

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

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Appellate Case Number: 2024-000140

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BAYAN ALEKSEY, #5059,

V.

STATE OF SOUTH CAROLINA,

**RECEIVED**

**Sep 19 2024**

S.C. SUPREME COURT

PETITIONER,

RESPONDENT.

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PETITION FOR A WRIT OF CERTIORARI

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## **QUESTIONS PRESENTED**

### **I.**

Whether the PCR Court abused its discretion when it found one affidavit, out of five submitted by Applicant in lieu of live testimony, inadmissible even though Applicant gave notice of intent to rely on the affidavit prior to the evidentiary hearing and the PCR Court gave the State the opportunity to call the affiant as a witness for cross examination or to call a rebuttal witness at a later hearing.

### **II.**

Whether the PCR Court failed in its duty to “make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented,” S.C. Code § 17-27-80, when its order did not make factual and legal findings related to the individual diagnostic criteria for intellectual disability, making only a conclusory finding that “there was simply not enough evidence” to indicate Applicant is a person with intellectual disability.

### **III.**

Whether the PCR Court erred in finding Applicant is not a person with intellectual disability, improperly relying on the opinion of a DDSN evaluator whose evaluation deviated from the clinical standards for her profession and despite evidence presented at the hearing that Applicant scored within the intellectual disability range on multiple IQ tests, had deficits in adaptive behavior, and that his deficits existed during the developmental period.

## STATEMENT OF THE CASE

Petitioner Bayan Aleksey was sentenced to death in Orangeburg County in 1998. This Court upheld his conviction and sentence on direct appeal. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Aleksey sought post-conviction relief (“PCR”), which was denied by the trial court, and this Court summarily denied a request for review of that decision. Order, *Aleksey v. State*, No. 2010-173586 (S.C. May 22, 2014). Aleksey’s trial and direct appeal proceedings concluded prior to the Supreme Court of the United States’ decision in *Atkins v. Virginia*, 304 U.S. 356 (2002), categorically barring the death penalty for individuals with intellectual disability. Aleksey’s initial PCR counsel did not investigate or present a claim pursuant to *Atkins*.

In his federal habeas proceedings, Aleksey was appointed new counsel who investigated Aleksey’s functioning and discovered evidence that he was likely a person with intellectual disability. They filed a successive PCR application, alleging Aleksey’s execution is barred by *Atkins* and the Eighth Amendment.<sup>1</sup> The PCR court appointed counsel to represent Aleksey, and following investigation of his claim, the case proceeded to an evidentiary hearing.

Prior to the evidentiary hearing, counsel for Aleksey filed a Notice of Intent to Rely on Affidavits (“Notice”). App. 966–1031. At the hearing, Respondent’s counsel objected to the admission of one of the five affidavits: the affidavit of Marjorie Hammock who assessed Applicant’s adaptive functioning. App. 6. The PCR court declined to rule on the admissibility of the affidavit at the hearing, giving the State the opportunity to contact Hammock to call her for

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<sup>1</sup> Aleksey also raised other claims federal habeas counsel uncovered during their investigation. Those claims were dismissed by agreement of the parties following this Court’s decision in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016), in which this Court held ineffective assistance of initial PCR counsel was not an extraordinary circumstance permitting a successive PCR application. App. 1043. The categorical bar of intellectual disability has, however, been deemed an extraordinary circumstance warranting a successive PCR proceeding. *See, e.g.*, Mem. Op., *Woods v. State*, No. 2019-0001713 (S.C. Dec. 18, 2019).

cross examination or to identify a rebuttal witness of their own. App. 142. The State did not take advantage of either opportunity. *See* App. 1032–41. On the day of his retirement, PCR Judge Edgar Dickson requested the State draft a proposed order denying *Atkins* relief. App. 1074. Following submission of an order drafted by the State in less than four hours, the judge signed the proposed order, with negligible changes, which for the first time found the Hammock affidavit was inadmissible. *See* App. 1055.

