STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2005CP2401205

Edward Lee Elmore *vs.* Jon E Director Ozmit

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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

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

Order Granting Post Convection Relief Vacating Death Sentence and Remanding to Court of General Sessions for Entry of Life Sentence

Dated at Greenwood, South Carolina, this 1st of February, 2010.

Court Reporter:

PRESIDING JUDGE - Honorable J. Mark Hayes II

This judgment was entered on the 4th of February, 2010, and a copy mailed first class this 4th of February, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

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SCRCP APP-24/FORM 4

Ingram B. Moon - Clerk of Court

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	**FOR THE EIGHTH JUDICIAL CIRCUIT**
COUNTY OF GREENWOOD)	
	05-CP-24-1205
EDWARD LEE ELMORE,)	
)	
Applicant,)	
)	**ORDER GRANTING POST CONVICTION**
-VS-)	**RELIEF PURSUANT TO *Atkins v. Virginia*,**
)	**536 US 304 (2002), VACATING DEATH**
STATE OF SOUTH CAROLINA)	**SENTENCE and REMANDING TO COURT**
and Jon Ozmint,)	**OF GENERAL SESSIONS FOR ENTRY OF**
)	**LIFE SENTENCE**
Respondents.)	

I. INTRODUCTION.

This is a Post Conviction Relief (PCR) matter filed by Edward Lee Elmore, a death-sentenced inmate. Applicant alleges, pursuant to the South Carolina Supreme Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), that he is mentally retarded and thus his death sentence violates the Eight Amendment to the United States Constitution. *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that persons with mental retardation are categorically ineligible for capital punishment). After the parties completed discovery and other pretrial matters were ruled upon, this Court convened an evidentiary hearing on May 5-6, 2009, at the Broad River Correctional Institution. Based on the evidence and record of this proceeding, the Court finds that the applicant is mentally retarded as that condition is defined under South Carolina law and for purposes of the application of the *Franklin* and *Atkins* cases. Therefore, the Court hereby vacates applicant's death sentence and remands the case to the Greenwood County Court of General Sessions for imposition of a life sentence.

II. LEGAL FRAMEWORK.

In 2002, the United States Supreme Court ruled that the Eighth Amendment to the United States Constitution prohibits the execution of persons with mental retardation. *Atkins*, 536 U.S. at 321. The Eighth Amendment, in part, prohibits the government from inflicting cruel and unusual punishment. The United States Supreme Court categorically excluded from execution mentally retarded persons and mandated such a categorical exemption as part of this nation's death penalty jurisprudence.[1]

The Supreme Court left it primarily to the states to establish appropriate procedures for determining whether capital litigants are mentally retarded and thus, ineligible for capital punishment. *Id.* at 317. In *Franklin*, 356 S.C. at 280, 588 S.E.2d at 606, the South Carolina Supreme Court delineated such a procedure in a post-conviction relief action brought by a death-sentenced person:

> A death row inmate who claims he is mentally retarded and, as a result, not subject to the death penalty, may institute post-conviction relief (PCR) proceedings, because his sentence is in violation of the Constitution and exceeds the maximum authorized by law. As with other PCR claims, the applicant must show he or she is mentally retarded by a preponderance of the evidence. If mental retardation is proven, the PCR court will vacate the death sentence and impose a life sentence. (Internal citations omitted).

Our Supreme Court held that the applicable definition of mental retardation is found in

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[1] The Supreme Court reasoned and held that "by definition, [mentally retarded 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.

the current death penalty statute. *Id.* 356 S.C. at 278-79,588 S.E.2d at 605.[2]

Statutory Definition of Mental Retardation.

South Carolina's statute defines mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. §16-3-20 (C)(b)(10). This same definition is found in the South Carolina Mental Retardation Act, *see* S.C. Ann. §44-20-30(11), and in the Mental Retardation Regulations, *see* 88 S.C. Code Ann. Regs. 210(K). Thus, the definition of mental retardation consists of three prongs: (1) subaverage intellectual functioning, (2) limitations in adaptive functioning, and (3) a manifestation of these attributes before age eighteen (18). For clarity purposes, even though much of the testimony and evidence presented was in the nature of a clinical diagnosis of mental retardation, this court, in determining whether applicant has met his burden of proof of establishing mental retardation, has applied the evidence to the legislature's definition of mental retardation. *See Franklin*, 356 S.C. at 278-9, 588 S.E.2d at 605, citing with approval S.C. Code § 16-3-20(C)(b)(10) (2003), 44-20-30(11) (2002), and 44-26-10(11).

