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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

The State,

Respondent,

v.

Gary DuBose Terry

Appellant.

Appellate Case No. 2000-25085

RESPONSE TO STATE'S MOTION TO RECONSIDER STAY OF EXECUTION NOTICE

The State asks this Court to reconsider its April 6, 2022, order entering a stay of execution for Appellant, Gary DuBose Terry, pursuant to the procedures established in *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), for circumstances in which a death-sentenced individual seeks to pursue post-conviction relief. Consistent with the Court's order and *In re Stays*, this Court remanded the case to the Circuit Court for further proceedings; Judge Hood has been assigned exclusive jurisdiction over the case; and the parties have agreed to a hearing regarding appointment of counsel on May 5, 2022. Following that hearing, Terry and his counsel will prepare for an evidentiary hearing at which the Circuit Court will address the single claim raised in his post-conviction relief (PCR) application: that Terry is a person with intellectual disability and thus cannot be executed pursuant to the Supreme Court's Eighth Amendment categorical bar to such executions established in *Atkins v. Virginia*, 536 U.S. 304 (2002). At this stage, the burden for proving that Terry is not entitled to a stay rests with the State. They have not met and cannot meet that burden.

First, the State points to the fact that there was testimony at the penalty phase of Terry's 1997 trial from a defense psychologist that Terry's scores on psychological tests did not meet the threshold for intellectual disability (or mental retardation, as the disability was then labeled). This is in no way surprising and does not negate Terry's claim that he is a person with intellectual disability. The trial took place in 1997, five years before *Atkins* was decided, meaning the defense psychologist did not assess Terry's intellectual functioning pursuant to a formal *Atkins* evaluation. Instead, the psychologist's testimony about Terry's intellectual functioning was offered by the defense in mitigation of punishment as part of a (poorly conceived and implemented) assertion of brain damage. At the time, mental health professionals (and lawyers for capital defendants) did not have the incentive to conduct the type of analysis and investigation necessary to distinguish between intellectual disability and borderline or low-average functioning (which the psychologist admitted was present in Terry's case) because nothing of legal consequence flowed from doing so.[1] Consistent with these basic principles, the Supreme Court of the United States has recognized

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[1] It is also important to note that the trial testimony does not indicate which test(s) the psychologist administered or Terry's scores on those tests. Thus, the test or tests may not have been designed to assess global intelligence and may not have been suitable for making a determination of whether Terry had significantly subaverage intellectual functioning. *See* Gilbert S. McVaugh, III & Mark D. Cunningham, Atkins v. Virginia*: Implementations and Recommendations for Forensic Practice*, 37 J. PSYCHIATRY & L. 131, 144 (2009).

Despite counsel's best efforts, we have been unable to obtain raw data or the file from the psychologist who administered the test or tests. He is now retired and elderly, and it appears that his file on Terry was most likely destroyed many years ago. However, even assuming that his vague trial testimony is accepted at face value, *i.e.*, that Terry obtained an IQ score of 75 or above on a global test of intelligence, it would still not be determinative because experts in the field of intellectual disability and numerous studies have shown that a person's highest IQ score is not their "true" IQ. *E.g.*, Frank M. Gresham, *Interpretation of Test Scores in* Atkins *Cases: Conceptual and Psychometric* Issues, 16 APPLIED NEUROPSYCHOLOGY 91, 93 (2009) ("[A]n individual can have more than one true score. . . . [A]n individual taking [three different IQ tests] will have three true scores, one for each test."). *See also Hall v. Florida*, 572 U.S. 701, 712 (2014) (recognizing that IQ scores are best understood as a range of scores on either side of the raw score); *Wiley v. Epps*, 625 F.3d 199, 214-16, 222 (5th Cir. 2010) (rejecting the idea that any individual above-range IQ score automatically negates other, within-range scores). Furthermore, as the underlying raw data is not available, the possibility of scoring error, which has been demonstrated in a number of cases, also cannot be discounted. *See, e.g.*, Joseph J. Ryan et al., *Scoring Reliability on the WAIS-R*, 51 J. CONSULTING &

that "[m]ental retardation as a mitigator and mental retardation under *Atkins* . . . are discrete legal issues." *Bobby v. Bies*, 556 U.S. 825, 836 (2009).

