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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.

APPENDIX

EMILY C. PAAVOLA

SC Bar No. 77855

LINDSEY S. VANN

SC Bar No. 101408

Justice 360

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Columbia, SC 29201

(803) 765-1044

Counsel for Petitioner

Other Counsel of Record:

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Office of the Attorney General

P.O. Box 11549

Columbia, SC 29211

Counsel for Respondent

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STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)
ANTHONY WOODS)
Applicant,)
v.)
THE STATE OF SOUTH CAROLINA.)
Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CF 14-00382

APPLICATION
FOR POST-CONVICTION RELIEF

1. Place of Detention: Kirkland Correctional Institution, Columbia, South Carolina.
2. Sentencing court: Clarendon County Court of General Sessions located in Manning, S.C.
3. Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:

Murder, first-degree burglary, criminal sexual conduct, first degree.
5. The date upon which sentence was imposed and the terms of the sentence:

A death sentence was imposed on December 8, 2006.
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8. Applicant appealed to the South Carolina Supreme Court, which affirmed.
State v. Woods, 328 S.C. 3, 676 S.E.2d 128 (2009).
9. Not applicable.

10 & 11. GROUND FOR RELIEF WITH SUPPORTING FACTS

- 10 & 11(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is intellectually disabled. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive

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CLERK OF COURT
CLARENDON COUNTY
SOUTH CAROLINA

functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

- 10(b) Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during his capital trial.
- 11(b) Supporting Facts: Trial counsel failed to investigate and present evidence that Applicant is intellectually disabled, including evidence that Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, rendering him ineligible for capital punishment. Trial counsel failed to present this evidence at a pretrial hearing and at any point throughout his capital trial. Trial counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).
- 12. Applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the Clarendon County Court of General Sessions, and an appeal of the denial of his application for post-conviction relief to the State Supreme Court. Applicant has filed a petition for a writ of habeas corpus in federal court.
- 13. Applicant filed a PCR application in the Sumter County Court of Common Pleas, Case No. 2009-CP-14-654, on November 23, 2009. The trial court denied post-conviction relief and the South Carolina Supreme Court denied review.
- 14. The grounds set forth above have not been previously presented to this or any other court, state or federal.
- 15. Not Applicable.
- 16. These grounds were not raised at trial because trial counsel ineffectively failed to raise them. These grounds were not raised in applicant's initial PCR proceeding because initial PCR counsel ineffectively failed to raise them.
- 17. Applicant was previously represented by counsel.
- 18. Applicant was represented at trial by James Hoffmeyer and Frederick A. Hoefer, II. He was represented on direct appeal by Joseph L. Savitz, III. Applicant was represented in his initial PCR proceeding by Melissa R. Armstrong and Robert L. Kilgo, Jr.

19. Applicant seeks relief from his death sentence.
20. Applicant is under other sentences.

Respectfully submitted,

Emily C. Paavola

Lindsey S. Vann

Justice 360

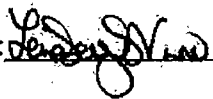
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(803) 765-1044

BY:  _____

September 17, 2018

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

ANTHONY WOODS,
Applicant,

v.

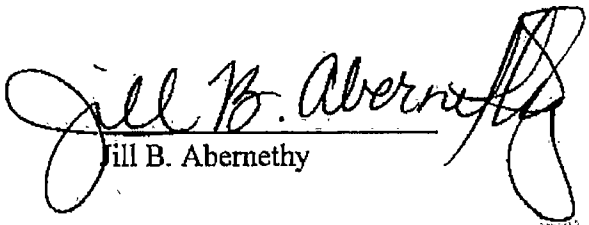
THE STATE OF SOUTH CAROLINA,
Respondent.

)
) IN THE COURT OF GENERAL SESSIONS
) CA No.

)
)
)
) CERTIFICATE OF SERVICE
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The undersigned hereby certifies that a copy of the Application for Post-Conviction Relief was served by first class United States mail, postage prepaid, this 17th day of September, 2018, upon the following:

William Edgar Salter, III
SC Attorney General's Office
P.O. Box 11549
Columbia, SC 29211


Jill B. Abernethy

Clarendon County Clerk of Court Office



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September 19, 2018

Julie Coleman
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Dear Ms. Coleman:

Re: Anthony Woods
Case #2018-CP-14-00382

Enclosed you will find a copy of the PCR Application, indictment, sentencing sheet, etc. on Anthony Woods.

Mr. Woods was represented by attorneys James Hoffmeyer and Frederick A. Hoefer, II. Kathy Richardson was the Court Reporter.

Please contact this office, if we can be of further assistance to you.

Yours truly,

Beulah G. Roberts
Clarendon County
Clerk of Court



ALAN WILSON
ATTORNEY GENERAL

December 6, 2011

The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
Post Office Box 136
Manning, South Carolina 291025

Re: Anthony Woods, #06023 v. State of South Carolina
2018-CP-14-00382

Dear Ms. Roberts:

Enclosed please find the original and one (1) copy of the **Return and Motion to Dismiss (Capital Case)** in the above-captioned case for filing in your office. Please file and return the copy in the self-address stamped envelope. By copy of this letter we are serving opposing counsel with the Order.

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

2018 OCT 22 PM 4:06

WES/ab

Enclosure

cc: Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
Victim Advocacy Division

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2018-CP-14-00382

RETURN AND MOTION TO DISMISS
(Capital Case)

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Anthony Woods, #06023 (Woods) has filed a successive Application for Post-Conviction Relief (PCR), through counsel, on September 19, 2018 (2018-CP-14-00382). Respondent now makes a Return and Motion to Dismiss. Respondent submits that Woods' 2018 Application should be summarily dismissed for several reasons:

- It is barred by the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2015);
- It is successive to his original PCR Application (2009-CP-14-00654) that he filed on November 23, 2009, and which resulted in the Supreme Court of South Carolina filing an Order denying certiorari on December 13, 2017;
- None of the exceptions to the rule barring successive applications apply to Woods' case, such as a claim that his original PCR counsel were not statutorily qualified to represent him;
- His freestanding claim of intellectual disability, in Grounds 10 & 11(a), fails to present a cognizable claim because it is beyond the statutory jurisdiction of the PCR Act. *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided well before Woods' trial. Because this claim was available at time of the trial and sentencing, the claim cannot be reached, absent an allegation of ineffective assistance of trial counsel;
- Ground 10 & 11(b) is barred by res judicata because it was presented in the original PCR proceedings but abandoned by Woods' original PCR attorneys; and
- The important need for finality of litigation demands that, in the absence of any basis for exercise of a "rare exception" of allowing a successive application.

I. PROCEDURAL HISTORY

A. Woods' trial and direct appeal.

The Applicant, Woods, is confined in the Kirkland Correctional Institution, of the South Carolina Department of Corrections, as the result of his Clarendon County murder conviction and death sentence. The Clarendon County Grand Jury indicted him in January 2004 for murder, burglary in the first degree and criminal sexual conduct (CSC) in the first degree (04-GS-14-0036). These charges stemmed from Woods' murder of fifty-three year old Joanne Dubose, in her Clarendon County home, on or about June 2, 2003.¹

On March 15, 2006, the State served Woods with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A) (Supp. 2009), and it gave notice that it would rely upon the aggravating circumstances that the murder was committed while in the commission of burglary and criminal sexual conduct. *App. 2153*.²

The South Carolina Supreme Court assigned the case to the Honorable John C. Few and gave Judge Few exclusive jurisdiction over the case. W. James Hoffmeyer, Esquire, and Frederick A. Hoefer, II, Esquire represented Woods in the trial court. On June 28, 2006, Judge Few held a hearing on Woods' motion for a change of venue and to select a jury from another county pursuant to S.C. Code Ann. § 17-21-85 (1990). Third Circuit Solicitor C. Kelly Jackson

¹ Woods was on a crime spree in Clarendon County at the time. He was also indicted and convicted of burglary in the 1st degree, assault and battery with intent to kill (ABIK) and CSC in the 1st degree for May 27, 2003 crimes he committed against eighty-four year old Laura Jackson. He was indicted for and convicted of burglary in the 1st degree and two counts of ABIK, in a separate trial, for a June 4, 2003 break-in at the home of fifty-three year old Linda Taylor and her eighty-four year old mother. The Court of Appeals affirmed the Jackson convictions in *State v. Woods*, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2008), *cert. denied* October 28, 2008. The Court of Appeals dismissed his appeal from the Taylor convictions on September 16, 2008. Copies of these opinions were attached to the original PCR Return.

² The State gave notice on June 28, 2006, that it intended to seek a sentence of life without parole (LWOP) based upon his prior convictions. *App. 2153-54*.

represented the State at the hearing. The State consented to the motion and Judge Few granted it. The parties also agreed that the jury should be drawn from Marion County.

Following motions hearings before Judge Few on September 9, 2006, Woods received a jury trial on September 11-14, 2006 in Clarendon County. Messrs. Hoffmeyer and Hoefer represented him. This trial resulted in a mistrial in the guilt phase. When the case was called for retrial, the State withdrew its consent to the change of venue. At a hearing before Judge Few on October 4, 2006, Woods opposed the State's action and argued that the State was bound by its earlier consent. Judge Few, however, ruled that he would first attempt to draw a Clarendon County jury.

On November 27-December 8, 2006, Woods received a jury trial before Judge Few and a Clarendon County Jury. Messrs. Hoffmeyer and Hoefer represented him. Solicitor Jackson and Assistant Solicitor Dudley Saleeby represented the State. The jury convicted Woods of murder, burglary in the first degree and CSC in the first degree. Judge Few denied the motion for a new trial. *App. 1-2140.*

Woods exercised his statutory right to a twenty-four hour cooling off period. In the sentencing phase, Judge Few submitted two statutory aggravating circumstances to the jury: that the murder was committed while in the commission of criminal sexual conduct and while in the commission burglary. § 16-3-20(C)(1)(a)(1)(a) & (c). He also submitted the two statutory mitigating factors found in § 16-3-20(C)(1)(b)(2) & (7).³ The jury found both aggravating factors beyond a reasonable doubt and recommended a sentence of death. *App. 2149-2742.* Judge

³ These are that "the murder was committed while the Defendant was under the influence of mental or emotional disturbance," and "[t]he mentality of the Defendant at the time of the crime."

Few sentenced Woods to death for murder, and he imposed consecutive sentences of thirty years for CSC in the 1st degree and LWOP for burglary in the 1st degree. *App. 2742-44.*

Woods timely served and filed a notice of appeal. Former Chief Appellate Defender Joseph L. Savitz, III, represented him on appeal. On November 24, 2008, Woods filed a Final Brief of Appellant. *App. 4010-42.*⁴ Respondent filed the Final Brief of Respondent on November 3, 2008. *App. 4043-4115.*

⁴ He presented five issues:

1. The trial judge committed reversible error by summarily granting the State's motion to transfer jury selection from Marion County to Clarendon County, without requiring it to establish that it could not receive a fair and impartial trial from a jury picked in Marion County, as this ruling violated *Article V, Section 23*, of the *South Carolina Constitution* and *S.C. Code Sections 17-21-80* and *17-21-85*, as well as *State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997).
2. The trial judge committed reversible error by excusing potential juror Carolyn Hilton, a black female, for cause, since her voir dire, taken as a whole, did not indicate that her beliefs concerning capital punishment would have prevented or substantially impaired her performance of her duties as a juror in accordance with her instructions and her oath, so this ruling violated *Wainwright v. Witt*, 479 U.S. 412 (1985), and *S.C. Code Section 16-3-20(E)*.
3. The trial judge committed reversible error by denying the defense motion to suppress physical evidence seized from Woods' residence connecting him with the DuBose crimes, as the search warrant did not comply with *S.C. Code Section 17-13-140*, nor was it supported by probable cause, so that the search and seizure of evidence from the residence violated the *Fourth Amendment*.
4. The trial judge committed reversible error in the guilt phase by refusing to instruct the jury (1) that a mere suspicion of guilt does not constitute proof beyond a reasonable doubt or (2) that a reasonable doubt can be found through the lack of evidence presented, as these omissions from the reasonable doubt charge he did give impermissibly lessened the State's burden of proof, in violation of state law, the *Fourteenth Amendment* and *In re Winship*, 397 U.S. 358 (1970).

The South Carolina Supreme Court affirmed Woods' convictions and death sentence in a published Opinion filed on March 30, 2009. *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009). *App.* 4016-23. The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003). Woods filed a Petition for Rehearing on April 14, 2009. *App.* 4124-26. The Court denied rehearing on May 13, 2009. *App.* 4127-28. It sent the Remittitur to the Clarendon County Clerk of Court on the same date. *App.* 4129.

Woods, through Mr. Savitz, filed a Motion for Stay of Execution, in which he indicated his intention to raise the following issue in the United States Supreme Court on certiorari:

Did the trial judge commit reversible error by excusing potential juror Carolyn Hilton, a black female, for cause, since her voir dire, taken as a whole, did not indicate that her beliefs concerning capital punishment would have prevented or substantially impaired her performance of her duties as a juror in accordance with her instructions and her oath, in violation of *Wainwright v. Witt*, 469 U.S. 412 (1985) and S.C. Code Ann. § 16-3-20(E) (2003)?

App. 4130-32.

The State thereafter filed a Return opposing his motion (*App.* 4133-37), but the South Carolina Supreme Court filed an Order granting his motion on June 24, 2009. *App.* 4138-39.

Rather than pursue that remedy, Woods (through Mr. Savitz) filed a second Petition for Stay of Execution pursuant to *In re Stays of Execution* on August 13, 2009, so that he could pursue Post-Conviction Relief (PCR) remedies. *App.* 4140-43. Respondent did not oppose the

-
5. The trial judge committed reversible error by omitting from his final charge to the jury at sentencing the limiting instruction required by *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), since the State introduced evidence that Woods had committed other burglaries and a criminal sexual conduct shortly before and after the DuBose murder and had in fact already been convicted of those offenses.

Final Brief of Appellant, *App.* 4016-17.

second request for a stay and submitted a letter in lieu of a Return to his Petition. *App. 4144*. The South Carolina Supreme Court granted a stay of execution in an Order filed on September 17, 2009. In that Order, the Court appointed the Honorable George C. James, Jr., to preside over the case and gave him exclusive and statewide jurisdiction over the matter. *App. 4145-46*.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's September 17, 2009 Order and S.C. Code Ann. § 17-27-160 (Supp. 2009), Judge James convened a hearing at the Sumter County Courthouse on Monday, November 9, 2009. Woods was present at this hearing, as were Melissa Armstrong, Esquire, and Robert L. Kilgo, Jr., Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing. Following this hearing, Ms. Armstrong and Mr. Kilgo were appointed to represent Woods in PCR, with Ms. Armstrong being lead counsel. *App. 4149-51*.

B. The original PCR proceedings (2009-14-00654).

Woods filed his original PCR Application (2009-14-00654) on November 23, 2009. *App. 4152-54*. In that Application, he raised the following claim:

9. Applicant was denied the effective assistance of trial counsel in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, South Carolina Constitution and laws. *Strickland v. Washington*, 466 U.S. 668 (1984).
- 10.(A). Applicant was denied the effective assistance of counsel due to trial counsel's failure to adequately present evidence in mitigation of punishment.

Respondent made its original Return on December 10, 2009, and requested a hearing. *App. 4155-83*. Woods filed an Amended Application, dated May 1, 2012 (*App. 4184-87*), in which he raised the following claims:

- A. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to conduct a reasonable investigation

into Appellant's social history resulting in an inadequate penalty phase presentation. This dereliction was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).

- B. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to conduct a reasonable investigation into Appellant's mental health status and history resulting in an inadequate and erroneous penalty phase presentation in mitigation. Counsel relied on the state's forensic evaluation which was flawed, based on erroneous and scant social history and family information related to Mr. Woods' upbringing, functioning, and adaptive behavior, contained numerous errors of fact and relied on highly prejudicial hearsay accounts of Mr. Woods' personal history. In light of the overwhelming wealth of information available to rebut the spurious and poorly reasoned conclusions of the state's examiners, Counsel was derelict in adopting the state's conclusions and multiple diagnoses. This dereliction was unreasonable, outrageously prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).
- C. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Counsel failed to conduct a reasonable investigation into Appellant's cognitive and adaptive functioning and history resulting in their failure to raise the issue of Appellant's mental retardation. In fact, it appears Counsel never even considered the possibility that Appellant could be or was mentally retarded. In part, it appears Counsel dismissed this possibility due to their lack of information which stemmed from the deficient investigation conducted into Appellant's life and family history which clearly supports that Appellant failed numerous years of school was socially promoted until the age of 21 when he received a "certificate" from high-school, never lived independently, drove a Car, paid bills or had a checking account could not be employed beyond the level of entry-level manual labor and had to have family fill out his job applications. In short, there was overwhelming evidence of extraordinarily low level adaptive functioning. Counsel's dereliction in failing to uncover all of the readily-available evidence of mental retardation was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).
- D. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States

Constitution, Counsel presented damaging and prejudicial mental health testimony from its own expert in psychiatry. This dereliction flowed directly from counsel's failure to conduct a reasonable and thorough social history. Counsels' actions were unreasonable, prejudicial and require vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).

- E. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to properly prepare for and conduct voir dire of the jurors in Appellant's case. Specifically, Counsel did not use all of the available defense strikes when good cause existed to use all of the defense strikes, with the result being that Appellant was tried and sentenced by a jury whose composition did not meet the requirements of law or due process, resulting in an unfair trial due to ineffective assistance of counsel.

Respondent filed an Amended Return dated May 29, 2012. *App. 4188-4227*.

On December 31, 2013, Woods' counsel notified Judge James and Respondent via email that Woods was amending his allegations. Specifically, counsel said that the claim of mental retardation was withdrawn and that he was asserting ineffective assistance of counsel for "1) failure to preserve the Stewart charge objection—Mr. Hoefer raised the issue but the Supreme Court indicated it was not properly preserved [;] 2) failure to prepare an adequate mitigation case will be alleged with greater specificity to include the failure to obtain the MRI scan and/or have an MRI scan performed based on the 2005 MRI report indicating that there were abnormalities, though the state doctor opined they were not of clinical significance." This email further indicated that counsel would subsequently file another Amended Application.

Following a November 14, 2013 motions hearing (*App. 4228-37*), Judge James held the PCR hearing in the Sumter County Courthouse on January 7-10, and 14-15, 2014. He heard arguments on February 27, 2014. Ms. Armstrong and Mr. Kilgo represented him throughout the hearing and Woods was present for the taking of all testimony, with the exception of the

testimony of Dr. Jefferies. *App. 4237-4940*.⁵ PCR counsel provided Judge James and Respondent with the Amended Application at a pretrial conference on the day before the hearing. *See App. 4237-38. See also App. 5384-87* (Order). After trial counsel had testified at the hearing, Woods amended his fifth allegation to assert the additional claim that trial counsel was ineffective for not objecting to the State's closing argument in the sentencing phase. *App. 4836-41*.

On February 27, 2014, he formally submitted a second Amended Application, which contained the grounds pursued in the PCR hearing:

- A. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Constitution and Law. **Counsel failed to conduct a reasonable investigation into Appellant's life history and background**, including but not limited to: failing to hire a mitigation specialist, whose role is to gather facts and help locate all records and witnesses and assist counsel in organizing the mitigation information and formulating mitigation strategy (as well as obtaining the MRI scan from 2005) and assist counsel in having this evidence reviewed by an independent expert, such as a radiologist and/or neurologist and/or [a] neuropsychologist-all experts trained to understand the intricacies of MRI testing and the possible significance of head trauma, as well as the significance of "personality changes secondary to head injury," which was noted in the SCDC records. Additionally, counsel did not invest necessary time with their social work expert resulting in an incomplete mitigation penalty phase presentation. Due to the complete absence of any defense at the guilt or innocence phase of trial, it was incumbent upon counsel to present as compelling a case in mitigation as possible, as guilt was essentially a foregone conclusion. *See Florida v. Nixon*, 125 S.Ct. 511 (2004). This dereliction was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Wiggins v. Smith*, 539 U.S. 510, 522-23[] (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).[];

⁵ Contrary to the Court Reporter's title on the transcript of this hearing, there was only one PCR hearing, and the November 13, 2014 hearing was to determine whether the Department of Disabilities and Special Needs had to disclose documents in response to Woods' subpoena.

Council v. Catoe, 380 S.C. 159, 670 S.E.2d 356 [(2008)]; *Rosemond v. Catoe*, 383 S.C. 320, 680 S. 2nd 5 (2009); *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*.

- B. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Constitution and Law. **Counsel failed to conduct a reasonable investigation into Appellant's mental health status and history** resulting in an inadequate and erroneous penalty phase presentation in mitigation, including but not limited to: Counsel's reliance on the state's forensic evaluation which was flawed, based on erroneous and scant social history and family information related to Mr. Woods' upbringing, functioning, and adaptive behavior, contained numerous errors of fact and relied on highly prejudicial, and wholly uncorroborated, hearsay accounts of Mr. Woods' personal and behavioral history. In light of the overwhelming wealth of information available to rebut the spurious and poorly reasoned conclusions of the state's examiners, Counsel was derelict in adopting the state's conclusions and multiple diagnoses and presenting this evidence through their own retained psychiatrist, Dr. Harold Morgan, now retired, who is called in the 11th hour to replace Dr. Tom Martin who was unavailable at the time of the retrial. Dr. Morgan's trial testimony speaks to the last-minute nature of his involvement in the case and lack of preparedness. Dr. Morgan testified he met Mr. Woods one time---December 2, 2006, for one hour and a half (ROA at 2504, line 15), which was after the trial had started on November 28, 2013. Dr. Morgan had minimal information from which to work -- SCDC records,[SCDMH's Report indicating Anti-Social personality Disorder and one conversation with Social Worker Shirley Furtick. On cross-examination, Dr. Morgan admitted he was called in at the last minute to "pinch-hit" for Dr. Martin. (ROA at 2511, lines 11-13). Failure to provide relevant and readily accessible information to the defense experts and prepare him for trial was unreasonable. One and one half hours was scant involvement with a man's life was literally "on the line," and had been labeled with numerous and prejudicial personality disorders. While Dr. Morgan did know of one prior episode at SCDC where Mr. Woods indicated hearing voices, he clearly did nothing to follow up with further meetings with Mr. Woods, and this would appear to be due to time, as Dr. Morgan was an

11th hour “pinch-hit” substitute for Dr. Martin and he was never provided with the 2005 MRI scan, as it was never provided to counsel, nor reviewed by an independent neurologist or radiologist. This dereliction was unreasonable, outrageously prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 US. 668 (1984).

- C. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution. **Counsel presented damaging and prejudicial mental health testimony from its own expert in psychiatry.** This dereliction flowed directly from counsel's failure to conduct a reasonable and thorough social history. Had counsel investigated the records of the South Carolina Department of Corrections that confirmed a history of head trauma and an abnormal MRI scan in 2005 (the scan and raw data were never provided by the state or sought by trial counsel), hired a mitigation specialist to investigate and uncover the wealth of information that existed as to Mr. Woods' impoverished, unstable upbringing by a psychotic and schizophrenic mother, the mitigation evidence would have accurately reflected the degree of cognitive impairment and deprived upbringing that was the true life history of Mr. Woods. Mr. Woods' history, after a thorough and competent investigation does not support the multiple personality disorder labels applied to Mr. Woods by William S. Hall Institute. Astonishingly, the Hall report noted Mr. Woods had an abnormal MRI (which they failed to obtain due to a conclusory reading of the MRI as abnormal but of no “clinical significance”) and a documented history of head injuries yet failed to factor in the impact of head injury to the overall clinical assessment of Mr. Woods. Instead, the Hall report focused on reported “bad” behaviors attributed to Mr. Woods, despite the fact that there was no evidence to support the reported bad behaviors. The twin diagnoses of “frotteurism” and “zoophilia” were based on ... Mr. Woods' alleged “admission” to these behaviors, for which there was no objective evidence. The verifiable and objective facts of Mr. Woods' social and medical and scholastic history demonstrate beyond reasonable dispute that Mr. Woods is not an “anti-social personality disorder” (with a host of additional sexual disorders to boot), but rather a brain damage and cognitively impaired man with borderline

mental retardation/intellectual functioning and, like his mother, Schizophrenia. Evidence of Mr. Woods' brain damage and Schizophrenia existed prior to the time of the crime, and obviously prior to trial and this evidence was within reasonable reach of counsel. More importantly, the evidence of brain damage and Schizophrenia completely refutes and undermines any confidence a reasonable person would have in the prejudicial findings of William S. Hall that were, in part at least, based on information supplied by a first cousin (David Woods) who knew nothing of Mr. Woods' early years in New York with his mother or his later years in New York with his girlfriend and sister. As to Mr. Woods' father, Anthony Woods, Sr., was often away from the family and abandoned and divorced Mr. Anthony Woods' mother. In short, Anthony Woods' father was not present during a substantial portion of Mr. Woods early life, nor of his life in New York, a period of time during which Mr. Woods was unable to understand the bus system to get to work, could not fill out a job application, never had a driver's license or was able to live on his own. In light of the overwhelming evidence of brain damage, mental illness, and borderline intellectual functioning, Counsels' actions were unreasonable, prejudicial and require vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).

- D. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina law and Constitution. **Counsel failed to preserve as error the issue of the trial court's error in refusing to provide a "limiting" instruction [charging] the jury on the matter of prior crimes under the case of *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), which held that the jurors should be told that prior crimes evidence cannot be construed as evidence in aggravation, but may only be considered as evidence of the defendant's "general character."** In the alternative, trial counsel was ineffective for failure to object to the solicitor's improper argument that Applicant's two prior convictions for criminal sexual conduct were two additional aggravating factors. The solicitor's argument was misleading and was an inaccurate statement of the law. The two prior CSC and burglary convictions were not "aggravation" evidence,[] but character evidence, and counsel should have objected [to] these misstatements of the law, as they allowed the sentencing jury to consider

character evidence as additional aggravating factors. The trial court's refusal to provide a limited instruction was not harmless. On the contrary, the solicitor seized upon the absence of the charge by calling the victim witnesses of Mr. Woods' prior convictions for burglary and assault, and arguing in his closing to Mr. Woods already had a "two-for-one" life sentence, so that life for the death of Ms. Dubose would result in a "three-for-one" sentence. (ROA at p. 2564, line 17-p. 2565, line 6). Appellate counsel raised the *Stewart* charge issue and the Supreme Court noted in its opinion that the issue was not preserved under *Avery v. State*. Clearly, this issue was not dismissed on the [merits], which is obvious given the State's evidence and argument, but rather due to [the] failure of trial counsel to preserve the issue for review. This issue entitles Mr. Woods to any sentencing phase trial and vacation of his death sentence.

- E. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution. Counsel failed to argue the admissibility of the social work demonstrative exhibits under S.C.R.E. 1006; *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), and further failed to argue against the solicitor's objection to the social worker expert's reliance on hearsay under the exception that hearsay is admissible if it is routinely relied upon in the expert's field. S.C.R.E. 703. These errors greatly undermined the social work presentation of Applicant's life history, resulting in prejudice to Mr. Woods. A youth sentencing hearing should be granted due to this error. *Strickland v. Washington*, *Wiggins v. Smith*, *Williams v. Taylor*.

See App. 5384-87, Order. Judge James denied relief on these claims in an Order filed on May 6, 2015. App. 5374-5447.

C. The PCR appeal.

Woods timely served his notice of appeal, and he thereafter filed a Petition for Writ of Certiorari, in which he presented the following Questions:

1.
Whether the PCR court erred by ruling petitioner had failed to prove prejudice from defense counsel's undisputedly deficient performance in not arguing against

and preserving the trial judge's wrongful exclusion of the extensive genogram as a demonstrative exhibit for appeal, since its exclusion prevented the defense from effectively exposing the jury to the mitigating evidence of petitioner's chaotic life from birth until the crime, and the failure to take exception prevented reversal on appeal?

2.

Whether the PCR court erred by finding counsel was not ineffective in utilizing Dr. Morgan as a "pinch-hitting" expert where defense counsel's lack of preparation of Dr. Morgan, (once they decided to use him), due to their wholly inadequate investigation, made Dr. Morgan a damaging witness where he testified petitioner had an anti-social personality disorder which could not be cured, that he was malingering, that he had no empathy for other human beings, and that he had not learned anything from his incarceration for his past crimes?

3.

Whether the PCR court erred by finding defense counsel conducted a reasonable penalty stage investigation where counsel had the social worker also act as an unqualified investigator, the social worker/investigator never went to New York to investigate petitioner's childhood, the defense failed to discover the numerous head injuries petitioner suffered, and their effect on his frontal lobes which controlled his ability to make rational judgments, since there was a reasonable likelihood the outcome would have been different if the jury understood the significance of petitioner's head injuries, and his chaotic upbringing?

4.

Whether the PCR court erred in finding defense counsel was not ineffective for failing to utilize appellant's MRI, or obtain one before trial since petitioner's head injuries and the frontal lobe damage to his brain were critical to the jury understanding petitioner's impulsive behavior and his lack of judgment as a result of his head injuries since this went directly to his moral culpability in mitigation?

5.

Whether the PCR court erred by finding defense counsel was not ineffective for failing to request a *State v. Stewart* instruction explaining the difference between character evidence and evidence of statutory aggravating circumstances since *State v. Skipper* was no longer the controlling precedent, and particularly where the solicitor gave a closing argument which a reasonable juror could have understood to mean that evidence of other "similar" crimes and convictions could be considered as evidence of the aggravating circumstances in this case?

Respondent made its Return to his Petition on September 26, 2016. Woods filed a Reply to Return to Petition for Writ of Certiorari on December 1, 2016. The South Carolina Supreme Court filed an Order denying certiorari on December 13, 2017. It set the Remittitur to the Clarendon County Clerk of Court on December 29, 2017. Woods did not file a petition for writ of certiorari in the United States Supreme Court.

D. Currently Pending Federal Habeas Corpus Proceedings.

Woods filed what he styled as a “Placeholder” Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina, through counsel, on April 12, 2018. *Woods v. Stirling, et al.*, No. 5:18-cv-00144-DCN-KDW.⁶ *ECF #29*. On May 10, 2018, the Honorable David C. Norton, United States District Judge, granted a stay of execution, over the State’s objection, until Woods files a habeas Petition with more specific claims. *ECF #42*. On August 1, 2018, Judge Norton filed an Order directing Woods to file his amended petition on or before Friday, September 21, 2018. *ECF #48*.

On September 19 2018, Woods filed an Amended Petition for Writ of Habeas Corpus. *Woods v. Stirling, et al.*, No. 5:18-cv-00144-DCN-KDW. [*ECF #53*]. He raises the following allegations in his Amended Petition:

- I: Petitioner was denied the right to a fair and impartial jury trial as guaranteed by the Sixth and Fourteenth Amendments, when the trial judge denied the defense’s motion to change venue.**

- II: Petitioner was denied the right to effective assistance of counsel during the penalty phase of his capital trial, as guaranteed by the Sixth and Fourteenth Amendments, when trial counsel: (a) failed to investigate and offer a complete and accurate presentation of the available mitigating evidence, including evidence of Petitioner’s life history, mental illness and brain damage; and, (b) instead presented inaccurate and damaging testimony through their own witness.**

⁶ He is represented in his habeas proceedings by Ms. Paavola and Ms. Vann, who filed this Application on his behalf.

- III: Petitioner was denied the right to effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, by counsel's failure to object to the trial court's improper instruction directing the jury to find that the murder had occurred "during the commission of" the statutory aggravating circumstances, contrary to *State v. Riddle*, 389 S.E.2d 665 (S.C. 1990), and other applicable law.
- IV: Petitioner's death sentence violates the Eighth Amendment because he is intellectually disabled and thereby ineligible for a sentence of death under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny; and Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, because trial counsel failed to raise this claim.
- V: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, because trial counsel failed to object when Petitioner was visibly shackled without justification and without an individualized determination by the trial judge, in violation of the Fifth, Eighth and Fourteenth Amendments.
- VI: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, because trial counsel failed to call a pathologist to testify and/or failed to adequately object to the admission of numerous crime scene photos which were offered under misleading and prejudicial circumstances.
- VII: Petitioner was denied the right to effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments, because trial counsel failed to object to the State's racially discriminatory use of peremptory challenges in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986).

The motion asks for stay under the United States Supreme Court's decision in *Rhines v. Weber*, 544 U.S. 269, 275 (2005), so that he can pursue the claims set forth in his successive 2018 Application. Respondent has not yet made a Return to the Amended Petition and has until October 3, 2018, to respond to the motion for a stay. Respondent has this day filed a Response opposing Woods' motion.

E. PCR Application 2018-CP-14-00382.

On September 19, 2018, counsel for Woods in the federal habeas proceedings filed Woods' 2018 Application (2018-CP-14-00382), which they had served on the South Carolina Attorney General's Office on September 17, 2018. See *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) ("It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer;" this is the Clerk of Court in PCR cases). Respondent now moves to dismiss his Application.

Respondent incorporates the following documents, which have previously been served upon Woods' counsel and the District Court:

1. The Petition for Writ of certiorari dated April 27, 2016;
2. The Appendix to the Petition for Writ of Certiorari (11 Volumes), containing the following:
 - a. The Record on Appeal from the direct appeal:
 - Trial Transcript – November 27 – December 8, 2006;
 - Change of Venue Motion – October 4, 2006;
 - Motions – June 28, 2006;
 - Transcript – September 9, 2006;
 - Transcript – September 11-14, 2006;
 - Indictment;
 - Death Notice;
 - Jury Instructions on Aggravating and Mitigating circumstances;
 - Aggravating Circumstances Verdict Form;
 - Recommendation of Death Sentence;
 - Affirmation of Death Sentence;
 - Death Sentence;
 - Sentencing Sheets;
 - Blood Sample Order;
 - Search Warrants;
 - Change of Venue Motions;
 - Psychiatric Evaluation;
 - Juror Information;
 - Order on Motion to Transfer Venue – June 28, 2006;
 - Order Denying Motion to Change Venue – October, 2006; and
 - Trial Judge's Report.

- b. Final Brief of Appellant – November 24, 2008;
 - c. Final Brief of Respondent – November 3, 2008;
 - d. Opinion (Op. No. 26623);
 - e. Petition for Rehearing – April 14, 2009;
 - f. Order Denying Petition for Rehearing – May 13, 2009;
 - g. Remittitur – May 13, 2009;
 - h. Petition for Stay of Execution – May 15, 2009;
 - i. Remittitur – May 13, 2009;
 - j. Petition for Stay of Execution – May 15, 2009;
 - k. Return to Petition for Stay of Execution – May 28, 2009;
 - l. Order granting stay of execution – June 24, 2009;
 - m. Petition for Stay of Execution – August 13, 2009;
 - n. State's Letter in lieu of Return to Petition for Stay of Execution – August 24, 2009;
 - o. Order granting stay of execution – September 17, 2009;
 - p. Order appointing counsel – November 10, 2009;
 - q. Post-Conviction Relief Application – November 23, 2009;
 - r. Return – December 10, 2009;
 - s. Amended Application for Post-Conviction Relief – May 1, 2012;
 - t. Amended Return – May 29, 2012;
 - u. PCR Hearing Transcript – November 14, 2013;⁷
 - v. Motion to Produce Records from DDSN;
 - w. Ruling by the Court;
 - x. PCR Hearing Transcript – January 7-10, 2014;
 - y. PCR Hearing Transcript – January 14-15, 2014;
 - z. PCR Hearing Transcript – February 27, 2014;
 - aa. Order of Dismissal [2009-14-00654] filed May 6, 2015;
 - bb. Indictment and Sentencing Sheets.
- 3. Supplemental Record on Appeal containing: Search Warrant;
 - 4. The Return to Petition for Writ of Certiorari filed September 27, 2016;
 - 5. Motion to Seal Return to Petition for Writ of Certiorari – November 26, 2016;
 - 6. Return to Motion to Seal – October 18, 2016;
 - 7. The Reply to Return to Petition for Writ of Certiorari – December 1, 2016;
 - 8. South Carolina Supreme Court's Order denying motion to seal – 12-2-16;
 - 9. South Carolina Supreme Court's Order denying certiorari – 12-13-17;
 - 10. Remittitur issued December 29, 2017; and
 - 11. The Execution Notice filed on January 3, 2018.

⁷ The Index page of the Appendix to the Petition for a Writ of Certiorari erroneously refers to the November 13, 2013 hearing transcript as a PCR hearing transcript. However, the matter heard on November 13, 2013 was whether the South Carolina Department of Disabilities and Special Needs (DDSN) should be required to produce documents requested by Woods' attorneys and not in Respondents' possession.

Copies of these documents, which constitute the prior state court record, will be provided to the judge assigned to this case by the South Carolina Supreme Court. Further, Respondent has attached copies of both the December 31, 2013, email from Woods' counsel to Judge James and Respondent, in which counsel abandoned the claim that trial counsel were ineffective for not investigating and presenting evidence that Woods is intellectually disabled, the February 27, 2014 second Amended Application.

Additionally, Respondent will provide the Court with copies of

- The January 12, 2018 Order of the Honorable David C. Norton, United States District Judge [ECF # 10], granting Woods a stay of execution so that he could file a Petition for Writ of Habeas Corpus;
- The Orders appointing Emily Paavola, Esquire, and Lindsey Sterling Vann, Esquire, in federal habeas proceedings [ECF #s 16 & 17];
- The "Placeholder" Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina, through counsel, on April 12, 2018. *Woods v. Stirling, et al.*, No. 5:18-cv-00144-DCN-KDW. ECF #29;
- The May 10, 2018 Order filed by United States District Judge David C. Norton, granting a stay of execution over the State's objection, until Woods files a habeas Petition with more specific claims. ECF #42;
- The August 1, 2018, Order filed by Judge Norton directing Woods to file his amended petition on or before Friday, September 21, 2018. ECF #48; and
- Woods' Motion to Stay Proceedings Pending Exhaustion of State Remedies on September 19, 2018. ECF # 54.

II. STATEMENT OF FACTS

The direct and circumstantial evidence presented in the guilt phase of Woods' trial proved that he burglarized the home of Joanne Dubose (the victim), a fifty-three year old school teacher in Manning, South Carolina. He then raped and murdered her. Joanne had taught elementary school for roughly thirty years at the time of her death. Gloria Eanes, who is a

resident of Manning, testified that she and Joanne were both single, that they were close friends and that they often socialized. *App. 1703-05.*

Ms. Eanes last spoke to Joanne on Sunday, June 1, 2003, in a phone call between 8:00 and 9:00 p.m. Ms. Eanes worked on Monday, June 2nd, but Joanne was out of school. They did not speak that day because their plan was to eat dinner at Shoney's on Tuesday night. Ms. Eanes telephoned Joanne three times on Tuesday, but Joanne never answered the phone. On the final call, Ms. Eanes left a message on the answering machine asking Joanne to call her. However, she never heard from her friend. *App. 1705-08.*

Ms. Eanes called Joanne from work on Wednesday, June 4th but still she did not get any response. She called that afternoon and left another message that was not returned. When she got home, her answering machine had a message from another friend who had also been unable to reach Joanne. After briefly speaking to this person by telephone, Ms. Eanes went to Joanne's house to see what was wrong. When she got to Joanne's house, Joanne's car was parked in the yard. *App. 1708-10.*

Ms. Eanes knocked on the door and called for her friend by name. Joanne's dog barked, but she did not answer. Ms. Eanes let herself the house with a key and continued to call Joanne's name, without any response. She immediately smelled a foul odor. Because the dog ran from the living room to the bedroom several times, Ms. Eanes followed the dog into the bedroom. There, Ms. Eanes saw Joanne lying on the bed, flat on her back, with "blood running off the side of her face." Ms. Eanes backed out of the bedroom and went into the living room, where she telephoned 911. *App. 1710-12; 1718.*

Ms. Eanes hung up the phone, got the dog out of the bedroom and went outside when she heard the police coming. She then gave the dog to a neighbor. *App. 1713-14.* Ms. Eanes testified

that Joanne was a neat housekeeper and that she never allowed the house to be in disarray as it was on June 4th. Ms. Eanes also testified that Joanne had two satellite receivers in her home. App. 1714-17.

Teresa and Steven Skurry lived next door to Joanne, along with their infant son. Mr. Skurry is a paramedic and a fireman. Mrs. Skurry and Joanne were friends. Mrs. Skurry last saw Joanne around 9:15 a.m. on Monday, June 2nd.⁸ She did not come outside to investigate when several trucks and police cars, all with their emergency lights on, responded to a fire in the Skurry's home shortly after midnight on Tuesday, June 3rd. Nor did Joanne respond either when Mrs. Skurry called to see whether she and her son could come over to Joanne's house to get out of the smoke, or when a loud fan was used to air out the Skurry's home. App. 1721-26; 1728-34.

Mr. Skurry saw Joanne's car parked in the yard later on Tuesday, but he did not see her. When he returned home from playing golf on Wednesday, June 4th, his wife told him that she had overheard on his pager that the fire department was going to Joanne's house. So, he immediately went next door to investigate. When he arrived, he saw Ms. Eanes, who said, "I think she's [dead], I think she's hemorrhaged, I ... have called everybody, [and] they are on the way." App. 1734-35.

Mr. Skurry knew that something was not right as soon as he went into the house because of the foul smell. He also noticed a lot of dog feces on the floor. He went into the bedroom and saw Joanne lying in bed. She was flat on her back, her blanket was up to her chest and a bed sheet or pillowcase had been tied around her neck. EMS personnel arrived a minute or so later. Will Mathews, the paramedic in charge, went closer to the bed and saw that her right arm had also been tied with the sheet tied around her neck; and her legs were spread under the sheet over

⁸ Mr. Skurry testified that there was no lighting behind either their house or Joanne's house. There also was an overgrown area behind Joanne's backyard. App. 1730-33.

her body. Everyone left the room when Captain Allen Lee, of the Manning Police Department, arrived and stated that the area was a crime scene. *App. 1735-39; 1743-53; 1768-79.*

Wendell Cooper worked for the Manning Police Department in 2003. He came into contact with Woods at the police department, around 5:00 a.m. on June 5, 2003. Officer Cooper thereafter transported him to and from the hospital for medical treatment. Woods' hand was bleeding, and he was wearing dark pants and a pair of tennis shoes. Officer Cooper seized the clothing and shoes when Woods was treated at the hospital. He then gave these items to SLED Agent Bruce Gantt. *App. 1789-94. See also App. 1781-86.*

Without objection, SLED Agent Gantt was qualified as an expert in crime scene processing, fingerprint identification and footwear impression analysis. He and fellow SLED Agent Diane Bodie responded to Joanne's residence on the night of June 4th and processed the crime scene. While they did not find any fingerprints of evidentiary value, Agent Gantt lifted a shoe print impression off of the hardwood floor in Joanne's bedroom. They determined that the point of entry was the back door to the residence, where a window pane near the door's lock had been broken. They also seized the sheets, mattress and bedding from the bedroom. *App. 1798-1813; 1828-47.*

Agent Gantt happened to be at the Manning Police Department when Captain Cooper brought in Woods' clothing. Once Agent Gantt saw Woods' shoes, he recognized the similarity between Woods' right shoe and the impression lifted from Joanne's bedroom. So, he immediately had the shoes sent to SLED for testing. Based upon his subsequent comparison of Woods' right shoe to the impression from the bedroom, he opined that the shoes were consistent in size, shape and outsole design, and that there "were random wear patterns located within the shoe [and] within the questioned impression that were similar." He also found "identifying

characteristics in both the shoe and the impression that were similar.”⁹ Therefore, he opined that the impression could have been made by Woods’ right shoe or another shoe with the same combined class characteristics, area patterns and random characteristics. However, he testified that it was not very likely that one would find another such shoe. *App. 1816; 1838-54; 1868-69.*

SLED subsequently conducted expert testing on a number of items seized from Joanne’s bedroom for the presence of blood and semen and DNA testing. Likewise, cuttings and swabs taken from the shoes Woods was wearing when he was arrested were examined. Woods’ blood was found on the cuttings and a swab taken from his shoes. More importantly, there were three cuttings taken from the bed sheet. Two revealed the presence of semen and one matched Woods’ DNA. Also, one DNA profile from the mattress pad matched Joanne, while one matched Woods. A vaginal swab revealed the presence of semen but a profile could not be developed. *App. 1940-54; 1984-95.*¹⁰

The pathologist testified that Joanne died of asphyxiation, strangled with the bedsheet that had been tightly tied around her neck. Also, she had been dead for about two days at the time of the June 5, 2003 autopsy. The absence of evidence of sexual trauma to the vagina and anus could be accounted for by decomposition of her body. *App. 1876-77; 1881-88.*

A search of Woods’ residence was conducted pursuant to a warrant. There, police found two satellite receivers that belonged to Joanne, and an access card for satellite reception. *App.*

⁹ This apparently referred to marks and cuts on the shoe that is present in the impression. *App. 1852.*

¹⁰ The chances of randomly selecting another person who had the same DNA profile as Woods’ was one in 2.5 quadrillion (1 in 2,500,000,000,000,000).

1892-1930; 1939. Finally, the State presented evidence of 1990 convictions for burglary in the second degree and burglary in the third degree. *App. 1795-97.*¹¹

Among other evidence offered in the sentencing phase, the State presented evidence that Woods was convicted on January 5, 1990 of burglary in the third degree, grand larceny and malicious injury to real property; that he was convicted on a 1990 indictment for burglary in the second degree, malicious injury to real property and resisting arrest; that he had pled guilty in 1999 to 12 counts of breaking and entering into a motor vehicle, and petit larceny; and that he was convicted, following a trial, of breaking and entering into a motor vehicle and grand larceny in 2000. *App. 2231-34.*

The State also presented evidence that Woods had attacked his first victim less than one week before the murder, when he burglarized the home of eighty-four year old Laura Jackson, on May 27, 2003. In that incident, he beat her, tied her to her bed and sexually assaulted her. Mrs. Jackson only survived because she had played dead. Before leaving, he positioned her body in a fashion similar to the way Joanne was found. Another jury convicted him of burglary in the first degree, ABIK and CSC in the first degree in connection with the savage attack. *App. 2257-84.*

The State also presented evidence that he struck again two days after the murder, when he burglarized the home that fifty-three year old Linda Taylor shared with her eighty-four year old mother on June 4, 2003. Knowing that the home was occupied by at least one woman, he still relentlessly pursued his objective and broke in, even after Linda Taylor beat his arm with a cane and cut his hand on broken glass in the door. *App. 2311-50; 2385-89; 2396-2401.* He was convicted burglary in the first degree and two counts of ABIK in the Taylor case. *See App. 2230-40; 2350-73; 2396-2401.*

¹¹ The trial judge gave a limiting charge with respect to the jury's consideration of these convictions. *App. 1797.*

Finally, there was evidence of the manhunt immediately after the crimes at the Taylor house that led to his June 5, 2003 arrest. Police and bloodhounds pursued him for hours before he was arrested. When placed in the patrol car, Woods only said, "F_ _ k you and your God." *App. p. 2401, lines 10-12.*

III. ALLEGATIONS

Woods raises the following grounds for relief in the 2018 PCR Application:

- 10&11(a) Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is intellectually disabled. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).
- 10(b) Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during his capital trial.
- 11(b): Supporting Facts: Trial counsel failed to investigate and present evidence that Applicant is intellectually disabled, including evidence that Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, rendering him ineligible for capital punishment. Trial counsel failed to present this evidence at a pretrial hearing and at any point throughout his capital trial. Trial counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

III. DISCUSSION

1. The Application is barred by the statute of limitations.

South Carolina has very strict prohibitions against successive and untimely PCR applications that preclude the action here. First, it is clear that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. S.C. Code Ann. § 17-27-45(A) (Supp. 2018), specifically provides that

[a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As discussed in part A. of the Procedural History, the South Carolina Supreme Court affirmed Woods' convictions and death sentence in a published decision filed on March 30, 2009. *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009). *App. 4016-23*. It sent the Remittitur to the Clarendon County Clerk of Court on May 13, 2009. *App. 4129-30*. He therefore had one year from May 13, 2009, within which to file the current Application. He did not file the Application in 2018-CP-14-00382 until September 19, 2018. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court).

Thus, Woods filed his 2018 Application over nine years after the Remittitur was sent to the Clarendon County Clerk of Court following the conclusion of his direct appeal. Further, he cannot avail himself of either subsections § 17-27-45(B) or (C) (exceptions to statute of limitations and successiveness bar include applications based upon a new retroactively applied substantive standard in criminal law, or new "evidence of material facts not previously presented

and heard that require vacation of the conviction or sentence” if filed within one-year “after the date when the facts could have been ascertained by the exercise of reasonable diligence”), since both of the allegations in his 2018 either was raised or could have been raised by his original PCR attorneys, in the original PCR Application, as amended, and could have been heard at the evidentiary hearing held on January 7-10, and 14-15, 2014. As a result, the 2018 Application is barred by § 17-27-45(A). *See also Pelzer v. State*, 378 S.C. 516, 520, 662 S.E.2d 618, 620 (Ct. App. 2008) (“Statutes of limitations are not simply technicalities, but are fundamental to a well-ordered judicial system”).

Nor is Woods entitled to equitable tolling. As the Court of Appeals explained in *Pelzer*:

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. *Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr.*, 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). “Equitable tolling is reserved for extraordinary circumstances.” *Id.*; *see, e.g., Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, “[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”); *Hopkins v. Floyd’s Wholesale*, 299 S.C. 127, 382 S.E.2d 907 (1989) (holding statute of limitations equitably tolled for workers’ compensation claim during reliance period in which employer represented to employee that claim compensable and would be taken care of without employee filing claim). The doctrine of equitable tolling can be summarized:

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.

Pelzer, 378 S.C. 516, 520-21, 662 S.E.2d at 620.

Woods cannot show any action by the State that precluded him from asserting the present claims in his 2009 Application. To the contrary, his Ground 10 & 11(b) - asserting that trial counsel failed to investigate and present evidence he is intellectually disabled - was raised in the 2009 proceedings as ground C of the May 1, 2012 Amended Application. However, his original PCR attorneys abandoned this claim through a December 31, 2013, email from Woods' counsel to Judge James and Respondent, counsel confirmed this at the PCR hearing (*see App. 4816-27*), and counsel did not present this claim in the February 27, 2014 second Amended Application.¹²

2. The Application is impermissibly successive to the 2009 Application.

The Application also must be dismissed because it is impermissibly successive to the previous Application (2009-CP-14-00654) that he filed on November 23, 2009, on which he had a hearing and which concluded when the South Carolina Supreme Court filed an Order denying certiorari on December 13, 2017. Woods' current Application only raises one claim that is cognizable in PCR: his claim that trial counsel failed to investigate and present evidence he is intellectually disabled. Ground 10 & 11(b). Again, this allegation was raised in the 2009 proceedings, but it was abandoned by his attorneys. *See App. 4816-27*.¹³ (His free-standing claim in Grounds 10 & 11(a) is not properly before this Court for the reasons stated, *infra*).

¹² Thus, his representation in ¶ 14 of the Application that "[t]he grounds set forth above have not been previously presented to this or any other court, state or federal" is erroneous. For reasons that are not altogether clear, collateral appellate counsel failed to include the Second Amended Application in the Appendix to the Petition for Writ of Certiorari. A copy off it and counsel's December 31, 2013 e-mail, however, are attached to this Return and Motion to Dismiss.

¹³ Original PCR counsel's decision to abandon their ineffectiveness claim was hardly surprising, in light of a finding by DDSN that he was not intellectually disabled; the evidence of prior testing; the evidence of his intellectual functioning offered at trial; and the testimony of Dr. David Price, a neuropsychologist retained by collateral counsel, that Woods had borderline intellectual functioning. *App. 4735-37; 4740; 4742*. Moreover, it is clear that trial counsel's failure to present evidence of Woods' intellectual disability or, as it was termed at the time of

The Uniform Post Conviction Procedure Act provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which

trial, mental retardation was objectively reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984).

When the defense social worker, Ms. Furtick, was asked at trial about any behavioral testing on Woods, she testified that he scored borderline on "social skills and skill abilities." On one I.Q. test, he scored a 73. Also, the records did not contain any information about disciplinary problems in school. After the automobile accident, he lived with family members for a while and may have lived in the garage. He also had a girlfriend with whom he lived in New York, and he worked minimum wage jobs there. *App. 2603-04. See also App. 4816-27; Applicant's Ex. 7* (DDSN records).

Defense psychiatrist Dr. Harold Morgan testified on cross-examination that Woods was borderline mentally retarded "according to the IQ tests, but I don't think that he's mentally retarded." *App. 2629, lines 8-10*. Further, psychological testing by the psychologist at DMH, administered as part of the court-ordered evaluation of him, reflected that he was borderline mentally retarded. He had a full scale IQ of 73. "Performance IQ was found to be 81 and Verbal IQ was found to be 69." *See App. 3948-51*.

In *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979), the Court found that the distinction between "mental retardation" and "borderline mental retardation" was the distinction in whether certain mitigating factors would be charged. In light of expert testimony to effect that defendant, who was a borderline mental retardate, could communicate on a college level, trial court did not err in refusing to submit to jury as mitigating circumstances statutory sections providing that murder was committed under influence of mental or emotional disturbance or that defendant's capacity to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired.

Both PCR counsel and trial counsel could reasonably rely upon the opinions of their experts' opinions that Woods is not intellectually disabled. *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003); *Payner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Smith*, 311 F.3d at 676; *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *United States v. Roane*, 378 F.3d 382, 408-09 (4th Cir. 2004) (rejecting a claim of ineffective assistance of counsel for failure to argue score inflation because counsel received a report and is not required to second-guess the evaluation).

for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (Supp. 2018).

“This statute forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* expressly declined to interpret the term “sufficient reason” to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase “very narrowly” by Court Rule, and it held that “as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. ... We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not” *Id.*

Although the Court in *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel as *Aice* urged, “well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under *Aice*'s view.” *Id.* at 451, 409 S.E.2d at 394. Thus, “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.” *Id.* at 451, 409 S.E.2d at 394.¹⁴

¹⁴ For instance, successive PCRs are allowed for belated direct appeals where a person did not fairly get their “one bite at the apple” because they did not knowingly and intelligently waive the right to appeal from denial of relief. See *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). And, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive

Additionally, the Court in *Aice* indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Aice*, 305 S.C. at 450 52, 409 S.E.2d at 394 95. The Court concluded as follows:

We have held that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. *Austin* never received a full “bite” at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, *Aice* seeks to have more than one procedural “bite” at the apple. *Aice* has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While *Austin* could rely on Rule 50(6) for support of his claim, *Aice*’s request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id. at 452, 409 S.E.2d at 395.

One exception to the bar on successive applications that is neither alleged nor available to Woods is the failure of original PCR counsel to satisfy the statutory qualifications of counsel for death penalty PCR actions found in S.C. Code Ann. § 17-27-160(B) (Supp. 2018). *See Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016) (“petitioner’s allegation that he was denied a state-created right to qualified counsel constitutes a ‘sufficient reason’ to permit a successive

application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. Clearly, Woods’ case does not involve that scenario. Also, the Supreme Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the applicant’s first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Woods’ current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily concede that counsel was statutorily qualified, that the allegations raised in that action were raised with the assistance of counsel, and that he had a hearing on the issues raised by counsel.

PCR application under section 17-27-90"). Again, Woods has not raised this claim, and it is refuted by the record. See *App. 4149-51*.

Thus, while successive applications are not categorically disallowed, *id.*,¹⁵ none of the exceptions apply to Woods' successive PCR action. Rather, he could have raised his current ineffectiveness claim in his previous PCR Application.¹⁶ As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*. See also *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1,

¹⁵ See also §§17-27-45(B) and (C) (providing statutorily created exceptions to the rule set forth in *Aice*, for statute of limitations purposes); *Odum v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) ("belated review of appellate issues, or 'rare procedural circumstances' are reasons to allow successive actions).

¹⁶ The best that his current attorneys can do is point out that they would have handled the first PCR application differently; and, with the uncerring vision of hindsight and with the knowledge that those allegations raised by his original PCR attorneys were unsuccessful, that they would have alleged five additional grounds in which they contend that counsel rendered ineffective assistance. If the Court allowed a hearing on merits of the claims in this Application and Woods was ultimately unsuccessful, other counsel would undoubtedly allege that his present counsel were ineffective because the third set of attorneys would have raised other grounds and would have handled it differently. However, simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to him. See *Strickland*, **Error! Main Document Only.** 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel's perspective as the time;" see also *id.* ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way"). See also, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that appellate counsel may make reasonable strategic choice not to appeal every non-frivolous argument requested by defendant, and noting "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"); *Smith v. Stewart*, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988) (Counsel is not ineffective for failing to file a "kitchen sink" brief).

3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

3. Woods' claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), is not a cognizable claim for post-conviction relief.

Woods' Ground 10&11(a) alleges that his death sentence violates the Eighth Amendment of the United States Constitution because he is intellectually disabled, citing to *Atkins v. Virginia*, 536 U.S. 304 (2002). This claim is not a cognizable claim for post-conviction relief.

The jurisdiction of the PCR court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction"). Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (same); *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885-86 (1975) (same).

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the Court addressed how the issue of intellectual disability (then mental retardation) should be handled at the trial level after the United States Supreme Court's decision in *Atkins*.

Regarding the procedures to be used in making the mental retardation determination in post-*Atkins* cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Cf. State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998)4 (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. See S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); see also *State v. Laney*, 367 S.C. 639, 627 S.E.2d 726 (2006).

The procedures outlined by the South Carolina Supreme Court show that an Eighth Amendment claim asserting that a death sentence would constitute cruel and unusual punishment because the defendant is intellectual disabled can only be properly raised before the trial court in post-*Franklin* trials. Woods' November-December, 2006 trial was almost three full years after *Franklin*. Since trial counsel could have but did not raise this Eighth Amendment claim at trial and on direct appeal, Woods cannot raise his freestanding claim of intellectual disability in PCR. § 17-27-20(b); *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520.

4. Woods' Ground 10 & 11(b) is barred by principles of res judicata.

As discussed, Woods' claim in Ground 11(b)(1) - that counsel were ineffective for failing to investigate and present evidence he is intellectually disabled - was presented in the original PCR proceedings but it was abandoned by Woods' original PCR attorneys without allowing the PCR judge an opportunity to rule on it.

The Court explained in *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999), that:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues

which might have been raised in the former suit.” *Hilton Head Center of South Carolina, Inc. v. Public Service Comm’n of South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986).

See also *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm’n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (“A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit”) (citing *Wold v. Funderburg*, 250 S.C. 205, 157 S.E.2d 180 (1967)).

