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Appendix A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Bayan Aleksey, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2024-000140

ON WRIT OF CERTIORARI

Appeal From Orangeburg County
The Honorable Edgar W. Dickson,

Opinion No. 28333
Heard April 1, 2026 – Filed May 20, 2026

AFFIRMED

Allison Franz, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson, Deputy Attorney General Donald J. Zelenka, Senior Assistant Deputy Attorney General Melody Jane Brown, all of Columbia, for Respondent.

JUSTICE VERDIN: We issued a writ of certiorari to review the finding by the post-conviction relief (PCR) court that Bayan Aleksey is not intellectually disabled. Aleksey was sentenced to death after a jury found him guilty of murdering a state trooper during a traffic stop. His conviction and sentence were affirmed on direct appeal, and his first application for PCR was denied. Aleksey later filed a second

PCR application, asserting he is intellectually disabled and therefore ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002). The PCR court conducted a hearing pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). At that hearing, Aleksey presented five affidavits in lieu of live testimony. Among them was the affidavit of a licensed social worker (Hammock affidavit), offered as the sole expert evidence on adaptive functioning, the second prong of the intellectual disability inquiry. The PCR court excluded the Hammock affidavit, explaining it addressed a contested issue and that Hammock was unavailable for cross-examination or a credibility determination. After considering the remaining evidence, the PCR court found Aleksey failed to prove intellectual disability by a preponderance of the evidence. We affirm.

I. Factual and Procedural Background

Aleksey shot and killed Sergeant Franklin Lingard of the South Carolina Highway Patrol during a traffic stop in 1997. A year later, a jury convicted Aleksey of murder and sentenced him to death. This Court affirmed Aleksey's conviction and sentence on direct appeal. *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). After the Supreme Court of the United States (Supreme Court) denied review, Aleksey filed his first PCR application in 2001, alleging ineffective assistance of counsel.

While that application was pending, the Supreme Court decided *Atkins*, holding the execution of intellectually disabled persons violates the Eighth Amendment. 536 U.S. at 321. The Supreme Court left to the states "the task of developing appropriate ways to enforce" that constitutional restriction. *Id.* at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). In response, this Court in *Franklin* held that death-sentenced inmates may pursue PCR relief to litigate intellectual disability claims. *Franklin*, 356 S.C. at 280, 588 S.E.2d at 606. We adopted the statutory definition of intellectual disability, "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period," and placed the burden on the applicant to prove the condition by a preponderance of the evidence. *Id.* at 278–80, 588 S.E.2d at 605–06 (quoting S.C. Code Ann. § 16–3–20(C)(b)(10) (2003) (providing mental retardation[1] is a statutory mitigating circumstance)). If proven, the death sentence must be vacated and a life sentence imposed. *Id.* Thus, an applicant must establish

[1] "In 2011, the General Assembly substituted the term 'mental retardation' with 'intellectual disability.'" *Ex parte S.C. Dep't of Disabilities & Special Needs v. Linkhorn*, 420 S.C. 1, 5 n.3, 800 S.E.2d 777, 779 n.3 (2017) (citing Act No. 47, 2011 S.C. Acts 172).

three elements: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset during the developmental period.[2]

In 2010, the PCR court denied Aleksey's first application. This Court denied certiorari in 2014, and the Supreme Court did the same the following year. Aleksey then pursued federal habeas relief. During those proceedings, new counsel identified evidence suggesting a potential intellectual disability. Aleksey filed this second PCR application in June 2015, asserting his execution is barred by *Atkins*.[3] The PCR court then ordered an intellectual disability evaluation by the South Carolina Department of Disabilities and Special Needs (SCDDSN). Dr. Alicia Hall conducted the evaluation, concluding Aleksey is not intellectually disabled. Two days before the March PCR hearing, Aleksey served notice of his intent to rely on five affidavits in lieu of live testimony.

The evidence at the PCR hearing showed Aleksey underwent seven IQ tests. Three were administered during the developmental period. At age six in 1975, he scored 96 (Test #1). In 1979, he scored 82 (Test #2). In 1983, at age fourteen, he scored 90 (Test #3). Four additional tests were administered in adulthood. In 1998, at age twenty-nine, he received a Full-Scale IQ score of 71 (Test #4), but the results were deemed invalid due to poor effort and malingering. In 2015, he scored 73 (or 72, according to Dr. Hall) (Test #5), though Dr. Hall found the result uninterpretable due to significant variability across indices. Dr. Hall instead calculated a General Ability Index (GAI)[4] score of 80. In 2018, Aleksey received a Full-Scale IQ score of 70 (Test #6), though Dr. Hall concluded his verbal IQ (VIQ) of 85 better reflected Aleksey's functioning. In 2019, Dr. David Price administered the final IQ test,

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[2] Previously, the eighteenth birthday marked the end of the development period. *State v. Blackwell*, 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017) (analyzing the adaptive functioning prong with the standard of "significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen" (quoting *State v. Stanko*, 402 S.C. 252, 286, 741 S.E.2d 708, 726 (2013), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019)). The developmental period is currently defined as "the period of time between conception and the twenty-second birthday." S.C. Code Ann. Regs. 88-510(C) (Supp. 2025). The exact age for the developmental period is not dispositive here.

[3] Aleksey moved to stay the federal habeas proceeding, which was granted on August 19, 2015, pending this Court's findings.

[4] Dr. Hall testified this is the proper clinical step when faced with the variability of results.

producing a Full-Scale IQ of 74 (Test #7). Dr. Price also conducted malingering testing and found the IQ results valid.[5]

During the hearing, Dr. Hall opined Aleksey is not intellectually disabled. She explained she administered her own testing, interviewed Aleksey, and reviewed extensive records, including affidavits, psychological reports, and school records.[6] Relying on the Diagnostic and Statistical Manual of Mental Disorders, 5th Edition (DSM-5), she defined significantly subaverage intellectual functioning as deficits in reasoning, problem-solving, judgment, and related abilities, generally reflected by an IQ of about 70 or below. She concluded Aleksey's functioning fell in the "low average range" and did not satisfy the first intellectual disability prong. She emphasized his developmental-period scores—96, 82, and 90 (Tests #1–3)—were well above the intellectual disability range. Although later scores were lower (Tests #4–7), Dr. Hall attributed them to poor effort and malingering. She noted the examiner for Test #4 concluded Aleksey was malingering, and that Test #5 showed multiple indicators of poor effort. Regarding her own testing, Test #6, Dr. Hall reported "it was clear he was not putting forth his best effort."

Dr. Hall also concluded Aleksey did not exhibit significant deficits in adaptive functioning. Using the DSM-5 definition—"deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility"—she assessed how effectively Aleksey met ordinary life demands. During her interview with Aleksey, Aleksey reported he "hustled to make ends meet," held various blue-collar jobs, and managed his share of rent and utility payments. Aleksey paid bills independently using money orders and accurately described how to obtain and use them. Further, Aleksey stated he

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[5] Dr. Hall applied the Flynn effect to six of the IQ tests. The Flynn effect adjusts for the rise in scores after publication of the testing. It is calculated by taking the years from publication to testing, multiplying this number by .33, and subtracting the number from the obtained IQ score. The IQ test results with the adjusted score were as follows: Test #1: 87.75, Test #2: 80.35, Test #3: 87.03, Test #4: Inappropriate to use score to make Flynn effect adjustment because results were deemed an underestimate, Test #5: GAI Flynn adjustment of 77.69, and Test #6: VIQ Flynn adjustment of 80.71. However, the application of the Flynn effect is not dispositive here.

[6] Dr. Hall reviewed the Hammock affidavit after her report was written and said that although she could have amended her report, she did not want to do so. Dr. Hall did not review Dr. Price's report and IQ Test (#7), because it was conducted after her report was finalized.

maintained his residence by cleaning, cooking, and doing laundry. Although he sometimes needed initial instruction, he could perform tasks independently once shown.

Turning to his developmental history, Dr. Hall acknowledged deficits in social and executive functioning, including organization, emotional regulation, and impulse control. She attributed these difficulties to ADHD and emotional disturbance diagnoses Aleksey received as a teenager. Dr. Hall emphasized his placement in special education classes was consistent with his ADHD and emotional disability diagnoses. She also noted his exposure to domestic violence and emotional abuse. In her view, Aleksey's academic struggles and behavioral issues stemmed from these factors, along with poor attendance, rather than intellectual disability.

Dr. Hall also reviewed records from the South Carolina Department of Corrections (SCDC), which included numerous written requests by Aleksey concerning his case and life in SCDC. Dr. Hall found these communications were generally well organized, with appropriate structure and minimal errors. They demonstrated Aleksey's ability to navigate institutional systems, articulate requests, and engage in problem-solving. In Dr. Hall's opinion, these abilities were inconsistent with significant adaptive deficits.

Finally, Dr. Hall concluded Aleksey did not meet the third prong of intellectual disability, onset in the developmental period. Dr. Hall testified that although Aleksey exhibited developmental delays and was evaluated multiple times as a child, no provider diagnosed or even suspected intellectual disability. Instead, Aleksey was diagnosed with other conditions, including ADHD and learning disabilities.

Dr. Price testified regarding intellectual functioning. Dr. Price administered Test #7, yielding a score of 74, and found no evidence of malingering. Dr. Price explained this score corresponded to a mental age of approximately eleven years and eight months. However, Dr. Price acknowledged that a diagnosis of intellectual disability requires assessment of both intellectual and adaptive functioning, and he evaluated only the former.

Aleksey submitted several affidavits. His mother, Vera Aleksey (Mother), asserted Aleksey had delayed speech, limited vocabulary, and difficulty forming relationships. She described Aleksey as fearful, socially isolated, and emphasized his placement in special education classes. Mother also detailed Aleksey's father's abuse and Aleksey's struggles with employment and independent living.

Lester David Rosengard, a licensed clinical social worker who treated Aleksey as a teenager, described Aleksey as sensitive, gullible, and lacking judgment. Rosengard reported Aleksey struggled to understand rules, depended heavily on his mother, and exhibited impulsive and emotionally unstable behavior. Rosengard recommended residential treatment, which Aleksey's mother declined.

Allison Franz, who argued this case with Aleksey and opposing counsel's consent, testified that when she was a second-year law student at Cornell participating in the Cornell capital punishment clinic, she conducted a readability analysis of Aleksey's correspondence to the SCDC staff from 2012. Franz stated that the analysis suggested Aleksey had a fifth-grade reading level. On cross-examination, however, Franz acknowledged the analysis measured readability, not writing ability.

Aleksey also proffered the affidavit of Marjorie Hammock, a licensed social worker with decades of experience. At the time of the hearing, Hammock was eighty-six years old and unavailable to testify; she has since passed away.[7] Hammock's affidavit addressed adaptive functioning and concluded Aleksey had significant deficits across conceptual, social, and practical domains.

In the conceptual domain, Hammock found limitations in Aleksey's communication, self-direction, and functional academics. Hammock reported Aleksey's speech development was delayed, and his vocabulary remained limited as he aged, reflecting a restricted command of language. She also concluded Aleksey lacked the ability to function independently at an age-appropriate level, relying heavily on his mother for guidance and decision making. As to academics, Hammock detailed a consistent pattern of poor performance: Aleksey was referred for psychological evaluation at age six due to delayed speech and low verbal performance; his standardized test scores placed him in the bottom four percent nationally in third grade; he failed most of his fourth and fifth grade classes; and he was placed in special education by sixth grade. By eighth grade, his abilities were assessed at approximately a fifth-grade level and he ultimately dropped out in ninth grade. Based on this history, Hammock concluded Aleksey's functional academic skills were insufficient for independent living, including tasks such as completing a job application or managing a bank account.

In the social domain, Hammock described a persistent pattern of isolation, immaturity, and impaired interpersonal functioning. She found Aleksey was quiet, withdrawn, and heavily dependent on his mother, with limited ability to relate to

[7] She died March 2, 2024.

peers. He was bullied due to his placement in special education and, in turn, avoided social interaction out of fear and embarrassment. Hammock emphasized his emotional instability, noting he was eager for acceptance yet easily manipulated by others. She characterized Aleksey as naïve and gullible, often unable to appreciate the consequences or risks of his actions. Aleksey's leisure activities reflected similar limitations—he did not participate in sports, struggled to understand rules or structured play, and was unable to complete even simple recreational tasks, such as building models or playing board games.

In the practical domain, Hammock identified deficits in self-care, independent living, community use, and employment. She reported Aleksey exhibited delayed development in basic self-care, including prolonged bedwetting and reliance on his mother for routine tasks. As an adult, Aleksey never lived independently, struggled to maintain a household, and was unable to prepare meals or manage daily responsibilities without assistance. Although he could occasionally shop for groceries, Hammock found he was unable to manage money effectively, plan expenditures, or maintain financial independence. Hammock also concluded Aleksey lacked the capacity to sustain employment, noting he required supervision in early jobs and was terminated for poor performance and misunderstandings about basic responsibilities, including handling money. Hammock further cited concerns over his health and safety, including difficulty managing medication and a history of suicidal behavior during adolescence. Taken together, Hammock concluded these deficits rendered Aleksey unable to function independently in daily life.

The State objected only to the Hammock affidavit. After the hearing, the PCR court postponed ruling on the admission of the affidavit, allowing time for the State to contact Hammock for cross-examination or to identify its own rebuttal witness. The record, however, reflects no further action by the State.

In its order denying relief, the PCR court excluded the Hammock affidavit, finding Hammock unavailable and emphasizing the need for cross-examination on the contested issue of adaptive functioning. The PCR court found Dr. Hall's testimony to be thorough and credible. The PCR court also found that Aleksey failed to prove he satisfied all three prongs of the intellectual disability standard and denied relief. The PCR court later denied Aleksey's Rule 59(e), SCRCP, motion.

II. Standard of Review

"[A] trial judge's ruling regarding an *Atkins* determination will be upheld on appeal if supported by the evidence and not against its preponderance." *Blackwell*, 420 S.C. at 140, 801 S.E.2d at 720.

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *Id.* at 136, 801 S.E.2d at 718 (quoting *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006)). "An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law." *Id.*

III. Intellectual Disability

Aleksey argues the PCR court erred in finding he failed to prove, by a preponderance of the evidence, that he is intellectually disabled. Aleksey contends he satisfied all three required prongs, even without the excluded Hammock affidavit. However, the evidence shows: (1) Aleksey's IQ scores during the developmental period did not reflect significantly subaverage intellectual functioning; (2) his adaptive deficits were attributed to ADHD and emotional disturbance, not intellectual disability; and (3) he did not manifest intellectual disability during the developmental period. Thus, we find the record supports the PCR court's determination.

a. Significantly Subaverage Intellectual Functioning

Aleksey argues the PCR court erred in relying on Dr. Hall's testimony because: (1) Aleksey's four most recent IQ tests (Tests #4–7) fall within the intellectual disability range; (2) his earlier tests (Test #1–3) are unreliable; (3) there was no basis to discount later sources for malingering or poor effort; and (4) Dr. Hall's use of the GAI was improper. We disagree.

To satisfy the first intellectual disability prong, a PCR applicant must establish significantly subaverage intellectual functioning. An IQ test is the standard measure of intellectual functioning and has a mean score of "100, which means that a person receiving a score of 100 is considered to have an average level" of functioning. *Atkins*, 536 U.S. at 309 n.5. "An IQ between 70 and 75 or lower . . . is typically considered the cutoff IQ score for the intellectual function prong of the [intellectual disability] definition." *Id.* At the same time, a "state cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70." *Moore v. Texas*, 581 U.S. 1, 12 (2017); *id.* at 14 (holding "because the lower end of

Moore's score range falls at or below 70, the [lower court] had to move on to consider Moore's adaptive functioning"); *Hall v. Florida*, 572 U.S. 701, 722–23 (2014) (agreeing "with the medical experts that when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits" and, thus, rejecting Florida's strict cutoff of 70); *Brumfield v. Cain*, 576 U.S. 305, 316 (2015) (holding the state court's conclusion that a score of 75 precluded an intellectual disability finding was unreasonable).[8]

In *Blackwell*, we found no intellectual disability despite recent low IQ scores, relying on the following facts:

> Blackwell, *prior to the age of 18,* scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made 'reasonably sufficient grades during his school career'; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

Blackwell, 420 S.C. at 142, 801 S.E.2d at 721 (emphasis in original).

Here, as in *Blackwell*, the developmental-period evidence is dispositive. Although Aleksey's adult IQ scores (Tests #4–7) fall within the qualifying range, his earlier scores (Tests #1–3) do not. Those scores place him well above the range typically associated with intellectual disability and weigh heavily against his claim. Further,

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[8] The standard error of measurement is "a statistical fact, a reflection of the inherent imprecision of the test itself" and accounts for the fact that "an individual's score is best understood as a range of scores on either side of the recorded score . . . ." *Moore*, 581 U.S. at 13 (quoting *Hall*, 572 U.S. at 713); *See Hall*, 572 U.S. 701, 713 ("Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points) . . . .[T]his involves a score of 65–75 (70 ± 5)" (quoting DSM–5, at 37)); *see e.g.*, *Moore*, 581 U.S. at 14 ("Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79"). Here, we recognize the standard error of measurement and proceed with our analysis.

the divergence between earlier and later scores does not satisfy the requirement that his condition manifested during the developmental period.

Aleksey also challenges the reliability of Tests #1–3, citing incomplete documentation regarding their administration. The PCR court nevertheless credited Dr. Hall's testimony that these were standard assessments administered by trained professionals. Further, Dr. Hall did not rely on those scores in isolation. Instead, she considered them alongside Aleksey's school records, diagnoses, and developmental history. The PCR court found her testimony credible, and we defer to that determination. *Blackwell*, 420 S.C. at 140, 801 S.E.2d at 720 ("Because the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we must defer to the court's determinations."); *See Black v. Carpenter*, 866 F.3d 734, 748–49 (6th Cir. 2017) (holding the evidence did not support a finding of significantly subaverage intellectual functioning when childhood IQ scores ranged from 83 to 97, despite later scores of 69 and 57 in adulthood); *State v. Morrison*, 236 So. 3d 204, 225 (Fla. 2017) (holding a childhood IQ score of 78 precluded a finding of significantly subaverage intellectual functioning, despite a score of 70 at age 40).

We likewise find no error in the PCR court's acceptance of Dr. Hall's conclusions regarding malingering and effort. Dr. Hall testified Tests #4 and #5 underestimated Aleksey's functioning and that Test #6, which she administered, showed signs of malingering based on her clinical judgment, observations, and experience. Dr. Hall explained malingering as "someone intentionally producing or presenting themselves as having deficits or mental illness," while noting it differs from merely poor effort. Although Dr. Price found no malingering on Test #7, the PCR court was entitled to credit Dr. Hall's testimony. We defer to that credibility determination as well. *Blackwell*, 420 S.C. at 140, 801 S.E.2d at 720 ("Because the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we must defer to the court's determinations.").

Finally, Dr. Hall adequately explained her use of GAI. She testified the Full-Scale IQ test from Test #5 was uninterpretable due to variability among indices and that the Wechsler Adult Intelligence Scale (WAIS) manual directs calculation of the GAI in such circumstances using verbal comprehension and perceptual reasoning. She described this as a standard "fail safe" to obtain a valid score. Thus, the PCR court did not abuse its discretion in considering this evidence. *Id.* ("Because the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we must defer to the court's determinations.").

We hold the PCR court's finding that Aleksey failed to prove significantly subaverage intellectual functioning is supported by the evidence and is not against its preponderance. Because all three prongs must be satisfied, this conclusion is dispositive. We nevertheless briefly address the remaining prongs to confirm the absence of error in the PCR court's analysis.

b. Deficits in Adaptive Functioning

The PCR court found Aleksey did not present a formal evaluation establishing deficits in adaptive functioning. Aleksey contends that, even without the Hammock affidavit, the record contains sufficient evidence to satisfy this prong. We disagree.

The second intellectual disability prong requires "significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen." *Blackwell*, 420 S.C. at 139, 801 S.E.2d at 719 (quoting *Stanko*, 402 S.C. at 286, 741 S.E.2d at 726). It is satisfied by proof of deficits in at least one of three domains—conceptual, social, or practical—not strengths in other areas. *Moore*, 581 U.S. at 8, 137 S. Ct. at 1046. Conceptual skills include communication, academic functioning, money management, and judgment. DSM–5, at 37. Social skills include interpersonal interaction, emotional regulation, and communication. DSM–5, at 37. Aleksey does not argue he established deficits in practical functioning.

In *Blackwell*, this Court agreed with the trial court that the defendant did not have significant deficits in adaptive functioning because Blackwell's grades were reasonably sufficient. *Blackwell*, 420 S.C. at 142, 801 S.E.2d at 721. At age eighteen, Blackwell had a reading grade level of 5.8, an arithmetic problem-solving level of 6.6, and an arithmetic computation level of 5.2. *Id.* Blackwell also dropped out of school in the eleventh grade. *Id.* Additional evidence also showed Blackwell was not diagnosed with mental retardation during the relevant period, maintained steady employment as a commercial truck driver, raised two children during a lengthy marriage, and functioned independently at home before age eighteen. *Blackwell*, 420 S.C. at 142–23, 801 S.E.2d at 721.

Similarly, in *Green*, the Fourth Circuit Court of Appeals found no significant adaptive deficits where the defendant demonstrated functional independence across multiple domains. *Green v. Johnson*, 515 F.3d 290, 302 (4th Cir. 2008). There, the defendant communicated effectively during interviews, made sophisticated library requests, explained commissary errors in writing, managed money and savings

accounts, paid rent, used money orders, obtained a driver's license, and concealed criminal activity. *Id.*

Here, although Aleksey points to academic struggles and social difficulties, the record reflects substantial evidence of adaptive functioning. As in *Green*, Aleksey paid rent and bills, used money orders, and maintained a household by cleaning, cooking, and doing the laundry. *Id.* The record further shows Aleksey performed routine domestic tasks and learned and retained new skills.

Dr. Hall also found that Aleksey's written communications from prison reflected organization, coherence, and reasoning inconsistent with significant adaptive deficits. She attributed his documented difficulties to ADHD and environmental factors, rather than intellectual disability. The PCR court credited this testimony, and we defer to that determination.

On this record, and in the absence of a formal adaptive functioning evaluation contradicting Dr. Hall's conclusions, the PCR court did not err in finding Aleksey failed to carry his burden on this prong.

c. Onset During Developmental Period

The third prong of intellectual disability requires onset during the developmental period. Aleksey contends the record shows such a manifestation through his school records and argues his childhood IQ scores (Tests #1–3) are neither dispositive nor reliable. The record does not support that conclusion.

This intellectual disability prong does not require a formal diagnosis or specific IQ score during childhood. *See Blackwell*, 420 S.C. at 172, 801 S.E.2d at 737 (Pleicones, A.J., dissenting) ("The absence of records indicating a diagnosis of intellectual disability prior to the age of eighteen cannot suffice to rule out such a diagnosis."). Rather, the inquiry is whether the intellectual disability manifested during the developmental period. *Stanko*, 402 S.C. at 286, 741 S.E.2d at 726; *Atkins*, 536 U.S. at 318.

Here, every IQ score from the developmental period falls well above the range associated with the intellectual disability (96, 82, and 90 (Tests # 1–3)). No contemporaneous diagnosis suggests intellectual disability, despite multiple educational and psychological evaluations. Taken together, the PCR court did not err in finding Aleksey failed to carry his burden on this prong. *See Carpenter*, 866 F.3d at 748–49 (holding the evidence did not support a finding of significantly

subaverage intellectual functioning where childhood IQ scores ranged from 83 to 97, despite later scores of 69 and 57 in adulthood); *Morrison*, 236 So. 3d at 225 (holding a childhood IQ score of 78 precluded a finding of significantly subaverage intellectual functioning, despite a score of 70 at age 40).

Accordingly, we hold the PCR court's finding that Aleksey failed to prove the three required prongs is supported by the evidence and is not against its preponderance.

IV. Exclusion of Hammock Affidavit

Aleksey also contends the PCR court abused its discretion in excluding the Hammock affidavit. We disagree.

A PCR court "may receive proof by affidavits, depositions, oral testimony or other evidence . . . ." S.C. Code Ann. § 17–27–80 (2014). "Whether to admit such evidence is within the court's discretion." *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018)). We will not reverse the PCR court's decision "absent an abuse of discretion resulting in prejudice to a party." *McKnight v. State*, 378 S.C. 33, 56, 661 S.E.2d 354, 365 (2008).

The weight assigned to adaptive functioning evaluations is based on the "court's assessment and credibility determination of the expert testimony." *Blackwell*, 420 S.C. at 142 n.11, 801 S.E.2d at 721 n.11; see *id.* at 140, 801 S.E.2d at 720 ("Because the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, we must defer to the court's determinations."). In *Simpson*, we upheld the admission of extensive affidavit and deposition testimony in lieu of live witnesses, noting the decision fell within the PCR court's discretion and caused no prejudice to the State. 367 S.C. at 607–08, 627 S.E.2d at 712. There, "most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State," and "the court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." *Id.* at 608, 627 S.E.2d at 712.

Here, the PCR court excluded the Hammock affidavit because its scope, context, and adequacy could not be "adequately addressed without cross-examination and/or other challenges." The PCR court also found the Hammock affidavit was Aleksey's only evidence on adaptive functioning. Relying on *United States v. Candelario-Santana*, the PCR court emphasized the importance of courts making their "own independent determinations of the clinicians' judgment and credibility" for an

adaptive functioning analysis, given that adaptive functioning is subjective and more amorphous than intellectual functioning. *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 211–12 (D.P.R. 2013); *id.* at 204–05 (holding expert testimony on adaptive functioning was unreliable where the expert was combative, seemed unwilling to explain evidence, and had errors in its findings).

Aleksey argues that the PCR court's decision to leave the record open for the State to submit additional testimony and affidavits countering the evidence presented, as in *Simpson*, sufficiently addressed the State's concerns. We believe the need for cross-examination and the PCR court's credibility assessment, given the contested basis of the adaptive functioning prong, sufficiently supported the PCR court's exclusion of the affidavit. Given the contested nature of adaptive functioning, we cannot say the PCR court abused its discretion in excluding the affidavit.

Even if admitted, the Hammock affidavit would have addressed only one prong of the intellectual disability inquiry. As stated, Aleksey failed to prove the remaining requirements. Its exclusion, therefore, did not prejudice the outcome.

We decline to address Aleksey's additional arguments regarding the exclusion of the Hammock affidavit. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

V. Alternate Sustaining Ground

We also decline to address the State's alternate sustaining ground that Aleksey's PCR action was untimely and successive. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *id.* ("An appellate court may not rely on Rule 220(c), SCACR, . . . when the court believes it would be unwise or unjust to do so in a particular case."); *Futch*, 335 S.C. at 613, 518 S.E.2d at 598 (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

VI. Conclusion

We hold the PCR court's finding that Aleksey did not prove he is intellectually disabled is supported by the evidence and is not against its preponderance. We further find the PCR court did not abuse its discretion in excluding the Hammock affidavit. The PCR court's decision is therefore

AFFIRMED.

KITTREDGE, C.J., JAMES, HILL, JJ., and Acting Justice Matthew Price Turner, concur.

Appendix B

STATE OF SOUTH CAROLINA) COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 2015-CP-38 -764 (Capital Case) ORDER (DENYING RELIEF)

FILED FOR RECORD
WINNIFA B. CLARK
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CLERK OF COURT
ORANGEBURG, SC

This is a capital post-conviction relief (PCR) action filed on June 11, 2015. The State moved to dismiss the action as untimely and improperly successive with its return filed August 10, 2015, amended April 26, 2021, as this is Applicant's second PCR action. (*See* C/A 2001-CP-38-628, order denying relief filed February 5, 2010). At a motions hearing held on May 6, 2021, the undersigned heard argument on the State's motion to dismiss. The application presented various claims within ten grounds, Grounds (A) through (J). The parties confirmed to the Court at the May 6, 2021 hearing that they were in agreement that Grounds (B) through (J) are procedurally barred as untimely and successive without exception. The Court will grant the State's motions as to these grounds. The remaining ground, Ground (A), is based on an allegation of intellectual disability and exemption for the death penalty. The Court convened a hearing on this one ground on March 24, 2022. After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled. For that reason, the Court hereby DENIES Applicant's intellectual disability claim. Consequently, this Court dismisses the application in its entirety.

THE CRIME

The Supreme Court of South Carolina provided this general summary of the murder and the investigation and certain key evidence:

> 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.
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> 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.
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> 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.
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> 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).

PROCEDURAL HISTORY

Trial

Applicant was arrested on January 1, 1998. He was indicted for murder at the January 1998 term of the Court 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 Applicant on the charge. On August 24, 1998, the matter was called to trial before the Honorable Edward B.

Cottingham. The matter was prosecuted by Walter M. Bailey, Jr., Solicitor of the First Judicial Circuit. On August 29, 1998, the jury entered a unanimous verdict of guilty for the crime of murder. ROA. p. 1804.[1] The sentencing phase began on August 31, 1998. ROA. p. 1856. At the conclusion of evidence, argument, and instruction, the jury began deliberations on September 1, 1998. After two (2) hours and ten (10) minutes of deliberation, on September 1, 1998, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. ROA. p. 2171-72. After denying counsel's motion for a new trial and sentencing, Judge Cottingham sentenced Applicant to death. ROA. p. 2179-82.

Direct Appeal

Robert M. Dudek, Esq., of the South Carolina Office of Appellate Defense, represented Applicant on appeal, and raised the following issues, as set out by the Supreme Court in its opinion:

> I. Did the trial court's instruction that the jury had "one single objective and that is to seek the truth" violate appellant's due process rights by shifting the burden of proof to appellant and diluting the reasonable doubt standard of proof?
>
> II. Did the trial court err by refusing to suppress appellant's confession and by impermissibly delegating a portion of his *Miranda* duties to the jury?
>
> III. Did the trial court err in refusing to allow appellant to cross-examine Blackwell concerning dismissed indictments on narcotics charges?
>
> IV. Did the trial court err by refusing to redact from appellant's statement references to a contract on his life?

Aleksey, 343 S.C. at 25–26, 538 S.E.2d at 251.

On November 13, 2000, the Court entered its opinion affirming the conviction and sentence after these levels of review: (1) affirming for lack of prejudicial trial error; (2) affirming after finding that the "death sentence was not the result of passion, prejudice, or other arbitrary factors,"

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[1] "ROA" refers to the record on appeal from Aleksey's direct appeal.

(3) affirming after finding the evidence supports the jury's finding of the aggravating circumstance," and, finally, (4) affirming after proportionality review concluding, "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." *Id.*, at 36, 538 S.E.2d at 256. Rehearing was denied on December 6, 2000. *Id.*, at 20, 538 S.E.2d at 248.

Applicant then sought certiorari to the Supreme Court of the United States raising his jury instruction issue following as presented in Issue I of the direct appeal. On May 14, 2001, the Supreme Court denied the petition. *Aleksey v. South Carolina*, 532 U.S. 1027 (2001). Applicant then obtained a stay to pursue post-conviction relief.

The First Application for Post-conviction relief
(2001-CP-38-628)

Applicant filed an application for post-conviction relief on May 31, 2001. 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 Applicant in the action. Applicant would amend his application on September 20, 2002, and again on January 31, 2005. An evidentiary hearing was held in two parts, November 12 through November 15, 2002, and July 7 through July 10, 2003. After briefing, and the filing of the third (and amended) application, Judge Goodstein issued an Order denying relief on February 4, 2010. Applicant filed a motion to alter or amend, and a hearing on the motion was held on May 4, 2010. Judge Goodstein denied the motion by order entered September 2, 2010. Applicant appealed the denial of post-conviction relief.

First PCR Action Appeal

Mr. Dudek, appointed appellate counsel from the direct appeal, and current counsel, Elizabeth Franklin-Best, then also of the South Carolina Office of Appellate Defense, represented Applicant in the appeal. Appellate counsel filed a petition for writ of certiorari in the Supreme Court of South Carolina on June 11, 2011, presenting nine (9) issues from the PCR action. Respondent, State of South Carolina, made its return to the petition on November 16, 2011. On May 23, 2014, the South Carolina Supreme Court denied the Petition. *Aleksey v. State of South Carolina*, Appellate Case No. 2010-173586 (S.C.S.Ct. May 22, 2014 Order denying petition for certiorari). Applicant filed a timely petition for rehearing on June 5, 2014, that the Court denied on June 26, 2014. The Court issued the remittitur on June 26, 2014.

As he did after his direct appeal, Applicant sought further review by filing a petition for a writ of certiorari in the Supreme Court of the United States on December 1, 2014. Counsel raised three ineffective assistance claims (related to conflict, prison adaptability evidence, and a challenge to his confession). On February 23, 2015, the Supreme Court denied the petition. *Aleksey v. South Carolina*, 574 U.S. 1162 (2015). Applicant then turned to the federal courts, obtained a stay of execution, and filed a federal habeas corpus petition.

Pending Federal Habeas Corpus Proceedings
(5:14-03016-JMC-KDW)

The District Court appointed Teresa Norris and Elizabeth Franklin-Best as counsel on July 28, 2014, and entered the appropriate stays to allow the action to be filed and considered. On June 9, 2015, counsel filed a habeas petition in the district Court. On the same date, Applicant filed a motion to stay. Applicant had raised the claims he would also raise in this action, and advised the federal court these claims were not raised and considered in his state court proceedings "due to inadequate assistance of post-conviction counsel" but he would be "simultaneously filing a second

a second application for state post-conviction relief" with these allegations of error. (Return Attachment 10, Federal Habeas Corpus Petition, ECF No. 75 at 9, 13-14, 20, 22, 25, 26-27, 28, 29, 36, 44). Over objection, the United States Magistrate assigned to the case granted a stay on August 19, 2015, concluding that based on the filings she could "[]not definitively say that [Applicant's] pending PCR application is not subject to review." (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.

Relevant Procedural History for this Action

Applicant filed his application on June 11, 2015. This is Applicant's second PCR action challenging his 1998 capital trial and sentencing. The trial judge imposed a sentence of death on September 1, 1998 for Applicant's 1997 murder of a police officer, Sgt. Franklin Lingard of the South Carolina Highway Patrol. Applicant filed his first PCR application on May 31, 2001. That action was denied on February 4, 2010, with certiorari review denied on May 23, 2014. He is currently in federal court on a petition for writ of habeas corpus. The District Court has stayed that action, at Applicant's request, for Applicant to return to this Court and pursue another PCR action.

On August 10, 2015, Respondent, State of South Carolina, made its initial return and moved to dismiss the action as improperly successive and untimely. Judge Early, then appointed to hear this capital action,[2] allowed argument on the State's motion to dismiss on September 9, 2015, along with argument on Applicant's motion to stay the proceedings until resolution of

[2] Supreme Court of South Carolina Order dated July 1, 2015 (Toal, C.J.) (filed in Appellate Case No. 1998-008987).

Robertson v. State,[3] 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 completion of the evaluation and opinion. Applicant, through counsel, was to provide "all pertinent materials to SCDDSN which Applicant finds necessary to a complete and fair evaluation" by the neutral examiner.[4] (Scheduling Order dated June 14, 2018).

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." (Diagnostic Evaluation, SCDDSN evaluator Dr. Alicia V. Hall, Ph.D., Licensed Clinical Psychologist, p. 17).

In light of the notice of Judge Early's retirement, this Court was assigned the matter on February 20, 2019,[5] with the State's motion to dismiss still pending.[6]

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[3] 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (holding "*Martinez* [*v. Ryan*, 566 U.S. 1 (2012)] does not afford [a capital PCR applicant] a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel").

[4] Aleksey did not oppose the evaluation in general, but opposed the motion as premature when the State's motion to dismiss was still pending, and Aleksey's motion to stay until *Robertson v. State* was decided. (See Response to Motion for an Evaluation for Mental Retardation/Intellectual Disability, filed September 10, 2015).

[5] Supreme Court of South Carolina Order dated February 20, 2019 (Beatty, C.J.) (appointing the Honorable Edgar W. Dickson in light of Judge Early's "upcoming retirement").

[6] That motion was not specifically ruled upon; however, is was rendered moot when the Supreme Court of South Carolina issued the decision in 2016.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

Summary Dismissal of Grounds (B) through (J)

Based on the parties' agreement and the relevant records from the prior proceedings as submitted by the State with its return, this Court finds and concludes that Grounds (B) through (J) are untimely and improperly successive without exception. The Court grants the motion to dismiss as to those grounds. *See* S.C. Code Ann. § 17-27-70(c) ("The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.").

The following findings of fact as supported by agreement and the uncontested record, along with the Court's conclusions of law, follow:

Statute of Limitations

S.C. Code § 17-27-45(A) provides a PCR action "must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later." This Court agrees with the parties that Applicant did not file a timely action. Applicant's direct appeal concluded at the denial of his petition to the Supreme Court of the United States on May 14, 2001. Applicant had until May 14, 2002 to file an application with these allegations. He did not file the current application until June 11, 2015. This is over thirteen (13) years after the expiration of the one-year time limit for filing. Grounds (B) through (J) are barred by Section 17-27-45 (A).[7]

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[7] Aleksey does not claim the exceptions of Section 17-27-45 (B) or (C) of the statute. However, the Court notes the basis for Grounds (B) through (J) do not depend on previously unavailable court decisions affecting a substantive standard or establishing a new right since the time of trial or the prior PCR, and would have been apparent from the trial and/or appellate records as discussed in the following section. Thus, the exceptions would not be applicable.

Successive Applications Bar

S.C. Code § 17-27-90 provides "[a]ll grounds for relief available to an applicant ... must be raised in his original, supplemental or amended application." Allegations not raised, or raised but not "finally adjudicated," are barred and "may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application." S.C. Code § 17-27-90. "In order to be entitled to a successive PCR application, *the applicant must establish* that the grounds raised in the subsequent application could not have been raised in the previous application." *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) (emphasis added).

The relevant records of the prior proceedings are before the Court for review, and those records show that Applicant's Grounds (B) through (J) are not only untimely as set out above, but also improperly successive. Further, the record supports these claims were, in fact, all available during the prior PCR proceeding. Consequently, Grounds (B) through (J) are barred as improperly successive and without exception.

Dismissal of the Remaining Ground (A)

"'Intellectual disability' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (12); S.C. Code Ann. § 16-3-20 ("'Mental retardation' means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.").[8] It is this definition that our

[8] Though the term "mental retardation" remains in a portion of our statute, the currently accepted term for the condition is "intellectual disability." *See State v. Stanko*, 402 S.C. 252, 283, 741 S.E.2d 708, 724 n. 1 (2013), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019). Though the term "mental retardation" is disfavored, both "mental

Supreme Court adopted as controlling in the capital context. *Franklin v. Maynard*, 356 S.C. 276, 278, 588 S.E.2d 604, 605 (2003). Though the Court has said it "has strictly adhered to this statutory definition," it also "has recognized that the USSC in *Atkins* 'relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen.'" *State v. Blackwell*, 420 S.C. 127, 139, 801 S.E.2d 713, 719 (2017) (citing *State v. Stanko*, 402 S.C. 252, 286, 741 S.E.2d 708, 726 (2013)).

The applicable law is not at issue and has not been challenged. At issue is whether Applicant has carried his burden of showing, by a preponderance of the evidence, that he is intellectually disabled. *See Franklin*, 356 S.C. at 279, 588 S.E.2d at 606. After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled.

At the March 2022 hearing, the Court heard testimony from Dr. Alicia Hall (qualified as an expert in forensic psychology and intellectual disability assessment before and after developmental period), Dr. David Price (qualified as an expert in clinical psychology & forensic neuropsychology), Pamela Leonard (who came on as a mitigation specialist in the limited role of looking into Applicant's intellectual disability), and Allison Franz (a clinic student from Cornell Law). Applicant himself waived his appearance and was not present at the hearing. Additionally, Applicant proffered the Affidavit of Marjorie Hammock, which opined directly on adaptive

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retardation" and "intellectual disability" may be considered as interchangeable in describing the precise diagnosis at issue here.

functioning in the developmental period. Applicant did not call Ms. Hammock as a witness at the hearing and in fact stated that they were unable to get in contact with her prior to the hearing. As a result, the State was unable to cross examine Ms. Hammock and objected to Applicant's reliance on the affidavit.

Dr. Hall testified, consistent with her report, that in her opinion Applicant "does not meet the diagnostic criteria for intellectual disability as defined" in our State. This Court finds Dr. Hall's presentation was thorough and credible. The Court accepts and credits Dr. Hall's opinion. This Court particularly notes that Dr. Hall was open to hear and consider whatever evidence Applicant wished to present. Applicant did not provide a formal evaluation for adaptive functioning for the evaluation, though Applicant had opportunity to do so.

Applicant actually did not offer any opinion on intellectual disability at the hearing. Applicant gave notice a few days prior to the hearing scheduled for March 24, 2022, of his intent to rely on certain affidavits. This Court considered the offer of affidavits at the hearing; however, Applicant had asserted he "intend[ed] to offer proof in support of his post-conviction relief claims through affidavits of certain witnesses *in lieu of direct examination* of those witnesses at the evidentiary hearing scheduled to commence March 24, 2022." (Notice of Intent, p. 1) (emphasis added). He identified 5 affidavits upon which he intended to rely: Dr. David Price, Marjorie Hammock, Vera Aleksey, Lester David Rosengard, and Allison Franz. (Notice of Intent, p. 1). None of these reflect an opinion on intellectual disability. Even so, Applicant did not simply rely on these affidavits. Applicant called Dr. Price and Ms. Franz and both were subject to cross-examination. Consequently, the stated desire to rely on these affidavits "in lieu of direct examination" was abandoned by Applicant's conduct at the hearing. Further, Applicant did not

rely solely on the affidavits from Ms. Aleksey[9] or Mr. Rosengard for any point or assertion apart from evaluation information. Mr. Rosengard's affidavit was merely part and parcel of the information provided to Dr. Hall for the evaluation, and could be admissible as part of the basis for Dr. Hall's opinion. *See generally* Rule 705, SCRE ("The expert may in any event be required to disclose the underlying facts or data on cross-examination."). At any rate, the intent to rely on the affidavits apart from the evaluation was abandoned by Applicant's conduct at the hearing. That left remaining the affidavit from Ms. Hammock – the only affidavit to which Respondent objected.

The State objected to the affidavit and this Court exercises its discretion to reject the Hammock affidavit. Applicant asserted that Ms. Hammock could not be reached and indicated a deposition and or testimony at a subsequent hearing would not be an option, citing her advanced age and Applicant's inability to reach her for appearance. In essence, Applicant conceded that nothing in Ms. Hammock's affidavit and report has been or can be subjected to the crucible of cross-examination. Yet, Ms. Hammock was the only affiant who offered an opinion on a contested fact (adaptive functioning in the development period) based on a contested basis (incomplete evaluation and/or bias in consideration of information). Applicant's expert, Dr. Price, did not opine as to any review and/or reliance on Ms. Hammock's report or opinion. To the contrary, Dr. Price plainly stated he did not have an opinion as to intellectual disability.[10] The State raised significant questions about the scope, context and adequacy of the Hammock report and opinion. These simply cannot be adequately addressed without cross-examination and/or other challenges,

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[9] The affidavit from Vera Aleksey is dated December 30, 2018. Nothing shows that the affidavit was submitted to Dr. Hall though it would have been available for the DDSN report that was not filed until April 1, 2019.

[10] It is unclear whether Dr. Price reviewed the report and found it insufficient or Applicant failed to provide the report to Dr. Price for consideration much like Applicant failed to provide the report to Dr. Hall for consideration (or reconsideration). At any rate, the affidavit is irrelevant to the testimony of either Dr. Price or Dr. Hall.

and should not be in this context. This Court finds persuasive authority from other jurisdictions that have recognized the importance of presenting witnesses who would opine on adaptive functioning so that the courts may accurately and carefully assess credibility:

> Many courts have noted, correctly, that "[a]daptive behavior is a broader category, and more amorphous, than intellectual functioning." Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility.

United States v. Candelario-Santana, 916 F. Supp. 2d 191, 211–12 (D.P.R. 2013) (citations omitted). Indeed, our Supreme Court has noted the difference credibility can make when considering the presentation of two witnesses with different conclusions on adaptive functioning. *Blackwell*, 420 S.C. at 141–42, 801 S.E.2d at 720. The Supreme Court of South Carolina has underscored the decision whether to admit affidavits is committed to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State,* 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). In light of the above facts, this Court exercises its discretion to reject the Hammock affidavit and declines to accept the Hammock affidavit.

Again, after careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled as required under *Franklin.* This Court finds Applicant has failed to show "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period" as required under our case law. *Blackwell*, 420 S.C. at 139, 801 S.E.2d at 719. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

CONCLUSION

For all the foregoing reasons, this Court denies relief and dismisses the application.

IT IS SO ORDERED THIS 30th day of June, 2022.

Edgar W. Dickson, Circuit Court Judge
By Special Assignment

Orangeburg, South Carolina.

Appendix C

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY, #5059 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 2015-CP-38 -764 (Capital Case) ORDER DENYING MOTION TO ALTER OR AMEND

This is a capital post-conviction relief action initially filed on June 11, 2015. After narrowing the focus of the action to one ground – a claim of intellectual disability – this Court convened an evidentiary hearing on March 24, 2022, to receive the opinion of the court's expert witness and offer the parties the opportunity to present additional evidence. On June 30, 2022, after careful consideration of the evidence presented and the requirements for finding intellectual disability, this Court announced its conclusion that Applicant had failed to carry his burden of proof. The Court issued its Order denying relief that same day. On August 1, 2022, Applicant, through counsel, filed a motion to alter or amend raising four arguments. Applicant submitted a memorandum of law in support of those four arguments on August 31, 2022. After careful consideration of the motion, memorandum, and critically reviewing the June 30, 2022 Order again in light of those arguments, this Court DENIES the motion to alter or amend. Applicant has failed to show any basis for this Court to alter or amend its ruling and the Court expressly reaffirms its ruling as issued on June 30, 2022.

ARGUMENTS PRESENTED

Applicant's motion to alter or amend is based on these arguments:

1. *Lack of Jurisdiction:* Based on emails between counsel and the Chambers, the date of the Order's filing, and Judge Dickson's retirement on June 30, 2022, it appears Judge Dickson did not have jurisdiction to rule on Applicant's claim for relief.

2. *Improper reliance on and adoption of a proposed order drafted by the State.*

3. *Legally and factually erroneous findings concerning the affidavit of Marjorie Hammock.*

4. *Legally erroneous conclusion and lack of factual findings supporting denial of Applicant's claim that he is a person with intellectual disability and, therefore, ineligible for execution pursuant to* Atkins v. Virginia, 536 U.S. 304 (2002).

