No. 26A345

In the Supreme Court of the United States

BAYAN ALEKSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner, Bayan Aleksey, raised a claim for post-conviction relief of intellectual disability pursuant to *Atkins v. Virginia*. At an evidentiary hearing, Aleksey sought to admit into evidence five affidavits, including an affidavit by Marjorie Hammock, a social worker who assessed Aleksey's adaptive functioning, which testified to Aleksey's adaptive deficits. The trial court admitted every affidavit except Hammock's, explicitly reserving its ruling on Hammock's affidavit to allow the State an opportunity to call Hammock for cross-examination or present its own evidence to counter the information in the affidavit.

The State did not take advantage of either opportunity, instead filing a pleading that simply reiterated its objections to Hammock's affidavit. On the day of his retirement, with no further communication between the court and the parties or notice that he intended to exclude the affidavit, the trial court judge notified the parties that he intended to deny relief and signed a state-drafted proposed order that found, for the first time, the Hammock affidavit inadmissible.

The questions presented are:

I. Did the trial court's exclusion of expert evidence of adaptive functioning without notice or an opportunity to be heard violate the Due Process Clause of the Fourteenth Amendment?

II. Did the South Carolina Supreme Court violate this Court's precedents in *Hall v. Florida* and *Moore v. Texas* in crediting expert testimony that directly contravened clinical standards and "the medical community's diagnostic framework"?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

This petition arises from a successive petition for post-conviction relief in which Bayan Aleksey was the petitioner before the Circuit Court of Orangeburg County, South Carolina, and an appeal from the denial of relief in that proceeding before the Supreme Court of South Carolina. The Respondent is the State of South Carolina. There are no additional parties to this litigation.

State v. Aleksey, No. 1998-GS-38-00244, Orangeburg County, South Carolina, sentenced on September 1, 1998.

State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), South Carolina Supreme Court denial of direct appeal relief on November 13, 2000.

Aleksey v. State, No. 2001-CP-38-628, Orangeburg County, South Carolina, denial of state post-conviction relief on February 4, 2010.

Aleksey v. State, No. 2010-173586, South Carolina Supreme Court denial of petition for a writ of certiorari on May 22, 2014, and rehearing on June 25, 2014.

Aleksey v. State, No. 14-7320, United States Supreme Court denial of petition for a writ of certiorari on February 23, 2015.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bayan Aleksey respectfully petitions this Court for a writ of certiorari to review the judgment of the South Carolina Supreme Court.

OPINIONS BELOW

The opinion of the South Carolina Supreme Court (App. 037a) is reported at 930 S.E.2d 304. The order of the South Carolina Supreme Court denying rehearing is unreported, but is attached in the Appendix to this petition. App. 037a. The state court order denying post-conviction relief is unreported but is attached in the Appendix to this petition. App. 016a.

JURISDICTION

The Supreme Court of South Carolina entered its judgment on June 23, 2026. On September 15, 2026, the Chief Justice extended the time to file a petition for a writ of certiorari to November 20, 2026. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Petitioner Bayan Aleksey was sentenced to death in Orangeburg County in 1998. *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.

A. Aleksey's Attempt to Offer Proof by Affidavit

Prior to the evidentiary hearing, counsel for Aleksey filed a Notice of Intent to Rely on Affidavits pursuant to S.C. Code § 17-27-80, which explicitly allows post-conviction courts to receive proof by affidavit. App. 182a. 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. 182a. Aleksey also specifically acknowledged 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. 183a.

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. 044a. The PCR judge took the issue under advisement. During the hearing, he heard testimony from Dr. Alicia Hall, a forensic psychologist at the South Carolina Department of Developmental Disabilities and Special Needs ("DDSN") who performed a court-ordered evaluation of Aleksey and concluded that he did not have 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. 106a. 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. 106a.

At the close of the hearing, the court revisited the affidavit issue. The court explicitly declined to rule on the admissibility of the affidavit, and gave the State the opportunity to contact Hammock to call her for cross examination or to identify a rebuttal witness of their own:

> ATTORNEY VANN: I think we have an outstanding issue of Marjorie Hammock's affidavit, which is still proffered.

