No._____

In the
Supreme Court of the United States
October Term, 2016

RICKY LEE BLACKWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

REDACTED PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

Capital Case

1.

In concluding that petitioner, whose IQ was scored at 63 and 68 by both sides' expert witnesses, is not intellectually disabled and his execution not forbidden by the Eighth Amendment, did the South Carolina Supreme Court's blatant disregard for expert opinion and methodology violate this Court's precedents in *Hall v. Florida* and *Moore v. Texas*?

2.

(Redacted pursuant to Motion to File Petition for Certiorari and Appendix Under Seal)

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No. _____

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Counsel for Ricky Lee Blackwell petitions the Court to issue a writ of certiorari to review the decision of the South Carolina Supreme Court.

CITATION TO OPINION BELOW

The South Carolina Supreme Court's opinion is reported as *The State v. Ricky Lee Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017) The opinion is reproduced in the appendix at pages App. 1 – 46.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C § 1257(a), since petitioner is asserting the deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the United States Constitution which provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ." U.S. Const. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which provides in pertinent part, "Excessive bails shall not be required, nor . . . cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

In addition, this case also involves the Fourteenth Amendment to the United States Constitution, which provides in pertinent part, "[N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law. . . ." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

Petitioner was indicted by the Spartanburg County, South Carolina grand jury for the offenses of murder and kidnapping. R. 4829 - 4832. The state sought the death penalty.

Petitioner asserted below that the Eighth Amendment barred his execution because he is intellectually disabled. *Atkins v. Virginia*, 536 U.S. 304 (2002). The trial court held a three-day evidentiary hearing beginning February 19, 2014. R. 3765. At the hearing, the experts agreed that petitioner's sub-70 IQ scores (63, 68) and his adaptive deficits demonstrated he was intellectually disabled. R. 4245, l. 25 – 4246, l. 4. R. 4192, ll. 9-12. R. 3836, ll. 10-18. R. 3920, l. 3 – 3937, l. 16. R. 4447. Based on her review of school records, testing, and the numerous members of petitioner's family who show signs of intellectual disability, (for example petitioner's father, Cletus, has an IQ of

60), petitioner's expert concluded the disability manifested during the developmental period. R. 3852, l. 22 – 3853, l. 4. R. 3882, l. 20 – 3883, l. 19. R. 4205, l. 24 – 4206, l. 2. R. 3875, l. 14 – 3876, l. 3. The state's expert conceded that any notion that petitioner's intellectually disability did not manifest during the developmental period was pure speculation. R. 4246, ll. 11-22. The trial judge discarded the experts' opinions and four days after the *Atkins* hearing, issued a written order declaring petitioner eligible for the death penalty. App. 62; Supp. R. 14. Petitioner raised the *Atkins* issue on appeal and the South Carolina Supreme Court affirmed. *State v. Blackwell*, 801 S.E.2d 713 (S.C. 2017). Issue one *infra*.

Petitioner's case came for trial on March 3, 2014, before the Honorable Roger L. Couch, and a jury. R. 47 - 48.

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The jury found petitioner guilty of murder and kidnapping. R. 2602, ll. 1-8. Following a penalty phase trial the jury recommended a sentence of death. R. 3258, ll. 12-25. Judge Couch then imposed the death penalty for murder. R. 3262, ll. 14-21. The South Carolina Supreme Court, 4-1, affirmed petitioner's convictions and death sentence.

WHY CERTIORARI SHOULD BE GRANTED

1.

Petitioner, whose IQ was scored at 63 and 68 by both sides' expert witnesses, is intellectually disabled and his execution forbidden by the Eighth Amendment. In affirming his death sentence, the South Carolina Supreme Court's blatant disregard for expert opinion and methodology violated this Court's precedents in *Hall v. Florida* and *Moore v. Texas.*

Discussion

Summary of Argument

Petitioner seeks certiorari and respectfully submits this case is suitable for summary disposition. The South Carolina Supreme Court's opinion conflicts with this Court's Eighth Amendment decisions in *Hall v. Florida*, 134 S.Ct. 1986 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017). Sup. Ct. R. 10(c). No serious dispute existed among the experts that petitioner is intellectually disabled; yet the trial judge and the state supreme court bucked their opinions, invented their own ad-hoc methods, and declared petitioner eligible for the death penalty. The lower courts' rejection of expert testimony and standards does not simply create "an unacceptable risk" that South Carolina will put an intellectually disabled man to death; it creates a certainty that an execution in violation of the Eighth Amendment will occur unless this Court intervenes. *See Hall*, 134 S.Ct. at 1990.