Because this claim was raised but abandoned, Respondent submits that it is barred by principles of res judicata. *Id.* See also *State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) (“Appellants’ allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata”); *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (“A dismissal ‘with prejudice’ indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication”).

5. Woods’ efforts to litigate the 2018 Application frustrate the important need for finality of litigation.

Finally, Respondent submits that Woods’ attempt to litigate his successive and time-barred Application is contrary to this recognized need for finality of litigation. Woods seeks to litigate issues that could have been litigated at trial and in his original PCR proceedings. In fact, as discussed above, Woods’ intellectual functioning was presented through experts retained by trial counsel and PCR counsel, and their experts opined he had borderline intellectual functioning. Woods’ current attorneys have now found experts willing to opine that he is

intellectually disabled. Also, his original PCR attorneys abandoned the claim of ineffective assistance of trial counsel, following investigation of this claim, because both DDSN and their own expert concluded that Woods had borderline intellectual functioning, as opposed to being intellectually disabled.

Both the United States Supreme Court and the Supreme Court of South Carolina have emphasized the necessity for finality of litigation in criminal cases. The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). In his concurring and dissenting Opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part).

Seven years after *Mackey*, the Supreme Court of South Carolina quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978).

The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, 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. See *Butler v. State*, 397 S.E.2d 87

(S.C.1990). 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 a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice, 305 S.C. at 451, 409 S.E.2d at 394. (Bold emphasis added).

There is simply no valid reason would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process. To create the exception now urged by Woods would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. This type of needless delay is contrary to *Aice*'s recognition of the need for finality of litigation. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, having made its Return and Motion to Dismiss, Respondent prays that the Court summarily dismiss the 2018 PCR Application for the above-stated reasons.

Respectfully submitted,

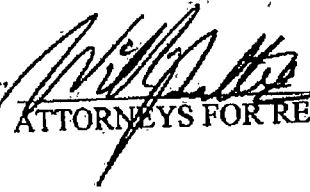
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By: 
ATTORNEYS FOR RESPONDENT

October 3, 2018.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2018-CP-14-00382

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, certify that I have served the foregoing *Return and Motion to Dismiss* by depositing one copy of same in the United States mail, postage prepaid, addressed to Applicant's counsel as follows:

Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

This 3rd day of October, 2018.


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STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

ANTHONY WOODS

Applicant,

v.

THE STATE OF SOUTH CAROLINA.

Respondent,

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-14-00382

RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS

Applicant Anthony Woods, through undersigned counsel, submits the following response to Respondent's Return and Motion to Dismiss ("Motion to Dismiss").¹ Despite the fact that a number of other death sentenced inmates in Applicant's position have been allowed to proceed on their claims of intellectual disability in the exact same procedural posture, Respondent argues that: (1) the Application for Post-Conviction Relief ("PCR") should be summarily dismissed because it is impermissibly successive and time-barred; and, (2) Woods' freestanding claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, is not a cognizable claim for post-conviction and is barred by res judicata. For the reasons set forth below Respondent's request for dismissal should be rejected in this case as it has been in the other cases where the identical arguments were made.

¹ This Court held a hearing on the Motion to Dismiss on February 7, 2019 at which Woods was represented by undersigned counsel. At the conclusion of the hearing, the Court gave both parties ten (10) days to file briefing on the issues discussed at the hearing.

I. RELEVANT LEGAL PRINCIPLES.

A. INTELLECTUAL DISABILITY

In *Atkins v. Virginia*, the United States Supreme Court found that the Eighth Amendment to the Constitution prohibits the execution of persons with mental retardation.² *Atkins*, 536 U.S. at 321. The Court held that “by definition, [intellectually disabled persons] have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.” *Id.* at 318. In *Hall v. Florida* the Supreme Court reaffirmed that because “[n]o legitimate penological purpose is served by executing a person with intellectual disability,” they are not eligible for “the law’s most severe sentence.” *Hall v. Florida*, 134 S. Ct. 1896, 1992-93 (2014); *see also Moore v. Texas*, 137 S. Ct. 1039, 1048 (2017).

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court held that the State’s definition of intellectual disability is found in the death penalty statute, which defines that condition as “significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.” *Id.* at 278-79, 588 S.E.2d at 605 (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)). Thus, the definition of intellectual disability consists of three prongs:

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

A person meets the sub-average intellectual functioning component if his or her IQ is approximately

² The Court has since instructed that the term “intellectual disability” replaces and has the same meaning as what was previously referred to as “mental retardation.” *Hall v. Florida*, 134 S. Ct. 1986, 1990 (2014) (citing *Rosa’s Law*, 124 Stat. 2643).

75 or less. *Atkins*, 536 U.S. at 309 n.5; *Hall*, 134 S. Ct. at 1995, 2001; *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 second prong requires significant deficits in at least one of three areas of adaptive behavior: conceptual, social and practical skills. American Association on Intellectual Disabilities and Developmental Disorders (hereafter, "AAIDD") 2010 Manual 5; Diagnostic and Statistical Manual of Mental Disorders 33 (5th Ed. 2013). 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

B. POST-CONVICTION PROCEDURE

South Carolina adopted the Uniform Post-Conviction Procedure Act (hereafter, the "PCR Act") in 1969. *See* S.C. Code Ann. § 17-27-10 to -160, as amended. Its purpose is 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) (discussing purpose of state post-conviction review). According to the South Carolina Supreme Court, the PCR Act 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 "affords all the

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).

protections contemplated by our founding fathers. It 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”).

The PCR Act provides that 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.” S.C. Code Ann. § 17-20-10(a)(1). Post-conviction is also the appropriate forum for review of a claim that “the sentence exceeds the maximum authorized by law.” S.C. Code Ann. § 17-20-10(a)(3).

II. PROCEDURAL HISTORY.

Woods was convicted and sentenced to death in December 2006 for the murder and sexual assault of Joanne Dubose, a fifty-three year old Manning school teacher, in Clarendon County. His sentence and conviction were affirmed on direct appeal in the South Carolina Supreme Court. *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009).

At the time of Woods’ capital trial in 2006, trial counsel were aware that examiners from the State Department of Mental Health had administered a WAIS-III IQ exam to Woods and he obtained a full-scale IQ score of 73.⁴ Woods’ reading skills were measured at a third grade level. App. 4727. And yet, there is no evidence in the record or from undersigned counsel’s independent investigation that trial counsel took the basic step of retaining or consulting with a mental health expert with expertise in intellectual disability. Trial counsel did not investigate and collect

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).

information relating to Woods' adaptive behavior, nor did they retain any experts to further examine Woods' intellectual functioning. Trial counsel never asserted that Woods is exempt from a death sentence under *Atkins*.

Attorneys Melissa Armstrong and Robert Kilgo, Jr. were appointed to represent Woods in his initial PCR proceedings. They initially did allege an *Atkins* claim, App. 4185, and retained Dr. David Price to examine Woods' intellectual functioning. On March 28, 2012, Dr. Price administered the WAIS-IV and Woods obtained a full-scale IQ score of 72. App. 4727. Less than thirty days later, on April 26, 2012, Woods was examined by the Department of Disabilities and Special Needs ("DDSN"). The DDSN examiner, Dr. Gordon E. Brown, Jr., who authored and signed the DDSN report, did not administer an IQ test to Petitioner. Instead, Dr. Brown's report indicates that Thomas Kirby, who was "a contract psychologist with DDSN," administered the Stanford-Binet Intelligence Scale, 5th Edition, while Dr. Brown observed. See CD Containing DDSN Records, PCR Exhibit #15. Dr. Brown reported that Woods received a score of 81 on the Stanford Binet. After receiving the DDSN report, initial PCR counsel voluntarily withdrew the *Atkins* claim. App. 4816. No court has ever ruled on the substantive issue of Woods' intellectual disability.

III. ARGUMENT.

A. Standard of Review.

Motions to dismiss are controlled by Rule 12, SCRCP. The South Carolina Supreme Court has explained the standard as follows:

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).

B. SUCCESSIVE PCR APPLICATIONS ARE NOT STRICTLY PROHIBITED.

Relying on *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), Respondent argues that the PCR Application should be summarily dismissed because it is successive. Motion to Dismiss, at 28-33. In *Aice*, the South Carolina Supreme Court observed that successive PCR applications generally should not be entertained “unless 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 held that there are 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. Subsequently, the Court has invoked the exception noted in *Aice* on a number of occasions and under various circumstances. *See, e.g., Washington v. State*, 324 S.C. 232, 235-36, 478 S.E.2d 833, 834-35 (1996) (allowing a successive PCR application because of the ineffective assistance of initial PCR counsel and various other procedural irregularities); *Case v. State*, 277 S.C. 474, 289 S.E.2d 412 (1982) (finding that a “unique” combination of facts warranted allowing a successive PCR application, including the fact that Case had no attorney in his first PCR

proceeding); *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).

In *Robertson v. South Carolina*, the Court held that the “[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 29, 35 (2016). Notably, *Robertson* did not overrule *Aice* or any of the other cases finding “sufficient reason” to permit a successive PCR application. Instead, the Court merely applied the general principle already outlined by *Aice* and concluded that Robertson’s allegations that his initial PCR counsel did not meet the statutory qualification requirements constituted an additional “sufficient reason” for permitting a successive PCR application. *Id.*

Atkins’s and *Hall*’s prohibition against executing people with Intellectual Disabilities is rooted in prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution. Article I, Section 15 of the South Carolina Constitution also bars cruel and unusual punishment and, therefore, prohibits executing people with intellectual disability. Denying a PCR applicant the ability to present evidence that he is ineligible for the death penalty due to his intellectual disability risks allowing the execution of a person constitutionally exempt from the death penalty. Such an unconstitutional execution 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.⁵ *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

⁵ Respondent further contends Woods’ freestanding *Atkins* claim cannot be reached because “[i]ssues that could have been raised at trial or on direct appeal cannot be asserted in [a] PCR application absent a claim of ineffective assistance of counsel.” Motion to Dismiss, at 33-34. Post-conviction relief, however, is not limited to claims of ineffective assistance of counsel, but rather extends to any constitutional violation. See e.g. *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (post-conviction relief granted based on solicitor’s failure to disclose impeachment evidence

C. AT LEAST THREE OTHER COURTS IN SOUTH CAROLINA HAVE ALLOWED APPLICANTS TO PURSUE *ATKINS* CLAIMS IN A SECOND PCR ACTION.

Under similar circumstances, the Honorable J. Mark Hayes allowed Eddie Elmore to seek post-conviction 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 mental retardation. See Order Denying Motion to Dismiss, *Elmore v. State*, No. 2005-CP-24-1205, at 2 (June 18, 2007), attached as Exhibit A. Ultimately, Judge Hayes considered the merits of Elmore’s claim and found Elmore intellectually disabled; the State did not appeal Judge Hayes’ order.

Similarly, two additional capital PCR applicants – Bayan Aleksey (2015-CP-38-764) and Stephen Cory Bryant (2016-CP-43-828) - 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 to go forward over the State’s objection that the application should be dismissed as successive and untimely. See *Third 120 Day Status Report, Aleksey v. State*, No. 2015-CP-38-00764 (June 7, 2017), attached as Exhibit B. 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 Order

constituted *Brady* violation, and State’s failure to correct co-defendant’s false testimony at trial).

Denying State's Motion to Dismiss in *Bryant v. South Carolina*, 2016-CP-43-828 (July 13, 2016), attached as Exhibit C. 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. Notably, Judge Cooper held the evidentiary hearing addressing Bryant's *Atkins* claim nearly two years after the South Carolina Supreme Court's decision in *Robertson*. There is no meaningful distinction between this case and *Elmore*, *Aleksey*, or *Bryant*,⁶ and Woods should be permitted to litigate his *Atkins* claim.

D. WOODS' CLAIMS ARE TIMELY.

Respondent argues that Woods' PCR Application is barred by the statute of limitations set forth in S.C. Code Ann. § 17-27-45(A). *See* Motion to Dismiss, at 26-28. The one-year statute of limitations does not apply to successive PCR applications permitted under one or more exception. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (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."). The South Carolina Supreme 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. The court has never applied the one-year statute of limitations to a permissible successive PCR application. *See Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996). Additionally, it is well within this Court's equitable discretion to toll the limitations period for any appropriate duration. *See Ferguson*

⁶ A fourth similar case remains pending in Sumter County. PCR Applicant Bobby Wayne Stone filed a successive PCR application alleging he is intellectually disabled after evidence of his intellectual disability was first identified during his federal habeas proceedings. The State moved to dismiss the case for many of the same reasons as in this case and Judge Michael G. Nettles held a hearing on the motion to dismiss. Judge Nettles has not yet ruled on the motion to dismiss in Stone and the case remains pending. *See Stone v. State*, No. 2018-CP-43-1025.

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”).

D. WOODS’ CLAIMS ARE NOT BARRED BY RES JUDICATA.

Respondent argues that because Woods’ initial PCR counsel raised but abandoned an intellectual disability claim in Woods’ initial PCR proceedings, his claims in this proceeding are barred by res judicata. Respondent’s argument ignores the third requirement to establish res judicata – that the claim was previously adjudicated.

“To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.” *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 469, 419 S.E.2d 217, 218 (1992). In Woods’ case, because initial PCR counsel voluntarily dismissed the intellectual disability claim prior to an evidentiary hearing, no evidence of intellectual disability was presented at the hearing and the issue was not ruled on by the initial PCR court. Accordingly, the claim was not adjudicated previously and cannot be dismissed on res judicata grounds.

At the hearing on the Motion to Dismiss, this Court posed the question of what would happen if undersigned counsel again voluntarily dismissed Woods’ intellectual disability claim. As counsel responded at the hearing, this is exceedingly unlikely to happen given the strength of Woods’ claim of intellectual disability developed during federal habeas proceedings.⁷ If, however,

⁷ During the hearing on the Motion to Dismiss, Respondent seemed to assert Woods’ claim should be dismissed because an expert has not opined that Woods is intellectually disabled but has, instead, recommended further evaluation for intellectual disability. Respondent’s argument must fail. Woods’ claim is supported by Dr. Susan Knight’s opinion stating: “[I]t is my opinion to a reasonable degree of psychological certainty that a prima facie case of intellectual disability is present.” Knight Dec. ¶ 14, admitted as Motion to Dismiss Hearing Exhibit 2. Via Dr. Knight’s

this Court were to allow this case to proceed through a thorough investigation of intellectual disability and it was then dismissed, undersigned counsel believe Respondent would have a strong argument for dismissing any future claim of intellectual disability because it would be evident that the withdrawal was made after a complete investigation and thus was knowingly and intelligently waived. In fact, this Court could, should it choose to do so, require such an on the record waiver. This, however, is not what happened during Woods' initial PCR. Undersigned counsel's investigation reveals that prior PCR counsel prematurely dismissed the intellectual disability claim without a full investigation.⁸ Woods should, therefore, be afforded the opportunity to fully

declaration, declarations from Dr. Daniel Grant, Jan Vogelsang and Caroline Everington (all admitted as exhibits at the Motion to Dismiss Hearing) and Woods' PCR application, Woods has pled sufficient facts, which if assumed to be true warrant relief. *See Robertson*, 418 S.C. at 519, 795 S.E.2d at 36 (allowing for summary dismissal "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."). Woods' evidence of intellectual disability uncovered thus far was developed in a short period of time and with limited funds available to undersigned counsel in preparation for filing a federal habeas petition. During that review, undersigned counsel identified evidence that Woods meets all three prongs of the intellectual disability definition and, in order to obtain further review, asserted a claim for relief in this 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 (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)).

⁸ For example, initial PCR counsel did not investigate the validity of the DDSN's IQ score on testing they administered to Woods. Undersigned counsel's preliminary investigation revealed that the score is suspect because it was administered by an examiner who does not appear to be licensed, a third party improperly observed the administration of the test, the test administered was outdated likely artificially inflating the score obtained, and Woods had been administered an IQ test only twenty-nine days earlier also likely artificially inflating the IQ score obtained. *See* Applicant's Exhibits 2 and 3 (admitted at the hearing on the Motion to Dismiss). Initial PCR counsel may have also been operating under a misunderstanding of the law and intellectual disability criteria because Woods' initial PCR hearing was held prior to the Supreme Court's rulings in *Hall* and *Moore* in which the Supreme Court held that IQ scores over 70 or 75 do not preclude a finding of intellectual disability. Prior PCR counsel may have erroneously believed an IQ score of 81, which is not reliable, defeated a claim of intellectual disability.

investigate and present evidence of his intellectual disability for consideration to this Court, allowing him the first full and fair adjudication of his intellectual disability. To deny Woods this possibility unreasonably risks executing someone with intellectual disability who, for the reasons laid out in *Atkins*, should be protected from such a fate.

CONCLUSION

For all of the reasons set forth above, this Court should deny the Motion to Dismiss.

Respectfully submitted,

Emily C. Paavola

Lindsey S. Vann

Justice 360

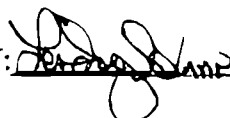
900 Elmwood Ave., Suite 200

Columbia, SC 29201

Emily@justice360sc.org

Lindsey@justice360sc.org

(803) 765-1044

BY:  _____

Counsel for Applicant.

February 19, 2019.

Exhibit A

State of South Carolina)
)
County of Greenwood)

Judgment In A Civil Case

Common Pleas Court

Case# 2005-CP-24-1205

EDWARD LEE ELMORE
Plaintiff

STATE OF SOUTH CAROLINA
Defendant

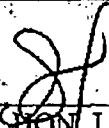
- ☐ JURY VERDICT: This action came before the court for a trial by jury. The issue have been tried and a verdict rendered.
- ☒ DECISION BY COURT: This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED. (CHECK REASON) ☐ rule 12b; SCRPC ☐ rule 41(a), SCRPC (vol. Nonsuit); ☐ rule 43(k), SCRPC (settled); ☐ other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ rule 40(j); SCRPC; ☐ bankruptcy; ☐ other

IT IS ORDERED AND ADJUDGED: ☒ See attached order;
☐ Statement of Judgment by Court;

ORDER- MOTION TO DISMISS IS DENIED

FILED COMMON PLEAS
24th JUDGE
JUN 25 PM 2:54
GREENWOOD COUNTY
S.C.

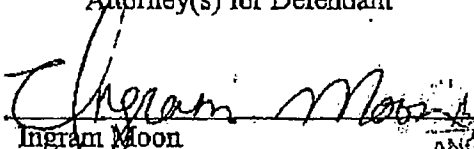
Dated at Greenwood, South Carolina, this 13TH day of JUNE 2007,


HON. J MARK HAYES
Presiding Judge

This judgment was entered on the 18TH day of JUNE 2007,
and a copy mailed first class this 25TH day of JUNE 2007,
to attorneys of record or to parties (when appearing pro se) as follows:

DIANA HOLT
Attorney(s) for Plaintiff

DONALD ZELENK
Attorney(s) for Defendant


Ingram Moon
Clerk of Court

ANGEL... FURHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENWOOD)

C.A. No. 2005-CP-24-1205

Edward Lee Elmore, #4293)

Applicant,)

ORDER

vs.)

State of South Carolina,)

Defendant.)

2007 JUN 13 PM 12:06

FILED
2007 JUN 13 PM 12:06
CLERK OF COURT
GREENWOOD COUNTY
S.C.

This case involves a PCR application of a death penalty inmate. In his application, he claims that he is not eligible for the death penalty due to his mental retardation. His present PCR was filed after the United States Supreme Court decision in *Atkins* and the SC Supreme Court decision in *Franklin v. Maynard*. These two decisions established that a mentally retarded inmate is not eligible for the death penalty, and also articulated the procedure for an inmate claiming mental retardation, who was sentenced to the death penalty prior to the *Atkins* decision, to challenge his death sentence by means of a PCR application, even if successive, in state court, as previously proscribed by the legislature.

The State seeks to have the present PCR dismissed due to it being beyond the statute of limitation, and thus, untimely. The State presents reasonable and rational arguments to support its position and buttresses its stance with references to factual testimony previously presented, concerning the mental state of the defendant.



ATTEST: TRUE COPY
Angela Woodhurst
ANGELA WOODHURST
CCCP AND GS
GREENWOOD COUNTY
S.C.

The defense offers the theory of equitable tolling and then argued facts and inferences that they suggest will show the defendant is mentally retarded and not death penalty eligible.

After a review of the information provided by the attorneys, the Court is denying the State's motion to dismiss at this time. In deciding this motion, the court has viewed the record in a light most favorable to the non-moving party and has drawn all reasonable inferences in a manner most favorable to the non-moving party. The court is aware of some appellate precedents that provide verbiage to support a more relaxed standard in ruling on a motion to dismiss in a PCR action such as the present one. However, this court declines to apply a relaxed standard to the issues presently before it. Applying the announced standard, the court cannot rule, as a matter of law, that the applicant's PCR application should be dismissed. Both 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 claiming mental retardation. The South Carolina Supreme Court in *Franklin* made clear that the legislative mandated process of filing a post conviction relief application was the proper means to address the inmate's mental issues, even though the PCR application filed to address the mental retardation issue may be successive.

In ruling on motions to dismiss, a court must deny the motion if additional facts need to be developed and/or the law applicable to the facts needs to be developed. Here, defense counsel made statements during the hearing that placed the timing of the defense's awareness or knowledge of the mental retardation as a factual matter for the court to decide. In a non-PCR case, the Court of Appeals has indicated that when counsel makes such factual assertions during



a hearing involving dispositive motions, a lower court should act cautiously before granting the dispositive motion. In ruling on motions as the one presently before the court, the court does not look to the weight or credibility of the non-moving party's evidence.

This decision should be not read to preclude the State or the applicant from subsequently presenting the statute of limitation (including the collateral issue related to the timing of the assertion of the mental retardation issue) arguments and defenses once the case is developed factually.

Based on the above, the State's present motion to dismiss is denied without prejudice.

Additionally, at the hearing representatives from the agency responsible for performing the evaluation were present and made statements to the court indicating the evaluation process may take several months. The court wishes the parties to update the court on the evaluation issue and also wishes to be updated on the status of the case. The court requests that the attorneys contact the Court within 10 days of receipt of this order to schedule a mutually convenient time for a status conference. The parties may wish to contact the evaluating agency to receive and update from them and/or ask that they participate in the status conference.

Dated at Spartanburg, South Carolina,
this 13th day of June, 2007.



J. Mark Hayes
Presiding Judge

Exhibit B

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

BAYAN ALEKSEY,

Applicant,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

IN THE FIRST JUDICIAL CIRCUIT

IN THE COURT OF COMMON PLEAS

2015-CP-38-00764

Third 120 Day Status Report

Please refer to prior status reports for previous activity in this case. Subsequent to the last report, attorney Laura Wood Young was substituted for attorney Teresa Norris. Robertson v. State of South Carolina was decided by the South Carolina Supreme Court, which gives guidance on many of the issues involved in this matter. A telephone conference was conducted with all attorneys regarding how to properly proceed in light of the Robertson decision. This court has granted the state's motion for an evaluation for mental retardation/intellectual disability of the applicant. The court will continue to hold the state's motion to dismiss in abeyance until the evaluation has been completed.


The Honorable Doyet A. Early, III

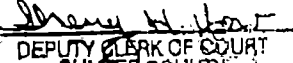
June 6, 2017

Exhibit C

RECORDED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2016 JUL 15 PM 2:47) FOR THE THIRD JUDICIAL CIRCUIT
 COUNTY OF SUMTER)
 JAMES D. CAMPBELL)
 CLERK OF COURT)
 SUMTER COUNTY, S.C.) Case No. 2016-CP-43-828

Stephen Cory Bryant,)
 Applicant)
)
 vs.) **Order Denying State's Motion to Dismiss**
)
)
 State of South Carolina,)
 Respondent.)

CERTIFIED TRUE COPY
 OF ORIGINAL FILED

 DEPUTY CLERK OF COURT
 SUMTER COUNTY
 SOUTH CAROLINA

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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



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

On June 19, 2015, Mr. Bryant filed motion for stay of execution and for appointment of counsel in the United States District Court for the District of South Carolina so that he could pursue a petition for writ of *habeas corpus*.² On June 24, 2015, the Honorable David C. Norton granted the stay of execution for ninety days. Also on June 24, 2015, the Honorable Bristow Marchant appointed Charles Grose and Jon Sheldon³ to represent Mr. Bryant. By order dated September 18, 2015, Judge Norton extended the stay of execution until January 14, 2016. Pursuant to Judge Norton's order dated January 13, 2016, Mr. Bryant filed his "place holder" petition for writ of *habeas corpus* on January 14, 2016. Also on January 14, 2016, Judge Norton extended the stay of execution until "resolution of Petitioner's *habeas corpus* petition." On April 28, 2016, Mr. Bryant amended his *habeas* petition.

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

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

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

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12

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

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

CONCLUSIONS OF LAW

The Supreme Court of the United States observed:

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

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


3

Atkins v. Virginia, 536 U.S. 304, 321, 122 S. Ct. 2242, 2252, 153 L. Ed. 2d 335 (2002) (internal quotations and citations omitted). *Atkins*, accordingly, held that offenders suffering from Intellectual Disabilities⁵ are not eligible for capital punishment.

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

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

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

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

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

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S.E.2d at 606.

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

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

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

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

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

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

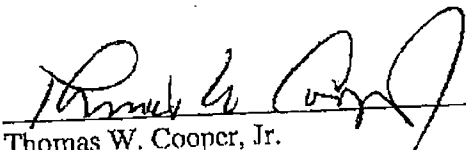
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Intellectual Disabilities. Additionally, holding that an *Atkins* claim is subject to procedural default would result in an unnecessary waste of judicial time and resources and, based on an incorrectly applied technicality, the wrongful execution of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

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

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

IT IS SO ORDERED.


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

July 13, 2016
Manning, South Carolina



ALAN WILSON
ATTORNEY GENERAL

February 19, 2019

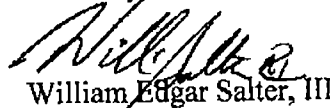
The Honorable Beulah G. Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, South Carolina 29102

Re: Anthony Woods, #06023 v. State of South Carolina
2018-CP-14-00382
Capital PCR

Dear Ms. Roberts:

Enclosed please find the original and one (1) copy of the *Supplemental Memorandum in Support of Return and Motion to Dismiss* in connection with the above referenced case for filing in your office. Please file the original order and return a certified copy to me in the self-addressed envelope provided for your convenience.

Sincerely,



William Edgar Salter, III
Senior Assistant Attorney General

WES:ab
Enclosures

cc: Emily C. Paavola, Esquire (with enclosure)
Lindsey S. Vann, Esquire (with enclosure)

2019 FEB 28 PM 4:22
Beulah Roberts, Clerk-Clarendon Co. SC

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2018-CP-14-00382

SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF RETURN AND
MOTION TO DISMISS
(Capital Case)

On February 7, 2019, this Court heard arguments on Respondent's Motion to Dismiss the successive Application for Post-Conviction Relief Anthony Woods, #06023 (Woods) filed a (PCR), through counsel, on September 19, 2018. 2018-CP-14-00382. Woods was present at the hearing and represented by counsel, Emily C. Paavola, Esquire, and Lindsey S. Vann, Esquire. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Joe Maye represented the State. At the conclusion of the hearing, the Court granted the parties ten days within which to submit briefing on the motion to dismiss. Respondent now supplements the arguments made in support of its October 3, 2018 Return and Motion to Dismiss as follows:

As discussed in the Return, Woods' 2018 Application should be summarily dismissed because

- It is barred by the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2018);
- It is successive to his original PCR Application (2009-CP-14-00654) that he filed on November 23, 2009, and which resulted in the Supreme Court of South Carolina filing an Order denying certiorari on December 13, 2017;
- None of the exceptions to the rule barring successive applications apply to Woods' case, such as a claim that his original PCR counsel were not statutorily qualified to represent him;

Beulah Roberts, Clerk-Clarendon S.C.
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- His freestanding claim of intellectual disability, in Grounds 10 & 11(a), fails to present a cognizable claim because it is beyond the statutory jurisdiction of the PCR Act. *Atkins v. Virginia*, 536 U.S. 304 (2002), was decided well before Woods' trial. Because this claim was available at time of the trial and sentencing, the claim cannot be reached, absent an allegation of ineffective assistance of trial counsel;
- Ground 10 & 11(b) is barred by the doctrine of res judicata because it was presented in the original PCR proceedings but abandoned by Woods' original PCR attorneys; and
- The important need for finality of litigation demands that, in the absence of any basis for exercise of a "rare exception" of allowing a successive application.

I.

Respondent incorporates the "Procedural History" (Return, pp. 2-17), and the "Statement of Facts" (Return, pp. 19-25), from the October 3, 2018 Return and Motion to Dismiss. Also, consistent with the statement on page 19 of the Return and Motion to Dismiss, Respondent has attached copies of the following documents:

- The January 12, 2018 Order of the Honorable David C. Norton, United States District Judge *Woods v. Stirling, et al.*, No. 5:18-cv-00144-DCN-KDW [*ECF # 10*], granting Woods a stay of execution so that he could file a Petition for Writ of Habeas Corpus;
- The Orders appointing Emily Paavola, Esquire, and Lindsey Sterling Vann, Esquire, in federal habeas proceedings [*ECF #s 16 & 17*];
- The "Placeholder" Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina, through counsel, on April 12, 2018. *ECF #29*;
- The May 10, 2018 Order filed by United States District Judge David C. Norton, granting a stay of execution over the State's objection, until Woods files a habeas Petition with more specific claims. *ECF #42*;
- The August 1, 2018, Order filed by Judge Norton directing Woods to file his amended petition on or before Friday, September 21, 2018. *ECF #48*; and
- Woods' Motion to Stay Proceedings Pending Exhaustion of State Remedies on September 19, 2018. *ECF # 54*.

II. ALLEGATIONS

Woods raises the following grounds for relief in the 2018 PCR Application:

- 10&11(a)** Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is intellectually disabled. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).
- 10(b)** Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during his capital trial.
- 11(b)** Supporting Facts: Trial counsel failed to investigate and present evidence that Applicant is intellectually disabled, including evidence that Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, rendering him ineligible for capital punishment. Trial counsel failed to present this evidence at a pretrial hearing and at any point throughout his capital trial. Trial counsel's performance was deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Moore v. Texas*, 137 S. Ct. 1039 (2017), *Hall v. Florida*, 134 S. Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

III. DISCUSSION

- 1. The Application is barred by the statute of limitations.**

Respondent incorporates by reference the argument that the Application is barred by the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2018), (Return, pp. 25-28), from the October 3, 2018 Return and Motion to Dismiss.¹

2. The Application is impermissibly successive to the 2009 Application.

Respondent again submits that the Application must be dismissed because it is impermissibly successive to the previous Application (2009-CP-14-00654) that Woods filed on November 23, 2009, on which he had a hearing and an unsuccessful appeal to the South Carolina Supreme Court, certiorari being denied on December 13, 2017.

Woods' current Application only raises one claim that is cognizable in PCR: that trial counsel failed to investigate and present evidence he is intellectually disabled, which is his Ground 10 & 11(b). Woods asserted at the February 7th hearing on the State's Motion to Dismiss that he was not asserting a claim that counsel was ineffective. Yet, if he does not, then there is no claim properly before this Court in PCR because his free-standing claim in Grounds 10 & 11(a) is not properly before this Court for the reasons stated, *infra*.

The Uniform Post Conviction Procedure Act provides that:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless 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.

¹ Woods' representation in ¶ 14 of the Application that "[t]he grounds set forth above have not been previously presented to this or any other court, state or federal" is erroneous. Collateral appellate counsel failed to include the Second Amended Application in the Appendix to the Petition for Writ of Certiorari. A copy off it and counsel's December 31, 2013 e-mail, however, were attached to the Return and Motion to Dismiss.

S.C. Code Ann. § 17-27-90 (Supp. 2018).

“This statute forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* expressly declined to interpret the term “sufficient reason” to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase “very narrowly” by Court Rule, and it held that “as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. ... We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not” *Id.*

Although the Court in *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel as *Aice* urged, “well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict’s counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under *Aice*’s view.” *Id.* at 451, 409 S.E.2d at 394. Thus, “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.” *Id.* at 451, 409 S.E.2d at 394.²

² For instance, successive PCRs are allowed for belated direct appeals where a person did not fairly get their “one bite at the apple” because they did not knowingly and intelligently waive the right to appeal from denial of relief. See *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). And, in *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. Clearly, Woods’ case does not involve that scenario. Also, in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), the Supreme Court

Additionally, the Court in *Aice* indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Aice*, 305 S.C. at 450 52, 409 S.E.2d at 394 95. The Court concluded as follows:

We have held that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. *Austin* never received a full “bite” at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, *Aice* seeks to have more than one procedural “bite” at the apple. *Aice* has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While *Austin* could rely on Rule 50(6) for support of his claim, *Aice*’s request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id. at 452, 409 S.E.2d at 395.

One exception to the bar on successive applications that is neither alleged nor available to Woods is the failure of original PCR counsel to satisfy the statutory qualifications of counsel for death penalty PCR actions found in S.C. Code Ann. § 17-27-160(B) (Supp. 2018). *See Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016).

In the noncapital PCR case of *Kelly v. State*, 404 S.C. 365, 365-66, 745 S.E.2d 377, 377-778 (2013), the South Carolina Supreme Court filed an Order in which it held that the United States Supreme Court’s decision in *Martinez v. Ryan*, 566 U.S. 1 (2012), “is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions. As such,

permitted a successive application where the applicant’s first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Woods’ current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily concede that counsel was statutorily qualified, that the allegations raised in that action were raised with the assistance of counsel, and that he had a hearing on the issues raised by counsel.

petitioner's contention that, based on *Martinez*, the circuit court erred in dismissing petitioner's third application for post-conviction relief as successive is without merit."

In *Robertson*, the petitioner filed a successive PCR application alleging that his initial PCR counsel were ineffective and that the Court "should amend existing state court PCR proceedings to permit [him] to file a second PCR application" in light of *Martinez*. He also alleged that neither attorney who had represented him in his original PCR was qualified to represent a capital PCR applicant under S.C. Code Ann. § 17-27-160(B) (Supp. 2018). *Id.* at 513, 795 S.E.2d at 513. The Supreme Court created an exception to the successiveness bar for capital PCR applicants whose counsel were not properly qualified under § 17-27-160(B). *See Robertson*, 418 S.C. at 516, 795 S.E.2d at 35.³ However, the Court reaffirmed its holding in *Aice* 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." *Robertson*, 418 S.C. at 514, 795 S.E.2d at 33 (citation omitted), and it extended the Order in *Kelly* to capital PCR cases. *Id.* at 516, 795 S.E.2d at 34.

Thus, while successive applications are not categorically disallowed, *id.*,⁴ none of the exceptions apply to Woods' successive PCR action. Rather, he could have raised his current ineffectiveness claim in his previous PCR Application. As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*. *See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244

³ Again, Woods has not raised this claim, and it is refuted by the record. *See App. 4149-51*.

⁴ *See also* §§17-27-45(B) and (C) (providing statutorily created exceptions to the rule set forth in *Aice*, for statute of limitations purposes); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999) ("belated review of appellate issues, or 'rare procedural circumstances' are reasons to allow successive actions).

S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002).

As will be argued, *infra*, his allegation of ineffective assistance of trial counsel for failing to raise a claim of intellectual disability is also barred by the doctrine of res judicata because his original PCR attorneys raised it in the 2009 proceedings, but knowingly and intelligently abandoned it during the original hearing. *See App. 4816-27*.⁵ Therefore, Woods is necessarily asserting that his original PCR counsel were ineffective for making that waiver. However, such a claim is foreclosed by *Robertson* and *Aice* and does not entitle him to a hearing on his successive Application. Indeed, no court after *Robertson* has granted relief on a claim that counsel were ineffective in failing to raise a claim of intellectual disability or that original PCR counsel were ineffective for not pursuing a claim that counsel were ineffective for failing to raise a claim of intellectual disability.

⁵ On December 31, 2013, Woods' counsel notified Judge James and Respondent via email that Woods was amending his allegations, that the claim of mental retardation was withdrawn, and that he was asserting ineffective assistance of counsel for "1) failure to preserve the *Stewart* charge objection—Mr. Hoefer raised the issue but the Supreme Court indicated it was not properly preserved [;] 2) failure to prepare an adequate mitigation case will be alleged with greater specificity to include the failure to obtain the MRI scan and/or have an MRI scan performed based on the 2005 MRI report indicating that there were abnormalities, though the state doctor opined they were not of clinical significance." This email further indicated that counsel would subsequently file another Amended Application. Counsel knowingly and intelligently abandoned the ineffective assistance claim for not pursuing that Woods is intellectually disabled at the PCR hearing (*see App. 4816-27*), and counsel did not present this claim in the February 27, 2014 second Amended Application.

At the February 7th hearing before this Court, Woods cited four cases where issue of ID has been raised in a successive application: *Edward Lee Elmore*, 2005-CP-24-1205; *Bayan Aleksey*, 2015-CP-38-00764; *Stephen Corey Bryant*, 2016-CP-43-828; and *Bobby Wayne Stone*. In the *Elmore* case, as noted by Woods at the hearing, the State did not appeal the PCR Order that found Elmore was ineligible for the death penalty because of his intellectual disability. Since the State did not appeal, there is no guidance from the South Carolina Supreme Court as to whether the successive action should have been allowed in that discrete circumstance.

The PCR judge in *Aleksey* has not issued an order excusing the procedural bar. Instead, he has permitted the applicant to proceed with investigations into intellectual disability. The *Stone* case does not help Woods, since it is under advisement by Judge Nettles. *Bryant* is the only example where the court issued an order excusing the procedural bar. However, the State has yet to have an opportunity to raise the procedural bar on appeal in *Bryant* or in any of these cases, with the exception of *Elmore*.

Accordingly, there is absolutely no guidance from our appellate courts as to whether the successive actions should have been allowed in those discrete circumstances. Nor is this Court bound by a ruling by another circuit court judge in a different case with different facts. Further and unlike each of those cases, Woods original PCR counsel did initially allege ineffective assistance claim as Ground C. of his May 1, 2012 Amended Application (*App. 4184-87*), but abandoned this claim after investigating it (*see App. 4816-27*), and counsel did not present this claim in the February 27, 2014 second Amended Application.

Therefore, this Application must be dismissed as impermissibly successive.⁶

⁶ As discussed in section 4, *infra*, PCR counsel's decision to abandon their ineffectiveness claim relating to Woods' supposed intellectual disability was reasonable under *Strickland*, as counsel's failure to raise this claim at trial.

3. Woods' claim under *Atkins v. Virginia*, 536 U.S. 304 (2002), is not a cognizable claim for post-conviction relief.

Woods' Ground 10&11(a) alleges that his death sentence violates the Eighth Amendment of the United States Constitution because he is intellectually disabled, citing to *Atkins v. Virginia*, 536 U.S. 304 (2002). This claim is not a cognizable claim for post-conviction relief.

The jurisdiction of the PCR court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985), which states, "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."

Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. As the South Carolina Supreme Court explained in *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 519-20 (1993), a capital PCR case:

Under the doctrine enunciated in *Simmons v. State*, 264 S.C. 417, 215 S.E.2d 883 (1975), errors which can be reviewed on direct appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings. Under *in favorem vitae* review, all direct appeal errors are assumed to have been reviewed by this Court, and thus are barred from collateral attack. Drayton urges, however, that the rule articulated in *Simmons* should be inapplicable when the defendant seeking post-conviction relief has been sentenced to death. In essence, Drayton would have this Court apply *in favorem vitae* review to collateral proceedings brought prior to our decision abolishing *in favorem vitae* review.¹ Drayton cites *Yates v. Aiken*, 290 S.C. 231, 349 S.E.2d 84 (1986), *rev'd*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988), and *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984), as examples of this Court's implicit acceptance of *in favorem vitae* review in post-conviction relief proceedings.

^{FN1/} *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

S.C.Code Ann. § 17-27-20(b) (1985) of the Uniform Post-Conviction Procedure Act provides that post-conviction relief "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." The *Simmons* rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal. *Peeler v. State*, 277 S.C. 70, 283 S.E.2d 826 (1981); *see*

also *Cummings v. State*, 274 S.C. 26, 260 S.E.2d 187 (1979); *Ashley v. State*, 260 S.C. 436, 196 S.E.2d 501 (1973); *Sellers v. Boone*, 261 S.C. 462, 200 S.E.2d 686 (1973). Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel. *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983).

Woods' argued at the February 7th hearing before this Court that a free-standing claim of intellectual disability cannot be waived by counsel representing a capital defendant, either at trial or in Post-Conviction Relief proceedings because an intellectually disabled individual is ineligible for the death penalty. Yet, his argument is contrary to both *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny, as well as state court procedures established by the South Carolina Supreme Court.

"An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). "A defendant ... has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983) and *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring)). However, "the lawyer has—and must have—full authority to manage the conduct of the trial. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Thus, Woods was and is bound by his counsel's failure to assert the intellectual disability claim at trial and the remedy is to seek relief based on counsel's alleged ineffective assistance under *Strickland* for not pursuing the claim. *Id.*

Moreover, state court procedure does not support Woods' argument. In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the Court addressed how the issue of intellectual disability (then mental retardation) should be handled at the trial level after the United States Supreme Court's decision in *Atkins*. The Court stated that:

Regarding the procedures to be used in making the mental retardation determination in post-*Atkins* cases, we conclude the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Cf. State v. Reed*, 332 S.C. 35, 503 S.E.2d 747 (1998) (defendant bears burden of proving incompetence by preponderance of evidence); *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998) (same).

If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is not mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

Franklin, 356 S.C. at 279, 588 S.E.2d at 605 (footnotes omitted); *see also State v. Laney*, 367 S.C. 639, 646-47, 627 S.E.2d 726, 730-31 (2006).

The procedures outlined by the Court in both *Franklin* and *Laney* show that an Eighth Amendment claim asserting that a death sentence would constitute cruel and unusual punishment because the defendant is intellectually disabled can only be properly raised before the trial court in post-*Franklin* trials. Woods' November-December, 2006 trial was almost three full years after *Franklin*. Since trial counsel could have but did not raise this Eighth Amendment claim at trial and on direct appeal, Woods cannot raise his freestanding claim of intellectual disability in PCR.

§ 17-27-20(b); *Franklin*, 356 S.C. at 279, 588 S.E.2d at 605; *Drayton*, 312 S.C. at 8-9, 430 S.E.2d at 520.⁷

4. Woods' Ground 10 & 11(b) is barred by principles of res judicata.

As discussed, Woods' claim in Ground 11(b)(1) - that counsel were ineffective for failing to investigate and present evidence he is intellectually disabled - was presented in the original PCR proceedings but it was abandoned by Woods' original PCR attorneys without allowing the PCR judge an opportunity to rule on it.

The Court explained in *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999), that:

Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 417 S.E.2d 569 (1992). Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." *Hilton Head Center of South Carolina, Inc. v. Public Service Comm'n of South Carolina*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992); *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986).

See also *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) ("A litigant is barred from raising any issues which were adjudicated in the

⁷ Respondent further submits that Woods still could potentially pursue a free-standing claim of intellectual disability in a state habeas corpus proceeding brought in the South Carolina Supreme Court's original jurisdiction after he has exhausted all other remedies in state and federal court. See *Butler v. State*, 302 S.C. 466, 467, 397 S.E.2d 87, 87 (1990), *cert. denied*, 498 U.S. 972 (1990) (writ of habeas corpus issued under circumstances where there was a violation, which, in the setting, constituted a denial of fundamental fairness shocking to the universal sense of justice). See also *Tucker v. Catoe*, 346 S.C. 483, 485, 552 S.E.2d 712, 713 (2001) (granting relief); *Drayton*, 312 S.C. at 9 n. 2, 430 S.E.2d at 520 n. 2.

former suit and any issues which might have been raised in the former suit”) (citing *Wold v. Funderburg*, 250 S.C. 205, 157 S.E.2d 180 (1967)).

Because this claim was raised but abandoned, Respondent submits that it is barred by principles of res judicata. *Id.* See also *State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) (“Appellants’ allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata”); *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) (“A dismissal ‘with prejudice’ indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication”).

It would be unfair to the State for the Court to rule otherwise. See *Stein v. New York*, 346 U.S. 156, 197 (1953) (“The people of the State are also entitled to due process of law”), *overruled on other grds.*, *Jackson v. Denno*, 378 U.S. 368 (1964); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (“[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true”) (quoting *Snyder v. Mass.*, 291 U.S. 97, 122 (1934)); *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 451 (1984) (“It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial”). As this Court correctly observed at the February 7th hearing, neither the PCR judge nor Respondent could stop the original PCR attorneys from abandoning the ineffective assistance of counsel claim. In the absence of proof that it was being abandoned in bad faith or for an improper motive – both of which are absent from the record – it must be assumed that original PCR counsel were acting ethically. See Rule 407, SCACR Rule of Prof. Conduct 3.1 (“A lawyer shall not bring or defend a proceeding, or

assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"); *see also* Rule 407, SCACR Rule of Prof. Conduct 3.3(a)(3) ("A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false").

Moreover, original PCR counsel's decision to abandon their ineffectiveness claim did not amount to ineffective assistance of counsel under *Strickland* and the Supreme Court's decision in *Martinez*. Indeed, PCR counsel's decision was hardly surprising, in light of a finding by DDSN that he was not intellectually disabled. *See Applicant's Ex. 7* (DDSN records). Additionally, counsel had evidence of prior psychological testing by DMH, as part of a 2000 court-ordered evaluation that found he had borderline intellectual functioning (Respondent's Ex. 8, *App. 5354-73.*) and a 2004 evaluation that likewise reached this conclusion. *App. 3948-51.* Also, the evidence uncovered by trial counsel was that he had borderline intellectual functioning but he was not intellectually disabled. Finally, PCR counsel had the opinion of their own independent, expert neuropsychologist, Dr. David Price, that Woods had borderline intellectual functioning. *App. 4735-37; 4740; 4742.*

Moreover, it is clear that trial counsel's failure to present evidence of Woods' intellectual disability or, as it was termed at the time of trial, mental retardation was objectively reasonable under *Strickland*. When the defense social worker, Ms. Furtick, was asked at trial about any behavioral testing on Woods, she testified that he scored borderline on "social skills and skill abilities." On one I.Q. test, he scored a 73. Also, the records did not contain any information about disciplinary problems in school. After the automobile accident, he lived with family

members for a while and may have lived in the garage. He also had a girlfriend with whom he lived in New York, and he worked minimum wage jobs there. *App. 2603-04. See also App. 4816-27; Applicant's Ex. 7* (DDSN records).

Defense psychiatrist Dr. Harold Morgan testified on cross-examination that Woods was borderline mentally retarded "according to the IQ tests, but I don't think that he's mentally retarded." *App. 2629, lines 8-10*. Further, the 2004 psychological testing by the psychologist at DMH, administered as part of the court-ordered evaluation of him, reflected that he was borderline mentally retarded. He had a full scale IQ of 73. "Performance IQ was found to be 81 and Verbal IQ was found to be 69." *See App. 3948-51*.

In *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979), the Court explained that the distinction between "mental retardation" and "borderline mental retardation" is the distinction in whether certain mitigating factors would be charged. In light of expert testimony to the effect that a defendant who was a borderline mental retardate could communicate on a college level, the Court held that the trial judge did not err in refusing to submit to jury as mitigating circumstances statutory sections providing that murder was committed under influence of mental or emotional disturbance or that defendant's capacity to appreciate criminality of his conduct or conform his conduct to requirements of law was substantially impaired.

It was reasonable under *Strickland* for both PCR counsel and trial counsel to rely upon the opinions of their experts' opinions that Woods is not intellectually disabled. *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Smith*, 311 F.3d at 676; *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995); *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995); *United States v. Roane*, 378 F.3d 382, 408-09 (4th Cir. 2004) (rejecting a claim of

ineffective assistance of counsel for failure to argue score inflation because counsel received a report and is not required to second-guess the evaluation). Also, Woods “had no constitutional right to insist on the appointment of any particular expert, *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 1096 (1985), and the Constitution did not require trial counsel to shop around for yet another mental health expert simply because the experts that they had retained, and who evaluated Woods, rendered what his present counsel have asserted is an unfavorable or less than desirable opinion. *Walton v. Angelone*, 321 F.3d 442, 466 (4th Cir. 2003); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th Cir. 1998); *Sidebottom v. Delo*, 46 F.3d 744, 753 (8th Cir. 1995).

To the extent Woods alleges the experts relied upon by trial counsel and/or PCR counsel were incorrect, that the experts failed to find additional facts, or that they failed to perform any testing correctly, his claim is of the effective assistance provided by the expert. This is not a cognizable Sixth Amendment claim, in the absence of proof of ineffective assistance of counsel. The Fourth Circuit explained in *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998), that:

The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate. Furthermore, it would undermine the finality of state criminal convictions, which would constantly be subject to psychiatric reappraisal years after the trial had ended.

The best that his current attorneys can do is point out that they would have handled the first PCR application differently; and, with the unerring vision of hindsight and with the knowledge that those allegations raised by his original PCR attorneys were unsuccessful, that they would have alleged that counsel rendered ineffective assistance for not presenting evidence that Woods is intellectually disabled. If the Court allowed a hearing on merits of the claims in this Application and Woods was ultimately unsuccessful, other counsel would undoubtedly

allege that his present counsel were ineffective because the third set of attorneys would have raised other grounds and would have handled it differently. However, simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to him. See *Strickland*, 466 U.S. at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight ... and to evaluate the [challenged] conduct from counsel’s perspective as the time;” see also *id* (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way”). See also, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (stating that appellate counsel may make reasonable strategic choice not to appeal every non-frivolous argument requested by defendant, and noting “the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible”); *Smith v. Stewart*, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988) (Counsel is not ineffective for failing to file a “kitchen sink” brief). Nor is there ineffective assistance of counsel under *Strickland* where the attorney chooses one reasonable strategy to the exclusion of another. See *United States v. Guerrero*, 938 F.2d 725, 730 (7th Cir.1991); *United States v. Adamo*, 882 F.2d 1218, 1227 28 (7th Cir.1989) (same).

Additionally, he has not provided this Court with an expert opinion that he is, in fact, intellectually disabled. He has offered a series of unsworn “declarations” from various experts to support his claim. Although each declaration states that it is states that the declarations are “affirm[ed] under penalty of perjury,” none of the declarations are notarized and none indicate that someone authorized to administer an oath or affirmation— such as a notary public - has done so. See *State v. Brandon*, 186 S.C. 448, ___, 197 S.E. 113, 114 (1938) (deputy clerk, who was merely a de facto clerk because legal requirements for her reappointment had not been complied

with, was without legal authority to administer an oath upon which statutory offense of false swearing could be based); *State v. Hayward*, 10 S.C.L. 546, 549 (S.C. Const. App. 1819) (perjury may not be predicated of a criminal complaint made upon oath before a magistrate who was not authorized to administer the oath, because he had taken the oath of qualification before a person not authorized to administer it). Also, Respondent has not had an opportunity to cross-examine any declarant.

Moreover, none of these declarations supports allowing the Court to entertain this successive Application. For instance, the declaration of clinical psychologist Dr. Susan Knight indicates that she "was retained by counsel for Anthony Woods to serve as a consultant to assist in assessing whether Mr. Woods had any mental or cognitive impairments that might be relevant to his ongoing appeals." **Applicant's Exhibit 2, ¶ 3.**

Critical to the present motion, she further states that:

13. **In my capacity as a consultant, I have not conducted a full assessment of Mr. Woods' adaptive behavior, nor have I evaluated whether or not any deficits he has in either intellectual functioning or adaptive behavior manifested during the developmental period.** I am generally aware from a review of prior records, court testimony, and my clinical interviews with Mr. Woods that he struggled in school, exhibited signs of academic deficits, appears to have a work history of intermittent and brief employment in basic manual labor type jobs and rarely, if ever, succeeded at living independently for any significant period of time. However, **a reliable and accurate assessment of whether or not Mr. Woods meets all three criteria for a diagnosis of intellectual disability requires further investigation and evaluation, which I have not undertaken.**
14. Based on the information I have recounted above, it is my opinion to a reasonable degree of psychological certainty that a prima facie case of intellectual disability is present and intellectual disability certainly cannot be ruled out at this time. **I recommend that Mr. Woods' attorneys conduct a complete investigation, with the assistance of appropriate experts with expertise in intellectual disability, to determine whether or not he satisfies all three criteria for a diagnosis of intellectual disability.**

Applicant's Exhibit 2, ¶¶ 13 & 14. (Emphasis added).

Further, he proffered a declaration from Janet Vogelsang, a clinical social worker who testified on Woods' behalf in the original PCR proceeding, as *Applicant's Exhibit 5* at the February 7th hearing. Ms. Vogelsang makes the following pertinent representations in her declaration:

2. In 2010, I was retained by attorneys Lisa Armstrong and Robert Kilgo to conduct a social history assessment in Anthony Woods's case.
3. Through my experience as a licensed clinical social worker and evaluating social histories in capital cases, I am familiar with the diagnostic criteria and symptoms of intellectual disability.
4. I believed Mr. Woods was intellectually disabled from early on in my evaluation and encouraged his attorneys to pursue an intellectual disability claim.

Vogelsang goes on to claim that she "recognized several indicators of intellectual disability in Mr. Woods," that she relayed this information to Woods' original PCR attorneys, and that she urged original PCR "counsel to pursue this issue and provided them with a list of evidence I believed demonstrated deficits in adaptive behavior." Counsel did not act on her "expert" opinion after receiving the report from DDSN.

Respondent submits that there are serious credibility problems with her unsworn declaration. First, Ms. Vogelsang testified at the PCR hearing that "clinical social worker is a mental health professional. They are trained, licensed and if they chose board certified to diagnose and treat mental, emotional and behavioral disorders." *App. 4538-39*. Although her testimony was lengthy, she never testified to the matters in her unsworn declaration. *App. 4536-4675*.

Further, cross-examination revealed that Ms. Vogelsang "never had ... the mental health role of actually diagnosing or treating the defendant in a capital case. I have always been called as a social historian." *App. 4635, lines 8-11*. She likewise admitted on cross-examination that she

had only met once with Woods “for about 3 or 4 hours.” *App. 4638, lines 7-11*. Importantly, she testified that she had shared all of her findings with Dr. Price (*App. 4641, lines 3-20*), PCR counsel’s neuropsychologist who found that Woods was not intellectually disabled. Further, at the end of cross-examination she admitted that “I did not respond correctly” to a series of questions asked of her earlier. *App. 4669, lines 12-19*. See also *Davis v. State*, 9 So.3d 539, 559 (Ala. Crim. App. 2008) (in the course of affirming the circuit court’s denial of the claim trial counsel were ineffective for failing to request the services of a social worker, the Court of Appeals quoted, with approval, the following findings by the circuit judge: “‘Vogelsang is a professional witness, in the sense that she goes out and interviews many different people, decides what is relevant or not, and then comes into Court and places that information before the fact-finder while insulating the actual witnesses from cross-examination. Even though this is permitted, such a process must necessarily result in a lessened weight [being] given at times to such testimony’”).

Moreover, even if this Court grants Respondent’s motion to dismiss, Woods still has the opportunity to raise this claim in federal court provided that he can meet his burden under *Martinez*. Respondent has taken the position in federal habeas proceedings that his ineffective assistance of counsel claim is procedurally defaulted because it was not raised in state court. See *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). In order for the federal court to address a procedurally defaulted claim, *Coleman* required a petitioner to show cause for and prejudice from a default, or that a fundamental miscarriage of justice will occur if the claim is not heard, *i.e.*, an assertion of actual innocence. See, *e.g.*, *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S.Ct. 2639 (1986).

Based upon principles of equity, 566 U.S. at 13-16, the Court in *Martinez* “qualifie[d] *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.” 566 U.S. at 17.

Woods can establish cause for the default of this claim under *Martinez* if he can make two showings: he must first demonstrate that the underlying claim of ineffective assistance of trial counsel is substantial – that it has some merit. *Martinez*, 566 U.S. at 14 (citing *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue). *Miller-El* holds that the habeas petitioner must “sho[w] that reasonable jurists could debate whether (or for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Miller-El*, 537 U.S. at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). However, if the ineffective assistance of trial counsel claim “is insubstantial, *i.e.*, it does not have any merit or ... is wholly without factual support,” the procedural default precludes federal habeas review. *Martinez*, 566 U.S. at 16. Second, he must show that his PCR counsel’s representation was objectively unreasonable under *Strickland* for not raising this claim. *Id.* at 9; *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“the *Strickland* test provides sufficient guidance for resolving virtually all ineffective assistance-of-counsel claims”). Respondent submits that one reason for the 2018 Application is Woods realizes that he cannot meet this burden to excuse the procedural default.

Therefore, *res judicata* bars the ineffective assistance of counsel claim, but even if the Court reached the “merits of that claim, it lacks merit. Accordingly, Respondent moves for summary dismissal of it as well.

5. Woods' efforts to litigate the 2018 Application frustrate the important need for finality of litigation.

Finally, Respondent submits that Woods' attempt to litigate his successive and time-barred Application is contrary to this recognized need for finality of litigation. Woods seeks to litigate issues that could have been litigated at trial and in his original PCR proceedings. In fact, as discussed above, Woods' intellectual functioning was presented through experts retained by trial counsel and PCR counsel, and their experts opined he had borderline intellectual functioning. Woods' current attorneys have now found experts willing to opine that he is intellectually disabled. Also, his original PCR attorneys abandoned the claim of ineffective assistance of trial counsel, following investigation of this claim, because both DDSN and their own expert concluded that Woods had borderline intellectual functioning, as opposed to being intellectually disabled.

Both the United States Supreme Court and the Supreme Court of South Carolina have emphasized the necessity for finality of litigation in criminal cases. The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). In his concurring and dissenting Opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail

today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the Supreme Court of South Carolina quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441, 248 S.E.2d 120, 123 (1978).

The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, 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. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **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 a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice, 305 S.C. at 451, 409 S.E.2d at 394. (Bold emphasis added). *See also Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) ("[T]hough, generally, a prisoner's 'principal interest ... is in obtaining speedy federal relief on his claims,' ... not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their incarceration and avoid execution of the sentence of death").

In support of Respondent's position that this request is dilatory, Respondent would point out that Woods' current attorneys originally filed what he styled as a "Placeholder" Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina, through counsel, on April 12, 2018, *Woods v. Stirling, et al.*, No. 5:18-cv-00144-DCN-KDW, *ECF #29*, which was ninety days after the original stay of execution was granted. *ECF #10*. They thereafter successfully fought Respondents efforts to respond to that Petition and move this

case forward. On May 10, 2018, the Honorable David C. Norton, United States District Judge, granted a stay of execution, over the State's objection, until Woods files a habeas Petition with more specific claims. *ECF #42*. On August 1, 2018, Judge Norton filed an Order directing Woods to file his amended petition on or before Friday, September 21, 2018. *ECF #48*. The amended Petitioner was filed only two days before that deadline.

