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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.

REPLY BRIEF OF PETITIONER

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Petitioner, Bayan Aleksey, submits the following in reply to the Brief of Respondent.[1]

I. RESPONDENT MISCONSTRUES THE RECORD IN ASSERTING THE HAMMOCK AFFIDAVIT WAS PROPERLY REJECTED BY THE PCR COURT.

Respondent's assertion that it would have been prejudiced by the admission of Hammock's affidavit, due to the alleged late filing of the notice of intent to rely on affidavits close in time to the hearing (Br. of Resp. at 11, n.5) ignores that the affidavit was provided to counsel for Respondent in discovery more than two years before the evidentiary hearing. App. 9. Not only did Respondent have ample pre-hearing notice of its contents (during which no attempt was made to depose Hammock or otherwise investigate the affidavit's content), Respondent also took no action after the hearing to present evidence to undermine or contradict the evidence included in the affidavit despite the PCR judge expressly leaving the record open for it do so. *See* App. 142; *Simpson v. Moore*, 367 S.C. 587, 607–08, 627 S.E.2d 701, 712 (2006). In short, no prejudice has been proven.

Respondent also minimizes the error of excluding the affidavit, indicating the affidavit "does not matter" because it does not offer an opinion on intellectual functioning. *See* Br. of Resp. at 14, n.11. On the contrary, nothing in this Court's or the Supreme Court's *Atkins* precedent requires a single expert opine on all three prongs of intellectual disability. A petitioner is merely required to "show he or she is [intellectually disabled] by a preponderance of the evidence." *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). Accordingly, Hammock's

[1] Petitioner does not reply here to Respondent's Additional Sustaining Ground. Br. of Resp. at 27–31. This ground was raised in Respondent's Response to the Petition for Writ of Certiorari, and this Court did not grant certiorari on the additional sustaining ground. Further, this Court has already recognized that a claim of intellectual disability results in extraordinary circumstances permitting successive PCR proceedings as it raises the "possibility that the Constitution categorically bars Petitioner's execution" and need not revisit that issue in this case. *Woods v. State*, No. 2019-0001713, 2019 WL 6898088, at *1 (S.C. Dec. 18, 2019); *see also Terry v. State*, No. 1997-006197 (S.C. Apr. 6, 2022).

information relating to, and opinion on, the adaptive functioning prong does "matter" for the purposes of the intellectual disability analysis.

Finally, Respondent erroneously contends that Hammock's affidavit is based on unreliable information. Br. of Resp. at 17, n.15. The first argument in this regard, i.e., that the affidavit is "inconsistent" in listing many sources of information when only actually relying on information from Aleksey's mother in a 2019 interview, is false. *See id.* Hammock clearly listed her sources for pieces of information including school records (including special education records), hospital records, and affidavits from other witnesses (which were not challenged by Respondent), which demonstrates that she relied on the sources listed at the beginning of her affidavit and not merely an interview with Aleksey's mother.

Respondent also improperly asserts that Aleksey provided contradictory information about his skills in his interview with Dr. Hall. *See id.* This ignores the well-known fact that intellectually disabled individuals often seek to mask their deficits. "It has long been recognized in the field that one of the most commonly encountered characteristics of individuals who have intellectual disability is their intense motivation to mask their limitations." James W. Ellis, Caroline Everington, & Ann M. Delpha, Evaluating Intellectual Disability: Clinical Assessments in *Atkins* Cases, 46 Hofstra L. Rev. 1305, 1367 (2018). Clinicians recognize there is such an intense stigmatization of individuals who are labeled as intellectually disabled that those individuals will go to tremendous lengths to hide their intellectual and functional deficits and present themselves as functioning normally. *Id.* at 1367–68; *see also* AAIDD-11 at 52 ("'[M]ental retardation' has been a particularly stigmatizing and pejorative label that leads most individuals with this label to fight hard not to be identified as 'MR.'"). Thus, it is improper to discount the information of

witnesses who knew Petitioner during the developmental period merely because Aleksey presented himself as higher functioning.

II. RESPONDENT MISCONSTRUES ALEKSEY'S ARGUMENT AND THE CLINICAL STANDARDS TO JUSTIFY THE LOWER COURT'S FINDING THAT ALEKSEY DID NOT SATISFY THE INTELLECTUAL DISABILITY STANDARD.

Respondent maintains that Aleksey "summarily favor[ed]" Aleksey's IQ scores administered outside the developmental period. Br. of Resp. at 21. This misconstrues Aleksey's argument, which was rather that the consistency of four IQ scores on testing over the course of twenty years that all fall within the intellectual disability range demonstrates that Aleksey's actual intellectual functioning satisfies the first (intellectual functioning) prong of the diagnostic criteria. Br. of Pet. at 9–11. Aleksey went on to offer reasons for why Dr. Hall was incorrect in finding these scores were affected by malingering or lack of effort on those tests. Br. of Pet. at 10–11. Further, Aleksey argued that his IQ scores in the intellectual disability range were consistent with Aleksey's poor academic performance as a child, demonstrating his intellectual functioning deficits had an onset during the developmental period. *See* Br. of Pet. at 19; *Smith v. Commissioner*, 2024 WL 4793028, at *2 (11th Cir. Nov. 14, 2024) (recognizing the requirement to conduct a "holistic" review of a person's "multiple IQ scores" and to review adaptive functioning where that review "does not foreclose the conclusion that he has significantly subaverage intellectual functioning"). Far from summarily favoring certain scores, Aleksey clearly argued why it was inappropriate for the PCR Court to discount those scores.