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[2] The practical effect of *Atkins* and *Franklin* requires a trial court to conduct an evidentiary hearing as to mental retardation after the Applicant's culpability for the crime has already been established. No challenge was presented by either the Attorney General or the Applicant to *Atkins* or *Franklin*. Both sides agreed that the legal precedent of *Atkins* and *Franklin* controlled this Court's review of the Applicant's mental retardation claim.

Additionally, during the hearing before this Court, the Court was not informed or presented any facts concerning the crime which lead to the imposition of the death penalty. Neither the Attorney General nor the Applicant contended that the facts which resulted in the Applicant's conviction were relevant to the issue presently before this Court. Both sides concurred that the issue of mental retardation was to be decided excluding consideration of the Applicant's culpability of the crimes for which he was convicted. Thus, the legal test and the facts to be applied to that test were narrow; i.e. whether Applicant was mentally retarded as defined by South Carolina law.

III. LEGAL ANALYSIS AND FACTUAL FINDINGS.

To determine whether the applicant has met the three prong test for mental retardation, the Court applied the preponderance of evidence test to the information presented. This Court has examined the evidence presented to determine which evidence is of greater weight – or more convincing – the evidence which as a whole shows that a fact sought to be true is more probable than not true. The word preponderance means something more than weight; it denotes a superiority of weight, or outweighing. The degree of proof which this Court has applied in determining if applicant met his burden of proof is whether the evidence, when viewed as a whole, demonstrated the fact to be proved is more probably true than not. The burden of proof never shifted from the applicant and was not measured by this Court simply by the number of witnesses called in support of a fact or against a fact.

After reviewing the evidence presented, the testimony of the witnesses, and arguments put forth, the Court finds the applicant has proved by a preponderance of the evidence that he is mentally retarded.

This Court gave significant weight to the testimony of Dr. Donna Culley regarding all three prongs of the mental retardation calculus. Dr. Culley was appointed to perform an independent evaluation for the Court. Dr. Culley is a licensed clinical psychologist employed by the Department of Developmental and Special Needs ("DDSN"). Her primary job responsibility is to conduct forensic evaluations for DDSN. Dr. Culley was appointed as an expert to assist the

Court in making a determination of the issue of mental retardation.[3]

An important aspect of Dr. Culley's evaluation and opinion is that DDSN is the state agency in South Carolina statutorily charged with assessing possible mental retardation in individuals. Whether the individuals voluntarily or involuntarily consent to the mental retardation assessment, DDSN, when requested by any one of eight statutorily delineated categories of state officials, including prosecutors, perform evaluations to determine mental retardation. S.C. Code Ann. § 44-20-450, *and see* § 44-23-410.

In this matter, the South Carolina Attorney General's office specifically requested that the Court order a DDSN examination of the applicant. The Attorney General requested "examiners, who are experienced and trained clinicians and at least one whose expertise is in the field of mental retardation and who is skilled in the administration and interpretation of psychometric (IQ) tests and in the assessment of adaptive behavior and the impact of intellectual

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[3] The Court raised a concern at the evidentiary hearing about one of applicant's counsel being present in the room while Dr. Culley performed her assessment of the applicant. As expressed at the hearing, the attendance by counsel during Ms. Culley examination of the applicant is disturbing. Applicant's counsel presence during the assessment gives the appearance of ignoring this Court's prior order; an order which attempted to assure the integrity of the assessment by prohibiting such conduct. Nevertheless, I cannot find information in the record that Dr. Culley's opinions should be disregarded or were tainted by the presents of counsel. However, counsel's presence has allowed Dr. Culley's opinions to be properly questioned by the Attorney General's representative. After the evidentiary hearing, both sides have submitted information in an attempt to supplement the record on the issue of counsel's presence when Dr. Culley performed her evaluation. Given the reliance this court is placing on Dr. Culley's opinion, the additional submissions have been reviewed to determine if counsel's presence had any bearing on the issue of improperly influencing or otherwise affecting Dr. Culley's opinion. None is apparent from the reading of these documents. However, this court draws no official conclusions from the additional information presented. Neither party has sought permission to supplement the record and no motions have been filed with the court for consideration of this information. Therefore, absent a cursory review, this additional information has not been considered at this time in this decision and any future use of this information as it relates to the present matter before this Court rests exclusively with the parties or the attorneys.