There is simply no valid reason would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process. To create the exception now urged by Woods would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. This type of needless delay is contrary to *Aice*'s recognition of the need for finality of litigation. *Aice*, 305 S.C. at 451, 409 S.E.2d at 394.

WHEREFORE, Respondent prays that the Court summarily dismiss the 2018 PCR Application for the above-stated reasons and those in the Return and Motion to Dismiss.

Respectfully submitted,

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By: Will. J. Salter
ATTORNEYS FOR RESPONDENT

February 19, 2019.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

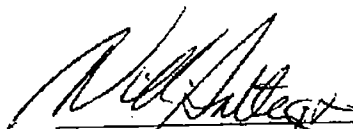
2018-CP-14-00382

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, certify that I have served the foregoing *Supplemental Memorandum in Support of Return and Motion to Dismiss* by depositing one copy of same in the United States mail, postage prepaid, addressed to Applicant's counsel as follows:

Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

This 19th day of February, 2019.



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2019 FEB 28 PM 4:24
Judith Roberts, Clerk-Clarendon S.C.

STATE OF SOUTH CAROLINA)

COUNTY OF CLARENDON)

Anthony Woods, #06023)

Applicant,)

vs.)

The State of South Carolina,)

Respondent.)

COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
CASE NUMBER 2018-CP-14-00382

ORDER GRANTING
MOTION TO DISMISS

In this case, the applicant seeks post-conviction relief (PCR) from his death sentence on the grounds that he is intellectually disabled and, therefore, the sentence is constitutionally prohibited "cruel and unusual punishment" as held in *Atkins v. Virginia*, 534 U.S. 304, 122 S.Ct. 2242 (2002). This PCR action was assigned to the undersigned judge by Order of the South Carolina Supreme Court dated November 8, 2018.

Now before this court is the Respondent/State's Motion to Dismiss on the grounds that this PCR action is successive, barred by the statute of limitations, and barred by the doctrine of *res judicata*. A formal hearing was held on the State's motion on February 7, 2019, in Georgetown, S.C..¹ Appearing for the State were Senior Assistant Attorney General William Edgar Salter, III and Assistant Attorney

¹ The Supreme Court Order assigning this case to the undersigned states, "Judge Culbertson 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."

/MAC

General Joseph Maye. Appearing on behalf of the applicant were attorneys Emily C. Paavola and Lindsey S. Vann of the Justice 360 Law Firm. Both parties presented memorandums and made oral arguments. Further, the parties were allowed 10 days to submit additional briefs.

Based upon the pleadings, memorandums, briefs and arguments of counsel, I do hereby make the following findings of fact and conclusions of law.

BACKGROUND

The applicant was indicted and convicted by jury trial of murder, burglary in the first degree and criminal sexual conduct in the first degree. He received sentences of death for murder and consecutive sentences of life without parole for first degree burglary and 30 years for first degree criminal sexual conduct. The applicant's conviction and death sentence were affirmed by the South Carolina Supreme Court in *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009). The South Carolina Supreme Court denied rehearing and sent the remittitur to the lower court on May 13, 2009. The applicant's intellectual disability was not raised at trial, during sentencing or on appeal.

On November 23, 2009, the applicant filed an Application for Post-Conviction Relief in case number 2009-CP-14-00654 ("2009 PCR"). On May 9, 2012, the applicant filed an Amended Application for Post-Conviction Relief in the 2009 PCR alleging ineffective assistance of trial counsel in failing "to conduct a

reasonable investigation into [applicant's] cognitive and adaptive functioning and history resulting in their failure to raise the issue of [applicant's] mental retardation."

That Amended Application for Post-Conviction Relief is the first time the applicant raised the issue of his intellectual disability. However, the applicant filed a second Amended Application for Post-Conviction Relief on January 7, 2014, that replaced the allegation of intellectual disability with the following allegation:

Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution...This dereliction flowed directly from counsel's failure to conduct a reasonable and thorough social history...The verifiable and objective facts of [applicant's] social and medical and scholastic history demonstrate beyond reasonable dispute that [the applicant] is...a brain damaged and cognitively impaired man with borderline mental retardation/intellectual functioning...In light of the overwhelming evidence of brain damage, mental illness, and borderline intellectual functioning, Counsels' actions were unreasonable, prejudicial, and require vacation of Applicant's sentence of death.

The parties stipulate that the applicant abandoned his allegation of intellectual disability in the 2009 PCR action but sought post-conviction relief on other grounds.

By Order of the Honorable George C. James, Jr., Circuit Court Judge, dated May 6, 2015, the applicant's application for post-conviction relief in the 2009 PCR action was denied. That order was appealed and, by Order of the South Carolina Supreme Court dated December 13, 2017, certiorari was denied.

On September 19, 2018, the applicant filed this second PCR action seeking post-conviction relief based upon the following allegations:

Applicant's death sentence violates the Eighth Amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution due to the fact that he is intellectually disabled. Because Applicant has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning, both of which began before he was eighteen years old, he is ineligible for capital punishment. *Moore v. Texas*, 137 S.Ct. 1039 (2017), *Hall v. Florida*, 134 S.Ct. 1986 (2014), *Atkins v. Virginia*, 536 U.S. 306 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during his capital trial.

On October 22, 2018, the State filed its Return and Motion to Dismiss the Applicant's application for post-conviction relief.

LAW AND DISCUSSION

The State seeks dismissal of this PCR action on the grounds that the application is: 1) barred by the statute of limitations; 2) successive to the 2009 PCR; and 3) barred by *res judicata*. The applicant argues that his intellectual disability is a freestanding claim under *Atkins* and, therefore, an exception to the prohibition against successive PCR actions. As such, the applicant argues that the one year statute of limitations does not apply and the action is not successive.

Code of Laws of South Carolina, 1976 § 17-27-45 states as follows:

(A) An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

Code § 17-27-90 prohibits successive PCR applications "unless 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." "A successive postconviction [sic] relief application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings." *Odom*, 337 S.C. 256, 523 S.E.2d 753 (1999). In *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991), the South Carolina Supreme Court held that an applicant could not maintain a successive application for post-conviction relief on the ground that the first PCR application was insufficient due to ineffective PCR counsel. However, the Supreme Court has held that exceptions exist to the statute of limitations and prohibition against successive PCR applications. See *Norris v. State*, 335 S.C. 30, 515 S.C. 523 (1999) – State is estopped from asserting

the statute of limitations defense to a subsequent PCR application after it had previously consented to a dismissal of the original PCR application and agreed that the petitioner could re-file his application; *Odom v. State, supra* – statute of limitations did not apply to *pro se* petitioner's appeal from summary denial of his application for post-conviction relief based on denial of his right to appeal, which was procedural error; *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016) – applicant convicted of murder and sentenced to death could maintain a successive PCR application alleging that prior PCR counsel was not qualified under the *South Carolina Effective Death Penalty Act*.

Contrary to the applicant's argument in this case, this court rules as a matter of law that this PCR action is barred by the statute of limitations and is successive to the applicant's 2009 PCR action. Therefore, the State's Motion to Dismiss should be granted.

This PCR action was filed on September 19, 2018, more than one year after the Supreme Court issued the remittitur following the applicant's appeal of his criminal trial and sentencing. The United States Supreme Court's decision in *Atkins* (holding that the execution of an intellectually disabled person is constitutionally prohibited "cruel and unusual punishment") was the law at the time of the applicant's criminal trial and 2009 PCR. The applicant withdrew his allegation of intellectual disability as grounds for relief in his 2009 PCR, thus indicating that the applicant

knew of his intellectual disability and could have ascertained facts supporting the allegation during his 2009 PCR. No appellate decision exists which holds intellectual disability to be an exception to the one-year statute of limitations or bar against successive PCR actions. Therefore, this PCR action is barred by Code §17-27-45 and §17-27-90.

Since the applicant's alleged intellectual disability has never been litigated, this action is not barred by the doctrine of *res judicata*.

To establish *res judicata*, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) **adjudication of the issue in the former suit.** (emphasis added.)

Reidman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992).

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED, that the State of South Carolina's Motion to Dismiss this action is GRANTED.

AND IT IS SO ORDERED.

June 3, 2019


Benjamin H. Culbertson
Presiding Judge

June 11, 2019

The Honorable Beulah Roberts
Clarendon County Clerk of Court
P.O. Box 136
Manning, SC 29102

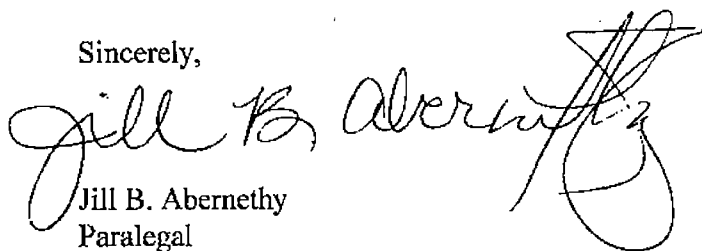
RE: *Anthony Woods v. State of South Carolina*
2018-CP-14-00382

Dear Ms. Roberts:

Please find enclosed, with certificate of service, the original and one copy of Applicant's Motion to Alter or Amend Judgment. If you can please clock-in the extra copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please feel free to contact our office.

Sincerely,


Jill B. Abernethy
Paralegal

Enclosure

cc: Honorable Judge Benjamin H. Culbertson
William Edgar Salter, III

2019 JUN 18 PM 5:11
Beulah Roberts, Clerk-Clarendon S.C.

STATE OF SOUTH CAROLINA

COUNTY OF CLARENDON

ANTHONY WOODS

Plaintiff,

vs.

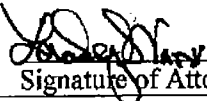
STATE OF SOUTH CAROLINA

Defendant.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

CASE NO.: 2018-CP-14-00382

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: Lindsey Vann, Bar No. 101408 Address: 900 Elmwood Ave., Suite 200 Columbia, SC 29201 Phone: 803-765-1044 Fax 803-765-1143 E-mail: lindsey@justice360sc.org Other: _____		Defendant's Attorney: William E. Salter, III, Bar No. _____ Address: P.O. Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: ☐ YES / ☐ NO	
Estimated Time Needed: _____			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant		6/11/19 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____			
☒ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION		JUDGE CODE _____	
☐ Motion Fee to be paid upon filing of the attached order.		Date: _____	
☐ Other: _____			
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: \$ _____			
☐ CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

ANTHONY WOODS
Applicant,

v.

THE STATE OF SOUTH CAROLINA.
Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-14-00382

CLERK OF COURT
TELEPHONE 803-652-1234

MOTION TO ALTER OR AMEND JUDGMENT

Pursuant to Rule 59(e), S.C. R. Civ. P., Applicant, Anthony Woods, respectfully moves this Court to alter or amend the judgment contained in the Court's Order Granting Motion to Dismiss ("Order") signed on June 3, 2019 and filed with the Clerk of Court on June 7, 2019. The motion should be granted because this Court failed to give sufficient legal weight to other cases in South Carolina that have allowed successive post-conviction relief ("PCR") applications to proceed in similar circumstances to those presented here. The judgement should be altered and Applicant's PCR application should be deemed permissibly successive and timely or, alternatively, equitable tolling granted.

In dismissing Applicant's application as untimely, the Court found no appellate court has specifically held that successive PCR applications raising claims of intellectual disability are not subject to the statute of limitations. This finding failed to consider the decisions of the South Carolina Supreme Court holding that the statute of limitations does not apply when a successive PCR application is permitted. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted to

allow an applicant one “fair ‘bite’ at the apple.”); *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (same); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (allowing a successive PCR application to proceed despite being filed over a year after his initial PCR was denied and over two years after the conclusion of trial). The Supreme Court has refused to apply the time bar used in ordinary cases because to do so would preclude courts from considering claims despite exceptional circumstances justifying a successive PCR application. That is the case here: successive PCR applications are definitely permitted in cases where a colorable claim of intellectual disability is presented because such a claim is a categorical bar to execution. This exceptional circumstance – the risk of executing a person with intellectual disability – permits a successive PCR application and would be frustrated by application of the one-year statute of limitation.

The court also failed to acknowledge or address the unfairness in treating Applicant different from every other person who has raised a claim of intellectual disability under similar circumstances. Since the Supreme Court of the United States created the Eighth Amendment categorical bar to execution for persons with intellectual disability in *Atkins v. Virginia*, 536 US. 304 (2002), four other death sentenced inmates have raised similar claims in similar procedural postures. In all four cases circuit judges have denied the State’s motions to dismiss and allowed successive PCR applications raising claims of intellectual disability to go forward despite being filed more than one year after *Atkins* was decided. *See* 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).¹ As Judge Michael Nettles

¹ Orders from *Elmore*, *Aleksey*, and *Bryant* were attached to Applicant’s Response in Opposition to Respondent’s Motion to Dismiss filed on February 19, 2019. The order in Bobby Wayne Stone’s

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.”² Order, *Stone v. State*, No 2018-CP-43-01025, at 6 (Feb. 22, 2019). Thus, it is inappropriate to “raise form over substance” by dismissing Applicant’s PCR application as untimely. *Id.* at 8. This Court’s order makes Applicant the only individual sentenced to death in this State to be denied the opportunity to prove that he is a person with intellectual disability whose execution would violate the Eighth Amendment. There is no principled or equitable basis for singling Applicant out for such lethally disparate treatment.³ *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).

Finally, this Court did not address Applicant’s argument that even if the PCR application was untimely, equitable tolling should be granted. *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

case was issued on February 22, 2019, but undersigned counsel was unable to obtain a copy of the filed order until June 6, 2019. The *Stone* order is attached to this motion as Exhibit A.

² 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. Order, *Stone v. State*, No 2018-CP-43-01025, at 7 & 7 n.4 (Feb. 22, 2019)

³ For these same reasons, to the extent the Order found Applicant’s PCR application alleging intellectual disability is impermissibly successive, the Order should be amended. Denying a PCR applicant the opportunity to present evidence he is ineligible for the death penalty due to intellectual disability risks allowing the execution of a person constitutionally exempt from the death penalty. Such an unconstitutional execution 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 v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

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 Applicant being wrongly executed despite being intellectually disabled pursuant to *Atkins*. Failure to allow Applicant to go forward to investigate and prove his intellectual disability would be an unconscionable miscarriage of justice.

CONCLUSION

For all of the reasons set forth above and in Applicant's Response in Opposition to Respondent's Motion to Dismiss, this Court should amend its order, deny Respondent's Motion to Dismiss, and schedule an evidentiary hearing on Applicant's claim of intellectual disability.

Respectfully submitted,

Emily C. Paavola

Lindsey S. Vann

Justice 360

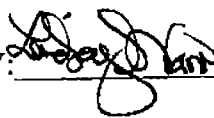
900 Elmwood Ave., Suite 200

Columbia, SC 29201

Emily@justice360sc.org

Lindsey@justice360sc.org

(803) 765-1044

BY: 

Counsel for Applicant.

June 11, 2019.



State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

Michael G. Nettles
Judge

Florence City-County Complex
180 North Liberty Street, MSC-XX
Florence, SC 29501
Phone: (843) 292-7433
Fax: (843) 292-7436
mnettl@sccourts.org

February 20, 2019

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

RECORDED
2019 FEB 22 PM 2:03
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Re: *Bobby Wayne Stone v. State of South Carolina*, 2018-CP-43-01025

Dear Mr. Clerk:

Please find enclosed with this letter Judge Nettles' order granting in part and denying in part Respondent's Motion to Dismiss. I ask that you please file the enclosed order and also pursuant to Rule 71.1(f), SCRCP, that you please provide a copy of this order to the parties. I appreciate your attention to this matter. Should you require anything further please do not hesitate to contact me at the information listed above.

Sincerely,

W.H. McAbee III
Law Clerk

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2019 FEB 22 PM 2:03

Bobby Wayne Stone, SK # 501
Applicant, SUMTER COUNTY S.C.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2018-CP-43-01025

v.

The State of South Carolina,
Respondent,

**ORDER GRANTING MOTION TO
DISMISS IN PART AND DENYING
IN PART**

(CAPITAL CASE)

This matter comes before the Court by way of Applicant's Second Application for Post-Conviction Relief ("PCR"). Respondent has filed a motion seeking summary dismissal of Applicant's PCR action asserting that it is procedurally barred as successive, that it is barred by the applicable statute of limitations, and that Applicant's claim for relief under *Atkins v. Virginia*¹ is not cognizable in a PCR action. The Court having been fully apprised of both parties written submissions, and by their oral arguments, finds that Respondent's motion should be granted in part, denied in part, and that the issue of whether Applicant is entitled to relief under *Atkins v. Virginia* should be set for an evidentiary hearing on the merits.

PROCEDURAL HISTORY

Applicant, Bobby Wayne Stone, is currently confined on Death Row at Kirkland Correctional Institution pursuant to orders of commitment issued by the Sumter County Clerk of Court. Applicant was indicted by the Sumter County Grand Jury in August, 1996, for murder, first-degree burglary, and possession of a weapon during a violent crime. Applicant was tried

¹ 536 U.S. 304, 122 S.Ct. 2242 (2002).

before the Honorable R. Markley Dennis, Jr., and a jury. Applicant was represented at this first trial by Cameron B. Littlejohn, Jr. Esq., and James H. Babb, Esq. The jury found Applicant guilty of all charges as indicted. The jury found the existence of two aggravating factors and recommended a sentence of death. Judge Dennis sentenced Applicant to death, a consecutive term of thirty (30) years for first-degree burglary, and to five (5) years consecutive on the weapons charge.

Applicant appealed his conviction and sentence to the South Carolina Supreme Court. The Supreme Court affirmed Applicant's conviction but reversed the sentence of death and remanded the case for resentencing. *See State v. Stone (Stone I)*, 350 S.C. 442, 567 S.E.2d 244 (2002). Applicant was resentenced by the Honorable Howard P. King and a jury. Applicant was again represented by Messrs. Babb and Littlejohn. The resentencing jury found the existence of one aggravating factor and recommended a sentence of death. Judge King resentenced Applicant to death. Applicant appealed from this sentence to the South Carolina Supreme Court. The Supreme Court affirmed Applicant's second sentence of death in a published opinion. *See State v. Stone (Stone II)*, 376 S.C. 32, 655 S.E.2d 487 (2007). Applicant did not petition the Supreme Court of the United States for certiorari.

Applicant filed his first application for PCR on April 10, 2008. The undersigned was assigned as presiding judge for Applicant's first PCR application by order of the South Carolina Supreme Court. Applicant was represented in his first PCR by John H. Blume, Esq. and Robert E. Lominack, Esq. Applicant raised a multitude of issues in his first PCR application. The Court convened an evidentiary hearing on April 23-24 and August 10, 2012.² On May 2, 2013, the Court entered its Order of Dismissal dismissing all of Applicant's claims for PCR. Applicant filed

² At the conclusion of the hearing on August 10 the Court, with the consent of the Applicant, relieved Mr. Lominack as counsel and substituted Emily Paavola, Esq., as co-counsel with Mr. Blume.

a motion pursuant to Rule 59(e), SCRCP, to alter or amend the judgment on May 10, 2013. The State also filed a Motion to Alter or Amend the Judgment on May 10, 2013. The Court convened a hearing on the motions on August 2, 2013. The Court filed its Amended Order on August 14, 2013, again denying the application for PCR.

Applicant timely appealed the Circuit Court's denial of PCR. The South Carolina Supreme Court granted certiorari on July 23, 2015. By published opinion on February 8, 2017, the South Carolina Supreme Court affirmed the PCR Court's dismissal. The Supreme Court issued a modified opinion on March 29, 2018, in which it again affirmed the PCR Court. *See Stone v. State (Stone III)*, 419 S.C. 370, 798 S.E.2d 561 (2017). Applicant petitioned the Supreme Court of the United States for a Writ of Certiorari on August 24, 2017. The Court denied the Petition for Writ of Certiorari on October 30, 2017. *See Stone v. South Carolina*, 138 S.Ct. 392 (Mem.) (2017). Having exhausted all state remedies Applicant filed a petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *See Stone v. Davis*, C/A No. 2:17-cv-01221-MGL-MGB. The Honorable Mary Geiger Lewis, United States District Judge, entered a stay of execution which remains in effect until the conclusion of Applicant's federal habeas action. Furthermore, Judge Lewis has stayed Applicant's federal habeas action until Applicant's second state PCR action is complete.

Applicant filed the present PCR action on June 5, 2018. The State filed its Return and Motion to Dismiss on August 28, 2018. The undersigned was appointed as presiding judge over this successive PCR by order of the Supreme Court dated November 28, 2018. Furthermore, the order of the Supreme Court required this Court to issue an order ruling on Respondent's Motion to Dismiss within forty-five (45) days from the date of the order. The Supreme Court extended the time for this Court to issue its order on Respondent's Motion to Dismiss to February 25, 2019

by an order dated January 16, 2019. The Court convened a hearing at the Marc J. Westbrook Judicial Center in Lexington, South Carolina, on January 25, 2019.

FACTUAL BACKGROUND

The factual history of this case is adequately presented in the South Carolina Supreme Court's opinions in *Stone I*, *Stone II*, and *Stone III*. For the sake of brevity the Court will recount the facts as they were stated by the Supreme Court in *Stone III*:

"Bobby Wayne Stone shot and killed Charlie Kubala of the Sumter County Sheriff's Office....Stone began the day of February 26, 1996, by purchasing beer and two firearms—a .410 bore shotgun and a competition-grade .22 caliber semi-automatic pistol. He spent the remainder of the day roaming through the woods, drinking the beer and shooting the guns. Later that afternoon, Stone wandered into the backyard of Ruth Griffith. In Stone's statement to the police, he said he and Griffith were "old drinking buddies." Griffith denied that, and claimed she knew Stone only because he previously dated her niece and had been to Griffith's house to pick up her niece. Griffith's adult daughter, Mary Ruth McLeod, was living with Griffith and was at the house when Stone arrived. McLeod asked Stone—who was standing in the yard holding a beer can and his newly-purchased pistol—to leave the property. Stone complied, but McLeod had already called 911. Sergeant Charles Kubala arrived at Griffith's house at 6:06 p.m. By then, Stone had returned to the woods, so Sergeant Kubala checked the scene, spoke with McLeod and Griffith, and left. A short time later, Griffith heard gunshots in her yard and then someone banging on the inside door of her side porch. McLeod had left the house, so Griffith called her neighbor—Landrow Taylor—who came over and called 911 from inside Griffith's home. Sergeant Kubala once again responded to the call, arriving at 7:07 p.m. Stone was still on the side porch, banging on the door and holding his pistol in his hand. Taylor and Griffith remained inside while Sergeant Kubala went around the house toward the side porch. From inside, Taylor and Griffith heard someone yell "halt" or "hold it," followed immediately by three or four gunshots. Stone struck Sergeant Kubala with two of the shots—once in the neck and once in the ear—and Sergeant Kubala died on the scene. After hours of searching, Sumter County Sheriff's officers found Stone in the woods, lying motionless between two logs with the murder pistol beneath his body. Early the next morning, Stone gave a statement in which he confessed to the shooting. He claimed it was an accident, however, explaining, 'I just turned from the house door and the gun went off on the porch and I ran.'"

419 S.C. at 378-79, 798 S.E.2d at 565-66.

ALLEGATIONS

Applicant has asserted four claims in this second PCR applications. First, Applicant has alleged his sentence of death is in violation of the Eighth Amendment. Particularly Applicant claims that he is intellectually disabled within the meaning of *Atkins v. Virginia* and, therefore, is constitutionally unable to be executed. Second, Applicant has asserted an ineffective assistance of counsel claim in that trial counsel failed to investigate and present evidence that Applicant is intellectually disabled. Third, Applicant has asserted an ineffective assistance of counsel claim in that trial counsel was ineffective in failing to retain a forensic pathologist, crime scene reconstruction expert, and other similar expert assistance, to prove that the facts and circumstances of the crime were consistent with an accident theory. Finally, Applicant alleges that there are now material facts not previously presented and heard that requires vacation of his conviction or sentence in the interest of justice.

ANALYSIS

A. *Atkins* Claim

Applicant has alleged that he is categorically barred from execution as he is intellectually disabled. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is of course axiomatic that the constraints of the Eighth Amendment are binding on the states pursuant to the Due Process Clause of the Fourteenth Amendment. *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 1190 (2005). Pursuant to *Atkins v. Virginia* the Eighth Amendment categorically prohibits the execution of a person who is intellectually disabled.³ 536 U.S. at 321, 122 S.Ct. at 2252. It is

³ The Supreme Court of the United States has indicated that the term "intellectual disability" replaces, and has the same meaning as, what was previously referred to as "mental retardation." *Hall v. Florida*, 572 U.S. 701, 704 (2014).

of course undisputed that trial counsel never raised the issue of whether Applicant was intellectually disabled at trial. The State has moved to dismiss the present case as time barred and as successive. The Court finds that in the present case that this issue is deserving of a hearing on the merits.

As noted above *Atkins* represents a complete categorical bar on the execution of the intellectually disabled. See *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039, 1048 (2017) (“In *Atkins v. Virginia*, we held that the Constitution ‘restrict [s] ... the State’s power to take the life of’ any intellectually disabled individual.”) (emphasis original). As such if Applicant is in fact intellectually disabled then he cannot be executed under any circumstances. The Respondent has moved to dismiss the action as improperly successive under S.C. Code Ann. § 17-27-90. “This statute forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court is not unsympathetic to Respondent’s position. Successive PCR applications are, as a general rule, highly disfavored. *Id.* “Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions ‘shows only that ‘conventional notions of finality’ should not have *as much* place in criminal as in civil litigation, not that they should have none.’ *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074-75 (1989) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970)) (emphasis original).

The Uniform Post-Conviction Relief Act clearly allows for attacks on sentences which are in violation of the Federal or State Constitutions. See S.C. Code Ann. § 17-27-20(A)(1). The State contends that as Applicant could have raised this issue during his last sentencing the issue is

procedurally barred. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998). The Court finds whether or not Applicant knew, or should have known, he was intellectually disabled at the time of his resentencing is an issue that cannot be resolved solely on the record before the Court. "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." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005); S.C. Code Ann. § 17-27-70(b), (c). "When considering the State's motion for summary dismissal of an application, 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." *Mose v. State*, 420 S.C. 500, 505-06, 803 S.E.2d 718, 720 (2017) (citing *Leamon*, 363 S.C. at 434, 611 S.E.2d at 495). Assuming all the facts of Applicant's petition are in fact true then Applicant was not aware of his potentially being intellectually disabled.⁴ So at least at this juncture the Court is unwilling to say that Applicant could have raised this issue at resentencing.

Furthermore, and as explained above, the Eighth Amendment categorically prohibits the execution of an intellectually disabled person. As the Court has explained it is not unsympathetic to the State's procedural concerns. However, this fails to take into account that "death is different." "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976). If the Court were to follow the State's arguments it would be to

⁴ The Court likewise finds that a review of the record in this case shows potential notice at no earlier than Applicant's first PCR action.

completely disregard whether death is even an allowable punishment in this specific case. In essence the State would have the Court raise form over substance. This type of artificial line drawing, without any reference to the wider view of the case, has explicitly been discouraged by the Supreme Court of the United States. In *Hall* the Supreme Court warned that courts should not enforce rigid rules which create an unacceptable risk that persons with intellectual disability will be executed. 572 U.S. at 704, 134 S.Ct. at 1990. As the Court further explained "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724, 134 S.Ct. at 2001. To deny Applicant a chance to show that he is intellectually disabled is to deny him the fair opportunity the Constitution requires.

Respondent has countered that Applicant is not without a remedy as he has at least two avenues of relief. First, that Applicant may seek habeas corpus in the state courts. Secondly, Applicant can pursue whatever avenues are available to him in his federal habeas action. As a first matter it is highly debatable about whether this case would even qualify for habeas relief under the Constitution of 1895. "The availability of habeas corpus has been severely limited by the Uniform Post Conviction Procedure Act." *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 428 (1998). "However, habeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles." *Id.* at 41, 495 S.E.2d at 428. "Habeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable." *Id.* "The [PCR] Act is broadly inclusive and will *rarely* be inadequate or unavailable to test the legality of the detention." *Id.* (emphasis added). Even if the Court were to assume that the State is in fact correct on its procedural assertion then it has failed

to show how the end result in this court would be measurably different. As our Supreme Court has explained:

"[Petitioner] will bear the burden to prove a sufficient reason why the present claims were not raised in their previous applications. If they are unable to meet their burden of proof, the applications may be dismissed as successive. Further, if petitioners can show upon remand that PCR is unavailable, all other remedies have been exhausted, and the issues raised now could not have been raised in their prior PCR applications, the lower court may treat the applications as habeas petitions and provide a hearing on their constitutional claim."

Id at 42, 495 S.E.2d at 429.

Here, assuming the State is correct, PCR would be unavailable, all other remedies are exhausted, and, viewing the Applicant's petition as factually correct as the Court must⁵, the issue could not have been raised previously.⁶ The Court would be forced to treat this application as a habeas petition and consider Applicant's constitutional claim. Essentially the State urges this Court to partake in the legal equivalent of carrying coal to Newcastle. The Court finds that the interests of justice and judicial economy do not favor such a routine.

The position that this case should be left to the federal courts is likewise unpersuasive. The Court is unaware of any authority that requires it to decline to hear a case simply because Applicant could potentially receive relief in another forum. "For it is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496-97, 91 S.Ct. 1005, 1009 (1971). Simply because Applicant could go to federal court and potentially gain relief does not relieve this Court of its duty to determine a case before it. The State provided the Court with a long list of hypothetical scenarios in which Applicant could potentially gain relief. However,

⁵ The allegations in a habeas petition, like in a PCR application, must be treated as true for purposes of dismissal before a hearing. *Tillman v. Manning*, 241 S.C. 221, 223-24, 127 S.E.2d 721, 721-22 (1962).

⁶ Even assuming that Applicant knew of a claim of intellectual disability in his first PCR action the State would have of course argued that it was not cognizable as a freestanding claim in PCR. So under the State's theory Applicant was unable to have raised this issue in his previous PCR.

whatever merit this may or may not have⁷ it is not this Court's place to try and discern what a federal district judge may or may not do. Simply put this Court has a duty to hear Applicant's claim and the State has not shown sufficient cause to dismiss the claim summarily.

Furthermore, this is not the first time that a court has been called upon to deal with such a case. The Honorable Thomas W. Cooper, Jr., dealt with a case which sat in almost the exact same procedural posture. *See Order Denying State's Motion to Dismiss, Bryant v. State*, 2016-CP-43-00828 (July 13, 2016). The Court reviewed Judge Cooper's order, which was included in Applicant's reply to the State's motion, and finds much of it persuasive. So contrary to the State's position the Court is not completely tilling new earth with its decision.⁸

Therefore, for the reasons above the Court finds it appropriate to deny the State's motion to dismiss as to Applicant's freestanding *Atkins* claim. The Court finds that Applicant should be allowed to proceed forward on this claim. It will now be Applicant's burden to show by a preponderance of the evidence that he is intellectually disabled as that term is defined in S.C. Code Ann. § 16-3-20(C)(b)(10). *Franklin*, 356 S.C. at 278-79, 588 S.E.2d at 605.

B. Ineffective Assistance of Counsel-Atkins Claim

⁷ It is almost certain that Applicant's claim would be considered to be procedurally defaulted in federal court. *See Prieto v. Zook*, 791 F.3d 465, 468 (4th Cir. 2015). However, it is possible that Applicant's claim could be reviewed *de novo* pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012). In this case the Respondent is in no better position than if the claim is heard in this Court. Should this Court ultimately rule against Applicant then Respondent is entitled to deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA). 22 U.S.C. § 2254(d).

⁸ Applicant also included orders from the Honorable J. Mark Hayes in *Elmore v. State*, 2005-CP-24-01205 (June 13, 2007), and the fact that the Honorable Doyet A. Early III has not dismissed an *Atkins* claim in a successive PCR in *Aleksey v. State*, 2015-CP-38-00764. The Court declines to consider either of these cases as persuasive. As a first matter both Elmore and Aleksey were sentenced pre-*Atkins* unlike Stone who was sentenced post-*Atkins*. Unlike Stone both Elmore and Aleksey had no choice but to bring their claim in a successive PCR action. *See Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003) fn. 7. Furthermore, as to the case concerning Aleksey the Court views the fact that Judge Early has not ruled on the State's motion to dismiss as unpersuasive either way.

Applicant has also alleged that trial counsel was ineffective for failing to raise the issue of his intellectual disability in his re-sentencing. The Court finds that this claim is improper for two reasons.

As a first matter it is unduly duplicative in view of the fact that the Court is hearing Applicant's freestanding *Atkins* claim. Under the Sixth Amendment every defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 683, 104 S.Ct. 2052, 2061 (1984). Counsel's performance is measured by "an objective standard of reasonableness" *Stone III*, 419 S.C. at 380, 798 S.E.2d at 566 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003)). The Court must presume counsel "rendered adequate assistance and exercised reasonable professional judgment." *Id.* Applicant is required to show that: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Even assuming that Applicant could make out the first prong of *Strickland* the second prong would still require him to show that he is in fact intellectually disabled. This is of course what the Court has already decided to determine. Should the Court determine that Stone is in fact intellectually disabled then he is barred from execution. Whether or not his trial counsel was ineffective becomes wholly redundant.

As a second matter the State is correct in that this claim is barred as successive. S.C. Code Ann. § 17-27-90 clearly mandates that any claim for relief available to a defendant must be raised in the applicant's first PCR action. "In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Odom v. State*, 337 S.C. 256, 261, 523

S.E.2d. 753, 755 (1999). Here Applicant could have raised a claim that trial counsel had failed to effectively investigate a claim of intellectual disability by the time of his first PCR hearing. At pg. 4153 of the appendix in Applicant's appeal from the denial of his first PCR application the following colloquy occurred between PCR counsel and Applicant's expert:

Q [Mr. Blume]: And so the low cognitive functioning when he was a young child and the Bender Score when he was a young child, what do they suggest to you?

A [Dr. Merikangas]: That he was suffering from mental deficiency, probably mental retardation.

Clearly then from at least 2012, when that exchange occurred, PCR counsel was on notice that there was a chance that Applicant was intellectually disabled. The proper course would have been for PCR counsel to have moved to have amended the application to have asserted a claim of ineffective assistance of counsel for not having raised this issue to the trial court.⁹ To allow Applicant to raise this claim for the first time in this successive application involves the natural problem that to do so would essentially require a finding by this Court that PCR counsel in the first application was ineffective. However, it is now firmly established that prior ineffective assistance of PCR counsel is not by itself sufficient to allow a successive PCR action. *See Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016); *see also Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Therefore, this claim is barred as successive under the Uniform Post-Conviction Relief Act.

C. Ineffective Assistance-Failure to Retain Experts

⁹ The Court is aware that the State would hold that the same is true for the freestanding claim of intellectual disability. However, as noted in *Hall* persons facing execution "must have a fair opportunity to show that the Constitution prohibits their execution." 572 U.S. at 724. Thus, Applicant's freestanding claim should be allowed to go ahead so that he may have the "fair opportunity" that the Constitution requires. The Supreme Court has indicated that there is no such requirement when the claim is brought as one of ineffective assistance. Furthermore, as the State argues now, and would have likely argued then, such an issue shouldn't be raised in PCR.

Applicant also alleges that he was denied effective assistance of trial counsel due to counsels' failure to retain "a forensic pathologist, crime scene reconstruction expert, and other similar expert assistance to prove the facts and circumstances of the crime were consistent with an accident theory." This claim is barred as successive as this Court, and the South Carolina Supreme Court, have already decided this issue.

As the Supreme Court noted in *Stone III* "Stone argues trial counsel failed to properly implement the strategy because they did not thoroughly investigate and present evidence supporting the accidental shooting theory." 419 S.C. at 404, 798 S.E.2d at 579. The issue of whether Applicant's trial counsel properly retained experts to argue an accident theory of the case was fully vetted by the first PCR court and by the South Carolina Supreme Court. As to the guilt phase the Supreme Court noted "We find trial counsel's approach to the accident theory in general, and hiring of Girndt in particular, was reasonable." *Id* at 405, 798 S.E.2d at 580. The Supreme Court further noted:

"Stone argues, however, trial counsel should have found another expert—one who would testify the shooting was an accident. The PCR court found trial counsel was reasonable in making the decision not to pursue another expert. The evidence supports this finding, and we agree. The "prevailing norms" that guide our judgment as to whether counsel's performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion." *Id* at 406, 798 S.E.2d at 580-81.

Furthermore, the Supreme Court found that during the resentencing "The PCR court found trial counsel's performance in this respect was reasonable. The evidence supports the finding." *Id* at 407, 798 S.E.2d at 581. This ground has been fully adjudicated and is therefore barred by § 17-27-90.

D. New Found Evidence

Applicant also claims that there are new technological advancements, which were not available at trial, which support his accident defense. Again the Court finds that this claim is

barred as successive and is barred by the law of the case. The Court finds that any attempt to elicit new evidence showing accident would be futile. Under no theory would it be probable that a jury would have found Applicant not guilty via the defense of accident. As the undersigned noted in his order in Applicant's first PCR:

"Applicant cannot show entitlement to accident as he must not only have been acting lawfully, but must also show that he used due care in the handling of the weapon. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). Not only was Applicant behaving unlawfully many times over but, by no stretch, can invading an enclosed porch and banging on the back door with a loaded pistol in one's hand be considered due care. Since Applicant was not entitled to either an involuntary manslaughter or accident charge under any view of the evidence, then counsel could not have been deficient nor Applicant prejudiced from the failure to get an expert to support his statement." *State v. Stone*, 2008-CP-43-00905 (August 12, 2013) (Nettles, J.).

The same problem is presented to Applicant here. In view of the record it matters little what new evidence Applicant brings forward. The evidence shows that under no variation of the facts would Applicant be entitled to a charge of accident. This Court considered in great detail the claim of accident in Applicant's prior PCR action. His claim of new technology is an attempt to repackage his previous PCR's accident claims in a new form. "The 'new' evidence is the same as the 'old' evidence.... If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). The evidence of an accident was unpersuasive in the first case because legally Applicant was not entitled to a charge on accident. The proposed "new" evidence of Applicant does nothing to change this fact.

Furthermore, in the prior litigation Applicant never appealed from this Court's determination that the facts simply do not support a defense of accident. Thus, this issue is now the law of the case. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on

appeal, but expressly rejected by the appellate court.” *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). “In other words, ‘[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case.’” *Id* (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997)). “While the doctrine is ordinarily applied in later stages of the same lawsuit, it also has application to different lawsuits between the same parties.” *In re PHC Assoc.*, 949 F.2d 585, 592 (2nd Cir. 1991) (citing *Schupak v. Califano*, 454 F.Supp. 105, 114 fn. 17 (E.D.N.Y. 1978)). This Court, as a matter of law, determined that Stone could not have established a defense of accident due to the fact that he was acting unlawfully and with undue care. Applicant was required to appeal that ruling at the same time that he appealed all other issues in *Stone III*. His failure to do so is inexcusable and this Court will not consider again issues it found to be unpersuasive almost six years ago. This claim is barred both as successive and as precluded by the law of the case doctrine.

CONCLUSION

The Court has determined that it is required to hold an evidentiary hearing into whether Applicant’s claim of intellectual disability is well-founded. Therefore, the Court will allow Applicant to proceed with this successive PCR action on the grounds that his execution may be in violation of the Eight Amendment due to his intellectual disability. The Court does this in order to provide Applicant with the “fair opportunity to show that the Constitution prohibits [his] execution.” *Hall*, 527 U.S. at 721, 139 S.Ct at 2001. This will be the sole claim that will be before the Court. The Court finds that Applicant’s other claims are all barred for the reasons

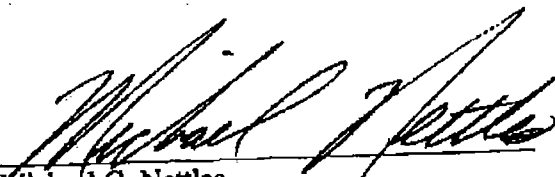
stated previously. Therefore, the Court dismisses the other grounds raised in the Application pursuant to the State's motion. This Court is required by the November 28 order of the Supreme Court to issue a scheduling order in this matter within forty-five (45) days from the date of this order. The parties are directed to plan a date and time for a status conference in this matter no later than fifteen (15) days from the date of this order. Furthermore, the final hearing on the merits of this application must be held within one-hundred and eighty (180) days of the date of the status conference pursuant to S.C. Code Ann. § 17-27-160(C).

The Court does desire to impress upon Applicant that this is the *sole* claim that the Court will consider. The fact that the Court is considering this successive application is due solely to the special protections that the Eighth Amendment gives to those who are potentially intellectually disabled and facing sentence of death. This is not designed to be a process whereby a host of new claims are brought to bear in a second round of PCR litigation. Therefore, the Court finds that, absent truly extraordinary circumstances, it will prohibit the filing of any further amended applications.

Therefore, for the foregoing reasons the Court **GRANTS** the State's Motion to Dismiss as to the ineffective assistance of counsel claims, and as to the claim of newly discovered material facts. The Court **DENIES** the State's Motion to Dismiss as to the claim of intellectual disability.

AND IT IS SO ORDERED!

February __, 2019
Florence, South Carolina


Michael G. Nettles
Presiding Judge by Special Assignment of the South
Carolina Supreme Court

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

ANTHONY WOODS

Applicant,

v.

THE STATE OF SOUTH CAROLINA.

Respondent.

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-14-00382

**CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE 7/23/2019**

Beulah S. Roberts

CLERK OF COURT
CLARENDON COUNTY, SC

2019 JUL 23 AM 11:00
Beulah Roberts, Clerk-Clarendon S.C.

**MEMORANDUM IN SUPPORT OF
MOTION TO ALTER OR AMEND JUDGMENT**

Applicant, Anthony Woods, by and through undersigned counsel submits the following memorandum in support of his Motion to Alter or Amend. Pursuant to Rule 59(e), S.C. R. Civ. P., Applicant respectfully moves this Court to alter or amend the judgment contained in the Court's Order Granting Motion to Dismiss ("Order") signed on June 3, 2019 and filed with the Clerk of Court on June 7, 2019. The motion should be granted because this Court failed to give sufficient legal weight to other cases in South Carolina that have allowed successive post-conviction relief ("PCR") applications to proceed in similar circumstances to those presented here. The judgement should be altered and Applicant's PCR application should be deemed permissibly successive and timely or, alternatively, equitable tolling granted.

In dismissing Applicant's application as untimely, the Court found no appellate court has specifically held that successive PCR applications raising claims of intellectual disability are not subject to the statute of limitations. This finding failed to consider the decisions of the South Carolina Supreme Court holding that the statute of limitations does not apply when a successive

PCR application is permitted. *See Odom v. State*, 337 S.C. 256, 263, 523 S.E.2d 753, 264 (1999) (holding statute of limitations does not apply when a successive PCR application is permitted to allow an applicant one “fair ‘bite’ at the apple.”); *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (same); *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833 (1996) (allowing a successive PCR application to proceed despite being filed over a year after his initial PCR was denied and over two years after the conclusion of trial). The Supreme Court has refused to apply the time bar used in ordinary cases because to do so would preclude courts from considering claims despite exceptional circumstances justifying a successive PCR application. That is the case here: successive PCR applications are definitely permitted in cases where a colorable claim of intellectual disability is presented because such a claim is a categorical bar to execution. This exceptional circumstance – the risk of executing a person with intellectual disability – permits a successive PCR application and would be frustrated by application of the one-year statute of limitation.

The court also failed to acknowledge or address the unfairness in treating Applicant different from every other person who has raised a claim of intellectual disability under similar circumstances. Since the Supreme Court of the United States created the Eighth Amendment categorical bar to execution for persons with intellectual disability in *Atkins v. Virginia*, 536 US. 304 (2002), four other death sentenced inmates have raised similar claims in similar procedural postures. In all four cases circuit judges have denied the State’s motions to dismiss and allowed successive PCR applications raising claims of intellectual disability to go forward despite being filed more than one year after *Atkins* was decided. *See 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).¹ As 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.”² Order, *Stone v. State*, No 2018-CP-43-01025, at 6 (Feb. 22, 2019). Thus, it is inappropriate to “raise form over substance” by dismissing Applicant’s PCR application as untimely. *Id.* at 8. This Court’s order makes Applicant the only individual sentenced to death in this State to be denied the opportunity to prove that he is a person with intellectual disability whose execution would violate the Eighth Amendment. There is no principled or equitable basis for singling Applicant out for such lethally disparate treatment.³ *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).

Finally, this Court did not address Applicant’s argument that even if the PCR application was untimely, equitable tolling should be granted. *Ferguson v. State*, 382 S.C. 615, 618, 677 S.E.2d

¹ Orders from *Elmore*, *Aleksey*, and *Bryant* were attached to Applicant’s Response in Opposition to Respondent’s Motion to Dismiss filed on February 19, 2019. The order in Bobby Wayne Stone’s case was issued on February 22, 2019, but undersigned counsel was unable to obtain a copy of the filed order until June 6, 2019. The *Stone* order is attached to this motion as Exhibit A.

² 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. Order, *Stone v. State*, No 2018-CP-43-01025, at 7 & 7 n.4 (Feb. 22, 2019)

³ For these same reasons, to the extent the Order found Applicant’s PCR application alleging intellectual disability is impermissibly successive, the Order should be amended. Denying a PCR applicant the opportunity to present evidence he is ineligible for the death penalty due to intellectual disability risks allowing the execution of a person constitutionally exempt from the death penalty. Such an unconstitutional execution 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 v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

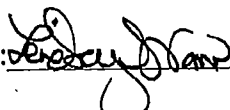
600, 602 (2009); *see also Moses v. State*, No. 2015-000609, 2017 WL 3496440 (S.C. Aug. 16, 2017) (“[I]f a PCR applicant raises the doctrine of equitable tolling as a defense to the statute of limitations, the judge should make the fact-specific determination of whether equitable tolling is justified). Equitable tolling is clearly justified in this case to avoid the possibility of Applicant being wrongly executed despite being intellectually disabled pursuant to *Atkins*. Failure to allow Applicant to go forward to investigate and prove his intellectual disability would be an unconscionable miscarriage of justice.

CONCLUSION

For all of the reasons set forth above and in Applicant’s Response in Opposition to Respondent’s Motion to Dismiss, this Court should amend its order, deny Respondent’s Motion to Dismiss, and schedule an evidentiary hearing on Applicant’s claim of intellectual disability.

Respectfully submitted,

Emily C. Paavola
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(803) 765-1044

BY: 
Counsel for Applicant.

July 18, 2019.



State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

Michael G. Nettles
Judge

Florence City-County Complex
180 North Irby Street, MSC-XX
Florence, SC 29501
Phone: (843) 292-7433
Fax: (843) 292-7436
mnettlej@sccourts.org

February 20, 2019

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

RECORDED
2019 FEB 22 PM 2:03
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Re: *Bobby Wayne Stone v. State of South Carolina*, 2018-CP-43-01025

Dear Mr. Clerk:

Please find enclosed with this letter Judge Nettles' order granting in part and denying in part Respondent's Motion to Dismiss. I ask that you please file the enclosed order and also pursuant to Rule 71.1(f), SCRPC, that you please provide a copy of this order to the parties. I appreciate your attention to this matter. Should you require anything further please do not hesitate to contact me at the information listed above.

Sincerely,

W.H. McAbee III
Law Clerk

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED
2019 FEB 22 PM 2:03

Bobby Wayne Stone, SK # 50125
Applicant, SUMTER COUNTY S.C.

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT

C/A No.: 2018-CP-43-01025

v.

The State of South Carolina,
Respondent,

**ORDER GRANTING MOTION TO
DISMISS IN PART AND DENYING
IN PART**

(CAPITAL CASE)

This matter comes before the Court by way of Applicant's Second Application for Post-Conviction Relief ("PCR"). Respondent has filed a motion seeking summary dismissal of Applicant's PCR action asserting that it is procedurally barred as successive, that it is barred by the applicable statute of limitations, and that Applicant's claim for relief under *Atkins v. Virginia*¹ is not cognizable in a PCR action. The Court having been fully apprised of both parties written submissions, and by their oral arguments, finds that Respondent's motion should be granted in part, denied in part, and that the issue of whether Applicant is entitled to relief under *Atkins v. Virginia* should be set for an evidentiary hearing on the merits.

PROCEDURAL HISTORY

Applicant, Bobby Wayne Stone, is currently confined on Death Row at Kirkland Correctional Institution pursuant to orders of commitment issued by the Sumter County Clerk of Court. Applicant was indicted by the Sumter County Grand Jury in August, 1996, for murder, first-degree burglary, and possession of a weapon during a violent crime. Applicant was tried

¹ 536 U.S. 304, 122 S.Ct. 2242 (2002).

before the Honorable R. Markley Dennis, Jr., and a jury. Applicant was represented at this first trial by Cameron B. Littlejohn, Jr. Esq., and James H. Babb, Esq. The jury found Applicant guilty of all charges as indicted. The jury found the existence of two aggravating factors and recommended a sentence of death. Judge Dennis sentenced Applicant to death, a consecutive term of thirty (30) years for first-degree burglary, and to five (5) years consecutive on the weapons charge.

Applicant appealed his conviction and sentence to the South Carolina Supreme Court. The Supreme Court affirmed Applicant's conviction but reversed the sentence of death and remanded the case for resentencing. *See State v. Stone (Stone I)*, 350 S.C. 442, 567 S.E.2d 244 (2002). Applicant was resentenced by the Honorable Howard P. King and a jury. Applicant was again represented by Messrs. Babb and Littlejohn. The resentencing jury found the existence of one aggravating factor and recommended a sentence of death. Judge King resentenced Applicant to death. Applicant appealed from this sentence to the South Carolina Supreme Court. The Supreme Court affirmed Applicant's second sentence of death in a published opinion. *See State v. Stone (Stone II)*, 376 S.C. 32, 655 S.E.2d 487 (2007). Applicant did not petition the Supreme Court of the United States for certiorari.

Applicant filed his first application for PCR on April 10, 2008. The undersigned was assigned as presiding judge for Applicant's first PCR application by order of the South Carolina Supreme Court. Applicant was represented in his first PCR by John H. Blume, Esq. and Robert E. Lominack, Esq. Applicant raised a multitude of issues in his first PCR application. The Court convened an evidentiary hearing on April 23-24 and August 10, 2012.² On May 2, 2013, the Court entered its Order of Dismissal dismissing all of Applicant's claims for PCR. Applicant filed

² At the conclusion of the hearing on August 10 the Court, with the consent of the Applicant, relieved Mr. Lominack as counsel and substituted Emily Paavola, Esq., as co-counsel with Mr. Blume.

a motion pursuant to Rule 59(e), SCRPC, to alter or amend the judgment on May 10, 2013. The State also filed a Motion to Alter or Amend the Judgment on May 10, 2013. The Court convened a hearing on the motions on August 2, 2013. The Court filed its Amended Order on August 14, 2013, again denying the application for PCR.

Applicant timely appealed the Circuit Court's denial of PCR. The South Carolina Supreme Court granted certiorari on July 23, 2015. By published opinion on February 8, 2017, the South Carolina Supreme Court affirmed the PCR Court's dismissal. The Supreme Court issued a modified opinion on March 29, 2018, in which it again affirmed the PCR Court. *See Stone v. State (Stone III)*, 419 S.C. 370, 798 S.E.2d 561 (2017). Applicant petitioned the Supreme Court of the United States for a Writ of Certiorari on August 24, 2017. The Court denied the Petition for Writ of Certiorari on October 30, 2017. *See Stone v. South Carolina*, 138 S.Ct. 392 (Mem.) (2017). Having exhausted all state remedies Applicant filed a petition for a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. *See Stone v. Davis*, C/A No. 2:17-cv-01221-MGL-MGB. The Honorable Mary Geiger Lewis, United States District Judge, entered a stay of execution which remains in effect until the conclusion of Applicant's federal habeas action. Furthermore, Judge Lewis has stayed Applicant's federal habeas action until Applicant's second state PCR action is complete.

Applicant filed the present PCR action on June 5, 2018. The State filed its Return and Motion to Dismiss on August 28, 2018. The undersigned was appointed as presiding judge over this successive PCR by order of the Supreme Court dated November 28, 2018. Furthermore, the order of the Supreme Court required this Court to issue an order ruling on Respondent's Motion to Dismiss within forty-five (45) days from the date of the order. The Supreme Court extended the time for this Court to issue its order on Respondent's Motion to Dismiss to February 25, 2019

by an order dated January 16, 2019. The Court convened a hearing at the Marc J. Westbrook Judicial Center in Lexington, South Carolina, on January 25, 2019.

FACTUAL BACKGROUND

The factual history of this case is adequately presented in the South Carolina Supreme Court's opinions in *Stone I*, *Stone II*, and *Stone III*. For the sake of brevity the Court will recount the facts as they were stated by the Supreme Court in *Stone III*:

"Bobby Wayne Stone shot and killed Charlie Kubala of the Sumter County Sheriff's Office....Stone began the day of February 26, 1996, by purchasing beer and two firearms—a .410 bore shotgun and a competition-grade .22 caliber semi-automatic pistol. He spent the remainder of the day roaming through the woods, drinking the beer and shooting the guns. Later that afternoon, Stone wandered into the backyard of Ruth Griffith. In Stone's statement to the police, he said he and Griffith were "old drinking buddies." Griffith denied that, and claimed she knew Stone only because he previously dated her niece and had been to Griffith's house to pick up her niece. Griffith's adult daughter, Mary Ruth McLeod, was living with Griffith and was at the house when Stone arrived. McLeod asked Stone—who was standing in the yard holding a beer can and his newly-purchased pistol—to leave the property. Stone complied, but McLeod had already called 911. Sergeant Charles Kubala arrived at Griffith's house at 6:06 p.m. By then, Stone had returned to the woods, so Sergeant Kubala checked the scene, spoke with McLeod and Griffith, and left. A short time later, Griffith heard gunshots in her yard and then someone banging on the inside door of her side porch. McLeod had left the house, so Griffith called her neighbor—Landrow Taylor—who came over and called 911 from inside Griffith's home. Sergeant Kubala once again responded to the call, arriving at 7:07 p.m. Stone was still on the side porch, banging on the door and holding his pistol in his hand. Taylor and Griffith remained inside while Sergeant Kubala went around the house toward the side porch. From inside, Taylor and Griffith heard someone yell "halt" or "hold it," followed immediately by three or four gunshots. Stone struck Sergeant Kubala with two of the shots—once in the neck and once in the ear—and Sergeant Kubala died on the scene. After hours of searching, Sumter County Sheriff's officers found Stone in the woods, lying motionless between two logs with the murder pistol beneath his body. Early the next morning, Stone gave a statement in which he confessed to the shooting. He claimed it was an accident, however, explaining, 'I just turned from the house door and the gun went off on the porch and I ran.'"

419 S.C. at 378-79, 798 S.E.2d at 565-66.

ALLEGATIONS

Applicant has asserted four claims in this second PCR applications. First, Applicant has alleged his sentence of death is in violation of the Eighth Amendment. Particularly Applicant claims that he is intellectually disabled within the meaning of *Atkins v. Virginia* and, therefore, is constitutionally unable to be executed. Second, Applicant has asserted an ineffective assistance of counsel claim in that trial counsel failed to investigate and present evidence that Applicant is intellectually disabled. Third, Applicant has asserted an ineffective assistance of counsel claim in that trial counsel was ineffective in failing to retain a forensic pathologist, crime scene reconstruction expert, and other similar expert assistance, to prove that the facts and circumstances of the crime were consistent with an accident theory. Finally, Applicant alleges that there are now material facts not previously presented and heard that requires vacation of his conviction or sentence in the interest of justice.

ANALYSIS

A. Atkins Claim

Applicant has alleged that he is categorically barred from execution as he is intellectually disabled. The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." It is of course axiomatic that the constraints of the Eighth Amendment are binding on the states pursuant to the Due Process Clause of the Fourteenth Amendment. *Roper v. Simmons*, 543 U.S. 551, 560, 125 S.Ct. 1183, 1190 (2005). Pursuant to *Atkins v. Virginia* the Eighth Amendment categorically prohibits the execution of a person who is intellectually disabled.³ 536 U.S. at 321, 122 S.Ct. at 2252. It is

³ The Supreme Court of the United States has indicated that the term "intellectual disability" replaces, and has the same meaning as, what was previously referred to as "mental retardation." *Hall v. Florida*, 572 U.S. 701, 704 (2014).

of course undisputed that trial counsel never raised the issue of whether Applicant was intellectually disabled at trial. The State has moved to dismiss the present case as time barred and as successive. The Court finds that in the present case that this issue is deserving of a hearing on the merits.

As noted above *Atkins* represents a complete categorical bar on the execution of the intellectually disabled. See *Moore v. Texas*, 581 U.S. ___, 137 S.Ct. 1039, 1048 (2017) (“In *Atkins v. Virginia*, we held that the Constitution ‘restrict [s] ... the State’s power to take the life of’ any intellectually disabled individual.”) (emphasis original). As such if Applicant is in fact intellectually disabled then he cannot be executed under any circumstances. The Respondent has moved to dismiss the action as improperly successive under S.C. Code Ann. § 17-27-90. “This statute forbids a successive PCR application unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court is not unsympathetic to Respondent’s position. Successive PCR applications are, as a general rule, highly disfavored. *Id.* “Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions ‘shows only that ‘conventional notions of finality’ should not have *as much* place in criminal as in civil litigation, not that they should have *none*.’ *Teague v. Lane*, 489 U.S. 288, 309, 109 S.Ct. 1060, 1074-75 (1989) (quoting Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970)) (emphasis original).

The Uniform Post-Conviction Relief Act clearly allows for attacks on sentences which are in violation of the Federal or State Constitutions. See S.C. Code Ann. § 17-27-20(A)(1). The State contends that as Applicant could have raised this issue during his last sentencing the issue is

procedurally barred. *Gibson v. State*, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998). The Court finds whether or not Applicant knew, or should have known, he was intellectually disabled at the time of his resentencing is an issue that cannot be resolved solely on the record before the Court. "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." *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005); S.C. Code Ann. § 17-27-70(b), (c). "When considering the State's motion for summary dismissal of an application, 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." *Mose v. State*, 420 S.C. 500, 505-06, 803 S.E.2d 718, 720 (2017) (citing *Leamon*, 363 S.C. at 434, 611 S.E.2d at 495). Assuming all the facts of Applicant's petition are in fact true then Applicant was not aware of his potentially being intellectually disabled.⁴ So at least at this juncture the Court is unwilling to say that Applicant could have raised this issue at resentencing.

