ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY LEE BLACKWELL,

APPELLANT

APPELLATE CASE NO. 2014-000610

FINAL BRIEF OF APPELLANT
REDACTED

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5.

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6.

Whether the court erred by ruling the state presented racially neutral reasons for striking black male jurors Cheeks and Fullenwider where the state did not strike similarly situated white jurors who also had a criminal record, or had pending criminal charges in the same county, and the treatment of alleged "pro-life" black and white jurors by the solicitor was also disparate?

7.

Whether the court erred by qualifying Juror #43, Donna Champion, because her position that the defense had to prove appellant deserved a life sentence rather the death penalty was burden shifting, inconsistent with the law, and her entire voir dire showed she would not consider certain categories of mitigating evidence?

STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County grand jury for the offenses of murder and kidnapping. R. 4829 - 4832. Following pretrial hearings, his case came for trial on March 3, 2014, before the Honorable Roger L. Couch and a jury. William McGuire, Clay Allen and Boyd Young represented appellant. The state was represented by Solicitor Barry Barnette, Deputy Solicitor Derrick Bulsa and Assistant Solicitor Russell Ghent. R. 47 - 48.

The jury found appellant 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, and ruled that the kidnapping conviction was subsumed by the murder conviction. R. 3262, ll. 14-21.

This appeal follows.

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Trial testimony

The state first presented the short testimony of Spartanburg County Sheriff's Deputy Bill Meyer. He responded to the scene where appellant had shot Brooke, the child of his estranged wife's lover, in her presence. Meyer was told that appellant was the shooter and he began putting up crime scene tape. R. 2358, l. 8 – 2374, l. 9. There was also testimony that appellant 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.[2] R. 2502, l. 7 – 2511, 11.

The state then called its star witness, Angela Davis. Davis had been married to appellant for approximately twenty-seven years. R. 2378, l. 3 – 2379, l. 3.

She was separated from appellant 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 appellant came over to her house to discuss medical "and life insurance and stuff through my job on him" because their divorce was not final. Davis testified that she was "taking a personal lay off from Firestone for three months." R. 2380, ll. 4-23.

Davis said appellant told her that she came "to Chesnee all 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 appellant "[l]ooked back at me and he said you make sure you go over there and get them boys. And my daddy asked him, said Ricky, he said why don't

[2] The decedent was shot four times, and appellant shot himself once in the stomach.

you stay here and play some cards with me. And Ricky told him, he said, I got to go pay some bills and do some shopping. But as soon as I get my bills and my shopping done, I'll come back and play cards." R. 2381, ll. 1-7. 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 trailer 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 she parked the car but she was concerned Heather's dog would bite Brooke. She claimed: "So, I turned around and looked at her and I said Brooke, honey, don't get out of this car until I get this dog cause I don't want you to get dog bit (sic). She said okay. So, I got out of the car and I reached down and got the dog, but when I turned back around he had her." R. 2383, ll. 17-23. Davis said: "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. Davis said she ran into her daughter's house and "I dialed 911, but my handicapped granddaughter was

screaming so loud that I couldn't make ways of hearing them good or them hearing me good." R. 2386, l. 7 – 2387, l. 2.

On cross-examination Davis acknowledged that appellant lived next door to their daughter, Heather, and that Heather's children were "special needs kids." R. 2395, ll. 12-20. Davis admitted appellant was a hard worker, but quickly added, "when he had a job." She refused to admit appellant "pretty much always had a job except for that period where he had cancer." Davis countered: "He wasn't holding jobs." She acknowledged appellant was out of work for ten years fighting cancer, but allowed that "he held a job for seven years" at Springs Industries. R. 2396, ll. 5-13.

Davis refused to admit that her leaving "hit Ricky hard." She said she did not want to reconcile with appellant, and that their family doctor talked to her about getting marriage counseling. She told her doctor: "I do not want to work this out, I want a divorce, I want out . . ." R. 2397, l. 21 – 2398, l. 8. Davis denied she told her doctor that she "should be a Christian woman, but there's some things [she] wanted to do first?" Davis then reconsidered: "I may have, but I don't remember telling him that." R. 2398, ll. 2-15.

When asked about appellant'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.

When asked about appellant's commitment to "a mental hospital," Davis asserted that the doctor was there "and Ricky was screaming and hollering don't let her leave me, don't let leave me. I looked at the doctor, I told the doctor that I had left him. I was wanting

a divorce. I wanted out." Davis testified that the doctor told her: "[Y]ou have serious problems and I wouldn't dare tell you to go back to him, and I said well, do you have him? She said we got him and I left. I did not stay. I left." R. 2398, l. 23 – 2399, l. 6.

Davis denied she told appellant 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 appellant, 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. R. 2400, l. 20 – 2401, l. 24.

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The trial court erred in finding that appellant was not mentally retarded at the pretrial hearing pursuant to *Atkins v. Virginia*[3] and *Franklin v. Maynard*,[4] and therefore sentencing appellant to death violates his rights under the Eighth Amendment.

Introduction

Human beings thirst for simple answers. Simplicity can be a great virtue in life, reasoning, and the law. Maxims such as Occam's Razor teach us that the simplest answer, or the simplest argument, is often the correct answer or the best argument. Unfortunately, simplicity does not always describe reality. The real world is often complex and human beings must sometimes put aside their desire to ever-simplify the world and embrace complexity.

This case is one of those times. All of the errors made by the trial court regarding the issue of whether appellant Ricky Lee Blackwell is mentally retarded stem from the failure to embrace complexity. The state certainly encouraged this approach. The state argued that appellant was not mentally retarded because he could drive a truck. The trial court seized on this isolated fact. Reading the trial court's Atkins order, it is clear that most of the trial court's findings and conclusions (and errors) revolve around appellant's short career as a truck driver. These findings were flatly contradicted by the thorough testimony and reports from the defense psychologist. More importantly, from this Court's perspective sitting in review, the trial court's findings were also contradicted by the testimony of the court's own expert. The trial court declined to even credit the state's

[3] 536 U.S. 304 (2002).

[4] 356 S.C. 276, 588 S.E.2d 604 (2003).

expert in its Order—likely because the state's expert admitted she did no testing or investigation of any kind.

This case is not one of dueling experts because the experts agree on almost all of the questions about appellant's mental retardation. Instead, this Court must examine the complex issues that both experts confronted and compare that evidence to the trial court's findings. The trial court's conclusions are supported only by cherry-picked, simplistic facts that ignore the voluminous and intelligent testimony presented by the experts at the Atkins hearing. When the simple notion that appellant cannot be mentally retarded because he was a truck driver is rejected, the complex evaluations by the experts irrefutably lead to the conclusion that appellant is ineligible for the death penalty under Atkins.

Procedural Posture

Pursuant to Franklin v. Maynard, the trial court held a pre-trial hearing on the issue of whether appellant was mentally retarded.[5] The hearing was conducted from February 19, 2014 until February 21, 2014, which was a Friday. Atkins Hearing R. 3765. The trial judge did not rule from the bench at the conclusion of the hearing. Four days later, on Tuesday, February 25, 2014, Judge Couch issued a written order initially stating, "I agree with the defense that there are several factors in Ricky Blackwell's life which would raise the possibility of mental retardation...." Supp. R. 14. However, Judge Couch found that appellant failed to meet the burden of proof. Supp. R. 14. The trial began the following Monday, March 3, 2014. R. 1. On March 20, 2014, at the post-trial motion hearing, appellant asked for a new trial based on the court's adverse

[5] This brief will adopt the trial court's convention of using the term "mental retardation," although the witnesses used "intellectual disability" along with "mental retardation" interchangeably. Supp. R. 1.

ruling in its order. R. 4816, ll. 8-21. The trial judge denied the motion. March 20, 2014, Hearing R. 4824, l. 2 – 14, l. 5.

Three witnesses testified at the hearing. R. 3767 – 3768. Dr. Kimberly Harrison ("Harrison") from the South Carolina Department of Mental Health testified for the State. R. 3767. R. 3775, ll. 11-12. Dr. Gordon Brown ("Brown"), also employed by the South Carolina Department of Mental Health, but formerly of the South Carolina Department of Disabilities and Special Needs, was appointed by the Court to evaluate appellant. R. 4135, ll. 6 – 4137, l. 10. Dr. Ginger Calloway ("Calloway") testified for the defense. R. 3827, l. 14 – 3828, l. 10.

The Purpose of Atkins and the Theories of this Crime

When the United States Supreme Court decided that the execution of mentally retarded defendants violated the Eighth Amendment, it stated its reasons in the second sentence of the Atkins decision. Atkins, 536 U.S. at 306. The Court held, "because of their disabilities in areas of reasoning, judgment, and control of their impulses... they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." Id. The court further explained that the death penalty's twin aims– retribution and deterrence– were inconsistent with executing the mentally retarded. Id. at 318-19. Retribution "necessarily depends on the culpability of the offender." Id. at 319. Because the death penalty "can serve as a deterrent only when murder is the result of premeditation and deliberation," the "cognitive and behavioral impairments that make these defendants less morally culpable – for example, the diminished ability to understand and process information, to learn from experience, to engage in logical

reasoning, or to control impulses" make it unlikely that the death penalty would have any deterrent effect. Id. at 319-20.

The tragic facts of this case align with the rationale of Atkins. In a horrifying scenario that cannot be fathomed without the explanation of diminished impulse control, appellant shot an eight year old girl four times, including once in the head. R. 2540, ll. 13-15. Appellant had no history of violence and his only criminal conviction was for petty larceny for siphoning gasoline in 1981. R. 2647, ll. 3-24. Appellant only came into contact with the decedent though his ex-wife, Angela Davis (formerly Blackwell) ("Angie").

Angie and appellant were married for almost 27 years. R. 2334, l. 25 – 2395, l. 1. At the time of the shooting she and appellant had been separated for about "a year and nine months or maybe a little longer." R. 2379, ll. 16-18. Angie admitted that she was still married to appellant when she "took up with" Bobby Center, the decedent's father. R. 2396, l. 23 – 2397, l. 20. The state argued that appellant shot the child in revenge for the affair. R. 2346, ll. 7-21. The defense argued that appellant likely snapped in the face of cruel treatment and taunting from Angie. R. 3195, l. 17 – 3199, l. 10. Under either version, the shooting of an innocent child makes no sense except for a person suffering from an intellectual disability who lacked the ability to think logically and could not control his impulses. Id. at 319-20.

The limitations of mentally retarded people recognized in Atkins explain this tragedy better than any other theory. The trial judge never discussed the reasoning of Atkins in his order. The court simply stated Atkins' constitutional prohibition on executing mentally retarded defendants without further discussion. Supp. R. 2. Had the

court explored the reasoning of Atkins in more detail, it likely would have not reached the wrong conclusion about whether appellant is mentally retarded.

Evidence Presented at the Atkins Hearing

The Experts, Their Qualifications, and Their Respective Investigations

Dr. Calloway testified for the defense and opined that appellant is mentally retarded. Dr. Calloway received her doctorate in psychology from North Carolina State University. R. 3828, ll. 14-23. Her curriculum vitae was 24 pages long. R. 4335 – 4357. She had practiced primarily as a forensic psychologist for the 15-20 years prior to the hearing. R. 3829, ll. 21-23. She had testified in "somewhere between 8 to 10 or 12 times" in Atkins hearings. R. 3966, ll. 14-17. She had conducted more Atkins evaluations but had not always testified in those cases. R. 3966, ll. 18-20.

Dr. Calloway issued a forty-page report and an eight-page supplemental report which were reviewed by the trial judge. Supp. R. 1-14. R. 4358 – 4405. The Court's expert, Dr. Brown, agreed that Dr. Calloway conducted a "thorough" investigation. R. 4238, ll. 6-9. She reviewed her medical records, school records, and testing done on both appellant and members of his family. R. 4362 – 4363. She conducted her own testing regarding intellectual functioning and adaptive behaviors on both appellant and the people she could find who knew the most about appellant including members of his family, employers, and members of the community. R. 4362 – 4363.

