

RECEIVED

DEC 05 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-001713

ANTHONY WOODS,PETITIONER,

v.

STATE OF SOUTH CAROLINA.....RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

EMILY C. PAAVOLA
SC Bar No. 77855
LINDSEY S. VANN
SC Bar No. 101408
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
Counsel for Petitioner

Other Counsel of Record:

William Edgar Salter
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE & RELEVANT FACTS.....2

 I. Introduction.....2

 II. Trial Counsel and Initial PCR Counsel Failed to Raise and Litigate a Claim of Intellectual Disability.....3

 III. Federal Habeas Counsel Sought to Exhaust an *Atkins* Claim in State Court....4

ARGUMENT..... 11

 I. This Court has Held the General Bar Against Second-in-Time PCR Applications Has Multiple Exceptions 11

 II. At Least Four Similarly Situated PCR Applicants Have Been Allowed to Pursue *Atkins* Claims in Second-in-Time PCR Proceedings 13

 III. The Categorical Nature of the Bar Against Executing the Intellectually Disabled Justifies an Exception to the Successor Bar Where the Issue of Intellectual Disability has not Previously Been Adjudicated 17

 IV. The PCR Court Erred in Granting Summary Dismissal and Denying an Evidentiary Hearing..... 19

CONCLUSION.....21

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002).....	<i>passim</i>
<i>Brumfield v. Cain</i> , 135 S. Ct. 2269 (2015)	2, 3
<i>Hall v. Florida</i> , 572 U.S. 701 (2014).....	<i>passim</i>
<i>Harvey v. South Carolina</i> , 310 F.Supp. 83 (D. S.C. 1970).....	10
<i>McNeil v. Polk</i> , 476 F.3d 206 (4th Cir. 2007).....	16
<i>Moore v. Texas</i> , 137 S. Ct. 1039 (2017)	2, 17
<i>Moore v. Texas II</i> , 139 S. Ct. 666 (2019)	2
<i>Nicholson v. Branker</i> , 739 F. Supp. 2d 839 (E.D.N.C. 2010)	3
<i>Rivera v. Quarterman</i> , 505 F.3d 349 (5th Cir. 2007)	3
<i>Roper v. Simmons</i> , 533 U.S. 551 (2005).....	17
<i>United States v. Smith</i> , 790 F. Supp. 2d 482 (E.D. La. 2011).....	3

STATE CASES

<i>Aice v. State</i> , 305 S.C. 448, 409 S.E.2d 392 (1991)	10, 11, 12, 18
<i>Aleksey v. State</i> , No. 2015-CP-38-00764.....	4, 13
<i>Austin v. State</i> , 305 S.C. 453, 409 S.E.2d 395 (1991)	12
<i>Bryant v. South Carolina</i> , 2016-CP-43-828	4, 13
<i>Carter v. State</i> , 293 S.C. 528, 362 S.E.2d 20 (1987).....	12
<i>Case v. State</i> , 277 S.C. 474, 289 S.E.2d 412 (1982).....	13
<i>Elmore v. State</i> , No. 2005-CP-24-1205	4, 13, 15
<i>Ferguson v. State</i> , 382 S.C. 615, 677 S.E.2d 600 (2009)	20
<i>Finklea v. State</i> , 273 S.C. 157, 255 S.E.2d 447 (1979)	10
<i>Franklin v. Maynard</i> , 356 S.C. 276, 588 S.E.2d 604 (2003).....	2

Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989).....12

Hope v. State, 328 S.C. 78 492 S.E.2d 76 (1997).....12

Moses v. State, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017).....20

Oats v. State, 181 So.3d 457 (Fla. 2015)3

Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).....10, 12, 20

Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016)10, 13, 18, 19

Stone v. State, No. 2018-CP-43-010254, 13, 14

Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996)11, 20

White v. Commonwealth, No. 2013-SC0791-MR, 2016 WL 2604759 (Ky. May 5, 2016)14

CONSTITUTIONS & STATUTES

S.C. Const. art. I § 3.....16

S.C. Code § 16-3-26.....9

S.C. Code § 17-20-10.....10

S.C. Code Ann. § 17-27-20.....10

S.C. Code § 17-27-90.....1, 11, 12, 13

S.C. Code § 17-27-160.....9

OTHER

American Association on Intellectual Disabilities and Developmental Disorders, 2010 Manual 53, 5, 6

Diagnostic and Statistical Manual of Mental Disorders (5th Ed. 2013)3

Alan S. Kaufman, *Practice Effects*, 2 Encyclopedia of Human Intelligence, 828-833 (1994)6

Larry W. Yackle, POSTCONVICTION REMEDIES § 4 (1981 & Supp. 1993)10

QUESTION PRESENTED

In *Atkins v. Virginia*, 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth Amendment prohibits the execution of persons with intellectual disability. Although there is strong evidence that Anthony Woods is intellectually disabled, his trial counsel did not raise an *Atkins* claim and his initial post-conviction counsel withdrew the same claim without a full investigation prior to the PCR evidentiary hearing. As a result, no court has ever adjudicated whether Woods is a person with intellectual disability. Undersigned counsel – who were appointed to represent Woods in his federal habeas proceedings – discovered additional compelling evidence of intellectual disability and filed a second-in-time PCR application in the Clarendon County Circuit Court in an effort to exhaust the *Atkins* claim as required by federal law. Despite the fact that four other similarly situated capital PCR applicants have been allowed by the South Carolina courts to pursue *Atkins* claims in this same manner, the lower court summarily dismissed Woods’s claim and denied his request for an evidentiary hearing.