Furthermore, and as explained above, the Eighth Amendment categorically prohibits the execution of an intellectually disabled person. As the Court has explained it is not unsympathetic to the State's procedural concerns. However, this fails to take into account that "death is different." "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991 (1976). If the Court were to follow the State's arguments it would be to

⁴ The Court likewise finds that a review of the record in this case shows potential notice at no earlier than Applicant's first PCR action.

completely disregard whether death is even an allowable punishment in this specific case. In essence the State would have the Court raise form over substance. This type of artificial line drawing, without any reference to the wider view of the case, has explicitly been discouraged by the Supreme Court of the United States. In *Hall* the Supreme Court warned that courts should not enforce rigid rules which create an unacceptable risk that persons with intellectual disability will be executed. 572 U.S. at 704, 134 S.Ct. at 1990. As the Court further explained "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Id.* at 724, 134 S.Ct. at 2001. To deny Applicant a chance to show that he is intellectually disabled is to deny him the fair opportunity the Constitution requires.

Respondent has countered that Applicant is not without a remedy as he has at least two avenues of relief. First, that Applicant may seek habeas corpus in the state courts. Secondly, Applicant can pursue whatever avenues are available to him in his federal habeas action. As a first matter it is highly debatable about whether this case would even qualify for habeas relief under the Constitution of 1895. "The availability of habeas corpus has been severely limited by the Uniform Post Conviction Procedure Act." *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 428 (1998). "However, habeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles." *Id.* at 41, 495 S.E.2d at 428. "Habeas corpus is available only when other remedies, such as PCR, are inadequate or unavailable." *Id.* "The [PCR] Act is broadly inclusive and will *rarely* be inadequate or unavailable to test the legality of the detention." *Id.* (emphasis added). Even if the Court were to assume that the State is in fact correct on its procedural assertion then it has failed

to show how the end result in this court would be measurably different. As our Supreme Court has explained:

"[Petitioner] will bear the burden to prove a sufficient reason why the present claims were not raised in their previous applications. If they are unable to meet their burden of proof, the applications may be dismissed as successive. Further, if petitioners can show upon remand that PCR is unavailable, all other remedies have been exhausted, and the issues raised now could not have been raised in their prior PCR applications, the lower court may treat the applications as habeas petitions and provide a hearing on their constitutional claim."

Id at 42, 495 S.E.2d at 429.

Here, assuming the State is correct, PCR would be unavailable, all other remedies are exhausted, and, viewing the Applicant's petition as factually correct as the Court must⁵, the issue could not have been raised previously.⁶ The Court would be forced to treat this application as a habeas petition and consider Applicant's constitutional claim. Essentially the State urges this Court to partake in the legal equivalent of carrying coal to Newcastle. The Court finds that the interests of justice and judicial economy do not favor such a routine.

The position that this case should be left to the federal courts is likewise unpersuasive. The Court is unaware of any authority that requires it to decline to hear a case simply because Applicant could potentially receive relief in another forum. "For it is a time-honored maxim of the Anglo-American common-law tradition that a court possessed of jurisdiction generally must exercise it." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 496-97, 91 S.Ct. 1005, 1009 (1971). Simply because Applicant could go to federal court and potentially gain relief does not relieve this Court of its duty to determine a case before it. The State provided the Court with a long list of hypothetical scenarios in which Applicant could potentially gain relief. However,

⁵ The allegations in a habeas petition, like in a PCR application, must be treated as true for purposes of dismissal before a hearing. *Tillman v. Manning*, 241 S.C. 221, 223-24, 127 S.E.2d 721, 721-22 (1962).

⁶ Even assuming that Applicant knew of a claim of intellectual disability in his first PCR action the State would have of course argued that it was not cognizable as a freestanding claim in PCR. So under the State's theory Applicant was unable to have raised this issue in his previous PCR.

whatever merit this may or may not have⁷ it is not this Court's place to try and discern what a federal district judge may or may not do. Simply put this Court has a duty to hear Applicant's claim and the State has not shown sufficient cause to dismiss the claim summarily.

Furthermore, this is not the first time that a court has been called upon to deal with such a case. The Honorable Thomas W. Cooper, Jr., dealt with a case which sat in almost the exact same procedural posture. *See* Order Denying State's Motion to Dismiss, *Bryant v. State*, 2016-CP-43-00828 (July 13, 2016). The Court reviewed Judge Cooper's order, which was included in Applicant's reply to the State's motion, and finds much of it persuasive. So contrary to the State's position the Court is not completely tilling new earth with its decision.⁸

Therefore, for the reasons above the Court finds it appropriate to deny the State's motion to dismiss as to Applicant's freestanding *Atkins* claim. The Court finds that Applicant should be allowed to proceed forward on this claim. It will now be Applicant's burden to show by a preponderance of the evidence that he is intellectually disabled as that term is defined in S.C. Code Ann. § 16-3-20(C)(b)(10). *Franklin*, 356 S.C. at 278-79, 588 S.E.2d at 605.

B. Ineffective Assistance of Counsel-Atkins Claim

⁷ It is almost certain that Applicant's claim would be considered to be procedurally defaulted in federal court. *See Prieto v. Zook*, 791 F.3d 465, 468 (4th Cir. 2015). However, it is possible that Applicant's claim could be reviewed *de novo* pursuant to *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309 (2012). In this case the Respondent is in no better position than if the claim is heard in this Court. Should this Court ultimately rule against Applicant then Respondent is entitled to deferential review under the Antiterrorism and Effective Death Penalty Act (AEDPA). 22 U.S.C. § 2254(d).

⁸ Applicant also included orders from the Honorable J. Mark Hayes in *Elmore v. State*, 2005-CP-24-01205 (June 13, 2007), and the fact that the Honorable Doyet A. Early III has not dismissed an *Atkins* claim in a successive PCR in *Aleksey v. State*, 2015-CP-38-00764. The Court declines to consider either of these cases as persuasive. As a first matter both Elmore and Aleksey were sentenced pre-*Atkins* unlike Stone who was sentenced post-*Atkins*. Unlike Stone both Elmore and Aleksey had no choice but to bring their claim in a successive PCR action. *See Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003) fn. 7. Furthermore, as to the case concerning Aleksey the Court views the fact that Judge Early has not ruled on the State's motion to dismiss as unpersuasive either way.

Applicant has also alleged that trial counsel was ineffective for failing to raise the issue of his intellectual disability in his re-sentencing. The Court finds that this claim is improper for two reasons.

As a first matter it is unduly duplicative in view of the fact that the Court is hearing Applicant's freestanding *Atkins* claim. Under the Sixth Amendment every defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 683, 104 S.Ct. 2052, 2061 (1984). Counsel's performance is measured by "an objective standard of reasonableness" *Stone III*, 419 S.C. at 380, 798 S.E.2d at 566 (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527 (2003)). The Court must presume counsel "rendered adequate assistance and exercised reasonable professional judgment." *Id.* Applicant is required to show that: "(1) counsel's representation fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the proceeding would have been different." *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Even assuming that Applicant could make out the first prong of *Strickland* the second prong would still require him to show that he is in fact intellectually disabled. This is of course what the Court has already decided to determine. Should the Court determine that Stone is in fact intellectually disabled then he is barred from execution. Whether or not his trial counsel was ineffective becomes wholly redundant.

As a second matter the State is correct in that this claim is barred as successive. S.C. Code Ann. § 17-27-90 clearly mandates that any claim for relief available to a defendant must be raised in the applicant's first PCR action. "In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application." *Odom v. State*, 337 S.C. 256, 261, 523

S.E.2d. 753, 755 (1999). Here Applicant could have raised a claim that trial counsel had failed to effectively investigate a claim of intellectual disability by the time of his first PCR hearing. At pg. 4153 of the appendix in Applicant's appeal from the denial of his first PCR application the following colloquy occurred between PCR counsel and Applicant's expert:

Q [Mr. Blume]: And so the low cognitive functioning when he was a young child and the Bender Score when he was a young child, what do they suggest to you?

A [Dr. Merikangas]: That he was suffering from mental deficiency, probably mental retardation.

Clearly then from at least 2012, when that exchange occurred, PCR counsel was on notice that there was a chance that Applicant was intellectually disabled. The proper course would have been for PCR counsel to have moved to have amended the application to have asserted a claim of ineffective assistance of counsel for not having raised this issue to the trial court.⁹ To allow Applicant to raise this claim for the first time in this successive application involves the natural problem that to do so would essentially require a finding by this Court that PCR counsel in the first application was ineffective. However, it is now firmly established that prior ineffective assistance of PCR counsel is not by itself sufficient to allow a successive PCR action. *See Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016); *see also Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Therefore, this claim is barred as successive under the Uniform Post-Conviction Relief Act.

C. Ineffective Assistance-Failure to Retain Experts

⁹ The Court is aware that the State would hold that the same is true for the freestanding claim of intellectual disability. However, as noted in *Hall* persons facing execution "must have a fair opportunity to show that the Constitution prohibits their execution." 572 U.S. at 724. Thus, Applicant's freestanding claim should be allowed to go ahead so that he may have the "fair opportunity" that the Constitution requires. The Supreme Court has indicated that there is no such requirement when the claim is brought as one of ineffective assistance. Furthermore, as the State argues now, and would have likely argued then, such an issue shouldn't be raised in PCR.

Applicant also alleges that he was denied effective assistance of trial counsel due to counsels' failure to retain "a forensic pathologist, crime scene reconstruction expert, and other similar expert assistance to prove the facts and circumstances of the crime were consistent with an accident theory." This claim is barred as successive as this Court, and the South Carolina Supreme Court, have already decided this issue.

As the Supreme Court noted in *Stone III* "Stone argues trial counsel failed to properly implement the strategy because they did not thoroughly investigate and present evidence supporting the accidental shooting theory." 419 S.C. at 404, 798 S.E.2d at 579. The issue of whether Applicant's trial counsel properly retained experts to argue an accident theory of the case was fully vetted by the first PCR court and by the South Carolina Supreme Court. As to the guilt phase the Supreme Court noted "We find trial counsel's approach to the accident theory in general, and hiring of Girndt in particular, was reasonable." *Id* at 405, 798 S.E.2d at 580. The Supreme Court further noted:

"Stone argues, however, trial counsel should have found another expert—one who would testify the shooting was an accident. The PCR court found trial counsel was reasonable in making the decision not to pursue another expert. The evidence supports this finding, and we agree. The "prevailing norms" that guide our judgment as to whether counsel's performance was reasonable do not require counsel to pursue a second expert after a qualified expert has given an adverse opinion." *Id* at 406, 798 S.E.2d at 580-81.

Furthermore, the Supreme Court found that during the resentencing "The PCR court found trial counsel's performance in this respect was reasonable. The evidence supports the finding." *Id* at 407, 798 S.E.2d at 581. This ground has been fully adjudicated and is therefore barred by § 17-27-90.

D. New Found Evidence

Applicant also claims that there are new technological advancements, which were not available at trial, which support his accident defense. Again the Court finds that this claim is

barred as successive and is barred by the law of the case. The Court finds that any attempt to elicit new evidence showing accident would be futile. Under no theory would it be probable that a jury would have found Applicant not guilty via the defense of accident. As the undersigned noted in his order in Applicant's first PCR:

"Applicant cannot show entitlement to accident as he must not only have been acting lawfully, but must also show that he used due care in the handling of the weapon. *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999). Not only was Applicant behaving unlawfully many times over but, by no stretch, can invading an enclosed porch and banging on the back door with a loaded pistol in one's hand be considered due care. Since Applicant was not entitled to either an involuntary manslaughter or accident charge under any view of the evidence, then counsel could not have been deficient nor Applicant prejudiced from the failure to get an expert to support his statement." *State v. Stone*, 2008-CP-43-00905 (August 12, 2013) (Nettles, J.).

The same problem is presented to Applicant here. In view of the record it matters little what new evidence Applicant brings forward. The evidence shows that under no variation of the facts would Applicant be entitled to a charge of accident. This Court considered in great detail the claim of accident in Applicant's prior PCR action. His claim of new technology is an attempt to repackage his previous PCR's accident claims in a new form. "The 'new' evidence is the same as the 'old' evidence.... If the evidence was not persuasive in the first case, the defendant does not get a second chance. Otherwise, there would never be an end to litigation." *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). The evidence of an accident was unpersuasive in the first case because legally Applicant was not entitled to a charge on accident. The proposed "new" evidence of Applicant does nothing to change this fact.

Furthermore, in the prior litigation Applicant never appealed from this Court's determination that the facts simply do not support a defense of accident. Thus, this issue is now the law of the case. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on

appeal, but expressly rejected by the appellate court.” *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). “In other words, ‘[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case.’” *Id.* (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997)).

“While the doctrine is ordinarily applied in later stages of the same lawsuit, it also has application to different lawsuits between the same parties.” *In re PHC Assoc.*, 949 F.2d 585, 592 (2nd Cir. 1991) (citing *Schupak v. Califano*, 454 F.Supp. 105, 114 fn. 17 (E.D.N.Y. 1978)). This Court, as a matter of law, determined that Stone could not have established a defense of accident due to the fact that he was acting unlawfully and with undue care. Applicant was required to appeal that ruling at the same time that he appealed all other issues in *Stone III*. His failure to do so is inexcusable and this Court will not consider again issues it found to be unpersuasive almost six years ago. This claim is barred both as successive and as precluded by the law of the case doctrine.

CONCLUSION

The Court has determined that it is required to hold an evidentiary hearing into whether Applicant’s claim of intellectual disability is well-founded. Therefore, the Court will allow Applicant to proceed with this successive PCR action on the grounds that his execution may be in violation of the Eight Amendment due to his intellectual disability. The Court does this in order to provide Applicant with the “fair opportunity to show that the Constitution prohibits [his] execution.” *Hall*, 527 U.S. at 721, 139 S.Ct. at 2001. This will be the sole claim that will be before the Court. The Court finds that Applicant’s other claims are all barred for the reasons

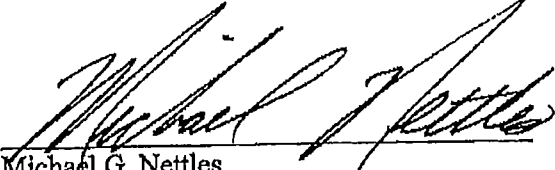
stated previously. Therefore, the Court dismisses the other grounds raised in the Application pursuant to the State's motion. This Court is required by the November 28 order of the Supreme Court to issue a scheduling order in this matter within forty-five (45) days from the date of this order. The parties are directed to plan a date and time for a status conference in this matter no later than fifteen (15) days from the date of this order. Furthermore, the final hearing on the merits of this application must be held within one-hundred and eighty (180) days of the date of the status conference pursuant to S.C. Code Ann. § 17-27-160(C).

The Court does desire to impress upon Applicant that this is the *sole* claim that the Court will consider. The fact that the Court is considering this successive application is due solely to the special protections that the Eighth Amendment gives to those who are potentially intellectually disabled and facing sentence of death. This is not designed to be a process whereby a host of new claims are brought to bear in a second round of PCR litigation. Therefore, the Court finds that, absent truly extraordinary circumstances, it will prohibit the filing of any further amended applications.

Therefore, for the foregoing reasons the Court **GRANTS** the State's Motion to Dismiss as to the ineffective assistance of counsel claims, and as to the claim of newly discovered material facts. The Court **DENIES** the State's Motion to Dismiss as to the claim of intellectual disability.

AND IT IS SO ORDERED!

February __, 2019
Florence, South Carolina


Michael G. Nettles
Presiding Judge by Special Assignment of the South
Carolina Supreme Court

Respondent.

CERTIFICATE OF SERVICE


Jill B. Abernethy

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2018-CP-14-00382

RESPONSE OPPOSING MOTION TO
ALTER OR AMEND JUDGMENT
(Capital Case)

On June 3, 2019, this Court granted Respondent's Motion to Dismiss this successive Application for Post-Conviction Relief (PCR) that death row Applicant Anthony Woods, #06023 (Woods) filed through counsel because the Court found that his 2018 "PCR action is barred by the statute of limitations and is successive to the applicant's 2009 PCR action." Woods made a Motion to Alter or Amend Judgment on June 11, 2019. In accordance with the Court's Order, he submitted a supporting Memorandum on July 18, 2019. Respondent now makes a Response opposing his motion for the following reasons:

Notwithstanding Woods' argument to the contrary, Respondent submits that the Court properly granted Respondent's motion to dismiss and correctly found that the Application was barred by the statute of limitations, S.C. Code Ann. § 17-27-45(A) (Supp. 2018). Likewise, this Court correctly found that the Application is impermissibly successive in violation of S.C. Code Ann. § 17-27-90 (Supp. 2018) and *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991) ("This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly").

Nor is there plausible merit to Woods' contention that he was entitled to equitable tolling of the statute of limitations. To the contrary and as explained below, the only time that he could

properly raise a free standing claim of intellectual disability was prior to his trial. Also, he is not entitled to equitable tolling of the statute of limitations in order to pursue a claim that trial counsel was ineffective for not raising this claim as a potential bar to the death penalty at trial because his original PCR counsel raised a claim that trial counsel was ineffective for failing to present evidence of Woods' intellectual disability ((*App. 4184-87*) but abandoned that claim at the PCR hearing (*App. 4816-27*), as this Court found on at p. 3 of the Order Granting Motion to Dismiss.¹

Further, this Court correctly found that "No appellate decision exists which holds intellectual disability to be an exception to the one-year statute of limitations or bar against successive PCR actions." Order Granting Motion to Dismiss, at p. 7. Woods has not pointed to any case decided by the South Carolina Supreme Court or the South Carolina Court of Appeals holding that an applicant's intellectual disability is an exception to either the one-year statute of limitations in § 17-27-45(A) or the bar against successive PCR applications because no such case exists! So, he has focused instead on how other circuit court judges have handled similar claims in other death penalty PCR cases: *Edward Lee Elmore v. State*, 2005-CP-24-1205; *Bayan Aleksey v. State*, 2015-CP-38-00764; *Stephen Corey Bryant v. State*, 2016-CP-43-828; and *Bobby Wayne Stone v. State*, 2018-CP-43-01025. He has attached the February 22, 2019 Order in

¹ On December 31, 2013, Woods' counsel notified Judge James and Respondent via email that Woods was amending his allegations, that the claim of mental retardation was withdrawn, and that he was asserting ineffective assistance of counsel for "1) failure to preserve the *Stewart* charge objection—Mr. Hoefer raised the issue but the Supreme Court indicated it was not properly preserved [;] 2) failure to prepare an adequate mitigation case will be alleged with greater specificity to include the failure to obtain the MRI scan and/or have an MRI scan performed based on the 2005 MRI report indicating that there were abnormalities, though the state doctor opined they were not of clinical significance." This email further indicated that counsel would subsequently file another Amended Application. Counsel knowingly and intelligently abandoned the ineffective assistance claim for not pursuing that Woods is intellectually disabled at the PCR hearing (*see App. 4816-27*), and counsel did not present this claim in the February 27, 2014 second Amended Application.

Stone to his motion. Respondent submits that his reliance on these other cases is misplaced for several reasons.

First and as Respondent argued on pages 10-13 of Respondent's Supplemental Memorandum in Support of Return and Motion to Dismiss, Woods' current Application only raises one claim that is cognizable in PCR: that trial counsel failed to investigate and present evidence he is intellectually disabled, which is his Ground 10 & 11(b). Woods asserted that he was not asserting a claim that counsel was ineffective at the February 7th hearing on the State's Motion to Dismiss. Yet, if he does not, then there is no claim properly before this Court in PCR because his free-standing claim in Grounds 10 & 11(a) is not a cognizable claim for post-conviction relief for the reasons argued

The jurisdiction of the PCR court is statutorily limited by S.C. Code Ann. § 17-27-20(b) (1985), which provides, "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." Post-conviction relief is not a substitute for an appeal, and a PCR application cannot assert any issues that could have been raised at trial or on appeal. See also *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 519-20 (1993). "An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,' including questions of overarching defense strategy." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). "A defendant ... has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.'" *Id.* (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983) and *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring)). However, "the lawyer has—and must have—full authority to manage the conduct of the trial. Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-

examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial." *Taylor v. Illinois*, 484 U.S. 400, 418 (1988). Thus, Woods was and is bound by his counsel's failure to assert the intellectual disability claim at trial and the remedy is to seek relief based on counsel's alleged ineffective assistance under *Strickland* for not pursuing the claim. *Id.*

Moreover, in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), the South Carolina Supreme Court addressed how claims of intellectual disability (then mental retardation) should be handled at the trial level after the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). The procedures outlined by the Court in *Franklin* and *State v. Laney*, 367 S.C. 639, 646-47, 627 S.E.2d 726, 730-31 (2006), mandate that **an Eighth Amendment claim** asserting that a death sentence would constitute cruel and unusual punishment because the defendant is intellectual disabled **can only be properly raised before the trial court** in post-*Franklin* trials. Woods' November-December, 2006 trial was almost three full years after *Franklin*. Because trial counsel could have but did not raise this Eighth Amendment claim at trial and on direct appeal, Woods cannot raise his freestanding claim of intellectual disability in PCR.

The PCR judge in *Aleksey* has not issued an order excusing the procedural bar. Instead, he has permitted the applicant to proceed with investigations into intellectual disability.² Respondent submits that this, too, was wrong. Further, as this Court is not bound by the ruling of another circuit court judge in another case. More importantly, to the extent that the PCR judges in *Aleksey*, *Bryant*, and *Stone* allowed the applicants in those cases to proceed on free-standing

² As observed in the Sixth Joint Status Report filed in *Aleksey v. Stirling*, C/A No. 5:14-3016-JMC-KDW [ECF # 120], the South Carolina Department of Disabilities and Special Needs ("SCDDSN") submitted its report to the state court and parties by letter dated March 28, 2019. DDSN found, as it did in Woods first PCR, that Aleksey was not intellectually disabled.

claims of intellectual disability, their rulings are subject to being reversed on appeal. However, Respondent is unable to immediately correct the error in those cases by taking an appeal because each of the Orders in those cases is interlocutory and not subject to an immediate appeal.

An order that does not finally end a case or prevent a final judgment from which a party could appeal generally is not immediately appealable. *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). *See also Bolding v. Bolding*, 283 S.C. 501, 502, 323 S.E.2d 535, 536 (Ct.App.1984) (Generally, an order that leaves some further act to be accomplished is considered interlocutory). A decree or judgment that leaves in doubt whether the plaintiff will prevail is not final. *Donaldson v. Bank*, 4 S.C. 106, 115 (1873). *See also Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004) (An order is not immediately appealable when appellants "have not 'arrived at the end of the road' and [would] be able to appeal the decision after the trial [was] finished"). Accordingly, an order denying summary judgment is interlocutory and not generally appealable. *Willis v. Bishop*, 276 S.C. 156, 276 S.E.2d 310 (1981). *See also Ballenger v. Bowen*, 313 S.C. 476, 477-78, 443 S.E.2d 379, 380 (1994) (providing that an order denying a motion for summary judgment is not immediately appealable and does not have the effect of striking any defense since the defense may be raised again later in the proceedings); *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n. 2, 443 S.E.2d 539, 540 n. 2 (1994) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue can be raised again at a later stage of the proceedings"); *Pruitt v. Bowers*, 330 S.C. 483, 488, 499 S.E.2d 250, 253 (Ct.App. 1998) (stating an appeal of an order granting a motion to amend a complaint is interlocutory and generally not appealable).

Judge Coper in *Stephen Corey Bryant* observed this problem in footnote 3 of the attached October 3, 2016 Order Denying Applicant's 59E Motion, which was filed in a companion case of the case that survived:

As Respondent correctly pointed out at the August 23, 2016, hearing, Respondent has argued and preserved their position that the separate action is also barred as improperly successive and untimely, but Respondent is unable to seek to alter or amend the ruling and/or seek an appeal as the issue is not dispositive to the action. This Court recognizes and fully agrees that some interlocutory appeals may be wise to avoid continuing litigation that may ultimately be rendered a nullity (and is cognizant of circumstances where that has happened); however, our state appellate structure rarely allows such action. It is this Court's hope, however, that the litigation will be expedited and not cause exceptional delay in either relief, or, in the absence of relief, the prompt return to federal court.

See *Stephen Corey Bryant v. State*, 2016-CP-43-828, Order Denying Applicant's 59E Motion, at p. 4 n. 3. The State, as the respondent in *Bryant* has filed a cross appeal and anticipates filing a Petition for Writ of Certiorari on August 26, 2019, challenging the Order that allowed a hearing on the free-standing claim that Bryant was intellectually disabled.³

Further, Woods conceded at the hearing that the State did not appeal the PCR judge's Order in the *Elmore* that found Elmore was ineligible for the death penalty because of his intellectual disability. Since the State did not appeal, there is no guidance from the South Carolina Supreme Court as to whether the successive action should have been allowed in that discrete circumstance. Accordingly, there is absolutely no guidance from our appellate courts as to whether the successive actions should have been allowed in those discrete circumstances.

Nor is this Court bound by a ruling by another circuit court judge in a different case with different facts. Also, Respondent submits that Woods has not and cannot advance a valid reason

³ Respondent also notes that in *Stephen Corey Bryant*, #5252 v. Stirling, et al., C/A No. : 9:16-cv-01423-DCN-BM, the Respondents have filed a Motion to lift Stay [ECF #68, p. 1] because "[b]y order filed January 4, 2019, the Honorable William H. Seals, Jr., denied relief finding Petitioner failed in his burden of proof" and that "Petitioner has conceded he lacks evidence to support his claim of Intellectual Disability on the first prong of the diagnosis."

for the Court to make the same error the PCR judges in these other cases have made. Further and unlike each of those cases, Woods original PCR counsel did initially allege ineffective assistance claim as Ground C. of his May 1, 2012 Amended Application (*App. 4184-87*), but abandoned this claim after investigating it (*see App. 4816-27*), and counsel did not present this claim in the February 27, 2014 second Amended Application. Therefore, this Application must be dismissed as impermissibly successive.

Woods has not been deprived of "the opportunity to present evidence he is ineligible for the death penalty due to intellectual disability," as he argues in footnote 3. Rather, he raised the ineffectiveness claim in his original PCR but abandoned it without giving the PCR judge an opportunity to rule on it and after receiving the report from DDSN that he is not intellectually disabled. This is why Respondent argued and still asserts that Woods' claim in Ground 11(b)(1) - that counsel were ineffective for failing to investigate and present evidence he is intellectually disabled - is barred by principles of res judicata. *Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) ("A litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit") (citing *Wold v. Funderburg*, 250 S.C. 205, 157 S.E.2d 180 (1967)). See also *State v. Gilbert*, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) ("Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata"); *Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 209, 345 S.E.2d 740, 743 (Ct. App. 1986) ("A dismissal

'with prejudice' indicates an adjudication on the merits and, operating as res judicata, precludes subsequent litigation to the same extent as if the action had been tried to a final adjudication").⁴

This Court astutely observed at the February 7th hearing that neither the PCR judge nor Respondent could stop the original PCR attorneys from abandoning the ineffective assistance of counsel claim. In the absence of proof that it was being abandoned in bad faith or for an improper motive – both of which are absent from the record – it must be assumed that original PCR counsel were acting ethically. See Rule 407, SCACR Rule of Prof. Conduct 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law"); see also Rule 407, SCACR Rule of Prof. Conduct 3.3(a)(3) ("A lawyer shall not knowingly ... offer evidence that the lawyer knows to be false. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false").

Accordingly, Respondent submits that the Court properly granted the motion to dismiss the 2018 Application for the reasons found by the Court. It would be unfair to the State for the Court to needlessly add delay to the execution of a just sentence when not presented good reason to do so. See *Stein v. New York*, 346 U.S. 156, 197 (1953) ("The people of the State are also entitled to due process of law"), overruled on other grds., *Jackson v. Denno*, 378 U.S. 368 (1964); *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a

⁴ As discussed in section 4 of Respondent's Supplemental Memorandum in Support of Return and Motion to Dismiss, PCR counsel's decision to abandon their ineffectiveness claim relating to Woods' supposed intellectual disability was reasonable under *Strickland v. Washington*, 466 U.S. 668 (1984), as was counsel's failure to raise this claim at trial.

filament. We are to keep the balance true'") (quoting *Snyder v. Mass.*, 291 U.S. 97, 122 (1934)); *State v. Stewart*, 283 S.C. 104, 110, 320 S.E.2d 447, 451 (1984) ("It would do well for defense counsel to remember that the people of the State as well as the defendant are entitled to a fair trial"). *Cf. Glossip v. Gross*, 135 S.Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (finding that lengthy delays in capital cases "create two special constitutional difficulties. First, a lengthy delay in and of itself is especially cruel because it "subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement." Second, lengthy delay undermines the death penalty's penological rationale").

WHEREFORE, Respondent submits that the Court properly granted the motion to dismiss the 2018 PCR Application for the above-stated reasons and those in the Court's June 3, 2019 Order.

Respectfully submitted,

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Attorney General

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Deputy Attorney General

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Senior Assistant Deputy Attorney General

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By 
ATTORNEYS FOR RESPONDENT

August 2, 2019.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

Anthony Woods, #06023,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

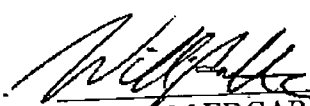
2018-CP-14-00382

CERTIFICATE OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, certify that I have served the foregoing *Response Opposing Motion to Alter or Amend Judgment* by depositing one copy of same in the United States mail, postage prepaid, addressed to Applicant's counsel as follows:

Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201

This 2nd day of August, 2019.


WILLIAM EDGAR SALTER, III
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305

STATE OF SOUTH CAROLINA)
COUNTY OF SUMTER)

IN THE COURT OF COMMON PLEAS

Stephen Corey Bryant, SCDC #5252,

C/A No. 2016-CP-43-829

CAPITAL PCR

Applicant,

vs.

State of South Carolina,

Respondent.

ORDER DENYING APPLICANT'S
RULE 59(E) MOTION

CERTIFIED TRUE COPY
OF ORIGINAL FILED

DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

By Order dated July 7, 2016, filed July 15, 2016, this Court denied Applicant's motion to stay and granted Respondent's motion to dismiss the action as improperly successive and barred by the statute of limitations. By motion dated July 25, 2016, filed July 28, 2016, Applicant moved to alter or amend the Court's ruling, requesting either the stay be granted and/or Respondent's motion to dismiss be denied. Respondent did not file a written response.

On August 23, 2016, this Court held a hearing on the motion.¹ Charles Grose, Esq., and Diana Holt, Esq., represented Applicant at the hearing. Applicant's presence was waived by counsel. Senior Assistant Attorney General Melody Brown and Senior Assistant Deputy Attorney General Donald Zelenka represented Respondent. In consideration of the pleadings in this matter, the motion, and the arguments presented for and against the motion to alter or amend at the August 23, 2016 hearing, this Court denies the motion. The following factual findings and conclusions are set out in support of the Court's ruling:

¹ The undersigned requested a court reporter for the hearing; however, due to a shortage of available personnel, Court Administration was unable fulfill the request. This Order may serve as a substitute for a transcript if one becomes necessary for future review, and reflects the basic arguments of counsel in addition to the findings and conclusions of the Court.

1. Applicant first argues that the Court's findings and conclusions regarding the appointment of counsel to proceedings on Respondent's motion to dismiss are "overly restrictive." (Rule 59 Motion, p. 3). This Court finds Applicant's arguments regarding appointment were rendered moot by the August 1, 2016 Order of the Supreme Court of South Carolina appointing counsel in the surviving action, 2016-CP-43-828.

2. Applicant next argues this Court erred in failing to find "sufficient reason" to allow the instant action to survive in light of the successive application and time bars. (Rule 59 Motion, pp. 4-7). Applicant contends this Court failed to recognize this action "is directly on par with [Luke] *Williams* and [Edward] *Elmore*," two capital cases in which successive applications were allowed. (Rule 59 Motion, p. 6). However, these cases were previously referenced in the response in opposition to the motion to dismiss and discussed at the hearing on June 21, 2016. This Court included a discussion of the cases on page 11 of its Order Granting Respondent's Motion to Dismiss. This Court disagrees with Applicant on the import of these cases. Again, though each was a capital case where a successive PCR action was heard (with disparate results – one ultimately successfully on a claim raised, the other not) the propriety of those successive actions under the procedural rules was not considered and addressed by an appellate court as the State did not appeal. Therefore, this Court has been guided by the plain language of the PCR statute and appellate decisions regarding application of the procedural bars. This Court finds no cause to alter or amend its decision.

3. This Court also finds no cause to alter or amend its ruling as Applicant has failed to show sufficient grounds to prevent the application of the general rule barring submission of a successive action. "In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the

previous application.” *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008). Further, in addition to the reasons set out in the Order Granting Respondent’s Motion to Dismiss, pp. 11-12, this Court finds Applicant’s “exceptional circumstances” argument fails, in part, because the companion case survives. Success in that case would grant Applicant the relief sought in this case, *i.e.*, vacating his death sentence and a declaration that he is ineligible to receive the death penalty because he suffers from Intellectual Disability. Should he be unsuccessful in that case because he does not suffer from Intellectual Disability, then his prior lawyers cannot be found ineffective for failing to discover or present evidence of such a disability. The same reasoning applies to the Statute of Limitations and Equitable Tolling Issues. As such, this Court declines to alter or amend its ruling.

4. To the extent Applicant also claims incompetency may have hindered the presentation of claims in the prior PCR action, (Rule 59 Motion, p. 8), this Court rejects the argument on the facts of record. Applicant asserted incompetency in the prior PCR action and Judge Cothran suspended the proceedings to ensure that Applicant was competent to assist his PCR counsel. Dr. Donna Schwartz-Watts (now Maddox), a seasoned forensic psychiatrist, closely monitored and worked with Applicant to ensure his competency for the proceedings. (See, for example, PCR Appeal Appendix, pp. 1537, 1540-1550, 1566-1570). Applicant has failed to produce any evidence to the contrary either in the response in opposition to the motion to dismiss, the argument presented at the June 21, 2016 hearing, or the argument presented at the August 23, 2016 hearing. As such, this Court declines to alter or amend its ruling.

5. Applicant concedes that *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309 (2012), does not provide an exception to the State’s procedural rules. (Rule 59 Motion, p. 10). However, he argues that the concept which flows from that case, *i.e.*, allowing a federal court to consider

ineffective assistance of trial counsel claims "in the first instance," is incentive for this Court to disregard the procedural bars as applied. *Id.* This Court finds no cause to disregard the procedural bars. The federal habeas proceedings will continue regardless of the state actions.² Further, there is no cause to do damage to the State's procedural limitations in an effort to circumvent review in federal court. Under that logic, there should be no successive application bar or limitations period which is plainly not the case. Regardless, the application of *Martinez* is for the federal court. As such, this Court declines to alter or amend its ruling.

6. Applicant also asks the Court to consider there is "no prejudice" to the State in disregarding the procedural bars at issue and allowing the claims to be heard as the State waived the exhaustion requirement in federal court which would have avoided a procedural bar in that forum. (Rule 59 Motion, pp. 11-12). Applicant, however, continued with his desire to return to state court in the federal action, relying on this Court's previous determination that the separate successive action, 2016-CP-43-828, could continue.³ The federal court, noting Applicant's

² This Court acknowledges Applicant's present PCR counsel's assertion made at the August 23, 2016 hearing that all state and federal actions will "go away" if the State will offer a life sentence. This Court does not find that assertion persuasive as the federal action contests the plea itself, not just the sentence. Additionally, those claims, and potentially others, may still be addressed in future litigation. *See, for example, Sanders v. State*, 412 S.C. 611, 617, 773 S.E.2d 580, 583 (2015) (while "recognize[ing] the value in allowing defendants to waive certain rights in exchange for concessions by the State," finding "a rule in which a defendant is precluded from challenging the very advice he received in agreeing to that waiver" was not acceptable). At any rate, this Court makes the decision on the record presented.

³ As Respondent correctly pointed out at the August 23, 2016, hearing, Respondent has argued and preserved their position that the separate action is also barred as improperly successive and untimely, but Respondent is unable to seek to alter or amend the ruling and/or seek an appeal as the issue is not dispositive to the action. This Court recognizes and fully agrees that some interlocutory appeals may be wise to avoid continuing litigation that may ultimately be rendered a nullity (and is cognizant of circumstances where that has happened); however, our state appellate structure rarely allows such action. It is this Court's hope, however, that the litigation will be expedited and not cause exceptional delay in either relief, or, in the absence of relief, the prompt return to federal court.

objection, declined the offer of waiver and granted Applicant's motion to stay. (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, filed in this action on July 29, 2016). In other words, there was an opportunity to go forward in federal court which Applicant argued should be rejected, and it was. Any prejudice to him is of his own making. This Court, much like Respondent in the federal action,⁴ recognizes that there is conflict between the treatment of Applicant's successive applications, but this Court has considered the separately filed actions independently, and has issued Orders based on its assessment of each action independently. This Court declines to alter or amend its ruling.

7. Lastly, this Court finds, for all the reasons set out above – particularly as to the dispositive nature of the surviving action as to whether any related ineffective assistance claims would be meritorious if heard – there are sufficient distinctions between this case and the *Robertson*-type cases to deny the request to stay these proceedings pending a ruling in that case. See *James D. Robertson v. State*, Appellate Case No. 2012-205909 (argued October 8, 2015). This Court declines to alter or amend its ruling.

8. Upon consideration of the arguments presented,⁵ this Court reaffirms its rulings denying Applicant's motion to stay the proceedings and granting Respondent's motion to dismiss. The action is barred as successive and untimely.

⁴ The federal stay order recognizes Respondent's offer of waiver was based on the uncertainty in application of state procedural bar in capital actions, "and in an effort to promote timely adjudication and finality of the conviction while providing Petitioner opportunity to litigate his claim of ineligibility of a death sentence....". (July 26, 2016 Order in 9:16-cv-01423-DCN-BM, p. 7, filed in this action on July 29, 2016).

⁵ Applicant included other assertions in his introduction in the Rule 59 Motion; however, these assertions were not presented as argument and have neither been considered nor addressed herein. Further, Applicant footnotes in his opening paragraph that the Court's Order was drafted by the Attorney General's Office. (Rule 59 Motion, p. 1 n. 1). That is correct. It is also correct this Court carefully reviewed and considered every word of the Order apart from the caption.

CONCLUSION

THEREFORE, for all the reasons set out above, this Court DENIES Applicant's motion to alter or amend the Court's judgment.

IT IS SO ORDERED. \

s/
The Honorable Thomas W. Cooper, Jr.
South Carolina Circuit Court Judge

9/16/16, 2016.
Manning, South Carolina.

which this Court later amended. This Court has again considered its Order and again affirms its adoption of the proposed order. The findings and conclusion are the Court's findings and conclusions. Respondent correctly noted at the August 23, 2016 hearing that the Court asked for proposed orders from the State in this case and Applicant in the surviving case and that Applicant lodged no objection to this process at the time the Court requested the Orders. In fact, Applicant submitted his own order in the surviving action which this Court treated the same as the proposed order at issue here. Further, each proposed order was based on the Court's ruling announced at the conclusion of the June 21, 2016 hearing. At any rate, this Court is cognizant of the preference announced in *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) that PCR judges "draft their own findings of facts and conclusions of law in death penalty case," and is equally aware of the fact that failure to do so is not *per se* error. This Court notes our Supreme Court, while announcing the preference in *Hall*, simultaneously acknowledged "that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." 360 S.C. at 364, 6601 S.E.2d at 341. What is at issue is whether the PCR judge actually considered and accepted the proposed findings and conclusions as his own. This is shown by a judge's adequate review of the proposed language before its adoption. *Id.* This Court made a detailed and careful review of each finding and conclusion in the proposed order language and the Order is, and should be considered without question, the Court's order in this matter. This Court makes these findings should the issue later arise. However, Applicant made no argument to the contrary either in his Rule 59 motion or in argument at the August 23, 2016 hearing.



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State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

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September 25, 2019

Via Email and U.S. Mail Delivery

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RE: *Woods v. State* (2018-CP-14-00382)

Dear Attorneys:

Please find enclosed a copy of the Form 4 Order denying the applicant's Motion to Alter or Amend Judgment in the above referenced case.

Under copy of this letter, the original Form 4 Order is forwarded to the Clerk of Court for filing.

With kindest regards, I remain

Very truly yours,

Benjamin H. Culbertson

BHC/bhc

pc: Hon. Beulah G. Roberts
Clarendon County Clerk of Court

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018-CP-14-00382

2018 OCT 1 AM 10:50
Seal: Robert H. Culbertson - Clarendon

Anthony Woods, #06023

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Applicant's Motion to Alter or Amend Judgment is DENIED.
(This motion is decided on briefs without oral arguments.)

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

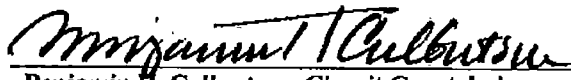
Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A
If applicable, describe the property, including tax map information and address, referenced in the order:		

e judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details. E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


Benjamin H. Culbertson, Circuit Court Judge

2148
Judge Code

Sept. 25, 2019
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



2018-CP-14-00382
CASE NO. 2018-CP-14-00382

State of South Carolina
The Circuit Court of the Fifteenth Judicial Circuit

Benjamin H. Culbertson
Resident Circuit Judge

P. O. Box 479 (zip code 29442)
401 Cleland St. (zip code 29440)
Georgetown, South Carolina
Telephone: (843) 545-3030
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Email: bculbertson@sccourts.org

September 25, 2019

The Honorable Daniel E. Shearouse
Clerk of Court, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

Tonnya K. Kohn, Director
Court Administration, S.C. Judicial Department
1220 Senate St., Suite 200
Columbia, SC 29201-3739

RE: *Anthony Woods, #06023 v. State of South Carolina*
Case Number: 2018-CP-14-00382

Dear Ms. Kohn and Mr. Shearouse:

Pursuant to the Supreme Court order dated 11/8/2018 regarding the above referenced PCR action, I provide the following status of this case:

- 11/8/2018: This case was assigned to the undersigned judge by Order of the South Carolina Supreme Court dated 11/8/2018.
- 11/29/2018: Supreme Court issues order allowing for appointment of counsel for Applicant.
- 12/4/2018: Applicant submits Motion for Appointment of Counsel.
- 12/6/2018: Respondent submits Return and Motion to Dismiss to undersigned judge.
- 2/4/2019: Attorneys Emily C. Paavola and Lindsey S. Vann are appointed attorneys for the Applicant.

90:5471 100510Z

2/7/2019: A formal hearing of Respondent's Motion to Dismiss is held.

2/19/2019: Applicant submits Response in Opposition to Respondent's Motion to Dismiss.

6/3/2019: State's Motion to Dismiss is granted.

6/11/2019: Applicant files Motion to Alter or Amend Judgment.

9/25/2019: Applicant's Motion to Alter or Amend Judgment is denied.

With kindest regards, I remain

Very truly yours,

Very truly yours,
Benjamin H. Culbertson
 Benjamin H. Culbertson

BHC/bhc

pc: Hon. Beulah G. Roberts, Clarendon County Clerk of Court
Emily C. Paavola, Esquire
Lindsey S. Vann, Esquire
W. Edgar Salter, Sr. Assistant Attorney General
Joseph Maye, Asst. Attorney General

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON)	2018-CP-14-00382
Anthony Woods,	)
	)
Plaintiff,	) Transcript of Record
	)
vs.	) February 7, 2019
	)
State of South Carolina,	)
	)
Defendant.	)

B E F O R E:

Honorable Benjamin H. Culbertson
Georgetown County Courthouse
Georgetown, South Carolina

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

Emily C. Paavola, Esquire
Lindsey Sterling Vann, Esquire
Attorneys for Plaintiff

William E. Salter, III, Esquire
W. Joseph Maye, Esquire
Attorneys for Defendant

Grace L. Hurley, CVR-CM-M
Circuit Court Reporter

1 Applicant's Exhibits

2 A-1 Declaration of Aly Hamby

3 A-2 Declaration of Dr. Susan Knight

4 A-3 Declaration of Daniel H. Grant

5 A-4 Declaration of Caroline Everington

6 A-5 Declaration of Jan Vogelsang

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1 (On the record, February 7, 2019.)

2 THE COURT: All right. This is 2018-CP-14-00382, Anthony
3 Woods versus State of South Carolina. The matter is before
4 the Court on a motion to dismiss. If I could get all
5 attorneys to please give the court reporter your name and who
6 you represent.

7 MR. SALTER: I am Senior Assistant Attorney General Ed
8 Salter. I represent the Respondent, the State of South
9 Carolina.

10 THE COURT: All right.

11 MR. MAYE: Assistant Attorney General Joseph Maye for
12 Respondent.

13 THE COURT: Could you spell your last name, please?

14 MR. MAYE: Sure. M-A-Y-E.

15 THE COURT: I'm sorry?

16 MR. MAYE: M-A-Y-E, Maye.

17 THE COURT: Okay. Thank you. Anyone -- go ahead.

18 MS. PAAVOLA: Good morning, Your Honor. I'm Emily
19 Paavola. It's P-A-A-V-O-L-A, and I'm here on behalf of Mr.
20 Woods.

21 THE COURT: All right.

22 MS. VANN: My name is Lindsey Vann. Vann is V-A-N-N, and
23 I am also here on behalf of Mr. Woods.

24 THE COURT: All right. All right. Mr. Salter, Mr. Maye,
25 who wants to argue on behalf of the State?

1 MR. SALTER: I will, Your Honor.

2 THE COURT: All right.

3 MR. SALTER: Thank you. May it please the Court, the
4 State has moved to dismiss the 2018 PCR application by
5 Clarendon County death row inmate Anthony Woods because his
6 application is time-barred under the statute of limitations
7 and is successive to a previously filed PCR application which
8 went, went the distance, if you will, and the State Supreme
9 Court ultimately denying certiorari after he lost in a PCR
10 court. We also assert that the ineffective assistance of
11 counsel claim is barred by the doctrine of res judicata and
12 that his freestanding claim of intellectual disability is not
13 properly before the post-conviction relief court because it's
14 beyond the statutory authority of the court to grant such a
15 claim since it could have been raised at trial and on appeal.

16 Procedurally, it's a rather complicated procedure --
17 procedural history. The Clarendon County jury indicted Woods
18 in January 2004 for murder, criminal sexual conduct in the
19 first degree and burglary in the first degree, and these
20 charges all stem from the June 2nd, 2003 murder of Joanne
21 Dubose in her Clarendon County home. The State timely served
22 both a notice of intent to seek the death penalty and a notice
23 of the statutory aggravating circumstances. Jim Hoffmeyer,
24 Rick Hoefer represented Mr. Woods at trial. Following an
25 original jury trial that ended in a mistrial, he received a

1 jury trial on November 27th through December 8th of 2006, the
2 jury ultimately convicting him of the charges of murder,
3 criminal sexual conduct in the first degree and burglary in
4 the first degree.

5 Following a sentencing hearing, the jury found the
6 aggravating circumstances of burglary and criminal sexual
7 conduct and recommended a sentence of death. Judge Few, now
8 Justice Few, imposed the death sentence for murder. He
9 imposed consecutive sentences of 30 years imprisonment for
10 criminal sexual conduct in the first degree and life without
11 parole for burglary in the first degree. There was an appeal
12 from the conviction and sentence, but the South Carolina
13 Supreme Court affirmed on March 30, 2009. The Supreme Court
14 thereafter granted Woods a stay of execution so that he could
15 pursue his post-conviction relief remedies, and it appointed
16 the Honorable George C. James, Jr., who is now Justice James,
17 to preside over the case. Melissa Armstrong and Robert Kilgo
18 represented Mr. Woods at the PCR hearing, and of importance to
19 the current motion, know that ground C of Woods May 1st, 2012
20 amended application was that counsel failed to conduct a
21 reasonable investigation into Appellant's cognitive and
22 adaptive functioning and history resulting in the failure to
23 raise the issue of Appellant's mental retardation. This claim
24 was subsequently waived, however, on the record at the PCR
25 hearings which were held on January 7th through 10th and 14th

1 through 15th of 2014. Judge James ultimately denied relief in
2 an order that was filed on May the 6th of 2015. Woods appealed
3 and filed a petition for writ of certiorari. The South
4 Carolina Supreme Court, however, filed an order denying
5 certiorari on December 13th, 2017, thereafter sent the
6 remittitur to the Clarendon County Clerk of Court.

7 Woods then went to federal court where he obtained a stay
8 of execution, and he currently has a petition for writ of
9 habeas corpus pending in the United States District Court for
10 the District of South Carolina where he's being represented by
11 the same attorneys who represent him today.

12 Among the issues he raised in federal court is his ground
13 four which asserts that his death sentence is unconstitutional
14 because he is intellectually disabled and ineligible for the
15 sentence of death under Atkins v. Virginia, which is cited as
16 536 U.S. 304 [sic]. It's a 2002 case. This ground also
17 asserts that he was denied effective assistance of counsel
18 because trial counsel failed to raise the claim.

19 Over the State's objection, that action in federal court
20 has been stayed so that it can come back to the state court
21 and attempt to raise these claims, which are the same claims
22 are being now raised in his 2018 application.

23 The State takes the position, first, that the entire
24 application must be dismissed because it's beyond the statute,
25 excuse me, the statute of limitations and 17 -- 17-27-45(a).

1 That provision requires that any action brought under the
2 Post-Conviction Relief Act must be brought within one year of
3 either the date of conviction, the date the remittitur is sent
4 following an appeal or the last date of any action on the
5 case. Here the controlling date is the date of the remittitur
6 which is, I believe, May 13th, 2009. So he had one year after
7 May 13th, 2009, to file an application. The current
8 application was not filed until 2018, well over nine years
9 after the remittitur went down. The provisions in 17-27-45(B)
10 and (C) do not apply because his claim of intellectual
11 disability could have been brought at trial because Atkins v.
12 Virginia was decided four years before his trial and his --
13 obviously his ineffective assistance of counsel claim was
14 raised and abandoned. We also take the position that the
15 application must be dismissed as impermissibly successive to
16 the 2009 application. 17-27-90 requires all grounds for
17 relief available to an Applicant under this chapter must be
18 raised in its original supplemental or amended application.
19 In Aice v. State, and Madam Court Reporter, Aice is spelled A-
20 I-C-E, in Aice v. State the South Carolina Supreme Court
21 stated that 17-27-90 forbids a successive PCR application
22 unless an Applicant can point to a sufficient reason why the
23 new grounds for relief, excuse me, that he asserts were not
24 raised or were not raised properly. The court then explained
25 and it had defined the phrase sufficient reason very narrowly,

1 and it, it held so long as it was possible to raise the claim
2 in its original application the Applicant could not raise it
3 in a subsequent or successive application. While Aice
4 recognized that there are exceptions to this rule, it refused
5 to recognize ineffective assistance of PCR counsel as a per se
6 reason for allowing a successive application. Recently in
7 Robertson v. State, which is 795 S.E.2d 29, 2016, the court
8 reaffirmed this holding in Aice. Although the court in
9 Robertson created an exception that is inapplicable here and
10 that being that the failure of PCR counsel to be statutorily
11 qualified to represent a capital PCR applicant under 17-27-
12 160(B), Robertson rejected ineffective assistance of PCR
13 counsel generally as permitting a successive application.

14 As I noted, the allegations of ineffective assistance of
15 counsel, which is the only claim we submit is properly raised
16 in post-conviction relief was raised in the original PCR
17 proceedings but was abandoned on the record by the PCR
18 attorneys who, who then placed into the record the information
19 that they relied upon in making their determination to drop
20 the claim, and that's at pages 4816 through 27 of the
21 appendix.

22 So although they've styled this as a claim of
23 ineffective, excuse me, ineffective assistance of counsel,
24 what he's really complaining about is ineffective assistance
25 of PCR counsel because they did have the claim. They did

1 initially raise it and then abandoned it because they didn't
2 think that it had merit. The best his current attorneys can
3 say is that they would have handled the case differently, you
4 know, with the benefit of hindsight and knowing that the
5 application that was raised was unsuccessful. Yet this is not
6 sufficient reason to show either deficient performance or
7 prejudice under Strickland v. Washington, and contrary to what
8 they may assert, it is our position that the original PCR
9 counsel's decision to abandon their ineffectiveness claim was
10 not surprising. It was justified. First, they had a report
11 from DDSN that said he's not intellectually disabled. They
12 had their own neuropsychologist who testified that Woods had
13 borderline intellectual functioning. In the testimony of
14 trial counsel's psychiatrist, Dr. Harold Morgan, that he had
15 borderline intellectual functioning, and there was a pretrial
16 competency evaluation by DMH which did psychological testing
17 and reached the same conclusion. So even if we got to the
18 merits of all this, even if we cut through all my procedural
19 bars and we get to the merits, they're not going to be able to
20 prevail because both original trial counsel and PCR counsel
21 were reasonable in their performance. They had a right to
22 rely upon the information provided to them by their experts,
23 and you're not entitled to relief under Strickland v.
24 Washington, excuse me, under Strickland v. Washington based on
25 ineffective assistance of an expert as opposed to ineffective

1 assistance of the attorney.

2 Although we have taken the position that his claims are
3 procedurally default in federal court, Woods still has the
4 opportunity to raise his claims in the federal habeas
5 proceedings under the United States Supreme Court's decision
6 in Martinez v. Ryan which is 566 U.S. 1. It's a 2012 case.
7 Martinez would allow him to do this even though the claims are
8 barred, otherwise barred provided he can show that the
9 underlying claim of ineffective assistance of trial counsel is
10 substantial, that is that it has merit, and he then has to
11 show that original PCR counsel was ineffective for not raising
12 it. Counsel has provided this Court with a number of
13 documents Tuesday night that have been -- previously been
14 provided in the federal proceedings. They're further along in
15 federal court, and we would urge this Court to allow them to
16 litigate the matter there. They obviously don't want to have
17 to meet their burden under Martinez, but I submit to you that
18 coming back here is not the answer to that problem for them.

19 With respect to the freestanding claim of intellectual
20 disability under Atkins v. Virginia, again, we submit that
21 it's not properly before the Court. 17-27-20(B) provides that
22 this remedy is not a substitute for nor does it affect any
23 remedy incident to the proceedings in the trial court or of
24 direct review of the sentence or conviction. After Atkins the
25 South Carolina Supreme Court set forth the procedure to be

1 followed for claims where there is a claim of intellectual
2 disability, and they did so in Franklin v. Maynard, which is
3 588 S.E.2d 604, 2003. Franklin held that an Eighth Amendment
4 claim that a death sentence would be cruel and unusual
5 punishment because the Defendant is intellectually disabled
6 can only properly be raised before the trial court imposed it.
7 Franklin cases, excuse -- Woods' November and December 2006
8 trial was almost three full years after Franklin. So he can't
9 raise the freestanding claim now.

10 The other, the other thing is res judicata would bar the
11 ineffective assistance of counsel claim. In Plum Creek
12 Development Corporation versus City of Conway, our Supreme
13 Court explained that under the doctrine of res judicata a
14 litigant is barred from raising any issues which were
15 adjudicated in the former suit and any issues which might have
16 been raised in the former suit. Obviously, this was raised.
17 It was then abandoned on the record. So therefore, res
18 judicata precludes him from going forward on the claim.
19 Additionally, we submit that the 2018 application frustrates
20 the principle of finality which is very important in criminal
21 litigation. Both the United States Supreme Court and the
22 South Carolina Supreme Court have emphasized a need and a
23 necessity for finality of litigation in criminal cases. In
24 fact, in refusing to recognize ineffective assistance of PCR
25 counsel as a per se reason for permitting a successive action,

1 our court explained in Aice finality must be realized at some
2 point in order to achieve a semblance of effectiveness in
3 dispensing justice. At some juncture judicial review must
4 stop, with only the very rarest of exceptions, when the system
5 has simply failed a Defendant and where to continue the
6 Defendant's imprisonment without review would amount to gross
7 miscarriage of justice. We can envision successive PCR
8 applications filed for the purpose of delaying a just
9 execution in a capital case, as well as other abuses of the
10 reviewing system Aice urges that we establish.

11 It is our position that he's had his full bite at the
12 apple which is what Aice requires. He's had that. He's gone
13 through all the State remedies that he has, that properly has
14 and should not be allowed to come back into the court.

15 THE COURT: All right. Thank you.

16 MR. SALTER: Thank you.

17 THE COURT: Ms. Paavola.

18 MS. PAAVOLA: Thank you, Your Honor. May it please the
19 Court?

20 Your Honor, our first position that I want to explain is
21 that there is no reason to treat this case any differently
22 than the several other courts that have considered this same
23 issue in South Carolina. There are at least four other
24 capital cases in this or a similar procedure posture that I'm
25 aware of, and none of those courts have granted the State's

1 motion to dismiss. I would like, if I could, to hand up some
2 copies of those orders for Your Honor.

3 THE COURT: I mean, are they circuit court orders or
4 appellate orders?

5 MS. PAAVOLA: Yes.

6 THE COURT: They're circuit court orders?

7 MS. PAAVOLA: Yes, Your Honor.

8 THE COURT: Let me ask you, when they decided the motion
9 to dismiss, was that pre-Robinson [sic] or post-Robertson?

10 MS. PAAVOLA: Some are before Robertson and some are
11 after, I believe.

12 THE COURT: Okay. Well, let me see the ones that are
13 after Robertson because that's the one I've got a real --

14 MS. PAAVOLA: Let me check, Your Honor.

15 THE COURT: -- that's what I've got a real --

16 MS. PAAVOLA: Perhaps maybe I should just go through
17 them.

18 THE COURT: Okay.

19 MS. PAAVOLA: And then I can hand them up after, if you
20 wish.

21 THE COURT: All right.

22 MS. PAAVOLA: So the first case I'd like to discuss is
23 Eddie Elmore. Mr. Elmore raised an Atkins claim in a second
24 PCR application, which was clearly untimely. The State moved
25 to dismiss that petition as untimely and also they argued it

1 should be barred by issue preclusion because Mr. Elmore's own
2 experts had testified in his first PCR action that he was not
3 intellectually disabled, and so they argued he should not be
4 allowed to bring another action raising that issue. Judge
5 Mark Hayes denied the State's motion to dismiss in a written
6 order, which I have, which is, of course, pre-Robertson
7 because I believe this was 2007, and he ultimately granted
8 Atkins relief on the merits to Mr. Elmore.

9 The next case that address this issue is Stephen Corey
10 Bryant.

11 THE COURT: Well, let me ask you this, was his -- Judge
12 Hayes' decision, is it on appeal? Has it been appealed? Was
13 it affirmed?

