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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Orangeburg County

Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case Number: 2024-000140

BAYAN ALEKSEY, #5059,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

BRIEF OF PETITIONER

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

STATEMENT OF THE CASE

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

In his federal habeas proceedings, Aleksey was appointed new counsel who investigated Aleksey's functioning and discovered evidence that he was likely a person with intellectual disability. Habeas counsel filed a successive PCR application alleging, as relevant here, that Aleksey's execution is barred by *Atkins* and the Eighth Amendment. The PCR court appointed counsel to represent Aleksey, and the case proceeded to an evidentiary hearing on the question of Aleksey's intellectual disability.

Prior to the evidentiary hearing, counsel for Aleksey filed a Notice of Intent to Rely on Affidavits. App. 966–1031. At the hearing, the State objected to the admission of one of the five affidavits: the affidavit of Marjorie Hammock who assessed Aleksey's adaptive functioning. App. 6. The PCR court declined to rule on the admissibility of the affidavit at the hearing, giving the State the opportunity to contact Hammock to call her for cross examination or to identify a rebuttal witness of their own. App. 142. The State did not take advantage of either opportunity. *See* App. 1032–41. On the day of his retirement, PCR Judge Edgar Dickson requested the State draft a proposed order denying *Atkins* relief. App. 1074. Following submission of an order drafted by the

State in less than four hours, the judge signed the proposed order, with negligible changes, which for the first time found the Hammock affidavit was inadmissible. *See* App. 1055.

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

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

Despite this evidence, the PCR Court did not individually rule on the three criteria required for a determination of whether a person is intellectually disabled, making only a conclusory finding that "there was simply not enough evidence presented to indicate that applicant satisfied all three diagnostic criteria." App. 1055. Aleksey filed a motion to alter or amend, which was denied

without the PCR court making additional factual findings and legal conclusions. App. 1071, 1109–10. This appeal follows.

ARGUMENT

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

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

> This procedure is authorized pursuant to S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." The South Carolina Supreme Court has endorsed this process. *See Simpson v. Moore*, 367 S.C. 587, 607–08, 627 S.E.2d 701, 712 (2006) (rejecting the State's argument that it was error for the PCR court to consider over forty depositions and twenty-two affidavits in lieu of live testimony), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982). Accordingly, courts across the state have received affidavits in lieu of testimony in numerous capital post-conviction cases. *See, e.g., Stephen C. Stanko v. State*, 08-CP-22-01446 (Georgetown County); *Louis Michael Winkler, Jr. v. State*, 11-CP-26-03907 (Horry County); *Kevin Mercer v. State*, 09-CP-32-5465 (Lexington County); *Kenneth Simmons v. State*, 05-CP-18-1368 (Dorchester County); *Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun County); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County).

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

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

At the conclusion of the hearing, Judge Dickson addressed the admissibility issue again and did not rule the affidavit was inadmissible. Instead, he allowed the record to remain open for the State to attempt to contact Hammock or to obtain their own expert who could respond to the information contained in the affidavit. App. 142 (allowing the State time to "find somebody, or try to find [Hammock] and call her"). The State failed to take advantage of these opportunities. Instead, the State filed an Additional Response to Applicant's Offer to Rely on Affidavits, again asking the PCR Court to reject the affidavit. App. 1032–41. The State then drafted a proposed

order finding the affidavit inadmissible—which the PCR judge signed—instead of confronting the information it contained by calling Hammock for cross examination or presenting its own expert.

The PCR Court's ruling that the Hammock affidavit is inadmissible was an abuse of discretion. The PCR judge properly allowed the State the opportunity to call Hammock for cross examination or to rebut the information contained in her affidavit. App. 142. The State's failure to do so does not render the affidavit inadmissible, and there was no prejudice to the State. *See Simpson*, 367 S.C. at 607, 627 S.E.2d at 608–09 (finding no prejudice to the State where "the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by" the PCR applicant).

Further, the Order made erroneous factual findings related to the affidavit by misrepresenting the record from the PCR hearing. *See State v. Jones*, 416 S.C. 283, 290, 786 S.E.2d 132, 136 (2016) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."). For example, the Order incorrectly concluded that Hammock was unavailable for the State to cross examine. App. 1053. At the hearing, counsel for Aleksey indicated that Hammock had not responded to a phone call and an email before the hearing, and because the law permits an applicant to present proof by way of affidavit, he decided to admit her affidavit at the hearing. App. 11. This was not a concession that Hammock was unavailable. Nothing in the record indicates that the State even tried to contact Hammock despite being given additional time to do so, much less that it subpoenaed her to appear at a hearing or noticed her for a deposition. *See* Rule 804, SCRE (defining the situations in which a declarant is considered "unavailable").