Petitioner met all three prongs of the clinical and legal definition of intellectual disability. *See Hall*, 134 S.Ct. at 1994 ("As the Court noted in *Atkins*, the medical community defines intellectual disability according to three criteria: significantly subaverage intellectual functioning, deficits in adaptive functioning. . . and onset of these deficits during the developmental period."). In his dissent below, Former Chief Justice Pleicones of the South Carolina Supreme Court recognized that the abandonment of expert opinion and methodology beg reversal from this Court. *See Blackwell*, 801 S.E.2d at 736-40 (Pleicones, A.J., dissenting).[1]

[1] The Honorable Costa M. Pleicones was Chief Justice of the South Carolina Supreme Court at the time the court heard oral argument, but retired before the court issued its opinion and therefore is titled "Acting Justice" in the opinion. Former Chief Justice Pleicones, over the course of his long career, voted to uphold multiple death sentences. *See, e.g., State v. Bryant*, 704 S.E.2d 344 (S.C. 2011) (authoring opinion affirming death sentence); *State v. Justus*, 709 S.E.2d 668 (S.C. 2011); *Sigmon v. State*, 742 S.E.2d 394 (S.C. 2013) (concurring in result only).

At the state's insistence, and confronted with a horrible crime, the trial judge discarded the experts' testimony. The state urged this result, arguing that petitioner's short, unsuccessful stint as a truck driver meant he could not be intellectually disabled. The prosecutor stated:

> You're trying to say well, the IQ scores are this and they're low and everything, but they – you can't be adapted or whatever. **This is a gentleman that's drove a truck. He's went all the way to Texas, to New York, to New Jersey driving through that traffic I can't imagine. Obviously he has adaptability to handle that.**

R. 4276, l. 3 – 4277, l. 20 (emphasis added). The trial judge ignored the law and the experts, committing the same errors that required reversal in *Hall* and *Moore*.

Given the chance to correct this error, the majority of the South Carolina Supreme Court relegated discussion of *Hall* and *Moore* to footnotes, distinguishing them as relating only to bright line IQ cutoffs and praising the trial judge for not relying on Texas law. *See Blackwell*, 801 S.E.2d at n.10 & n.11 (crediting the trial judge for not utilizing factors described in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). The dissent perhaps left a message for this Court:

> I fear that the trial judge's reliance on Blackwell's 'perceived adaptive strengths' will be found to have unconstitutionally skewed his view of the evidence since, as the United States Supreme Court recently explained, 'the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*.' *Moore v. Texas*, 581 U.S. ___, ___, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017) (emphasis in original).

Blackwell, 801 S.E.2d at n.45 (Pleicones, A.J., dissenting). Petitioner humbly submits that this case is suitable for summary reversal in light of *Hall* and *Moore*.

The Trial Judge Ignored Expert Testimony and Methodology to Conclude that Petitioner is Not Intellectually Disabled.

The trial judge cast aside the consensus guidelines of the medical community and concocted his own techniques to assess petitioner. On each of the three prongs of the definition

of intellectual disability the trial judge committed legal errors forbidden by *Hall* and *Moore*. On the intellectual functioning prong, the court ignored the IQ tests used by the experts and cherry-picked unreliable scores from screening measures given petitioner as a child (some of which indicated intellectual disability). On the adaptive functioning prong, the court invented its own way to score a highly specialized psychological test and over-emphasized petitioner's work history. On the age of onset prong, the trial judge adopted what the state's expert agreed was pure speculation that events after the age of eighteen caused a decline in petitioner's intellect. The South Carolina Supreme Court ratified his mistakes.

The Legal Error on Prong One: Intellectual Functioning

Scoring less than seventy on a generally accepted, statistically normed IQ test meets the first prong. *Hall*, 134 S.Ct. at 1994-95. Petitioner's expert scored his IQ at 63. R. 4245, l. 25 – 4246, l. 4. The state's expert witness scored his IQ at 68. R. 4192, ll. 9-12. No dispute existed on the first prong. *See Blackwell*, 801 S.E.2d at 738 ("Dr. Calloway testified, and the State's expert Dr. Brown agreed, that their IQ testing of Blackwell conducted in his mid-50s revealed he was mildly mentally retarded.") (Pleicones, A.J., dissenting).