Even discounting the contents of the Hammock affidavit, at the PCR evidentiary hearing, Aleksey presented evidence on all three diagnostic criteria for intellectual disability. *See* S.C. Code § 16-3-20(c)(b)(10) (requiring proof of (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period). Aleksey also used this evidence to confront Dr. Alicia Hall, the evaluator for the South Carolina Department of Disabilities and Special Needs (“DDSN”) who found Aleksey was not a person with intellectual disability.

Dr. David Price testified he administered an IQ test to Aleksey in 2019. App. 100, 145. Aleksey’s full-scale IQ on that test was a 74, which falls in the intellectual disability range. App. 100, 102. Additionally, Aleksey’s IQ was tested three other times as an adult, and he scored between 70 and 74 on those tests, which are also in the intellectual disability range and are consistent with Dr. Price’s IQ testing. *See* App. 58–59, 101, 145, 939, 942. Aleksey’s school records demonstrated that his functioning during his school years was consistent with his adult IQ scores in the intellectual disability range and that Aleksey’s academic performance was consistently poor and well below grade level. App. 463–877. Aleksey also presented affidavits from witnesses who knew Aleksey during the developmental period, which recounted his behavioral deficits. *See* App. 209, 213–20.

Despite this evidence, in the order denying relief, the PCR Court did not address the three criteria required for a determination of whether a person is intellectually disabled. Instead, the order only included a conclusory finding that “there was simply not enough evidence presented to indicate that applicant satisfied all three diagnostic criteria.” App. 1055. Aleksey filed a motion to alter or amend, asking the lower court to make specific findings on the three diagnostic prongs, App. 1071, but the PCR court found its initial ruling was sufficient and declined to make additional factual findings and legal conclusions. App. 1109–10.

This appeal follows.

## **ARGUMENT**

### **REASONS THE WRIT SHOULD BE GRANTED**

#### **I. THE PCR COURT ERRED IN RULING THE AFFIDAVIT OF MARJORIE HAMMOCK WAS INADMISSIBLE.**

Prior to the PCR hearing, Aleksey filed a Notice of Intent to Rely on Affidavits in lieu of live testimony, including affidavits from Dr. David Price (a forensic psychologist who administered an IQ test to Aleksey), Marjorie Hammock (a social worker who evaluated Aleksey’s adaptive functioning by interviewing witnesses and reviewing records), Vera Aleksey (Aleksey’s mother), Lester David Rosengard (Aleksey’s childhood counselor), and Allison Franz (a law student who conducted a reading level analysis of Aleksey’s writing). App. 966–1031. In accordance with the typical practice in capital PCR cases across the State, Aleksey provided copies of each affidavit to the state, App. 969–1031, and recounted the legal framework allowing the Court to receive proof by affidavit:

This procedure is authorized pursuant to S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, “[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing.” The South Carolina Supreme Court has endorsed this process. *See Simpson v. Moore*, 367 S.C. 587, 607–08, 627

S.E.2d 701, 712 (2006) (rejecting the State’s argument that it was error for the PCR court to consider over forty depositions and twenty-two affidavits in lieu of live testimony), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982). Accordingly, courts across the state have received affidavits in lieu of testimony in numerous capital post-conviction cases. *See, e.g., Stephen C. Stanko v. State*, 08-CP-22-01446 (Georgetown County); *Louis Michael Winkler, Jr. v. State*, 11-CP-26-03907 (Horry County); *Kevin Mercer v. State*, 09-CP-32-5465 (Lexington County); *Kenneth Simmons v. State*, 05-CP-18-1368 (Dorchester County); *Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun County); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County).

App. 966–67. Aleksey further noted that by relying on these affidavits and providing them to the State in advance of the hearing, “the State will have a better opportunity to consider their statements and make informed decisions about whether to cross-examine those witnesses than if the witnesses were called for direct examination at the evidentiary hearing.” App. 967. Aleksey also specifically acknowledged that: “Of course, applicant acknowledges that the Attorney General has the prerogative to call any or all witnesses who have provided affidavits or other documentary evidence for purposes of cross-examination. Whether to do so is completely within the Attorney General’s discretion.” App. 967.