Similarly, the Order erroneously concluded that "Applicant's conduct at the hearing" abandoned his intent to rely on affidavits. App. 1054. Essentially, the Order found that Aleksey's

presentation of live testimony from two witnesses who also provided affidavits in the case waived his ability to rely on affidavits from another witness. The law makes no such provision, and Aleksey clearly demonstrated his intention to rely on affidavits, including Hammock's, by submitting a formal written notice of intent to do so in advance of the hearing, arguing in favor of the affidavits' admissibility during the hearing, and making no waiver of his intent to rely on them at the hearing. These erroneous legal and factual findings were an abuse of discretion warranting remand for the PCR court to consider the evidence presented in the affidavit and to reassess the determination of Aleksey's intellectual disability in light of that evidence.

II. THE PCR COURT ERRED IN FINDING APPLICANT IS NOT A PERSON WITH INTELLECTUAL DISABILITY.

The PCR Court also erred in finding Aleksey is not a person with intellectual disability. In ruling on the issue, the PCR Court failed to make specific findings regarding each of the three diagnostic criteria that must be considered when ruling on an *Atkins* claim. S.C. Code § 16-3-20(C)(b)(10) (outlining three diagnostic criteria: (1) significantly subaverage intellectual functioning, (2) deficits in adaptive behavior, and (3) manifestation during the developmental period). Instead, the order denying relief included only a conclusory finding crediting the testimony of Dr. Hall, App. 1053, and one conclusory paragraph finding "there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria."[1] App.

[1] The full 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. [*State v.*] *Blackwell*, 420 S.C. [127,] 139, 801 S.E.2d [713,] 719 [(2018)]. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

1055. Though it is unclear from the PCR Court's order whether it found Aleksey satisfied some but not all of the diagnostic criteria, even if it found Aleksey failed to prove all three, it was in error because Aleksey presented evidence to satisfy all three diagnostic criteria for the diagnosis of intellectual disability.

a. *Legal and Clinical Standards for Intellectually Disability*

Persons with intellectual disability are categorically ineligible for the death penalty. *See Atkins*, 536 U.S. 304; *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). This categorical exemption recognizes that, as a class, persons with intellectual disability are less morally culpable, and therefore, less deserving of the death penalty. This is because intellectual disability results in a person having an inability to make "calculated judgments," to "control impulses," and "to abstract from mistakes and learn from experience." *Atkins*, 536 U.S. at 316–20; *Hall v. Florida*, 572 U.S. 701, 708–09 (2014). While states are left with "the task of developing appropriate ways to enforce the restriction on executing the intellectually disabled," that discretion is "not unfettered," and "must be informed by the medical community's diagnostic framework." *Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (quoting *Hall*, 572 U.S. at 719). When assessing intellectual disability, the states and courts cannot disregard current medical standards in favor of older clinical standards or lay stereotypes about intellectually disabled people. *Moore*, 581 U.S. at 13, 18–20.

South Carolina's definition of intellectual disability is consistent with the medical community's, identifying three required diagnostic criteria: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period. *See* S.C. Code § 16-3-20(C)(b)(10); Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition Text Revision 38 (2022) [hereinafter "DSM-5-TR"]; AAIDD,

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App. 1055.

Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support, Twelfth Edition 13 (2021) [hereinafter "AAIDD-12"]. Intellectual disability must be proven by a preponderance of evidence at a hearing. *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (citations omitted).

b. *Significantly Subaverage Intellectual Functioning*

A person meets the significantly subaverage intellectual functioning prong if his intellectual functioning, as measured by a comprehensive standardized IQ test, is two standard deviations below the population mean, including a margin for measurement error. DSM-5-TR at 39. This means a full-scale IQ score of approximately 75 or below when assessed on a comprehensive standardized IQ test that is individually administered according to the proper protocols. *Id.*; *Atkins*, 536 U.S. at 309 n.5 ("It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual functioning prong of the mental retardation definition."). When a petitioner presents evidence that the "individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual functioning deficits," reviewing courts must "continue the inquiry and consider other evidence of intellectual disability." *Moore*, 581 U.S. at 15.

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

[2] App. 58–59, 101, 145, 939, 942.