14 MS. PAAVOLA: The State decided not to appeal that issue
15 --

16 THE COURT: Okay.

17 MS. PAAVOLA: -- after their relief was granted on the
18 Atkins claim.

19 THE COURT: All right. Go ahead.

20 MS. PAAVOLA: Stephen Corey Bryant also filed a second
21 PCR application in the exact same circumstances that we have
22 here. He discovered evidence to support a potential Atkins
23 claim during his federal habeas proceedings. They then filed
24 a second PCR application raising both a freestanding Atkins
25 claim as we have done here, as well as a claim that trial

1 counsel was ineffective for failing to raise the Atkins claim
2 at trial, and those are, of course, the two claims that we
3 have raised. The State moved to dismiss that application on
4 all of the grounds that they have argued here, that it was
5 successive, it was untimely and also that the freestanding
6 claim is not cognizable in post-conviction. Judge Thomas
7 Cooper issued a written order, which I brought a copy of.
8 It's dated 2016, and he specifically found that the
9 freestanding Atkins claims should go forward because it is not
10 subject to waiver or default. So we believe that is the
11 correct way to think about this. We have asserted ineffective
12 assistance of counsel, trial counsel claim as well if the
13 Court finds it is necessary to address that to reach the
14 underlying merits of the Atkins claim, but we actually believe
15 that in Bryant that is the correct way to think about this,
16 that the argument that we're making is for succession -- to
17 overcome the successor bar is primarily that you cannot waive
18 a claim that the Eighth Amendment bars an execution of a
19 person who is intellectually disabled, and so we should be
20 allowed to address that issue. It should be an exception to
21 the successor bar as these other courts have found. So that's
22 Corey Bryant.

23 THE COURT: Now, was that pre-Robertson?

24 MS. PAAVOLA: Robertson was decided in December of 2016
25 and the Bryant order is dated July of 2016.

1 THE COURT: Okay.

2 MS. PAAVOLA: Although to be clear Robertson addresses a
3 separate exception to the successor bar which is when post-
4 conviction counsel is not statutorily qualified, and we have
5 not made that argument here.

6 THE COURT: Yeah. And I -- but I was thinking Robertson
7 said that that was the only exception

8 MS. PAAVOLA: No. I don't think that's correct. There
9 have been a number of other exceptions that the Supreme Court
10 has carved out, including other procedural irregularities, a
11 failure to have a direct appeal. Williams was allowed to file
12 a second PCR application because his initial PCR counsel was
13 ineffective and that was allowed to go forward so --

14 THE COURT: That was after Robertson?

15 MS. PAAVOLA: That's well before Robertson, Your Honor.

16 THE COURT: Yeah. That's what I'm talking about is since
17 December of 2016 is there any PCR that has been allowed to go
18 forward when the allegation is ineffective assistance of
19 counsel that was waived in a prior hearing, that was waived in
20 a prior PCR?

21 MS. PAAVOLA: Our allegation is not ineffective
22 assistance of counsel. Our allegation is primarily that Mr.
23 Woods is not subject to the death penalty because he is
24 intellectually disabled, and --

25 THE COURT: Okay.

1 MS. PAAVOLA: -- and there are these, these cases that
2 I'm discussing have all allowed those claims to go forward.
3 It is true these two are both before Robertson, but I think
4 the Robertson opinion and other opinions of the South Carolina
5 Supreme Court have made clear that there have been a number of
6 exceptions carved out, that the successor bar is not absolute,
7 and I think certainly if not having PCR counsel who'd meet the
8 statutory qualifications counts as an exception, then the fact
9 that you are intellectually disabled and the Eighth Amendment
10 bars your execution certainly should be an exception as well.
11 That is our position.

12 THE COURT: Okay. But that position was initially raised
13 but then waived. You're just saying that they can't waive
14 that in the --

15 MS. PAAVOLA: Well, it was raised in the post-conviction
16 as an allegation, but they withdrew this claim we believe
17 unreasonably, and I'd be happy to discuss why we think that,
18 and therefore, it was never adjudicated. So Mr. Salter has
19 overlooked a very important piece of their doctrine of res
20 judicata which requires an adjudication. They asserted this
21 claim, but they withdrew it before there was ever any
22 evidentiary hearing or adjudication on the merits, and
23 therefore, no state court in South Carolina has ever heard the
24 claim that Mr. Woods is a person with intellectual disability.

25 THE COURT: All right. Go ahead.

1 MS. PAAVOLA: The third case I would like to mention is
2 Bayan Aleksey. Mr. Aleksey also discovered evidence of his
3 intellectual disability after his federal habeas petition had
4 been filed as we have here. He again filed a second PCR
5 application raising the Atkins claim. The State moved to
6 dismiss that application making the same arguments they've
7 made here. Judge Early has not granted their motion to
8 dismiss. He is holding it in abeyance and has ordered that
9 Mr. Aleksey be evaluated by the Department of Disabilities and
10 Special Needs to determine if he does, in fact, meet the
11 criteria for a diagnosis of intellectual disability, and it's
12 my understanding that that case is proceeding under a
13 scheduling order toward an evidentiary hearing.

14 The fourth case that I'd like to mention I don't have an
15 order from yet is Bobby Stone. Again, these are exact same
16 circumstances. The evidence in support of an Atkins claim was
17 discovered in federal habeas. A second PCR application was
18 filed. The State filed the same motion to dismiss. We had
19 arguments on that motion to dismiss before Judge Michael
20 Nettles on January 25th. Judge Nettles intends to issue a
21 written order, it's my understanding, tomorrow on the State's
22 motion to dismiss. I understand that I am a biased observer,
23 but based on my observation of those arguments and the Judge's
24 request that we discuss scheduling, I believe he intends to
25 deny the State's motion to dismiss, but I would certainly be

1 happy to update you when we receive a written order from him.
2 It is, therefore, our position that there is no meaningful
3 distinction between this case and Elmore, Aleksey or Bryant,
4 and Mr. Woods should be permitted to litigate his Atkins
5 claim. Would you like me to hand up any of these orders?

6 THE COURT: No. That's fine. I can, I can pull them.

7 MS. PAAVOLA: Next I would just like to discuss for a few
8 minutes the standard of review for this Court's decision on
9 the State's motion to dismiss. I'm referring to Robertson,
10 which 418 S.C. 505, and I just wanted to go over briefly that
11 standard. Robertson is the most recent decision that we know
12 of discussing a motion to dismiss on a second in time PCR
13 application as we have here, and so I think it's particularly
14 instructive. In Robertson the court said that summary
15 dismissal of a PCR application without a hearing is
16 appropriate only if it is apparent on the face of the
17 application that there is no need for a hearing and the
18 Applicant is not entitled to relief. In considering this
19 motion, of course, the Court must assume facts presented by
20 the Applicant as true and view them in the light most
21 favorable to the Applicant, and where the Applicant alleges
22 facts that would establish an exception to either the statute
23 of limitations or the prohibition against successive PCR
24 applications and those facts are not conclusively refuted by
25 the record, a question of fact is raised which can only be

1 resolved by a hearing, and we believe that is the situation
2 here because we have asserted a number of facts which cannot
3 be refuted by the record, that Mr. Woods is, in fact, a person
4 who is intellectually disabled.

5 THE COURT: But how is that not an -- is that an
6 exception to the statute of limitations and an exception to
7 the successive?

8 MS. PAAVOLA: Yes. It is our position that it is and
9 that these other four courts who have addressed this issue
10 agree.

11 THE COURT: Okay. So how -- what do they list as the
12 exception? Do they rely on any appellate decision that
13 outlines intellectual disability as an exception to the
14 statute of limitations in filing a PCR?

15 MS. PAAVOLA: There is no appellate decision that says
16 intellectual disability is an exception to the successor bar.

17 THE COURT: Okay. So what are they relying on when they
18 issue their order that says it's an exception?

19 MS. PAAVOLA: Well, the Elmore order references the fact
20 simply that the Eighth Amendment says we can't execute people
21 who are intellectually disabled, and so even though the State
22 has procedural arguments for why we shouldn't hear that claim,
23 the court is simply not going to prevent them from -- this
24 claim from being litigated because it's, it's a categorical
25 bar to the death penalty. It's hard to understand how the

1 State's position could be even if a person is in fact
2 categorically exempt under the Constitution, we should
3 nevertheless be permitted to execute them because of a
4 procedural rule, and that's essentially my reading of the
5 Elmore order, but I would be happy to hand it to you if you
6 want to take a look, and then the Bryant opinion similarly
7 notes that there have been a number of exceptions to the
8 successor bar and that it's simply not an issue that can be
9 subject to procedural default if you are, in fact,
10 categorically exempt from the death penalty, and it references
11 the fact that Mr. Elmore was allowed to proceed over
12 procedural issues and simply says --

13 THE COURT: Yeah. But those all predate Robertson.

14 MS. PAAVOLA: Yes.

15 THE COURT: Okay.

16 MS. PAAVOLA: But I did not read Robertson --

17 THE COURT: So, I mean, that's, that's, that's where I'm
18 -- I need you to explain how those judges made their ruling in
19 light of Robertson.

20 MS. PAAVOLA: I don't read Robertson as inconsistent with
21 this argument in any way. Robertson does not say as far as I
22 am aware that the only exception to the successor bar is the
23 disqualification of PCR counsel. Robertson specifically notes
24 that it's not overruling Aice which says you generally cannot
25 bring a second PCR application. That is true. However, Aice

1 itself says there are a number of exceptions to that rule. It
2 is not a hard and fast rule, and then Robertson acknowledges
3 that prior to Robertson we had not had this argument that
4 having counsel who's not qualified should be an exception as
5 well, but because that rule is itself not hard and fast, and
6 there are a number of exceptions, the qualification issue
7 should be one of them, and so we are simply saying that it's a
8 natural extension, it's consistent with, there's nothing
9 inconsistent with Robertson in arguing for something else to
10 be a sufficient reason to be an exception to the successor
11 bar.

12 THE COURT: All right. Go ahead.

13 MS. PAAVOLA: So our PCR application, as I said, contains
14 two grounds for relief. One is the freestanding Atkins claim.
15 The second is that trial counsel is ineffective for not
16 raising the Atkins claim. Trial counsel were aware at the
17 time of his trial in 2006, which clearly postdates Atkins,
18 that Mr. Woods had a full scale IQ score of 73. The
19 definition of intellectual disability requires a finding of
20 three elements. The first element is sub-average intellectual
21 functioning. That according to precedence from the United
22 States Supreme Court means an IQ of approximately 75 or less
23 and so Mr. Woods had at the time of trial evidence of an IQ
24 score of 73. His reading skills were measured at a third
25 grade reading level. Despite these facts, his trial attorneys

1 did not retain any experts in intellectual disability as far
2 as we can tell from our investigation and review of their
3 file. They did not do any investigation relevant to an Atkins
4 claim and they certainly did not raise an Atkins claim at any
5 point at trial, and therefore, of course, no such claim could
6 have been raised on direct appeal as well.

7 Next, Mr. Woods' PCR attorneys did initially allege an
8 Atkins claim. They hired an expert, Dr. David Price, to
9 conduct an IQ -- a second IQ evaluation of Mr. Woods. Dr.
10 Price gave Mr. Woods an IQ test on which he scored a 72. Less
11 than 30 days after that, however, the Department of
12 Disabilities and Special Needs reported that they had tested
13 Mr. Woods again and that they, they reported his IQ as 81.
14 Based on that report, it's our understanding PCR counsel
15 withdrew the claim with no additional investigation. As I
16 said, because they withdrew it it was never adjudicated, and
17 therefore, res judicata does not apply.

18 Our investigation indicates that PCR counsels' decision
19 to withdraw that claim was unreasonable for a number of
20 reasons. There are a number of things evident from the face
21 of the DDSN report that they should have investigated that are
22 clearly stated there in the report, and I'd like to just
23 briefly list those.

24 First, the DDSN report, this information that I'm going
25 through is referenced in all of the affidavits or declarations

1 that we sent by email. Would you like me to mark any of those
2 for purposes of this hearing?

3 THE COURT: If you want to put them in the record. I've
4 got them. I reviewed them. So whatever you want.

5 MS. PAAVOLA: If you don't mind --

6 THE COURT: All right.

7 MS. PAAVOLA: -- I would just hand up a copy to be
8 marked.

9 THE COURT: All right. Yeah. Let's put these as
10 Applicant's Exhibits -- what would it be -- One, Two.

11 MS. PAAVOLA: One, Two, Three and Four, Your Honor.

12 THE COURT: Okay.

13 (Whereupon, Applicant's Exhibits One through Five
14 admitted into evidence and appropriately marked.)

15 THE COURT: And that's what you emailed me?

16 MS. PAAVOLA: Yes, Your Honor.

17 THE COURT: Okay.

18 MS. PAAVOLA: All right. So first I would like to
19 discuss the DDSN report. The report was authorized by Dr. --
20 I mean, was authored by Dr. Gordon Brown, who was the examiner
21 at DDSN at the time who was assigned to do the Atkins
22 evaluations. Although Mr. Brown authored the report and
23 signed it, he did not actually do any testing of Mr. Woods.
24 Instead, the report says that testing was conducted by Dr.
25 Thomas Kirby. He is listed as a contract psychologist, but he

1 did not sign the report, and no further information was given
2 about Dr. Kirby. Our investigation indicates that Dr. Kirby
3 does not appear to be a licensed psychologist in South
4 Carolina or any other state that we can determine. That
5 information is referenced in the declaration of Aly Hamby,
6 which is marked as Applicant's Exhibit One. In addition to
7 that, Dr. Kirby apparently violated the instructions in the IQ
8 test examiners' manual by having Dr. Brown present during the
9 testing. The manual clearly states that you should not have a
10 third-party observer present during IQ testing, and there's a
11 large body of clinical literature that also advises and
12 explains why this is not an appropriate thing to do, and that
13 issue is discussed in much greater detail in both the
14 declaration of Dr. Susan Knight and the declaration of Dan
15 Grant and those are Applicant's Exhibits Two and Three.

16 In addition to that, the tests that Dr. Kirby gave to
17 Mr. Woods was a very old test. It's called the Stanford-
18 Binet. At the time it was administered, the norms that were
19 used to create that test were 10 to 11 years old. We know
20 from the clinical literature that as IQ tests age they tend to
21 give overinflated IQ test results, and so we believe the score
22 is artificially inflated for that reason and also because of
23 something that's called the practice effect, which is just
24 that if you give a person an IQ test many times close together
25 their IQ score will tend to become artificially inflated, not

1 because their IQ is actually increased but because they've had
2 recent chances to practice, and so because of that the
3 clinical literature specifically says you should not give a
4 person a second IQ test within a six to 12-month period of
5 time. In this case Dr. Kirby gave Mr. Woods a second IQ test
6 29 days after he had been tested by Dr. Price, and then
7 finally on the issue of prong one, which is the IQ prong, we
8 asked Dr. Susan Knight to evaluate Mr. Woods and give him
9 another IQ test, which she did in 2018, and his IQ score was
10 reported as a 66, and so we believe there is very strong
11 evidence to find that Mr. Woods meets prong one of the
12 definition for intellectual disability.

13 Prong two of the definition for intellectual disability
14 requires deficits in adaptive behavior. You have to have
15 significant deficits in one out of three skill areas. The
16 skill areas are social skills, practical skills and conceptual
17 skills. PCR counsel hired two additional experts who could
18 have assisted in the evaluation. In fact, some of them did
19 some things to assist in the evaluation of prong two, and
20 those people are Jan Vogelsang and Dr. Caroline Everington.
21 Their declarations are marked as Applicant's Exhibits Four and
22 Five. Jan Vogelsang was asked to look at Mr. Woods' social
23 history by PCR counsel. She has explained in her declaration
24 that she believed Mr. Woods was intellectually disabled from
25 very early on in her evaluation. She encouraged his attorneys

1 to pursue a claim that he was intellectually disabled. She
2 found him to be slow and had -- that he had difficulty
3 comprehending and responding to simple questions. She said
4 her interviews with his family members also revealed evidence
5 of adaptive deficits. She urged post-conviction counsel to
6 pursue the claim and even went so far as to give them a list
7 of evidence that she believed demonstrated deficits in
8 adaptive behavior. Our investigation indicates that PCR
9 counsel did not consult with Ms. Vogelsang. That's what she
10 says in her declaration when they decided to withdraw the
11 Atkins claim. She says in her declaration that had they done
12 so she would advised them not to do that and said that they
13 should have continued their investigation.

14 Dr. Caroline Everington was also retained by PCR counsel
15 to do formal assessments of prong two. So in addition to
16 records and family interviews and that sort of thing, there
17 are a number of tests that are designed to formally measure
18 adaptive behavior, and Dr. Everington is an expert in many --
19 in giving many of those tests, and in this case she
20 administered two tests to Mr. Woods and reported that both of
21 the scores fell within the intellectual disability range. She
22 also said her interview with Mr. Woods revealed many
23 indicators of intellectual disability. She noted that he had
24 a history of low skill laborer jobs that he obtained through
25 the help of other people rather than competing for those jobs

1 on the open market. She noted he never obtained a driver's
2 license. He was unable to look up a name in a phone book when
3 she examined him. He had difficulty with measurements, and
4 she likewise stated that PCR counsel did not ask for her
5 advice when they decided to abandon the claim. They actually
6 just stopped speaking to her according to her declaration.
7 She never heard back from them, but had they asked her she
8 would have advised them that the DDSN's reported score of 81
9 did not rule out intellectual disability, that they should
10 continue their investigation and that they should also closely
11 examine the reliability of that IQ score as we have done.

12 Finally, I would just like to mention that in addition to
13 these declarations we did get the assistance of a mitigation
14 investigator as part of the federal proceedings, and as a
15 result of that investigation we have collected additional
16 information that supports a diagnosis of intellectual
17 disability. According to our investigation Mr. Woods was slow
18 to reach a number of childhood milestones, including he was
19 slow to walk and talk as a child. He had -- he was unable to
20 learn to ride a bike until much later than children his own
21 age, and his family and friends described him as a child as
22 slow, gullible, passive and a follower and said he was not
23 able to understand things the way that other children his age
24 could, and these elements, of course, are related to both
25 adaptive behavior, but also the third prong of intellectual

1 disability which requires some evidence of onset during the
2 developmental period, and so his family members and friends
3 and teachers and other people have been interviewed give
4 information that's consistent with a finding on prong three.

5 The witnesses that we have spoken to also said he had
6 difficulty -- he had to had -- give -- be given simple
7 instructions repeatedly over and over in order to understand
8 what he was being asked to do. He was unable to play
9 childhood games as he couldn't understand the rules. He
10 consistently struggled academically. That is clearly evident
11 from his school records. He did not graduate from high
12 school. He failed multiple grades multiple times and was
13 ultimately given a certificate of attendance at age 21. The
14 witnesses said he was isolated and bullied, that other
15 children called him names like stupid. He had difficulty
16 making change and managing money. He had to ask other people
17 to hold money for him and they would distribute it to him in
18 small increments in order to help him manage his money. He
19 did not have a driver's license. He never lived independently
20 with any success for any period of time, and he never obtained
21 a job without substantial assistance from his family or
22 friends, and all of the jobs that he has had involve simple
23 tasks and unskilled labor. These are facts that we believe we
24 could prove if we were to have an evidentiary hearing. We
25 don't think there is any way that these can be refuted on the

1 record. We think it is appropriate for this Court to hold a
2 hearing to address the issue of whether Mr. Woods is, in fact,
3 intellectually disabled. Thank you.

4 THE COURT: Well, let me ask, what is the State and the
5 Court supposed to do when in a PCR action there is an
6 allegation of ineffective assistance of trial counsel because
7 they did not raise the issue of intellectual disability and
8 you get to the hearing and PCR counsel says, "We're
9 withdrawing that allegation?" What does the State and what
10 does the Court do because when we get to the trial of this
11 case what am I supposed to do when you say, "We're not going
12 to pursue that. We withdraw it", I allow you to do it, and
13 then he turns around a year from now files another PCR action
14 alleging intellectual disability and that it was non-waivable,
15 it couldn't be waived, it couldn't be withdrawn? I mean, what
16 does the Court and what does the State do when, when the
17 Applicant comes forward and says, "I don't want to pursue that
18 remedy"?

19 MS. PAAVOLA: Your Honor, I think that's very unlikely to
20 happen here as I've outlined. We believe this is a very
21 strong case of intellectual disability. I recognize that it
22 would have been ideal had his PCR attorneys not withdrawn that
23 claim on a very flimsy basis when there is a lot of strong
24 evidence in support of intellectual disability that clearly
25 should've been heard by a court in South Carolina. That is

1 why we are here, and that's our position, but I understand
2 your concern that there has to be an end at some point. I'm
3 simply saying that there are exceptions, and I certainly think
4 that if one exception is your PCR counsel didn't meet the
5 technical statutory criteria there must be an exception for
6 you are categorically exempt from the death penalty. Those to
7 me do not seem comparable. It seems clear that there must be
8 an exception for that.

9 THE COURT: Well, no, to me, PCR counsel, I mean, either
10 they have the requisite number of years of practice or they
11 have, you know, a license to practice law or all the statutory
12 requirements. I mean, that doesn't really require any fact-
13 finding by the Court or the State or, or the Applicant. It
14 either is there or it's not there. You either meet it or you
15 don't meet it. Here you've got conflicting experts, and it's
16 going to require a court determination just like any other PCR
17 action that deals with ineffective assistance of trial
18 counsel. Now, I understand your argument that he's
19 intellectually disabled, but that is still a factual
20 determination that's going to have to be made by the Court and
21 at this point I don't know to what extent the State would
22 challenge it, but it seems like it's a little bit more
23 conclusive when you deal with attorney qualifications for a
24 death penalty PCR versus intellectual disability.

25 MS. PAAVOLA: Well, it actually does require some fact-

1 finding to determine if PCR counsel was qualified. In fact,
2 we've had -- Ms. Vann had an evidentiary hearing solely on the
3 question of whether initial PCR counsel were qualified or not
4 qualified, and we had --

5 THE COURT: Well, what was the alleged disqualification?

6 MS. PAAVOLA: Well, the qualification requirements
7 require that you have attended at least 12 hours of CLE within
8 the past two years that are specifically related to capital
9 post-conviction practice and/or that you -- or, I'm sorry, or
10 that you have previously represented someone in state or
11 federal post-conviction in a capital case, and so, in both
12 Robertson and the Stanko cases the courts bifurcated the
13 proceedings. They scheduled in Robertson and held in Stanko
14 an evidentiary hearing solely on the question of was initial
15 PCR counsel qualified or not, and then when it was found that
16 they were not we are scheduling second evidentiary hearings to
17 address the merits of the claims that PCR counsel could have
18 or should have raised had they been properly qualified. So I
19 think the fact that the Supreme Court supports that very
20 extensive factual development is consistent with what we are
21 saying here, which is simply that there should be an
22 evidentiary hearing in any state court about whether Mr. Woods
23 is, in fact, intellectually disabled.

24 THE COURT: All right. So we get ready for the
25 evidentiary hearing and you say, "We don't want to go forward,

1 we're withdrawing that claim," what do I do?

2 MS. PAAVOLA: I really can't answer that other than to
3 say I think that's nearly impossible. It's not gonna' happen.

4 THE COURT: Well, I mean, if it becomes quite evident
5 that you're not going to prevail at trial and you realize
6 you're not going to prevail at trial and you know that you can
7 kick this can further down the road and create further delay
8 why wouldn't that be the thing to do?

9 MS. PAAVOLA: I, I can't give you a satisfactory answer
10 other than to tell you my purposes here are not to create
11 delay but rather simply to have a fair adjudication of Mr.
12 Woods' constitutional rights.

13 THE COURT: Okay. All right. Anything in reply?

14 MR. SALTER: Yes, sir, briefly. You know, in answer to
15 your question about what can the Court or the State do when an
16 Applicant represented by counsel has counsel make an on-the-
17 record waiver of a claim, there's nothing we can do. I can't
18 accuse counsel of being unethical without any basis for doing
19 so. If they make a good faith determination that they're not
20 going to prevail, as Your Honor just said, then that's their
21 obligation to do that, and that's, and that's -- we submit
22 that's what would happen, and to answer your question about
23 whether or not there's been relief on a case based on
24 ineffective assistance of counsel after Robertson, the
25 answer's no, and I need to kind of probably go back more into

1 what the Robertson case was about. Ms. Paavola was involved
2 in Robertson as well. The issue before the Supreme Court was
3 whether or not the United States Supreme Court's decision in
4 Martinez v. Ryan would allow for an ineffective assistance of
5 counsel claim in capital cases, and the court said no. They'd
6 already rejected the idea that, that it was -- Martinez
7 created a right for noncapital applicants in Kelly v. State.
8 There's an order out there, Kelly v. State that says that and
9 then in Robertson they said we're going to extend that rule to
10 capital cases.

11 Now, the four cases that more -- has cited, Edward Lee
12 Elmore, she's correct, we'd made a determination after Judge
13 Hayes found that Elmore was intellectually disabled, we made a
14 determination not to appeal the statute of limitations ruling.
15 Bayan Aleksey, that's just -- that is currently just being
16 investigated. Stephen Corey Bryant did go all the way to a
17 hearing, but at the hearing they not only didn't meet their
18 burden of proof but then after the hearing said, "Well, we
19 weren't even trying to do that. What we were trying to do is
20 show that he had fetal alcohol syndrome, not intellectual
21 disability." Now, the Stone case is under advisement, and in
22 all these cases we do not have -- the State has not had a
23 right, other than in Elmore, we haven't had a right to appeal.
24 There's nothing we can do about having, having to go forward.
25 We can't take an interlocutory appeal, and unless we get like

1 a writ of mandamus or some other extraordinary writ, there's
2 nothing we can do.

3 Now, she asserts that the circumstances here are the same
4 as in these other cases. They're not. Stone is perhaps the
5 closest. In Stone the PCR attorney, the original PCR
6 attorneys, including John Blume, who's a professor up at
7 Cornell University, he taught Ms. Paavola. He's held himself
8 out to be an expert on intellectual disability, but he didn't
9 raise the claim of intellectual disability at the -- at that
10 hearing. In fact, he was the lawyer representing Mr. Elmore
11 and he represented Mr. Franklin that I mentioned earlier.

12 With respect to the ability to raise a freestanding claim
13 of intellectual disability, again, we'd submit that the PCR
14 statute precludes that. However, he still has state habeas.
15 Right now there's not a -- there's not the death warrant
16 pending. However, if one should issue, he could bring a state
17 habeas action in which that'd be in the original jurisdiction
18 of the State Supreme Court and we would have a hearing and
19 then a determination would be made at that time whether or not
20 he was intellectually disabled, sort of like competency to be
21 executed.

22 I would note also there's a case that is cited in 2009
23 Ferguson v. State, that's 677 S.E.2d 600. Ferguson stands for
24 the proposition that a PCR application is not subject to being
25 dismissed simply because the Applicant is incompetent. We

1 would submit the same would hold true for intellectual
2 disability. Again, to the extent that Woods alleges that the
3 experts relied upon by trial counsel or PCR counsel were
4 incorrect or that they failed to find facts or they failed to
5 assign correct weight to certain facts, they didn't do proper
6 testing, that doesn't entitle him to relief. As the Fourth
7 Circuit Court of Appeals explained in Wilson v. Greene, which
8 is at 155 F.3d 396 on page, at page 401, the court says, "The
9 Constitution does not entitle a criminal Defendant to the
10 effective assistance of an expert witness. To entertain such
11 claims would immerse federal judges in an endless battle of
12 the experts to determine whether a particular psychiatric
13 examination was appropriate. Further, it would undermine the
14 finality of state criminal convictions which would constantly
15 be subject to psychiatric reappraisal years after the trial
16 has ended."

17 Now, there's -- Ms. Paavola stated at length about how
18 they may have evidence of his intellectual disability. I
19 submit to you that's not what they have, and if you look at
20 the declaration of his expert, Dr. Susan Knight, she indicates
21 that she was retained by counsel for Anthony Woods to serve as
22 a consultant to assist in assessing whether Mr. Woods had any
23 mental or cognitive impairments that might be relevant to his
24 ongoing appeals. That's in her paragraph three. In paragraph
25 13 of her statement she says, "In my capacity as a consultant

1 I have not conducted a full assessment of Mr. Woods' adaptive
2 behavior, nor have I evaluated whether or not any deficits he
3 has in either intellectual functioning or adaptive behavior
4 manifested during the developmental period. I am generally
5 aware from a review of the prior records, court testimony and
6 my clinical interviews with Mr. Woods that he struggled in
7 school, exhibited signs of academic deficits, appears to have
8 a work history of intermittent and brief employment in basic
9 manual labor type jobs and rarely, if ever, succeeded at
10 living independently for any significant period of time.
11 However, a reliable and accurate assessment of whether or not
12 Mr. Woods meets all three criteria for a diagnosis of
13 intellectual disability requires further investigation and
14 evaluation, which I have not undertaken." So they don't meet,
15 they don't meet that. They want -- they just want to come in,
16 spend more money, delay the case and then turn around and say,
17 well, the death penalty shouldn't be imposed because it takes
18 too long and it costs too much, and we say that that's wrong,
19 and for the reasons we've previously argued submit that the
20 matter should be summarily dismissed.

21 THE COURT: All right. I've heard enough. All right.
22 I'm going to take it under advisement. All right. Ms.
23 Paavola, I know you had made the request. Technically, you
24 did just get appointed the other day. I think I've got a good
25 strong handle on your argument and everything you've

1 submitted. Do you want to follow up with another brief or
2 memorandum or -- I mean, I think I've got a good handle on
3 your argument but I don't know if there's any --

4 MS. PAAVOLA: I would be happy to submit a post argument
5 brief, Your Honor, and I don't think it would take an
6 inordinate amount of time.

7 THE COURT: Okay. Well, I'll do that. I'll allow both
8 parties to submit post argument briefs. How long do you all
9 want?

10 MS. PAAVOLA: Ten days?

11 THE COURT: Is that agreeable?

12 MR. SALTER: Yes, sir, Your Honor. I believe we've
13 pretty much stated our position.

14 THE COURT: Okay. So you don't need to submit anything
15 else?

16 MR. SALTER: I don't believe so, not unless I see
17 something in what she files.

18 THE COURT: Okay.

19 MR. SALTER: And I can do that very quickly.

20 THE COURT: Well, this isn't going to be a brief and a
21 responsive brief and a thing to argument. This is, I mean,
22 you've made -- you've argued your motion. She's argued
23 against it. You've been given the opportunity to reply. If
24 you want to summarize it or submit another brief everybody has
25 got 10 days to do that.

1 MR. SALTER: Very well, Your Honor.

2 THE COURT: All right.

3 MR. SALTER: That's fine.

4 THE COURT: We'll do it that way.

5 MS. PAAVOLA: Thank you.

6 THE COURT: All right. So don't -- I guess -- I hope I
7 didn't open a Pandora's box. This is not to be a wait and get
8 their brief and then respond to their brief. This is just
9 simply to set forth your, your position, which I think both
10 parties have adequately argued their position here. However,
11 given the timeliness of when Ms. Vann and Ms. Paaavola were
12 appointed, I know they wanted a continuance of this motion
13 hearing, which I denied, and so now I'm going to give them an
14 opportunity to give 10 days to follow up with a brief if you
15 want to. You don't have to. All right. Now, having said
16 that, we'll just, we'll just delay on the status conference,
17 okay, because I do, I've got to go back and read it. Is it
18 Robinson -- Robertson.

19 MR. SALTER: Robertson.

20 THE COURT: Robertson. Yeah. I've got to go back and
21 read that case again as well because I may have been reading
22 it wrong. I need to take a look at it. All right. Anything
23 else?

24 MS. PAAVOLA: Your Honor, Ms. Vann has reminded me that
25 you have an appointment order to hand to us according to your

1 email.

2 THE COURT: Okay. I guess it's back there in my office.

3 Yeah.

4 MS. PAAVOLA: Okay.

5 THE COURT: I'll get that to you.

6 MS. PAAVOLA: Thank you.

7 THE COURT: Sure will. All right. Thank you.

8 (Adjourned.)

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1 C E R T I F I C A T E

2

3 I, the undersigned, Grace L. Hurley, Official Court
4 Reporter for the State of South Carolina, do hereby certify
5 that the foregoing is a true, accurate and complete Transcript
6 of Record of the Hearing held in the case of Anthony Woods
7 versus State of South Carolina, held in the Court of Common
8 Pleas for, Clarendon County, Georgetown County Courthouse,
9 Georgetown, South Carolina, on February 7, 2019.

10 I do hereby certify that I am neither of kin, counsel,
11 nor interest to any party hereto.

12

13

14

15

16 _____
Grace L. Hurley, CVR-CM-M
17 Official Reporter

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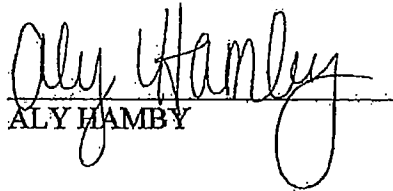
24 February 25, 2019.

25

Declaration of Aly Hamby

1. I am currently a third year law student at Cornell Law School in Ithaca, New York. From January 2018 through May 2018, I was enrolled in the law school's Capital Punishment Clinic. One of my assignments in the clinic was to research the qualifications of Dr. Thomas Kirby, who had conducted an IQ test for Mr. Anthony Woods, a South Carolina death row inmate. As part of my research, I was asked to determine whether Dr. Kirby was a licensed psychologist.
2. After some preliminary research, I searched the South Carolina Department of Labor, Licensing, and Regulation's online "Licensee Look-Up" database. Dr. Kirby was not listed as a licensed psychologist in the database. The database listed both psychologists with active licenses and psychologists whose licenses had lapsed. I also ran similar searches within the online databases of other neighboring states. Dr. Kirby was not listed as a licensed psychologist in any of those databases either.
3. On March 14, 2018, I called the South Carolina Board of Examiners in Psychology directly and spoke to a staff member. I told her that I was trying to confirm whether Thomas Kirby was a licensed psychologist, but his name was not listed on the online database. She then gave me additional suggestions for searching the online database for this information. Following our phone call, I searched the database again, using her suggestions. Thomas Kirby still did not appear in the search results as a licensed psychologist.
4. On March 21, 2018, I called the South Carolina Board of Examiners in Psychology and spoke to the staff member again. I explained that I had searched the database using her suggestions, but Thomas Kirby was not listed within the search results. I asked her what it meant if he was not listed. She told me that if he did not show up in the search results, then he was not licensed. I then asked her if there was any way that he could still be licensed, even if he was not listed in the database. She again confirmed that would it mean that he was not licensed.

I affirm, under the penalty of perjury, that the foregoing is true and correct.


ALY HAMBY

DECLARATION OF DR. SUSAN KNIGHT

1. My name is Dr. Susan C. Knight. I am a clinical psychologist with specialization in forensic psychology. I am board certified in Forensic Psychology through the American Board of Professional Psychology. I am presently employed in private psychological practice wherein I conduct clinical and forensic evaluations for private and public legal entities, and provide consultation to federal, state and county court systems. I hold adjunct faculty positions at the Cornell Law School and the Charleston School of Law, teaching law students at both institutions in the areas of mental disorder and forensic psychology.
2. I received my Ph.D. in Clinical Psychology from the University of Louisville in 2004. I completed my pre-doctoral internship in Forensic and Correctional Psychology at the Federal Medical Center in Butner, NC, with the United States Department of Justice. Subsequently, I completed my post-doctoral fellowship in Forensic Psychology within the Department of Psychiatry at the University of Southern California, Keck School of Medicine, in Los Angeles, CA. My CV, which provides my full qualifications, training, and publications, is attached as Exhibit A.
3. I was retained by counsel for Anthony Woods to serve as a consultant to assist in assessing whether Mr. Woods had any mental or cognitive impairments that might be relevant to his ongoing appeals. In that capacity, I administered the Wechsler Adult Intelligence Scale – 4th Edition (WAIS-IV) to Mr. Woods on August 30, 2018. The results of the WAIS-IV indicated that Mr. Woods obtained a Full Scale IQ of 66. On the four composite score indices, he obtained a score of 66 on the Verbal Comprehension Index; a score of 82 on the Perceptual Reasoning Index; a score of 69 on the Working Memory Index; and a score of 65 on the Processing Speed Index. Composite scores were obtained using 95% confidence intervals, which indicate that there is a 95% probability that his true intellectual functioning is represented by these scores.
4. The same day, I also administered the Test of Memory Malingering (“TOMM”). Mr. Woods’ results on the TOMM were 44 on the first trial and 49 on the second trial, which indicated that Mr. Woods was giving good effort during my evaluation. (A score of 50 is a perfect score on the TOMM). Mr. Woods was cooperative and polite, and he appeared to put forth good effort for the duration of the test procedure.
5. Mr. Woods’ Full Scale IQ score of 66 places him in the “Extremely Low” range of intelligence, performing significantly below the level of his same-age peers. His Full Scale IQ score falls in the 1st percentile rank, indicating that 99% of individuals in his age range obtain a higher score.

6. Based on my review of records provided to me by Mr. Woods' counsel, he has been administered individualized, standardized intelligence testing three times prior to my evaluation. On December 14, 2004, he obtained a Full Scale IQ of 73 on the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III). This test was administered by Dr. Camilla Tezza at William S. Hall, Department of Mental Health. On March 28, 2012, Mr. Woods obtained a Full Scale IQ of 72 on the WAIS-IV, which was administered by Dr. David Price in preparation for Mr. Woods' post-conviction relief proceedings. Less than one month later, Mr. Woods scored a Full Scale IQ score of 81 on the Stanford-Binet, Fifth Edition (SB-5), which was administered by Dr. Thomas Kirby at the request of the Department of Disabilities and Special Needs. Thus, the following chart reflects the total known data regarding Mr. Woods' results on individualized intelligence testing:

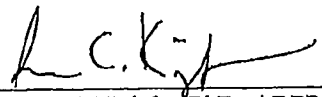
Date	Test	Administered By	FSIQ
12/14/2004	WAIS-III	Dr. Camilla Tezza	73
3/28/2012	WAIS-IV	Dr. David Price	72
4/26/2012	SB-5	Dr. Thomas Kirby	81
8/30/2018	WAIS-IV	Dr. Susan Knight	66

7. A diagnosis of intellectual disability requires an IQ of approximately 75 or less combined with significant deficits in adaptive functioning skills, with initiation of both during the developmental period. *See Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014); S.C. Code Ann. § 16-3-20(C)(b)(10); INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS, 36 (American Association on Intellectual and Developmental Disabilities, 11th ed. 2010). All three of Mr. Woods' IQ scores obtained on the Wechsler Scales fall below 75.
8. Mr. Woods has a reported score of 81 on the Stanford-Binet, Fifth Edition. However, the report from DDSN states that both Dr. Kirby and Dr. Gordon B. Brown were present while the Stanford-Binet test was administered to Mr. Woods. There is a large body of literature establishing that the presence of third-party observers during intelligence testing adversely impacts test results. For example, the two primary board-certifying agencies in the field of clinical neuropsychology (the American Board of Professional Neuropsychology and the American Academy of Clinical Neuropsychology) have issued specific statements against this practice. *See* Exhibit B, Policy Statement of the American Board of Professional Neuropsychology at p.392 ("A considerable body of research supports that TPO [third party observers] can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as misrepresentation of the data."), and Exhibit C, Affidavit Regarding Opposition to the Presence of Third Party Observers at p.2 ("Our standard practice is not to have any person or recording equipment present for the examination, other than the examinee and the examiner. This is the standardized and accepted practice in the specialty of clinical neuropsychology, which enhances our ability to obtain valid performances, upon which we base our interpretations and conclusions.").

Moreover, the Examiner's Manual for the Stanford-Binet, Fifth Edition, likewise instructs that "[o]nly the examiner and examinee should be present" during testing. The only exception provided is for children under the age of five, in which case a parent or caregiver may be present.

12. The definition of intellectual disability has three prongs: (1) significantly subaverage intellectual functioning; (2) significant deficits in adaptive behavior; and (3) manifestation during the developmental period. *See* AAIDD Manual p.5, 12.
13. In my capacity as a consultant, I have not conducted a full assessment of Mr. Woods' adaptive behavior, nor have I evaluated whether or not any deficits he has in either intellectual functioning or adaptive behavior manifested during the developmental period. I am generally aware from a review of prior records, court testimony, and my clinical interviews with Mr. Woods that he struggled in school, exhibited signs of academic deficits, appears to have a work history of intermittent and brief employment in basic manual labor type jobs and rarely, if ever, succeeded at living independently for any significant period of time. However, a reliable and accurate assessment of whether or not Mr. Woods meets all three criteria for a diagnosis of intellectual disability requires further investigation and evaluation, which I have not undertaken.
14. Based on the information I have recounted above, it is my opinion to a reasonable degree of psychological certainty that a prima facie case of intellectual disability is present and intellectual disability certainly cannot be ruled out at this time. I recommend that Mr. Woods' attorneys conduct a complete investigation, with the assistance of appropriate experts with expertise in intellectual disability, to determine whether or not he satisfies all three criteria for a diagnosis of intellectual disability.

I affirm, under the penalty of perjury, that the foregoing is true and correct.


Susan C. Knight, PhD, ABPP

September 10, 2018.

Exhibit A

SUSAN C. KNIGHT, PH.D, ABPP

Telephone: (843) 637-5729; Facsimile: (843) 410-2802

Electronic Mail: knight@apsforensic.com

Mailing Address: 1941 Savage Rd., Ste. 100A-606, Charleston, SC 29407

EDUCATIONAL HISTORY:

September 2004 - August 2005	Postdoctoral Fellowship in Forensic Psychology University of Southern California Keck School of Medicine Dept. of Psychiatry & Behavioral Sciences USC Institute of Psychiatry & Law P.O. Box 86125 Los Angeles, CA (ACGME Accredited)
September 2003 - August 2004	Pre-doctoral Internship in Forensic Psychology U.S. Department of Justice (USDOJ)/Bureau of Prisons Federal Correctional Complex and Medical Center Butner, NC (APA Accredited Internship)
August 1999 - August 2004	Doctorate of Philosophy, Clinical Psychology University of Louisville, Louisville, KY Department of Psychological and Brain Sciences (APA Accredited Program)
August 1999 - May 2002	Master of Arts, Clinical Psychology University of Louisville, Louisville, KY Department of Psychological and Brain Sciences [Degree embedded within the Clinical Psychology Doctoral program, APA Accredited]
August 1994 - May 1998	Bachelor of Arts, Psychology, <i>Magna Cum Laude</i> Trinity University, San Antonio, TX

PROFESSIONAL LICENSURE:

- Psychologist, State of North Carolina, License #3407 [June 2007]
- Psychologist, State of South Carolina, License #1053 [May 2007]

BOARD CERTIFICATION:

- ABPP- Board certification in Forensic Psychology awarded by the American Board of Professional Psychology (ABPP) [April 2009]

PROFESSIONAL EXPERIENCE

Clinical and Forensic Psychologist
Applied Psychological Services, LLC
1941 Savage Rd., Ste. 100A-606
Charleston, SC 29407

August 2013 - Present

Responsibilities: Conduct comprehensive forensic psychological evaluations on a wide variety of criminal and civil issues, to include, but not limited to, competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, sentencing/mitigation, and fitness for duty evaluations. Provide clinical therapeutic services to an adult outpatient population.

Clinical Assistant Professor of Forensic Psychiatry
Community and Public Safety Psychiatry Division
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
29-C Leinbach Drive
Charleston, SC 29407

August 2013 - April 2014

Responsibilities: Conduct comprehensive forensic psychological evaluations on a wide variety of criminal and civil issues, and provide consultation to the county, state and federal court systems as necessary. Types of evaluations include competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, and fitness for duty assessments for health care, public safety and transportation personnel. Provide instruction, teaching and supervision to forensic post-doctoral fellows, medical residents, interns and students on forensic and general clinical psychological issues.

Assistant Professor of Forensic Psychiatry
Associate Director of the Forensic Psychiatry Fellowship
Director - Progressive Professionals Program (PPP)
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
29-C Leinbach Drive
Charleston, SC 29407

January 2008-August 2013
July 2008-August 2013
November 2010-August 2013

Responsibilities: Conduct comprehensive psychological forensic evaluations on a wide variety of criminal and civil issues, and provide consultation to the county, state and federal court systems as necessary. Types of evaluations include competency to stand trial, criminal responsibility, violence risk assessments, sexual behavior assessments, and fitness for duty assessments for health care, public safety and transportation personnel. Provide clinical therapeutic services (therapy and psychological assessment) to a general outpatient population as needed. Provide instruction, teaching and supervision to forensic post-doctoral fellows, medical residents, interns and students on forensic and general clinical psychological issues.

Clinical Psychologist
Grew, Morter and Hartye, P.A.
3141 John Humphries Wynd, Ste. 275
Raleigh, NC 27612

April 2007- November 2007

Responsibilities: Provided mental health services in a private practice setting to an outpatient population. Clinical duties included providing short and long term individual therapy, and conducting psychological assessments addressing a wide range of psychological issues. Forensic duties included conducting psycho-legal evaluations and providing consultation as needed for forensic issues.

Clinical Psychologist
Los Angeles County Department of Mental Health
Century Regional Detention Facility- Los Angeles County Jail
Women's Forensic Outpatient Program (WFOP)
11705 S. Alameda St.
Lynwood, CA 90262

September 2005-December 2006

Responsibilities: Provided mental health services to a correctional population, including diagnostic intake interviews, brief therapy, crisis intervention services and psychological assessments. Forensic duties included managing patients in the Misdemeanant Incompetent to Stand Trial (MIST) program, including competency restoration and consultation with the mental health court system.

Forensic Psychologist (Contract Basis)
Metropolitan Detention Center- Los Angeles
Federal Bureau of Prisons
535 N. Alameda St.
Los Angeles, CA 90012

September 2006- December 2006

Responsibilities: Conducted pre-trial and post-trial psychological forensic evaluations for the Federal Bureau of Prisons on a contract basis. Evaluations covered a variety of psycho-legal issues, including competency to stand trial, criminal responsibility, dangerousness evaluations and sentencing issues. Duties included interviews, psychological assessment, report writing and providing consultation and/or testimony to the Federal Court system as needed.

Forensic Psychologist
USC-Keck School of Medicine
Institute of Psychiatry, Law and Behavioral Science
Los Angeles, CA 90086-0125

September 2006- December 2006

Responsibilities: Conducted forensic evaluations for the juvenile court system in Los Angeles addressing a variety of psycho-legal issues. Duties included evaluations, report-writing and providing consultation to the Juvenile Court System.

Postdoctoral Fellow in Forensic Psychology
University of Southern California/Keck School of Medicine
Institute of Psychiatry, Law & Behavioral Science
P.O. Box 86125
Los Angeles, CA 90086-0125

September 2004 –August 2005

Responsibilities: Conducted psychological and legal evaluations for attorneys and courts related to criminal delinquency and dependency issues; evaluation, psychological assessment, and treatment of mentally disordered offenders, including outpatient sex offender treatment. Received specialized training on how to conduct psychological autopsies for the Los Angeles County Coroner's Office.

Pre-doctoral Clinical Psychology Intern
Federal Correctional Complex- Butner
Old N.C. Hwy 75
Butner, NC 27509

August 2003 - September 2004

Responsibilities: Worked in the forensic evaluation program at the Federal Medical Center and conducted federal pre-trial forensic evaluations which involved comprehensive psychological evaluation and report writing. Provided expert testimony to federal court. Worked in the Sex Offender Treatment Program (SOTP), an intensive, residential therapeutic program for male sexual offenders. Employed specialized assessment, didactic, and cognitive-behavioral techniques to evaluate, treat, and manage sexual offenders. Also conducted individual and group therapy, and assisted in managing the special needs of mental health inmates.

Graduate Student Therapist
Outpatient Psychiatry/Ambulatory Care Building
550 S. Jackson St.
Louisville, KY 40202

May 2002- May 2003

Responsibilities: Conducted individual and group psychotherapy as well as psychological testing with a variety of patients presenting at a local hospital for psychological treatment. Conducted initial intake interviews with potential patients presenting for medication and therapy; provided diagnosis, case formulation and treatment recommendations.

Clinic Assistant
University of Louisville/Psychological Services Center
Davidson Hall, Suite 210, Louisville, KY 40292

August 2000- June 2002

Responsibilities: Conducted initial assessment intake interviews with potential clients for the psychology clinic. Assisted in diagnosis, treatment recommendations, and disposition of clients to specialty clinic teams. Maintained client database and records for clinic operation. Coordinated clinic in-services (professional presentations) for students and psychological community at large. Maintained subject records and billing for ongoing research project.

Research Assistant
Central State Hospital/Dept. of Psychology
10510 La Grange Rd.
La Grange, KY 40223

August 1999 - July 2000

Responsibilities: Collected and analyzed data related to program evaluation from all disciplines (nursing, medical staff, psychologists, social workers and pastoral staff). Created and maintained comprehensive research database tracking all patients with a diagnosis of Mental Retardation and all patients with guardians

Caseworker / Case Manager
Crosspoint, Inc.
605 Augusta St.
San Antonio, TX, 78215

May 1998 - December 1998

Responsibilities: This facility provided a structured program of re-socialization for female adults primarily referred from federal correctional and health care facilities. Responsibilities included administration of direct services provided to clients on an individual and/or group basis. Consulted with, and managed interface to local support agencies when and where necessary on behalf of the client.

CLINICAL PRACTICA/PSYCHOTHERAPY EXPERIENCE

Graduate Student Therapist
University of Louisville/Psychological Services Center
Louisville, KY 40292

August 1999 - May 2003

Responsibilities: Conducted individual therapy sessions and a wide variety of full psychological assessments with outpatient clients (adults and children).

Doctoral Practicum Student (Assessment & Therapy)
Kentucky State Reformatory
La Grange, KY 40032

August 2000 - September 2002

Responsibilities: Conducted psychological testing and individual therapy for adult male inmates housed in the Correctional Psychiatric Treatment Unit at a medium security state prison. Compiled and analyzed sex offender data in the Sex Offender Risk Assessment Unit (SORA) at Kentucky State Reformatory.

ACADEMIC APPOINTMENTS:

- **Clinical Instructor** August 2004 - September 2005
University of Southern California
Keck School of Medicine
Department of Psychiatry and Behavioral Sciences
Los Angeles, CA 90033
- **Adjunct Faculty** August 2006 – December 2006
University of Southern California
Department of Psychology
Los Angeles, CA 90089
- **Assistant Professor** January 2008 – August 2013
Medical University of South Carolina
Department of Psychiatry, Charleston, SC 29425
- **Clinical Assistant Professor** August 2013- June 2015
Medical University of South Carolina
Department of Psychiatry, Charleston, SC 29425
- **Adjunct Professor of Law** May 2011- Present
Charleston School of Law
Charleston, South Carolina
- **Adjunct Professor of Law** January 2015- Present
Cornell University Law School
Ithaca, New York

PROFESSIONAL AFFILIATIONS

- American Psychological Association (APA) [1999 to Present]
- American Psychology-Law Society (APLS) [2003 to Present]
- South Carolina Psychological Association (SCPA) [2008 to Present]
- American Board of Professional Psychology (ABPP) [2009 to Present]
- Association for the Treatment of Sexual Abusers (ATSA) [2012 to Present]
- Association of Threat Assessment Professionals (ATAP) [2015 to Present]
- Society of Clinical Child & Adolescent Psychology (SCCAP) [2017 to Present]

SELECTED PRESENTATIONS

1. Knight, S.C. & Einstein, G. (1996). *Aging and Retrieval Inhibition in Prospective Memory*. Paper presented at the National Convention of Undergraduate Research (NCUR) in the Spring of 1997 in Austin, TX.
2. Weaver, C.M., Bock, P., Knight, S. & Gretarsdottir, B. (1999, November). *Demographic Study of 1998 Jefferson County Kentucky Guardianship Population*. Poster presented at the annual meeting of the Kentucky Psychological Association, Louisville, KY. Poster was awarded second prize for graduate research.
3. Knight, S.C., Scanish, J., Fintel, T., & Meyer, R.G. (2002, August). *Characteristic of the Female Sex Offender*. Poster presented at the 2002 APA conference in Chicago, Illinois in the APLS (Division 41) of research.
4. Knight, S.C. (2006). *The Sex Offender's Brain: A review of the etiological evidence towards a neurobiochemical basis*. Lecture presented to faculty, staff and students at the University of Southern California, Department of Psychology, as part of the Continuing Education (CE) colloquia.
5. Mulbry, L. W. & Knight, S.C. (March 2008). *Competency to Stand Trial, Criminal Responsibility and Capacity to Conform*. Presentation to the Charleston County Solicitor's Office.
6. Knight, S.C. (September 2008). *Psychological Autopsy: Determining the Manner of Death Through Investigative Psychological Analysis*. Lecture presented to the Medical University of South Carolina, Department of Psychiatry, Division of Forensic Psychiatry, Day of Discovery conference.
7. Stroud, Z., Knight, S.C., Halavonich, R.H., & Mulbry, L.W. (October 2008). *Mass Shooters: An Antihero of our Time*. Presentation presented at the national American Academy of Psychiatry and Law (AAPL) conference in Seattle, WA.
8. Knight, S.C. (July 2009). *The MMPI-2: Fundamentals of Interpretation*. Lecture to the Medical University of South Carolina Psychology Internship Program
9. Knight, S.C. (November 2009). *The Disruptive Professional*. Presentation given to the Senior Medical Leadership Council of the South Carolina Hospital Association. Columbia, South Carolina.
10. Knight, S.C. (November 2009). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant*. Presentation to the South Carolina Bar Association Distance Learning Division. Columbia, South Carolina.

11. Knight, S.C. (November 2009). *Psychiatric Malpractice: A review of select South Carolina cases*. [Invited Speaker]. Presentation given at the Medical University of South Carolina, Forensic Interest Group Meeting. Charleston, South Carolina.
12. Knight, S.C. (January 2010). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant*. Workshop on competency to stand trial and criminal responsibility presented to attorney participants at the Medical University of South Carolina. Charleston, South Carolina.
13. Knight, S.C. (April 2010). *The Mentally Ill Offender: An Epidemic in Courts and Corrections*. [Invited Speaker]. Presentation at the 2010 Mental Health Professionals Collaboration held at the Medical University of South Carolina for mental health professionals statewide. Charleston, South Carolina.
14. Knight, S.C. & Mulbry, L.W. (October 21, 2010). *Automatism: A 15-year review of criminal appellate case law*. Scientific paper presentation at the national American Academy of Psychiatry and Law (AAPL) conference in Tucson, AZ.
15. Knight, S.C. (October 29, 2010). *South Carolina Mental Health Law: How to Proceed with a Mentally Disordered Defendant*. Workshop on competency to stand trial and criminal responsibility presented to the Berkeley County Public Defender's Office.
16. Knight, S.C. & Mulbry, L.W. (January 30, 2011). *School Shooters: A Unique Class of Violent Offenders*. [Invited Speaker]. Presentation to the South Carolina Psychiatric Association (SCPA) statewide conference in Charleston, SC.
17. Knight, S.C. (June 2011). *Legal Insanity and Competence*. [Invited Speaker]. Update in Psychiatry-Mental Illness, Victimization and Criminal Justice. A Forum for Clinicians, Policymakers, Judges, Attorneys and Law Enforcement. Charleston, South Carolina.
18. Knight, S.C. (June 2011). *Relationship Between Mental Illness and Criminal Behavior. Update in Psychiatry-Mental Illness, Victimization and Criminal Justice*. [Invited Speaker]. A Forum for Clinicians, Policymakers, Judges, Attorneys and Law Enforcement. Charleston, South Carolina.
19. Beck, B., Knight, S.C., & Mulbry, L.W. (October 2012). *Robotripping: Dextromethorphan's Link to Violent Crime, Rising Use and Emergent Legislation*. Poster presented at the national meeting of the American Academy of Psychiatry and Law (AAPL), Montreal, Canada.
20. Knight, S.C. (December 2012). *Sexual Predators: Pathology and the Law*. [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.

21. Knight, S.C. (December 2012). *Legal Competence*. [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.
22. Knight, S.C. (April 2013). *Legal Competence: Civil Competencies*. [Invited Speaker]. South Carolina Association of Probate Judge's Conference. Columbia, South Carolina.
23. Beck, B., Knight, S. C. & Mulbry, L.W. *Revisions in Gun and Mental Health Laws in the Wake of Newtown*. Poster accepted for presentation at the October 2013 national meeting of the American Academy of Psychiatry and Law (AAPL), San Diego, California.
24. Knight, S.C. (September 2013). *Workplace Violence: Assessment, Intervention and Prevention*. [Invited Speaker]. A Psychiatric Update: Annual conference held by the South Carolina Department of Mental Health.
25. Knight, S.C., Mulbry, L.W., Mullis, D. & Fields, C. (October 2013). *Guns and Psychiatry: Disarming the Mentally Ill*. Grand Rounds Presentation, Medical University of South Carolina, Department of Psychiatry and Behavioral Science.
26. Knight, S.C. (December 2013). *Ethical Considerations in Forensic Evaluations*. [Invited Speaker]. Judges and Attorneys Substance Abuse and Ethics Seminar, Medical University of South Carolina, Charleston, South Carolina.
27. Knight, S.C. (June 2014). *The Mentally Ill Offender: An Epidemic in Courts and Corrections*. [Invited Speaker]. National Judges Association: 35th Annual Education Conference. Charleston, South Carolina.
28. Knight, S.C. (October 2015). *Sentencing re: Miller: Perspective of a Forensic Psychologist in Juvenile Life Without Parole Hearings*. [Invited Speaker]. Columbia, South Carolina.
29. Knight, S.C. (August 2016). *Psychological Assessments in Juvenile Sentencing and Resentencing Cases*. [Invited Speaker]. Representing a Juvenile Facing Life Without Parole Conference. South Carolina Commission on Indigent Defense, Columbia, South Carolina.
30. Knight, S.C. (March 2017). *Navigating the Psycholegal Nexus: The Role of Forensic Psychology*. [Invited Speaker]. Southeastern Psychological Association (SEPA) – National Meeting. Atlanta, Georgia.
31. Knight, S.C., Young, L. & Jones, Z. (March 2017). *Structure and Substance in Sentencing: Legal, Psychological & Mitigation Elements of Miller Proceedings*. [Invited Workshop]. American Psychology-Law Society (AP-LS) – National Meeting. Seattle, Washington.