QUESTION I.

Whether Anthony Woods, like at least four other death-sentenced inmates before him, should be permitted to proceed with a second-in-time PCR application asserting a colorable claim that he is intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*.

QUESTION II.

Whether a claim of categorical exclusion from capital punishment (such as intellectual disability or juvenility) may be “the basis for a subsequent [PCR] application,” S.C. Code § 17-27-90, where a petitioner makes a *prima facie* showing and no court has previously adjudicated that claim.

STATEMENT OF THE CASE & RELEVANT FACTS

I. Introduction.

The “Constitution restrict[s] . . . the State’s power to take the life of *any* intellectually disabled individual.” *Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017) (emphasis original) (internal quotes omitted). As the United States Supreme Court has repeatedly held, “[n]o legitimate penological purpose is served by executing a person with intellectual disability,” and thus, people with intellectual disability are not eligible for “the law’s most severe sentence.” *Hall v. Florida*, 572 U.S. 701, 709 (2014); *see also Atkins*, 536 U.S. 304, 321 (2002); *Moore*, 137 S. Ct. at 1048 (2017); *Moore v. Texas II*, 139 S. Ct. 666, 669 (2019). The definition of intellectual disability consists of three prongs:

- (1) subaverage intellectual functioning;
- (2) limitations in adaptive functioning; and,
- (3) a manifestation of these attributes before age 18.

See Franklin v. Maynard, 356 S.C. 276, 588 S.E.2d 604 (2003). A person meets the sub-average intellectual functioning component if his or her IQ is approximately 75 or less. *Atkins*, 536 U.S. at 309 n.5; *Hall*, 572 U.S. at 713, 723; *Moore*, 137 S. Ct. at 1049; *see also Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015) (relying on *Hall* to find unreasonable a state court’s conclusion that a score of 75 precluded an intellectual disability finding). The Court has instructed that states must “understand that an IQ test score represents a range rather than a fixed number.” *Hall*, 572 U.S. at 723. When a defendant has at least one IQ score that falls within a test’s inherent margin of error (typically up to 75), the defendant must be permitted to present additional evidence of intellectual disability. *Id.* The second prong requires significant deficits in at least *one* of three

areas of adaptive behavior: conceptual, social and practical skills.¹ The medical community's diagnostic framework requires a properly trained and educated expert in intellectual disability to conduct a comprehensive assessment of adaptive behavior, using – among other things – multiple sources and a rigorous collection of data.² Finally, because intellectual disability is a developmental disorder, the third prong of the definition is onset during the developmental period, which is typically considered prior to the age of eighteen.³

II. Trial Counsel and Initial PCR Counsel Failed to Raise and Litigate a Claim of Intellectual Disability.

At the time of Woods's capital trial in 2006, trial counsel James Hoffmeyer and Frederick Hoefler were aware Woods had obtained a full-scale IQ score of 73 on a WAIS-III administered by the State, and that Woods's reading skills were measured at a third grade level.⁴ App. 49, 219. Despite this information, there is no evidence in the record or from undersigned counsel's independent investigation that trial counsel retained or consulted with an expert in intellectual disability; nor did they investigate or collect information relating to Woods's adaptive functioning or obtain their own expert evaluation.

¹ American Association on Intellectual Disabilities and Developmental Disorders (hereafter, "AAIDD") 2010 Manual 5; Diagnostic and Statistical Manual of Mental Disorders 33 (5th Ed. 2013).

² 2010 Manual at 28; DSM-5 at 37–38.

³ The analysis of age of onset does not require an individual have been tested or diagnosed with intellectual disability before age 18; instead the signs of intellectual disability need only have *manifested* before that age. *See, e.g., Brumfield*, 135 S. Ct. at 2274; *Oats v. State*, 181 So.3d 457, 469 (Fla. 2015); *Nicholson v. Branker*, 739 F. Supp. 2d 839, 857 (E.D.N.C. 2010).

⁴ The Wechsler Adult Intelligence Scales (WAIS) IQ test has been repeatedly identified as the "gold standard" for accurately and reliably determining intelligence. *See e.g., Rivera v. Quarterman*, 505 F.3d 349, 361 (5th Cir. 2007); *United States v. Smith*, 790 F. Supp. 2d 482, 491 (E.D. La. 2011).

Attorneys Melissa Armstrong and Robert Kilgo, Jr. were appointed to represent Woods in his PCR proceedings. They initially did allege an *Atkins* claim and retained Dr. David Price to examine Woods's intellectual functioning. App. 261. On March 28, 2012, Dr. Price administered the WAIS-IV and Woods obtained a full-scale IQ score of 72. App. 50. Less than thirty days later, Woods was examined by the South Carolina Department of Disabilities and Special Needs ("DDSN") which reported that Woods received a score of 81 on the Stanford Binet.⁵ After receiving the DDSN report, initial PCR counsel withdrew the *Atkins* claim. See App. 274-77.