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

Because the PCR Court failed to make any findings regarding Aleksey's intellectual functioning, appellate review must consider the evidence and testimony presented on his IQ scores in the first instance. Dr. Hall acknowledged these scores "appear to be in the Intellectual Disability range," App. 948, but she improperly discounted the scores in completing her evaluation.[5] First, she made subjective findings that Aleksey did not put forth sufficient effort or malingered on his IQ tests instead of relying on objective measures to determine his effort. She opined that Dr. Vidic's 1998 testing "was an underestimate," but she admitted that Dr. Vidic did not administer any testing to determine if Aleksey malingered on the IQ test. App. 59–60. On her own testing in 2018, Dr. Hall admitted that she did not administer any testing to make an objective finding of whether Aleksey malingered, though she has administered such testing in another *Atkins* case. App. 63–64. Contrary to her subjective findings on malingering, when Aleksey was administered

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

[4] Dr. Hall reviewed the raw data from Dr. Grant's administration of the WAIS-IV in 2015 and identified a calculation error in Dr. Grant's scoring. Dr. Grant reported Aleksey's IQ score was 73, but Dr. Hall rescored the testing and determined it was 72. App. 58–59.

[5] Dr. Hall did not offer an opinion on Dr. Price's 2019 testing because it was administered after she completed her evaluation. *See* App. 145, 949. Dr. David Price testified at the hearing regarding his administration of the IQ test to Aleksey. In his expert opinion, the test he administered provided a reasonably valid measure of Aleksey's intellectual functioning. App. 108, 145.

an objective test to determine malingering by Dr. Grant in 2015, it demonstrated that Aleksey was not malingering. App. 60.

Dr. Hall's assertions of malingering are further undermined by the consistency in Aleksey's scores over time. It is not feasible that an individual could fake consistent IQ scores over a period of many years. Indeed, "comparing test scores across multiple administrations, over years, and even across standardized tests may provide the most robust evidence of effort and performance." Marc J. Tasse & John H. Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* 101 (2018). Contrary to Dr. Hall's assertions, Aleksey's consistent scores, within four points of each other on four tests across twenty years, demonstrates he was not malingering and the scores represent a valid measure of his intellectual functioning.

Dr. Hall also improperly disregarded the in-range full scale IQ score from Aleksey's 2015 testing. Dr. Hall did so not because of malingering, but because she said "there was too much variability between the indices." App. 60. She explained that a full-scale IQ score is made up of subscores on four indices, which are verbal comprehension, perceptual reasoning, working memory, and processing speed. App. 60. Because of the variation between the subscores, she relied on the General Ability Index ("GAI") instead of the full-scale IQ. App. 61. Doing so was improper because the GAI is based only on the verbal comprehension and perceptual reasoning indices, ignoring the working memory and processing speed indices, which were the lowest two subscores on Aleksey's IQ test.[6] App. 61. Essentially, reliance on the GAI allowed Dr. Hall to cherry pick Aleksey's highest subscores rather than rely on the full scale IQ score.

[6] The GAI is "summary score that is less sensitive than the FSIQ to the influence of working memory and processing speed." David Wechsler, *WAIS-IV Technical and Interpretive Manual*, at 166 (4th Ed. 2008). When used, the GAI is meant to be "compared to the FSIQ to assess the effects of working memory and processing speed on the expression of cognitive ability," which can provide insights on supports necessary for a test taker. *Id.* However, the testing manual itself

Dr. Hall's reliance on the GAI was contrary to the clinical standards. The testing manual for the IQ test administered explains that working memory and processing speed are important factors that contribute to overall IQ, and therefore, the full-scale IQ score. App. 61-62. Eliminating these scores "reduces the breadth of coverage" of the score. App. 61. Accordingly, the testing manual does not provide for use of the GAI in diagnosing or ruling out intellectual disability. App. 62–63. The medical community has also expressly rejected the practice of discounting a full-scale IQ just based on variability between the subscale scores. *See* AAIDD-12, at 28 ("[A]lthough some have suggested that clinicians should never interpret the full-scale IQ score if there is significant variability or discrepancy between the subscale scores, the current evidence indicates that there is no reason to question the validity of the full-scale IQ even in cases where there is significant factor/part score variability."); *see also* DSM-5-TR, at 42 (recognizing that IQ testing "may identify areas of relative strengths and weaknesses", in other words, variability among the subscores).