Dr. Ginger Calloway performed an *Atkins* evaluation for petitioner. R. 3827, l. 14 – 3828, l. 10. The state called as its witness Dr. Gordon Brown, who agreed that Dr. Calloway conducted a "thorough" investigation.[2] R. 4238, ll. 6-9. Both Drs. Calloway and Brown gave petitioner the

[2] A third doctor, Kimberly Harrison, testified for the state at the *Atkins* hearing and is mentioned in passing in the trial judge's order and the state supreme court's opinion. She only performed a competency evaluation—not an *Atkins* evaluation—which consisted entirely of a brief interview with petitioner. R. 3804, l. 22 – 3805, l. 2. She performed no testing and conducted no investigation. R. 3806, ll. 17 – 25. R. 3819, l. 21 – 3820, l. 4. The state's witness, Dr. Brown, agreed that Dr. Harrison had not done a "thorough *Atkins* investigation." R. 4238, ll. 3-5. Former Chief Justice Pleicones wrote a withering criticism of Dr. Brown for his assignment of some weight to Dr. Harrison's opinion that petitioner was not intellectually disabled even though she "was not

same IQ test: the Wechsler Adult Intelligence Scale, Fourth Edition ("WAIS-IV"). R. 4437. R. 4245, l. 24 – 4246, l. 4. Petitioner scored a 63 on the first administration of the WAIS-IV by Dr. Calloway and a 68 on the second administration by Dr. Brown. R. 4245, l. 25 – 4246, l. 4. R. 4192, ll. 9-12. Dr. Brown wrote in his report, "There is no doubt that Mr. Blackwell currently demonstrates significant deficits in intellectual functioning...." R. 4447.

Despite the agreement of the experts on prong one, the trial judge found petitioner had not met his burden. The trial court chose to ignore the IQ tests given by Drs. Calloway and Brown. App. 56; Supp. R. 8, ¶ 12. The court noted appellant's scores of 63 and 68, but then found these scores were not as reliable as the testing administered to petitioner while he was in school. App. 56; Supp. R. 8, ¶ 12. Dr. Calloway found four "IQ" scores from school testing: (1) 68, at the age of 7; (2) 87, at the age of 8; (3) 86, at the age of 11; and (4) 72, at the age of 14. R. 4445. R. 4362. The trial judge used these scores to find petitioner did not meet the first prong (even though two scores placed petitioner squarely within the intellectual disability range), writing, "[m]ost" of petitioner's scores "are above the score of 70 which is generally accepted as the level at which a finding of mild mental retardation would be possible." App. 61; Supp. R. 13.

Crediting unreliable testing from the 1960s—against all of the expert testimony—violated *Hall*. The state's expert testified that the scores in the school records "are not really IQ scores." R. 4183, ll. 3-17. In his report he wrote, "School records do include references to 'IQ' scores, but the scores are on screening measures and **cannot be considered equivalent** to scores obtained on more comprehensive tests such as the Wechsler." R. 4445 (emphasis added). Even more importantly, Dr. Brown explicitly stated (under questioning by the state) that he did not "trust" the

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asked to make such a finding and conducted no investigation." *Blackwell*, 801 S.E.2d at 738 (Pleicones, A. J., dissenting).

purported "IQ" scores of 86 and 87. R. 4183, ll. 3-17. Dr. Brown said, "[A]s a psychologist, I can't say that I would trust the scores of I think 86 and 87 as being necessarily an indication that he would not be [mentally retarded]." R. 4183, ll. 3-17.

The state supreme court made the same error, although the majority wrote, "Admittedly, **it is concerning** that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the *Atkins* hearing." *Blackwell*, 801 S.E.2d at 721 (emphasis added). The court credited what it called the "standard school I.Q. tests" and omitted that both experts said these results were unreliable. *Id.* The court also held that the fact that petitioner's reading and math skills were at a sixth grade level at the age of 18 somehow weighed **against** a finding that petitioner met the intellectual functioning prong. *Id.* The dissent rightfully criticized the trial judge for using "unreliable school records." *Id.* at 737 (Pleicones, A.J., dissenting).

Eschewing the experts' assessment of petitioner's intellectual functioning is a legal error under *Hall*. "In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." *Hall*, 134 S.Ct. at 1993. While *Atkins* left the states some leeway in determining intellectual disability, the *Hall* Court recognized that states do not have unfettered discretion lest the protections of *Atkins* "become a nullity." *Id.* at 1999.

In *Hall*, this Court reversed the Florida Supreme Court for seeking "to execute a man because he scored a 71 instead of 70 on an IQ test." *Id.* This Court criticized Florida's disregard for "established medical practice." *Id.* at 1994. As noted in *Hall*, even modern IQ tests are "imprecise." *Id.* at 2001. If refusing to account for the standard error of measurement on a reliable, scientifically valid test was constitutional error in *Hall*, then seizing on unreliable IQ numbers to disregard valid testing and all expert opinion, as happened here, must also be error.

