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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM ORANGEBURG COUNTY
Honorable Edgar W. Dickson, Circuit Court Judge

BAYAN ALEKSEY, #5059 ..... PETITIONER

V.

STATE OF SOUTH CAROLINA. ..... RESPONDENT.

Appellate Case No. 2024-000140

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I.

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

II.

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

III.

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

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

I.

Whether the PCR judge abused his discretion in disallowing one of Aleksey's five offered affidavits when the judge expressed clear reasons for not accepting one of the five demonstrating a classic exercise of the discretion both the PCR statute and case law vests in the PCR judge?

II.

Whether the PCR judge erred in making his findings of facts and conclusion of law as required by S.C. Code Ann. § 17-27-80 by not addressing each way Aleksey failed in his burden of proof?

III.

Whether the PCR judge's ruling that Aleksey failed to carry his burden of proof to show he suffers from intellectually disability lacks factual support or reflects an error of law when the only evidence before the PCR judge was that Aleksey failed to provide an opinion on intellectual disability while the court's expert provided a compelling and comprehensive opinion that Aleksey did not meet the criteria?

STATEMENT OF THE CASE

Petitioner, Aleksey, appeals from the denial of relief from his second post-conviction relief (PCR) action. In the second action, Aleksey raised a claim of intellectual disability and exemption from execution pursuant to *Atkins v. Virginia,* 536 U.S. 304 (2002), along with eight additional claims of ineffective assistance against 1998 trial counsel, and one claim of "cumulative effect" resulting in prejudice. Ultimately, only the intellectual disability claim was allowed to proceed to hearing. The PCR court's determination that Aleksey failed to carry his burden of proof to show he suffers from intellectual disability is the only issue raised in his appeal.

The Murder and Trial Proceedings

Aleksey murdered Sgt. Franklin Lingard of the South Carolina Highway Patrol on New Years's Eve 1997. Aleksey was arrested on January 1, 1998, and indicted for murder at the January 1998 term 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 Aleksey on the charge. On August 24, 1998, the case was called to trial before the Honorable Edward B. Cottingham. A jury returned both the guilty verdict and after the separate sentencing proceeding, found that a sentence of death was warranted. Judge Cottingham imposed the sentence on September 1, 1998.

Direct Appeal

Robert M. Dudek, Esq., of the South Carolina Office of Appellate Defense, represented Aleksey on appeal and briefed four issues for this Court's consideration. On November 13, 2000, this court affirmed and additionally found that "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." *State v. Aleksey*, 343 S.C. 20, 36, 538 S.E.2d 248,

256 (2000). Rehearing was denied as was Aleksey's subsequent petition to the Supreme Court of the United States. *Id*; *Aleksey v. South Carolina*, 532 U.S. 1027 (2001).

First Post-Conviction Relief Action and Appeal

Aleksey filed an application for post-conviction relief on May 31, 2001. (*See* 2001-CP-38-628). 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 Aleksey in the action. Judge Goodstein issued an order denying relief on February 4, 2010, and later denied a petition to alter or amend. Aleksey, then represented once again Mr. Dudek and joined by Elizabeth Franklin-Best, both of the Division of Appellate Defense, filed a petition for writ of certiorari with this Court on June 22, 2011, presenting nine (9) issues from the PCR action. The petition was denied on May 22, 2014. (*Aleksey v. State of South Carolina*, Appellate Case No. 2010-173586). A petition for rehearing was denied as was a subsequent petition to the Supreme Court of the United States. *Id, Aleksey v. South Carolina*, 574 U.S. 1162 (2015).

Federal Habeas Corpus Proceeding (Stayed)

The federal district court appointed Teresa Norris, Esq., and Elizabeth Franklin-Best, Esq., (at that time no longer with the Division of Appellate Defense), as counsel for the federal action. On June 9, 2015, counsel for Aleksey filed a petition for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. On the same date, counsel also filed a motion to stay in order to return to state court and pursue additional post-conviction proceedings. Over objection, the Magistrate granted a stay on August 19, 2015. (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.