At the beginning of the PCR hearing, the State only objected to admission of the Hammock affidavit, and the PCR judge took the issue under advisement. App. 6–15. During the hearing, he heard testimony from Dr. Alicia Hall, a forensic psychologist at DDSN who conducted a Court ordered evaluation of Aleksey for intellectual disability. Dr. Hall acknowledged that she received the Hammock affidavit with information about Aleksey’s adaptive functioning but not until after she had completed her own evaluation. App. 68. Dr. Hall acknowledged that she could have changed her opinion after issuing her report based on this new information, but she declined to do so. App. 68.

At the conclusion of the hearing, Judge Dickson addressed the issue again and did not rule the affidavit was inadmissible. Instead, he allowed the record to remain open for the State to attempt to contact Hammock or to obtain their own expert who could respond to the information contained in the affidavit. App. 142. The State failed to take advantage of these opportunities. Instead, the State filed an Additional Response to Applicant’s Offer to Rely on Affidavits. App. 1032–41. The State then drafted a proposed order simply finding the affidavit inadmissible—which the PCR judge signed—instead of confronting the information it contained by calling Hammock for cross examination or presenting its own expert.

The PCR Court’s ruling that the Hammock affidavit is inadmissible was an abuse of discretion. The PCR judge properly allowed the State the opportunity to call Hammock for cross examination or to rebut the information contained in her affidavit. The State’s failure to do so does not render the affidavit inadmissible, and there was no prejudice to the State. *See Simpson*, 367 S.C. at 607, 627 S.E.2d at 608–09 (finding no prejudice to the State where “the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by” the PCR applicant).

Further, the Order made erroneous factual findings related to the affidavit by misrepresenting the record from the PCR hearing. For example, the Order incorrectly concluded that Hammock was unavailable for the State to cross examine. App. 1053. At the hearing, counsel for Aleksey indicated that Hammock had not responded to a phone call and an email before the hearing, and because the law permits an applicant to present proof by way of affidavit, he decided to admit her affidavit at the hearing. App. 11. This was not a concession that Hammock was unavailable. Nothing in the record indicates that the State even tried to contact Hammock despite being given additional time to do so, much less that it subpoenaed her to appear at a hearing or

noticed her for a deposition. *See* Rule 804, SCRE (defining the situations in which a declarant is considered “unavailable”).

Similarly, the Order erroneously concluded that “Applicant’s conduct at the hearing” abandoned his intent to rely on affidavits. App. 1054. Essentially, the Order found that Aleksey’s presentation of live testimony from two witnesses who also provided affidavits in the case waived his ability to rely on affidavits from another witness. The law makes no such provision, and Aleksey clearly demonstrated his intention to rely on affidavits, including Hammock’s, by submitting a formal written notice of intent to do so in advance of the hearing and making no waiver of his intent to do so at the hearing. These erroneous legal and factual findings were an abuse of discretion warranting review by this Court and ultimately remand for a hearing at which the PCR court considers the evidence presented in the affidavit and appropriate additional testimony related to the affidavit’s contents.

## **II. THE PCR COURT FAILED TO MAKE REQUIRED FACTUAL AND LEGAL FINDINGS REGARDING THE DIAGNOSTIC CRITERIA FOR INTELLECTUAL DISABILITY.**

In ruling on the question of intellectual disability, the PCR Court’s order did not make factual findings regarding the three diagnostic criteria that must be considered when ruling on an *Atkins* claim. S.C. Code § 16-3-20(C)(b)(10) (outlining three diagnostic criteria: (1) significantly subaverage intellectual functioning, (2) deficits in adaptive behavior, and (3) manifestation during the developmental period). The order denying relief included only a conclusory finding crediting the testimony of Dr. Hall, App. 1053, and one conclusory paragraph on the question of intellectual disability. That paragraph reads:

[A]fter 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 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.1d at 719. For that reason, the Court hereby DENIES Applicant’s intellectual disability claim.

App. 1055.