The trial judge's error is analytically similar to the lower court's error in *Brumfield v. Cain*, 135 S.Ct. 2269 (2015). In *Brumfield*, the trial court found the defendant did not meet the intellectual functioning prong because of one IQ score of 75 and another alleged higher score. *Brumfield*, 135 S.Ct. at 2278-79. The higher score supposedly came from a Dr. Jordan who "never testified at trial." *Id.* The cross-examination quoted by this Court indicates that the alleged higher score was "only... a screening test" compared to the "standardized measure of intellectual functioning" on which Brumfield scored a 75. *Id.* The *Brumfield* Court held that the state trial judge "could not reasonably infer from this evidence that any examination Dr. Jordan had performed was sufficiently rigorous to preclude definitively the possibility that Brumfield possessed subaverage intelligence." *Id.* The error here is more egregious than in *Brumfield* because the experts told the trial judge not to rely on the screening tests from the 1960s instead of the WAIS-IV standardized tests, but he ignored their testimony.

The Legal Error on Prong Two: Adaptive Functioning

As he did with prong one, the trial judge ignored the experts' testimony and invented his own way to assess petitioner's adaptive functioning which over-emphasized petitioner's adaptive strengths. A person with significant deficits in adaptive functioning meets the second prong, despite the presence of adaptive strengths. *Moore*, 137 S.Ct. at 1050. Petitioner's expert found he had significant deficits in six of ten areas of adaptive functioning (only two areas of deficit were required under this measurement from the DSM-IV). R. 3836, ll. 10-18. R. 3920, l. 3 – 3937, l. 16. *See also Brumfield*, 135 S.Ct. at 2279 n.6 (describing the adaptive functioning definition also used in Blackwell's case). Petitioner had significant deficits in communication, home living, social interaction, community use, self-direction, and functional academics. R. 4394.

Dr. Calloway conducted extensive interviews and used a standardized instrument, the Adaptive Behavior Assessment System ("ABAS") to analyze petitioner's adaptive functioning. *See Wiley v. Epps*, 625 F.3d 199, 218 (5th Cir. 2010) (noting that the "tenth edition of the [American Association on Mental Retardation] specifically recommends the use of standardized measures and instruments, and it notes that the ABAS-II test 'can be used to identify significant limitations in adaptive behavior.'") *quoting* AAMR 10th ed. at 76, 81, 83. The ABAS is administered by a psychologist individually to people who know the subject. R. 3843, l. 11 – 3845, l. 11. Dr. Calloway used the ABAS to interview eight people who knew petitioner. R. 3862, ll. 11 – 22.

The state's expert admitted **he did not have the time or resources** to independently investigate petitioner's background. R. 4166, l. 24 – 4167, l. 10 (emphasis added). He testified petitioner's expert "had already done an extensive background investigation." R. 4166, l. 24 – 4167. l. 10. Dr. Brown also chose to use the ABAS, but only gave it to petitioner. R. 4143, l. 15 – 4144, l. 14. Dr. Brown agreed that given more time and more resources, he would have given the ABAS to petitioner's family members and friends. R. 4215, ll. 11-19. Dr. Brown concluded in his report that **"an argument can be made that [petitioner] also currently demonstrates significant deficits in adaptive functioning."** R. 4447 (emphasis added). No dispute existed on the second prong. *See Blackwell*, 801 S.E.2d at 739 ("Dr. Brown, the State's expert, merely opined that while Blackwell arguably demonstrates significant adaptive deficits at age 55, it is 'not clear' whether he met the criteria before age 18.") (Pleicones, A.J., dissenting).

The trial judge ignored the experts' conclusion and, violating the commands of *Hall* and *Moore*, invented his own way to assess petitioner's adaptive functioning. Contradicting himself, the trial judge criticized Dr. Calloway for not giving the ABAS to enough people, but then credited Dr. Brown (who only gave the ABAS to petitioner and did no other independent research) for

giving "greater weight" to the adaptive functioning prong. App. 58; Supp. R. 10, ¶ 20. App. 62; Supp. R. 14. R. 4166, l. 24 – 4167, l. 10.

The trial judge then made up his own way to score the ABAS. App. 58-59; Supp. R. 10-11, ¶ 20. The court complained that Dr. Calloway did not simply average the scores given by the interview subjects and criticized her for not "simply reporting data." R. 4127, ll. 14 – 15. App. 58-59; Supp. R. 10-11, ¶ 20. The trial judge redid the doctor's math and used his new scores to find that petitioner did not have adaptive deficits in several areas where Dr. Calloway found a deficit. App. 58-59; Supp. R. 10-11, ¶ 20.