III. Federal Habeas Counsel Sought to Exhaust an *Atkins* Claim in State Court.

Undersigned counsel were appointed to represent Woods in his federal habeas proceedings. Based on the record and undersigned counsel's investigation, it appears that initial PCR counsel did not conduct any investigation or inquiry into whether the IQ score reported by DDSN was based on a reliable, accurate and proper test administration. Moreover, it does not appear that initial PCR counsel consulted with any of the experts they had retained to evaluate whether Woods was intellectually disabled before they decided to withdraw the claim. Had PCR counsel continued their investigation, rather than abandoning it prematurely, they would have uncovered substantial evidence that undermines the reliability of DDSN's reported IQ score and further supports a finding that Woods is, in fact, a person with intellectual disability.

Undersigned counsel raised an *Atkins* claim in federal court and obtained a stay of Woods's federal proceedings to allow him to first assert this claim before the state courts, as at least four similarly situated habeas petitioners have done. See *Elmore v. State*, No. 2005-CP-24-1205; *Aleksey v. State*, No. 2015-CP-38-00764; *Bryant v. South Carolina*, 2016-CP-43-828; *Stone v. State*, No. 2018-CP-43-01025. Woods filed a second-in-time PCR application in state court on

⁵ As discussed below, evidence suggests this score is not valid and is artificially inflated.

September 19, 2018, and requested an evidentiary hearing and an opportunity for further fact development. In support of his *Atkins* claim, Woods presented the lower court with the following factual allegations:

1. Prong 1

With regard to his intellectual functioning, Woods presented evidence to the circuit court that the IQ score of 81 reported by DDSN is unreliable for multiple reasons. First, the test does not appear to have been administered by a licensed psychologist. Although the DDSN report is authored and signed by Dr. Gordon E. Brown, Jr., the report indicates that Thomas Kirby actually administered the IQ test. Mr. Kirby did not sign the report and no further information regarding his qualifications was provided. Woods submitted a declaration from Ms. Aly Hamby, whose investigation indicated that Mr. Kirby is not a licensed psychologist. App. 217. Second, the DDSN report explicitly states that Dr. Brown was present and observed while Mr. Kirby administered the IQ test to Woods. This is contrary to the specific instructions in the IQ test manual, and it is also contrary to a large body of clinical literature establishing a professional consensus against third party observers during IQ testing. Woods provided declarations from Drs. Susan Knight and Dr. Daniel Grant explaining this point.⁶ App. 219, 234, 243, 249. Third, at the time of the DDSN evaluation, the norms for the Stanford Binet IQ test were outdated by 10 to 11 years. It is well-established that using a test with out-of-date norms can produce an artificiality inflated result. *See* AAIDD 2010 Manual at p.37. This is the reason that manufacturers of the tests periodically update and re-norm the testing instruments. Because of the age of the norms, the results of the Stanford

⁶ Dr. Grant is a neuropsychologist with expertise in intellectual disability. He agreed to consult with undersigned counsel during their preparations for filing the federal habeas petition, but he was not retained and no funding was available for his assistance.

Binet administered to Woods are artificially inflated. App. 249-50. Fourth, The Stanford Binet results are also likely inflated due to practice effect.⁷ Because Woods was given the Stanford Binet just twenty-nine days after he was given the WAIS-IV, which is a similar test, the results of the Stanford Binet are very likely an artificial overestimation. App. 250.

In addition to investigating the DDSN evaluation, undersigned counsel consulted with Dr. Susan Knight, a board certified forensic psychologist and a member of the American Psychological Association. App. 218, 227. On August 30, 2018, Dr. Knight administered the WAIS-IV to Woods, and he obtained a full-scale IQ score of 66. Woods submitted a declaration from Dr. Knight in which she explained that Woods gave good effort during her testing. His score places him in the “Extremely Low” range of intelligence, indicating that 99% of his peers obtained a higher IQ score. Thus, Woods presented evidence of four IQ scores from tests administered between 2004 and 2018.

Date	Test	Administered By	Full-Scale IQ (FSIQ)
12/14/2004	WAIS-III	Dr. Camille Tezza	73
3/28/2012	WAIS-IV	Dr. David Price	72
4/26/2012	SB-5	Dr. Thomas Kirby	81
8/30/2018	WAIS-IV	Dr. Susan Knight	66

App. 219. All three of Woods’s scores obtained on the Wechsler Scales are below 75. These three “gold standard” tests were administered by three different examiners over a period of fourteen years and all three results are consistent with each other. Accordingly, Woods presented multiple

⁷ “Practice Effect” refers to gains in IQ scores on tests of intelligence that result from a person being retested on the same or similar test within a relatively short period of time – generally within one year. See AAIDD MANUAL at p.38. Thus, practitioners should generally refrain from administering the same or a similar IQ test to the same person within a short period of time because it often leads to an overestimation of the examinee’s true intelligence. *Id.*; see also, Alan S. Kaufman, *Practice Effects*, 2 Encyclopedia of Human Intelligence, 828-833 (1994).

