.

18 Q Okay. What about when you have the specifier of  
19 inattentive presentation; couldn't that be related?

20 A Well, specifiers don't make diagnoses. Specifier  
21 just means do you have these particular symptoms within  
22 a diagnosis. So any specifier could relate to any  
23 diagnosis, if it is appropriate. If you have someone  
24 who is inattentive, you can do that for any  
25 neurological condition where attention is an issue.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 You can't use that to relate to alcohol related  
2 disorders specifically.

3 Q So can we say -- can we agree that alcohol in  
4 utero could be correlated to a number of different  
5 deficiencies or limitations?

6 A Yes.

7 Q Let's go back to intellectual disability. You  
8 agree that there is a first prong and that has to be  
9 deficits and intellectual functions?

10 A Yes.

11 Q And you have to determine that somehow?

12 A Yes.

13 Q And clinicians normally administer tests,  
14 correct, for any number of things?

15 A I would agree with "any number of things."

16 Q And they administer tests for IQ testing?

17 A That is one. Historically, that is one.

18 Q Historically, like the beginning of the last  
19 century, it was something that clinicians relied on  
20 consistently since around 1902, or something along  
21 those lines?

22 A Right around there, yes.

23 Q And they are recognized testing instruments?

24 A Yes.

25 Q And those are the ones that clinicians refer to,

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 rely on, as opposed to scholastic records or something  
2 like that?

3 A I think for the standardized most up-to-date  
4 testing, you are correct.

5 Q And even there, when you look at an IQ test and  
6 know it is a recognized instrument, it is the latest  
7 and correct edition?

8 A Yes.

9 Q And even that you have ways to ensure that it is  
10 fairly and accurately scored, correct?

11 A There are methods, yes.

12 Q And theories and statistical necessities, such as  
13 standard error of measurement, that's applied, isn't  
14 it?

15 A It can be, yes.

16 Q So to each test?

17 A It can be, yes.

18 Q And some tests have a three-point difference,  
19 three on each side, and sometimes five?

20 A That's correct.

21 Q And there is also the practice effect?

22 A Yes.

23 Q And that is a phenomena you mentioned in your  
24 affidavit that was attached to the response in  
25 opposition to our motion for summary judgment?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A That's correct.

2 Q Now, the Flynn effect is something you mentioned,  
3 but is the Flynn effect discussed in the DSM-5?

4 A I don't recall the Flynn effect being discussed  
5 in the DSM-5. I think that is because IQ testing was  
6 minimized pretty much totally, so I think it was not  
7 discussed.

8 Q Do you know of any reference in a psychiatric  
9 manual that talks about intellectual disability where  
10 the Flynn effect is discussed?

11 A Sure.

12 Q And where would that be?

13 A The International Classification of Diseases, 10  
14 and 11.

15 Q Now, is that --

16 MR. GROSE: I would like him to finish.

17 THE COURT: Go ahead.

18 A The AAIDD Manual, newest manual, AAIDD users  
19 manual, which is put out in 2011, and the newest Social  
20 Security regulations, which is put out in February of  
21 2018, all include the Flynn effect.

22 Q (MS. BROWN) Are you aware of articles that note  
23 that a problem with the Flynn effect is that it  
24 generally is not applied in clinical practice but is  
25 regularly applied in legal work?

DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A I'm aware of articles that make that implication,  
2 yes.

3 Q And the DSM-5 is, of course, you said a  
4 psychiatric or psychiatrist combination of diagnoses, a  
5 guide, a manual to go by?

6 A It is really a classification system.

7 Q But the international manual you just mentioned  
8 is actually more of a total help guide?

9 A No. It is a classification system as well. They  
10 are both classification systems. The International  
11 Classification System -- which is more used in the  
12 United States than the DSM -- has a separate  
13 psychiatric section, but it does include other health  
14 -- other types of help as well. But it has a specific  
15 psychiatric and neurological section.

16 Q And it has other sections as well?

17 A That's correct.

18 Q So it is not simply a psychiatric manual as the  
19 DSM-5 is?

20 A Well, that's -- it is as comprehensive a  
21 psychiatric manual as the DSM-5.

22 Q You are a member of the American Association on  
23 Intellectual and Developmental Disabilities, right?

24 A That's correct.

25 Q And you are active?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A Yes.

2 Q And you are aware there have been discussions  
3 between that organization and others to figure out how  
4 to maybe get some of these definitions together?

5 A Oh, yes.

6 Q Because some of them are quite often, aren't  
7 they, categorized differently?

8 A Definitions of?

9 Q Intellectual disability.

10 A I would say they are pretty consistent until --  
11 the newest one is the DSM-5. The DSM-4 and DSM -- the  
12 earlier edition of AAIDD were almost exactly the same.  
13 The committee for the DSM-5 intellect  
14 neuro-developmental disorders actually had two members,  
15 including the president of the AAIDD, on their  
16 committee. So they were very, very similar until the  
17 DSM-5 came out where it incurs neuropsychological  
18 testing.

19 Q And the AAIDD has that definition, you said, of  
20 intellectual disability similar to the DSM-5, that  
21 significant limitations in both intellectual  
22 functioning and adaptive behavior?

23 A That's correct.

24 Q And the AAIDD also recognizes one way to measure  
25 intellectual functioning is an IQ test?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A Yes.

2 Q And, generally, an IQ test of 70 or as high as 75  
3 indicates a limitation in intellectual function?

4 A That's correct.

5 Q So going back to the IQ tests that we have here,  
6 you initially said in your affidavit that there was a  
7 practice effect?

8 A Yes.

9 Q But you haven't discussed a practice effect.

10 A No -- well, I haven't discussed practice effect  
11 because I didn't discuss intellectual testing.

12 Q And let's go back to that. Those scores are  
13 quite higher than 70, aren't they?

14 A Yes.

15 Q In fact, there is a 79, the lowest, and then an  
16 86 and a 92?

17 A That's correct.

18 Q And I believe the DJJ folks had a test score of  
19 93?

20 A That's correct.

21 Q That indicates that he can't meet that first  
22 prong, right?

23 A Depending upon the criteria. I think that is  
24 exactly the reason we look at the fact that the DSM-5  
25 says -- does not include criteria of intellectual -- IQ



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 testing. It moves it to associated features.

2 Q Let's look at the DSM-5. I want to look directly  
3 at the diagnostic criteria. I'll hand up a page  
4 similar to what I did a few minutes ago.

5 (Respondent's Exhibit 2 marked.)

6 MS. BROWN: May I approach?

7 THE COURT: You may.

8 Q (MS. BROWN) Doctor, could you tell me if you  
9 could identify that, please, sir?

10 A Yes. This is the very first page of the three  
11 primary criteria for intellectual disability, also  
12 known as Intellectual Developmental Disorder, from the  
13 Diagnostic and Statistical Manual, Fifth Edition.

14 Q And I would -- I would like to -- let me back up.  
15 This is something you have read before?

16 A Yes.

17 Q You are familiar with it?

18 A I am.

19 Q And it's generally relied on in clinical  
20 practices in your medical profession?

21 A Yes.

22 MS. BROWN: I would move this particular exhibit  
23 into evidence.

24 MR. GROSE: No objection.

25 THE COURT: State's 2 in evidence without

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 objection.

2 (Respondent's Exhibit 2 admitted.)

3 Q (MS. BROWN) Looking at this exhibit we have the  
4 diagnostic criteria set up. The first one is deficit  
5 and intellectual functions, correct?

6 A Yes.

7 Q And at the very end of the sentence it says,  
8 Confirmed by both clinical assessment and  
9 individualized standardized intelligent testing?

10 A Yes.

11 Q I see down at the bottom "specifiers," and that  
12 follows the specified current level of severity,  
13 correct?

14 A Yes.

15 Q And if I'm reading that correctly, Doctor, it  
16 says that the various levels of severity are defined on  
17 the basis of adaptive functioning and not IQ scores  
18 because it is adaptive functioning that determines the  
19 levels of support required?

20 A Correct.

21 Q Is that the passenger you are relying on to say  
22 that IQ is no longer as important in intellectual  
23 disability?

24 A If you look at -- is there a copy of the DSM-5?

25 Q I have one.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A May I borrow that for a moment?

2 MS. BROWN: If I may approach?

3 THE COURT: Yes.

4 A There is two factors that show that the DSM-5 has  
5 deemphasized IQ testing. If we had a copy of the DSM-4  
6 here it would have the same language you used earlier,  
7 Ms. Brown, in terms of a specific IQ score. So it  
8 would say you would have to have an IQ score of 70 to  
9 75. It also would not have the "and" where you have  
10 clinical assessment and individualized standardized  
11 intellectual testing. So the clinical assessment was  
12 not part of the DSM-5 -- I mean DSM-4. It has been  
13 added because of the clear difficulties that we know  
14 that occurred in intellectual testing.

15 If I could find this, and I'll try to do this  
16 quickly. Page 37 it is noted that Criteria A, which  
17 used to be just a number, just IQ, refers to  
18 intellectual functions that involves reasoning, problem  
19 solving, planning, abstract thinking, judgment,  
20 learning from instruction and experience and practical  
21 understanding. It does go on to note the intellectual  
22 functioning is typically measured by an IQ test;  
23 however, it notes that clinical training are required  
24 to interpret test results and assess intellectual  
25 performance. Factors that may affect test scores

DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 include practice effect and the Flynn effect. Invalid  
2 scores may result from brief intelligence screening  
3 tests or group tests. It goes on to talk about  
4 multiple reasons why individual IQ testing may be  
5 problematic.

6 It then goes on to note, Individual cognitive  
7 profiles based on neuropsychological testing are more  
8 useful for understanding intellectual abilities than a  
9 single IQ score. Such testing may identify areas of  
10 relative strength or weaknesses and assessment  
11 important for academic and vocational functioning. IQ  
12 test scores are approximations of conceptual  
13 functioning, but may be insufficient to assess the  
14 reasoning in real life situations and mastery of  
15 practical tasks. For example, a person with an IQ  
16 score above 70 may have such severe adaptive behavior  
17 problems and social judgment, social understanding and  
18 other areas of adaptive functioning that the person's  
19 actual functioning is comparable to that of individuals  
20 with a lower IQ score; thus, clinical judgment is  
21 needed in interpreting the results of the IQ score.  
22 None of that language was in the DSM-4. So it really  
23 reflects the fact of what we know now scientifically at  
24 least since early 2000 and codified in 2019, that IQ  
25 scores don't have the weight because conceptually they

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 don't capture the kinds of behaviors and thinking that  
2 neuropsychological testing has, so that is why they  
3 moved them away.