Dr. Calloway explained that clinicians are trained to use their judgment in scoring the ABAS, especially when the interviewees are intellectually disabled, like petitioner's daughter, whose IQ is 57. R. 4131, l. 5 – 4133, l. 10. R. 3875, l. 14 – 3876, l. 3. Dr. Brown agreed that clinicians must interpret the data they collect. R. 4172, l. 25 – 4173, l. 8. The trial judge's invented scoring method for the complex ABAS is a more egregious error than failing to take into account the standard error of measurement in *Hall* and the over-emphasis of adaptive strengths in *Moore*. Re-scoring the ABAS would be similar to recalculating a score on the Wechsler or the Stanford-Binet standardized, normed IQ tests. The trial judge committed a legal error by contriving his own formulation for a peer-reviewed scientific instrument.

At the state's urging, the trial judge erroneously used petitioner's short career as a commercial truck driver and his possession of a commercial driver's license as adaptive strengths which foreclosed the possibility of intellectual disability. App. 56 – 57; Supp. R. 8 – 9, ¶ 13-14. The state court also seized on petitioner's adaptive strengths instead of his deficits in violation of *Moore*. *Blackwell*, 801 S.E.2d at 721-22. The court devoted a total of five sentences to its adaptive functioning analysis. *Id.* The majority credited the trial court's reasoning:

> The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage.

Id. at 721. The court dropped a footnote after this brief summary to attempt to distinguish *Moore*, stating that the trial judge "made no reference to the impermissible *Briseno* factors." *Id.* at 721 n.11. The court then stated the trial judge "carefully considered and **weighed** Blackwell's adaptive strengths against his adaptive deficits." *Id.* (emphasis added).

No one disputed that petitioner had strengths in the "work" area of adaptive functioning, but weighing this admitted strength against uncontroverted deficits was error. R. 4276, l. 3 – 4277, l. 20. Even claiming that petitioner "achieved his goal of becoming a commercial truck driver" stretches the record. Petitioner had multiple accidents during his stint as a truck driver. R. 3884, ll. 19-24 (accident in 1982 and quit job). R. 3885, ll. 2-12 (accident in 1983, lost job). R. 3885, ll. 10-17 (accident in 1986, lost job). R. 3885, l. 23 – 3886, l. 6 (in 1985, attempted to be a self-employed truck driver but wrecked his truck). R. 4406. R. 4368-69. Petitioner also held menial jobs: putting the lids on boxes of peaches; stacking pallets; bagging ice; basic factory jobs in textile companies; driving a forklift. R. 3884, l. 8 – 3885, l. 20. R. 3886, ll. 10-21. In all the jobs petitioner held, he never became a supervisor, was never asked to train new people, and was never given jobs requiring judgment. R. 3886, l. 22 – 3887, l. 15.

Like many intellectually disabled people who function in society and hold jobs, petitioner was dependent on his support structure—primarily his ex-wife. R. 3921, ll. 7-21. Dr. Calloway described petitioner's home life: "He didn't wash or dry his own clothes. He didn't cook for himself. He didn't budget money. He did not routinely shop on his own without assistance . . .

for clothes or groceries." R. 3921, ll. 18-21. Petitioner never wrote checks because he was afraid of "messing up." R. 3933, ll. 3-10. He did not use credit or debit cards. R. 3933, ll. 11-14.

When his wife left him, petitioner could not keep up with these basic tasks. R. 3921, ll. 22-24. Petitioner's mother moved in with him and then petitioner moved in with his parents. R. 3921, l. 22 – 3922, l. 5. Petitioner's trailer went into foreclosure because he did not know how to pay the mortgage without his wife. R. 3922, ll. 6-13. Dr. Brown admitted that he did not know that after his wife left him, petitioner was basically sleeping on a mattress on the floor in an empty trailer until the power got cut off and his parents took over his care. R. 4197, l. 22 – 4203, l. 5.

The trial court and state supreme court made the same analytical error as the Texas appellate court in *Moore*. The experts used current medical definitions and standardized instruments to assess petitioner's adaptive functioning. Petitioner's expert found ample deficits that supported her diagnosis of intellectual disability, the state's expert agreed, but both courts ignored their medical opinions. The trial judge and the state supreme court seized on petitioner's strength in the area of work to find petitioner eligible for death and this was error under *Moore*. The state supreme court's simplistic dismissal of this Court's opinion in *Moore*—as criticized by former Chief Justice Pleicones in his dissent—begs reversal.

The Legal Error on Prong Three: Age of Onset

The trial judge and the state supreme court relied on speculation to conclude petitioner did not satisfy the age of onset prong. A person whose intellectual and adaptive deficits manifest before the age of eighteen satisfies the age of onset prong. Relying on school records, school testing, participation in special education "adjunct" classes, interviews, and the fact that many of petitioner's close relatives are intellectually disabled, petitioner's expert concluded that his deficits

manifested in the developmental period. R. 3852, l. 22 – 3853, l. 4. R. 3882, l. 20 – 3883, l. 19. R. 4205, l. 24 – 4206, l. 2.