The court's expert, Dr. Brown, admitted on direct examination by the solicitor that he did no independent investigation into appellant's background. R. 4166, l. 24 – 4167, l. 1. He stated the reason he did not conduct any investigation but because was

because "[we] typically don't have time to do that or time or resources to do that."[6] R. 4167, ll. 2-4. He had to rely on what was provided to him and that, as the solicitor described it, "Dr. Calloway had already done an extensive background." R. 4167, ll. 7-10. On cross-examination, Dr. Brown admitted that his investigation did not require him to leave the building at the Department of disabilities and special needs. R. 4214, l. 23 – 4215, l. 10. Dr. Brown said that he wished he had the opportunity to give adaptive functioning testing to appellant's family members and friends, interview them, but did not have the resources to do so. R. 4215, l. 11 – 4219, l. 14. The Department was "in the process" of hiring a social worker who can help conduct investigations in the future. R. 4216, ll. 9-19. As trial counsel put it:

> Q. And – okay. Just so we're clear about that. I'm certainly – I'm not attacking either your credentials or your skills.
>
> Okay. Just with regard to resources, you are limited?
>
> A. Right.
>
> Q. And you do have a plan now, it appears in the future, to actually do a little bit more investigation –
>
> A. Correct.
>
> Q. In these situations?
>
> A. Correct.

R. 4217, ll. 2-11.

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[6] At the time of the hearing, Dr. Brown had recently left the Department of Disabilities and Special Needs to go work in the Department of Mental Health in the sexually violent predator program. R. 4135, ll. 15-19. R. 4140, ll. 8-11. He began doing Atkins evaluations after another doctor left the department "and no one else wanted to take the job." R. 4141, ll. 16-21. Dr. Brown had been involved "to some extent" in a total of 7 Atkins evaluations and his appearance in this case was his second time testifying in an Atkins matter. R. 4142, ll. 4-11.

Dr. Brown issued a twelve-page report which the trial court reviewed and credited in its Order. Supp. R. 14. R. 4436 – 4447. Dr. Brown reviewed the testing data and Dr. Calloway's report. R. 4437. Dr. Brown reviewed the records collected and reviewed by Dr. Calloway. R. 4437. Dr. Brown did interview appellant and administered 3 tests to him, which will be discussed in more detail below. R. 4437. Dr. Brown ultimately concluded in his report that appellant was not mentally retarded. R. 4447.

In Dr. Brown's conclusions in his report, he wrote that it was "very significant that the DMH examiners did not see any indication of intellectual disability during the course of an evaluation of competency to stand trial." R. 4447. The DMH examiner Dr. Brown referred to was Dr. Kimberly S. Harrison. R. 4421 – 4428. Dr. Harrison stated that after speaking with appellant, she had "no concern that he might have an intellectual disability." R. 3804, l. 22 – 3805, l. 2. Dr. Harrison then admitted that there was no way to look at an individual and tell that a person suffers from mild intellectual disability. R. 3806, ll. 10-16. She agreed that mildly mentally retarded people can communicate and answer questions. R. 3806, ll. 4-9. She admitted she did no testing even though testing is "the best way" to determine if someone suffers from mental retardation. R. 3806, ll. 17 – 25. She admitted she did no testing or used any instruments to determine appellant's adaptive functioning. R. 3819, l. 21 – 3820, l. 1. Defense counsel asked Dr. Harrison, "and, therefore, he did not investigate any adaptive deficits, correct?" R. 3820, ll. 2-3. Dr. Harrison replied, "not in any formal way, no." R. 3820, l. 4. Dr. Brown agreed that what Dr. Harrison did "was not a thorough Atkins evaluation." R. 4238, ll. 3-5. The trial court did not credit Dr. Harrison's work or opinion in its Order and mentioned her name only once. Supp. R. 1 – 14.

The Experts Agreed that Appellant Was Not Malingering

This case contains no hint of malingering by appellant or his family. Judge Couch made no finding that appellant was malingering. Supp. R. 1 – 14. Dr. Brown admitted that appellant was "a pretty hard worker." R. 4222, ll. 5-7. As pointed out by the experts, appellant suffered from cancer and went on Social Security disability for ten years. R. 4076, l. 22 – 4078, l. 5. In 1998, Blackwell left disability and went back to work. R. 4078, ll. 6-17. Dr. Brown admitted that there was even "some shock" from the state that appellant "would go off the public dole and return to work." R. 4222, ll. 8-13. Dr. Brown was asked whether there was any evidence of malingering and he replied "None." R. 4191, ll. 23-24. Dr. Brown stated he would have noted any evidence of malingering if there was a problem. R. 4192, ll. 3-8. Both Dr. Calloway and Dr. Brown gave appellant the Test of Memory Malingering, which showed no evidence of malingering. R. 4146, l. 15 – 4147, l. 9. R. 3859, ll. 1-16. The members of appellant's family who gave him ratings and a test designed to measure appellant's adaptive functioning frequently gave him higher marks been people who were not related to appellant. R. 4099, l. 11 – 4103, l. 8.

The Experts Agreed on the Clinical and Legal Definition of Mental Retardation

The experts agreed that the definition of mental retardation has three prongs, all of which must be met. As Dr. Calloway defined it, the three prongs are (1) "significantly subaverage general intellectual functioning;" (2) "the presence of adaptive deficits in two of ten areas identified by the DSM-IV-TR"; and (3) "onset of the disability before the age of 18." R. 3834, ll. 9-16. When asked to state the three prongs of mental retardation, Dr. Brown testified, "I don't know that I can say it any differently than its already been said."

R. 4145, l. 23 – 4146, l. 5. Dr. Brown also testified that an Atkins evaluation "should not be any different" from any other mental retardation situation. R. 4150, ll. 11-19. He stated that the criteria would be the same. R. 4150, ll. 13-19.

In Atkins, the Court cited the definitions of mental retardation from the American Association on Mental Retardation and the DSM-IV. Atkins at 308 n.3. Both definitions used by the Atkins Court described mental retardation in the same fashion as Dr. Calloway and Dr. Brown. Id. The trial court cited South Carolina's death penalty statute, which contains the following definition of mental retardation: "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 16-3-20(C)(b)(10). Supp. R. 2.

The trial court's Order inexplicably criticizes Dr. Calloway for using the definitions of mental retardation from Atkins and the DSM-IV, but never explained how the definition used in Atkins, the DSM-IV, or by either expert in this case differed from section 16-3-20(C)(b)(10). Supp. R. 4-5. Without citation to any authority, the trial court also stated that it gave "greater weight" to Dr. Brown's report because he gave "greater weight" to appellant's functional adaptations "as is required by our state's statutory definition of mental retardation." Supp. R. 14. Nothing in section 16-3-20(C)(b)(10) assigns differing weight to any of the three prongs of mental retardation or greater weight to adaptive behavior. S.C. Code Ann. 16-3-20(C)(b)(10). Dr. Brown's report specifically cites the same clinical sources for his definition of the adaptive functioning prong as used in Atkins and by Dr. Calloway. R. 4445. Since neither the statute (nor Dr. Brown) provided any definition different from either Atkins, the clinical definition, or the

definition provided by Dr. Calloway, assigning more weight to Dr. Brown's report on this basis was a legal error.

The Evidence Regarding Prong One: Intellectual Functioning

Both Dr. Calloway and Dr. Brown agreed that appellant meets prong one of the definition of mental retardation. Dr. Brown wrote in his report, "There is no doubt that Mr. Blackwell currently demonstrates significant deficits in intellectual functioning...." R. 4447. Dr. Brown gave appellant the same IQ test Dr. Calloway gave him, the Wechsler Adult Intelligence Scale, 4th edition ("WAIS-IV"). R. 4437. Appellant scored a 68. R. 4192, ll. 9-12. Dr. Brown agreed that a score of 68 "clearly puts Mr. Blackwell in the M.R. range." R. 4192, ll. 9-12. When Dr. Calloway gave appellant the WAIS-IV, he scored a 63. R. 4245, l. 25 – 4246, l. 4. Dr. Brown agreed those scores were "roughly similar." R. 4246, ll. 5-6. R. 4197, ll. 4-15. Appellant's score on the WAIS-IV places him in the bottom 2% of the population meaning that roughly 98% of the population would score higher than appellant. R. 3901, l. 12 – 3902, l. 6. Dr. Calloway, from reviewing Dr. Brown's report, stated that there seemed to be no disagreement that appellant met the intelligence prong of mental retardation's definition. R. 3902, ll. 7-11.

The experts also reviewed appellant's school records which contained his grades and results of multiple tests. Appellant took "adjunct" classes. R. 3882, l. 20 – 3883, l. 19. Dr. Calloway interviewed appellant's schoolteacher, Louise Scruggs ("Scruggs") who explained that adjunct classes "predated special education classes in that county." R. 3882, l. 25 – 3883, l. 12. Dr. Brown agreed that adjunct classes "were the pre-runner to special ed classes." R. 4205, l. 24 – 4206, l. 2. Scruggs indicated these classes would provide smaller groups and individualized attention. R. 3883, ll. 13-19. Despite the extra

attention, appellant failed these classes and repeated the ninth grade. R. 3882, ll. 18-24. R. 3883, l. 20 – 3884, l. 2. R. 4206, ll. 3-5. Appellant was the only one of the adjunct students who failed the 9th grade. R. 3813, ll. 15-21. Of the three credits appellant received in the 9th grade, one was for adjunct math, another was for "prevention," and the last was for physical education. R. 4270, ll. 15-18.

When appellant was 18 years old (and still in high school) he took a test called the Adult Basic Learning Examination. R. 3898, ll. 15-24. Appellant's scores at the age of 18 indicated he was reading "at grade level 5.8." R. 3899, ll. 8-11. Appellant's total arithmetic grade was at "grade 5.6." R. 3899, ll. 12-15. Dr. Brown agreed that these were the scores appellant received at the age of 18. R. 4221, ll. 10-18. Dr. Calloway explained what the scores meant: "Well, if you look at how he was scoring, I think that may be helpful, he's scoring at like a fifth to sixth grade level here at age 18. So, he's, he's really functioning like an 11 to 12 year old child." R. 3899, ll. 16-24. In his report, Dr. Brown wrote that the "data seems to indicate that Mr. Blackwell was on track toward graduation." R. 4438. However, in the hearing when Dr. Brown was confronted with appellant's scores, he admitted that he "would agree then that does not seem to indicate that [appellant] was on track toward high school graduation." R. 4221, ll. 10 – 4222, l. 4.

Appellant's scores at the age of 18 were almost the same as his scores on a similar test given by Dr. Calloway. R. 4109, ll. 7-19. Dr. Calloway administered the Wide Range of Achievement Test ("WRAT-4") to appellant. R. 3857, ll. 7-24. It measures a person's achievement level to see where they are functioning. R. 3857, ll. 16-24. At the age of 53, appellant functioned at grade level 7.4 in word reading, 5.3 in sentence

comprehension, 6.8 in spelling, and 4.6 and math computation. R. 4108, ll. 17-25. Appellant scored in the 4th percentile. R. 4108, l. 17 – 4109, l. 5.

Dr. Calloway and Dr. Brown also agreed on the results of other testing given to appellant during his school years. Some of these tests purported to give an IQ score. R. 4445. The experts agreed that the scores were not true IQ scores. An example was the California Test of Mental Maturity which was not strictly speaking an intelligence test, but used for placement purposes. R. 3891, ll. 5-11. These tests needed no specialized expertise to administer them and were often given to children in group settings. R. 3891, ll. 16-22. Some of these tests gave percentile ranks. R. 3893, ll. 5-10. At 11 years old, appellant fell in the 5th percentile. R. 3893, ll. 11-15. At the age of 12, he scored in the 28th percentile. R. 3893, ll. 20-23. At the age of 14, on the Comprehensive Test of Basic Skills, appellant scored in the 7th percentile. R. 3898, ll. 3-14.

Dr. Brown concurred. He wrote in his report, "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. Dr. Brown explained the complicated nature of using the scores to measure IQ when questioned by the solicitor. R. 4183, ll. 6-17. Dr. Brown stated that the individual exam he gave was more accurate than any school exam. R. 4183, ll. 3-5. The solicitor asked Dr. Brown:

> Q. And I think you would agree that the individual exam you gave is probably more accurate than any school exam?
>
> A. Correct.
>
> Q. Okay. But the school numbers certainly support or could, could there be an argument that they support that he is not mentally retarded or did not suffer intellectual functioning, difficulties?