impairment in an individual's life," to conduct a mental retardation assessment of applicant. *See* Respondent's Motion for an Evaluation of Applicant for Mental Retardation at p. 2. The Court is aware from all of the evidence submitted that DDSN examiners have conducted mental retardation assessments, at one time or another, of every death-sentenced post conviction claimant seeking relief pursuant to *Atkins*.

While the decision of this Court was not based upon the number of witnesses called by either side, the applicant did present, in addition to Dr. Culley, three additional expert witnesses who testified that applicant met all three criteria for mental retardation. Applicant's witnesses administered a number of different tests and measures assessing and evaluating applicant's intellectual and adaptive functioning. On the adaptive functioning prong, the Court found Dr. George Woods' testimony especially helpful and persuasive as to the existence of deficits in applicant's adaptive functioning limitations. The State's expert witness (Dr. Roger Moore) was enlightening from the position of providing information to discredit the methodology or protocol used by some of the applicant's witnesses. He did point out areas where an evaluation of the evidence should occur when determining if the case presented by applicant was reliable and also as to accepting or rejecting the testimony of the applicant's experts. His information was valuable to critiquing the testimony of the other witnesses and in understanding and weighing the value of the evidence in making a determination of the applicant's mental health/mental retardation status as required under South Carolina law. His testimony was carefully considered in evaluating the evidence and opinions of the other witnesses.[4] Nevertheless, for the reasons

[4] The Attorney General's expert did not perform a mental retardation evaluation of the Applicant. Additionally, no expert opinion was presented to this Court that the Applicant was not mentally retarded.

which will be set forth in detail below, the Court finds that applicant has satisfied his burden of demonstrating by a preponderance of the evidence that he has significantly subaverage intellectual functioning, existing concurrently with deficits in adaptive functioning and that the onset of his disability was during the developmental period.

A. SIGNIFICANT SUBAVERAGE INTELLECTUAL FUNCTIONING.

The first prong of mental retardation diagnosis requires an individual to display significant subaverage intellectual functioning. Determinations regarding a person's intellectual functioning are made primarily by referring to intelligence tests.

i. Intelligence Quotient Testing and Scores.

This Court is persuaded by a preponderance of the evidence that Mr. Elmore's intellectual functioning is significantly subaverage based upon the results of the intellectual quotient ("IQ") test administered to him over the years. All experts who assessed applicant consistently described him as cooperative and as having given his best effort. No expert found that applicant attempted to skew the results of the testing to secure a favorable result. The fact that applicant's scores on tests and other measures has been consistent -- consistently significantly subaverage -- since he first entered school at the age of six years and over his lifetime, with no significant deviation, greatly diminishes the possibility that applicant is malingering.

According to the DDSN report, significantly subaverage intellectual functioning "refers to performance that is two or more standard deviations below the population mean." DDSN Report at p. 11. Based upon the expert testimony and the DDSN report prepared for the Court,

this Court concludes that the standard error of measurement ("SEM") is helpful in accurately assessing applicant's intellectual functioning.[5] The DDSN report specifically included a definition of SEM as being "[t]he amount an observed score is expected to fluctuate around the true score. About 95% of the time the obtained score will vary by less than plus or minus two standard errors from the actual true score." *Id.*

Dr. Culley recounted in her report submitted to the Court that four IQ tests were administered to applicant from the age of twelve through the age of thirty-four. Dr. Culley testified consistent with her report regarding those tests and the proper interpretation of the results. It is Dr. Culley's expert opinion, as set forth in her report and in her testimony at the PCR hearing, that "all of the test data indicate that Mr. Elmore meets the DSM-IV-TR criteria for significantly subaverage intellectual functioning (Criterion A). All of applicant's IQ tests fall within the range of mental retardation as defined by the DSM-IV-TR including those that were obtained during [applicant's] developmental period (61, 72, 58) and those during adulthood (71, 75)." DDSN Report at p. 8. The developmental period is defined as being "the period between birth and before 18 years of age" by DDSN. DDSN Report at p. 11. Further, DDSN definitively states that mental retardation cannot begin or develop after the age of 18 years." *Id.* Thus, Dr. Culley's more relevant finding is that applicant suffered from significant subaverage