The state's expert admitted that it would be "pure speculation" that environmental factors later in life affected petitioner's IQ. R. 4246, ll. 11-22. No dispute existed on the third prong after the *Atkins* hearing's conclusion. *See Blackwell*, 801 S.E.2d at 738 ("While Dr. Brown speculated that perhaps Blackwell's chemotherapy, a four-wheeler accident, and alcohol and drug use after the age of 18 may have affected his I.Q. score, he agreed there was 'absolutely no evidence of that.'") (Pleicones, A.J., dissenting).

The AAIDD manual describes familial factors such as low IQ as a risk factor for intellectual disability. R. 4274, l. 20 – 4275, l. 10. Multiple close relatives of petitioner have very low IQ scores. R. 3871, ll. 18-24. Petitioner's father, Cletus, had an IQ score of 60. R. 3872, ll. 3-9. Two grandchildren scored in the 40s and 50s on their IQ tests. R. 3876, l. 10 – 3877, l. 20. Petitioner's daughter had two scores of 57 and 71. R. 3875, l. 14 – 3876, l. 3. Petitioner's brother had approximate scores of 73 and 74. R. 3874, ll. 10-18. Both experts testified that mental retardation can have a familial hereditary component. R. 3942, ll. 3-10. R. 4210, ll. 17-23. In response, the prosecutor mocked Dr. Calloway for relying on the family's low IQ scores and compared her to the Nazis. R. 4042, l. 20 – 4043, l. 21.

The lower courts did not address the family's history of low intellectual functioning. The appellate court endorsed the trial judge's speculation that chemotherapy, depression, and a four-wheeler accident may have affected petitioner's IQ later in life. *Blackwell*, 801 S.E.2d at 721. The court made this finding despite also noting that at the age of eighteen, petitioner read at a sixth grade level and, when tested again in his 50s, still read at a sixth grade level. *Id.* App. 61; Supp. R. 13. R. 4108, ll. 17-25.

The trial judge and the state supreme court also persisted in the notion that the four-wheeler accident and the chemotherapy could have adversely affected petitioner's intellectual functioning despite Dr. Brown abandoning this position during the *Atkins* hearing. A CT scan after the accident showed no brain injury. R. 4089, l. 16 – 4090, l. 20. Dr. Brown agreed that "as a matter of science" it was safe to rely on the presumption that IQ remains relatively constant through life. R. 4194 ll. 1-15. *See Branham v. Heckler*, 775 F.2d 1271, 1274 (4th Cir. 1985) (assuming that IQ remained constant in absence of any evidence of change in intellectual functioning from subsequent accidents); *Sird v. Chater*, 105 F.3d 401, 402 n.4 (8th Cir. 1997) (same); *Hodges v. Barnhart*, 276 F.3d 1265, 1268-69 (11th Cir. 2001) (same). The following colloquy occurred on Dr. Brown's cross-examination:

> Q. Okay. Well, specifically you mention a couple of environmental factors, chemotherapy, four wheeler accident, and alcohol and drug use, and you kind of – you seem to speculate that they could have some cause of Mr. Blackwell's IQ?
>
> A. I'm saying they could have.
>
> **Q. And you have absolutely no evidence of that though?**
>
> **A. That's correct.**
>
> Q. Okay. For instance, you didn't go and interview anybody to see if there was a change in his personality after the four wheeler accident?
>
> A. No, I did not.
>
> Q. And that's a – that's common, in head injuries, to see if there is an effect with somebody, see if their, their mood or temperament has changed, for instance?
>
> A. Correct.
>
> Q. You could do that, right?
>
> A. Correct.
>
> **Q. And, of course, in this case, there is no evidence of any change in Mr. Blackwell after the four wheeler accident?**

A. Not that I'm aware of, no.

Q. Right. And there's no evidence in the record that his IQ was affected or, or affected negatively by chemotherapy?

A. No evidence, no.

Q. Okay. Or alcohol and drug use, there is no evidence that we can rely on to say that that negatively affected his IQ?

A. That's correct.

Q. Okay. So, with regard to these environmental factors, we really only have speculation with regard to did it possibly affect his IQ?

A. I would agree with that.

R. 4195, l. 8 – 4196, l. 15 (emphasis added). Dr. Brown ultimately agreed that it would be "pure speculation" that environmental factors such as the four wheeler accident affected appellant's IQ. R. 4246, ll. 11-22. Under *Hall* and *Moore*, abandoning the experts' testimony and relying on "pure speculation" to find petitioner did not satisfy the age of onset prong was error and this Court should reverse.

