

Mar 21 2022

THE STATE OF SOUTH CAROLINA)
)
 COUNTY OF LEXINGTON)
)
 Gary Dubose Terry, SCDC#5054,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

S.C. SUPREME COURT
 IN THE COURT OF COMMON IN THE
 COURT OF COMMON PLEAS
 FOR THE ELEVENTH CIRCUIT

Case No. _____

Application for Post-Conviction Relief

1. Place of Detention: Broad River Correctional Institution, Columbia, South Carolina.
2. Sentencing Court: Lexington County Circuit Court in Lexington, South Carolina.
3. Not applicable.
4. The indictment number or numbers upon which the offense or offenses for which sentence was imposed:

Indictment number 1995-GS-3291670 charged murder, first degree burglary, first degree criminal sexual conduct, and malicious injury to a telephone system.

5. The dates upon which the sentence was imposed and the terms of the sentence:

A death sentence was imposed on September 21, 1997, for the crime of murder. Applicant was sentenced to life imprisonment for burglary in the first degree; thirty-five years' imprisonment for criminal sexual conduct in the first degree; and ten years' imprisonment for malicious injury to a telephone system.

6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgement of conviction and sentence.

8. Applicant appealed to:

The Supreme Court of South Carolina, which affirmed, *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (S.C. Mar. 13, 2000);

The Supreme Court of the United States, which denied petition for writ of certiorari to the Supreme Court of South Carolina, *Terry v. South Carolina*, 531 U.S. 882 (U.S., Oct. 2, 2000);

courts must therefore consider the standard error of measurement, “one of the most important concepts in measurement theory,” which converts a fixed IQ score into the 10-point range that confidently contains and best reflects a person’s true IQ score. *Hall*, 134 S.Ct. at 1995. There is also a professional and scientific consensus that obtained IQ scores are not accurate unless they are corrected for a phenomenon known as norm obsolescence, in which IQ scores artificially increase over time and warrant adjustment from aged norms when tested. This observation is known as the “Flynn Effect.” AAIDD Manual at 42, 123; DSM-5 at 37; *see also* Kevin S. McGrew, *Norm Obsolescence: The Flynn Effect* 161 in *THE DEATH PENALTY AND INTELLECTUAL DISABILITY* (Edward A. Polloway, ed. 2015) (“Not only is there a scientific consensus that the Flynn effect is a valid and real phenomenon, there is also a consensus that individually obtained IQ scores derived from tests with outdated norms must be adjusted to account for the Flynn effect, particularly in *Atkins* cases.”). Because the Flynn Effect is an “established” component of the scientific and medical “community’s diagnostic framework,” *Hall*, 134 S.Ct. at 1995, 2000, legal assessments of intellectual disability must also incorporate it. *See Walker v. Kelly*, 593 F.3d 319, 337 (4th Cir. 2010).

On a recent administration of the Woodcock-Johnson IV Test of Cognitive Abilities (hereinafter WJ-IV), one of three gold-standard IQ tests, Mr. Terry’s obtained IQ score was adjusted per the requisite Flynn effect, resulting in a full-scale IQ score of 74, with a 95% confidence interval of 69 to 79. David Freedman, *Cognitive and Functional Assessment: A Practitioner’s Guide to Testing*, FEDERAL DEATH PENALTY RESOURCE COUNSEL 54 (Mar. 2019) (describing WJ-IV as one of the three dominant, comprehensive, and nationally normed IQ tests which meet the current psychometric criteria for reliability and validity currently in use). Dr. Scott Decker, neuropsychologist, administered a measure of malingering and concluded that the testing scores were valid and that Mr. Terry put forth good effort. Mr. Terry’s IQ includes a range that extends more than two standard deviations below the mean.

- 11(b). Applicant Gary Terry also has significant deficits in adaptive functioning. Adaptive deficits are the “inability to learn basic skills and adjust behavior to changing circumstances.” *Hall*, 572 U.S. at 710. Adaptive deficits must be assessed using both “clinical evaluation and individualized . . . measures.” *Moore*, 137 S.Ct. at 1048-50. Clinicians look to whether an individual’s adaptive performance falls two or more standard deviations below the mean in any of three adaptive skill sets—conceptual, social, and practical—in determining the significance of adaptive deficits. *Id.* at 1046 (citing AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* 43 (11th ed. 2010)).

Mr. Terry has a documented history of special developmental needs and learning disabilities that indicate significant conceptual deficits. Throughout elementary school, Mr. Terry consistently received low marks in his progress across all subjects. Mr. Terry’s fourth grade teacher, for example, reported that in Reading, Language, and Spelling, Mr. Terry received the lowest possible mark for progress, despite receiving the highest possible mark for effort. Mr. Terry was forced to repeat fifth grade. When Mr. Terry was in fifth grade the first time, his teacher recommended that he be evaluated for special educational services. As part of the evaluation, school officials administered the Vineland Social

Maturity Scale, a standardized measure of adaptive behavior. See Donald J. Raggio & Twila W. Massingale, *Comparability of the Vineland Social Maturity Scale and Vineland Adaptive Behavior Scale—Survey Form with Infants Evaluated for Developmental Delay*, 71 *Perceptual and Motor Skills* 415 (1990) (noting that the Vineland Social Maturity Scale has a “long and venerable history in the assessment of adaptive behavior, particularly in the area of mental retardation”). Mr. Terry’s Vineland scores were “below the level” expected for his age, “suggested immaturity in social skills,” and fell approximately two standard deviations below the mean—the diagnostic cut-off for intellectual disability. See *Moore*, 137 S.Ct. at 1046. The school then placed Mr. Terry in a resource program for learning disabled students in language arts and math classes and developed an individualized education plan for him. Nevertheless, Mr. Terry continued to receive failing grades. His school records reflect difficulty with completing work on time, using time wisely, and thinking and working independently. Mr. Terry was repeatedly reevaluated throughout middle and high school and remained in resource courses until he dropped out of high school in ninth grade.