Respondent also misrepresents Aleksey's position regarding the validity of Dr. Hall's examination and report. Aleksey did not agree that Dr. Hall followed the IQ test's technical manual when relying on the General Ability Index ("GAI"), as opposed to the full scale IQ ("FSIQ") score. Br. of Resp. at 23. On the contrary, Aleksey made clear during Dr. Hall's cross-examination that the technical manual explicitly indicates the GAI is "not . . . a replacement for the full-scale IQ"

and does not indicate the GAI can be used for diagnosis of intellectual disability. App. 62. Respondent further ignores that the authoritative manuals on diagnosis of intellectual disability clearly establish that for intellectual disability diagnostic purposes the FSIQ should be used to assess the intellectual functioning prong. *See* AAIDD, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support*, Twelfth Edition, 28 (12th Ed. 2021) ("In reference to determining significant limitations in intellectual functioning, a full-scale IQ score should be used."). Thus, Dr. Hall's reliance on the GAI of 80 instead of Aleksey's FSIQ of 72 on the 2015 administration of the WAIS-IV was contrary to established clinical standards.[2] *See* App. 60–61.

The GAI was developed in the early 1990s to identify children with learning disabilities. *The WISC-III in Context*, in WISC-III CLINICAL USE AND INTERPRETATION: SCIENTIST-PRACTITIONER PERSPECTIVES, 1–38 (A. Prifitera, et al. eds) (1998). But it is not used for diagnosis of intellectual disability, which requires measurement of a person's FSIQ. The GAI is not an FSIQ because it removes consideration of the individual's working memory and processing speed from

[2] The cases cited by Respondent asserting professionals reference the GAI in cases on Westlaw do not support reliance on a GAI for the purposes of diagnosing intellectual disability. Br. of Resp. at 24 n.20; *C.B. through S.B. v. Henry Cnty. Sch. Dist.*, No. 1:20-CV-01771-JPB, 2024 WL 1962016, at *5 (N.D. Ga. Mar. 29, 2024) (addressing appropriate supports in a school setting based on the child's functioning, not for purposes of diagnosing intellectual disability); *L.A.F. v. Kijakazi,* No. 23-CV-00778-STV, 2024 WL 5428962, at *12 (D. Colo. Feb. 8, 2024) (addressing a social security/disability applicant's employability based on their functioning, not for the purposes of diagnosing intellectual disability); *Turnbolm v. Comm'r of Soc. Sec.,* No. 1:22-CV-1242, 2024 WL 396653, at *5 (W.D. Mich. Feb. 2, 2024) (citing part scores where the applicable statue explicitly allows such consideration, not for the diagnosis of intellectual disability); *Brandoen J. v. Comm'r of Soc. Sec.,* No. 6:22-CV-0470-JR, 2023 WL 3996663, at *2 (D. Or. June 14, 2023) (citing FSIQ and GAI scores, all over the intellectual disability range, for purposes of evaluating a social security/disability applicant's functioning, not for the diagnosis of intellectual disability).

the intelligence calculation, thus measuring only part of a person's intellectual functioning.[3] *See* App. 61. The medical community has therefore rejected reliance on this narrower assessment of intellectual functioning, finding that "part score interpretation should not be standard practice during the consideration of [intellectual disability] diagnosis and eligibility." Randy G. Floyd, et al., *Theories and Measurement of Intelligence* in 1 AMERICAN PSYCHOLOGICAL ASSOCIATION HANDBOOK OF INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 385, 412–13 (Laraine Masters-Glidden ed. in chief, 2021). Dr. Hall's treatment of Aleksey's IQ scores was contrary to the clinical standards, and it was inappropriate for the PCR judge to rely on her testimony to assess the intellectual functioning prong of intellectual disability. *See Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (holding that an *Atkins* court's assessment "must be informed by the medical community's diagnostic framework").

CONCLUSION

For the reasons stated above and in the Brief of Petitioner, this Court should reverse the holding of the lower court and remand for further proceedings and, ultimately, find Aleksey is a person with intellectual disability who is ineligible for the death penalty.

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[3] A person's intellectual functioning is made up of multiple facets, making the FSIQ the best means of accurately and reliably determining a person's intellectual functioning. Indeed, the developer of the WAIS series of IQ tests described intelligence as:

> the aggregate or global capacity of the individual to act purposefully, to think rationally, and to deal effectively with his environment. It is global because it characterizes the individual's behavior as a whole; it is aggregate because it is composed of elements or abilities which, though not entirely independent, are qualitatively differentiable.

Lisa Whipple Drozkick et al., *The Wechsler Adult Intelligence Scale – Fourth Edition and the Wechsler Memory Scale – Fourth Edition, in Contemporary Intellectual Assessment: Theories, Tests, and Issues* 197, 198 (Dawn P. Flanagan & Patti L. Harrison eds., 3d ed. 2012) (citing David Wechsler, *The Measurement of Adult Intelligence* 3 (1939)).

Respectfully submitted,

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