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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2024-000140

Case No. 2021-CP-40-02306

BAYAN ALEKSEY,.....*Petitioner*,

v.

STATE OF SOUTH CAROLINA, ... *Respondent*.

PETITIONER'S PETITION FOR REHEARING

Petitioner, Bayan Aleksey, through undersigned counsel, respectfully petitions this Court for rehearing of its May 20, 2026 opinion affirming the decision of the Circuit Court. Rule 221(a), SCACR. Rehearing is appropriate because this Court improperly deferred to the circuit court's decision to credit testimony that contradicted clinical guidance in intellectual disability diagnosis, imposed a heightened burden on Petitioner to prove that he satisfied the criteria for a diagnosis of intellectual disability, and upheld the circuit court's prejudicial exclusion of Marjorie Hammock's affidavit. In support of rehearing, Petitioner submits the following.

I. The Court erred in deferring to the circuit court's findings on the merits of Petitioner's intellectual disability claim.

a. The Court improperly deferred to the circuit court's decision to credit the testimony of Dr. Alicia Hall, which contravened clinical standards.

The PCR court does not have discretion to credit expert testimony that directly contradicts the guidelines of the medical community. *Moore v. Texas*, 581 U.S. 1, 12–13 (2017) (courts do

not have "unfettered discretion" to define the bounds of intellectual disability, and their intellectual disability determinations "must be informed by the medical community's diagnostic framework" (quoting *Hall v. Florida*, 572 U.S. 701, 719 (2014))). Here, the PCR court abused its discretion by crediting testimony from Dr. Alicia Hall with no basis in the accepted clinical standards, and this Court erred in deferring to the circuit court's findings.

First, the PCR court's decision to credit Dr. Hall's testimony that Petitioner's early IQ scores were "standard assessments administered by trained professionals" overlooks the fact that Dr. Hall had no evidence on which to base this testimony. *Aleksey v. State*, Op. No. 28333, at 10 (S.C. May 20, 2026) (hereinafter "Op."). Despite extensive investigation, App. 121–23, Petitioner was unable to locate the underlying data from the tests administered in Petitioner's childhood. Clinicians must be able to closely review underlying test data to determine whether a score is reliable. *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); AAIDD, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Supports* (12th ed. 2021) ("AAIDD-12") at 38–40. Without the data, Dr. Hall had no way of knowing who administered the tests, the testing conditions, or whether there were any errors in scoring. Consequently, her testimony that the scores were valid and reliable lacks any evidentiary basis.

The Court also erred in deferring to the PCR court's decision to credit Dr. Hall's testimony that Petitioner's "written communications from prison reflected organization, coherence, and reasoning inconsistent with significant adaptive deficits." Op. at 12. Both the medical community

and the Supreme Court recognize that reliance on adaptive strengths developed in a structured, controlled environment, such as a prison, is improper. *Moore*, 581 U.S. at 16 (cautioning against reliance on adaptive strengths developed in prison); DSM-5 at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g. prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained."); AAIDD, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) ("AAIDD-11") at 20 (warning against reliance on "behavior in jail or prison"); *see also* App. 72. Further, Dr. Hall's reliance on Petitioner's verbal communication in prison to outweigh other evidence of adaptive deficits similarly contravenes clinical guidelines. *See* AAIDD, *User's Guide: Mental Retardation Definition, Classification, and Systems of Supports* (10th ed. 2002) at 22 ("Do not use . . . verbal behavior to infer a level of adaptive behavior or about having MR/ID.").

Further, the Court improperly defers to the PCR court's decision to credit Dr. Hall's testimony that Petitioner's adaptive deficits should be attributed to his ADHD diagnosis. Op. at 12. The clinical guidelines are clear that an ADHD diagnosis does not exclude an intellectual disability diagnosis, and learning disabilities like ADHD frequently co-occur with intellectual disability. DSM-5 at 40; *Moore*, 581 U.S. at 17 ("The existence of a personality disorder or mental health issue, in short, is 'not evidence that a person does not also have intellectual disability.'").