By statute, a PCR judge is required to “make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.” S.C. Code § 17-27-80. This Court has regularly recognized the necessity for PCR trial courts to make factual findings to allow for appellate review. In *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 240, 241 (1991), this Court remanded a case due to the trial court’s failure to make sufficient factual findings, noting:

The PCR court dismissed McCray’s allegations of ineffective assistance of counsel without making findings of fact on the specific allegations raised. . . . The PCR court’s conclusions regarding ineffective assistance are insufficient for appellate review and fail to meet the standard set forth in the statute [S.C. Code § 17-27-80 (1976)]. Accordingly, we reverse the order denying McCray relief and remand for a new PCR hearing.

*Id.*; see also *Pruitt v. State*, 310 S.C. 254, 255–56, 423 S.E.2d 127, 128 (1992) (remanding to the trial court where the PCR judge’s order failed to “address the merits of the issues raised by the applicant”). Findings on each of the issues raised are especially important in capital cases. See, e.g., *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) (“strongly encourage[ing] PCR judges to draft their own findings of fact and conclusions of law in death penalty cases); Order, *Lindsey v. State*, No. 2012-206087 (S.C. Sept. 30, 2014) (vacating a capital PCR Order of Dismissal and remanding to the circuit court for issuance of an amended order “to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the records and the applicable law”).

Here, the PCR court failed to comply with its duty to make factual findings. As discussed in more detail below, Aleksey presented evidence on all three diagnostic criteria for intellectual disability. See *infra* Section III. Yet, the PCR court’s order failed to make any factual findings on

the individual criterion. For example, Aleksey presented four IQ scores that fell within the intellectual disability range, but the order does not explain how he nevertheless failed to prove significantly subaverage intellectual functioning. In fact, the court merely ruled that the evidence was insufficient to “indicate that Applicant satisfied all three diagnostic criteria.” App. 1055. That could mean the court found Aleksey did satisfy one or two of the criteria, but not all three, or that it found Aleksey failed to prove all three criteria. Without specific factual findings, it is impossible to know what the PCR court actually determined based on the evidence and for this Court to consider whether evidence supports those findings. Accordingly, the PCR findings are “insufficient for appellate review,” and this Court should remand for further factual findings on the question of intellectual disability. *See McCray*, 305 S.C. at 330, 408 S.E.2d at 241.

### **III. THE PCR COURT ERRED IN FINDING APPLICANT IS NOT A PERSON WITH INTELLECTUAL DISABILITY.**

Even if the PCR court found Aleksey failed to prove all three criteria for intellectual disability, it was in error because Aleksey presented evidence to satisfy all three diagnostic criteria.

#### *a. Legal and Clinical Standards for Intellectually Disability*

Persons with intellectual disability are categorically ineligible for the death penalty. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). This categorical exemption recognizes that, as a class, persons with intellectual disability are less morally culpable, and therefore, less deserving of the death penalty. This is because intellectual disability results in a person having an inability to make “calculated judgments,” to “control impulses,” and “to abstract from mistakes and learn from experience.” *Atkins*, 536 U.S. at 316–20; *Hall v. Florida*, 572 U.S. 701, 708–09 (2014). While states are left with “the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled,” that discretion is “not unfettered”, and “must be informed by the medical community’s diagnostic

framework.” *Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (quoting *Hall*, 572 U.S. at 719). When assessing intellectual disability, the states and courts cannot disregard current medical standards in favor of older clinical standards or lay stereotypes about intellectually disabled people. *Moore*, 581 U.S. at 13, 18–20.

South Carolina’s definition of intellectual disability is consistent with the medical community’s, identifying three required diagnostic criteria: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period. *See* S.C. Code § 16-3-20(C)(b)(10); Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition Text Revision 38 (2022) [hereinafter “DSM-5-TR”]; AAIDD, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support*, Twelfth Edition 13 (2021) [hereinafter “AAIDD-12”]. Intellectual disability must be proven by a preponderance of evidence at a hearing. *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (citations omitted).

b. *Significantly Subaverage Intellectual Functioning*

A person meets the significantly subaverage intellectual functioning prong if his intellectual functioning, as measured by a comprehensive standardized IQ test, is two standard deviations below the population mean, including a margin for measurement error. DSM-5-TR at 39. This means a full-scale IQ score of approximately 75 or below when assessed on a comprehensive standardized IQ test that is individually administered according to the proper protocols. *Id.*; *Atkins*, 536 U.S. at 309 n.5 (“It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition.”). When a petitioner presents evidence that the “individual’s IQ score, adjusted for the test’s standard error, falls within the clinically established range for intellectual functioning deficits,” reviewing courts must

“continue the inquiry and consider other evidence of intellectual disability.” *Moore*, 581 U.S. at 15.

At the PCR hearing, Aleksey presented evidence that his IQ falls in the intellectual disability range. Over the course of twenty years—from 1998 through 2019—Aleksey was administered four individually administered standardized IQ tests. His scores on each of these tests were within four points of each other and all within the intellectual disability range:<sup>2</sup>

<b>Test Date</b>	<b>Test Type<sup>3</sup></b>	<b>Administrator</b>	<b>Full Scale IQ</b>
7/1998	WAIS-III	Dr. Jeffrey Vidic	71
4/2015	WAIS-IV	Dr. Daniel Grant	72
12/27/2018	SB-V	Dr. Alicia Hall (DDSN)	70
11/20/2019	WAIS-IV	Dr. David Price	74

Dr. Hall acknowledged these scores “appear to be in the Intellectual Disability range,” App. 948, but she improperly discounted the scores in completing her evaluation.<sup>4</sup> First, she made subjective findings that Aleksey did not put forth sufficient effort or malingered on his IQ tests instead of relying on objective measures to determine his effort. She opined that Dr. Vidic’s 1998 testing “was an underestimate,” but she admitted that Dr. Vidic did not administer any testing to determine if Aleksey malingered on the IQ test. App. 59–60. On her own testing in 2018, Dr. Hall

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<sup>2</sup> App. 58–59, 101, 145, 939, 942.

<sup>3</sup> The tests listed below are the Wechsler Adult Intelligence Scales (“WAIS”), third and fourth editions, and the Stanford-Binet (“SB”), fifth edition. The Wechsler and Stanford-Binet tests are individually administered comprehensive measures of IQ, which are considered the gold standards for assessing intellectual functioning. *See* App. 44.

<sup>4</sup> Dr. Hall did not offer an opinion on Dr. Price’s 2019 testing because it was completed after she completed her evaluation. *See* App. 145, 949. Dr. David Price testified at the hearing regarding his administration of the IQ test to Aleksey. In his expert opinion, the test he administered provided a reasonably valid measure of Aleksey’s intellectual functioning and that Aleksey’s intellectual level has an approximate Full Scale IQ of 74. App. 108, 145.

admitted that she did not administer any testing to make an objective finding of whether Aleksey malingered, though she has administered such testing in another *Atkins* case. App. 63–64. Contrary to her subjective findings on malingering, when Aleksey was administered an objective test to determine malingering by Dr. Grant in 2015, it demonstrated that Aleksey was not malingering. App. 60.

Dr. Hall’s assertions of malingering are further contradicted by the consistency in Aleksey’s scores. It is not feasible to believe that an individual could fake similar scores over a period of many years. Because of this, “comparing test scores across multiple administrations, over years, and even across standardized tests may provide the most robust evidence of effort and performance.” Marc J. Tasse & John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* 101 (2018).

Dr. Hall discounted Dr. Grant’s 2015 testing, not on the basis of malingering, but because she found “there was too much variability between the indices.” App. 60. She explained that a full-scale IQ score is made up of subscores on four indices, which are verbal comprehension, perceptual reasoning, working memory, and processing speed. App. 60. Dr. Hall opined that there was too much variation between the subscores, so she relied on the General Ability Index (“GAI”) instead of the full-scale IQ. App. 61. The GAI is measured based only on the verbal comprehension and perceptual reasoning indices, ignoring the working memory and processing speed indices, which were the lowest two subscores on Aleksey’s IQ test. App. 61.