4 Q (MS. BROWN) Thank you, sir. That passage, as  
5 you just read, isn't that consistent with our prior  
6 discussion that there are ways now to be consistent  
7 and reliable when you scoring are IQ tests?

8 A Well, those take into consideration the ways to  
9 be consistent and reliable. Unfortunately, you can't  
10 be consistent and reliable with an instrument. It's  
11 kind of that garbage-in-garbage-out idea, that we can  
12 -- it is like my children call them a hooptie for a  
13 car. You can continue to add wiring and do different  
14 things, but you can't get it fixed, and that is the  
15 problem we have with IQ testing.

16 Q And I believe that the passage you read said also  
17 that one IQ test should be dispositive?

18 A Correct. One IQ score shouldn't be dispositive.

19 Q And that should be whether it is too high or too  
20 low, shouldn't it?

21 A I would agree with that.

22 Q Consistency is something that as a clinician you  
23 look for?

24 A Sure.

25 Q And in this particular case, the IQ test came

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 back consistently higher than what you would see with  
2 intellectual disability?

3 A They came back consistently higher, but the tests  
4 were different tests, the quality of the tests were to  
5 some degree questionable, and that is the issue that we  
6 have, that we're dealing with an instrument and a  
7 series of instruments that basically are being  
8 deemphasized because the quality of the instrument,  
9 even though it may be consistent, the quality of the  
10 instrument is being called into question.

11 Q Okay. Did you ask for IQ testing in this case?

12 A I did not.

13 Q Wouldn't that have either questioned or maybe  
14 even verified some of the other results if you had done  
15 this yourself?

16 A Well, by DSM-5, I didn't need to because it is no  
17 longer a criteria. What I asked for was  
18 neuropsychological testing which, in fact,  
19 neuropsychological testing is clearly the gold standard  
20 in reasoning, problem solving, planning, abstract  
21 thinking, judgment, academic learning and learning from  
22 experience. IQ testing is not the gold standard for  
23 that today; neuropsychological testing is.

24 Q But you agree it could have perhaps supported  
25 what you were saying that there was a lower functioning

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 than reflected on the other IQ tests?

2 A I think my clinical judgment, Ms. Brown, would  
3 keep me away from doing IQ testing in this situation.  
4 Because we have IQ tests -- another IQ test may give us  
5 nothing but practice effect. We talked about practice  
6 effect before. What we really want to know is how Mr.  
7 Bryant's brain worked, and neuropsychological testing,  
8 first of all, it was new to him. It was testing he  
9 never had. It was a type of testing that really  
10 crosses the bridge between testing and brain  
11 functioning, what we call ecological validity. So it  
12 was a much more valid approach to looking at how his  
13 brain worked than IQ testing.

14 Q Isn't the last IQ test that we're aware of was in  
15 May of 1996?

16 A Yes.

17 Q That's when Mr. Bryant scored a 93?

18 A Yes.

19 Q Practice effect, generally, is a phenomena that  
20 comes into question if a test is taken within one year?

21 A Practice effect can last not 22 years, but  
22 practice effect can last up to 13 years. It depends  
23 upon the type of test that you are administering.  
24 Practice effect can last a -- it is not the function of  
25 the test, it is a function of the task. There is some

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 tests like the Wisconsin Card Sorting Test that should  
2 only be done once in a lifetime because the cueing is  
3 so high, and that is true about some very simple types  
4 of IQ tests. But I'm not arguing that an IQ test could  
5 have been done. It would not have been, in my  
6 professional opinion, appropriate in terms of giving us  
7 information that the neuropsychological testing can do.

8 Q So you would expect a score similar to that of  
9 DJJ?

10 A I don't know. The reason is because I don't know  
11 that -- there are a number of things we don't have. We  
12 don't know who gave the test. I won't read that again,  
13 but if you look at the DSM-5 it talks about you need to  
14 know the qualifications of the person who gave the  
15 test, you have to know the environment which it was  
16 given, whether it was a group test, which it could have  
17 been, or a brief intelligence test. There are so many  
18 issues that surround those four or five scores that I'm  
19 not saying they are invalid, I'm just saying that there  
20 is no reason to repeat an IQ test in this case, in my  
21 professional opinion.

22 Q If you did have information about how the test  
23 was given, how it was for, what the test meant to the  
24 psychologist who administered the test and DJJ, would  
25 that have been something you would want to see?



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1     A     Sure. I think it would be helpful, especially  
2     given the -- it's hard to explain a 93 when you have  
3     neuropsychological testing in the first percentile as a  
4     valid test. It might be a reliable test. There is a  
5     difference between reliability -- reliability is the  
6     story of the king who has no clothes. Valid means that  
7     it's true. So when you have a score that is a 93 and  
8     you have someone that is doing neuropsychological  
9     testing in the first and fifth percentile, it is hard  
10    to justify that IQ score. So I would have liked to  
11    have known that information.

12    Q     Have you ever been provided an affidavit of Kevin  
13    Everhart, Ph.D.?

14    A     I don't recall that affidavit.

15    Q     And this would be the gentleman who administered  
16    the test in DJJ.

17    A     I would like to see that.

18    Q     Would you also like to see an affidavit of Tracy  
19    D. Gunter, the psychiatrist who reviewed Dr. Everhart's  
20    test and test results?

21    A     I have seen -- I know Dr. Gunter and have  
22    reviewed that declaration, so I probably reviewed the  
23    psychologist as well, I just don't recall. But I do  
24    recall Dr. Gunter's.

25    Q     Let me show you copies of the affidavits that are

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 already a part of the record and part of our motion for  
2 summary judgment and see if that refreshes your  
3 recollection. This is an affidavit of Tracy Gunter,  
4 five pages. This is an affidavit of Kevin Everhart,  
5 four pages.

6 A Thank you.

7 Q Yes, sir.

8 (A brief pause in the proceedings.)

9 A I do recall the report from Dr. Everhart. May I  
10 review Dr. Gunter's quickly?

11 Q Absolutely.

12 A Thank you.

13 (A brief pause in the proceedings.)

14 A I do thank you.

15 Q Does that refresh your recollection?

16 A Yes.

17 Q And that's not something you shared with us at  
18 the beginning of your testimony in direct as a document  
19 or documents that you rely on?

20 A I didn't recall.

21 Q And Dr. Everhart's affidavit, which you just had  
22 an opportunity to review, he notes not just IQ tests  
23 and the raw data and scores, but that he looked at the  
24 history and that grades were better with medication and  
25 that there was a consideration on how all of this

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 worked together, which would you say that is a fair  
2 statement?

3 A Actually, no, I wouldn't. First of all, he  
4 didn't identify the IQ test that he did and he didn't  
5 give any raw data on the IQ test, just the scores. So  
6 the affidavit, although it reflects his opinion, in  
7 fact, doesn't show -- I still don't know what test he  
8 did. I don't know under what circumstances he did  
9 them. It appears that he was a student when these were  
10 done, which is excellent, but there is no indication of  
11 what test was done.

12 There actually is no raw data on the scores of  
13 those tests. So that would be very, very helpful.  
14 That is number one. Number two, when you look at both  
15 Dr. Gunter's and Dr. Everhart's material, you see that  
16 neither of them have the opportunity of  
17 neuropsychological testing; for example, Dr. Gunter  
18 says something about his temper. Dr. Everhart says  
19 something about him doing better on medication and,  
20 yet, he failed first grade and obviously wasn't helped  
21 by medication. He failed again academically. And so I  
22 do appreciate the fact that he did the reviews, but  
23 there is no data there, and most importantly there is  
24 no adaptive functioning data and there is no  
25 neuropsychological data. So I wonder how both of them

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 would have looked at some of these statements like,  
2 This was due to his temper, or, he did well in school.  
3 You know, he was tested every year that he was in  
4 school academically. We don't have all the scores, but  
5 we have reviews that he was tested. It is a rare  
6 student that does well that is tested every year while  
7 they are in school. So there is some inferences there  
8 that these particular declarations don't capture.

9 THE COURT: It's getting close to 1 o'clock.

10 MS. BROWN: Pretty significant. Would you like  
11 to break?

12 THE COURT: I have to be somewhere at 1:00. I  
13 can come right back, but I have to let someone in my  
14 house at 1:00.

15 MR. GROSE: Can we take lunch?

16 THE COURT: Okay. That is the only thing, you  
17 can have the whole week other than that. Won't be  
18 long. What time do you want to start back?

19 MS. BROWN: 2 o'clock.

20 THE COURT: Sure.

21 (A lunch recess is taken.)

22 THE COURT: All right. You may continue.

23 MS. BROWN: Thank you, Your Honor.

24 CROSS-EXAMINATION

25

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 BY MS. BROWN:

2 Q Doctor, we were in our conversation about DJJ and  
3 his evaluation before we broke for lunch?

4 A Yes. Yes.

5 Q And, in particular, you had an opportunity to  
6 review the affidavit of Kevin Everhart and Dr. Gunter's  
7 affidavit?

8 A Correct.

9 Q Now, as I understood what you said, that the  
10 affidavit from Dr. Everhart did not give you an  
11 indication of what test was actually given at DJJ?

12 A I may have been incorrect, but I don't recall an  
13 IQ test that was given.

14 Q I'll ask you to look at Page 2 of the affidavit  
15 of Paragraph 4?

16 A Oh, you are correct.

17 Q So the affidavit does reflect the test and the  
18 performance scale and the verbal scale and the average  
19 and a little bit about the VMI, correct?

20 A Yes.

21 Q And the PIAT scores?

22 A That's correct.

23 Q "At grade level," what does that mean?

24 A That means that those scores were consistent with  
25 a grade, like if it's a fifth grade level, et cetera.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q So appropriate level, would that be correct, for  
2 his age?

3 A Not necessarily appropriate.

4 Q But it could be?

5 A Just a grade level that the person is at.

6 Q Okay. And it says, Applicant's VMI standard  
7 score was 105 with an age equivalency of 15 years, 11  
8 months, and his PIAT score was 96, meaning he was  
9 reading at almost a ninth grade level?