IQ scores that fall in the intellectual disability range and warrant consideration of “additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *Hall*, 572 U.S. at 714, 723.

2. Prong 2.

As evidence that he suffers from deficits in adaptive functioning, Woods presented the declarations of Dr. Caroline Everington and Jan Vogelsang who were retained in Woods’s initial post-conviction proceedings to investigate and evaluate Woods’s adaptive behavior. Dr. Everington reported that she administered the Test of Adolescent Language, 4th Edition (“TOAL 4”) and a Wide Range Achievement Test, 4th Edition (“WRAT 4”) to Woods and he “scored in the intellectual disability range on both tests.”⁸ App. 256. She also conducted an interview with Woods, which “revealed many indicators of intellectual disability.” App. 256. For example, Dr. Everington noted that Woods “worked low skill laborer jobs which were obtained through the help of others,” “[h]e did not have a driver’s license,” he “did not know how to look up a name in the phone book,” and he “had trouble with measurements.” App. 256. Dr. Everington stated that initial PCR counsel did not seek her advice before deciding to abandon the *Atkins* claim, but had she been asked, Dr. Everington would have explained that a score of 81 on the Stanford Binet “does not rule out intellectual disability, especially given Mr. Woods’s other IQ scores in the intellectual disability range and his scoring on the testing [she] administered.” App. 257. She also would have

⁸ Dr. Everington is an Emeriti faculty member at Winthrop University, where she served as an Associate Dean and Professor of Special Education. Her work and research have focused on intellectual disability, with a particular focus on intellectual disability and the criminal justice system. She has published twenty (20) scholarly articles on intellectual disability and the criminal justice system. She has served as an expert in intellectual disability in 80 to 100 capital cases over the past twenty-six (26) years. App. 256.

advised PCR counsel to closely examine the reliability of the 81 IQ score, which it appears, they did not do.

Jan Vogelsang is a social worker who was retained to conduct a social history evaluation of Woods. App. 258. During her evaluation, she recognized “indicators of intellectual disability,” including that she “found him to be slow in that he had difficulty comprehending and understanding simple questions.” App. 258. Vogelsang also conducted interviews with Woods’s family members, revealing “Woods could not live independently and did not know how to get a job or how to obtain public assistance” and “any jobs Mr. Woods had were low-skilled labor positions that were consistent with the functioning of someone with intellectual disability.” App. 258. Ms. Vogelsang likewise “urged” initial PCR counsel to pursue an *Atkins* claim and even went so far as to “provide[] them with a list of evidence [she] believed demonstrated deficits in adaptive behavior.” App. 258. PCR counsel did not consult with Ms. Vogelsang before they withdrew the *Atkins* claim, but had they done so, Ms. Vogelsang would have advised against this course of action and, instead, “would have told them they should continue developing evidence of intellectual disability.” App. 258.

The evidence of deficits in adaptive behavior recounted by Ms. Vogelsang and Dr. Everington is consistent with undersigned counsel’s investigation into Woods’s social history and adaptive functioning. As explained to the lower court at both oral argument and in briefing, Woods was able to obtain some services from a social history investigator during the course of preparations for filing his federal habeas petition.⁹ Those efforts produced *additional* evidence of significant deficits in adaptive behavior, including that:

⁹ Woods’s evidence of intellectual disability uncovered thus far was developed in a short period of time and with limited funds available to counsel in preparation for filing a federal habeas petition. During that review, counsel identified evidence that Woods meets all three prongs of the

- Woods was slow to walk and talk as a child;
- he did not learn to ride a bike until much later than other children;
- his family and friends described him as “slow,” “gullible,” “passive,” and “a follower,” and recounted that he was unable to understand things the way normal children could;
- as a child, Woods was unable to play “hide-and-seek” because he did not understand the rules of the game and would just get lost – not hide;
- he consistently struggled to complete homework and needed help every day;
- Woods had to be given simple instructions repeatedly in order to understand what he was being told to do;
- Woods was quiet and often overlooked at school;
- he had difficulty making change;
- Woods spent a lot of time alone because he could not keep up with other kids;
- other students teased Woods and called him “stupid”;
- Woods failed multiple grades repeatedly and did not graduate from high school; he received a certificate at age twenty-one;
- Woods did not have a driver’s license but drove occasionally anyway, and he had difficulty doing this;
- Woods had trouble understanding how to manage money and asked his friends to hold his cash for him and distribute it weekly in small increments after he obtained money in a settlement;
- Woods never successfully lived independently for any significant period of time; and,
- he never obtained a job without substantial assistance from family or friends.

intellectual disability definition and, in order to obtain further review, asserted a claim for relief in the lower Court. There is no requirement that an expert evaluation be completed before raising a claim for relief in a PCR application and seeking additional funding for a full evaluation of the claim. *See* S.C. Code § 16-3-26(C) (authorizing investigative, expert, or other services [that] are reasonably necessary for the representation of the defendant) (incorporated into PCR by S.C. Code § 17-27-160(B)).