> A. Well, again, I think that goes back to **what's been discussed in previous testimony** regarding the fact **that those are not really IQ scores.** They are more measures of scholastic aptitude, more measures of achievement. They can be roughly equivalent to an IQ score, **but as 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.**

R. 4183, ll. 3-17 (emphasis added).

The scores of 86 and 87 that Dr. Brown did not trust were two of four scores that purported to be "IQ" scores. R. 4445. Dr. Brown and Dr. Calloway agreed on what the reported scores were and they listed them in their reports as follows:

- 68, at the age of 7 years, in the first grade, and in April 1966.
- 87, and the age of 8 years, in the third grade, in October 1967.
- 86, at the age of 11 years, in October 1970.
- 72, at the age of 14 years, in October 1973.

R. 4445. R. 4362. Dr. Brown wrote that the score of 72 was "within the borderline range of intellectual functioning" and that the score of 68 was "within the range of mild mental retardation." R. 4445 Then when asked by the solicitor whether the score of 87 on the California Test of Mental Maturity meant that appellant was "well beyond any margin of error or whatever for mentally retarded," Dr. Calloway replied that the test measured achievement and was "not so much an individually administered IQ test." R. 4004, ll. 10-18.

The Evidence Regarding Prong Two: Deficits in Adaptive Functioning

The experts largely agreed that appellant satisfied the adaptive functioning prong. According to the DSM-IV, a person meets the definition of mentally retarded with respect to the adaptive functioning prong if they have a deficit in two of ten skill areas.

R. 3836, ll. 10-18. Practitioners in the field expect that mentally retarded persons will have strengths along with their deficits. R. 3837, ll. 13-24. Adaptive functioning is about "looking at the entire picture of who the person is with regard to strengths and deficits in identifying those deficits in terms of the skill areas." R. 3840, ll. 15-24. Dr. Calloway ultimately found deficits in 6 of the 10 areas of adaptive functioning. R. 3920, l. 3 – 3937, l. 16. R. 4378 – 4394. She did not find significant deficits in 4 areas of adaptive functioning, including the area of work. R. 3920, l. 3 – 3937, l. 16. R. 4378 – 4394. Dr. Brown concluded in his report that "**an argument can be made that [appellant] also currently demonstrates significant deficits in adaptive functioning.**" R. 4447.

The best practice in the field for determining adaptive deficits is to use a standardized instrument as well as extensive interviewing. R. 3841, ll. 8-21. Three tests are accepted by practitioners which are the Vineland, the SIB-R, and the Adaptive Behavior Assessment System ("ABAS"). R. 3843, ll. 3-8. Dr. Calloway used the ABAS. R. 3843, ll. 7-10. Dr. Brown also selected the ABAS and administered it to appellant. R. 4143, l. 15 – 4144, l. 14. Dr. Brown selected the ABAS because its ten different areas "parallels more directly what we're looking for according to the DSM-IV criteria, and it just seems to be a little bit easier to deal with conceptually then the [other test] is." R. 4144, ll. 5-14. Dr. Brown agreed that using the ABAS was a matter of his professional choice. R. 4144, ll. 15-19.

The ABAS is not a simple test. How to give the test is a subject of study for experts in the field and Dr. Calloway learned to give the test after "supervision and consultation from people who are expert in the field." R. 3843, l. 11 – 3845, l. 11. The ABAS is administered by a psychologist individually to people with information about

the subject of the evaluation. R. 3843, l. 11 – 3845, l. 11. Dr. Calloway testified that the people who trained her recommended obtaining as many as ten to twenty different people for interviewing with the ABAS, but in practice it is "often difficult to find that number of people." R. 3844, ll. 1-11.

When giving the ABAS, the clinician sits with the interviewee and asks the person to rate the subject on a four-point scale as to whether the subject could perform a particular action. R. 3844, ll. 12 – 3845, l. 11. The interviewing is difficult because interviewees "often lose sight of the fact that we are not looking at what a person might do if given the proper opportunity.... We're looking at what a person actually did or does." R. 3844, ll. 12-21. Part of the clinician's job is to determine whether the interviewee is guessing and the ABAS contains a correction factor for these guesses. R. 80, l. 22 – 3845, l. 11.

Dr. Calloway explained that when she interviewed informants from appellant's life with the ABAS, if it was clear that interviewee was guessing, she would note that in the test's column "and then the number of guesses that he had exceeded what's accepted by the ABAS manual." R. 4048, l. 12 – 4049, l. 13. This part of the ABAS was explained in more detail with respect to Dr. Calloway's administration of the test to appellant's pastor. R. 4048, l. 12 – 4049, l. 13. If there were areas where the reporter (such as the pastor) did not have enough information and would guess, if his guesses exceeded what was accepted by the ABAS manual, Dr. Calloway would conclude that the reporter did not have enough information regarding that area of appellant's situation, but would still use the ratings where the reporter had enough information and "could answer in a reliable way." R. 4048, l. 12 – 4049, l. 21.

The test is not simply given to just the subject because mentally retarded persons who "have sufficient awareness to know that they are not as bright" can find this to be shameful. R. 3845, ll. 12-21. They attempt to cover up what they do not know and pretend that they do know. R. 3845, ll. 22-25. This concept is described as "The Cloak of Competence" which means that people with mild mental retardation attempt to pass as average normal people. R. 3845, l. 22 – 3846, l. 9. As a result of the Cloak of Competence, mentally retarded subjects will overestimate their abilities. R. 3846, ll. 10-14. Because of this factor, clinicians cannot rely on an ABAS given solely to the subject alone. R. 3846, l. 15 – 3847, l. 19. Dr. Brown agreed that the Cloak of Competence was a valid concept with respect to people who are mentally retarded. R. 4223, ll. 7-18. Dr. Brown admitted that "one administration by itself" of the ABAS "is not gonna be adequate, but it does a measure of adaptive functioning." R. 4145, ll. 14-17.

Dr. Brown agreed that if he had the opportunity he would have given the ABAS to family members and friends but that he had limited time and resources. Atkins hearing R. 4215, ll. 11-19. Dr. Brown wanted to talk to Angie and discussed interviewing her with his supervisor and DDSN's attorney. R. 4218, ll. 10-22. He ultimately stated that logistics and lack of resources were "a major factor" in the decision not to interview Angie. R. 4218, l. 10 – 4219, l. 14. Dr. Calloway asked to interview Angie, but Angie refused to cooperate and would not make herself available. R. 4051, ll. 13-22.

The journal articles in the field show a consensus that giving an ABAS to only the subject is not reliable and not valid. R. 3849, ll. 1-6. Dr. Calloway testified that if she could get between "six to twelve people, that's pretty good for most situations." R. 3849, ll. 7-17. When asked about the number of informants and whether "10 to 20" were

preferred and whether she was comfortable with "6 to 12" informants, Dr. Calloway responded that she "wouldn't say I'm totally comfortable with 6 to 12, but that's all we could find... That were available and that would talk with us." R. 4033, ll. 5-13.

Dr. Brown stated, "Well, I don't think, in a case like this, I ever feel like I have everything that I need." R. 4148, ll. 9-12. When asked why he did not undertake an independent investigation of appellant's background, Dr. Brown replied, "We typically don't have time to do that or time or resources to do that," and then agreed that "Dr. Calloway had already done an extensive background" investigation. R. 4166, l. 24 – 4167, l. 10.

Dr. Calloway gave the ABAS to the following individuals:

- Appellant's mother, Mildred Blackwell.
- Appellant's father, Cletus Blackwell.
- Appellant's daughter, Heather Bryant.
- Appellant's pastor and counselor, Reverend Ken Rice.
- Appellant's neighbor and friend of the family, Jean White.
- Appellant's teacher, Louise Scruggs.
- Appellant's employer, Ricky Bagwell.
- Appellant's employer, Gail Shook.

R. 3862, ll. 11-22. Through the ABAS, her interview with appellant, and through her review of the records collected, Dr. Calloway learned appellant was married to Angie for 29 years. R. 3869, ll. 8-19. Although they had a joint checking account, appellant never wrote a single check. R. 3869, ll. 20-24. Angie paid all the bills, made all of his medical appointments, did all of the shopping, managed his medications, and managed the

household. R. 3869, l. 20 – 3870, l. 18. Multiple sources reported that appellant worked and then turned his paycheck over to Angie. R. 3870, ll. 19-23.

Appellant grew up in Chesnee. He lived on land that was owned by his father and mother to live within walking distance of them. R. 3871, ll. 1-8. Appellant was still living with his parents when he married Angie. R. 3881, ll. 8-11. After their marriage they lived briefly with Angie's parents and then they moved into a trailer that appellant's parents bought for them and put on their own land. R. 3881, ll. 12-17.

After dropping out of school, appellant held numerous jobs, mostly involving menial labor. His employment history was summarized on pages 11 through 12 of Dr. Calloway's report and on pages 4 through 6 of Dr. Brown's report. R. 4368 – 4369. R. 3884, ll. 6 – 3890, l. 17. R. 4439 – 4441. Examples of the types of jobs appellant had after dropping out of school were putting the lids on boxes of peaches, stacking pallets, bagging ice, and basic factory jobs in textile companies. R. 3884, l. 8 – 3885, l. 20.

In 1982, appellant got a job as a truck driver and shortly thereafter got into an accident. R. 3884, ll. 19-24. His father then got him a job with the same trucking company where his father worked, but appellant had an accident and lost that job. R. 3885, ll. 2-12. He then had another trucking job with a company called Charles Belue and had another accident. R. 3885, ll. 10-17. Appellant also intended to be a self-employed truck driver, but ultimately lost the truck after having an accident and wrecking it. R. 3885, l. 23 – 3886, l. 6. Dr. Calloway reviewed an employee termination form that showed he was terminated from a truck driving job in 1985 after rear ending another vehicle and was not eligible for rehire. R. 4249, l. 23 – 4250, l. 19. R. 4406.

Appellant grew up riding in the trucks because his father was a truck driver and he also lived on a farm were there were trucks and other equipment to drive. R. 3887, ll. 16-24. Some of appellant's employment records suggest that appellant had people in his truck and was disciplined for this from time to time. R. 3888, ll. 3-13. Appellant would be taught how to drive a truck by going through the same route multiple times and having people in the truck with him when he was learning a new route. R. 3888, ll. 14-22. Many times when appellant would drive a truck he would not be by himself but would follow another truck in the same convoy. R. 3889, ll. 10-13.

Appellant was unemployed for ten years due to cancer but was a hard worker and eventually went back to work in 1997 at Springs Industries where he operated a forklift. R. 3886, ll. 10-21. He got the job at Springs with his wife's help. R. 3886, ll. 18-21. In all the jobs appellant 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. Dr. Calloway described his jobs as consistent with the kind of employment you would expect for someone who was mildly mentally retarded. R. 3887, ll. 4-15. People who were mildly mentally retarded are often called the "educable mentally handicapped." R. 3887, ll. 4-15. This means they can be taught repetitive tasks. R. 3887, ll. 4-15.

Dr. Calloway tested testified that someone can be mildly mentally retarded and drive a truck and the forklift. R. 3838, ll. 16-20. Mildly mentally retarded people can read, get a GED, write letters, use a telephone, count money, make change, work, have a driver's license, including a commercial driver's license. R. 3838, l. 16 – 3840, l. 14. Dr. Calloway had reviewed CDL tests. R. 4062, l. 19 – 4063, l. 6. While Dr. Brown's report indicated that it would be very difficult for a mentally retarded person to obtain a CDL,

he did not say that it would be impossible. R. 4446. Appellant's employer, Bagwell, reported that "if you could drive at all you could drive those trucks" and also said, "you don't need a Ph.D. or a college degree to drive a truck." R. 3932, ll. 5-15

Dr. Brown agreed that appellant's employment records show that he never made more than $10,000 a year until he was 28 years old and did not "break" $20,000 a year until he was 45 years old. R. 4224, ll. 4-18. This first few jobs after he dropped out of high school were "sort of menial labor jobs." R. 4224, ll. 2-3. Dr. Brown agreed that from his review the records indicated that appellant had never been a supervisor and was never given the opportunity to train a new employee. R. 4225, ll. 1-6.