10 A Yes.

11 Q And that is consistent with where he was in  
12 school at the time, correct?

13 A I don't think so. I don't think he went to the  
14 ninth grade.

15 Q And what makes you think that?

16 A I may have my data wrong, but I thought that he  
17 did not make it to the ninth grade. I thought he just  
18 went to the eighth grade. I know he was 12 years old  
19 when he left school, but I don't recall him making it  
20 to the ninth grade.

21 Q Okay. Do you recall looking at a report,  
22 psychological evaluation, dated May 10 of 1996 from the  
23 South Carolina Department of Juvenile Justice?

24 A I do.

25 Q You didn't mention that report when you listed

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 off what you had reviewed?

2 A That's correct, I didn't.

3 Q And do you recall what that report had in it?

4 A I don't recall all of the scores. If you could  
5 show that to me, I don't recall.

6 Q Okay. Do you recall reading a statement, Corey  
7 knows of no problems with his birth, growth or early  
8 development?

9 A Yes.

10 Q And it's always better, in general terms, to have  
11 more information, isn't it?

12 A Absolutely.

13 Q Because if you have a narrow focus, you may be  
14 incorrect and not even know you are incorrect?

15 A That's correct.

16 Q I want to talk a little bit about the report that  
17 you sort of went through. You went through your report  
18 in your testimony in terms of what you were looking at,  
19 the information you received?

20 A Sure.

21 Q Do you remember that?

22 A Yes.

23 Q And you testified that -- you first noted the  
24 significant history of sexual abuse?

25 A That's correct.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q And why did you start out a neuropsychiatric  
2 examination with that summary?

3 A Because any neuropsychiatric examination, any  
4 neurological examination, has to take environment into  
5 consideration for what we call co-morbid disorders.  
6 The brain reflects impaired physical pain. The most  
7 recent book by Bessel Van Der Kolk from Harvard called,  
8 "The Body Keeps Score," and it is a book on trauma. So  
9 the idea that trauma is just psychological is not  
10 correct. Trauma actually impacts the body and the  
11 brain. So that history of trauma would be very  
12 relevant.

13 Q And that is something you would want the  
14 factfinder in a sentencing proceeding to hear?

15 A Yes. I don't consider it, as I said, as  
16 specifically relevant as the neurological findings, but  
17 it is important.

18 Q And not particularly relevant to the neurological  
19 findings because it neither controls it nor supports  
20 it, but it is a factor that is related; is that true?

21 A That is an interesting question. No.  
22 Environment controls neurology. Neurology does not  
23 control environment. So if you are a child that has a  
24 normal brain and you are born into an extraordinarily  
25 violent family or into a family where there is



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 excessive drinking or drug use, it affects your brain  
2 as well. So environment really does impact  
3 neurological findings and physical findings.

4 Q And suffering trauma?

5 A That is what I meant by trauma, yes, that's  
6 correct.

7 Q And I want to talk a little bit about the social  
8 history, because as I understood your testimony on  
9 direct, you said you received a social history?

10 A I don't think I received a social history. I  
11 reviewed the social history. I think I did receive a  
12 chronology, but I think I reviewed the social history  
13 given by Dr. Pamela Crawford and also by Dr. Everington  
14 and also some declarations that discussed social  
15 history.

16 Q Did you read any information from Carolyn Graham?

17 A The name sounds familiar, but I don't recall.

18 Q Did you read any information from Dr. Marti  
19 Loring?

20 A Yes.

21 Q What information do you recall from Dr. Loring?

22 A Sorry, I don't recall. If you can refresh my  
23 recollection?

24 Q Well, would trauma -- evidence of trauma or  
25 opinions on a traumatic childhood refresh your

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 recollection?

2 A Other than what I read. I don't recall

3 Dr. Lauren's findings on that.

4 Q Did you speak with SCDC personnel that interacted  
5 with Mr. Bryant?

6 A No, and I wouldn't. When you are looking at  
7 developmental disability, the idea that persons within  
8 the prison system or correctional system can speak to  
9 that, that is really not correct. That is one of the  
10 difficulties that I found with Dr. Gunter's report.  
11 When Dr. Gunter gave her three categories, she said,  
12 Specific to intellectual disability I look at three  
13 criteria, and her criteria was would look at juvenile  
14 education history, time spent in special education  
15 classes; second was psychological scores; third was  
16 observations by staff at DJJ. Observations by staff  
17 are not appropriate in AAIDD, as well as others note  
18 that observations by staff is not appropriate when you  
19 try to determine intellectual or developmental  
20 disability.

21 Q Well, now, I think that would be true for  
22 adaptive functioning, but aren't there some facts and  
23 information that may help you determine intellectual  
24 ability?

25 A I can't imagine.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q You can't imagine any conversation of any depth  
2 that might ask you to rethink a little bit of your  
3 clinical judgment on intellectual disability?

4 A Well, the real problem, Ms. Brown, is that  
5 developmental disability and intellectual disability  
6 require that they be found without supports, that you  
7 are able to evaluate a person without any type of  
8 intellectual or conversational or supports. Once you  
9 are within a prison system or the confines of a jail,  
10 you are, by definition, supported; consequently, it  
11 makes it very, very difficult to make those kinds of  
12 determinations.

13 Q I think that is a fair point, but you just don't  
14 throw everything out, though, do you?

15 A You might -- do you throw everything out?

16 Q Let me give you an example. Shower schedule  
17 isn't necessarily indicative of anything, would it,  
18 because an officer goes in and offers a shower and it's  
19 either yes or no.

20 A Yes.

21 Q That's not your decision to go take it; you've  
22 either said yes or no.

23 A That's correct.

24 Q Right? But if you file a grievance and you are  
25 specifically saying I expected a money order to be

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 deposited into my account in the amount of \$10, I have  
2 an account balance of \$6 and some odd cents, I need a  
3 statement of my account because this would be incorrect  
4 according to my records, essentially, something like  
5 that you would want to know about, wouldn't you?

6 A Number one, that is not inconsistent with either  
7 developmental or intellectual disability. Number two,  
8 I think what I would want to know, which we might never  
9 know, is did he really write it? You are making an  
10 assumption that the person wrote it; you don't know if  
11 that is true or not.

12 Q That's true. And a little investigation would  
13 help, wouldn't you agree?

14 A But the point is that is not something  
15 inconsistent. It is just like knowing someone has a  
16 driver's license, that doesn't help you to determine if  
17 they have developmental or intellectual disability  
18 because people with DD or ID can function on that  
19 level. There is nothing that you said about -- in  
20 terms of presentation -- that is inconsistent with  
21 intellectual or developmental disability.

22 Q But it could be?

23 A No, it couldn't be. I'm sorry, I don't mean  
24 to....

25 Q No. No. That is our conversation.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1     A     No. No. People with intellectual and  
2     developmental disability can read at a sixth grade  
3     level, so that whole thing about grade levels is not  
4     really relevant. That doesn't rule it in or out.

5     Q     Is it not an adaptive functioning question to ask  
6     if you can balance a checkbook or go to an ATM and use  
7     a credit card?

8     A     It is part of it. Could possibly be, yes.

9     Q     Okay. Now, you've contributed articles  
10    expressing the need for investigation?

11    A     Yes.

12    Q     And, in particular, mitigation investigator for  
13    capital cases?

14    A     Sorry, say again. I contributed to an article?

15    Q     Expressing the need for investigation,  
16    particularly in the need of capital cases?

17    A     Probably in capital cases, yes.

18    Q     And even expressed that the investigator needs to  
19    share all of the information with the experts?

20    A     If possible, yes.

21    Q     And, generally, mitigation investigators, along  
22    with social workers, create genograms, correct?

23    A     They can, yes.

24    Q     And the genograms detect patterns within  
25    families, correct?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A They can if done correctly.

2 Q Alcohol use?

3 A Yes.

4 Q Trauma?

5 A Yes.

6 Q Are you aware whether there exists a study, a  
7 history, by a mitigation investigator in this case?

8 A A study of history? No, I'm not aware.

9 Q Okay. All right. Are you aware that Mr. Bryant  
10 has family members?

11 A Yes.

12 Q And are you aware he has brothers?

13 A Yes.

14 Q Are you aware that there is some intellectual  
15 disabilities or limitations that you see run in  
16 families?

17 A There are some, yes.

18 Q Do you know if there is a problem with Mr.  
19 Bryant's family?

20 A I don't recall the diagnosis of intellectual  
21 disability in his family, obviously, related to Fetal  
22 Alcohol.

23 Q And in gathering information, did you speak with  
24 Dr. Maddox, formerly Dr. Schwartz-Watts?

25 A I did not speak with her, but I did review her --

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 I did not speak with her concerning the case, but I did  
2 review her declaration.

3 Q And what declaration is that?

4 A It was perhaps a one-page declaration saying that  
5 there were things that in her previous testimony she  
6 was not aware of.

7 Q Would that have been for the 2012 competency  
8 hearing during the first PCR hearing?

9 A I don't recall exactly where it is from.

10 Q Are you aware that Dr. Maddox created a report  
11 for her evaluation prior to her testimony at  
12 sentencing?

13 A I believe that I saw the report. I don't recall.

14 Q Let's go on. You were saying a little something  
15 about educational history, and as I understood your  
16 testimony on direct, you relied in great part on the  
17 2016 declaration?

18 A Yes.

19 Q Did you ever ask for information that was more  
20 contemporaneous with the developmental ages?

21 A You mean current?

22 Q What would actually apply in intellectual  
23 disability.

24 A During the developmental period?

25 Q Yes. Did you ever ask for information?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A I reviewed the testing of Dr. Everington on her  
2 academic testing.

3 Q But you were aware there were sentencing  
4 proceedings?

5 A Yes.

6 Q And you were aware people testified in  
7 mitigation?

8 A Yes.

9 Q And you didn't ask to see all of that data,  
10 everything they gathered?

11 A I did ask and reviewed some of the transcripts,  
12 but as it related to the testing, I reviewed  
13 Dr. Everington's testing since it was the best  
14 reflection of adaptive functioning.

15 Q And that is because she used standardized tests?

16 A She's an expert in adaptive functioning, because  
17 she used specific types of testing and did interviews  
18 to corroborate her testing.