(Motion, p. 2) (emphasis in original).

DISCUSSION

Though the Court has not limited its review and consideration of the record, order, pleadings, or the motion and memorandum in any way, the Court sets out the following salient facts in denying each of the four grounds.

1. *Jurisdiction.* This matter was originally assigned to the Honorable Doyet A. Early, III.[1] 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). 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." (Diagnostic Evaluation, SCDDSN evaluator Dr. Alicia V. Hall, Ph.D., Licensed Clinical Psychologist, p. 17).

[1] Supreme Court of South Carolina Order dated July 1, 2015 (Toal, C.J.) (filed in Appellate Case No. 1198-008987).

In light of the notice of Judge Early's then approaching retirement, the undersigned was assigned the matter on February 20, 2019.[2] The undersigned heard and considered the evidence presented, including receiving the SCDDSN report. The Court issued its order on June 30, 2022. Though the undersigned retired after June 30, 2022, the undersigned is considered active retired and still assigned the matter. There has been no disruption in the assignment and the undersigned continues to have authority to act in this matter. Applicant's argument lacks merit.

2. *The Proposed Order*. First, this Court rejects the concept that a proposed order cannot be requested, received and adopted in full or part, whether in a capital post-conviction relief case or otherwise. The Rules of Civil Procedure expressly acknowledge the possibility of submission of proposed orders. Rule 5(b)(3), SCRCP. The rule references not just general "proposed orders," but also "proposed findings of fact or conclusions of law, or proposed judgment...." *Id.* Our Supreme Court has in just the past few years yet again noted the routine acceptance of proposed orders in post-conviction relief matters:

> ...We recognize the prevailing party often prepares a proposed order for the PCR court. *See Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004) ("[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.").

Fishburne v. State, 427 S.C. 505, 516, 832 S.E.2d 584, 589 (2019).

The Court also underscored the necessity of an open process to ensure that each party is informed of the submission or submissions and cautioned that it is the duty of both counsel and the court to carefully review the proposed language:

> When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant. A copy of the proposed order should be transmitted to opposing counsel. Opposing counsel should promptly

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[2] Supreme Court of South Carolina Order dated February 20, 2019 (Beatty, C.J.) (appointing the Honorable Edgar W. Dickson in light of Judge Early's "upcoming retirement").

> review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order. Because the PCR judge will ultimately be signing the order, the PCR judge must carefully review the proposed order to ensure it includes appropriate findings of fact and conclusions of law as to all issues raised.

Id.

In this matter, the undersigned adhered to the procedure outlined above, particularly in "carefully review[ing] the proposed order," which it has now had the opportunity to again review in light of Applicant's motion.[3] The order has been adopted by this Court. It is the Court's order. Though Applicant disagrees with the conclusion, he cannot contend that he was unaware of the process. Further, mere disagreement does not show error in the process or the findings and conclusions.

Moreover, in line with the practice of requesting and receiving proposed orders, Applicant, at the request of the Court, has submitted his own proposed order regarding the motion to alter or amend. Applicant, though, rather than simply proposing a grant of the motion and requesting a new order, asks this Court to adopt his proposed order to grant relief. This indicates Applicant's own acknowledgment of the practice and demonstrates his participation in the practice.

At any rate, the nub of the concern remains whether the Court exercised its judicial duty or abdicated its judicial duty by signing the proposed order. This Court affirms that the findings of facts and conclusions of law are the Court's findings of facts and conclusions of law. The Court announced its conclusion prior to the proposed order in its email of June 30, 2022, directed to the parties, which reflected:

> After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence

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[3] Notably, Applicant's motion actually supports the open and detailed review conducted, even including emails from the undersigned's chambers during the drafting process. (*See* Memorandum in Support of Motion, at pp. 2-3).

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> presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

(Email, June 30, 2022).

The Court acknowledges that the initial proposed order process concluded within one afternoon, but that did not restrict the Court from review. The focus was narrow, and parts of the order reflected merely the relevant findings and conclusions going to the uncontested dismissal of other grounds. The portion regarding intellectual disability begins on page 9 of the 14 page order. Further, the affidavit matter was fully litigated by both sides. The proposed fact findings followed the case closely and correctly. The Court agreed with the findings of facts and conclusions of law. However, to the extent, that Applicant's complaints about the timeframe should be considered at all, they are now moot. This Court has again reviewed the matter in detail, as has Applicant. The Court reaffirms its findings of facts and conclusions of law as reflected in the June 30, 2022 Order.

3. *The Hammock Affidavit*. In the Court's email of June 30, 2022, the undersigned noted that Applicant had proffered the Hammock Affidavit. The Court also noted that "Applicant did not call Ms. Hammock as a witness at the hearing and in fact stated that they were unable to get in contact with her prior to the hearing. As a result, the State was unable to cross examine Ms. Hammock and objected to Applicant's reliance on the affidavit." This Court did not simply recall the offer of proof by affidavit from the hearing alone. The Court reviewed Applicant's notice of intent to rely on affidavits and considered both the State's response both at the hearing and its additional response in the filing of May 26, 2022. Critically, though, Applicant's counsel indicated at the hearing that neither a subsequent hearing to receive testimony nor a deposition could be

arranged, and conceded Applicant's own inability to reach the potential witness. (Order, p. 12; Additional Response, para. 2).[4]

Our Supreme Court has underscored the decision whether to admit affidavits is committed to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). In apparently finding no abuse of discretion (or perhaps no reversible abuse of discretion) in allowing multiple affidavits in *Simpson*, our Court resolved that there was "no prejudice to the State" given that "most of the relevant witnesses testified at the PCR hearing and were cross-examined by the State" and the PCR "court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." *Id.*, at 608, 627 S.E.2d at 712. That was not possible here. The State could not cross-examine a witness Applicant failed to call, and nothing was ever presented to counter. Under the guidance of *Simpson*, this Court exercised its discretion to reject the Hammock affidavit in these circumstances.

4. *No Intellectual Disability Finding.* This Court found "there was simply not enough evidence presented to indicate" intellectual disability and directed the State to submit a proposed order. (Email, June 30, 2022). The proposed findings submitted by the State follow evidence

---

[4] The Court acknowledges Applicant's argument that he simply gave up on contacting the witness in favor of offering the affidavit, (*see* Memorandum in Support, at 11), but the Court again affirms that Applicant's comments of the witness being non-responsive indicated no ability to have the witness come to court or otherwise preserve the testimony by deposition. But the precise concession Applicant intended, in actuality, has little impact. Applicant could not contact the witness for the hearing and attempted to rely on an affidavit. Applicant's attempt to shift the responsibility for his evidence to the State by indicating the State should look for the witness is unavailing for two critical reasons: (1) Applicant's argument depends on an assumption that an affidavit must be accepted, but an applicant does not have the authority to force acceptance of affidavits, rather the acceptance of affidavits is in the discretion of the court, (*see Simpson*, discussed on this page); (2) Applicant has the burden of proof, and he cannot shift that burden to the State.

6/7

presented, including those regarding Dr. Hall's (SCDDSN) evaluation and credible testimony. The Court found so then and reaffirms so now. Of note, the proposed findings accurately reflected Applicant's only expert in psychology presented, Dr. Price, did not opine as to intellectual disability. In short, Applicant did not actually offer any opinion on intellectual disability at the hearing. Applicant has the burden of proof to show intellectual disability by a preponderance of the evidence. *Franklin v. Maynard*, 356 S.C. 276, 280, 588 S.E.2d 604, 606 (2003). He failed.

The Court finds again that there was simply not enough evidence presented at the hearing to indicate that Applicant satisfied all three diagnostic criteria required to show intellectual disability.

CONCLUSION

For all the foregoing reasons, this Court reaffirms each finding of fact and conclusion of law in the June 30, 2022 Order denying relief and denies the motion to alter or amend.

Edgar W. Dickson, Circuit Court Judge
By Special Assignment

~~December~~ January 5, 2024.

Appendix D

The Supreme Court of South Carolina

Bayan Aleksey, Petitioner,

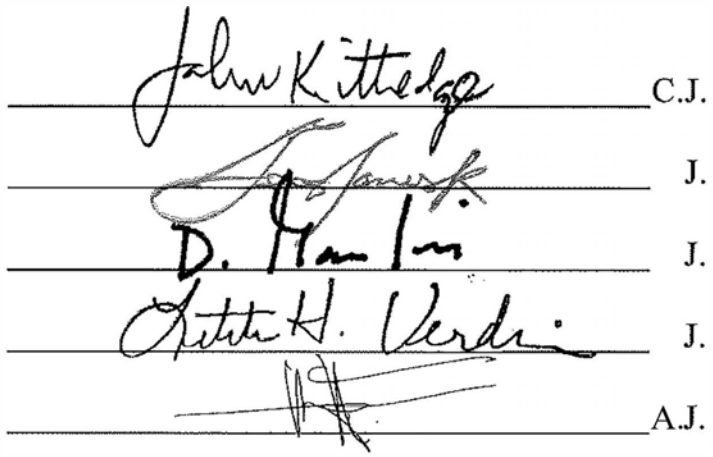
v.

State of South Carolina, Respondent.

Appellate Case No. 2024-000140

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.

J.

J.

J.

A.J.

Columbia, South Carolina
June 23, 2026

cc: Melody Jane Brown
Allison Franz
Alan McCrory Wilson
Donald J. Zelenka

Appendix E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ORANGEBURG	)	FIRST JUDICIAL CIRCUIT
BAYAN ALEKSEY	)	NO. 2015-CP-38-764
	)	
VS.	)	TRANSCRIPT OF RECORD
	)	
STATE OF SOUTH CAROLINA	)	Post Conviction Relief Hearing

B E F O R E:
The Honorable Edgar W. Dickson, Judge

DATE: Thursday, March 24, 2022
10:07 a.m.
Orangeburg, South Carolina

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Reported by: Cathy J. Provost, RMR, Official Court Reporter

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COURT REPORTER LEGEND:

dash -- intentional/purposeful interruption; change in thought
ellipses ... trailing off
[ph] phonetically written
[sic] written as said
[indiscernible] unable to be understood due to low volume or quality of audio

-- P R O C E E D I N G S --

THE COURT: This is Case No. 2015-CP-38-764, Bayan Aleksey, Applicant, versus State of South Carolina. This is the evidentiary hearing that's been scheduled in this case.

It's my understanding, based on the status conference that we had on, I believe, the 22nd, that I was going to receive as a Court's Exhibit Judge Early's request for an independent evaluation. Is that correct?

ATTORNEY BROWN: We have Dr. Hall here.

THE COURT: Oh, okay.

ATTORNEY BROWN: I'll present her for questioning.

(Court's Exhibits 1 and 2 are identified.)

ATTORNEY BROWN: And we have premarked her CV and her report from March of 2019 as Court's exhibits.

THE COURT: All right. And that's Court's, was that 1 and 2, or 1?

ATTORNEY BROWN: One and 2.

THE COURT: Okay.

ATTORNEY BROWN: I believe the CV is 1 and the report is 2, Your Honor.

THE COURT: Okay. All right, Ms. Brown. If you would -- yeah, Ms. Brown, if you want to call your first witness.

ATTORNEY BROWN: We do have pending motion, Your Honor.

THE COURT: Okay.

ATTORNEY BROWN: And I believe that's opposing counsel's

motion on the affidavits, if you would like to hear that first.

THE COURT: Sure.

(Applicant's Exhibit 1 is identified.)

ATTORNEY VANN: Yes, Your Honor. Just a couple of things, but first I also had mentioned that I would bring an original of Mr. Aleksey's waiver of appearance, and so I've marked that as Applicant's Exhibit 1.

THE COURT: Okay. Any objection to that?

ATTORNEY BROWN: No objection, Your Honor.

THE COURT: Okay. So if you'd just -- you already had it marked, so we'll accept that in evidence.

(Applicant's Exhibit 1 is admitted into the record.)

THE COURT: Okay.

ATTORNEY VANN: And then as Ms. Brown said, yes, on Tuesday we filed applicant's notice of intent to rely on affidavits, and we supplied five affidavits with that notice. They are from Dr. David Price, Marjorie Hammock, Vera Aleksey who is Mr. Aleksey's mother, Lester David Rosengard, and Allison Franz.

Two of those affidavits, from Dr. Price and from Allison Franz, we will also be presenting live testimony from those witnesses.

THE COURT: Okay.

ATTORNEY VANN: And then the other three we would be presenting in lieu of live testimony, and have presented them with the notice of intent to rely on affidavits. The State has

each of those and has had each of those for quite some time. And I believe that Ms. Brown has an objection to one of them coming in but not all five of them.

THE COURT: All right. And anything else you need to tell me before I ...

ATTORNEY VANN: I might have some response to her objection.

THE COURT: All right. Ms. Brown, your objection is to which one?

ATTORNEY BROWN: Your Honor, we object to the Marjorie Hammock affidavit. We recognize that affidavits can be received in post-conviction relief cases, the statute does allow that, but our State Supreme Court has said that it is in the discretion of the PCR judge, and we would submit to you that this particular affidavit doesn't have particular just facts that we wouldn't contest or something that it doesn't go to the heart of the matter; this particular affidavit has several opinions about adaptive functioning which does go to the heart of the matter, and more importantly, adaptive functioning is an area that is greatly subjective when you are doing especially a post-developmental period assessment for intellectual disability.

And because it's so important to have the live witness, we would submit to you that it would be an abuse of discretion to allow just the affidavit at this point. I do have some cases I'd like to rely on, Your Honor.

THE COURT: Yes, ma'am.

ATTORNEY BROWN: The first one is *Simpson v. Moore*. And may I approach with a copy?

THE COURT: Yes, ma'am. Thank you, ma'am.

ATTORNEY BROWN: Yes, sir.

ATTORNEY: I appreciate it.

ATTORNEY BROWN: Your Honor, I tabbed the portion that talks about depositions/affidavits to be accepted at a PCR hearing, and this particular case -- it's a capital case, it's very relevant, it's right on point, and again, we don't contest that the Court can receive evidence by affidavit, but what's really important is the third paragraph under that depositions and affidavits portion on Page 12 of the Westlaw numbering, and that is: There is no abuse of discretion because most of the relevant witnesses testified at the PCR hearing and were cross-examined and, in addition, the Court gave the State the opportunity to submit additional testimony and/or affidavits.

And at this point, Your Honor, we have been gearing up for this particular hearing for quite some time, so if the applicant had wanted to present an opinion on adaptive functioning we would suggest that that would more appropriately be done by live testimony.

THE COURT: Where you can cross-examine that person.

ATTORNEY BROWN: Yes, sir. And --

THE COURT: Go ahead.

ATTORNEY BROWN: And just to underscore how important it is

for adaptive functioning, I'd also would like to hand up two additional cases. One is from our State Supreme Court. It's the case of *State v. Ricky Lee Blackwell.* May I approach?

THE COURT: Oh, yes, ma'am. Yes. Thank you, ma'am.

ATTORNEY BROWN: This case underscores how important it is for the trial judge, when determining intellectual disability, to actually have the evaluator before him. In that case the trial judge had to weigh the certain elements that the evaluator used to make the determination on adaptive functioning.

And the Supreme Court underscored, because there was record support for that detailed factual determination, that they were affirmed on direct appeal.

The other case I'd like to hand up is a federal case. It's *United States v. Candelario-Santana.*

THE COURT: Thank you, ma'am.

ATTORNEY BROWN: Yes, sir. And I marked this particular case not because, of course, it's binding on us but it has a very good summation of why it's so important to have live testimony on this particular issue.

And on Page 14 of the Westlaw cite, we have this one part under paragraphs 8 and 9: Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong 2 that under prong 1. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinician's judgment and

credibility.

So, Your Honor, we don't object lightly to the affidavit, but we believe, because this is so important to the only issue in this case that's been allowed to go forward, that live testimony should be presented.

THE COURT: Thank you, ma'am. Ms. Vann.

ATTORNEY VANN: Yes. So we submitted the affidavit for presentation based on the *Simpson v. Moore* case and the statute that explicitly provides that the Court may receive proof by affidavits, deposition, oral testimony, or other evidence.

In the *Simpson v. Moore* case, they admitted 40 depositions and 22 affidavits into evidence in lieu of live testimony. Our Supreme Court found that there was no abuse of discretion to admit that and that it did not prejudice the State because the Court gave the State the opportunity to submit additional testimony and affidavits countering the evidence presented.

That is still available here. We presented this affidavit to the State back in October of 2019. They have had it since then. It was also --

THE COURT: When did you -- I'm sorry. When did you present it to them?

ATTORNEY VANN: We submitted it to them in a discovery production on October 22nd of 2019 in advance of the hearing that was then-scheduled in November of 2019.

THE COURT: All right. Continue. I didn't mean to -- I

just needed to --

ATTORNEY VANN: Thank you. The document was also admitted as an exhibit at the motion to dismiss hearing that we had before this Court in May of 2021, so it has been presented already, and it was provided to Dr. Hall at DDSN on October 30th of 2019, so both the State and the expert for the Court have had that for over two-and-a-half years.

And so as in *Simpson*, the State has had an opportunity to a review that, they had an opportunity to present additional testimony, or their own affidavits to counter that. They could have called Ms. Hammock to cross her based on that evidence in that affidavit as well.

As we said in the notice of intent to rely on affidavits, we submitted this in lieu of our direct testimony but that, of course, does not prevent them from calling her to cross her on the information in that affidavit. We also did try to contact Ms. Hammock before this hearing. She is 86 years old and retired.

THE COURT: She is how old?

ATTORNEY VANN: Eighty-six years old and retired, and we were not able to get in touch with her. And so in reliance on the statute and *Simpson v. Moore*, we submitted it to this Court, and we submit that it would not be an abuse of discretion to allow that in lieu of her live testimony.

THE COURT: Where is she? Where is Ms. Hammock?

ATTORNEY VANN: She is in the Columbia area, I believe.

THE COURT: So when she did this report three years ago she was 83, approximately?

ATTORNEY VANN: Yes, Your Honor.

THE COURT: Okay. And you were not able to get in touch with her prior to this hearing?

ATTORNEY VANN: No, Your Honor. I called her and I emailed her with the contact information that we had for her when she did the report, and I was not able to get in touch with her.

THE COURT: Okay. Is that the reason you did not call her as a witness, or you all just wanted to rely on the affidavit?

ATTORNEY VANN: Under the case law and the history in the state of presenting affidavits, we felt that that was the best presentation. That was her report from the time that she had reviewed all of the records and had met with Mr. Aleksey and interviewed his mother.

THE COURT: Anything else you want to tell me, Ms. Vann?

ATTORNEY VANN: No, Your Honor.

THE COURT: All right. Ms. Brown, you all have known about this report since 2019?

ATTORNEY BROWN: I did not, Your Honor.

THE COURT: Okay.

ATTORNEY BROWN: I will say that the State has had multiple counsel on this case. I recall seeing it for the very first time in our, I believe it was, May 2021 hearing, and it was offered as

an exhibit.

I noticed at that time, and I'll point out to the Court, that the evaluation from DDSN was provided to the clerk of court on March 28th of 2019, and Ms. Hammock's affidavit was not notarized until October of 2019, and I remember at the hearing pointing out that DDSN didn't even have this information to rely on.

I will not say that it wasn't emailed to us at some point, Your Honor. I did not know about it until that particular hearing.

I am concerned that the information we received this morning indicates that we won't have access to her at all. I think that adds another layer of complexity and weighs in favor of not admitting the affidavit.

THE COURT: Ms. Brown, can't this be cured by me allowing you the opportunity to get an affidavit in response to that or bring someone in to testify as to this?

ATTORNEY BROWN: Well, Your Honor, we have to have access to the witness to be able to figure out why she did certain things in the report. For instance, most of her report, it's heavily relying on a 2019 interview. I won't know what that interview is -- and that's with Vera Aleksey. I won't know what that interview is without being able to have access to the witness, and page after page relies on that particular interview and the affidavit as well. But a lot of that information is developed

outside of my realm of knowledge, so I will need access to the witness.

THE COURT: But can't you present someone, an expert or someone, to address the adaptive behavior? I mean, don't we have -- doesn't the State have someone addressing adaptive behavior?

ATTORNEY BROWN: If they got an expert that can do that, I suppose I could research to see what such expert would be. Ms. Hammock's a social worker and doesn't have any expertise that I can detect from the affidavit for this particular area, so I would have to think about what expert would be able to counter.

But I'm not sure, again, that I can counter what I don't know, and as far as the information that she has that I'm not aware of, I have to ask her about that.

THE COURT: Okay.

ATTORNEY BROWN: I think, Your Honor, that would be the first step in trying to offer a compromise. The first step would be to have access to her.

THE COURT: To Ms. Hammock?

ATTORNEY BROWN: Yes, sir.

THE COURT: Okay. Well, all right. Well, for what it's worth, at very least it's going to be proffered at this point, and I'll decide what I'm going to do with it.

Are you also contesting the affidavit based on the fact that she's not an expert in that area since you said she's a social

worker and not -- has not presented -- You don't know of anything that would allow her to offer an opinion to the Court on adaptive behavior?

ATTORNEY BROWN: I would say that would be one of my questions about whether she can even do that. But the biggest question, Your Honor, would be the quality of the reporting and the quality of the opinions.

For example, Your Honor, looking over the affidavit which I think you have identified and that's before you, basically it's taking what the mother says and saying these are examples of deficiencies. But there's a wealth of information that has not been considered. She does make reference to girlfriends, that he moved out of his mother's house and lived off of girlfriends, but then we have the trial court record that says that he took advantage of women all the way through his 20s until his arrest at age 29.

All of that is relevant and it rebuts that, but we're in an odd situation where this is related to us as: Here's my opinion; I think intellectual disability; this could support my opinion on intellectual disability; I did an interview; don't have any notes or anything produced from the interview.

It's a very loose basis of knowledge for any kind of an assertion of significant adaptive functioning limitation.

THE COURT: Okay. Thank you, ma'am. Where I am right now, it's a proffer, okay, and we'll decide. I'll read over

everything and see how I feel after I reviewed the other evidence. Okay.

(Applicant's Exhibits 2, 3, 4, 5, and 6 are identified.)

ATTORNEY VANN: Thank you, Your Honor. Should I admit the other affidavits that there was no objection to?

THE COURT: Any objection to the other affidavits?

ATTORNEY BROWN: No, sir. They don't have any opinion going to the ultimate issue.

THE COURT: Okay. All right. And those are all -- everything except Ms. Hammock's is in evidence.

ATTORNEY VANN: Yes, Your Honor. So we had those premarked -- and I can give you copies with the numbering on them -- Dr. David Price as Exhibit No. 2, Vera Aleksey as Exhibit No. 4, Lester David Rosengard as Exhibit 5, and Allison Franz as Exhibit 6.

THE COURT: All right.

(Applicant's Exhibits 2, 4, 5, and 6 are admitted into the record.)

THE COURT: Thank you, ma'am.

ATTORNEY VANN: Thank you.

THE COURT: Any other prehearing/pretrial things I need to take up?

ATTORNEY VANN: No, Your Honor.

THE COURT: Anything else from the State?

ATTORNEY BROWN: No, sir, Your Honor.

THE COURT: Okay. So now we're ready to go over the opinion that Judge Early wanted. You said you had the expert here?

ATTORNEY BROWN: Yes, sir, Your Honor. We can call Dr. Alicia Hall to the stand.

THE COURT: And, Dr. Hall, since there's no -- I'm going to swear you in, okay.

DR. ALICIA V. HALL, Ph.D.,

having first been duly sworn, is examined and testifies as follows:

THE COURT: And, Ms. Hall, do you mind just telling me your full name for the record.

THE WITNESS: Alicia, A-l-i-c-i-a, V. Hall, H-a-l-l.

THE COURT: Okay. And, Ms. Brown, she is your witness.

ATTORNEY BROWN: Thank you, Your Honor.

DIRECT EXAMINATION

BY ATTORNEY BROWN:

Q Good morning.

A Good morning.

Q Dr. Hall, would you please tell us where you're currently employed and your position.

A South Carolina Department of Disabilities and Special Needs. I am the chief psychologist in the Office of Clinical Services.

Q And what are your duties within that position?

A There's two separate areas in that office, but I strictly work on forensic issues, so we do court-ordered evaluations for

competency to stand trial, we handle PCR cases, and that's about it.
Q Strictly court-ordered evaluations, --
A Yes.
Q -- that's what your practice is?
A Yes.
Q And do you hold any professional licenses for your work?
A Yes. I'm licensed as a psychologist in South Carolina.
Q And can you review just briefly with us your educational background since college?
A Yes. I have a doctorate from the University of South Florida in clinical psychology. I was on the Child Track, and with a focus in forensics.
Q And forensics would be what in the field of psychology?
A Forensics in psychology is the marriage, or intersection, between psychological functioning or legal psycho issues and the legal system.
Q And can you give us a brief summary of your professional employment?
A Since coming to South Carolina I've worked at the Department of Mental Health, I've worked at the University of South Carolina School of Medicine, and the Department of Disability for Special Needs.
Q Are you a member of any professional organizations specific to psychology?

A Yes. I'm a member of APLS, which is the American Psychological Law Society, which is a division of APA. I'm a member of the American Society of Black Psychologists. I'm a member of AAID, which is the American ... focuses on disabilities and special needs, it's the premier organization for that. I'm also a member of INSAR, which is an International Association of Autism -- I'm sorry, it's now called INSAR, International Association for Autism Research.

Q Okay. What kind of evaluations do you conduct today?

A DDSN does strictly competency-to-stand-trial evaluations. The way the state statute is written, those are the evaluations that we do, so we see individuals where there is a presence, or a question, of whether or not they have an intellectual disability or a related disability, and so we were to answer the question for the Court whether or not that person is competent to stand trial.

Q And how does that work with DMH, too? How does that --

A Well, it's a state statute. Because they're two lead state agencies, if the question is an intellectual disability or related disability, then the order goes to DDSN. If the question is mental health, the order goes to DMH.

Each agency receives all the information along with that corresponding court order, and then we decide if a joint evaluation is needed, meaning the presence of a co-occurrence, something that would be under DDSN'S purview and something that

would be under DMH'S purview. And then each agency sends an evaluator to do what we call a joint evaluation.

Q And what kind of specialty training do you have to conduct evaluations for intellectual disability?

A So I've worked with folks with intellectual disability or neurodevelopmental disorders since approximately 2001, so when I came to South Carolina for my internship at William S. Hall Psychiatric Institute, part of my training was in the Developmental Disorders Clinic, and so that's where I really got firsthand instruction and training in working with individuals with neurodevelopmental disorders. And so since that time I've always worked with those individuals in private practice, and research, and in forensic practice.

Q And you say individuals. What kind of an age range are we looking at?

A Across the lifespan.

Q Have you taught any classes or courses on assessments for intellectual disability?

A Not just strictly on that, but I do teach at the University of South Carolina, Department of Psychology. The courses I taught are human sexuality, human development, abnormal psychology, and then child behavioral -- behavior and mental disorders, and then currently I am teaching advanced forensics.

Q And can you share with us how many evaluations you've done for intellectual disability?

A Do you mean diagnostically or just for competency, or forensically?
Q Forensically.
A Probably close to a thousand. I've been doing it since 2006.
THE COURT: Did you say 2,000?
THE WITNESS: 2006.
THE COURT: No, no, no. You've been doing it since 2006.
THE WITNESS: I've been doing the forensic evaluations since 2006.
THE COURT: But you asked a number of how many times, right?
THE WITNESS: I said close to a thousand.
THE COURT: Okay, close to a thousand. Okay.
THE WITNESS: If not over. I don't know.
Q And have you testified in any South Carolina Courts before?
A Yes.
Q And were you qualified as an expert?
A Yes.
Q And in what discipline were you qualified to be an expert in?
A In forensic psychology and dealing with special needs when that is in question.
Q Have you ever been qualified as an expert specifically in the assessment of intellectual disability?
A Yes. Yes.

Q And time-wise, are the majority your evaluations presently in your job as you hold it today for intellectual disability during the developmental period or post-developmental period?
A Most of the people that we see already have a diagnosis, but there are, I think, around, again, maybe 20 percent of the cases -- and it varies from year to year -- where the person had not been diagnosed and so we offer a provisional diagnosis at that point.
Q How many post-developmental-period assessments have you done?
A Maybe 300.
THE COURT: How many?
A It's hard to put a number on that.
Q Around 300; is that correct?
A Yes.
THE COURT: Ms. Hall, I am protected by walls and walls of glass for apparently no reason, and I don't have the microphone up there. Do you mind speaking just a little louder?
THE WITNESS: Of course.
THE COURT: Okay. Thank you, ma'am. Appreciate it. Go ahead.
Q And have you conducted evaluations to detect intellectual disability in any capital cases?
A Yes.
Q And how many of those have you done?

A Five.
Q And you have a current CV, correct?
A Yes.
Q I'd like to show you what's been marked Court's Exhibit 1 and see if you can identify that as a copy of your current CV.
A Yes.
ATTORNEY BROWN: Your Honor, we would move that in as a Court's exhibit. And I have a copy for the Court, if you would like.
THE COURT: Yes, ma'am, if you don't mind. Thank you, ma'am. I will accept it. Appreciate it.
(Court's Exhibit 1 is admitted into the record.)
Q And I believe within that CV you've got some educational materials at the back, both talks that you've given, courses, and materials that you've written?
A Yes, ma'am.
Q And how many of those approximately do you have in your CV at this time?
A I'd have to count them, but quite a few.
Q Quite A few pages worth?
A Yes, ma'am.
Q Is that fair to say?
A That's fair to say.
ATTORNEY BROWN: Your Honor, based on the testimony, we would ask you to find Dr. Hall qualified as an expert in forensic

psychology and in intellectual disability assessment, both before and after the developmental period.

THE COURT: And, Ms. Vann, any objection?

ATTORNEY VANN: No objection, Your Honor.

THE COURT: All right. She is qualified as an expert in both of those fields. Okay.

Q Dr. Hall, how did you become involved in this particular case?

A DDSN received a court order. The order was actually sent to our legal general counsel at the time, who was Tana Vanderbilt, and so that's how we got involved.

Q Is the ordinary process you receive an order from a Circuit Court judge to conduct an evaluation?

A Yes.

Q And you were not employed or retained by the Office of the Attorney General?

A Not at all.

Q And you were not employed or retained by the applicant, Mr. Bayan Aleksey?

A No.

Q You came in as a neutral examiner?

A Yes.

Q In post-developmental-period assessments, you have to obtain records, so you have some information to make that backward-looking assessment, correct?

A Yes.
Q And in this case who was responsible for providing the records to you?
A Mr. Bayan's counsel.
Q And the examination order was signed back in May of 2017, and your report came out in 2019. During that time did you work significantly on this case?
A No, and that's because we didn't receive all the records that were required until significantly later. And so the policy of DDSN is that we begin doing our evaluation once we've received all the records. So, in response, once we receive everything we need to actually begin the evaluation.
Q And were you ever in a position where you needed to ask for additional records?
A Yes.
Q And did you do that?
A Yes, via email, I think, on -- during a status -- let me back up. We had several status conversations, and so during the status -- it wasn't a hearing, it was a -- conference call, and I think we emailed twice, we had to ask for records.
Q And did Mr. Aleksey or counsel provide documents to you as requested?
A Yes. It's my understanding that as they got information they were sharing it, but it was difficult to get records because they were requesting things from out of state.

Q Did you ever refuse receipt of any documents offered to you from Mr. Aleksey?
A No.
Q Were you ever advised that there were documents received that may not be given to you, that were being withheld from review?
A No.
Q Were you ever aware or informed that they were waiting on additional documents and they wanted you to wait on your report?
A Not that I recall.
Q Okay. Did you ever have a request from either party to delay your evaluation until more testing or more materials could be found?
A No, but I believe that, you know, Ms. Vanderbilt and I made it clear that we couldn't move until we had certain documents.
Q Turning to your report, you issued a report dated March 27th, 2019. And I believe Ms. Vanderbilt, who was, correct me if I'm wrong, general counsel at the time --
A At the time, yes.
Q -- sent that report into the clerk's office. It's filed. It's part of this case. I have a copy. I wonder if you would be able to identify this, marked as Court's Exhibit 2, and tell me if that is your report as it was sent to the clerk of court's Office?
A Yes, this is a copy of my report.

ATTORNEY BROWN: Your Honor, we'd like to move that in as Court's Exhibit 2.
THE COURT: And no objections, are there?
ATTORNEY VANN: No objection, Your Honor.
THE COURT: Okay.
(Court's Exhibit 2 is admitted into the record.)
ATTORNEY BROWN: And I have a copy.
THE COURT: And just for the record, there was no objection to her CV either, right?
ATTORNEY VANN: No, Your Honor.
THE COURT: All right. Continue, Ms. Brown.
Q And you set out on Page 1 of your report that you're guided by the definition of intellectual disability as set out in our state statute, 16-3-20, right?
A Yes.
Q And are you familiar with the definition of intellectual disability that is set out by the American Association on Intellectual and Developmental Disabilities?
A Yes.
Q Now, is that the organization that you mentioned earlier?
A Yes.
Q And you're a member of that organization?
A Yes.
Q Is their definition substantially the same?
A It's substantially the same.

Q And as a forensic psychologist, are you familiar with the DDSN file?
A Yes.
Q And that's the manual for diagnosis that would be used by most psychiatrists and psychologists; is that correct?
A Yes.
Q And does it have a definition of intellectual disability?
A Yes.
Q Is it substantially the same?
A Yes.
Q So all roads lead to the determination of the level of intellectual functioning and adaptive behavior during the developmental period; is that fair?
A Yes, that's fair.
Q And is that what you were looking for?
A Yes.
Q Okay. And it's not just limitation, it's significant; is that correct?
A Yes.
Q And what are you looking for when you're looking for significant? How can you conceptualize that for us?
A Significant to the point where it impedes or hampers someone's functioning, removes their independence of functioning, or limits their independence of functioning. So that's what we're looking for.

Q Now, I think we might have talked about this a little bit earlier, but in order to conduct your evaluation you have to have sources of information?
A Yes.
Q And in your report you have listed out information on Pages 2 to 3?
A Yes.
Q Are those all the records that you received and reviewed?
A Prior to the report being written, yes.
Q So those are the documents that you used to form your opinion in this matter?
A Yes.
Q And that includes a social worker's assessment from '98?
A Yes.
Q And that's contemporaneous to the trial, correct?
A Yes.
Q And you had trial court records, too?
A Yes.
Q And in going further back, you had documents from the '80s, correct?
A Yes.
Q And then even from the '70s?
A Yes.
Q And those documents included prior evaluations, both in school and/or intellectual functioning, correct?

A Yes.
Q Kind of unusual, isn't it, for you to be provided results from formal IQ tests that were actually performed during the developmental period?
A That's not unusual at all, especially in PCR cases or access [ph] cases. In our CST work, depending on the age of the person, federal law mandates that anyone in special education, their records are destroyed after five years of graduation or five years of them stopping going to school, so sometimes it's difficult to get those records.
Q And that's helpful for you when they're there?
A Yeah. We love it when they're there.
Q And on Page 7 of your report you listed three tests in particular between the ages of 6 and 14?
A I listed three between the ages 6 and 14.
Q Is that correct?
A Yes.
Q Are those tests that you listed out, are they accepted measures for IQ testing?
A Yes.
Q Did they appear to be used in the correct timeframe to you?
A They were the ones that were available at the time that they were given.
Q Just a little background, these tests change over time, right?

A Yes. They're updated, re-normed over time.
Q So I notice you didn't list anything that would be considered an informal IQ exam like school testing/school aptitude?
A No, because those are not used to make the diagnosis.
Q And why aren't those a good resource for the diagnosis?
A They're given -- it's difficult to standardize the administration of them, where the tests, 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.
Q And from the records that you reviewed, were these tests given by professionals who would normally use them to aid in determining intellectual functioning?
A They were all given by either school psychologists or psychologists practicing in a more private setting.
Q And that would be a professional who would have the manuals and be able to --
A And been trained on how to administer the test.
Q I'm going to get you to skip back a little bit to your Page

3 of the report. And on Page 3 you're discussing a bit of family history, and I just wanted to go over a few things. There's no indication in your report of some type of family history of intellectual disability; is that correct?
A That is correct.
Q And there's no indication of some kind of delayed development apart from speech?
A That's correct.
Q Did you have several sources that reported that to you?
A Yes. The school records, his medical records, and then Mr. Bayan, himself, was unaware of anyone in his -- of his relaying of his behavior being delayed or his development being delayed.
Q And no indication of some kind of trauma to the child during pregnancy?
A No.
Q Nothing like that, okay. Going forward, on Page 4 you indicate that there's school records that seem to span from first grade, even, forward; is that correct?
A That is correct.
Q Is it unusual or usual to have these types of records in a post-developmental, backward-looking review, for intellectual disability?
A We always request them, so when we get those contemporaneous records that's very important for us to be able to look at that

information.
Q And in comparison to some of the other capital cases that you've reviewed would you say this case has more information or less information than those?
A About the same. Maybe a little bit more. I can only think of one other case where there were more records provided.
Q And it's also better to have more information, correct?
A More is always better. Yes.
Q More is better, okay. You discussed some of the records on Page 4 in that report, and I wanted to bring to your attention -- it's about mid page -- when you discuss an evaluation and placement in special education.
A Yes.
Q Do you see that part?
A Uh-huh.
Q You have that he was classified as a student having, quote, emotional disability, end quote. Why did that stand out to you?
A In order for you to receive special education services, either a parent or a teacher has to be concerned that a child is not living up to what they think the child's academic potential is, and so they've raise the question, Is something going on that is preventing the child from doing well in school?
And so at the time Mr. Bayan's behavior was such that it was preventing him from benefiting from a general education setting, so they did an evaluation of him to determine if he met criteria

for special education.

So there are approximately 23 disability/disabling classifications in school which would require a child to receive special education services under the IDA, and so they're really looking at all of those things to see what qualifications a child has to get those services, and so where Mr. Banyan received -- or excuse me, Mr. Aleksey, received -- services, or where he met criteria for those services were under emotional disability.

Q And is it fair to say that he was evaluated fairly consistently throughout his school years?

A Yes. According to the IDEA, kids who are in special education have to be reevaluated every three years to make sure that they're still eligible for those services.

Q Okay. And on Page 5 you noted that there was a concern about a possible mild learning disability. Can you tell us a little bit about that notation?

A Yes. His teacher, or the IEP team, thought that while he did have some emotional difficulty, they were also wondering if he also had a learning disability that increased the likelihood of the disruptive behavior that was happening, or the emotional component that was happening, but what they felt was that the emotional component really was what they could address, and he clearly met criteria for that as opposed to a learning disability.

Q So he was being repeatedly assessed and offered assistance

throughout this period --
A Yes.
Q -- trying to get him to the right assistance that he would need?
A Right. Trying to get him the assistance that he would need in school so that he could perform academically to the best of his ability.
Q You have teachers, and you have psychologists --
A A school psychologist, yes.
Q They work together --
A Yes.
Q -- to do these assessments? Okay.
(State's Exhibit 1 is identified.)
Q Let me show you a few items from your records that you reviewed to see if you can identify these as some items that you relied on. The first has been premarked State's Exhibit 1. I apologize for the quality but this is as good as I could get that. Can you identify that is a record that you received, reviewed, and relied on?
A This looks like it. I viewed these on a computer screen so I could read them more clearly.
Q Can you tell the approximate date there?
A It looks like July 2nd, 19 -- or, July 9th, 1980. Maybe the first page looks like it says July 2nd, 1980.
Q It's a terrible copy.

A Yes.
Q It is. What I'm going to ask you about, what I want to ask you about and have you focus on, is the first paragraph of the second page, so perhaps you could turn your attention to that first paragraph and see if that refreshes your recollection whether you received this and reviewed it.
A Okay. Yes, I can read this.
Q And in that second paragraph --
ATTORNEY BROWN: Your Honor, may I move this in as State's Exhibit ...
THE COURT: One, is that what you have it marked as?
ATTORNEY BROWN: One. We did, and we switched it.
THE COURT: Ms. Vann, do you have a copy of that?
ATTORNEY VANN: Do I -- I'm sorry?
THE COURT: Do you have a copy of that?
ATTORNEY VANN: Yes, Your Honor, I do.
THE COURT: Any objection?
ATTORNEY VANN: No objection.
THE COURT: State's 1 is in, without objection.
(State's Exhibit 1 is admitted into the record.)
ATTORNEY BROWN: Thank you, Your Honor.
Q Dr. Hall, if you could turn to that Page 2, that first paragraph.
A Yes.
Q What was the recommendation for him at that time? What was

he to receive in support?
A The report says, recommendation with individual psychotherapy.
Q And does it also say that a psychologist gave him a test at that point?
A Looks like a psychological was also given to Bayan in November of '78 where the IQ level seems to be 100-and-something in performance, 94 in verbal, and a total IQ of 99.
Q Okay. And what was the diagnosis assessed at that time?
A Diagnosis by the psychologist was withdrawn emotion of childhood.
Q Is that something that would have supported your detection of the emotional disability?
A Well, it supports the school's classifying him as a student with an emotional disability.
Q But not intellectual disability at that time?
A But not intellectual disability at that time.
Q Had anybody ever identified him with intellectual disability in any of the records that you received and reviewed?
A No.
(State's Exhibit 2 is identified.)
Q I have one more that -- actually a couple more. This has been marked State's Exhibit 2. Same thing. I want to know if you can identify that as a record that you received, reviewed, and relied upon?

THE COURT: You say that's State's 2?
ATTORNEY BROWN: State's 2, Your Honor.
THE COURT: Thank you, ma'am.
ATTORNEY VANN: I'm sorry. Can I ask which document she's looking at as No. 2? I have them out of order. Okay. Thank you.
ATTORNEY BROWN: Sure.
A Yes, I have reviewed this.
Q And that data appears a bit clearer. What date is that?
A The date the report was submitted was July 12, 1983.
Q And this is a record that reflects a little something about IQ testing?
A Yes.
Q Can you tell us a little bit about what this record told you?
A This is a psychological evaluation report that was given when Mr. Aleksey was admitted to Hillside. And this report, again, demonstrated that his intellectual functioning was 90, or the average range; that his performance IQ was 93; and that his verbal IQ was 88. Again, scores outside of the ID range.
Q Okay. And this was around 13 or 14 years old?
A Yes. He was 14 at the time.
Q He was 14 at the time. And on the last page there -- I'm not sure that it's actually numbered, but it's the third page --
A Yes.

Q -- in that summary, what comments did the evaluators include?
A They concluded that while the tests showed that he had average intelligence they give a caveat that this score may be an underrepresentation of his actual potential.
Q And as a psychologist, Dr. Hall, what does that tell you?
A That the score may not accurately represent his intellectual functioning. So it's giving you an estimate, but it may not be the best estimate.
(State's Exhibit 3 is identified.)
Q And we will go on to State's 3, and I'll ask you the same. Have you received that, reviewed that, and relied on that for your opinion?
A Yes, I remember seeing this.
ATTORNEY BROWN: Your Honor, may I move State's 3 in at this time?
ATTORNEY VANN: Is it this one?
ATTORNEY BROWN: It's the short letter.
ATTORNEY VANN: Thank you.
THE COURT: You want State's 2 in as well?
ATTORNEY BROWN: State's 2 and 3.
THE COURT: Two and 3. Any objection?
ATTORNEY VANN: No, Your Honor.
THE COURT: Okay. State's 2 and 3 are in, without objection.

(State's Exhibits 2 and 3 are admitted into the record.)
Q What is the opinion on the root cause of Bayan Aleksey's issues according to the record you have before you?
A That he had emotional problems that are evidenced by impulsive behaviors, angry outbursts, and sadness.
Q So the root problem is an emotional disability, --
A Yes.
Q -- correct? Now, I wanted to ask you, as a psychologist, are the two mutually exclusive, emotional disability and intellectual disability?
A I'm not sure I understand your question.
Q You can have both an emotional disability and intellectual disability?
A Yes.
Q And the course of these records show he was tested for both --
A Yes.
Q -- but only emotional disability could be found?
A Yes.
Q And to be clear just what we've gone over, that's a small portion of what you listed in your report and what you reviewed, correct?
A That's correct.
Q And tell us a little bit about your interview with Mr. Bayan Aleksey? Was he cooperate? What was the quality like?

A He was cooperative. During the interview he answered my questions. He was charming, quick to smile. Rapport was easily established with him. He answered my questions freely. If there was something he didn't want to answer or something he didn't know, he would just say, I don't want to answer that, or, I don't know.

If it was something I felt I needed an answer to and I said, you know, I encouraged him to answer, most of the times he did. In fact, I said something, I'm not quite sure what you're trying to explain to me, he would rephrase it so that I made sure that I got it right and understood what he was communicating to me.

Q So what were your observations about his effort during that interview with you?

A During the interview his effort was appropriate. During testing I saw effort change.

Q And how so?

A He was more likely to give up, more likely to answer I don't know or I don't want -- you know, I don't want to do that. I would encourage him to just try; that, you know, as we move through the tests some things are going to be more difficult so we'll start off easy, and as we move, the testing will become more difficult, so you're not expected to know everything. I explained that to him a couple of times, and he would just smile and just say, I'm -- you know, I don't know, I'm not going to do that, and so I would just move on.

Q But you did get to complete your IQ test that you wanted to give him, right?
A Yes.
Q Tell us a little bit about why you deemed it necessary to give him another IQ test?
A He had been tested during the developmental period. He had been tested by another private examiner, Dr. Grant, I believe it was, and so for my own sense of understanding his level of functioning, and also to have the Court have another piece of information about his level of functioning, I chose to give an IQ test.
Q Okay. And you said that you thought that you received good results because he participated?
A I thought that they were an underestimate of his functioning.
Q And you saw that personally, you observed that?
A Yes.
Q And you also mentioned in your report that -- there's a Dr. Vidic, I believe, at DMH --
A Uh-huh.
Q -- and he had a conclusion in some of the pretrial proceedings that Mr. Aleksey's effort on the test was minimal at best.
A Yes.
Q I find it interesting that you put that in your report. Did

you go in your testing with that concept that there may be a problem with effort?

A No. If I remember correctly, I didn't receive those records until after I had seen Mr. Aleksey --

Q Okay.

A -- but I included it in the report because it spoke to his approach to testing; that when he was at Hillside there was a concern that he wasn't putting forth his best effort at age 14. Then when he was seen by Dr. Vidic at DMH as part of the competency proceeding, he didn't put forth his best effort.