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[5]Expert evidence showed that consideration of SEM, which is an "estimate of the amount of error usually attached to an examinee's obtained score," *see* Jerome M. Sattler, *Assessment of Children*, 28 (3rd ed. 1992), is critical and "must be part of any decision concerning a diagnosis of mental retardation." Mental Retardation: Definition, Classification, and Systems of Supports, 57(American Association on Mental Retardation, 10th ed. 2002) ("AAMR Manual"). In addition, courts across the country have made clear that SEM is an important consideration when deciding whether a person is mentally retarded. *See e.g., Walker v. True*, 399 F.3d 315, 322 (4th Cir. 2005); *Walton v. Johnson*, 407 F.3d 285, 296 (4th Cir. 2005; *United States v. Davis*, 611 F.Supp.2d 472 (D.Md.,2009).

intellectual functioning prior to his eighteenth birthday.

Dr. Culley's report included the following summary of previous psychological test results of intellectual functioning:

2-25-1971	Tested by Abbeville School District Slosson Intelligence Test		
		IQ Score:	**72**
2-26-1971	Tested by Abbeville School District		
	Picture Peabody Vocabulary Test	**IQ Score:**	**58**
3-16-1982	Tested by William Ward, Psychologist III		
	Wechsler Adult Intelligence Scale-Revised	**Verbal IQ Score:**	**75**
		Performance IQ Score:	**65**
		Full Scale IQ Score:	**71**
1-30-1993	Tested by Denis Keyes, Ph. D.		
	Wechsler Adult Intelligence Scale-Revised	**Verbal IQ Score:**	**81**
		Performance IQ Score:	**69**
		Full Scale IQ Score:	**75**

Subsequent to issuing her report, Dr. Culley was provided with the results of two additional WAIS-III IQ test results and raw data of testing conducted on applicant in 2004 and 2007 by a defense retained expert. The tests results were a 2004 full scale IQ score of 72 (Verbal IQ 80 and Performance IQ 67) and a 2007 full scale IQ score of 65 (Verbal IQ 72 and Performance IQ of 65). Dr. Culley testified at the PCR hearing, as did Dr. McKee, Dr. Everington and Dr. Woods, that the additional test results were consistent with the other IQ test scores and thus this court can conclude that applicant has significantly subaverage intellectual

functioning.

In sum, the evidence at the PCR hearing established that all of applicant's IQ scores are in the significantly subaverage intellectual functioning range and this Court is persuaded that applicant's test scores are an accurate measure of his intellectual functioning, and the scores place him within the mental retardation range of significantly subaverage intellectual functioning. Even those scores that fall within the SEM area are consistent with mild mental retardation, and applicant has no IQ scores that exceed the SEM.

ii. Additional Indicators of Intellectual Functioning.

a. *Academic Achievement Prior to Age 18.*

Applicant's educational history supports the existence of significant intellectual defects. The reports and testimony presented at the PCR hearing revealed that applicant failed and repeated the first grade twice, he failed and repeated second grade once, he did not complete third grade until he was twelve years old, and he completed fourth grade at the age of thirteen. Although he entered the fifth grade at the age of fifteen, he ended up withdrawing from school shortly after the school year commenced. The school records do not indicate that applicant was placed in special education classes. However, special education classes did not exist in this state until approximately 1975, which was after applicant had already left school for good. DDSN Report at p. 3.

Applicant's school records provide significant evidence that applicant performed in the mental retardation range of intellectual function. Dr. Culley's report contained the following summary of all standardized testing reflected in the school records:

> Mr. Elmore was identified as early as the 1st grade by the Metropolitan Readiness Tests to be a "poor risk" for both Reading Readiness and Number Readiness. His

> Total Readiness Status fell at the 1st percentile rank. He was administered the California Short-Form Test of Mental Maturity in the 1st and 2nd grade ... In 1969 the CTMM was administered and resulted in a Total IQ score of 61. This score would be consistent with intellectual functioning in the mild range of mental retardation. In 1971, Mr. Elmore was 12 years old and in the 3rd grade. He was administered the Slosson Intelligence Test for Children and Adults and produced an 1Q score of 72. He was also tested with the Peabody Picture Vocabulary Test and produced and IQ of 58. Both of these scores would be consistent with mild mental retardation. In summary, there are three tests from the school records that report 10 scores and all of these fall within the range of mental retardation as defined by the DSM-IV-TR. DDSN Report p. 7.

The Court places confidence in these records because they were made prior to any allegations of wrongdoing against applicant and prior to applicant's having any reason to attempt to skew results.

b. Academic Achievement Testing Results After Age 18.

Applicant was administered academic achievement testing by Geoff McKee, Ph.D. and Caroline Everington, Ph.D., both of whom issued reports and testified before this Court at the PCR hearing. Both experts reported that applicant's scores on academic achievement testing were consistent with his testing prior to adulthood and, thus, with mental retardation. Dr. McKee testified that he administered the Wide Range Achievement Test ("WRAT"), Fourth Edition, math computation and word reading subtests. He reported that applicant scored in the second percentile, with a standard score of 70 on the reading subtest, which after being normed, is equivalent to a fourth grade level. Likewise, applicant scored a standard score of 65 on the math subtest, which equates to the first percentile, with a grade equivalent of between second and third. Dr. Everington administered the WRAT, Third Addition and the Kaufman Functional Academics Skills Test ("K-FAST") tests to applicant. His scores on those tests were all within the mental retardation range, with grade equivalents being all at or below the second percentile

and the second grade level, and all were consistent with his pre-adult test results. Thus, the Court finds that all intellectual and academic testing over the course of applicant's life has consistently resulted in scores that are consistent over time and places applicant within the mental retardation range.

iii. Conclusion.

After considering all of the evidence in applicant's case, this Court finds by a preponderance of the evidence that applicant has significantly subaverage intellectual functioning and, therefore, applicant meets the first prong of the statutory definition of mental retardation of subaverage general intellectual functioning. *See Franklin*, 356 S.C. 276, *and* SC Code § 16-3-20(C)(b)(10).

B. DEFICITS IN ADAPTIVE BEHAVIOR

The second requirement for a diagnosis of mental retardation looks to the expression of intellectual deficits in the life of an individual.

i. Definitions of Adaptive Functioning Deficits.

South Carolina's definition of mental retardation refers without elaboration to "deficits in adaptive behavior." S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). The subaverage intellectual functions must exist concurrently with deficits in adaptive behavior. Similarly, *Atkins* refers to "significant limitations in adaptive skills such as communication, self-care, and self-direction." *Atkins,* 536 U.S. at 318. Even though the legal test for determining mental retardation being applied by this Court is found in SC Code § 16-3-20, *Atkins* provides some insight, even though not mandatory from an analytical position, as to the United States Supreme Court examination of mental retardation. *Atkins* quoted approvingly two professional sources to define mental

retardation. The first is the American Association on Mental Retardation (AAMR) definition. *Id.* at 308 n.3. According to the AAMR, a person has mental retardation when significantly subaverage intellectual functioning "exists concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." AAMR Manual, *supra* at 22. The American Psychiatric Association's phrasing of the adaptive functioning requirement, also quoted by the *Atkins* Court, is virtually identical. South Carolina DDSN looks at adaptive behavior as being "[r]elated to an individual's typical performance during daily routines and changing circumstances" ... "and as referring to an individual's ability to function and meet his needs independently and the social demands of the environment for his age" ... which "can be influenced by education, motivation, personality characteristics, mental disorders, etc." DDSN Report at p. 11. Again, while the American Association on Mental Retardation and The American Psychiatric Association's phraseology, as well as the language contained in the DDSN report, does not alter the legal definition contained in S.C. Code § 16-3-20(C)(b)(10), this information is helpful to the Court in determining the analytical process utilized by the experts who testified and issued opinions in this case. Taken as a whole, these definitions are harmonious, and provide sufficient guidance to the Court in evaluating applicant's adaptive functioning.

ii. Applicant's Adaptive Functioning.

The Statutory Definition.

Once again, as previously noted, the Attorney General specifically requested that the Applicant be evaluated in regard to his claim of mental retardation by the Department of

Disabilities and Special Needs. This Court granted the Attorney General's request which resulted in the applicant being evaluated by Dr. Donna Culley. A review of her report and testimony reflect a detailed professional and credible analysis of the information that resulted in her opinion that the applicant demonstrates concurrent deficits in adaptive functioning. Her opinions were based on reasonable professional criteria. She reasoned and concluded that "all measures indicate significant limitations in adaptive functioning in the skill areas of communication, self-care, home living, social/interpersonal skills, functional academics skills, health, and safety," a conclusion which this Court believes has been demonstrated by a preponderance of the evidence. DDSN Report at pp. 12-13. Thus the second prong of the statutory test for mental retardation was satisfied. Dr. Culley's testimony and this conclusion were supported by other evidence presented during the hearing.

a. functional academics.

Applicant presented substantial evidence regarding his functional academic limitations. Applicant failed the first grade twice and the second grade once. It took applicant *five years* to move beyond the first two grade levels. Applicant finally gave up and quit school in the fifth grade at the age of thirteen, though he did give eighth grade a two week try before he floundered and dropped out for good at the age of fifteen. The school records are especially helpful because they provide a contemporaneous record of applicant's performance at a time predating criminal charges against him. His deficits in this area were further confirmed by the achievement testing administered by Dr. McKee and Dr. Everington. Their testing indicated that applicant's reading, spelling and math abilities are currently at the fourth grade level or below. Additionally, the evidence revealed that applicant had difficulty with practical tasks such as balancing a

checkbook and even today lacks the ability to do simple conversions such as inches to feet needed for basic measurements. Given the totality of the evidence, the Court finds by a preponderance of the evidence that applicant exhibited deficits in functional academics prior to the age of 18 which continued into adulthood.

b. work

The only jobs applicant has ever held were in the capacity as an unskilled laborer. Dr. Culley provided this work history for applicant to the Court:

> Mr. Elmore reported his first jobs to be raking leaves, picking up pecans and collecting coke bottles on the road to sell to stores when he was a young child. His first formal employment was with a "factory that made thread and cloth" where his older sister worked. He reported his job duties included cleaning up and running a machine that made the cloth. He reported working for Milliken where he "made the dye." He described times when they had to "shut down the line" when he "messed up." He stated that he worked at yet another factory for approximately two months that made cloth and that he ran a machine.
>
> Mr. Elmore described working with his brother for a man by the name of Clarence Aiken. He stated they would paint and clean houses inside and out and would clean windows and carpets. He indicated that the amount they were paid depended on the job and stated that they were paid in cash. He reported that he also did work on the side by himself such as cleaning gutters and windows and painting. When asked how much he earned working on his own, he stated, "they buy the paint and tell me how much they'll pay me." DDSN Report at p. 4.

Dr. Culley and other experts who testified at the PCR hearing confirmed that applicant's work history was consistent with mental retardation. Based on the totality of the evidence, this Court finds that applicant has substantial deficits in this adaptive skill area.

c. communication

George Woods, M.D., related the clearest assessment of applicant's deficits in adaptive functioning in the area of communication. Dr. Woods noted that while applicant's verbal skills are, relevantly speaking, applicant's strong suit. Applicant's ability to communicate is not all

that it appears to be. Dr. Woods explained the dichotomy arising from the appearance of adequate communication skills by applicant and the reality of applicant's deficiency in adaptive skills in communication, as follows:

> Mr. Elmore has significant limitations in all three adaptive skill areas: conceptual (Communication, Functional Academics, and Self-Direction), social (Interpersonal Skills), and practical (Occupational Skills, Home Living, Community Use, and Health and Safety). Mr. Elmore has significant defects in the conceptual domain. While Mr. Elmore is able to verbally express himself adequately, although concretely, this is the product of forty-eight years experience coping with his difficulties and learning how to "pass."[6] However, Mr. Elmore is unable to entertain abstract concepts, no matter how elementary. Woods Report at p. 8.
>
> While Mr. Elmore is pleasant and conversational, the results of a recently administered Test of Adolescent and Adult Language (TOAL) 3, a comprehensive test of language, indicate his abilities are severely limited. His highest score, which 91% of the population would have surpassed, was on the Speaking Grammar subtest (ninth percentile). His scores on the remaining seven subtests, including inter alia Listening, Reading, and Writing, placed him in the first and second percentiles. When pressed to operate on a complex level, his deficiency in abstract communication and comprehension is apparent. He suffers from alexithymia, or severe poverty of thought. Alexithymia is a quantitative decrease in access to words, concepts, and meaningful connections.Woods Report at p. 9.

Dr. Woods testimony at the PCR hearing was consistent with his report. Based on Dr. Woods assessment and the relevant testing conducted by Drs. Everington and McKee, the Court finds by a preponderance of the evidence that applicant has significant limitations in the

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[6]In discussing the concept of "passing" in the mentally retarded, Dr. Woods explained that "the stigma of being adjudged mentally retarded may be great, many retarded individuals will go to great lengths to "pass" as normal. 'Hence, their lives are directed toward the fundamental purpose of denying that they are in fact mentally incompetent. [They] must at all times attend to the practical problems of seeming to others to be competent and of convincing themselves that this is so.' Robert B. Edgarton, THE CLOAK OF COMPETENCE 131-32 (University of California Press 1993). Thus mentally retarded individuals may be able to appear to achieve a degree of "normal" living by, for example, driving a car, reading a newspaper, or even gaining employment. Woods report at p. 7.

communication skills area.

d. home living

The evidence before the Court established that applicant never lived independently. He lived with his mother most of his life. At the age of twenty he did have a girlfriend, who was nearly ten years older than applicant, and he lived with her for periods of time during the course of what was described as their two year on-again/off-again relationship. He would return to his mother's residence during the "off again" periods of his relationship with his girlfriend.

Applicant was not able to maintain a checking account and he did not pay bills. Dr. Culley recounted applicant's failures at banking and other basic skills necessary to functional home living:

> Mr. Elmore stated that some of his jobs paid him by check and he would cash them at the bank. He said that he had an account at "a bank in my hometown", but he "wrote too many checks and they charged me with bad checks" because he "wasn't keepin' up with how much money." Mr. Elmore never paid bills but would give money to his mother and his girlfriend who paid for the household expenses. Mr. Elmore said he had a driver's license and a car, but did not pay the insurance for the vehicle. He received tickets for driving without a license and uninsured vehicle. His car was insured in his girlfriend's name prior to his arrest. When asked how much money he was paid for his painting work, applicant responded that the employer would set applicant's pay for the work after the job. DDSN Report at p. 8.

The Court finds by a preponderance of the evidence that applicant has significant limitations in the home living area.

e. health and safety

Applicant has significant deficiencies in health and safety skills. Dr. Woods recounted an anecdote about one of the painting jobs applicant attempted to do that illustrates applicant's deficiencies in health and safety matters, as follows:

> One of these jobs was to paint the outside of a funeral home. The ladder Mr. Elmore used was too short to reach the top of the building, so Mr. Elmore decided to put the ladder flush against the building. He then tied a broom handle to the end of the brush to get even higher. When Mr. Elmore started climbing this perpendicular ladder he fell to the ground and hurt his ankle. Mr. Elmore remembers the funeral home director commenting that at least Mr. Elmore was at the right building. Woods Report at p. 12.

According to Dr. Woods, the funeral home story "provides a glimpse into a series of Mr. Elmore's cognitive deficits, particularly visual spatial coordination." Dr. Woods explained that applicant's "thinking was much more consistent with the concrete perceptive skills of a child." Dr. McKee testified that his testing of applicant in the area of health and safety revealed that applicant's normed score was lower than the average score of mildly mentally retarded adults on the Independent Living Scale test instrument, which is an individually administered test and is normed on a variety of clinical populations, one of which is adults suffering with mild mental retardation. Again, Dr. Woods provided several examples in his report and testimony that the Court finds persuasive on this point. Dr. Woods said that applicant's inability to protect himself from dangerous chemicals on the job by wearing protective gear was indicative of deficits in applicant's health and safety skills, as was his failure to take medication for hypertension. *Id.* at 13. Based on the record evidence, this Court finds by a preponderance of the evidence that applicant has significant limitations in the health and safety area of adaptive functioning.

f. self-direction

All evidence indicated that applicant never had a life plan, a plan for a career or job, or a plan for raising or supporting a family. Dr. Woods reached that opinion in his assessment of applicant. Woods Report at p. 10. There was no evidence to the contrary in the record before the Court. Thus, the Court finds by a preponderance of the evidence that applicant has significant

limitations in the self-direction skill area. The Court notes that this conclusion is further supported by the severe intellectual and academic deficits previously noted.

g. social skills

By most accounts, applicant exhibits substantial deficits in social skills. He has never lived on his own. He has only formed relationships with family and has seldom formed relationships outside of family, although he did have an on again, off again relationship with a woman for a couple of years. Dr. Woods said applicant's relationship with the girlfriend was more like a mother-child relationship, in the day-to-day aspects of it. Applicant was never married and he has no children. He is described as a loner. As a teenager, the evidence indicates he interacted better with younger children than his own peers due to his limited cognitive abilities. He often avoided large family gathering because he was not comfortable in groups. Although applicant is universally described as a pleasant person with a compliant manner, his social skills are widely reported to be simple and superficial. Based on a preponderance of all the evidence presented, the Court finds that applicant has significant deficits in the social skills area of adaptive functioning.

h. community use

Dr. Caroline Everington conducted testing using the Scales of Independent Living-Revised (SIB-R"), which consisted of interviews of applicant and of individuals who knew applicant well about applicant's related abilities at the time of and prior to his arrest in 1982. Applicant scored a standard score of 52 on the community living skills portion of the SIB-R, which places him below the first percentile. She also testified that he was not able to use a phone book. The Court was provided information that applicant was able to drive a car and eventually

earned a driving license at the age of approximately twenty years. As Dr. Woods stated, people with mental retardation do have some relative strengths interspersed among the many weaknesses. After careful consideration of all the evidence presented, the Court finds by a preponderance of the evidence that applicant demonstrated deficiencies in community skills.

i. self-care

Dr. Culley reported that applicant demonstrated deficiencies in the skill area of self-care on all measures of tests administered to applicant by Dr. McKee and Dr. Everington. DDSN Report at p. 10. Dr. Woods recounted several practical examples of applicant's deficiency in self-care, as well. According to Dr. Woods, applicant failed to take medication for his diagnosed hypertension and applicant had failed to seek medical care before his arrest. Although many reporters describe applicant as being neatly dressed and as demonstrating good hygiene, those aspects of self-care do not render applicant sufficiently more skilled at self-care than they would a seven year old child who was able to dress and clean himself without help. Self-care skills require that someone be able to obtain water service and pay for it, to obtain housing in which to keep clothing and perform a hygiene routine, or to shop for food and prepare balanced and healthy meals. Applicant has never demonstrated that he can live on his own and care for his day-to-day needs in the sense that an adult living independently must be able to accomplish. Thus, the Court finds by a preponderance of the evidence that applicant is deficient in the skill area of self-care.

iii. Conclusion.

Based on the above, and when considering the evidence as a whole, the Court finds by a preponderance of the evidence presented that applicant has proven that he satisfies the second

prong of the statutory definition of mental retardation.

C. ONSET OF DEVELOPMENTAL DEFICITS BEFORE AGE EIGHTEEN.

The Court finds that the third prong of the statutory definition of mental retardation is not contested from the evidence. The greater weight of the evidence demonstrates that the onset of mental retardation was during the developmental period. The record is replete with evidence that applicant suffered significant subaverage intellectual functioning and deficits in adaptive skill functioning commencing at a very early age and that persisted throughout the developmental period and to this day.

IV. CONCLUSION

The Court finds that, by a preponderance of the evidence, the applicant has met his burden of proof in demonstrating that he suffers from mental retardation, as defined by the law of this state. *See* S.C. Code Ann. §16-3-20 (C)(b)(10) and §44-20-30(11). Therefore, because the applicant suffers from mental retardation, he is ineligible for the death penalty. *Atkins v. Virginia*, 536 U.S. 304 (2002). In Accordance with *Franklin*, the sentence of death is vacated and a life sentence shall be imposed. To the extent necessary, this matter is remanded to the Court of General Sessions in Greenwood County for the imposition of the life sentence.

AND IT IS SO ORDERED.

Honorable J. Mark Hayes, II
Circuit Court Judge
Presiding by Appointment of the Supreme Court

February 1, 2010
Spartanburg, South Carolina