19 Q Okay. Now, I'm going to switch to the  
20 neurological examination you testified to. That was  
21 within her -- the education history part that you are  
22 talking about, you went to neurological, is that  
23 because environment affected what you were doing, or  
24 why would that be?

25 A I don't quite understand your question, I'm



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1    sorry.

2       Q     Okay.  You had a neurological examination  
3   presentation?

4       A     Yes.

5       Q     But it was within your comments on educational  
6   history and --

7       A     I see.  I see.

8       Q     I just want to know why that would be?

9       A     Sure.  Because his neurological impairment impact  
10   his -- impact educational history.  He has strengths  
11   and deficits and his deficits really relate to  
12   functional mathematics.  He speaks reasonably well, but  
13   what you see here is that he has pretty significant  
14   functional mathematic deficits.  The reason why I said  
15   that within the education is because the  
16   neuropsychological testing and the -- my neurological  
17   testing shows that he's going to have a problem with  
18   numbers, and that testing supports the idea he would  
19   have problems academically with mathematics.

20      Q     And do you know if there was ever a neurological  
21   examination made in or around the time of the plea that  
22   you could have looked at and compared what you are  
23   doing today with something closer to the developmental  
24   period?

25      A     The only even close to neurological was

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Dr. Everhart did a test of motor integration, and it is  
2 not a neurological examination. It is called -- the  
3 only test I can imagine he would have done is a  
4 screening test called the Bender, which is a test of  
5 being able to look at things and try to put them  
6 together. He said that he was within normal limits,  
7 but it is not a neurological examination.

8 Q Are you aware that Dr. Watts testified at the  
9 time of sentencing that there is no organic damage?

10 A Dr. Watts did no testing for organic damage.

11 Q And you don't remember anything about an EEG or  
12 neurological examination?

13 A An EEG is a test of electrical functioning.  
14 50 percent of people that have normal EEGs --  
15 50 percent of diagnosed and treated epileptics have  
16 normal EEGs. What Dr. Watts did was a nine lead EEG,  
17 which has actually been completely limited at this  
18 time.

19 Q I think you said you reviewed a report by  
20 Dr. Maddox -- let me ask you --

21 A I don't recall reviewing a report by Dr. Maddox,  
22 but I do recall reviewing a declaration by Dr. Maddox.

23 Q Okay. Well, there is a report in the record I  
24 would like to ask you about.

25 A Sure.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 MS. BROWN: Your Honor, for clarity, this is  
2 already a part of the record, it is part of the PCR  
3 appendix for the first PCR. It is probably easiest to  
4 find it by the federal habeas -- the header is across  
5 the top of all of the documents we previously  
6 submitted. This is Entry No. 1611 at Page 55. I do  
7 have a copy for the Court if it makes it easier for  
8 you to follow along.

9 Q I want to ask you if this is something you  
10 reviewed before?

11 (A brief pause in the proceedings.)

12 A (Witness examines document.) I believe it is.

13 Q (MS. BROWN) On Page 5 of that report -- and that  
14 is little Page 5 at the bottom, the top number is 1611  
15 at Page 59.

16 A Yes.

17 Q Four paragraphs up from the bottom, do you see  
18 there is a reference to neuropsychological testing?

19 A Yes.

20 Q Sir, would you please read that one paragraph  
21 into the record and we'll speak about it in a little  
22 bit?

23 A The one paragraph?

24 Q Just that one.

25 A Mr. Bryant could not put a good effort in

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 neurological testing which was conducted in April of  
2 2008. He did have an EEG on August 25, 2008 which was  
3 read as normal. He had a neurological examination by  
4 Dr. James Selph on October 25th of 2008 as well.  
5 Dr. Selph recommended an MRI of the brain with contrast  
6 due to his distractibility, which was completed and  
7 shown to be normal except in the sinus area.

8 Q So there was a couple of different tests  
9 accomplished prior to this report; wouldn't you agree?

10 A It appears to be, yes.

11 Q Did you have any of that information when you  
12 were making your opinion?

13 A For testing? No.

14 Q Okay. Now, there is a reference to an MRI there.  
15 MRI is a film of the brain, for lack of a more  
16 sophisticated term, to put it in my words. If you show  
17 organic brain damage, any brain damage, any volume  
18 loss, that is a powerful bit of evidence, isn't it?

19 A Legally -- it has nothing to do with whether  
20 there is something wrong or impaired medically, but  
21 legally people are like that.

22 Q And as a -- I'm sorry, were you finished?

23 A Not quite. It's just that a normal MRI is not  
24 the standard -- the clinical standard for brain  
25 functioning. Neuropsychological testing is the

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 clinical standard for brain functioning.

2 Q And that testing comes with clinical judgment and  
3 accepting some things or discarding some things?

4 A Neuropsychological testing?

5 Q Anything that you exercise clinical judgment on,  
6 you will be accepting some things and rejecting some  
7 things because, by definition, this is what "clinical  
8 judgment" means, correct?

9 A That is true, Ms. Brown. Great question.  
10 However, it cannot comply to neuropsychological testing  
11 because neuropsychological testing is testing -- it is  
12 just a test. That is the difference between the IQ  
13 testing and neuropsychological testing. IQ testing,  
14 unfortunately, relies upon clinical judgment because it  
15 is such poorly validated testing. Neuropsychological  
16 testing, on the other hand, doesn't rely upon clinical  
17 judgment in the same way because you can go at the  
18 brain in multiple ways and determine issues like  
19 efforts, for example. Dr. Moburg, when he went and did  
20 his testing, he looked at issues of effort, and that is  
21 why we look at these consistent areas, because  
22 consistent areas of consistent strengths and consistent  
23 weaknesses tell us whether someone is putting forth  
24 effort or not.

25 Q When you were describing Dr. Moburg's

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 participation, contribution to your report, you said he  
2 specializes in Fetal Alcohol Syndrome?

3 A And dysmorphology, correct.

4 Q And he and Dr. Davies did some measurements?

5 A That's correct.

6 Q And where are those measurements?

7 A Where are they? I consulted with him. I don't  
8 know if they turned in a report or not.

9 Q So there was nothing that you had to exercise  
10 clinical judgment over?

11 (A brief pause in the proceedings.)

12 A They are different, certainly in terms of  
13 Dr. Davies. Dr. Davies did a facial evaluation and  
14 neurological examination. So I would have to exercise  
15 clinical judgment in terms of his neurological  
16 examination. Dr. Moburg, not so much. You know, his  
17 was pretty much straight science, algorithms,  
18 neuropsychological testing. So there was a difference  
19 there.

20 Q (MS. BROWN) But even that is affected on how  
21 much information you have, right?

22 A It can. It can be. But eyes that are small  
23 can't be affected by information. A philtrum that is  
24 flat can't be impacted by information.

25 Q But an angle of a picture could be misleading?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1     A     The angle of a picture could be if the algorithm  
2     is unprecise, and that is why in this particular  
3     testing you look at multiple algorithms.

4           Let me give you an example.  If Dr. Moburg just  
5     said he has microsomia and frontal lobe problems, then  
6     that is up for clinical judgment.  If he said that he's  
7     got microsomia, but doesn't have any facial deformities  
8     and that is all there was, then it is up to clinical  
9     judgment.  But it is an accumulative impact that really  
10    takes it away from a clinical judgment.

11    Q     Would you agree with me if you had multiple  
12    photographs, let's say from age 1 to age 18, and then  
13    you did a study and the photographs were close up, some  
14    distance, some from the side, would you not agree that  
15    that may make your statistical study a little more sure  
16    because you have more information?

17    A     Well, I know exactly what you are saying and I  
18    can understand how that theoretically sounds  
19    appropriate, but the studies that you really want and  
20    the pictures -- for example, the pictures that I had in  
21    my report, you really want the studies to before ten,  
22    the facial studies, because after that, a person can  
23    actually grow out of the facial features of Fetal  
24    Alcohol.  The term is bossism, B-O-S-S-I-S-M.  Your  
25    bones tend to get harder, they tend to get rounder so

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 you tend to lose those facial features that you have as  
2 a child. The important pictures are really the ones  
3 between one and about five.

4 Q Do you know if you have more than one?

5 A I don't know if we have more than one, but the  
6 one is pretty classic Fetal Alcohol.

7 Q You also mentioned something about being short in  
8 stature; doesn't that have to do with family traits?

9 A It can.

10 Q Do you have any idea whether Mr. Bryant is a  
11 short member of his family or all of his family members  
12 are short?

13 A I know that -- I didn't beforehand, but, you  
14 know, it doesn't really matter that all of his family  
15 members are short. It is just, as you say, one issue.  
16 Mr. Bryant falls lower than the tenth percentile in  
17 terms -- so that is just something you have to take  
18 into consideration.

19 Q Another bit of information?

20 A That's correct.

21 Q But we don't know whether Mr. Davies or Mr.  
22 Moburg had any information about family traits?

23 A Other than his mother acknowledging that she  
24 drank.

25 Q Okay. Now, malingerer is a recognized



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1 phenomenon, right?

2 A Yes.

3 Q And it is more than just the failure to  
4 cooperate?

5 A Correct.

6 Q Usually it is something about secondary gain,  
7 some reason you are doing what you are doing?

8 A That's correct.

9 Q And, of course, relief from legal consequences is  
10 a fairly big one?

11 A Yes.

12 Q And the DSM-5 has guidelines for that?

13 A Yes.

14 Q And do you go by those guidelines?

15 A Depends upon the situation. Certainly those  
16 guidelines are reasonable.

17 Q And the first one is to be very cognizable or  
18 consider malingering, should be strongly suspected if  
19 the individual is referred by an attorney?

20 A Yes.

21 Q Is that the case here?

22 A Yes.

23 Q And you didn't give any kind of a malingering  
24 test, did you?

25 A I gave multiple malingering tests.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q What would those be?

2 A My neurological examination and review of  
3 neuropsychological testing. If you look at the battery  
4 of neurological testing, and I think that is when we  
5 talk about Dr. -- he put forth good effort.  
6 Malinger tests, first of all, they are  
7 non-psychological test. They test neither neurological  
8 nor psychological. So the Cask MR, MacArthur, SIRS,  
9 these are tests that are non-psychological.