Second Post-Conviction Relief Action

Aleksey filed his second PCR application on June 11, 2015. (App. 950-965). On August 10, 2015, the State, made its initial return and moved to dismiss the action as improperly successive and untimely.[1] This Court initially assigned the Honorable Doyet A. Early, III, to hear the matter. Judge Early held a motions hearing on the State's motion to dismiss on September 9, 2015, and also received argument on Aleksey's motion to stay the proceedings until resolution of *Robertson v. State*, 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. Aleksey, through counsel, was to provide "all pertinent materials to SCDDSN which Applicant finds necessary to a complete and fair evaluation" by the neutral examiner. Upon Judge Early's retirement, this Court assigned the matter to the Honorable Edgar W. Dickson on February 20, 2019. 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

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[1] Aleksey failed to include the return and many of the filings in the second action in the appendix filed with his petition. A petitioner is obligated to file the record before the lower court in seeking certiorari review. *See* Rule 243(d), SCACR (petitioner's tasked with providing the appendix for the action along with his petition); Rule 243(f), SCACR ("The appendix shall contain: (1) The entire lower court record."). However, for purposes of this return, Respondent notes that many of the documents are available online in the Public Index in Case No.2015-CP-38-00764, at https://publicindex.sccourts.org/Orangeburg/PublicIndex/CaseDetails.aspx?County=38&CourtAgency=38002&Casenum=2015CP3800764&CaseType=V&HKey=747888109122897910981108514711080114835056886757109111681208288797167100505780651117555538852511 07. Should the Court grant certiorari review, it is likely an order to direct Aleksey to supplement the appendix would be necessary.

Aleksey does not meet the diagnostic criteria for intellectual disability as defined in the South Carolina Code of Laws." (App. 949).

On April 26, 2021, the State filed an amended return and motion to dismiss and once again submitted that the action was untimely and improperly successive and should be summarily dismissed. An evidentiary hearing was held on March 24, 2022, which focused solely on Aleksey's claim of intellectual disability, as all other claims would be dismissed as untimely and improperly successive. The same day of the hearing, Aleksey filed a notice of intent to rely on affidavits, which he had served on March 22, 2022. Notably, Aleksey did not present any expert at the evidentiary hearing to testify that he met all three prong of an intellectual disability diagnosis in that expert's opinion. (*See* App. 1110). At the close of the hearing, Judge Dickson kept the record open for additional argument and/or other remedial action regarding one of the affidavits that offered an opinion on one prong of the three required for the diagnosis. (App. 142-143). The State filed a response on May 26, 2022, maintaining its objection to the affidavit. (App. 1032-1071). By order of relief filed July 7, 2022, Judge Dickson denied relief. (App. 1043-1056). Aleksey filed a motion to alter or amend on August 3, 2022, (App. 1057-1103), which was denied by order filed January 11, 2024, (App. 1104-1110).

Aleksey filed a petition for writ of certiorari in this Court on September 19, 2024. This return follows.

GENERAL SUMMARY OF FACTS

This Court provided the following general summary of the murder, the investigation and certain key evidence, in the direct appeal opinion:

> 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.
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> 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.
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> 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).

STANDARD OF REVIEW

The standard of review for post-conviction relief matters "depends on the specific issue" before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings "and will uphold them if there is evidence in the record to support them." *Smalls*, 422 S.C. at 180, 810 S.E.2d at 839 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016)). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40.

ARGUMENT

Primarily the petition should be denied as the record fully and fairly supports that Aleksey simply failed in his burden of proof. There is no contest to the controlling law applied, and the facts of record demonstrate support for Judge Dickson's order. Notably, Aleksey failed to offer any clinical opinion that he suffered from intellectual disability and the court's examiner found the records – the majority of which Aleksey provided her for her review and opinion – did not support a diagnosis of intellectual disability. Certiorari review is not warranted in this case. In further support of this position, Respondent would respectfully show the Court:

I. The PCR judge properly exercised his discretion in declining to accept one affidavit offered by Aleksey where the affidavit contained an opinion on adaptive functioning which is roundly considered the most subjection prong of an intellectual disability diagnosis and one that a court should critically consider given its subjective nature.

