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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

BRIEF OF RESPONDENT

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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 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.

(BOP at 1).

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'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, who bears the burden of proof, 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. That determination is challenged in two ways: 1) that an affidavit regarding the adaptive functioning prong (*i.e,* the second of three prongs) was not accepted; and 2) Aleksey otherwise disagrees with the court's expert who the PCR judge found credible and persuasive in her opinion that Aleksey did not meet the criteria for intellectual disability. Respondent argues that Aleksey's challenges lack merit.

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 by 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*,[2] 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

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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=74788810912289791098110851471108011483505688675710911168120828879716710050578065111755553885251107. As noted in the return, the Court may still direct Aleksey to add any of these documents to the appendix.

[2] In that case, this Court concluded that an "allegation that he was denied a state-created right to qualified counsel constitutes a 'sufficient reason' to permit a successive PCR application under section 17-27-90." *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 35 (2016). That particular exception is not at issue here.

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 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 prongs 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).

Judge Dickson announced his ruling on June 30, 2022 and called for a proposed order from the State. (App. 1074). By order signed on June 30, 2022, and filed on July 7, 2022, Judge Dickson denied relief. In doing so, the judge acknowledged the evidence that was presented at the evidentiary hearing, and concluded that "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.*" (App. 1052, 1055).[3] 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).[4] Aleksey appealed from the denial of relief.

On September 19, 2024, Aleksey filed a petition for writ of certiorari in this Court and raised three questions for consideration:

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

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[3] In fact, this language follows the email outline of findings and conclusions sent to both parties in advance of the proposed order request with the addition of the one legal citation included. (*See* App.1074). Though Aleksey's comments in his brief regarding the process appear to still challenge whether the order reflects the judge's independent decision, that position fails to square with the plain facts of record.

[4] Aleksey appears to continue to cast doubt on the PCR court's exercise of its judicial duty in accepting the proposed order, highlighting the tight timeframe of the initial review or the proposed order. (*See* BOP, 2-3). To be clear, this was an open process with Aleksey's counsel copied at submission. (*See* App. 1060). Even so, the compressed or rushed review argument loses all steam when – several months later, *on January 5, 2024,* the PCR court addressed Aleksey's concerns expressed in the Rule 59 motion and set out not only that the action's "focus was narrow," and that he had reviewed and adopted the proposed language after fair consideration, but also, "that Applicant's complaints about the timeframe … are now moot. Th[e] Court has again reviewed the matter in detail, as has Applicant. The Court reaffirms its findings of facts and conclusion of law as reflected in the June 30, 2022 Order." (App. 1108). In sum, even though Aleksey appears to disapprove of the proposed order process, there is nothing wrong with the proposed order process generally. *See State v. Lindsey,* Op. No. 28304 (S.C.Sup.Ct. filed Nov. 5, 2025) (Howard Adv.Sh. 39 at 31) ("We hold the PCR court did not err in requesting proposed orders from the parties after remand or in adopting the State's proposed order. PCR courts can, and commonly do, request and adopt proposed orders from parties, even though PCR courts are encouraged to write their own orders in death penalty PCR cases.").

> 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.

(Pet., at 1).

The State filed a return and Aleksy replied. By order dated June 3, 2025, this Court granted the petition as to Questions I and III but denied certiorari review on Question II. The Court also ordered additional briefing. Petitioner filed his brief on October 3, 2025. This Brief of Respondent 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.
>
> Appellant was pulled unconscious from the car, treated at the scene by EMS, then taken to the hospital, and from there to the Orangeburg/Calhoun Regional Detention Center on New Year's Day. A background check on appellant revealed an extensive record of arrests for fraud-related activities, outstanding warrants, and numerous aliases. In addition, both the Mustang and its license tag were stolen.
>
> On January 2nd, appellant gave two statements to officers from the State Law Enforcement Division (SLED). In the first, he claimed Blackwell was driving and shot Sergeant Lingard, after which they stopped and changed seats. In the second, appellant confessed to the shooting.