App. 203-04. This evidence, although not complete and based only on a preliminary investigation, strongly suggests that Woods suffers from significant deficits in at least one area of adaptive behavior and therefore satisfies the second prong.

3. Prong 3.

Regarding the age of onset, Woods presented the lower court with information indicating his deficits manifested prior to the age of eighteen, including much of the information collected thus far by the social history investigator. App. 203-04. Counsel explained to the circuit court that Woods has a very strong claim of intellectual disability. He noted, however, that no expert had ever been retained to conduct a full *Atkins* assessment and no court has ever adjudicated this claim. Woods asserted that he “should . . . be afforded the opportunity to fully investigate and present evidence of his intellectual disability” for the first time. App. 56-57.

The lower court did not engage with the evidence presented, but instead summarily dismissed the application as impermissibly successive and time-barred. App. 102-08. The court denied Woods’s motion to alter or amend on September 25, 2019. App. 171-73. This appeal follows.

ARGUMENT

I. THIS COURT HAS HELD THE GENERAL BAR AGAINST SECOND-IN-TIME PCR APPLICATIONS HAS MULTIPLE EXCEPTIONS.

The Uniform Post-Conviction Procedure Act (“the PCR Act”) was implemented “to govern all aspects of PCR,” *Robertson v. State*, 418 S.C. 505, 513, 795 S.E.2d 29, 33 (2016), and to provide convicted persons with a comprehensive mechanism to raise any unresolved and previously unmentioned questions of fact or law relevant to their convictions or sentences. *See* S.C. Code Ann. § 17-27-20(a); *see also* Larry W. Yackle, POSTCONVICTION REMEDIES § 4, at 3 (1981 & Supp. 1993). It was “designed to incorporate all rights available under federal habeas corpus.” *Finklea v. State*, 273 S.C. 157, 158, 255 S.E.2d 447, 447-48 (1979); *see also Harvey v. South Carolina*, 310 F.Supp. 83, 85 (D. S.C. 1970) (The PCR Act “is designed to afford post-conviction relief of a scope sufficiently broad to comply with the mandates and holdings of the United States Supreme Court relating to federal review of state convictions”).

Thus, post-conviction review is available to “[a]ny person who has been convicted of, or sentenced for, a crime and who claims, [*inter alia*], that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State,” or that “the sentence exceeds the maximum authorized by law.” S.C. Code § 17-20-10(a)(1), (3). To address these types of claims, “[a]ll applicants are entitled to a full and fair opportunity to present claims in one PCR application.” *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999).

While the PCR Act “generally prohibits the filing of successive PCR applications,” *Robertson*, 418 S.C. at 513, 795 S.E.2d at 33 (citing S.C. Code § 17-27-90), a number of exceptions to that rule have been recognized. In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), this Court found that a successive PCR application could be entertained if “the court finds a ground for relief asserted which for *sufficient reason* was not asserted or *was inadequately raised* in the original,

supplemental or amended application.” *Id.* at 450, 409 S.E.2d at 394 (emphasis added) (quoting S.C. Code Ann. § 17-27-90). The *Aice* Court specifically recognized other exceptions to the general rule, including “when the system has simply failed a defendant and where to continue the defendant’s imprisonment without review would amount to a gross miscarriage of justice.” *Id.* at 451, 509 S.E.2d at 394.

This Court has invoked the exception noted in *Aice* on a number of occasions and under various circumstances. In *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996), the Court allowed the applicant to proceed with a successive application alleging State misconduct during the trial because “[h]e did not have the benefit of a direct appeal, because his attorney failed to file an appellate brief” and (due to procedural irregularities) no court would be able to consider the merits of the State misconduct claim if a successive PCR application were not permitted. *Id.* at 235-36, 478 S.E.2d at 834-35. *Cf. Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (allowing a second PCR application where the initial application was voluntarily withdrawn resulting in no adjudication of the claims on their merits – no “one bite at the apple”).

Similarly, where a PCR applicant was denied appellate review of the denial of his initial PCR application because initial PCR counsel failed to file an appeal, the Court allowed a successive PCR application to “correct the unfairness which has occurred.” *Austin v. State*, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991); *see also Hope v. State*, 328 S.C. 78, 80 n.1 492 S.E.2d 76, 78 n.1 (1997) (allowing a new evidentiary hearing where initial PCR counsel failed to file an appeal and no record of an evidentiary hearing existed).

In *Odom*, this Court allowed a successive PCR application where “Odom never received a complete ‘bite at the apple’ because both of his PCR applications were summarily dismissed before he was appointed legal counsel.” 337 S.C. at 262, 523 S.E.2d at 756; *see also Carter v. State*, 293

S.C. 528, 362 S.E.2d 20 (1987) (allowing a successive PCR where initial PCR counsel was the same as trial counsel); *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982) (finding a “unique” combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR proceeding).

Most recently, in *Robertson v. South Carolina*, this Court held that the capital “[p]etitioner’s allegation that he was denied a state-created right to qualified [initial PCR] counsel constitutes a ‘sufficient reason’ to permit a successive PCR application under section 17-27-90.” 418 S.C. at 516; 795 S.E.2d at 35. Each of these exceptions was recognized by this Court in order to ensure PCR applicants had an opportunity to present and have (fully) heard claims that may have warranted reversal of their conviction or sentence.