PUBLICATIONS

1. Oliver, J. M., Knight, S.C., Weaver, C.M., Boyd, A.R. & Meyer, R.G. (2000). Attitudes of board certified forensic psychologists toward critical issues in forensic psychology and the legal system. *Bulletin of the American Academy of Forensic Psychology*, 21 (1), 8-10.
2. Oliver, S.C., Knight, S.C., Weaver, C.M. & Meyer, R.G. (2001). Attitudes of forensic practitioners about competency to stand trial evaluations: Theoretical and practical considerations. *Bulletin of the American Academy of Forensic Psychology*, 22 (1), 20-22.
3. Knight, S.C. & Meyer, R.G. (2003). Gender Identity Disorder: The Case of Bruce/Brenda. In R.G. Meyer's, *Case Studies in Abnormal Behavior* (6th ed.), (pp. 134-140). Boston: Allyn & Bacon.
4. Knight, S.C. & Meyer, R.G. (2007). Forensic Hypnosis. In A. M. Goldstein's (Ed.) *Forensic Psychology: Emerging Topics and Expanding Roles*, NY: Wiley.
5. Gomez, A. & Knight, S.C. (2013). Disclosure of Mental Health Records in Court-Mandated Outpatient Treatment Proceeding and the Health Insurance Portability and Accountability Act (HIPPA). *Journal of the American Academy of Psychiatry and Law*. Vol. 41: 460-641.

Exhibit B

GUEST EDITORIAL

Policy Statement of the American Board of Professional Neuropsychology regarding Third Party Observation and the recording of psychological test administration in neuropsychological evaluations

Alan Lewandowski^a, W. John Baker^b, Brad Sewick^c, John Knippa^d, Bradley Axelrod^e, and Robert J. McCaffrey^f

^aNeuropsychology Associates and Western Michigan University, School of Medicine, Kalamazoo, MI, USA; ^bPsychological Systems, Royal Oak, MI, USA; ^cSpectrum Rehabilitation, Southfield, MI, USA; ^dCoast Psychiatric Associates, Long Beach, CA, USA; ^eJohn D. Dingell Department of Veterans Affairs Medical Center, Detroit, MI, USA; ^fDepartment of Psychology, University at Albany, SUNY, Albany, NY, USA

General

Neuropsychologists are frequently presented with requests from parents, attorneys, nurse case managers, insurance representatives, school personnel, allied health professionals, family members, or other interested parties who have some type of relationship with a patient or client examinee to directly observe or record the administration of psychological and neuropsychological tests. Consequently, a number of practice concerns have been raised that include, but are not limited to, the effects on the examinee's performance and the neuropsychologist administering the assessment, violations of testing guidelines, the impact on standardization procedures, the appropriateness of applying test findings to normative samples established under standardized circumstances, and test security. These requests can become even more problematic and complicated when the request occurs within the adversarial process associated with the legal system, such as competency hearings, custody evaluations, divorce proceedings, civil litigation, and criminal investigations (Bush, Pimental, Ruff, Iverson, Barth & Broshek, 2009; Duff & Fisher, 2005; Howe & McCaffrey, 2010; Lynch, 2005; McCaffrey, Fisher, Gold, & Lynch, 1996; McCaffrey, Lynch, & Yantz, 2005; McSweeney et al., 1998; Sweet, Grote, & Van Gorp, 2002).

Definition of Third Party Observation

Third Party Observation (TPO) is defined in this practice guideline as the direct or indirect presence of an individual other than the patient or client and the psychologist or their technician administering a published psychological test in order to obtain objective data under standardized conditions for clinical, counseling, or forensic purposes in order to render

clinical conclusions, opinions, interpretations, or recommendations based on the data collected. Direct presence means a person(s) physically present in the room other than the psychologist or his/her technician and the examinee. Indirect presence means viewing through a window, two-way mirror, use of any camera, or audio or video recording device, or any electronic or communication device. The act of recording includes the on-site transcription by a court recorder or reporter during an examination by either direct or indirect involvement (Barth, 2007; Constantinou, Ashendorf, & McCaffrey, 2002; Constantinou, Ashendorf, & McCaffrey, 2005; Eastvold, Belanger, & Vanderploeg, 2012; McCaffrey, Fisher, Gold, & Lynch, 1996).

Ethical considerations

The Ethical Principles of Psychologists and Code of Conduct of the American Psychological Association (hereafter called the Ethics Code) helps guide the thinking and behavior of psychologists, and provides direction with regard to clinical practice standards. Relevant to TPO and the Ethics Code are both the General Principles and a number of the Ethical Standards.

Within the Ethics Code a series of General Principles are outlined with the intent of guiding psychologists to practice at the highest professional level. Relevant to TPO are General Principle A (Beneficence and Non-maleficence), B (Fidelity and Responsibility), C (Integrity), and D (Justice).

In contrast to the General Principles, the Ethics Code offers specific standards that represent obligations to which psychologists are bound, and consequently form the basis for ethical violations and consequently the basis for sanctions. Most relevant to TPO are Ethical Standards 2 (Competence) and 9 (Assessment). (American Psychological Association, 2010).

Principle A: Beneficence and nonmaleficence

Principle A is applicable and is described as follows:

Psychologists strive to benefit those with whom they work and take care to do no harm. In their professional actions, psychologists seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons, and the welfare of animal subjects of research. When conflicts occur among psychologists' obligations or concerns, they attempt to resolve these conflicts in a responsible fashion that avoids or minimizes harm. Because psychologists' scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence. Psychologists strive to be aware of the possible effect of their own physical and mental health on their ability to help those with whom they work (American Psychological Association, 2010, p. 3).

It is incumbent on neuropsychologists to be vigilant regarding the impact of their professional opinion on others, particularly with regard to diagnostic testing. Scientific and professional judgments and conclusions should be based on data from neuropsychological assessments gathered in a standardized manner and, therefore, without the influence of extraneous factors that might influence the collection of behavior samples. Neuropsychologists must always be mindful that their verbal and written opinions affect the medical, social, and legal lives of others and, therefore, must safeguard those with whom they interact professionally to do no harm.

Principle B: Fidelity and responsibility

Principle B is applicable and is described as follows.

Psychologists establish relationships of trust with those with whom they work. They are aware of their professional and scientific responsibilities to society and to the specific communities in which they work. Psychologists uphold professional standards of conduct, clarify their professional roles and obligations, accept appropriate responsibility for their behavior, and seek to manage conflicts of interest that could lead to exploitation or harm.

Psychologists consult with, refer to, or cooperate with other professionals and institutions to the extent needed to serve the best interests of those with whom they work. They are concerned about the ethical compliance of their colleagues' scientific and professional conduct. Psychologists strive to contribute a portion of their professional time for little or no compensation or personal advantage (American Psychological Association, 2010, p. 3).

It is the responsibility of all psychologists who elect to perform diagnostic testing, to do so within the established parameters of the instrument(s) they employ and therefore in a standardized manner. Whether or not a neuropsychologist is engaged in a patient-doctor relationship, acting as an independent clinician, a clinician for an institution, state or federal agency, or an independent examiner for an insurance carrier or legal counsel, a professional obligation exists to uphold standards for the delivery of scientific work commensurate with the responsibilities to the profession, community, and society in general.

Principle C: Integrity

Principle C is applicable and is described as follows.

Psychologists seek to promote accuracy, honesty, and truthfulness in the science, teaching, and practice of psychology. In these activities psychologists do not steal, cheat, or engage in fraud, subterfuge, or intentional misrepresentation of fact. Psychologists strive to keep their promises and to avoid unwise or unclear commitments. In situations in which deception may be ethically justifiable to maximize benefits and minimize harm, psychologists have a serious obligation to consider the need for, the possible consequences of, and their responsibility to correct any resulting mistrust or other harmful effects that arise from the use of such techniques (American Psychological Association, 2010, p. 3).

The practice and promotion of clinical assessment requires that neuropsychologists present themselves and their work to others in an accurate and honest manner and avoid any misrepresentation of their findings. A considerable body of research supports that TPO can affect the accuracy of test findings, and to purposefully disregard its potential impact can be construed as a misrepresentation of the data

Principle D: Justice

Principle D is applicable and is described as follows.

Psychologists recognize that fairness and justice entitle all persons to access to and benefit from the contributions of psychology and to equal quality in the processes, procedures, and services being conducted by psychologists. Psychologists exercise reasonable judgment and take precautions to ensure that their potential biases, the boundaries of their competence, and the limitations of their expertise do not lead to or condone unjust practices (American Psychological Association, 2010, p. 3-4).

In an attempt to provide fair and just treatment to all patients and clients, neuropsychologists do not modify assessment procedures or alter their work on the basis

of personal opinion or professional bias, nor do they neglect to maintain an awareness of their competency level and the limitations of their expertise. To this end, the American Psychological Association (APA), psychological state organizations, and neuropsychological specialty organizations, provide multiple continuing education opportunities for neuropsychologists to learn, maintain, and improve their professional expertise, and avoid practices that are irregular or not commensurate with accepted clinical practice. Given the body of literature that exists regarding observer effects, it is incumbent on neuropsychologists who provide evaluations to make clear to patients, clients, families, and other professionals that they do not endorse TPO and to try to avoid this type of intrusion in the assessment.

Ethical standard 2: Competence

Ethical Standard 2 is applicable to TPO and the recording of test administration. Section 2.04, Bases for Scientific and Professional Judgments states the following:

Psychologists' work is based upon established scientific and professional knowledge of the discipline. (American Psychological Association, 2010, p. 5; see also Standards 2.01e, Boundaries of Competence).

Ethical standard 2.04

Ethical Standard 2.04 requires neuropsychologists to conduct their practice within the boundaries of scientific knowledge. Texts on psychological testing have long cited the need to conduct testing in a distraction-free environment (Anastasi & Urbina, 1997). For example, the Wechsler Adult Intelligence Scale-Third Revision (WAIS-III) requires that, "As a rule, no one other than you and the examinee should be in the room during the testing" (1997, p. 29). The manual further directs, "Attorneys who represent plaintiffs sometimes ask to observe, but typically withdraw this request when informed of the potential effect of the presence of a third person" (Wechsler, 1997, p. 29). The requirement to avoid interference from others is noted in the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV), which advises that no one other than the examiner and the examinee should be in the room during test administration (Wechsler, 2003, p. 23).

The concept of being free from distractibility is also emphasized in the Wechsler Adult Intelligence Scale-Fourth Revision (WAIS-IV) that instructs the examiner to provide a physical environment "free from distractions and interruptions" and stresses that "External distractions must be minimized to focus the examinee's attention on the tasks presented and not on outside

sounds or sights, physical discomfort, or testing materials not in use" (Wechsler, 2008, p. 24). This is also emphasized in the administration manual for the Rey Complex Figure Test (Meyers, 1995, p. 6). Similarly, the scoring manual for the California Verbal Learning Test-Second Edition (CVLT-II) instructs that only the examiner and examinee be present in the room during testing (Delis et al., 2000, p. 8). By eliminating the presence of third parties, the examiner eliminates potential interference and the possibility of their distracting from or influencing the testing process, hence variables that are inconsistent with test standardization.

Most test manuals specify that the examiner is responsible for ensuring that the testing environment is quiet and free from distractions (Meyers, 1995; Williams, 1991; Urbina, 2014) and are often very specific about the testing room being limited to "A table or desk and two chairs" (Meyers, 1995). Similarly, the manual for the California Verbal Learning Test-Second Edition (CVLT-II) states "as a rule, no one other than you and the examinee should be in the room during testing" (Delis, Dramer, Kaplan & Ober, 2000, p. 8). As described above, these instructions serve to emphasize the importance of controlling distraction as an important factor in assessment.

Ethical standard 9: Assessment

Ethical Standard 9 is applicable to TPO and recording. In Section 9.01, Bases for Assessments, the code notes "(a) Psychologists base the opinions contained in their recommendations, reports, and diagnostic or evaluative statements, including forensic testimony, on information and techniques sufficient to substantiate their findings" (American Psychological Association, 2010, p. 12; see also Standard 2.04, Bases for Scientific and Professional Judgments).

Test results generated by nonstandard methods that negatively impact the validity of the findings are insufficient. In forensic settings, neuropsychologists are often required to use their findings in comparison with other evaluations. The ability to compare separate data sets, when one evaluation was conducted following proper testing procedures and the other evaluation had inherent threats to validity such as a third party observer is dubious.

Under 9.01:

(a) the psychologist cannot provide opinions or evaluative statements because TPO presence yields the evaluation of questionable validity. (b) Except as noted in 9.01c, psychologists provide opinions of the psychological characteristics of individuals only after they have conducted an examination of the individuals adequate to

support their statements or conclusions. When, despite reasonable efforts, such an examination is not practical, psychologists document the efforts they made and the result of those efforts, clarify the probable impact of their limited information on the reliability and validity of their opinions, and appropriately limit the nature and extent of their conclusions or recommendations. (American Psychological Association, 2010, p. 12; see also Standards 2.01, Boundaries of Competence, and 9.06, Interpreting Assessment Results). (c) When psychologists conduct a record review or provide consultation or supervision and an individual examination is not warranted or necessary for the opinion, psychologists explain this and the sources of information on which they based their conclusions and recommendations.

Section 9.02: Use of assessments

Section 9.02 describes the following:

(a) Psychologists administer, adapt, score, interpret, or use assessment techniques, interviews, tests, or instruments in a manner and for purposes that are appropriate in light of the research on or evidence of the usefulness and proper application of the techniques. (b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation. (c) Psychologists use assessment methods that are appropriate to an individual's language preference and competence, unless the use of an alternative language is relevant to the assessment issues (American Psychological Association, 2010, p. 12).

Section 9.02 (a) suggests that tests administered by a neuropsychologist in a manner that is inconsistent with the standardization of the instrument and contrary to the test manual, may be in violation of this standard. When an exception exists, it is incumbent on the neuropsychologist to provide a rationale or need that supports altering standardization in the report. Otherwise, TPO is contrary to this standard.

Section 9.06: Interpreting assessment results

Section 9.06 describes the following:

When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of the assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations (American Psychological Association, 2010, p. 13; see also Standards 2.01b and c, Boundaries of Competence).

Many authors and organizations (Anastasi & Urbina, 1997; National Academy of Neuropsychology, 2000a; Oregon Psychological Association, 2012; Michigan Psychological Association, 2014) emphasize that, during test development, procedures are standardized without the presence of an observer. Subsequently the data obtained outside of those parameters lacks corresponding assurance of validity and interpretive significance.

Section 9.11: Maintaining test security

Section 9.11 raises the importance of maintaining test security. "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code" (American Psychological Association, 2010, p. 13). Test security is a critical issue, as it addresses the prevention of unnecessary exposure of psychometric materials that can result in diminishing a test's ability to accurately distinguish between normal and abnormal performance.

Several professional organizations have emphasized the importance of maintaining test security. The APA, the National Academy of Neuropsychology (NAN), and several state associations (among others) emphasize test security as essential to the practice of psychology, and that it is incumbent on neuropsychologists to protect the integrity of psychological test materials (American Psychological Association, 1999; National Academy of Neuropsychology, 2003; Michigan Psychological Association, 2014).

Other state and national psychological organizations as well as a number of authors have raised concerns about the potential for testing material to be used inappropriately by attorneys or become part of the public domain (American Academy of Clinical Neuropsychology, 2001; American Psychological Association, 1999; Bush et al., 2009; Canadian Psychological Association, 2009; Essig, Mittenberg, Petersen, Strauman, & Cooper, 2001; Kaufman, 2005, 2009; McCaffrey et al., 1996; Michigan Psychological Association, 2014; Morel, 2009; National Academy of Neuropsychology, 1999; Oregon Psychological Association, 2012; Victor & Abeles, 2004; Wetter & Corrigan, 1995). Public accessibility allows individuals involved in litigation to self-educate or be coached as to how to perform on certain measures or how to selectively pass or fail key components of the neuropsychological evaluation and thus invalidate the results of the assessment. As a result, several psychological organizations have taken a formal position against the presence of TPO during assessment.

The National Academy of Neuropsychology (Axelrod et al., 2000) advises that TPO is inconsistent with psychological guidelines and practices, as it threatens the validity, reliability, and interpretation of test scores. The position of the academy is that TPO should be avoided whenever possible outside of necessary situations involving a nonforensic setting where the observer is both neutral and noninvolved (e.g., student training or an interpreter). This view is also held by the Canadian Psychological Association (CPA) that advises "It is not permissible for involved third parties to be physically or electronically present during the course of neuropsychological or similar psychological evaluations of a patient or plaintiff" (CPA, 2009).

The American Academy of Clinical Neuropsychology (AACN; 2001) has taken the position that "It is not permissible for involved third parties to be physically or electronically present during the course of an evaluation assessment of a plaintiff patient with the exception of those situations specified below" (p. 434). Exceptions are described that include as an example, the assessment of young children who require the presence of a family member.

The executive committee of the Oregon Psychological Association (2012) adopted a clear and unequivocal policy that the observation by a third party compromises test validity and security and therefore advises against the presence of TPO during assessment. Similarly, the Michigan Psychological Association Ethics Committee has advised against TPO for the same reasons (Michigan Psychological Association, 2014).

Research evidence

In support of professional ethics, there is a significant body of research indicating that TPO cannot be assumed as inconsequential to test findings. A review of the pertinent literature overwhelmingly supports the negative consequences of either direct or indirect TPO or recording on the behavior of both the examiner and the examinee, and the validity of findings obtained in a neuropsychological assessment.

It is self-evident that neuropsychological evaluations be conducted in a standardized fashion consistent with the publisher's directives to ensure valid and reliable results. Consistent with other major neuropsychological organizations, it is the position of the American Board of Professional Neuropsychology that altering test procedures to accommodate observation or recording compromises test standardization and affects the subsequent data set obtained. As there is no basis for accepting as valid an assessment under nonstandard (observed or recorded) conditions, it is questionable if findings

reflect a reasonable degree of certainty or fall within an accepted range of probability. Test results therefore lack the normal and accepted parameters of validity and, more importantly, do not reflect the expected standards of psychological care. Given current research it is not surprising that most publishers of psychological tests have cautioned against TPO in their instruction manuals and national organizations have advised against TPO (National Academy of Neuropsychology, 2000a; Committee on Psychological Tests and Assessment, 2007).

The issue of TPO has been investigated by numerous researchers, including an early case study by Binder and Johnson-Greene (1995). Multiple studies have established and replicated the dubious validity of data obtained during recorded or observed evaluations. A considerable amount of research now exists demonstrating the deleterious effect on data obtained during nonstandard evaluations involving executive functioning (Horowitz & McCaffrey, 2008), attention and processing speed (Binder & Johnson-Greene, 1995; Kehrer, Sanchez, Habif, Rosenbaum, & Townes, 2000), and memory/recall of information (Eastvold et al., 2012; Gavett, Lynch, & McCaffrey, 2005; Lynch, 2005; Yantz & McCaffrey, 2005). Eastvold et al. (2012) meta-analysis found negative effects on multiple cognitive measures and that attention, learning, and memory (delayed recall) were most adversely impacted by the presence of an observer.

Exceptions to TPO

Third party assistant (TPA)

In selected circumstances, the presence of an unbiased, impartial, and neutral third party observer may be necessary to proceed with or complete a neuropsychological assessment. In these cases, rather than an involved third party observing or monitoring the behavior of the test administrator or examinee, the third party holds a neutral position and acts in an indirect manner to assist or expedite the completion of the assessment. Given this significant difference of purpose, we suggest that the presence of an uninvolved and neutral observer during an evaluation is more accurately identified as a third party assistant (TPA).

A TPA may be deemed appropriate in clinical examinations in which the examiner is acting as a clinical treater with an established patient-doctor relationship, as opposed to an independent psychological examination for an insurance company or a forensic assessment in civil or criminal proceedings. A TPA may be appropriate in a testing situation in which the presence

of a parent, family member, guardian, family friend, or interpreter is necessary, and without whose presence the examination could not proceed because of a mental disability or clinical limitation that requires an accommodation. Examples might include a child with suspected or diagnosed autism, developmental disorders affecting intelligence, confirmed brain injury that precludes independent living, children who are either too young or severely anxious that they cannot be left alone, elderly adults with compromised cognition who are unwilling to participate without the presence of a trusted family member or friend, or patients who have a thought disorder impacting reality testing, among others.

Alternatively, there are cases in which a language barrier precludes valid test administration. While the preference is for the examination to be conducted in the examinee's native language, in some these cases an interpreter may be necessary because a native speaking psychological examiner is not available or within a practical distance. In these situations, to avoid potential conflicts of interest, if it is at all possible the interpreter should have no relationship (i.e., such as family member, close friend or social affiliation) to the person being examined.

Similarly, if an examinee is deaf or hearing impaired, an individual versed in American Sign Language (ASL) or a member of the deaf community would be necessary to complete an examination. Absent a qualified examiner fluent in sign language, a certified specialist or ASL interpreter may be needed.

Training presents another situation in which a TPA is considered appropriate. Not unlike medical students, psychology students and technicians learning the administration of psychology test procedures require direct observation, practice, and supervision to ensure accuracy and competence.

In the aforementioned cases, the examiner is ethically required to document in the neuropsychological report the use of a TPA and any deviations of standardization or modifications in test administration. The limitations of normative data with subsequent impact on the generalization of findings should be clearly noted.

Forensic examinations, independent medical examinations, and acting as an expert witness

Neuropsychologists who choose to perform forensic assessments are ethically required to be aware of the specialty guidelines pertinent to this area of expertise. In order to avoid potential conflict, neuropsychologists who regularly provide forensic consultations should inform referral sources that if TPO or recording

develops as an issue or is required by legal proceedings, they may elect to remove themselves from the assessment.

When retained as an expert witness in forensic situations, neuropsychologists should resist demands for TPO if requested by opposing counsel, retaining counsel, or the court. The neuropsychologist should educate the court or those involved as to the APA Ethics Code and the existing scientific research that supports the negative effects of this type of intrusion. However, it is recognized that often in forensic situations professional ethics and the adversarial nature of the legal system may not agree. If attempts to educate those involved fail and counsel insists, or the court directs to proceed with TPO, the neuropsychologist can consider removing himself/herself from the assessment.

In those exceptions in which a neuropsychologist is *compelled* by the court to evaluate with a TPO because of existing state statutes or if the neuropsychologist is placed in a situation whereby withdrawing will bring clear and substantial harm to the examinee, the manner in which test validity and clinical findings are affected and may be compromised should explicitly documented. The neuropsychologist should then follow existing recommendations and guidelines for protecting test security including requesting that test material and intellectual property be provided only to another licensed psychologist who would be bound by the same duty to protect.

If this is not possible, the neuropsychologist should request a protective order specifically prohibiting either party from copying test material or intellectual property, using them for any other purpose than the matter at hand, and directing that they be returned uncopied directly to the psychologist or destroyed in a manner verifiable by the psychologist.

Conclusion

Requests for TPO frequently create an ethical dilemma for neuropsychologists as any observation or recording of neuropsychological tests or their administration has the potential to influence and compromise the behavior of both the examinee and the administrator, threatens the validity of the data obtained under these conditions by, and consequently limits normative comparisons, clinical conclusions, opinions, interpretations, and recommendations. For these reasons, APA ethical standards support the position that TPO in neuropsychological testing should be avoided.

Ethical standards of practice compel neuropsychologists to avoid or resist requests for conducting assessments complicated by TPO, except for those situations

as described. Neuropsychologists should therefore not engage in, endorse, abet, or conduct assessments complicated by TPO or recording of any kind other than under the order of a court after all reasonable alternatives have been exhausted. It would be entirely appropriate for a neuropsychologist to decline to perform an examination under these conditions.

As an exception, TPA is acceptable under infrequent clinical circumstances that necessitate the involvement of an assistant or in a rare forensic case that might require a neutral or uninvolved party such as a language interpreter. A neuropsychologist is obligated to clarify in the report the rationale for the use of TPA, identify what procedures and standards have been modified, and how or to what degree the findings, results, and conclusions may be impacted. This should include limitations in the generalization of the diagnostic data and the impact on assessment's findings.

In summary, it is the position of the American Board of Professional Neuropsychology that it is incumbent on neuropsychologists to minimize variables that might influence or distort the accuracy and validity of neuropsychological assessment. Therefore, it is the recommendation of the American Board of Professional Neuropsychology that neuropsychologists should resist requests for TPO and educate the referral sources as to the ethical and clinical implications.

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Exhibit C

Affidavit Regarding Opposition to the Presence of Third Party Observers
and Recording of Neuropsychological and Psychological Assessments
Performed in the State of Illinois

This statement has been endorsed by Clinical Neuropsychologists who are board certified by the American Board of Clinical Neuropsychology and who are currently residing and practicing in the State of Illinois.

Created by Jerry J. Sweet, Ph.D., ABPP and Leslie Guidotti Breting, Ph.D. in June 2012.

Clinical neuropsychologists are often asked to evaluate an individual who is involved in some form of civil or administrative proceeding (e.g., related to personal injury litigation, medical malpractice litigation, application for disability benefits, worker's compensation claim) in which an attorney formally requests that a third party (i.e., lawyer, lawyer's representative, and/or recording device) be present to observe the entire evaluation.

It is very problematic to be asked to allow either third party observation or recording of a neuropsychological evaluation. This issue has been discussed in great detail within the field of neuropsychology. Basically, the opposition within the field can be categorized as involving two issues: validity of test results and test security. Upon request, this affidavit can be accompanied by a number of relevant supporting materials that have been published on this topic, including pages from current test manuals by test publishers that specifically discourage the practice of third party observations related to lawsuits. An official statement from the American Academy of Clinical Neuropsychology on the subject of opposition to third party observers and recording has been published and can be provided. A separate professional organization, the National Academy of Neuropsychology has also developed an official position against these practices and can be provided. Relevant citations on the topic of third party observation and recording, as well as test security have been placed at the conclusion of this affidavit.

With regard to validity of test results, a neuropsychological evaluation is not the same as a medical examination. Our procedures (unlike the physician's straightforward evaluation of basic reflexes and balance, for example) require an environment free of distractions within which the examiner and examinee can develop a comfortable working relationship that lasts over a period of hours and is intended to optimize the validity of information gathered in the clinical interview and via formal testing procedures. The presence of a third party observer or recording equipment interrupts the normal focus of the examiner and the examinee on the assessment procedures, and in so doing makes the differential diagnosis more complex, increasing the likelihood that certainty of some specific conclusions would be reduced. There is a considerable scientific literature on the deleterious effects of the presence of observation or recording on an individual's task performance, despite best efforts to remain unobtrusive. This effect is known as "social facilitation" (i.e., the effect or effects of the presence of a person on an individual's task performance).

The second issue is that of test security, which relates to the rights of the publishers of test materials to not have their work rendered useless by the potential public release of questions and answers to psychological and neuropsychological tests. For this same reason, publishers of

testing materials require proof of being a licensed psychologist before tests can be purchased. Test security issues pertain to attorneys or their representatives observing or recording the evaluation process, and to release of the raw data once the evaluation is complete. The appropriate manner in which to share or allow discovery of all aspects of neuropsychological evaluations is to release all of the information gathered during the course of the evaluation directly to the plaintiff's or claimant's expert.

There is no intent on the part of clinical neuropsychologists to withhold information gained during the evaluation by not allowing third party observation and recording. In fact, all the examinee's responses salient to the bases of our opinions will be written down and scored according to standardized procedures. A detailed formal report will describe the entire evaluation process and all results. The attorney's own expert neuropsychologist can review all these materials at a later date and the attorney can ask detailed questions about all parts of our evaluation as part of the discovery process. Observing or recording of our evaluation is simply not necessary to ensure adequate discovery of facts from our evaluation. Moreover, as noted earlier, the presence of a third party observer or recording can invalidate portions of the results; the presence of a video or audio recording device violates the copyrights of the test publishers.

The issue of test security is not restricted to the immediate case at hand. Again referring to two separate relevant surveys of attorneys (Wetter & Corrigan, 1995; Essig et al., 2001), it is known that attorneys spend substantial time preparing clients for neuropsychological examinations, including sharing information pertaining to test content, methods of detecting malingering, and common symptoms of brain injury. Apparently, attorneys feel obligated to use whatever information they have in their possession, which would have the effect of invalidating or undermining future evaluations as well (Victor & Abeles, 2004). The guidance on ethics from the American Psychological Association and related organizations in the form of Standards for Educational and Psychological Testing and the American Psychological Association's Ethical Principles of Psychologists and Code of Conduct are clear in requiring limited access to questions and answers of copyrighted and normed tests that would undermine future use (e.g., Duff & Fisher, 2005; Kaufman, 2005, 2009; Sweet, Grote, & van Gorp, 2002).

To summarize, our standard practice is not to have any person or recording equipment present for the examination, other than the examinee and the examiner. This is the standardized and accepted practice in the specialty of clinical neuropsychology, which enhances our ability to obtain valid performances, upon which we base our interpretations and conclusions.

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The individuals listed below comprise the entire group of clinical neuropsychologists who as of June 1, 2012 are board-certified by the American Board of Clinical Neuropsychology (ABCN), which is one of 14 psychology specialties operating under the auspices of the American Board of Professional Psychology (ABPP). All signatories are licensed as clinical psychologists in Illinois, reside in Illinois, and actively practice in Illinois.

Joseph S. Alper, Ph.D., ABPP

Joseph S. Alper, Ph.D.

Joshua A. Barras, Ph.D., ABPP

Joshua A. Barras, Ph.D.

Bryan A. Bernard, Ph.D., ABPP

Bryan A. Bernard, Ph.D.

Kyle R. Bonesteel, Ph.D., ABPP

Kyle R. Bonesteel, Ph.D.

Theresa Campbell, Ph.D., ABPP

Theresa Campbell, Ph.D.

Amy V. Davis, Ph.D., ABPP

Amy V. Davis, Ph.D.

Jill Dorflinger, Ph.D., ABPP

Jill Dorflinger, Ph.D.

Joseph W. Fink, Ph.D., ABPP

Joseph W. Fink, Ph.D.

Elizabeth K. Geary, Ph.D., ABPP

Elizabeth K. Geary, Ph.D.

Diana S. Goldstein, Ph.D., ABPP

Diana S. Goldstein, Ph.D.

Christopher L. Grote, Ph.D., ABPP

Christopher L. Grote, Ph.D., ABPP

Robert E. Hanlon, Ph.D., ABPP

Robert E. Hanlon, Ph.D.

Robert L. Heilbronner, Ph.D., ABPP

Robert L. Heilbronner, Ph.D.

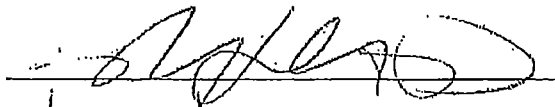
Erin K. Hill, Psy.D., ABPP

Erin K. Hill, Psy.D.

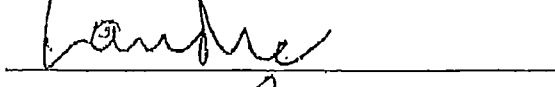
David Katz, Ph.D., ABPP

David Katz, Ph.D.

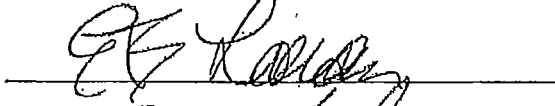
Shanna Kurth, Ph.D., ABPP



Nancy A. Landre, Ph.D., ABPP



Eric Larson, Ph.D., ABPP



Brian J. Leahy, Ph.D., ABPP



Aaron C. Malina, Ph.D., ABPP



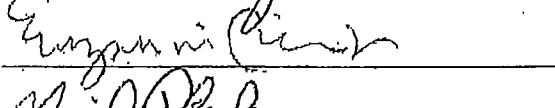
Eileen M. Martin, Ph.D., ABPP



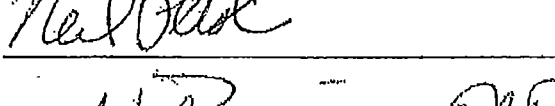
David L. Nyenhuis, Ph.D., ABPP



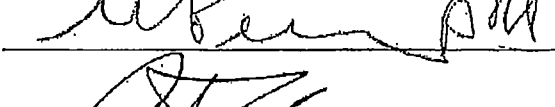
Elizabeth M. Pieroth, Psy.D., ABPP



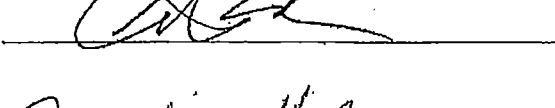
Neil H. Pliskin, Ph.D., ABPP



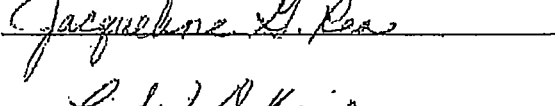
Margaret Primeau, Ph.D., ABPP



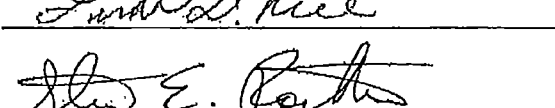
Christopher Randolph, Ph.D., ABPP



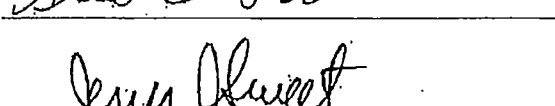
Jacqueline G. Rea, Ph.D., ABPP



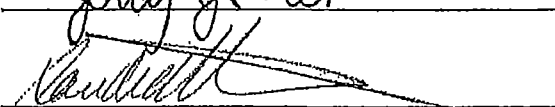
Linda D. Rice, Ph.D., ABPP



Steven E. Rothke, Ph.D., ABPP



Jerry J. Sweet, Ph.D., ABPP

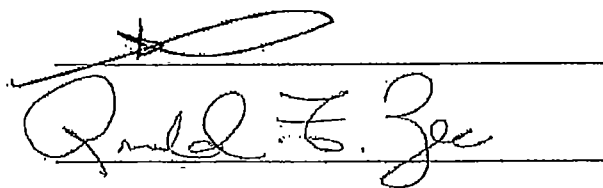


Sandra Weintraub, Ph.D., ABPP



Douglas M. Whiteside, Ph.D., ABPP

Ronald F. Zec, Ph.D., ABPP

A handwritten signature in cursive script, appearing to read "Ronald F. Zec", is written over a horizontal line. Above this line, there is a separate, loopy handwritten mark that resembles a stylized "X" or a flourish.

Declaration of Daniel H. Grant

1. I am licensed as a psychologist in the State of Georgia (Georgia License Number 859) with training in psychological and neuropsychological evaluation procedures. I have an Ed.D in school psychology from the University of Georgia, with a major in school psychology and a minor in mental retardation and reading. In addition to attaining the qualifications for licensure in psychology, I obtained both pre and post-doctoral training at the Medical College of Georgia in clinical neuropsychology. I am board certified as a clinical neuropsychologist by the American Board of Professional Neuropsychology. I am also a board certified forensic examiner and Fellow of the American College of Forensic Examiners. A copy of my CV is attached as Exhibit A to this declaration.
2. Based on records provided to me by counsel for Anthony Woods, it is my understanding that he has taken four standardized comprehensive tests of intelligence, the reported results of which are listed in the chart below:

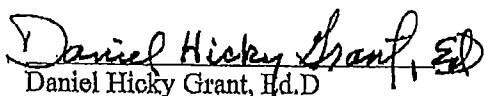
Date	Test	Administered By	FSIQ
12/14/2004	WAIS-III	Dr. Camille Tezza	73
3/28/2012	WAIS-IV	Dr. David Price	72
4/26/2012	SB-5	Dr. Thomas Kirby	81
8/30/2018	WAIS-IV	Dr. Susan Knight	66

3. A diagnosis of intellectual disability requires a finding of three criteria: (1) significantly sub-average intellectual functioning, demonstrated by a full-scale IQ score of approximately 75 or less; (2) significant deficits in adaptive behavior; and, (3) evidence of manifestation during the developmental period.
4. Mr. Woods has a reported score of 81 on the Stanford Binet, Fifth Edition ("SB-5") administered during an evaluation at the Department of Disabilities and Special Needs ("DDSN") in 2012. There are several factors that should be considered related to this test administration.
5. First, the report from DDSN states that Dr. Kirby and Dr. Gordon E. Brown were both present while Dr. Kirby administered the Stanford Binet to Mr. Woods. The National Association of Neuropsychologists has published a position paper specifically instructing against having an observer present during intelligence testing because it renders the results invalid. The Examiner's Manual for the Stanford Binet also tells examiners not to allow third party observers.
6. Second, at the time that Mr. Woods was administered the Stanford Binet, Fifth Edition, the test was quite old. The normative sample for the SB-5 was collected over a twelve-month period in 2001 and 2002. See SB-5 Technical Manual at p.47. Thus, when the test was administered to Mr. Woods and interpreted, the norms were approximately 10 to 11 years old. It is well-established that using a test with out-of-date norms can produce an artificially inflated result. See AM. ASS'N ON INTELL.

AND DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (11th ed. 2010) [hereinafter AAIDD MANUAL] at p. 37

7. Finally, it should be noted that Mr. Woods was given a WAIS-IV less than a month prior to being given the Stanford Binet. The term "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). Some of the subtests on the WAIS-IV are similar to items on the Stanford Binet 5 and thus one would expect that Mr. Woods's scores would also be artificially inflated given the recent administration of the WAIS-IV.
8. All three of Mr. Woods's Wechsler Scale scores are below 75. They were administered by three different examiners over a period of fourteen years and all three results are consistent with each other. Based on the information I have recounted above, it is my opinion to a reasonable degree of scientific certainty that the score of 81 on the Stanford Binet is likely an overestimation of Mr. Woods's IQ because the Stanford Binet's norms are old, leading to artificially high scores, and because this test was administered less than one month after Mr. Woods was given a similar IQ test, resulting in some practice effect given the similarity between the tasks on the two tests. Based on these IQ scores, I recommend that Mr. Woods's attorneys conduct a complete investigation, with the assistance of appropriate experts with specific training in intellectual disability, to determine whether Mr. Woods has significant deficits in adaptive behavior and satisfies all three criteria for a diagnosis of intellectual disability.

I affirm, under the penalty of perjury, that the foregoing is true and correct.


Daniel Hicky Grant, Ed.D

September 17, 2018

Exhibit A

DANIEL HICKY GRANT, Ed.D
Post Office Box 1359
Richmond Hill, Georgia 31324
(912) 727 - 3158

danielgrant@msn.com

Board-Certified Neuropsychologist - The American Board of Professional Neuropsychology
Advanced Certification in Pain Management - American Academy of Pain Management
Board Certified Expert In Traumatic Stress - Diplomate, American Academy of Experts In Traumatic Stress
Licensed Psychologist - Georgia License Number 859

EDUCATION: ED.D. Educational Psychology, 1981 - University of Georgia

Major: School Psychology

Minors: Retardation and Reading

Dissertation: The Use of Hypnosis and Suggestions to Improve Study Habits,
Study Attitudes, Self -Concept, and Reduction of Text Anxiety.

Post Doctorate: Training In Clinical Neuropsychology, 1980 - Department of
Neurology, Medical College of Georgia.

Post masters: School Psychology, 1972- 1973 - Georgia Southern College

M.A., Psychology, 1970 - 1971 - West Georgia College

Master Thesis: An Evaluation Survey of the Center, A Tax Supported Drug
Rehabilitation Facility In Savannah, Georgia.

Post Baccalaureate In Psychology, 1970 - Armstrong State College

B.A., Biology, 1964 - 1969 - Georgia Southwestern College

PROFESSIONAL EMPLOYMENT HISTORY:

01/95-Present	Private practice In Neuropsychology and Forensic Psychology Richmond Hill, Georgia
10/11-07-12	Full Time Counseling Psychologist Army Substance Abuse Program Ft. Stewart, Georgia
04---7/11	Part Time Psychologist Savannah Regional Youth Detention Center, Savannah, Georgia
03---04	Consulting Psychologist Gateway Community Service Board Savannah Youth Detention Center, Savannah, Georgia
02---8/11	Part Time Psychologist Claxton Regional Youth Detention Center, Claxton, Georgia
98---1/03	Part Time Psychologist Savannah Regional Youth Detention Center, Savannah, Georgia
9/95 -3/02	NEUROPSYCHOLOGIST (Part time), Outpatient Psychiatric Service, Winn Army Hospital, Fort Stewart, Georgia

6/97 - 12/97 CONSULTING PSYCHOLOGIST, Fraser Counseling Center, Hinesville, Georgia

3/83 - 12/94 PRIVATE PRACTICE IN PSYCHOLOGY AND NEUROPSYCHOLOGY, Brunswick and Savannah, Georgia

12/82 - 4/97 CONSULTING PSYCHOLOGIST - Coastal Correctional Institution, Diagnostic Unit, Garden City, Georgia

11/77 - 12/82 SCHOOL PSYCHOLOGIST - Hall County Board of Education, Gainesville, Georgia

4/76 - 4/77 PSYCHOLOGIST/CONSULTANT - Alcohol Drug Abuse Clinic, Northeast Georgia Community Mental Health Center, Athens, Georgia

1975 - 1976 ASSISTANTSHIP WITH DR. ALAN KAUFMAN - University of Georgia Department of Educational Psychology Instructional Assistant for Intelligence Testing Course Taught By Alan Kaufman

12/72 - 9/74 CLINICAL DIRECTOR - Department of the Army (Civilian) Alcohol and Drug Abuse Center, Fort Stewart, Georgia - Consultant to the Pediatric and Mental Hygiene Clinics (Consulting Psychologist GS-11)

9/72 - 12/72 CONSULTANT - Tuttle Army Hospital, Savannah Georgia, Drug and Alcohol Program, Hunter Army Airfield

6/71 - 12/72 STAFF PSYCHOLOGIST - Georgia Regional Hospital at Savannah Child Psychiatric Unit, Retardation Unit, Adult Services, Alcohol-Drug Unit and Supervised School Psychometrist Interns

10/69 - 3/70 ASSISTANT DIRECTOR - Uplight Crisis Center (A Substance Abuse Treatment Center) Savannah, Georgia

6/69 - 9/69 PSYCHIATRIC ATTENDANT - Memorial Medical Center Savannah, Georgia

LICENSURE AND CERTIFICATIONS:

Licensed Psychologist - Georgia License Number PSY000859
Board Certification in Clinical Neuropsychology by the American Board of Professional Neuropsychology
Advanced Certification in Pain Management by the American Academy of Pain Management
Diplomate, Board Certified Forensic Examiner by American Board of Forensic Examiners
Fellow of the American College of Forensic Examiners
American Academy of Experts in Traumatic Stress and Crisis Management

PROFESSIONAL MEMBERSHIPS:

American Academy of Experts in Traumatic Stress
American Academy of Pain Management
American Association on Intellectual and Developmental Disabilities
American Board of Forensic Examiners
American Psychological Association
American Psychological Society
Georgia Association of School Psychologists

Georgia Psychological Association
International Neuropsychological Society
National Academy of Neuropsychologists
National Center for Crisis Management

COLLEGE DISTINCTIONS AND HONORS:

Phi Delta Kappa, National Honorary Professional Fraternity In Education
Delta Kappa Phi, National Honorary Professional Fraternity In Education

COMMUNITY ACTIVITIES:

Member of the Board of Directors for Arts on the Coast Richmond Hill
Past Member of the Board of Directors for the Richmond Hill YMCA
Past President and Board of Directors for the Richmond Hill Exchange Club

PUBLICATIONS AND PRESENTATIONS:

Grant, D. *Stress and Its Effects*. Psychological Techniques in the Treatment of Malignancy. Presented at Pensacola Naval Air Station, Pensacola, Florida, July 1977.

Grant, D. *The School Psychologist as a Learning Specialist: The Use of Hypnosis In the Schools*. A paper presented at the National Association of School Psychologists Eighth Annual Convention, Kansas, March 1976.

Grant, D. *A Total Approach to the Treatment of Alcoholism, a Model*. An unpublished manuscript presented to the U.S. Army Drug and Alcohol Assistance Team, U.S. Army Health Services Command, Washington D.C. 1973.

Grant, D. *The Effect of Post Hypnotic Suggestion on Self-Concept, Locus of Control Test Anxiety, Study Habits and Attitudes and Reading Achievement with Special Studies Students at the University of Georgia*. A Pilot Study. Unpublished manuscript.

Grant, D. Hartlage, L. And Prim, J. *Experimental Children's Version of the Shipley-Hartford Test Format*. A paper presented at the Second Annual Meeting of the National Academy of Neuropsychologist, Atlanta, Georgia, October 1982.

Grant, D. Hartlage, L., and Telzrow, C. *Visual Memory Assessment In Young Children*. Paper presented at the Annual Meeting of the International Neuropsychological Society, Mexico 1983.

Grant, D. Hartlage, L., Powers, J., and Newnon, M. *Non-Verbal Memory Assessment In Elementary School Children*. A paper presented at the American Psychological Association Convention, Anaheim, California, August 1983.

Hartlage L., Grant D., Powers, J., Newnon, M. *Non-Verbal Memory assessment In Elementary School Age Children*. A paper presented at the American Psychological Association Convention in Anaheim, California, August 1983.

Grant, D., Womble, L., Telzrow, C. *Screening for Differentiations of EMR and LD In the Primary Grades*. A paper presented at the American Psychological Association Convention Anaheim, California, August 1983.

Grant, D., *Assessment of Functional Behavior Using the Street Survival Skills Questionnaire*. A paper presented at the Georgia Association of School Psychologists, Jekyll Island, Georgia, April 1984.

McIntyre, T., Mauger, P., Grant, D. Metzger, D. Young, R. *The Development of a Multidimensional Inventory for the Diagnosis of Personality Disorders*. A paper presented at the Southeastern Psychological Association, Atlanta, Georgia, March 1985.

Grant, D. Sleep Interview Form and Sleep Interview Self Form, Screening questionnaires for sleep disorders adopted for use in their detention facilities by the Georgia Department of Juvenile Justice July 8, 2009

SPECIAL INTERESTS:

- Pain Management
- Neuropsychology
- Psychodiagnostics of Children and Adults
- Clinical Hypnosis
- Teaching Clinical Techniques
- Forensic Psychology
- Occupational-Vocational Evaluations
- Intellectual Disabilities
- Developmental Disabilities
- Substance Abuse and Addictions

SPECIALIZED ABILITIES:

Experience and expertise in psychodiagnostic tests, including projectives, educational, neuropsychological, rehabilitation and vocational evaluations with preschool children, school children, adolescents and adults in outpatient/inpatient institutions and in correctional facilities. Experience in performing forensic evaluations for capital and other criminal cases, documenting personal injuries and providing expert testimony.

Experience in teaching psychological testing, clinical hypnosis and other counseling techniques, as well as supervising individuals involved in both.

Extensive training and experience in crisis management, individual therapy, group therapy, behavior therapy and hypnotherapy, with inpatient and outpatient children, adolescents, and adults. Evaluation and treatment of alcohol and substance abusers and experience with special areas such as attention deficit disorders, learning disabilities, intellectual disabilities, developmental disabilities, head injuries, personal injury, traumatic stress, personality disorders, obesity, pain management and neuropsychological complications of medical disorders. I have 28 years experience in working with detained juveniles and adults. During this time I assessed individuals for potential problems with adaptability to detention life, need for mental health services, making recommendations for housing, providing intervention services to enhance level of adjustment, crisis management and supervision of clinical staff. I also participated in the development and implementation of the automated Offender Profile Report used with all inmates entering the Georgia Prison System.

Specialized training and experience in forensic psychology. I have completed extensive forensic/neuropsychological evaluations and testified in criminal and personal injury cases in Juvenile, Magistrate, Probate, State, Superior and Federal Courts. I have also testified before Social Security Administrative Law Judges and Workers Compensation Administrative Law Judges. I have extensive experience in capital cases in multiple states at both the trial and appeal level.

Participated in internship and training program in neuropsychology in the Neuropsychology Department at the Medical College of Georgia.

Completed 80-hour certificate program in biofeedback, through the Stens Corporation, June 1992.

REFERENCES: Available upon request.

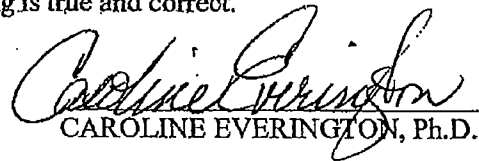
Declaration of Caroline Everington, PhD

1. I, am currently an Emeriti faculty member from Winthrop University in Rock Hill, SC, where I served as Associate Dean and Professor of Special Education. I hold PhD, MS, and BS degrees in special education, with an emphasis in intellectual disability. My work as a faculty member and my research have focused on intellectual disability. I have had a particular focus on intellectual disability and criminal justice system for the past thirty years. I have published 20 scholarly articles on intellectual disability and the criminal justice system, many of which focus on diagnosis of intellectual disability in capital cases. I have given numerous professional presentations on diagnosis of intellectual disability in capital cases to forensic psychologists and legal professionals. I am the author of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR), a widely-used forensic evaluation instrument.
2. Over the past 26 years, I have been hired as an expert in intellectual disability in approximately 80 to 100 capital cases. A diagnosis of intellectual disability requires a finding of three criteria: (1) significantly subaverage intellectual functioning, (2) deficits in adaptive functioning, and (3) evidence of the first two occurring during the developmental period (prior to the age of eighteen).
3. When I conduct an evaluation, I generally work with a psychologist who does IQ testing (to evaluate intellectual functioning) and I evaluate the individual's adaptive behavior. During the course of my evaluations, I review records related to the individual, interview the individual, and conduct adaptive functioning interviews of people who knew the individual well during the developmental period. Whenever possible, I administer a standardized test of adaptive functioning to a person who knew the individual well during the developmental period.
4. In 2010, I was retained by attorneys Lisa Armstrong and Robert Kilgo to do adaptive functioning testing as part of an intellectual disability evaluation for Anthony Woods in conjunction with his post-conviction relief proceedings.
5. In Mr. Woods's case, I reviewed various records, interviewed Mr. Woods, and administered two tests to Mr. Woods. I met with Mr. Woods on November 12, 2010 and administered the Test of Adolescent Language, 4th Edition (TOAL 4) and a Wide Range Achievement Test, 4th Edition (WRAT 4). Mr. Woods scored in the intellectual disability range on both tests.
6. My interview with Mr. Woods also revealed many indicators of intellectual disability. For example, Mr. Woods worked low skill laborer jobs which were obtained through the help of others. He did not have a driver's license and when he obtained a car (with money from a settlement after being hit by a car), the car and insurance were in his brother's name. Mr. Woods did not know how to look up a name in the phone book and had trouble with measurements. This type of information warranted additional investigation to corroborate and determine if there was additional evidence of deficits in adaptive behavior.
7. Shortly after my interview with and testing of Mr. Woods, I provided the test results to Mr. Woods's attorneys indicating the results were in the intellectual disability range. I asked the attorneys for additional information, including additional records such as social security

records, prison industry records, and information on Mr. Woods's work history. I did not receive the information I requested and followed up with the attorneys in June of 2011. Also in June of 2011, I provided the attorneys with a list of people I wanted to interview regarding Mr. Woods's adaptive functioning. The attorneys did not make arrangements for those interviews and stopped communicating with me without explanation. The attorneys did not respond to my request to conduct additional interviews or communicate with me further about my adaptive behavior evaluation. I was later copied on some communications from the attorneys about scheduling team meetings, but I was never informed of a scheduled team meeting, asked to attend a team meeting, or the hearing.

8. I am aware Mr. Woods received an IQ score of 81 on a Stanford Binet test administered in 2012. Such a score 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 I administered. If Mr. Woods's attorneys had discussed the score with me, I would have advised them to work with a psychologist to closely examine the reliability of the 81 IQ score. Mr. Woods's attorneys did not consult with me about their decision to abandon a claim of intellectual disability.

I affirm, under the penalty of perjury, that the foregoing is true and correct.

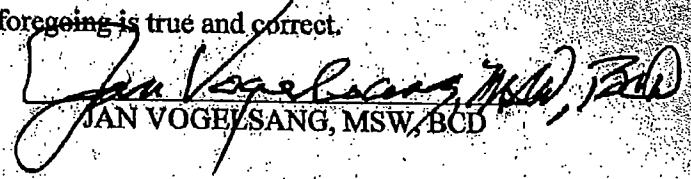

CAROLINE EVERINGTON, Ph.D.

9/14/2018
Date

Declaration of Jan Vogelsang

1. I am a licensed clinical social worker with significant experience in evaluating and presenting the social histories of capital defendants around the country. I have been involved in approximately seventy capital cases as a social historian.
2. In 2010, I was retained by attorneys Lisa Armstrong and Robert Kilgo to conduct a social history assessment in Anthony Woods's case.
3. Through my experience as a licensed clinical social worker and evaluating social histories in capital cases, I am familiar with the diagnostic criteria and symptoms of intellectual disability.
4. I believed Mr. Woods was intellectually disabled from early on in my evaluation and encouraged his attorneys to pursue an intellectual disability claim.
5. During the course of my evaluation, I recognized the following indicators of intellectual disability in Mr. Woods:
 - a. Mr. Woods had two IQ scores in the intellectual disability range, a 73 on a WAIS-III in 2004 and a 72 on a WAIS-IV in 2012.
 - b. I interviewed Mr. Woods and found him to be slow in that he had difficulty comprehending and responding to simple questions regarding his life. He struggled with focusing on the questions and his answers did not comport with what had been asked. For example, questions regarding simple life tasks such as clothing, shopping, and transportation were difficult or impossible for him to answer.
 - c. Interviews with Mr. Woods's family members revealed indicators that Mr. Woods suffered from deficits in adaptive behavior. For example, Mr. Woods's sister Vera told me that Mr. Woods could not live independently and did not know how to get a job or how to obtain public assistance. Vera had to put in job applications for Mr. Woods and help him obtain food stamps and Medicaid. Additionally, any jobs Mr. Woods had were low-skilled labor positions that were consistent with the functioning of someone with intellectual disability.
6. In light of the indicators that Mr. Woods was a person with intellectual disability, I urged his counsel to pursue this issue and provided them with a list of evidence I believed demonstrated deficits in adaptive behavior.
7. After Mr. Woods received an IQ score of 81 from the Department of Disabilities and Special Needs ("DDSN"), there was no more discussion from Mr. Woods's attorneys about an intellectual disability claim. The attorneys did not discuss their decision to abandon the claim with me, but if they had, I would have told them that, given the other IQ test scores, an 81 on a test administered by DDSN did not mean that Mr. Woods was not a person with intellectual disability. If the attorney had asked me, I would have told them they should continue developing evidence of intellectual disability.

When I affirm, under the penalty of perjury, that the foregoing is true and correct.


JAN VOGESANG, MSW, BCD

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CLARENDON	)	
Anthony Woods,	)	09-CP-14-654
Applicant.	)	AMENDED APPLICATION FOR
vs.	)	POST-CONVICTION RELIEF
State of South Carolina,	)	
Respondent.	)	

1. Place of Detention:
The Applicant is currently detained at Leiber Correctional Institution.
2. Name and Location of Court which imposed sentence:
Clarendon County Court of General Sessions located in Manning, S.C.
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
One count of murder, first-degree burglary, criminal sexual conduct, first-degree.
4. The date upon which sentence was imposed and the terms of the sentence:
On December 2006, the Court imposed a sentence of death.
5. A finding of guilty was made after a plea of not guilty.
6. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes.
7. If you answered "yes" to (6), list:
 - a. The name of each court to which you appealed:
The South Carolina Supreme Court.
 - b. The result in each such Court to which you appealed: Affirmed.
 - c. The date of each such result: May 13, 2009.
 - d. If known, citations of any written opinion or orders entered pursuant to such results: State v. Woods, 328 S.C. 3, 676 S.E.2d 128 (2009).
8. N/A.

9/10. (The grounds on which Appellant bases his allegations that he is being held in custody unlawfully and the facts in support thereof):

- A. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to conduct a reasonable investigation into Appellant's social history resulting in an inadequate penalty phase presentation. This dereliction was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).
- B. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to conduct a reasonable investigation into Appellant's mental health status and history resulting in an inadequate and erroneous penalty phase presentation in mitigation. Counsel relied on the state's forensic evaluation which was flawed, based on erroneous and scant social history and family information related to Mr. Woods' upbringing, functioning, and adaptive behavior, contained numerous errors of fact and relied on highly prejudicial hearsay accounts of Mr. Woods' personal history. In light of the overwhelming wealth of information available to rebut the spurious and poorly reasoned conclusions of the state's examiners, Counsel was derelict in adopting the state's conclusions and multiple diagnoses. This dereliction was unreasonable, outrageously prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).
- C. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to conduct a reasonable investigation into Appellant's cognitive and adaptive functioning and history resulting in their failure to raise the issue of Appellant's mental retardation. In fact, it appears Counsel never even considered the possibility that Appellant could be or was mentally retarded. In part, it appears Counsel dismissed this possibility due to their lack of information which stemmed from the deficient investigation conducted into Appellant's life and family history which clearly supports that Appellant failed numerous years of school, was socially promoted until the age of 21 when he received a "certificate" from high-school, never lived independently, drove a car, paid bills or had a checking account, could not be employed beyond the level of entry-level manual labor and had to have family fill out his job applications. In short, there was overwhelming evidence of extraordinarily low level adaptive functioning. Counsel's dereliction in failing to uncover all of the readily-available evidence of mental retardation was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).
- D. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel presented

damaging and prejudicial mental health testimony from its own expert in psychiatry. This dereliction flowed directly from counsel's failure to conduct a reasonable and thorough social history. Counsels' actions were unreasonable, prejudicial, and require vacation of Applicant's sentence of death. Strickland v. Washington, 466 U.S. 668 (1984).

- E. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Counsel failed to properly prepare for and conduct voir dire of the jurors in Appellant's case. Specifically, Counsel did not use all of the available defense strikes when good cause existed to use all of the defense strikes, with the result being that Appellant was tried and sentenced by a jury whose composition did not meet the requirements of law or due process, resulting in an unfair trial due to ineffective assistance of counsel

11. Prior to this application, and with respect to this conviction, Applicant has not filed (a) any petition in a State Court under South Carolina Law, nor (b) any petitions in state or Federal Courts for habeas corpus or post-conviction relief, nor (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7), nor any other petitions, motions or applications in this or any other Court.

12. Not applicable.

13. No ground set forth in (9) has been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed.

14. Not applicable.

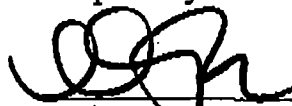
15. The grounds set forth in (9) were not previously raised because they are cognizable only in post-conviction relief.

16. Applicant was represented by an attorney during his arraignment, plea trial, sentencing and appeal.

17. Frederick Hoefer, Esquire and W. James Hoffmeyer, Esquire, of the Florence County Bar represented the applicant during his trial court proceedings. Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense, located in Columbia, South Carolina represented Applicant on his direct appeal.