State v. Aleksey, 343 S.C. 20, 25, 538 S.E.2d 248, 250–51 (2000).

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." *Id.* (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. *Id.* at 180-81, 810 S.E.2d at 840.

ARGUMENT

The issues in this case require only an ordinary application of the standard of review. The PCR court, having heard the evidence, found Aleksey failed in his burden of proof. The facts of record and the controlling case law support the PCR judge's decision. Thus, the lower court ruling should be affirmed. Aleksey is due no relief.

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 first 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)[5] that he intended to rely on the affidavit.[6] (BOP at 4-5; App. 968, 1). Aleksey asserts that he followed "typical practice" in noticing his intent to rely on affidavits,[7] therefore, the burden shifted to the State to produce its

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5 Aleksey only asserts that he gave notice "prior to" or "in advance of" the hearing. (BOP at 4-5). When the compressed timeframe is revealed, the inference Aleksey forwards that the State had ample time to assess, find and/or depose and/or call new witnesses for a hearing *two days later* is particularly lacking in persuasion.

6 As it turns out, Aleksey did not rely on only affidavits in lieu of testimony as his motion suggested, 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).

7 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. Though contrary to Aleksey's preference, the State is allowed to object for untimely notice of material or for any other reason.

witness or otherwise counter the opinion or show prejudice.[8] (BOP at 4-6). However, the discretion to accept affidavits in lieu of testimony rests with the PCR court. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing S.C. Code Ann. § 17-27-80). Nothing in the statute provides that an applicant can force admissibility on the PCR court by his own unilateral action. Aleksey's argument lacks merit.

Analysis

The fact that the statute allows but does not compel acceptance is reflected in its plain text: "The court *may* receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." S.C. Code Ann. § 17-27-80. This Court's treatment of the question of the acceptance of affidavits is consistent with the statute: "Whether to admit such evidence is within the court's discretion." *Simpson,* 367 S.C. at 607, 627 S.E.2d at 712 (citing *Beckett v. State,* 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). At its base, Aleksey's argument wrongly focuses on the State's ability to call witnesses rather than the PCR court's exercise of discretion. Aleksey argues that according to *Simpson,* because the PCR court gave the State an opportunity to find Aleksey's missing witness, then an abuse of discretion in not admitting the affidavit followed. (BOP at 6). That is an egregious misinterpretation of *Simpson.*

In *Simpson*, this Court did not assign a burden for either a proffer of an affidavit or resistance to such proffer; 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. Thus, while true that this Court in *Simpson* did

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[8] 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.

not find prejudice to the PCR court's decision to admit the depositions and affidavits, it did not instruct that a PCR court must admit an affidavit in any particular circumstance. Nothing in the statute or *Simpson* strips the PCR court of its discretion in accepting or rejecting an offered affidavit. The critical question for this Court, then, remains whether the PCR court abused its discretion in this case. *Beckett*, 278 S.C. at 224, 294 S.E.2d at 47 (finding a complaint by a PCR applicant that the judge accepted an affidavit lacked merit where applicant failed to allege and show an abuse of discretion). Based on the circumstances here, the court did not abuse its 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.

Here, the PCR judge plainly exercised his discretion in only disallowing one of the offered affidavits on discrete, expressed reasons: (1) counsel conceded 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[9] ; 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, well-documented and supported. 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. (BOP 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.[10] 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. In fact, Ms. Hammock was the only affiant who offered in the affidavit an opinion on the contested adaptive functioning prong[11] based on a very contested basis – a fact that the State pointed out in making

[9] 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).

[10] Aleksey's counsel asserted at the hearing that 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 the assertion that the record was held open for calling that witness or another, (*see* BOP at 6), the PCR court did not confine the State to those options 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).