> 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. . . .
>
> 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. 180–81a. 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, the State did not take advantage of either opportunity. Instead, the State filed an "Additional Response to Applicant's Offer to Rely on Affidavits," App. 248a, 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, and the PCR court's directive, at the hearing. App. 180a.

B. Other Evidence of Intellectual Disability

South Carolina requires an applicant raising an intellectual disability claim pursuant to *Atkins v. Virginia* to prove by a preponderance of the evidence that he satisfies 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); *Franklin v. Maynard*, 588 S.E.2d 604, 606 (S.C. 2003) (citations omitted). South Carolina's definition is consistent with that of the medical community. *See* American Psychiatric Association, *Diagnostic & Statistical Manual of Mental Disorders* 38 (5th ed. text rev. 2022) [hereinafter "DSM-5-TR"]; American Association for Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Diagnosis, Classification, and Systems of Support* 13 (12th ed. 2021) [hereinafter "AAIDD-12"]. Even disregarding Hammock's affidavit, Aleksey presented substantial evidence of intellectual disability at the PCR hearing.

1. Prong 1: Significantly Subaverage Intellectual Functioning

Aleksey presented evidence that his IQ falls within the significantly subaverage range.[1] Over the course of twenty years—from 1998 through 2019—

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[1] 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.

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]

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

Dr. Hall acknowledged that these scores, including the score from her own testing, "appear to be in the Intellectual Disability range," App. 275a, but discounted the scores in completing her evaluation[5] on account of her own subjective findings that Aleksey did not put forth sufficient effort or malingered on his IQ tests rather than any 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. 097a–098a. On her own testing in 2018, Dr. Hall admitted that she did not administer any testing to

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[2] App. 096a–097a, 139a, 186a, 266a, 269a.

[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. 082a.

[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. 096a–097a.

[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. 186a, 276a. 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. 146a, 186a.

make an objective finding of whether Aleksey malingered, though she has administered such testing in another *Atkins* case. App. 101a-102a. Contrary to her subjective findings on malingering, when Aleksey was administered an objective test to determine malingering by Dr. Grant in 2015, it demonstrated that Aleksey was not malingering. App. 098a.

Further, Dr. Hall disregarded the in-range full scale IQ score from Aleksey's 2015 testing because, she asserted, "there was too much variability between the indices." App. 098a. 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. 098a. Because of the variation between the subscores, she relied on the General Ability Index ("GAI") instead of the full-scale IQ. App. 099a.

2. Prong 2: Deficits in Adaptive Behavior

Aleksey presented evidence of deficits in two of the three adaptive functioning domains: conceptual and practical.[6] In the conceptual domain, which involves using concepts or abstract principles often reflected in academic skills, money management skills, and how people use judgment in new situations,[7] Aleksey's school records demonstrated that his functioning during his school years was consistent with his

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[6] The second prong of the intellectual disability inquiry concerns deficits in adaptive behavior. 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 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.

[7] DSM-5-TR at 39.

adult IQ scores in the intellectual disability range and that his academic performance was consistently poor and well below grade level. Aleksey was referred for special education screening in 1974 as a first grader, 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. 111a. Aleksey later had to repeat fifth grade, and was nearly retained in seventh grade as well. App. 113a. Aleksey was placed in special education in eighth grade, and finally, after repeated academic failures, Aleksey dropped out of school in the ninth grade. App. 116a. Outside of school, witnesses reported Aleksey also "had trouble understanding rules so it was hard for him to follow rules." App. 242a. He "always had trouble managing money." App. 239a. He was never responsible for paying bills or rent and could not manage a checking account. App. 239a. Dr. Hall agreed that Aleksey had deficits in conceptual skills. *See* App. 105a.

Aleksey also presented evidence of deficits in the social domain, which involves 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. School evaluators described Aleksey "as a child who cries easily on separation from mother and had poor peer relationships." App. 118a. His mother reported that Aleksey "was afraid of being around a lot of other children." App. 118a. 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. 238a. She also reported "[h]e was quiet and shy never at ease with other kids." App. 238a.

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. 118a–119a. A social worker who worked with Aleksey as a child similarly reported that he was "[o]bviously naïve and gullible." App. 119a; *see also* App. 243a (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. 118a.

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. 108a. Even when Aleksey did start "using words, he put them together in a way that didn't make sense." App. 237a. Records from the Hillside Jewish Hospital where he was treated in 1983 indicated "poor achievement in spelling, word recognition, and reading comprehension." App. 108–09a. 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. 109a.