18. Applicant seeks a reversal of his conviction, and vacation of his sentence.
19. Applicant is not now under sentence from any other court.

Respectfully Submitted:



Melissa J. Armstrong, Esquire
1400 Laurel Street, Ste. 4
Columbia, S.C. 29201
(803) 765-2796.

Robert L. Kilgo, Esquire
Kilgo Law Firm
P.O. Box 583
Darlington, S.C. 29540

ATTORNEYS FOR APPLICANT.

This 1st day of May, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

IN THE COURT OF COMMON PLEAS

Anthony Woods, #06023,

2009-CP-14-00654

Applicant,

v.

State of South Carolina,

Respondent.

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE

DATE

5/16/15

Brenda B. Roberts

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CLARENDON COUNTY, SC

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CLARENDON COUNTY, SC

This matter is before the court for disposition of issues raised by Anthony Woods in his application for post-conviction relief (PCR). The applicant is represented by Melissa R. Armstrong, Esq., and Robert L. Kilgo, Jr., Esq. The State is represented by W. Edgar Salter, III, Esq. The court must note that counsel on both sides have displayed remarkable expertise, intense preparation, and excellent grasp of the issues.

Attached hereto as Exhibit A is a list of definitions of terms that may be used in this order. For the reasons set forth herein, the application is denied.

I. PROCEDURAL HISTORY

Anthony Woods (hereinafter "the applicant" or "Woods"), is currently incarcerated on death row in the South Carolina Department of Corrections. The Clarendon County Grand Jury indicted him for murder, burglary in the first degree, and criminal sexual conduct (CSC) in the first degree (04-GS-14-0036). These charges stemmed from Woods' murder of fifty-three year old Joanne Dubose in her Clarendon County home on or about June 2, 2003.¹

¹ Woods was also indicted and convicted of burglary in the first degree, assault and battery with intent to kill (ABIK) and CSC in the first degree for May 27, 2003 crimes he committed against eighty-four year old Laura Jackson; he was indicted for and convicted, in a separate trial, of burglary in the first degree and two counts of ABEK for a June 4, 2003 break-in at the home of fifty-three year old Linda Taylor and her eighty-four year old mother. The Court of Appeals affirmed the Jackson convictions in *State v.*

On March 15, 2006, the State served Woods with a Notice of Intent to seek the death penalty, pursuant to S.C. Code Ann. § 16-3-20(A) (Supp. 2009). At that time, the State also gave notice that it would rely upon the aggravating circumstances that the murder was committed while in the commission of burglary and criminal sexual conduct. The State gave notice on June 28, 2006, that it intended to seek a sentence of life without parole (LWOP) based upon his prior convictions. R. pp. 2123-2124.

The South Carolina Supreme Court assigned the case to the Honorable John C. Few. W. James Hoffmeyer, Esquire, and Frederick A. Hoefer, II, Esquire were appointed to represent Woods at trial. On June 28, 2006, Judge Few held a hearing on Woods' motion for a change of venue and to select a jury from another county pursuant to S.C. Code Ann. § 17-21-85 (1990). Third Circuit Solicitor C. Kelly Jackson represented the State at the hearing. The State consented to the motion and Judge Few transferred venue to Marion County.

Woods received a jury trial before a Marion County jury on September 11-14, 2006 in Clarendon County. Messrs. Hoffmeyer and Hoefer represented him, while Solicitor Jackson and R. Ferrell Cothran represented the State. This trial resulted in a hung jury in the guilt phase.

When the case was called for retrial, the State withdrew its consent to the change of venue. Woods argued that the State was bound by its earlier consent. Judge Few, however, ruled that he would first attempt to draw a Clarendon County jury.

On November 27-December 8, 2006, Woods received a jury trial before Judge Few and a Clarendon County jury. Messrs. Hoffmeyer and Hoefer represented him. Solicitor Jackson and Assistant Solicitor Dudley Saleeby represented the State. The jury convicted Woods of murder, burglary in the first degree, and CSC in the first degree.

Woods, 376 S.C. 125, 654 S.E.2d 867 (Ct. App. 2008), cert. denied October 28, 2008). The Court of Appeals dismissed his appeal from the Taylor convictions on September 16, 2008.

Woods exercised his statutory right to a twenty-four hour cooling off period. In the sentencing phase, Judge Few submitted two statutory aggravating circumstances to the jury: that the murder was committed while in the commission of criminal sexual conduct and while in the commission of a burglary. § 16-3-20(C)(a)(1)(a) & (d). Judge Few submitted two statutory mitigating factors to the jury pursuant to § 16-3-20(C)(b)(2) & (7):

- (1) The murder was committed while the Defendant was under the influence of mental or emotional disturbance; and
- (2) The mentality of the Defendant at the time of the crime.

On December 8, 2006, the jury found both aggravating factors beyond a reasonable doubt and recommended a sentence of death. Judge Few then sentenced Woods to death for murder and imposed consecutive sentences of thirty years for CSC in the first degree and LWOP for burglary in the first degree.

Woods timely served and filed a notice of appeal. Former Chief Appellate Defender Joseph L. Savitz, III, represented him on appeal before the South Carolina Supreme Court. On November 24, 2008, Woods filed a Final Brief of Appellant, in which he presented five issues:

1. The trial judge committed reversible error by summarily granting the State's motion to transfer jury selection from Marion County to Clarendon County, without requiring it to establish that it could not receive a fair and impartial trial from a jury picked in Marion County, as this ruling violated *Article V, Section 23*, of the *South Carolina Constitution* and *S.C. Code Sections 17-21-80 and 17-21-85*, as well as *State v. Manning*, 329 S.C. 1, 495 S.E.2d 191 (1997).
2. The trial judge committed reversible error by excusing potential juror Carolyn Hilton, a black female, for cause, since her voir dire, taken as whole, did not indicate that her beliefs concerning capital punishment would have prevented or substantially impaired her performance of her duties as a juror in accordance with her instructions and her oath, so this ruling violated *Wainwright v. Witt*, 479 U.S. 412 (1985), and *S.C. Code Section 16-3-20(E)*.

3. The trial judge committed reversible error by denying the defense motion to suppress physical evidence seized from Woods' residence connecting him with the Dubose crimes, as the search warrant did not comply with *S.C. Code Section 17-13-140*, nor was it supported by probable cause, so that the search and seizure of evidence from the residence violated the *Fourth Amendment*.
4. The trial judge committed reversible error in the guilt phase by refusing to instruct the jury (1) that a mere suspicion of guilt does not constitute proof beyond a reasonable doubt or (2) that a reasonable doubt can be found through the lack of evidence presented, as these omissions from the reasonable doubt charge he did give impermissibly lessened the State's burden of proof, in violation of state law, the *Fourteenth Amendment* and *In re Winship*, 397 U.S. 358 (1970).
5. The trial judge committed reversible error by omitting from his final charge to the jury at sentencing the limiting instruction required by *State v. Stewart*, 283 S.C. 104, 320 S.E.2d 447 (1984), since the State introduced evidence that Woods had committed other burglaries and a criminal sexual conduct shortly before and after the Dubose murder and had in fact already been convicted of those offenses.

These grounds for appeal are recited herein because appellate ground number 5 relates to one of the applicant's current PCR grounds. The Supreme Court of South Carolina affirmed Woods' convictions and death sentence in *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009). Woods filed a Petition for Rehearing on April 14, 2009. The Supreme Court denied rehearing by order filed on May 13, 2009 and sent the remittitur to the Clarendon County Clerk of Court on the same date.

On May 15, 2009, Woods filed a Petition for 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 could file a petition for writ of certiorari in the United States Supreme Court. The South Carolina Supreme Court granted a stay of execution in an order filed on June 24, 2009.

However, appellate counsel Savitz did not file a petition for writ of certiorari. Instead, on August 13, 2009, Mr. Savitz filed a second Petition for Stay of Execution, pursuant to *In re Stays of Execution*, so the applicant could pursue post-conviction relief. Respondent did not oppose the request for a stay.

On September 17, 2009, the South Carolina Supreme Court granted a stay of execution and appointed the undersigned to preside over this case. This court convened a hearing at the Sumter County Courthouse on Monday, November 9, 2009. Woods was present at this hearing, as were Melissa Reed Kimbrough (now Armstrong), Esquire, and Robert L. Kilgo, Jr., Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing. The court ascertained that Woods wished for counsel to be appointed and found that Ms. Armstrong and Mr. Kilgo met the qualifications set forth in S.C. Code Ann. § 12-27-160(B). On November 10, 2009 this court filed its order appointing Ms. Armstrong and Mr. Kilgo to represent Woods, with Ms. Armstrong being lead counsel.

With the assistance of appointed counsel, Woods filed his original PCR application on November 23, 2009. At that time, he raised the following allegations:

9. Applicant was denied the effective assistance of counsel in violation of United States Constitution, South Carolina Constitution and laws. *Strickland v. Washington*, 466 U.S. 668 (1984).
10. The facts supporting this claim are as follows:
 - (A). Applicant was denied the effective assistance of counsel due to trial counsel's failure to adequately present evidence in mitigation of punishment.

On December 10, 2009, Respondent made its original return in this case and requested a hearing. Also, Respondent incorporated the following documents by reference and provided them to the court on January 11, 2012:

1. The Record on Appeal from the appeal;
2. The November 24, 2008 Final Brief of Appellant;
3. The Final Brief of Respondent filed on November 3, 2008;
4. The Supreme Court opinion affirming Woods' convictions and sentence, *State v. Woods*, 382 S.C. 153, 676 S.E.2d 128 (2009);
5. The Petition for Rehearing filed on April 14, 2009;
6. The order denying rehearing filed on May 13, 2009;
7. The Remittitur;
8. The May 15, 2009 Petition for Stay of Execution;
9. The Return to Petition for Stay of Execution filed on May 28, 2009;
10. The South Carolina Supreme Court's order granting a stay of execution, filed on June 24, 2009;
11. The second Petition for Stay of Execution, pursuant to *In re Stays of Execution*, filed on August 13, 2009 so that Woods could pursue post-conviction relief;
12. The State's letter in *lieu* of a return to this petition;
13. The September 17, 2009 order of the South Carolina Supreme Court granting a stay of execution and appointing this court to preside over the case.

Since the original application, the applicant has submitted two amended applications. The specific grounds in the final application are set forth below. The State submitted its final return dated May 29, 2012.

II. FACTS

A summary of the facts of the murder and surrounding circumstances is necessary for a complete understanding and discussion of issues relevant to this PCR proceeding.

On or about June 2, 2003, Woods burglarized the home of Joanne Dubose ("Joanne" or "the victim"), a fifty-three year old schoolteacher in Manning, South Carolina. He then raped and murdered her. Joanne had taught elementary school for roughly thirty years at the time of her death.

Gloria Eanes testified that she and Joanne were both single, that they were close friends, and that they often socialized. R. pp. 1679-81. Ms. Eanes last spoke to Joanne in a phone call between 8:00 and 9:00 p.m., on Sunday, June 1, 2003. Ms. Eanes had to work on Monday, June 2, but Joanne was out of school. They did not speak that day because their plan was to eat dinner at Shoney's on Tuesday night. Ms. Eanes telephoned Joanne three times on Tuesday, but Joanne never answered the phone. On the final call, Ms. Eanes left a message on the answering machine for Joanne to call her but did not hear from her. R. pp. 1681-84. She went to Joanne's house to see what was wrong. When she got to Joanne's house, Ms. Eanes knocked on the door and called for Joanne by name. Joanne's dog barked, but Joanne did not answer. Ms. Eanes let herself into Joanne's house with a key and immediately smelled a foul odor. Because the dog ran from the living room to the bedroom several times, Ms. Eanes followed the dog into the bedroom. There, Ms. Eanes saw Joanne lying on the bed, flat on her back. There was blood running off the side of her face. Ms. Eanes backed out of the bedroom and went into the living room, where she telephoned 911. R. pp. 1686-88, 1694. Ms. Eanes hung up the phone, got the dog out of the bedroom and went outside when she heard the police coming.

Teresa and Steven Skurry and their infant son lived next door to Joanne. Mr. Skurry is a paramedic and a fireman. Mrs. Skurry and the victim were friends. Mrs. Skurry last saw Joanne around 9:15 a.m. on Monday, June 2. Joanne did not come outside to investigate when several trucks and police cars, all with their emergency lights on, responded to a fire in the Skurry's

home shortly after midnight on Tuesday, June 3. Joanne did not answer when Mrs. Skurry called to see whether she and her son could come over to Joanne's house to get out of the smoke, or when a loud fan was used to air out the Skurry's home. R. pp. 1697-1702; 1704-10. The reason for her not answering was that she was dead.

Mr. Skurry testified that he saw Joanne's car parked in the yard later on Tuesday June 3, but he did not see her. When he returned home from playing golf on Wednesday, June 4, his wife told him that she had overheard on his pager that the fire department was going to Joanne's house. He immediately went next door to investigate. When he arrived, he saw Ms. Eanes, who told him she thought Joanne was dead and that she had called 911. R. pp. 1710-11.

Mr. Skurry testified he knew something was not right as soon as he went into the house because of the foul smell. He also noticed a lot of dog feces on the floor. When he went into the bedroom, he saw Joanne lying in bed. She was flat on her back, her blanket was up to her chest, and a bed sheet or pillowcase had been tied around her neck. EMS personnel arrived a minute or so later. Will Mathews, the paramedic in charge, went closer to the bed and saw that Joanne's right arm had also been tied with the sheet tied around her neck and that her legs were spread under the sheet that was over her body.

During the sentencing phase, evidence was introduced establishing that two days before he murdered Joanne, Woods burglarized the home that fifty-three year old Linda Taylor shared with her eighty-four year old mother. Woods broke in even after Linda Taylor beat his arm with a cane and he cut his hand on broken glass as he smashed the glass on their back door. R. pp. 2282-2320; 2355-59; 2366-71. A manhunt immediately after the crimes at the Taylor house led to Woods' capture on June 5, 2003. Police and bloodhounds pursued him for hours before he was arrested. When placed in the patrol car, his only statement was "F__ k you and your God". R.

p. 2371, ll. 10-12. Woods was convicted of burglary in the first degree and two counts of ABIK in the Taylor case. *See R. pp. 2200-10; 2320-43; 2366-71.*

Wendell Cooper worked for the Manning Police Department in 2003. He came into contact with Woods around 5:00 a.m. on June 5, 2003 at the police department after Woods was arrested for the burglary of the Taylor home (summarized below). He transported Woods to and from the hospital for medical treatment. Woods' hand was bleeding, and Woods was wearing dark pants and a pair of tennis shoes. Officer Cooper seized the clothing and shoes when Woods was treated at the hospital. He then gave these items to SLED Agent Bruce Gantt. *R. pp. 1765-70. See also R. pp. 1757-62.*

SLED Agent Gantt was qualified at trial as an expert in the areas of crime scene processing, fingerprint identification and footwear impression analysis. *R. pp. 1774-81.* He and fellow SLED Agent Diane Bodre responded to Joanne's residence on the night of June 4th and processed the crime scene. Although they did not find any fingerprints of evidentiary value, Agent Gantt lifted a shoe print impression off of the hardwood floor in Joanne's bedroom. They also determined that the point of entry was the back door to the residence, where a windowpane near the door's lock had been broken. They also seized the sheets, mattress and bedding from the bedroom. *R. pp. 1782-89; 1804-23.*

Agent Gantt was at the Manning Police Department when Captain Cooper brought in Woods' clothing after Woods was apprehended. When Agent Gantt saw Woods' shoes, he recognized the similarity between Woods' right shoe and the impression lifted from Joanne's bedroom. He immediately had the shoes sent to SLED for testing. Based upon his subsequent comparison of Woods' right shoe to the impression from the bedroom, he opined that the shoes were consistent in size, shape and outsole design, and that there "were random wear patterns

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located within the shoe [and] within the questioned impression that were similar." He also found "identifying characteristics in both the shoe and the impression that were similar."² Therefore, he opined that the impression could have been made by Woods' right shoe or another shoe with the same combined class characteristics, area patterns and random characteristics. However, he testified that it was not very likely that one would find another such shoe. R. pp. 1792; 1814-30; 1844-45.

SLED subsequently tested a number of items seized from Joanne's bedroom for the presence of blood and semen and DNA testing. Likewise, cuttings and swabs that were taken from the shoes Woods was wearing when he was arrested were examined. Woods' blood was found on the cuttings and a swab taken from his shoes. There were three cuttings taken from Joanne's bed sheet. Two revealed the presence of semen and one matched Woods' DNA. Also, one DNA profile from the mattress pad matched Joanne, while one matched Woods. A vaginal swab revealed the presence of semen but a profile could not be developed. The evidence established that the chances of randomly selecting another person who had the same DNA profile as Woods' was one in 2.5 quadrillion (1 in 2,500,000,000,000,000). R. pp. 1916-30; 1960-71.

The pathologist testified that Joanne had been dead for about two days at the time of the June 5, 2003 autopsy. The absence of evidence of sexual trauma to the vagina and anus could be accounted for by decomposition of her body. R. pp. 1859-64.

A search of Woods' residence was conducted pursuant to a warrant. There, police found two satellite receivers that belonged to Joanne, along with an access card for satellite reception.

² This apparently referred to marks and cuts on the shoe that are present in the impression. R. p. 1828.

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R. pp. 1868-1906; 1915. Finally, the State presented evidence of 1990 convictions for burglary in the second degree and burglary in the third degree. R. pp. 1771-73.³

Among other evidence offered in the sentencing phase, the State presented evidence that less than one week prior to the murder, Woods burglarized the home of eighty-four year old Laura Jackson. In that incident, he beat her, tied her to her bed and sexually assaulted her. Mrs. Jackson survived only because she played dead during the sexual assault. Before leaving, Woods positioned her body in a fashion similar to the way Joanne was found. Another jury convicted him of burglary in the first degree, ABIK and CSC in the first degree for this attack. R. pp. 2227-54.

III. SUMMARY OF ALLEGATIONS

Woods filed an Amended Application dated May 1, 2012 and a final Amended Application dated January 6, 2014. In that last application, he asserts the following grounds for relief. These allegations are quoted directly from the applicant's final amended application, with any bold print being in the application itself:

- A. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Constitution and Law. **Counsel failed to conduct a reasonable investigation into Appellant's life history and background**, including, but not limited to: failing to hire a mitigation specialist, whose role is to gather facts and help locate all records and witnesses and assist counsel in organizing the mitigation information and formulating mitigation strategy (as well as obtaining the MRI scan from 2005) and assist counsel in having this evidence reviewed by an independent expert, such as a radiologist and/or neurologist, and/or neuropsychologist – all experts trained to understand the intricacies of MRI testing and the possible significance of head trauma, as well as the significance of “personality change secondary to head injury,” which was noted in the SCDC work records. Additionally, counsel did not invest the necessary time with their social work expert resulting in an incomplete mitigation penalty phase presentation. Due to the complete absence of any defense at the guilt or

³ The trial judge gave a limiting charge with respect to the jury's consideration of these convictions. R. pp. 1773.

innocence phase of trial, it was incumbent upon counsel to present as compelling a case in mitigation as possible, as guilt was essentially a foregone conclusion. See *Florida v. Nixon*, 125 S.Ct. 511 (2004). This dereliction was unreasonable, prejudicial and requires vacation of Applicant's sentence of death. *Wiggins v. Smith*, 539 U.S. 510, 522-23, (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Council v. Catoe*, 380 S.C. 159, 670 S.E. 2d 356 (2008); *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E. 2d 5 (2009); *ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*:

- B. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and constitution. **Counsel failed to conduct a reasonable investigation into Appellant's mental health status and history** resulting in an inadequate and erroneous penalty phase present in mitigation, including but not limited to: Counsel's reliance on the state's forensic evaluation which was flawed, and based on erroneous and scant social history and family information related to Mr. Woods' upbringing, functioning, and adaptive behavior, contained numerous errors of fact and relied on highly prejudicial, and wholly uncorroborated, hearsay accounts of Mr. Woods' personal and behavioral history. In light of the overwhelming wealth of information available to rebut the spurious and poorly reasoned conclusions of the state's examiners, Counsel was derelict in adopting the state's conclusions and multiple diagnoses and presenting this evidence through their own retained psychiatrist, Dr. Harold Morgan, now retired, who was called in at the eleventh hour to replace Dr. Tom Martin who was unavailable at the time of the retrial. Dr. Morgan's trial testimony speaks to the last minute nature of his involvement in the case and lack of preparedness. Dr. Morgan testified he met Mr. Woods one time --- December 2, 2006, for one hour and a half (ROA at 2504, line 15), which was after the trial had started on November 28, 2013. Dr. Morgan had minimal information from which to work --- SCDC records, SDMH's Report indicating Anti-Social personality Disorder and one conversation with Social Worker Shirley Furtick. On cross-examination, Dr. Morgan admitted he was called in at the last minute to "pinch hit" for Dr. Martin. (ROA at 2511, lines 11-13). Failure to provide relevant and readily accessible information to the defense expert and prepared him for trial was unreasonable. One and one-half hours was scant involvement with a man whose life was literally "on the line," and had been labeled with numerous and prejudicial personality disorders. While Dr. Morgan did know of one prior episode at SCDC when Mr. Woods indicated hearing voices, he clearly did nothing to follow up with further meetings with Mr. Woods, and this would appear to be due to time, as Dr. Morgan was an eleventh hour "pinch hit" substitute for Dr. Martin and he was never provided with the 2005 MRI scan, as it was never provided to counsel, nor reviewed by an independent neurologist or radiologist. This dereliction was unreasonable, outrageously prejudicial and requires vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).

C. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution. **Counsel presented damaging and prejudicial mental health testimony from its own expert in psychiatry.** This dereliction flowed directly from counsel's failure to conduct a reasonable and thorough social history. Had counsel investigated the records of the South Carolina Department of Corrections that confirmed a history of head trauma and an abnormal MRI scan in 2005 (the scan and raw data were never produced by the state or sought by trial counsel), hired a mitigation specialist to investigate and uncover the wealth of information that existed as to Mr. Woods' impoverished, unstable upbringing by a psychotic and schizophrenic mother, the mitigation evidence would have accurately reflected the degree of cognitive impairment and deprived upbringing that was the true life history of Mr. Woods. Mr. Woods' history, after a thorough and competent investigation, does not support the multiple personality disorder labels applied to Mr. Woods by William S. Hall Institute. Astonishingly, the Hall report noted Mr. Woods had an abnormal MRI (which they failed to obtain due to a conclusory reading of the MRI as abnormal but of no "clinical significance") and a documented history of head injuries yet failed to factor in the impact of head injury to the overall clinical assessment of Mr. Woods. Instead, the Hall report focused on reported "bad" behaviors attributed to Mr. Woods, despite the fact that there was no evidence to support the reported bad behaviors. The twin diagnoses of "frotteurism" and "zoophilia" were based on either Mr. Woods' alleged "admission" to these behaviors, for which there was no objective evidence. The verifiable and objective facts of Mr. Woods' social and medical and scholastic history demonstrate beyond reasonable dispute that Mr. Woods is not an "anti-social personality disorder" (with a host of additional sexual disorders to boot), but rather a brain damaged and cognitively impaired man with borderline mental retardation/intellectual functioning and, like his mother, Schizophrenia. Evidence of Mr. Woods' brain damage and Schizophrenia existed prior to the time of the crime, and obviously prior to trial, and this evidence was within reasonable reach of counsel. More importantly, the evidence of brain damage and Schizophrenia completely refutes and undermines any confidence a reasonable person would have in the prejudicial findings of William S. Hall that were, in part at least, based on information supplied by a first cousin (David Woods) who knew nothing of Mr. Woods' early years in New York with his mother or his later years in New York with his girlfriend and sister. As to Mr. Woods' father, Anthony Woods, Sr. was often away from the family and abandoned and divorced Mr. Anthony Woods' mother. In short, Anthony Woods' father was not present during a substantial portion of Mr. Woods' early life, nor of his life in New York, a period of time during which Mr. Woods was unable to understand the bus system to get to work, could not fill out a job application, never had a driver license or was ever able to live on his own. In light of the overwhelming evidence of brain damage, mental illness, and borderline intellectual functioning, Counsels'

actions were unreasonable, prejudicial, and required vacation of Applicant's sentence of death. *Strickland v. Washington*, 466 U.S. 668 (1984).

- D. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution. Counsel failed to preserve as error the issue of the trial court's error in refusing to provide a "limiting" instruction charge the jury on the matter or prior crimes under the case of *State v. Stewart*, 283 S.C. 104, 320 S.E. 2d 447 (1984), which held the jurors should be told that prior crimes evidence cannot be construed as evidence in aggravation, but may only be considered as evidence of the defendant's "general character." The trial court's refusal to provide a limiting instruction was not harmless. On the contrary, the solicitor seized upon the absence of the charge by calling the victim witnesses of Mr. Woods' prior convictions for burglary and assault, and arguing in his closing that Mr. Woods already had a "two for one" life sentence, so that life for the death of Ms. Dubose would result in a "three-for-one" sentence. (ROA at p. 2564, line 17-p. 2565, line 6). Appellate counsel raised the *Stewart* charge issue and the Supreme Court noted in its opinion that the issue was not preserved under *Avery v. State*. Clearly, this issue was not dismissed on its merits, which is obvious given the state's evidence and argument, but rather due to failure of trial counsel to preserve the issue for review. This issue entitles Mr. Woods to a new sentencing phase trial and vacation of his death sentence.
- E. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, South Carolina Law and Constitution. Counsel failed to argue the admissibility of the social work demonstrative exhibits under S.C.R.E. 1006, *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), and further failed to argue against the solicitor's objection to the social work expert's reliance on hearsay under the exception that hearsay is admissible if it is routinely relied upon in the expert's field. S.C.R.E. 703. These errors greatly undermined the social work presentation of Applicant's life history, resulting in prejudice to Mr. Woods. A new sentencing hearing should be granted due to this error. *Strickland v. Washington, Wiggins v. Smith, Williams v. Taylor*.

Particularly with regard to grounds A, B, and C, it is necessary that the court take into consideration the mitigation evidence that was actually presented at trial, as well as the mitigation evidence the applicant presented during the PCR hearing (and which he claims should have been presented in his favor at trial). It is also necessary to review the forensic evaluations performed by the S.C. Department of Mental Health in 2000 and in 2004-05. It is also necessary

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to review trial counsel's explanations for presenting the evidence they chose to present at trial and for not presenting other evidence.

A.

2000 and 2004-05 Forensic Evaluations Performed at William S. Hall Psychiatric Institute

The applicant was charged in Clarendon County in 1999 with twelve counts of B&E Auto, one count of grand larceny, twelve counts of petty larceny, and one count of receiving stolen goods. The circuit court ordered competency and criminal responsibility evaluations. Lanette Atkins, M.D. of SCDMH performed the evaluations on May 9, 2000. Her report was admitted into evidence at the PCR hearing as Exhibit 7 for the State. After the applicant was indicted for the Dubose murder, the Taylor burglary, and the Jackson rape, the circuit court ordered competency and criminal responsibility evaluations. These were performed by Katherine Jacoby, M.D. at the Hall Institute. Her report was admitted as Exhibit 8 for the State.

In her 2000 report (obviously three years before Joanne was murdered), Dr. Atkins detailed statements made by the applicant about his early years. He reported first drinking alcohol between the ages of 10 and 15 and smoking cigarettes at age 8 or 10. He reported he was in regular classes in school but that he was suspended for fighting on multiple occasions. He said he had stolen boot-legged liquor from his grandmother and pencils from his schoolmates. He reported that as a teen-ager, he was "setting forest fires and having fun". The report further states, "He reported a history of cruelty to animals and reported that he has killed dogs, squirrels, and rabbits 'just to kill for fun.' He reported he killed these animals by shooting them with BB guns or pellet guns. He also reported that at times he would beat them with sticks or bottles." The context of this portion of the report undoubtedly places these actions as occurring during the applicant's school-age years. Counsel for the applicant and the applicant's PCR experts suggest

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that evidence of these activities should be disregarded because the applicant now denies having done these things.

Dr. Atkins also details in her report that the applicant reported to her that while he was in school he would move through crowded hallways and rub up against females to get sexually aroused. There is also reference to a report of bestiality relating back to a 1985 visit to Santee-Wateree Mental Health in Manning after the applicant admitted sodomizing and killing a dog at the county dog pound and that he did so to satisfy a sexual need. This history is also detailed in Dr. Jacoby's report (Exhibit 8 for Respondent). In that report, Dr. Jacoby stated that the applicant admitted in 1985 that he had committed the act, but during the 2004-05 evaluations, he denied doing it.

Dr. Atkins noted in her 2000 report that the applicant reported that he had been hearing voices for about six months, with the voices saying "no" and calling his name and his son's name at times. The voices would also tell him when to move and not to move and what to eat. He said he saw pants walking and sweaters with no one in them. He said he saw faces that were skulls, and heard his lawyer's voice, correctional officers' voices, and other people's voices off and on. She recorded the history of a significant head injury when he was hit by a car in 1989 and that he was previously hit in the head with a pipe followed by loss of consciousness and was hit in the head with a 2x4.

Dr. Atkins opined in 2000 that the reported visual hallucinations were bizarre and of questionable validity. She concluded that he was very vague in describing the auditory and visual hallucinations and appeared to be making these things up on the spot. She took into account the head injuries but stated that the offenses he was charged with at that time were not consistent with the type of offenses one would see committed by individuals who have sustained

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a head injury that resulted in impulsivity. She concluded he was competent to stand trial and was criminally responsible at the time of the offenses. In the cover memo to the 2000 report, Pamela M. Crawford, M.D. of SCDMH set forth the staff diagnosis of alcohol dependence, cocaine dependence (sustained full remission), paraphilia (not otherwise specified), possible psychotic disorder (not otherwise specified), and antisocial personality disorder.

In her May 2005 report (Exhibit 8), Dr. Jacoby referenced a statement made to her by Deputy Chief Joe Braddon (sic) (Joe Bradham was the former Chief Deputy with the Clarendon County Sheriff's office) that he responded to the scene when the applicant was hit by a car and sustained the head injury, and that he believed this accident was after the applicant was arrested for sodomizing and killing the dog at the dog pound.

Dr. Jacoby also referenced the MRI of the applicant's brain which was performed on April 6, 2005. By the time the PCR proceeding was commenced, these films had been destroyed by Palmetto Imaging, the facility where the MRI was performed. The interpretation of these films has been the subject of much debate in this proceeding. The radiologist's report states that the films were an "unremarkable MRI of the brain." Dr. Jacoby stated in her 2005 report that she had reviewed the films (see Source of Information #41 in her report) and that the film "showed scattered hyperintensities in his bilateral parietal regions that were not felt to be of clinical significance." The applicant emphatically maintains that this interpretation was incorrect, in light of the MRI performed after the PCR proceeding commenced.

In her 2005 report, Dr. Jacoby also reports the applicant's drug and alcohol abuse, his mother's mental illness and his chaotic childhood, a family report that he had "sticky fingers" while growing up, his cousin David's belief that the applicant's religious beliefs were "extreme and out of context"; the applicant's denial of the dog pound incident, his denial of rubbing

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against females in the hallway school ("frottage"), his being hit by a car and being in a coma, reports of his personality changing after that event (staring off into space, being withdrawn, conversation becoming tangential), his father's report that "you can't believe a word he says", that the applicant sometimes feels depressed, his report during this evaluation that he has auditory and visual hallucinations almost every day, his denial of these hallucinations to a mental health worker at Santee-Wateree Mental Health several months prior to the murder, and that testing suggested but was not diagnostic of malingering psychosis, etc.

Dr. Jacoby reported that the applicant was evaluated by Camilla Tezza, Ph.D., a psychologist, on December 9, 2004 and April 5, 2005. Dr. Tezza reported that the applicant's clinical presentation and testing suggested malingered psychosis. According to Dr. Jacoby, Dr. Tezza "did not feel his current cognitive defects/relative defects could be attributed to his major head injury at age 20".

Dr. Jacoby concluded the applicant was competent to stand trial and was criminally responsible at the time of the murder of Joanne Dubose. She recommended treatment for drug and alcohol abuse and for sexual disorders. She stated neuropsychological testing should be performed because of the applicant's deficits in attention and executive functioning combined with his history of head trauma. Dr. Jacoby also cited the abnormalities on MRI in his parietal lobes which should be further assessed with functional testing. This testing was scheduled for July 5, 2005 but was actually conducted on July 13, 2005 by neuropsychologist Dr. Gordon Teichner. In her addendum (part of Exhibit 8), Dr. Jacoby referenced the evaluation performed by Dr. Teichner on that date. He reported to her that he was of the opinion that the applicant was malingering symptoms of psychosis based on his review of records and the applicant's clinical presentation during his evaluation.

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In his addendum to Dr. Jacoby's report, forensic psychiatrist Richard L. Frierson, M.D., reported the diagnoses of voyeurism by history, frotteurism by history, paraphilia not otherwise specified, malingering of psychosis, anxiety disorder not otherwise specified, alcohol and cocaine dependence, personality change secondary to closed head injury, antisocial personality disorder-adolescent onset, and borderline intellectual functioning.

B. Mitigation Evidence Presented at Trial

Harry Devoe, Esq.

Mr. Devoe was a Clarendon County public defender who had represented the applicant in prior criminal matters. He visited the applicant at the Clarendon County Detention Center within two days of the applicant's arrest for murder. Mr. Devoe described seeing the applicant in his jail cell in the fetal position on his bunk and described what he observed as the applicant's "catatonic" state. Devoe visited the next day as well, at which time the applicant was sitting on the floor of his cell in a catatonic state hunched over and hugging his knees. Mr. Devoe had represented the applicant in previous cases and said the applicant had to know who he was because he had previously represented him in other cases.

Brenda Woods

Brenda Woods is the applicant's sister and is one year older than he. She testified she has served eleven years in prison for distribution of crack cocaine. She testified she has taken medication for depression. She stated that their mother (Shirley Woods) and father (Anthony, Sr.) were "together" until she was eight years old and that she, the applicant, their sister Vera, and their younger brother Freddie witnessed their parents fight on many occasions and that they witnessed a lot of physical violence in these fights. She testified their mother believed in witchcraft, she talked to herself, waked around outside barefoot even in cold weather, and told

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the children that people were "out to try to hurt us." On one occasion, their mother broke all the glass out of a window and told the children someone was coming to hurt them. She told the children that people in the family were "putting the root on us". "Root", witchcraft, and voodoo were not explained to the court, but it appears that all three mean basically the same things to the witnesses who testified about Shirley Woods' belief in them. Brenda further testified at trial their mother once threw a tractor rim at a policeman who had come to detain her and that the applicant, who was a small boy, witnessed this and was very upset. Brenda stated that their mother was hospitalized in psychiatric facilities seven or eight times that she recalled. She testified that the applicant loved his mother very much and that he believed she had the root powers she claimed to have.

Brenda testified that at some point when they were living in New York, their mother was taken away and the children were separated. The applicant and Freddie went to live with their grandmother in Manning, S.C., and she and sister Vera lived with their father in New York City. At some point thereafter their mother also came down to Manning to live in the same household with the applicant. She related that when the applicant was around twenty years old, she was also living in Manning and sent him to the store to buy cigarettes; while he was walking to the store, he was struck by a car driven by a drunk driver. The applicant sustained a terrible blow to the head, all his teeth were knocked out, and he was hospitalized for two to three weeks. The impact was severe enough to knock the soles off the applicant's shoes. She testified that from that point forward, the applicant seemed different and more distant. She told the jury that the applicant was not as talkative and started using drugs. She said he began to wash his hands continuously throughout the day and night, acted like he was in another world, and had memory problems.



Harriet Felder

Harriet Felder is the applicant's paternal aunt. She testified to the jury that she was around the applicant frequently after he moved to Manning when he was a small boy. She stated that after the applicant's mother was put in the hospital, she saw him a good bit. She said the applicant loved his mother very much and was very obedient to her. She was afraid of the applicant's mother. She described incidents during which the mother would declare that she had power and that she wanted the children to "put their hand in her back to give her more power". The mother was put in a mental institution when the applicant was a little boy and when she came back for a couple of years, she was still acting strangely. She was re-hospitalized and then at some point, no one knew where she was. She testified the applicant never got over his mother leaving him and that her absence affected him much more than the other children.

Lillian Ragin

Lillian Ragin is also a paternal aunt of the applicant. She recalled the applicant moving to Manning when he was a small boy. She knew the applicant's mother was mentally ill and recalled an occasion when law enforcement was called because the mother was breaking glass. When the mother was taken away in a car, the applicant was on the front porch crying and saying "She does have the power." This power, according to the mother, was to make the sun stand still and to hurt anyone who tried to hurt them. Ms. Ragin testified that her mother-in-law told her that Shirley Woods threw a "black ball" with root at her and the children.

Ms. Ragin testified that when he was a little boy, the applicant was very underweight, frequently had no clothes on, and was barefoot most of the time. She took him to the health

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department to be checked out and it took about six months to get his weight up to a satisfactory level.

Ms. Ragin also testified that the applicant's mother would be in and out of mental hospitals, and when she would get out, she would get the children and then have to give up the children when she was back in the hospital. According to Ms. Ragin, the mother's absences especially affected the applicant, and he strongly believed his mother had special powers derived from her children and from God.

Ms. Ragin testified that the applicant went to prison and was released in 2003. She testified she was concerned he had mental problems and asked his probation agent for help, but the agent said there was nothing they could do.

David Woods

David Woods is the applicant's first cousin (their fathers are brothers). He was employed as an SCDSS Food Stamp Eligibility worker. He testified that he and the applicant are the same age and that they lived together at their grandmother's in Manning from age 5-7 until he (David) went to college. He recalled that the applicant did not do well in school and that the applicant repeated several grades, some more than once. He recalled that when the applicant was 6-9 years old, the applicant went through a period of bed wetting two or three times per week. He testified the applicant's mother was around on occasion but overall not very much. He testified the applicant loved his mother. He recalled that the mother would light matches and burn them under chairs to get rid of the root that David's mother had put around the house. He stated that for a time, no one knew where the applicant's mother was.

David testified that when he was home during his sophomore year in college, he was told that the applicant was hit by a car. He visited the applicant in the hospital, and the applicant's

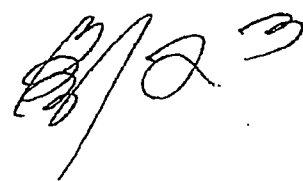
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head was bandaged, teeth were missing, and his shoulder was in a splint. The applicant was in the hospital for about two weeks. David testified that after the accident, the applicant was more withdrawn and his belief in his mother's powers was stronger.

Shirley Furtick

Shirley Furtick was qualified by the trial court as an expert in the field of social work. She performed a biological psychological social assessment on the applicant. She explained that this assessment is an interviewing assessment that allows one to look at all aspects of an individual's development. The goal is to interview as many people as possible and to review as many documents as possible. The assessment is intended to render a picture of how a person "got to be who they are and where they are." She testified that she interviewed the applicant's aunts, his father, his cousin David, his mother's guardian, and his sisters. She reviewed records of school assessments performed on the applicant by another social worker, law enforcement incident reports, a forensic evaluation performed at the Hall Institute, correctional records, medical records of his mother, his sister's medical records, and other evaluations done on the applicant.

Furtick testified that the first six to ten years of a child's life are very important to a child's emotional development because that is the period in which the child's foundations are established. These foundations should include emotional bonding with a significant caretaker, e.g., the mother, and an overall sense of trust and of being wanted, accepted, cared for, and important. During their early years, children also develop a sense of how to manipulate their primary caretaker. During this time, the caretaker should set limits on the child's behavior, and if limits are not set, the child does not learn how to regulate his behavior.



The applicant's mother was his primary caretaker during his early years. Furtick testified that the early years of the applicant's life were characterized by "early dethronement". According to Furtick, his mother was not emotionally available to him because she was also caring for three other toddlers and she was also experiencing emotional grieving at the loss of her sister and mother. Also, when the applicant was around four years old, his mother and father separated and his mother left the home. Just before the separation, sisters of the father would come to help care for the children so the father could work. The mother cared for the applicant until he was around six years old.

During these early years, the applicant's mother was already suffering from a mental illness that was not diagnosed or treated until 1971, when the applicant was seven years old. She suffered from paranoid schizophrenia, which, according to Furtick, is one of the most debilitating mental illnesses. This disease is characterized by suspicion, hallucinations, and perhaps delusions. The delusions would manifest themselves into feelings of superiority and power and hallucinations would be characterized by hearing voices. Furtick testified that this made it difficult for the mother to consistently parent the children, to set limits and structure, to be responsible, and to responsibly take care of the children. Furtick testified this would not be a good environment for a small child.

When the applicant was around six years old, he, his siblings, and his mother lived with his maternal grandfather and two cousins. They then moved to South Carolina, at which time the mother was first admitted to the state hospital. The applicant and his brother went to live with their paternal grandmother and his sisters moved to New York to live with their father. His mother did well for a while after her first release from the hospital, but during the course of her

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being in South Carolina, she was admitted to the state hospital ten different times, with the stays ranging from one month to one year.

Furtick testified that the applicant idolized his mother, and in his child's mind, saw all of her behavior as acceptable and good. He did not question her belief in voodoo. Overall, he did not develop healthily mentally because he did not get the foundation he needed. Because of his mother's mental illness and its chronicity, there was not sufficient bonding and nursing from his mother. His older sisters provided most of his caretaking, and he consequently was not subjected to much discipline or supervision. He and his younger brother were "pretty much left to their own". His grandmother became ill, and aunts were in and out to help with the children. Furtick testified that there was no consistent foundation for discipline, structure, and setting limits. As a child raised in this type of environment, the applicant had no way of regulating his own behavior when he became an adult. He, as other similarly raised children, ended up being very impulsive and using very bad judgment, as he did not know how to regulate and conform his behavior to what was acceptable.

Furtick also testified the applicant repeated the seventh grade three times and the ninth grade three times. He was socially promoted from the tenth to the twelfth grade and received a certificate of attendance from Manning High School when he was twenty-one years old. He did not have the intellectual ability to perform school work and has an IQ of 73. She did not have medical records from his being hit by an automobile in 1985. He moved to New York to live with his girlfriend after the accident and had menial jobs and had to quit one job because he could not figure out how to use the city bus system. She noted in his SCDC medical records that he had been prescribed psychiatric medications, but other than that, he had never been treated for a mental illness.

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Her conclusions were (1) the applicant was raised in a home with many deficits and did not get the foundation he needed because of these deficits, (2) because of his mother's mental illness and its chronicity, there was not sufficient bonding and nursing between them and he was raised by his older siblings, (3) he did not get the supervision he needed because his siblings acted as his surrogate parents, (4) he had no way of regulating his behavior, and (5) this caused him to be very reactive and impulsive and to frequently use very poor judgment.

Harold Morgan, M.D.

Dr. Morgan is board certified in general psychiatry and forensic psychiatry. He was called to testify by the applicant during the mitigation phase. He testified that he reviewed the applicant's SCDC records, SCDMH records, school records, spoke with Ms. Furtick, and spoke with the applicant on December 2, 2006, a few days before trial. He filled in for Dr. Thomas Martin, who had originally been retained by the applicant as an expert forensic psychiatrist. Dr. Martin had been slated to testify when the case was first called to trial in September 2006. That trial resulted in a hung jury during the guilt phase.

Dr. Morgan diagnosed the applicant as suffering from antisocial personality disorder, formerly known as psychopathic personality or sociopathic personality. He also stated the applicant has a learning disorder that was not addressed when the applicant was a child. With regard to antisocial personality disorder, Dr. Morgan explained that the personality is the skeleton of a person's emotional and mental life, or the foundation on which a person builds behavior, feelings, and interaction with others. He stated that a personality disorder is a disturbance of the person's emotional and mental structure. An antisocial personality disorder is characterized by a disregard for other people's rights and feelings. The range of behavior reflecting that disorder includes petty theft, cheating, fraud, and various kinds of other criminal

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activities. He explained that people with this disorder are not able to learn from their experiences and that they do the same things over and over again even though they get in trouble for doing them. He stated that the cause of this disorder is not fully known but that there is a genetic component (something the person is born with) and an environmental component. As to the former, he testified that if one looks back to the history of those with the disorder, one would typically see a lot of confusion and chaos in their early lives where there has been no structure or limits or consistency. Applying this to the applicant, Dr. Morgan stated that there was virtually no consistency in his early life and that "it was chaos". The applicant was confused about his mother's mental health, i.e., what was real and not real. The ability to develop some internal controls was not there for the applicant.

On the issue of prison adaptability, Dr. Morgan testified that in general, there is no real treatment for the disorder but that the impulsivity in someone with this disorder seems to go away by the time the person reaches middle age, and that they do rather well in a structured environment, such as prison, because the structures and limits are very clear and are consistently enforced. He stated that the applicant's SCDC records show that he has done quite well from a behavioral standpoint while in prison.

On cross-examination, Dr. Morgan admitted he had seen the applicant for a total of 1 ½ hours but he stated that in most of psychiatry, the important information one needs for a diagnosis comes from the patient's history, which he was able to glean from previous evaluations and records. He agreed that the applicant was not psychotic (out of touch with reality), was not retarded, and was criminally responsible. He noted the SCDC records showed a history of voyeurism, frotteurism, paraphilia, zoophilia, and malingering. Dr. Morgan stated that the applicant's repeated imprisonment shows that the applicant "just can't get it." He further

admitted that the applicant's behavior was self-gratifying and that he showed an unwillingness or inability to empathize with others.

On re-direct, Dr. Morgan testified that he had reviewed Dr. Martin's records and had talked to Dr. Martin as well, and that these conversations also helped him form his opinions. He stated that he and Dr. Martin had the same opinions about the applicant mental status.

C. Aggravation Evidence Presented by State at Trial

During the sentencing phase, the State presented evidence in aggravation that primarily centered upon the applicant's criminal activities just before and just after the time of the rape and murder of Joanne Dubose. Among other evidence offered in the sentencing phase, the State presented evidence that less than one week prior to the instant murder, the applicant burglarized the home of eighty-four year old Laura Jackson, on May 27, 2003. In that incident, he beat her, tied her to her bed, and sexually assaulted her. The evidence established that Mrs. Jackson survived only because she had played dead, after which time the applicant raped her. A jury convicted him of burglary in the first degree, assault and battery with intent to kill, and CSC in the first degree in connection with the attack on Mrs. Jackson.

The State also presented evidence in aggravation that on June 4, 2003, the applicant burglarized the home that fifty-three year old Linda Taylor shared with her eighty-four year old mother. This was two to three days after he murdered Joanne Dubose. The State presented evidence that the applicant broke into the home and attacked the women even after Linda Taylor beat his arm with a cane and he cut his hand on broken glass in the door.

Finally, there was evidence of the manhunt immediately after the crimes at the Taylor house that led to his June 5, 2003 arrest. Police and bloodhounds pursued the applicant for hours before he was arrested. Evidence established that when the applicant was placed in the patrol car,

his only statement was "F__k you and your God". He was convicted burglary in the first degree and two counts of ABIK in the Taylor case.

D. Evidence Presented by the Applicant and the State during PCR Hearing

Since the applicant claims the pre-trial mitigation investigation and mitigation evidence were prejudicially lacking, it is also necessary to summarize the evidence presented at the PCR hearing.

Frederick A. Hoefer, II, Esq.

Mr. Hoefer was appointed in March 2006 to represent the applicant at trial in the instant murder case. He said he probably began working on the case before he was formally appointed by order dated May 8, 2006. His notes reflect his first meeting with the applicant was in April 2006. He testified that he has been practicing for 33 years and primarily handles criminal, domestic, and civil cases. He was an assistant solicitor before going into private practice and sat second chair in five death penalty cases. After moving to private practice, he was appointed in two other death penalty cases in which the death penalty notice was eventually withdrawn. This was the first death penalty case he defended that went to trial. He testified that attorney James Hoffmeyer (summary of his testimony is below) had been appointed some time before him and had already been to trial in two other cases against the applicant. He estimated he spent in excess of one hundred hours in preparation.

Mr. Hoefer testified that the applicant was not uncooperative but was difficult to talk to and understand as far as his rationalization was concerned. The applicant told him he had not committed the crimes and that the evidence against him had been planted. He said that Mr. Hoffmeyer had the better relationship with the applicant. The solicitor intimated he would offer life without parole, but the applicant was not interested in a plea. Mr. Hoefer thought this was a

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bit unrealistic, but he said it was not unusual to have an unrealistic client. No formal plea offer was ever made.

Mr. Hoefer testified that although there was a possibility that an LWOP offer would be made, he and Mr. Hoffmeyer still prepared the case as if it would go to trial. He received both prison and mental health records on the applicant but does not recall whether he noticed that an MRI of the applicant's brain had been done. He testified that if he had been aware that a brain MRI showed an abnormality, he would have followed up on that point with an expert. The MRI films were not provided to Dr. Morgan or Dr. Martin, but the report was provided to Dr. Morgan or Dr. Martin, and if either noticed a problem related to the MRI, they did not bring it to counsel's attention.

Mr. Hoefer testified that the lineup of mitigation experts included Patti Rickborn, Shirley Furtick, Thomas Martin, M.D., and Diane Follingstad, a clinical psychologist. He did not recall specifically the records he and Mr. Hoffmeyer sent to Dr. Martin. Dr. Martin did not testify at the first trial because the jury was hung on the issue of guilt. The trial judge set the re-trial for the week of November 27, 22006; however, Dr. Martin had an overseas vacation planned for that time frame. Mr. Hoefer said they were prepared and there was no need to put the trial off because a delay would make their preparation "cold". He admitted that they could have forced Dr. Martin to appear at the second trial, but in the beginning, Dr. Morgan had been the first witness contacted to be an expert in forensic psychiatry, but Morgan advised he was slowing his practice down and recommended Dr. Martin. Since Dr. Martin would be unavailable for the second trial, they contacted Dr. Morgan and he stepped in for Dr. Martin and reached the same conclusions as Dr. Martin. Hoefer testified that Martin and Morgan had access to the same records and neither suggested any additional testing or an independent MRI. Hoefer testified

that in his view, Dr. Morgan softened the blow of the antisocial personality disorder diagnosis by explaining that the condition had genetic and environmental components.

Mr. Hoefer testified that he had retained private investigator Patti Rickborn in another death penalty case (*State v. Baccus* (citation omitted)) that ended up as a plea to a life sentence. Hoefer testified Ms. Rickborn was not of much assistance in the applicant's case. She notified the defense team in the summer of 2006 that she would not be able to assist them. He had good experience with Ms. Rickborn in the past, so he did not "stay on top of her" after she had been hired. After she was not responding to inquiries from him and Mr. Hoffmeyer, they received a letter from her stating she could not be of assistance. This letter was introduced as Exhibit #5 for the State and in the letter Ms. Rickborn relates her position that she was first contacted in mid-July 2006 and that she told counsel she "could do a few interviews" before the September trial but that her case load and the short time before trial prohibited her from conducting a full investigation in advance of trial. She explained that she agreed only to interview seven specified people and that she wanted to correct any misconception that she was conducting a full investigation for the penalty phase of the trial. She stated that she never agreed to perform services such as locating and obtaining medical records, court records, school records, jail/prison records, and preparing witnesses for trial.

Mr. Hoefer did not recall how the team came to contact Shirley Furtick. They discussed hiring a mitigation investigator but decided Ms. Furtick could accomplish the same tasks a mitigation investigator could. He recalled that the attorneys and Ms. Furtick met with several of the applicant's relatives in Manning before trial. Mr. Hoefer said counsel relied on Ms. Furtick to get all necessary background information on the applicant. He recalled there were not many school records available and that some were in the applicant's DMH file. He recalls that they

were told the hospital records regarding the 1985 head injury had been destroyed. He had no reason to be displeased with Ms. Furtick's work. She did not tell them she needed anything from them or that she needed more time to work on the case, and he stated that if she had told them she needed anything, they would have gotten it for her.

Mr. Hoefer testified that he and Mr. Hoffmeyer never officially divided up their responsibilities, though in hindsight that may have been a good idea. Mr. Hoffmeyer devoted most of his time to more scientific elements of the case and Mr. Hoefer handled more of the fact witnesses.

Mr. Hoefer testified he did not question the validity of the conclusions or background information in the 2005 SCDMH evaluation. He was aware the applicant had sustained a head injury after being hit by a car but did not recall being aware of any other head injuries. He did not consider calling the applicant's mother's guardian *ad litem* to testify. He and Mr. Hoffmeyer were relying upon Dr. Martin's, Dr. Morgan's, and Ms. Follingstad's expertise in their fields in determining the strategy with regard to mental health mitigation. Ms. Follingstad had been hired as a prison adaptability expert. Hoefer explained that she used an adaptability scale with ten modal profiles and that she advised by letter dated November 30, 2006 (State's Exhibit 4) that she had concluded the applicant would fall into one of the three bottom profiles and not adapt well to prison life; therefore they had to turn to Dr. Morgan for an opinion on adaptability and he concluded the applicant was a good candidate. Even though Dr. Morgan also had to state his opinion that the applicant had an antisocial personality disorder, they needed his testimony on adaptability. Hoefer testified that if he had only elicited testimony on direct examination about prison adaptability, the very seasoned solicitor (Dudley Saleeby) would have most certainly elicited the antisocial personality diagnosis on cross-examination.

Mr. Hoefer also was questioned about not objecting to the solicitor's closing argument during the sentencing phase that the applicant had already been sentenced to life for the Taylor and Jackson attacks ("two for one") and that the applicant was looking for life a third time ("three for one"). Mr. Hoefer testified that he did not recall his thought process for not objecting to that statement.

W. James Hoffmeyer, Esq.

Mr. Hoffmeyer testified he has been licensed to practice law since 1992. He was appointed to represent the applicant and tried all three of the cases relevant to this matter (Jackson, Taylor, and Dubose). He testified the State gave notice of intent to seek the death penalty in the Dubose murder after the applicant was convicted in the Taylor matter. He testified that the applicant was not a difficult client and that he met with the applicant a fair number of times in preparation for the cases.

He recalled one mental evaluation being performed after he was appointed and he attended at least one that lasted several hours. He stated that with regard to the 2005 brain MRI, he did not ask for a copy of the films. He stated Drs. Morgan and Martin did not ask for any additional information or testing and neither man identified any irregularities in the records they reviewed. Hoffmeyer testified that he had to rely on their expertise. He stated that the defense strategy was geared toward the sentencing phase, during which the defense concentrated upon the applicant's tragic childhood, the mother's severe mental problems, and the applicant's exposure to her erratic behavior.

Mr. Hoffmeyer testified that an attorney in Florence, Hank Anderson, had worked with Ms. Furtick in another capital case and was pleased with her work, so he contacted Furtick for assistance. She was the defense's main mitigation witness, according to Mr. Hoffmeyer. She

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did not ask him to contact any family members in New York, where the applicant had lived for a time when he was younger. She did not complain that she did not have enough time to do her job and, overall, they relied on her expertise. She did not identify any other steps they should take, nor did she ask for additional assistance. He stated that David Woods was the primary family contact for the defense team and that he was the only family member actively involved in the case. Mr. Hoffmeyer testified that he met with David Woods regularly and that he and Mr. Hoefer met with the applicant's incarcerated sister at the Clarendon County jail. He discussed with Ms. Furtick and David Woods which family members to call as witnesses and that they called the ones they thought would help; they never received contact from family members Effie Burgess, Frederick Woods, or the applicant's sister Vera.

Concerning the genogram exhibit, Mr. Hoffmeyer testified that he probably should have proffered the exhibit to preserve that issue for appeal.

Shirley Furtick

As noted above, Ms. Furtick also testified at trial. She testified at the PCR hearing that her overall task was to review documents and help develop a picture of the applicant's life. She performed the aforementioned Biopsychosocial Assessment. She said that in capital cases, there is generally an investigator or an attorney to help her gather information, but there was not in this case. She said that someone did provide her with SCDMH and SCDC records. She had no contact with Ms. Rickborn. She did not travel out-of-state to interview any witnesses but she did speak to the applicant's father, sisters, and perhaps an aunt, who all lived in New York. She spent a total of four hours interviewing the applicant. Her voucher (State's Exhibit 6) reflects that she spent 82.5 hours on the case and traveled 687 miles. She provided her assessment to the two defense attorneys and prepared the genogram demonstrative exhibit, which the trial judge

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would not admit into evidence. The trial judge would also not allow her to testify as to what any person she interviewed told her.

Ms. Furtick testified that she wanted to gather as much information as possible. She said she had no meetings with the attorneys and other experts together. She said such meetings would help her be clear on what the defense team was looking for in the way of information and evidence and that other experts could supplement the information she already had. She testified she was never asked for her thoughts about the witnesses to be called. She did not recall having the applicant's mother's mental health records but she did talk to a staff person at the home where she resided. She did not recall talking to the mother's guardian. Ms. Furtick testified that the mother's schizophrenia was important to the mitigation picture and that she wanted as much information about that condition as possible. She testified she had the information about the applicant's head injuries and that was important as well.

Ms. Furtick testified she was comfortable with the conclusions she reached, based on the information she had.

Leonard W. Mulbry, M.D.

Dr. Mulbry was called by the applicant and was qualified as an expert in forensic psychiatry. He is board certified in that field and in general psychiatry. He practiced hand surgery for eighteen years before going into general psychiatry. He is in private practice in forensic psychiatry.

In late 2008, Dr. Mulbry was employed as a contract psychiatrist with SCDC. Most of his duties as a "prison psychiatrist" involved medication management. He was not assigned to treat specific inmates, though he typically saw inmates who were in lock-up or death row. He testified on direct examination that he first encountered the applicant on July 8, 2009 and

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monitored his medications until he first departed SCDC employment in early 2011. He returned to SCDC on November 7, 2013.

He testified that records during his first tenure (2009-2011) show the applicant complained of hearing voices. Sometimes the voices threatened him and called his family names. Sometimes the voices were vague as to content. The applicant was not sad or depressed and he was sleeping and eating okay. The applicant sometimes refused his medications, which is not uncommon because some psychotropic medicines have unpleasant side effects. If an inmate refuses medications, they are not forced upon him unless the inmate would otherwise be a danger to himself or others. The applicant described the voices as sometimes threatening, other times just men and women vaguely talking, but no specific content was described. He put Woods on Perphenazine, an anti-psychotic. Dr. Mulbry stated that "psychosis" is a loss of touch with reality characterized by delusions (fixed false beliefs), hallucinations, and paranoia.