The gist of Aleksey's argument is that the PCR judge abused his discretion in not accepting one of several affidavits Aleksey offered in lieu of testimony (the Hammock affidavit) when Aleksey gave notice (not quite two days before the hearing) that he intended to rely on the affidavit.[2] (Pet. at 4-5). Aleksey asserts that he followed "typical practice" in noticing his intent to rely on affidavits,[3] therefore, the burden shifted to the State to produce his witness or otherwise

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[2] As it turns out, Aleksey did not rely on affidavits in lieu of testimony, and had some affiants testify. The PCR judge concluded that Aleksey's "stated desire to rely on these affidavits 'in lieu of direct examination' was abandoned by Applicant's conduct at the hearing." (App. 1100).

[3] The "typical practice" assertion appears to derive from the fact capital PCR applicants have attempted to rely on affidavits in other cases after service of a notice on the State shortly before a hearing. The State is not aware of any "typical practice" approved by the court, and the statute and case law continue to place the acceptance of affidavits in the discretion of the PCR judge. Further, the State is allowed to object for untimely notice of material or for any other reason. Consequently, reference to "typical practice" fails to support any valid point concerning admissibility.

counter the opinion or show prejudice.[4] (Pet. at 4-6). However, the discretion to accept affidavits in lieu of testimony rests with the PCR court, not Aleksey. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing S.C. Code Ann. § 17-27-80). Further, this Court did not assign a burden in *Simpson,* rather, it underscored that acceptance of the affidavit "result[ed] in no prejudice to the State," since "[m]ost of the relevant witnesses testified at the PCR hearing" and the State was allowed additional time for further submissions "countering the evidence presented by Simpson." *Id.* at 607-608, 627 S.E.2d at 712. The critical question for this Court remains whether the PCR court abused its discretion. *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982) (finding a complaint by the PCR applicant that the judge accepted an affidavit in PCR proceedings lacked merit where he failed to allege and show an abuse of discretion).

"An appellate court will not reverse the trial court's" discretionary "decision unless that court abused its discretion." *State v. Allen*, 370 S.C. 88, 94, 634 S.E.2d 653, 656 (2006). "An abuse of discretion occurs when the trial court's ruling is [1] based upon an error of law, such as application of the wrong legal principle; or, [2] when based upon factual conclusions, the ruling is without evidentiary support; or, [3] when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or [4] when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious. *Id.* at 94, 634 S.E.2d at 656. The record supports that there was no abuse of discretion.

Here, the PCR judge plainly exercised his discretion as he allowed affidavits that contained either uncontested assertion of fact, or the witnesses were at the hearing and would be cross-examined; but disallowed the Hammock affidavit for these discrete reasons: (1) counsel conceded

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[4] The burden of proof is on the applicant in post-conviction relief proceedings. *See, e.g., Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 329 (2011). Aleksey cannot obtain by fiat a shift of the burden that the law assigns him.

that they were unable to reach Ms. Hammock for the hearing; (2) "Ms. Hammock was the only affiant who offered an opinion on a contested prong essential to a diagnosis (adaptive functioning in the development period) based on a contested basis (incomplete evaluation and/or bias in consideration of information)"; (3) the affidavit and/or opinion did not appear to have been reviewed and/or relied upon by Aleksey's other expert presented at the hearing, Dr. Price, for an opinion[5] ; and (4) the argument and case law regarding the importance of the court's assessment of credibility of an expert opining on adaptive functioning. (App. 1054-1055). The ruling is the essence of discretion and well-documented for this Court's review. Moreover, Aleksey has shown no lack of support for each of the noted reasons.

As to the first point, Aleksey argues that simply because they could not reach Ms. Hammock, that did not necessarily mean the State could not, and the record does not show whether the State could or could not reach Ms. Hammock. (Pet. at 6). Aleksey misses the point. The point made was that Aleksey did not have Ms. Hammock at the hearing and their witness was not available for the PCR court to assess her credibility.[6] That is not a contested point.