3. Prong 3: Age of Onset

The evidence of Aleksey's deficits in adaptive functioning related specifically to Aleksey's functioning during the developmental period as described in his school records and by people who knew him during that time.[8] *See, e.g.*, App. 236–43a. 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 Moore v. Texas,* 581 U.S. 1, 7 (2017) (describing third criterion as "the onset of [intellectual and adaptive] deficits while still a minor"); *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).

Aleksey was administered three IQ tests during the developmental period on which he scored above the intellectual disability range. *See* App. 266a. These developmental period tests, however, are not reliable measures of Aleksey's intellectual functioning during that time. Despite extensive investigation, App. 159–61a, Aleksey was not able to locate the underlying data from those tests to determine who administered the tests, the testing conditions, or to submit the scoring to be

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[8] The third criterion for an intellectual disability diagnosis requires onset during the developmental period (prior to age 22). 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.

reviewed for any errors, and the State presented no evidence that the tests were reliable measures of his intellectual functioning.[9]

C. The Trial Court's Decision and Order

Without any further communication from either party, on the day of his retirement, PCR Judge Edgar Dickson requested the State draft a proposed order denying *Atkins* relief. App. 277a. 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 inadmissible. *See* App. 028a. The order further misrepresented the record by concluding that Hammock was unavailable for the State to cross-examine.[10] App. 026a. Similarly, the order erroneously concluded that "Applicant's conduct at the hearing" abandoned his intent to rely on affidavits, finding that 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. App. 027a.

The PCR court also found that Aleksey was not a person with intellectual disability, but failed to 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

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[9] Aleksey presented evidence of the investigation he undertook to attempt to obtain the test data from his childhood IQ tests at the evidentiary hearing. App. 157–61a.

[10] 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. 049a. 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, South Carolina Rules of Evidence (defining the situations in which a declarant is considered "unavailable").

that applicant satisfied all three diagnostic criteria." App. 028a. Aleksey filed a motion to alter or amend, which the PCR court denied without making additional factual findings or legal conclusions. App. 030a.

Aleksey appealed the PCR court's denial of relief to the South Carolina Supreme Court, which concluded that Aleksey had not carried his burden to prove that he had intellectual disability and that the circuit court did not err in excluding Hammock's affidavit. *Aleksey v. State*, 930 S.E.2d 304 (S.C. May 20, 2026) (attached as Appendix A).

REASONS THE WRIT SHOULD BE GRANTED

The Court should grant certiorari in this capital case because the state court erred in "decid[ing] an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Specifically, the decisions of the state court must be vacated under the Eighth and Fourteenth Amendments to the United States Constitution because (a) the process by which the circuit court excluded Marjorie Hammock's affidavit violated Aleksey's due process rights; and (b) the circuit court violated this Court's precedents in *Moore v. Texas* and *Hall v. Florida* by crediting Dr. Hall's testimony, which directly contravened "the medical community's diagnostic framework." *Hall v. Florida*, 572 U.S. 701, 719 (2014).

I. Aleksey reasonably relied on the circuit court's statements concerning Marjorie Hammock's affidavit to his detriment, and the process by which the court excluded the affidavit violated due process.

The South Carolina Code explicitly provides that circuit courts hearing claims for post-conviction relief may receive proof by affidavit, and the South Carolina

Supreme Court has endorsed this process. *See Simpson v. Moore*, 627 S.E.2d 701, 712 (S.C. 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*, 810 S.E.2d 836 (S.C. 2018); *Beckett v. State*, 294 S.E.2d 46, 47 (S.C. 1982). Accordingly, courts across the state have received affidavits in lieu of testimony in numerous capital post-conviction cases in South Carolina.[11]

A litigant seeking the protection of the Eighth Amendment is entitled to procedural due process in the adjudication of that claim. *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring in controlling opinion) ("Because petitioner has raised a viable claim under the Eighth Amendment, and because that claim was not adjudicated fairly within the meaning of due process or of § 2254(d), petitioner is entitled to have his claim adjudicated by the District Court on federal habeas corpus."); *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (applying Justice Powell's test in *Ford* and identifying it as controlling). 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. 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

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[11] *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).