The State also fails to note in its reconsideration request that in the pre-*Atkins* trials and/or PCR hearings of Edward Lee Elmore, William Bell, and Kenneth Simmons, the parties elicited similar testimony to the effect that the defendant or petitioner did not meet the criteria for intellectual disability. Nevertheless, after *Atkins*, judges in this state ultimately found all three defendants to be persons with intellectual disability, and those judgments were either not appealed or were not overturned on appeal to this Court. As a result, Elmore, Bell, and Simmons all subsequently had their death sentences modified to life imprisonment. Order Granting Post-Conviction Relief Pursuant to *Atkins v. Virginia*, 536 U.S. 304 (2002), Vacating Death Sentence, *Bell v. State* No. 2003-CP-04-1857; Order Granting Post Conviction Relief Pursuant to *Atkins v. Virginia* 536 US 304 (S.C. 2002), Vacating Death Sentence and Remanding to Court of General Session for Entry of Life Sentence, *Elmore v. State* No. 05-CP-24-1205; Return to Petitioner-Respondent's Petition for Writ of Certiorari at 9-14, *Simmons v. State* No. 05-CP-18-1368. The outcomes in these cases underscore that pre-*Atkins* trial testimony that a person does not meet the intellectual disability threshold is of dubious relevance.

What makes it even less relevant is that until 2014, many mental health professionals, lawyers, and judges believed that to satisfy prong one of the criteria for intellectual disability (significantly subaverage intellectual functioning), a person had to have an IQ score of 70 or below. *E.g.*, *Hall*, 572 U.S. at 715-16 (noting approximately nine States mandated a strict IQ score cutoff at 70). However, in *Hall v. Florida*, the Supreme Court held that this practice was inconsistent

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CLINICAL PSYCHOLOGY 149 (1983) (finding that regardless of scorer experience level, mechanical error produced summary scores varying by as much as four to eighteen IQ points).

with the clinical understanding of the disability and that if a death sentenced inmate presented an IQ score of 75 or below, he was entitled as a matter of law to present other criteria for intellectual disability, including "testimony regarding adaptive deficits" and age of onset. *Id.* at 713-14, 723. The Court emphasized that although IQ is significant in the overall evaluation of intellectual disability, IQ testing is "imprecise" and States must understand an IQ score "represents a range rather than a fixed number." *Id.* at 723.

The State also maintains that Terry should not be afforded even the opportunity to establish that he is a person with intellectual disability protected by *Atkins*'s categorical bar to execution on finality grounds. On the several occasions when *bona fide* claims of intellectual disability have arisen late in the appeal process, this Court has stayed their executions and permitted them to pursue relief in PCR proceedigns. Anthony Woods's case provides an excellent (and the most recent) example. Woods's trial counsel knew Woods had an in-range IQ score on a State-administered test and yet made no effort to consult with experts or investigate a possible intellectual disability claim. Petition for Writ of Certiorari at 3, *Woods v. State*, No. 2019-MO-044, 2019 WL 6898088 (S.C. 2019). And although Woods's PCR counsel did retain an expert who administered an additional IQ test on which Woods again scored within range and did raise an *Atkins* claim, they withdrew the *Atkins* claim after a State evaluation. *Id.* at 4. This Court, however, did not find this a bar to relief and permitted Woods to raise his *Atkins* claim in a successor PCR application, holding that "[b]ecause there is a possibility the Constitution categorically bars Petitioner's execution, . . . the successive PCR application in this case is permissible because of extraordinary circumstances." *See Woods v. State*, No. 2019-MO-044, 2019 WL 6898088 (S.C.

2019).[2] There is no basis in law or fact to treat Gary Terry differently than this Court has treated other similarly situated death sentenced inmates.

In sum, Gary Terry has presented a *prima facie* case of intellectual disability in his recently filed PCR application alleging a score on a "gold standard" IQ test that is within the range of intellectual disability and significant deficits in adaptive functioning, both of which manifested during the developmental period. This Court has appointed a Circuit Judge, the Honorable Robert Hood, to preside over the case, and an initial hearing for the appointment of counsel has been scheduled for May 5, 2022. Terry should be given the same opportunity to prove his claim that this Court has provided other defendants, and the State's motion for reconsideration should be denied, to avoid the miscarriage of justice in the execution of a person with intellectual disability.

Respectfully submitted,

Hannah Freedman, S.C. Bar No. 103373
Brendan Van Winkle, S.C. Bar No. 104768
Allison Franz, S.C. Bar No. 105189
JUSTICE 360
900 Elmwood Ave., Ste. 200
Columbia, SC 29201
hannah@justice360sc.org
brendan@justice360sc.org
allison@justice360sc.org

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[2] Nor is Woods alone in raising a late-stage *Atkins* claim. While the overall numbers are small in relation to the size of death row during the twenty years since *Atkins* was decided, four other similarly situated death sentenced inmates have been permitted to pursue intellectual disability claims in second-in-time PCR applications. *See Elmore v. State*, No. 2005-CP-24-1205; *Aleksey v. State*, No. 2015-CP-38-00764; *Bryant v. South Carolina*, 2016-CP-43-828; *Stone v. State*, No. 2018-CP-43-01025.