Dr. Mulbry testified that he returned to this job in November 2013. He said the applicant was doing very well on his medicines and was not hearing voices. His assessment at that time was schizophrenia, while the previous diagnosis was psychosis, not otherwise specified (NOS). Mulbry said schizophrenia typically manifests itself in men in their early 20s. There is a notation in the SCDC records from September 18, 2000 (a little less than three years before the applicant murdered Ms. Dubose in June 2003) that a Dr. Cusack treated the applicant briefly with Risperdal but that the applicant was taken off that medication because he wanted to be able work in prison industries (inmates cannot work in prison industries if they are on psychotropic medication).

On cross-examination, Dr. Mulbry testified that the "NOS" designation is given to those patients who do not fit within the diagnostic criteria for schizophrenia. Dr. Mulbry did not

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review the SCDMH evaluations of the applicant and did not have any information from Drs. Martin or Morgan. Dr. Mulbry also conceded that these records reflect that on May 18, 2007, the applicant gave a history of hearing voices, which he had denied earlier. There are notations that the applicant said he began hearing voices after he was hit by a car as a child (the applicant was hit by a car when he was 20). On May 21, 2007, the applicant reported he began hearing voices at the time of his incarceration four years ago (when the applicant was in his late 30s). On December 6, 2007, the applicant reported he had been hearing voices for the past five years. On December 12, 2007, he said he had been hearing voices for several years. A record entry made by Dr. Edward Higgins reflected his concern that the applicant might be malingering his symptoms of schizophrenia.

Dr. Mulbry also noted on cross-examination that his first encounter with the applicant was actually on January 30, 2009 and not on July 8, 2009, as he testified to on direct examination. He conceded that his note dated July 8, 2009 reflects that the applicant had been off his medications for two years and that he was not hearing voices and had no paranoia. The applicant never heard voices in his presence. In September 2009 and June 2010, the applicant reported hearing voices. Dr. Mulbry testified that the SCDC records reflect his June 10, 2010 assessment of psychosis NOS, "by report". He testified that "by report" is an uncertain modifier. Mulbry testified that the meaning of "by report" is that the applicant looked quite normal to him and that the impression was based on the history obtained from the applicant and records. On August 11, 2010, the SCDC treatment team (of which Mulbry was a part) rendered a diagnostic impression of psychosis NOS.

Dr. Mulbry testified that the term "diagnostic impression" is different from the term "diagnosis". The former is not as confident impression as an actual "diagnosis". The SCDC

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records from February 4, 2011 reveal a diagnostic impression of antisocial personality disorder, depression, psychosis, and poly-substance abuse. The applicant continued to describe the voices vaguely, which Dr. Mulbry said was not uncommon. He said the typically, hearing negative voices is a strong indicator of schizophrenia, and patients are sometimes reluctant to fully describe the voices. Mulbry testified that SCDC records throughout 2013 reflect the applicant was hearing voices but was doing well on medication.

On redirect examination, Dr. Mulbry testified that the symptoms of schizophrenia ebb and flow, but that the more it is treated, the more stable the symptoms become. As noted above, Dr. Mulbry testified on cross that one of his diagnostic impressions was antisocial personality disorder. He testified on redirect that he noted that impression because he had seen it in some other records. He testified that a conduct personality disorder must be present by age 15 for there to be a true diagnosis of antisocial personality disorder at age 18 or later. He said that to retroactively determine the existence of a conduct personality disorder, one would have to gather that information from the patient or from reliable sources. He stated there is a significant genetic risk of a child developing schizophrenia if a parent has the disease.

On recross examination, Dr. Mulbry conceded that he may not have diagnosed schizophrenia in the applicant until 2013.

Rebecca Dribbon

Rebecca Dribbon is employed by Wake County, N.C. Human Services and was appointed guardian for Shirley Woods, the applicant's mother, by a North Carolina court in 1998. She stated Ms. Woods was adjudicated incompetent in 1997 and was a resident of Dorothea Dix Hospital until it closed. She testified that Shirley has a fixed delusion of having hundreds of children. Ms. Dribbon was unaware Shirley had a family until December 2003. She

said that on September 9, 2006, she was contacted by a South Carolina attorney and she first learned of the applicant's two life sentences. The attorney wanted information on Shirley's first hospitalization, which she said was based on a diagnosis of schizo-affected disorder (schizophrenia with a mood component). She said that prior to September 2006, Shirley had absolutely demonstrated "outbursts".

Ms. Dribbon testified that Shirley has been at Longleaf Neurological Treatment Center since 2004. This facility houses people who have "aged out" of the state hospital. She sees Shirley every 5-6 weeks. She did not write down the name of the attorney who contacted her as it was pertinent to her care. She stated she would have testified in 2006 if asked.

Janet D. Vogelsang

Ms. Vogelsang was qualified as an expert in clinical social work. She is in private practice and engages in the diagnosis and treatment of mental, emotional, and behavioral disorders. She is licensed in this State and is board certified. She has worked on over one hundred capital cases. She has been qualified as an expert in eleven states in domestic and criminal court cases. She has testified in approximately seventy cases in trial and post-conviction relief proceedings.

Ms. Vogelsang testified that if she is retained in a capital case, she compiles a family background history which is accomplished through clinical interviews, visiting the defendant's home and community, consulting with other professionals, etc. The purpose of the history is to shed light on what brought the defendant to his current circumstances. She goes back to prior generations, as people do not grow up in a vacuum. She stated that mental health conditions and behavior patterns can be passed from generation to generation. She stated that parents are

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typically the primary care-givers of their children, so the history of the parents is important to developing the family history.

She testified that a social worker usually relies on visual aids when testifying because these aids help the witness pull the information together to make the significant aspects of the findings more understandable to the jury.

Ms. Vogelsang testified that if she is retained in a capital case, she engages in the following:

1. Receives contact from attorney
2. Asks what the attorney needs
3. Ascertains the date of trial
4. Makes sure the defense has a mitigation investigator (she is not one)
5. Talks to mitigation investigator to ascertain the extent of work done by that person
6. Receives and reviews the mitigation investigator's work
7. Puts together a plan as to who she will clinically interview (looking for positive and negative information)
8. Visits the defendant's community and home
9. Reads other experts' reports
10. Prepares visual aids
11. Has meetings with attorney and other experts. She is not a member of the legal team and does not offer legal input.

Ms. Vogelsang testified that she tries to get two sources of for every piece of information she gathers. She said being a social worker and mitigation investigator on the same case is not acceptable.

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In the instant case, she interviewed Vera Woods, the applicant's child's mother, in Schenectady, New York, and interviewed others in Manning and Savannah. She read the trial testimony, including that of Shirley Furtick. In her opinion, Ms. Furtick's testimony was very brief and it appeared that Ms. Furtick was acting as both a social worker and a mitigation investigator. She could not tell if Ms. Furtick engaged in face-to-face interviews. Ms. Vogelsang testified that it seemed that Ms. Furtick was not allowed to give complete testimony at trial of what her interviews revealed. She testified that it was customary in her experience to rely upon what others told her in reaching her opinions, but Ms. Furtick was not allowed to do so.

Ms. Vogelsang testified that, in her opinion, the issue of the applicant's mother's schizophrenia was not adequately raised because Ms. Furtick was not allowed to use her visual aids (genogram) in front of the jury. She stated that Ms. Furtick talked about the schizophrenia in a general sense and did say it was stressful to the applicant, but the testimony lacked detail as to how the condition manifests itself and did not point out the importance of the mother's behavior in the family dynamic. She testified that parents who have schizophrenia and practice "roots" present a very confusing picture to their children. She stated that the applicant would get very upset if people did not believe his mother had "the power".

Ms. Vogelsang testified that it would have been important to research where the applicant lived in New York because he was there from birth to age eight. She stated that a mitigation investigator would have been able to gather information about that community and that would have been invaluable to her work in the case. She went to New York, saw where the applicant lived, and spoke to family members in person. She opined that in this community, the applicant's stressors included that the mother had four children in five years, which impacted his

ability to get attention from his mother. Other stressors were that the family suffered financially, the father left home, the mother was mentally ill, and a younger brother went missing with no explanation.

Ms. Vogelsang testified that the kinds of interaction a child needed were not there for the applicant. Accordingly, the applicant had no help with developmental skills. She also mentioned that if a child in the family were hurt, the mother did nothing to comfort the child. She stated that Shirley was a "terribly impaired single mother", and after she was gone, the children lived with her mother, "who was just like her."

According to Ms. Vogelsang, the applicant suffered two major falls as a child, but she testified on cross-examination that this information was anecdotal and there were no medical records. She also stated on cross-examination that she reviewed the SCDMH evaluation and some SCDC records, and that neither fall was referenced in those records. She produced two pictures (Exhibit 8 of Applicant) of one place where she claimed the applicant fell when he was a child. She stated that the applicant's Aunt Ida told her this was where he fell when he was six years old, necessitating a hospital visit. According to Ms. Vogelsang, Ida was the applicant's primary caretaker for about a year when Shirley was not around. According to Ms. Vogelsang, the other fall occurred when the applicant jumped out of a second story window.

Ms. Vogelsang reviewed the applicant's family tree prepared by Ms. Furtick and stated that it was satisfactory and consistent with what she had compiled. She further stated that it was clear to her that there was a significant pattern of mental illness on Shirley's side, as Shirley, her sister Brenda, and their mother had mental issues. Ms. Vogelsang testified that providing details to the jury from Ms. Furtick's developmental chronology would have been helpful to the jury's understanding of the applicant's troubled history.

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Ms. Vogelsang testified that she met Effie Burgess (the mother of the applicant's child) in Manning. She testified that Burgess told her that the applicant did not even know what pregnancy labor was and thought it was roots. Burgess told her that the applicant had trouble learning the simplest of things and would become very frustrated. They moved to Schenectady to live with her brother and the applicant got a job as a dishwasher and making sandwiches. Ms. Vogelsang testified that at some point in New York, Effie swore out a warrant against the applicant after they had a fight. He did not stay long and moved back to S.C.

On cross-examination, Ms. Vogelsang testified that she knew Ms. Furtick had talked to Ida. She agreed that Ms. Furtick and several family members testified during the sentencing phase that Shirley Woods had been hospitalized for her mental problems. She was satisfied with Ms. Furtick's family tree. She agreed that Shirley's mental illness was mentioned several times during the sentencing phase.

Ms. Vogelsang testified on cross that about one-third to one-half of her case load is capital cases and that she has always testified for the defendant in these cases. She testified that at least half of her capital cases have been PCR cases and that in most of those, a social worker had not testified in the sentencing phase. Her role in capital cases is that of a social historian. She is a member of the National Association of Social Workers, which has a longstanding policy against the death penalty. She testified that she has no personal stance on the death penalty.

She testified on cross that she was contacted about this case by PCR counsel in 2010 and started working on the case in 2011. She met with the applicant one time for three to four hours. She said it was an unusual interview. The applicant was cooperative but she stated she did not know if the applicant understood her role in his case. They spent most of the interview discussing his religious beliefs and his interpretation of the Bible. She stated the applicant spent

a lot of time writing and copying scripture and that he carried literature concerning his faith. She said he believes something bad will happen to him if he is too far from his Bible.

Ms. Vogelsang testified that she spoke to Dr. Barry Price and met with him on a couple of occasions in late 2011 or early 2012. She shared her findings with him. She stated she interviewed the applicant's New York family (Ida, Effie, and Vera) and also David Woods, Lillie Ragin, Henrietta Felder, Ronald Felder, Brenda Woods, the applicant's father, and his stepmother. She spoke to the applicant's brother Freddie by phone, and he commented to her, "There but for the grace of God go I." She testified that it appeared to her that one of the applicant's trial counsel had represented the applicant in another matter and that this attorney had a good relationship with David Woods and that David was the only family member "who cared".

No New York family members testified at the PCR hearing and none testified at trial. She agreed that the only family members who testified at trial were from the father's side. Ms. Vogelsang did not meet with the applicant's trial counsel and she did not meet with Drs. Morgan or Martin. She read Dr. Morgan's testimony and read Dr. Martin's notes.

Ms. Vogelsang testified that capital case legal teams usually have issues with their cases and, as a social worker, she is not privy to many of those issues. She stated that is why mitigation investigators are used. She stated that if she learned adverse information from the defense team, it would likely have to be shared with the prosecution. The mitigation investigator decides what information the social worker gets from the defense team. She stated she has been trained to question the information she does get and does not try to convince the defense team she only wants helpful information. When getting information from family members, the family members usually don't know whether their information helps or hurts the defendant's case. She

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testified that she does not know if she has been shielded from adverse information in this PCR case.

On the issue of Ms. Furtick's genogram, Ms. Vogelsang testified that in order for this exhibit to be effective, the exhibit has to be shown to the jury and introduced into evidence. She testified that the genogram gives the jury a good visual idea of the family history. She agreed that even though the genogram was excluded by the trial judge, the information contained in the genogram was testified to by Ms. Furtick.

Barry Jeffries, M.D.

Dr. Jeffries was called by the applicant and was qualified as an expert in diagnostic radiology, neuroradiology, and interventional radiology. During preparation for the hearing, the court granted the applicant's motion that an MRI of his brain be obtained. Dr. Jeffries read the MRI and testified that it showed two, and possibly three, areas of damage, which he termed "lesions". One area was in the area of the brain connecting the left and right hemispheres, one was in the right frontal lobe, and another possible one was in the left frontal lobe. He testified that these areas of damage would cause an inability to control inhibitions and would result in lower advanced thought processes. He explained that a bright person's brain could adapt to the damage because a brighter person has more neural connections and the brain can find more pathways for effective thought processes. He stated that if a person such as the applicant is not very bright, the chance of adapting to the damage is lessened because of a lower number of neural connections. Dr. Jeffries testified that if a person has schizophrenia, that condition can also impact a person's ability to compensate for a brain injury.

Dr. Jeffries testified that the MRI he reviewed was very recent but that the brain injuries were sustained many years ago. He could not specify when the damage occurred but stated it

likely occurred as a result of trauma. He testified that the scan he reviewed is consistent with the type of injury that would cause changes in personality.

There is no dispute that an MRI of the applicant's brain was performed on April 6, 2005 by Palmetto Imaging. The film itself was destroyed by Palmetto Imaging through no fault of the parties. Therefore, Dr. Jeffries was not able to review the film, but he did read the report prepared by Palmetto Imaging. The report summarized the film as an "unremarkable MRI of the brain".

David Richard Price, Ph.D.

Dr. Price was called by the applicant and was qualified as an expert in clinical psychology, forensic psychology, and neuropsychology. He produced a ten page list of records he reviewed (Applicant's Exh. 13). He interviewed the applicant two times for a total of ten hours. He reviewed the testimony of Dr. Morgan and Shirley Furtick. He did not agree with Dr. Morgan's diagnosis of antisocial personality disorder and borderline personality disorder and said it was an oversimplification of a diagnosis and was based on inadequate information. He stated that a diagnosis of antisocial personality disorder was not warranted because there was no evidence of a conduct disorder by age 15. He also cited the existence of a series of traumatic brain injuries, the fourth and last occurring when the applicant was 21. Dr. Price stated that all of the applicant's aberrant behavior began after the third injury. As noted above, SCDMH evaluations reflect aberrant behavior in the applicant's teen years. Price testified that a neuropsychological evaluation would have been warranted and that it was a gross error not to diagnose the traumatic brain injuries and introduce this evidence in mitigation. As noted above, Dr. Teichner did perform a functional neuropsychological evaluation in 2005. Dr. Price stated

that a proper forensic psychiatric examination was not performed and that the applicant's borderline intellectual functioning was not properly presented at trial.

Dr. Price testified that even though the applicant has an IQ of 75, his academic progress was less than one would expect. He stated he could have presented a pretty compelling case for mild mental retardation (however, the court notes that the applicant abandoned the ground for relief based on mental retardation).

Dr. Price testified the applicant sustained four separate traumatic brain injuries. He claims these were as follows: a concussion in New York, being hit in the head with an iron pipe, being hit in the head with a 2x4 wooden board, and being hit by a car at age 21. Dr. Price stated the applicant sustained damage to the frontal lobes of his brain. This area regulates and inhibits behavior.

Dr. Price was questioned about Dr. Jacoby's SCDMH notation that the applicant was malingering psychosis. Dr. Price stated that malingering itself is not a disorder and that the applicant was not smart enough to feign psychosis. He stated that the applicant was given four malingering tests and that the one that detected malingering (SIRS) may be an inappropriate test for individuals with low intellect, brain injuries, and schizophrenia.

Dr. Price said the SCDC records reveal that the applicant was treated in prison for psychosis NOS since he was incarcerated in 2000. He opined that even though all the pertinent information was at hand for use during the sentencing phase, the lack of a good evaluation and defense's failure to retain a neuropsychiatrist and a neuropsychologist resulted in an inadequate presentation of the applicant's mental health condition. Dr. Price testified he would have focused on the applicant's intellectual deficit, his brain injuries, and his schizophrenia and

psychosis. He again stated that Dr. Morgan's diagnosis of antisocial personality disorder was a gross error.

On cross-examination, Dr. Price testified that he ruled out antisocial personality disorder because there was no evidence the applicant had a conduct disorder by age 15. He appears to have discounted or disregarded the reports in the 2000 SCDMH evaluation noting the applicant's statements that he set fires and tortured and killed small animals. His rationale for disregarding this history is that the applicant now denies having done those things. He stated his diagnosis of schizophrenia, dementia due to head trauma, personality change due to head trauma, and borderline intellectual functioning. He stated the applicant's brain injury and drug dependency preceded the personality changes. He stated the use of drugs and alcohol escalated after the applicant's head injury around age twenty. Counsel for the State questioned Dr. Price about SCDC records from the 2000 competency evaluation in which the applicant reported that he began drinking alcohol as early as age ten and that the applicant described an abusive and unstable childhood, that the applicant began using drugs before he was hit by a car when he was around twenty years old. Dr. Price's opinion remains as stated above.

IV. GROUNDS A-C: ALLEGATIONS OF FAILURE TO REASONABLY INVESTIGATE LIFE HISTORY, FAILURE TO REASONABLY INVESTIGATE MENTAL HEALTH STATUS AND HISTORY, AND PRESENTING DAMAGING AND PREJUDICIAL MENTAL HEALTH TESTIMONY FROM OWN PSYCHIATRIST

To establish that he received ineffective assistance of counsel, a PCR applicant must make a twofold showing. *See Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The mere fact that trial counsel's defense strategy was unsuccessful does not render counsel's assistance

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unconstitutionally ineffective. *Id.* at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995). “Judicial scrutiny of counsel’s performance must be highly deferential,” and “every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel’s perspective at the time.” *Id.* at 689. *See also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (“[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight”).¹

Our Supreme Court recently addressed a PCR applicant’s claim that his death penalty trial counsel was ineffective for failing to thoroughly investigate and present mitigating evidence during the sentencing phase of his trial. *Weik v. State of South Carolina*, 409 S.C. 214, 761 S.E.2d 757 (2014). In *Weik*, defense investigators conducted extensive interviews with the applicant’s family members and others. These people provided significant mitigating information regarding the severe abuse the applicant endured as a child, primarily that his father was “tyrannical and psychotic”. Trial counsel failed to present this information to the jury and failed to even use it to cross-examine the State’s forensic psychologist, who largely portrayed the applicant’s childhood as normal. The Court held that “[t]he PCR judge erred in finding counsel presented all available mitigation evidence to the jury. Though counsel introduced *psychological*

¹ The Supreme Court has explained that:

“Surmounting *Strickland*’s high bar is never an easy task.” *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S.Ct. 2052.

Harrington v. Richter, 131 S.Ct. 770, 787 (2011). *See also Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (“And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard”).

testimony regarding Petitioner's mental illness, counsel failed to present even a skeletal version of Petitioner's *social history* even though there was abundant social history evidence available to them." 409 S.C. at 235. The Court recited the following:

"An ineffective assistance claim has two components: A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (citation omitted). "To establish deficient performance, a petitioner must demonstrate that counsel's representation 'fell below an objective standard of reasonableness.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "[T]o establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 534, 123 S.Ct. 2527 (quotations and citation omitted). "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Id.* Prejudice is established where "there is a reasonable probability that at least one juror would have struck a different balance." *Id.* at 537, 123 S.Ct. 2527 (citation omitted). A "reasonable probability" is less than a preponderance of the evidence but still "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052.

"The sentencing stage is the most critical phase of a death penalty case." *Romano v. Gibson*, 239 F.3d 1156, 1180 (10th Cir.2001). "Any competent counsel knows the importance of thoroughly investigating and presenting mitigating evidence." *Id.* During the sentencing phase of a death penalty trial, counsel is required to investigate and present meaningful mitigating evidence absent a reasonable strategic choice not to do so. *Rompilla v. Beard*, 545 U.S. 374, 390-93, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005) (citing *Wiggins*, 539 U.S. at 538, 123 S.Ct. 2527). Important sentencing phase considerations include a defendant's "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (finding testimony that defendant suffered "physical torment" and sexual abuse as a result of his alcoholic, absentee mother and subsequent foster families constituted a "powerful mitigating narrative" that counsel was ineffective for failing to present); see *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background may be less culpable than defendants who have no such excuse."); *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Lockett v. Ohio*, 438

U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (invalidating an Ohio law that did not permit consideration of aspects of a defendant's background); *Wilson v. Sirmons*, 536 F.3d 1064, 1088 (10th Cir.2008) (finding "there is no substitute for the information counsel can glean from the family when researching the defendant's background, as they are almost always the only people who can provide a complete narrative of the defendant's life").

Weik v. State, 409 S.C. at 233-34.

Under *Strickland*, this court must first determine whether counsel's performance fell below an objective standard of reasonableness, and if it did, this court must determine whether there is a reasonable probability that, but for trial counsel's "unprofessional errors", the results of the proceeding would have been different. The language quoted from *Weik* above establishes that when considering the presentation of mitigating evidence in a death penalty case, this court must reweigh the evidence in aggravation against the totality of available mitigating evidence. *Wiggins v. Smith*, 539 U.S. at 534. Under *Wiggins*, prejudice is established "where there is a reasonable probability that at least one juror would have struck a different balance." 539 U.S. at 537.

Of course, the first inquiry is whether Woods has established that his trial counsel's performance fell below accepted professional norms. Within the body of his Ground A, Woods cites the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* as authority of some sort; at the hearing, the applicant contended these guidelines establish the appropriate standard for trial counsel's investigation into and presentation of mitigating evidence in the penalty phase of his trial and that all capital defense counsel must comply with those standards. The United States Supreme Court in *Bobby v. Van Hook*, 130 S.Ct. 13 (2009), however, re-emphasized that the ABA guidelines are merely guidelines and that trial counsel need not comply with them to render objectively reasonable representation. The Court noted that the Constitution simply requires trial counsel to make reasonable choices:

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[T]he Court of Appeals (following Circuit precedent) treated the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel " 'must fully comply.' " 560 F.3d, at 526 (quoting *Dickerson v. Bagley*, 453 F.3d 690, 693 (C.A.6 2006)). *Strickland* stressed, however, that "American Bar Association standards and the like" are "only guides" to what reasonableness means, not its definition. 466 U.S., at 688, 104 S.Ct. 2052. We have since regarded them as such. See *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). What we have said of state requirements is a *fortiori* true of standards set by private organizations: "[W]hile States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Roe v. Flores-Ortega*, 528 U.S. 470, 479, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Bobby, 130 S.Ct. at 17 (footnote omitted).²

This court rejects any argument from the applicant that the ABA Guidelines mandate a certain course of action to be taken by death penalty trial counsel.

As noted above, even if a PCR applicant can prove deficient performance, he must also demonstrate that he was prejudiced by his attorneys' errors. *Id.* at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). To demonstrate that he was prejudiced by his attorneys' performance he must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

² Justice Alito wrote a separate concurring decision in *Van Hook* to more forcefully emphasize his "understanding that the opinion in no way suggests that the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (rev. ed. 2003) (2003 Guidelines or ABA Guidelines) have special relevance in determining whether an attorney's performance meets the standard required by the Sixth Amendment." *Van Hook*, 130 S.Ct. at 20 (Alito, J., concurring). He explained that "[t]he ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination" *Id.* (emphasis added).

The *Bobby* Court repeats the general rule that a "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.* In the context of a capital sentencing proceeding, the applicant must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wong v. Belmontes*, 130 S.Ct. 383 (2009); *Porter v. McCollum*, 130 S.Ct. 447, 449 (2009) ("To assess that probability, we consider "the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding"--and "reweig[h] it against the evidence in aggravation") (citation omitted); *Wiggins*, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 333-41, 504 S.E.2d 822, 823-28 (1998) (petitioner did not meet burden).

It is undeniably trial counsel's responsibility to adequately investigate and present evidence in mitigation of guilt. *Williams*, 529 U.S. at 395; *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir. 2003). However, counsel is only required to make a reasonable investigation for possible mitigating evidence. *Matthews*, 105 F.3d at 919.

The Supreme Court emphasized in *Wiggins* that:

Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S., at 689. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.* at 691.

Wiggins, 539 U.S. at 533 (emphasis added). See also *Bobby*, 130 S.Ct. at 18-19 (counsel's performance not deficient where counsel gathered a substantial amount of information and then made a reasonable decision not to pursue additional sources); *Lovitt v. True*, 403 F.3d 171, 179 (4th Cir. 2005); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Id* at 157 (Traxler, J., concurring) (citing *Wiggins* and *Strickland*).

Ground A-Failure to Conduct a Reasonable Investigation into Life History and Background

The applicant maintains that trial counsel failed to conduct a reasonable investigation into his life history and background, including, but not limited to, hiring a mitigation specialist. In this ground, the applicant also maintains trial counsel did not invest necessary time with the social worker (Ms. Furtick), which resulted in an incomplete mitigation penalty phase presentation. I disagree. First, to the extent this is argued by the applicant, the fact that a mitigation specialist was not used does not automatically constitute ineffective assistance of counsel. Second, trial counsel made an objectively reasonable investigation into the applicant's social history, as evidenced by Ms. Furtick's testimony, and counsel presented mitigation evidence through her and several family members and attorney Devoe. The family witnesses and Ms. Furtick presented a compelling picture of the applicant's tremendously chaotic childhood and its effect on his development. *Weik, supra*, can certainly be distinguished, as in *Weik*, trial counsel almost totally ignored available mitigation evidence during that crucial phase of Weik's trial. Here, that is simply not the case.

As for the applicant's contention concerning trial counsel's failure to obtain the 2005 MRI films and have them reviewed by an appropriate expert, trial counsel had what they rightfully considered to be the benefit of the expertise of Dr. Martin, and then Dr. Morgan, both

undeniably qualified in the field of forensic psychiatry. Both had access to the SCDMH evaluations which referenced the 2005 MRI. As noted above, the written MRI report reflected it was an "unremarkable MRI of the brain." Dr. Jacoby read the films and stated in her 2005 report that the films "showed scattered hyperintensities in his bilateral parietal regions that were not felt to be of clinical significance." Even if Dr. Martin or Dr. Morgan should have reviewed the films or should have recommended that they be reviewed by a neuroradiologist or some other expert or should have recommended a follow-up MRI, this does not entitle the applicant to relief for two reasons. First, there is no right to effective assistance of expert witnesses. See *Wilson v. Greene*, 155 F.3d 396, 401-02 (4th Cir. 1998). See also *Walton v. Angelone*, 321 F.3d 442, 464 (4th Cir. 2003). *Poyner v. Murray*, 964 F.2d 1404, 1418 (4th Cir. 1992) (no right of effective assistance of expert exists distinct from the right to effective assistance of counsel). In *Campbell v. Polk*, 447 F.3d 270 (4th Cir. 2006), the Fourth Circuit refused to read a medical malpractice standard into the performance of an expert witness. Second, as argued by the State, trial counsel is entitled to rely upon information they obtained from their experts and they are not required to second-guess the opinions given. In *Pruett v. Thompson*, 996 F.2d 1560, 1574 (4th Cir. 1993), trial counsel retained a psychiatrist to evaluate the applicant before trial. The psychiatrist reached conclusions that were basically of no help to a mitigation presentation. The applicant essentially argued that trial counsel should have known that he suffered from mental illness, organic brain damage, developmental problems, and post-traumatic stress disorder, and should have known that the retained psychiatrist's evaluation was flawed. The Court rejected that contention and stated that "[a]n attorney is not required to be an expert in psychiatry." In the instant case, all references to the 2005 MRI alerted trial counsel to nothing, other than that the MRI was of no significance. Trial counsel, after reviewing the relevant records and learning of the interpretations of the films,

could hardly be expected to question the accuracy of these interpretations. Also, neither Dr. Martin nor Dr. Morgan alerted trial counsel to any need to have the films interpreted in more detail. As noted in *Hendricks v. Calderon*, 70 F.3d 1032, 1038 (9th Cir. 1995), “[i]f an attorney has the burden of reviewing the trustworthiness of a qualified expert’s conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous.”

Trial counsel undoubtedly has a duty to reasonably investigate and present mitigation evidence at sentencing. See again *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); see also *Williams v. Taylor*, 529 U.S. 362, 395-96, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Byram v. Ozmint*, 339 F.3d 203, 209 (4th Cir.2003). The applicant cites both *Wiggins* and *Williams* in Ground A of his last amended application as authority for the proposition that trial counsel’s “dereliction was unreasonable, prejudicial and requires vacation of [a]pplicant’s death sentence.” However, it must be noted that in *Williams*, trial counsel “failed to conduct an investigation that would have uncovered extensive records graphically describing [the petitioner’s] nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.” 529 U.S. at 395, 120 S.Ct. 1495. In *Wiggins*, trial counsel “introduced no evidence of [the applicant’s] life history.” 539 U.S. at 515, 123 S.Ct. 2527. In the instant case, trial counsel was certainly aware of the need to present the applicant’s life history, and they did so in the form of testimony from the applicant’s family members, Ms. Furtick, and Dr. Morgan.

The applicant presented the testimony of Ms. Vogelsang in an effort to establish that Ms. Furtick’s presentation of the applicant’s life and social history fell short of the mark and that trial counsel was responsible for this shortcoming. While Ms. Vogelsang is qualified as an expert in

social work, the points that she claims could have and should have been raised to the jury were in fact testified to by Ms. Furtick. Again, Ms. Furtick's mitigation testimony clearly explained the applicant's tumultuous, chaotic, and miserable childhood.

Also, the applicant's claim that trial counsel should have hired a mitigation investigator has no merit. The applicant did not hire a mitigation investigator for the purposes of the PCR proceeding, and it is therefore impossible to know what an actual mitigation investigator could have uncovered had one been hired before trial. Even so, Ms. Vogelsang did testify as to her knowledge of what a mitigation investigator does in a capital case. She testified that her checklist of things to do once hired in a capital case includes making sure a mitigation investigator has been hired, talking to the mitigation investigator to ascertain what the investigator has done, and reviewing the investigator's work. She testified that mitigation investigators are able to thoroughly investigate the community or communities where the defendant lived and that the investigator can relay that information to the defense lawyers, who then decide what information the social worker gets in order to reach his or her opinions. Ms. Vogelsang testified that one of the reasons mitigation investigators are used and why social workers should not perform mitigation investigation is so the social worker can be shielded from adverse information. Ms. Vogelsang testified that she thought Ms. Furtick's testimony was brief, that it looked like she had worn the hats of a social worker and mitigation investigator, that she could not tell if Ms. Furtick had had face-to-face interviews with family members, and that she was not allowed to use her genogram in front of the jury. She also testified that the applicant's mother's schizophrenia was inadequately raised, primarily because Ms. Furtick was not allowed to use her genogram. She said a mitigation investigator would have been invaluable in getting information relevant to the applicant's experiences while living in New York as a child. She

stated she went to New York and interviewed family face-to-face. She proceeded to summarize what she learned from those contacts. However, after examining the totality of her testimony, it is clear that she presented no more to this court than Ms. Furtick presented to the jury when she testified at trial. In addition, even though Ms. Vogelsang testified that a social worker should not perform the functions of a mitigation investigator, there is no evidence whatsoever that Ms. Furtick's arguable performance of both duties prejudiced the applicant in any way.

Ground B- Failure to Conduct a Reasonable Investigation into Mental Health Status and History

The applicant complains in this ground that trial counsel erroneously relied upon the State's 2005 forensic evaluation, which he characterizes as "flawed, and based on erroneous and scant social history and family information related to [his] upbringing, functioning, and adaptive behavior, contained numerous errors of fact and relied on highly prejudicial, and wholly uncorroborated, hearsay accounts of [his] personal and behavioral history." The applicant maintains trial counsel was derelict in adopting the State's conclusions and diagnoses (from previous evaluations) and in presenting them to the jury through Dr. Morgan, "who was called in at the eleventh hour to replace" Dr. Martin. The applicant claims Dr. Morgan's trial testimony speaks to his lack of preparedness and the last-minute nature of his involvement. The applicant claims trial counsel failed to provide Dr. Morgan with relevant and readily accessible information and that Dr. Morgan spending only 1 ½ hours with the applicant before testifying was "scant involvement with a man ... who had been labeled with numerous and prejudicial personality disorders". The applicant also recites in this ground that trial counsel never provided Dr. Morgan with the 2005 MRI film and never had it reviewed by an independent neurologist or radiologist.

The court concludes that trial counsel's performance on these issues was within accepted professional norms. The fact remains that trial counsel presented a great deal of information about the applicant's mental health status during the mitigation phase of the trial. This evidence presented has been summarized above. The applicant would have trial counsel question the opinions of Dr. Martin and Dr. Morgan, both of whom concluded that the applicant has an antisocial personality disorder. As noted above, trial counsel need not question the opinions of the retained experts, as that would render the expert's role superfluous. See *Hendricks v. Calderon*, *supra*, 70 F.3d at 1038.

The applicant claims trial counsel simply adopted the opinions of the State's examiners that the applicant has an antisocial personality disorder. That is not the case, as available records were reviewed by Drs. Morgan and Martin, and it is they who relied upon the content of these records in reaching their conclusions. Trial counsel was not required to second-guess the experts' conclusions. *Pruett*, *supra*, 996 F.2d at 1574.

In Ground B, the applicant also claims that Dr. Morgan did not spend enough time with him or with Ms. Furtick before reaching his conclusions and testifying. He also claims that Dr. Morgan did nothing to follow up with further meetings with the applicant on the issue of the applicant hearing voices. This is again a claim of ineffective assistance of an expert, and the applicant is not entitled to effective assistance of expert witnesses; the focus of this court must be upon the assistance of trial counsel. In any event, Dr. Morgan had the opportunity to review the available records and reached conclusions he felt were supported in his area of expertise. *Strickland* does not require trial counsel to shop around for experts simply because the experts the applicant has retained in his PCR matter have rendered what he perceives to be more favorable opinions of his mental status. *Poyner v. Murray*, *supra*, 964 F.2d 1404, 1419.

The applicant again notes that the 2005 MRI film was never given to Dr. Morgan and that it was never reviewed by an "independent" neurologist or radiologist. The fact remains, as noted above, that Dr. Morgan was aware of the content of the MRI report and it was up to him, not trial counsel, to determine whether further review was necessary. As trial counsel Mr. Hoefer testified, both Dr. Martin and Dr. Morgan had access to the MRI records and neither asked for any additional information or testing.

To the extent the applicant claims that Dr. Morgan's shortcomings were due to trial counsel not providing him with necessary information, it is clear that Dr. Morgan was provided with all he felt was necessary, and there is no evidence that trial counsel's investigation into the applicant's mental health status and history was deficient. In any event, Dr. Morgan did not testify at the PCR hearing, so it is impossible to determine if he would now state he needed additional information. Further, no prejudice has been demonstrated. Dr. Morgan testified that the applicant has an antisocial personality disorder. In *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990), the Supreme Court recognized that an antisocial personality disorder is admissible as mitigating evidence in a capital case. In the instant case, the trial court charged the applicant's mental health status as a mitigating factor to be considered. This court is not convinced that placing a different diagnostic label on the applicant's mental condition would make it reasonably probable that at least one juror would have voted for a life sentence.

Ground C-Presenting Damaging and Prejudicial Mental Health Testimony from Own

Expert in Psychiatry

In the body Ground C of his last amended application, the applicant claims he is entitled to relief because trial counsel failed to conduct a reasonable and thorough social history

investigation. He claims that if trial counsel had investigated the records of SCDC that confirmed a history of head trauma and an abnormal 2005 MRI scan and hired a mitigation specialist to investigate the information pertaining to the applicant's upbringing by a mentally ill mother, the mitigation evidence presented "would have accurately reflected the degree of cognitive impairment and deprived upbringing that was the true life history of Mr. Woods." The applicant claims that a thorough and competent investigation would have revealed that the multiple personality disorder labels applied to the applicant by the doctors at the Hall Institute were erroneous. In that regard, he claims that the Hall Institute doctors (Atkins in 2000 and Jacoby in 2005) failed to factor into their opinions that the applicant had sustained head injuries. He claims the Hall Institute reports focused on "bad" behaviors attributed to him, despite the fact that there was no evidence to support the reported bad behavior. He states that the "twin diagnoses of 'frotteurism' and 'zoophilia' were based on ... [his] alleged 'admission' to these behaviors, for which there was no objective evidence." The applicant claims that the verifiable and objective facts of his social, medical, and scholastic history establish beyond reasonable dispute that he does not have an antisocial personality disorder, but rather is "a brain-damaged and cognitively impaired man with borderline mental retardation and schizophrenia." He claims his brain damage and schizophrenia existed at the time of the crime and that evidence of it was within reasonable reach of trial counsel. He claims that evidence of brain damage and schizophrenia "completely refutes and undermines any confidence a reasonable person would have in the prejudicial findings" of the Hall Institute. The applicant states in conclusion that in light of the overwhelming evidence of brain damage, mental illness, and borderline intellectual functioning, trial counsel's performance was deficient and his death sentence should be vacated.

Ground C is many respects a restatement of Grounds A and B, but with the added claim that trial counsel presented damaging and prejudicial mental health testimony from Dr. Morgan. The court again notes that an antisocial personality disorder is recognized as mitigating evidence in South Carolina. *State v. Caldwell, supra*. Also, as noted above, trial counsel had retained the services of Diane Follingstad, a Ph.D. in clinical and forensic psychology, to render an opinion as to the applicant's adaptability to prison life. On November 30, 2006, during the guilt phase of the trial, she advised trial counsel Mr. Hoefer that her review placed the applicant near the bottom of the adaptability scale. Trial counsel realized they could not present her testimony to the jury. Dr. Morgan was of the opinion that the applicant would adapt sufficiently to prison life. Even though Dr. Morgan was of the opinion that the applicant had an antisocial personality disorder, trial counsel concluded that they needed evidence that the applicant would adapt well to prison life. Therefore, they made the decision to have Dr. Morgan testify. As noted above in the summary of his PCR testimony, Mr. Hoefer was aware that if he did not elicit Dr. Morgan's opinions on the antisocial personality disorder, solicitor Saleeby would have certainly explored it on cross-examination. Based on the circumstances present at the time of the sentencing phase, trial counsel made an acceptable strategic decision to have Dr. Morgan testify as he did.

The applicant claims that trial counsel did not properly investigate SCDC records that confirmed a history of head trauma and an abnormal MRI scan. The MRI scan has been repeatedly discussed and no further review is necessary. On the issue of the SCDC records, whether the records discuss head trauma or other issues, the applicant would have the court pick and choose which records trial counsel should have concentrated upon. The records discussed head trauma, the applicant's horrible childhood, his mentally ill mother, the applicant's claims that he was hearing voices, and the summary of the MRI review. The same records also discuss

his torturing of animals, frotteurism, zoophilia, malingering of psychosis, and a clinically insignificant MRI. As has been noted above, these records were made available to Dr. Martin and Dr. Morgan, and they both concluded the applicant has an antisocial personality disorder. Trial counsel cannot be faulted for relying upon the opinion of two forensic psychiatrists on this issue.

Further, as noted, the applicant suffered no prejudice, as an antisocial personality disorder is recognized as a mitigating factor in a capital case.

Reweighing of Evidence

As to Grounds A-C, even if the court were to conclude that trial counsel's performance was deficient in any of the particulars recited by the applicant, the court must "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins v. Smith*, *supra*, 539 U.S. at 534. Under *Wiggins*, prejudice is established "where there is a reasonable probability that at least one juror would have struck a different balance." 539 U.S. at 537.

In the instant case, the circumstances of the applicant's murder and rape of Joanne Dubose were horrific. He burglarized her home, strangled her with a bedsheet, tied it around her neck, and raped her. The jury also heard evidence that less than one week prior to his murder of Joanne Dubose, the applicant burglarized the home of eighty-four year old Laura Jackson. Mrs. Jackson testified that she locked up her house, turned off all lights except for her nightlight and an outside security light. She took off her glasses and hearing aids, got in bed at 9:00 p.m., and went to sleep. Just after falling asleep, she heard a noise and lay there as the noise got nearer and nearer. The applicant broke down her bedroom door when he could not open it. He beat her with his fists and choked her. He wrapped a pillow case around her head and put a pillow over her face. He tied her arms to her bed with a lamp cord. When she tried to scream, he choked her

so she could not. She realized the more she fought him, the angrier he would get, so she went perfectly limp and played dead. He then took off her underwear and raped her. He got off her and straightened her body so that she was lying perfectly flat on her back, still tied up, similar to the way Joanne Dubose was found. He then pulled the sheet over her body. He then took all the drawers out of her dresser, stole a jewelry box and her pocketbook, and then left.

The jury also heard the testimony of Linda Taylor during the sentencing phase. She testified about the applicant breaking into the home she shared with her 84 year old mother two days after the applicant murdered Joanne Dubose. She testified that she and her mother ate supper in Sumter, drove to Manning, and were watching an Atlanta Braves game in separate rooms. Around 11:00, after the game was over, she went into the den to watch the news. Her mother was in the bathroom changing clothes. As she was sitting in a chair watching the news, she heard a noise outside in the driveway. She peeped through the slats of the blinds on the back door and saw the applicant standing there in the floodlight. She hollered for her mother to call 911. At that moment, the applicant's fist came through the glass window pane and he tried to grab an interior door knob. He opened one deadbolt and she locked it back; they did this several times. She grabbed her walking cane and beat his hand but that did not faze him. She grabbed his hand and ground it around on the shards of glass in the broken pane, cutting his hand and arm. He still gained entry into the house and pushed her back into a recliner and the wall. She hollered for her mother to call 911 and the applicant told her to shut up. He turned and went down the hall to where her mother was, and she grabbed a filet knife and followed him. She found her mother face down on the floor. The applicant had put her mother in a bear hug to get the phone from her and tore the cartilage in her ribs. The applicant was gone, but he had taken all her mother's pocketbooks and a Bible.

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The applicant must establish that if the mitigation evidence that the applicant claims should have been presented was presented, there is a reasonable probability that at least one juror would have voted for a life sentence. After carefully weighing the mitigation evidence presented at the PCR hearing and comparing it with all the evidence in aggravation presented at trial, this court concludes there is not a reasonable probability that at least one juror would have voted for a life sentence. Stated another way, the applicant has not carried his burden of proving such a reasonable probability. The evidence in aggravation was immensely compelling and the mitigation evidence the applicant claims should have been presented pales in comparison. The fact that the applicant could have been portrayed to the jury as a schizophrenic man with a history of head injuries, as opposed to a man with an antisocial personality disorder is, in my view, of absolutely no consequence.

V. FAILURE TO PRESERVE REQUEST FOR A *STEWART* CHARGE

In Ground D, the applicant claims trial counsel failed to preserve as error the issue of the trial judge refusing to provide a limiting instruction on the matter of prior crimes under *State v. Stewart*, 283 S.C. 104, 320 S.E. 2d 447 (1984). The court concludes that such an instruction was not warranted.

During the guilt phase of the trial, the applicant was convicted of murder, burglary in the first degree, and criminal sexual conduct in the first degree (CSC 1st). During the sentencing phase of the trial, the State was properly permitted to introduce evidence of the applicant's convictions for burglary in the first degree and CSC 1st with regard to these offenses against victim Laura Jackson, offenses he committed on May 27, 2003. The State was also properly permitted to introduce evidence of the applicant's conviction for burglary in the first degree, that offense occurring against Linda Taylor and Elizabeth Taylor on June 4, 2003. The applicant was

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convicted of these other offenses prior to the death penalty trial. The applicant does not contest the admissibility of these other convictions.

The applicant maintains that trial counsel was ineffective for failing to properly request a charge under *State v. Stewart, supra*, during the sentencing phase. Specifically, the applicant maintains that trial counsel should have requested under *Stewart* that the jury be charged that it could consider evidence of these other convictions, if at all, only as proof of the applicant's characteristics but could not consider this evidence as proof of a statutory aggravating circumstance.

The trial transcript confirms that during evening proceedings the day before closing arguments and the jury charge during the sentencing phase, trial counsel Hoefer did request the trial judge to give a *Stewart* charge. The trial judge indicated at that time that he would not give the charge, as he did not think it was warranted under *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985). However, the trial judge stated that when the proceedings resumed the following morning, counsel could again submit a request for a *Stewart* charge and that he would make a decision on the charge at that time. When the trial resumed the following morning, Mr. Hoefer did not renew the request. Mr. Hoefer testified at the PCR hearing that he simply forgot to make the request again and that he should have renewed the request to protect the record. The applicant points to footnote 4 in the Supreme Court's opinion in the direct appeal (*State v. Woods*, 382 S.C. 153, 162, 676 S.E.2d 128 (2009)), in which the Court briefly addressed the *Stewart* issue, referring to it as Woods' Issue 5 on appeal. In that footnote, the Court seems to state that trial counsel did not preserve the *Stewart* issue. Another portion of that footnote is addressed below.

The applicant maintains that the trial judge's failure to give a *Stewart* charge was particularly harmful in light of the solicitor's closing argument, in which he argued that armed robbery and CSC 1st of Joanne Dubose weren't the only two aggravating circumstances. He argued that the offenses against Linda Taylor and Laura Jackson were also aggravating circumstances. After summarizing the rape of Mrs. Jackson, the solicitor stated, "Aggravating circumstances, you bet." Noting the life sentences Woods received in the Taylor and Jackson crimes, the solicitor argued that Jackson had already received a "two for one and he's asking you for a three for one."

Since *Stewart* was decided, the South Carolina Supreme Court has addressed whether a *Stewart* charge must be given. The applicant argues that case law holds that if the charge is warranted and properly requested by a defendant, the failure to give such a charge is reversible error. Therefore, according to the applicant, if the charge should have been given in the instant case, and if trial counsel did not request the charge, then the death sentence should be vacated and the case remanded for a new sentencing phase. The State contends the charge was not warranted, but that even if the charge were warranted, that since *in favorem vitae* review was abolished in *State v. Torrence*, (citation omitted), the applicant would have to demonstrate prejudice and that a new sentencing phase would not be the automatic result of a failure to preserve a proper request for a *Stewart* charge.

The court will first review pertinent case law addressing the necessity of a *Stewart* charge, beginning with *Stewart* itself. Stewart was convicted of the murder of Junie Rider in the guilt phase of his trial. The State chose to present the aggravating circumstances accompanying the murder (assault with intent to ravish, armed robbery, larceny with a deadly weapon, and housebreaking) during the sentencing phase only. Evidence that Stewart had committed similar

crimes before and after Mrs. Rider's murder was also admitted during the sentencing phase. The trial judge charged the jury that it could consider evidence of the crimes unrelated to the Rider murder not as proof of statutory aggravating circumstances, but only as to show the defendant's "characteristics" as they might bear logical relevance to the crime of murder. The Supreme Court held this jury charge was properly given.

The Supreme Court again addressed the necessity of such a limiting instruction in *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), reversed on other grounds, 476 U.S. 1, 106 S.Ct. 1669 (1986). In *Skipper*, the defendant was convicted of murder and criminal sexual conduct during the guilt phase of the trial. During the sentencing phase, evidence of another rape committed by the defendant was introduced as evidence of the defendant's characteristics. The trial judge did not give the jury the *Stewart* instruction that evidence of the other rape could be considered only as evidence of Skipper's characteristics and not as proof of the statutory aggravating circumstance of his rape of the murder victim. The Court stated that its holding in *Stewart* was not intended to require the limiting instruction in cases where the statutory aggravating circumstance relied upon by the State has been proven beyond a reasonable doubt in the guilt phase. The Court stated "[t]he test to be applied is whether the failure to give the charge is prejudicial to the defendant. Where, as here, the State's alleged aggravating circumstance has been established in the guilt phase by the Appellant's conviction of rape, no prejudice resulted to him from failure to give the limiting charge to the jury in the sentencing phase." 285 S.C. at 49.

In *State v. Plemmons*, 286 S.C. 78, 332 S.E.2d 765 (1985), judgment vacated on other grounds, 476 U.S. 1102 (1986), the defendant was convicted of murder and armed robbery during the guilt phase. Evidence of prior unspecified convictions was introduced during the sentencing phase, and the trial judge did not give a *Stewart* limiting instruction. Citing *Skipper*,

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the Court again held the limiting instruction was not necessary because a statutory aggravating circumstance had been proven beyond a reasonable doubt during the guilt phase.

In the instant case, the applicant maintains that a properly requested *Stewart* charge would have been necessary under two more recent decisions of our Supreme Court, *State v. Green*, 301 S.C. 347, 392 S.E.2d 157 (1990), and *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996). In *Green*, the defendant was convicted of the murder and armed robbery of Susan Babich during the guilt phase. Evidence of the defendant's commission of other crimes prior to the murder of Ms. Babich was admitted during the sentencing phase. The defendant claimed that evidence of these prior crimes was inadmissible and that even if such evidence were admissible, the judge's instruction regarding their consideration of the evidence was erroneous. The Court noted that evidence that a defendant has committed or attempted a crime or crimes similar to that for which he is on trial is proper because the evidence indicates a defendant's characteristics and predisposition to commit similar crimes. The Court went on to state that these other crimes "may not be used to prove statutory aggravating circumstances. Instead, the judge must properly limit the jury's consideration of these offenses to evidence of appellant's characteristics as they may bear logical relevance to the crime." 301 S.C. at 358, citing *State v. Stewart*. The *Green* Court noted that the trial judge had given a *Stewart* limiting instruction and concluded that the instruction "complied with the requirements of *State v. Stewart*". 301 S.C. at 358.

In *State v. George*, *supra*, the defendant was convicted of murder and armed robbery in Horry County during the guilt phase. During the sentencing phase, evidence of his commission of a separate armed robbery in Clarendon County was introduced. The trial judge gave a *Stewart* limiting instruction. On appeal, the defendant argued that evidence of the Clarendon County robbery should have been reviewed by the jury under a clear and convincing test. The Court

concluded that the Clarendon armed robbery need not be proven by clear and convincing evidence and that the Clarendon robbery evidence was admissible because it indicated the defendant's characteristics and predisposition to commit similar crimes. The Court added:

Nevertheless, because these crimes may not be used to prove statutory aggravating circumstances, the judge must properly limit the jury's consideration of these offenses to evidence of the appellant's characteristics as they may bear logical relevance to the crime.

323 S.C. at 513, citing *Green, supra*, and *Stewart, supra*.

The *George* Court held that the trial judge's *Stewart* limiting instruction "sufficiently informed the jury that it was not to use the evidence of the [Clarendon robbery] to establish guilt of a statutory aggravating circumstance."

The Supreme Court's holding in *Skipper* and *Plemmons* that a *Stewart* limiting instruction is not warranted when the defendant has been found guilty of a statutory aggravating circumstance during the guilt phase has not been overruled. However, the Court's language in *Green* and *George* noting the necessity of a *Stewart* limiting instruction in those two cases does create uncertainty as to what is the rule. However, in my view, the Court's language in *Green* and *George* is *obiter dictum*, as the propriety of a *Stewart* charge was not an issue before the court in either case. Rather, the issue in those cases was whether the evidence of other crimes was admissible in the sentencing phase in the first instance, and if admissible during the sentencing phase, whether the other crimes had to be proven by clear and convincing evidence. This conclusion is supported by the Supreme Court's observation in footnote 4 of its opinion in the applicant's direct appeal. 382 S.C. 153, at 162. Therein, the Court references "Woods' Issue 5" (the *Stewart* charge issue) and cites *State v. Skipper, supra*, for the proposition that a "*Stewart* limiting instruction required only where defendant not convicted in guilt phase of crime relied on

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by State as statutory aggravating circumstance." The court interprets the entire footnote to mean that even if the *Stewart* issue was not properly preserved by trial counsel, the limiting instruction was not warranted under the rule set forth in *Skipper*. As concluded by the *Skipper* Court, the test is whether the defendant has been prejudiced by the trial court's failure to give a limiting instruction; if the aggravating circumstance relied upon by the State has already been proven beyond a reasonable doubt in the guilt phase, there is no prejudice resulting from the trial court's failure to give a *Stewart* instruction in the sentencing phase.

The applicant was convicted of CSC 1st and burglary in the first degree during the guilt phase. Therefore, it is clear that a *Stewart* instruction was not warranted during the sentencing phase. Consequently, the applicant's claim of ineffective assistance for counsel's failure to properly request a *Stewart* instruction is respectfully denied.

VI. TRIAL COUNSEL'S FAILURE TO PRESERVE OBJECTION TO EXCLUSION OF GENOGRAM AND FAILURE TO ARGUE ADMISSIBILITY OF INFORMATION RELIED UPON BY SOCIAL WORKER EXPERT

In Ground E, the applicant submits that trial counsel failed to argue the admissibility of Ms. Furtick's demonstrative exhibits (the genogram, Applicant's Exhibit 1) under SCRE 1006 and "further failed to argue against the solicitor's objection to her reliance on hearsay under the exception to the hearsay rule that hearsay is admissible if it is routinely relied upon in the expert's field. S.C.R.E. 703." He argues these errors greatly undermined Ms. Furtick's presentation of his life history, resulting in prejudice to him.

The genogram is essentially a family tree with references to various mental conditions, incarcerations, occupations, alcoholisms, and relationships noted beside various individuals' names. The trial transcript reveals that before Ms. Furtick testified, the solicitor objected to the admissibility of the genogram on the ground that these references constituted unconfirmed

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hearsay and that he would not be able to cross-examine the sources of the information to explore the accuracy of the information. The applicant's trial counsel, Mr. Hoffmeyer, argued that the information on the genogram was admissible under Rule 703, SCRE, as it was of the type customarily and reasonably relied upon by experts in the social work field in arriving at certain opinions. He specifically stated the information was not offered to prove the truth of the matter asserted, but rather to serve as a basis for her reasoning and conclusions. The trial judge responded that Rule 703 permits an expert witness to base an opinion on something that is not admitted into evidence and upon something that is not even admissible into evidence, but he stated that "Rule 703 does not then make that otherwise inadmissible evidence admissible." R. pp. 2449-2453. Mr. Hoffmeyer then stated that he would not use the genogram and would simply ask Ms. Furtick what he thought to be appropriate questions.

Though the immediate topic being addressed is the admissibility of the genogram, I must first disagree with the learned trial judge that the "otherwise inadmissible" evidence upon which Ms. Furtick relied upon in reaching her opinions was not admissible for the limited purpose of explaining to the jury the various bases for her conclusions. Rule 703, SCRE, reads as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

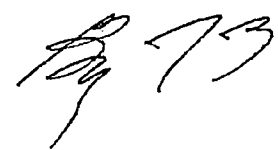
Judge Howard's opinion in *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 529 S.E.2d 45 (Ct. App. 2000) is very instructive. In *Hundley*, the Court of Appeals addressed the issue of an expert economist testifying to the various bases for his opinions and concluded that the background information upon which he relied was itself admissible so the jury would have an understanding of what his opinions were based upon. The Court rejected the

argument that allowing the otherwise inadmissible evidence was "a mere conduit" to allow inadmissible hearsay. The general rule appears to be that if the information is of the sort customarily relied upon by experts in that field in reaching their opinions, then the information is admissible for that limited purpose.

In *Jones v. Doe*, 372 S.C. 53, 640 S.E.2d 514 (Ct. App. 2006), the Court of Appeals again addressed Rule 703 and the admissibility of information upon which an expert bases an opinion. The Court noted that Rule 703 does not allow for the unqualified admission of hearsay simply because an expert has relied upon it in forming an opinion. However, the Court cited a well-recognized treatise on evidence which observed "[T]he expert may testify to evidence even though it is inadmissible under the hearsay rule, but allowing the evidence to be received for this purpose does not mean it is admitted for its truth. *It is received only for the limited purpose of informing the jury of the basis of the expert's opinion and therefore does not constitute a true hearsay exception.*" *Jones*, 372 S.C. at 62-63, citing 2 Kenneth S. Broun, et al., *McCormick on Evidence* § 324, at 418 (2006) (emphasis added by the *Jones* Court).

In *Allegro, Inc. v. Scully*, 400 S.C. 33, 46-47, 733 S.E. 2d 114 (Ct. App. 2012), the Court Appeals referenced the *Jones* holding in *dicta*, but did not note that the otherwise inadmissible information forming the basis for the opinion was indeed admissible for the limited purpose of explaining the basis for the expert's opinion.

In my view, the information forming the basis for Ms. Furtick's opinions was admissible. The applicant argues that trial counsel "failed to argue against the solicitor's objection to [Ms. Furtick's] reliance" on this information. The applicant is correct, and trial counsel's failure to preserve the objection was deficient. However, a full reading of Ms. Furtick's testimony yields



only the conclusion that all of the information upon which she based her conclusions was, in fact, related to the jury by Ms. Furtick.

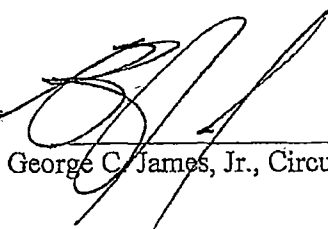
Returning to the genogram itself, the applicant cites *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) for the proposition that the genogram was at least admissible as a demonstrative exhibit and perhaps as an exhibit to go into the jury room. Trial counsel agreed at the PCR hearing that he should have argued this point to the trial judge. The transcript reveals that after the trial judge commented on the inadmissibility of the underlying bases for Ms. Furtick's opinions (see above-quoted statement of the trial judge), trial counsel stated that he would not use the genogram and would simply ask appropriate questions of the witness. In my view, the genogram would have been admissible at least as a demonstrative exhibit. However, even if trial counsel was ineffective for failing to pursue the admission of the genogram, the court concludes there was no prejudice resulting to the applicant. The fact remains that Ms. Furtick was able to relate to the jury the information that was on the genogram. It is not reasonable to conclude that the outcome of the sentencing phase would likely have been different if the genogram had been seen by the jury and specifically referenced by witnesses at trial.

CONCLUSION

For the foregoing reasons, the application for post-conviction relief is denied. The applicant shall have thirty days from the date his counsel receives written notice of entry of judgment to appeal this order to the Supreme Court of South Carolina.

AND IT IS SO ORDERED.

May 6, 2015


George C. James, Jr., Circuit Judge