When Dr. Calloway interviewed people with the ABAS, she also used additional questions given to her by one of the leading practitioners in the field of mental retardation. R. 3902, l. 22 – 3903, l. 6. After giving the ABAS and recording the answers, Dr. Calloway then scored it and converted the scores to standard which then becomes a composite score. R. 3903, ll. 7-15. To determine whether appellant had adaptive functioning deficits, she then looked through her records to see whether they confirmed or disconfirmed the findings of the ABAS looking for a convergence (or failure of convergence) of data. R. 3903, ll. 16-20.

On the ABAS, a score of 10 is average. R. 3905, ll. 14-22. In Dr. Calloway's report she noted "significantly low" scores with one asterisk and "very significantly low scores" with two asterisks. R. 3905, l. 14 – 3906, l. 1. Each area of the ABAS has roughly 30 to 40 questions. R. 3906, ll. 16-20. Questions are designed to determine whether an individual has the ability to perform tasks independently without help. R.

3909, ll. 6-13. If someone guesses too much on the ABAS, the clinician must write off their scores. R. 3907, ll. 14-23.

For each question, an individual can give the subject a score of zero meaning the subject has no ability at all. R. 3910, ll. 5-11. A score of one would mean that the subject "sometimes does that." R. 3910, ll. 6-11. A score of two means that the subject "occasionally does it." R. 3910, ll. 5-11. A score of three means the subject "does it all the time." R. 3910, ll. 5-11. In scoring the ABAS, the clinician adds up the ratings for a raw number which is then converted into a scaled score. R. 3910, ll. 6-23. The highest scaled score an individual can get is a 19. R. 3910, l. 24 – 3911, l. 5.

The skill areas which Dr. Calloway used to test are identified by the American Association on Mental Retardation as being the areas that are important for everyday functioning. R. 3913, ll. 15-24. With regard to the skill of home living, appellant had scores from two people who rated him very significantly low, and two people who rated him significantly low. R. 3912, ll. 9-18. With regard to health and safety, three people rated appellant as very significantly low and two people rated him as significantly low. R. 3914, ll. 14-22. Appellant was not found to have any deficit with regard to leisure. R. 3914, l. 23 – 3915, l. 7. With regard to the area of self-care, one person identified him as very significantly low and three people identified him as significantly low. R. 3915, ll. 8-15. With regard to the area of self-direction, one person rated appellant "very significantly low" and four people rated him as significantly low. R. 3915, ll. 16-21. With regard to community use, five people rated appellant as very significantly low. R. 3907, ll. 7-13.

Regarding home living, appellant was quite dependent upon his wife. R. 3921, ll. 7-21. Dr. Calloway described appellant'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. Appellant did not write 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 Angie left him, appellant was unable to keep up with these tasks. R. 3921, ll. 22-24. Appellant's mother moved in with him for a little while and shortly thereafter appellant moved in with his parents. R. 3921, l. 22 – 3922, l. 5. After Angie left him, the trailer where they lived went into foreclosure because appellant did not know how to pay the monthly mortgage payment. R. 3922, ll. 6-13.

Reverend Rice described how appellant dealt with Angie leaving him. R. 3926, l. 12 – 3927, l. 8. He would visit Reverend Rice on almost a daily basis. R. 3926, l. 12 – 3927, l. 8. Reverend Rice told him the same message every day and that he had to quit giving all his money to Angie because she was not coming back to him, especially if appellant continued supporting her while she lived with Bobby Center. R. 3926, l. 12 – 3927, l. 8. Despite the pastor's repeated advice, appellant "never quite seemed to grasp that. He kept doing the same sort of repetitive maladaptive pattern again and again." R. 3927, ll. 5-8. Dr. Brown admitted that he did not know that after Angie left him, appellant 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. Dr. Brown agreed that this would not surprise him. R. 4200, l. 17-22. Dr. Brown admitted he had no idea how much help appellant and Angie got from appellant's parents in setting

up their first trailer, paying the mortgage, doing shopping, buying clothes, or who took care of the children. R. 4204, ll. 14 – 4205, l. 1.

With regard to his social skills, appellant's world was "constricted." R. 3925, ll. 19-20. Almost all of his time was spent with his parents or with his daughter. R. 3925, ll. 4-7. Growing up, he was frequently taken advantage of by his peers. R. 3927, l. 9 – 3928, l. 14. Appellant would give away his possessions in hopes of making a friend. R. 3927, l. 9 – 3928, l. 14. For example, some friends took a car from appellant and appellant's father ultimately had to involve law enforcement. R. 3928, ll. 3-14.

Dr. Calloway ultimately found deficits in 6 of the 10 areas of adaptive functioning: (1) communication, (2) home living, (3) social functioning, (4) community use, (5) self-direction, and (6) functional academics. R. 3920, l. 3 – 3937, l. 16. R. 4378 – 4394. She did not find significant deficits in four areas of adaptive functioning: (1) self-care, (2) health and safety, (3) leisure, and (4) work. R. 3920, l. 3 – 3937, l. 16. R. 4378 – 4394. The assistant solicitor attempted to get Dr. Brown to agree that appellant did not have an adaptive functioning deficit, asking him, "I mean he's held numerous jobs. He had a family life, raise children. Isn't that – can't we extrapolate backwards and say he had no adaptive functioning disability?" R. 4189, l. 23 – 4190, l. 5. Dr. Brown replied, "I think that's one thing we look at, and that's part of what we do, but I don't think this, in itself, is sufficient." R. 4190, ll. 2-8.

The trial judge questioned Dr. Calloway regarding how the ABAS was scored. R. 4123, l. 13 – 4129, l. 5. Judge Couch stated he "looked at the scores that you reported and did an average of those scores, and a couple of things confused me." R. 4123, l. 24 – 4124, l. 1. The trial judge stated that he averaged the scores of the reporters in the area of

home living and came up with a number of 5.6. R. 4125, ll. 9-12. He asked her how she could conclude that appellant had an area of significant deficits in adaptive functioning when the ABAS showed an average of 5.6, which is above the criteria for significant impairment (a score of 4). R. 4123, l. 15 – 4125, l. 13. The individual ratings were contained in a chart on pages 24 through 26 of Dr. Calloway's report. R. 4381 – 4383.

The court apparently averaged the scores of the reporters on each section of the ABAS. R. 4126, l. 19 – 4127, l. 12. Dr. Calloway explained, "we don't use the ABAS scores that way to average across people." R. 4125, ll. 14-19. Judge Couch asked Dr. Calloway whether there was "something going on besides simply reporting data?" R. 4127, ll. 14-15. Dr. Calloway agreed and explained that in the area of adaptive functioning, the conclusion is not simply what the ABAS score showed. R. 4127, ll. 14-23. She explained that adaptive functioning was "the most difficult part of the Atkins evaluation because it so nuanced." R. 4127, ll. 16-23. She further explained, "With adaptive functioning, because adaptive functioning is looking at life skills across the many domains of behavior, you don't have one score. So, you don't just say oh, because there was the score, that means he has a deficit." R. 4128, ll. 16-20.

Judge Couch asked whether that was inconsistent with Dr. Calloway's testimony where she "talked in terms that I simply gathered the data and report it when you were doing that, and it seems to me there's more to it than that." R. 4128, ll. 21-24. Dr. Calloway agreed that the court was correct with regard to adaptive functioning and that there was a certain methodology used with the test. R. 4128, l. 25 – 4129, l. 5. Dr. Calloway further explained about how a clinician judges adaptive functioning in conjunction with ABAS scores and that the identity of the reporters must be taken into

account. R. 4131, l. 5 – 4133, l. 10. The following colloquy explained the difficulties of determining adaptive functioning and why averaging the scores from an ABAS would be an error:

> Q. With regard to all of the information on the ABAS – oh, and by the way, judge, you indicated that leisure was a significant deficit. It's actually reported not a deficit, and, and that was the sixth –
>
> THE COURT: I realize that now. But, again, there, there were a couple of them that didn't follow the four – that's – the thing starts off with saying you look at ten, two standard –
>
> MR. MCGUIRE: And you –
>
> THE COURT: – deviations of six. It comes down to that four, and that's the number you look for a significant problem, and then I've got some here that fell in threes that were not considered problems, and some that fell at an average of five that were considered problems, and it seemed to me that there's more to it than simply reporting numbers.
>
> MR. MCGUIRE: Okay.
>
> THE COURT: And I think I've got my answer on that.
>
> MR. MCGUIRE: I just want to make sure you're satisfied.
>
> For instance, one of the reporters is Heather, his daughter, and I think, in your interviews with her, you discovered that she loves her dad very much, and she thinks he can hang the moon, and I think she was consistently a high reporter.
>
> A. Correct.
>
> Q. And you have to take that into account when, when doing an ABAS?
>
> A. Correct.
>
> Q. And that's part of a clinician's judgment?
>
> A. That, that's correct. That's absolutely correct.
>
> Q. And that is an accepted best practice in the field is to interview people in person, get as much – many people as you can, can interview them all in person, and there is some clinician judgment that goes into the reporting?

A. Yes.

Q. Okay. But, but overall, you're looking at a consistency and a convergence of all the information from all the people including teachers, supervisor, family members, correct?

A. Correct.

Q. And what did the consistency and convergence of that data tell you?

A. Well, that led me to the conclusion about the diagnosis.

Q. Okay. And, for instance, somebody might use the subject or the defendant as a self-reporter and that's fraught with problems, correct?

A. Yes, it is.

Q. And if you just average it, without taking into account the clinician's judgment, that person with mild M.R. or I.D. would overinflate their abilities, exaggerate – if you don't use a clinician's judgment, you'll fall into a trap?

A. Correct.

Q. And, so, it's actually required?

A. Yes.

R. 4131, l. 5 – 4133, l. 10 (emphasis added).

Dr. Brown agreed that a clinician must use his training and judgment when assessing the adaptive functioning prong. When asked by the assistant solicitor about "being a reporter of information," and whether he considered himself a reporter, Dr. Brown replied, "To some degree, but I, I think when we're writing any report about test data, **there's some interpretation of the data that we report.**" R. 4172, l. 25 – 4173, l. 5 (emphasis added). He said, **"So, I think we are reporters, but I think it goes beyond that."** R. 4173, ll. 6-8 (emphasis added). He agreed with the assistant solicitor that part

of his job was to extract the significant parts of the data and include it in his report. R. 4173, ll. 9-11.

Dr. Brown reviewed the raw test data of Dr. Calloway on the tests she conducted, including "the ABAS for all various family members and other informants." R. 4151, ll. 17-19. When given an opportunity to "give the judge an overview of what these tests are and how they are conducted," Dr. Brown replied, "Well, again, I'm not sure what I can add to what's already been said." R. 4157, ll. 1-4. The assistant solicitor then interrupted Dr. Brown. R. 4157, ll. 4-6. In his report, Dr. Brown addressed the results Dr. Calloway had obtained on the ABAS in four categories, "the general adaptive composite, conceptual and social and practical skill areas as opposed to the ten separate areas." R. 4161, ll. 14-24. R. 4446. Dr. Brown stated "It could be done either way." R. 4161, ll. 14 – 24.

In his report, Dr. Brown wrote, "Adaptive functioning is much more difficult to quantify that is intelligence." R. 4446. "The ABAS-II was used by the undersigned as a measure of adaptive functioning, with Mr. Blackwell serving as the informant. Dr. Calloway had earlier used the same instrument with several other informants. While scores can be presented from those assessments, all are problematic." R. 4446. Dr. Brown thoughtfully explained this comment after questioning from the assistant solicitor:

> I think the nature of any instrument like this, whether we're talking about the ABAS or any other similar instrument, they are really designed to look at adaptive functioning so that agencies like DDSN can develop from that a plan of supports. What's gonna best help this person to succeed and overcome these, these deficits.
>
> So, we're using it for a purpose that it really wasn't developed for. I don't think when these tests were developed there was any thought that they might be used in death penalty cases to determine whether somebody would be eligible for that. Nevertheless, **it's the best that we have**, but

> we were asking someone to rate someone like Mr. Blackwell who is 53, 54 years old at the time, first of all, we got the issue of dealing with current level of adaptive functioning and then trying to extrapolate from that how does that relate back to his functioning prior to the age of 18.
>
> And then if you do go back, and if, for example, they teach you to rate him related to how he was functioning at age 16 or 17, relying on the memory that almost 40 years old at that point, so, I think the nature of the instrument, in most cases, is gonna make the data problematic.