Then the testing that I got from Dr. Grant -- I don't want to misspeak. One of the -- there was some indication ... I can't find the report of Dr. Grant, but then in my experience with him he wasn't putting forth, I thought he wasn't putting forth, his best effort and giving up rather easily.

So it just showed a pattern that that's how he approaches psychological testing, at least since the age of 14.

Q And speaking of Dr. Grant's testing, can you please explain to the Court why, in your opinion, there's a difference between the full score that Dr. Grant has and the score that you, I guess, adjusted to a General Ability Index score? Would you explain that portion of the report a little bit, please?

A Yes. According to the WAIS manual, the full-scale score is uninterpretable if one or more of the four indices that are used to compute that score is one-and-a-half standard deviation lower

than another one.

And so in that testing, the processing speed index was significantly lower -- I'm sorry, not processing speed -- the working memory index was significantly lower than the perceptual reasoning index, which makes the full scale uninterpretable, and so the manual tells us then to have an interpretable, or a representation of, global intellectual functioning to then calculate the GAI, which is the General Ability Index. So that is only consistent of the verbal comprehension index and the perceptual reasoning index, and so it doesn't take into account working memory or processing speed, both of which things can be affected by time, motivation -- meaning if the person is slow in terms of time -- motivation, those kind of things. So it still allows you to talk about the person's global functioning.

Q If you'll pardon my expression trying to get this in terms I understand, it's a failed safe that's built into the test where you can still get a valid score; you just arrive at a different -- you arrive at that score in a different way?

A It's another option that allows you to talk about the person's overall intellectual functioning.

Q Okay. And let's talk about your test. You did not use a WAIS test; you selected another test?

A Yes. I chose the Stanford-Binet, Fifth Edition.

Q Why did you select that test instead of going with one of the other standardized tests?

A Well, the Stanford-Binet is a standardized test.
Q Okay.
A It is like the Wechsler Scale. It is a gold standard intellectual -- a test of intellectual ability. It's different from the Wechsler in that it allows -- it's presented in a round-robin sort so it also allows you to use -- or, measures verbal and nonverbal skills in the same constructs. So on a Wechsler Scale, when you look at verbal comprehension you're looking at those tasks for verbal skills, but you don't get similar tasks when you're looking at nonverbal skills.

On the Stanford-Binet, it allows you to look at verbal skills on the same tasks that you looked at nonverbal scales on. So you get nonverbal knowledge/skills, verbal knowledge/skills; nonverbal fluid reasoning, verbal fluid reasoning. So it gives you an option to look at those measures, or the scores that you get are combined for both verbally and nonverbally on that one construct.

Q So is the Stanford-Binet better than the WAIS, or is the WAIS better than the Stanford-Binet?
A They're well-correlated with each other.
Q And that's usually the psychologist's choice?
A It's a psychologist's choice, what they're comfortable using, what they want to use.
Q Now, on Page 11 of your report you suggest that the best estimate of intellectual functioning may be the verbal score.

A Yes.
Q And why do you say that?
A Because the way Mr. Aleksey approached the task, he was much more engaged on the verbal task than the nonverbal task, so it was more likely that he would give up or answer, I don't know, or not attempt the task on the nonverbal items rather than verbal ones.
Q And that the strength in the verbal score is a consistency from his earlier test as well?
A They're similar from his earlier tests.
Q And I notice that you gave consideration to the Flynn effect, and you call it controversial. Is it normally applied in psychological testing?
A It's controversial because when do we apply the Flynn? So in typical diagnostic, psychological evaluations, Flynn is not applied, but in high stakes like death-penalty cases, best practices suggest that the Flynn should be applied.
And so as a field, we're still arguing -- I shouldn't say arguing -- discussing on what best practice should be. And I happen to agree that best practice is that you take the Flynn effect into account because the stakes are so high.
Q So giving every benefit to Mr. Aleksey's score, what did you think that the Flynn effect would lower that score to?
A Well, I didn't know, so that's why I calculated the Flynn. And consistently -- I shouldn't say consistently. His score was

either in what we call the borderline range or the low-average range.
Q So it was around 80, I believe you have in your report; is that correct?
A Full scale was 87.3 if you went back to the scores that were obtained during his developmental period.
Q And giving every benefit, again, to the score that you calculated under the GAI, that 80 goes to 77.69; is that correct?
A Right.
Q So that's well above a range that you would normally be concerned about a significant intellectual disability?
A Correct. It's outside. It's outside the range.
Q Now, adaptive functioning, you did mention that in your report, as well, and you note that it's more difficult to quantify. And this is on Page 13.
A Uh-huh.
Q And you also said that there was no formal assessment provided to you.
A Right. And during his developmental period none of the school records or the private records that I looked at did a global assessment of Mr. Aleksey's adaptive functioning, and then nothing during when he was tested as an adult formally looked at his adaptive functioning.
Q But you also referenced ADHD. How did that impact your consideration of the facts that you were provided?

A Right. Some of the -- the diagnosis of ADHD, those individuals do have some adaptive deficits, particularly in social functioning and conceptual functioning, so it's not unusual that he would have been seen to have some social difficulty and some difficulty conceptually, or in school, because he had that diagnosis.

Q And you also reported that during your interview with Mr. Aleksey he described how to manage money, and he described some of his living arrangements, and cooking. Can you just give the Court a few of the examples of Mr. Aleksey's knowledge of life skills like that?

A Right. So I asked him about his living independently when he moved away from his mother's home into -- and he readily admitted that he never lived independently, like never had his own place. He said, I always lived with a girlfriend.

And so I had to assess, well, what were the roles in the household, and he stated that he was not the best cook but there were some things that he could cook. He said he could cook spaghetti.

He said that he was actively involved in things like doing laundry so I asked him to tell me how he did laundry. Did he have a washer and dryer in the apartment? Did he have to go to the laundromat? He said, You know, it's New York, so we went to the laundromat; that he was able to, you know, do laundry without messing it up; that he was able to pay bills. And I asked him

how did he pay his bills, did they have a checking account? And he said, no, that they used money orders. And I had him explain to me, well, how do you, you know, get a money order, and he was able to tell me how he would go to a convenience store or the post office and get money orders to pay their bills, and then put those money orders either in the mail or take it, like, to the water place or the place that would accept where you could pay your bills.

So he was very clear about what his role was in his day-to-day functioning in taking care of himself and contributing to the household.

Q And you mentioned no formal assessment provided to you. Are there tests, or guidelines, or scales that you can use in --

A Yeah, there's several. There's the Vineland Adaptive Behavior Scale. Another one would be the ABAS, which is the Adaptive Behavior Assessment System, which are interviews of teachers/parents. There's even some data to suggest that you can use those interviews with the person that you are assessing and can get some good data from them, so that would be a more formal.

There's a rather old test that would have been, at the time during his developmental period, that could have been used called the Street Survival Skills Questionnaire. That's a more formal assessment of the individual that you're assessing adaptive functioning.

So there are ways, if people were concerned about his

adaptive functioning, that they could have assessed it formally during that time.

Q And that was never done in any of the records going back all the way to his early school years that you could --

A None of the records that were provided.

Q But you didn't have to go to adaptive functioning in this report, though, did you, because if you don't have the first prong, the second prong necessarily will fail to get a diagnosis of intellectual disability, correct?

A Well, you have to have all three --

Q Okay.

A -- in order to get the diagnosis. So you have to have criteria 1, which is the low IQ score; you have to have criteria 2, which are significant deficits in developmental -- or, adaptive functioning, and then the third one is that those deficits have to be present during the developmental period.

(State's Exhibit 4 is identified.)

Q Dr. Hall, if I can show you two more documents. We'll start with what's been marked State's Exhibit 4. And same thing. And see if that was provided to you, and you reviewed it, and relied on it?

A Yes.

Q Okay. And the date on there? The year?

A October 19th, 1981.

Q And so that would have been around age 12; is that correct?

A Somewhere around there. Yes.
Q What indication is there about a separation from his mother that was needed?
A One of the goals from his psychotherapist who provided, I believe, both group and individual therapy, believed that separation between him and his mother would be important so that Mr. Aleksey could begin to develop independent skills. He described their relationship as symbiotic, so now I think we would describe that as codependent.
Q And how did Mr. Aleksey describe that situation to you during your interview?
A He acknowledged that he wanted to move out of mom's house so that he could gain some independence; that he wanted to be able to be his own person. I mean, he left, if I remember correctly, I think what he said he was 18 or 19, so that total development would be appropriate at that age to want to express to have some autonomy, and that's what he described.
Q And he only described doing the laundry and successfully cooking, that sort of thing, when he moved out?
A Yes.
Q So when he broke that relationship?
A Right. And he acknowledged that the women that he lived with taught him how to do those things. And he said that, you know, Once you show me how to do something, I know how to do it. He said, I may have to ask you a question, but I get it, you

know, I can do something. You don't have to show me a lot of times. And he kind of took pride in that, not boastful, but just saying that, you know, I'm able to adapt in that way.

Q And the last one I want to show you is --

THE COURT: Did you want that one in evidence?

ATTORNEY BROWN: Yes, sir. I was going to move 4 and 5 into evidence at the same time.

THE COURT: At the same time? Okay. We can do that. We can do that. I just didn't want to forget.

ATTORNEY BROWN: I appreciate that very much. I could probably use a reminder, too.

(State's Exhibit 5 is identified.)

Q This is marked State's Exhibit 5. Does that look like something you received, reviewed, and relied on?

A Yes.

Q Okay. And what age is he at this time when this document is created according to the face of the document?

A Eighteen years old.

Q And is that a document that is submitted to you as coming from Mr. Aleksey?

A Yes. I believe this was the application where he was trying to get services from voc rehab, or vocational rehabilitation.

Q And how does he describe his own disability?

A As an emotional one. He says, I'm unable to deal with people I do not know. I get nervous and disoriented when dealing

with strangers and unusual situations. He talks about having anxiety, and just that he thinks that he would do well in the automotive field because he gets satisfaction working with tools and it's a job that would allow him to have minimal contact with others.

Q And in his writing is there misspelling?

A I'm the wrong person to ask about spelling.

Q It could be a misspelling, it could be capitalized here or there?

A Yeah.

Q But he certainly has a goal in that writing, correct?

A Yes.

Q And is that similar or dissimilar to the writing that you reference in your report?

A This style would be similar.

Q And you noted in your report he still writes and expresses himself better than one would expect an individual with deficits to be able to do?

A Yes.

Q And does that also support that opinion, --

A Yes.

Q -- the last exhibit?

A Yes.

ATTORNEY BROWN: Beg the Court's indulgence.

THE COURT: Yes, ma'am.

ATTORNEY BROWN: Your Honor, as a housekeeping matter, I want to make sure that State's 1 through 5 have been offered and accepted into evidence.

THE COURT: Well, we're doing 1 through 3. And do you want State's 4 and 5 in without -- are they in without objection?

ATTORNEY VANN: No objection, Your Honor.

THE COURT: Okay. So State's 4 and 5 are in, without objection. So we now have them all.

(State's Exhibits 4 and 5 are admitted into the record.)

ATTORNEY BROWN: Thank you, Your Honor. No further questions.

THE COURT: Okay. We're going to take a short break. So Dr. Hall, excuse me. You can step down, walk around if you need to. If you want can take a break, you can, but you can't talk to anybody.

THE WITNESS: Don't talk to anybody.

THE COURT: I know you're familiar with that. I just wanted to make sure to remind you. Okay. Thank you all.

(Applicant's Exhibit 7 is identified.)

ATTORNEY VANN: Your Honor, we do have a record notebook that we were hoping to introduce through Dr. Hall. Could I give it to her to take a look at --

ATTORNEY: That would be great.

ATTORNEY VANN: -- so that we don't have to do it while you're sitting up on the bench?

THE COURT: That is a wonderful idea. Thank you.
ATTORNEY VANN: Thank you.
(Court recessed at 11:27 a.m. and reconvened at 11:41 a.m.)
ATTORNEY VANN: Your Honor, could I hand up a copy of the affidavit?
THE COURT: Yes, ma'am.
ATTORNEY VANN: They're marked as 1 through 5, but I noted that this one, 2 is proffered for now.
THE COURT: Thank you, ma'am. Ms. Vann, are you ready to proceed?
ATTORNEY VANN: Yes. Thank you, Your Honor.
THE COURT: Okay. And, Ms. Brown, is the State ready?
ATTORNEY BROWN: Yes.
THE COURT: All right. Ms. Vann, Dr. Hall is your witness.
ATTORNEY VANN: Thank you.

CROSS-EXAMINATION

BY ATTORNEY VANN:
Q Good morning, Dr. Hall. I'm Lindsey Vann. I'm an attorney for Mr. Aleksey.
A Good morning.
Q Your report that was entered as the Court's Exhibit 2 says that it's an evaluation for the presence of mental retardation or intellectual disability pursuant to *Atkins v. Virginia;* is that correct?
A Yes.

Q And because this is a capital case, that means that this evaluation has to be pursuant to *Atkins v. Virginia?*
A Yes.
Q Does your evaluation also have to be pursuant to other cases interpreting *Atkins v. Virginia* from the U.S. Supreme Court?
A The only other case that may apply, I think, that's more toward the ultimate issue would be *Hall v. Florida.*
Q Okay. And that was in 2014?
A Yes.
Q And what about Moore v. Texas, have you read that case?
A No, I have not.
Q Okay. Are you familiar with it at all? It's a 2017 case.
A No.
Q In your CV I reviewed it appears that you attended a training on intellectual disability in capital cases. Was that in 2014?
A Yes.
Q And that was about eight years ago?
A Yes.
Q Have you received any additional training in evaluations pursuant to *Atkins v. Virginia?*
A Not specifically.
Q Have you ever published any articles on intellectual disability?
A No.

Q Would it be fair to say based on your CV that the majority of your publication is in autism research?
A Yes.
Q And I believe you said that you completed your report in 2018 in this case?
A No. The report was completed in 2019, but I interviewed and tested Mr. Aleksey in December of 2018.
Q Thank you for that clarification. And over the course of the evaluation, you reviewed the records that we talked about in the State's direct questioning, correct?
A Yes.
Q And have you reviewed the records notebook that I provided to you?
A Yes.
Q And are those all the records that you received and were able to review in the course of your evaluation?
A Yes.
ATTORNEY VANN: Your Honor, I would move to admit the Bayan Aleksey Records Notebook as Applicant's Exhibit 7.
THE COURT: Ms. Brown?
ATTORNEY BROWN: I don't have an objection to most of them. The only objection I have is my continuing objection to the Marjorie Hammock affidavit, as that was not provided before the report, and I wanted to make that distinction. It's been provided since but not before the report.

THE COURT: And so that wasn't considered by Dr. Hall?
ATTORNEY BROWN: It was not considered at the time.
THE COURT: Okay. Subject to that, I guess, clarification, that will go in as Applicant's 7. Is that correct?
ATTORNEY VANN: Yes, No. 7. Thank you.
THE COURT: Okay.
(Applicant's Exhibit 7 is admitted into the record.)
Q And in the course of your evaluation you also conducted an interview of Mr. Aleksey, correct?
A Yes.
Q But you did not interview his mother, Vera Aleksey?
A No.
Q And you did not interview his counselor, David Rosengard?
A No.
Q So moving on to prong 1, which is significantly subaverage intellectual functioning, would you agree that a person with an IQ score of approximately 75 or below falls within the intellectual disability range?
A No, because it would depend on the prong 2, which is their adaptive functioning.
Q Okay. But you said you were familiar with *Hall v. Florida*, *and* that says that you have to take into account the standard error of --
ATTORNEY BROWN: Objection. That would call for a legal conclusion.

THE COURT: If you can just rephrase the question.
ATTORNEY VANN: Yes, Your Honor.
Q Are you familiar with the standard error of measurement?
A Yes.
Q Could you explain that, please?
A So that is the amount of error that's built into your score. So you should look around in an interval of the score that you actually got, plus or minus the standard measurement.
Q And does the standard error measured typically by points, plus or minus, to the score?
A Typically, yes.
Q In your evaluation you did have three full-scale IQ scores that were 75 or below, correct?
A Yes.
Q And that was the 1998 WAIS-III conducted by Dr. Vidic, and that was in '71?
A Yes.
Q And the 2015 WAIS-IV conducted by Dr. Grant?
A Yes.
Q You said, I think, in your report that it was a 72, but he reported a 73. Can you explain the difference?
A Yeah. I asked to see the -- it was just a calculation error. I asked to see the protocol, and he just made a simple calculation error.
Q So your opinion is it's actually a 72, or based on your

recalculation, a 72?
A Yeah.
Q And then you had the 2018 Stanford-Binet V that you administered, and the score on that test was a 70?
A Yes.
Q So those three scores over the course of 20 years were all within two or three points of each other; is that correct?
A Yes.
Q But you discounted each of those scores, as you talked about, and I'd like to go into each of them briefly.
On the Vidic IQ test, which was the 1998 WAIS-III -- and that were the test conducted at William S. Hall --
A Yes.
Q -- you reported that Dr. Vidic believed the WAIS-III score was an underestimate, but did Dr. Vidic administrator any test designed to identify malingering in a person with intellectual disability?
A Specifically, no.
Q He did administer, I think you mentioned, the Structured Interview of Reported Symptoms, correct?
A Right.
Q But that is a test to measure malingering of symptoms of psychiatric illness, --
A Yes.
Q -- not intellectual disability?

A Yes.
Q And he also administered the Personality Assessment Inventory, but that's also not intended to be a malingering test for intellectual disability, correct?
A That is correct.
Q And then on the Grant IQ test, which was the WAIS-IV in 2015, he did administer a test for malingering called the Test of Memory Malingering, or the TOMM, correct?
A Yes.
Q And he found in his report that there was no indication of malingering on the TOMM?
A On the TOMM, yes.
Q Correct. But you found that the IQ score, or the full-scale IQ score, that was reported could not be interpreted because there was too much variability between the indices, correct?
A Yes.
Q So can you clarify -- the full-scale IQ score is based on multiple indices. Do you know, or can you list out, what those indices are?
A Yes. There's a verbal comprehension, perceptual reasoning, working memory, and processing speed.
Q And those all combined together -- I think you said they create subscores, and those combine together to provide the full-scale IQ?
A You combine those together to get the full scale.

Q But you arrive at the GAI, which was the score that you reported, by discounting the working memory and processing speed indices, correct?
A Those are not included in the calculation of the GAI.
Q Okay. So essentially by reporting the GAI in this instance you removed the two lowest scores that made up the full-scale IQ on that test?
A Yes, because that's part of standard practice.
Q And you mentioned the WAIS manual. And are you familiar with the portion of the WAIS manual that indicates full-scale IQ is considered the most valid measure of overall cognitive ability?
A Yes.
Q I think you actually cite that in your report?
A Uh-huh.
Q And are you aware that the administration manual goes on to say that working memory and processing speed are vital to the comprehensive evaluation of cognitive ability, and excluding those measures of these abilities from the summary score reduces its breadth of coverage?
A Yes.
Q And are you familiar with the WAIS-IV: Technical and Interpretive Manual?
A Yes.
Q And in that manual it says that working memory and

processing speed are included in the full-scale IQ to reflect research that suggest both are important factors that contribute to overall intellectual functioning?
A Yes.
Q The 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?
A Yes.
Q And according to the technical manual, even when the GAI is used it is considered an optional score, not as a replacement for the full-scale IQ. Would you agree with that?
A Yes.
Q The WAIS administrative manual does not mention using the GAI to diagnose intellectual disability, does it?
A No, it doesn't.
Q And the administration manual does not mention using the GAI to exclude someone as having intellectual disability, does it?
A No, it doesn't.
Q And similarly, the technical manual does not mention using GAI for the diagnosis of intellectual disability?
A No, it doesn't.
Q And are you familiar with research by Taylor Koriakin, K-o-r-i-a-k-i-n, talking about using the GAI versus the full-scale IQ and with the conclusion that using the GAI is inappropriate for diagnosing someone with intellectual

disability?
A No.
Q Okay. And I'd like to move on to your IQ test, the Stanford-Binet, that you administered. In your report you indicated that the score must be interpreted with caution because he was not putting forth his best effort during the testing. But you didn't indicate that you administered any tests to diagnose Mr. Aleksey with malingering; is that correct?
A No. I did not give malingering-specific testing.
Q So you relied instead on your judgment, your own judgment, of Mr. Aleksey's --
ATTORNEY BROWN: Objection, Your Honor. That may be a slight mischaracterization of the record.
THE COURT: She can answer how she did it, so go ahead and ask the question. She can explain how she did it.
ATTORNEY VANN: Thank you.
Q So you relied on your own subjective judgment of his effort?
A I mean, that's part of our training. Those, based on the TOMM and the SLUMS that you asked me about earlier, are tools in which we use but they are not the end-all be-all. So just that one TOMM score doesn't indicate if someone's malingering or not malingering. That's information that you use with your clinical judgment.
So it wasn't the ... So in my years of giving tests and having to encourage people to do the best job that they can do,

it was my clinical experience that he wasn't putting forth his best effort during the process. And part of that was the difference in presentation from when I was just interviewing him, and also the difference in presentation between the type of tasks that he was asked to do. As I said earlier, when we were doing verbal tasks he was much more engaged than when we were doing the nonverbal task. He was more likely to give up and not even attempt items.

Q But in another capital case, the *Bennie Brown* case, you found the defendant intellectually disabled and you did administer a TOMM in that case, correct?

A I did.

Q And your report stated that the verbal IQ may be the best estimate of his intellectual functioning?

A Yes.

Q But that, again, discounts the portion of the test, or a portion of the test, that makes up the full-scale IQ for the Stanford-Binet?

A Yes.

Q I'd like to talk about some of the scores in the developmental period. And in your report I believe you identified three test scores that were obtained on WISC instruments when he was a child?

A Yes.

Q And then Ms. Brown pointed out another IQ test in November

of 1978. So can you describe the practice effect?
A So the practice effect is the concept that, as people are given tests or tasks, the more they're given it the better they get at it because they've had experience with it and it is no longer novel.
Q And so there were four tests during the developmental period all on this same test. Could the practice effect have impacted any of those tests?
A Possible. Probably not probable because of the length of time between each administration.
Q How much time in between the administration?
A The effect was four years between each administration.
Q But then we add in the November 1978. That would put one in November of 1978 and one in July of 1979?
A Yeah. I thought you were asking me about the --
Q I'm sorry.
A I'm sorry. Yes, then that would be an issue.
Q Were you able to learn anything about the conditions under which each of these tests were administered?
A Nothing more than what was written in the actual report.
Q And I'd like to ask you to turn in the records notebook to tab 13. And this looks to be the WISC record form from 1974; is that correct?
A Yes.
Q And is the examiner line left blank?

A Yes.
Q Would you typically expect to see the examiner sign the test booklet?
A Not necessarily, because the examiner would typically be the person who wrote the report.
Q So I believe behind quickpage [sic] 12 -- and I apologize, the pages are a little bit jumbled and out of -- I'm sorry, tab 12 -- the pages are a little bit out order. The first page is at the back of tab 12.
A Okay. Yes.
Q This appears to be signed by -- this report appears to be signed by Charles White, Psychologist in Training.
A And Richard Slowes [ph], School Psychologist.
Q Do you know which one of those administered the WISC test in 1974?
A No.
Q Were you able to obtain any raw data or other information about the 1979 WISC-R test?
A No.
Q Were you able to identify any other information about the administration of the 1983 WISC-R test?
A No.
Q Are you aware of a study that revealed administrators of the WISC-R test, even when training and giving the test, frequently make administration and scoring errors that could affect the

full-scale IQ?
A No.
Q Okay. I'd like to turn to prong 2, adaptive behavior, or adaptive functioning. Am I correct in reading your report that you conclude that he did not have deficits in any of the three main areas of adaptive behavior?
A No. I'd say on page 13, that school records -- third paragraph -- that school records indicate Mr. Aleksey had some adaptive deficits in social skills and particularly adaptive functioning skills, so I acknowledge that he did have some adaptive functioning deficits.
Q So are you saying that he met the criteria for adaptive deficits in the social area?
A I'm saying he had some deficits in social and adaptive functioning, but those are not related to intellectual disability, they are part of his ADHD diagnosis.
Q And maybe just to take a step back, can you describe the three main areas of adaptive functioning?
A They are social, conceptual, and practical. So practical is day-to-day functioning, money, hygiene. Practical can be academic kind of functioning. And social are social skills, how you get along with individuals, navigating the social world successfully.
Q And is it correct that you only have to prove adaptive deficits in one of those three areas to qualify to meet prong 2

of the intellectual disability diagnosis?
A Right. As the DSM-V is written, one of three.
Q One of the three?
A Uh-huh.
Q Thank you. Did you review Marjorie Hammock's report finding that Mr. Aleksey had adaptive deficits in all three skill areas?
ATTORNEY BROWN: Your Honor, I just want to note an objection to --
THE COURT: I'll note your objection. Thank you, ma'am. And that is maintained, okay. All right. Thank you, ma'am.
Q You can answer the question.
A Yes. I reviewed it after my report was written.
Q And could you have amended your report based on that if you had wanted to?
A If I had wanted to, yes.
Q When Ms. Brown was asking you questions she discussed formal assessments of adaptive deficits, and you said there were no formal assessments in this case.
A Yes.
Q Is it correct under the AIDD and the DSM that it kind of anticipates that there are going to be some cases where formal testing of adaptive deficits cannot be completed?
A Yes.
Q Could you explain why there might be a case where you cannot complete an adaptive deficit measure?

A You might not have informants available. The diagnosis might not be raised until later in life so you wouldn't -- nobody would have brought that up during the developmental period. If someone is incarcerated it can be difficult to assess their adaptive functioning because of the nature of our, you know, system, that most people don't get to do a lot of things with autonomy. They tell you when to get up, when to eat, when to shower, you know, those kind of things.

Q And did you attempt to do a formal assessment of adaptive behavior in this case?

A No.

Q And you didn't try to administer one to his mother, and that may be a person who could have done a formal assessment?

A Yeah. One of the things that would have been difficult about that is that by the time I saw Mr. Aleksey he was 51, I think.

Q Around 50.

A Fifty, 51. So there's some literature to suggest that parents struggle recalling accurate information about their child's development as the child gets older, 21 or 22, and Mr. Aleksey was well over that, so I didn't think a formal assessment may not give me accurate data, so I relied more on the contemporaneous records for that information.

Q But you did speak to Mr. Aleksey about his own functioning, correct?

A Right.
Q Are you familiar with the term cloak of competence?
A Yes.
Q Could you describe what that is?
A It's the idea that individuals who have mild ID, or even borderline intellectual functioning, will do things to mask their deficits so that other people don't recognize that they have cognitive difficulties.
Q Could that include not wanting to share with someone about or tell someone that they have deficits?
A They can tell someone they didn't have deficits, or minimize their deficits, or try to present in a way those deficits aren't there.
Q Thank you. So I'd like to talk briefly about conceptual skills. Would communication fall under conceptual skills?
A Communication would be under social and some conceptual.
Q And would language skills fall under conceptual?
A That would be social and conceptual.
Q Your report indicates that Mr. Aleksey's mother said that he had delayed speech until he was about three years old?
A Yes. I believe she reported that in the DMH social history.
Q And he had to attend speech therapy to address this issue?
A Yes.
Q But your report doesn't include notes from the Hillside Jewish Hospital where he was treated in 1983 and it indicated

poor achievement in spelling, word recognition, and reading comprehension. Are you familiar with that in the records?
A Yes.
Q And the Hillside Jewish Hospital also indicated the results suggest pervasive deficits in language functioning, even taking into account behavioral factors which may have affected Bayan's performance. Are you familiar with that in the record?
A Uh-huh, yes.
Q Did you read David Rosengard's declaration as part of your evaluation?
A I did.
Q Okay. And that is on tab 4 of the records notebook. And in paragraph 7 I believe your report -- Bayan had trouble understanding rules, so it was hard for him to follow the rules; is that correct?
A Yes, I see I that.
Q And then in paragraph 6 he says that he had limited vocabulary when he was working with Mr. Rosengard?
A Yes.
Q Your report includes a copy of a written communication that Mr. Aleksey made while he was in the Department of Corrections, correct?
A Yes.
Q And I believe that's on page 13 and 14 of your report. The actual letter that he wrote is copied on page 14, correct?

A Yes.
Q And I believe you said you weren't not familiar with the *Moore v. Texas* decision out of the U.S. Supreme Court, but are you familiar with the DSM counseling against reliance on adaptive behavior in prison or a jail setting?
A Yes. It shouldn't be the sole source of your opinion of whether or not someone has adaptive functioning deficits or not.
Q And is that that because, as you said, that's a more structured environment than the real world, or the outside world?
A Yes.
Q Would it surprise you to -- I'm sorry. Did you do any testing or evaluation of the reading level, readability level, of that communication that he wrote?
A No.
Q Would it surprise to you learn that the Flesch-Kincaid readability grade level is a fifth-grade reading level?
A No.
Q Would Mr. Aleksey's academic skills fall under conceptual?
A Yes.
Q Your report indicated that he did not meet the criteria for special education in 1974 when he was evaluated. Do you know what the placement criteria were for special education in New York in 1974?
A I do not.
Q I'm going to go back to tab 12 again, on page 4. It

indicates the referral reason, or the reasons for referring him for evaluation, were: 1, late speech development; 2, poor socializing behavior; 3, tendency to take things that are not his, and; 4, poor concentration. Is that correct?
A Yes.
Q And then if you will turn to page 6, also behind tab 12, as part of the psychological evaluation didn't the psychologist note that his -- and I'm looking at the last sentence on the bottom of the page -- his fund [ph] of educationally relevant information and his ability to deal abstractly with that information is at the retarded level?
A Yes, that's what it says.
Q And your report indicated that he may have repeated fourth grade?
A Yes.
Q If we could turn to tab 16, pages 3 and 5. Do these appear to be his report cards from the 1977-1978 year and the 1978-1979 year in schooling?
A Yes.
Q And on the bottom of both of those pages does it say, In September this pupil will be in fifth grade for both years?
A Yes.
Q Does that indicate that he repeated fifth grade as well?
A It would suggest that he repeated fifth grade.
Q When a child repeats a grade would that impact how you

interpret academic achievement testing later on? So if it says that he's operating at a fifth-grade level but he's repeated fifth grade, does that change how you interpret an academic achievement test?
A I'm not sure I understand your question.
Q I'm not sure I understand how I asked it. Basically my question is, there are academic achievement tests that report achievement in grade level, correct?
A Yes.
Q And if someone repeats a grade, so they've taken fifth grade twice, later on down the road does that make it appear, perhaps, that he is older than most people would be in sixth grade --
A Uh-huh.
Q -- and so if someone achieves at a sixth-grade level but they've actually taken fifth grade twice, does that change how you interpret an academic-achievement score?
A No.
Q Okay. Your report indicated that Bayan's mother again asked for him to be evaluated for special education services in 1979, correct?
A Yes.
Q And that would have been at the end of fifth grade?
A Yes.
Q And if we could turn to page -- tab 19, page 2. Does the senior child clinical psychologist, Dr. Leonard Wright [ph], also

ask for, or at least pass along, Mrs. Aleksey's request for evaluation?
A He says that he will be available for evaluation July or August. I'm not sure if that addresses her concern about getting him evaluated by the school.
Q Okay. And at the end of the second paragraph of that letter does he indicate, I also suspect his fundamental academic skills are also deficient?
A Yes.
Q Okay. And if we could go to tab 20, on page 1. And you indicate -- let's see. In your report you indicate that in period 1 the teacher comment says: Bayan is making tremendous efforts toward improving his behavior. Is that correct?
A Yes.
Q And in period 2 it says: Bayan has fallen behind in many areas due to his inability to concentrate and focus on his assignments. Is that correct?
A Yes.
Q And in your report you indicate that he was almost retained in the seventh grade, as well, correct?
A Yes.
Q Could you turn to tab 23. And I believe this is the letter you're referring to where they indicate that he is -- His progress to date seems to indicate he or she is not meeting the promotional requirements and may have to be held over in Grade 7?

A Yes.
Q Does it also indicate that his current reading score, or level, is 5.5?
A Yes.
Q Would that be a grade level?
A That's what I interpreted it as.
Q And that's when he's in seventh grade after he has repeated at least one grade, correct?
A Yes.
Q And also behind that tab, on page 4, is this a letter to Mrs. Aleksey?
A Yes.
Q And in the first paragraph it indicates: You stated that you believe your son should be receiving algebra and that the work he has been given instead was on a third-grade level.
A Yes, it says that.
Q And then in the cumulative total score on his testing it says that he's functioning at a fifth-grade level?
A Yes.
Q And then in the next paragraph after that it says: Thus, Bayan's level of performance, which is far below grade level.
A Yes.
Q And then finally, in the last paragraph of that letter it says: While I can emphasize with your aspirations and desire for grade-level performance in academic areas for your son, all data

to date indicate, including his latest reading score from 1982, reveal that his current functioning levels are well below such expectations.
A Yes.
Q And then in eighth grade -- your report indicates he was placed in a special education class; is that correct?
A Yes.
Q And behind tab 24, on page 3.
A The third page or the one that's marked page 3? The very first -- at the top of the first page is page 3.
Q I see what you're saying. The one marked page 3 in the bottom right-hand corner, so the actual third piece of paper.
A Okay.
Q Is that his Individualized Educational Program from 1982?
A Yes, this is part of it. That is the attachment that details the modifications that he should get during testing.
Q And can you just read what those modifications are for testing?
A Time limit extended or waived, so he should get more time than his classmates; examination administered in a special location, so he should have his test taken apart from other students; questions read to student, math, written -- and writing tests; questions read to student for reading test; answers recorded in any manner; student permitted to use a calculator or abacus for math test; questions omitted and credit prorated; and

examination copy provided in two forms, Braille and large print. Oh, wait. Hold on. Looks like Bayan did 1 through 4, which would apply to him.

Q Okay, so that the circles --

A Yes, by the circles, it indicates the first four.

Q So that would be time limit extended; examination in a special location; the questions are read to the student for math and writing tests; and the questions are read to the student for reading tests?

A Yes.

Q Okay. And then in your report you noted that around the ninth grade Mr. Aleksey dropped out of high school, correct?

A Yes.

Q You also indicated that he was presenting with symptoms of ADHD and experiencing failing performance while in school?

A Yes.

Q And I believe you used those two as basically to discount adaptive deficits as being related to his intellectual functioning, correct?

A His adaptive deficits were commensurate with the ADHD diagnosis that he received later, so like even, for example, the things that he was given as modifications on the IEP, the ones that I just read, are typically given to students who have ADHD in schools as opposed to, you know, kids who have intellectual disability or, at the time that they would have called, mental

retardation.
Q But there's no exclusionary criteria, so he could have ADHD and intellectual disability, correct?
A It's possible. You'd have to do a little bit more digging to make sure, if the individual had intellectual disability, that the difficulties that you see in concentration and focus are not -- are significantly more -- How do I want to say this? That -- so individuals who have intellectual disability, it is not unusual for them to have lower concentration focus compared to the neurotypical peers. Do they have ADHD becomes a question if their impairments are beyond the developmental level.

So let me explain this. Let's say you have an individual who is 10, has intellectual disability, and developmentally he's 5. Does he have the attention, focus skills, of a five year old? If the answer is yes then ADHD would be an inappropriate diagnosis because those things are on his developmental level.

If it's determined that his deficits are lower, that he's functioning at, like, a three-year-old or a two-year-old level, then ADHD could be a co-morbid diagnosis. Does that make sense?
Q Yes, that does make sense. Co-morbid means that you can have multiple diagnoses occurring?
A Co-occurring, that they could have, if they meet criteria for both diagnoses.
Q That makes sense. Thank you. So I'd like to turn to social skills. And you said that he did perhaps have some deficits in

social skills?
A Yeah. I think the record is clear that he had some deficits in social skills.
Q And your report indicates that Mrs. Aleksey reported that he was afraid of being around a lot of other children, correct?
A Yes.
Q And I'm going to ask you to turn to tab 12 again. I'm sorry, it seems to be our favorite tab. On page 6, does the psychological report also indicate that at daycare -- I'm sorry. I'll let you get there.
A I'm here.
Q So this is in the middle of the paragraph labeled Developmental History. It says: At daycare Bayan is described as a child who cries easily on separation from mother and had very poor peer relationships; is that correct?
A Yes.
Q And did you review the Barbara Gonzalez affidavit that was provided to you?
A Yes.
Q And that indicated that he had very few friends?
A It did.
Q Would gullibility fall under social skills also?
A Yeah.
Q And you reviewed Ms. Gonzalez's affidavit, and she said that he was gullible and a person who would fall for obvious ploy?

A Yes.
Q And the Rosengard affidavit similarly said, Obviously naive and gullible; is that correct?
A Yes.
Q Okay. And just on practical skills, would use of transportation fall under that?
A Yes.
Q So your report indicates that he had a variety of jobs and was fired frequently because of poor performance?
A Uh-huh.
Q If you could turn to tab 5. This is the affidavit of Vera Aleksey, Mr. Aleksey's mother. And in paragraph 20, which is on page 4 --
A I'm there.
Q -- did she describe his job as: Bayan sometimes had little temporary jobs. He tried to work at a service station, but it didn't work out there, or a nearby grocery store. He doesn't have the ability to do something alone. Is that correct?
A That is what she said. Yes.
Q And then I think on your direct we talked about his attempt to go to vocational school, is that correct, after high school?
A Well, voc rehab, yes.
Q And if we flip to tab 32 -- so now we're going to go to the back -- and if you go to page 78 -- and those are the page numbers at the bottom right-hand corner.

A I'm there.
Q Is this a letter from the vocational rehabilitation counselor?
A Yes.
Q And does she say that she has canceled his evaluation?
A Yes.
Q Does she say: As you know, you were having tremendous difficulties getting to the North Shore Center by public transportation; is that correct?
A Yes.
ATTORNEY VANN: Court's indulgence.
THE COURT: Yes, ma'am.
ATTORNEY VANN: I have no further questions, Your Honor.
THE COURT: All right.
ATTORNEY VANN: Thank you.
THE COURT: Thank you. Anything on redirect?
ATTORNEY BROWN: Just a few questions, Your Honor.

REDIRECT EXAMINATION

BY ATTORNEY BROWN:
Q Dr. Hall, you were asked a little bit about malingering, and I want to draw a little bit of distinction here. Malingering is a specific term, correct?
A Yes.
Q What does malingering mean to your profession?
A It means that a person is saying, or making up, symptoms

that don't actually exist in order to -- for a secondary gain. So it could be to avoid criminal prosecution; it could be to gain financially in a civil suit; it could be to avoid military service; or avoid hazardous duty. So it's someone intentionally producing or presenting themselves as having deficits or mental illness.

Q That's not necessarily the same thing as somebody who doesn't give a good effort, is it?

A Not necessarily.

Q Okay. And on page 9 of your report you were asked about did you administrator any kind of test about the evaluation and deficits and performance. And didn't you give him the Saint Lewis University Mental Status Examination?

A Yes.

Q And there was something that he did that caused you to think that he was not putting forth his best effort. What was that?

A He presented -- these are the questions on this particular instrument I had asked him previously, just asking the question. Once they were presented in the format of the SLUMS, his performance changed. So questions that he had previously answered, he would say, I don't know, to or answer incorrectly. And so once again I would encourage him to put forth his best effort or do the best job he could, and he would give up and not respond or say, continue to say, I don't know.

Q So in this particular example you are reflecting a choice

that Mr. Aleksey made at a particular time. He was participating some --
A Yes.
Q -- and then he decided not to participate?
A Yes.
Q And if you had a standardized test at that time that would test effort it would show good effort to begin with and lack of effort if you did it a little bit later, correct?
A I'm not sure ...
Q If he's participating fully with you to begin with and you tested him at that time it showed good effort?
A Possibly could have showed good effort.
Q So it's kind of a timing thing?
A I don't know if it's a timing thing or if it is more his style. He's much more comfortable just talking and having conversation, answering questions. When presented with formal tasks, that's when I saw a change in his effort.
Q Okay.
A And he -- I don't want to speculate, but it was my observation that when he was presented with formal tasks his motivation decreased.
Q And you were asked a little bit about the GAI score. I just want to make sure that I understand. When you go to that, that is permissible based on the manual, correct?
A Yes.

Q And you were also asked about the '78 and '79 test and what the practice effect could possibly be?
A Yes.
Q Can you explain a little bit about that practice effect?
A Because those tests were given so close in time -- in psychology, we really like a good 18 months to 24 months in between administration of the same IQ test. I believe -- now, this was before my time, but I believe the standard at that time was a year apart and they think that practice effect would be diminished.

But given that those tests were given so closely, the 1979 score may have had practice affect in it, but it would suggest to me that that may not have been quite an issue as that -- let me get to the page where I list them -- is that the score of 90 -- I'm sorry, the score of 82, uhm ... It was '78 and '79. The score of 82 was lower than the scores previously, so with practice effect, you would see an increase in the score, or you would expect to see an increase in the score rather than a decrease in the score.

Q And the average expected increase, what are we talking about, a block of 10 points or 5 points, or?
A Off the top of my head, I can't say what the literature is. I'd have to look it up to say how much the score would change.
Q Okay. Fair enough. And you were asked a little bit about the scores that other people reported as 71, 72, and I think it

was a 70 on yours. But those were not considered valid, correct?
A Right.
Q Okay. So you couldn't depend on those, and that's what you reflected in your report, right?
A Right. Because of his response style, his approach, those scores were not considered a valid.
Q And for the '79 testing, you were shown a document that had someone in training working on that?
A Yes.
Q But there's also always a psychologist there, is that correct, when you have someone in training?
A Correct. When you're in training your work is supervised by a psychologist, which could mean that the psychologist is in the room with you while you're doing the administration. It could mean that -- in my training, watching from another -- you have a camera watching you, or you could have recorded it and then you went back and scored along while you are watching the videotape. So, yes, there's various ways training happens.

Given the date of this, I would imagine that -- again, I don't want to speculate. There's lots of options with how supervision can happen.
Q Fair enough. And anybody can make a mistake in scoring?
A Yes. I've done it. It's happened to me.
Q And I believe you found one with Dr. Grant?
A Yes.

Q And you were asked a little bit about the deficits that you're looking for for adaptive functioning, and I heard a couple of times just saying deficit and identifying deficits, but haven't you shared with us that the deficits have to be significant?

A Right. So the deficits that an individual with intellectual disability would be significant even though they may have similar deficits as someone with ADHD. So an individual with intellectual disability can have deficits in social functioning, can have deficits in practical skills, but they're going to have significant deficits so that they're going to be required to have much more support in order to successfully navigate the world.

And so it's not unusual to see an individual with ADHD have social deficits. We learn social skills through observation. I know parents think you teach your children social skills. You do not. You teach your children manners; you teach your children what the social expectation is for their behavior, but children learn social skills through observation.

And one of reasons why kids with ADHD have social deficits is because they are not observant. Their disorder prevents them from being able to observe and learn from watching their parents, their siblings, other peers, from what's the appropriate social interaction. And so that's when they can have social deficits.

Q And you were asked to describe cloak of competence, which is a definition for certain acts --

A Right.
Q -- that you use in psychology, correct?
A No. It's a way a person who has deficits are trying to mask them, it's their way of presenting. If we think about, you know, Harry Potter has a cloak where he can make himself invisible, so the cloak of competence is the behaviors, the way people present, in order to make those deficits not appear obvious to other people.
Q But now, you can kind of remove some of that cloak by asking very telling questions about the individual, right?
A Right.
Q He can try to push things away but if you ask him, for example, as you did here, Describe to me how you would do laundry --
A Yes.
Q -- then that's not masking anymore; he's telling you something he's learned, correct?
A Yes. It's harder for them to mask and answer that question because you're looking for a specific piece of information; you're not just glossing over and accepting what's at face value. Cloak of competence is successful because people accept face-value information, and my job is to go beyond face value.
Q And you were also asked a little bit about the 1974 special education rules.
A Yes.

Q And you didn't have those right off the top of your head to relay, but you are aware they had them, right?
A Yes.
Q And I think that you shared with us on your direct that this is exactly the kind of rules and the structure that the schools were using to find out if Mr. Aleksey had an emotional problem or if he had an intellectual functioning problem, correct?
A Well, they were trying to figure out what the deal was. Were the deficits they're seeing due to intellectual disability? Was it due to a learning disability? Was it due to an emotional disability? What were the things that they could classify that was preventing him from performing academically to his best ability?
Q And you were asked one time about a notation of, he was making tremendous efforts.
A Uh-huh.
Q That's a positive, correct?
A Yes.
Q And if you are emotionally disturbed you are not paying attention, or you are thrown out of class because you have done something that disrupted the rest of the class, you're not going to learn, are you?
A That disrupts the learning process.
Q And of course you were asked about transportation at the very end of cross-examination. Are you aware of whether he can

drive or not?
A No. I did not ask him if he could drive. I was not familiar with the case because I don't like to have the discovery and stuff when working on these kind of cases, but I thought I read in what was provided that he was driving, that he had driven from New York to South Carolina.
Q And were you ever given a summary, provided a summary, of any of the sentencing phase apart from the actual murder of the officer in this case?
A I believe ...
Q Let me ask you more specifically.
A Yes.
Q Did you ever receive a summary or any notification of the events where he was driving a BMW and pulled over to get another person's attention, and began a relationship, --
A Yes.
Q -- started changing cars, started going to dealerships, making his own deals?
A Yes.
Q Because this occurred in his 20s would that be something that you think might go into an adaptive functioning evaluation?
A Yes.
Q Because, again, he didn't do much before he left his mother, according to the records?
A Yes. Ad that's by his own admission. Yes.

Q That's by his own admission.
ATTORNEY BROWN: The Court's indulgence.
THE COURT: Yes, ma'am.
ATTORNEY BROWN: No further questions. Thank you.
THE COURT: Ms. Vann, anything on recross?
ATTORNEY VANN: Nothing further, Your Honor.
THE COURT: Thank you, Dr. Hall. You may step down.
THE WITNESS: Thank you.
THE COURT: Appreciate it.
THE WITNESS: Am I excused?
THE COURT: Any objection to me releasing her from her subpoena?
ATTORNEY VANN: None from the applicant.
ATTORNEY BROWN: None from the State, Your Honor.
THE COURT: You are excused.
THE WITNESS: Thank you.
THE COURT: Thank you, ma'am. All right. We're going to take a break for lunch because I like to eat lunch -- I hope you all do -- and we'll be back at 2:00. Okay. All right. Thank you all.
(Court recessed at 12:41 p.m. and reconvened at 2:02 p.m.)
THE COURT: So we're through with complying with Judge Early's order about the independent eval, right?
ATTORNEY BROWN: Yes, sir. And I do have additional copies.
THE COURT: Okay.

