STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

---

Appellate Case Number: 2024-000140

---

RECEIVED

Sep 19 2024

S.C. SUPREME COURT

BAYAN ALEKSEY, #5059,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

---

# APPENDIX
VOLUME **3** OF **3**

---

**LINDSEY S. VANN**
Justice 360
900 Elmwood Ave., Suite 200
Columbia, SC 29201
(803) 765-1044
*Counsel for Petitioner*

**MELODY BROWN**
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
*Counsel for Respondent*

**INDEX**

Smith, R.D. & Price, D.R. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at CNA Commercial Insurance. August, 1998.

Smith, R.D. & Price, D.R. Reviewing and Analyzing Educational Records In Brain Injury Cases. Annual Mental and Emotional Injury Claims Conference and Seminar. October, 2000.

Smith, R.D. & Price, D.R. Brain Injuries. Invited lecture at the PLRB/LIRB Crossroads 2003 Claims Conference and Insurance Services Expo. April, 2003.

Smith, R.D. & Price, D.R. Evaluating Brain Injuries. Invited seminar at Philadelphia Insurance Company. June, 2005.

Taff, E.W. Cross-Examination of the Neuropsychologist. Preeminent Lawyer - Superstars of Trial Seminar. Sponsored by Defense Research Institute. September, 2006.

Walker, R.J. & Price, D.R. Direct Examination of the Plaintiff's Neuropsychologist. Preeminent Lawyer - Superstars of Trial Seminar. Sponsored by Defense Research Institute. September, 2006.

Watson, R. & Price, D.R. The Not-So-Obvious Injury: Posttraumatic Stress Disorder and Closed Head Injury. Invited lecture at the North Carolina Academy of Trial Lawyers 35th Annual Convention. June, 1999.

## PUBLICATIONS

Burke, W.H., Price, D.R. & Price, D.C. Claims Analysis of Rehabilitation Plans in Mild Closed Head Injury, Claims Magazine, June, 1993, 68-75.

Law, J., Price, D.R., & Herbert, D.A. A Study of WAIS, Quick Test, and Premorbid Estimates of Intelligence for Neuropsychiatric Patients. Perceptual and Motor Skills, 1981, 52, 909-911.

Price, D.C., Raskin, D.E., & Price, D.R. Malingering. In Burke, W.H. (Ed.) The Handbook of Forensic Rehabilitation. Houston: HDI Publishers. 1994.

Price, D.R. Teens, Sex, Education, and You: Avoiding a Far-Reaching Tragedy. Family Connections, Vol. 1, No. 3, Fall, 1987.

Price, D.R. Children and Divorce: They Can Survive. Family Connections, Vol. 2, No. 1, Winter, 1988.

Price, D.R. The Evolution of Malingering. Claims Magazine. July, 1993, 37-42.

Price, D.R. The Evolution of PTSD Claims. Claims Magazine. January, 1994, 30-32.

Price, D.R. PTSD Diagnostic Criteria Evolves Again. Claims Magazine. February, 1994, 30-32, 88.

Price, D.R. Personality Disorders and Traits. In McDonald, J.J. & Kulick, F.B. (Eds.) Mental and Emotional Injuries in Employment Litigation. Washington: Bureau of National Affairs, 1994.

Price, D.R. Case Analysis in Forensic Rehabilitation. In Burke, W.H. (Ed.) The Handbook of Forensic Rehabilitation. Houston: HDI Publishers. 1994.

Price, D.R. Evaluating Claims of Postconcussional Disorder. Claims Magazine. March, 1995.

Price, D.R. Case Analysis in Psychological Injury Claims. In Price, D.R. & Lees-Haley, P.R. (Eds.) The Insurer's Handbook of Psychological Injury Claims. Seattle, Claims Books. November, 1995.

Price, D.R. Personality Disorders in Psychological Injury Claims. In Price, D.R. & Lees-Haley, P.R. (Eds.) The Insurer's Handbook of Psychological Injury Claims. Seattle, Claims Books. November, 1995.

Price, D.R. Evaluating Claims of Head Injury. In Price, D.R. & Thorness, B. (Eds.) The Proceedings of The Annual Symposium on Head Injury. Seattle, Claims Books. December, 1995.

Price, D.R. Evaluating Claims of Head Injury. In Price, D.R. & Thorness, B. (Eds.) The Proceedings of The Annual Symposium on Head Injury. Seattle, Claims Books. November, 1996.

Price, D.R. The Insurance/Defense Network's Deposition and Examination Guide for Psychological Injury Claims. Greenville, SC, I/DN Press. November, 1997.

Price, D.R. Clinical Evaluation and Case Formulation of Mental and Emotional Injury Claims. In McDonald, J.J. & Kulick, F.B. (Eds.) Mental and Emotional Injuries in Employment Litigation, 2nd Edition. Washington. Bureau of National Affairs, 2002.

Price, D.R. 2002. Fraudulent Claims of Psychological Injury. Today's Insurance Professional. Winter 14-16.

Price, D.R. Evaluating Claims of Pediatric Brain Injuries. The Legal Edge. Volume VIII, Issue Three, Page 1.

Price, D.R. Posttraumatic Stress Disorder and Mild Traumatic Brain Injury Claims. The Defenseline. Volume 32, No. 1, 11-13.

Price, D.R. Evaluating Injury Claims. Claims Magazine. March, 2007.

Price, D.R. Overcompensating. Claims Advisor. Fall, 2010.

Price, D.R. Evaluating Injury Claims. Property Casualty 360, March, 2007.

Price, D.R. The Expanding Definition of PTSD. Claim Management Magazine, February, 2011.

Price, D.R. Feigning Spell. Claim Management Magazine, March, 2011.

Price, D.R. & Boutot, M.R.. Crisis Management Series: Managing Psychological Injury Claims. Risk Management Magazine. July, 2002, 46-52.

Price, D.R., Burke, W.H. & Price, D.C. Identification of Fictitious Closed Head Injury Claims. Claims Magazine. May, 1993, 37-40.

Price, D.R., Greene, H.W. & Price, D.C. Red Flags For Psychological Injury Claims. CPCU Journal. Vol. 47, No. 3, September, 1994.

Price, D.R., Herbert, D.A., Walsh, M.A. & Law, J. A Study of WAIS-R, Quick Test, and PPVT IQs for Neuropsychiatric Screening Purposes. Perceptual and Motor Skills, 1990, 70, 1320-1322.

Price, D.R. & Lees-Haley, P.R. (Eds.) The Insurer's Handbook of Psychological Injury Claims. Seattle, Claims Books. November, 1995.

Price, D.R. & Lees-Haley, P.R. Defending Claims of Postconcussion Syndrome. Defense Counsel Journal. Vol. 62, No. 4, October, 1995.

Price, D.R. & McDonald, J.J. False Claims of Clergy Sexual Abuse. Risk Management Magazine. January, 2003, 48-51.

Price, D.R. & Price, D.C. Understanding DSM-III-R, the Standard Classification System for Mental Health Disorders. In the DRI monograph, Defending Cases Involving Psychological and Head Injuries. Vol. 1992, No. 3, August, 1992.

Price, D.R. & Smith, R.D. Evaluating Psychological Effects of MVA's. Claims Magazine. June, 2002, 71-74.

Price, D.R. & Smith, R.D. MVAs and PTSD: Does One Follow the Other? Trucking Industry Defense Association (TIDA) Newsletter. Fall/Winter, 2002.

Price, D.R. & Thorness, B. (Eds.) The Proceedings of The Annual Symposium on Head Injury. Seattle, Claims Books. December, 1995.

Price, D.R. & Thorness, B. (Eds.) The Proceedings of The Annual Symposium on Head Injury. Seattle, Claims Books. November, 1996.

**COMMENTARIES:**

Price, D.R. The Clinician's Corner. LCA Commentary. Volume 1, Issue I. September, 2007.

Price, D.R. The Clinician's Corner. LCA Commentary. Volume 1, Issue II. October, 2007.

Price, D.R. The Clinician's Corner. LCA Commentary. Volume 1, Issue III. November, 2007.

Price, D.R. Clinician's Corner: Posttraumatic Stress Disorder, Part I: A Brief History and Overview, *3 Litigation Commentary & Rev. 57* (August/September 2010).

Price, D.R. Clinician's Corner: Posttraumatic Stress Disorder, Part II; The Evolution of Posttraumatic Stress Disorder - Criterion A, *3 Litigation Commentary & Rev. 85* (November/December 2010).

Price, D.R. Clinician's Corner: Posttraumatic Stress Disorder, Part III: The Evolution of Posttraumatic Stress Disorders - Criteria B-H, *4 Litigation Commentary & Rev. 10* (January/February 2011).

Price, D.R. Clinician's Corner: Posttraumatic Stress Disorder, Part IV: Stressors that Cause PTSD, *4 Litigation Commentary & Rev.* (March/April 2011).

Price, D.R. The Clinician's Corner. Posttraumatic Stress Disorder, Part V: PTSD and Kidnapping, *4 Litigation Commentary & Rev. 76* (June/July 2011).

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | Case No. 2015-CP-38-764 |
| | ) | |
| BAYAN ALEKSEY | ) | |
| *Applicant,* | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA | ) | |
| *Respondent.* | ) | |
| | ) | |

**AFFIDAVIT OF MARJORIE HAMMOCK, LISW, MSW**

Marjorie Hammock, who appeared personally before me, affirms and states the following:

1. I am a Licensed Independent Social Worker in Columbia, South Carolina. I have been practicing social work for fifty-nine years, fifteen of which I was the Chief of Social Work Service for the Department of Corrections. During my time at the Department of Corrections, I provided direct services to inmates, especially the geriatric, handicapped, and mentally ill populations. I obtained my Bachelor of Arts Degree and my Master of Social Work Degree from Howard University in Washington, D.C.

2. I was retained by Mr. Bayan Aleksey's attorneys to conduct a review of Mr. Aleksey's developmental period (pre-18 years old) adaptive functioning in the context of an intellectual disability evaluation. My findings in Mr. Aleksey's case are recounted in detail in my report dated October 10, 2019, attached to this affidavit.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught.

Marjorie Hammock
MARJORIE HAMMOCK, LISW, MSW

Sworn to and subscribed before me
This 31st day of October, 2019

Notary Public for the State of South Carolina
My commission expires: 3-29-20

**Report of Marjorie Hammock**
**on Developmental Period Adaptive Behavior Deficits**

ALEKSEY, Bayan
Date of report: October 10, 2019

Date of birth: [redacted]
Age: 51

I, Marjorie Hammock, was asked by Bayan Aleksey's attorneys to conduct a review and evaluation of Bayan's developmental period (pre-18 years old) adaptive functioning as part of the overall evaluation of whether Bayan is a person with intellectual disability. I conducted the requested evaluation and a report of my findings follows.

*Sources of Information*

- South Carolina Department of Disabilities and Special Needs Evaluation performed by Dr. Alicia V. Hall (March 28, 2019)
- Birth certificate for Bayan Aleksey
- Birth and medical records for Bayan Aleksey from Roosevelt Hospital in New York, New York
- Psychiatric and medical records from Queens Child Guidance Center in Flushing, New York
- Medical and psychiatric records for Bayan Aleksey from Long Island Jewish-Hillside Medical Center in Glen Oaks, New York
- Pretrial order for a competency evaluation from Solicitor William M. Bailey and the accompanying request for evaluation
- Report on competency from Dr. Thomas W. Behrmann and Dr. Richard L. Frierson at the William S. Hall Psychiatric Institute to Solicitor William M. Bailey
- Psychological report by Dr. Jeffrey Vidic
- William S. Hall Psychiatric Institute social work assessment by Carol M. David (July 8, 1998)
- Physical examination by Dr. A. Daniel Vallini (July 17, 1998)
- Social Security Earnings Statement for Bayan Aleksey (1987-1997)
- Lester David Rosengard affidavit
- Vera Lall Aleksey affidavit
- Barbara Zingalis declaration
- Dr. Daniel Grant declaration
- Dr. Donna Schwartz Maddox declaration
- New York State Education Department Office of Vocational Rehabilitation records for Bayan Aleksey
- Individualized Education Program records for Bayan Aleksey
- School records from The William Lloyd Garrison Special Primary School
- School records from The Hillside Campus School
- School records from St. Michael's Catholic Elementary School
- School records from Edward Bleeker Junior High School

- School Records from John Browne High School
- City of New York Board of Education records
- Standardized test results from throughout Bayan Aleksey's school years
- Interviews with Bayan Aleksey at Broad River Correctional Institution, Columbia, SC, August 26, 2019 and September 24, 2019
- Interview with Vera Lall Aleksey in New York, New York, by phone from Columbia, SC, September 17, 2019

*Qualifications*

I am a Licensed Independent Clinical Social Worker. I have been practicing social work for 59 years, fifteen of which I spent as the Chief of Social Work Service for the Department of Corrections. During my time in the Department of Corrections, I provided direct services to inmates, and especially geriatric, handicapped, and mentally ill populations. I received my B.A. and M.S.W. Degrees from Howard University in Washington, D.C., and taught as an Assistant Professor and Field Coordinator in the Social Work Department at Benedict College for fourteen years until I retired in 2013. I am a Gold Card member and Pioneer of the National Association of Social Workers, served on the National Board and was past President of the South Carolina State Chapter. I am a past President of the Columbia Chapter of the National Association for Black Social Workers. I have received numerous awards for my professional and humanitarian work.

*Clinical Criteria for Assessing Adaptive Behavior*

Intellectual disability is defined under South Carolina law as "significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).

Adaptive behavior is learned behavior performed in the context of society's expectations across different settings, including the home, school, work, and other community-based environments. (Schalock et al., 2010; Tassé and Blume, 2018). Because society's demands and expectations generally increase across an individual's lifetime, there is a generalized expectation that as a person matures from an infant to a child to an adult, they will be able to perform more complex tasks and demonstrate more advanced adaptive behavior. (Tassé and Blume, 2018). Adaptive behavior is, in other words, the collection of conceptual, social, and practical skills that a person learns in order to function.