R. 4187, ll. 2-23. These comments by Dr. Brown showed the difficulty and complexity of dealing with the adaptive functioning prong of mental retardation, but his conclusion in his report that an "argument can be made that [appellant] currently demonstrates significant deficits in adaptive functioning" and his testimony showed that the two psychologists were largely in agreement that appellant met the adaptive functioning prong of mental retardation's definition.

The Evidence Regarding Prong Three: Onset Before Age 18

While the two experts' reports showed a disagreement on the onset prong, after the testimony was complete, it was clear Dr. Brown agreed that only speculation existed to counter the evidence that appellant's difficulties manifested during his youth. Dr. Calloway testified that "a number of different sources" showed that appellant's intellectual functioning was subaverage before the age of 18. R. 3852, l. 22 – 3853, l. 4. Dr. Calloway partly relied on the school information to determine that appellant's mental retardation onset before age 18. R. 3961, l. 17 – 3962, l. 11. Those records showed that he "clearly he was functioning between the level of other children his age." R. 3962, ll. 1-11. In her report she concluded that, "Extensive review and testing indicated that Mr. Blackwell exhibited these deficits and subaverage functioning prior to the age of 18 years." R. 4394.

Also important to this conclusion was the history of low intellectual functioning in appellant's family. The AAIDD manual describes familial factors such as low IQ as a risk factor for intellectual disability. R. 4274, l. 20 – 4275, l. 10. Dr. Calloway testified that mental retardation can have a familial hereditary component. R. 3942, ll. 3-10. She reviewed records regarding appellant's family including IQ tests given to several family members. R. 3863, l. 11 – 3867, l. 18.

Multiple people in appellant's family had test scores in their records that approximated IQ and placed them within the range of mental retardation. R. 3871, ll. 18-24. Appellant's father, Cletus, had a reported IQ score of 60. R. 3872, ll. 3-9. Appellant's brother had approximate IQ scores of 73 and 74. R. 3874, ll. 10-18. Appellant's daughter, Heather had two scores of 57 and 71. R. 3875, l. 14 – 3876, l. 3. Appellant's grandson had been given the Wechsler intelligence scale for children on which he scored a 52. R. 3876, ll. 12-16. That score was not a screening measure but was a standardized, normed, true IQ test. R. 3876, l. 10 – 3877, l. 4. Another grandson had been given an individual IQ test – the Stanford-Binet intelligence scale – and scored a 50. R. 3877, ll. 12-20. On another test, the Reynolds, the grandson scored a 46. R. 3877, ll. 12-20. Appellant's cousin was diagnosed with moderate mental retardation. R. 3878, ll. 2-7. All of these people were in the mentally retarded range. R. 3878, ll. 8-11.

The assistant solicitor attempted to attack Dr. Calloway for reporting the number of low IQ scores in appellant's family. R. 4036, l. 22 – 4042, l. 19. Dr. Calloway testified that "in some cases of mild intellectual disability, there can be a familial association, i.e., a number of people in the family can have limited intellect." R. 4041, ll. 20 – 4042, l. 1. She stated, "There certainly is a strong association here for members of

his family to have limited intellect, which [appellant] also exhibited on an IQ test." R. 4042, ll. 15-19.

The assistant solicitor then asked Dr. Calloway if she was familiar with what he called the "Genomics Movement" in the 1920s and 1930s. R. 4042, ll. 20-24. The assistant solicitor asked Dr. Calloway whether "genetics was used by, and you said so called science, but it was people who were working in psychology to justify everything from racial inferiority to being used by the Germans, isn't that true?"[7] R. 4043, ll. 17-21. On redirect, defense counsel asked Dr. Calloway, "I'm not going to ask you too much about genetics and Nazis and the final solution, but I will ask you, you did note in the report the fact that Cletus, Ricky's father, was tested and had an IQ score of 60" to which Dr. Calloway responded "correct." R. 4112, ll. 9-13. She agreed that "any expert in the field," in the context of an Atkins investigation, should include in their report the fact that multiple people in a subject's family tested in the mentally retarded range. R. 4112, l. 9 – 4113, l. 3.

Dr. Brown agreed this information was important and properly considered. He included a paragraph about the family history of mental retardation in his report. R. 4438. At the hearing he agreed that he was present "for the cross-examination involving Genomics or Eugenics and Nazis and that criminal, criminal genes and stuff," but he had included some of the same information in his own report. R. 4210, ll. 6-12. When asked why he would include this information, Dr. Brown replied, "Because [there] often is a family history of intellectual disability, **and if there is a history of intellectual**

[7] The irony of a government official who was doing his absolute best to execute a mentally retarded person accusing the defense psychologist of promoting eugenics and comparing her to the Nazis was apparently lost on the assistant solicitor.

disability within the family, that makes it more likely that a particular individual might also have that diagnosis." R. 4210, ll. 17-23 (emphasis added). Dr. Brown agreed that as a forensic examiner, he would be "remiss" if he knew such information and left it out of his report. R. 4210, l. 24 – 4211, l. 2. He agreed that a forensic psychologist has an obligation to include information about the family's mental retardation because it is "significant." R. 4211, ll. 4-9.

Dr. Brown's report concluded that it was "not clear" that appellant met the criteria for mental retardation prior to the age of 18. R. 4447. He supported this lack of clarity by citing "[t]hree significant risk factors" that occurred in adulthood: cancer treatment, depression, and a head injury. R. 4447. The report does not state that these factors did have an effect on appellant's intellectual and adaptive functioning, but speculated that they "can" have an effect. R. 4447.

At the hearing, Dr. Brown all but abandoned this notion. Appellant's medical records from Spartanburg Regional Hospital showed he received treatment in 2002 for injuries sustained in a four wheeler accident. R. 4085, l. 15 – 4091, l. 2. The record showed that appellant lost consciousness for 15 to 20 minutes. R. 4085, l. 23 – 4086, l. 3. However the records also showed that the hospital did a CT scan of his brain and it was normal. R. 4089, ll. 16-25. Appellant had a broken clavicle. R. 4089, ll. 13-21. Nothing in the medical records showed anything about injuries to the external area of appellant's head. R. 4090, ll. 8-20.

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. Defense counsel asked Dr. Brown if he could agree that "speculating without evidence that

something may have affected IQ is improper." R. 4194, l. 22 – 4195, l. 2. Dr. Brown replied, "I, I don't know that I would say it's completely improper. **I obviously can't rely completely on speculation.** But I, I think, in the absence of solid data, there – I would think, almost by definition, there has to be some speculation." R. 4195, ll. 3-7 (emphasis added). The following colloquy occurred on 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, 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.

The state elected not to call Dr. Brown during the penalty phase.

Discussion

The evidence presented by the defense and through Dr. Brown conclusively demonstrated that appellant is mentally retarded and the Eighth Amendment forbids his execution. U.S. Const. amend. VII. U.S. Const. amend. XIV. In Atkins, the United States Supreme Court stated, "We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty." Atkins, 536 U.S. at 321. "Construing and applying the Eighth Amendment in the light of our evolving standards of decency, we therefore conclude that such punishment is excessive and that the Constitution places a substantive restriction on the State's power to take the life of a mentally retarded offender." Id. "No legitimate penological purpose is served by executing a person with intellectual disability." Hall v. Florida, 134 S.Ct. 1986, 1992 (2014).

Standard of Review

The standard of review is whether the trial judge's findings have "evidentiary support and [are] not against the preponderance of the evidence." State v. Reed, 332 S.C. 35, 39-40, 503 S.E.2d 747, 749 (1998) (stating standard of review for trial court's findings regarding a defendant's competency to stand trial); State v. Kelly, 331 S.C. 132, 149, 502 S.E.2d 99, 108 (1998). In Franklin, when this Court created South Carolina's procedure for making Atkins determinations, it specifically referenced Reed and Kelly and how trial courts determine a defendant's competency to stand trial. Franklin at 279, 588 S.E.2d at 606. Since the competency model was adopted in Franklin, it follows that the standard of review of a trial court's determination on mental retardation is the same.

The Trial Court's Findings and Conclusions are Not Supported and are Against the Preponderance of the Evidence

Despite the agreement of the experts that appellant met at least two and arguably agreed on all three of the prongs of mental retardation, the trial court concluded that appellant had met none of them. The trial court reached these conclusions only as the result of numerous factual and legal errors and omitting many of the facts and opinions detailed above. The trial court also failed to appreciate the complexity of many of the issues, including IQ scores and how clinicians measure adaptive functioning. Finally, the court relied wholly on speculation for its finding that appellant did not meet the age of onset prong.

In Franklin, this Court stated that "the trial judge shall make the determination in a pre-trial hearing . . . after hearing evidence, including expert testimony, from the

defendant and the State." Franklin at 279, 588 S.E.2d at 606. "The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence." Id.

Ignoring the opinions of the medical experts was an error of law. As the United States Supreme Court recently held in Hall:

> That this Court, state courts, and state legislatures **consult and are informed by the work of medical experts in determining intellectual disability is unsurprising.** Those professionals use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities. Society relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue. And the definition of intellectual disability by skilled professionals has implications far beyond the confines of the death penalty: for it is relevant to education, access to social programs, and medical treatment plans. **In determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions.**

Hall, 134 S.Ct. at 1993 (emphasis added). The trial court's hostility toward the opinions of the medical community is apparent at the beginning of its Order. The court criticized Dr. Calloway for using definitions of mental retardation from the American Association on Mental Retardation and claiming they had been "embraced" by the Atkins Court. Supp. R. 4. It is abundantly clear after Hall that clinical definitions must be used by state courts when evaluating mental retardation. Hall, 134 S.Ct. at 1998-99. The Court held, "**The clinical definitions of intellectual disability,** which take into account that IQ scores represent a range, not a fixed number, **were a fundamental premise of Atkins.** Id. at 1999 (emphasis added). The trial court's refusal to acknowledge best clinical practices and the testimony of the experts is a legal error under Hall.

Errors Regarding Intellectual Functioning

Despite the agreement of both experts that appellant had, as Dr. Brown put it, "significant deficits in intellectual functioning," the trial court concluded otherwise. Ignoring their opinions and testimony was error under Hall. The trial court chose to ignore the IQ tests given by Drs. Calloway and Brown. Supp. R. 8, ¶ 12. The court noted appellant's scores of 63 and 68, but then held that these scores were not as reliable as the testing administered to appellant while he was in school. Supp. R. 8, ¶ 12.

Both experts agreed that the tests given to appellant in school were not true IQ scores. Dr. Brown stated that the scored 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. Even more importantly, Dr. Brown explicitly stated (under questioning by the state) that he did not "trust" the 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.

Despite the court's own expert stating that he did not "trust" the 86 and 87 scores, the trial judge specifically credited them, holding that "[m]ost" of appellant'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." Supp. R. 13. Seventy is not a bright-line score. Hall, 134 S.Ct. at 2001. "Intellectual disability is a condition, not a number." Id. In Hall, the Supreme 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. Courts must take into

account the standard error of measurement on a test and realize that IQ testing provides a range, not a singular point. Id. It is clear from the Hall Court's thorough discussion of the complexities of IQ testing that the trial court erred in disregarding the opinions of the experts and crediting scores that were not true IQ tests. As noted in Hall, even modern IQ tests are "imprecise." Id. at 2001. If modern testing is imprecise, then discrediting the results of both experts' modern tests in favor of school tests that the experts agreed were not true IQ tests and could not be trusted was error.