II. AT LEAST FOUR SIMILARLY SITUATED PCR APPLICANTS HAVE BEEN ALLOWED TO PURSUE *ATKINS* CLAIMS IN SECOND-IN-TIME PCR PROCEEDINGS.

Since *Atkins*, at least four South Carolina courts have concluded that because intellectual disability is a categorical bar to the ultimate punishment of death, it must also warrant an exception to the successor bar. In all four cases circuit judges have refused to dismiss second-in-time PCR applications raising *Atkins* claims and allowed investigation and factual development for the purposes of an evidentiary hearing. *See* App. 60-73, 116-131 (Order Denying Motion to Dismiss, *Elmore v. State*, No. 2005-CP-24-1205 (June 18, 2007); Third 120 Day Status Report, *Aleksey v. State*, No. 2015-CP-38-00764 (June 7, 2017); Order, *Bryant v. South Carolina*, 2016-CP-43-828 (July 13, 2016); Order, *Stone v. State*, No. 2018-CP-43-01025 (Feb. 22, 2019)).

In the first such case, prior to finding Eddie Lee Elmore intellectually disabled and ineligible for the death penalty, the Honorable J. Mark Hayes denied the State’s request for dismissal and allowed Elmore to seek relief even though his intellectual disability was identified outside the statute of limitations and raised in a successive PCR application. Judge Hayes noted

that “[b]oth the United States Supreme Court and the South Carolina Supreme Court desire a substantive review of the mental status of pre-*Atkins* death penalty sentenced inmate[s] claiming [intellectual disability].” App. 61. Elmore was removed from death row after employing the same procedural mechanism for review of his *Atkins* claim Woods pursued here.¹⁰

Similarly, Judge Michael Nettles found in *Stone*, “*Atkins* represents a complete categorical bar on the execution of the intellectually disabled” and “[a]s such if Applicant is in fact intellectually disabled then he cannot be executed under any circumstances.”¹¹ App. 121. Thus, the judge found, it is inappropriate to “raise form over substance” by dismissing applicant’s second-in-time PCR application as untimely.¹² App. 123. The *Stone* case remains pending and the judge has authorized funding for investigation in preparation for a hearing on the merits of the *Atkins* claim, which is currently expected to take place sometime next year.

Two additional capital PCR applicants – Bayan Aleksey and Stephen Cory Bryant – discovered evidence of their intellectual disabilities *after* their federal habeas petitions had been filed, and both filed second-in-time PCR applications in state court raising their *Atkins* claims. Judge Doyet A. Early, III, allowed Aleksey’s freestanding *Atkins* claim investigation and

¹⁰ The State did not appeal Judge Hayes’s order finding Elmore intellectually disabled.

¹¹ At least one other state supreme court has addressed the issue and come to the same conclusion. In *White v. Commonwealth*, No. 2013-SC0791-MR, 2016 WL 2604759 (Ky. May 5, 2016), the Kentucky Supreme Court reversed the lower court finding that the defendant waived his *Atkins* claim, stating: “Simply put, offenders who raise successful claims under *Atkins* and *Hall* are barred from execution. This protection to the condemned endures to the very moment of execution, in the same manner as the Eighth Amendment bars a state from carrying out a sentence of death upon the insane.” *Id.* at **5.

¹² In *Stone*, the court recognized that *Stone* may have been able to know of his potential intellectual disability at the time of his first PCR action (like initial PCR counsel in the instant case could have), but nevertheless denied the State’s motion to dismiss and ordered *Stone*’s case proceed to an evidentiary hearing on the issue of intellectual disability. App. 122.

evaluation to go forward over the State's objection that the application should be dismissed as successive and untimely. App. 64. The Aleksey case currently remains pending and is proceeding toward an evidentiary hearing.

Likewise, Bryant filed a second-in-time PCR application raising a freestanding *Atkins* claim, and Judge Thomas W. Cooper, Jr. issued a written order denying the State's motion to dismiss the claim and finding that an *Atkins* claim is not subject to procedural default. *See* App. 66-72. Judge Cooper held an evidentiary hearing on Bryant's intellectual disability claim in October of 2018 at which the judge considered the merits of Bryant's intellectual disability claim. Bryant's claim of intellectual disability was ultimately denied (on the merits – not on procedural grounds) and is now pending on appeal.

In each of the five cases (including Woods's) where intellectual disability has been raised in a second-in-time PCR application, the applicant has had a good faith basis for raising their claim – each had at least one IQ score on a gold-standard IQ test in the intellectual disability range.¹³ *See, e.g.*, App. 61 (Order in *Elmore*, No. 2005-CP-24-1205, denying the State's motion to dismiss after viewing the evidence presented in the light most favorable to the non-moving party). A review of other pending cases involving death-sentenced inmates who have completed their initial state post-conviction review demonstrates that only a small number of such inmates have attempted to raise an *Atkins* claim in a second-in-time PCR application. Since *Atkins*, at least fourteen individuals have advanced through federal habeas proceedings without returning to state

¹³ It is worth noting that, although he does not believe more is required, Woods presented far more evidence at the initial pleadings stage than any of the other PCR applicants who have been allowed to proceed to a hearing in this same procedural posture.

court to raise an *Atkins* claim.¹⁴ Thus, only the few individuals with a good faith basis for alleging they are ineligible for the death penalty due to intellectual disability have sought an exception to the successor bar requested here.