ATTORNEY BROWN: And Ms. Franklin-Best and I went through everything to make sure that they were accurate.

THE COURT: Okay. Thank you. And so now you're ready with the applicant's case?

ATTORNEY FRANKLIN-BEST: Yes, Your Honor.

THE COURT: Okay. Ms. Franklin-Best, okay. Yes, ma'am.

ATTORNEY FRANKLIN-BEST: Thank you, Your Honor. We would like to call Dr. David Price, Your Honor.

DR. DAVID RICHARD PRICE,

having first been duly sworn, is examined and testifies as follows:

CLERK OF COURT: Please be seated, and state your full name for the Court.

THE WITNESS: David Richard Price.

CLERK OF COURT: Thank you.

DIRECT EXAMINATION

BY ATTORNEY FRANKLIN-BEST:

Q Good afternoon, Dr. Price. If you could just please state your current employment for the record.

A I'm employed by The Forensic Network, which I own, which is a forensic -- it's a national forensic consulting practice.

Q And could you please tell us what your educational background is?

A I graduated from Clemson with a bachelor's in psychology. I graduated from Auburn University with a master's and a doctoral

degree in clinical psychology. I did my internship at University of Pittsburgh, University Drive, PA, in Pittsburgh, Pennsylvania.

Q And you just mentioned that you were currently employed with The Forensic Network. Could you just tell us a little bit about what that is?

A Started in 1990. I closed my practice for forensic issues, and I consult in civil cases, criminal cases, disability cases, things like that.

Q And in addition to your current practice what other positions have you held?

A Well, prior to being in The Forensic Network, I was with Behavioral Resources, which was, at that time, the largest psychological consulting practice in South Carolina where we treated patients and things of that nature.

I've also had academic performance at the Auburn University -- it was USC Spartanburg in the old days; it's USC Upstate now -- and started the forensic psychiatry program at the Medical University of South Carolina with Jim Ballenger.

Q With your background and experience what specifically have you done in the area intellectual disability?

A Well, my master's degree was on developing an assessment tool to assess children with developmental disabilities and needs, cognitive issues. I have had extensive experience in cognitive issues and assessing cognitive issues.

We assess -- basically you can divide it in a global way,

two things: We can assess what formerly was called mental retardation - now is called intellectual disability, which are individuals that fail to acquire intellect, if you would.

And then I also do a good bit of brain injury, which those individuals have dementia, and what dementia really is the loss of acquired intellect.

And it's many of the same assessment instruments with both of them.

Q And so you've been working in this area for 20 - 30 years?

A Since 1978.

Q Since '78, okay. And how many assessments do you believe that you've conducted over the course of your career?

A Thousands, tens of thousand.

Q Tens of thousands. And are you a licensed psychologist?

A I am.

Q And what jurisdictions are you licensed in?

A I'm licensed in the state of South Carolina.

Q Can you briefly describe any professional societies or activities that you're involved in that are relevant to intellectual disability?

A I'm a member of the National Association of Professional Practicing Psychologists. Those are psychologists who broke away from American Psychological Association to focus more on our needs regarding treating people and evaluating people rather than academic psychologists, research psychologists, industrial

organization psychologists, and actually did that about 20 years ago.

Q Any other professional societies, or is this your main?

A Yeah, that's the one I'm a member of. I lecture to professional societies all the time, and I think I've made 300 professional presentations, and generally those are associations related to either insurance companies, government agencies, or legal societies.

Q Okay. And have you conducted any research or published any works relevant to the area of intellectual disability?

A I lecture all the time on cognitive function and brain injury, which is very closely associated with intellectual disability. I perform, on average, five intellectual disability evaluations a week for Social Security, people applying for Social Security Disability. I have done research and published research on the Wechsler Adult Intelligence Scale. And also relevant to this case, I've lectured extensively and written on malingering.

Q And these works of yours, they are contained in your CV?

A Yes, ma'am.

ATTORNEY FRANKLIN-BEST: And, Your Honor, I would just sort of note that this has already been admitted as an exhibit in this case.

THE COURT: Which exhibit number is that?

ATTORNEY BROWN: It is Applicant's No. 2.

Q And have you testified in other courts on issues related to intellectual disability?
A I have.
Q And can you tell me where and how often?
A I've testified in General Sessions Courts in South Carolina, Family Court in South Carolina, Federal Court in South Carolina, and I've also testified in other states, both for the state courts and federal courts.
Q And have you been previously qualified as an expert?
A I've been qualified as an expert clinical psychologist, forensic psychologist, and forensic neuropsychologist.
Q And have you ever not been qualified as an expert?
A I was not qualified as an expert in one case in Montana, which their Supreme Court overturned and I was qualified.
ATTORNEY BROWN: And, Your Honor, at this point we would to move to have Dr. Price qualified as an expert in the field of clinical psychology and forensic neuropsychology.
THE COURT: Any objection, Mr. Salter?
ATTORNEY SALTER: No objection, Your Honor.
THE COURT: He is so qualified.
ATTORNEY FRANKLIN-BEST: Thank you, Your Honor.
Q Just tell me a little bit about the scope of your work in this particular case? Can you just tell the Court what you were asked to do in this case.
A Your Honor, I was asked to go administer an intellectual

test to Mr. Aleksey.
Q And can you just briefly explain what an intellectual disability is?
A It's called intellectual disability now. Prior to 2013 it was referred to as mental retardation. Prior to, I think it was, 1966, they had different classifications, even one that was idiot for somebody with an IQ under 55.
And what happens is they take the technical terms from diagnostic labels and in the community at large and use them as critical terms, and so basically so many people would use the term like "retard" and things like that. Congress took mental retardation off the table and replaced it with intellectual disability.
Q What does it mean? I mean, when you say somebody has an intellectual disability, what do you mean? What are they incapable of doing?
A Intellectual disability, as I noted earlier, is having some defect that prevents from you the acquisition of intellect. And we understand there are various categories of that, but those categories aren't black and white; it's not like, You have this IQ, so you're right here.
And, in fact, DSM-V, when it came out in May of 2013, specifically talks about moving away from an absolute IQ score to determine intellectual disability or function. It's really a way of trying to -- the whole idea about diagnosing anybody is that

if we can diagnose you, then we should have some type of ability to have a plan to treat you or help you in whatever your condition is.

We actually -- probably the largest entity that identifies intellectual disability are school systems, and they do it with IEPs. And then we use that information to put those individuals in specialized classes, specialized assistance, trying to further them along.

Q And just a couple of kind of academic questions here, but could you just explain to the Court what a standard error of measurement is in DSM?

A We have -- mental IQ is a set point, and let's just talk about the WAIS-IV since that's the test used, that was talked about in the test earlier. An IQ -- standard error of measurement for IQ on the WAIS is plus or minus 5 points, so an IQ of 75 would be an IQ of 70 to 80, because if we came back and tested that person on a different day there may be a couple variations in their IQ points, but we do know that with 95 percent certainty you would be within plus or minus 5.

Q And can you explain also what the Flynn effect is?

A Interesting, the Flynn effect came when an Australian psychologist noticed that there was a drift upward in IQ scores on tests as you get away from when they were normed and first developed. He's probably the most famous Australian psychologist known.

What he discovered is -- and this was applied to the WAIS -- but it's actually been, there's been a meta-analysis, a look at all the research, on the Flynn effect and it has provided strong evidence that IQs increase .3 percent from the day the test is normed and released.

So the WAIS was released in 2008, so for every year since then, when we test somebody you should subtract .3 from that. So, an example, it's been 10 years, 2018 would be similar, that would be three points IQ that you would reduce from the IQ score.

Q And is that true for every different kind of test? I mean, the WAIS or the Stanford-Binet, do all of these use the Flynn effect?

A Well, most of the research has been one of the WAIS tests, whether it's the WISC or the WAIS or the WPPSI, just because that group of tests are the ones most frequently used on individuals to measure intellect in this country, but it's been found to be true for the Stanford-Binet as well.

Q And just to talk a little bit about your specific work in this case, did you administer an IQ test to Mr. Bayan Aleksey?

A I did.

Q And on what date did you do that?

A I did that on November 19th, 2020.

Q And could you please describe for the Court the conditions under which you gave that test to him?

A I gave that test to him while he was incarcerated. I had a

room at the facility.
Q And were you at Broad River Correctional Facility?
A Yes, ma'am.
Q Do you believe that Bayan's confinement in SCDC impacted the results that you obtained in this case?
A Yeah. Actually, it's been my experience that confinement somewhat improves the cognitive functioning of inmates because, not 100 percent, but it precludes them from engaging in behaviors that directly impair their cognitive capacity; they're not pouring toxins in their body, they're not taking drugs, they're not doping stuff like that. So generally, you know, that's sort of what the treatment is for someone that has an intellectual disability, you put them in a structured environment where they can't harm themselves and can prosper.
Q And which test did you administer to Mr. Aleksey?
A I administered to him the Wechsler Adult Intelligence Scale-IV.
Q And what other tests are there? I mean, we heard a little bit earlier about some of these, the WISC-R and the --
A The WISC-R is the Wechsler Intelligence Scale for Children, and the WPPSI is the Wechsler Intelligence -- or, Preschool and Primary Scale of Intelligence.
Q And is there the Woodcock, or the --
A The Woodcock is more of an achievement test --
Q Okay.

A -- to measure one's academic functioning.
Q But a Stanford-Binet would be another IQ test?
A The Stanford-Binet would be another IQ test.
Q Can you please explain, like, what's meant as a gold standard test?
A Well, the gold standard test is one that is generally accepted by the relevant scientific community, and the gold standard test for intellect would be the Wechsler Adult Intelligence Scale IV for adults.

Social Security requires -- to assess intellectual disability for an adult in Social Security, they're required -- they prefer the WAIS, they'll accept the Stanford-Binet, and then there's also a test for nonverbal intellect for individuals that can't speak. Those are the only three they accept.

Q And what are subcategories in these tests? Can you explain that?
A Well, I wasn't sure how the term subcategories are used. We have full-scale IQ, we have composite scores like your verbal comprehension composite score, and then we have scale scores. And generally an IQ is derived from the WAIS based upon the administration of 10 subtests, and the scale scores are coming from those subtests.
Q And what were your findings in this case?
A My findings in this case was that Mr. Aleksey had a full-scale IQ of 74, which is at the fourth percentile, and then

he had a -- that would give him a mental age, by the way, of 11 years, 8 months. If you adjusted that score for the Flynn effect, he had an IQ of 70, which would be 11 years and 2 months.

And then you administer the 10 scale scores, and you add those scale scores up for the full IQ, all of them, but they are broken off into different things. Like for verbal comprehension, you would do similarities, finding the similarity between two words; you would give them vocabulary, of course; and then information, which is generally their recall of general fundamental information.

Q And the scores that you obtained in this case, I mean, do they fall within the range of intellectual disability?

A Well, the Flynn effect -- well, both of them could fall in the range of disability. DSM-V cautions against using a specific number to determine intellectual disability and puts more of a burden on adaptive functioning, but even then they establish it as a range, and so mild intellectual disability could go all the way up to mid 70s.

Q And so how does IQ testing sort of fit within the diagnosis of intellectual disability? I mean, I think you kind of touched on that. It's the number; it's also adaptive to behaviors. Is that so it's just one component, one constituent part of the --

A It's one part of it, but it's an important part of it, and it's an important part of it in trying to determine, really, funding for an individual, training for an individual, housing

for an individual, I mean, supervision for an individual.
Q And so is it kind of fair to say that when you look at, sort of like, the numbers, you know, the IQ-test numbers and the adaptive functioning, are these kind of weighted equally when you're making these assessments, or is it all just part of a picture?
A No, not really. I think most people do start looking at the number which then alerts them to the need to look at other things. Say you gave the WAIS and you got an IQ of 95, well, then there's not much reason to do an assessment of adaptive functioning.
Q And just to talk a little bit more about your work in malingering -- and you're published in the area of malingering; is that accurate?
A I'll be giving two lectures in San Antonio on malingering the week after next.
Q And can you just sort of describe a little bit more of your background in that area? I know we touched on it a little bit because you've been working in this area for a long time, but how is it that you got sort of specially interested in the issue of malingering?
A I think I got -- it's been so long ago -- interested in the idea of malingering and fraud upon my work in claims for compensation.
For example, I do a lot of work in mild traumatic brain

injury. And we know the research very clearly shows that 40 percent of those claims are malingered, and so we evaluate for that.

The whole field is very concerned about that. In 2005 the National Academy of Neuropsychology put out a physician paper that said neuropsychologists should have tests of performance validity in all of their evaluations.

And just, if I bore you, tell me stop. There's really two types of validity testing we do. One is symptom validity, and that is, Does a person accurately report their symptoms? And the personality assessment inventory was mentioned earlier, and it does have symptom validity indices on it. And the other one is performance validity. And what performance validity means, Is someone putting adequate effort on testing?

And what we generally do is we mix performance validity -- if I'm doing a neuropsychological battery, I'm going to have several measures of performance validity in that so I can make sure the person is giving me the same effort at 10:00 as they are at 1:00 or something like that. And so that's the standard, you know, when we give a test. And I did that for Mr. Aleksey.

Now, the thing about malingering, malingering is not a mental disorder; it is the feigning of a mental disorder, and it takes more to diagnose that than a single intellectual test or just one single performance validity test.

And I think I mentioned it before -- I know I mentioned it

in my affidavit -- I gave him the test of malingering memory that he was just below the cutoffs on in this, and then I looked at the Reliable Digit Span which is an embedded measure of symptom validity on the WAIS, and he was at 6 and the cutoff's at 7.

But what I also looked at -- I mean, this is what I do for a living as a clinician, I do it for everybody from State Farm to the Justice Department -- I then look at what data that I do have. It might be limited data. Those are the two pieces of information I have from him, the reading of records and the clinical interview -- but what he had was, his working memory score, composite score, is at the first percentile.

Working memory is the glue that binds all of the memory and cognitive functions together. And I'll give you a great example of working memory. When you ask me a question on this stand, I have to remember the question and then execute my response. That's working memory. If you ask me directions to Tea Town, I have to remember the address while I tell you how to get there. That's working memory.

His working memory was at the first percentile. And when I looked at that, I then looked at digit span. There's two tests on working memory composite scoring, it's digit span and arithmetic. Digit span requires you to listen to a sequence of numbers and then repeat them back correctly, and it also has a portion where you have to listen to a different sequence of numbers and say them backwards. For example, I say one-nine, and

you would tell me nine-one. And that's a very complex thing. You have to hold that string of numbers in your head while you go ahead and convert them backwards and then verbally tell the examiner. And that was also at the first percentile. And that's 50 percent of a working memory score.

And arithmetic is the other score on there that was impaired. And arithmetic, an example of working memory in arithmetic, is if you have an equation, you have to remember the equation while you simultaneously work to solve it. And so that was low.

So given that he just missed the cutoffs -- and I think on the TOMM the cutoff -- well, I know on the TOMM the cutoffs on trial 2 and recall is anything below 45, and I think he was 43 on the one and maybe 44 on the other. And then on the WAIS, the cutoff was 7, and his Reliable Digit Span score was 6. So I think that that probably contributed to the performance on the TOMM.

Q And so it's just because of those particular categories where he was particularly deficient that it impacted his ability to score well on other parts of the test? Is that sort of an accurate way of --

A Well, actually, he served better on -- like, on processing speed, he had a composite score of 92, which would be at the 30 percentile, so that's just a particular strong weakness for him, as is verbal comprehension. Verbal comprehension was at the

fifth percentile.
Q So you can still be intellectually disabled but have certain strengths along with very profound deficiencies; is that accurate?
A You can. We've all heard the term mediate survive [ph] where some people can be spectacular at something and still have across-the-board intellectual disabilities. You can be better at some things than others. This would probably -- this kind of configuration, with a working memory and verbal comprehension, would be consistent with someone who had an attention deficit disorder.
Q But if you had an attention deficit disorder can you also be intellectually disabled?
A Very commonly co-occur. You know, ADHD diagnosis sometimes gets overused, but it very commonly occurs in people in intellectual disabilities; autism, developmental disorders.
Q It's because they present similarly or -- I mean, what -- do you know anything about that relationship between the co-morbidities?
A Yeah. I think it's more because people are trying to help the person that's inflicted with those focus their concentration and attention, and so that gets diagnosed and then they can be described psychostimulant medication.
Q Okay.
A In all of these kind of cognitive things, the symptoms

overlap.
Q Okay. So in order to determine whether somebody might be malingering on an IQ test, should the TOMMs or the RDS be a part of any battery for determining malingering, or would it ever be acceptable to just sort of make a subjective assessment of that?
A Well, I can tell you right now the research says if you make a subjective assessment you're more likely than not to be wrong.
Q So in any time that you're trying to determine malingering do you use these instruments to make those determinations?
A I do.
Q If I can ask you just a couple more questions, Dr. Price. Do you believe that the working memory score here undermines the validity of the test that you administered?
A No. I think it's just documentation of a cognitive weakness.
Q And overall is it your opinion that the score of 74 here, or a 70 with a Flynn effect taken into consideration, do you believe that score is valid?
A I think that's reasonably valid. Yes.
ATTORNEY FRANKLIN-BEST: All right. No more questions, Your Honor.
THE COURT: Mr. Salter, any questions of this witness?
ATTORNEY SALTER: Again, I'll be very brief.

CROSS-EXAMINATION

BY ATTORNEY SALTER:

Q Now, you've given over 300 professional presentations, correct?

A Yes, sir.

Q All right, sir. And when I looked through your CV I didn't see any related to either mental retardation or, what we call today, intellectual disability.

A I assess intellectual disability or retardation in -- hundreds of times a year.

Q Yes, sir. I'm not asking you that, though.

A And I think there are some presentations. I'd have to go back through it. I don't remember all 300 of them.

Q All right, sir. How about your written articles?

A The written articles would be the publication of the WAIS.

Q And it's fair to say that most of the materials, both your presentations and what you've written, is on malingering, correct?

A And brain injury.

Q And brain injury. Yes, sir.

A Yes.

Q You were asked about the Flynn effect. Do you apply the Flynn effect in your clinical practice?

A Sometimes.

Q Sometimes. When would you do that?

A When the scores are under 80 - 85.
Q Do you always do that when the scores are under 80 - 85?
A I'd have to look at the entire clinical picture.
Q Now, you testified that the WAIS, currently WAIS-4, is now the gold standard, correct?
A That's correct.
Q But the Stanford-Binet is an acceptable measurement, right?
A It is.
Q Measuring instrument. Excuse me. And it's accepted by the Social Security Administration?
A It's one of three intellectual tests that they'll accept.
Q All right. What is the third one?
A It's called the TONI, Test of Nonverbal Intellect, for people that are mute.
Q Now, you didn't conduct a clinical interview of Mr. Aleksey, did you?
A Or record review, no, sir.
Q Or record review?
A Correct.
Q So you weren't familiar with any prior testing that may have been done --
A That's correct. That's correct.
Q And you don't have an opinion as to whether or not he's intellectually disabled, do you?
A All I have my opinion on is these test results because I

don't have enough information.

ATTORNEY SALTER: Nothing further, Your Honor.

THE COURT: Anything on redirect?

ATTORNEY FRANKLIN-BEST: Nothing, Your Honor.

THE WITNESS: May I be excused, Your Honor?

THE COURT: Yes, sir. Ms. Vann, who's next? Are you ready to call your next witness?

ATTORNEY VANN: Yes. Applicant calls Pamela Leonard.

PAMELA B. LEONARD,

having first been duly sworn, is examined and testifies as follows:

CLERK OF COURT: Please be seated, and state your full name for the Court.

THE WITNESS: My name's Pamela B. Leonard.

CLERK OF COURT: Thank you.

THE COURT: And, Ms. Leonard, if you could speak up just a little louder, I'd appreciate it.

THE WITNESS: I will.

THE COURT: Thank, ma'am. I appreciate it. Ms. Vann.

ATTORNEY VANN: Thank you, Your Honor.

THE COURT: Yes, ma'am.

DIRECT EXAMINATION

BY ATTORNEY VANN:

Q Good afternoon, Ms. Leonard. Could you please describe what your connection is to the Bayan Aleksey case?

A In August of 2017 I was contacted and asked to come on as a mitigation specialist in the limited role of looking into intellectual disability for Bayan Aleksey.
Q Can you just briefly describe what a mitigation specialist is?
A In general, mitigation specialists are people who -- it's an investigation function looking for all records related to the defendant and interviewing as many people as possible who have known that person over time.
Q And I think you said the scope of your work in this case was limited to investigating intellectual disability.
A Correct.
Q Is that more limited than in other capital cases that you've worked on?
A Oh, yeah. I would say it's considerably more limited.
Q Have you conducted investigation in this case at any other stage other than this particular intellectual disability question?
A No. And if -- but if I saw something that related to something else, I would pin it onto -- it wasn't my task to investigate that.
Q But you were not the investigator at trial?
A I was not.
Q Or at his initial post-conviction proceeding?
A No.

Q Or his federal habeas proceeding?
A No.
(Applicant's Exhibit 8 is identified.)
Q I'd like to show what you what has been premarked as Applicant's Exhibit 8.
ATTORNEY VANN: May I approach the witness?
THE COURT: You may.
Q Could you describe what this is?
A That's my CV.
Q And is it your current CV?
A Yes, from the beginning of this month.
ATTORNEY VANN: I would move to have this admitted as Applicant's Exhibit 8.
ATTORNEY SALTER: No objection, Your Honor.
THE COURT: All right. Applicant's 8 is in, without objection.
(Applicant's Exhibit 8 is admitted into the record.)
ATTORNEY VANN: May I provide you a copy, Your Honor?
THE COURT: That would be great. Thank you, Ms. Vann.
ATTORNEY VANN: Thank you.
Q And can you give a brief overview of your employment history, Ms. Leonard?
A How far back do you want me to go?
Q As is relevant to mitigation investigation and intellectual disability, please.

A I have on my CV that I began in private practice in death-penalty investigation in 1992. I think it was actually -- that's when I really began working full time in that area but I had been taking cases and assisting in a few cases between 1990 and 1992. And then I worked in private practice while living in Atlanta through '94.

And in January '95 I went to work for Multi-County Public Defender agency, which was a misleading title. It actually was a capital defender, trial capital defender, office in Georgia, multi-County meaning we covered the entire state. And I did that job through 2005.

And in 2005 I went into private practice in capital defense mitigation, and also the Defense-Initiated Victim Outreach services. And during that time I had gone back to school, graduate school, at Eastern Mennonite University, and was studying restorative justice.

Could I please have some water?

THE COURT: Oh, sure.

THE WITNESS: I'm kind of gravelly.

THE COURT: No. I'm sorry. Would you prefer us to move the microphone up there to you?

THE WITNESS: Can you hear me?

THE COURT: I can hear you. Well, we can move the microphone around to make it easier.

THE WITNESS: I'm good. Thank you.

THE COURT: Oh, you're good. All right.

A In 2006 I was the director of the Georgia Counsel for Restorative Justice, which was a project at Georgia State University, housed in -- it was a joint project. It was Georgia State University School of Law and the Georgia State School of Social Work, and I was the director and later the executive director, though I am neither a social worker, nor a lawyer. And that went on through 2010.

And at that time my husband and I moved back to North Carolina where our family's from, and I've been in private practice in those areas ever since.

And I have a farm, too.

Q Thank you. Could you briefly describe the relevant training you've had in capital mitigation investigations?

A When I began doing mitigation in the early 1990s there really wasn't any formal training, per se. There were some training sessions that were headed up by the National Association of Criminal Defense Lawyers. I remember going to one in New Orleans in the very early '90s. But the reason that -- and then a lot of it was just paying attention, learning from lawyers how to investigate cases.

I also went to -- I was -- I was certified in the investigator, private investigator, program in Georgia, and I completed that when I was an employee of the state of Georgia. And they didn't license you at that point, you couldn't get a

license, but I was certified.

And I also had the really terrific experience of going to, you know, what I refer to as "cop" school, it was the training for police officers in Georgia, and that was wonderful training.

And then I also learned, you know, by reading and studying the literature. And then there began to be more training programs headed up by criminal defense agencies, and pretty soon I was teaching at those because there was a real shortage of mitigation specialists at that time.

Q How did you get involved in investigating for intellectual disability specifically?

A As I say, I was in Georgia which was, I think, the third state in the United States to really bring the -- to bring, back then it was called, mental retardation into the field of capital mitigation. And the reason it was in 1998/1989, Georgia passed a statute that people with mental retardation were not eligible to be executed; however, they had the reasonable doubt burden -- and I think that's still being litigated currently -- and so we had to learn about it.

Q How many capital intellectual disability or active investigations do you think you've done?

ATTORNEY SALTER: Your Honor, I've been sitting here kind of patiently, but I have a relevancy objection.

THE COURT: Okay. Ma'am, you trying to qualify her for --

ATTORNEY VANN: No, I am not trying to qualify her, but she

is going to be testifying about her efforts to obtain records that are not in the record here, and so I think her background in investigation and experience is relevant.

But I can definitely move on. That was my last question on her training, certainly.

THE COURT: If you don't mind.

ATTORNEY VANN: Absolutely.

THE COURT: Thank you, ma'am.

Q I'm sorry. How many intellectual disability evaluations or investigations have you participated in?

A In cases where I was the primary investigator, would probably be around 20, but I have reviewed scores of them because, in my capacity as a director of mitigation and investigation at the Capital Defender Office in Georgia, we were assisting and reviewing cases all over the state.

Q And generally how does somebody become involved in investigating intellectual disability in a capital case?

A Generally I would say they might be a mitigation specialist, and then where we start to see just see the particulars of the laws, regulations, literature, tests, et cetera, that are -- and adaptive skills, in particular, I think that's where we really are on the ground investigating those.

Q So once intellectual disability has been identified as the possible claim --

ATTORNEY SALTER: Objection. She's leading. And again, I

don't see the relevance of any of this.

THE COURT: And I note your objection, Mr. Salter. And since I'm not really sure where we're going with this, and since I have nothing else to do this afternoon, I'm going to let her continue.

Tell me what we're trying to establish?

ATTORNEY VANN: Your Honor, this is my last question generally, and then I will move into her work on this case. So my question for her right now is --

THE COURT: Okay.

ATTORNEY VANN: -- how you go about doing intellectual -- what you are looking for in an intellectual disability investigation.

THE COURT: But I think it's a question about relevance. Did she find something? Is she testifying about something in this case? I mean, what is she supposed to testify about?

ATTORNEY VANN: She is going to testify about her efforts to obtain certain records related to the childhood IQ scores.

THE COURT: Okay, the ones that are mentioned in the evaluation?

ATTORNEY VANN: Yes, Your Honor.

THE COURT: Okay. And she's just trying to get the backup information from them?

ATTORNEY VANN: Yes, Your Honor.

THE COURT: And was she able to get it?

ATTORNEY VANN: No.
THE COURT: Okay.
ATTORNEY VANN: So the question is, What efforts did you go to?
THE COURT: Okay. Well, I'm going to let her testify about what she was trying to do. Okay. Go ahead.
ATTORNEY VANN: Thank you.
Q So once someone is identified intellectual disability as a potential issue in the case how do you go about investigating for a client's intellectual disability?
A I search through all records, every piece of paper with that person's name on it, and up to and including prenatal medical records for the mother, and speak to everyone who knew that person through the developmental period, who knew that person over time.
ATTORNEY VAN WINKLE: And in this case we've been looking a lot at records combined into a notebook. And if I could hand that up to her, Your Honor?
THE COURT: Sure.
Q Are you familiar with the records that are in this notebook?
A Yes, especially tab 12.
Q Can you describe how these records were collected?
A I would say quite a few of them were in the trial counsel's file and PCR file, and when I came into the case there were probably -- I mean, there were multiple boxes that I had to go

through, at least eight banker boxes. And then we have made efforts to acquire additional records as well.
Q Okay. I would like to point you to specific tabs. I'm actually going to skip 12 and go right to 13, if we could. Can you describe generally what is behind tab 13?
A I can if I switch to my stronger glasses. Okay. What page, please?
Q Tab 12. You can start with page 1.
A Thirteen, right?
Q I'm sorry. Yes, tab 13, page 1.
A Okay. I'm there.
Q Can you describe what this is?
A It's the record form of a WISC, Wechsler Intelligence Scale for Children.
Q Can you tell what year it was administered?
A I know that it was first grade. November 26, 1974.
Q And you said he was in first grade. How old was he?
A Six. He was six years old.
Q And could you learn anything from this document about the circumstances of the test administration?
A Well, I can see that it was put forward because it was referred by the guidance department, but I'm not seeing the examiner's signature. Someone with poor handwriting.
Q Okay. And if you can turn to tab 19. On page 1, can you tell us what that document is?

A It's a referral to the Committee on the Handicapped.
Q And then if you go to page 4 and 5 behind that tab as well. I know it's a poor copy, but can you describe what this document appears to be?
A It's a handwritten psychological report from the Committee on the Handicapped, and so it's a narrative summary. Ordinarily it would be typed up.
Q On the bottom of page 5 does it refer to a Wechsler Intelligence Scale for Children - Revised test?
A It does. The verbal scale is 81; performance scale is 86; and the full scale is 82.
Q And did you attempt to do any other investigation into this test based on finding this record?
A Yes. Because it is handwritten, it's a bit confusing. You know, I'm not seeing what we usually see where all the reports that come -- in a typical report there's scaled scores that the previous psychologist talked about, and I attempted to get the raw data for this test, for this evaluation.
Q Can you describe your attempts to get that data?
A I went in person to the Committee on the Handicapped in the county -- and this was in New York, specifically in Flushing, and talked to as many people as I could there. I went to the schools where he went to school, I went to the actual Committee for the Handicapped within the school system, and I was not able to find any raw data. They were not able to provide anything to me.

Q Were you able to discover anything about the conditions under which this test was administered?
A No.
Q And I'd like to turn to tab 27, please. And do you know -- could you describe what these records are and where they're from?
A This is from Hillside. It's a residential treatment center where Bayan was admitted. And what it's saying, he was admitted for the mentally ill, as a voluntary or minor voluntary patient.
Q And if we turn to page 32, which is the third-from-the-last page --
THE COURT: And what tab is this again?
ATTORNEY VANN: I'm sorry?
THE COURT: What tab is this again?
ATTORNEY VANN: This is tab 27, page 32.
Q And at the bottom of that page does it refer to another WISC-R test?
A Yes. There's reference to a WISC-R that earned a full-scale IQ of 19, and a performance of 83, and a verbal of 88.
Q Did you attempt to do any further investigation into that IQ testing?
A I did. I attempted to get raw data on all of these tests because that's very helpful in determining how it was administered, who administered it, and to check the numbers.
Q And were you able to find the raw data in this test, or for this test?

A I was not. It was very frustrating. You know, I spent several days in New York in person going all of these agencies, people, teachers, schools, and was not able to acquire any raw data at all.
Q And you mentioned also doing interviews in this case. Were there any limitations on your ability to interview people who knew Bayan during the developmental period?
A There were. Bayan had more, I would say, one of the latter cases I've had where there were fewer people to interview, because Bayan and his mother, as Dr. Hall referenced, were very enmeshed and had very few friends. Her family is from -- was from Trinidad. She was separated from her husband, and she was a very -- a person without very -- as far as I could find, one friend, and she and Bayan spent most of their time together.
Q And who was that one friend?
A Barbara Gonzalez [ph].
Q And did you speak with Barbara Gonzalez?
A I did.
Q And there are declarations at the front of this binder, if I could flip back. There's a declaration behind tab 1 from Barbara Gonzalez; behind tab 4 from Lester David Rosengard; and tab 5 from Vera Lall Aleksey. Did you obtain those affidavits, or declarations?
A Well, let me ask you about obtaining. I actually, by hand, took the affidavits to Vera Aleksey and to David Rosengard. I

spoke with Ms. Galensky [sic]. However, she's in California, and we had to culminate a rather long, actually over the phone, for her signature, to take the affidavit out there and have it notarized.

Q And just to clarify, that was Ms. Gonzalez in California?

A Correct.

Q And how did the information in these affidavits come to be in the affidavits?

A I interviewed those people. Ms. Gonzalez only on telephone, but Vera Aleksey and Mr. Rosengard, I interviewed twice, and took the affidavits to them, and they reviewed it. And Mr. Rosengard had a couple of minor corrections that will be reflected in his handwriting.

Q And is that why there are some scratch-outs and his initials in his affidavit?

A Yes.

Q Thank you.

ATTORNEY VANN: The Court's indulgence. No further questions.

THE COURT: Anything on cross?

ATTORNEY SALTER: Just very briefly.

CROSS-EXAMINATION

BY ATTORNEY SALTER:

Q Ms. Leonard, you introduced yourself as Pamela B. Leonard. The B stands for Blume?

A It does.
Q And John Blume's your brother, correct?
A He's my little brother.
Q He's a younger brother?
A Yes.
Q I have one, too, so I understand. All right. You were retained in August 2017; is that correct?
A Yes.
Q When did you first start working on the case?
A I probably came -- you know, would have gone to the office in Columbia within a month or two, because there were already records that were collected.
Q So you were retained well in advance of the DDSN evaluation, correct?
A I was.
Q Now, you traveled to New York, you said, in May of 2018?
A Yes.
Q Now, prior to traveling to New York did you make any effort to determine the retention policies of the various organizations you contacted subsequently?
A I don't remember specifically, but I can tell you that if you call somebody on the phone and ask them about their retention policy, you will likely be told, Well, we destroy all those records after five years. But if you actually go in person, often there might be someone who can get those records for you.

And that was actually my hope, was that I could, if I could talk to someone who had perhaps been there while Bayan was there who would remember him, and they would have a much stronger opportunity to dig around and find records possibly still in the archives than calling on the phone where it's very easy to dismiss someone.

Q But you weren't able to find any?

A I was not. It was a very frustrating experience.

Q Did you provide the results of your investigation to DDSN?

A I provide the results of my investigation to the attorneys who -- I would say that it would not be -- it would not be appropriate for me to directly get information.

Q Why not?

A Why?

Q Yes, ma'am.

A Because I'm not Mr. Bayan or Mr. Bayan Aleksey's attorney. I work at their direction.

Q Okay. They didn't ask you to provide it, did they?

A No. They provided it themselves.

Q Now, as I understand your role as a mitigation investigator, you go out and gather information; is that correct?

A Yes.

Q And you pass that information along to a social worker?

A There's not a social worker in this case. If there were, like, a social worker hired as an expert, then, yes, that

information would be passed along through the attorneys. But I don't directly provide information to --

Q So you provided the information back to the attorneys, and the attorneys then hire a social worker, and then they pass the information on to the social worker?

A Yes.

Q I'm just trying to understand how it all works.

A Yes.

Q Thank you. And that's what you have done in this case, right?

A Correct.

Q You didn't withhold any information that you found, did you?

A Withhold it? That would be unethical for me to withhold information from the attorneys I'm working with.

Q Thank you, ma'am.

ATTORNEY SALTER: Thank you very much.

THE COURT: Before you ask a question, you know, tab 13 were the test results, and tab 27, are those test reports that are reported, just the reports, not the actual tests or anything like that. You were looking for the actual tests, right?

THE WITNESS: I was. Because some of these don't have signatures on them, there was -- it was brought out under Dr. Hall that there was a psychologist in training and a psychologist. I don't really -- we don't know what was happening there. I have had in the past where trainees were actually

conducting the test, and then the psychologist, the licensed psychologist, reviews the written record but not the actual administration of the test, which is so critical.

THE COURT: Is there any reason that you were concerned that someone may have written down these numbers incorrectly and transferring them from the test results?

THE WITNESS: Absolutely.

THE COURT: You were concerned about that?

THE WITNESS: Yeah. And that's what I'm saying. It's somewhat irregular to have -- it was like a draft, not an actual report.

THE COURT: Okay. All right. All right. Ms. Vann, any questions?

ATTORNEY VANN: No further questions.

THE COURT: All right. Thank you, ma'am. I appreciate it.

THE WITNESS: May I go? I've got to get back to North Carolina.

THE COURT: Well, you better go fast because you've got to get past Columbia.

Ms. Vann or Ms. Franklin-Best, or Mr. Van Winkle, or somebody else?

ATTORNEY FRANKLIN-BEST: Mr. Van Winkle.

THE COURT: Are you Mr. Van Winkle?

ATTORNEY VAN WINKLE: I am, sir.

THE COURT: Oh. Nice to meet you.

ATTORNEY VAN WINKLE: We'd call Allison Franz.

ALLISON FRANZ,

having first been duly sworn, is examined and testifies as follows:

CLERK OF COURT: Please be seated, and state your full name for the Court.

THE WITNESS: Allison Franz.

CLERK OF COURT: Thank you.

DIRECT EXAMINATION

BY ATTORNEY VAN WINKLE:

Q Ms. Franz, how did you get involved in Mr. Aleksey's case?

A I was assigned to Mr. Aleksey's case as a Cornell law student in the capital punishment --

THE COURT: Can you hold on one second. Ms. Franz, do you mind talking just a little louder?

THE WITNESS: Yes. Sorry.

THE COURT: Pretend you're yelling at someone, okay. Thank you. Pretend you'd like to be yelling at your professor.

THE WITNESS: Okay. I'm sorry.

Q I'll ask the first one again. How did you get involved in Mr. Aleksey's case?

A I got involved in Mr. Aleksey's case as a clinic student in criminal law.

Q And what does the clinic do?

A It gives law students the opportunity to work on capital

cases with experienced lawyers.
Q And when did you get involved in Mr. Aleksey's case?
A It was fall of 2019.
Q And what assignment were you given regarding Mr. Aleksey's case?
A I was told to conduct a readability analysis, a piece of Mr. Aleksey's writing, to determine readability and grade-level equivalency.
Q And did you report what you found?
A Yes.
Q And I believe this report has already been admitted as Exhibit 6. Is this your report?
A Yes.
Q Is that your signature on the second page?
A Yes.
Q And then on the third page, is that -- or, the first exhibit, is that the document you submitted?
A Yes.
Q And then, Ms. Franz, what is readability analysis?
A A readability analysis is a measurement that measures the readability of a piece of text, which is how easy it is for a reader to understand. It will measure the complexity of the text, and it can measure the grade equivalency.
Q And what website did you use to conduct this analysis?
A I used www.readabilityformulas.com.

Q And why did you pick that website?
A I chose that website because it had previously been used by courts that had previously considered readability analyses.
Q And then from that website which particular readability analysis did you use?
A I used the Flesch-Kincaid test.
Q And why did you use that one?
A I used that test because research indicated that the Flesch-Kincaid test was most frequently used to analyze readability.
Q And then so overall how does the website work?
A So the way the website works is --
ATTORNEY BROWN: Your Honor, I'd have an objection to outside of any sort of scope of expertise. She's just using it.
THE COURT: And I understand that, so I'll note your objection. She's not testifying to being an expert in this Flesch-Kincaid. Are you?
ATTORNEY VAN WINKLE: No. She's just explaining how she --
THE COURT: She's just saying she put it in?
ATTORNEY VAN WINKLE: Yes.
THE COURT: All right.
Q So how do you use the website?
A The way it works is you copy and paste a piece of text into the website, click/check text readability, and the website performs an analysis.

Q And when did you perform this analysis for Mr. Aleksey?
THE COURT: Can I ask a question?
ATTORNEY VAN WINKLE: Yes, sir.
THE COURT: You all cited two federal court cases, I guess, where they used this readability test. Has it ever been used in South Carolina? And, Mr. Van Winkle, I'm not trying to pick on you. If you ladies know of any South Carolina cases --
ATTORNEY VANN: We have not identified any South Carolina cases. This was recommended to identify a readability test and determine the grade-level equivalency, and so we asked Ally to do some research into what courts have accepted in the past. So we have those federal cases, and then I believe there was a study -- and maybe you can ask her that.
THE COURT: Yes, by somebody.
ATTORNEY VANN: Yes, Your Honor. By Wayne [ph]. Yes.
THE COURT: Okay. All right. Sorry. I didn't mean to interrupt you and get you out of your game. It's the first time I've run into readability.
ATTORNEY VAN WINKLE: Yes, sir.
THE COURT: Okay. Sorry.
Q Ms. Franz, what piece of writing by Mr. Aleksey did you upload into the software?
A I uploaded Mr. Aleksey's correspondence with SCDC that was dated February 20th, 2012.
Q And why did you use that piece of writing?

A I chose that piece because it was the one that Dr. Hall referenced in her report.
Q And what were the results of the readability analysis?
A The analysis indicated that Mr. Aleksey's writing had a grade-level score of 4.9, which means that Mr. Aleksey's reading was at a fifth-grade level.
Q I asked you this at the beginning, but again to be clear, the text you uploaded into the readability analysis is attached to that document as Exhibit A?
A Yes.
Q And I believe it also mentions another case. Is that the same analysis?
A Yes. So I did an analysis of the same piece of writing in Microsoft Word.
Q When did you conduct that analysis?
A That was also in September of 2019.
Q And what were the results?
A It also revealed that Mr. Aleksey's writing was at a fifth-grade level.
Q Does Microsoft Word use the Flesch-Kincaid test?
A Yes.
ATTORNEY VAN WINKLE: And I think that's all we have for Ms. Franz.
THE COURT: Nothing else on direct?
ATTORNEY VAN WINKLE: Nothing else on direct.

THE COURT: All right. And so, Ms. Brown, anything on cross?

ATTORNEY BROWN: Just one or two on follow-up.

CROSS-EXAMINATION

BY ATTORNEY BROWN:

Q You said that you had looked at *United States v. Montgomery*, and in your parenthetical, using the -- hope I say this right -- Flesch-Kincaid -- what is it --

A I believe it's Flesch-Kincaid, but I'm not sure.

Q -- the readability analysis to assist in the determination that the defendant satisfies the first prong of an intellectual disability determination. How so?

A To be completely honest with you, ma'am, I don't remember just because I did do this three years ago. So I don't remember exactly what the case said.

Q Do you recall reading the case?

A I do.

ATTORNEY BROWN: Your Honor, may I approach with a copy of the case?

THE COURT: Sure. This is like a pop quiz in law school. Okay. The case is that big?

ATTORNEY VANN: I assume it's a federal habeas case. They can be quite thick.

THE COURT: All right. Go ahead. I'm sorry, Ms. Franz.

Q And I have tabbed it with a yellow tab where I wanted to go. It's Westlaw, page 45, at the bottom.

And I wanted you to start reading there, maybe the paragraph at the end of the first column and the second paragraph. Just kind of scan it, or however comfortable you are, to refresh your recollection.

A You're referring to the paragraph that starts: Multiple Piece of evidence?

Q No. The one that starts: Dr. Reschly testified the defendant was regarded.

ATTORNEY BROWN: If I may approach?

THE COURT: Yes, ma'am.

ATTORNEY BROWN: Okay. This right in there.

Q Has that refreshed your recollection a bit?

A I'll be honest. Not terribly much. I'm sorry.

Q Well, would you agree with me that Dr. Reschly is talking about intellectual disability, and he has used this readability scale to determine the level of the book that the inmate is reading, not anything to do with the inmate's writing?

A It appears as though that is what that paragraph's referring to. Yes.

Q And the second column, it starts with page 56, about halfway there, would you agree with me that the evidence in the trial, in District Court, reflected that even USA Today is written at a fifth-grade level?

A Yes. That's correct.
Q So the readability goes to the text and not the individual's comprehension or ability necessarily?
A Well ...
ATTORNEY VAN WINKLE: Objection. That calls for an expert opinion.
THE COURT: Well, as I have done this whole time, I'll note your objection right now. I'm going to let her answer to the best of her ability. Okay.
A My understanding is that the readability analysis reflects the grade level. But beyond that, I don't know if I can say.
Q Would you have done any other legal research before you used that particular test? Or, I guess it's an investigation engine, we'll call it that.
A Beyond looking for references to see what prior courts have used, that test, or that website, I mean?
Q Well, did you recall coming across a Georgia case, *Common Cause/Georgia v. Phillips?*
A I do not recall that.
Q And you're familiar with case law, obviously, right? May I hand you another case?
A Yes, ma'am.
Q I've got another little tab here at Westlaw, page 13, there at the very bottom.
THE COURT: What case is this?

ATTORNEY BROWN: This is *Common Cause/Georgia v. Billups*. It is at 2007 Westlaw 7600409. It is out of the Northern District of Georgia.

THE COURT: All right.

Q At the very bottom, the second column, what does this particular federal court write about the readability index?

A Would you like me to quote or --

Q Just that first line. Neither the ...

A Neither the Flesch-Kincaid readability index nor the Flesch Reading Ease test measure the actual ability of a particular individual to competent a document. Indeed, all individuals with a tenth-grade education may not be able to read a document scored at a tenth-grade reading level.

Q It still kind of focuses in on the document more so than the writer or reader?

A Here, it does. That's correct.

ATTORNEY BROWN: Your Honor, I'd like to make these two different cases exhibits in response to the affidavit that's already in the record.

THE COURT: Any objection?

ATTORNEY VAN WINKLE: No, sir.

THE COURT: You're doing good. You're doing good.

ATTORNEY VAN WINKLE: Thank you.

ATTORNEY BROWN: No further questions. Thank you very much.

THE COURT: Anything on redirect?

ATTORNEY VAN WINKLE: Just one moment, please.

THE COURT: Take your time. Mr. Van Winkle, just hold on one second. And you can talk as long as you need to. We've got to get everything marked before.

ATTORNEY VAN WINKLE: Okay.

(State's Exhibits 6 and 7 are identified.)

(State's Exhibits 6 and 7 are admitted into the record.)

ATTORNEY BROWN: And *Montgomery* is State's Exhibit 6.

THE COURT: State's No. 6. And so *Common Cause* will be 7?

ATTORNEY BROWN: Yes, sir, *Common Cause* is 7.

THE COURT: When she's through, the court reporter's through, then you can start. Let me make sure Cathy's ready.

THE COURT REPORTER: Yes.

THE COURT: Are you ready? All right.

REDIRECT EXAMINATION

BY ATTORNEY VAN WINKLE:

Q Ms. Franz, do you still have the *Montgomery* opinion in front of you? Will you please just read this last sentence here?

THE COURT: Tell me where you're pointing to, just what page number so I --

ATTORNEY VAN WINKLE: It's wherever -- it's in *Montgomery*, wherever the marker is, and it's the paragraph right next to it, last sentence.

THE COURT: Okay.

ATTORNEY VAN WINKLE: The last sentence right by the marker.

THE COURT: All right.

ATTORNEY BROWN: I think I left these up here. Your Honor, do you want them to look over?