Inexplicably, the trial court noted appellant's achievement testing but ignored this evidence when making its conclusion on the first prong. Supp. R. 13. The trial court correctly transcribed the results of the Dr. Calloway's investigation that appellant's achievement tests at the age of 18 showed him functioning on a sixth grade level. Supp. R. 13. The court omitted from its order the testing done by Dr. Calloway which showed appellant was still functioning on a sixth grade level at the age of 53. R. 4108, ll. 17-25. Appellant's failure to progress past the sixth grade level from his youth to his fifties is conclusive evidence that appellant is mentally retarded.

The trial court also omitted any reference to the history of low intellectual functioning in appellant's family. Both experts agreed this information was significant and was accepted in the field as a risk factor for mental retardation. Dr. Brown testified that the history of low intellectual functioning in a subject's family made it "more likely" that the subject was mentally retarded. R. 4210, ll. 17-23. The scores on true IQ tests by members of appellant's family were 52, 50, and 46 by appellant's grandchildren. R. 3871, l. 18 – 3878, l. 11. Other testing (like the tests credited by the trial judge) showed scores of 57 and 71 for appellant's daughter, a score of 60 for appellant's father, scores in

the low 70s for appellant's brother, and a diagnosis of mental retardation for appellant's cousin. R. 3871, l. 18 – 3878, l. 11. The court erred in ignoring this information.

No real disagreement existed between the experts that appellant satisfied his burden on the intellectual functioning prong. Appellant's IQ scores, his academic record (including the testing), and the history of mental retardation in his family proved that appellant's intellect is significantly subaverage and satisfies the definition for mental retardation. The court seized on the simple appellation of the letters "I" and "Q" to numbers without attempting to understand what the experts were conveying about the complex nature of these scores. This failure to grasp that all IQ scores are not created equal led the court to erroneously conclude that a man with the intellectual ability of an eleven year old child was not mentally retarded. The trial judge erred in disregarding the opinions of the experts and the evidence on this prong.

Errors Regarding Adaptive Functioning

Much as with the intellectual functioning prong, the trial court erred in disregarding the evidence and opinions of the experts on appellant's adaptive functioning. Hall, 134 S.Ct. at 1998-99. Dr. Calloway found deficits in six of ten areas of functioning. R. 3920, l. 3 – 3937, l. 16. Only two deficits are needed to qualify as mentally retarded. R. 3836, ll. 10-18. Dr. Brown concluded in his report that "an argument can be made that [appellant] also currently demonstrates significant deficits in adaptive functioning." R. 4447 (emphasis added). Despite this evidence, the trial court concluded that it received "little or no evidence" regarding this prong. Supp. R. 10, ¶ 19.

The trial court also erred in stating that Dr. Brown's report was deserving of more consideration because it gave "greater weight to Mr. Blackwell's functional adaptations

as is required by our state's statutory definition of mental retardation." Supp. R. 14. South Carolina's definition of mental retardation contains no such assignment of weight. S.C. Code Ann. § 16-3-20(C)(b)(10). The trial judge erred in giving greater credence to Dr. Brown's report because it misread the statute as requiring more emphasis on the adaptive functioning prong.

Both experts used the same test—the ABAS—to assist them in measuring appellant's adaptive functioning. The trial court seemed to believe that Dr. Calloway's use of a normed test accepted by the medical community actually weighed against her credibility, even though it was the same test used by Dr. Brown. The trial court stated it had "serious questions" about whether Dr. Calloway gave the ABAS to enough people. Supp. R. 10, ¶ 20. This finding is directly contradicted by the trial court crediting the report of Dr. Brown because of it gave "greater weight" to appellant's functional adaptations after Dr. Brown admitted he performed no independent investigation. Supp. R. 14. R. 4166, l. 24 – 4167, l. 10. Dr. Brown did not perform an investigation or interview people because in his clinical judgment it was not required; he did not investigate because he lacked the time and resources (despite being a court's expert). R. 4166, l. 24 – 4167, l. 10. Dr. Brown agreed that Dr. Calloway's investigation into appellant's background was "extensive." R. 4166, l. 24 – 4167, l. 10.

Both experts agreed that the adaptive functioning prong is the most difficult to assess and understand, yet the trial court seized on the simple fact that appellant was a truck driver to conclude appellant did not meet the definition. Supp. R. 8 – 10, ¶ 13, 14, and 19. This conclusion was certainly urged upon the trial judge by the state. During his cross-examination of Dr. Calloway during her rebuttal, Solicitor Barnette accused her of

trying to have her cake and eat it, too. R. 4276, ll. 3-4. Solicitor Barnette followed this accusation with:

> 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.** If you're saying his father can take care of things for him and him have to be –
>
> MR. MCGUIRE: Object to the form of the question. We've already had two questions.
>
> THE COURT: Well, he hasn't finished the question, but he is on cross-examination and you're allowed to lead on cross-examination.
>
> MR. MCGUIRE: Yes, sir.
>
> THE COURT: You may proceed.
>
> SOLICITOR BARNETTE: Thank you, Your Honor.
>
> Q. So, here, here now you're saying Cletus has had all these life experiences, and he's taking care of all these things for the defendant and everything. Well, the defendant did the same thing. He took care of a family. **He took care of, you know, through trucking.** He obviously worked, came up to a salary of 32,000 at one point. Increase his salary over the years. This is a gentleman that obviously has adapted very well if we believe the IQ scored and what you've submitted.
>
> A. I don't—
>
> MR. MCGUIRE: Objection. That's testimony. Lack of a question.
>
> THE COURT: Is that a question?
>
> SOLICITOR BARNETTE: Yes, sir.
>
> THE COURT: All right. You may answer it.
>
> A. I don't agree with you that he's adapted very well. I do agree with you that he's adapted very well in the work area, and I think about that. So, I, I simply agree with you that he's done very well in the work area, **and it's also true that people with mild intellectual disability have strengths and they have limitations,** and the way

> that I have arrived at this Atkins evaluation is to approach this topic in both a scientific way and a way that meets the standards of the field. **So, I don't take one area and say work is very good for him, he has a strength, therefore he's not intellectually disabled.**

R. 4276, l. 3 – 4277, l. 20 (emphasis added).

As the experts agreed, the ability to adapt in one area of a person's life does not mean he is not mentally retarded. Dr. Calloway candidly admitted that the area of "work" was a strength for appellant and he had no significant deficits in that area. This strength does not negate the limitations in six other areas of adaptive functioning, especially when only two are required to satisfy this prong. See United States v. Davis, 611 F.Supp.2d 472, 475-76 (D. Md. 2009) (citing the American Association on Mental Retardation manual's assumption that "Within an individual, limitations often coexist with strengths.").

Finding that appellant did not meet the adaptive functioning prong because of a relative strength is similar to the error found by the United States Supreme Court in Hall. In Hall, the experts opined that the defendant was mentally retarded. Hall, 134 S.Ct. at 1991. The Supreme Court unfavorably quoted the trial judge as stating that he was suspicious of "professional overkill" by the experts because "'[n]othing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed.'" Id. Ignoring the expert testimony in Hall because the defendant stole a car and robbed a convenience store would be analytically the same error as concluding appellant is not mentally retarded because he once drove a truck.

The trial court also erred in finding Dr. Calloway not credible because she used her clinical judgment in scoring the ABAS. The trial judge wrote that "the Court finds that in several instances, Dr. Calloway substituted her subjective opinions for the responses of the informants." Supp. R. 11. The trial court cited her testimony on direct examination that she "was simply merely giving the test" and then found an "inconsistency" with her view of her role after she "acknowledged" that she used her "subjective expertise in weighting some of the results of the ABAS-II." Supp. R. 11. As evidence of this, the trial judge used his own example of how he averaged the scores of the reporters on the ABAS and the averages he computed were different from the deficits in adaptive functioning found by Dr. Calloway. Supp. R. 11.

Essentially, the trial judge made up his own way to score the ABAS and to assess adaptive functioning in a way that was not supported by the testimony of either expert. Ignoring the expert testimony in this fashion is an error under Hall. Part of the clinician's job is to determine whether the interviewee is guessing and the ABAS contains a correction factor for these guesses. R. 3844, l. 22 – 3845, l. 11. She also took into account the limitations of the reporters, such as appellant's daughter who suffers from low intellectual functioning, otherwise the ABAS would not be accurate. R. 4131, l. 5 – 4133, l. 10. Dr. Calloway testified that using professional judgment to score the ABAS is required by the best practices in the field. R. 4131, l. 5 – 4133, l. 10. Dr. Brown answered the question of whether he was merely a "reporter of information" the same way Dr. Calloway did: that the clinician must interpret "the data that we report." Atkins hearing R. 4172, l. 25 – 4173, l. 5. No justification existed for the trial judge to discount

the experts' opinions on how to score the ABAS or how to determine adaptive functioning.

The Sixth Circuit recently held that a state court's use of "holistic" and "commonsense" reasoning departed from expert opinions on adaptive functioning and reversed. Van Tran v. Colson, 764 F.3d 594, 605 (2014). The Van Tran court held that the state court's "ostensibly commonsense reasoning, by itself, is not sufficient to reject the experts' conclusions that Van Tran has more than one adaptive deficit." Id. The expert testimony was in accordance with "professionally accepted definitions" and "clinical best practices." Id. "The reliable and professionally vetted methods presented by Van Tran's experts, from which the legal standards draw their substance, must guide the court's inquiry." Id.

The trial court in Van Tran, just as here, invented its own way to assess adaptive functioning, particularly with respect to the area of functional academics. Id. at 606-08. The trial court, against the expert testimony, concluded that the defendant's problems in functional academics were a result of his deficits in communication (which were admitted). Id. The Sixth Circuit held, "This discounting of expert testimony was based on the trial court's refusal to accept the expert conclusions of Van Tran's witnesses. . . .These conclusions, while perhaps reasonable in appearance to a layperson, are in the context of this case too unsupported by the record to be upheld as reasonable." Id. at 607. "The State presented no testimony to contradict the conclusions of Van Tran's experts, all of whom agreed that he suffered significant deficits in functional academics." Id. The trial judge's decision to create his own way to score the ABAS is analytically similar to the error in Van Tran.

As in Van Tran, the trial court here decided the case against the weight of the experts on the adaptive functioning prong. Dr. Calloway testified that appellant had deficits in six areas. Dr. Brown agreed in his report that a case could be made that appellant suffered deficits in adaptive functioning. The court's complete disregard of the expert testimony in favor of its own method of assessing adaptive functioning was error.

Errors Regarding Age of Onset

The trial court based its finding regarding the age of onset prong on, as Dr. Brown agreed, "pure speculation." R. 4246, ll. 11-22. The trial court held that his current IQ scores "both carry with them the possibility that they may have been adversely affected by events occurring in his adult life." Supp. R. 13. The trial judge also wrote that while he could not "assume that the intervening factors directly affected his later IQ testing, I cannot rule them out either." Supp. R. 8, ¶12. The court listed these intervening factors as the four-wheeler accident, cancer and chemotherapy treatment, and depression. Supp. R. 7 – 8, ¶ 11.

Inconsistent with these findings was the court's recognition that "most experts agree that a person's IQ remains relatively constant throughout their life. . . ." Supp. R. 8, ¶ 12. In fact, the court failed to appreciate the significance of this point and that it carries the force of law. On direct examination, the assistant solicitor asked Dr. Brown how an Atkins case is different than any other mental retardation situation. R. 4150, ll. 13-14. Dr. Brown replied, "the valuation itself should not be any different in terms of the criteria were looking at." R. 4150, ll. 15-16. Consistent with the experts' testimony that a court in an Atkins situation considers the same criteria as any other court deciding a mental retardation claim, trial counsel offered extensive argument and citations

concerning how this prong is treated in social security disability cases. See, e.g., Muntzert v. Astrue, 502 F.Supp.2d 1148 (D. Kan. 2007). R. 4306, l. 25 – 4313, l. 22. The trial court indicated his skepticism of this argument, stating, "Heard a lot of mention of the admin judge. I'm not an admin judge," and asking trial counsel to separate the social security cases from the criminal cases. R. 4320, l. 18 – 4321, l. 19. The court did not cite any disability cases in its Order.