Lastly, the Court's opinion improperly credits Dr. Hall's testimony regarding her use of the GAI to rule out an ID diagnosis, which contravened clinical standards. Op. at 10. The medical community recognizes that clinicians should not use the GAI to diagnose or rule out intellectual disability because it is a "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). Instead, 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." *Id.* Accordingly, the testing manual does not provide for use of the GAI in diagnosing or ruling out intellectual disability, *see* App. 62–63, and the medical community has expressly rejected the practice of discounting a full-scale IQ score based solely on variability between subscale scores. *See* AAIDD-12, at 28 ("[T]he 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."). Dr. Hall had no clinical basis to discount her in-range IQ score on the basis of subscore variability, and the circuit court abused its discretion in crediting her testimony.

b. The Court's opinion imposes a heightened burden on Petitioner to show that he is a person with intellectual disability.

Finally, the Court's opinion imposed a heightened burden on Petitioner to prove the first and third prongs of intellectual disability that are ungrounded in the medical community's diagnostic framework. First, with respect to Prong 1, while acknowledging that IQ scores above the qualifying range are not dispositive, the Court's analysis treats them as such. An IQ score out of the intellectual-disability range does not automatically end the intellectual disability inquiry. *Moore v. Texas*, 581 U.S. 1, 15 (2017). Further, the Court declined to engage with the evidence that the childhood IQ scores on which the circuit court's analysis rested are inherently unreliable both in light of Petitioner's subsequent consistent, qualifying IQ scores and the lack of underlying data for the childhood tests, instead deferring to the circuit court's analysis without considering its lack of evidentiary basis.

Second, regarding Prong 3, while the Court recognized that the onset prong "does not require a formal diagnosis or specific IQ score during childhood," Op. at 12, the Court nevertheless concluded that Petitioner did not meet his burden to prove the onset prong based on the fact that "every IQ score from the developmental period falls well above the range associated with the

intellectual disability" and "[n]o contemporaneous diagnosis suggests intellectual disability." Op. at 12. A diagnosis of intellectual disability does not require in-range IQ scores or a diagnosis of intellectual disability during the developmental period, only that symptoms manifested during the developmental period. *See Brumfield v. Cain*, 576 U.S. 305, 308–10 (2015); *State v. Blackwell*, 420 S.C. 127, 172–73, 801 S.E.2d 713, 737 (2018).

II. The process by which the circuit court excluded Marjorie Hammock's affidavit prejudiced Petitioner.

The Court concluded that the circuit court did not abuse its discretion in excluding the affidavit of Marjorie Hammock. However, the Court did not address the circuit court's representation at the close of the PCR hearing that it would make no decision on the affidavit's admissibility until the State attempted to contact Hammock or present other evidence to counter the information in her affidavit. At the close of the hearing, the circuit court explicitly declined to rule on the admissibility of the affidavit and left the record open for the State to contact Hammock or present other evidence to challenge her conclusions:

> ATTORNEY VANN: I think we have an outstanding issue of Marjorie Hammock's affidavit, which is still proffered.
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> THE COURT: And right now it's still proffered, because what I want to talk to you all about is, Ms. Brown, you've given me a lot of reasons not to listen to it, not to read it, and I had asked earlier if you wanted an opportunity to search, if you wanted opportunity to find somebody, or try and find her and call her, and leave the record open. And so I don't know if you had an opportunity to think about that. And I can give you some time to talk about it and think about it.
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> ATTORNEY BROWN: We'll be happy to talk about it and see if we are able to reach her. That would be, I think, the first step. And if we're not able to reach her, perhaps we can discuss it again.
>
> THE COURT: Sure. Because I'm not going to make a decision until after we get that. But since that's one way to clear up the problem I wanted to give you all an opportunity to see if we wanted to do it that way, and then we can kind of work our way back down. If we have to have another hearing, we can do it, or we can do it by Webex. . . .
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> ATTORNEY BROWN: Yes, sir, I appreciate that.