The American Association on Intellectual and Developmental Disabilities (AAIDD) is generally considered the leading professional authority in defining intellectual disability, including adaptive behavior. (Tassé and Blume, 2018). The AAIDD defines adaptive behavior as the collection of conceptual, social, and practical skills that have been learned by people to function in their everyday lives. (Schalock et al., 2010). The AAIDD (formerly known as the American Association on Mental Retardation) previously defined adaptive behavior by reference to ten categories of behavior: (1) communication skills, or the ability to comprehend and express information through spoken and symbolic language; (2) self-care, including toileting, eating, dressing, hygiene, and grooming; (3) home living, encompassing housekeeping, property

maintenance, food preparation and cooking, shopping, and daily scheduling; (4) community use, meaning the ability to make appropriate use of community resources like public transportation, stores, religious facilities, and other public entities like schools, libraries, and recreational facilities; (5) self-direction, or the ability to abide by a schedule, initiate appropriate activities, ask for help when needed, and resolve problems in novel situations; (6) health and safety, or the ability to maintain one's own health; (7) functional academics, meaning the cognitive and intellectual skills related to learning at school like reading, writing, math, health, and geography; (8) leisure, including activities that reflect personal preferences and choices and involve playing with others, taking turns, and learning new activities; (9) work skills related to holding a part-time or full-time job; and (10) social/interpersonal skills, including the ability to recognize feelings, read cues, regulate one's own behavior, and forming and fostering relationships. Under this definition, a person has deficits in adaptive behavior if they have limitations in two of the ten domains of adaptive functioning. (Luckasson et al., 2002). This was the standard in place at the time of the Supreme Court's 2002 decision, *Atkins v. Virginia*, which barred the execution of people with intellectual disabilities.

Since then, however the AAIDD has revised the definition of adaptive behavior, breaking it into three broad skill areas. These three adaptive behavior domains are defined as follows: (1) conceptual skills, which encompass communication, academics, and self-direction; (2) social skills, including interpersonal abilities, responsibility, capacity to follow rules, self-esteem, gullibility, naiveté, and the ability to avoid victimization; and (3) practical skills like basic personal care and work skills. (Schalock et al., 2010; American Psychiatric Association, 2013; Tassé and Blume, 2018). Under this definition, a person has deficits in adaptive behavior if he or she has limitations in one of the three skill areas. (Schalock et al., 2010). The American Psychological Association (APA), another authority on intellectual disability and adaptive behavior, has historically adopted the AAIDD definition of adaptive behavior. The most recent edition of the APA's Diagnostic and Statistical Manual (DSM), the DSM-V, defines adaptive behavior by reference to the same three domains—conceptual, social, practical. (APA, 2013). The following chart reflects how the older ten-part standard fits in to the newer, three-domain standard:

| *Modern Domains* | *Older Domains* |
|---|---|
| Conceptual skills | Communication<br>Functional academics<br>Self-direction |
| Social skills | Leisure<br>Social/interpersonal |
| Practical skills | Community use<br>Home living<br>Health and safety<br>Self-care<br>Work |

(Luckasson et al., 2002; Schalock et al., 2010; American Psychiatric Association, 2013).

Courts in South Carolina have evaluated adaptive functioning limitations under both the older, ten category definition and the more recent three-domain definition. My report therefore includes a summary of Bayan's adaptive skills using both definitions.

The current standards for diagnosing intellectual disability recommend collecting information from as many sources as have valid information. (Schalock et al., 2010; APA, 2013). One of the persistent themes in Bayan's life has been social isolation, and as a result, there are very few living people who knew Bayan well enough during his developmental period to accurately recall useful information about his functioning. However, I was able to speak with, and review affidavits from, informants who knew Bayan in different contexts and who supplied useful information, and I was also provided a variety of records, including school, counseling, and work records, and mental health/psychiatric evaluations. My assessment was therefore based on multiple sources of information, consistent with prevailing standards. The purpose of my evaluation was to assess Bayan's typical functioning, not his capacity or maximum ability, within the context of Bayan's community and cultural environment. (Schalock et al., 2010).

## Overview of Bayan's Life History

Bayan Aleksey was born on [redacted] to Vera and Ronald Aleksey. (Bayan Aleksey birth certificate). Vera Aleksey was born in Trinidad and met Mr. Aleksey in New York when she came to the United States on a green card to work as a hair stylist in 1966. (Vera Aleksey Aff. Dec. 30, 2018; Hillside Hosp. Records p. 26). At the time, Mr. Aleksey was married to another woman. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). When Mrs. Aleksey got pregnant with Bayan in 1968, Mr. Aleksey obtained a divorce and he and Mrs. Aleksey were married at City Hall. (Vera Aleksey Aff.). Mrs. Aleksey experienced nausea, vomiting, and bleeding throughout her pregnancy, and she was treated for persistent urinary tract infections and anemia. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Bayan was born with the assistance of forceps, meaning a doctor applied forceps to his head and pulled him out of his mother's body. (Roosevelt Hosp. Records; Vera Aleksey Aff.). Mrs. Aleksey was hospitalized for two weeks post-partum because of anemia and post-partum depression, which continued to afflict her for months after Bayan's birth. (Vera Aleksey Aff.).

When Bayan was born, his father was working in restaurants, although he had previously been employed at IBM and placed a high value on education and intellect. (Vera Aleksey Aff.). It was not until after their marriage that Mrs. Aleksey became aware that Mr. Aleksey suffered from a severe drinking problem. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). When drunk, Mr. Aleksey would become violent and verbally and physically abuse Mrs. Aleksey. Bayan witnessed many such incidents of abuse. (Bayan Aleksey Interview, Aug. 21, 2019; Vera Aleksey Aff.; Hillside Hosp. Records p. 26; Dr. Frierson Report, Aug. 7, 1998). In 1972, Mrs. Aleksey left her husband and took Bayan, but the separation was never made legal and Mr. Aleksey obtained monthly court-ordered visitation rights. As a result, his father remained in Bayan's life. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). Mrs. Aleksey reported that Mr. Aleksey continued to be abusive after the separation and, several times, she had to call the police to remove Mr. Aleksey from her home and obtained several court restraining orders to keep Mr. Aleksey away from her and Bayan. (Vera Aleksey Aff.) This continued until Mr. Aleksey's death in 1990.

When Bayan entered school, he was unable to do the school work and his family structure was such that he did not have the support he needed, especially from his father, who berated and verbally abused him for his poor academic performance. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). Bayan's delayed verbal development, profound social limitations, and pervasive deficits, all described below, were likely magnified by the trauma he suffered during the developmental period. (School Records 1975).

Bayan, like many people with intellectual disability, relies on masking to conceal his deficits and limitations. (Olley, 2012; Edgerton, 1993). Interviews with Bayan Aleksey). Masking, also commonly referred to as a "cloak of competence," is the tendency of an individual with intellectual disability to "make every effort to 'fit in' and 'pass' for someone who does not have a disability" because of the stigma associated with that diagnosis. (Tassé and Blume, 2018; Olley, 2012; Edgerton, 1993). Bayan's mother in particular helped him weave his cloak of competence by helping him with academic tasks, allowing him to skip school to cover up his poor performance, being available to him constantly either in person or by phone to assist with daily tasks, and helping him get small jobs as a teenager and young adult. This kind of reliance on a "benefactor" has been widely described in the literature. (Tassé and Blume, 2018). When Bayan eventually moved out of his mother's house, his girlfriends were woven into his cloak (as described in greater detail below), although they also took advantage of his deficits. And even today, Bayan remains adept at masking or cloaking his shortcomings. For example, in my interviews with him, Bayan did several things that the literature has identified as characteristic masking behaviors: he acquiesced to questions he did not understand; he avoided topics that could expose his academic and intellectual shortcomings; and he changed the subject, frequently returning to matters he could discuss with greater fluency. (Edgerton, 1993). Interviews with Bayan Aleksey).

## Conceptual Skills

*Communication*

Bayan's school records, the interviews I conducted, and affidavits I reviewed indicate that Bayan has profound limitations in communication. Bayan's mother reported that he could not speak more than a few syllables at a time or more than a few coherent words until he was three years old. (Vera Aleksey Aff.; Roosevelt Hosp. Records). When he did start talking, he would put words together that did not make sense. (Vera Aleksey Aff.). Mrs. Aleksey struggled to keep Bayan at the daycare center because she would drop him off and he would immediately lie down on the floor and start crying. The teacher was very good to Bayan, but he was often inconsolable and Mrs. Aleksey would have to come pick him up. (Hillside Hosp. Records; Interview with Vera Aleksey, Sept. 17, 2019).

Bayan was a very quiet child. (Vera Aleksey Aff.; School Records—First Grade Assessment). For example, when he was in the first grade, his school called Mrs. Aleksey to tell her that Bayan was unable to talk. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). They seated Bayan next to one of the girls in an effort to encourage him to speak, but he was silent. (Interview with Vera Aleksey, Sept. 17, 2019). Even as Bayan got older, his vocabulary did not develop and it was still confusing when he talked because he would string together unrelated words and made repeated errors, even when corrected. (School Records 1979). For example, a Board of Education evaluator noted that Bayan "read the word plot as pilot, which remained uncorrected after efforts at decoding." (School Records 1979).

Bayan failed to comprehend rules or expectations, which others sometimes interpreted as misbehavior. (David Rosengard Aff.). For example, in first grade, Bayan developed a tendency of taking things home he was told not to take, like a stamp pad, and Mrs. Aleksey would have to return the objects to the school. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan could not understand why this was not acceptable. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey tried to help Bayan by putting him in counseling, but it was not effective because Bayan would not talk to the counselors. (Interview with Vera Aleksey, Sept. 17, 2019). Later, Bayan's long-term counselor at the Long Island Jewish Hillside Hospital, David Rosengard, noted that Bayan had a limited vocabulary and had trouble comprehending instructions or rules. (David Rosengard Aff.).

School records confirm the informants' recollections. According to Bayan's school reports, he had late speech development and Richard Sloves, a school psychologist, described Bayan's speech as characterized by "clang associations." (School Records 1975). For example, when asked to define the word "nail" at age six, Bayan said "[a] finger that you put in the mailbox." (School Records 1975). Later, when Bayan was ten, an assessment from the Committee on the Handicapped indicated that he had difficulty with analogies, could not name opposites to simple words like "sour," "heavy," "laugh," "narrow," or "false," and struggled to distinguish between similar-sounding words. (School Records 1979). When Bayan was in his early teens, school reports indicate that he had a "somewhat limited" command of English, which was his first language. (Hillside Hosp. Records). His speech was described as "choppy," as though he was either "hold[ing] back his thoughts and feelings, or uncontrollably let[ting] them out." (Hillside Hosp. Records). When Bayan was fourteen, psychological testing indicated that he was struggling from "pervasive deficits in language functioning, even taking into account behavioral factors which may have interfered with Bayan's performance." (Hillside Hosp. Records; School Records 1983). His vocabulary remained limited. (Individualized Education Program Records).

*Self-Direction*

Bayan was never independent or able to function at an appropriate developmental level without help from his mother. His school records indicate that Bayan was unable to master "self-control" and that he needed "assistance coping [with] unstructured free time." (School Records—First Grade; Hillside Hosp. Records). Bayan had "difficulty following through on completing a project." (Hillside Hosp. Records). When he was evaluated by school psychologists, they noted that Bayan had "difficulties with the development of self and autonomy." (School Records 1975). Bayan was dependent on others for direction and unable to successfully manage living on his own. For example, he could not be left alone and Mrs. Aleksey regularly had to bring him to work with her. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mr. Rosengard reported that Bayan was "extremely dependent" on Mrs. Aleksey, who "constantly monitored and protected him." (David Rosengard Aff.). Bayan required his mother's help with all of his daily activities. (Interview with Vera Aleksey, Sept. 17, 2019). When Mrs. Aleksey was not immediately involved, Bayan was unable to follow through on obligations. (Vera Aleksey Aff.; David Rosegard Aff.; Hillside Hosp. Records). At one point, he was placed on home schooling but that was not successful because Bayan could not be depended to show up for lessons. (School Records 1984). Even as Bayan got older, his mother had to help him make and keep appointments and get to work. (Vera Aleksey Aff.; Board of Education Records).

*Functional Academics*

Bayan has a long and well documented history of difficulty in this area. He did poorly in school from the time he was a toddler, and Bayan's learning difficulties caused tension between him and his father, who put a high value on academic achievement. (Vera Aleksey Aff.). Indeed, Bayan's school performance was so poor, and his father's reaction to that so negative, that his school records document the fights between Bayan and Mr. Aleksey. (School Records 1984). Bayan's first grade records indicate that his "fund of educationally relevant information and his ability to deal abstractly with that information is at a retarded level." (School Records 1975). At age six, Bayan was referred to a school psychologist for testing in part because of his delayed speech development, immaturity, and depressed verbal performance. (School Records 1975).

In an effort to help Bayan learn and to alleviate the familial conflict caused by Bayan's academic difficulties, Mrs. Aleksey enrolled Bayan in St. Michael's parochial school in third grade. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). The school was stricter, but Bayan did not do any better academically. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019; School Records St. Michael's). At St. Michael's, Bayan failed most of his classes and his teachers reported that they were "disappointed in Bayan's personal and scholastic progress," indicating that the education system had recognized Bayan's low functioning and lack of appropriate progress. (School Records St. Michael's). Bayan's standardized test scores in third grade put him in the bottom four percent of students nationwide. (School Records St. Michael's). Mrs. Aleksey hired a high school-aged tutor to help Bayan, but Bayan could never tell the tutor what his homework was, could not grasp the notion of homework, and was constantly confused, so the tutor stopped coming. (Interview with Vera Aleksey, Sept. 17, 2019). A private teacher came to the home for a short time, but that, too, was unsuccessful because Bayan was unable to effectively communicate. (Board of Education Records).