As to the second point, Aleksey does not argue that Ms. Hammock does not give an opinion, indeed, he cannot make that argument as the affidavit plainly shows she did.

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[5] As the PCR judge noted, "To the contrary, Dr. Price plainly stated he did not have an opinion as to intellectual disability." (App. 1054; *see also* App. 110).

[6] Counsel for Aleksey asserted at the hearing they "did try to contact Ms. Hammock before this hearing. She is 86 years old and retired... and we were not able to get in touch with her." (App. 10). Contrary to Aleksey's assertion that the record was held open for her to be contacted and called, or another expert called, (*see* Pet. at 6), the PCR court did not hamstring the State to such an extent or indicate that the affidavit would otherwise be accepted; rather, the PCR court afforded time for the State consider the failure to present the witness and expressed that it would consider other options including another hearing if necessary as the matter was worked through. (*See* App. 142).

As to the third point, the affidavit was not otherwise referenced by another expert to even attempt to show it was admissible for another purpose. *See generally* rule 703, SCRE (expert's basis for opinion "need not be admissible in evidence").[7] Again, Aleksey does not argue to the contrary.

And to the fourth and final point, case law, including this Court's precedent, supports the importance of a circuit court's assessment of the credibility of a witness regarding adaptive functioning. *See State v. Blackwell*, 420 S.C. 127, 143, 801 S.E.2d 713, 720-721, n. 11, and n. 12 (2017) (underscoring the difference to be given the circuit court judge in assessing credibility of expert testimony on adaptive functioning assessment); *United States v. Candelario-Santana,* 916 F. Supp. 2d 191, 211 (D.P.R. 2013) ("[b]ecause of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater" and "courts must make their own independent determinations of the clinicians' judgment and credibility") (citing *United States v. Davis*, 611 F. Supp. 2d 472, 491 (D. Md. 2009)[8]; *United States v. Smith*, 790 F. Supp. 2d 482, 505 (E.D. La. 2011)[9]). Incidentally, the PCR judge could have alternatively found the failure to present the witness undercut reliance on any assertion in the affidavit for the same basic reason, the *court* was unable to adequately assess credibility. Acceptance of the affidavit did not require acceptance

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[7] Notably, the rule is not a basis for admissibility, only reference. *See State v. Kromah,* 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). Further, one expert cannot testify to the credibility of another. *Id.*

[8] The court observed: "[a]daptive behavior is a broader category, and more amorphous, than intellectual functioning." *Davis*, 611 F.Supp.2d at 491.

[9] The court observed: "... as the degree to which a matter is left to an individual clinician's judgment increases, so does the degree to which the Court must rely on its assessment of the relative competence and credibility of the individual experts to resolve disputes between them..." *Smith*, 790 F.Supp.2d at 505.

of the opinion. However, as our statute and case law demonstrates, just because the affidavit was offered does not compel its acceptance. It is inescapable that Aleksey failed to present this witness, and equally inescapable the PCR judge was not compelled to accept the offered affidavit in lieu of live testimony subject to cross-examination.

Further, Aleksey is unable to show prejudice because of the ruling alone. To be sure, Ms. Hammock opined (on very limited support, mostly for a 2019 interview with Aleksey's mother)[10], that Aleksey has "significant deficits" in some areas and perhaps others she suspected but could not support, but nonetheless opined that his "deficits" would support the adaptive function prong of an intellectual disability diagnosis.[11] (App. 1018). She did not, however, opine on intellectual disability.

In sum, Aleksey shows no cause for the granting of the petition to address this issue where he fails to show an abuse of discretion by the PCR judge.

II. Aleksey fails to show insufficiency in the PCR judge's findings of facts and conclusion of law as required by S.C. Code Ann. § 17-27-80, simply by asserting the PCR judge did not address each way Aleksey failed in his burden of proof.