As early as 1985, the Fourth Circuit held, "**We must and do assume**, therefore, that in the absence of any evidence of a change in plaintiff's intellectual functioning from the time of his back injury to the time of his IQ test, that he had the same or approximately the same IQ (63) at the time of his back injury . . . as he did at the time of his 1982 test." Branham v. Heckler, 775 F.2d 1271, 1274 (1985). See also Luckey v. U.S. Dep't Health & Human Servs., 890 F.2d 666, 668-69 (4th Cir. 1989) (rejecting the notion that claimant's low IQ had not manifested during his developmental years because "there is no evidence that Luckey's IQ had changed"). The Eighth and Eleventh Circuits also have presumptions that IQ remains constant without any evidence of a change in a claimant's intellectual functioning. Sird v. Chater, 105 F.3d 401, 402 n.4 (8th Cir. 1997); Hodges v. Barnhart, 276 F.3d 1265, 1268-69 (11th Cir. 2001).

Applying this assumption to the present case, the trial court erred in finding appellant did not satisfy his burden of proof because it could not "rule out" that appellant's IQ had changed. 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. Dr. Brown repeatedly agreed that there was "no evidence" of a change in appellant's IQ. 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.

Furthermore, the trial court ignored evidence of the family history of low intellectual functioning. The numerous low IQ scores in his family are strong evidence that appellant's mental retardation was present during his youth. The experts agreed this family history was significant, yet the trial court did not mention this information in its Order. The trial court therefore engaged in impermissible speculation that appellant's intellectual functioning, despite the numerous low test scores, the numerous failed special education classes, the assessment of appellant functioning at a sixth grade level at the age of 18 and at the age of 53, the low scores on the ABAS from people both within and outside his family, the fact that appellant never lived alone and was always taken care of by either his parents or Angie, the fact that multiple people in his family show signs of mental retardation, and the current IQ scores on scientifically valid tests of 63 and 68 are all perhaps due to a four wheeler accident, depression, or chemotherapy. This speculation is an error of law and this Court should reverse.

4.

The trial court erred in refusing to charge the jury that the state had the burden to prove appellant was not mentally retarded beyond a reasonable doubt and, alternatively, charging the jury that it was required to find appellant was mentally retarded by a preponderance of the evidence, all of which impermissibly shifted the burden of proof to appellant and resulted in verdict forms that were hopelessly confusing in violation of his rights under the United States Constitution.

Relevant Facts

After the close of the evidence at the sentencing phase, appellant transmitted to the court proposed jury instructions, proposed mitigating circumstances, and a proposed "Finding of Mental Retardation." R. 3139, ll. 3-14. R. 3143, ll. 7-17. R. 3711 – 3734. Defendant's proposed instruction number one informed the jury that a "person with mental retardation may not be sentenced to death." R. 3711 – 3728. He further requested instruction that "[Before] you may consider the sentence to be imposed in this case you must unanimously find, beyond a reasonable doubt, that he is not mentally retarded." R. 3711 – 3734. The defendant's instruction also would have told the jury that if they unanimously found beyond a reasonable doubt that appellant was not mentally retarded, they could continue with their deliberations and "must consider his intellectual level as a mitigating circumstance in your further deliberations." R. 3711 – 3734.

Defense counsel argued that the "only burden of proof that I can think of for the... prosecution or the State must prove, beyond a reasonable doubt, the someone is not, for example, insane. But, in this case, not mentally retarded." R. 3150, l. 14 – 3151, l. 13. Defense counsel readily admitted contrary authority from this Court's opinion in

State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). R. 3150, l. 22 – 3151, l. 13. In response, the trial judge stated, "I understand that this is, to a certain degree, a – would appear to be burden shifting." R. 3151, ll. 14-20. The trial judge then indicated that his understanding of Laney and Franklin meant that the defense had the burden of presenting the evidence and he believed the preponderance standard applied. R. 3152, ll. 5-15.

Recognizing that the trial judge had denied the request to charge on burden of proof beyond a reasonable doubt, defense counsel then objected to the trial judge charging the jury that it must find mental retardation by the preponderance of the evidence. R. 3152, ll. 16 – 3153, l. 19. Defense counsel argued that a charge on preponderance of the evidence would be burden shifting. R. 3153, ll. 16-19. The trial judge responded that the preponderance standard was "the lowest standard we have." R. 3153, l. 20 – 3154, l. 7. The trial judge also noted that he intended to leave mental retardation as a mitigating factor, "which doesn't require any particular level of proof." R. 3154, ll. 16-20. Defense counsel suggested that the jury "should be just charged that if they find [its existence] is essentially the language I would alternatively suggest." R. 3157, ll. 2-7. The trial judge relied on Franklin and Laney, and denied defense counsel's request. The trial judge replied, "I understand all those things and then, again, I have considered it thoroughly and I guess this case may define it further." R. 3160, ll. 23-25.

The trial judge initially charged the jury that the "burden of proof is upon the State, and that burden remains with the State." R. 3216, ll. 8-9. Concerning the statutory aggravators, the trial judge charged that the State had to prove the existence of at least one of the aggravators by proof beyond a reasonable doubt. R. 3228, ll. 12-14. The trial

judge then defined reasonable doubt. R. 3228, l. 15 – 3229, l. 6. Regarding mental retardation, the court charged the jury:

> Now, in order to establish that the defendant suffered from mental retardation at the time of the crime, that fact must be found by you, the jury, by evidence that you find to be the preponderance of the evidence or the greater weight of the evidence. This is a different standard of proof than I've discussed with you in the past in this case. Normally, in a criminal proceeding, facts are to be proven beyond a reasonable doubt. That's not the standard as to this particular question or issue. The level of proof as to this question is lower than proof beyond a reasonable doubt.
>
> Again, for a finding by you of – for the jury on this matter, the level of proof must be by the great weight or preponderance of the evidence.

R. 3219, ll. 13-25. The trial judge then gave a definition of preponderance of the evidence. R. 3220, l. 1 – 3221, l. 4. The court instructed the jury to consider its mental retardation verdict form first. R. 3221, ll. 18-20. R. 3735. The court's verdict form read:

> We, the jury unanimously find by the preponderance of the evidence that the defendant was mentally retarded as defined as, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period at the time of the commission of the crime of murder in this case.

R. 3735. The form had blanks for the jury to indicate either "Yes", "No", or that they were unable to make a unanimous finding. R. 3735. The form instructed the jury that if they found "Yes" to stop their deliberations. R. 3735. The jury checked "No" and recommended a sentence of death. R. 3735. R. 3257, ll. 16 – 3259, l. 2. Appellant renewed his objection to this charge verdict form at the post-trial motion hearing. R. 4819, l. 10 – 4820, l. 21.

Discussion

Franklin left open the question of the burden of proof for the jury on mental retardation at the sentencing phase after the Eighth Amendment's restriction on the death penalty in Atkins. Franklin at 279, 588 S.E.2d at 606. U.S. Const. amends. VIII, XIV. According to Franklin, when the trial judge does not find the defendant is mentally retarded, "the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime." Id. "if the jury finds this mitigating circumstance, then a death sentence will not be imposed." Id.

Laney left open the constitutionality of our statute's designation of mental retardation as merely a mitigating circumstance in light of Atkins. Laney at 647, n.4, 627 S.E.2d at 731, n.4 (citing S.C. Code Ann. § 16-3-20(C)(b)(10)). The defendant in Laney argued pursuant to Atkins, Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000) that the fact that appellant was not mentally retarded must be found by the jury beyond a reasonable doubt. Laney at 646-49, 627 S.E.2d 730-32. This Court rejected that argument, finding that the issue of mental retardation was not an aggravating circumstance but instead was one of eligibility for the sentence imposed by the jury. Id. However, the United States has since reaffirmed the principle from Apprendi and Ring that juries must pass on issues that increase punishment because they are elements of the crime and not sentencing factors. Alleyne v. United States, 133 S.Ct. 2151 (2013).

Jury instructions which create a burden shifting presumption are unconstitutional. Sandstrom v. Montana, 442 U.S. 510 (1979). "Under our state law, no articulated burden is placed on the capital defendant to prove his statutory mitigating circumstances." State

v. Patrick, 289 S.C. 301, 308, 345 S.E.2d 481, 485 (1986) *overruled on other grounds by* Casey v. State, 305 S.C. 445, 409 S.E.2d 391 (1991) . As determined by this Court in Laney and Franklin, the issue of mental retardation is a mitigating circumstance and therefore charging the jury that the defendant had a burden of proof was erroneous.

This Court's decision not to hold that the defendant had a burden of proof in Franklin indicates that it did not intend for the burden from the pre-trial determination by the judge to carry over to the jury's deliberations in the sentencing phase. Charging a burden of proof on a mitigating circumstance is error under Patrick. The jury heard three burdens of proof during its charge: (1) beyond a reasonable doubt; (2) preponderance of the evidence; and (3) that they could recommend a sentence of life imprisonment for any reason or no reason at all. In the final analysis, the defense correctly argued that if the judge did not charge the jury that the state had to disprove mental retardation beyond a reasonable doubt, then the judge's instruction on the defendant having the burden of proof by the preponderance of the evidence and the verdict forms would be hopelessly confusing. Indeed, the jury demonstrated confusion when it asked a question about whether the signing of the form indicating a verdict on the aggravators automatically resulted in the death penalty. R. 3252, l. 16 – 3255, l. 17.

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). While a court is not required to give any particular verbiage, instructions may not confuse or mislead the jury. State v. Leonard, 292 S.C. 133, 137, 355 S.E.2d 270, 273 (1987). "The purpose of instructions is to enlighten the jury and to aid it in arriving at a correct verdict." Id. When a reasonable juror "might find the instruction confusing" and infer a burden of proof on the defendant,

it is error despite general language charging that "the burden of proof was not raised from the shoulders of the State." State v. Adams, 275 S.C. 108, 109-10, 267 S.E.2d 538, 539 (1980) *citing* Sandstrom, at 518 n.7. The multiple, confusing burdens of proof and the placing of a burden by the preponderance standard on appellant were errors. This Court should reverse and remand the case for a new sentencing proceeding.

5.

The trial court erred in refusing to admit evidence of appellant's remorse contained in the records of a hospital chaplain pursuant to Rule 803(6), SCRE, in mitigation, and in response to testimony from a police officer who claimed appellant said "the only thing that I'm sorry about is that I didn't do a better job on myself," since the exclusion of this relevant evidence violated appellant's Eighth Amendment rights.

Relevant facts

During the state's case in aggravation, Spartanburg County Sheriff Deputy Lorin Williams ("Williams") testified that he went into the trauma bay of the hospital while medical staff were attending to appellant's gunshot wound. R. 2680, l. 18 – 2682, l. 15. Officer Williams read appellant his rights and questioned him. R. 2683, l. 16 – 2685, l. 25. Officer Williams claimed appellant told him that Angie "was continuously throwing up her boyfriend to him" and that appellant had "been having sour thoughts about how to get back at this man for breaking up his marriage." R. 2685, ll. 3-9.

The police officer continued to question appellant. R. 2685, ll. 11-25. He asked appellant to give him a reason to help him understand "how this could happen to a child of this age." R. 2685, ll. 11-25. The officer claimed appellant told him it was "his way of getting back at, at her dad for breaking up the marriage." R. 2685, ll. 11-25. The officer asked appellant, "is there something you can tell me, tell me it was an accident, tell, tell me you are sorry, tell me anything like that. And he just looked at me, he said the only thing that I'm sorry about is that I didn't do a better job on myself." R. 2685, ll. 18-25.

On cross-examination, defense counsel asked the officer if he had spoken with the chaplains at the hospital and the officer told him, "Had no reason to." R. 2688, l. 1 – 2689, l. 17. Defense counsel also asked whether the officer knew "that Mr. Blackwell was praying for Bobby Center's family at the hospital," to which the officer replied, "I know what he told me." R. 2689, ll. 18-20.

During appellant's mitigation case, and outside the presence of the jury, appellant called Gracie Williams, records custodian from Spartanburg Regional Hospital. R. 2961, ll. 3-5. Appellant proffered medical records from the hospital chaplain through the records custodian. R. 2961, ll. 17-19. R. 3386. The state objected on hearsay grounds. R. 2961, l. 24 – 2968, line 6.