Petitioner's Case is Similar to This Court's Summary Dispositions Based on Hall and Moore

This Court's summary reversals based on *Hall* and *Moore* are strikingly similar to petitioner's case. In *Carroll v. Alabama*, this Court reversed in light of *Moore*. 137 S.Ct. 2093 (2017). Like the South Carolina Supreme Court's over-emphasis of petitioner's adaptive strengths because of his career as a truck driver, the Alabama court relied on the fact that Carroll had a job in the prison kitchen, "read novels, self-help books, and magazines" and passed a GED examination. *Carroll v. State*, 215 So.3d 1135, 1152 (Ala. Crim. App. 2015). *See also Lane v. Alabama*, 136 S.Ct. 91 (2015) (reversing in light of *Hall*).

In *Wright v. Florida*, this Court reversed the Supreme Court of Florida in light of *Moore*. 583 U.S. ___, Case No. 17-5575 (Oct. 16, 2017). Much like the trial judge here, in *Wright* the state court criticized an expert witness for using her clinical judgment in scoring the ABAS. *Wright v. State*, 213 So.3d 881, 900 (2017). The Florida court abandoned expert testimony and substituted its own opinion of Wright's adaptive functioning by claiming that Wright's interviews with police and trial testimony were "inconsistent with an intellectually disabled defendant." *Id.* at 900-01. The court credited lay witnesses who said Wright "never had trouble understanding them" and that they saw him "ride the city bus to varying degrees." *Id.* at 901-02. Mirroring the errors here, the Florida courts cherry-picked facts to find Wright did not have adaptive deficits, contravening expert opinion. *See also Haliburton v. Florida*, 135 S.Ct. 178 (2014) (reversing in light of *Hall*).

This Court also summarily reversed Texas death sentences in light of *Moore*. *See Martinez v. Davis*, 137 S.Ct. 1432 (2017); *Henderson v. Davis*, 137 S.Ct. 1450 (2017). While both state court opinions relied on the unconstitutional *Briseno* factors, they also committed the sin of cherry-picking facts to supplant expert testimony. In *Martinez*, the Texas habeas court relied on the defendant's scheme to check himself into a mental institution for "free food, shelter, and women," his employment as a barber and assembly line worker, and his decision to establish a meth lab to "further his standing with the Texas Syndicate gang" to conclude Martinez was not intellectually disabled. *Martinez v. Davis*, 653 Fed. Appx. 308, 315-16 (5th Cir. 2016). The state court's error in *Martinez* closely resembles the error in this case of over-emphasizing petitioner's short employment driving trucks.

To conclude the defendant in *Henderson* was eligible to be executed, the state court, according to the Fifth Circuit, "was free to weigh *all* of the evidence, not just the evidence of

Henderson's limitations and Henderson's expert witness's testimony." *Henderson v. Stephens*, 791 F.3d 567, 586 (5th Cir. 2015). Just as in petitioner's case, the Texas courts over-emphasized the defendant's adaptive strengths and discounted his adaptive deficits. *Id.*

The *Hall* and *Moore* errors in Texas, Florida, and Alabama have been repeated in South Carolina. Unlike those cases, the South Carolina Supreme Court had the benefit of both *Hall* and *Moore*, yet flagrantly ignored their holdings. Petitioner submits his case, like those reversed from other states, reflects the continued attempts by state courts to nullify this Court's decision in *Atkins*. *See Moore*, 137 S.Ct. at 1052-53. *Moore* declared that the "medical community's current standards supply one constraint on States' leeway in this area." *Id.* at 1053. By ignoring current medical standards and expert testimony, the lower state courts also ignored this Court's precedents. This Court should grant certiorari, reverse, and remand for consideration under *Hall* and *Moore*.

2.

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Trial testimony

The state first presented the short testimony of Spartanburg County Sheriff's Deputy Bill Meyer, who responded to the scene where petitioner had shot Brooke, the child of his estranged wife's lover, in her presence. R. 2358, l. 8 – 2374, l. 9. There was testimony that petitioner walked out of the woods a short time later, shot himself, and dropped his gun. He did not point his gun at the police, and his gun had been fired five times. The decedent was shot four times, and petitioner shot himself once. R. 2502, l. 7 – 2511, 11.

The state then called its star witness, Angela Davis. Davis was married to petitioner for approximately twenty-seven years. R. 2378, l. 3 – 2379, l. 3. In South Carolina, as occurred in this case, all of the evidence of the guilt stage is automatically incorporated into the penalty phase of the death penalty trial.