Aleksey asserts that he presented evidence to support each prong of an intellectual disability diagnosis and that the PCR judge did not make sufficient findings of facts and conclusion

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[10] The affidavit reflects heavy reliance on this affidavit though it begins with a listing of other resources. (*See also* App. 12). Of course, Aleksey did not present Ms. Hammock at the hearing to explain this inconsistency. Further, Aleksey omitted to inform this Court that Ms. Hammock passed away, at the age of 88 on March 2, 2024. *See* https://www.legacy.com/obituaries/name/marjorie-hammock-obituary?pid=206485477&page=2. Again, because Aleksey did not present the witness for cross-examination at the hearing, or preserve testimony with the availability of cross-examination such as in a *de bene esse* deposition, he has failed to preserve the opportunity for challenge to the evidence, and now, there is no possibility to challenge the evidence on a remand of any type.

[11] To be clear, as set out in section III below, that was not an "uncontested" conclusion. The court's expert, Dr. Hall, testified to the contrary along with her detailed explanations.

ofo law addressing his evidence and/or arguments to meet the requirements of S.C. Code Ann. § 17-27-80. (Pet. at 8). He asserts that "the court merely ruled that the evidence was insufficient to 'indicate that Applicant satisfied all three diagnostic criteria.' App. 1055." (Pet. at 9).[12] Because this could mean that "Aleksey did satisfy one or two of the criteria, but not all three, or that ... Aleksey failed to prove all three criteria." (Pet. at 9). The obvious problem is that either one means that Aleksey failed in his burden of proof exactly as the PCR judge found.

Aleksey's argument is akin to an argument that a PCR judge did not make fact-findings on deficient performance but only on lack of prejudice in an ineffective assistance of counsel analysis. It should be rejected for the same reason. That would be an exercise in futility, and one not worthy of a remand. *See Strickland v. Washington,* 466 U.S. 668, 697 (1984) ("there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffective assistance claim is not to grade counsel's performance."). The order in this case shows that each issue was addressed (which Aleksey does not contest)[13], and as far as the treatment of the intellectual disability issue, the PCR court addressed both the controlling law and important facts. This follows the statute. S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.").

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[12] Though he asserts the PCR court "merely ruled" as indicated above, Aleksey simply takes one sentence from the conclusion. The prior pages set out the PCR court's guiding principles for the determination. (*See* App. 1051-1055).

[13] Every issue apart from the intellectual disability claim was found barred under the statute of limitations and found to be improperly successive without exception. (App. 1050-1051).

Notably, the PCR judge found that "[t]he applicable law [was] not at issue and ha[d] not been challenged." (App. 1052). Aleksey still does not challenge the applicable law as set out in the order. Moreover, the PCR judge found that "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 out case law." (App. 1055). As this Court set out in *Blackwell*, if *evidence exists* that the first prong could be met, then advance to the second prong is permitted, but that does not mean *that a finding* on that prong one is met, or stated different, that such a "finding" would mean anything when other prongs fail. *See Blackwell,* 420 S.C. at 143, n. 11, 801 S.E.2d at 721 (though evidence of higher scores existed, "given the fact that Blackwell's I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell's adaptive functioning using the current clinical standards presented by the medical experts"). *See also Moore v. Texas*, 581 U.S. 1, 14 (2017) ("Because the lower end of Moore's score range falls at or below 70, the CCA had to move on to consider Moore's adaptive functioning"); *Hall v. Florida,* 572 U.S. 701, 723 (2014) ("when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits"). Notably, the Supreme Court recently reversed and remanded a capital case where the lower federal court's opinion could be read as approving mandatory acceptance of a lower score. *Hamm v. Smith*, 604 U.S. 1, 2 (2024).

In other words, the referenced precedent supports that a possibility of meeting the first prong may allow advancement to the second prong; yet, failure to meet any one of the prongs defeats the possibility of a diagnosis, much like defeating one element of self-defense. *See State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("It is an axiomatic principle of law that

the defense has not been established if any one element is disproven."); *see also Blackwell,* at 162, 801 S.E.2d at 731-732 ("because the absence of mental retardation is neither an element of the offense of capital murder nor a statutory aggravating circumstance, the State has no burden of proof").