In fourth grade, Bayan received Fs in almost every single class. (School Records St. Michael's). His report cards from that year show that Bayan was "inattentive during class" and did not complete his assignments; a note in Bayan's file reads: "His progress is unsatisfactory!" (School Records St. Michael's). Again, when Bayan took a standardized test, he scored in the bottom three percent of test takers nationally. (School Records St. Michael's).

Bayan was socially promoted to fifth grade. (School Records St. Michael's). He failed all of his classes the entire year. (School Records St. Michael's). His teacher wrote that she was "after him constantly" but Bayan could not do the work. (School Records St. Michael's). His report cards indicate that over the course of the year Bayan did not make progress academically. (School Records St. Michael's). The principal at St. Michael's recommended counseling for Bayan, which Mrs. Aleksey tried, but Bayan did not speak to the therapists until he met Mr. Rosengard around age twelve. (Interview with Vera Aleksey, Sept. 17, 2019). Leonard Reich, Ph.D., a doctor who evaluated Bayan, wrote to Mrs. Aleksey that Bayan's "fundamental academic skills are also deficient." (School Records 1979). The counselors noted that Bayan was very immature and suggested that he return to public school. (School Records 1979; Interview with Vera Aleksey, Sept. 17, 2019).

Before Bayan returned to public school for sixth grade at the age of ten years, he was evaluated by the Board of Education of the City of New York, Committee on the Handicapped. (School Records 1979; Vera Aleksey Aff.). The notes from this evaluation in July 1979 indicate that Bayan understood the concept of addition but made errors. (School Records 1979). He made errors in time, measurement facts, fractions, and multiplication. (School Records 1979). As a result of this evaluation, Bayan was placed in special education classes and received standardized testing modifications, including extra time. (School Records 1979; School Records 1974). Nevertheless, he continued to fail most of his classes. (School Records 1979; School Records Junior High). Bayan's report cards note that although he was "making a tremendous effort," he had "fallen behind in many areas." (School Records Public School 21). A letter from Bleeker Junior High School warned Mrs. Aleksey that Bayan was at risk of not being promoted to eighth grade. (School Records 1981; Board of Education Records). When Bayan was promoted to the eighth grade, he continued to struggle and his level of performance was "far below grade level"; cumulatively, his abilities were assessed at a fifth grade level. (School Records 1981; School Records Junior High). Bayan's test scores "suggest[ed] pervasive deficits in language functioning." (School Records 1983). He told his counselor that his teachers were giving him low level work that embarrassed him, and the counselor felt Mrs. Aleksey helped Bayan cover up his academic limitations by allowing him to skip school and stay home. (Board of Education Records; David Rosengard Aff.; Hillside Hosp. Records). He was discharged from his junior high school in January 1984, when he should have been in ninth grade. (Board of Education Records).

Mrs. Aleksey requested a reevaluation to have Bayan placed back in special education classes. (Individualized Education Program Records). He was again evaluated by the Committee on the Handicapped. (School Records 1984). His word recognition was assessed at three years below his age, his reading comprehension was "substantially below level of word recognition," and his math skills were in the fourth grade range. (School Records 1984). Bayan continued to fail his classes. (School Records 1984; School Records 1985). Mrs. Aleksey remembered talking to his teachers, who told her that Bayan would raise his hand over and over but could never answer the question when he was called on. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He was consistently teased and mocked about being in special education. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). One of Mrs. Aleksey's friends, Barbara Zingalis, recalled that Bayan was "slow about learning things, simple things." (Barbara Zingalis Aff.). Although Bayan entered high school, Mrs. Aleksey described it as a failure. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan dropped out without graduating part of the way through ninth grade. (School Records 1984; School Records 1985; Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019).

As one would expect with such a history, Bayan could not effectively use academic skills in his community life. He was not an effective reader, so he was unable to complete a job application or manage a bank account. His functional academic skills were insufficient for independent living, and his mother even struggled to provide him with the structure he required to function at a developmentally appropriate level.

## Social Skills

*Social*

A consistent theme throughout Bayan's life has been social isolation and a marked inability to make and maintain relationships. Bayan has profound social deficits that impact every aspect of his life.

As a young child, Bayan was described in school records as quiet, withdrawn, dependent on his mother, and unable to relate to other children. (School Records 1975; Hillside Hosp. Records). When he started day care at age three, he was inappropriately upset about the separation from his mother, cried inconsolably, and resisted attendance for at least a month. (Hillside Hosp. Records). As indicated above, Bayan was referred to a school psychologist at age six because he displayed poor socializing behavior, a tendency to annoy other children, and an inability to appropriately interact with others. (School Records 1975). The school psychologists who saw Bayan described him as "a child with a strong need to maintain close adult contact." (School Records 1975). Bayan's records from the Hillside Hospital indicate that when he entered school in first grade, he was "resistant, frightened and complained of noise. He was withdrawn and did not relate to other children." (Hillside Hosp. Records). Bayan was overwhelmed by school so he would often leave school and walk the two blocks home, constantly forcing his mother to leave work and bring him back to school. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey reported that Bayan would cry to her "why am I different from the other kids" or "why did God make me like this, so different from everyone else?" (Vera Aleksey Aff.).

As Bayan got older, he remained fearful, socially isolated, and immature. For example, in high school, Bayan met some new kids but when they came to see if he wanted to ride the bus with him, Bayan hid. (Vera Aleksey Aff.). Mrs. Aleksey reported that puberty was very hard for Bayan because he "had no friends, feared the other kids, and had a hard time controlling himself." (Vera Aleksey Aff.). At one point he became suicidal and was placed in residential treatment. (Vera Aleksey Aff.). His hospital records note that he was "an isolated youngster," and that although he had lived in Flushing for five years, he did not "seem to have any friends in the neighborhood." (Hillside Hosp. Records). In high school, he would go with his mother to a drive-in because he did not have any friends. (Interview with Vera Aleksey, Sept. 17, 2019). Once, when Bayan was around fourteen, the Flushing Subway line got stuck when Mrs. Aleksey was coming home. Bayan panicked because she was late; he broke down and was in tears and almost called the police, even though he knew that the Flushing line was often delayed. (Interview with Vera Aleksey, Sept. 17, 2019).

Bayan was bullied for being in special education and avoided making friends with his peers because he was afraid they would find out he was in special education classes. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Educational records from daycare to high school are replete with concern that Bayan "ha[d] no male or female friends," was "afraid of other kids," and struggled to make friends. (School Records 1982; David Rosengard Aff.; School Records Hillside Hosp. Records; Individualized Education Program Records). School tests from high school note that Bayan struggled "in the area of emotional functioning" and that there were "signs of social-sexual immaturity." (School Records 1983). When Bayan went to the residential facility, his interactions with others were described as "childish" and "superficial." (HillsideHosp.Records).

Nevertheless, Bayan was eager to be liked and this resulted in him often being taken advantage of, once people realized that they could use him. Mr. Rosengard reported that Bayan was "obviously naïve and gullible" and lacked judgment. (David Rosengard Aff.). Mrs. Zingalis recalled that Bayan was "a very compliant and passive child" and that he had "an innocence about him." (Barbara Zingalis Aff.). Bayan "smiled, even when smiling wasn't called for" and "never could see the big picture or reality of another's motives." (Barbara Zingalis Aff.). Ms. Zingalis described Bayan as "gullible," a person who "would fall for the obvious ploys." (Barbara Zingalis Aff.). Mrs. Aleksey recalled a time at parochial school when Bayan approximately ten years old when he told a boy that his mother kept money in her closet. (Interview with Vera Aleksey, Sept. 17, 2019). The kid promised Bayan a lot of things if he would take the money. (Interview with Vera Aleksey, Sept. 17, 2019). One day, an elderly man came to Mrs. Aleksey's house with a kid, who told her that Bayan gave him $50. The man had to explain that Bayan could not buy friends. (Interview with Vera Aleksey, Sept. 17, 2019).

Dr. Reich, a school psychologist, wrote to Mrs. Aleksey that Bayan was "restless, but friendly. He tends to exaggerate in order to win my favor." (School Records 1979). Later, when Bayan returned to public school and was placed in special education classes, his teacher told Mrs. Aleksey that Bayan was frequently used by other kids and while all children get into trouble, Bayan was always "left holding the bag" when other kids got out of it. (Vera Aleksey Aff.). Mr. Rosengard worried that "Bayan was never able to comprehend that there were people who would use his gullibility and get him into trouble." (David Rosengard Aff.). Mrs. Aleksey explained that Bayan would get into trouble but he would not know how to solve it, so he skipped from problem to problem. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan's judgment was so poor that he often failed to comprehend the severity or danger of a situation and did not learn from getting in trouble. (David Rosengard Aff.). Bayan's social deficits were so profound that Mrs. Aleksey was reluctant to entrust his care to others. (Barbara Zingalis Aff.). As Ms. Zingalis succinctly explained, Bayan "wanted so much to be liked by other kids, but he had very few friends." (Barbara Zingalis Aff.).

*Leisure*

Mrs. Aleksey reported that Bayan was not a sports fan at all and that she could never get him interested in sports. (Interview with Vera Aleksey, Sept. 17, 2019). He never played any sports or even tried out because he was not good at sports and could not follow the rules or understand the plays. (Vera Aleksey Aff.). Mrs. Aleksey bought him a bicycle but he could not learn how to ride. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan's inability to learn angered his father and Bayan ended up with a fractured elbow, so Mrs. Aleksey got rid of the bike. (Interview with Vera Aleksey, Sept. 17, 2019). Mr. Rosengard reported that Bayan loved to make models during counseling sessions and attempted to do so, but he was never able to complete one (though the other children in the program could). (Rosengard Aff.). Bayan could not figure out how to play board games, and he was often frustrated in group therapy sessions because he could not develop interests like the other boys. (Rosengard Aff.).

## Practical Skills

*Self-Care*

Bayan's records indicate some deficits in self-care. A childhood hospital report described Bayan as being dependent on diapers at age three. (Roosevelt Hosp. Records). He frequently wet or soiled the bed or his pants. (Roosevelt Hosp. Records). When he was a young child, Mrs. Aleksey did everything for him. When he got up in the morning, she made his breakfast and helped him dress. (Vera Aleksey Interview, Sept. 17, 2019). Even after Bayan was in elementary school, he could not button his shirts and Mrs. Aleksey had to put in a lot of effort to show Bayan how to put his clothes on himself. (Vera Aleksey Interview, Sept. 17, 2019).

*Home-Living*

Bayan has never lived independently. His mother could never leave him alone until he was 14 or 15 years old, but even then, Bayan was not truly independent. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey would give him a key so he could come home from school, which was only a block away. He would come home and call her at work every fifteen minutes, to the point that her employer became annoyed. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey explained to Bayan that he could not call so often because it made her boss mad, but Bayan still called just as often for assistance when he was home without her. (Interview with Vera Aleksey, Sept. 17, 2019).

Mrs. Aleksey had to help Bayan with his household chores and tried to train him to make his bed and put his clothes away, but he could not remember to do these things on his own. (Interview with Vera Aleksey, Sept. 17, 2019). She had to constantly redirect him. (Interview with Vera Aleksey, Sept. 17, 2019). When Bayan was fifteen, David Rosengard, his counselor, felt "strongly" that Bayan needed to be placed in residential treatment. (David Rosengard Aff.). Mr. Rosengard reported that he was able to procure a placement for Bayan at a center in Westchester County, but at the last minute Mrs. Aleksey withdrew consent. (David Rosengard Aff.). Mr. Rosengard opined that "this was a tragic error." (David Rosengard Aff.).

Bayan could not cook or even prepare simple foods for himself. When he was 13 and 14 years old, he went to a babysitter after school, who would feed him. (Interview with Vera Aleksey, Sept. 17, 2019). One day, when Mrs. Aleksey came home, Bayan told her "ma, I made dinner." (Interview with Vera Aleksey, Sept. 17, 2019). Bayan had overboiled one huge pot of spaghetti, enough for ten people. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He didn't read the instructions. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey tried to teach Bayan that you don't make the whole box at once because the spaghetti swells, but he did the same thing again with rice. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan sometimes tried to help Mrs. Aleksey with groceries, and he could sometimes buy a few things for her if she called in an order ahead of him, but it was usually easier for her to do it herself. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019).

Bayan always had trouble managing money. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He could not budget or plan his spending, and he was never responsible for paying rent or any bills. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey opened a checking account for Bayan and put some money in it, but he couldn't

manage it and it was closed. (Vera Aleksey Aff.). When Bayan wanted to move out of Mrs. Aleksey's home, she did not want him to go because he was not ready, but over the course of time he moved in with his various girlfriends and they took care of him.[1] (Interview with Vera Aleksey, Sept. 17, 2019). Those romantic relationships, however, always broke down because Bayan could not pull his own weight, emotionally, financially or otherwise. (Vera Aleksey Aff.). Mrs. Aleksey reported that Bayan was dependent on his girlfriends. (Interview with Vera Aleksey, Sept. 17, 2019).

*Community Use*

When Bayan started at St. Michael's, his mother had to walk him to school because it was down the block. (Interview with Vera Aleksey, Sept. 17, 2019). In high school, Bayan could walk to school, which was a block away, but this was the most sophisticated community travel Bayan mastered on his own. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey also recalled that when she had a car, he would go to work with her and she would sometimes let Bayan feed the meter, but Bayan did not understand how the meters worked and he would often fail to put the coin all the way into the meter or would put too many quarters in the machine. (Interview with Vera Aleksey, Sept. 17, 2019).

When Bayan was in high school, the special education program arranged for him to have an assessment for work abilities at the Office of Vocational Rehabilitation, but the office cancelled his appointment because he was "having tremendous difficulties" getting to the evaluation center. (Board of Education Records). Later, after Bayan dropped out of high school, Bayan wanted to learn how to work on cars, but the training center was in Long Shore, New York. Mrs. Aleksey reported that she took Bayan there in her car and that when he was younger they had often taken the bus from Flushing into New York so she was hopeful Bayan would be able to get there on his own. (Vera Aleksey Aff.). Bayan never went to the training center because he was afraid to take the bus alone. (Vera Aleksey Aff.).