THE COURT: That's good. Thank you.

ATTORNEY BROWN: All right, Ms. Franz.

A This is especially true in light of testimony from Dr. Reschly that persons with mild mental retardation/intellectual disability, quote, generally function at the sixth-grade level or below, unquote.

ATTORNEY VAN WINKLE: No further questions, Your Honor.

THE COURT: Anything on recross?

ATTORNEY BROWN: No, sir. Thank you.

THE COURT: Thank you, Ms. Franz. You're doing good. Appreciate it. All right. Is applicant ready to call another witness?

ATTORNEY VANN: The applicant rests, Your Honor.

THE COURT: Okay. Thank you. State, do you want to take a break, or you've got ...

ATTORNEY BROWN: The only thing that we have, Your Honor, are some exhibits that we thought it might be easier for you to look at. They're portions of the record already before the Court but we went ahead and copied sections so we could hand them up for you to look at. We can do that, or we can take a break and do that, whichever Your Honor would prefer.

THE COURT: No. Do you already have them marked in right

now, or organized, or?

ATTORNEY BROWN: I do have them organized. Yes, sir.

THE COURT: Have you all seen those?

ATTORNEY VANN: No, we have not, Your Honor.

THE COURT: Why don't you all look it over, and if everybody's in agreement I'll just come back and receive them. We'll put them on the record and just receive them. Okay.

ATTORNEY BROWN: Yes, sir.

THE COURT: So we'll take about a five-minute break and then come back. Okay. Thank you all.

(Court recessed at 3:17 p.m. and reconvened at 3:26 p.m.)

THE COURT: Now, did you make extra copies for me?

ATTORNEY BROWN: I made extra copies.

THE COURT: All right. Ms. Vann, have you all had a chance to look them over?

ATTORNEY VANN: Yes, Your Honor.

THE COURT: And for the record, Ms. Brown, if you want to tell me what you've got for me.

ATTORNEY BROWN: Absolutely. We've got portions of the record that are already a part of the action through the attachments, at the first, I think it was, the initial return, and also by the statutory provision that the record comes in with PCR action.

THE COURT: Yes.

ATTORNEY BROWN: But basically, Your Honor, we are bringing

the Court's attention to sentencing phase testimony of Theresa McCann, M-c-C-a-n-n; Jaime Farrell, and that's J-a-i-m-e F-a-r-r-e-l-l; and Sarah Pivero, it's P-i-v-e-r-o. The trial transcript pages are 1864 to 1923.

THE COURT: Okay.

ATTORNEY BROWN: Additionally, transcript pages 1953 to --60, that's testimony of Marie Morann [ph]. She was referenced earlier in regard to a car sale to Mr. Aleksey.

And then finally, a pretrial ruling, a Blair hearing of Dr. Frierson's testimony regarding IQ and effort. That's a standalone transcript that was part of the record on appeal that I'm also including. That's it.

THE COURT: Okay. Thank you, ma'am. Do you have -- those are extra copies?

ATTORNEY BROWN: Yes, sir. You may mark them up or whatever you need to do.

THE COURT: Oh, good. Thank you. Appreciate it.

ATTORNEY VANN: Are you actually entering those as exhibits with numbers?

ATTORNEY BROWN: Sure. Would you like me to --

ATTORNEY VANN: No. I just was wondering. It doesn't matter to me.

ATTORNEY HOLFORD: If it makes it cleaner, if you think.

ATTORNEY VANN: Just trying to figure out how to mark them on my sheet. That's fine. She gave us copies, so we're fine.

THE COURT: Okay. You're good. All right. Anything else from the State?

ATTORNEY BROWN: No, sir.

THE COURT: Anything else from the applicant?

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.

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. You know. Okay.

ATTORNEY BROWN: Yes, sir. I appreciate that.

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

(End of Transcript of Record.)

CERTIFICATE OF REPORTER

I, Cathy J. Provost, Official Court Reporter for the Fourteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial/proceedings of the captioned case in the Court of Common Pleas for Orangeburg County, South Carolina, on the 24th day of March, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Date: May 7, 2024

\s\ Cathy J. Provost
Cathy J. Provost, RMR
Official Circuit Reporter

Appendix F

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	Case No. 2015-CP-38-764
Bayan Aleksey	)	
Applicant,	)	
	)	**APPLICANT'S NOTICE OF INTENT**
vs.	)	**TO RELY ON AFFIDAVITS**
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Applicant, Bayan Aleksey, hereby informs the Court and opposing counsel that he intends to offer proof in support of his post-conviction relief claims through affidavits of certain witnesses in lieu of direct examination of those witnesses at the evidentiary hearing scheduled to commence March 24, 2022. In support of this notification, applicant apprizes this Court of the following relevant facts:

1. Applicant is an indigent, death-sentenced inmate in South Carolina. He was convicted and sentenced to death in Orangeburg County. *See State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). Applicant alleges he is intellectually disabled and ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304 (2002).

2. In support of his claims, Applicant intends to rely upon affidavits provided by Dr. David Price, Marjorie Hammock, Vera Aleksey, Lester David Rosengard, and Allison Franz. This procedure is authorized pursuant to S.C. Code § 17-27-80, which provides that, in a hearing on an application for post-conviction relief, "[a]ll rules and statutes applicable in civil proceedings are available to the parties. The court may receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." The South Carolina Supreme Court has endorsed this process. *See Simpson v. Moore*, 367 S.C. 587, 607–08, 627

S.E.2d 701, 712 (2006) (rejecting the State's argument that it was error for the PCR court to consider over forty depositions and twenty-two affidavits in lieu of live testimony), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018); *Beckett v. State*, 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982). Accordingly, courts across the state have received affidavits in lieu of testimony in numerous capital post-conviction cases. *See, e.g., Stephen C. Stanko v. State*, 08-CP-22-01446 (Georgetown County); *Louis Michael Winkler, Jr. v. State*, 11-CP-26-03907 (Horry County); *Kevin Mercer v. State*, 09-CP-32-5465 (Lexington County); *Kenneth Simmons v. State*, 05-CP-18-1368 (Dorchester County); *Herman Lee Hughes v. Michael Moore*, 98-CP-09-101 (Calhoun County); *Joseph M. L. Gardner v. Michael Moore*, 98-CP-18-453 (Dorchester County); *Keith L. Simpson v. Michael Moore*, 97-CP-42-1911 (Spartanburg County).

3. Entering affidavits and prior testimony is not prejudicial to the State's case and introducing affidavits in lieu of live testimony will expedite the hearing. Moreover, because Applicant has provided counsel for Respondent all of these materials, 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.

4. Applicant hereby provides both counsel for the Respondent and the Court with copies of the affidavits of Dr. David Price, Marjorie Hammock, Vera Aleksey, Lester David Rosengard, and Allison Franz attached cumulatively hereto as Attachment A.

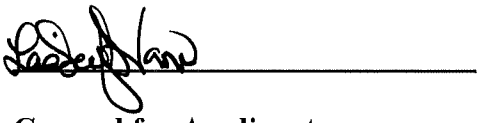
5. Of course, applicant acknowledges that the Attorney General has the prerogative to call any or all witnesses who have provided affidavits or other documentary evidence for purposes of cross-examination. Whether to do so is completely within the Attorney General's discretion.

WHEREFORE, applicant requests that the Court accept the affidavits provided by certain defense witnesses in lieu of a direct examination of those witnesses at trial.

Respectfully submitted,

Elizabeth A. Franklin-Best
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Columbia, South Carolina 29205
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Lindsey Vann
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29201
(803) 765-1044
lindsey@Justice360sc.org



Counsel for Applicant

March 22, 2022.

ATTACHMENT A

AFFIDAVIT OF DAVID R. PRICE, PH.D.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

BEFORE ME, the undersigned authority on this day personally appeared

DAVID R. PRICE, Ph.D.

known to me and being by me duly sworn, according to law, upon his oath, stated the following:

1. My name is David R. Price. I am over twenty-one (21) years of age and I am fully competent to testify herein. I have personal knowledge of the matters addressed in this Affidavit and hereby affirm that they are true and correct to the best of my knowledge.

2. I am a licensed psychologist in the State of South Carolina with extensive training and experience in forensic psychological issues including psychological injuries, mild traumatic brain injuries, and post-traumatic stress disorder. A true and correct copy of my CV, as of the date of this Affidavit, is attached hereto as Exhibit "A".

3. I am a Neuropsychologist, Clinical Psychologist and Forensic Psychologist. I have been qualified as an expert in such in numerous state and federal courts. I have never not been qualified as an expert in these fields.

4. In the course of my career I have held various academic appointments most recently as the Administrative Director of the Forensic Psychiatry Program at the Medical University of South Carolina located in Charleston, South Carolina.

5. I have given 274 professional presentations and have published 37 articles, six book chapters and two books. The publications have been focused on forensic issues such as the assessment of Malingering, Traumatic Brain Injury, Posttraumatic Stress Disorder, Mental Retardation and Intellectual Functioning.

6. I was asked to assess the intellectual functioning of Mr. Bayan Aleksey. I examined him On November 20, 2019. I assessed him using the Wechsler Adult Intelligence Scale – Fourth Edition (WAIS-IV). Is the most accepted and used intellectual test for adult by professional psychologists.

7. Wechsler Adult Intelligence Scale-Fourth Edition (WAIS-IV) is the best adult test of overall cognitive abilities available. On this test on November 20, 2019, Mr. Aleksey had a Full Scale IQ of 74, which is at the fourth percentile. He had a Verbal Comprehension Index score of 76, which is at the fifth percentile. He had a Perceptual Reasoning Index score of 79, which is at the eight percentile. He had a Working Memory Index score of 66, which is at the first percentile. He had a Processing Speed Index score of 92 which is at the 30th percentile.

8. The Working Memory Index score of 66 is quite significant. Working Memory is the small amount of information that can be held in mind and used in the execution of cognitive tasks. It facilitates planning, comprehension, reasoning, and problem solving (Nelson Cowan. Working Memory Underpins Cognitive Development, Learning and Education. Educational Psychology Review. 2014. June 1:26(2):197-223.) It is one of our most valuable and used cognitive skills. The Wechsler Adult Intelligence –Fourth Edition Technical and Interpretive Manual reports on page 128 that, "Contemporary research indicates that working memory is an essential component to of other higher cognitive processes." At the one percentile, Mr. Aleksey's Working Memory is severely impaired.

9. Mr. Aleksey was administered tests of Performance Validity. The Test of Memory Malingering (TOMM) is a test to assess for someone attempting to minimize their ability to remember pictorial stimuli. It is a measure of motivation to perform well on tests as well as malingering. The two rules on this test is that any score of less than 25 would be suggestive of malingering. The second rule is that any score less than 45 on Trial 2 or the Recognition trial would be indicative of malingering. Mr. Aleksey scored 34 and on Trial 2 he scored 41. Mr. Aleksey also had a score of 43 on the Recognition Trial. On the WAIS IV Reliable Digit Span (RDS) he had a score of six just below the cutoff of seven indicating adequate effort.

10. It is felt by this examiner that the TOMM and RDS scores were adversely impacted by Mr. Aleksey's impairment in Working Memory. These scores were just beneath the cutoffs and trended in the right direction. Hence this examiner believes his WAIS IV test performance is valid and that his intellectual level has an approximate Full Scale IQ of 74.

11. An IQ of 74 gives Mr. Aleskey a Mental Age of 11-years-eight-months. This gives a snap shot of how he functions day-to-day. It does affect his behavioral functioning.

12. Intellectual Disability is no longer calculated on a simple intelligence test score. Nor is it wed to a set point to differentiate between an individual with an Intellectual Disability and someone with Borderline Intellectual Functioning. Clinical assessment of both cognitive functioning and adaptive functioning are required to make the diagnosis of Intellectual Disability

David R. Price, Ph.D.

SUBSCRIBED AND SWORN TO BEFORE ME on the 1 day of September, 2021, to certify which witness my hand and official seal of office.

SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY PUBLIC,
THIS 1 DAY OF September, 2021.

Kimberly Bradley
NOTARY PUBLIC
COMMISSION EXPIRES: May 7, 2031

APPENDIX A

CURRICULUM VITAE

DAVID R. PRICE, PH.D.

DAVID RICHARD PRICE, PH.D.

EDUCATIONAL HISTORY

1982	Auburn University	Auburn, Alabama 36849
	Major:	Clinical Psychology
	Degree:	Doctor of Philosophy
	Dissertation:	Conversation Skills Training with Chronic Psychiatric Patients
	Chair:	James F. McCoy, Ph.D.
1979	Auburn University	Auburn, Alabama 36849
	Major:	Clinical Psychology
	Degree:	Master of Science
	Thesis:	Concurrent Validity of an Early Childhood Screening Instrument. The Comprehensive Early Evaluation Profile, Research Edition
	Co-Chair:	James F. McCoy, Ph.D. Samuel B. Green, Ph.D.
1977	Clemson University	Clemson, South Carolina 29631
	Major:	Psychology
	Minor:	Sociology
	Degree:	Bachelor of Arts with Honor
	Honors:	Psi Chi 1977 Sigma Phi Epsilon Honorary 1976-1977 South Carolina Psychological Association Award for Undergraduate Research 1977

LICENSURE

License Number 330 to practice Clinical Psychology issued by the South Carolina Board of Examiners in Psychology on October 8, 1983.

CLINICAL POSITIONS

1991-present Private Practice
304 W. Stone Avenue
Greenville, South Carolina 29609

Duties: Private practice offering psychotherapy, psychological and neuropsychological evaluations, and forensic consultation. Organizational consultation, intervention, and development.

1991-present The Forensic Network
304 W. Stone Avenue
Greenville, South Carolina 29609

President: Senior Analyst
Duties: Forensic consultation and psychological and neuropsychological evaluations in civil and criminal cases. Claims analysis/review. Fitness for Duty evaluations.

2010-2013 The Assessment Center
304 W. Stone Avenue
Greenville, South Carolina 29609

Duties: Evaluate childhood developmental disorders including Autism through structured observations on specific tasks and administration of a battery of tests to assess language, sensory processing, adaptive behavior, and cognitive abilities.

1983-1991 Behavior Resources, Inc.
217 East Park Avenue
Greenville, South Carolina 29601

Private Practice: Principal member
Duties: Personality, vocational, and neuropsychological assessment. Individual, behavior, family, and marital therapy. Case analysis, forensic consultation, and expert testimony at the local, state, and federal level.

1982-1983 Psychology Service
South Carolina State Hospital
2100 Bull Street
Columbia, South Carolina 29202

Staff Psychologist
Duties: Diagnostic assessment. Crisis intervention, brief psychotherapy, and group therapy. Consultant to treatment team in an acute care psychiatric admission unit. Program evaluations.

Supervisor: Linda S. Moore, Ph.D., Chief Psychologist

1981-1982 Psychology Services (116B)
University Drive
Veterans Administration Medical Center
Pittsburgh, Pennsylvania 15240

Clinical Psychology Intern (APA Approved)
Duties: Personality, vocational, and neuropsychological assessment. Stress management, biofeedback and hypnotherapy/relaxation training. Medical/Consultative liaison. Individual, group, behavior, family, and marital therapy.

Supervisor: Arnold Freedman, Ph.D., Chief Psychologist

1979-1981 Psychology Service (116B)
Veterans Administration Medical Center
Tuskegee, Alabama 36083

Psychology Technician. Half-time GS-9 Civil Service position
Duties: Individual, group, and behavior therapy. Personality, neuro-psychological, and diagnostic assessment. Consultation to treatment team.

Supervisor: David A. Herbert, Ed.D., Chief Psychologist

1978-1979 Lee County Head Start
Auburn, Alabama 36830

B.A. Level Psychologist. Half-time position.
Duties: Individual, group, and behavioral assessment. Program design and evaluation. Consultation to speech and education departments.

Supervisors: James F. McCoy, Ph.D., Consultant
Joseph G. Cunningham, Ph.D., Consultant

1977-1979 Psychology Department
Auburn University, Alabama 36849

Instructor
Duties: Teach Introductory Psychology and Developmental Psychology

Supervisor: Philip Lewis, Ph.D., Professor and Department Head

ACADEMIC POSITIONS

2003- Adjunct Associate Professor
Department of Social and Behavioral Sciences
University of South Carolina Spartanburg
800 University Way
Spartanburg, South Carolina 29303

Duties: Teach lower and upper level undergraduate psychology courses.

1996- Adjunct Associate Professor
Department of Psychiatry and Behavioral Sciences
Medical University of South Carolina
171 Ashley Avenue
Charleston, South Carolina 29425-0742

Duties: Lecture psychiatric students on all forensic areas germane to a psychiatric practice. Administrative Director of the Forensic Psychiatry Research Foundation.

TEACHING APPOINTMENTS

2003- Adjunct Associate Professor. Department of Social and Behavioral Sciences, University of South Carolina Spartanburg, 800 University Way, Spartanburg, South Carolina.

1996- Adjunct Associate Professor, Forensic Psychiatry Program, Department of Psychiatry and Behavioral Sciences, Medical University of South Carolina. Charleston, South Carolina.

1998- Attorney General's National Advocacy Center. U.S. Department of Justice. Columbia, South Carolina.

1997 Ira C. Eaker College for Professional Development, Air Force Judge Advocate General School. Montgomery, Alabama.

1983-1984 Limestone College, Gaffney, South Carolina.

1982 Midlands Technical College, Lexington, South Carolina.

1977-1979 Auburn University, Auburn, Alabama.

PRESENTATIONS

Ballenger, Ballenger, J.C. & Price, D.R. Evaluating the Expert and the Expert's Examination Protocol. Psychological and Psychiatric Injury Claims Seminar. Sponsored by the Forensic Psychiatry Program, Medical University of South Carolina. March, 1997.

Blackwelder, I. & Price, D.R. The Legal Context of Mental and Emotional Injury Compensatory Claims in Employment Litigation. Invited lecture presented at the United States Postal Service Law Department Conference. November, 1993.

Fabia, R., Price, D.R., & Presant, N. Analysis of Psychological Injury Claims. Panel discussion presented at the Compensatory Damage Claims in Federal Sector EEOC Cases. February, 1997.

Kerrigan, R.E., Read, G.C., Price, D.R. & Herman, A.F. Practical Tips on Why and When You Hire a Defense Medical Opinion. Invited lecture at the Damages Seminar sponsored by the Defense Research Institute. March, 1997.

Lees-Haley, P.R. & Price D.R. Evaluating Posttraumatic Stress Disorder. Invited lecture at the Society of Claim Law Associates Sixth Annual Conference and Seminar. September, 1997.

McDonald, J.J., Jr., Price, D.R. & Smith, R.D. Ethics: Do What, When, Where, and How? Annual Psychiatric, Psychological and Neuropsychological Injury Claims Conference and Seminar. November, 2002.

McCoy, J.F., McGee, G.G., Price, D.R., & Mason, D. Social Skills Training For Aggressive Children While Playing Competitive Games. Paper presented at the meeting of the Association for the Advancement of Behavior Therapy. November, 1980.

McCoy, J.F., Price, D.R., Herring, S.T., & McGee, G.G. Social Skills Training For Aggressive Children in a Summer Day Camp. Paper presented at the meeting of the Southeastern Psychological Association. March, 1982.

Mross, A. & Price, D.R. Special Issues: Managing the Mentally Ill Employee, the Personality Disorder Employee, and the Substance Abuse Employee Under the ADA and the Enforcement Guidance. Invited lecture presented at the National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act, sponsored by the Government Training Institute Foundation. June, 1999.

Mross, A. & Price, D.R. Special Issues: Managing the Mentally Ill Employee, the Personality Disordered Employee, and the Substance Abuser Employee Under the ADA and the Enforcement Guidance. Invited lecture presented at the National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act, sponsored by the Government Training Institute Foundation. November, 1999.

Price, D.R. A Survey of Prisoners' Past Participation in and Attitudes Towards Sports. Paper presented at the meeting of the South Carolina Psychological Association. April, 1977.

Price, D. R. Behavior Therapy in General Medical and Surgical Hospitals. Paper presented at Psychiatry Grand Round, University Drive Veterans Administration Medical Center. February, 1982.

Price, D.R., In-service Training. The Use of Brief Forms of MMPI: The Use and Abuse of the Mini-mult. Presented to the staff of the Unit 1, Psychology Service, South Carolina State Hospital, September, 1982.

Price, D.R., In-service Training. An Introduction to Basic Neuro-anatomy and Neuropsychology. A series of lectures presented to the staff of Unit 1, Psychology Service, South Carolina State Hospital. October-November, 1982.

Price, D.R. Witness Preparation: The Professional in the Courtroom. Invited seminar presented at the meeting of the Council on Child Abuse and Neglect. September, 1989.

Price, D.R. Defending Against Claims of Psychological Injury Involving Claims of Depression, Anxiety, Organic Brain Syndrome or Trauma. Invited seminar presented at the meeting of the Atlanta Claims Association. April, 1990.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. February, 1992.

Price, D.R. Psychological, Neuropsychological, and Psychiatric Disorders in Mitigation. Invited seminar and case clinic at the offices of the Public Defender of Indiana. July, 1992.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. August, 1992.

Price, D.R. The Analysis of Psychological Injury Claims. In-house seminar at Selective Insurance Company of the Southeast. January, 1993.

Price, D.R. The Analysis of Psychological Injury Claims. In-house seminar at Central Insurance Company. February, 1993.

Price, D.R. The Analysis of Psychological Injury Claims. In-house seminar at Gulf Insurance Group. February, 1993.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. April, 1993.

Price, D.R. Issues in Malingering and Factitious Disorders. Defense of Damages Conference and Seminar. April, 1993.

Price, D.R. Standards of Care in the Evaluations of Claims of Sexual Harassment. Defense of Damages Conference and Seminar. April, 1993.

Price, D.R. Claims Analysis. In-house lecture at Central Insurance Company. April, 1993.

Price, D.R. Defending Claims of Psychological Injury. Invited speech at the Southeastern Claims Association. June, 1993.

Price, D.R. The Analysis of Psychological Injury Claims. In-house seminar at Gulf Insurance Group. July, 1993.

Price, D.R. Medical Signs and Symptoms. NAACP Legal Defense Fund Annual Capital Punishment Conference. July, 1993.

Price, D.R. Use of the Diagnostic and Statistical Manual, Third Edition Revised (DSM-III-R) and its Revision (DSM-IV) in Diagnosing Mental Illness. NAACP Legal Defense Fund Annual Capital Punishment Conference. July, 1993.

Price, D.R. The Analysis of Claims of Closed Head Injury. Defending Claims of Closed Head Injury Seminar sponsored by the Atlanta Claims Association. August, 1993.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. October, 1993.

Price, D.R. Issues in Malingering and Factitious Disorders. Defense of Damages Conference and Seminar. October, 1993.

Price, D.R. Evaluating Claims of Head Injury. Paper presented at The Annual Symposium on Head Injury Claims. December, 1993.

Price, D.R. Defending Head Injury Claims. Invited in-house seminar at A.I. Management and Professional Liability Claim Adjusters, Medical Malpractice Claims. January, 1994.

Price, D.R. The Most Problematic Psychological Injury Claims. Invited keynote speech at Second Annual Mid-Atlantic Regional RIMS Conference. June, 1994.

Price, D.R. Mental Conditions to Consider. Invited lecture at The Benefits and Challenges of Representing Capitol Defendants in the 90's seminar sponsored by The Association of the Bar of the City of New York. June, 1994.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. July, 1994.

Price, D.R. Defending Claims of Psychological Injury. Invited lecture at The Arkansas Association of Defense Counsel 1994 Annual Meeting and Seminar. August, 1994.

Price, D.R. Psychological Injury, a General Orientation. Keynote speech at The South Carolina Claims Association Fall meeting. October, 1994.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. November, 1994.

Price, D.R. Evaluating Claims of Head Injury. Defense of Damages Conference and Seminar. November, 1994.

Price, D.R. Defending Psychological Injury Claims. Invited lecture at a Johnson and Higgins of Ohio seminar. Cleveland, Ohio. November, 1994.

Price, D.R. Introduction to Brain Anatomy and Head Injury. Invited lecture presented at the Handling Head Trauma Cases From The Questionable To The Catastrophic Seminar sponsored by the Atlanta Claims Association. February, 1995.

Price, D.R. The Analysis and Defense of Claims of Head Injury. Invited lecture presented at the Handling Head Trauma Cases From The Questionable To The Catastrophic Seminar sponsored by the Atlanta Claims Association. February, 1995.

Price, D.R. Defending Psychological Injury Claims. Invited lecture at a Johnson and Higgins of Ohio seminar. Columbus, Ohio. April, 1995.

Price, D.R. Defending Psychological Injury Claims. Invited lecture at a Johnson and Higgins of Ohio seminar. Cincinnati, Ohio. April, 1995.

Price, D.R. Defending Psychological Injury Claims. Invited lecture at a Johnson and Higgins of Ohio seminar. Toledo, Ohio. April, 1995.

Price, D.R. Trends and Red Flags in Psychological Injury Claims. Southeastern Electric Exchange Claims Meeting. April, 1995.

Price, D.R. Analysis of the Psychological Injury Claim. Self-Insurers Association Members Only Conference. April, 1995.

Price, D.R. Mental and Emotional Injury Claims in Employment Litigation. South Carolina Bar Annual Meeting. June, 1995.

Price, D.R. Psychological Injury Claims: Future trends. Piedmont Claims Association. June, 1995.

Price, D.R. Evaluating Psychological Injury Claims. Invited in-house seminar presented to the State Accident Fund Claims and Legal Departments. June, 1995.

Price, D.R. Psychological Injury Claims in the Workplace. National Workers' Compensation and Occupational Medicine Seminar. July, 1995.

Price, D.R. The Defense of Mental and Emotional Injury Claims in Employment Litigation. In-house seminar presented to Haynsworth, Baldwin, Johnson and Greaves. August, 1995.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. August, 1995.

Price, D.R. Psychological Injury Claims. Dallas Claims Association. September, 1995.

Price, D.R. Evaluating Psychological Injury Claims. In-house seminar presented to the Legal Department of The New York Transit Authority. September, 1995.

Price, D.R. The Analysis and Limitation of Damages. Keynote speech at the Defense of Damages Conference and Seminar. November, 1995.

Price, D.R. Analysis and Evaluation of Posttraumatic Stress Disorder and Other Psychological Injury Claims. Invited lecture at the Defense and Evaluation of PTSD and Other Psychological Injury Cases Arising from Injury or Employment Situations Seminar sponsored by the Defense Research Institute. November, 1995.

Price, D.R. Evaluating Claims of Head Injury. The Annual Symposium on Head Injury Claims. November, 1995.

Price, D.R. Defending Psychological and Neuropsychological Injury Claims. In-house seminar presented to National Indemnity Company. February, 1996.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. In-house seminar presented to Nationwide Insurance Company. February, 1996.

Price, D.R. Defending Psychological and Neuropsychological Injury Claims. In-house seminar presented to Westchester Specialty Group. March, 1996.

Price, D.R. Identifying the "Red Flags" in a Traumatic Brain Injury Claim. Invited lecture at the Traumatic Brain Injury: A Plaintiff and Defendant's Perspective Seminar sponsored by Lorman Education Services. March, 1996.

Price, D.R. Twenty-five Defense Tips in the Evaluation of the Brain Injury Claim. Invited lecture at the Defense and Evaluation of Brain Damage Claims Seminar sponsored by the Defense Research Institute. April, 1996.

Price, D.R. Psychological Injury Claims. The Virginia's Self-Insurers Association, Inc. April, 1996.

Price, D.R. Evaluating Closed Head Injuries and Psychological Injury Claims. In-house seminar presented to Nationwide Insurance Medical Coordinator Seminar. May, 1996.

Price, D.R. The Analysis and Evaluation of Brain Injury Claims. Invited lecture at the Defense Trial Counsel of West Virginia 1996 Annual Convention. June, 1996.

Price, D.R. The Analysis of the Psychological Injury Claim. The Annual Mental and Emotional Injury Claims Conference and Seminar. July, 1996.

Price, D.R. The Analysis and Evaluation of Psychological Injury Claims. Invited lecture at the Psychological Injury Claims Seminar sponsored by the Defense Research Institute. November, 1996.

Price, D.R. Evaluating Claims of Head Injury. The Annual Symposium on Head Injury Claims. November, 1996.

Price, D.R. The Role of the Consulting Defense Expert in the Evaluation of Brain Injury Claims. Invited lecture at the Evaluation and Settlement of Claims Involving Acquired Brain Injury seminar sponsored by The Brain Injury Association of North Carolina Second Annual Trial Lawyers Conference. January, 1997.

Price, D.R. Evaluation of the Psychological Injury Claim. Psychological and Psychiatric Injury Claims Seminar. Sponsored by the Forensic Psychiatry Program, Medical University of South Carolina. March, 1997.

Price, D.R. Psychological and Neuropsychological Tests. Psychological and Psychiatric Injury Claims Seminar. Sponsored by the Forensic Psychiatry Program, Medical University of South Carolina. March, 1997

Price, D.R. Mild Traumatic Brain Injuries. Psychological and Psychiatric Injury Claims Seminar. Sponsored by the Forensic Psychiatry Program, Medical University of South Carolina. March, 1997.

Price, D.R. The Role of Financial Incentives in the Production of Mental and Emotional Symptoms. Invited lecture at the Damages Seminar sponsored by the Defense Research Institute. March, 1997.

Price, D.R. Twenty-five Defense Tips in the Evaluation of the Brain Injury Claim. Invited lecture at the Damages Seminar sponsored by the Defense Research Institute. March, 1997.

Price, D.R. Evaluating Neurological, Psychological and Psychiatric Injury Claims. In-house seminar presented to General Accident Insurance Company. April, 1997.

Price, D.R. Twenty-five Defense Tips in the Evaluation of the Brain Injury Claim. Invited lecture at the Brain Damage Institute sponsored by the Defense Research Institute. April-May, 1997.

Price, D.R. Investigation and Defense of Closed Head Injury Trauma Cases. Invited lecture at the PRO NET 5th Annual Meeting. June, 1997

Price, D.R. Evaluating Neurological, Psychological, and Psychiatric Injury Claims. In-house seminar presented to Peerless Insurance Company. July, 1997.

Price, D.R. The Analysis of the Psychological Injury Claim. The Annual Mental and Emotional Injury Claims Conference and Seminar. July, 1997.

Price, D.R. Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act. The National Symposium on Federal EEO Law, Process and Procedures. Washington, D.C. September, 1997.

Price, D.R. Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act. The National Symposium on Federal EEO Law, Process and Procedures. Los Angeles. September, 1997.

Price, D.R. Twenty-five Defense Tips in the Investigation and Evaluation of Brain Injury Claims. Presented at The Hot Topics in Worker's Compensation client seminar sponsored by Gibbes, Gallivan, White and Boyd. October, 1997.

Price, D.R. Posttraumatic Stress Disorder Claims. Invited lecture at The Trucking Industry Defense Association's 5th Annual Industry Seminar. October, 1997.

Price, D.R. Twenty-five Defense Tips on the Evaluation and Defense of Psychological Injury Claims. Invited lecture at the Defense and Evaluation of Psychological Injury Cases Seminar sponsored by the Defense Research Institute. November, 1997.

Price, D.R. Analysis of Psychological Injury Claims. Invited lecture at the Compensatory Damages Claims in Federal Sector EEO Cases Seminar sponsored by the Government Training Institute. December, 1997.

Price, D.R. The EEOC's Enforcement Guidance: Issues, Questions and Concerns From a Clinician's Perspective. National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act sponsored by the Government Training Institute. January, 1998.

Price, D.R. Mental and Emotional Injury Claims in Employment Litigation. Invited lecture presented to the Employment and Labor Law Section at The South Carolina Bar Mid-year Meeting. January, 1998.

Price, D.R. Ten Most Common Mistakes Made by Plaintiff's in ABI Cases. Invited lecture at the Mild Acquired Brain Injury: Proving it is Real seminar sponsored by The Brain Injury Association of North Carolina 3rd Annual Trial Lawyers Conference. January, 1998.

Price, D.R. Evaluating Psychological Injury Claims. Invited in-house seminar presented to F.A. Richard and Associates, Inc/ Ingalls Shipbuilding, Inc. March, 1998.

Price, D.R. Twenty-five Defense Tips in the Investigation and Evaluation of Brain Injury Claims. Presented at The 31st Annual Convention of The Georgia Defense Lawyers Association. April, 1998.

Price, D.R. Posttraumatic Stress Disorder Claims. Invited lecture at The Attorney General's National Advocacy Center. U.S. Department of Justice. May, 1998

Price, D.R. Analyzing Psychological Injuries. Invited lecture at The Attorney General's National Advocacy Center. U.S. Department of Justice. July, 1998.

Price, D.R. Psychological Impact of Work Related Injury. Invited lecture at the Hand Care in The Workplace seminar sponsored by The Carolina Hand Center. July, 1998.

Price, D.R. Analyzing Psychological Injury Claims. Invited lecture at the South Carolina Defense Trial Attorneys' Association and Claims Management Association of South Carolina Joint Meeting. July, 1998.

Price, D.R. The EEOC's Enforcement Guidance: Issues, Questions and Concerns From a Clinician's Perspective. National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance Under the Americans with Disabilities Act. Invited lecture for Sedgwick Claims Management Services, Inc. August, 1998.

Price, D.R. The Analysis of the Psychological Injury Claim. The Annual Mental and Emotional Injury Claims Conference and Seminar. August, 1998.

Price, D.R. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at SAFECO Insurance Group sponsored by the PLRB/LIRB Extension Program. October, 1998.

Price, D.R. Analysis of Neuropsychological Injury Claims. Invited lecture at the Handling Psychological and Neuropsychological Injury Claims Seminar, sponsored by Lorman Education Services. November, 1998.

Price, D.R. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at Highlands Insurance Group sponsored by the PLRB/LIRB Extension Program. November, 1998.

Price, D.R. Handling Psychological and Neuropsychological Injury Claims. Invited lecture to the Advanced Casualty Classes at Royal Sun Alliance Insurance Co. November, 1998.

Price, D.R. Psychological Injury Claims and Fraud. Invited lecture at the National Council on Compensation Insurance, Incorporated, West Coast Forum and Fraud Conference. November, 1998.

Price, D.R. Tips for the Evaluation of the Closed Head Brain Injury Claim. Invited lecture at the Psychological and Neuropsychological Injury Claims: From PTSD to Closed Head Injury Claims Seminar sponsored by the Defense Research Institute. November, 1998.

Price, D.R. Discovery of Emotional Distress Injuries and Evidence in Compensatory Damages Cases. Invited lecture at the Compensatory and Consequential Damages and Federal Sector Cases Seminar sponsored by the Government Training Institute Foundation. March, 1999.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited lecture at the South Carolina Claims Association's Spring Meeting. April, 1999.

Price, D.R. The Ethical Evaluation of Psychological Injury Claims. In-house seminar presented at Edward, Ballard, Bishop, Sturm, Clark and Keim. June, 1999.

Price, D.R. The Ethical Discovery, Analysis, and Conceptualization of Psychological Injury Claims. The Annual Psychological and Neuropsychological Injury Claims Conference and Seminar. August, 1999.

Price, D.R. Expert Witnesses and Testimony. Invited lecture at the Judge Advocate General Negotiations and Settlement Seminar at the Ira C. Eaker College for Professional Development, Air Force Judge Advocate General School. August, 1999.

Price, D.R. Analyzing Records and Conceptualizing Psychological Injury Claims. Invited lecture at the Mild/Moderate Traumatic Brain Injuries and Psychological Injury Seminar sponsored by the Defense Research Institute. August, 1999.

Price, D.R. Analysis of Brain Injury Claims. Invited lecture at the Traumatic Brain Injury Seminar sponsored by the Atlanta Claims Association. November, 1999.

Price, D.R. Handling Psychological Aspects of Personal Injury Claims. Invited lecture at the Third Annual Claims Exposition and Conference. November, 1999.

Price, D.R. Evaluating the Potentially Violent Employee. Invited lecture at the National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance under the Americans with Disabilities Act sponsored by the Government Training Institute Foundation. November, 1999.

Price, D.R. The Defense of Mild Traumatic Brain Injury Cases. Invited lecture at the Damages Seminar sponsored by the Defense Research Institute. March, 2000.

Price, D.R. Analysis of Mental and Emotional Injury Claims. Invited lecture at the Damages Seminar sponsored by the Defense Research Institute. March, 2000.

Price, D.R. Analysis of Psychological Injury Claims. Invited lecture at the Compensatory and Consequential Damages in Federal Cases Seminar sponsored by the Government Training Institute. March, 2000.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited lecture at the Ninth Annual Worker's Compensation and Occupational Medicine Seminar sponsored by S·E·A·K. March, 2000.

Price, D.R. Evaluating Symptom Magnification, Deception and Malingering. Invited lecture at the Ninth Annual Worker's Compensation and Occupational Medicine Seminar sponsored by S·E·A·K. March, 2000.

Price, D.R. Analysis of Psychological Injury Claims. Invited lecture at the Compensatory and Consequential Damages in Federal Cases Seminar sponsored by the Government Training Institute Foundation. April, 2000.

Price, D.R. Evaluating Psychiatric Injury Claims for Compensatory Damages in Personnel Cases. Invited lecture at the OAGC (M&RA) CPL Seminar for the Department of the Navy. August, 2000.

Price, D.R. The Ethical Discovery, Analysis and Conceptualization of Psychological Injury Claims. Annual Mental and Emotional Injury Claims Conference and Seminar. October, 2000.

Price, D.R. Handling the Psychological Aspects of Claims. Invited lecture at the Annual Claims Exposition and Conference. October, 2000.

Price, D.R. The Emotional Side of Asbestosis, Lung Cancer, and Mesothelioma. Invited lecture at the Asbestos Personal Injury Litigation Seminar sponsored by the Defense Research Institute. November, 2000.

Price, D.R. The Ethical Discovery, Analysis, and Conceptualization of Psychological Injury Claims. Annual Mental and Emotional Injury Claims Conference and Seminar. November, 2000.

Price, D.R. Psychological Injury Claims: Overview, Analysis and Evaluation. Psychiatric, Psychological and Neuropsychological Claims Conference and Seminar. July, 2001.

Price, D.R. Psychological and Brain Injury Claims. Tennessee Farmers Insurance Companies. August, 2001

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Defending Traumatic Brain Injury Claims Seminar sponsored by Mabry & McClelland. September, 2001.

Price, D.R. The Psychological Aspects of Claims. Invited lecture at the Annual Claims Exposition and Conference. October, 2001.

Price, D.R. Evaluating Psychological Injury Claims. Invited lecture at the Louisiana Claims Association Eighth Annual Educational Conference. May, 2002.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited lecture at Sharon W. Ware & Associates. April, 2002.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited lecture at Hartford/Omni Insurance Company. August, 2002.

Price, D.R. A Review of Federal Employment Mental Health Issues: From a Psychiatrist's Perspective. Invited lecture at the 2002 EXCEL: Examining Conflicts in Employment Laws Conference. Sponsored by the EEOC. August, 2002.

Price, D.R. Evaluating Claims of Brain Injury. Invited lecture at the Evaluating Traumatic Brain Injury Seminar sponsored by Mabry & McClelland. September, 2002.

Price, D.R. Analysis and Evaluation of Psychological and Neuropsychological Injury Claims. Annual Psychiatric, Psychological and Neuropsychological Injury Claims Conference and Seminar. November, 2002.

Price, D.R. Evaluating Brain Injury Claims. Invited lecture at the McAngus, Goudelock & Courie, LLC Client Seminar. November, 2002.

Price, D.R. Dealing with Psychological Injury Claims in Employment Cases. Invited lecture at the Civilian Personnel Law Seminar for the Department of the Navy. February, 2003.

Price, D.R. Posttraumatic Stress - Real or Fake. Invited lecture at the Case Management Society of America (CMSA), Birmingham Alabama Chapter, Ninth Annual Conference. April, 2003.

Price, D.R. Psychiatric, Psychological and Neuropsychological Injury Claims. Invited lecture at Travelers Insurance Company, Charlotte, North Carolina. May, 2003.

Price, D.R. Evaluating Psychological Injury Claims. Invited lecture at the Louisiana Claims Association Ninth Annual Educational Conference and Expo, Biloxi, Mississippi. May, 2003.

Price, D.R. The Science of Neuropsychology: Evaluating Mild Brain Injury Cases. South Carolina Defense Trial Attorneys' Association and Claims Management Association of South Carolina, Thirty-Sixth Annual Joint Meeting. July, 2003.

Price, D.R. Federal Employment Mental Health Issues: From a Psychologist's Perspective. Examining Conflicts in Employment Laws Conference sponsored by the EEOC. August, 2003.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited in-house seminar presented to Carolina Casualty Insurance Company. September, 2003.

Price, D.R. Malingering. Invited lecture at The Oregon Chapter International Association of Special Investigations Unit 9th Annual Insurance Fraud Conference. April, 2004.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited lecture at Citizens Insurance Company. May, 2004.

Price, D.R. Primer on Evaluating Psychological Injury Claims. Invited lecture presented at the Society of Insurance Trainers and Educators. June, 2004.

Price, D.R. Educating the Trainers on Teaching How to Evaluate Psychological and Neuropsychological Injury Claims. Invited lecture presented at the Society of Insurance Trainers and Educators. June, 2004.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited in-house seminar presented at the Gainey Corporation. July, 2004.

Price, D.R. Identification of Fraudulent Psychological and Neuropsychological (Brain) Injury Claims. Invited lecture presented at the 2004 Asia Pacific Fraud Convention and Trade Show. September, 2004.

Price, D.R. Investigating and Detecting Fraudulent Stress Claims. Invited lecture presented at the 2004 Asia Pacific Fraud Convention and Trade Show. September, 2004.

Price, D.R. Evaluating Workplace Stress Claims. Invited lecture at the Managing Stress: A Multi-Disciplinary Approach Seminar. September, 2004.

Price, D.R. Posttraumatic Stress Disorder Claims. Invited lecture at the Insurance Fraud Executive Council. November, 2004.

Price, D.R. Evaluating Claims of Pediatric Brain Injury. Invited Lecture at the Brain Injuries Seminar, sponsored by Mabry & McClelland, January, 2005.

Price, D.R. Detecting Fraudulent Psychological and Neuropsychological Injury Claims. IASIU 20th Annual Seminar and Expo on Insurance Fraud. September, 2005.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited in-house seminar presented to State Farm Insurance Company. (Please note this seminar was presented twice by request.) September, 2005.

Price, D.R. Evaluating Psychological and Neuropsychological Injury Claims. Invited in-house seminar presented to State Farm Insurance Company. (Please note this seminar was presented twice by request.) September, 2005

Price, D.R. Evaluating Traumatic Brain Injury Claims. Invited lecture at Sharon W. Ware & Associates. December, 2005.

Price, D.R. Evaluating the Invisible Injury Claim - Posttraumatic Stress Syndrome Disorder. Invited lecture presented at the Damages Seminar sponsored by the DRI Trial Tactics Committee. March, 2006.

Price, D.R. Malingering and Fraud in Psychological and Neuropsychological Injury Claims. Invited lecture presented at the Damages Seminar sponsored by the DRI Trial Tactics Committee. March, 2006.

Price, D.R. Evaluating Malingering in Workers' Compensation. Invited lecture at the South Carolina Workers' Compensation Update 2006 Seminar sponsored by the Council on Education in Management. May, 2006.

Price, D.R. Evaluating Brain Injury Claims. Invited lecture at Crawford University sponsored by Crawford & Company. June, 2006.

Price, D.R. Evaluating Malingering in Psychological and Neuropsychological Injury Claims. Presented at the 21st Annual Seminar & Expo on Insurance Fraud sponsored by the International Association of Special Investigation Units. September, 2006.

Price, D.R. Evaluating Claims of Mild Traumatic Brain Injury. Presented at the Atlanta Claims Association. November, 2006.

Price, D.R. Detecting Malingering, Symptom Exaggeration and Fraud in Psychiatric and Neuropsychological Claims. The NHCAA Institute for Health Care Fraud Prevention, 2006 Annual Training Pre Conference Program. November, 2006.

Price, D.R. Detecting Malingering, Symptom Exaggeration and Fraud in Psychological, Psychiatric and Neuropsychological Claims. The NHCAA Institute for Health Care Fraud Prevention, 2006 Annual Training Conference. November, 2006.

Price, D.R. Evaluating for Fraudulent Psychological and Neuropsychological Injury Claims presented at the Mental Health Fraud and Substance Abuse Issue Seminar sponsored by The National Health Care Anti-fraud Association Institute of Health Care Fraud Prevention. February, 2007.

Price, D.R. Malingering in Psychological, Psychiatric and Neuropsychological Injury Claims. Invited lecture at Carolina Casualty Insurance Company. April, 2007.

Price, D.R. Analysis of Psychological, Psychiatric, and Neuropsychological Claims. Presented at the 2007 Claims Conference sponsored by Mountain West Farm Bureau Insurance Company. June, 2007.

Price, D.R. "I Can't Even Think of Driving Again"; PTSD Claims. Trucking Industry Defense Association Worker's Comp Seminar. August, 2007

Price, D.R. Detecting Fraudulent Psychological and Neuropsychological (Brain) Injury Claims. Presented at the 22nd Annual Seminar & Expo on Insurance Fraud sponsored by the International Association of Special Investigation Units. September, 2007.

Price, D.R. Investigating Fraudulent Psychological Claims. The United States Postal Service and the Office of Inspector General, 2nd National Injury Compensation Symposium & Training Conference. April, 2008.

Price, D.R. Malingering. The United States Postal Service and the Office of Inspector General, 2nd National Injury Compensation Symposium & Training Conference. April, 2008.

Price, D.R. Detecting Fraudulent Psychological and Neuropsychological (Brain) Injury Claims. International Association of Special Investigation Units (IASIU), 23rd Annual Seminar & Expo on Insurance Fraud. September, 2008.

Price, D.R. Arson and The Criminal Mind. Carolina Fire Investigators Association. September, 2008.

Price, D.R. Malingering in Mental and Emotional Injury Claims. International Claims Association Annual Education Conference. September, 2008.

Price, D.R. Evaluating Mental and Emotional Injury Claims. International Claims Association Annual Education Conference. September, 2008.

Price, D.R. How to Interpret and Use Neuropsychological Testing. DRI Complex Medicine Seminar. November, 2008.

Price, D.R. Detecting Malingered Fraud in Psychological and Neuropsychological (Brain) Injury Claims. NC Insurance Crime Information Exchange 17th Annual Training Conference. February, 2009. (Please note this seminar was presented twice by request.)