In this case, unlike other such claims reviewed by this Court, there were no competing opinions to carefully consider and preserve the fact-findings related to the credibility and weight analysis for purposes of appellate review. The PCR judge found the court's expert, Dr. Hall, was credible after consideration of not only the report, but also the detailed testimony presented at the hearing. Additionally, it must be considered that a finding that one is not intellectually disabled is not a diagnosis, it is absence of a condition, which follows closely (and quite naturally) the decision ultimately made by the PCR judge. It cannot be overlooked that Aleksey had the burden of *showing* intellectual disability. *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003). Neither the PCR judge nor the State had a burden of disproving intellectual disability and there is no presumption of intellectual disability on which Aleksey could rely. Aleksey's criticisms should be rejected.

Respondent also notes that Aleksey had the opportunity to contest the findings, and he presented his own proposed findings in an order that found relief should be granted. (App. 1107). This shows not only that the result was likely more at issue more than the path to the conclusion, but also that Aleksey was well heard, his position was simply rejected. In fact, when asked to review the order again, the PCR judge confirmed the order reflected his findings of facts and conclusions of law as previously shared with the parties via email. (App. 1107). The focus was narrow and the order reflects just that. (App. 1104 and 1108).

For all these stated reasons, Respondent submits that Aleksey's complaints are insufficient to warrant certiorari review on this issue.

III. Aleksey shows no error in the PCR judge's determination that he failed to carry his burden of proof simply because the PCR judge did not address each of Aleksey's scattered pieces of evidence and/or arguments as potentially supporting individual prongs of the diagnosis when Aleksey failed to offer a diagnosis to critically examine compared to the court's expert's thorough opinion, and when failure to establish any one of the three recognized prongs prevents a finding of intellectual disability.

Following his previous argument in close measure, Aleksey argues in this issue a number of ways he suggests the PCR judge erred. However, Aleksey does not dispute that he failed to present any witness to opine that he has intellectual disability. He did not. Aleksey does challenge in this appeal the rejection of the Hammock affidavit on alleged adaptive functioning deficits but does not dispute that the affidavit was ultimately not accepted, as he could not. Yet, in argument for this issue, he claims the PCR judge erred in not setting out particular evaluations for specific items of evidence, Essentially, Aleksey argues that the PCR judge must record his findings on each piece of evidence or step of the analysis regarding the evidence to adequately rule. Aleksey can show no basis in law for that requirement.

The PCR judge found court expert Dr. Hall's testimony and conclusions based on her detailed analysis of the evidence to be credible, (App. 1053), noting that her evaluation was "thorough," (App. 1053), and that she accepted any information Aleksey would offer, but Aleksey "did not provide a formal evaluation for adaptive functioning ... though [he] had opportunity to do so." (App. 1053). He reaffirmed his findings after review based on the Rule 59 motion, (App. 110). Aleksey apparently attempts to convince this Court that there is enough evidence to piece together an opinion that he has failed to offer; thus, the PCR judge failed to set out the multiple different reasons his presentation failed. This, the PCR court was not required to do.

For instance, Aleksey attempts to take to task Dr. Hall's testimony on IQ scores and summarily favors by mere reference to the test administered by Dr. Price (Aleksey's PCR expert). (Pet. 10-13). Notably, Aleksey only reference testing beginning in 1998. (Pet. 11). Dr. Hall made a detailed analysis of *all* available testing, three of which were given during the developmental period showing results of 96 at 6yoa which was adjusted for a Flynn Effect[14] to 87.75; another approximately 5 years later showing an 82 score, adjusted to 80.35, and another at 14yoa showing a result of 90, adjusted to 87.03. (*See* App. 944).