Mr. Terry also has a history of significant social and practical deficits. Mr. Terry’s third, fourth, and fifth grade teachers all indicated that Mr. Terry’s ability to work well independently and develop effective work habits was “unsatisfactory,” the lowest possible category. Mr. Terry’s fifth grade teacher noted that Mr. Terry “tires easily” and had “frequent inattention.” Records from his seventh grade year indicate that Mr. Terry’s weaknesses included “[e]veryday coping behavior.” Mr. Terry also repeatedly received scores of “unsatisfactory” in different categories regarding “Personal Traits,” including completing work on time, using time to advantage, thinking and working independently, and contributing to class. Mr. Terry received “unsatisfactory” in all Personal Trait categories in the 1980-81 school year. In high school, Mr. Terry also received instruction and progress assessments in independent living skills, including writing and depositing checks, recognizing and knowing the difference between various coins and bills, computing the cost of grocery items, and understanding the difference between shopping “wants” and “needs.” Mr. Terry’s mother described him as “different” and “very shy” and reported that he often “played by himself” and liked to “be by himself.” She also noted that he did not participate in sports or other activities like Boy Scouts because he did not have the attention span to sit still for prolonged periods of time. As an older teenager, Mr. Terry continued to display significant deficits. He never lived alone and could not maintain consistent employment. The jobs he did hold—a bouncer at a night club, a tree trimmer, other forms of manual labor—involved primarily physical labor.

11(c). Applicant Gary Terry’s significantly subaverage intellectual functioning and deficits in adaptive functioning manifested before he was eighteen years old. Mr. Terry struggled academically, and at age eleven, he was placed in special education resource classes where he remained until dropping out. Interviews with family members also confirm that Mr. Terry displayed low intellectual functioning and deficits in adaptive functioning during the developmental period.

12. Applications filed with respect to this conviction:

Applicant filed petition in a State Court under South Carolina Law, petition in Federal Court for habeas corpus and post-conviction relief, petition in the United States Supreme Court for certiorari, and other petitions, motions, or applications in this court and others.

13. With respect to each petition, motion, or application of part (12):

Applicant filed an application for post-conviction relief in the Supreme Court of South Carolina on November 30, 2000, based on allegations that trial counsel were ineffective for failing to object to the exclusion of Applicant's statement and for failing to adjust defense strategy. Applicant was denied relief on all claims and the petition was dismissed. *Terry v. State*, 714 S.E.2d 326 (S.C. 2011).

Applicant filed petition in the United States Supreme Court for certiorari, which was denied. *Terry v. State*, 531 U.S. 882 (2000).

Applicant filed second application for post-conviction relief on June 29, 2012, which was dismissed as successive on June 19, 2018.

Applicant filed for habeas corpus in Federal Court on June 29, 2012, claiming ineffective assistance of counsel for trial counsel's (1) failure to object on the basis of prosecutorial misconduct; (2) failure to disclose an actual conflict of interest; (3) failure to conduct adequate and appropriate *voir dire*; (4) failure to develop evidence supporting a defense of guilty but mentally ill; and (5) failure to object to or impeach aggravating testimony. The petition was denied on September 26, 2019.

Applicant filed a motion to alter or amend judgment pursuant to Federal Rule of Civil P. 59(e) focusing solely on the first four grounds of habeas corpus petition. The motion was denied on December 10, 2019.

14. The grounds set forth above have not been previously presented to this or any other court.
15. Not Applicable.
16. Applicant did not previously raise this claim at trial or in an initial PCR proceeding because he was represented by ineffective counsel who failed to raise it.
17. Applicant was previously represented by counsel.
18. The names and addresses of each attorney who represented applicant at each proceeding:

During trial Applicant was represented by Elizabeth Fullwood, the Lexington County Public Defender, and I. McDuffie Stone, a lawyer in private practice, who also served as a part-time prosecutor in another state judicial circuit.

Assistant Appellate Defender Robert M. Dudek, of the S.C. Office of Appellate Defense, of Columbia, represented Applicant during appeal.

H. Wayne Floyd, an attorney in private practice in West Columbia, and Melissa Armstrong (previously Kimbrough), an attorney previously in private practice in Columbia, were appointed to represent Applicant in state post-conviction proceedings.

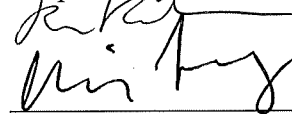
In federal habeas corpus, Applicant was represented by various attorneys: Derek J. Enderlin of Ross & Enderlin in Greenville; Elizabeth Anne Franklin-Best of Elizabeth Franklin-Best, PC, in Columbia; Laura Wood Young, previously of Blume, Franklin-Best & Young, LLC, in Columbia; and Teresa L. Norris, previously of Blume Weyble and Norris, of Columbia.

After Applicant's counsel moved for a stay in federal habeas corpus pursuant to *Rhines v. Webster*, 544 U.S. 269 (2005), he was represented in a second application for post-conviction relief by Teresa L. Norris, Elizabeth Franklin-Best, and Derek J. Enderlin.

Applicant was represented on appeal from denial of his petition for habeas corpus by Elizabeth Franklin-Best and Hannah Lyon Freedman of Justice 360, in Columbia.

19. Applicant seeks relief from his death sentence.
20. Applicant is not under sentence from any other court.

Respectfully submitted,



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