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. 180a.

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 United States v. Pacheco*, 434 F.3d 106, 116 (1st Cir. 2006) (finding violation of "fundamental fairness" where the trial court "did not deliver on its implicit promise; it refused, despite a contemporaneous objection, to conform its jury instructions to its earlier statement" (and citing *Bae v. Peters*, 950 F.2d 469, 478 (7th Cir. 1991) (acknowledging that a due process violation can occur if "a last-minute change in the charge . . . prejudice[s] a defendant's opportunity to defend himself"); *Lee County Branch of the NAACP v. City of Opelika*, 748 F.2d 1473, 1480 n. 12 (11th Cir.1984) (observing that "due process . . . mandate[s] that when the rules of the game are changed, the players must be afforded a full and fair opportunity to play by the new regulations" (citation and internal quotation marks omitted)); *State v. Jones*, 541 S.E.2d 813 (S.C. 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*, 284 S.E.2d 357 (S.C. 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").

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*, 627 S.E.2d 701, 712 (S.C. 2006), or to contact Hammock. App. 180–81a. 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. 051–52a, 180–81a) or in the court's subsequent email requesting a proposed order denying relief (App. 277a). 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.

II. The South Carolina Supreme Court erred in deferring to the circuit court's findings on the merits of Petitioner's intellectual disability claim and crediting expert testimony that contravened clinical standards.

While *Atkins v. Virginia* left states 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. In other words, the PCR court does not have discretion to credit expert testimony that directly contradicts the guidelines of the medical community. The PCR court abused its discretion by crediting testimony from Dr. Alicia Hall with no basis in the accepted clinical standards, and the South Carolina Supreme Court erred in deferring to the circuit court's findings.

First, Dr. Hall's reliance on the GAI, rather than the full-scale IQ score, contravened clinical standards. 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.[12] App. 099a. Essentially, reliance on the GAI allowed Dr. Hall to cherry-pick Aleksey's highest subtest scores rather than rely on the full-scale IQ score.

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." Diane L. Coalson, David Wechsler, & Susan Engi Raiford, *WAIS-IV: Wechsler Adult Intelligence Scale—Fourth Edition: Technical and Interpretive Manual* 166 (4th ed. 2008). Eliminating the working memory and processing speed subtests "reduces the breadth of coverage" of the score. App. 099a. 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. 100–01a, 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

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[12] The GAI is "summary score that is less sensitive than the FSIQ to the influence of working memory and processing speed." Diane L. Coalson, David Wechsler, & Susan Engi Raiford, *WAIS-IV: Wechsler Adult Intelligence Scale—Fourth Edition: Technical and Interpretive Manual* 166 (4th ed. 2008). 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 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." *Id.* at 5.

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). 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.

Second, Dr. Hall's assertions of malingering are undermined both by the tests of malingering that were administered to Aleksey and 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, and identifying malingering in such circumstances—without administering any malingering testing—runs directly counter to clinical standards. 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, demonstrate that he was not malingering and that the scores represent a valid measure of his intellectual functioning.

Further, 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. App. 010a. Despite extensive investigation, App. 159–61a, 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 T et al., *Wechsler Administration and Scoring Errors Made by Graduate Students and School Psychologists*, 37 J. Psychoeducational Assessment 679, 679 (2019) ("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-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 violated the mandates of *Moore* and *Hall* by 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." App. 012a. 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); American Association for Intellectual and Developmental Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Supports* (11th ed. 2010) at 20 (warning against reliance on "behavior in jail or prison"); *see also* App. 110a. Further, Dr. Hall's reliance on Aleksey's verbal communication in prison to outweigh other evidence of adaptive deficits similarly contravenes clinical guidelines.

See Robert L. Schalock, *User's Guide: Mental Retardation—Definition, Classification, and Systems of Supports: Applications for Clinicians, Educators, Disability Program Managers, and Policy Makers* (10th ed. 2007) at 22 ("Do not use . . . verbal behavior to infer a level of adaptive behavior or about having MR/ID.").

Finally, the South Carolina Supreme Court contravened *Moore* by deferring to the PCR court's decision to credit Dr. Hall's testimony that Aleksey's adaptive deficits should be attributed to his ADHD diagnosis. App. 012a. 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. *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.'").

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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