Further, in cross-examination, Dr. Hall pointed out that the 2015 test (by Dr. Grant), contained a calculation error and should have been reported a point lower, or 72 instead of 73. (App. 58). Notably, Aleksey has adopted that calculation *by Dr. Hall* in his petition to this Court. (App. 11). As to her use of the GAI (General Ability Index), while Aleksey asserts that it was improper to use the score, (*see* Pet. 12), he agreed that the manual for the test itself recognizes the GAI as an optional score. (App. 62 and 84). Aleksey has shown no departure from clinical standards. *See, e.g., Hall v. Florida.*, 572 U.S. at 724 (rejecting a determination that "contradicts the test's own design"). Further, Aleksey does not engage with Dr. Hall's careful conclusions on the full range of evidence on this prong, which reflect consideration of his "emotional disability" not an "intellectual disability" affecting his placement in school, (*see* App. 31-36), and agreeing that the later scores "appear" to place him in the range of intellectual disability, "the preponderance

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[14] The Flynn adjustment is not required but is often beneficial to capital defendants. As the Supreme Court has explained the adjustment is based upon "a controversial theory involving the inflation of IQ scores over time—required adjusting [a] score downward," generally by decreasing the score by .3 points per year "since the test was last normed." *Dunn v. Reeves,* 594 U.S. 731, 736 and n. 2 (2021). Aleksey is oddly silent to these developmental period, standardized test results showing a consist placement "in the Low Average range." (App. 944). He references them only as to the onset prong, and suggest that though they were reported, they should not be relied upon because he could not find at this late date the "raw data" to review. (*See* Pet. at 17). That is addressed later in this return.

of the evidence suggest thee scores are an underestimation of his true intellectual functioning," (App. 948).

Aleksey also complains that Dr. Hall found he had deficits in adaptive functioning, but, once again, fails to engage in the whole of the evaluation on this point as demonstrated in the testimony and report. Dr. Hall testified that Aleksey had a diagnosis of ADHD which correlates to with having to appear to possessive some "adaptive deficits," but that upon questioning, Aleksey could actively describe a lack of deficits and other contemporaneous matters also support the lack of deficits in the required number of areas. (*See* App. 47-52 and 948). In essence, Aleksey is correct that Dr. Hall found the *appearance* of some deficits, but close investigation revealed what appeared to be deficits for the intellectual disability prong were not tied to a limitation in intellectual functioning in the developmental period; thus, not supportive of intellectual disability. (App. 948-949). Rather than evaluation of facts, Aleksey attempts to rely on the *absence of evidence* and suggests that ADHD is not inconsistent with intellectual disability, (Pet. at 15-16), but that again misses the mark. Aleksey has the burden of showing intellectual disability exists whether or not ADHD was also present. That he did not do.

Lastly, for onset, Aleksey dismisses Dr. Hall's review of available record in favor of an argument that not enough was discovered to ensure At the hearing, Aleksey did not attempt to undermine the scores with evidence, but with the *absence* of more materials to ensure the testing was correctly administered and scored. (*See* App. 118-119). He relies on that absence here, as well. (*See* Pet. at 17-18). The fact the scores were reported by educational facilities and one medical facility was not questioned nor was the fact question that the tests noted as given were standardized, acceptable instruments to determine IQ. (*See* App. 939). Aleksey is squarely back

at burden of proof – that burden was his and the PCR judge did not accept speculation over known facts. Again, Aleksey has failed to present an issue worthy of certiorari review.

Additional Sustaining Ground

The PCR judge denied the State's motion to find the intellectual disability claim untimely and improper successive. Respondent suggests that the ordinary and standard procedural bars could be acknowledged as additional sustaining grounds again showing that Aleksey is not entitled to any relief.