[11] Indeed, the very fact that the witness has no opinion on intellectual disability presents a second reason to deny relief on this issue: it truly does not matter. Petitioner failed to meet the first prong of an intellectual disability showing, therefore, whether there was an opinion on the second prong is of no consequence. If the first prong is not satisfied, there is no need to go further. *Moore v. Texas*, 581 U.S. 1, 15 (2017) ("we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits").

its additional response in opposition to admission. (*See* App. 1033 ⁋ 3). Also as pointed out in the additional response, Aleksey overlooks access to methods he could have used to preserve testimony. (*See* App. 1035 ⁋ 7).

If Aleksey's witness may have been unavailable due to age or health concerns, he could have preserved the testimony at any time between the October 31, 2019 affidavit, (App. 1005), and the March 24, 2022 hearing, (App. 1). It should not be lost that capital PCR applicants are afforded the full scope of civil discovery, S.C. Code Ann. § 17-27-150(B), and bear the burden of proof in this civil action, Rule 71.1(e), SCRCP. Aleksey, though, does not acknowledge his own failure to preserve the testimony in a way that would have allowed for cross-examination. *See* Rule 32(a)(3)(C), (D), and (E), SCRCP (deposition may be accepted by the trial court in lieu of live testimony where "the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment" or the party "has been unable to procure the attendance of the witness by subpoena" or by request with notice of "exceptional circumstances … in the interest of justice and *with due regard to the importance of presenting the testimony of witnesses orally in open court,* to allow the deposition to be used." (emphasis added).[12]

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 such as what type of information was reviewed. *See generally* Rule 703, SCRE (expert's basis for opinion "need not be admissible in

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If no valid score satisfies this prong, based on the credible evidence presented, it follows that that the remainder need not be addressed.

[12] As Respondent previously reported in the return, it appears 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. Now, there is no possibility to challenge the evidence on a remand of any type.

evidence"). Notably, the rule is not a basis for admissibility. *See State v. Kromah,* 401 S.C. 340, 358, 737 S.E.2d 490, 499 (2013). 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, 12 (2017) (underscoring the deference 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)[13]; *United States v. Smith*, 790 F. Supp. 2d 482, 505 (E.D. La. 2011)[14]).

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 of the opinion. Even so, 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.

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

14 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.

Further, Aleksey is unable to show prejudice because of the ruling alone. To be sure, Ms. Hammock opined (on very limited support, mostly a 2019 interview with Aleksey's mother)[15] that Aleksey has "significant deficits" in some areas and perhaps others she suspected but could not support, and that his "deficits" would support the adaptive function prong of an intellectual disability diagnosis. (App. 1018). She did not, however, opine on intellectual disability. Consequently, the affidavit even if accepted and credited, would not show support for the *three-prong* intellectual disability diagnosis. (*See* App. 49). The presentation would still fall short.

Even so, for all the above reasons, Aleksey fails to show an abuse of discretion. Therefore, the PCR court's ruling that declined to admit the affidavit should be affirmed.

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[15] 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. Nor did he provide the assessment for the court's expert though Aleksey provided the court expert multiple other documents. (*See* App. 46). Notably, unlike the subjective (potentially biased) recall of past events that Ms. Hammock averred that she continually relied upon, Dr. Hall actually questioned Aleksey about his abilities and he explained how he did things, such as using money orders to pay bills. (*See* App. 47-48). That was knowledge and understanding that he obviously had, and correctly recalled, even after years in prison. Moreover, much closer to the developmental period, the trial record also showed that Aleksey used skills and deception against others demonstrating far from the follower mindset and gullibility that largely follows the condition when truly present. (*See* App. 90; *see also* App. 141). If nothing else, the fact that Aleksey perpetrated a series of deceptive acts for cons involving cars and finances would be important impeachment against evidence that suggested he did not understand how to handle money or fill out/understand paper forms. (*See* Trial Tr. pp. 1864-1923, 1953-1960, setting out testimony including Aleksey's negotiation of car purchase by himself (provided to the PCR court, App. 141)). At any rate, Respondent simply underscores that it would be far from an uncontested conclusion that Aleksey actually had adaptive functioning deficits sufficient to credibly support this prong.