The four lower court judges who permitted second-in-time PCR proceedings to allow applicants the opportunity to develop and present their *Atkins* claims properly applied this Court's principles regarding exceptions to the successor bar. In two of those cases, the courts have already held hearings on the merits of the *Atkins* claims and one person was removed from death row as a result of the judge finding him intellectually disabled (Eddie Elmore). Denial of the same opportunity to litigate Woods's *Atkins* claim would be erroneous and inequitable. There is no principled or equitable basis for singling Woods out for such lethally disparate treatment.¹⁵ See S.C. Const. art. I, § 3 (“[N]or shall any person be denied the equal protection of the laws.”). Cf. *McNeil v. Polk*, 476 F.3d 206, 212 (4th Cir. 2007) (requiring state procedural rules be “regularly” and “consistently” applied in order to create procedural bars in subsequent federal post-conviction proceedings).

¹⁴ Those death sentenced inmates are: Johnny Bennett, Gary Terry, Freddie Owens, James Robertson, Sammie Stokes, James Bryant, Richard Moore, John Wood, Marion Bowman, Brad Sigmon, Tyree Roberts (Abdiyyah Ben Alkebulanyahh), Quincy Allen, Mikal Mahdi, and Steven Bixby.

¹⁵ Even if this Court determines *Atkins* claims do not warrant an exception to the successor bar, the ruling should only apply prospectively and should still provide Woods with an opportunity to litigate his claim. To do otherwise, when Woods relied on four other court decisions allowing such claims to go forward, would be an inequitable result singling Woods out for execution despite being in a materially indistinguishable position as the others, including Elmore who was removed from death row by the same procedure Woods now seeks to employ.

III. THE CATEGORICAL NATURE OF THE BAR AGAINST EXECUTING THE INTELLECTUALLY DISABLED JUSTIFIES AN EXCEPTION TO THE SUCCESSOR BAR WHERE THE ISSUE OF INTELLECTUAL DISABILITY HAS NOT PREVIOUSLY BEEN ADJUDICATED.

Because *Atkins* provides a complete and categorical bar to the death penalty, an individual alleging and making a prima facie case of intellectual disability *must* be afforded one full and fair opportunity to present evidence in support of such a claim. Simply put, intellectual disability claims are different from regular claims raised in PCR because they place a whole category of people outside the reach of the death penalty. The Supreme Court recognized that executing persons with intellectual disability “contravenes the Eighth Amendment, for to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being.” *Hall*, 572 U.S. at 708. Because of the categorically diminished culpability of a person with intellectual disability, “[n]o legitimate penological purpose is served by executing” him. *Id.* The categorical nature of the bar means “the Constitution ‘restricts . . . the State’s power to take the life of *any* intellectually disabled individual.” *Moore*, 137 S. Ct. at 1048 (quoting *Atkins*, 536 U.S. at 321). Thus, to prevent a PCR applicant from presenting evidence that he is intellectually disabled runs contrary to the constitutional ban and create an “unacceptable risk that persons with intellectual disability will be executed.” *See, e.g., Moore*, 137 S. Ct. at 1044 (striking down a procedure considering factors that “creat[e] an unacceptable risk that persons with intellectual disability will be executed”); *Hall*, 572 U.S. at 704 (finding a “rigid rule [that] creates an unacceptable risk that persons with intellectual disability will be executed . . . unconstitutional”).

Similarly, in *Roper v. Simmons*, the Court held that the constitution prohibits the execution of anyone under the age of eighteen at the time of the crime. 533 U.S. 551, 572 (2005). No one would (or could reasonably) argue that a capital defendant who presented credible evidence that he was under the age of eighteen at the time of the capital offense had waived the claim of his exemption from the death penalty by failing to raise it at an earlier proceeding. Likewise, it is

unreasonable for the State to assert that a person with intellectual disability can be executed if he or she had the misfortune of being represented by counsel who failed to ensure that claim was adjudicated at the earliest possible procedural opportunity.

This Court has recognized the need for one full presentation and determination of PCR claims such as claims of State misconduct or where initial PCR counsel failed to meet qualification requirements or perfect appeals. *See supra* Section I. If those instances warrant an exception to the successor PCR bar, so too must a claim that an individual is exempt from the ultimate punishment due to intellectual disability where no court has previously had an opportunity to rule on the merits of the claim (and where the petitioner has presented compelling evidence establishing, at a minimum, a *prima facie* case of intellectual disability). To deny Woods the opportunity to present a claim of intellectual disability risks wrongfully executing him and would “amount to a gross miscarriage of justice” and thus must constitute one of the “rarest exceptions” to allow a successive PCR application to proceed. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