Price, D.R. Detecting Malingered Fraud in Psychological and Neuropsychological (Brain) Injury Claims. NC Insurance Crime Information Exchange 17th Annual Training Conference. February, 2009. (Please note this seminar was presented twice by request.)

Price, D.R. Detecting Fraudulent Psychological and Neuropsychological (Brain) Injury Claims. International Association of Special Investigation Units (IASIU). 24th Annual Seminar and Expo on Insurance Fraud. September, 2009.

Price, D.R. The Evaluation of PTSD: Causes and Symptoms. Making The Case For Life XII: Mitigation and Jury Selection in Capital Cases sponsored by the Southern Center for Human Rights and the National Association of Criminal Defense Lawyers. September, 2010.

Price, D.R. The Evolution of Posttraumatic Stress Disorder. Invited lecture at the Charlotte Claims Association. November, 2010.

Price, D.R. The Evolution of Posttraumatic Stress Disorder. Invited lecture at the Houston Claims Association. December, 2010.

Price, D.R. The Evolution of Posttraumatic Stress Disorder and Malingering. Invited lecture at the Chicago Claims Association. March, 2011.

Price, D.R. Dealing with Difficult Clients. Invited lecture at the Public Defender Investigators Conference. March, 2011.

Price, D.R. PTSD/Traumatic Brain Injury Claims, Future Trends. South Carolina Defense Trial Attorneys' Association & Claim Management Association of South Carolina. 44th Annual Joint Meeting. July, 2011.

Price, D.R. Managing Stress in the Private Investigator. Invited lecture at the Public Defenders Conference. March, 2012.

Price, D.R. Managing Stress in the Private Investigator. Invited lecture at the South Carolina Association of Legal Investigators. May, 2012.

Price, D.R. Evaluating Traumatic Brain Injury Claims. Invited lecture at the 2014 South Carolina Farm Bureau Claims Conference. March, 2014.

Price, D.R. Trends in PTSD and TBI Claims DSM-5™ and Beyond. Invited lecture at Canal Insurance Company. June, 2015.

Price, D.R. Trends in PTSD and TBI Claims, DSM-5 and Beyond, Part I. Iowa Defense Counsel Association's 2016 Annual Meeting. September, 2016.

Price, D.R. Trends in PTSD and TBI Claims, DSM-5 and Beyond, Part II. Iowa Defense Counsel Association's 2016 Annual Meeting. September, 2016.

Price, D.R. Evaluating PTSD and Traumatic Brain Injury Claims. Invited lecture at the Nationwide Division Midwest Region Conference. April, 2017.

Price, D.R. Traumatic Brain Injuries: Evaluating Claims. Invited lecture at the 2018 American National Claims / Litigation Training Conference. September, 2018.

Price, D.R. Traumatic Brain Injury: Analyzing Claims. Invited lecture at the 2019 National Association of Mutual Insurance Companies (NAMIC) Claims Conference. February, 2019.

Price, D.R. Traumatic Brain Injury: Analyzing Claims. Invited lecture at the 2019 Complex Summit, Midwest Zone, at Liberty Mutual Insurance, Warrenville, IL. May, 2019.

Price, D.R. Trends in TBI and PTSD Claims. 61st Annual Texas Farm Bureau Insurance 2019 Statewide Claims Meeting. August, 2019.

Fox, W.S. & Price, D.R. Evaluating Brain Injuries. Invited lecture at Home Depot. May, 2006.

Kamanski, J.B. & Price, D.R. Catastrophic Injury Defense. Presented at the 2011 Claims Conference of Northern California. September, 2011.

Price, D.R. & Beaudoin, D. Posttraumatic Stress Disorder. Invited lecture at the PLRB/LIRB Crossroads 2005 Claims Conference. April, 2005. (Please note this speech was presented twice by request.)

Price, D.R. & Beaudoin, D. Posttraumatic Stress Disorder. Invited lecture at the PLRB/LIRB Crossroads 2005 Claims Conference. April, 2005. (Please note this speech was presented twice by request.)

Price, D.R. & Blackwelder, I. Defending Mental and Emotional Injury Claims in Employment Litigation. Invited lecture presented at the United States Postal Service Law Department Conference. November, 1993.

Price, D.R. & Brannon, W. Head Trauma Damage Claims. Invited lecture at the South Carolina Defense Trial Attorneys' Association and Claims Management Association of South Carolina Joint Meeting. July, 1996.

Price, D.R., & Campbell, D.A. Overcoming Stress and Achieving Self-motivation. Invited seminar presented at the Administrative Management Society Area IV Conference. October, 1988.

Price, D.R. & Cohen, L. Evaluating Neurological, Psychological and Psychiatric Injury Claims. In-house seminar presented to Great West Casualty Company. April, 1996.

Price, D.R. & Darroch, R.M. "Traumatic Brain Injuries" - Claim Handling Guidelines & Coverage Issues. Atlantic Claim Executives Association Spring Conference. April, 2013.

Price, D.R. & Dowies, C. Managing Stress in the Claims Profession. Invited lecture at the PLRB/LIRB 2011 Claims Conference. April, 2011. (Please note this speech was presented twice by request.)

Price, D.R. & Dowies, C. Managing Stress in the Claims Profession. Invited lecture at the PLRB/LIRB 2011 Claims Conference. April, 2011. (Please note this speech was presented twice by request.)

Price, D.R. & Fox, W.S. Malingering and Symptom Exaggeration. Presented at the 2008 Claims Conference & Insurance Seminar Expo sponsored by PLRB/LIRB. April, 2008. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Fox, W.S. Malingering and Symptom Exaggeration. Presented at the 2008 Claims Conference & Insurance Seminar Expo sponsored by PLRB/LIRB. April, 2008. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Kerr, L.S. Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB 2011 Claims Conference. April, 2011. (Please note this speech was presented twice by request.)

Price, D.R. & Kerr, L.S. Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB 2011 Claims Conference. April, 2011. (Please note this speech was presented twice by request.)

Price, D.R. & Kerr, L.S. Traumatic Brain Injuries. Invited lecture at the PLRB/LIRB 2012 Claims Conference. April, 2012. (Please note this speech was presented twice by request.)

Price, D.R. & Kerr, L.S. Traumatic Brain Injuries. Invited lecture at the PLRB/LIRB 2012 Claims Conference. April, 2012. (Please note this speech was presented twice by request.)

Price, D.R., Crowley, B., Gold, L.H. & McDonald, J.J. Inter-Profession Ethics: The Ethical Interplay Between Psychologist, Psychiatrists and Attorneys. Psychiatric, Psychological and Neuropsychological Claims Conference and Seminar. July, 2001.

Price, D.R., Fox, W.S. & Kerr, L.S. Malingering and Symptom Exaggeration. Presented at the 2007 Claims Conference & Insurance Seminar Expo sponsored by the PLRB/LIRB. March, 2007. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R., Fox, W.S. & Kerr, L.S. Malingering and Symptom Exaggeration. Presented at the 2007 Claims Conference & Insurance Seminar Expo sponsored by the PLRB/LIRB. March, 2007. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R., Fox, W.S. & Kerr, L. Malingering and Symptom Exaggeration. PLRB/LIRB 2009 Claims Conference and Insurance Services Expo. March, 2009. (Please note this lecture was presented twice by request.)

Price, D.R., Fox, W.S. & Kerr, L. Malingering and Symptom Exaggeration. PLRB/LIRB 2009 Claims Conference and Insurance Services Expo. March, 2009. (Please note this lecture was presented twice by request.)

Price, D.R. & Hiers, J.B. Evaluating Claims of Brain Injury. The Annual Symposium on Head Injury Claims. Sponsored by the Forensic Psychiatry Program, Medical University of South Carolina. December, 1997.

Price, D.R.; Kamanski, J.B and Morgan, S. Catastrophic Injury Defense, Including Mild Traumatic Brain Injury Claims. Presented at the 24th Annual Combined Claims Conference. March, 2012.

Price, D.R. & Lees Haley, P.R. An Introduction to Psychological Injury Claims. Defense of Damages Conference and Seminar. August, 1995.

Price, D.R. & Lees Haley, P.R. An Introduction to Psychological Injury Claims. Defense of Damages Conference and Seminar. November, 1995.

Price, D.R., Lees-Haley, P.R. & McDonald, J.J. The Defense of Mental and Emotional Injury Claims in Employment Litigation. In-house seminar presented to Fisher and Phillips. February, 1995.

Price, D.R., Lees-Haley, P.R., & Smith, R.D. Handling Psychological Injury Claims. Invited in-house seminar presented to the Delta Air Lines, Inc. Claims Department. February, 1995.

Price, D.R., & McCoy, J.F. Conversation Skill Training with Chronic Psychiatric Patients. Paper presented at the meeting of the Southeastern Psychological Association. March, 1982.

Price, D.R. & McDonald, J.J. The Defense of Mental and Emotional Injury Claims in Employment Litigation. In-house seminar presented to Fisher and Phillips. April, 1993.

Price, D.R. & McDonald, J.J. The Defense of Mental and Emotional Injury Claims in Employment Litigation. Invited lecture at the Advanced Labor and Employment Law Practitioners Seminar at the Ira C. Eaker College for Professional Development, Air Force Judge Advocate General School. June, 1997.

Price, D.R. & O'Connell, B. A. Posttraumatic Stress Disorder Claims. Invited lecture for Sedgwick Claims Management Services, Inc. August, 1998.

Price, D.R. & Simon, R.I. The EEOC's Enforcement Guidance: Issues, Questions and Concerns from a Clinician's Perspective. Invited lecture at the National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance under the Americans with Disabilities Act sponsored by the Government Training Institute Foundation. June, 1999.

Price, D.R. & Simon, R.I. The EEOC's Enforcement Guidance: Issues, Questions and Concerns from a Clinician's Perspective. Invited lecture at the National Symposium on Psychiatric Disabilities and the EEOC's New Enforcement Guidance under the Americans with Disabilities Act. November, 1999.

Price, D.R. & Smith, R.D. Handling Psychological Injury Claims. Invited lecture at the PLRB/LIRB 1997 Claims Conference. April, 1997. (Please note that this speech was given twice on consecutive days by request.)

Price, D.R. & Smith, R.D. Handling Psychological Injury Claims. Invited lecture at Erie Insurance Company sponsored by the PLRB/LIRB Extension Program. October, 1997. (Please note that this speech was given twice in two consecutive three-hour sessions by request.)

Price, D.R. & Smith, R.D. Handling Psychological Injury Claims. Invited lecture at Grange Insurance sponsored by the PLRB/LIRB Extension Program. November, 1997.

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at MARTA (Metropolitan Atlanta Rapid Transit Authority). November, 1997.

Price, D.R. & Smith, R.D. Handling Psychological Injury Claims. Invited lecture at Kemper Insurance Company sponsored by the PLRB/LIRB Extension Program. November, 1997.

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/ AICPCU 1998 Claims Conference. April, 1998. (Please note that this speech was given three times on consecutive days by request.)

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/ AICPCU 1998 Claims Conference. April, 1998. (Please note that this speech was given three times on consecutive days by request.)

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/ AICPCU 1998 Claims Conference. April, 1998. (Please note that this speech was given three times on consecutive days by request.)

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at AMICA Mutual Insurance Company, sponsored by the PLRB/LIRB Extension Program. November, 1998.

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Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/ AICPCU 1999 Claims Conference. March, 1999. (Please note that this speech was given three times on consecutive days by request.)

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/ AICPCU 1999 Claims Conference. March, 1999. (Please note that this speech was given three times on consecutive days by request.)

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Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the Claims Conference 2000 sponsored by the PLRB/LIRB/ CPCU/ AICPCU. March, 2000. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Smith, R.D. Analysis of Psychological Injury Claims. Invited lecture at the Claims Conference 2000 sponsored by the PLRB/LIRB/CPCU/AICPCU. March, 2000. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Smith, R.D. Psychological and Neuropsychological Injury Claims. Invited lecture at the Claims Conference 2001 sponsored by the PLRB/LIRB/CPCU/AICPCU. March, 2001. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Smith, R.D. Psychological and Neuropsychological Injury Claims. Invited lecture at the Claims Conference 2001 sponsored by the PLRB/LIRB/CPCU/AICPCU. March, 2001. (Please note that this speech was given two times on consecutive days by request.)

Price, D.R. & Smith, R.D. Evaluating Mental and Emotional Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/AICPCU 2002 Claims Conference and Insurance Services Expo. April, 2002.

Price, D.R. & Smith, R.D. Evaluating Traumatic Brain Injury Claims. Invited lecture at the PLRB/LIRB/CPCU/AICPCU 2002 Claims Conference and Insurance Services Expo. April, 2002.

Price, D.R. & Smith, R.D. Evaluating Mental and Emotional Injuries. Invited lecture at the PLRB/LIRB Crossroads 2003 Claims Conference & Insurance Services Expo. April, 2003.

Price, D.R. & Smith, R.D. Detecting Fraudulent Mental and Emotional Injury Claims IASIU 18th Annual Seminar on Insurance Fraud sponsored by the International Association of Special Investigation Units. September, 2003. (Please note this lecture was presented twice by request.)

Price, D.R. & Smith, R.D. Detecting Fraudulent Mental and Emotional Injury Claims IASIU 18th Annual Seminar on Insurance Fraud sponsored by the International Association of Special Investigation Units. September, 2003. (Please note this lecture was presented twice by request.)

Price, D.R. & Smith, R.D. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at the Chambers, Mabry, McClelland and Brooks Client Seminar. May, 1998.

Price, D.R. & Smith, R.D. Psychological and Neuropsychological Injury Claims Evaluation. Invited lecture at the PLRB/LIRB Crossroads 2004 Claims Conference and Insurance Services Expo. March, 2004. (Please note this lecture was presented twice by request.)

Price, D.R. & Smith, R.D. Psychological and Neuropsychological Injury Claims Evaluation. Invited lecture at the PLRB/LIRB Crossroads 2004 Claims Conference and Insurance Services Expo. March, 2004. (Please note this lecture was presented twice by request.)

Price, D.R. & Smith, R.D. Detecting Fraud in Emotional and Psychological Injury Claims. IASIU 19th Annual Seminar and Expo on Insurance Fraud. September, 2004.

Price, D.R., Smith, R.D. & Kerr, L.S. Malingering and Symptom Exaggeration. Invited lecture at the 2006 PLRB/LIRB Claims Conference. April, 2006. (Please note that this speech was given on two consecutive days by request.)

Price, D.R., Smith, R.D. & Kerr, L.S. Malingering and Symptom Exaggeration. Invited lecture at the 2006 PLRB/LIRB Claims Conference. April, 2006. (Please note that this speech was given on two consecutive days by request.)

Price, D.R. & Stickley, R.S. Traumatic Brain Injury: Evaluating Claims. PLRB/LIRB 2017 Claims Conference and Insurance Service Expo. March, 2017. (Please note that this lecture was presented twice by request.)

Price, D.R. & Stickley, R.S. Traumatic Brain Injury: Evaluating Claims. PLRB/LIRB 2017 Claims Conference and Insurance Service Expo. March, 2017. (Please note that this lecture was presented twice by request.)

Price, D.R. & Stickley, R.S. Traumatic Brain Injury: Evaluating Claims. PLRB/LIRB 2018 Claims Conference. April, 2018. (Please note that this lecture was presented twice by request.)

Price, D.R. & Stickley, R.S. Traumatic Brain Injury: Evaluating Claims. PLRB/LIRB 2018 Claims Conference. April, 2018. (Please note that this lecture was presented twice by request.)

Price, D.R. & Stickley, R.S. Traumatic Brain Injury: Evaluating Claims. PLRB/LIRB 2019 Claims Conference. March, 2019. (Please note that this lecture was presented twice by request.)

Liberatore, J. & Price, D.R. Evaluating Claimed Traumatic Brain injuries. PLRB/LIRB Large Loss Conference. November, 2009. (Please note that this speech was given on two consecutive days by request.)

Liberatore, J. & Price, D.R. Evaluating Claimed Traumatic Brain injuries. PLRB/LIRB Large Loss Conference. November, 2009. (Please note that this speech was given on two consecutive days by request.)

Smith, R.D. & Price, D.R. Handling Psychological and Neuropsychological Injury Claims. Invited lecture at CNA Commercial Insurance. August, 1998.

Smith, R.D. & Price, D.R. Reviewing and Analyzing Educational Records In Brain Injury Cases. Annual Mental and Emotional Injury Claims Conference and Seminar. October, 2000.

Smith, R.D. & Price, D.R. Brain Injuries. Invited lecture at the PLRB/LIRB Crossroads 2003 Claims Conference and Insurance Services Expo. April, 2003.

Smith, R.D. & Price, D.R. Evaluating Brain Injuries. Invited seminar at Philadelphia Insurance Company. June, 2005.

Taff, E.W. Cross-Examination of the Neuropsychologist. Preeminent Lawyer - Superstars of Trial Seminar. Sponsored by Defense Research Institute. September, 2006.

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Watson, R. & Price, D.R. The Not-So-Obvious Injury: Posttraumatic Stress Disorder and Closed Head Injury. Invited lecture at the North Carolina Academy of Trial Lawyers 35th Annual Convention. June, 1999.

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Price, D.R. 2002. Fraudulent Claims of Psychological Injury. Today's Insurance Professional. Winter 14-16.

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Price, D.R. Posttraumatic Stress Disorder and Mild Traumatic Brain Injury Claims. The Defenseline. Volume 32, No. 1, 11-13.

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Price, D.R. & McDonald, J.J. False Claims of Clergy Sexual Abuse. Risk Management Magazine. January, 2003, 48-51.

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Price, D.R. Clinician's Corner: Posttraumatic Stress Disorder, Part IV: Stressors that Cause PTSD, *4 Litigation Commentary & Rev.* (March/April 2011).

Price, D.R. The Clinician's Corner. Posttraumatic Stress Disorder, Part V: PTSD and Kidnapping, *4 Litigation Commentary & Rev. 76* (June/July 2011).

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG BAYAN ALEKSEY *Applicant*, v. STATE OF SOUTH CAROLINA *Respondent*.	IN THE COURT OF COMMON PLEAS Case No. 2015-CP-38-764

AFFIDAVIT OF MARJORIE HAMMOCK, LISW, MSW

Marjorie Hammock, who appeared personally before me, affirms and states the following:

1. I am a Licensed Independent Social Worker in Columbia, South Carolina. I have been practicing social work for fifty-nine years, fifteen of which I was the Chief of Social Work Service for the Department of Corrections. During my time at the Department of Corrections, I provided direct services to inmates, especially the geriatric, handicapped, and mentally ill populations. I obtained my Bachelor of Arts Degree and my Master of Social Work Degree from Howard University in Washington, D.C.

2. I was retained by Mr. Bayan Aleksey's attorneys to conduct a review of Mr. Aleksey's developmental period (pre-18 years old) adaptive functioning in the context of an intellectual disability evaluation. My findings in Mr. Aleksey's case are recounted in detail in my report dated October 10, 2019, attached to this affidavit.

I affirm, under the penalty of perjury, that the foregoing is true and correct to the best of my knowledge. Further affiant sayeth naught.

Marjorie Hammock
MARJORIE HAMMOCK, LISW, MSW

Sworn to and subscribed before me
This 31st day of October, 2019
Jill B. Alverson
Notary Public for the State of South Carolina
My commission expires: 3-29-20

Report of Marjorie Hammock
on Developmental Period Adaptive Behavior Deficits

ALEKSEY, Bayan
Date of report: October 10, 2019

Date of birth: November 8, 1968
Age: 51

I, Marjorie Hammock, was asked by Bayan Aleksey's attorneys to conduct a review and evaluation of Bayan's developmental period (pre-18 years old) adaptive functioning as part of the overall evaluation of whether Bayan is a person with intellectual disability. I conducted the requested evaluation and a report of my findings follows.

Sources of Information

- South Carolina Department of Disabilities and Special Needs Evaluation performed by Dr. Alicia V. Hall (March 28, 2019)
- Birth certificate for Bayan Aleksey
- Birth and medical records for Bayan Aleksey from Roosevelt Hospital in New York, New York
- Psychiatric and medical records from Queens Child Guidance Center in Flushing, New York
- Medical and psychiatric records for Bayan Aleksey from Long Island Jewish-Hillside Medical Center in Glen Oaks, New York
- Pretrial order for a competency evaluation from Solicitor William M. Bailey and the accompanying request for evaluation
- Report on competency from Dr. Thomas W. Behrmann and Dr. Richard L. Frierson at the William S. Hall Psychiatric Institute to Solicitor William M. Bailey
- Psychological report by Dr. Jeffrey Vidic
- William S. Hall Psychiatric Institute social work assessment by Carol M. David (July 8, 1998)
- Physical examination by Dr. A. Daniel Vallini (July 17, 1998)
- Social Security Earnings Statement for Bayan Aleksey (1987-1997)
- Lester David Rosengard affidavit
- Vera Lall Aleksey affidavit
- Barbara Zingalis declaration
- Dr. Daniel Grant declaration
- Dr. Donna Schwartz Maddox declaration
- New York State Education Department Office of Vocational Rehabilitation records for Bayan Aleksey
- Individualized Education Program records for Bayan Aleksey
- School records from The William Lloyd Garrison Special Primary School
- School records from The Hillside Campus School
- School records from St. Michael's Catholic Elementary School
- School records from Edward Bleeker Junior High School

- School Records from John Browne High School
- City of New York Board of Education records
- Standardized test results from throughout Bayan Aleksey's school years
- Interviews with Bayan Aleksey at Broad River Correctional Institution, Columbia, SC, August 26, 2019 and September 24, 2019
- Interview with Vera Lall Aleksey in New York, New York, by phone from Columbia, SC, September 17, 2019

Qualifications

I am a Licensed Independent Clinical Social Worker. I have been practicing social work for 59 years, fifteen of which I spent as the Chief of Social Work Service for the Department of Corrections. During my time in the Department of Corrections, I provided direct services to inmates, and especially geriatric, handicapped, and mentally ill populations. I received my B.A. and M.S.W. Degrees from Howard University in Washington, D.C., and taught as an Assistant Professor and Field Coordinator in the Social Work Department at Benedict College for fourteen years until I retired in 2013. I am a Gold Card member and Pioneer of the National Association of Social Workers, served on the National Board and was past President of the South Carolina State Chapter. I am a past President of the Columbia Chapter of the National Association for Black Social Workers. I have received numerous awards for my professional and humanitarian work.

Clinical Criteria for Assessing Adaptive Behavior

Intellectual disability is defined under South Carolina law as "significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (quoting S.C. Code Ann. § 16-3-20(C)(b)(10)).

Adaptive behavior is learned behavior performed in the context of society's expectations across different settings, including the home, school, work, and other community-based environments. (Schalock et al., 2010; Tassé and Blume, 2018). Because society's demands and expectations generally increase across an individual's lifetime, there is a generalized expectation that as a person matures from an infant to a child to an adult, they will be able to perform more complex tasks and demonstrate more advanced adaptive behavior. (Tassé and Blume, 2018). Adaptive behavior is, in other words, the collection of conceptual, social, and practical skills that a person learns in order to function.

The American Association on Intellectual and Developmental Disabilities (AAIDD) is generally considered the leading professional authority in defining intellectual disability, including adaptive behavior. (Tassé and Blume, 2018). The AAIDD defines adaptive behavior as the collection of conceptual, social, and practical skills that have been learned by people to function in their everyday lives. (Schalock et al., 2010). The AAIDD (formerly known as the American Association on Mental Retardation) previously defined adaptive behavior by reference to ten categories of behavior: (1) communication skills, or the ability to comprehend and express information through spoken and symbolic language; (2) self-care, including toileting, eating, dressing, hygiene, and grooming; (3) home living, encompassing housekeeping, property

maintenance, food preparation and cooking, shopping, and daily scheduling; (4) community use, meaning the ability to make appropriate use of community resources like public transportation, stores, religious facilities, and other public entities like schools, libraries, and recreational facilities; (5) self-direction, or the ability to abide by a schedule, initiate appropriate activities, ask for help when needed, and resolve problems in novel situations; (6) health and safety, or the ability to maintain one's own health; (7) functional academics, meaning the cognitive and intellectual skills related to learning at school like reading, writing, math, health, and geography; (8) leisure, including activities that reflect personal preferences and choices and involve playing with others, taking turns, and learning new activities; (9) work skills related to holding a part-time or full-time job; and (10) social/interpersonal skills, including the ability to recognize feelings, read cues, regulate one's own behavior, and forming and fostering relationships. Under this definition, a person has deficits in adaptive behavior if they have limitations in two of the ten domains of adaptive functioning. (Luckasson et al., 2002). This was the standard in place at the time of the Supreme Court's 2002 decision, *Atkins v. Virginia*, which barred the execution of people with intellectual disabilities.

Since then, however the AAIDD has revised the definition of adaptive behavior, breaking it into three broad skill areas. These three adaptive behavior domains are defined as follows: (1) conceptual skills, which encompass communication, academics, and self-direction; (2) social skills, including interpersonal abilities, responsibility, capacity to follow rules, self-esteem, gullibility, naiveté, and the ability to avoid victimization; and (3) practical skills like basic personal care and work skills. (Schalock et al., 2010; American Psychiatric Association, 2013; Tassé and Blume, 2018). Under this definition, a person has deficits in adaptive behavior if he or she has limitations in one of the three skill areas. (Schalock et al., 2010). The American Psychological Association (APA), another authority on intellectual disability and adaptive behavior, has historically adopted the AAIDD definition of adaptive behavior. The most recent edition of the APA's Diagnostic and Statistical Manual (DSM), the DSM-V, defines adaptive behavior by reference to the same three domains—conceptual, social, practical. (APA, 2013). The following chart reflects how the older ten-part standard fits in to the newer, three-domain standard:

Modern Domains	*Older Domains*
Conceptual skills	Communication Functional academics Self-direction
Social skills	Leisure Social/interpersonal
Practical skills	Community use Home living Health and safety Self-care Work

(Luckasson et al., 2002; Schalock et al., 2010; American Psychiatric Association, 2013).

Courts in South Carolina have evaluated adaptive functioning limitations under both the older, ten category definition and the more recent three-domain definition. My report therefore includes a summary of Bayan's adaptive skills using both definitions.

The current standards for diagnosing intellectual disability recommend collecting information from as many sources as have valid information. (Schalock et al., 2010; APA, 2013). One of the persistent themes in Bayan's life has been social isolation, and as a result, there are very few living people who knew Bayan well enough during his developmental period to accurately recall useful information about his functioning. However, I was able to speak with, and review affidavits from, informants who knew Bayan in different contexts and who supplied useful information, and I was also provided a variety of records, including school, counseling, and work records, and mental health/psychiatric evaluations. My assessment was therefore based on multiple sources of information, consistent with prevailing standards. The purpose of my evaluation was to assess Bayan's typical functioning, not his capacity or maximum ability, within the context of Bayan's community and cultural environment. (Schalock et al., 2010).

Overview of Bayan's Life History

Bayan Aleksey was born on November 8, 1968, to Vera and Ronald Aleksey. (Bayan Aleksey birth certificate). Vera Aleksey was born in Trinidad and met Mr. Aleksey in New York when she came to the United States on a green card to work as a hair stylist in 1966. (Vera Aleksey Aff. Dec. 30, 2018; Hillside Hosp. Records p. 26). At the time, Mr. Aleksey was married to another woman. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). When Mrs. Aleksey got pregnant with Bayan in 1968, Mr. Aleksey obtained a divorce and he and Mrs. Aleksey were married at City Hall. (Vera Aleksey Aff.). Mrs. Aleksey experienced nausea, vomiting, and bleeding throughout her pregnancy, and she was treated for persistent urinary tract infections and anemia. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Bayan was born with the assistance of forceps, meaning a doctor applied forceps to his head and pulled him out of his mother's body. (Roosevelt Hosp. Records; Vera Aleksey Aff.). Mrs. Aleksey was hospitalized for two weeks post-partum because of anemia and post-partum depression, which continued to afflict her for months after Bayan's birth. (Vera Aleksey Aff.).

When Bayan was born, his father was working in restaurants, although he had previously been employed at IBM and placed a high value on education and intellect. (Vera Aleksey Aff.). It was not until after their marriage that Mrs. Aleksey became aware that Mr. Aleksey suffered from a severe drinking problem. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). When drunk, Mr. Aleksey would become violent and verbally and physically abuse Mrs. Aleksey. Bayan witnessed many such incidents of abuse. (Bayan Aleksey Interview, Aug. 21, 2019; Vera Aleksey Aff.; Hillside Hosp. Records p. 26; Dr. Frierson Report, Aug. 7, 1998). In 1972, Mrs. Aleksey left her husband and took Bayan, but the separation was never made legal and Mr. Aleksey obtained monthly court-ordered visitation rights. As a result, his father remained in Bayan's life. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). Mrs. Aleksey reported that Mr. Aleksey continued to be abusive after the separation and, several times, she had to call the police to remove Mr. Aleksey from her home and obtained several court restraining orders to keep Mr. Aleksey away from her and Bayan. (Vera Aleksey Aff.) This continued until Mr. Aleksey's death in 1990.

When Bayan entered school, he was unable to do the school work and his family structure was such that he did not have the support he needed, especially from his father, who berated and verbally abused him for his poor academic performance. (Vera Aleksey Aff.; Hillside Hosp. Records p. 26). Bayan's delayed verbal development, profound social limitations, and pervasive deficits, all described below, were likely magnified by the trauma he suffered during the developmental period. (School Records 1975).

Bayan, like many people with intellectual disability, relies on masking to conceal his deficits and limitations. (Olley, 2012; Edgerton, 1993). Interviews with Bayan Aleksey). Masking, also commonly referred to as a "cloak of competence," is the tendency of an individual with intellectual disability to "make every effort to 'fit in' and 'pass' for someone who does not have a disability" because of the stigma associated with that diagnosis. (Tassé and Blume, 2018; Olley, 2012; Edgerton, 1993). Bayan's mother in particular helped him weave his cloak of competence by helping him with academic tasks, allowing him to skip school to cover up his poor performance, being available to him constantly either in person or by phone to assist with daily tasks, and helping him get small jobs as a teenager and young adult. This kind of reliance on a "benefactor" has been widely described in the literature. (Tassé and Blume, 2018). When Bayan eventually moved out of his mother's house, his girlfriends were woven into his cloak (as described in greater detail below), although they also took advantage of his deficits. And even today, Bayan remains adept at masking or cloaking his shortcomings. For example, in my interviews with him, Bayan did several things that the literature has identified as characteristic masking behaviors: he acquiesced to questions he did not understand; he avoided topics that could expose his academic and intellectual shortcomings; and he changed the subject, frequently returning to matters he could discuss with greater fluency. (Edgerton, 1993). Interviews with Bayan Aleksey).

Conceptual Skills

Communication

Bayan's school records, the interviews I conducted, and affidavits I reviewed indicate that Bayan has profound limitations in communication. Bayan's mother reported that he could not speak more than a few syllables at a time or more than a few coherent words until he was three years old. (Vera Aleksey Aff.; Roosevelt Hosp. Records). When he did start talking, he would put words together that did not make sense. (Vera Aleksey Aff.). Mrs. Aleksey struggled to keep Bayan at the daycare center because she would drop him off and he would immediately lie down on the floor and start crying. The teacher was very good to Bayan, but he was often inconsolable and Mrs. Aleksey would have to come pick him up. (Hillside Hosp. Records; Interview with Vera Aleksey, Sept. 17, 2019).

Bayan was a very quiet child. (Vera Aleksey Aff.; School Records—First Grade Assessment). For example, when he was in the first grade, his school called Mrs. Aleksey to tell her that Bayan was unable to talk. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). They seated Bayan next to one of the girls in an effort to encourage him to speak, but he was silent. (Interview with Vera Aleksey, Sept. 17, 2019). Even as Bayan got older, his vocabulary did not develop and it was still confusing when he talked because he would string together unrelated words and made repeated errors, even when corrected. (School Records 1979). For example, a Board of Education evaluator noted that Bayan "read the word plot as pilot, which remained uncorrected after efforts at decoding." (School Records 1979).

Bayan failed to comprehend rules or expectations, which others sometimes interpreted as misbehavior. (David Rosengard Aff.). For example, in first grade, Bayan developed a tendency of taking things home he was told not to take, like a stamp pad, and Mrs. Aleksey would have to return the objects to the school. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan could not understand why this was not acceptable. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey tried to help Bayan by putting him in counseling, but it was not effective because Bayan would not talk to the counselors. (Interview with Vera Aleksey, Sept. 17, 2019). Later, Bayan's long-term counselor at the Long Island Jewish Hillside Hospital, David Rosengard, noted that Bayan had a limited vocabulary and had trouble comprehending instructions or rules. (David Rosengard Aff.).

School records confirm the informants' recollections. According to Bayan's school reports, he had late speech development and Richard Sloves, a school psychologist, described Bayan's speech as characterized by "clang associations." (School Records 1975). For example, when asked to define the word "nail" at age six, Bayan said "[a] finger that you put in the mailbox." (School Records 1975). Later, when Bayan was ten, an assessment from the Committee on the Handicapped indicated that he had difficulty with analogies, could not name opposites to simple words like "sour," "heavy," "laugh," "narrow," or "false," and struggled to distinguish between similar-sounding words. (School Records 1979). When Bayan was in his early teens, school reports indicate that he had a "somewhat limited" command of English, which was his first language. (Hillside Hosp. Records). His speech was described as "choppy," as though he was either "hold[ing] back his thoughts and feelings, or uncontrollably let[ting] them out." (Hillside Hosp. Records). When Bayan was fourteen, psychological testing indicated that he was struggling from "pervasive deficits in language functioning, even taking into account behavioral factors which may have interfered with Bayan's performance." (Hillside Hosp. Records; School Records 1983). His vocabulary remained limited. (Individualized Education Program Records).

Self-Direction

Bayan was never independent or able to function at an appropriate developmental level without help from his mother. His school records indicate that Bayan was unable to master "self-control" and that he needed "assistance coping [with] unstructured free time." (School Records—First Grade; Hillside Hosp. Records). Bayan had "difficulty following through on completing a project." (Hillside Hosp. Records). When he was evaluated by school psychologists, they noted that Bayan had "difficulties with the development of self and autonomy." (School Records 1975). Bayan was dependent on others for direction and unable to successfully manage living on his own. For example, he could not be left alone and Mrs. Aleksey regularly had to bring him to work with her. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mr. Rosengard reported that Bayan was "extremely dependent" on Mrs. Aleksey, who "constantly monitored and protected him." (David Rosengard Aff.). Bayan required his mother's help with all of his daily activities. (Interview with Vera Aleksey, Sept. 17, 2019). When Mrs. Aleksey was not immediately involved, Bayan was unable to follow through on obligations. (Vera Aleksey Aff.; David Rosegard Aff.; Hillside Hosp. Records). At one point, he was placed on home schooling but that was not successful because Bayan could not be depended to show up for lessons. (School Records 1984). Even as Bayan got older, his mother had to help him make and keep appointments and get to work. (Vera Aleksey Aff.; Board of Education Records).

Functional Academics

Bayan has a long and well documented history of difficulty in this area. He did poorly in school from the time he was a toddler, and Bayan's learning difficulties caused tension between him and his father, who put a high value on academic achievement. (Vera Aleksey Aff.). Indeed, Bayan's school performance was so poor, and his father's reaction to that so negative, that his school records document the fights between Bayan and Mr. Aleksey. (School Records 1984). Bayan's first grade records indicate that his "fund of educationally relevant information and his ability to deal abstractly with that information is at a retarded level." (School Records 1975). At age six, Bayan was referred to a school psychologist for testing in part because of his delayed speech development, immaturity, and depressed verbal performance. (School Records 1975).

In an effort to help Bayan learn and to alleviate the familial conflict caused by Bayan's academic difficulties, Mrs. Aleksey enrolled Bayan in St. Michael's parochial school in third grade. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). The school was stricter, but Bayan did not do any better academically. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019; School Records St. Michael's). At St. Michael's, Bayan failed most of his classes and his teachers reported that they were "disappointed in Bayan's personal and scholastic progress," indicating that the education system had recognized Bayan's low functioning and lack of appropriate progress. (School Records St. Michael's). Bayan's standardized test scores in third grade put him in the bottom four percent of students nationwide. (School Records St. Michael's). Mrs. Aleksey hired a high school-aged tutor to help Bayan, but Bayan could never tell the tutor what his homework was, could not grasp the notion of homework, and was constantly confused, so the tutor stopped coming. (Interview with Vera Aleksey, Sept. 17, 2019). A private teacher came to the home for a short time, but that, too, was unsuccessful because Bayan was unable to effectively communicate. (Board of Education Records).

In fourth grade, Bayan received Fs in almost every single class. (School Records St. Michael's). His report cards from that year show that Bayan was "inattentive during class" and did not complete his assignments; a note in Bayan's file reads: "His progress is unsatisfactory!" (School Records St. Michael's). Again, when Bayan took a standardized test, he scored in the bottom three percent of test takers nationally. (School Records St. Michael's).

Bayan was socially promoted to fifth grade. (School Records St. Michael's). He failed all of his classes the entire year. (School Records St. Michael's). His teacher wrote that she was "after him constantly" but Bayan could not do the work. (School Records St. Michael's). His report cards indicate that over the course of the year Bayan did not make progress academically. (School Records St. Michael's). The principal at St. Michael's recommended counseling for Bayan, which Mrs. Aleksey tried, but Bayan did not speak to the therapists until he met Mr. Rosengard around age twelve. (Interview with Vera Aleksey, Sept. 17, 2019). Leonard Reich, Ph.D., a doctor who evaluated Bayan, wrote to Mrs. Aleksey that Bayan's "fundamental academic skills are also deficient." (School Records 1979). The counselors noted that Bayan was very immature and suggested that he return to public school. (School Records 1979; Interview with Vera Aleksey, Sept. 17, 2019).

Before Bayan returned to public school for sixth grade at the age of ten years, he was evaluated by the Board of Education of the City of New York, Committee on the Handicapped. (School Records 1979; Vera Aleksey Aff.). The notes from this evaluation in July 1979 indicate that Bayan understood the concept of addition but made errors. (School Records 1979). He made errors in time, measurement facts, fractions, and multiplication. (School Records 1979). As a result of this evaluation, Bayan was placed in special education classes and received standardized testing modifications, including extra time. (School Records 1979; School Records 1974). Nevertheless, he continued to fail most of his classes. (School Records 1979; School Records Junior High). Bayan's report cards note that although he was "making a tremendous effort," he had "fallen behind in many areas." (School Records Public School 21). A letter from Bleeker Junior High School warned Mrs. Aleksey that Bayan was at risk of not being promoted to eighth grade. (School Records 1981; Board of Education Records). When Bayan was promoted to the eighth grade, he continued to struggle and his level of performance was "far below grade level"; cumulatively, his abilities were assessed at a fifth grade level. (School Records 1981; School Records Junior High). Bayan's test scores "suggest[ed] pervasive deficits in language functioning." (School Records 1983). He told his counselor that his teachers were giving him low level work that embarrassed him, and the counselor felt Mrs. Aleksey helped Bayan cover up his academic limitations by allowing him to skip school and stay home. (Board of Education Records; David Rosengard Aff.; Hillside Hosp. Records). He was discharged from his junior high school in January 1984, when he should have been in ninth grade. (Board of Education Records).

Mrs. Aleksey requested a reevaluation to have Bayan placed back in special education classes. (Individualized Education Program Records). He was again evaluated by the Committee on the Handicapped. (School Records 1984). His word recognition was assessed at three years below his age, his reading comprehension was "substantially below level of word recognition," and his math skills were in the fourth grade range. (School Records 1984). Bayan continued to fail his classes. (School Records 1984; School Records 1985). Mrs. Aleksey remembered talking to his teachers, who told her that Bayan would raise his hand over and over but could never answer the question when he was called on. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He was consistently teased and mocked about being in special education. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). One of Mrs. Aleksey's friends, Barbara Zingalis, recalled that Bayan was "slow about learning things, simple things." (Barbara Zingalis Aff.). Although Bayan entered high school, Mrs. Aleksey described it as a failure. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan dropped out without graduating part of the way through ninth grade. (School Records 1984; School Records 1985; Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019).

As one would expect with such a history, Bayan could not effectively use academic skills in his community life. He was not an effective reader, so he was unable to complete a job application or manage a bank account. His functional academic skills were insufficient for independent living, and his mother even struggled to provide him with the structure he required to function at a developmentally appropriate level.

Social Skills

Social

A consistent theme throughout Bayan's life has been social isolation and a marked inability to make and maintain relationships. Bayan has profound social deficits that impact every aspect of his life.

As a young child, Bayan was described in school records as quiet, withdrawn, dependent on his mother, and unable to relate to other children. (School Records 1975; Hillside Hosp. Records). When he started day care at age three, he was inappropriately upset about the separation from his mother, cried inconsolably, and resisted attendance for at least a month. (Hillside Hosp. Records). As indicated above, Bayan was referred to a school psychologist at age six because he displayed poor socializing behavior, a tendency to annoy other children, and an inability to appropriately interact with others. (School Records 1975). The school psychologists who saw Bayan described him as "a child with a strong need to maintain close adult contact." (School Records 1975). Bayan's records from the Hillside Hospital indicate that when he entered school in first grade, he was "resistant, frightened and complained of noise. He was withdrawn and did not relate to other children." (Hillside Hosp. Records). Bayan was overwhelmed by school so he would often leave school and walk the two blocks home, constantly forcing his mother to leave work and bring him back to school. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey reported that Bayan would cry to her "why am I different from the other kids" or "why did God make me like this, so different from everyone else?" (Vera Aleksey Aff.).

As Bayan got older, he remained fearful, socially isolated, and immature. For example, in high school, Bayan met some new kids but when they came to see if he wanted to ride the bus with him, Bayan hid. (Vera Aleksey Aff.). Mrs. Aleksey reported that puberty was very hard for Bayan because he "had no friends, feared the other kids, and had a hard time controlling himself." (Vera Aleksey Aff.). At one point he became suicidal and was placed in residential treatment. (Vera Aleksey Aff.). His hospital records note that he was "an isolated youngster," and that although he had lived in Flushing for five years, he did not "seem to have any friends in the neighborhood." (Hillside Hosp. Records). In high school, he would go with his mother to a drive-in because he did not have any friends. (Interview with Vera Aleksey, Sept. 17, 2019). Once, when Bayan was around fourteen, the Flushing Subway line got stuck when Mrs. Aleksey was coming home. Bayan panicked because she was late; he broke down and was in tears and almost called the police, even though he knew that the Flushing line was often delayed. (Interview with Vera Aleksey, Sept. 17, 2019).

Bayan was bullied for being in special education and avoided making friends with his peers because he was afraid they would find out he was in special education classes. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Educational records from daycare to high school are replete with concern that Bayan "ha[d] no male or female friends," was "afraid of other kids," and struggled to make friends. (School Records 1982; David Rosengard Aff.; School Records Hillside Hosp. Records; Individualized Education Program Records). School tests from high school note that Bayan struggled "in the area of emotional functioning" and that there were "signs of social-sexual immaturity." (School Records 1983). When Bayan went to the residential facility, his interactions with others were described as "childish" and "superficial." (HillsideHosp.Records).

Nevertheless, Bayan was eager to be liked and this resulted in him often being taken advantage of, once people realized that they could use him. Mr. Rosengard reported that Bayan was "obviously naïve and gullible" and lacked judgment. (David Rosengard Aff.). Mrs. Zingalis recalled that Bayan was "a very compliant and passive child" and that he had "an innocence about him." (Barbara Zingalis Aff.). Bayan "smiled, even when smiling wasn't called for" and "never could see the big picture or reality of another's motives." (Barbara Zingalis Aff.). Ms. Zingalis described Bayan as "gullible," a person who "would fall for the obvious ploys." (Barbara Zingalis Aff.). Mrs. Aleksey recalled a time at parochial school when Bayan approximately ten years old when he told a boy that his mother kept money in her closet. (Interview with Vera Aleksey, Sept. 17, 2019). The kid promised Bayan a lot of things if he would take the money. (Interview with Vera Aleksey, Sept. 17, 2019). One day, an elderly man came to Mrs. Aleksey's house with a kid, who told her that Bayan gave him $50. The man had to explain that Bayan could not buy friends. (Interview with Vera Aleksey, Sept. 17, 2019).

Dr. Reich, a school psychologist, wrote to Mrs. Aleksey that Bayan was "restless, but friendly. He tends to exaggerate in order to win my favor." (School Records 1979). Later, when Bayan returned to public school and was placed in special education classes, his teacher told Mrs. Aleksey that Bayan was frequently used by other kids and while all children get into trouble, Bayan was always "left holding the bag" when other kids got out of it. (Vera Aleksey Aff.). Mr. Rosengard worried that "Bayan was never able to comprehend that there were people who would use his gullibility and get him into trouble." (David Rosengard Aff.). Mrs. Aleksey explained that Bayan would get into trouble but he would not know how to solve it, so he skipped from problem to problem. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan's judgment was so poor that he often failed to comprehend the severity or danger of a situation and did not learn from getting in trouble. (David Rosengard Aff.). Bayan's social deficits were so profound that Mrs. Aleksey was reluctant to entrust his care to others. (Barbara Zingalis Aff.). As Ms. Zingalis succinctly explained, Bayan "wanted so much to be liked by other kids, but he had very few friends." (Barbara Zingalis Aff.).

Leisure

Mrs. Aleksey reported that Bayan was not a sports fan at all and that she could never get him interested in sports. (Interview with Vera Aleksey, Sept. 17, 2019). He never played any sports or even tried out because he was not good at sports and could not follow the rules or understand the plays. (Vera Aleksey Aff.). Mrs. Aleksey bought him a bicycle but he could not learn how to ride. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan's inability to learn angered his father and Bayan ended up with a fractured elbow, so Mrs. Aleksey got rid of the bike. (Interview with Vera Aleksey, Sept. 17, 2019). Mr. Rosengard reported that Bayan loved to make models during counseling sessions and attempted to do so, but he was never able to complete one (though the other children in the program could). (Rosengard Aff.). Bayan could not figure out how to play board games, and he was often frustrated in group therapy sessions because he could not develop interests like the other boys. (Rosengard Aff.).

Practical Skills

Self-Care

Bayan's records indicate some deficits in self-care. A childhood hospital report described Bayan as being dependent on diapers at age three. (Roosevelt Hosp. Records). He frequently wet or soiled the bed or his pants. (Roosevelt Hosp. Records). When he was a young child, Mrs. Aleksey did everything for him. When he got up in the morning, she made his breakfast and helped him dress. (Vera Aleksey Interview, Sept. 17, 2019). Even after Bayan was in elementary school, he could not button his shirts and Mrs. Aleksey had to put in a lot of effort to show Bayan how to put his clothes on himself. (Vera Aleksey Interview, Sept. 17, 2019).