II. 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.

The Supreme Court's Eighth Amendment precedent now prohibits the execution of individuals who are intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). The States are tasked to develop ways to identify those inmates who qualify for exemption under *Atkins*. *Id.,* at 317. This Court set out South Carolina's method for doing so in *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003). The court instructed that the definition of mental retardation, now intellectual disability, found in the murder statute, capital provisions should be followed. *Id.,* at 279, 588 S.E.2d 604, 606. The relevant definition, then, is found in S.C. Code Ann. §16-3-20(C)(b)(10): "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior manifested during the developmental period."

That definition largely follows the clinical definition referenced in *Atkins,* "... clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins,* 536 U.S. at 318. The Supreme Court noted the definition so phrased in *Atkins* was roughly the same as that announced by the American Association on Mental Retardation (AAMR); the American Psychiatric Association (APA), and consistent with the IQ range then identified in the DSM (IQ level of 50-55 to approximately 70). *Id.,* at 318 n.3. It also generally follows the definition recognized by the American Association on Intellectual and Developmental Disabilities (AAIDD) *Moore v. Texas,* 586 U.S. 133, 135 (2019). Though

recognizing reference is occasionally made to other considerations, our Court adheres to the state statutory definition. *State v. Blackwell,* 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017).

Moreover, all three prongs are required to be met. Courts do not find a lone showing of difficulties in adaptive functioning to be sufficient. *Hall v. Florida,* 572 U.S. 701, 737 n.12 (2014) ("The longstanding views of professional organizations have also been the intellectual functioning and adaptive behavior of independent factors."); *cf. United States v. Roof,* 10 F.4th 314, 380 (4th Cir. 2021) ("Although 'significant limitations in adaptive skills such as communication' are part of the *Atkins* test, *id.,* they are not sufficient by themselves to render a defendant mentally incapacitated."). This Court has rejected a similar argument based on general "alleged mental abnormalities" other than intellectual disability. *State v. Stanko*, 402 S.C. 252, 284-288, 741 S.E.2d 708, 724-726 (2013) (defendant's claim of brain damage, though refuted by other evidence, with evidence arguably demonstrating his "inability to adapt," would not support finding "an inability to communicate or care for himself adequately, or sub-average intellectual functioning.").

A defendant (or PCR applicant) bears the burden of showing all three prongs of intellectual disability by a preponderance of the evidence. *Franklin,* 356 S.C. at 279-280, 588 S.E.2d at 606. This was underscored in *Blackwell* with this Court instructed that "the sole judge[s] of the credibility of the witnesses and the weight to be given their testimony…." 420 S.C. at 140, 801 S.E.2d at 720. Because all three are required, the failure of any prong will defeat the diagnosis. *See Moore v. Texas*, 581 U.S. 1, 15 (2017) ("we require that courts *continue the inquiry* and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits"). *Accord State v. Bixby*, 388 S.C. 528, 554, 698 S.E.2d 572, 586 (2010) ("if any one element [of a defense] is disproven" the defense fails).

Analysis

Aleksey does not dispute that he failed to present any witness to opine that he has intellectual disability, or that the court's examiner opined Aleksey did not meet the diagnostic criteria for intellectual disability. Essentially, Aleksey argues that the PCR judge must record his findings on each piece of evidence and/or each step of an expert's intellectual disability analysis to adequately rule on the issue. Aleksey can show no basis in law for that requirement. Further, it is inconsistent with leading cases on exemption. If the first prong is not satisfied, there is no need to go further. *See Moore,* 581 U.S. at 15. Thus, if no valid score satisfies this prong in the instant case based on the credible evidence presented, it follows that that the remainder need not be addressed.