Dr. Hall’s reliance on the GAI was improper according to the current clinical standards. The testing manual for the IQ test administered explains that working memory and processing speed are important factors that contribute to overall IQ, and therefore, the full-scale IQ score. App. 61-62. Eliminating these scores “reduces the breadth of coverage” of the score. App. 61.

Accordingly, the testing manual does not provide for use of the GAI in diagnosing or ruling out intellectual disability. App. 62–63. The medical community has also expressly criticized the practice of discounting a full-scale IQ just because there is variability between the subscale scores. *See* AAIDD-12, at 28 (“[A]lthough some have suggested that clinicians should never interpret the full-scale IQ score if there is significant variability or discrepancy between the subscale scores, the current evidence indicates that there is no reason to question the validity of the full-scale IQ even in cases where there is significant factor/part score variability.”); *see also* DSM-5-TR, at 42 (recognizing that IQ testing “may identify areas of relative strengths and weaknesses”, in other words, variability among the subscores).

Accordingly, there is no basis for discounting the IQ scores demonstrating Aleksey’s intellectual functioning falls within the intellectual disability range. This satisfies the first diagnostic criterion. Assuming the circuit court found Aleksey failed to satisfy the intellectual functioning prong of intellectual disability, it was in error.

*c. Deficits in Adaptive Functioning*

Adaptive behavior refers to typical activities of everyday living in a community setting. AAIDD-12 at 29. To satisfy this criterion, an individual must demonstrate deficits in one of three skill areas of adaptive behavior: conceptual, social, or practical. AAIDD-12 at 31; DSM-5-TR at 37. Adaptive deficits exist when at least one domain “is sufficiently impaired that ongoing support is needed for the person to perform adequately across multiple environments, such as home, school, work, and community.” DSM-5-TR at 42. Aleksey presented evidence that he has deficits in adaptive functioning; specifically, the conceptual and social domains of adaptive functioning. Dr. Hall recognized he had deficits in these areas, but she improperly attributed those deficits to Attention Deficit Hyperactive Disorder (“ADHD”).

Conceptual skills involve using concepts or abstract principles to solve a problem, and include skills like school or academic skills, money management skills, and how people use judgment in new situations. DSM-5-TR at 39. Dr. Hall agreed Aleksey's academic performance demonstrates deficits in conceptual skills. His school records, App. 458–873, revealed that Aleksey was referred as a first grader in 1974 for special education screening, and the evaluator found his “fund of educationally relevant information and his ability to deal abstractly with that information is at a retarded level.” App. 73, 463. Aleksey later had to repeat both fourth and fifth grade. App. 73. At the end of fifth grade, in 1979, Aleksey was again evaluated for special education services. App. 74. The child psychologist conducting the evaluation indicated he “suspect[ed] that [Aleksey's] fundamental academic skills are also deficient.” App. 75. Aleksey was nearly retained in seventh grade as well. App. 75. The following year, Aleksey's mother asked the school to place Aleksey in regular math classes, but the school responded that he was receiving work on a third-grade level and his performance was “far below grade level.” App. 76, 578. Then, in eighth grade, Aleksey was placed in a special education class, and the school made modifications for him to take standardized testing as a result. App. 77. Finally, after his repeated academic failures, Aleksey dropped out of school around the ninth grade. App. 78.

Dr. Hall testified that Aleksey also had deficits in social skills. App. 80. Social skills involve the many components of social interaction, including a person's ability to meet and interact with people, regulate behavior and emotion in an age-appropriate fashion, implement proper social judgment, read social cues, and maintain equal interpersonal relationships. DSM 5-TR at 39. When evaluated during school, it was reported that Aleksey “is described as a child who cries easily on separation from mother and had poor peer relationships.” App. 80. A friend of Aleksey's mother

reported that Aleksey had very few friends, and “was gullible and a person who would fall for obvious ploy[s].” App. 80–81.