*Health and Safety*

When Bayan was a teenager, he became suicidal and was placed on medication. (Vera Aleksey Aff.; Vera Aleksey Interview Sept. 17, 2019; Bayan Aleksey Interview Aug. 26, 2019). He could never take the right dosage on his own. (Vera Aleksey Aff.) For example, Mrs. Aleksey reported that one time when Bayan was around thirteen years old, she picked him up from therapy and they got on the train. Bayan's head dropped back and his eyes rolled into his head, so Mrs. Aleksey took him to the hospital where she learned that Bayan had overdosed. As it turned out, Bayan thought his pills were not working because they were so tiny and he took many more than prescribed. (Vera Aleksey Aff.; Vera Aleksey Interview Sept. 17, 2019; Bayan Aleksey Interview Aug. 26, 2019).

Bayan did not move out of his mother's apartment and in with his girlfriends until after the end of the developmental period, *i.e.*, after he turned eighteen. However, this information is relevant because it is consistent with other evidence of his low level of functioning during the developmental period. Such reliance on adaptive behavior in a retrospective analysis is clinically appropriate, especially where—as here—the information reveals how Bayan functioned in the community, without his primary support system—his mother. (*See* Tassé and Blume, 2018; Keyes and Freedman, 2015; Shalock et al., 2012).

*Work*

Bayan had what Mrs. Aleksey described as "little jobs" over the course of his life, but he could not keep them. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019; Social Security Earnings Statement for Bayan Aleksey (1987-1997)). Mrs. Aleksey reported that Bayan required supervision, even when he was 18 and 19 years old, and that if he was left alone he would mess up, get confused, and have to leave the job. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). For example, Mrs. Aleksey got him a job doing construction with a friend of hers. (Interview with Vera Aleksey, Sept. 17, 2019). The man put Bayan in charge of collecting rent. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan collected the money but instead of turning it over to his boss, he brought it home to Mrs. Aleksey. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan did not understand, so when the man asked for his money, Bayan did not have it and Mrs. Aleksey had to give it back. (Interview with Vera Aleksey, Sept. 17, 2019). Similarly, Bayan collected money for delivering papers and believed the money was his to keep. (Interview with Vera Aleksey, Sept. 17, 2019). His boss got very angry and fired Bayan, but Bayan was upset because he like the job and did not understand the that money was not his. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey recalled that even when Bayan had these little jobs, she would have to call him and remind him to go to work. (Interview with Vera Aleksey, Sept. 17, 2019). As described above, she tried to get him to enter the job corps and the vocational school, but Bayan could not navigate the public transportation system and he was not accepted into either program. (Interview with Vera Aleksey, Sept. 17, 2019).

## Conclusions on Adaptive Behavior

Based on the social history records I reviewed, as well as information collected from knowledgeable informants, it is my opinion that Bayan has significant deficits in adaptive functioning in the areas of communication, functional academics, home living, community use, leisure, social skills, and work. Bayan also appears to have some deficits in other areas of adaptive functioning, but I do not have enough information to determine whether those deficits are significant. As with all persons with intellectual disabilities, Bayan also has some strengths coexisting with weaknesses. As described above, under the older definitions of intellectual disability, a person must have deficits in two of ten domains to satisfy the adaptive behavior prong, and under the current definition, a person must have a deficit in one of three domains. In Bayan's case, the adaptive behavior prong is satisfied under either definition, because he has a history of significant deficits in more than two of the ten areas in the older definition, and he has deficits in all three domains (conceptual, social, practical) in the contemporary definition.

Marjorie Brittain Hammock

Marjorie Brittain Hammock, LISW, MSW

Date: October 18, 2019

## References

American Psychiatric Association (APA). (2013). *Diagnostic and Statistical Manual of Mental Disorders* (5th Edition). Arlington, VA: American Psychiatric Publishing.

Edgerton, R. B. (1993). *The Cloak of Competence* (revised and updated). Berkeley: University of California Press.

Keyes, D. W., & Freedman (2015). Retrospective diagnosis and malingering (pp. 263–277). In E. A. Polloway (Ed.), *The Death Penalty and Intellectual Disability*. Washington, DC: American Association on Intellectual and Developmental Disabilities.

Luckasson, R., Borthwick-Duffs, S., Buntinx, W. H. E., Coulter, D. L., Craig, E. M., Shalock, R. L., Snell, M. E., Spitalnik, D. M., Spreat, S., & Tassé, M. J. (2002). *Mental Retardation: Definition, Classification, and Systems of Supports* (10th Edition). Washing, DC: American Association on Mental Retardation.

Ludia, E., Ballard, E. D., Greenbaum, R., Pao, M., Bridge, J., Reynolds, W., & Horowitz, L. (2012). Suicide risk in youth with intellectual disabilities: The challenges of screening. *Journal of Developmental & Behavioral Pediatrics, 33*, 431–440.

Olley, J. G. (2012) The death penalty, the courts, and intellectual disabilities (pp. 229–240). In J. K. Luiselli (Ed.), *The Handbook of High-Risk Challenging Behaviors in People with Intellectual and Developmental Disabilities*. Baltimore: Paul H. Brookes Co.

Schalock, R. L., Buntinx, W. H. E., Borthwick-Duffs, S., Bradley, V., Craig, E. M., Coulter, D. L., Gomez, S. C., Lachapelle, Y., Luckasson, R. A., Reeve, A., Shogren, K. A., Snell, M. E., Spreat, S., Tassé M. J., Thompson, J. R., Verdugo, M. A., Wehmeyer, M. L., & Yeager, M. H. (2010). *Intellectual Disability: Definition, Classification, and System of Supports* (11th Edition). Washington, DC: American Association on Intellectual and Developmental Disabilities.

Tassé, M. J., and Blume, J. H. B. (2018). *Intellectual Disability and the Death Penalty: Current Issues and Controversies*. Santa Barbara, California: Praeger.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE FIRST JUDICIAL CIRCUIT |
| COUNTY OF ORANGEBURG | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| BAYAN ALEKSEY, | ) | |
| Applicant, | ) | |
| vs. | ) | AFFIDAVIT |
| | ) | |
| STATE OF SOUTH CAROLINA, | ) | |
| Respondent. | ) | |
| | ) | |

STATE OF NEW YORK
COUNTY OF NEW YORK

Comes now, Vera Lall Aleksey, before the undersigned officer duly licensed to administer oaths and swears or affirms as follows:

I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

1. I, Vera Lall Aleksey, reside in New York City, New York. I am over the age of eighteen and competent to swear oaths. I am a citizen of the United States of America.

2. I am the mother of Bayan Aleksey. I was born in Trinidad and grew up there. My father, James Lall, was an educator and served as a school head master. My mother, Esther Lall, died in childbirth when I was a young child.

3. I am fluent in English. In 1966, I came to the United States to study Cosmetology, received my license, and began to work as a hairdresser. I resided in New York City. Soon after, I met Ronald Aleksey, who was married but separated at the time.

4. In May 1968, Ronald Aleksey and I married at City Hall. Ronald was very smart and had attended college. Before we met, Ronald drank a lot of alcohol. He had lost a job in 1963 due to his drinking but he didn't drink when we met.

5. Bayan was born in 1968 at Roosevelt Hospital in Manhattan, NY. During the first four months of my pregnancy, I was very sick. When I was six months pregnant, I was hospitalized for bladder infections. My labor with Bayan lasted 35 hours and the doctors used forceps to turn Bayan. This caused his head and face to be shaped wrong and the doctors fixed it. I had to stay in the hospital for two weeks due to anemia and depression. My depression lasted for several months after I left the hospital.

6. Ronald Aleksey's prior alcoholism gradually recurred and he became an abusive alcoholic. Bayan witnessed my husband physically abusing me but Ronald never physically harmed Bayan. Ronald Aleksey and I separated in 1972 but we never divorced.

7. I had to go back to work as a hairdresser and I had to depend on baby sitters to take care of Bayan. Sometimes he went to work with me. I had to work very hard to make ends meet and did not have time for many social relationships. I only had a few friends I could trust.

8. Ronald continued to have bouts of very heavy drinking. Between his bouts of drinking he would return to live with me and Bayan and things would be good for a while. At those times Ronald tried to be a father to Bayan but he got angry that Bayan was not smart like him. Ronnie did not understand why Bayan was not learning and developing like other children. Ronald complained that Bayan was immature for his age.

9. I had to call the police to remove Ronald from my apartment many times between 1972 and 1990, when he died in a fire. On multiple occasions, restraining Orders were issued keeping Ronald Aleksey away from me and Bayan.

10. Bayan did not walk until he was around two years old. He was three years old before he could not speak more than a few syllables at a time. Even after he started using words, he put them together in a way that didn't make sense.

11. From first grade, Bayan had difficulty making friends and was bullied. When he was in first grade, the school called me and said he was unable to talk.

12. When he got older, Bayan was able to say words OK but he had a limited vocabulary. It was still confusing when he talked because Bayan would string words together that didn't belong together.

13. The entire time Bayan was in school, he had trouble with academics. He had a tutor but even that didn't help Bayan learn like other kids. He was placed in Special Education. His teachers said that he would raise his hand over and over but couldn't answer the question when called on. He was teased and mocked about being in special education. Later in high school he met some new kids in the neighborhood. When they dropped by to see if he wanted to take the bus to school with them he hid from them. He didn't want to go with them because he feared other kids would reveal he was in special ed. Bayan never played any sports or even tried out because he couldn't succeed.

14. Bayan had trouble making friends and he was afraid to go to school. He was quiet and shy never at ease with other kids. He never had kids over for dinner or to stay overnight. When Bayan got frustrated, he would get upset but Bayan never started a fight. He tried to buy friends. One time he took money from my purse and gave it to kids so they would like him. He was very gullible and I was always afraid other kids would take advantage of him. One of his Special Ed teachers told me that Bayan was frequently used by other students and "left holding the bag."

15. Bayan was different from other kids. He used to cry and ask me, "Why did God make me like this, so different from everyone else?" He was very dependent on me and was happiest at home, with just the two of us. Bayan lacked judgment and I tried to help him understand how to behave when he was not at home.

16. When Bayan was about twelve years old, he started going to counseling at Queens Child Guidance Center. Mr. Rosengard was his counselor. Growing into teenage years was really hard for Bayan and he got into trouble at school where he had no friends, feared the other kids, and had a really hard time controlling himself. At one point he became suicidal was placed in residential treatment. Bayan has needed medication

since that time but he was never able to take the right dosage at the right time on his own.

17. Even when he got older, Bayan was not able to make and keep any kind of appointment on his own.

18. When he was approximately fifteen years old, Bayan's counselor, Mr. Rosengard recommended a long-term residential treatment center in Westchester County, New York. But I had talked to another parent whose child had gone there and didn't like it so I said no. In hindsight, that was a big mistake. Now, I believe that consistent long-term treatment could have been a critical turning point for Bayan.

19. Bayan was never able to finish high school. He wanted to learn to work on cars but the training center was out on Long Shore, NY. I took him in the car to visit and enroll at the training center. When he was younger, Bayan and I took the bus from Flushing into New York so I hoped he could make the trip to Long Shore alone but he was afraid to take the bus by himself.

20. Bayan sometimes had little temporary jobs. He tried to work at a service station but it didn't work out there or at a nearby grocery store. He doesn't have the ability to do something alone. Even when he worked at the canteen in prison, he had Mr. Roof to closely supervise him.

21. Bayan wanted to help me with chores at home. He kept his clothes and room very neat. I taught him how to make the bed and fold his clothes. This was how he helped at home. He was not able to cook for himself. Once he tried to surprise me by cooking dinner. He overcooked enough pasta for 10 people but didn't have enough canned sauce. Later, he was able to make deviled eggs that were OK. Bayan tried but he was not able to successfully do grocery shopping, though he did pick up groceries if I called in an order.

22. Bayan always had trouble with managing money. He didn't plan his spending and he rarely had any money to budget. He was never responsible for rent or utility bills. I opened a checking account for him once but he couldn't manage it and I had to close it after a short time.

23. Later, when Bayan became involved with girls, he chose young women with families, children, or pets. He wanted to be part of a real family. He had wanted that all his life. Bayan told the women that I was rich so they would go with him. I always laughed and told them the truth – that I have been a single woman of limited means for a long time.

24. Bayan never had a place of his own or a car of his own. He always got shelter and vehicles through women but he was never able to pull his own weight to maintain those relationships.

25. Since Bayan was arrested I have spent countless hours making calls to get records and assistance for him. I have helped him find cases and write legal papers, too.

26. I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

Further, Affiant sayeth naught.

Vera Lall Aleksey — 12/30/18

Affiant, Vera Lall Aleksey — Date

Sworn to and subscribed before me
this 30th day of December 2018.

NOTARY PUBLIC FOR NEW YORK

My Commission Expires:

4/26/2019

DEBRA A. NELSON
Notary Public, State of New York
No. 01NE6023576
Qualified in Queens County
Commission Expires April 26, 2019

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE FIRST JUDICIAL CIRCUIT |
| COUNTY OF ORANGEBURG | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| BAYAN ALEKSEY, | ) | |
| Applicant, | ) | |
| vs. | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA, | ) | |
| Respondent. | ) | |
| | ) | |

STATE OF NEW YORK
COUNTY OF QUEENS

Comes now, Lester David Rosengard, before the undersigned officer duly licensed to administer oaths and swears or affirms as follows:

I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

1. I, Lester David Rosengard, reside in Flushing, New York. I am over the age of eighteen and competent to swear oaths.

2. I am a ~~retired~~ LCSW Licensed Clinical Social Worker. I am ~~Retired~~ in good standing in the State of New York.

3. I provided individual and group therapy to Bayan Aleksey from 1980-1985 and advised his mother, Vera Aleksey.

4. Group therapy consisted of four to five boys at most. It was intended to help the youngsters learn social skills so they could make friends. They played board games and made models. Bayan loved making models but he was never able to complete one. He was often frustrated in group therapy because he was not skilled in making models and playing board games like the other boys.