Additionally, Aleksey asks this Court to reject a qualified expert's opinion on the basis that the expert did not apply rules in a manner Aleksey deems sufficient. No expert challenged the court's expert, Dr. Hall, on the methodology she used throughout her comprehensive report. In other words, on argument alone Aleksey asserts Dr. Hall's methodology as used in this case is infirm, but no one familiar with the methodology and discretion inherent in clinical practice and testing opined that a particular accepted principle was wrongly applied or interpreted against relevant medical and /or clinical standards. Indeed, the one expert presented by Aleksey as to IQ testing, Dr. Price, limited his testimony only to the test he administered long after the developmental period. (*See* App. 110). In fact, he was not provided *any* of the prior testing to consider. (*See* App. 110). Based on the fuller picture available to and reviewed by Dr. Hall, the PCR judge found Dr. Hall's testimony and conclusions based on her detailed analysis of the evidence, in agreement with test instructions and clinical practice as explained in the testimony, to

be credible. (App. 1053). And further, the PCR court reaffirmed its findings after additional review based on the arguments in Aleksey's Rule 59 motion. (App. 110).

Aleksey, though, apparently attempts to convince this Court that there is enough evidence to piece together an opinion that he has failed to offer, conditioned on discounting large swaths of information contrary to his position. This exceeds not only the standard of review afforded but also offends the clinical standards that should be applied. In sum, Aleksey presents no argument that PCR court abused his discretion in his fact-finding process or in the application of law.

First Prong Evidence and Findings

Aleksey, acknowledging that the PCR court found Dr. Hall's testimony credible and supportive of her conclusions, first challenges her conclusions as to IQ score interpretation. Aleksey summarily favors reference to the test administered for this action by Dr. Price (Aleksey's PCR expert who administered the 2015 test but an expert Aleksey did not call for testimony) and those administered *after* the murder (beginning in 1998) then posits a theory of "consistency." (BOP at 9-11). Yet, test administrators obtained information (not always reported) that indicated lack of effort. That is information of no little impact.

Further, Aleksey summarily discounts the reported, recorded, standardized testing from the critical developmental period. This is so, he claims, because he was unable to obtain enough information about these standardized tests. (BOP at 19). But the fact that they exist is nothing to brush aside. Dr. Hall made a detailed analysis of *all* available testing,[16] three of which were given

[16] This is a particularly important as a global assessment instead of attempting to rely merely on one low score. As of this filing, the Supreme Court of the United States is considering the question of "Whether and how courts may consider the cumulative effect of multiple IQ scores in assessing an *Atkins* claim." *Hamm v. Smith*, 145 S. Ct. 2776, 222 L. Ed. 2d 1075 (2025); *see also Hamm v. Smith*, Docket No. 24-872, Brief of Petitioner, Questions Presented. In that case, the American Psychological Association, with others, filed an *amicus* brief urging that no one test

during the developmental period showing results of 96 at 6yoa which was adjusted for a Flynn Effect[17] 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). Aleksey wishes to avoid these tests because he discovered no raw data to review and insufficient evidence regarding the credentials of those who administered the tests. (BOP at 17-19). But the testimony reveals precisely why the standardized testing during the crucial developmental period was properly considered. Dr. Hall explained that she relied only on recognized standard testing instrument scores and did not rely on "an informal IQ exam like school testing/school aptitude," because those informal tests "are not used to make the diagnosis." (App. 30). Further, the standardized tests carried signs of reliability. Of note, Dr. Hall testified that:

> … the Wechsler Scales or otherwise individual IQ tests, are given a standard way, they have been normed on various groups, and so you know that the information you get from them is both valid and reliable, unlike the group or school-administered aptitude tests. There's so many confounding variables that could come into play with that score that you get that it's just not as trustworthy, nor were those tests designed to use clinically to diagnosis someone with an intellectual disability.

(App. 30).

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should be elevated over the other in clinical settings where multiple tests are considered. (APA Amicus Brief, at 20).

[17] The Flynn adjustment is not required in general clinical practice. However, it is often applied in *Atkins* evaluation. That should give any court pause because acceptance of the discounting is not standard practice. As such, the State does not endorse its use, but merely underscores here that with the discounting of the scores applied, Aleksey still cannot reach the required level of functioning to satisfy the first prong. As the Supreme Court has explained, the Flynn discounting 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); *see also United States v. Candelario-Santana,* 916 F. Supp. 2d 191, 207 (D.P.R. 2013) ("Flynn Effect remains highly controversial and many courts have declined to accept its application.").