Dr. Hall testified that communication skills are both conceptual and social skills. App. 70. According to the records submitted at the PCR hearing, Aleksey had delayed speech until he was three years old and attended speech therapy. App. 70. Records from the Hillside Jewish Hospital where he was treated in 1983 indicated “poor achievement in spelling, word recognition, and reading comprehension.” App. 70–71. The records went on to indicate “results suggest pervasive deficits in language functioning, even taking into account behavioral factors.” App. 71.

Although Dr. Hall found Aleksey did have deficits in both conceptual and social skills,<sup>5</sup> she improperly attributed these deficits to his ADHD diagnosis instead of intellectual disability. App. 67. She conceded on cross examination that a person could meet criteria for both ADHD and intellectual disability. App. 79; *see also* App. 107 (Dr. David Price opining that intellectual disability and ADHD “[v]ery commonly co-occur”). As the Supreme Court has recognized, the existence of another mental disorder or even a personality disorder is not evidence that a person does not also have an intellectual disability. *Moore*, 581 U.S. at 17; *Brumfield v. Cain*, 576 U.S. 305, 319–20 (2015) (noting that the diagnostic criteria for intellectual disability do not include an exclusion criterion; therefore, the diagnosis should be made regardless of and in addition to the presence of another disorder). In fact, the DSM has specifically recognized that ADHD is a disorder that co-occurs most frequently in individuals with intellectual disability. DSM-5 at 40; *see also id.* (“Co-occurring mental, neurodevelopmental, medical and other physical conditions

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<sup>5</sup> Aleksey also presented evidence of deficits in practical skills, including that he had a variety of jobs, but was frequently fired for poor performance. App. 81. He was also scheduled for an evaluation at a vocational rehabilitation center, but he was unable to attend because he was “having tremendous difficulties getting to the North Shore Center by public transportation.” App. 82.

are frequent in intellectual disability, with rates of some conditions (e.g. mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population”).

The evidence at the hearing demonstrates deficits in two of the three domains of adaptive functioning. Assuming the circuit court found Aleksey did not meet this diagnostic criterion, it was in error and this Court should reverse.

d. *Onset During the Developmental Period*

Intellectual disability is a developmental disorder, requiring that deficits in both intellectual functioning and adaptive functioning manifest during the individual’s developmental period. DSM-5-TR at 37. The analysis of age of onset does not require an individual to have been diagnosed with intellectual disability during the developmental period; instead, the signs of intellectual disability need only have *manifested* before that age. *See Brumfield*, 576 U.S. at 308–10; *State v. Blackwell*, 420 S.C. 127, 172–73, 801 S.E.2d 713, 737 (2018). The developmental period is defined as up to the age of 22 years old by the American Association on Intellectual and Developmental Disabilities. AAIDD-12 at 13. The South Carolina statute and the DSM do not assign an age to the developmental period. S.C. Code § 16-3-20(C)(b)(10); DSM-5-TR at 37.

The evidence described above showing Aleksey’s deficits in adaptive functioning relates specifically to Aleksey’s functioning during the developmental period as described in his school records and by people who knew him during that time. *See App.* 209, 213–20, 396–416, 458–877. Accordingly, there is no question that his adaptive deficits manifested during the developmental period.

Aleksey did not have an IQ score within the intellectual disability range during the developmental period, but that is not required for diagnosis. *See United States v. Roland*, 218 F.Supp.3d 470, 478 (D.N.J. 2017); *Nicholson v. Branker*, 739 F.Supp.2d 839, 857 (E.D.N.C. 2010); *State v. Covington*, 2019 WL 368915, at \*3 (Sup. Ct. N.V. Jan. 22, 2019) (holding that the

defendant is intellectually disabled although the defendant was not placed in special education classes or subjected to intelligence testing before the age of eighteen). Dr. Hall identified three IQ tests administered during the developmental period with scores above the intellectual disability range<sup>6</sup>:

Test Date	Test Type	Administrator	IQ Score
11/26/1974	WISC	School System	96
7/17/1979	WISC-R	New York City Board of Education, Division of Special Education	82
6/20/1983	WISC-R	Hillside	90