To hold otherwise in this case would inappropriately place the burden of prior counsel’s failures (to raise and litigate the *Atkins* claim) on a potentially intellectually disabled indigent defendant. As *Atkins* recognized, individuals with intellectual disability have a “reduced capacity” that puts them at greater risk of being wrongfully executed. 536 U.S. at 320. Intellectually disabled defendants have a “lesser ability . . . to make a persuasive showing of mitigation in the face of prosecutorial evidence,” “may be less able to give meaningful assistance to their counsel and are typically poor witnesses.” *Id.* Given the lesser capacity, an intellectually disabled defendant is utterly reliant on their counsel to identify and litigate their claims for relief. In similar circumstances, this Court refused to hold a non-intellectually disabled capital defendant responsible for his counsel’s failure to raise lack of qualification in PCR proceedings. *Robertson*,

418 S.C. at 517, 795 S.E.2d at 35 (“We believe it is unreasonable to think that an indigent PCR applicant, who relies on the State to appoint qualified counsel, would have the knowledge to question counsel’s qualifications at the onset of the proceeding.”). If a typical capital defendant cannot be held accountable for his initial PCR counsel’s (or the court’s) failure to identify the issue of lack of qualification, it would be that much more unreasonable to hold a potentially intellectually disabled inmate responsible for his counsel’s failure to raise a claim of intellectual disability.

IV. THE PCR COURT ERRED IN GRANTING SUMMARY DISMISSAL AND DENYING AN EVIDENTIARY HEARING.

This Court has addressed the limited circumstances under which it is appropriate to dismiss a PCR application without a hearing on the merits:

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts, and (2) the applicant is not entitled to relief. 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. . . . Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.

Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (internal citations and quotations omitted).

Woods presented the PCR court with significant evidence establishing a *prima facie* case of intellectual disability. Specifically, he presented three IQ scores within the intellectual disability range, and multiple reasons to question the validity of a fourth score slightly outside of the range. Woods also presented evidence of life-long trouble with school, an inability to live by himself or manage money, and the fact that he could not play with other children because he did not

understand simple rules and was bullied by other kids. Woods further alleged that his *prima facie* showing of intellectual disability constituted “an exception to . . . the prohibition against successive PCR applications,” including presenting evidence that four other courts had previously allowed successive PCR applications for the sole purpose of evaluating a claim of intellectual disability in the cases of similarly situated capital defendants. Thus, the PCR court erred in dismissing Woods’s PCR application without a hearing to determine if Woods is in fact a person with intellectual disability who is ineligible for the death penalty.

The lower court also erred in finding Woods’s PCR application time-barred because this Court has explicitly held that the one-year statute of limitations does not apply to successive PCR applications permitted under one or more exception. *See Odom*, 337 S.C. at 263, 523 S.E.2d at 756 (holding statute of limitations does not apply when a successive PCR application is permitted simply to allow an applicant one “fair ‘bite’ at the apple.”). This Court’s policy of permitting successive PCR applications in certain exceptional circumstances would be frustrated if the one-year statute of limitations applied to bar an otherwise permissible successive PCR application. Thus, the court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Washington*, 324 S.C. 232, 478 S.E.2d 833.

Even if the claim was technically untimely, it is well within this Court’s equitable discretion to toll the limitations period for any appropriate duration. *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d 600, 602 (2009); *see also Moses v. State*, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017) (“[I]f a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified). Equitable tolling is clearly justified in this case to avoid the possibility of Woods being wrongly executed despite being intellectually disabled pursuant to

Atkins. Failure to allow Woods to go forward to investigate and prove his intellectual disability would be an unconscionable miscarriage of justice.

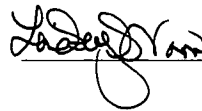
CONCLUSION

To avoid the possibility of wrongfully executing a person with intellectual disability who is constitutionally exempt from the punishment, this Court must recognize a narrow exception to the general bar against successive PCR applications where an applicant is able to present a *prima facie* case of intellectual disability. Failure to do so would “creat[e] an unacceptable risk that persons with intellectual disability will be executed.” *Hall*, 572 U.S. at 704. This Court should grant the writ of certiorari and ultimately remand for a determination of the merits of Woods’s *Atkins* claim.

Respectfully submitted,

EMILY C. PAAVOLA
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044

LINDSEY S. VANN
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201
803-765-1044



December 3, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Clarendon County

Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2019-001713

RECEIVED

DEC 05 2019

S.C. SUPREME COURT

ANTHONY WOODS,

V.

STATE OF SOUTH CAROLINA,

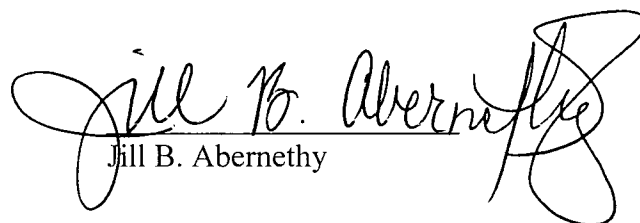
PETITIONER,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Petitioner's Petition for Writ of Certiorari and Appendix was served by first class United States mail, postage prepaid, this 4th day of December, 2019, upon the following:

William Edgar Salter, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy