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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

Lower Court Case Number: 2015-CP-38-764

BAYAN ALEKSEY, #5059,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

NOTICE OF APPEAL

Petitioner, Bayan Aleksey, appeals the Honorable Judge Edgar W. Dickson's order dismissing his capital post-conviction relief action filed on July 7, 2022 and the order denying Petitioner's timely motion to alter or amend judgment filed on August 1, 2022. The order denying Petitioner's motion to alter or amend judgment was signed and received by counsel for Petitioner on January 5, 2024 and filed with the Clerk of Court on January 11, 2024. A copy of the orders on appeal are attached to this notice.

Respectfully submitted,

s/ Lindsey S. Vann
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Justice 360
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February 2, 2024

STATE OF SOUTH CAROLINA) COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059) Applicant,) vs.) STATE OF SOUTH CAROLINA,) Respondent.	)	C/A No. 2015-CP-38 -764 (Capital Case) ORDER (DENYING RELIEF)

This is a capital post-conviction relief (PCR) action filed on June 11, 2015. The State moved to dismiss the action as untimely and improperly successive with its return filed August 10, 2015, amended April 26, 2021, as this is Applicant's second PCR action. (*See* C/A 2001-CP-38-628, order denying relief filed February 5, 2010). At a motions hearing held on May 6, 2021, the undersigned heard argument on the State's motion to dismiss. The application presented various claims within ten grounds, Grounds (A) through (J). The parties confirmed to the Court at the May 6, 2021 hearing that they were in agreement that Grounds (B) through (J) are procedurally barred as untimely and successive without exception. The Court will grant the State's motions as to these grounds. The remaining ground, Ground (A), is based on an allegation of intellectual disability and exemption for the death penalty. The Court convened a hearing on this one ground on March 24, 2022. After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled. For that reason, the Court hereby DENIES Applicant's intellectual disability claim. Consequently, this Court dismisses the application in its entirety.

THE CRIME

The Supreme Court of South Carolina provided this general summary of the murder and the investigation and certain key evidence:

> On New Year's Eve 1997, Sergeant Franklin Lingard of the South Carolina Highway Patrol stopped a white Ford Mustang with a Delaware license plate for speeding on Interstate 95. Sergeant Lingard approached the driver's side of the Mustang and was shot to death by a gun fired from inside the car on the driver's side. Officer Lin Shirer, a narcotics officer with the Calhoun County Sheriff's Office, accompanied Sergeant Lingard on patrol that night. Officer Shirer witnessed the shooting, but was unable to see inside the car to identify the shooter because of its dark tinted windows.
>
> A multi-car chase ensued. An officer stopped the Mustang long enough for Gloryvee Perez Blackwell (Blackwell) and her two children to exit from the passenger side of the vehicle. While Blackwell and the children were exiting the car, appellant held a gun to his head and threatened to kill himself if the officers came any closer to him. Appellant sped away and was eventually stopped again when an officer deliberately collided his vehicle with the Mustang.
>
> Appellant was pulled unconscious from the car, treated at the scene by EMS, then taken to the hospital, and from there to the Orangeburg/Calhoun Regional Detention Center on New Year's Day. A background check on appellant revealed an extensive record of arrests for fraud-related activities, outstanding warrants, and numerous aliases. In addition, both the Mustang and its license tag were stolen.
>
> On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Blackwell was driving and shot Sergeant Lingard, after which they stopped and changed seats. In the second, appellant confessed to the shooting.

State v. Aleksey, 343 S.C. 20, 25, 538 S.E.2d 248, 250–51 (2000).

PROCEDURAL HISTORY

Trial

Applicant was arrested on January 1, 1998. He was indicted for murder at the January 1998 term of the Court of General Sessions for Orangeburg County (98-GS-38-0244). The court appointed Thomas R. Sims, Esq., and I. McDuffie Stone, III, Esq., to represent Applicant on the charge. On August 24, 1998, the matter was called to trial before the Honorable Edward B.

Cottingham. The matter was prosecuted by Walter M. Bailey, Jr., Solicitor of the First Judicial Circuit. On August 29, 1998, the jury entered a unanimous verdict of guilty for the crime of murder. ROA. p. 1804.[1] The sentencing phase began on August 31, 1998. ROA. p. 1856. At the conclusion of evidence, argument, and instruction, the jury began deliberations on September 1, 1998. After two (2) hours and ten (10) minutes of deliberation, on September 1, 1998, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. ROA. p. 2171-72. After denying counsel's motion for a new trial and sentencing, Judge Cottingham sentenced Applicant to death. ROA. p. 2179-82.

Direct Appeal

Robert M. Dudek, Esq., of the South Carolina Office of Appellate Defense, represented Applicant on appeal, and raised the following issues, as set out by the Supreme Court in its opinion:

> I. Did the trial court's instruction that the jury had "one single objective and that is to seek the truth" violate appellant's due process rights by shifting the burden of proof to appellant and diluting the reasonable doubt standard of proof?
>
> II. Did the trial court err by refusing to suppress appellant's confession and by impermissibly delegating a portion of his *Miranda* duties to the jury?
>
> III. Did the trial court err in refusing to allow appellant to cross-examine Blackwell concerning dismissed indictments on narcotics charges?
>
> IV. Did the trial court err by refusing to redact from appellant's statement references to a contract on his life?

Aleksey, 343 S.C. at 25–26, 538 S.E.2d at 251.

On November 13, 2000, the Court entered its opinion affirming the conviction and sentence after these levels of review: (1) affirming for lack of prejudicial trial error; (2) affirming after finding that the "death sentence was not the result of passion, prejudice, or other arbitrary factors,"

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1 "ROA" refers to the record on appeal from Aleksey's direct appeal.

(3) affirming after finding the evidence supports the jury's finding of the aggravating circumstance," and, finally, (4) affirming after proportionality review concluding, "the death sentence is not excessive or disproportionate to the penalty imposed in similar cases, where, as here, the single aggravating circumstance was death of a police officer." *Id.*, at 36, 538 S.E.2d at 256. Rehearing was denied on December 6, 2000. *Id.*, at 20, 538 S.E.2d at 248.

Applicant then sought certiorari to the Supreme Court of the United States raising his jury instruction issue following as presented in Issue I of the direct appeal. On May 14, 2001, the Supreme Court denied the petition. *Aleksey v. South Carolina*, 532 U.S. 1027 (2001). Applicant then obtained a stay to pursue post-conviction relief.

The First Application for Post-conviction relief
(2001-CP-38-628)

Applicant filed an application for post-conviction relief on May 31, 2001. The matter was assigned to the Honorable Diane S. Goodstein. James Brown, Esq., of Beaufort and David Tarr, Esq., of Columbia – both meeting the heightened statutory requirements for appointment, see S.C. Code S.C. Code § 17-27-160 (B) – were appointed to represent Applicant in the action. Applicant would amend his application on September 20, 2002, and again on January 31, 2005. An evidentiary hearing was held in two parts, November 12 through November 15, 2002, and July 7 through July 10, 2003. After briefing, and the filing of the third (and amended) application, Judge Goodstein issued an Order denying relief on February 4, 2010. Applicant filed a motion to alter or amend, and a hearing on the motion was held on May 4, 2010. Judge Goodstein denied the motion by order entered September 2, 2010. Applicant appealed the denial of post-conviction relief.

First PCR Action Appeal

Mr. Dudek, appointed appellate counsel from the direct appeal, and current counsel, Elizabeth Franklin-Best, then also of the South Carolina Office of Appellate Defense, represented Applicant in the appeal. Appellate counsel filed a petition for writ of certiorari in the Supreme Court of South Carolina on June 11, 2011, presenting nine (9) issues from the PCR action. Respondent, State of South Carolina, made its return to the petition on November 16, 2011. On May 23, 2014, the South Carolina Supreme Court denied the Petition. *Aleksey v. State of South Carolina*, Appellate Case No. 2010-173586 (S.C.S.Ct. May 22, 2014 Order denying petition for certiorari). Applicant filed a timely petition for rehearing on June 5, 2014, that the Court denied on June 26, 2014. The Court issued the remittitur on June 26, 2014.

As he did after his direct appeal, Applicant sought further review by filing a petition for a writ of certiorari in the Supreme Court of the United States on December 1, 2014. Counsel raised three ineffective assistance claims (related to conflict, prison adaptability evidence, and a challenge to his confession). On February 23, 2015, the Supreme Court denied the petition. *Aleksey v. South Carolina*, 574 U.S. 1162 (2015). Applicant then turned to the federal courts, obtained a stay of execution, and filed a federal habeas corpus petition.

Pending Federal Habeas Corpus Proceedings
(5:14-03016-JMC-KDW)

The District Court appointed Teresa Norris and Elizabeth Franklin-Best as counsel on July 28, 2014, and entered the appropriate stays to allow the action to be filed and considered. On June 9, 2015, counsel filed a habeas petition in the district Court. On the same date, Applicant filed a motion to stay. Applicant had raised the claims he would also raise in this action, and advised the federal court these claims were not raised and considered in his state court proceedings "due to inadequate assistance of post-conviction counsel" but he would be "simultaneously filing a second

a second application for state post-conviction relief" with these allegations of error. (Return Attachment 10, Federal Habeas Corpus Petition, ECF No. 75 at 9, 13-14, 20, 22, 25, 26-27, 28, 29, 36, 44). Over objection, the United States Magistrate assigned to the case granted a stay on August 19, 2015, concluding that based on the filings she could "[]not definitively say that [Applicant's] pending PCR application is not subject to review." (C/A 5:14-03016-JMC-KDW, ECF No. 83 at 4). She also directed that "a joint status report" shall be filed "every six months," (C/A 5:14-03016-JMC-KDW, ECF No. 83 at 4), which the parties continue to do.

Relevant Procedural History for this Action

Applicant filed his application on June 11, 2015. This is Applicant's second PCR action challenging his 1998 capital trial and sentencing. The trial judge imposed a sentence of death on September 1, 1998 for Applicant's 1997 murder of a police officer, Sgt. Franklin Lingard of the South Carolina Highway Patrol. Applicant filed his first PCR application on May 31, 2001. That action was denied on February 4, 2010, with certiorari review denied on May 23, 2014. He is currently in federal court on a petition for writ of habeas corpus. The District Court has stayed that action, at Applicant's request, for Applicant to return to this Court and pursue another PCR action.

On August 10, 2015, Respondent, State of South Carolina, made its initial return and moved to dismiss the action as improperly successive and untimely. Judge Early, then appointed to hear this capital action,[2] allowed argument on the State's motion to dismiss on September 9, 2015, along with argument on Applicant's motion to stay the proceedings until resolution of

[2] Supreme Court of South Carolina Order dated July 1, 2015 (Toal, C.J.) (filed in Appellate Case No. 1998-008987).

Robertson v. State,[3] and the State's motion for an intellectual disability evaluation by a neutral court examiner. At the conclusion of that hearing, Judge Early took all motions under advisement.

By Order filed June 7, 2017, Judge Early ordered an intellectual disability evaluation "by neutral court examiners of the South Carolina Department of Disabilities and Special Needs," (SCDDSN), and that the report be provided to the Court with copies to each of the parties upon completion of the evaluation and opinion. Applicant, through counsel, was to provide "all pertinent materials to SCDDSN which Applicant finds necessary to a complete and fair evaluation" by the neutral examiner.[4] (Scheduling Order dated June 14, 2018).

On April 1, 2019, SCDDSN filed its report which concluded: "Based on the totality of the data, it is the opinion of this examiner that Mr. Bayan Aleksey does not meet the diagnostic criteria for intellectual disability as defined in the South Carolina Code of Laws." (Diagnostic Evaluation, SCDDSN evaluator Dr. Alicia V. Hall, Ph.D., Licensed Clinical Psychologist, p. 17).

In light of the notice of Judge Early's retirement, this Court was assigned the matter on February 20, 2019,[5] with the State's motion to dismiss still pending.[6]

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[3] 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (holding "*Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] does not afford [a capital PCR applicant] a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel").

[4] Aleksey did not oppose the evaluation in general, but opposed the motion as premature when the State's motion to dismiss was still pending, and Aleksey's motion to stay until *Robertson v. State* was decided. (See Response to Motion for an Evaluation for Mental Retardation/Intellectual Disability, filed September 10, 2015).

[5] Supreme Court of South Carolina Order dated February 20, 2019 (Beatty, C.J.) (appointing the Honorable Edgar W. Dickson in light of Judge Early's "upcoming retirement").

[6] That motion was not specifically ruled upon; however, is was rendered moot when the Supreme Court of South Carolina issued the decision in 2016.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Summary Dismissal of Grounds (B) through (J)

Based on the parties' agreement and the relevant records from the prior proceedings as submitted by the State with its return, this Court finds and concludes that Grounds (B) through (J) are untimely and improperly successive without exception. The Court grants the motion to dismiss as to those grounds. *See* S.C. Code Ann. § 17-27-70(c) ("The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.").

The following findings of fact as supported by agreement and the uncontested record, along with the Court's conclusions of law, follow:

Statute of Limitations

S.C. Code § 17-27-45(A) provides a PCR action "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." This Court agrees with the parties that Applicant did not file a timely action. Applicant's direct appeal concluded at the denial of his petition to the Supreme Court of the United States on May 14, 2001. Applicant had until May 14, 2002 to file an application with these allegations. He did not file the current application until June 11, 2015. This is over thirteen (13) years after the expiration of the one-year time limit for filing. Grounds (B) through (J) are barred by Section 17-27-45 (A).[7]

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[7] Aleksey does not claim the exceptions of Section 17-27-45 (B) or (C) of the statute. However, the Court notes the basis for Grounds (B) through (J) do not depend on previously unavailable court decisions affecting a substantive standard or establishing a new right since the time of trial or the prior PCR, and would have been apparent from the trial and/or appellate records as discussed in the following section. Thus, the exceptions would not be applicable.

Successive Applications Bar

S.C. Code § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." Allegations not raised, or raised but not "finally adjudicated," are barred and "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." S.C. Code § 17-27-90. "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) (emphasis added).

The relevant records of the prior proceedings are before the Court for review, and those records show that Applicant's Grounds (B) through (J) are not only untimely as set out above, but also improperly successive. Further, the record supports these claims were, in fact, all available during the prior PCR proceeding. Consequently, Grounds (B) through (J) are barred as improperly successive and without exception.

Dismissal of the Remaining Ground (A)

"'Intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (12); S.C. Code Ann. § 16-3-20 ("'Mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.").[8] It is this definition that our

[8] Though the term "mental retardation" remains in a portion of our statute, the currently accepted term for the condition is "intellectual disability." *See State v. Stanko*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 n. 1 (2013), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Though the term "mental retardation" is disfavored, both "mental

Supreme Court adopted as controlling in the capital context. *Franklin v. Maynard*, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003). Though the Court has said it "has strictly adhered to this statutory definition," it also "has recognized that the USSC in *Atkins* 'relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen.'" *State v. Blackwell*, 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017) (citing *State v. Stanko*, 402 S.C. 252, 286, 741 S.E.2d 708, 726 (2013)).

The applicable law is not at issue and has not been challenged. At issue is whether Applicant has carried his burden of showing, by a preponderance of the evidence, that he is intellectually disabled. *See Franklin,* 356 S.C. at 279, 588 S.E.2d at 606. After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled.

At the March 2022 hearing, the Court heard testimony from Dr. Alicia Hall (qualified as an expert in forensic psychology and intellectual disability assessment before and after developmental period), Dr. David Price (qualified as an expert in clinical psychology & forensic neuropsychology), Pamela Leonard (who came on as a mitigation specialist in the limited role of looking into Applicant's intellectual disability), and Allison Franz (a clinic student from Cornell Law). Applicant himself waived his appearance and was not present at the hearing. Additionally, Applicant proffered the Affidavit of Marjorie Hammock, which opined directly on adaptive

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retardation" and "intellectual disability" may be considered as interchangeable in describing the precise diagnosis at issue here.

functioning in the developmental period. Applicant did not call Ms. Hammock as a witness at the hearing and in fact stated that they were unable to get in contact with her prior to the hearing. As a result, the State was unable to cross examine Ms. Hammock and objected to Applicant's reliance on the affidavit.

Dr. Hall testified, consistent with her report, that in her opinion Applicant "does not meet the diagnostic criteria for intellectual disability as defined" in our State. This Court finds Dr. Hall's presentation was thorough and credible. The Court accepts and credits Dr. Hall's opinion. This Court particularly notes that Dr. Hall was open to hear and consider whatever evidence Applicant wished to present. Applicant did not provide a formal evaluation for adaptive functioning for the evaluation, though Applicant had opportunity to do so.

Applicant actually did not offer any opinion on intellectual disability at the hearing. Applicant gave notice a few days prior to the hearing scheduled for March 24, 2022, of his intent to rely on certain affidavits. This Court considered the offer of affidavits at the hearing; however, Applicant had asserted he "intend[ed] to offer proof in support of his post-conviction relief claims through affidavits of certain witnesses *in lieu of direct examination* of those witnesses at the evidentiary hearing scheduled to commence March 24, 2022." (Notice of Intent, p. 1) (emphasis added). He identified 5 affidavits upon which he intended to rely: Dr. David Price, Marjorie Hammock, Vera Aleksey, Lester David Rosengard, and Allison Franz. (Notice of Intent, p. 1). None of these reflect an opinion on intellectual disability. Even so, Applicant did not simply rely on these affidavits. Applicant called Dr. Price and Ms. Franz and both were subject to cross-examination. Consequently, the stated desire to rely on these affidavits "in lieu of direct examination" was abandoned by Applicant's conduct at the hearing. Further, Applicant did not

rely solely on the affidavits from Ms. Aleksey[9] or Mr. Rosengard for any point or assertion apart from evaluation information. Mr. Rosengard's affidavit was merely part and parcel of the information provided to Dr. Hall for the evaluation, and could be admissible as part of the basis for Dr. Hall's opinion. *See generally* Rule 705, SCRE ("The expert may in any event be required to disclose the underlying facts or data on cross-examination."). At any rate, the intent to rely on the affidavits apart from the evaluation was abandoned by Applicant's conduct at the hearing. That left remaining the affidavit from Ms. Hammock – the only affidavit to which Respondent objected.

The State objected to the affidavit and this Court exercises its discretion to reject the Hammock affidavit. Applicant asserted that Ms. Hammock could not be reached and indicated a deposition and or testimony at a subsequent hearing would not be an option, citing her advanced age and Applicant's inability to reach her for appearance. In essence, Applicant conceded that nothing in Ms. Hammock's affidavit and report has been or can be subjected to the crucible of cross-examination. Yet, Ms. Hammock was the only affiant who offered an opinion on a contested fact (adaptive functioning in the development period) based on a contested basis (incomplete evaluation and/or bias in consideration of information). Applicant's expert, Dr. Price, did not opine as to any review and/or reliance on Ms. Hammock's report or opinion. To the contrary, Dr. Price plainly stated he did not have an opinion as to intellectual disability.[10] The State raised significant questions about the scope, context and adequacy of the Hammock report and opinion. These simply cannot be adequately addressed without cross-examination and/or other challenges,

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[9] The affidavit from Vera Aleksey is dated December 30, 2018. Nothing shows that the affidavit was submitted to Dr. Hall though it would have been available for the DDSN report that was not filed until April 1, 2019.

[10] It is unclear whether Dr. Price reviewed the report and found it insufficient or Applicant failed to provide the report to Dr. Price for consideration much like Applicant failed to provide the report to Dr. Hall for consideration (or reconsideration). At any rate, the affidavit is irrelevant to the testimony of either Dr. Price or Dr. Hall.

and should not be in this context. This Court finds persuasive authority from other jurisdictions that have recognized the importance of presenting witnesses who would opine on adaptive functioning so that the courts may accurately and carefully assess credibility:

> Many courts have noted, correctly, that "[a]daptive behavior is a broader category, and more amorphous, than intellectual functioning." Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility.

United States v. Candelario-Santana, 916 F. Supp. 2d 191, 211–12 (D.P.R. 2013) (citations omitted). Indeed, our Supreme Court has noted the difference credibility can make when considering the presentation of two witnesses with different conclusions on adaptive functioning. *Blackwell*, 420 S.C. at 141–42, 801 S.E.2d at 720. The Supreme Court of South Carolina has underscored the decision whether to admit affidavits is committed to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State,* 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). In light of the above facts, this Court exercises its discretion to reject the Hammock affidavit and declines to accept the Hammock affidavit.

Again, after careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled as required under *Franklin.* This Court finds Applicant has failed to show "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period" as required under our case law. *Blackwell*, 420 S.C. at 139, 801 S.E.2d at 719. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

CONCLUSION

For all the foregoing reasons, this Court denies relief and dismisses the application.

IT IS SO ORDERED THIS 30th day of June, 2022.

Edgar W. Dickson, Circuit Court Judge
By Special Assignment

Orangeburg, South Carolina.

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 2015-CP-38 -764 (Capital Case) ORDER DENYING MOTION TO ALTER OR AMEND

This is a capital post-conviction relief action initially filed on June 11, 2015. After narrowing the focus of the action to one ground – a claim of intellectual disability – this Court convened an evidentiary hearing on March 24, 2022, to receive the opinion of the court's expert witness and offer the parties the opportunity to present additional evidence. On June 30, 2022, after careful consideration of the evidence presented and the requirements for finding intellectual disability, this Court announced its conclusion that Applicant had failed to carry his burden of proof. The Court issued its Order denying relief that same day. On August 1, 2022, Applicant, through counsel, filed a motion to alter or amend raising four arguments. Applicant submitted a memorandum of law in support of those four arguments on August 31, 2022. After careful consideration of the motion, memorandum, and critically reviewing the June 30, 2022 Order again in light of those arguments, this Court DENIES the motion to alter or amend. Applicant has failed to show any basis for this Court to alter or amend its ruling and the Court expressly reaffirms its ruling as issued on June 30, 2022.

ARGUMENTS PRESENTED

Applicant's motion to alter or amend is based on these arguments:

1/7 AB

1. *Lack of Jurisdiction:* Based on emails between counsel and the Chambers, the date of the Order's filing, and Judge Dickson's retirement on June 30, 2022, it appears Judge Dickson did not have jurisdiction to rule on Applicant's claim for relief.

2. *Improper reliance on and adoption of a proposed order drafted by the State.*

3. *Legally and factually erroneous findings concerning the affidavit of Marjorie Hammock.*

4. *Legally erroneous conclusion and lack of factual findings supporting denial of Applicant's claim that he is a person with intellectual disability and, therefore, ineligible for execution pursuant to* Atkins v. Virginia, 536 U.S. 304 (2002).

(Motion, p. 2) (emphasis in original).

DISCUSSION

Though the Court has not limited its review and consideration of the record, order, pleadings, or the motion and memorandum in any way, the Court sets out the following salient facts in denying each of the four grounds.

1. *Jurisdiction.* This matter was originally assigned to the Honorable Doyet A. Early, III.[1] By Order filed June 7, 2017, Judge Early ordered an intellectual disability evaluation "by neutral court examiners of the South Carolina Department of Disabilities and Special Needs," (SCDDSN). On April 1, 2019, SCDDSN filed its report which concluded: "Based on the totality of the data, it is the opinion of this examiner that Mr. Bayan Aleksey does not meet the diagnostic criteria for intellectual disability as defined in the South Carolina Code of Laws." (Diagnostic Evaluation, SCDDSN evaluator Dr. Alicia V. Hall, Ph.D., Licensed Clinical Psychologist, p. 17).

[1] Supreme Court of South Carolina Order dated July 1, 2015 (Toal, C.J.) (filed in Appellate Case No. 1198-008987).

In light of the notice of Judge Early's then approaching retirement, the undersigned was assigned the matter on February 20, 2019.[2] The undersigned heard and considered the evidence presented, including receiving the SCDDSN report. The Court issued its order on June 30, 2022. Though the undersigned retired after June 30, 2022, the undersigned is considered active retired and still assigned the matter. There has been no disruption in the assignment and the undersigned continues to have authority to act in this matter. Applicant's argument lacks merit.

2. *The Proposed Order.* First, this Court rejects the concept that a proposed order cannot be requested, received and adopted in full or part, whether in a capital post-conviction relief case or otherwise. The Rules of Civil Procedure expressly acknowledge the possibility of submission of proposed orders. Rule 5(b)(3), SCRCP. The rule references not just general "proposed orders," but also "proposed findings of fact or conclusions of law, or proposed judgment...." *Id.* Our Supreme Court has in just the past few years yet again noted the routine acceptance of proposed orders in post-conviction relief matters:

> ...We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.").

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019).

The Court also underscored the necessity of an open process to ensure that each party is informed of the submission or submissions and cautioned that it is the duty of both counsel and the court to carefully review the proposed language:

> When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly

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[2] Supreme Court of South Carolina Order dated February 20, 2019 (Beatty, C.J.) (appointing the Honorable Edgar W. Dickson in light of Judge Early's "upcoming retirement").

> review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised.

Id.

In this matter, the undersigned adhered to the procedure outlined above, particularly in "carefully review[ing] the proposed order," which it has now had the opportunity to again review in light of Applicant's motion.[3] The order has been adopted by this Court. It is the Court's order. Though Applicant disagrees with the conclusion, he cannot contend that he was unaware of the process. Further, mere disagreement does not show error in the process or the findings and conclusions.

Moreover, in line with the practice of requesting and receiving proposed orders, Applicant, at the request of the Court, has submitted his own proposed order regarding the motion to alter or amend. Applicant, though, rather than simply proposing a grant of the motion and requesting a new order, asks this Court to adopt his proposed order to grant relief. This indicates Applicant's own acknowledgment of the practice and demonstrates his participation in the practice.

At any rate, the nub of the concern remains whether the Court exercised its judicial duty or abdicated its judicial duty by signing the proposed order. This Court affirms that the findings of facts and conclusions of law are the Court's findings of facts and conclusions of law. The Court announced its conclusion prior to the proposed order in its email of June 30, 2022, directed to the parties, which reflected:

> After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence

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[3] Notably, Applicant's motion actually supports the open and detailed review conducted, even including emails from the undersigned's chambers during the drafting process. (*See* Memorandum in Support of Motion, at pp. 2-3).

> presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

(Email, June 30, 2022).