5. Bayan was very sensitive to any criticism from the other boys. He was never able to relax in these sessions. When Bayan got frustrated, he would get

agitated and somewhat hyper but he never started a fight.

6. Bayan's speech was OK but he had a limited vocabulary. He also lacked judgment. This was apparent, even to the other kids. In a therapy group titled "Using Your Head," the other boys had better judgment than Bayan and they tried to help Bayan develop the judgment he lacked.

7. Group therapy was supervised so the other boys could not bully Bayan. However, Bayan was obviously naïve and gullible. Bayan had trouble understanding rules so it was hard for him to follow rules. I believe his inability to comprehend rules was sometimes misinterpreted as rebelliousness.

8. Bayan was extremely dependent on his mother, who constantly monitored and protected him. Throughout the time I counseled Bayan, she kept him close to her and in the home as much as possible. She oversaw all of his daily activities.

9. Rather than help Bayan learn to manage his limitations, Mrs. Aleksey made Bayan ashamed of his limitations. She allowed him to cover up his academic limitations by letting him skip school and stay at home. She enabled him to hide his extreme anxiety about being separated from his mother by developing a myth that he was "protecting" her.

10. Bayan's father, Ronald Aleksey, was an abusive alcoholic. He and Vera were separated when Bayan began therapy in 1980. I encouraged Mr. Aleksey to be more supportive of Bayan but he berated Bayan for his poor academic performance. Mr. Aleksey did not seem capable of understanding that Bayan was making poor grades because he was unable to do age and grade level schoolwork.

11. When Bayan was approximately fifteen years old, I felt strongly that he needed to be in a residential treatment center in Westchester County. I was able to arrange a placement there for Bayan. However, at the last minute, his mother Vera Aleksey withdrew her consent. I believe this was a tragic error.

12. Bayan was truthful but he lacked the ability to understand the consequences of his own actions or actions of other people. I feel very badly that Bayan was never able to comprehend that there were people who would use his gullibility and get him into trouble.

Further, Affiant sayeth naught.

Affiant, Lester David Rosengard — Date: 09/20/2018

Sworn to and subscribed before me
this 20 day of September 2018.

NOTARY PUBLIC FOR NEW YORK

My Commission Expires:

VINCENT C PAPA JR.
NOTARY PUBLIC, State of New York
No. 01-PA9820111
Qualified in Queens County
Term Expires March 30, 2022

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | Case No. 2015-CP-38-764 |
| | ) | |
| BAYAN ALEKSEY | ) | |
| *Applicant,* | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA | ) | |
| *Respondent.* | ) | |
| | ) | |

**AFFIDAVIT OF ALLISON FRANZ**

1. I, Allison Franz, am a second-year law student at Cornell Law School, where I participate in the Cornell Capital Punishment Clinic. I began work with Bayan Aleksey's attorneys on Mr. Aleksey's case in June 2019.

2. In September 2019, I was instructed to conduct a readability analysis of Bayan Aleksey's correspondence to South Carolina Department of Corrections staff, dated February 20, 2012. This piece of Mr. Aleksey's writing was referenced in the report of Dr. Alicia Hall's December 27, 2018 diagnostic evaluation report.

3. My research on readability analyses revealed that several tests exist to determine the readability grade level of a piece of writing. Readability tests measure the grade level at which a piece of writing is written. Research indicates that the Flesch-Kincaid test is most frequently used to analyze readability. Lih-Wern Wang et al., *Assessing Readability Formula Differences with Written Health Information Materials: Application, Results, and Recommendations*, 9 Research in Social and Administrative Pharmacy 503, 507–08. The Flesch-Kincaid analysis is performed by inputting text into an online readability calculator or through Microsoft Word, which includes software to perform the analysis.

4. Courts also frequently use the Flesch-Kincaid test to analyze readability, and have performed the analysis by inputting text into online readability calculators found at www.readabilityformulas.com and other sites. *See, e.g.*, *Davis v. Moroney*, 857 F.3d 748 (7th Cir. 2017); *United States v. Montgomery* (W.D. Tenn. 2014) (using the Flesch-Kincaid readability analysis to assist in the determination that the defendant satisfies the first prong of an intellectual disability determination).

5. I performed a Flesch-Kincaid analysis of Mr. Aleksey's February 20, 2012 correspondence by copying and pasting the text into the calculator found at www.readabilityformulas.com. This analysis yielded a Flesch-Kincaid Grade Level score of 4.9, and revealed that Mr. Aleksey's writing is at a fifth-grade level. *See* Exhibit 1.

6. I performed another analysis of the same piece of writing in Microsoft Word. The Word Flesch-Kincaid analysis again revealed that Mr. Aleksey's writing is at a fifth-grade level.

Further Affiant sayeth naught.

Allison Franz

11/4/2019
Date

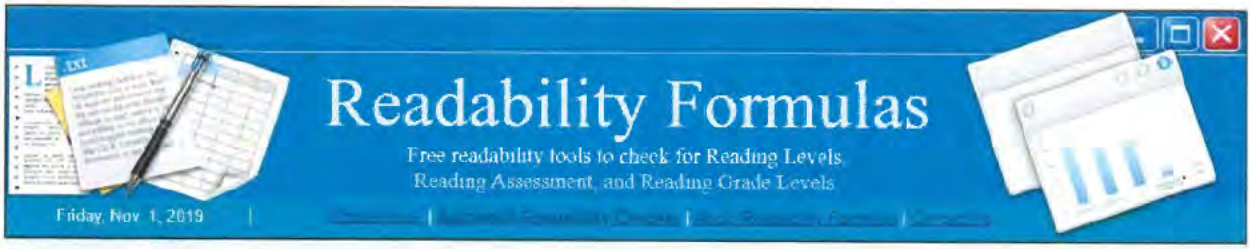
Sworn to and subscribed before me
this 4th day of November 2019.

NOTARY PUBLIC FOR
NEW YORK

My Commission Expires:

9/25/21

# EXHIBIT 1






**Check Your Readability:**
Check Text Readability NOW

Free Readability Calculators

**Learn about Readability Formulas:**
Dale-Chall Formula
Flesch Reading Formula
The Fry Graph
SPACHE Formula
[ View All ]

**Readability Help:**
[ View All Articles ]

**Writing Tips:**
[ View All Articles ]

**English Writing Products:**
StyleWriter software



## Text Readability Consensus Calculator

**Purpose:** Our Text Readability Consensus Calculator uses 7 popular readability formulas to calculate the average grade level, reading age, and text difficulty of your sample text.

## Your Results:

**Your text:** I wanted to let you know that I started to wax the .. (show all text)
unit this past weekend I waxed the whole bottom o the unit. Please, if possible come take a look. it looks good!!! Because of Cpl: Pringle Officer: Miller they got me a buffer from the yard because no one could find the one I normally use in our building. Sgt: Nickles tried to find our buffer as well Cpl: Scarf but could not also find it. Cpl: Pringle, Officer Miller help them get one for me. This weekend I◆ll do the top tier and other parts of the wing. I have to get more wax from Cpt: Brightharp and some white buffing pads. I wanted to please ask if you can allow, Sgt: Nickles, Cpl: Slater, CPL: Pringle, Sgt: Stags, Cpl: Steins, Sgt: Long, Lt: Williams, Lt: Wright, Sgt: Turnbine, Sgt Wentz access to a buffer when its locked up andmost of all on the weekend when Captain Brightharp is not here. And lets say that the above supervisors are not here can officers, Miller, Parker, Butler have access. Please consider my request. I no longer ask Sgt: Pool to do anything because she won◆t do nothing. Sgt: Poole should not be given credit. Sgt: Poole has not helped in no way on how b-side is. It◆s because of B1, A1, B2 shifts that this place looks good. Anyway, if you can come look at how the floor came out I think you will be happy with it. As always, thank you for your time and understanding always.

**Flesch-Kincaid Grade Level:** 4.9
Grade level: Fifth Grade.
[ f ] [ a ] [ r ]

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | ) | |
| | | |
| BAYAN ALEKSEY, #5059 | ) | C/A No. 2015-CP-38 -764 |
| | ) | (Capital Case) |
| Applicant, | ) | |
| vs. | ) | ADDITIONAL RESPONSE |
| | ) | TO APPLICANT'S OFFER |
| STATE OF SOUTH CAROLINA, | ) | TO RELY ON AFFIDAVITS |
| | ) | |
| Respondent. | ) | |
| | ) | |

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. The only objection by Respondent was to the affidavit of Marjorie Hammock. Respondent argued the Court should not accept the affidavit in lieu of live testimony as the affidavit reflected contested matter and opinion. When revisited at the end of the hearing, Applicant advised this Court that they were unable to reach Ms. Hammock to secure her presence at the hearing and confirmed that, to their knowledge, she would not be available for either testimony at a later date or deposition. The Court left the record open and requested Respondent present an additional response. Respondent now submits this additional response and maintains its objection to the Hammock affidavit. Respondent additionally sets out both procedural and substantive reasons for its objection as follows:

1. In his notice, Applicant asserted that 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). However, Applicant did not rely on these affidavits. In fact, 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[1] or Mr. Rosengard for any point or assertion apart from evaluation. 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.

2. Applicant asserted that Ms. Hammock was not available to give testimony at all. 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.

3. 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).

4. Further, no expert testified that he or she relied upon the Hammock report and opinion. In fact, though Applicant was obligated by Judge Early's order to provide all necessary

---

[1] 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.

documents to DDSN no later than November 1, 2018, (*see* Scheduling Order dated June 14, 2018),[2] Applicant did not provide a report from Ms. Hammock or any opinion from Ms. Hammock at any time for the required evaluation.[3] Nor did Applicant request reconsideration by Dr. Hall based on Ms. Hammock's report or opinion. Application'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.[4]

5. As Respondent argued during the hearing, S.C. Code § 17-27- 80 contemplates the potential for use of affidavits during post-conviction relief proceedings: "The court *may* receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." (emphasis added). 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)). *Simpson* is instructive. The South Carolina Supreme Court found no cause to reverse the discretionary ruling admitting a mix of depositions and affidavits "in lieu of live testimony," where such admission did not prejudice the respondent. *Id.* at 607-08, 627 S.E.2d at 712. Of note, the Court observed that "[m]ost of the relevant witnesses

---

[2] As Dr. Hall indicated in her testimony to this Court at the March 24, 2022 hearing, she requested and received documents after this time. Dr. Hall also indicated that she would not reject any materials that Applicant would want her to review.

[3] In fact, the report is dated October 10, 2019, months after the DDSN report was filed on April 1, 2019, and *references as a source* Dr. Hall's report. As Dr. Hall testified, she was never advised there would be additional material coming nor was there a request from Applicant to wait for additional material before issuing a report.

[4] 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.

testified at the PCR hearing and were cross-examined by the State." *Id.* at 608, 627 S.E.2d at 712. Further, the *Simpson* Court noted that the PCR judge allowed "the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." *Id.*

6. Respondent submits that acceptance of the Hammock affidavit would be an abuse of discretion because the affidavit offers a report rife with inadmissible hearsay[5] and includes an opinion that goes to a necessary prong of the intellectual disability diagnosis. Applicant simply asks the Court to accept this inadmissible hearsay and opinion without the challenge and testing that adversarial proceedings provide. The best "counter" to such an opinion is cross-examination. While the State may point to obvious deficiencies in the methodology expressed in the report (and does so below), lack of cross-examination inappropriately insulates Applicant's expert from the rigors of defending the opinion. This is especially troubling here were the subject matter is so obviously subjective and contested.

7. The burden is on the applicant in post-conviction relief. *See* Rule 71.1 (e), SCRCP. In particular, the burden is on an applicant to prove intellectual disability in the capital case context. *Franklin v. Maynard*, 356 S.C. 276, 279-80, 588 S.E.2d 604, 606 (2003) ("the defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence"). If Applicant's witness was unavailable, Applicant should have taken steps to preserve the testimony. Applicant is in civil litigation and has the civil discovery rules available to him in these capital proceedings. S.C. Code § 17-27-150. Applicant has shown no basis (and there appears to be none) why his own failure to preserve evidence should be used to his advantage. *See* Rule 32 (a)(3)(C), (D), and (E), SCRCP (deposition may be accepted by the trial court in lieu of live testimony where "the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment" or

---

[5] Rule 705, SCRE (expert may testify without revealing "underlying facts or data").

the party "has been unable to procure the attendance of the witness by subpoena" or by request with notice of "exceptional circumstances ... in the interest of justice and *with due regard to the importance of presenting the testimony of witnesses orally in open court*, to allow the deposition to be used") (emphasis added).[6]

8. Moreover, courts 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:

> ...the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptions" required by the statutory definition of "mental retardation." The court also discounted some of [Blackwell's expert] Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."

*State v. Blackwell*, 420 S.C. 127, 141–42, 801 S.E.2d 713, 720 (2017).

---

[6] In his notice, Applicant suggests that the State is free to call the affiants as their witnesses. (Notice of Intent, p. 2). As a practical matter, the notice of intent to rely on the affidavits with such suggestion was not made until March 22, 2022 for the March 24, 2022 hearing, hardly ample time. Second, it is not the State's burden to produce Applicant's witnesses. And third, Applicant conceded that the witness's appearance could not be secured by counsel for the hearing. If he could not produce his own witness, it is difficult to see how the opposing party could. At any rate, Applicant's argument that his failure to produce the witness should be held against the State lacks a basis in either theory, logic or law.

The fact that Applicant failed to present this witness or otherwise preserve the testimony through deposition where cross-examination is allowed, does not, under any acceptable theory, allow him to offer a simple affidavit to establish the truth of a contested matter.

9. Substantively, there are further criticisms of the opinion clearly demonstrated in the untested affidavit allegations and conclusion. The methodology reflected in the affidavit is largely inconsistent with recognized professional manuals or best practices. For instance, it is inescapable that the majority of the report focuses on information from one source, Applicant's mother, and heavily on one particular interview with that one source, noted as "Interview with Vera Aleksey, Sept. 17, 2019." Further, the opinion appears wholly subjective without any reference to any standardized assessment or individual challenges to Applicant directly; reflects an assumption of intellectual disability and effort to support the assumption; and, reflects (in considering the fullness of the record before this Court) the rejection and/or discounting of known evidence near the relevant developmental period reflecting on individual capacity outside the control and connection to Applicant's mother. This is error.