Further still, and convincing to Dr. Hall, was that these three standard IQ instruments were "given by professionals who would normally use them to aid in determining intellectual functioning," specifically, "They were all given by either school psychologists or psychologists practicing in a more private setting. (App. 30). These would be "professional[s] who would have the manuals and would have "been trained on how to administer the test." (App. 30). Dr. Hall carefully used only those scores that carry indicia of reliability in her professional opinion. Moreover, she used these developmental period tests in evaluating the educational placement and support records demonstrating responses to Aleksey's "emotional disability" diagnosis, noting that "none of his providers were concerned ID was a possibly an appropriate diagnosis for Mr. Aleksey." (*See* App. 32-39, 946-947). The record leaves little doubt that Dr. Hall carefully examined the evidence and exercised her professional judgment in an acceptable manner which supports the PCR court's decision to credit her testimony.[18]

As to Dr. Hall's use of the GAI (General Ability Index), while Aleksey asserts that it was improper to use the score, (BOP at 11), he agreed during the evidentiary hearing that the manual for the test itself recognizes the GAI as an optional score, conceding that the test's "technical manual indicates that the GAI can be compared to the full-scale IQ to assess the effects of working memory and processing speed on the expression of cognitive ability[.]" (App. 62). Aleksey failed to show there was any technical error in considering the optional score. Moreover, the only

[18] 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). Aleksey has adopted that calculation *by Dr. Hall* in his petition to this Court. (BOP at 10). Apparently, Aleksey considers that evaluation credible which itself undercuts his argument the Dr. Hall's evaluation of IQ scores should be suspect.

reference to GAI is with evaluation of Dr. Grant's 2015 test.[19] (App. 939-940; 947). And Dr. Hall appropriately noted the score was "not influenced by Mr. Aleksey's performance on the working memory and processing speed tasks." (App. 940). That precisely follows what Aleksey conceded the manual reflects as permissible. (*See* App. 62). When Aleksey claims use of the GAI allowed Dr. Hall to "cherry pick Aleksey's highest subscores rather than rely on the full scale IQ score," he is just wrong. The evidence shows a critical review of information which is appropriate. To accept Aleksey's suggestion that the GAI was improper to consider would, itself be improper as that is contrary to the test and clinical practice. *See, e.g., Hall v. Florida.*, 572 U.S. at 724 (rejecting a determination that "contradicts the test's own design"); *see also id.,* at 721 (2014) ("The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework.").[20] Moreover, to impose a rule that the IQ score must be accepted where other factors are present—for example, illness or malingering—does not make sense generally nor in clinical practice.

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[19] Again, Aleksey did not call Dr. Grant, but called Dr. Price to opine about another, later test. A fact-finder certainly could find that rather intriguing if indeed Dr. Grant's testing was actually correct and important. Aleksey did not, apparently, even share Dr. Grant's testing with Dr. Price. (*See* App. 110).

[20] In further showing its permissive clinical use, Westlaw reflects multiple cases where the GAI has been referenced by professionals. *See, e.g.*, *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) (referencing testimony that plaintiff's "General Ability Index ("GAI") score was 59, which is consistent with a mild level of intellectual disability" and "may be a better measure of C.B.'s general intelligence because it removes the impact of cognitive deficits in working memory and processing speed"); *L.A.F. v. Kijakazi,* No. 23-CV-00778-STV, 2024 WL 5428962, at *12 (D. Colo. Feb. 8, 2024) ("the ALJ found Dr. Lago's statement 'generally persuasive' as it related to Plaintiff's cognitive functioning because it was supported by the IQ and General Ability Index scores"); *Turnbolm v. Comm'r of Soc. Sec.,* No. 1:22-CV-1242, 2024 WL 396653, at *5 (W.D. Mich. Feb. 2, 2024) (referencing both scores); *Brandoen J. v. Comm'r of Soc. Sec.,* No. 6:22-CV-0470-JR, 2023 WL 3996663, at *2 (D. Or. June 14, 2023) (referencing both scores).