10 Q How about TOMM, T-O-M-M?

11 A That is probably the least psychological. These  
12 are what are called "forced choice tests." The best  
13 way to look for malingering is to look for internal  
14 consistency, and that is exactly -- when I say I did  
15 multiple tests, I did -- that is why I did a motor test  
16 rather than a psychological test of the frontal lobe.  
17 That is why we do dysmorphology rather than just ask  
18 someone. So what we have is scientific data that is  
19 internally consistent and reflects that he did not  
20 malingering.

21 Q What about using those tests? I mean, it's  
22 clinical practice to use the test, isn't it?

23 A I think I've written about this. I think if you  
24 look at the data -- first of all, there is no tests of  
25 malingering that apply to capital defendants. The

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1 MacArthur test, if you look at the test exactly, it  
2 applies to someone or questions of I think it is a  
3 second degree robbery where questions of mitigation,  
4 sentencing, neurological damage don't even come up. If  
5 you look at the SIRS, the developer of the test,  
6 Mr. Rogers at the University of North Texas,  
7 acknowledges that it is not a test you can use in --  
8 when you are looking at intellectual disability or  
9 cognitive problems.

10 If you look at the testing of malingered memory,  
11 this was a test where the fellow that developed it  
12 actually invited psychologists to send in their  
13 reports. He developed no normative sample for this  
14 test. When he initially developed it, he had no group  
15 to compare it to in terms of intellectual disability.  
16 He had no group to compare it to in terms of multiple,  
17 multiple areas. So the best test of malingering is  
18 internal consistency.

19 Q And, again, in the idea of more information is  
20 better, were you aware that a clinician  
21 administering -- is it a TOMM or T-O-M-M?

22 A It's T-O-M-M, Test of Malingered Memory.

23 Q Are you aware that was given to Mr. Bryant and  
24 the clinician that gave it determined that he was not  
25 putting forth an effort?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A Well, in attempting neuropsychological testing,  
2 the question is what is a normative sample -- again,  
3 you know, at the time that he was given this, which  
4 must have been 2007, 2008, a test of malingering memory  
5 had no normative sample for someone who had  
6 developmental disabilities. So he was comparing  
7 Mr. Bryant to basically no one. He had no scientific  
8 normative sample; that's the problem with that finding.

9 Q But you agree with me it is a recognized clinical  
10 instrument?

11 A A clinical instrument, yes -- I'm sorry, it is  
12 not a clinical instrument. It is a recognized test of  
13 effort, but it is not a clinical instrument.

14 Q Is it regularly given in clinic work that you are  
15 aware of?

16 A No, but it is given in legal work. It is rarely,  
17 if ever, given in a clinical setting in the same way  
18 that the Flynn is rarely used in a clinical setting.  
19 There is no reason to give a TOMM in a clinical  
20 setting.

21 Q And we have to go back to that first caution in  
22 the DSM-5 that if there is a legal connection,  
23 malingering should be strongly suspected?

24 A Absolutely.

25 Q And you did mention doing your own cognitive

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 test; what test was that?

2 A The Luria hand test, the graphesthesia, the  
3 writing on the hand, and the Montreal Cognitive  
4 Assessment, MCA, which is a screening test.

5 Q That is a screening test, but it's also partly a  
6 memory test, too, isn't it?

7 A It is one of 22 sections. Memory is one of 22  
8 sections.

9 Q So you gave that test, but you didn't give the  
10 TOMM?

11 A They are completely different.

12 Q But they have memory components?

13 A The test of malingering memory is not a test of  
14 memory, so you wouldn't give it if you were testing  
15 memory. It is purely a test of effort. The Montreal  
16 Cognitive Assessment is a test of working memory, so  
17 that actually is a test.

18 Q It is used most often to detect Alzheimer's  
19 Disease, isn't it?

20 A No. It is a test used in detecting different  
21 types of -- there are no tests that can only test for  
22 Alzheimer's, but it is used often to look at potential  
23 dementia. It could be multiple types of dementia, but  
24 that is not the only reason it was used. It is a test  
25 given to President Trump.

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1 Q Let me make sure we are on the same page. You  
2 are saying it was not a litmus test for Alzheimer's,  
3 but it is given when Alzheimer's is suspected?

4 A It's given when any cognitive impairment is  
5 suspected, including Alzheimer's.

6 Q I'm looking at one more thing. You said you  
7 reviewed some transcripts?

8 A Yes.

9 Q Did you review the sentencing transcript?

10 A I believe so.

11 Q I want to show you a portion of that and, again,  
12 this is already a part of the record. It is Entry No.  
13 16-4, Page 71. I would like to --

14 A Thank you.

15 (A brief pause in the proceedings.)

16 A Yes.

17 Q (MS. BROWN) Is that something you recall?

18 A I believe that I did review this.

19 Q Essentially, Dr. Watts testified he is not  
20 mentally retarded and has no organic brain damage,  
21 right?

22 A Yes.

23 Q And she listed a number of things that she did to  
24 make sure that she wasn't missing something, correct?

25 A Yes.

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q MRI of the brain -- and excuse me if I've asked  
2 this before and I just don't recall the answer, but did  
3 you look at an MRI of the brain?

4 A I don't recall looking at the MRI of the brain.

5 Q But you are aware that one existed?

6 A I believe so. I thought it was a CT scan.

7 Q And then neuropsychological testing, but he  
8 wasn't able to cooperate with that, so because of that,  
9 I had a neurologist see him, two steps to determine if  
10 there was a neurological problem, correct?

11 A Yes.

12 Q On Page 72 they are talking about the TOMM, Test  
13 of Malinger Memory?

14 A Yes.

15 Q And it is described within the text that you look  
16 at pictures of faces -- I believe there is 50 of  
17 them -- and you are asked to recall those faces, given  
18 a forced choice test; is that correct? 50? That's a  
19 lot.

20 A That's 50 items, but that is not what the test  
21 is.

22 Q So you're given a forced choice test and either  
23 they can tell whether he can proceed with testing or  
24 not, he did pass the cut-off score so she did not  
25 attempt any further tests because she felt that her

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1 results would not be reliable.

2 A That's correct.

3 Q That is what clinicians do when they are testing,  
4 correct?

5 A That is actually not correct.

6 Q They don't stop when they think they are going to  
7 get unreliable information?

8 A That's correct. They do the test to see if it is  
9 unreliable. You can't stop. That is like having -- I  
10 don't want to create a metaphor, but it is exactly the  
11 thing you don't do. The American Academy of  
12 Neuropsychology, I think in August of 2009, determined  
13 that what you do is you do your testing, effort  
14 testing, you find your effort testing and then you  
15 continue with your -- particularly if you only do one,  
16 you know, we have multiple tests available, and then  
17 you continue with your neuropsychological tests and you  
18 determine based upon, as you said, the entire quantity  
19 of information what the testing is. You don't just  
20 stop because you think it is going to be unreliable,  
21 you do the testing to see if it is going to be  
22 unreliable. That is particularly true at this time  
23 because a test of malingering memory was not normalized  
24 properly. It was not normalized for people that have  
25 intellectual or developmental disability. So there was



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1 no normative group for her to do that with.

2 If you take a cut-off score, you create cut-off  
3 scores for different groups. You create cut-off scores  
4 according to age, create cut-off scores whether someone  
5 has intellectual disability, create cut-off scores  
6 whether someone has a traumatic brain injury and  
7 compare them to those cut-off scores. At the time that  
8 the neuropsychologist gave the tests, there was no  
9 cut-off scores for intellectual scores, no cut-off  
10 scores for traumatic brain injury. That is why you  
11 have to continue to do your testing regardless of this  
12 test.

13 Q Does it make any difference that his IQ was in  
14 the 90s?

15 A Of course not.

16 Q Because you would still consider him to be  
17 limited in functioning?

18 A He is limited in functioning. When you do the  
19 neuropsychological testing, you see that he is limited  
20 in functioning, and that is the difference. IQ testing  
21 -- that is why you have both IQ testing and adaptive  
22 functioning, because IQ testing does not tell you how  
23 someone functions.

24 Q It is your testimony that you just accept  
25 everything that is said and you cannot test for

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1 malingerer?

2 A No. I'm saying that you can't test for  
3 malingerer.

4 Q But you use your own clinical judgment instead of  
5 a standardized test?

6 A You can certainly use the standardized testing;  
7 I'm not suggesting you don't. In this case, she used a  
8 test that was not standardized; that is the problem.  
9 Standardized testing requires that you have appropriate  
10 normative samples. This test did not have that in  
11 2008.

12 Q If you will assume for a moment that the doctor  
13 did not believe that there was an intellectual  
14 disability, then it would have been perfectly fine to  
15 use the test, correct?

16 A No. She was determining something before the  
17 testing. If she believed that he did not have an  
18 intellectual disability before she even gave him a  
19 test, before she even did the neuropsychological  
20 testing, that would be inappropriate.

21 Q And the DJJ report would not have affected a  
22 clinician's opinion?

23 A Let me review it one more time in why I feel that  
24 way, because I know Dr. Gunter and she is a very good  
25 psychiatrist, however, she's not a specialist in

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1 intellectual disability. Again, let me point out on  
2 page -- sorry, I get nervous up here, so I apologize --  
3 on Page 2 of 5, second paragraph: Specific to  
4 intellectual disability, I looked at three criteria to  
5 evaluate juvenile functioning at grade level or  
6 displayed signs of a learning disability, intellectual  
7 disability or other cognitive disorder. The first was  
8 the juvenile's educational history and time spent in  
9 special education compared to main-stream classes.

10 That has no relationship to intellectual  
11 disability. Often students that have true intellectual  
12 disability can graduate from college and have never  
13 been picked up by special education.

14 Next are the scores of psychological testing, and  
15 we discussed that. At DJJ she talked about the  
16 Wechsler, which was the standard edition in 1966. I  
17 might note that the Wechsler was formed, I believe, in  
18 1986. By 1996, it was also becoming obsolete.

19 Finally, I used observations by staff at DJJ as  
20 to whether the juvenile functioned similarly to peers,  
21 followed officers' requests and adapted to facility  
22 life.

23 Two of those three criteria are not found in any  
24 book, treatise, monograph on intellectual disability.  
25 Two of them are not found in the American Academy of

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1 Mental Retardation, AAIDD, no DSM. So two of the three  
2 criteria she was using to determine intellectual  
3 disability are incorrect.