Courts often look to relevant professional associations to weigh offered evidence of intellectual disability. *See, e.g., Hall v. Florida*, 572 U.S. 701, 721 (2014) ("These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments."). In *United States v. Davis*, 611 F. Supp. 2d 472, 491 (D. Md. 2009), the federal district court noted and discussed known resources for consideration. It noted that the American Association on Intellectual and Developmental Disabilities ("AAIDD") (formally "AAMR" or the American Association on Mental Retardation), issued a manual that expressed a preference for "standardized

measures." *Id.* Further, the *Davis* court recognized guidance from Dr. John Gregory Olley[7] who had worked within professional structures "toward the establishment of practice standards that would allow courts to judge more objectively whether an evaluation or testimony bearing on the question of mental retardation followed the best practices of the psychology profession." *Id.* at 492. Dr. Olley had opined that "typical procedures for assessing adaptive functioning" do not work-well in this backward looking review. *Id.* (citing Def. Ex. 17, J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 2,* PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/ Division 33, Washington, D.C.), Fall 2006). The *Davis* court found persuasive and helpful these steps as expressed by Dr. Olley to amass appropriate data: "(1) interview the defendant; (2) test the defendant's knowledge; (3) test the defendant's performance; (4) interview family members, neighbors, friends, and former employers; (5) administer an adaptive behavior scale to third-party reporters; (6) administer an adaptive behavior scale to the defendant; (7) examine objective archival information (e.g., school records, eligibility tests for Social Security benefits, etc.); (8) review subjective archival information (comments by teachers, coaches, counselors, etc.); and (9) apply clinical judgment." *Id.* (citing Def. Ex. 17, Olley III at 4–5).

10. Of particular note in this case when considering the above guidance, in contrast to Dr. Hall's interview and testing of Applicant's actual knowledge, Ms. Hammock largely ignores Applicant. Dr. Hall asked Applicant – away from any support sources – how to do some things that may reflect his level of functioning; however, Ms. Hammock did not ask Applicant anything

---

[7] As another federal court noted, Dr. Olley "is particularly experienced in the issue of *Atkins* evaluations. He has published articles on the retrospective assessment of adaptive functioning in *Atkins* cases and has developed criteria for the use of the ABAS-II standardized measure of adaptive behavior." *United States v. Wilson*, 170 F. Supp. 3d 347, 381 (E.D.N.Y. 2016).

in this vein (at least as far as we know from the simple affidavit assertions). While a "veil of competency" can be a danger in relying upon information from the subject, the subject cannot fake actual knowledge.[8] For example, Applicant explained to Dr. Hall the process of money orders and budgeting, cooking and doing laundry, away from his mother.[9] This is consistent with having the *ability* before the end of the developmental period, but not the *opportunity* to demonstrate that ability before the end of the developmental period. Further, there appears to be no objective structure to analyzing the information Hammock received, not even the information she received from her primary source. *See* Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill of Rights Journal, 467, 469 (2014) ("Both manuals [from the AAIDD and the American Psychiatric Association] suggest that reliability is increased by using a combination of informal clinical assessments and standardized assessments of adaptive functioning.").

---

[8] The Report at p. 5 reflects what appears to be an assumption of intellectual disability which shows a bias and a lack of detached inquiry applying accepted principles to arrive at a conclusion later. Ms. Hammock writes, "Bayan, like many people with intellectual disability, relies on masking to conceal his deficits and limitations," then goes on to reflect surface observations and unsupported conclusions. Most strikingly, she asserts, "his girlfriends... took advantage of his deficits," though she has no citation to support that assertion, but not surprisingly, as the trial records show just the opposite – Aleksey often took the lead in the relationships ending in financial detriment *to the girlfriends*. (*See* Respondent Exhibits: Trial Testimony of Theresa McCann; Jaime Farrell; Sarah Pivero).

[9] Dr. Hall plainly noted in the DDSN report that "there is no record of a formal assessment of his level of adaptive functioning." (Court Exhibit 2, DDSN Report, p. 13). Further, Dr. Hall did not need to "rule out" deficits in adaptive functioning as Applicant did not meet the first prong of intellectual disability. Even so, Dr. Hall opined that the information gathered from Applicant and from the records supplied by Applicant did not support the more subjective but occasionally useful prong of the diagnosis in certain cases. *See generally* James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1305, 1329–30 (2018) (noting that low IQ scores is insufficient to show intellectual disability and that "the goal of th[e deficits in adaptive functioning] prong of the definition is to limit the diagnosis of intellectual disability to people who have an actual, significant, disability.").

11. Also of note, the record shows, independent of the crime of murder, relationships with women and Applicant's dominance in the relationships. Though these relationships often ended in schemes or fraud, there is information about his ability to function in business and banking independent of the eventual crimes. There is even information in the record that Applicant navigated through the car buying process, (*see* Respondent's Exhibits, Trial Testimony of Theresa McCann, Sarah Pivero and Marie Moran), yet this information is omitted from consideration based on the report. *See* Everington, *supra.* at 471 ("Key to this is the context of adaptive skill assessment-the individual's *actual performance* in community settings.") (emphasis added); *see also* James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases,* 46 Hofstra L. Rev. 1305, 1332 (2018) ("determining whether an individual has significant limitations in adaptive skills involves a wider-ranging inquiry... the clinician will frequently employ a standardized instrument of assessment" and "will inquire about the subject's adaptive functioning by interviewing individuals who have observed him or her in childhood or in adult life."). Respondent does not suggest reliance on the mere fact of the resulting crimes, rather, Respondent makes the point that there is ample information on ability and independence apart from completion of those crimes. Nor does Respondent suggest that any one strength alone is dispositive, whether being the ability to pay pills, cook or do laundry, but none of those ability seemed to have been fairly or fully considered. That goes to credibility. Again, as Dr. Olley cautioned in his writings, it is preferable to obtain as much information as possible, though the sources in this type of backwards looking review will all be "imperfect." *Davis,* 611 F.Supp.2d at 492 (*quoting* Olley, *supra*). What the affidavit shows, though, is insufficient consideration of available sources of information. Thus, the conclusion as presented is unreliable and not credible.

12. In sum, it stand out that Dr. Hammock's methodology is flawed, result oriented, and incomplete. The affidavit should not be accepted when Applicant failed to present the witness for the State, and for the Court, to question.

**CONCLUSION**

For all the foregoing reasons, Applicant has not shown that the Hammock affidavit should be accepted in lieu of live testimony. The Court should exercise its discretion to reject the offered affidavit in light of the foregoing.

To the extent the Court should accept the affidavit, the methodology outlined in the affidavit undermines the credibility of the stated opinion for the reasons cited above. The opinion should be deemed neither credible, not reliable, nor persuasive

Respectfully Submitted,

ALAN WILSON
Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar No. 4806

By: _____

By: _____

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

May 23, 2022

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS<br>) IN THE FIRST JUDICIAL CIRCUIT |
| Bayan Aleksey,<br>S.C.D.C. No. 5059,<br><br>Applicant,<br><br>vs<br><br>State of South Carolina,<br><br>Respondent. | ) | **Case No. 2015-CP-38-764**<br>**(Capital Case)**<br><br>**CERTIFICATE OF SERVICE BY MAIL** |

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the *Additional Response to Applicant's Offer to Reply on Affidavits* in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

**Lindsey S. Vann, Esquire**
Brandan V. Winkle, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29202

**Elizabeth Franklin-Best, Esquire**
2725 Devine Street
Columbia, South Carolina 29205

DATED this 23rd day of May, 2022.

Angela Brown, Legal Assistant to
Melody J. Brown, Senior Assistant Deputy Attorney General

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



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.

1/14

## 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.

2/14

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,"

---

[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.

4/14

*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).

6/14

*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]

---

[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]

---

[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

---

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

10/14

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

11/14

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,

---

[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.

12/14

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 | IN THE COURT OF COMMON PLEAS |
| COUNTY OF ORANGEBURG | Case No. 2015-CP-38-764 |
| Bayan Aleksey<br>Applicant,<br>vs.<br>State of South Carolina,<br>Respondent. | |



**MOTION TO ALTER OR AMEND JUDGMENT**

Pursuant to Rule 59(e), S.C. R. Civ. P., Applicant Bayan Aleksey, respectfully moves this Court to alter or amend the judgment contained in the Order Denying Applicant's Request for Post-Conviction Relief [hereinafter "the Order"], dated June 30, 2022, filed July 7, 2022, and received by undersigned counsel via email from the Office of the Attorney General on July 22, 2022.[1] The Order contains numerous factual and legal errors and should be withdrawn and replaced by an order drafted by a judge with jurisdiction to adjudicate Applicant's claim that he is a person with intellectual disability.

Below, Applicant sets forth the grounds for altering or amending the Order and judgment; however, undersigned counsel respectfully request this Court allow Applicant an additional thirty (30) days in which to file a memorandum in support of this motion. Counsel have conferred with counsel for Respondent who do not object to the proposed timeline of filing a memorandum in support.

The grounds warranting altering or amending the Order are:

[1] As of this filing, undersigned counsel has not received official notice of the entry of the Court's order from the Clerk of Court or the Court itself.

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).*

Respectfully submitted,

Elizabeth A. Franklin-Best
Elizabeth Franklin-Best, P.C.
2725 Devine Street
Columbia, South Carolina 29205
(803) 331-3421
elizabeth@franklinbestlaw.com

Lindsey S. Vann
Brendan Van Winkle
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
lindsey@justice360sc.org
brendan@justice360sc.org

**Counsel for Applicant**

August 1, 2022.

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| COUNTY OF ORANGEBURG | ) | |
| | ) | Case No. 2015-CP-38-764 |
| Bayan Aleksey | ) | |
| Applicant, | ) | |
| | ) | |
| vs. | ) | |
| | ) | |
| State of South Carolina, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

**MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT**

Pursuant to the agreement between the parties, capital post-conviction relief ("PCR") Applicant Bayan Aleksey submits the following Memorandum in support of his Motion to Alter or Amend Judgment filed on August 1, 2022. Applicant moves pursuant to Rule 59(e), SCRCP for this Court to withdraw and replace the Order Denying Relief ("Order") because the signing judge lacked jurisdiction, the Order was improperly drafted by counsel for the State, and the Order contains numerous factual and legal errors in its consideration of Applicant's claim that he is a person with intellectual disability whose execution is barred pursuant to *Atkins v. Virginia*, 356 U.S. 304 (2002).

## I. JUDGE DICKSON LACKED JURISDICTION TO SIGN THE ORDER DENYING RELIEF.

Judge Edgar Dickson did not have jurisdiction to sign the Order due to his retirement on June 30, 2022.[1] *See* S.C. Code § 14-5-110 (establishing that "[t]erms of office for all circuit court

[1] Judge Dickson's term in Seat 1 of the First Judicial Circuit started on July 1, 2016 and ended on June 30, 2022, and the seat was filled by the Honorable Heath Taylor. South Carolina Judicial Selection Committee, *Term Chart Post 2.2.22 Election, available at* https://www.scstatehouse.gov/JudicialMeritPage/TermsofJudgesandJudicialInformation.php.

judges . . . shall commence as of July first of the year in which they are elected). Though the Order signed by Judge Dickson is dated June 30, 2022, communications between the Chambers and the parties indicate the Order was not actually signed until July 1, 2022, at the earliest. The Order was not filed in the Clerk's Office until July 7, 2022. Relevant email communications are attached as Exhibit 1 and reveal the following chain of events:

- On June 30, 2022, at 1:23 p.m., Judge Dickson's law clerk, Jessica Thompson, sent an email stating that, after consideration of the evidence presented at the evidentiary hearing, the Court denied Applicant's intellectual disability claim. Judge Dickson asked counsel for the State, Melody Brown, to "prepare a Proposed Order and provide it to opposing counsel for their comments." Ms. Thompson noted Judge Dickson's retirement on the same day, stating: "As you may be aware, Judge Dickson's final day on the bench is today, so, unfortunately, if the Order is submitted later than 5pm, we will have to contact court administration to see how it would be possible for him to sign the Order." Ex. 1, p. 1.
- At 4:21 p.m. on June 30, Ms. Brown emailed Judge Dickson and Applicant's counsel with a proposed order and noted "[a] copy is being provided to opposing counsel with this email so that everyone may review at one time. I will be reviewing again for typographical errors."[2] Ex. 1, p. 3.
- At 5:09 p.m. on June 30, Ms. Brown emailed Judge Dickson's law clerk with a few typographical errors noted in the proposed order. Ex. 1, p. 4.
- The following day, on July 1, 2022, Ms. Thompson emailed Ms. Brown asking if "the third sentence of the 'Pending Federal Habeas Corpus Proceedings' section [was] cut off early or am I simply misreading something?" Ex. 1, p. 6.

[2] The Proposed Order submitted by Ms. Brown on June 30, 2022 is attached as Exhibit 2.

- Later on the morning of July 1, 2022, Ms. Brown sent an email responding to Ms. Thompson's question and clarifying that the sentence was incomplete. Ms. Brown sent another email minutes later noting another error in footnote six and explaining that the errors were due to the State "working very quickly yesterday afternoon to provide the proposed language." Ex. 1, pp. 7, 9.
- Also on July 1, 2022, undersigned counsel for Applicant emailed to "object to the State drafting the order—especially in such a short time frame— . . . [and] to the order making findings beyond those indicated by the judge's email yesterday." Ex. 1, p. 11.
- Ms. Brown responded to Applicant's objections to the proposed order on July 5, 2022. In her response, she noted that once a proposed order is signed, the parties should review the order and file a Rule 59(e), SCRCP motion if necessary. Ex. 1., p. 12 (citing *Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019)). Ms. Brown raised the question of how to handle any motions arising from an order:

  > To ensure the ability for the parties to participate in the full review process as outlined above, I would respectfully request that the Court please advise as to the possibility of Rule 59 motion(s) if necessary. If I understood the prior emails correctly, it may be that Judge Dickson's retirement will prompt the need for special permission from our Supreme Court to allow this matter to be retained to completion, or that other arrangements may be made. I would very much appreciate an email that would confirm how to proceed if the motion(s) become necessary.