Accordingly, there is no basis for discounting the IQ scores that demonstrate Aleksey's intellectual functioning falls within the intellectual disability range. Assuming the circuit court found Aleksey failed to satisfy the intellectual functioning prong of intellectual disability, it was in error.

c. *Deficits in Adaptive Functioning*

Adaptive behavior refers to typical activities of everyday living in a community setting. AAIDD-12 at 29. To satisfy this criterion, an individual must demonstrate deficits in one of three

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recognizes that: "In general, the FSIQ is considered the most valid measure of overall cognitive ability. Working memory and processing speed are vital to the comprehensive evaluation of cognitive ability, and excluding measures of these abilities from a summary score reduces its breadth of construct coverage." David Wechsler, *WAIS-IV Administration and Scoring Manual*, at 5 (2008).

skill areas of adaptive behavior: conceptual, social, or practical. AAIDD-12 at 31; DSM-5-TR at 37. Adaptive deficits exist when at least one domain "is sufficiently impaired that ongoing support is needed for the person to perform adequately across multiple environments, such as home, school, work, and community." DSM-5-TR at 42. Without specific findings from the court below on adaptive functioning, this Court must review in the first instance the evidence Aleksey presented that he has deficits in adaptive functioning—specifically, the conceptual and social domains of adaptive functioning. Dr. Hall recognized Aleksey had deficits in these areas, but she improperly attributed those deficits to Attention Deficit Hyperactive Disorder ("ADHD") instead of intellectual disability.

Conceptual skills involve using concepts or abstract principles to solve a problem, and include skills like school or academic skills, money management skills, and how people use judgment in new situations. DSM-5-TR at 39. Aleksey's school records, App. 458–873, revealed that he was referred in 1974 as a first grader, for special education screening, and the evaluator found his "fund of educationally relevant information and his ability to deal abstractly with that information is at a retarded level." App. 73, 463. Aleksey later had to repeat both fourth and fifth grade. App. 73. At the end of fifth grade, in 1979, Aleksey was again evaluated for special education services. App. 74. The child psychologist conducting the evaluation indicated he "suspect[ed] that [Aleksey's] fundamental academic skills are also deficient." App. 75. Aleksey was nearly retained in seventh grade as well. App. 75. The following year, Aleksey's mother asked the school to place Aleksey in regular math classes, but the school responded that he was receiving work on a third-grade level and his performance was "far below grade level." App. 76, 578. Then, in eighth grade, Aleksey was placed in a special education class, and the school made modifications for him to take standardized testing as a result. App. 77. In a 1982 Individualized

Educational Program, the school recognized a need to provide Aleksey testing modifications, including extending or waiving the time limit and that the questions should be read to him. App. 77–78. Finally, after his repeated academic failures, Aleksey dropped out of school around the ninth grade. App. 78. Dr. Hall agreed Aleksey's academic performance demonstrates deficits in conceptual skills. *See* App. 67.

Outside of school, witnesses reported Aleksey also "had trouble understanding rules so it was hard for him to follow rules." App. 214. He "always had trouble managing money." App. 219. He was never responsible for paying bills or rent and could not manage a checking account. App. 219.

Social skills involve the many components of social interaction, including a person's ability to meet and interact with people, regulate behavior and emotion in an age-appropriate fashion, implement proper social judgment, read social cues, and maintain equal interpersonal relationships. DSM 5-TR at 39. When evaluated during school, it was reported that Aleksey "is described as a child who cries easily on separation from mother and had poor peer relationships." App. 80. His mother reported that Aleksey "was afraid of being around a lot of other children." App. 80. Even in high school, Aleksey's mother reported "he met some new kids in the neighborhood," but "[w]hen they dropped by to see if he wanted to take the bus to school with them he hid from them." App. 218. She also reported "[h]e was quiet and shy never at ease with other kids." App. 218.

A friend of Aleksey's mother reported that Aleksey had very few friends, and "was gullible and a person who would fall for obvious ploy[s]." App. 80–81. A social worker who worked with Aleksey as a child similarly reported that he was "[o]bviously naïve and gullible." App. 81; *see also* App. 215 (social worker recognizing Aleksey "was truthful but lacked the ability to

understand the consequences of his own actions or actions of other people" and lamenting that Aleksey "was never able to comprehend that there were people who would use his gullibility to get him into trouble"). Overall, Dr. Hall acknowledged that Aleksey had deficits in social skills. App. 80.

Dr. Hall testified that communication skills are both conceptual and social skills. App. 70. According to the records submitted at the PCR hearing, Aleksey had delayed speech until he was three years old and attended speech therapy. App. 70. Even when Aleksey did start "using words, he put them together in a way that didn't make sense." App. 217. Records from the Hillside Jewish Hospital where he was treated in 1983 indicated "poor achievement in spelling, word recognition, and reading comprehension." App. 70–71. The records went on to indicate that, even as a teen, Aleksey's test "results suggest pervasive deficits in language functioning, even taking into account behavioral factors." App. 71, 612.