In *Franklin v. Maynard*, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003), this Court "establish[ed] procedures implementing the *Atkins* decision." The *Franklin* case sets out that post-*Atkins* cases will have a claim of intellectual disability first determined by the trial judge, with the possibility of having the evidence of intellectual disability also submitted to the jury where the claim is rejected pre-trial. 356 S.C. at 279, 588 S.C.2d at 606; *see also State v. Blackwell*, 420 S.C. 127, 166, 801 S.E.2d 713, 733–34 (2017) ("Even though this procedure may be perceived as affording a defendant the opportunity to re-litigate the denial of a pre-trial *Atkins* determination, we believe the pre-trial and penalty phase presentations effectuate the procedure identified in *Franklin*."). For pre-*Atkins* cases, the claim may be raised as a free-standing claim under the PCR statute. 356 S.C. at 280, 588 S.C.2d at 606. *See also State v. Laney*, 367 S.C. 639, 646-47, 627 S.E.2d 726, 730 (2006) (re-affirming *Franklin* procedure). Critically, this Court recognized in *Franklin* that intellectual disability claims are subject to the one-year PCR statute of limitations but not barred as a claim could be filed in one-year pursuant to the "newly recognized right" section. *See Id.* at 280 & n. 7, 588 S.E.2d at 606 & n. 7 (citing to S.C. Code Ann. § 17–27–45(B) (2003), the Court found that "[a]n applicant is not barred from raising the mental retardation issue in a second PCR application," since the new Constitutional rule announced in *Atkins* – that the

Eighth Amendment bars the execution of a mentally retarded defendant - created a "substantive standard not previously recognized or right not in existence at time of state court trial, and ... [this new rule was] intended to be applied retroactively"). Pursuant to *Franklin,* this claim should have been denied as untimely and improperly successive.

As argued in the amended return, Aleksey's jury proceedings were in 1998, so he does fall within the pre-*Atkins* division of *Franklin.* However, his PCR action began in 2001 and did not conclude until 2010. In this case, Aleksey's claim is both improperly successive under S.C. Code Ann. § 17-27-90, as it was available to be raised in his prior PCR action, and time-barred under S.C. Code Ann. § 17-27-45(B), as it must have been raised within one year of the newly recognized right. Even calculated leniently from *Franklin,* Aleksey had up to and including November 3, 2004 (more correctly, though, he had up to and including June 20, 2003, which is one-year from *Atkins*). Aleksey did not file his final amended application until January 31, 2005, which after either of these dates.[15] Under *Franklin* and S.C. Code Ann. § 17-27-45(B), the claim should have been dismissed.

Relying in large measure on the unpublished opinion in *Woods v. State*, No. 2019-001713, 2019 WL 6898088, at *1 (S.C. Dec. 18, 2019)[16] and over the State's objection for the prohibition

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[15] As also included in the return, the prior PCR attorneys would have had opinions from testing at the Department of Mental Health that reflected Aleksey had "at times appeared to be trying to purposefully present himself as more impaired than he actually is." (Amended Return at 21, quoting from William S. Hall evalution). Further, in a pre-trial hearing from August 11, 1998, forensic psychiatrist Dr. Richard Frierson not only testified that he considered Aleksey to be malingering but that he was able to form an "opinion that his approximately I.Q. would fall in the high 70's, possibly into the very low 80's" or basically, "somewhere between 77 and 82." (Amended Return at 22 n. 15, citing [prior] PCR App. 2348).

[16] Only the *Woods* opinion was offered at that time; however, Respondent brings to the Court's attention that most recently, in *State v, Terry,* an inmate did not raise an *Atkins* claim until after exhaustion of all ordinary state and federal remedies. This Court, citing the possibility of exemption from execution, granted a stay, and also allowed the litigation. (*See* Appellate Case No.

against using unpublished opinion as precedent, Aleksey advised the PCR judge that this Court has recognized an exception to the procedural bars asserted by the State. The PCR judge ultimately accepted the argument for exception. Respondent submits that *Franklin* correctly synthesized the competing interests and remains good law. This Court may consider the procedural bar arguments as an additional sustaining ground under *Franklin*. Again, Aleksey is not entitled to any relief.

CONCLUSION

Based on the foregoing, this Court should deny the petition.

Respectfully submitted,

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1997-006197). Even so, both are in tension with the published *Franklin* decision which is the only one consistent with the PCR statutory provisions for timely presentation of issues.