  Ex. 1, p. 12.
- Ms. Thompson responded to Ms. Brown's email on July 6, 2022. At that time, she signed her email as Law Clerk to The Honorable Judge Heath P. Taylor. She stated: "I do not believe Judge Dickson can retain jurisdiction through the case's completion since he is now retired." Ex. 1, p. 13. At that time, Ms. Thompson provided no indication that the Order had been signed by Judge Dickson.

- On July 22, 2022, Ms. Brown sent an email to undersigned counsel, indicating she determined the Order had been filed and stating: "Yesterday, we checked the public index which shows the attached order as filed. . . . As of this writing, I have not received any such document from the clerk. However since the order has been entered, I thought it best to let you know."[3] Ex. 1, p. 14.
- The Order is stamped:

  FILED FOR RECORD
  WINNIFA B. CLARK

  2022 JUL -7 AM 9:47

  CLERK OF COURT
  ORANGEBURG, SC

  Order, at 1.
- The Order was signed by Judge Dickson in Orangeburg, South Carolina and was dated by hand on June 30, 2022. Order at 14.
- The Order signed and filed corrected the errors noted by Ms. Brown after 5 p.m. on June 30, 2022 and by Ms. Thompson on July 1, 2022. *See* Order at 5, 6, 8, 12, 13, (correcting the errors noted in Ex. 1, pp. 4, 6, 7).

Because the proposed order was not submitted until 4:21 p.m. on June 30, 2022, and errors noted after 5 p.m. on June 30 and on July 1, 2022 were corrected before the judge signed the Order, it appears the earliest the Order could have been signed was July 1, 2022, after Judge Dickson's term ended. Accordingly, he did not have jurisdiction to sign the Order, and it is a nullity. *Cf. Bunkum v. Manor Properties*, 321 S.C. 95, 99, 467 S.E.2d 758, 761 (1996) (finding that judgments

[3] Undersigned counsel did not have any notification from the judge, his clerk, or the Clerk of Court that the Order had been signed and filed until they received notice from Ms. Brown on July 22, 2022.

entered by a court lacking in subject matter jurisdiction "void," "a nullity, and its judgment has no effect") (*citing DeWitt v. S.C. Dept. of Highways & Public Transp.*, 274 S.C. 184, 262 S.E.2d 28 (1980)).

The Order should, therefore, be withdrawn to allow for assignment of a new judge with jurisdiction to adjudicate and issue a ruling on Applicant's claim. *See Ness v. Eckerd Corp.*, 350 S.C. 399, 404, 566 S.E.2d 193, 196 (Ct. App. 2002) (vacating an order by the initial circuit court judge following loss of subject matter jurisdiction and finding another circuit judge should consider post-trial motion following the initial judge's recusal); *SunTrust Morg v. Gobbi*, No. 2006-UP-243, 2006 WL 7286028 (S.C. Ct. App. May 16, 2006) (finding Judge Cottingham properly withdrew a prior order from Judge Baxley who was no longer assigned to that judicial circuit). The Rules of Civil Procedure specifically address such an occasion and provide: "If at any time after a trial or hearing has been commenced, but before the final order or judgment has been issued, the judge is unable to proceed, a successor judge shall be assigned." Rule 63, SCRCP. The rule allows for the successor judge to recall any witnesses, and, upon "certifying familiarity with the record," the successor judge can complete the proceedings—in this case issue an order addressing Applicant's intellectual disability claim. *Id.*

## II. THE COURT IMPROPERLY ADOPTED A PROPOSED ORDER DRAFTED BY COUNSEL FOR THE STATE WITH SCARCELY ANY TIME FOR REVIEW BY APPLICANT'S COUNSEL OR THE COURT.

Even if Judge Dickson signed the Order when he still had jurisdiction to do so—before his term ended on June 30—the signing of an order drafted by the State in less than four hours with limited time for judicial review was improper. The adoption of the State's order with negligible changes in such a short period of time was an abdication of Judge Dickson's duty to make his own findings of fact and conclusions of law.

The Legislature and the Supreme Court of South Carolina have recognized the general impropriety of a capital PCR judge adopting an order drafted by the State. The PCR statute requires a capital PCR judge to "in writing . . . make specific findings of fact and state expressly the judge's conclusions of law relating to each issue." *See* S.C. Code § 17-27-160(D); *see also* S.C. Code § 17-27-80 (governing post-conviction relief cases generally) ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented"). The Supreme Court has repeatedly expressed concerns with PCR courts issuing orders "that do not comply with section 17-27-80 and Rule 52(a), [SCRCP]," requiring that "the court shall find the facts specially and state separately its conclusions of law thereon." *See, e.g.*, *Fishburne*, 427 S.C. at 515, 832 S.E.2d at 589; *Simmons v. State*, 416 S.C. 584, 592–93, 788 S.E.2d 220, 225 (2016). Especially given the seriousness of a death penalty case, the Court "strongly encourage[s]" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); *see also Woodson v. North Carolina*, 428 U.S. 280, 303–04, 305 (1976) ("Because of that qualitative difference [between a death sentence and any other term of imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

The adoption of a State-drafted pleading as the Court's Order is especially prejudicial given the Supreme Court of the United States' increasingly restrictive rulings regarding the scope of federal habeas review. *See, e.g.*, *Shinn v. Ramirez*, 142 S. Ct. 1718, 1732 (2022) (emphasizing the requirement that claims first be raised in state court and that a federal habeas court's "review is highly circumscribed"). As the Court recently reiterated, "the federal court may review the claim based solely on the state-court record," *id.* (citing *Cullen v. Pinholster*, 563 U.S. 170, 180 (2011)), and must "review[] the specific reasons [for denial] given by the state court and defer[] to those

reasons if they are reasonable." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). Given the deference the Court mandates be given state court decisions, letting the State (the Office of the Attorney General) draft the order means the State also in most cases forecloses any possibility of federal court intervention. Thus, at present, for most state court prisoners, state PCR is the last opportunity for meaningful post-conviction review and because of that the process needs to be, and appear to be, fair. Relying on an order written by an adversarial party does not actually provide the required adjudication of the merits of a prisoner's claim *by the* state court. *See* 28 U.S.C. § 2254(d).

Here, the process followed by Judge Dickson was especially problematic because he asked the State to draft the order less than four hours before he was scheduled to retire. The State quickly drafted the order and submitted it less than forty minutes before Judge Dickson's retirement. *See* Ex. 1, pp. 1, 3. That did not allow Judge Dickson to "spen[d] an adequate amount of time reviewing the order before adopting it" to ensure the factual findings and legal conclusions in the Order were in accordance with his own findings of fact and conclusions of law. *See Hall*, 360 S.C. at 365, 601 S.E.2d at 341 (finding that the record demonstrated that a PCR judge who had two days to review and adopt a proposed order spent an adequate amount of time reviewing it, though the issue of a State drafted order was determined to be waived by the PCR applicant).

The timeframe also denied opposing counsel the opportunity to review the proposed order as the Supreme Court of South Carolina has required in non-capital cases where the prevailing party is asked to draft a proposed order. *See Fishburne*, 427 S.C. at 516, 832 S.E.2d at 589 (requiring that "[w]hen counsel for either side prepares the proposed order . . . [a] copy of the proposed order should be transmitted to opposing counsel," and "[o]pposing counsel should promptly review the proposed order and alert preparing counsel and the PCR court as to any

deficiencies in the proposed order."). The thirty-nine minutes between transmission of the proposed order and Judge Dickson's retirement was simply not enough time for the judge or opposing counsel to adequately review the Order.

This abbreviated process for drafting and adoption of the proposed order led to the adoption of "an insufficient PCR order" in two ways: (1) the Order contains factual findings and legal conclusions related to an affidavit presented at the PCR hearing from Marjorie Hammock that were not included in Judge Dickson's email requesting the State draft a proposed order; and (2) the Order makes only conclusory findings related to Applicant's intellectual disability, failing to include specific findings of fact or legal conclusions on each of the three prongs of an intellectual disability determination required by *Atkins*. *See Fishburne*, 427 S.C. at 512, 516, 832 S.E.2d at 587, 589 ("Over the years, we have issued numerous opinions addressing a PCR court's failure to make adequate findings of fact and conclusions of law regarding duly raised issues."); *see also* Order, *Lindsey v. State*, No. 2012-206087 (S.C. Sept. 30, 2014) (vacating a PCR Order of Dismissal "[i]n light of the Court's concern with the frequency and severity of the drafting errors . . . and this Court's admonishments to PCR judges in *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992), and *Hall v. Catoe*, [*supra*]" and remanding "to the circuit court for issuance of an amended order the complies with *Pruitt* and *Hall*, and with S.C. Code Ann. § 17-27-80 (2003)). These insufficiencies further render the Order inadequate to serve as an adjudication on the merits for federal habeas review. *See* 28 U.S.C. § 2254(d). This Court should, therefore, withdraw the insufficient Order, hold any necessary hearings, and issue a reasoned order with the Court's own findings of fact and conclusions of law. *See* Rule 63, SCRCP; S.C. Code § 17-27-160(D).

## III. THE ORDER CONTAINS LEGALLY AND FACTUALLY ERRONEOUS FINDINGS CONCERNING THE AFFIDAVIT OF MARJORIE HAMMOCK.

Although the email requesting the State draft a proposed order did not include any instructions from the court related to an affidavit from Marjorie Hammock, the Order submitted by the State and signed by Judge Dickson ruled the affidavit was inadmissible. This finding is inconsistent with how the issue was addressed at the PCR hearing and the law specifically allowing presentation of evidence through affidavits in PCR hearings.

Prior to the PCR hearing, Applicant 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 Applicant), Marjorie Hammock (a social worker who evaluated Applicant's adaptive functioning by interviewing witnesses and reviewing records), Vera Aleksey (Applicant's mother), Lester David Rosengard (Applicant's childhood counselor), and Allison Franz (a law student who conducted a reading level analysis of Applicant's writing). In that notice, Applicant 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).

Notice of Intent to Rely on Affidavits, at ¶2 (Mar. 22, 2022). Applicant 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." *Id.* at ¶3. Applicant 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." *Id.* at ¶5.

At the beginning of the PCR hearing, the State only objected to admission of the Hammock affidavit, and Judge Dickson took the issue under advisement. During the hearing, he heard testimony from Dr. Alicia Hall, a forensic psychologist at the South Carolina Department of Disabilities and Special Needs who conducted a Court ordered evaluation of Applicant for intellectual disability. Dr. Hall acknowledged that she received the Hammock affidavit with information about Applicant's functioning but not until after she had completed her own evaluation. 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.

At the conclusion of the hearing, Judge Dickson addressed the issue again. He 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. There is no indication in the record that the State took advantage of these opportunities. Instead, the State filed an Additional Response to Applicant's Offer to Rely on Affidavits. The State then drafted a proposed order simply finding the affidavit inadmissible, as

opposed to confronting the information it contained by calling Hammock for cross examination or presenting its own expert.

The Order errs in ruling the Hammock affidavit is inadmissible. Judge Dickson 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. Under these circumstances the affidavit was admissible 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 makes erroneous factual findings related to the affidavit by misrepresenting the record from the PCR hearing. For example, the Order incorrectly concludes that Hammock was unavailable for the State to cross examine. Order at 11. At the hearing, Applicant 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. This was not a concession that Hammock was unavailable. There is nothing in the record to indicate 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 concludes that "Applicant's conduct at the hearing" abandoned his intent to rely on affidavits. Order at 12. Essentially, the Order finds that Applicant presenting 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 Applicant

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 should be corrected by this Court in an amended Order.

## IV. THE ORDER FAILS TO ADEQUATELY ADDRESS AND ADJUDICATE, AND ULTIMATELY REACHES AN ERRONEOUS CONCLUSION REGARDING, APPLICANT'S CLAIM THAT HE IS A PERSON WITH INTELLECTUAL DISABILITY.

Following the rejection of the Hammock affidavit, the Order fails to address any of the other evidence Applicant presented at the PCR hearing and, in doing so, fails to make adequate factual findings or legal conclusions. The Eighth Amendment's prohibition against cruel and unusual punishment bars "the execution of persons with intellectual disability."[4] *Hall v. Florida*, 572 U.S. 701, 704 (2014); *Atkins v. Virginia*, 536 U.S. 304 (2002). South Carolina has defined intellectual disability 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) (2018). This definition comports with the medical community's generally accepted definition of intellectual disability 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. *Hall*, 572 U.S. at 710; *Atkins*, 536 U.S. at 308, n. 3; *State v. Blackwell*, 420 S.C. 127, 139 801 S.E.2d 713 (2017); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). Accordingly, a ruling on whether a capital defendant (or in this case, a capital PCR Applicant) is a person with intellectual disability

[4] The Court previously referred to "intellectual disability" as "mental retardation." In *Hall*, the Court instructed that the term "intellectual disability" replaces and has the same meaning as "mental retardation." *Hall*, 572 U.S. at 704 (citing Rosa's Law, 124 Stat. 2643).

requires consideration of evidence presented on all three diagnostic criteria and factual findings and legal conclusion on each of the three prongs.

At the hearing, Applicant presented evidence on all three prongs,[5] yet the Order includes only a conclusory finding crediting the testimony of Dr. Hall and one conclusory paragraph on the question 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.

Order at 13.