Although Dr. Hall found Aleksey did have deficits in both conceptual and social skills,[7] she improperly attributed these deficits to his ADHD diagnosis instead of intellectual disability. App. 67. She conceded on cross examination that a person could meet criteria for both ADHD and intellectual disability. App. 79; *see also* App. 107 (Dr. David Price opining that intellectual disability and ADHD "[v]ery commonly co-occur"). As the Supreme Court has recognized, the existence of another mental disorder or even a personality disorder is not evidence that a person does not also have an intellectual disability. *Moore*, 581 U.S. at 17; *Brumfield v. Cain*, 576 U.S. 305, 319–20 (2015) (noting that the diagnostic criteria for intellectual disability do not include an

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

exclusion criterion; therefore, the diagnosis should be made regardless of and in addition to the presence of another disorder). In fact, the DSM has specifically recognized that ADHD is a disorder that co-occurs most frequently in individuals with intellectual disability. DSM-5-TR at 45; *see also id.* ("Co-occurring neurodevelopmental and other mental health and medical conditions are frequent in intellectual developmental disorder, with rates of some conditions (e.g., mental disorders, cerebral palsy, and epilepsy) three to four times higher than in the general population.").

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

d. *Onset During the Developmental Period*

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

The evidence described above showing Aleksey's deficits in adaptive functioning relates specifically to Aleksey's functioning during the developmental period as described in his school records and by people who knew him during that time. *See* App. 209, 213–20, 396–416, 458–877.

Accordingly, there is no question that his adaptive deficits manifested during the developmental period.

Aleksey did not have an IQ score within the intellectual disability range during the developmental period, but that is not required for diagnosis. *See United States v. Roland*, 218 F.Supp.3d 470, 478 (D.N.J. 2017); *Nicholson v. Branker*, 739 F.Supp.2d 839, 857 (E.D.N.C. 2010); *see also State v. Covington*, 2019 WL 368915, at *3 (Sup. Ct. N.V. Jan. 22, 2019) (holding that the defendant is intellectually disabled although the defendant was not placed in special education classes or subjected to intelligence testing before the age of eighteen). Aleksey was administered three IQ tests during the developmental period with scores above the intellectual disability range:[8]

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

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

[8] App. 939.

psychological reports in a narrative summary. App. 121. Despite her extensive investigation, she was not able to locate the underlying test data to determine who administered the tests, the testing conditions, or to submit the scoring to be reviewed for any errors. App. 121–23.

To determine whether a test score is reliable, clinicians must be able to closely review underlying test data. *See* Erika Oak, et al., *Wechsler Administration and Scoring Errors Made by Graduate Students and School Psychologists*, Journal of Psychoeducational Assessment, July 2018, at 1 ("With the widespread use of IQ testing, it is important that the administration and scoring of cognitive assessments be correct."); *see also id.* (indicating research shows graduate students and certified, trained professionals make scoring errors when administering IQ tests). Possible sources of error that could cause an IQ score to be unreliable include the environment in which the test was given, the behavior of both the examiner and the participant, and errors in score calculation. AAIDD-12 at 38–40. The underlying data and identity and qualification of the test administrator are necessary to determine whether these errors existed. Therefore, if this data is missing, the score is unreliable because it is impossible to tell how the score was affected by measurement error.

Review of underlying test data is especially important for the type of test administered to Aleksey as a child. The WISC-R IQ test administered to children is especially problematic in terms of score reliability. Research indicates that scores for the WISC-R for children with intellectual disabilities do not meet accepted reliability standards, particularly subtest scores. Stephen D. Truscott et al., *WISC-R Subtest Reliability Over Time: Implications for Practice and Research*, 74 Psych. Reports 147, 153 (1994). "[A]lthough some stability exists for some of the subtest scores over time, stability is not sufficient for diagnosis, program planning, or decision making." *Id.* at 154. "Transitory shifts" in WISC-R scores make the chance for error too high to interpret the

scores with any reliability. *Id.* at 154–55. Additionally, administrator error frequently occurs in administering and scoring the WISC-R test, making review of the raw data and score sheets of WISC-R administrations necessary in order to determine the accuracy of the score reported. John R. Slate et al., *Practitioners' Administration and Scoring of the WISC-R: Evidence That We Do Err*, 30 J. School Psych. 77 (1992) ("Examiner errors, when corrected, resulted in changes in the Full Scale IQ that had the potential to influence labeling and placement decisions.").

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

CONCLUSION

The PCR Court abused its discretion in rejecting the affidavit of Majorie Hammock contrary to the PCR statute explicitly allowing PCR applicants to present evidence by affidavit, requiring remand for consideration of the contents of the affidavit. The PCR Court further erred in finding Aleksey is not a person with intellectual disability requiring reversal and a finding that Aleksey is a person with intellectual disability who is ineligible for the death penalty.

Respectfully submitted,

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