> THE COURT: Okay. All right. And so that's just going to be hanging over like [the] Sword of Damocles. All right. Thank you all.

App. 142–43. As the record makes clear, both parties understood at the close of the hearing that the "first step" in informing the court's decision on the affidavit's admissibility was for the State to attempt to contact Ms. Hammock again, and to inform the court if they were unable to do so. However, neither of those things ever happened. Instead, the State filed an "Additional Response to Applicant's Offer to Rely on Affidavits," App. 1032–42, which reiterated the State's position on why the affidavit was not admissible but gave no indication that the State had attempted to contact Ms. Hammock in accordance with its representations at the hearing. App. 142.

The process by which the circuit court's order ultimately ruled that Hammock's affidavit was inadmissible was constitutionally flawed and prejudicial to Petitioner in two ways. *McKnight v. State*, 378 S.C. 33, 56, 661 S.E.2d 354, 365 (2008) (reviewing courts need not defer to circuit court findings if they constitute "an abuse of discretion resulting in prejudice to a party"). First, given the exchange between court and counsel at the close of the hearing and the State's representation that it would attempt to contact Ms. Hammock, Petitioner's counsel had no indication that the court would find the affidavit inadmissible without any further communication from the State regarding its attempts to contact Ms. Hammock or to "find somebody" or identify further evidence to rebut the information contained in the affidavit. App. 142.

Parties are entitled to reasonably rely on statements or promises made by a trial court. If the court later reneges on the statement to the detriment of one of the parties, it is a violation of fundamental tenets of due process. *See State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001) (holding that it was fundamentally unfair for the trial judge to alter the language of jury instructions after defense counsel structured his argument around the language that the judge had already advised he would be using); *State v. Woomer*, 277 S.C. 170, 284 S.E.2d 357 (1981) (remanding

capital case for a new trial where "the trial court induced appellant to testify by limiting the scope of the testimony" and then violated that assurance by allowing the solicitor to ask questions outside the scope, because "Woomer had a right to rely on that assurance, and the solicitor's violation of the limited scope of cross examination was fundamentally unfair"); *United States v. Kostoff*, 585 F.2d 378, 380 (9th Cir. 1978) (holding that the trial court erred by approving instructions proposed by the defense and then changing them after the defendant's closing argument, which relied on the originally-proposed language, because "counsel was misled by the court to the defendant's prejudice").

The circuit court's failure to follow through on the representations made at the close of the PCR hearing—specifically, that the court was "not going to make a decision" on the admissibility of Hammock's affidavit until additional information was received from the state—prejudiced Petitioner. If Petitioner's counsel had known at the close of the PCR hearing that the court was going to find the affidavit inadmissible without any further communication from the State regarding steps it had taken to contact Hammock or otherwise counter the information in the affidavit, counsel could have called additional witnesses to testify to Petitioner's adaptive functioning. By contrast, admitting the affidavit would have caused no prejudice to the State: The circuit court gave the State ample "opportunity to submit additional testimony and affidavits countering the evidence presented by [Petitioner]," *Simpson v. Moore*, 367 S.C. 587, 608, 627 S.E.2d 701, 712 (2006), or to contact Hammock. App. 142–43. The State's decision not to take advantage of those opportunities is not prejudicial to the State.

Second, the circuit court allowed the State to take advantage of the order-drafting process to unilaterally issue a ruling that the circuit court never made. The circuit court never found the affidavit inadmissible either at the PCR hearing (App. 13–14, 142–43) or in the court's subsequent

email requesting a proposed order denying relief (App. 1074). Nonetheless, the State took advantage of the order-drafting process to decide that the affidavit was inadmissible, and included that finding in its proposed order even though the circuit court had never ruled on the question. App. 1054–55.

CONCLUSION

For the reasons stated above, this Court should grant rehearing and issue an amended opinion finding that the circuit court abused its discretion in finding that Petitioner is not a person with intellectual disability and/or excluding the affidavit of Marjorie Hammock and remanding for further proceedings.

Respectfully submitted,

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