Home-Living

Bayan has never lived independently. His mother could never leave him alone until he was 14 or 15 years old, but even then, Bayan was not truly independent. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey would give him a key so he could come home from school, which was only a block away. He would come home and call her at work every fifteen minutes, to the point that her employer became annoyed. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey explained to Bayan that he could not call so often because it made her boss mad, but Bayan still called just as often for assistance when he was home without her. (Interview with Vera Aleksey, Sept. 17, 2019).

Mrs. Aleksey had to help Bayan with his household chores and tried to train him to make his bed and put his clothes away, but he could not remember to do these things on his own. (Interview with Vera Aleksey, Sept. 17, 2019). She had to constantly redirect him. (Interview with Vera Aleksey, Sept. 17, 2019). When Bayan was fifteen, David Rosengard, his counselor, felt "strongly" that Bayan needed to be placed in residential treatment. (David Rosengard Aff.). Mr. Rosengard reported that he was able to procure a placement for Bayan at a center in Westchester County, but at the last minute Mrs. Aleksey withdrew consent. (David Rosengard Aff.). Mr. Rosengard opined that "this was a tragic error." (David Rosengard Aff.).

Bayan could not cook or even prepare simple foods for himself. When he was 13 and 14 years old, he went to a babysitter after school, who would feed him. (Interview with Vera Aleksey, Sept. 17, 2019). One day, when Mrs. Aleksey came home, Bayan told her "ma, I made dinner." (Interview with Vera Aleksey, Sept. 17, 2019). Bayan had overboiled one huge pot of spaghetti, enough for ten people. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He didn't read the instructions. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey tried to teach Bayan that you don't make the whole box at once because the spaghetti swells, but he did the same thing again with rice. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan sometimes tried to help Mrs. Aleksey with groceries, and he could sometimes buy a few things for her if she called in an order ahead of him, but it was usually easier for her to do it herself. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019).

Bayan always had trouble managing money. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). He could not budget or plan his spending, and he was never responsible for paying rent or any bills. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey opened a checking account for Bayan and put some money in it, but he couldn't

manage it and it was closed. (Vera Aleksey Aff.). When Bayan wanted to move out of Mrs. Aleksey's home, she did not want him to go because he was not ready, but over the course of time he moved in with his various girlfriends and they took care of him.[1] (Interview with Vera Aleksey, Sept. 17, 2019). Those romantic relationships, however, always broke down because Bayan could not pull his own weight, emotionally, financially or otherwise. (Vera Aleksey Aff.). Mrs. Aleksey reported that Bayan was dependent on his girlfriends. (Interview with Vera Aleksey, Sept. 17, 2019).

Community Use

When Bayan started at St. Michael's, his mother had to walk him to school because it was down the block. (Interview with Vera Aleksey, Sept. 17, 2019). In high school, Bayan could walk to school, which was a block away, but this was the most sophisticated community travel Bayan mastered on his own. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey also recalled that when she had a car, he would go to work with her and she would sometimes let Bayan feed the meter, but Bayan did not understand how the meters worked and he would often fail to put the coin all the way into the meter or would put too many quarters in the machine. (Interview with Vera Aleksey, Sept. 17, 2019).

When Bayan was in high school, the special education program arranged for him to have an assessment for work abilities at the Office of Vocational Rehabilitation, but the office cancelled his appointment because he was "having tremendous difficulties" getting to the evaluation center. (Board of Education Records). Later, after Bayan dropped out of high school, Bayan wanted to learn how to work on cars, but the training center was in Long Shore, New York. Mrs. Aleksey reported that she took Bayan there in her car and that when he was younger they had often taken the bus from Flushing into New York so she was hopeful Bayan would be able to get there on his own. (Vera Aleksey Aff.). Bayan never went to the training center because he was afraid to take the bus alone. (Vera Aleksey Aff.).

Health and Safety

When Bayan was a teenager, he became suicidal and was placed on medication. (Vera Aleksey Aff.; Vera Aleksey Interview Sept. 17, 2019; Bayan Aleksey Interview Aug. 26, 2019). He could never take the right dosage on his own. (Vera Aleksey Aff.) For example, Mrs. Aleksey reported that one time when Bayan was around thirteen years old, she picked him up from therapy and they got on the train. Bayan's head dropped back and his eyes rolled into his head, so Mrs. Aleksey took him to the hospital where she learned that Bayan had overdosed. As it turned out, Bayan thought his pills were not working because they were so tiny and he took many more than prescribed. (Vera Aleksey Aff.; Vera Aleksey Interview Sept. 17, 2019; Bayan Aleksey Interview Aug. 26, 2019).

Bayan did not move out of his mother's apartment and in with his girlfriends until after the end of the developmental period, *i.e.*, after he turned eighteen. However, this information is relevant because it is consistent with other evidence of his low level of functioning during the developmental period. Such reliance on adaptive behavior in a retrospective analysis is clinically appropriate, especially where—as here—the information reveals how Bayan functioned in the community, without his primary support system—his mother. (*See* Tassé and Blume, 2018; Keyes and Freedman, 2015; Shalock et al., 2012).

Work

Bayan had what Mrs. Aleksey described as "little jobs" over the course of his life, but he could not keep them. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019; Social Security Earnings Statement for Bayan Aleksey (1987-1997)). Mrs. Aleksey reported that Bayan required supervision, even when he was 18 and 19 years old, and that if he was left alone he would mess up, get confused, and have to leave the job. (Vera Aleksey Aff.; Interview with Vera Aleksey, Sept. 17, 2019). For example, Mrs. Aleksey got him a job doing construction with a friend of hers. (Interview with Vera Aleksey, Sept. 17, 2019). The man put Bayan in charge of collecting rent. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan collected the money but instead of turning it over to his boss, he brought it home to Mrs. Aleksey. (Interview with Vera Aleksey, Sept. 17, 2019). Bayan did not understand, so when the man asked for his money, Bayan did not have it and Mrs. Aleksey had to give it back. (Interview with Vera Aleksey, Sept. 17, 2019). Similarly, Bayan collected money for delivering papers and believed the money was his to keep. (Interview with Vera Aleksey, Sept. 17, 2019). His boss got very angry and fired Bayan, but Bayan was upset because he like the job and did not understand the that money was not his. (Interview with Vera Aleksey, Sept. 17, 2019). Mrs. Aleksey recalled that even when Bayan had these little jobs, she would have to call him and remind him to go to work. (Interview with Vera Aleksey, Sept. 17, 2019). As described above, she tried to get him to enter the job corps and the vocational school, but Bayan could not navigate the public transportation system and he was not accepted into either program. (Interview with Vera Aleksey, Sept. 17, 2019).

Conclusions on Adaptive Behavior

Based on the social history records I reviewed, as well as information collected from knowledgeable informants, it is my opinion that Bayan has significant deficits in adaptive functioning in the areas of communication, functional academics, home living, community use, leisure, social skills, and work. Bayan also appears to have some deficits in other areas of adaptive functioning, but I do not have enough information to determine whether those deficits are significant. As with all persons with intellectual disabilities, Bayan also has some strengths coexisting with weaknesses. As described above, under the older definitions of intellectual disability, a person must have deficits in two of ten domains to satisfy the adaptive behavior prong, and under the current definition, a person must have a deficit in one of three domains. In Bayan's case, the adaptive behavior prong is satisfied under either definition, because he has a history of significant deficits in more than two of the ten areas in the older definition, and he has deficits in all three domains (conceptual, social, practical) in the contemporary definition.

Marjorie Brittain Hammock

Marjorie Brittain Hammock, LISW, MSW

Date: October 18, 2019

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STATE OF SOUTH CAROLINA	)	
	)	IN THE FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG	)	
	)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY,	)	
Applicant,	)	
vs.	)	AFFIDAVIT
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	
	)	

STATE OF NEW YORK
COUNTY OF NEW YORK

Comes now, Vera Lall Aleksey, before the undersigned officer duly licensed to administer oaths and swears or affirms as follows:

I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

1. I, Vera Lall Aleksey, reside in New York City, New York. I am over the age of eighteen and competent to swear oaths. I am a citizen of the United States of America.

2. I am the mother of Bayan Aleksey. I was born in Trinidad and grew up there. My father, James Lall, was an educator and served as a school head master. My mother, Esther Lall, died in childbirth when I was a young child.

3. I am fluent in English. In 1966, I came to the United States to study Cosmetology, received my license, and began to work as a hairdresser. I resided in New York City. Soon after, I met Ronald Aleksey, who was married but separated at the time.

4. In May 1968, Ronald Aleksey and I married at City Hall. Ronald was very smart and had attended college. Before we met, Ronald drank a lot of alcohol. He had lost a job in 1963 due to his drinking but he didn't drink when we met.

5. Bayan was born in 1968 at Roosevelt Hospital in Manhattan, NY. During the first four months of my pregnancy, I was very sick. When I was six months pregnant, I was hospitalized for bladder infections. My labor with Bayan lasted 35 hours and the doctors used forceps to turn Bayan. This caused his head and face to be shaped wrong and the doctors fixed it. I had to stay in the hospital for two weeks due to anemia and depression. My depression lasted for several months after I left the hospital.

6. Ronald Aleksey's prior alcoholism gradually recurred and he became an abusive alcoholic. Bayan witnessed my husband physically abusing me but Ronald never physically harmed Bayan. Ronald Aleksey and I separated in 1972 but we never divorced.

7. I had to go back to work as a hairdresser and I had to depend on baby sitters to take care of Bayan. Sometimes he went to work with me. I had to work very hard to make ends meet and did not have time for many social relationships. I only had a few friends I could trust.

8. Ronald continued to have bouts of very heavy drinking. Between his bouts of drinking he would return to live with me and Bayan and things would be good for a while. At those times Ronald tried to be a father to Bayan but he got angry that Bayan was not smart like him. Ronnie did not understand why Bayan was not learning and developing like other children. Ronald complained that Bayan was immature for his age.

9. I had to call the police to remove Ronald from my apartment many times between 1972 and 1990, when he died in a fire. On multiple occasions, restraining Orders were issued keeping Ronald Aleksey away from me and Bayan.

10. Bayan did not walk until he was around two years old. He was three years old before he could not speak more than a few syllables at a time. Even after he started using words, he put them together in a way that didn't make sense.

11. From first grade, Bayan had difficulty making friends and was bullied. When he was in first grade, the school called me and said he was unable to talk.

12. When he got older, Bayan was able to say words OK but he had a limited vocabulary. It was still confusing when he talked because Bayan would string words together that didn't belong together.

13. The entire time Bayan was in school, he had trouble with academics. He had a tutor but even that didn't help Bayan learn like other kids. He was placed in Special Education. His teachers said that he would raise his hand over and over but couldn't answer the question when called on. He was teased and mocked about being in special education. Later in high school he met some new kids in the neighborhood. When they dropped by to see if he wanted to take the bus to school with them he hid from them. He didn't want to go with them because he feared other kids would reveal he was in special ed. Bayan never played any sports or even tried out because he couldn't succeed.

14. Bayan had trouble making friends and he was afraid to go to school. He was quiet and shy never at ease with other kids. He never had kids over for dinner or to stay overnight. When Bayan got frustrated, he would get upset but Bayan never started a fight. He tried to buy friends. One time he took money from my purse and gave it to kids so they would like him. He was very gullible and I was always afraid other kids would take advantage of him. One of his Special Ed teachers told me that Bayan was frequently used by other students and "left holding the bag."

15. Bayan was different from other kids. He used to cry and ask me, "Why did God make me like this, so different from everyone else?" He was very dependent on me and was happiest at home, with just the two of us. Bayan lacked judgment and I tried to help him understand how to behave when he was not at home.

16. When Bayan was about twelve years old, he started going to counseling at Queens Child Guidance Center. Mr. Rosengard was his counselor. Growing into teenage years was really hard for Bayan and he got into trouble at school where he had no friends, feared the other kids, and had a really hard time controlling himself. At one point he became suicidal was placed in residential treatment. Bayan has needed medication

since that time but he was never able to take the right dosage at the right time on his own.

17. Even when he got older, Bayan was not able to make and keep any kind of appointment on his own.

18. When he was approximately fifteen years old, Bayan's counselor, Mr. Rosengard recommended a long-term residential treatment center in Westchester County, New York. But I had talked to another parent whose child had gone there and didn't like it so I said no. In hindsight, that was a big mistake. Now, I believe that consistent long-term treatment could have been a critical turning point for Bayan.

19. Bayan was never able to finish high school. He wanted to learn to work on cars but the training center was out on Long Shore, NY. I took him in the car to visit and enroll at the training center. When he was younger, Bayan and I took the bus from Flushing into New York so I hoped he could make the trip to Long Shore alone but he was afraid to take the bus by himself.

20. Bayan sometimes had little temporary jobs. He tried to work at a service station but it didn't work out there or at a nearby grocery store. He doesn't have the ability to do something alone. Even when he worked at the canteen in prison, he had Mr. Roof to closely supervise him.

21. Bayan wanted to help me with chores at home. He kept his clothes and room very neat. I taught him how to make the bed and fold his clothes. This was how he helped at home. He was not able to cook for himself. Once he tried to surprise me by cooking dinner. He overcooked enough pasta for 10 people but didn't have enough canned sauce. Later, he was able to make deviled eggs that were OK. Bayan tried but he was not able to successfully do grocery shopping, though he did pick up groceries if I called in an order.

22. Bayan always had trouble with managing money. He didn't plan his spending and he rarely had any money to budget. He was never responsible for rent or utility bills. I opened a checking account for him once but he couldn't manage it and I had to close it after a short time.

23. Later, when Bayan became involved with girls, he chose young women with families, children, or pets. He wanted to be part of a real family. He had wanted that all his life. Bayan told the women that I was rich so they would go with him. I always laughed and told them the truth – that I have been a single woman of limited means for a long time.

24. Bayan never had a place of his own or a car of his own. He always got shelter and vehicles through women but he was never able to pull his own weight to maintain those relationships.

25. Since Bayan was arrested I have spent countless hours making calls to get records and assistance for him. I have helped him find cases and write legal papers, too.

26. I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

Further, Affiant sayeth naught.

Vera Lall Aleksey — 12/30/18

Affiant, Vera Lall Aleksey — Date

Sworn to and subscribed before me
this 30th day of December 2018.

NOTARY PUBLIC FOR NEW YORK

My Commission Expires:

4/26/2019

DEBRA A. NELSON
Notary Public, State of New York
No. 01NE6023576
Qualified in Queens County
Commission Expires April 26, 2019

STATE OF SOUTH CAROLINA)	
)	IN THE FIRST JUDICIAL CIRCUIT
COUNTY OF ORANGEBURG)	
)	IN THE COURT OF COMMON PLEAS
BAYAN ALEKSEY,)	
Applicant,)	
vs.)	
)	
STATE OF SOUTH CAROLINA,)	
Respondent.)	
)	

STATE OF NEW YORK
COUNTY OF QUEENS

Comes now, Lester David Rosengard, before the undersigned officer duly licensed to administer oaths and swears or affirms as follows:

I declare under penalty of perjury that the information contained in this affidavit is true and correct and based on my personal knowledge.

1. I, Lester David Rosengard, reside in Flushing, New York. I am over the age of eighteen and competent to swear oaths.

2. I am a ~~retired~~ LOR Licensed Clinical Social Worker. I am ~~retired~~ in good standing in the State of New York.

3. I provided individual and group therapy to Bayan Aleksey from 1980-1985 and advised his mother, Vera Aleksey.

4. Group therapy consisted of four to five boys at most. It was intended to help the youngsters learn social skills so they could make friends. They played board games and made models. Bayan loved making models but he was never able to complete one. He was often frustrated in group therapy because he was not skilled in making models and playing board games like the other boys.

5. Bayan was very sensitive to any criticism from the other boys. He was never able to relax in these sessions. When Bayan got frustrated, he would get

agitated and somewhat hyper but he never started a fight.

6. Bayan's speech was OK but he had a limited vocabulary. He also lacked judgment. This was apparent, even to the other kids. In a therapy group titled "Using Your Head," the other boys had better judgment than Bayan and they tried to help Bayan develop the judgment he lacked.

7. Group therapy was supervised so the other boys could not bully Bayan. However, Bayan was obviously naïve and gullible. Bayan had trouble understanding rules so it was hard for him to follow rules. I believe his inability to comprehend rules was sometimes misinterpreted as rebelliousness.

8. Bayan was extremely dependent on his mother, who constantly monitored and protected him. Throughout the time I counseled Bayan, she kept him close to her and in the home as much as possible. She oversaw all of his daily activities.

9. Rather than help Bayan learn to manage his limitations, Mrs. Aleksey made Bayan ashamed of his limitations. She allowed him to cover up his academic limitations by letting him skip school and stay at home. She enabled him to hide his extreme anxiety about being separated from his mother by developing a myth that he was "protecting" her.

10. Bayan's father, Ronald Aleksey, was an abusive alcoholic. He and Vera were separated when Bayan began therapy in 1980. I encouraged Mr. Aleksey to be more supportive of Bayan but he berated Bayan for his poor academic performance. Mr. Aleksey did not seem capable of understanding that Bayan was making poor grades because he was unable to do age and grade level schoolwork.

11. When Bayan was approximately fifteen years old, I felt strongly that he needed to be in a residential treatment center in Westchester County. I was able to arrange a placement there for Bayan. However, at the last minute, his mother Vera Aleksey withdrew her consent. I believe this was a tragic error.

12. Bayan was truthful but he lacked the ability to understand the consequences of his own actions or actions of other people. I feel very badly that Bayan was never able to comprehend that there were people who would use his gullibility and get him into trouble.

Further, Affiant sayeth naught.

Affiant, Lester David Rosengard — 09/20/2018 Date

Sworn to and subscribed before me
this 20 day of September 2018.

NOTARY PUBLIC FOR NEW YORK

My Commission Expires:

VINCENT C PAPA JR.
NOTARY PUBLIC, State of New York
No. 01-PA9820111
Qualified in Queens County
Term Expires March 30, 2022

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG BAYAN ALEKSEY *Applicant*, v. STATE OF SOUTH CAROLINA *Respondent.*	IN THE COURT OF COMMON PLEAS Case No. 2015-CP-38-764

AFFIDAVIT OF ALLISON FRANZ

1. I, Allison Franz, am a second-year law student at Cornell Law School, where I participate in the Cornell Capital Punishment Clinic. I began work with Bayan Aleksey's attorneys on Mr. Aleksey's case in June 2019.

2. In September 2019, I was instructed to conduct a readability analysis of Bayan Aleksey's correspondence to South Carolina Department of Corrections staff, dated February 20, 2012. This piece of Mr. Aleksey's writing was referenced in the report of Dr. Alicia Hall's December 27, 2018 diagnostic evaluation report.

3. My research on readability analyses revealed that several tests exist to determine the readability grade level of a piece of writing. Readability tests measure the grade level at which a piece of writing is written. Research indicates that the Flesch-Kincaid test is most frequently used to analyze readability. Lih-Wern Wang et al., *Assessing Readability Formula Differences with Written Health Information Materials: Application, Results, and Recommendations*, 9 Research in Social and Administrative Pharmacy 503, 507–08. The Flesch-Kincaid analysis is performed by inputting text into an online readability calculator or through Microsoft Word, which includes software to perform the analysis.

4. Courts also frequently use the Flesch-Kincaid test to analyze readability, and have performed the analysis by inputting text into online readability calculators found at www.readabilityformulas.com and other sites. *See, e.g.*, *Davis v. Moroney*, 857 F.3d 748 (7th Cir. 2017); *United States v. Montgomery* (W.D. Tenn. 2014) (using the Flesch-Kincaid readability analysis to assist in the determination that the defendant satisfies the first prong of an intellectual disability determination).

5. I performed a Flesch-Kincaid analysis of Mr. Aleksey's February 20, 2012 correspondence by copying and pasting the text into the calculator found at www.readabilityformulas.com. This analysis yielded a Flesch-Kincaid Grade Level score of 4.9, and revealed that Mr. Aleksey's writing is at a fifth-grade level. *See* Exhibit 1.

6. I performed another analysis of the same piece of writing in Microsoft Word. The Word Flesch-Kincaid analysis again revealed that Mr. Aleksey's writing is at a fifth-grade level.

Further Affiant sayeth naught.

Allison Franz

11/4/2019
Date

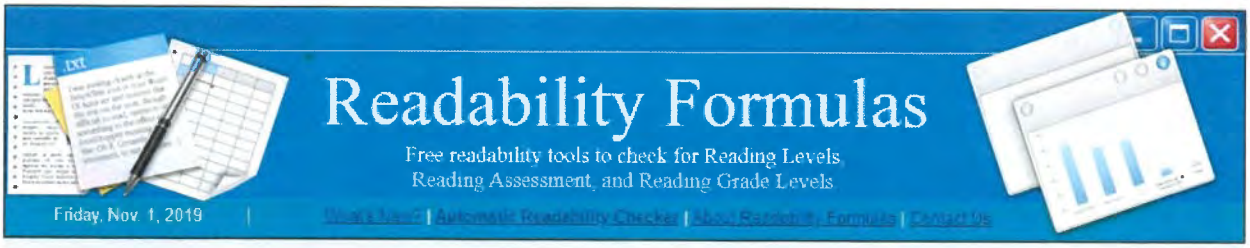
Sworn to and subscribed before me
this 4th day of November 2019.

NOTARY PUBLIC FOR
NEW YORK

My Commission Expires:

9/25/21

EXHIBIT 1



[HOME]

Check Your Readability:
Check Text Readability NOW



Free Readability Calculators

Learn about Readability Formulas:
Dale-Chall Formula
Flesch Reading Formula
The Fry Graph
SPACHE Formula
[View All]

Readability Help:
[View All Articles]

Writing Tips:
[View All Articles]

English Writing Products:
StyleWriter software

Ad closed by Google
Stop seeing this ad
Why this ad? ▷

Instant Grammar Checker
Easily fix typos, grammatical mistakes, and other common issues before you hit Send.
Grammarly
OPEN

Google™ Custom Search
Search

Text Readability Consensus Calculator

Purpose: Our Text Readability Consensus Calculator uses 7 popular readability formulas to calculate the average grade level, reading age, and text difficulty of your sample text.

Your Results:

Your text: I wanted to let you know that I started to wax the ...(show all text)
unit this past weekend I waxed the whole bottom o the unit. Please, if possible come take a look. It looks good!!! Because of Cpl: Pringle Officer: Miller they got me a buffer from the yard because no one could find the one I normally use in our building. Sgt: Nickles tried to find our buffer as well Cpl: Scarf but could not also find it. Cpl: Pringle, Officer Miller help them get one for me. This weekend I◆ll do the top tier and other parts of the wing. I have to get more wax from Cpt: Brightharp and some white buffing pads. I wanted to please ask if you can allow. Sgt: Nickles, Cpl: Slater, CPL: Pringle, Sgt: Stags, Cpl: Steins, Sgt: Long, Lt. Williams, Lt. Wright, Sgt. Tumbine, Sgt Wentz access to a buffer when its locked up andmost of all on the weekend when Captain Brightharp is not here. And lets say that the above supervisors are not here can officers, Miller, Parker, Butler have access. Please consider my request. I no longer ask Sgt. Pool to do anything because she won◆t do nothing. Sgt. Poole should not be given credit, Sgt: Poole has not helped in no way on how b-side is. It◆s because of B1, A1, B2 shifts that this place looks good. Anyway, if you can come look at how the floor came out I think you will be happy with it. As always, thank you for your time and understanding always.

Flesch-Kincaid Grade Level: 4.9
Grade level: Fifth Grade.
[f] [a] [r]

Appendix G

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
BAYAN ALEKSEY, #5059	)	C/A No. 2015-CP-38 -764
	)	(Capital Case)
Applicant,	)	
vs.	)	ADDITIONAL RESPONSE
	)	TO APPLICANT'S OFFER
STATE OF SOUTH CAROLINA,	)	TO RELY ON AFFIDAVITS
	)	
Respondent.	)	
	)	

Applicant gave notice a few days prior to the hearing scheduled for March 24, 2022 of his intent to rely on certain affidavits. This Court considered the offer of affidavits at the hearing. The only objection by Respondent was to the affidavit of Marjorie Hammock. Respondent argued the Court should not accept the affidavit in lieu of live testimony as the affidavit reflected contested matter and opinion. When revisited at the end of the hearing, Applicant advised this Court that they were unable to reach Ms. Hammock to secure her presence at the hearing and confirmed that, to their knowledge, she would not be available for either testimony at a later date or deposition. The Court left the record open and requested Respondent present an additional response. Respondent now submits this additional response and maintains its objection to the Hammock affidavit. Respondent additionally sets out both procedural and substantive reasons for its objection as follows:

1. In his notice, Applicant asserted that he "intend[ed] to offer proof in support of his post-conviction relief claims through affidavits of certain witnesses *in lieu of direct examination* of those witnesses at the evidentiary hearing scheduled to commence March 24, 2022." (Notice of Intent, p. 1) (emphasis added). He identified 5 affidavits upon which he intended to rely: Dr. David Price, Marjorie Hammock, Vera Aleksey, Lester David Rosengard, and Allison Franz.

(Notice of Intent, p. 1). However, Applicant did not rely on these affidavits. In fact, Applicant called Dr. Price and Ms. Franz and both were subject to cross-examination. Consequently, the stated desire to rely on these affidavits "in lieu of direct examination" was abandoned by Applicant's conduct at the hearing. Further, Applicant did not rely solely on the affidavits from Ms. Aleksey[1] or Mr. Rosengard for any point or assertion apart from evaluation. Mr. Rosengard's affidavit was merely part and parcel of the information provided to Dr. Hall for the evaluation, and could be admissible as part of the basis for Dr. Hall's opinion. *See generally* Rule 705, SCRE ("The expert may in any event be required to disclose the underlying facts or data on cross-examination."). At any rate, the intent to rely on the affidavits apart from the evaluation was abandoned by Applicant's conduct at the hearing. That left remaining the affidavit from Ms. Hammock – the only affidavit to which Respondent objected.

2. Applicant asserted that Ms. Hammock was not available to give testimony at all. Applicant asserted that Ms. Hammock could not be reached and indicated a deposition and or testimony at a subsequent hearing would not be an option, citing her advanced age and Applicant's inability to reach her for appearance. In essence, Applicant conceded that nothing in Ms. Hammock's affidavit and report has been or can be subjected to the crucible of cross-examination.

3. Ms. Hammock was the only affiant who offered an opinion on a contested fact (adaptive functioning in the development period) based on a contested basis (incomplete evaluation and/or bias in consideration of information).

4. Further, no expert testified that he or she relied upon the Hammock report and opinion. In fact, though Applicant was obligated by Judge Early's order to provide all necessary

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[1] The affidavit from Vera Aleksey is dated December 30, 2018. Nothing shows that the affidavit was submitted to Dr. Hall though it would have been available for the DDSN report that was not filed until April 1, 2019.

documents to DDSN no later than November 1, 2018, (*see* Scheduling Order dated June 14, 2018),[2] Applicant did not provide a report from Ms. Hammock or any opinion from Ms. Hammock at any time for the required evaluation.[3] Nor did Applicant request reconsideration by Dr. Hall based on Ms. Hammock's report or opinion. Application's expert, Dr. Price, did not opine as to any review and/or reliance on Ms. Hammock's report or opinion. To the contrary, Dr. Price plainly stated he did not have an opinion as to intellectual disability.[4]

5. As Respondent argued during the hearing, S.C. Code § 17-27- 80 contemplates the potential for use of affidavits during post-conviction relief proceedings: "The court *may* receive proof by affidavits, depositions, oral testimony or other evidence and may order the applicant brought before it for hearing." (emphasis added). The Supreme Court of South Carolina has underscored the decision whether to admit affidavits is committed to the sound discretion of the PCR judge. *Simpson v. Moore*, 367 S.C. 587, 607, 627 S.E.2d 701, 712 (2006) (citing *Beckett v. State,* 278 S.C. 223, 224, 294 S.E.2d 46, 47 (1982)). *Simpson* is instructive. The South Carolina Supreme Court found no cause to reverse the discretionary ruling admitting a mix of depositions and affidavits "in lieu of live testimony," where such admission did not prejudice the respondent. *Id.* at 607-08, 627 S.E.2d at 712. Of note, the Court observed that "[m]ost of the relevant witnesses

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[2] As Dr. Hall indicated in her testimony to this Court at the March 24, 2022 hearing, she requested and received documents after this time. Dr. Hall also indicated that she would not reject any materials that Applicant would want her to review.

[3] In fact, the report is dated October 10, 2019, months after the DDSN report was filed on April 1, 2019, and *references as a source* Dr. Hall's report. As Dr. Hall testified, she was never advised there would be additional material coming nor was there a request from Applicant to wait for additional material before issuing a report.

[4] It is unclear whether Dr. Price reviewed the report and found it insufficient or Applicant failed to provide the report to Dr. Price for consideration much like Applicant failed to provide the report to Dr. Hall for consideration (or reconsideration). At any rate, the affidavit is irrelevant to the testimony of either Dr. Price or Dr. Hall.

testified at the PCR hearing and were cross-examined by the State." *Id.* at 608, 627 S.E.2d at 712. Further, the *Simpson* Court noted that the PCR judge allowed "the State the opportunity to submit additional testimony and affidavits countering the evidence presented by Simpson." *Id.*

6. Respondent submits that acceptance of the Hammock affidavit would be an abuse of discretion because the affidavit offers a report rife with inadmissible hearsay[5] and includes an opinion that goes to a necessary prong of the intellectual disability diagnosis. Applicant simply asks the Court to accept this inadmissible hearsay and opinion without the challenge and testing that adversarial proceedings provide. The best "counter" to such an opinion is cross-examination. While the State may point to obvious deficiencies in the methodology expressed in the report (and does so below), lack of cross-examination inappropriately insulates Applicant's expert from the rigors of defending the opinion. This is especially troubling here were the subject matter is so obviously subjective and contested.

7. The burden is on the applicant in post-conviction relief. *See* Rule 71.1 (e), SCRCP. In particular, the burden is on an applicant to prove intellectual disability in the capital case context. *Franklin v. Maynard*, 356 S.C. 276, 279-80, 588 S.E.2d 604, 606 (2003) ("the defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence"). If Applicant's witness was unavailable, Applicant should have taken steps to preserve the testimony. Applicant is in civil litigation and has the civil discovery rules available to him in these capital proceedings. S.C. Code § 17-27-150. Applicant has shown no basis (and there appears to be none) why his own failure to preserve evidence should be used to his advantage. *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

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[5] Rule 705, SCRE (expert may testify without revealing "underlying facts or data").

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).[6]

8. Moreover, courts have recognized the importance of presenting witnesses who would opine on adaptive functioning so that the courts may accurately and carefully assess credibility:

> Many courts have noted, correctly, that "[a]daptive behavior is a broader category, and more amorphous, than intellectual functioning." Because of the relative subjectivity of the adaptive behavior analysis, the importance of clinical judgment becomes greater under prong two than under prong one. When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility.

United States v. Candelario-Santana, 916 F. Supp. 2d 191, 211–12 (D.P.R. 2013) (citations omitted). Indeed, our Supreme Court has noted the difference credibility can make when considering the presentation of two witnesses with different conclusions on adaptive functioning:

> ...the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptions" required by the statutory definition of "mental retardation." The court also discounted some of [Blackwell's expert] Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."

State v. Blackwell, 420 S.C. 127, 141–42, 801 S.E.2d 713, 720 (2017).

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[6] In his notice, Applicant suggests that the State is free to call the affiants as their witnesses. (Notice of Intent, p. 2). As a practical matter, the notice of intent to rely on the affidavits with such suggestion was not made until March 22, 2022 for the March 24, 2022 hearing, hardly ample time. Second, it is not the State's burden to produce Applicant's witnesses. And third, Applicant conceded that the witness's appearance could not be secured by counsel for the hearing. If he could not produce his own witness, it is difficult to see how the opposing party could. At any rate, Applicant's argument that his failure to produce the witness should be held against the State lacks a basis in either theory, logic or law.

The fact that Applicant failed to present this witness or otherwise preserve the testimony through deposition where cross-examination is allowed, does not, under any acceptable theory, allow him to offer a simple affidavit to establish the truth of a contested matter.

9. Substantively, there are further criticisms of the opinion clearly demonstrated in the untested affidavit allegations and conclusion. The methodology reflected in the affidavit is largely inconsistent with recognized professional manuals or best practices. For instance, it is inescapable that the majority of the report focuses on information from one source, Applicant's mother, and heavily on one particular interview with that one source, noted as "Interview with Vera Aleksey, Sept. 17, 2019." Further, the opinion appears wholly subjective without any reference to any standardized assessment or individual challenges to Applicant directly; reflects an assumption of intellectual disability and effort to support the assumption; and, reflects (in considering the fullness of the record before this Court) the rejection and/or discounting of known evidence near the relevant developmental period reflecting on individual capacity outside the control and connection to Applicant's mother. This is error.

Courts often look to relevant professional associations to weigh offered evidence of intellectual disability. *See, e.g., Hall v. Florida*, 572 U.S. 701, 721 (2014) ("These views do not dictate the Court's decision, yet the Court does not disregard these informed assessments."). In *United States v. Davis*, 611 F. Supp. 2d 472, 491 (D. Md. 2009), the federal district court noted and discussed known resources for consideration. It noted that the American Association on Intellectual and Developmental Disabilities ("AAIDD") (formally "AAMR" or the American Association on Mental Retardation), issued a manual that expressed a preference for "standardized

measures." *Id.* Further, the *Davis* court recognized guidance from Dr. John Gregory Olley[7] who had worked within professional structures "toward the establishment of practice standards that would allow courts to judge more objectively whether an evaluation or testimony bearing on the question of mental retardation followed the best practices of the psychology profession." *Id.* at 492. Dr. Olley had opined that "typical procedures for assessing adaptive functioning" do not work-well in this backward looking review. *Id.* (citing Def. Ex. 17, J. Gregory Olley, *The Assessment of Adaptive Behavior in Adult Forensic Cases: Part 2,* PSYCHOLOGY IN MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES (American Psychological Association/ Division 33, Washington, D.C.), Fall 2006). The *Davis* court found persuasive and helpful these steps as expressed by Dr. Olley to amass appropriate data: "(1) interview the defendant; (2) test the defendant's knowledge; (3) test the defendant's performance; (4) interview family members, neighbors, friends, and former employers; (5) administer an adaptive behavior scale to third-party reporters; (6) administer an adaptive behavior scale to the defendant; (7) examine objective archival information (e.g., school records, eligibility tests for Social Security benefits, etc.); (8) review subjective archival information (comments by teachers, coaches, counselors, etc.); and (9) apply clinical judgment." *Id.* (citing Def. Ex. 17, Olley III at 4–5).

10. Of particular note in this case when considering the above guidance, in contrast to Dr. Hall's interview and testing of Applicant's actual knowledge, Ms. Hammock largely ignores Applicant. Dr. Hall asked Applicant – away from any support sources – how to do some things that may reflect his level of functioning; however, Ms. Hammock did not ask Applicant anything

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[7] As another federal court noted, Dr. Olley "is particularly experienced in the issue of *Atkins* evaluations. He has published articles on the retrospective assessment of adaptive functioning in *Atkins* cases and has developed criteria for the use of the ABAS-II standardized measure of adaptive behavior." *United States v. Wilson*, 170 F. Supp. 3d 347, 381 (E.D.N.Y. 2016).

in this vein (at least as far as we know from the simple affidavit assertions). While a "veil of competency" can be a danger in relying upon information from the subject, the subject cannot fake actual knowledge.[8] For example, Applicant explained to Dr. Hall the process of money orders and budgeting, cooking and doing laundry, away from his mother.[9] This is consistent with having the *ability* before the end of the developmental period, but not the *opportunity* to demonstrate that ability before the end of the developmental period. Further, there appears to be no objective structure to analyzing the information Hammock received, not even the information she received from her primary source. *See* Caroline Everington, *Challenges of Conveying Intellectual Disabilities to Judge and Jury*, 23 Wm. & Mary Bill of Rights Journal, 467, 469 (2014) ("Both manuals [from the AAIDD and the American Psychiatric Association] suggest that reliability is increased by using a combination of informal clinical assessments and standardized assessments of adaptive functioning.").

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[8] The Report at p. 5 reflects what appears to be an assumption of intellectual disability which shows a bias and a lack of detached inquiry applying accepted principles to arrive at a conclusion later. Ms. Hammock writes, "Bayan, like many people with intellectual disability, relies on masking to conceal his deficits and limitations," then goes on to reflect surface observations and unsupported conclusions. Most strikingly, she asserts, "his girlfriends... took advantage of his deficits," though she has no citation to support that assertion, but not surprisingly, as the trial records show just the opposite – Aleksey often took the lead in the relationships ending in financial detriment *to the girlfriends*. (*See* Respondent Exhibits: Trial Testimony of Theresa McCann; Jaime Farrell; Sarah Pivero).

[9] Dr. Hall plainly noted in the DDSN report that "there is no record of a formal assessment of his level of adaptive functioning." (Court Exhibit 2, DDSN Report, p. 13). Further, Dr. Hall did not need to "rule out" deficits in adaptive functioning as Applicant did not meet the first prong of intellectual disability. Even so, Dr. Hall opined that the information gathered from Applicant and from the records supplied by Applicant did not support the more subjective but occasionally useful prong of the diagnosis in certain cases. *See generally* James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1305, 1329–30 (2018) (noting that low IQ scores is insufficient to show intellectual disability and that "the goal of th[e deficits in adaptive functioning] prong of the definition is to limit the diagnosis of intellectual disability to people who have an actual, significant, disability.").

11. Also of note, the record shows, independent of the crime of murder, relationships with women and Applicant's dominance in the relationships. Though these relationships often ended in schemes or fraud, there is information about his ability to function in business and banking independent of the eventual crimes. There is even information in the record that Applicant navigated through the car buying process, (*see* Respondent's Exhibits, Trial Testimony of Theresa McCann, Sarah Pivero and Marie Moran), yet this information is omitted from consideration based on the report. *See* Everington, *supra.* at 471 ("Key to this is the context of adaptive skill assessment-the individual's *actual performance* in community settings.") (emphasis added); *see also* James W. Ellis et. al., *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases,* 46 Hofstra L. Rev. 1305, 1332 (2018) ("determining whether an individual has significant limitations in adaptive skills involves a wider-ranging inquiry... the clinician will frequently employ a standardized instrument of assessment" and "will inquire about the subject's adaptive functioning by interviewing individuals who have observed him or her in childhood or in adult life."). Respondent does not suggest reliance on the mere fact of the resulting crimes, rather, Respondent makes the point that there is ample information on ability and independence apart from completion of those crimes. Nor does Respondent suggest that any one strength alone is dispositive, whether being the ability to pay pills, cook or do laundry, but none of those ability seemed to have been fairly or fully considered. That goes to credibility. Again, as Dr. Olley cautioned in his writings, it is preferable to obtain as much information as possible, though the sources in this type of backwards looking review will all be "imperfect." *Davis,* 611 F.Supp.2d at 492 (*quoting* Olley, *supra*). What the affidavit shows, though, is insufficient consideration of available sources of information. Thus, the conclusion as presented is unreliable and not credible.

12. In sum, it stand out that Dr. Hammock's methodology is flawed, result oriented, and incomplete. The affidavit should not be accepted when Applicant failed to present the witness for the State, and for the Court, to question.

CONCLUSION

For all the foregoing reasons, Applicant has not shown that the Hammock affidavit should be accepted in lieu of live testimony. The Court should exercise its discretion to reject the offered affidavit in light of the foregoing.

To the extent the Court should accept the affidavit, the methodology outlined in the affidavit undermines the credibility of the stated opinion for the reasons cited above. The opinion should be deemed neither credible, not reliable, nor persuasive

Respectfully Submitted,

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Attorney General of South Carolina

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
S.C. Bar No. 14244

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
S.C. Bar No. 4806

By: _____

By: _____

Post Office Box 11549
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ATTORNEYS FOR RESPONDENT

May 23, 2022

STATE OF SOUTH CAROLINA COUNTY OF ORANGEBURG	)	IN THE COURT OF COMMON PLEAS) IN THE FIRST JUDICIAL CIRCUIT
Bayan Aleksey, S.C.D.C. No. 5059, Applicant, vs State of South Carolina, Respondent.	)	**Case No. 2015-CP-38-764** **(Capital Case)** **CERTIFICATE OF SERVICE BY MAIL**

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the *Additional Response to Applicant's Offer to Reply on Affidavits* in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Lindsey S. Vann, Esquire
Brandan V. Winkle, Esquire
Justice 360
900 Elmwood Avenue, Suite 200
Columbia, South Carolina 29202

Elizabeth Franklin-Best, Esquire
2725 Devine Street
Columbia, South Carolina 29205

DATED this 23rd day of May, 2022.

Angela Brown, Legal Assistant to
Melody J. Brown, Senior Assistant Deputy Attorney General

Appendix H

Mary Poole
State Director
Patrick Maley
Deputy Director
Rufus Britt
Associate State Director
Operations
Susan Kreh Beck
Associate State Director
Policy
Lisa B. Weeks
Chief Financial Officer

SOUTH CAROLINA Department OF Disabilities AND Special Needs

3440 Harden Street Ext (29203)
PO Box 4706, Columbia, South Carolina 29240
803/898-9600
Toll Free: 888/DSN-INFO
Website: www.ddsn.sc.gov

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Eva R. Ravenel
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Sam F. Broughton, Ph.D.
Chris G. Neeley
Lorri S. Unumb

March 28, 2019

Ms. Winnifa B. Clark
Orangeburg County Clerk of Court
P.O. Box 9000
Orangeburg, SC 29116

RE: Bayan Aleksey, #5059
C/A No.: 2015-CP-38-764

Dear Ms. Clark:

Enclosed please find the South Carolina Department of Disabilities and Special Needs Evaluation pursuant to court order dated May 31, 2017 and filed June 7, 2017.

If you have any questions, please feel free to contact me at (803) 898-9683 or by email at tvanderbilt@ddsn.sc.gov.

Sincerely,

Tana Vanderbilt

Tana Vanderbilt
General Counsel

cc: The Honorable Judge Edgar W. Dickson, Judge-1st Judicial Circuit
Ms. Melody J. Brown, Esq., SC Attorney General's Office
Ms. Elizabeth Franklin-Best, Esq., Attorney for Mr. Aleksey
Ms. Lindsey Vann, Esq., Attorney for Mr. Aleksey
Steve Von Hollen, Director-Clinical Services, DDSN

Mary Poole
State Director
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EVALUATION FOR THE PRESENCE OF MENTAL RETARDATION/INTELLECTUAL DISABILITY PURSUANT TO ATKINS v. VIRGINIA

Name: Bayan Aleksey
Date of Evaluation: 12/27/2018
Place of Evaluation: Kirkland Correctional Center
Columbia, SC

Gender: Male
Race: Caucasian
Age: 50 years

Examiner: Alicia V. Hall, Ph.D.
Licensed Clinical Psychologist

PURPOSE OF EVALUATION

This evaluation was conducted pursuant to the United States Supreme Court's decision in the *Atkins v. Virginia*, 536 US 304 (2002), Department of Disabilities and Special Needs (DDSN) was required to evaluate Mr. Aleksey to determine whether he is suffering from an Intellectual Disability. The evaluation was necessary because the Defendant Bayan Aleksey Jr., has alleged that he is ineligible for the death penalty because he suffers from an intellectual disability. The standard to be used in this evaluation, consistent with South Carolina law and *Franklin v. Maynard*, 356 SC 276, 588 S.E.2d 604 (2003) which defines intellectual disability as "significant subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." SC Code Ann. Section 16-3-20.

LIMITS OF CONFIDENTIALITY

Before the interview started, Mr. Aleksey was advised of the purpose of the evaluation, and that the results and content of the evaluation would be communicated to his attorney(s), the SC Attorney General's Office, and the judge. In addition, he was informed of the possibility that the examiner might be called to testify regarding the content and results of the evaluation.

Referral Form, Psychological Evaluation, and IEP dates 6/21/1979, 7/1979, 7/17/1979
Report of Suspected Child Abuse Maltreatment undated
School records dated 1980
School records dated 1981
School records dated 1982
School records dated 1983
School records dated 1985

TESTS ADMINISTERED

Stanford-Binet Intelligence Scales– Fifth Edition (SB-V)
St. Louis University Mental Status Examination (SLUMS)

RELEVANT HISTORY

History in this section is as provided by Mr. Aleksey in the interview on 12/27/2018 and supplemented by available records. He appeared to be an adequate historian.

FAMILY HISTORY

Mr. Aleksey is a 50-year-old Caucasian male of Trinidadian and Russian decent. He was born and raised in New York, NY. He reported he was the child of Ronald and Vera Aleksey. He reported his parents separated when he was in elementary school. He reported his father was an alcoholic and would become aggressive in the home. He reported he has witnessed physical violence between his parents. Collateral information confirms his report of domestic violence. Mr. Aleksey had court ordered weekend visitations with his father. He also reported as he got older he and his father had verbal altercations. He denied there were physical altercations between him and his father. Mr. Aleksey reported his father would verbally berate him, often about his academic performance. He summed up his relationship as his father as "We just fought all the time." Mr. Aleksey stated he is the older of the two siblings. He reported he has a younger half-sister. He stated they don't have any contact. He reported his father is deceased. His father died when he was approximately 22 years old. He stated his mother lives in a rent controlled building in New York City. Mr. Aleksey has been incarcerated since his arrest for the murder charge. He stated has spent most of his incarceration at Lieber Correctional Institute in Ridgeville, Dorchester County, South Carolina. He reported he and his fellow death row inmates were moved to Kirkland Correctional Institution in Columbia, Richland County, South Carolina approximately 18 months ago due to the security issues at Lieber.

According to the William S. Hall Psychiatric Social Work Assessment dated 7/08/1998, Mrs. Aleksey reported her son was the result of an unplanned pregnancy. She reported she did not experience complications during the pregnancy and received appropriate prenatal care. Mr. Aleksey was born with the use of forceps. Mrs. Aleksey reported he met all his early developmental milestones within the typical developmental period, with the exception of speech. It was reported in the social history completed by K. Fisherman (2/24/1976) that Mr. Aleksey had articulation difficulties until he was three years old. Mrs. Aleksey reported he "was afraid of being around a lot of children." His mother related her son would not speak at school. He required speech therapy to address this issue. She recalled he seldom spoke in early elementary school. Mr. Aleksey said he has never been a victim of physical or sexual abuse. However his school record (1979 psychological evaluation) indicated Mr. Aleksey reported he had been hit by his father, which left visible bruises on his face to the school psychologist. The record indicated the school reported the incident and it was investigated, but DSS determined there was no abuse.