Additionally, consideration of the GAI was not the sole concern with accepting the 2015 score, but the failure to consider (or at least failure to report and/or discuss in the report) information from "the embedded validity indicators in the WAIS-IV." (App. 947). As Dr. Hall explained in her report:

> The psychological literature has noted the tasks that make up the PSI Index (Coding and Symbol Search) as embedded validity indicators. A PSI score ≥ 79, Coding scale ≥ 5, Symbold Search scaled score ≥6, and the Coding-Symbold Search scaled score different ≥ 5 are indicates of poor effort. Mr. Aleksey's PSI score was 71, Coding score was 7, Symbol Search score was 2, and the Coding-Symbol Search difference score was 5. Three of the four indicators suggest Mr. Aleksey gave poor effort on the IQ test. This suggest[s] the results reported by Dr. Grant are likely an underestimate of Mr. Aleksey's true intellectual functioning.

(App. 947-948).

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 that the later scores (which he wishes to rely on exclusive, *see* BOP at 10-11), "appear" to place him in the range of intellectual disability but "the preponderance of the evidence suggest[s] thee scores are an underestimation of his true intellectual functioning," (App. 948).

Moving away from the abundance of evidence that supports the rejection of prong one, Aleksey also complains that Dr. Hall found he had deficits in adaptive functioning that should have been recognized. (BOP at 13-14). Once again, Aleksey 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 with having the appearance of possessing some "adaptive deficits," but that upon questioning, Aleksey could actively describe a lack of deficits, with other contemporaneous matters supporting 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, (BOP at 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 again retreats to an absence of evidence, particularly of supporting documentation for the standardized testing during the developmental period. (BOA at 17-19). This is key for Aleksey because, as he must concede, he "did not have an IQ score within the intellectual disability range during the developmental period" (*i.e.,* when there is less known incentive to score lower), (BOP at 17), while his post-death sentence tests show poor effort (*i.e.,* known and significant incentive to score lower). Again, the fact those important and telling development period scores were reported by educational facilities and one medical facility was not questioned nor was the fact questioned 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 his speculation or his argument to overlook evidence rather than consideration of the known facts.

Aleksey is due no relief, and this Court should afford none. The lower court ruling should be affirmed.

Additional Sustaining Ground

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

In *Franklin*, this Court "establish[ed] procedures implementing the *Atkins* decision." 356 S.C. at 278, 588 S.E.2d at 605. 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). 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 circuit court 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 was 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 is after either of these dates.[21] Under *Franklin* and S.C. Code Ann. § 17-27-45(B), the claim should have been dismissed.[22]

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) and over the State's objection for the prohibition 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

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[21] 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 evaluation). 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).

[22] This is not out of step with other courts. *See*, e.g., *In re Bowles,* 935 F.3d 1210, 1215–16 (11th Cir. 2019) (reviewing request for successive habeas action where *Atkins* "he could have [been] included it in [the] original habeas" noting that the petitioner "cannot now rely on Atkins as a 'new' rule of constitutional law" noting the "the rule [was] no longer new"); *Richter v. Shinn,* No. CV2000205TUCCKJEJM, 2024 WL 863712, at *23 (D. Ariz. Feb. 29, 2024) (finding procedural bar where inmate "did not raise his ineffective assistance of sentencing counsel for an alleged failure to investigate his adaptive deficits or intellectual disability in his PCR petition").

accepted the argument for not applying the established procedural bars. *See also Bryant v. Stirling*, 126 F.4th 991, 999 (4th Cir. 2025) (on review of treatment of *Atkins* claims raised in successive applications: "We may assume—for the sake of argument—that current South Carolina practice provides an exception to the otherwise-applicable procedural limits on subsequent post-conviction relief applications for offenders who assert they are intellectually disabled under *Atkins* and *Hall.*"). However, an established practice of allowing late, successive actions on the issue has proven to foster delay over reliability.