4 Q Are you suggesting that you don't look at grade  
5 level, don't look at learning disability or cognitive  
6 disorder?

7 A I'm suggesting that those criteria are not  
8 correct. Those are not the criteria she used. She  
9 said when looking for those things, these are the  
10 criteria she used: Educational records, IQ testing,  
11 judgment by staff.

12 There is no support in any literature since the  
13 start of intellectual disability that says that those  
14 are the criteria. If you notice, she says nothing  
15 about adaptive functioning. So Dr. Gunter, who I know  
16 her very well and she's an excellent psychiatrist,  
17 however, she clearly knew nothing about intellectual  
18 disability at the time that she wrote this particular  
19 report or did the evaluation.

20 Q And you realize this would be DJJ, correct? We  
21 are talking about the same agency?

22 A Yes.

23 Q And if there was cause to make a determination on  
24 intellectual disability, it would be referred to DDSM?  
25 Are you familiar with the agency?

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1 A I'm not familiar with DDSM.

2 Q It is part of, as I understand it, Department of  
3 Mental Health and it has individual psychologists,  
4 other people that gather information to make a  
5 determination on intellectual disability.

6 A I see.

7 Q I had to determine whether it was anything in  
8 this individual's background to send for full  
9 evaluation --

10 MR. GROSE: I'm going to object to that because  
11 she's misstating the statute and the procedure for  
12 competency evaluation, and the records that she's  
13 talking about at DJJ weren't for a competency  
14 evaluation.

15 THE COURT: Response?

16 MS. BROWN: It is not a competency evaluation.  
17 It's just whenever someone sees a need to evaluate for  
18 intellectual disability, it would be a reference to  
19 DDSM.

20 MR. GROSE: She needs to call a witness to  
21 establish that fact, so I object. That is not  
22 correct.

23 THE COURT: Sustained.

24 MS. BROWN: Thank you, Your Honor.

25 Q (MS. BROWN) In the next paragraph you see, I saw

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1 almost 300 adolescents during my time at DJJ. I made  
2 diagnoses of mild mental retardation, now intellectual  
3 disability, in 15 cases; borderline intellectual  
4 functioning in approximately 60 cases; learning  
5 disability, either specified or unspecified, in about  
6 15 cases, and a cognitive disorder due to unknown  
7 medical injury or illness in approximately four cases.  
8 I further diagnosed conduct disorder in 160 cases,  
9 attention deficit/hyperactivity disorder/ADHD in 64  
10 cases and an unspecified adjustment disorder in 32  
11 cases.

12 She was looking at the whole child, correct?

13 A There is no indication that she was looking at  
14 the whole child. What you see, Ms. Brown, that is  
15 problematic is she was seeing those people using  
16 incorrect criteria. She saw each of these people and  
17 she made the diagnoses. I can't say about learning  
18 disability. I can't say about cognitive disorder due  
19 to no medical illness or -- because she doesn't say  
20 what criteria she used. In terms of intellectual  
21 disability or developmental disability, she did not use  
22 the correct criteria. Those criteria are not found in  
23 any medical journals or psychiatric journals. They  
24 were not found in 1996.

25 Q If you don't have a referral question and you

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1 just have a child in front of you and you want to help  
2 that child, you look at everything, don't you?

3 A You always look at everything with the right  
4 criteria.

5 Q Right criteria. And if you need someone to help  
6 you, then you send someone to go get help, right?

7 A Well, she could have if she would have done it by  
8 the -- there were standardized tests of adaptive  
9 functioning at that time that required her to talk to  
10 family members. She could have talked to family  
11 members and she could have even -- and this is not  
12 necessarily the best, but she could have had a  
13 self-reporting adaptive functioning test. She could  
14 have asked him, but there is no evidence that she  
15 looked at adaptive functioning at all except in a  
16 structured setting, which has been identified as being  
17 completely the incorrect way to go about it.

18 Q Can I ask you to turn to Page 4 of that  
19 affidavit?

20 A Sure.

21 Q In Paragraph 5?

22 A Page 4, Paragraph 5.

23 Q My impression of Applicant at the time was that  
24 he suffered from conduct disorder and was at a  
25 significant risk for the development of antisocial

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1 personality disorder. He also suffered from ADHD and  
2 an adjustment disorder. However, there was nothing to  
3 indicate to me that Applicant was intellectually  
4 disabled and nothing in my evaluation would have led me  
5 to do any further testing of him or make a referral to  
6 the Department of Disabilities and Special Needs for  
7 further evaluation. Based upon my evaluation and the  
8 estimated levels of intellectual functioning, I agreed  
9 with the testing psychologist that Applicant possessed  
10 the intellectual capacity to reach his goal of  
11 finishing school.

12 A Yes. What are you asking?

13 Q So, first of all, she was trying to figure out  
14 what that child presented with so she could help him  
15 and she saw no need to send him to the Department of  
16 Disabilities and Special Needs for further evaluation  
17 for adaptability, all of that sort of thing to make a  
18 diagnosis for intellectual disability because the level  
19 of intellectual functioning convinced her that  
20 Applicant possessed the intellectual capacity to reach  
21 his goal of finishing school?

22 A She reached that conclusion because she used the  
23 wrong criteria. If you look further down in the next  
24 paragraph where it says, Applicant's IQ was assessed  
25 using accepted testing instruments, she said, No



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 irregularities were noted in the testing; however, if  
2 you go further down and you see, for example -- this is  
3 one, two, three, four, five, six --

4 Q Are you on Page 3, Doctor?

5 A Page 3, yes. The seventh sentence up she says,  
6 In my evaluation, I noted the variability in  
7 Applicant's scores; for example, Applicant's scores of  
8 six in similarities and seven at similarities and  
9 arithmetic and seven in vocabulary were below average  
10 and not surprising given Applicant's history of  
11 suspensions and expulsions from school.

12 There is a term for this. It is called "cultural  
13 overshadowing." Cultural overshadowing means I think  
14 because of someone's environment these are the reasons  
15 why these things occur, but they didn't really look at  
16 his brain. They took these problems of similarities,  
17 which means he has concrete thinking, and these  
18 problems in mathematics, which we have now identified,  
19 and said, well, it's because he had problems in school,  
20 but now we know with more valid testing that those  
21 problems was because he has a brain that does not  
22 process mathematics.

23 So she was making assumptions about this  
24 variability that they saw in the testing that were not  
25 correct, and they were not correct because the criteria

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 was not correct.

2 Q And what texts would she have been using, the  
3 DSM-5 or DSM-4?

4 A 1996? She would have been using the DSM-3.

5 Q DSM-3? And that text said intellectual  
6 functioning can be measured by IQ test scores?

7 A But it also says you have to test for adaptive  
8 functioning, and she didn't do that.

9 Q And she wasn't diagnosing him, was she? She was  
10 just trying to help him generally and globally.

11 A But you are saying she didn't diagnose him with  
12 it based upon the test, but she couldn't diagnose him  
13 with it because she didn't do all of the testing that  
14 would have been required. So she can't say that she  
15 didn't diagnose him because she didn't use the proper  
16 criteria.

17 Q And she couldn't get over the 90-something IQ  
18 either.

19 A That was irrelevant. That is only one step.

20 Q And you referenced a report, an October 21, 2017  
21 report, from Dr. Everington, and that is actually an  
22 affidavit, isn't it?

23 A Yes.

24 Q And are you aware that Dr. Everington states in  
25 her affidavit that her evaluation is not complete?

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 A Yes.

2 Q She had interviews to finish, correct?

3 A Yes.

4 Q Was that done?

5 A I don't know.

6 Q And you agree that the document you had has  
7 actually referenced preliminary opinion, that is what  
8 she calls it, that it is her preliminary opinion?

9 A Yes.

10 Q Does that bother you that you have an incomplete  
11 report?

12 A Does it bother me? It made my question her  
13 conclusions. I didn't see anything after that date  
14 that made me question her conclusions.

15 Q Did you know that Mr. Bryant testified at his  
16 post-conviction relief hearing?

17 A I don't recall.

18 Q You didn't review his testimony, his interaction  
19 with attorneys?

20 A I don't recall.

21 Q You wouldn't know whether he corrected an  
22 attorney if an attorney misstated something?

23 A That may be true.

24 Q Might be interesting to know if you were doing  
25 clinical judgment on how he does with understanding,

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 especially in a high stress situation, correct?

2 A Depends upon the question, yes.

3 Q And, of course, post-conviction relief  
4 proceedings would be to get new sentencing and out from  
5 under a death sentence, correct?

6 A That's correct.

7 Q And you told us before you didn't consider the  
8 facts of the crime; is that correct?

9 A I did not -- in my evaluation for developmental  
10 disability, I did not take into consideration the facts  
11 of the crime.

12 Q And I think you'll agree with me that usually the  
13 facts of the crime don't really go to adaptive  
14 functioning, because if you are committing criminal  
15 acts, that is not acceptable, correct?

16 A Well, it is not because it is not acceptable, it  
17 is because most times you don't know what is occurring  
18 during the criminal acts. It is not a function of it  
19 being acceptable, although it is not acceptable.

20 Q Would you agree with me that you can consider the  
21 facts when you are considering other evidence of  
22 intellectual functioning?

23 A How do you mean? I don't quite understand.

24 Q The complexity of the plan, length of the time,  
25 amount of crime that was shown to have occurred in the

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 time period.

2 A Well, the AAIDD user manual suggests you do not  
3 consider any aspects of criminal behavior as -- when  
4 you are doing the determination of developmental  
5 disability.

6 Q But on intellectual functioning, the fact that  
7 there were three murders over a period of time, crime  
8 span from October 5, 2004 to October 13, 2004, Cliff  
9 Gainey, murdered, shot three times, left on a roadway.  
10 William Tejan -- this is the capital count -- shot nine  
11 times, burns to his eyes and beard, there was writing  
12 on the wall in blood. Christopher Burgess, similar to  
13 Mr. Gainey, was shot and left on the roadway.  
14 Mr. Bryant actually spoke to officers investigating all  
15 during this time.

16 A Those are terrible, terrible facts, Ms. Brown,  
17 that have nothing to do with developmental disability  
18 or intellectual disability.

19 Q It has nothing to do with your judgment of his  
20 intellect?

21 A There is no way that that can impact -- there is  
22 no way that you look at that for developmental -- they  
23 are terrible facts, but they have nothing to do with  
24 intellectual development disorder.