The Court acknowledges that the initial proposed order process concluded within one afternoon, but that did not restrict the Court from review. The focus was narrow, and parts of the order reflected merely the relevant findings and conclusions going to the uncontested dismissal of other grounds. The portion regarding intellectual disability begins on page 9 of the 14 page order. Further, the affidavit matter was fully litigated by both sides. The proposed fact findings followed the case closely and correctly. The Court agreed with the findings of facts and conclusions of law. However, to the extent, that Applicant's complaints about the timeframe should be considered at all, they are now moot. This Court has again reviewed the matter in detail, as has Applicant. The Court reaffirms its findings of facts and conclusions of law as reflected in the June 30, 2022 Order.

3. *The Hammock Affidavit.* In the Court's email of June 30, 2022, the undersigned noted that Applicant had proffered the Hammock Affidavit. The Court also noted that "Applicant did not call Ms. Hammock as a witness at the hearing and in fact stated that they were unable to get in contact with her prior to the hearing. As a result, the State was unable to cross examine Ms. Hammock and objected to Applicant's reliance on the affidavit." This Court did not simply recall the offer of proof by affidavit from the hearing alone. The Court reviewed Applicant's notice of intent to rely on affidavits and considered both the State's response both at the hearing and its additional response in the filing of May 26, 2022. Critically, though, Applicant's counsel indicated at the hearing that neither a subsequent hearing to receive testimony nor a deposition could be

arranged, and conceded Applicant's own inability to reach the potential witness. (Order, p. 12; Additional Response, para. 2).[4]

Our Supreme Court has underscored the decision whether to admit affidavits is committed to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). In apparently finding no abuse of discretion (or perhaps no reversible abuse of discretion) in allowing multiple affidavits in *Simpson*, our Court resolved that there was "no prejudice to the State" given that "most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State" and the PCR "court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." *Id.*, at 608, 627 S.E.2d at 712. That was not possible here. The State could not cross-examine a witness Applicant failed to call, and nothing was ever presented to counter. Under the guidance of *Simpson,* this Court exercised its discretion to reject the Hammock affidavit in these circumstances.

4. *No Intellectual Disability Finding.* This Court found "there was simply not enough evidence presented to indicate" intellectual disability and directed the State to submit a proposed order. (Email, June 30, 2022). The proposed findings submitted by the State follow evidence

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[4] The Court acknowledges Applicant's argument that he simply gave up on contacting the witness in favor of offering the affidavit, (*see* Memorandum in Support, at 11), but the Court again affirms that Applicant's comments of the witness being non-responsive indicated no ability to have the witness come to court or otherwise preserve the testimony by deposition. But the precise concession Applicant intended, in actuality, has little impact. Applicant could not contact the witness for the hearing and attempted to rely on an affidavit. Applicant's attempt to shift the responsibility for his evidence to the State by indicating the State should look for the witness is unavailing for two critical reasons: (1) Applicant's argument depends on an assumption that an affidavit must be accepted, but an applicant does not have the authority to force acceptance of affidavits, rather the acceptance of affidavits is in the discretion of the court, (*see Simpson,* discussed on this page); (2) Applicant has the burden of proof, and he cannot shift that burden to the State.

presented, including those regarding Dr. Hall's (SCDDSN) evaluation and credible testimony. The Court found so then and reaffirms so now. Of note, the proposed findings accurately reflected Applicant's only expert in psychology presented, Dr. Price, did not opine as to intellectual disability. In short, Applicant did not actually offer any opinion on intellectual disability at the hearing. Applicant has the burden of proof to show intellectual disability by a preponderance of the evidence. *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). He failed.

The Court finds again that there was simply not enough evidence presented at the hearing to indicate that Applicant satisfied all three diagnostic criteria required to show intellectual disability.

CONCLUSION

For all the foregoing reasons, this Court reaffirms each finding of fact and conclusion of law in the June 30, 2022 Order denying relief and denies the motion to alter or amend.

Edgar W. Dickson, Circuit Court Judge
By Special Assignment

January 5 ~~December~~, 2024

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