Davis was separated from petitioner at the time of the fatal incident on July 8, 2009. R. 2379, ll. 12-18. Angela took her boyfriend's daughter, Brooke, with her that day. She maintained petitioner came over to her house to discuss medical "and life insurance and stuff through my job on him" because their divorce was not final. R. 2380, ll. 4-23. Davis acknowledged petitioner told her that she came to the area "[a]ll the time, and you don't never go over there to get those boys. You don't never go see your boys. Go over there and see those boys today, and Brooke spoke up because she was, she was just so full of happiness and life. She said we're gonna go down there and go swimming

today." R. 2380, ll. 18-23.

Davis maintained that petitioner "[l]ooked back at me and he said you make sure you go over there and get them boys." Davis maintained that her plan was to go to "Brooke's home, Bobby's, and we're all gonna swim and just have a good day." R. 2381, ll. 19-21. Davis claimed she also intended to pick up her grandchildren and take them with Brooke to go swimming. R. 2381, l. 22 – 2382, l. 1.

Davis maintained that when she went by the mobile home where her daughter Heather and grandchildren lived that she noticed "my daughter's car was not in the driveway." R. 2382, ll. 6-10. Her claim to the jury from there was that "Ricky jumped out and flagged me down, and he said I thought you was picking up the boys and I said I was, but Heather's car [was] not there." "She's gone. He said she's gone to the store. She'll be back in a few minutes. Mark's [her husband] got the boys ready and they're waiting on you." R. 2383, ll. 1-7.

Davis testified that it was during these moments petitioner grabbed Brooke. R. 2383, ll. 17-23. Davis claimed: "I kept telling him Ricky, please let that baby go." R. 2384, ll. 1-2. Davis maintained that she yelled: "Ricky, please, it's me you want, take me, and let Heather take her home, and he said no and he took the gun and pointed it toward – on the car, and he said you pushed this too far. You did this. You tell me what Bobby thinks of this, and then the gun went off, and then it went off again." R. 2386, ll. 7-15. On cross-examination Davis acknowledged that petitioner lived next door to their daughter, Heather, and that Heather's children were "special needs kids." R. 2395, ll. 12-20.

Davis refused to admit that her leaving "hit Ricky hard." R. 2397, l. 21 – 2398, l. 8. When asked about petitioner's suicide attempts, Davis would only acknowledge: "He took a few pills and ran out there in the yard that day and showed Heather and us the bottle and stuff and Heather took [off] chasing after him trying to get the pills out of his hand. He, he did that to let us know what he

had done. To me it was show." R. 2398, ll. 16-22.

Davis denied she told petitioner that she and her new boyfriend had enough insurance on him so that when he died they would live comfortably. Davis claimed: "I ain't want nothing off of Ricky." R. 2399, l. 16 – 2400, l. 1.

Davis said she "had it out" with her daughter, Heather, over her affair with Bobby. She maintained that Heather would "never accept Bobby, she'd never accept nobody, and she told me not never to bring so and so around. So, we stayed apart. We didn't have a lot of communication, nothing to do with each other." R. 2400, ll. 2-9. When defense counsel questioned Davis about her being instructed not to bring Bobby and his family around petitioner, Davis claimed that: "Eventually Heather starts coming to Bobby's [house]." She maintained that Bobby even gave money to Heather's children. R. 2400, ll. 10-19. Davis denied that Heather had told her specifically not to bring Brooke and Bobby around her home which was near petitioner's home. R. 2400, l. 20 – 2401, l. 24.

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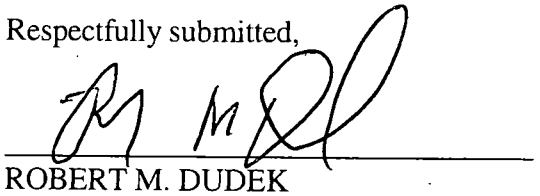
CONCLUSION

By reason of the foregoing arguments this Court should grant certiorari, vacate, and remand on issue one, and, in the alternative, grant certiorari, and grant petitioner a new sentencing trial as to issue two.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

October 27, 2017

No. _____

In The
Supreme Court of the United States
October Term, 2016

RICKY LEE BLACKWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I certify that copies of the sealed and redacted petition for writ of certiorari and appendix in this case have been served upon opposing counsel, Melody J. Brown, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 27th day of October, 2017.

ROBERT M. DUDEK
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 27th day of October, 2017

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

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CERTIFICATE OF SERVICE

I certify that copies of the motion to proceed in forma pauperis, and motion for leave to file petition and appendix under seal in this case have been served upon opposing counsel, Melody J. Brown, Esquire, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 27th day of October, 2017.

ROBERT M. DUDEK
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 27th day of October 2017.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023