25 Q Would you like to have looked at it before you

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 just said, no, I'm not considering it?

2 A I think I reviewed and -- certainly I reviewed  
3 Ms. Crawford -- Dr. Crawford's interview where she  
4 discussed Mr. Bryant discussing them, so I was familiar  
5 with the facts of the case, but that is not the same as  
6 developmental disorder.

7 Q And giving different stories at different times,  
8 wouldn't you have liked to know what Mr. Bryant said  
9 about his own crimes?

10 A "Wouldn't you like to know" doesn't really speak  
11 to the scientific understanding of developmental  
12 disorder.

13 Q I'm going to go a little bit to some of the law  
14 you referenced, because you said that you look at law  
15 when you do forensic psychology, I think you teach  
16 mental health and the law, correct?

17 A That's correct.

18 Q And today you shared with us some statutes that  
19 are from health statutes?

20 A That's correct.

21 Q What about the criminal statutes?

22 A You have to make a determination of health before  
23 you can apply to criminal statutes.

24 Q Well, now, you shared with us in discovery  
25 through your report that you were including statutes

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 from California and Colorado; do you recall that?

2 A Yes.

3 Q Why did you put California and Colorado in there?

4 A Because those are two states that have  
5 developmental disability statutes.

6 Q They most certainly do, but what you quoted to us  
7 were the health statutes. Each one has a separate  
8 statute defining intellectual disability for capital  
9 proceedings why didn't you quote the statutes for  
10 intellectual disability for capital proceedings?

11 A Because these were statutes that define the  
12 relationship between development disability and  
13 intellectual disability and really show that there are  
14 states that already understand that IQ is not  
15 relevant -- consistently relevant when you are looking  
16 at adaptive functioning, that's why.

17 Q As you said before, if you are in forensic  
18 psychiatry, you take the law as it is given to you,  
19 correct?

20 A Well, I think what I said is you present to the  
21 trier of fact. That is exactly what I did in this  
22 case. You present to the trier of fact that there are  
23 permutations in the law, and that is what I did.

24 Q In this jurisdiction, did you look at any of the  
25 case law where we had intellectual disability discussed

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 in the context of the capital case?

2 A I don't believe I did.

3 Q State versus Blackwell?

4 A I don't believe I did.

5 Q Okay. Franklin v. Manor?

6 A No.

7 Q Okay. Are you familiar where Aiken v. Byars or  
8 Miller versus Alabama?

9 A I am familiar with Miller versus Alabama.

10 Q Do you know the cut-off date for consideration in  
11 those cases for resentencing?

12 A Oh, no, I don't.

13 Q Would 18 years old sound right?

14 A That might be correct, yes.

15 Q Might be kind of a standard thing when you look  
16 at Miller versus Alabama, 18 years old?

17 A In that statute, yes.

18 Q What about an exemption from the death penalty,  
19 isn't that 18 years old as well?

20 A I don't know what you mean.

21 Q Okay. That is fair enough. Let's go back to the  
22 one you are familiar with, the Miller v. Alabama.  
23 Eighteen years old, that is a bright line, isn't it?

24 A I would have to see the statute. Is that how the  
25 statute reads?



## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q Doctor, I think we can agree that much has been  
2 written about the death penalty and intellectual  
3 disabilities, particularly as an exception to capital  
4 punishment?

5 A Yes.

6 Q Now, would you agree or disagree with the  
7 following statement: Individuals with Fetal Alcohol  
8 Syndrome and Autism Spectrum Disorder are other  
9 potential categories of excludable offenders?

10 A Say that again.

11 Q Sure. Individuals with Fetal Alcohol Syndrome  
12 and Autism Spectrum Disorder are other potential  
13 categories of excludable offenders.

14 A I would agree with that if they had the potential  
15 of adaptive functional deficits that were consistent  
16 with intellectual disability. I would not agree with  
17 it if you are talking about the entire category of  
18 Fetal Alcohol -- it is probably something I had  
19 written -- or autism.

20 Q In fairness, sir, no it's not, but it is written  
21 by Mark Tazay (phonetic) and John Glenn.

22 A Oh, okay. I would agree with that if they meet  
23 the adaptive functioning particularly and the  
24 neurological testing reflects the same type of  
25 impairments we see here today.

DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 Q Now, are you familiar with Mr. -- Dr. Tazay?

2 A I am.

3 Q And you have actually worked with him on

4 intellectual disability cases before, right?

5 A I probably have worked with Dr. Tazay, yes.

6 Q His specialty is intellectual disability?

7 A That is correct.

8 Q I kind of think I know what you'll say on this,  
9 but I'll read you one more quote and ask you if you  
10 agree or disagree: We are not suggesting that the  
11 definition of intellectual disability should be altered  
12 to encompass any of these other conditions, that would  
13 blur intellectual disability's clear diagnostic  
14 criteria. What is your opinion, sir?

15 A Read that one more time.

16 Q Certainly. We are not suggesting that the  
17 definition of intellectual disability should be altered  
18 to encompass any of these other conditions, that would  
19 blur intellectual disability's clear diagnostic  
20 criteria.

21 A I don't know what to say about that. I would  
22 have to disagree that the criteria are clear. I see  
23 them evolving between DSM-4 and 5. You see an  
24 evolution between the classification. You are seeing  
25 an evolution. As the intellectual IQ testing is

## DR. WOODS - CROSS-EXAMINATION BY MS. BROWN

1 falling into disfavor, you are finding real changes in  
2 how people are thinking about intellectual disability.  
3 So I'm not sure that I would agree with that.

4 Q Dr. Woods, I think you told us before you are a  
5 member of the American Association of Intellectual and  
6 Developmental Disorders?

7 A That's correct.

8 Q And you have worked with them on defining  
9 criteria?

10 A Actually, I work with the international  
11 association. I'm a member of the American association,  
12 but I'm more active in the international association,  
13 and that is the one where I did most of my clinical  
14 work, not with the American association.

15 Q Would you be familiar with the AAIDD's work  
16 within the legal system to ensure that diagnostic  
17 criteria is correctly applied?

18 A I know that there is tremendous work done; I'm  
19 not familiar with the specific work.

20 Q Okay. And have you heard a Moore versus Texas  
21 from 2017, United States Supreme Court case?

22 A Yes.

23 Q And you know that the court said accepted medical  
24 standards should be used?

25 A Yes.

DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 Q And you agree with that?

2 A Yes.

3 MS. BROWN: Thank you, sir. No further  
4 questions, Your Honor.

5 REDIRECT-EXAMINATION

6 BY MR. GROSE:

7 Q Just a few in follow up. In your evaluation of  
8 Mr. Bryant, did you use accepted medical standards?

9 A Absolutely.

10 (Applicant's Exhibit 3 marked.)

11 Q (MR. GROSE) I'm going to show you Applicant's  
12 No. 3; have you seen that before?

13 A Yes. Yes, I have.

14 Q When we were talking about the declaration of  
15 Dr. Maddox, is that what you were referring to?

16 A Yes.

17 Q And in that did she state that she had become  
18 aware of additional information?

19 A That's correct.

20 Q And looking at probably on Page 2, did she  
21 indicate whether she thought an assessment for  
22 intellectual disability and fetal alcohol syndrome was  
23 appropriate?

24 A Yes. She viewed it as appropriate.

25 Q And in that did she even reference the previous

## DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 attempts at neuropsychological testing?

2 A Yes, she does.

3 Q And even knowing that, she recommended these  
4 additional assessments and evaluations?

5 A That's correct.

6 Q And that's what you did?

7 A Yes.

8 Q Right after lunch they were asked a question  
9 about a statement that plaintiff -- Mr. Bryant knows of  
10 no problems with his birth or development. Do people  
11 that have an intellectual disability or developmental  
12 disability usually know they have problems with their  
13 birth or prenatal period?

14 A Well, it's not only people with -- I think the  
15 question was in the report from the Department of  
16 Justice it said that there were no known problems  
17 with -- and I didn't understand that that was directly  
18 from him, but many of us don't have that kind of  
19 history.

20 Q You talked earlier about people having people  
21 with disabilities -- developmental disabilities having  
22 strengths and weaknesses?

23 A Yes.

24 Q Can you elaborate on that a little bit, please?

25 A Sure. When you are evaluating someone for

## DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 developmental disorder or intellectual disorder, you  
2 have to kind of understand the history which -- from  
3 where this came from. The determination by the DSM-5  
4 and AAIDD for intellectual and development disabilities  
5 is really to provide services for people.  
6 Consequently, you look at their deficits rather than  
7 the strengths because their strengths don't -- you  
8 don't need anything. If someone can do something, then  
9 they don't -- you don't need to supply any support for  
10 them. If they have deficits, that is where you want to  
11 supply the support to make sure that that person gets  
12 what they need. So people with intellectual disability  
13 could get driver's licenses, they can drive, finish  
14 school, often read to the sixth grade level, but that  
15 doesn't mean that they don't have these impairments  
16 that prevent them from functioning. When those became  
17 significant, as Dr. Everington noted, greater than two  
18 standard deviations, those are the holes you want to  
19 fill, and that is why strengths don't count, it is  
20 merely weaknesses, deficits, that count.

21 Q And then there was questions about people with  
22 intellectual disabilities or developmental disabilities  
23 committing crimes --

24 A Yes.

25 Q -- and in a reference to the really sad sets of

## DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 facts that we have in this case. Do we find that  
2 people with developmental disabilities tend to find  
3 themselves in the criminal justice system more often?

4 A Yes.

5 Q Why is that?

6 A Because of their impaired ability to control  
7 their behavior, that is one reason. Because of  
8 vulnerabilities that often we find them being followers  
9 rather than leaders, and that is not the case in this  
10 particular one, but you do find people with brain  
11 impairments and intellectual disabilities being over  
12 represented in the criminal justice system.

13 Q Does that get back to what we talked about with  
14 executive functioning?

15 A That's correct. Being able to weigh and  
16 deliberate, being able to sequence and understand their  
17 behavior, being able to understand context, all of  
18 those things are more common with someone who has  
19 developmental disabilities.

20 Q Does that also get back to why you place an  
21 emphasis on the deficits and adaptive functioning?

22 A That is exactly right. It is the deficits that  
23 count. A person may have strengths, but deficits are  
24 what counts.