For example, 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. 1997-006197). That action, after having relief denied, is currently on appeal. (Appellate Case No. 2025-001760). Additionally, *Stephen Corey Bryant* was allowed additional proceedings over the State's objection adding a multi-year delay even when he eventually conceded he would not be able to offer evidence to prove the condition, arguing that he should have been able to amend the successive action on a new theory. *See* Appellate Case No. 2019-000610, (appeal from May 2016 PCR action concluding June 2021). Similarly, here, the federal habeas action has been stayed since 2015 and Aleksey has been litigating this action in the circuit court, and now in this appeal, since that same year.[23] These cases are in tension with the published *Franklin* decision which is the only one consistent with the PCR statutory provisions for timely presentation of issues.

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[23] Two other cases were similarly stayed and have proceedings in state court. One has a recently issued order finding intellectual disability, and the State has filed a Rule 59 motion to point out both legal and factual error. (*Bobby Wayne Stone*). That case, like others, shows that qualified and experienced prior PCR counsel did not raise the exemption claim earlier which itself calls into question the quality of the evidence offered for support of the late claim. The other is in case development according to the status reports filed with this Court. (*Anthony Woods*). The takeaway, however, is that the unwarranted delay cannot be denied and should not be condoned.

Allowing an inmate to wait decades past his original trial or PCR hearing to raise the issue does nothing to ensure timely litigation. To the opposite, records are more likely to be destroyed, and memories more likely dimmed – the very reason to enforce procedural bars, not abandon them. Consider here that Aleksey argues this Court should disallow consideration of standardized IQ test scores *during the developmental period* because he was unable decades later to obtain raw data to confirm their reliability. Should such an argument succeed, there is very little incentive indeed to promptly bring a claim. Moreover, as this Court affirmed in *Robertson v. State,* this State disfavors more than one PCR application. 418 S.C. at 513, 795 S.E.2d at 33. How much more so should the procedural bars apply in capital cases with the guarantee of two qualified attorneys, ample funding, and full civil discovery afforded without the necessity of an order showing good cause for the first PCR action. These are the most heavily litigated criminal cases. As such, they should be subject to more limitations, not less.

However, should this Court wish to maintain the exception for claims of intellectual disability, a better path may be to require a *prima facie* showing that the inmate could carry his burden of proof, and that he was unable to do so within the prior actions. *See In re Campbell*, 82 Fed.Appx. 349 (5th Cir. 2003) (denying applicant's motion for authorization to file successive federal habeas petition based on failure to make prima facie case of intellectual disability); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) (holding that a petitioner claiming he is intellectually disabled "also must demonstrate that there is a reasonable likelihood that he is in fact [intellectually disabled]" emphasizing that "[w]ere it otherwise, then literally any prisoner under a death sentence could bring an Atkins claim in a second or successive petition regardless of his or her intelligence. No rational argument can possibly be made that this result is appropriate under [28 U.S.C. § 2244(b)]"); *In re Wood*, 648 F. App'x 388, 391 (5th Cir. 2016) ("to obtain

authorization for a successive habeas petition, Wood must ... make a prima facie showing that his *Atkins* claim was previously unavailable, that he is intellectual disabled, and that his claim is not barred by the statute of limitations"); *Woods v. Buss*, 234 F. App'x 409, 412 (7th Cir. 2007) (finding *Atkins* claim barred noting a failure to present "a prima facie showing" of intellectual disability). At best, it encourages piecemeal litigation and delayed adjudication. At worse, requiring only the simple allegation of a claim is an open invitation to engage in the very abuse curtailed by *Aice*: "We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system…." *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

Respondent submits that *Franklin* correctly synthesized the competing interests and remains good law. This Court should consider the procedural bar arguments as an additional sustaining ground. Again, Aleksey is not entitled to any relief.

CONCLUSION

Based on the foregoing, this Court should affirm the lower court and deny any relief.

Respectfully submitted,

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