These developmental period tests, however, are not reliable measures of Aleksey’s intellectual functioning during that time. Investigator Pamela Leonard testified at the PCR hearing that she obtained Aleksey’s school records, which reported several IQ scores, and made many diligent attempts to obtain the underlying test data for each documented test. App. 119–23. For the 1974 testing, a “WISC Record Form” was located, but it was unsigned, so there was no way determine who administered the testing or what their qualifications were. App. 120, 464. For the 1979 and 1983 testing, Ms. Leonard was only able to find the IQ scores in handwritten psychological reports in a narrative summary. App. 121. Despite her extensive investigation, she was not able to locate the underlying test data to determine who administered the tests, the conditions, or to submit the scoring for review for any errors. App. 121–23.

To determine whether a test score is reliable, clinicians must be able to closely review underlying test data. Tasse & Blume, *Intellectual Disability and the Death Penalty* 89 (“Clinicians will also want to closely review previously administered test protocols for any observable

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<sup>6</sup> App. 939.

administration errors, verify the tabulation of raw scores and transformation to standard scores, and examine any recording of the administration, if available, for administration errors.”). Examiners must use clinical judgment in interpreting test scores, which means that they must consider any sources of potential measurement error. *Id.* Possible sources of measurement error that could cause an IQ score to be unreliable include the environment in which the test was given, the behavior of both the examiner and the participant, and errors in score calculation. AAIDD-12 at 38–40. The underlying data and identify and qualification of the test administrator are necessary to determine whether these errors existed. Therefore, if this data is missing, the score is unreliable because it is impossible to tell how the score was affected by measurement error.

Review of underlying test data is especially important for the type of test administered to Aleksey as a child. The WISC-R IQ test administered to children is especially problematic in terms of score reliability. Research indicates that scores for the WISC-R for children with intellectual disabilities do not meet accepted reliability standards, particularly subtest scores. Stephen D. Truscott et al., *WISC-R Subtest Reliability Over Time: Implications for Practice and Research*, 74 PSYCH. REPORTS 147, 153 (1994). “[A]lthough some stability exists for some of the subtest scores over time, stability is not sufficient for diagnosis, program planning, or decision making.” *Id.* at 154. “Transitory shifts” in WISC-R scores make the chance for error too high to interpret the scores with any reliability. *Id.* at 154–55. Additionally, administrator error frequently occurs in administering and scoring the WISC-R test, making review of the raw data and score sheets of WISC-R administrations necessary in order to determine the accuracy of the score reported. John R. Slate et al., *Practitioners’ Administration and Scoring of the WISC-R: Evidence That We Do Err*, 30 J. SCHOOL PSYCH. 77 (1992) (“Examiner errors, when corrected, resulted in changes in the Full Scale IQ that had the potential to influence labeling and placement decisions.”).

Because the test data and administrator information are not available for the developmental period tests, and because the recorded IQ scores are inconsistent with Aleksey's poor academic performance at the same time, these tests appear to overestimate his intellectual functioning and are not reliable measures for the purposes of an *Atkins* determination. It was especially inappropriate to rule out intellectual disability based on these unreliable childhood scores in light of the DSM's warning that "a person with deficits in intellectual functioning whose score is somewhat above 65–75 may nevertheless have such substantial adaptive behavior problems . . . that the person's actual functioning is clinically comparable to that of individuals with lower IQ." DSM-5-TR, at 42. Accordingly, the DSM instructs that "clinical judgment is important in interpreting the results of IQ tests, and using them as the sole criteria for the diagnosis of an intellectual developmental disorder is insufficient." *Id.* A more accurate measure of Aleksey's intellectual functioning during the developmental period are the four IQ scores that are consistent with one another, within the intellectual disability range, and are consistent with Aleksey's poor functioning as a child. Accordingly, to the extent the circuit court found Aleksey did not satisfy the age of onset criterion, the circuit court erred.

### **CONCLUSION**

For the reasons stated above, the PCR Order was insufficient to provide for appellate review, and its conclusions are governed by errors of law and are not supported by evidence in the record. This Court should, therefore, grant certiorari to correct these errors.

*[Signature block appears on the next page.]*

Respectfully submitted,

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