25 Q And earlier -- I didn't think we had a big stack,

DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 but looks like we do.

2 (A brief pause in the proceedings.)

3 Q (MR. GROSE) Earlier they had you look at what is  
4 in evidence as Defendant's Exhibit No. 2. Do you  
5 recall looking at that?

6 A Yes.

7 Q And that was from the DSM-5?

8 A That's correct.

9 Q And that is -- that is just one page of many?

10 A That's right.

11 Q With regards to those criteria, you can go  
12 through those criteria and tell us how those apply to  
13 Mr. Bryant?

14 A Sure. Intellectual disability, parentheses,  
15 intellectual developmental disorder is a disorder with  
16 onset during the developmental period that includes  
17 both intellectual and adaptive functioning deficits and  
18 conceptual, social and practical domains. The  
19 following three criteria must be met: Deficits in  
20 intellectual functions such as reasoning, problem  
21 solving, planning, abstract thinking, judgment,  
22 academic learning and learning from experience  
23 confirmed by both clinical assessment and  
24 individualized standardized intelligence testing.

25 Those areas are really what we call executive



## DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 functioning. The ability to reason, problem solve,  
2 effectively plan, have abstract thinking. The abstract  
3 thinking was captured in the 1996 testing with  
4 similarities, which is one of his lowest scores.  
5 Academic learning was captured in a 1996 testing with  
6 the mathematic score, again, one of his lowest scores.  
7 And DSM-5 confirms both clinical assessment and  
8 individualized standardized intelligence testing.

9 B, deficits in adaptive functioning that result  
10 in failure to meet developmental and social culture  
11 standards for personal independence and social  
12 responsibility without ongoing support -- so support  
13 means everything -- without ongoing support, the  
14 adaptive deficits limit functioning in one or more  
15 activity of daily life. Communication, we know that  
16 Mr. Bryant had problems in terms of communication.  
17 Social participation, he was isolated. Independent  
18 living, he never lived alone. Across multiple  
19 environments such as home, school, work and community.

20 Onset of intellectual and adaptive functioning  
21 during the developmental period, and you will see here  
22 that they did not use the criteria of 18, which was  
23 thrown out in May of 2013, clinically.

24 Q Now, if we were going to apply the 18, did Corey  
25 have these prior to age 18?

DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 A Yes.

2 Q Adaptive deficits and --

3 A Certainly, yes. Yes. Certainly had academic  
4 functioning, social functioning prior.

5 Q When we talk about the "developmental period,"  
6 what does that refer to from a medical standpoint?

7 A Well, it's a moving target. The period, as I  
8 said, was randomly chosen by the American Association  
9 of Mental Retardation to be 18 for many years. There  
10 is some jurisdictions, for example South Carolina, that  
11 limit the developmental period to 22. But we know now  
12 that the brain continues to grow until at least 25. So  
13 the developmental period is really a moving target, but  
14 somewhere between 18 and 25.

15 Q Now, you referenced to a photograph earlier?

16 A Yes.

17 Q I realize this is not in evidence, but if I show  
18 you what you have already identified as Plaintiff's  
19 Exhibit No. 2, and we go to Page 7, you include a  
20 photograph in that, right?

21 A That's correct.

22 MS. BROWN: Your Honor, if it is not in evidence,  
23 I object to any testimony about it.

24 MR. GROSE: Well, you asked questions about  
25 photographs, so I just want him to elaborate as to why

DR. WOODS - REDIRECT EXAMINATION BY MR. GROSE

1 this photograph is in the report. This does not go to  
2 any of her other objections about the report.

3 MS. BROWN: I believe it was just the number of  
4 photographs I asked about, Your Honor, and if there  
5 was --

6 THE COURT: I'll allow it, but I won't look at it  
7 because it's not in evidence.

8 MS. BROWN: Thank you, Your Honor.

9 Q (MR. GROSE) Why did you include that photograph  
10 in your report?

11 A Because this photograph, which is a child  
12 probably less than a year old, has classic symptoms of  
13 -- presentation of the Fetal Alcohol Spectrum Disorder.  
14 It has -- he has small eyes, I apologize, with widening  
15 and palpebral fissure, it has the flat philtrum, it has  
16 the circularity of the lips. It is about as classic a  
17 picture of Fetal Alcohol Spectrum Disorder as one could  
18 get.

19 Q There was questions about putting forth a good  
20 effort or malingering. In your examination of  
21 Mr. Bryant, did he put forth a good effort?

22 A Yes.

23 Q Did you see any signs of malingering?

24 A No.

25 Q And how do you reach that conclusion?

## DR. WOODS - RECROSS-EXAMINATION BY MS. BROWN

1     A     Well, much of my examination was neurological and  
2 motor, and so what I saw with Mr. Bryant is there is  
3 areas where he did reasonably well on the Montreal  
4 assessment, there is areas where he did well. There  
5 are areas where he did poorly. The areas he did  
6 well -- and what I meant by looking for malingering,  
7 the areas he did well are the areas that he's always  
8 done well. Areas of certain communication. But the  
9 areas he did poorly, for example, executive  
10 functioning, he did poorly on my testing, he did poorly  
11 on Dr. Moburg's testing, poorly on my motor testing, he  
12 did poorly on Dr. Davies testing and the stories that  
13 we have in the history. When I looked at the math, he  
14 did poorly on math motor testing. He did poorly on  
15 Dr. Moburg's motor testing. He did poorly on  
16 Dr. Everington's academic testing. And so what we see  
17 are these internal consistent impairments, which are  
18 things that people can't malingering. You can't malingering  
19 an impaired corpus callosum.

20           MR. GROSE: That is all I have. Thank you.

21           MS. BROWN: Your Honor, just briefly. I would  
22 like to have one document marked for identification,  
23 please.

24           (Respondent's Exhibit 3 marked.)

25                           RECROSS-EXAMINATION

## DR. WOODS - RECROSS-EXAMINATION BY MS. BROWN

1 BY MS. BROWN:

2 Q Is that a document you have encountered before?

3 A Yes.

4 Q In the last one it shows an entry from

5 September 18, 2012, right?

6 A Yes.

7 Q And you would have --

8 A You know what, I'm sorry, I'm not sure that I  
9 have seen this before, but go ahead.

10 Q Do you recognize it as a summary from South  
11 Carolina Department of Corrections?

12 A Yes.

13 Q This would be the type of record you would  
14 normally look at?

15 A Yes.

16 Q And that shows that is a record from Stephen  
17 Corey Bryant's file, SCDC No. 5252?

18 A That's correct.

19 MS. BROWN: I would like to move this into  
20 evidence, Your Honor.

21 THE COURT: Any objections?

22 MR. GROSE: No objection.

23 (Respondent's Exhibit 3 admitted.)

24 Q Going back to that 9-18-12 entry, does it not  
25 say, Reports having head imaging studies done at MUSC

## DR. WOODS - RECROSS-EXAMINATION BY MS. BROWN

1 for unknown reasons other than them being ordered by  
2 Dr. Schwartz-Watts?

3 A Yes.

4 Q And what was the date of the affidavit from  
5 Dr. Watts that you just referenced on your redirect?

6 A April 27, 2016.

7 Q Could you repeat that?

8 A April 27, 2016.

9 Q So we have a request for testing, but it looks  
10 like there was testing done, doesn't it?

11 A But this appears to be the previous testing,  
12 testing that was done in 2008. I don't think this  
13 refers to any other testing.

14 Q Take a look at the affidavit, if you can.

15 A It is sworn to and subscribe before me the  
16 27<sup>th</sup> day of April, 2016.

17 Q April 2016, okay. Actually, I'm not sure that I  
18 do have that one. Let me ask you to look at one other  
19 document, if I might.

20 A Okay.

21 (Respondent's Exhibit 4 marked.)

22 Q (MS. BROWN) If you would, look at this affidavit  
23 and tell us the date on that?

24 A This one is 11/2012.

25 Q That is from Dr. Watts?

## DR. WOODS - RECROSS-EXAMINATION BY MS. BROWN

1 A That's correct.

2 Q And turning -- I don't know if I moved that into  
3 evidence.

4 MS. BROWN: I'll move it into evidence.

5 MR. GROSE: No objection.

6 THE COURT: State's 4 is in evidence.

7 (Respondent's Exhibit 4 admitted.)

8 Q (MS. BROWN) The first page, Paragraph A, I'm  
9 concerned that Mr. Bryant's incompetence may be linked  
10 to a neurological impairment, on Page 8.

11 A Now, am I looking at the 2012 or 2016?

12 Q 2012.

13 A I'm sorry, where is that? Oh, yes. I'm  
14 concerned that Mr. Bryant's incompetence may be linked  
15 to -- right.

16 Q And if you would, flip that over to the backside  
17 of the page; there is one more paragraph there. Can  
18 you read that out for us, please?

19 A Sure. It is my opinion to a reasonable degree of  
20 medical certainty that Mr. Bryant is not competent to  
21 assist his counsel, but that his competence is  
22 likely -- through intervention of medications.  
23 Further, I believe Mr. Bryant needs neuro imaging  
24 intervention to rule or diagnose neurological  
25 impairment as a causative or contributor factor in his

## DR. WOODS - RECROSS-EXAMINATION BY MS. BROWN

1 mental capacity.

2 Q And that's the June 11, 2012 affidavit, correct?

3 A Yes.

4 Q Now that SCDC summary that I provided to you just  
5 a moment ago, that is a few months after this  
6 affidavit, correct? It would be recorded September 18,  
7 2012, according to the face of the document?

8 A I see. I see. I see. Yes.

9 Q So a few months after that?

10 A Yes.

11 Q And Mr. Bryant is recorded as having reported  
12 having had head imaging studies done at MUSC, correct?

13 A Yes.

14 Q Are you familiar with MUSC?

15 A Medical University of South Carolina.

16 Q You have it. And do you have any reports from  
17 MUSC?

18 A No, I don't recall any.

19 MS. BROWN: Thank you, doctor. Thank you.

20 THE COURT: You may step down.

21 MR. GROSE: Unless there is an objection, we ask  
22 that Dr. Woods be excused.

23 MS. BROWN: I do object -- no, I do not object.  
24 You looked quite alarmed there (laughing).

25 DR. WOODS: Hungry was the word (laughing).