This conclusory and blanket rejection of Applicant's claim is insufficient. It fails to address that Applicant presented evidence on all three prongs of intellectual disability and how that evidence undermined Dr. Hall's conclusions. Further, the Order does not explain why the evidence presented failed to satisfy the three prongs of the intellectual disability criteria, or even *which* of the three prongs were not met. This is simply insufficient for meaningful appellate or federal habeas review. *See McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 240, 241 (1991) ("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

[5] Even discounting Hammock's affidavit, Applicant presented evidence relevant to each of the three prongs, including Dr. David Price who testified he administered an IQ test with a score in the intellectual disability range, testimony from Pamela Leonard regarding the (in)validity of IQ scores in Applicant's school records, records from Applicant's developmental period (school, counseling, and work), and affidavits from Applicant's mother and counselor discussing his adaptive functioning during the developmental period.

[S.C. Code § 17-27-80 (1976)]. Accordingly, we reverse the order denying McCray relief and remand for a new PCR hearing."). This Court must remedy the lack of factual findings and conclusions of law, by vacating Judge Dickson's Order and replacing it with a reasoned order.

## CONCLUSION

For the reasons stated above, this Court should withdraw the previously entered order and replace it with an order drafted by a judge with jurisdiction to adjudicate Applicant's claim that he is a person with intellectual disability, not subject to the ultimate punishment of death.

Respectfully submitted,

Elizabeth A. Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

Lindsey S. Vann
Brendan Van Winkle
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
lindsey@justice360sc.org
brendan@justice360sc.org

**Counsel for Applicant**

August 31, 2022.

# Exhibit 1:
# Court & Party Emails

Gmail

Lindsey Vann <lindsey@deathpenaltyresource.org>

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Dickson, Edgar W. Law Clerk (Jessica Thompson)** <edicksonlc@sccourts.org> Thu, Jun 30, 2022 at 1:23 PM
To: Melody Brown <MBrown@scag.gov>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Dickson, Edgar W. Secretary (Catherine C. Wilson)" <edicksonsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Counsel,

On March 24, 2022, the Court held a PCR evidentiary hearing on Applicant's intellectual disability claim in which he alleges his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. The definition of "intellectual disability" requires three diagnostic criteria be found: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period.

At the 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 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.

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.

Ms. Brown, Judge Dickson asks that you prepare a Proposed Order and provide to opposing counsel for their comments. As you may be aware, Judge Dickson's final day on the bench is today, so, unfortunately, if the Order is submitted later than 5 pm, we will have to contact court administration to see how it would be possible for him to sign the Order.

**Thank you,**

***Jessica Thompson***

***Law Clerk***

***The Honorable Judge Edgar W. Dickson***

***P.O. Box 1949***

***Orangeburg, SC 29116***

***P: (803)-535-2187***

***E: edicksonlc@sccourts.org***

---

**From:** Melody Brown <MBrown@scag.gov>
**Sent:** Monday, May 23, 2022 4:51 PM
**To:** Dickson, Edgar W. <edicksonj@sccourts.org>; Dickson, Edgar W. Law Clerk (Jessica Thompson) <edicksonlc@sccourts.org>; Dickson, Edgar W. Secretary (Catherine C. Wilson) <edicksonsc@sccourts.org>
**Cc:** 'lindsey@justice360sc.org' <lindsey@justice360sc.org>; brendan@justice360sc.org; elizabeth@franklinbestlaw.com; Ed Salter <ESalter@scag.gov>; Angela Brown <abennett@scag.gov>
**Subject:** Bayan Aleksey: Capital PCR action - 2015-cp-38-764



[Quoted text hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Melody Brown** <MBrown@scag.gov> Thu, Jun 30, 2022 at 4:21 PM
To: "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Dickson, Edgar W. Secretary (Catherine C. Wilson)" <edicksonsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Dear Ms. Thompson:

Please accept this proposed order as requested. A copy is being provided to opposing counsel with this email so that everyone may review at one time. I will be reviewing again for typographical errors. Thank you.

[Quoted te t hidden]

**Aleksey, 2015 PCR. Proposed Order Denying Relief (03029390).docx**
34K

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Melody Brown** <MBrown@scag.gov> Thu, Jun 30, 2022 at 5:09 PM
To: "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Dickson, Edgar W. Secretary (Catherine C. Wilson)" <edicksonsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Dear Ms. Thompson:

We found a few typographical errors:

p. 6 at n. 2 – Case No. should be 1998-008987

p. 8 italicized "summary dismissal of Ground" should be "Grounds" (plural)

p. 12 at 5 lines from the bottom does have "Application's expert" instead of "Applicant's expert"

p. 13 (first few sentences) "other jurisdictions that have recognized" should be substituted grammar correction

I apologize for these errors and hope that they have not detracted terribly from review.

Please let me know if I may provide anything further.

Sincerely,

Melody

**MELODY J. BROWN, Senior Assistant Deputy Attorney General**
Office of the South Carolina Attorney General

Capital and Collateral Litigation Section | Office 803-734-6305 | mbrown@scag.gov

P.O. Box 11549 | Columbia, SC 29211

scag.gov

[Quoted te  t hidden]

Gmail

Lindsey Vann <lindsey@deathpenaltyresource.org>

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Dickson, Edgar W. Law Clerk (Jessica Thompson)** <edicksonlc@sccourts.org> Fri, Jul 1, 2022 at 10:36 AM
To: Melody Brown <MBrown@scag.gov>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Ms. Brown,

Was the third sentence of the “Pending Federal Habeas Corpus Proceedings” section cut off early or am I simply misreading something? I apologize if I am.

**Thank you,**

***Jessica Thompson***

***Law Clerk***

***The Honorable Judge Edgar W. Dickson***

***P.O. Box 1949***

***Orangeburg, SC 29116***

***P: (803)-535-2187***

***E: edicksonlc@sccourts.org***

---

**From:** Melody Brown <MBrown@scag.gov>
**Sent:** Thursday, June 30, 2022 5:10 PM
**To:** Dickson, Edgar W. Law Clerk (Jessica Thompson) <edicksonlc@sccourts.org>; Dickson, Edgar W. <edicksonj@sccourts.org>; Dickson, Edgar W. Secretary (Catherine C. Wilson) <edicksonsc@sccourts.org>
**Cc:** 'lindsey@justice360sc.org' <lindsey@justice360sc.org>; brendan@justice360sc.org; elizabeth@franklinbestlaw.com; Ed Salter <ESalter@scag.gov>; Angela Brown <abennett@scag.gov>
**Subject:** RE: Bayan Aleksey: Capital PCR action - 2015-cp-38-764



[Quoted text hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Melody Brown** <MBrown@scag.gov> Fri, Jul 1, 2022 at 10:59 AM
To: "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Good morning:

You are correct to note that needs attention. I think it should read just "filed a motion to stay" with "pending" deleted - a drafting error imported from the return. Good catch. I did not intend to submit any further procedural fact for consideration.

Melody

**MELODY J. BROWN, Senior Assistant Deputy Attorney General**
Office of the South Carolina Attorney General

Capital and Collateral Litigation Section | Office 803-734-6305 | mbrown@scag.gov

P.O. Box 11549 | Columbia, SC 29211

scag.gov



[Quoted text hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Melody Brown** <MBrown@scag.gov> Fri, Jul 1, 2022 at 11:18 AM
To: "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

May I respectfully add that there is an error in n. 6 on p. 7 – the note was to reference the motion for stay in state court – it should read: "Applicant's motion to stay was not specifically ruled upon; however, it was rendered moot when the Supreme Court of South Carolina issued the decision in 2016."

I do apologize for these drafting errors – we were working very quickly yesterday afternoon to provide the proposed language.

[Quoted te t hidden]

Gmail

Lindsey Vann <lindsey@deathpenaltyresource.org>

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Dickson, Edgar W. Law Clerk (Jessica Thompson)** <edicksonlc@sccourts.org> Fri, Jul 1, 2022 at 11:51 AM
To: Melody Brown <MBrown@scag.gov>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Not a problem, thank you.

**Thank you,**

***Jessica Thompson***

***Law Clerk***

***The Honorable Judge Edgar W. Dickson***

***P.O. Box 1949***

***Orangeburg, SC 29116***

***P: (803)-535-2187***

***E: edicksonlc@sccourts.org***

---

**From:** Melody Brown <MBrown@scag.gov>
**Sent:** Friday, July 1, 2022 11:18 AM
**To:** Dickson, Edgar W. Law Clerk (Jessica Thompson) <edicksonlc@sccourts.org>; Dickson, Edgar W. <edicksonj@sccourts.org>; Taylor, Heath P. Secretary (Catherine C. Wilson) <htaylorsc@sccourts.org>
**Cc:** 'lindsey@justice360sc.org' <lindsey@justice360sc.org>; brendan@justice360sc.org; elizabeth@franklinbestlaw.com; Ed Salter <ESalter@scag.gov>; Angela Brown <abennett@scag.gov>
**Subject:** RE: Bayan Aleksey: Capital PCR action - 2015-cp-38-764



[Quoted te t hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Lindsey S. Vann** <lindsey@justice360sc.org> Fri, Jul 1, 2022 at 4:06 PM
To: "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>
Cc: Melody Brown <MBrown@scag.gov>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Dear Ms Thompson,

We received your email and the State's proposed order. On behalf of Mr. Aleksey, we object to the State drafting the order-especially in such a short timeframe-as the Supreme Court of South Carolina does not approve of this practice and "strongly encourages" judges presiding in capital cases to "draft their own findings of fact and conclusions of law." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). We also object to the order making findings beyond those indicated by the judge's email yesterday.

Thank you, and I hope you have a good holiday weekend.

Best,
Lindsey S. Vann
Executive Director, Justice 360
900 Elmwood Avenue, Suite 200
Columbia, SC 29201 | (803) 765-1044

[Quoted text hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Melody Brown** <MBrown@scag.gov> Tue, Jul 5, 2022 at 11:24 AM
To: "Lindsey S. Vann" <lindsey@justice360sc.org>, "Dickson, Edgar W. Law Clerk (Jessica Thompson)" <edicksonlc@sccourts.org>
Cc: "Dickson, Edgar W." <edicksonj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Good morning:

In light of opposing counsel's email, I would submit in contrast to Applicant's reliance on *Hall v. Catoe*, which, incidentally, did not prohibit the practice, the more recent case of *Fishburne v. State*:

The preparation and finalization of a PCR order is often a collaborative effort. 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."). 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 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. Once a proposed order is finalized, signed by the PCR judge, filed, and served upon the parties, the parties should thoroughly review the final order to make sure all issues raised were adequately addressed as required by section 17-27-80 and Rule 52(a); if they were not, a timely ****590** Rule 59(e) motion should be filed, requesting the PCR court to address the appropriate issues.

*Fishburne v. State*, 427 S.C. 505, 516, 832 S.E.2d 584, 589–90 (2019).

To ensure the ability for the parties to participate in the full review process as outlined above, I would respectfully request that the Court please advise as to the possibility of Rule 59 motion(s) if necessary. If I understood the prior emails correctly, it may be that Judge Dickson's retirement will prompt the need for special permission from our Supreme Court to allow this matter to be retained to completion, or that other arrangements may be made. I would very much appreciate an email that would confirm how to proceed if the motion(s) become necessary.

Thank you.

[Quoted text hidden]

Gmail

Lindsey Vann <lindsey@deathpenaltyresource.org>

# Bayan Aleksey: Capital PCR action - 2015-cp-38-764

**Taylor, Heath P. Law Clerk (Jessica Thompson)** <htaylorlc@sccourts.org> Wed, Jul 6, 2022 at 11:57 AM
To: Melody Brown <MBrown@scag.gov>, "Lindsey S. Vann" <lindsey@justice360sc.org>
Cc: "Taylor, Heath P." <htaylorj@sccourts.org>, "Taylor, Heath P. Secretary (Catherine C. Wilson)" <htaylorsc@sccourts.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>, "Goodstein, Diane S. Law Clerk (Mark A. Hinds)" <DGoodsteinLC@sccourts.org>

Ms. Brown,

I do not believe Judge Dickson can retain jurisdiction through the case's completion since he is now retired. However, I've emailed Judge Goodstein's law clerk to confirm whether she can request the Supreme Court reassign the case to Judge Taylor for any subsequent proceedings/motions that are filed in the case. Hopefully this answers your question.

Thank you,

***Jessica Thompson***

***Law Clerk***

***The Honorable Judge Heath P. Taylor***

***P.O. Box 1949***

***Orangeburg, SC 29116***

***P: (803)-535-2187***

***E: htaylorlc@sccourts.org***

[Quoted text hidden]

Gmail

**Lindsey Vann <lindsey@deathpenaltyresource.org>**

# Bayan Aleksey: Capital PCR action - ORDER FILED

**Melody Brown** <MBrown@scag.gov> Fri, Jul 22, 2022 at 9:19 AM
To: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, "brendan@justice360sc.org" <brendan@justice360sc.org>
Cc: Ed Salter <ESalter@scag.gov>

Dear Counsel:

Good morning.

Yesterday, we checked the public index which shows the attached order as filed. We reached out to the clerk's office and requested a copy of the form showing service as that did not appear in the scan. We checked here and we did not have a copy from clerk. As of this writing, I have not received any such document from the clerk. However since the order has been entered, I thought it best to let you know.

Sincerely,

Melody

**MELODY J. BROWN, Senior Assistant Deputy Attorney General**
Office of the South Carolina Attorney General

Capital and Collateral Litigation Section | Office 803-734-6305 | mbrown@scag.gov

P.O. Box 11549 | Columbia, SC 29211

scag.gov

**Order (Denying Rellief) on MR.Filed 07-07-2022. (03052455xD2C78).PDF**
406K

# Exhibit 2: Proposed Order Submitted by Counsel for the State

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

[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 pending. 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 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 dismissed 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. 1198-008987).

*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]

---

[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 Ground (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]

[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

[8] Though 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 retardation"

our 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

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). Application'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,

---

[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 jurisdiction that has 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 _____ day of May, 2021.

_____
Edgar W. Dickson, Circuit Court Judge
By Special Assignment

_____, South Carolina.

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



A15

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

---

[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

---

[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).

4/7

> 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

---

[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.

6/7

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 ~~December~~ 5, 2024

7/7