EVALUATION PROCEDURES

Mr. Aleksey was interviewed for approximately ninety minutes on 12/27/2018 by the undersigned. The Stanford-Binet Intelligence Scales– Fifth Edition and the SLUMS were also administered on that date, requiring approximately two hours and forty minutes in total.

SOURCES OF INFORMATION

Records from South Carolina Department of Corrections, dated 1998-2012
SC State Supreme Court Appeal Aleksey v. South Carolina Volume 1- 14
Declaration of Barbara Zingalis dated 6/5/2015
Declaration of Donna Schwartz Maddox, MD dated 6/8/2015
Declaration of Daniel Hicky Grant, EdD (including raw test data) dated 5/27/2015
Affidavit of Lester David Rosengard, LCSW dated 9/20/2018
Mr. Aleksey' Birth Certificate
Records from Roosevelt Hospital, New York, dated 1968-1971
EEG Report by Milton Tarlau, MD PC date 11/20/1978
Records from Queens Child Guidance Center including:
- Financial Records
- Letters from David Rosengard, CSW dated 9/9/1984, 2/14/1985, and 3/11/1998

Records from William S. Hall Psychiatric Institute Forensic Unit including:
- Order for Competency Evaluation dated 6/4/1998
- Outpatient Appointment Sheet
- Forensic Unit Outpatient Evaluation by Richard L. Frierson, MD dated 7/31/1998
- Social Work Assessment conducted by Ms. Carol M. David, LISW with Mr. Aleksey's mother, on 7/8/1998
- Supplemental Progress Note by psychologist name illegible dated 7/8/1998
- Psychological Evaluation report by Jeffery Vidic, PhD undated
- Physical Examination note and Neurological Consultation response from Dr. Vallini dated 7/9/1998
- Neurological Consultation request written by Dr. Frierson dated 6/30/1998
- Record from Palmetto Imaging of MRI results dated 7/9/1998
- Records from SCDMH Clinical Laboratory dated 7/9/1998

Long Island Jewish Hillside Medical Center Inpatient Service Admission Note date 5/17/1983
Long Island Jewish Hillside Medical Center Psychological Evaluation Report date 7/12/1983
Long Island Jewish Hillside Medical Center Inpatient Service Discharge Summary date 7/1/1983
Long Island Jewish Hillside Medical Center Adolescent Day Hospital Psychoeducational Evaluation date 10/27/1983
School Records including
- SRA Assessment Survey dates 3/1/1977 & 4/10/1978
- Records from Board of Education, City of New York, District 25 dates 1/7/1983-2/17/1987
- Transcript of Junior High School, Grades 8, 9, and summer of 1983
- Report Cards from Junior High School
- Report Card from Public School 21
- Progress Reports from St. Michael's Elementary School date 1977-78, 1978-79
- Psychological Evaluation and Referral Form dates 2/28/1975
- WISC Record Form dated 11/26/1974
- Individualized Education Program (IEP) dated 9/1982
- Psychological Evaluation by Division of Social Education dated 1975
- School records dated 1974-1976

EDUCATIONAL HISTORY

Mr. Aleksey reported he did not graduate from high school. He recalled he dropped out in the 9th grade. He stated he dropped out because "school was hard for me. It was hard for me to concentrate." He stated he was a special education student. He was unsure why he was in special education, he reported he believed it had something to do with is inability to concentrate. He went on to clarify, "If it doesn't interest me, I can't concentrate on it." He minimized his behavioral problems in school. He reported he "cut school often," but denied he exhibited behavioral problems. He reported after he dropped out of school he tried to continue his education and training in JobCorp. Mr. Aleksey stated he did not continue with the problem because he had heard "rumors people were being abused" in the program. He reported he began to hang out with the "wrong crowd."

Mr. Aleksey's school records confirmed he dropped out in high school. However they paint a somewhat different picture regarding his behavior. Records indicate he began having behavioral problems in the first grade. His behavioral and poor academic performance led his mother to request the school evaluate him for special education services. He was evaluated by the school psychologist who concluded he did not meet criteria for special education. He remained in the general education class. At the end of his 1st grade year, Mr. Aleksey was described by his teacher, Miss Newman, as "bright but immature," and "is a nice boy and if given the special attention in grade 2, will mature and do the kind of work he is capable of doing." It appears Mr. Aleksey transferred to St. Michael's, a private Catholic School, for grades 3, 4, and 5. His transcript indicated he may have repeated the 4th grade. On all of his report cards, his teachers reported Mr. Aleksey was inattentive in class, refusing to do class work, and excessive absences. Unsatisfied with her son's academic and behavioral progress, Mrs. Aleksey enrolled him in his local public school. She again requested he be evaluated for special education services. Mr. Aleksey was evaluated in 1979. The results of the evaluation indicated he met criteria for special education. According to his initial Individualized Education Program (IEP), he was classified as a student with an Emotional Disability. (*An emotional disability is a disability that impacts a person's ability to effectively recognize, interpret, control, and express fundamental emotions.*) As a result he was placed in a CEH program. This program is "primarily for emotionally disturbed or socially maladjusted children with normal or near-normal intelligence who need therapeutic, behavioral and academic modifications in their school problem." Initially, he appeared to benefit from the special education accommodations. During the first marking period his teacher T. Gross, comment on his report card "Banyan is making tremendous effort toward improving his behavior. I'm very proud of him and hope he continues to progress. He needs much encouragement." However during the second marking period, his teacher expressed concern over his "inability to concentrate and focus on his assignments." The school records show Mr. Aleksey's teachers would express similar concerns throughout the remainder of his school career. When he was enrolled in Edward Bleecher Junior High School, there are notes from the teachers indicating he was exhibiting poor conduct and poor effort in some of his classes. His work was so unsatisfactory he was almost retained in the 7th grade. After some encouragement from Mrs. Aleksey, the principal decided to "conditionally [place] Banyan in the Class of 8-306 (E.H.)." His continued enrollment in the 8th grade was contingent on Mr. Aleksey's behavior.

Mr. Aleksey's school records show he was placed in the 8th grade in a special education class. Records show he was "truant, leaving class early, and not able to control his anger." This resulted in his being hospitalized in an inpatient treatment facility. He was placed in the Hillside Day Hospital program. Once he was discharged from the hospital program he was placed on home instruction. He was taught by a teacher three times a week. His home instruction teacher recommended Mr. Aleksey return to the school with special education accommodations and modifications. It appears he was allowed to return to school with an IEP in place. The IEP dated 4/10/1984 stated he was classified an emotionally

disturbed student. He was placed in a Modified Instruction Services-II program –Basic I (MIS-I). The IEP said Mr. Aleksey's educational difficulties were due to "possible organicity and possible learning disability appear to be mild and well compensated therefore emotional component remains as major factor." He continued to have issues with truancy. He missed as many as 15 days in one school year requiring him to either attend school or be removed from the program. It is unclear to the undersigned how he was promoted to the 9th grade. According to a letter from Mr. Rosengard of the Queens Child Guidance Center, Mr. Aleksey left New York, NY in January of 1985 to live in FL.

Upon his return to NYC in March of 1985, he applied to get back in school in a special education program, his request was denied. He then applied to the state Office of Vocational Rehabilitation to be in the Auto Mechanic program. On the application, Mr. Aleksey stated he wanted to be in the auto mechanic program because he was "unable to deal with people I do not know. I get nervous and disoriented when dealing with strangers and unusual situations. I am most capable and relaxed when working with machinery..." He was given multiple appointments to be evaluated for admittance to the program but he failed to appear due to issues with transportation. Ultimately his application was denied because he did not complete the intake process.

EMPLOYMENT HISTORY

Mr. Aleksey reported a history of being gainfully employed. He reported he has worked in a variety of blue collar jobs including, auto mechanic, fast food, detailing cars, and window tinting. He reported he was frequently fired from his positions because he had poor job performance or he was caught stealing. He was unemployed at the time of his arrest. He reported he "hustled to make ends meet" when he was unemployed, which included doing day labor.

RELATIONSHIP HISTORY

Mr. Aleksey reported he had several romantic relationships in the past. He related he had one relationship in which he lived with his girlfriend. He reported when he wasn't living with a girlfriend he lived independently, often with a roommate to help cover the expense of living in NYC. He reported he managed his finances and paid his bills on time. Mr. Aleksey reported he has never been married and has no children.

MEDICAL HISTORY

Mr. Aleksey reported he was in overall good health. He reported he had a heart murmur as a child but it had not caused him concern. He reported he was experienced a loss of consciousness from the car accident and was treated at MUSC briefly. He stated he may have suffered a concussion from car accident. He did not report lasting deficits from the head injury. According the SCDMH competency evaluation report by Dr. Frierson, an MRI and neurological consult were performed on Mr. Aleksey in 1998. The results of the MRI was "normal except for the presence of frontal sinusitis. [*A condition in which the cavities around the nasal passages become inflamed.*]" The reported also noted "the neurological consultation revealed no clinical evidence of nervous system disease..." Mr. Aleksey reported he has developed vitiligo since being incarcerated. SCDC medical records confirms he has been diagnosed with vitiligo. He has not been prescribed medications at the time this report was written.

PSYCHIATRIC HISTORY

Mr. Aleksey has a history of psychiatric hospitalization and outpatient mental health treatment as a juvenile. He reported, "I was in a bunch of hospitals. I was out of control. I had a lot of emotional problems." He related that since Death Row has been moved to Kirkland Correctional Institute, he has experienced more irritability and claustrophobia because he is confined 23 of 24 hours a day. He also

stated the conditions are horrible which have contributed to his feelings of upset. He stated at Lieber Correctional Institute, he was allowed more privileges and the facility was in better condition. He denied a history of suicidal or homicidal thoughts.

Mr. Aleksey's Long Island Jewish Hillside Medical Center records indicate he was admitted on 5/23/1983 due to "complaints of school dysfunction, aggressive impulse dyscontrol (sic), hypervigilance, family dysfunction, poor peer relations." He was diagnosed with Conduct Disorder, socialized nonaggressive and Mixed Specific Developmental Disorder (*A residual category for disorders in which there is some admixture of specific developmental disorders of speech and language, of scholastic skills, and of motor function, but in which none predominates sufficiently to constitute the prime diagnosis.*) While Mr. Aleksey made some progress on his treatment goals his prognosis was guarded. The discharge summary related the biggest areas of difficulty for him were school and family dysfunction. In the school, Mr. Aleksey tended to "become negative and disruptive when expectations for his performance and productivity were increased." Family therapy was unsuccessful because "the patient is granted transient adult status" and perceives his role as the protector of his incompetent mother who has never accepted her role as the single head of household." Mr. Aleksey was discharged on 6/21/1983 to the outpatient Adolescent Day Hospital program. He remained in the Adolescent Day Hospital program for about six months (6/22/1983-1/6/1984). He was diagnosed with Conduct Disorder, and Attention-Deficit Disorder without Hyperactivity (ADHD).

Records from Queens Child Guidance Center show Mr. Aleksey received outpatient treatment. Unfortunately his records were destroyed in accordance with agency policy. However, in the school records there was a letter written by David Rosengard, CSW (3/8/1984) that indicated Mr. Aleskey was a client whose "problems were characterized as impulsive behaviors, anger outburst, [and] sadness." In an affidavit dated 9/20/2018, Mr. Rosengard recalled he "provided individual and family treatment to Mr. Aleksey form 1980-1985." He described the adolescent Mr. Aleksey as naïve and gullible. He also described how Mrs. Aleksey's constant hovering prevented her son from learning the skills necessary to overcome his limitations. Mr. Rosengard recommended Mr. Aleksey be admitted to a residential program but his mother refused to consent to the treatment.

According the SCDMH William S. Hall Psychiatric Institute Forensic Unit Outpatient Evaluation report dated 7/31/1998, Mr. Aleksey was seen on multiple occasions at Creedmore Psychiatric Center. He was initially seen due to suicidal ideation in August 1987. He was diagnosed with Adjustment Disorder with Mixed Emotional Features and Conduct Disturbance and Borderline Personality Disorder. He was seen again in December of the same year. He was diagnosed with Adjustment Disorder with Disturbance of Emotions and Conduct Disturbance as well as Antisocial and Borderline Personality Disorder.

In 1998 Mr. Aleksey was evaluated by SCDMH William S. Hall Psychiatric Institute Forensic Unit. This evaluation was conducted pursuant to an order from the Orangeburg County Court of General Sessions. The court "order requested an evaluation of his competency to stand trial, his criminal responsibility....and a determination of his capacity to conform his conduct to the requirements of the law" for the charge of murder. As part of his competency evaluation, a psychological evaluation was performed on Mr. Aleksey by Dr. Jeffery Vidic, licensed clinical psychologist. Dr. Vidic concluded Mr. Aleksey was malingering psychiatric symptoms. He suspected Mr. Aleksey was not putting forth his best effort on the cognitive and intellectual functioning tests. Dr. Vidic concluded while Mr. Aleksey demonstrated mild impairments in his attention, comprehension, and verbal abstract reasoning skills, moderate impairments his memory and calculation skills, and intellectual abilities in the borderline range; however, these results were not indicative of his true level of cognitive and intellectual

functioning. Dr. Vidic concluded Mr. Aleksey's "effort on all these test was minimal at best, and he at times appeared to be trying to purposefully present himself as more impaired than he actually is." In the report dated 7/31/1998, Richard L. Frierson, MD opined Mr. Aleksey was competent to stand trial, was not suffering from a mental disease or defect that would have inhibited his understanding of the wrongfulness of his behavior, and at the capacity to conform his behavior to the requirements of the law at the time of the offense. Mr. Aleksey was diagnosed with Adjustment Disorder, Unspecified, Borderline Intellectual Functioning, and Mixed Personality Disorder with Borderline and Antisocial Features.

SUBSTANCE ABUSE

Mr. Aleksey denied a history of alcohol or drug abuse. His mother confirmed his report.

DDSN HISTORY

Mr. Aleksey has not previously been evaluated by DDSN. He has never been referred to DDSN for an evaluation of eligibility for services, nor has he been evaluated regarding competency to stand trial by DDSN.

PREVIOUS PSYCHOLOGICAL EVALUATIONS

Mr. Aleksey has been evaluated on several occasions throughout his lifespan.

(New York Board of Education, age 6)			
01/22/1975	Wechsler Intelligence Scale for Children-Revised	Full Scale IQ	**96**
		Verbal IQ	85
		Performance IQ	110
(New York Board of Education, age 10)			
07/17/1979	Wechsler Intelligence Scale for Children-Revised	Full Scale IQ	**82**
		Verbal IQ	81
		Performance IQ	86
(Long Island Jewish Hillside Medical Center, age 14)			
07/12/1983	Wechsler Intelligence Scale for Children-Revised	Full Scale IQ	**90***
		Verbal IQ	88
		Performance IQ	93
(William S. Hall Psychiatric Institute, age 29)			
07/08/1998	Wechsler Adult Intelligence Scale-III	Full Scale IQ	**71****
		Verbal IQ	77
		Performance IQ	69

*These scores underestimate his IQ due to testing behaviors
**These results were deemed invalid due to poor effort and malingering

Daniel H. Grant, PhD evaluated Mr. Aleksey on 4/20/2015 (age 46). He administered a number of cognitive and neuropsychological testing, including the WAIS-IV. The results of his evaluation are summarized below:

Wechsler Adult Intelligence Scale - Fourth Edition (WAIS-IV)

The WAIS-IV is an individually administered battery of tests for assessing the intellectual abilities and cognitive strengths and weaknesses of adolescents and adults between the ages of 16 and 69 years. This test yields five composite scores Verbal Comprehension Index (VCI), the Perceptual Reasoning Index

(PRI), the Working Memory Index (WMI), and the Processing Speed Index (PSI). For each of the composite scales, the distribution of sum of scaled scores is converted to a scale of standard scores with a mean of 100 and a standard deviation of 15. Therefore, a score of 100 on any of these five composites is equivalent to the average performance of an adult at that particular age on each composite. The VCI and the PRI consists of three core subtests. The PSI and the WMI consists of two core subtests. The scaled scores for each subtest range from 1-19, with a mean score of 10 and a standard deviation of 3. The Full Scale IQ (FSIQ) is usually considered to be the most representative measure of global intellectual functioning. It is the aggregate of the Verbal Comprehension Index (VCI), the Perceptual Reasoning Index (PRI), the Working Memory Index (WMI), and the Processing Speed Index (PSI). Mr. Aleksey earned a FSIQ of 72 which ranks his overall ability in the **Borderline** range of intellectual functioning. His overall thinking and reasoning abilities exceed those of approximately 2% of adults his age. ***However, Mr. Aleksey's FSIQ could not be interpreted because he demonstrated too much variability in his performance across the four Indexes.*** His Indices range from 69 on the WMI (2nd percentile) to 84 on the PRI (18th percentile), nevertheless, since Mr. Aleksey's performance on the VCI (80) and PRI (84) was not significantly different, these indexes can be combined to yield a General Ability Index (GAI). The GAI differs from the FSIQ because it is not influenced by Mr. Aleksey's performance on the working memory and processing speed tasks. Mr. Aleksey's expressed, general cognitive ability is in the **Low Average** range of intellectual functioning. The validity of these scores will be addressed later in this report. The results of the WAIS-IV are as follows:

Index/Subtest	Score	95% CI	Percentile	Descriptive Category
Verbal Comprehension (VCI)	**80**	**75-86**	**09**	**Borderline to Low Average**
Similarities	04			
Vocabulary	08			
Information	07			
Perceptual Reasoning (PRI)	**84**	**79-91**	**14**	**Borderline to Average**
Block Design	11			
Matrix Reasoning	05			
Visual Puzzles	06			
Working Memory (WMI)	**69**	**64-78**	**2**	**Extremely Low to Borderline**
Digit Span	05			
Arithmetic	04			
Processing Speed (PSI)	**71***			
Coding	07			
Symbol Search	02			
General Ability Index (GAI)	**80**	**76-86**	**09**	**Borderline to Low Average**

*Score is uninterpretable due to the significant difference between the PSI subtests.

In addition, Dr. Grant reported Mr. Aleksey has significant cognitive deficits with his memory and processing information. He concluded Mr. Aleksey "is likely to experience significant difficulty in using good judgement making quick decisions under pressure or in a fast moving, rapid evolving situations."

BEHAVIORAL OBSERVATIONS/MENTAL STATUS EXAMINATION

Mr. Aleksey was interviewed on 12/27/2018 at the Kirkland Correctional Institute in Columbia, SC. Mr. Aleksey was cooperative during the interview. He appeared to be an adequate historian. Mr. Aleksey was appropriately attired in the standard intuitional uniform. Grooming and hygiene were adequate. Sensory systems appeared intact. Eye contact was good. He was alert and oriented in all spheres. Speech was normal in rate and volume and articulation was clear. Attention and concentration skills

appeared to be adequate in interview. There was no indication of psychomotor agitation or slowing, and no unusual mannerisms were noted. Affect was congruent with the topic of conversation. Mood appeared to be normal; he described his current mood as "good" and his usual mood as "angry." Upon further inquiry he related his anger stems from his being in a small cell for most of the day. Mr. Aleksey reported no suicidal or homicidal ideation or intent. He denied experiencing visual (e.g. seeing objects not present) and auditory hallucinations (e.g. hearing voices), and none were evident in interview. No delusional (i. e., false fixed beliefs) material was elicited. His thought process was logical and coherent. Insight and judgment was adequate. Mr. Aleksey described sleep as variable, saying that he sleeps on average seven to eight hours a night, sometime more due to boredom. He denied difficulties with his appetite, saying that he eats regular meals.

Mr. Aleksey was able to register and immediately recall three words. After a delay with intervening tasks he was able to recall the three words without cueing, indicating intact short term memory. He was able to spell the word *block* forward and backward indicating adequate concentration. He correctly named the current president of the United States "Trump." He was able to correctly name previous presidents of the USA "Obama, Bush, Clinton and Bush." He also knew the first president of the US was "Washington." Mr. Aleksey was able to name five states in the U.S. "New York, Pennsylvania, New Jersey, South Carolina, and Massachusetts." The previously listed tasks were an attempt to determine Mr. Aleksey's fund of general knowledge. His abstract reasoning and his ability to identify similarities among objects were good. Judgment to hypothetical situations was good.

Mr. Aleksey's performance changed during the testing portion of the evaluation. He was administered the Saint Louis University Mental Status (SLUMS) examination. The SLUMS is a brief instrument used to screen individuals for the presence of cognitive deficits. His performance resulted in an overall score of 14 out of 30 points, which would suggest he has a significant cognitive deficits. He correctly identified location, and year. He demonstrated difficulties on tasks of short-term memory, delayed recall, and immediate story recall. This score is unreliable because he was not putting forth his best effort. He performed significantly worse than he had earlier in the interview when he was asked similar questions. For example, during the SLUMS he did not know the day of the week. But he was able to easily answer that question at the beginning of the evaluation. He would often reply, "I don't know." He was encouraged to give his best effort but continued this response pattern into the IQ testing. During the IQ testing, Mr. Aleksey tended to give up easily on tasks and some tasks he did not attempt. He also seemed to have lapses in attention and concentration, when he had to be redirected to the task. Therefore these results must be interpreted cautiously.

DEFINITION OF INTELLECTUAL DISABILITY

Intellectual Disability is defined by the Diagnostic and Statistical Manual, Fifth Edition, (DSM-5), using three criteria. Criterion A is "Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing." Criterion B states "Deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work, and community. The final Criterion C requires "Onset of intellectual and adaptive deficits during the developmental period."

PSYCHOLOGICAL TEST RESULTS

Intellectual Functioning

General intellectual functioning is defined by the Intelligence Quotient (IQ) which is obtained by assessment with a standardized, individually administered intelligence test. Significantly subaverage intelligence is defined as an IQ of about 70 or below, which is approximately two standard deviations below the mean. [Intelligence Tests have a mean of 100 with a standard deviation of 15].

Stanford-Binet Intelligence Scales– Fifth Edition (SB-V)

The SB-V is an individually administered battery of tests for assessing the intellectual abilities and cognitive strengths and weaknesses of individuals between the ages of 2 and 85 years. This test yields includes 10 subtests, five within the nonverbal domain (seeing visual trends) and 5 within the verbal domain (comprehending words and spoken directions). These two domains are assessed with subtests addressing multiple cognitive functions. For each of the IQ scores and Factor Index scores, the distribution of sum of scaled scores is converted to a scale of standard scores with a mean of 100 and a standard deviation of 15. Therefore, a score of 100 on any of these score is equivalent to the average performance of an individual at that particular age on each composite. The scaled scores for each subtest range from 1-19, with a mean score of 10 and a standard deviation of 3. The Full Scale IQ (FSIQ) is provides a global summary of Mr. Aleksey's intellectual functioning and is a reliable measure of his general ability to solve problems, reason, and adapt to cognitive demands of the environment. Mr. Aleksey earned a FSIQ of 70 which ranks his overall ability in the **Borderline Delayed** range of intellectual functioning. His overall thinking and reasoning abilities exceed those of approximately 2% of adults his age. He also obtained a Nonverbal IQ (NVIQ) of 59 and a Verbal IQ (VIQ) of 85. The results of the SB-V must be interpreted with caution because Mr. Aleksey was not putting forth his best effort during the testing. His scores are as follows:

	Nonverbal Subtest	**Verbal Subtest**	**Percentile**	**Factor Index Score**	**Descriptive Category**
Fluid Reasoning	02	10	05	**76**	Borderline
Knowledge	06	08	13	**83**	Low Average
Quantitative Reasoning	05	07	07	**78**	Borderline
Visual-Spatial Processing	02	07	02	**68**	Mildly Impaired
Working Memory	03	06	02	**68**	Mildly Impaired
		IQ Scores	**Percentile**	**95% C.I.**	
Nonverbal IQ		**59**	1	55-67	Mildly Impaired
Verbal IQ		**85**	16	80-91	Low Average to Average
Full Scale IQ (FSIQ)		**70**	2	66-75	Mildly Impaired to Borderline

Examination of Mr. Aleksey score profile indicates there was a statistically significant difference between the NVIQ and VIQ or subtest scores; thus it is reasonable to assume his verbal skills are better developed than his nonverbal skills. It is important to note that Mr. Aleksey appeared more engaged in the verbal items on the test. During the nonverbal items he tended to give up easily on items. Also he would not attempt items. He would look at the question or task and immediately say "I don't know."

When encouraged to try or guess, he refused. Most often he would repeat "I don't know." Therefore the best estimate of Mr. Aleksey's intellectual functioning may be the Verbal IQ score measured of 85.

The Fluid Reasoning (FR) Index is a measure of the person's ability to utilize inductive and deductive reasoning. Mr. Aleksey obtained a FR of 76 (95% CI=70-87), which ranks him in the 5th percentile and places him in the **Borderline Delayed** to **Low Average** range. This suggests that Mr. Aleksey's ability to identify shapes, to identify sequences and patterns, or identify cause and effect relationships, and explain answers is adequate. His performance revealed significant difference between the nonverbal and verbal domains. He scored higher on the verbal domain than the nonverbal one. This pattern is very different from his previous testing in which he nonverbal abilities were consistently better than his verbal ones.

The Knowledge (KN) Index is a measure of the accumulated fund of information acquired throughout life. It demands that such information be accurately retrieved from storage in long-term memory. Mr. Aleksey obtained a KN of 83 (95% CI=76-92), which ranks him in the 13th percentile and places him in the **Borderline Delayed** to **Average** range, which is an area of strength for him. This suggests that Mr. Aleksey's verbal comprehension of gestures and nonverbal signals based on word list of common objects and activities; and his ability to define words is limited. Mr. Aleksey's performance did not reveal significant differences between the nonverbal and verbal domains.

The Quantitative Reasoning (QR) Index is a measure of Mr. Aleksey's ability to solve numerical problems. Mr. Aleksey obtained a QR of 78 (95% CI=72-88), which ranks him in the 7th percentile and classifies him in the **Borderline Delayed** to **Low Average** range. This suggests that Mr. Aleksey's ability to identify numbers and fundamental qualitative concepts such as counting, addition, and subtraction is adequate. His performance did not reveal significant differences between the nonverbal and verbal domains.

The Visual-Spatial Processing (VS) represents Mr. Aleksey's ability to recognize patterns and relationships. Mr. Aleksey's VS was assessed by tasks that his ability to understand verbal spatial concepts such as "inside" and "between", requiring receptive language skills in responding to maps and illustrations and spatial perceptions. Mr. Aleksey obtained a VS score of 68 (95% CI=63-79), which ranks him in the 2th percentile and classifies him in the **Mildly Impaired** to **Borderline Delayed** range. This suggests that Mr. Aleksey's abilities in the VS domain are underdeveloped. His performance also indicated a significant difference between the nonverbal and verbal domains. He scored higher on the verbal domain than the nonverbal one. As previously noted, this is different from his previous testing.

The Working Memory (WM), a measure Mr. Aleksey's ability to temporarily retain information in memory, perform some operation or manipulation on it, and produce a result. He obtained a WMI (Gsm) of 68 (95% CI=62-79), which ranks him in the 2th percentile and classifies him in the **Mildly Impaired** to **Borderline Delayed** range. This suggests that Mr. Aleksey's short term memory and attention, and his ability to repeat sentences verbally presented to him is adequate. He does not have any significant differences between the nonverbal and verbal domains.

The Flynn Effect Adjustment

The Flynn Effect is an error that is related to the use of outdated norms for scoring and interpreting IQ scores (see for example, Flynn, 1984, 1987, 1999, 2000). James Flynn, a New Zealand political scientist, has studied the gradual rise in measured IQ scores for decades, and his research has found that with each passing year there is an average increase in IQ of 0.33 points, ultimately resulting in an increase of

approximately 3 points per decade. The American Psychological Association Dictionary of Psychology (2006) defines the Flynn Effect as:

> "the gradual rise of IQ level that has been observed since the time when records of IQs first were kept. Although the average IQ remains 100, due to periodic re-norming of IQ tests, raw scores have been rising. These increases have been roughly 9 points per generation (i.e., 30 years). The gains have been unequally distributed across the different abilities, with fluid abilities show substantially greater gains than crystallized abilities." (p.382)

A controversial issue is whether IQ scores should be adjusted in accordance with the calculated rise in scores. The method for correction is quite simple and is as follows: First count the years from publication to testing, multiple this number by .33 and subtract this number from the obtained IQ. For example, if a person obtained a score of 76 in 2011 on a test published in 2005, the resulting score would be 74 (0.33 x 6 = 1.98; 76 - 1.98 = 74.02). At the time of writing, adjusting for the Flynn Effect is not done by all practicing clinicians, but it is recommended by many scholars and supported by the AAIDD (see AAIDD, 2010, pg. 37).

It appears Mr. Aleksey was administered a standardized individual intelligence test on three occasions during the developmental period. The first time was in 1974 as a part of an educational evaluation. At that time he was 6 years old. He was administered the Wechsler Intelligence Scale for Children, (WISC). It was published in 1949. Mr. Aleksey earned a full scale IQ (FSIQ) score of 96. Mr. Aleksey's FSIQ was measured as 96, with the Flynn Effect Adjustment (0.33 x 25=8.25; 96-8.25=*87.75*) his FSIQ is *87.75*. He was tested again in 1979, by the school psychologist using the WISC-R (1974). The results showed Mr. Aleksey's FSIQ score was 82. Mr. Aleksey's FSIQ with the Flynn Effect Adjustment (0.33 x 5=1.65; 82-1.65=80.35) his FSIQ is *80.35*. During his hospitalization at the Long Island Jewish Hillside Medical Center, a psychological evaluation was performed to help aid diagnostic clarification. He was tested again in 1983 at 14 years old using the WISC-R. The results showed Mr. Aleksey's FSIQ score was 90. Mr. Aleksey's FSIQ with the Flynn Effect Adjustment (0.33 x 9=2.97; 90-2.97=87.03) his FSIQ is *87.03*. Scores obtained in 1974, 1979, and 1983 did not differ significantly and fall in the Low Average range.

It appears that next time Mr. Aleksey was administered a standardized individual intelligence test was as a part of the previous legal proceedings, when he was 29 years old. These results were deemed an underestimate by the evaluating psychologist. Therefore it would be inappropriate to use them to make the Flynn effect adjustment. In 2015, Mr. Aleksey was administered the Wechsler Adult Intelligence Scale, Fourth Edition (2008). While Mr. Aleksey's earned a FSIQ of 73 could not be interpreted, a valid General Ability Index (GAI) was calculated to determine his general cognitive ability. Mr. Aleksey's general cognitive ability was measured as 80, with the Flynn Effect Adjustment (0.33 x 7=2.31; 80-2.31=77.69) his GAI is *77.69*. This examiner administered the Stanford-Binet Intelligence Scales– Fifth Edition (2005) in 2018. Mr. Aleksey's VIQ was measured as 85, with the Flynn Effect Adjustment (0.33 x 13=4.29; 85-4.29=80.71) his VIQ is *80.71*. The scores obtained in 2015 and 2018 were not significantly different and fall in the Borderline to Low Average range.

Adaptive Functioning

The second criterion for a diagnosis of Intellectual Disability is concurrent deficits in adaptive functioning. Adaptive functioning is defined by DSM-5 as "how effectively individuals cope with common life demands and how well they meet standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting." This is further defined as requiring deficits in present adaptive functioning in at least two of the following

areas: communication, social participation, and independent living, across multiple environments, such as home, school, work, and community.

The AAIDD, alternatively, defines adaptive behavior as "the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives." On appropriate standardized measures of adaptive behavior, "significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean of either (a) one of the following three types of adaptive behavior: conceptual, social, or practical or (b) an overall score on a standardized measure of conceptual, social, and practical skills." [Quotes are from Intellectual Disability: Definition, Classification, and Systems of Supports, the eleventh edition of the AAIDD Definition Manual, 2010, page 43].

Adaptive functioning is much more difficult to quantify than intelligence. In Mr. Aleksey's case, there is no record of a formal assessment of his level of adaptive functioning. During the interview, he described his adult life in terms that generally indicated average levels of adaptive functioning. He reported he worked or "hustled" to make ends meet. Mr. Aleksey stated he was responsible for half of the rent and utilities. He was able to pay his bills independently. He stated he never maintained a checking account. He would use money orders to pay the bills. He was able to correctly describe how one purchases a money order. He stated, "I would usually go down to the post office and get them." He went on to describe how he would separate the money into different piles along with the corresponding bill. Once he had the money order, he would mail it or take it directly to the company he was paying. Also, he related he contributed to maintaining the household by cleaning the apartment, cooking, and doing the laundry. Mr. Aleksey acknowledged there were times when he required assistance to learn a new skill. He stated he did not learn a lot from his mother. He said she would help him when she could but he often asked other people questions to help him figure out how to navigate the world. He stated once someone showed him how to do something he remember how to do it.

School records indicated Mr. Aleksey had some adaptive deficits in social skills, and particularly executive functioning skills (i.e. organization, motivation, emotional regulation, and inhibition). These deficits commensurate with the deficits individuals who have a diagnosis of ADHD exhibit. Mr. Aleksey was diagnosed with ADHD as a teen. However, his school records suggest he was presenting symptoms of ADHD, particularly inattentive symptoms, in elementary school. These deficits are also common in children who experience family violence. Throughout the records provided it has been reported Mr. Aleksey witnessed domestic violence between his parents and experienced at a minimum verbal and emotional abuse from his father.

In the SCDC records, there are numerous examples of Mr. Aleksey's written communication. In these written communications are on the SCDC Request to Staff Member form. He has used this form for various types of request including: to get information regarding New York warrant, the disposition of that case, to request a room change, permission to exercise, to work in the dorm, make complaints against a staff member, to request a polygraph to support his claim against a staff member, etc. The forms are filled out neatly, and for the most part, lack grammatical, spelling, and syntax errors. When completing the form, Mr. Aleksey wrote his request using letter format. His request always included a salutation, the request in body of the letter, a closing, and his signature usually in cursive. There were examples where the SCDC Request to Staff Member form was not used to communicate to staff. In these instances, Mr. Aleksey made sure to use the format consistent with the form in his letter. He titled his communications "Request to Staff." He also included at the top of the page "To," "From," and, "Date." For example, on 2/20/2012. Mr. Aleksey wrote a two page letter addressed to Warden McCabe

and Master Nettles. In this letter he informed them of his work waxing the floor and request access to the floor buffer. The following is the body of the letter:

> *Dear Warden McCabe and Master Nettles*
>
> *I wanted to let you know that I started to wax the unit. This past weekend I waxed the whole bottom of the unit. Please,* (emphasis his) *if possible come take a look, it looks good!!!*
>
> *Because of Cpl. Pringle, Officer Miller they got me a buffer form the yard because the no one could find the one I normally use in our building.*
>
> *Sgt. Nickles tried to find our buffer as well Cpl. Scater but could not also find it. Cpl. Pringle, Officer Miller help them get one for me.*
>
> *This weekend I'll do the top tier and the other parts of the wing. I have to get more wax from Cpt Brightharp and some white budding pads.*
>
> *I wanted to please ask if you can allow, Sgt. Nickles, Cpl, Slater, Cpl. Pringle, Sgt. Stags, Cpl. Steins, Sgt. King, Lt. Williams, Lt. Wright, Sgt. Turnbine, Sgt. Wenitz access to a buffer when its locked up and mist of all on the weekend when Captain Brightharp is not here.*
>
> *And lets say that the above supervisors are not here can officers, Miller, Parker, Butler, have access. Please consider my request.*
>
> *I no longer ask Sgt. Poole to do anything. Because she won't do nothing. Sgt. Pole* (sic) *should not be given credit, Sgt. Poole has not helped in why on how B-side is.*
>
> *Its because of B1, A1, B2 shifts that this place looks good.*
>
> *Anyway, if you can come look at how the floor came out I think you will be happy with it,*
>
> *As always, thank you for your time and understanding always*
>
> *Respectfully Always*
> *Aleksey*

This letter is longer than others but is typical in style to the other communications in his record. This letter shows Mr. Aleksey is able to navigate the system and successfully use his problem solving skills to get what he wants. Moreover, this letter shows the complexity of his thought processes, the sophistication of his language, and his reasoning skills (he suggest a contingency plan for the future) was better than would be expected for an individual with significant deficits in adaptive functioning or intellectual ability.

Age of Onset

The third prong of the diagnosis of Intellectual Disability is age of onset, which must be established within the developmental period. It is clear that Mr. Aleksey did not receive a formal diagnosis of intellectual disability during the developmental period. He was evaluated by his local school district and other mental health professionals on multiple occasions as a child and adolescent. He was diagnosed

with various mental illnesses, and a possible learning disability. He seemed to have some developmental delays, which were recognized by his teachers and mental health professionals. However, Mr. Aleksey was never diagnosed with Intellectual Disability (ID). ID was never even given as a rule-out diagnosis. This indicated none of his providers were concerned ID was a possibly an appropriate diagnosis for Mr. Aleksey.

Malingering

According to DSM-5 malingering is as the intentional production of false or grossly exaggerated physical or psychological problems, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs. There was no indication of Mr. Aleksey malingering during portion interview of the evaluation. However, it was clear he was not putting forth his best effort during the testing portion of the evaluation. This examiner believes Mr. Aleksey's presentation was due to limited attention and concentration skills and an attempted to underperform on the tests. As stated previously in this report, Mr. Aleksey tended to give up easily and/or refused to attempt tasks. In addition, there were times when he seemed easily distracted and had to be redirected to the task or questions (when allowed) had to be repeated to gain his attention. Mr. Aleksey appears to have a history testing behaviors that either require commentary or draw into question the validity of the results of his previous IQ scores. For example, in the 1979 school psychological report, the psychologist noted he was "mildly fidgety." In the Long Island Jewish Hillside Medical Center psychological report dated 7/12/1983, Mr. Aleksey's response style to the testing situation was described as "...great deal of behavior test variability...probably reflecting not only temporary lapses in attention and concentration but also haphazard, impulsive response style. These difficulties grew apparent particularly towards the end of the testing session." The examiner believed because of his test behavior "It should be emphasized above all that these summary [IQ] scores seem to underrepresent Bayan's intellectual potential." However as an adult, there is reason to believe he has attempted to appear more impaired than he is.

In 1998, Dr. Vidic performed a full psychological evaluation on Mr. Aleksey as part of a court ordered competency evaluation. Dr. Vidic described Mr. Aleksey's testing behavior and effort similarly to this current report. Dr. Vidic wrote "his effort in all of these test was minimal at best, and he at times appeared to be trying to present himself as more impaired that he actually is." This would suggest the IQ scores reported in the 1998 evaluation are an underestimate of his true ability. In the declaration Dr. Grant submitted to the court, he chided Dr. Vidic's conclusion that Mr. Aleksey's IQ scores were an underestimate due to his lack of effort. Dr. Grant indicated that Dr. Vidic's conclusion was faulty because it was not based on the data. However in the data Dr. Grant provided there is reason to believe he did not give a complete picture of the data related to Mr. Aleksey's intellectual functioning and effort on the testing.

In the declaration provided, Dr. Grant reported Mr. Aleksey's FSIQ was 73, (it is actually 72. There was a small calculation error). However, Dr. Grant failed to report the FSIQ was uninterpretable. While in general the FSIQ is considered the most valid measure of overall cognitive ability, it is very sensitive to neuropsychological deficits related to working memory and/or processing speed. The WAIS-IV manual states the impaired performance on the working memory and/or processing speed may mask the actual differences between the overall cognitive ability and other cognitive abilities such as memory. Thus the GAI is another way for the psychologist to discuss the general intellectual ability of the individual. The other issue Dr. Grant did not comment on was the embedded validity indicators in the WAIS-IV. 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 score ≤ 5, Symbol Search scaled score ≤6,

and the Coding-Symbol Search scaled score difference ≥ 5 are indicators 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 the results reported by Gr. Grant are likely an underestimate of Mr. Aleksey's true intellectual functioning.

It is important to note, that person who malingers or feigns cognitive or psychiatric problems may in fact have genuine deficits. They may be choosing to enhance or highlight their difficulties to make sure the examiner understands they have deficits. Mr. Aleksey has a well-documented history of cognitive struggles in school and on pervious neuropsychological testing, but these do not rise to the level one would expect of an individual with Intellectual Disability.

DIAGNOSTIC SUMMARY AND CONCLUSIONS

A diagnosis of Intellectual Disability must meet all three specific criteria. It requires concurrent significant deficits in intellectual and adaptive functioning, with an age of onset during the developmental period. Mr. Aleksey does not have significant deficits in intellectual functioning. His intellectual functioning measured in the low average range which is higher than would be expected of someone who truly has Intellectual Disability. Mr. Aleksey did demonstrate difficulties in school that appear to have impacted his academic performance; so much so, he was educated in the special education setting for most of his formal education. He was classified as a student with an Emotional Disability not Intellectual Disability. Even with the Flynn effect adjustment, Mr. Aleksey's IQ scores produced during the developmental period are in the low average range. While his most recent scores appear to be in the Intellectual Disability range, the preponderance of the evidence suggest these scores are an underestimate of his true intellectual functioning. It is important to point out people cannot score higher than their true ability on IQ test, (i.e. they cannot fake smart), but they can score lower than their ability. Thus Mr. Aleksey does not meet criteria on the first prong of the Intellectual Disability diagnosis.

In regards to the second prone of the Intellectual Disability diagnosis, concurrent significant deficits in adaptive functioning in one or more activities of daily life and across multiple environments, such as home, school, work, and community. Mr. Aleksey did exhibit problems in school. His grades and his performance on educational standardized tests indicated he was academically behind is peers. However his poor performance in school appears to be related to his undiagnosed/untreated ADHD, his emotional disability, and his poor school attendance. Throughout the school records provided, Mr. Aleksey's teachers comment on his poor ability to maintain attention and focus. In addition, there is no evidence to suggest he has significant adaptive functioning deficits such that without support his functioning would be limited across multiple environments. Prior to his incarceration, Mr. Aleksey reported he had several romantic relationships, lived independently, and was responsible for managing his finances. Since his incarceration, he has demonstrated he has the adaptive function skills to navigate the system to address his needs. Therefore Mr. Aleksey has not met the second prong of the Intellectual Disability diagnosis.

The final prong of the Intellectual Disability diagnosis is the onset of deficits is in the developmental period. Mr. Aleksey demonstrated deficits in social functioning as a youngster. He was diagnosed with Mixed Specific Developmental Disorder as a teen. However, as previously noted this diagnosis recognizes an individual may have some developmental delays but not significant enough to meet criteria for a specific diagnosis. Moreover, this diagnosis is only given in the in the absence of sensory deficits, subnormal intelligence or poor educational conditions. Meaning the deficits are not attributable to hearing or vision problems, low IQ, or attending a failing school. Mr. Aleksey did not demonstrate

intellectual deficits as child. Hence, he does not meet the final prong of the Intellectual Disability diagnosis.

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.

Date signed: 3/27/19

Alicia V. Hall, Ph.D.
Chief Psychologist
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Appendix I

Gmail

Lindsey Vann <lindsey@deathpenaltyresource.org>

Bayan Aleksey: Capital PCR action - 2015-cp-38-764

Dickson, Edgar W. Law Clerk (Jessica Thompson) <edicksonlc@sccourts.org> Thu, Jun 30, 2022 at 1:23 PM
To: Melody Brown <MBrown@scag.gov>, "Dickson, Edgar W." <edicksonj@sccourts.org>, "Dickson, Edgar W. Secretary (Catherine C. Wilson)" <edicksonsc@sccourts.org>
Cc: "lindsey@justice360sc.org" <lindsey@justice360sc.org>, "brendan@justice360sc.org" <brendan@justice360sc.org>, "elizabeth@franklinbestlaw.com" <elizabeth@franklinbestlaw.com>, Ed Salter <ESalter@scag.gov>, Angela Brown <abennett@scag.gov>

Counsel,

On March 24, 2022, the Court held a PCR evidentiary hearing on Applicant's intellectual disability claim in which he alleges his death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution. The definition of "intellectual disability" requires three diagnostic criteria be found: (1) significantly subaverage intellectual functioning; (2) deficits in adaptive functioning; and (3) onset of these deficits during the developmental period.

At the hearing, the Court heard testimony from Dr. Alicia Hall (qualified as an expert in forensic psychology and intellectual disability assessment before and after developmental period), Dr. David Price (qualified as an expert in clinical psychology & forensic neuropsychology), Pamela Leonard (who came on as a mitigation specialist in the limited role of looking into Applicant's intellectual disability), and Allison Franz (a clinic student from Cornell Law). Applicant himself waived his appearance and was not present at the hearing. Additionally, Applicant proffered the Affidavit of Marjorie Hammock, which opined directly on adaptive functioning in the developmental period. Applicant did not call Ms. Hammock as a witness at the hearing and in fact stated that they were unable to get in contact with her prior to the hearing. As a result, the State was unable to cross examine Ms. Hammock and objected to Applicant's reliance on the affidavit.

After careful consideration of the evidence presented at the hearing in connection with the requirements for a finding of intellectual disability, the Court finds there was simply not enough evidence presented to indicate that Applicant satisfied all three diagnostic criteria required to render someone intellectually disabled. For that reason, the Court hereby DENIES Applicant's intellectual disability claim.

Ms. Brown, Judge Dickson asks that you prepare a Proposed Order and provide to opposing counsel for their comments. As you may be aware, Judge Dickson's final day on the bench is today, so, unfortunately, if the Order is submitted later than 5 pm, we will have to contact court administration to see how it would be possible for him to sign the Order.

Thank you,

Jessica Thompson

Law Clerk

The Honorable Judge Edgar W. Dickson

P.O. Box 1949

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From: Melody Brown <MBrown@scag.gov>
Sent: Monday, May 23, 2022 4:51 PM
To: Dickson, Edgar W. <edicksonj@sccourts.org>; Dickson, Edgar W. Law Clerk (Jessica Thompson) <edicksonlc@sccourts.org>; Dickson, Edgar W. Secretary (Catherine C. Wilson) <edicksonsc@sccourts.org>
Cc: 'lindsey@justice360sc.org' <lindsey@justice360sc.org>; brendan@justice360sc.org; elizabeth@franklinbestlaw.com; Ed Salter <ESalter@scag.gov>; Angela Brown <abennett@scag.gov>
Subject: Bayan Aleksey: Capital PCR action - 2015-cp-38-764

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