The defense argued that the documents were "a record of regularly conducted activity at Spartanburg Hospital, and the records custodian is here to testify to that fact." R. 2962, ll. 11-18. The chaplains themselves "didn't have much memory actually of this event. So, their notes are actually the best evidence of it." R. 2963, ll. 17-20. The trial judge reviewed the document and published the pertinent section:

> I assume the pertinent portions are the parts that I discussed earlier that state the patient was struggling with guilt. Wanted to tell his grandchildren he loved them. He was struggling with his actions and what had been done, and another entry, the next day, by a different individual said but he was sad, had some prayers in his heart, asked for the family. We prayed the Lord's Prayer together.

R. 2965, ll. 13-22. The trial judge ruled that this record was an opinion that would not be admitted under the hearsay exception for a regularly kept business record. R. 2965, l. 23 – 2966, l. 6.

The defense then proffered testimony from the records custodian who stated that the records were kept in the regular course of business, the information would have been

recorded at or about the time the information existed, and that they were genuine. R. 2966, l. 14 – 2967, l. 23. Defense counsel further argued that the document was being offered in response to Officer Williams' testimony, as a business record, and as mitigation evidence under the Eighth Amendment. Counsel argued the failure to admit this evidence would violate appellant's right to present mitigating evidence under the Eighth Amendment to the United States Constitution. He noted that hearsay rules in particular "would necessarily fold" in the face of appellant's right to present mitigating evidence. He cited Green v. Georgia, 442 U.S. 95, 97 (1979) to the trial court in support of his argument. (Reliable hearsay evidence that is relevant to a capital defendant's defense should not be excluded by rote application of a state hearsay rule). He also cited Mills v. Maryland, 486 U.S. 367, 374 (1988) and Skipper v. South Carolina, 476 U.S. 1 (1986) in support of his argument. R. 2968, l. 13 – 2971, l. 3. R. 3386.

The solicitor took full advantage of the exclusion of this evidence. He told the jury that "not once did he [appellant] show any remorse for Brooke. Doesn't even show one concern about Brooke . . . He said I shot and killed Brooke [to Investigator Williams]. Didn't show any remorse. He said what, what would you on done differently. He said well, I would of just done of done a better job of shooting myself. That's how much he cared about Brooke C." R. 3169, ll. 13-14.

Discussion

The chaplain's record was admissible under the business records exception. Rule 803(6), SCRE. The court affirmed its ruling excluding the evidence. Under Rule 803, the availability of the declarant is immaterial. Id.

The proffer of the records custodian showed that the records were kept in the course of a regularly conducted business activity. The rule's prohibition on admission of opinions did not apply because the chaplain's records were not opinions, but statements made by appellant to the chaplain—the very definition of hearsay and why the exception exists. "Medical records are admitted routinely as business records." Ex Parte Department of Health and Environmental Control, 350 S.C. 243, 565 S.E.2d 293 (2002) (holding that medical records were admissible under the business records exception).

Furthermore, to the extent the records contained any subjective opinions, appellant's right to present mitigation evidence under the Eighth Amendment trumps any defect. U.S. Const. amend. VIII. "It is beyond dispute that in a capital case the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record in any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Mills v. Maryland, 486 U.S. 367, 374 (1988) (internal quotations omitted). See also Eddings v. Oklahoma, 455 U.S. 104 (1982). Further, appellant had the due process right to respond to this evidence that he expressed no remorse after the shooting. Skipper v. South Carolina, 476 U.S. 1 (1986).

Further, as seen above, Green v. Georgia, 442 U.S. 95, 97 (1979) holds that reliable hearsay evidence that is relevant to a capital defendant's defense should not be excluded by rote application of a state hearsay rule.

The evidence from Officer Williams was highly inflammatory. The trial court's ruling prevented appellant from responding with mitigating evidence that contradicted the deputy and showed that appellant was remorseful and was praying for the decedent's family.

As also seen above, the solicitor took full advantage of the exclusion of this evidence. He told the jury that appellant did not show any remorse for killing the decedent. He only allegedly was sorry he had not killed himself also. R. 3169, ll. 13-14. Solicitors argue lack of remorse to sentencing juries because they know "lack of remorse" inflames the passions of the jury. Where the state takes advantage of the exclusion of relevant mitigating evidence, the error is not harmless. State v. Chaffee, 294 S.C. 88, 92, 362 S.E.2d 875, 877 (1987).

Further, the refusal to allow the jury to consider this evidence that appellant was "struggling with guilt," and "struggling with his actions and what he had done," as rebuttal mitigation evidence to the testimony of Investigator Williams that appellant was centered on himself was also not harmless because any one juror may vote for a life sentence "for any reason or no reason at all." State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275, 276 (2000). Appellant is entitled to a new sentencing trial.

6.

The court erred by ruling that the state presented racially neutral reasons for striking black male jurors Cheeks and Fullenwider where the state did not strike similarly situated white jurors who also had a criminal record, or had pending criminal charges in the same county and the treatment of alleged "pro-life" black and white jurors by the solicitor was also disparate.

Relevant Facts

Following jury selection Defense Counsel Young made a Batson motion challenging the solicitor's use of preemptory challenges to remove three black men from the venire.[8] R. 2308, l. 20 – 2315, l. 1. The black jurors that were struck were Juror 45, Cory Cheeks, Juror 79, Stacy Fullenwider, and black Alternate Juror 79, John Lindsey. R. 2314, l. 18 – 2315, l. 9. R. 3391 – 3392. Solicitor Barnette cited Juror Cheeks' criminal domestic violence conviction as well as Juror Fullenwider's "criminal record" as reasons for the strikes, as well as his concerns about their allegedly "pro-life" positions on the death penalty. R. 2315, l. 12 – 2316, l. 2.

Defense Counsel Young noted the gross inconsistency with the solicitor's use of his preemptory challenges. The solicitor did not strike white Juror 70, Michael Estes, who also had a criminal domestic violence conviction. Further, the solicitor did not strike a white sitting juror, Juror 188, Stephanie Partridge, who had a pending breach of trust charge at the time of the trial in the same county. The solicitor also did not exercise a preemptory

[8] See Batson v. Kentucky 476 U.S. 79 (1986). Appellant is not pursuing the gender-based challenges on appeal.

challenge on white juror 154, Donald Lowe who had very serious criminal charges of kidnapping and criminal domestic violence of a high and aggravated nature dismissed. R. 2316, l. 24 – 2318, l. 15. Defense counsel said the solicitor's reasons for striking the Black jurors were pretextual, and that the solicitor had failed to strike similarly situated white jurors. R. 2318, ll. 10-15. The judge discussed this then with the solicitor:

> THE COURT: All right. Hear from the State.
>
> SOLICITOR BARNETTE: [M]r. Estes is a pro-death (sic) juror, if you just look from the facts of the situation, and interviewing him from that standpoint. It was – he worked at the DOC [Department of Corrections] for a short period of time. I think it was six months, if I remember right, through the testimony, and answering questions about Ms. Marcotte [a struck juror not challenged on appeal] you know, that's being – she was there for 12 years at least if I remember right from that standpoint.
>
> The – Mr. Estes, from that standpoint, it doesn't match up what he's saying because our reasons is cause they're pro-life jurors on top of that. It's just not merely – they do have the convictions as a factor in this situation, but also ---
>
> THE COURT: You took from their answers then---
>
> SOLICITOR BARNETTE: Took from the answers.
>
> THE COURT: ---that you felt they were being more pro-life than not?
>
> SOLICITOR BARNETTE: And if you look at him, and you look through my questioning or Mr. Bulsa's questioning, I can't remember who, who did which one, it was based off our questioning of those individuals from that standpoint.
>
> THE COURT: Anything further from the challenge?
>
> MR. YOUNG: No, Your Honor
>
> THE COURT: All right.

> THE COURT: All right. In reviewing the, the reasoning given by the State for those strikes, I find that it is not pretextual, and I do not find that it indicates a pattern of discrimination, and I will deny the motion.
>
> MR. YOUNG: Your Honor, I don't have them printed out, but I would like to offer just court records concerning the Jurors that I argued were similarly situated, just their local court records.

R. 2318, l. 16 - 2319, l. 25

Thus, black male jurors Cheek and Fullenwider were struck by the solicitor for allegedly having criminal records while the solicitor did not strike white sitting Juror Partridge or white potential jurors Lowe or Estes who either had a criminal records, pending criminal charges, or had extremely serious criminal charges against them dismissed. R. 3391 – 3392.

The defense then noted the solicitor's alleged "added" reason that the struck black jurors were also "pro-life" also rang hollow. The defense pointed to Juror 266, William Van Der Plaat, who was also "similarly life leaning or pro-life comments in his voir dire, and he's a white male similarly situated to the ones challenged by – in our last motion." R. 2322, ll. 12-17. In fact, as will be seen infra, Juror Van Der Plaat, stated that life imprisonment may be worse than the death penalty, and he expressed his strong concern that innocent people could be executed.[9]

White Juror Partridge

It is apparent the light went on for the solicitor during the voir dire of Juror Stephanie Partridge. The judge noted before her voir dire that she had a pending criminal

[9] Solicitors, the one in this case included, frown upon a juror thinking that life imprisonment without parole is worse than death for obvious reasons as they attempt to obtain a death sentence.

charge "in this county." According to prosecutors, she has "entered an admission of guilt and is entering the PTI program at this point in time." The Deputy Solicitor offered that Juror Partridge had given a written statement to the police admitting her guilt, and she asked to enroll in PTI. The solicitor's office had not yet approved her entering PTI at the time of trial. R. 795, ll. 3-18.

The solicitor's office at first stated they would like to disqualify Partridge. The judge agreed that Partridge having criminal charges pending against her could "cut both ways" since she could have hard feelings towards the police, or as defense counsel stated, she could "throw them a bone and deliver a verdict they would like" so her PTI application would be approved. R. 796, ll. 2-17; R. 797, l. 6.

The judge noted that Partridge was not automatically disqualified and that the attorneys would be allowed to question her. R. 797, ll. 1-22.

This case involves the murder of a child and Partridge noted on questioning that she had an eleven year old and a seven-year-old child. R. 823, l. 19. Juror Partridge was raised as a Jehovah's Witness, but apparently did not continue in the practice of that faith. She did note, however, that "the scriptures definitely have a strong bearing on how I feel. On the one hand, I do believe an eye for an eye." She also noted there were "three cities of refuge for people who might have been guilty, but yet there was a place for them to reside and live with their lives normal – I mean as balanced." R. 825, l. 12 – 826, l. 13.

Partridge said she had thought about the death penalty and she observed: "I think the only injustice is that women are not put on death row as well, which I -- but that is just my personal opinion." R. 826, l. 12 – 827, l. 12.

When questioned about her pending criminal charges, Partridge claimed they would not impact her verdict:

Q Okay. Now, I hate to go into this, but the judge mentioned it about your pending case with the Sheriff's office.

A Yes.

Q And you're, you're aware that they're the prosecuting agency in this case.

A Yes, I do.

Q And it's not gonna impact your decision at all?

A No, it shouldn't. There's no correlation.

Q Okay. I understand that---

A Yeah.

Q You're gonna need to be comfortable because you're gonna be hearing a lot of witnesses coming up here.

A Uh-huh. (Affirmative).

Q Okay. And you can set that aside---

A Oh, yeah.

Q You mentioned knowing one of the witnesses.

A Uh-huh. (Affirmative).

Q Who is that again?

A Elizabeth Sima. She's the principal---

Q In Woodruff?

A ---of the elementary school.

Q Okay. All right. That's another – she was actually the complainant in the case also.

A Yes.

Q Okay.

A I have the utmost respect for Elizabeth and I have a very unique relationship with her. She's an amazing principal and, and, again, it's, it's compartmentalization.

Q And you, you feel---

A There's just---

Q ---confident you can do that?

A This is me and my stupidity, my issue, and this has nothing to do with that, and whether she's involved in both is irrelevant.

R. 830, l. 9 – 831, l. 24.

White Juror Van Der Plaat

During the voir dire of Van Der Plaat, he testified he was a "type three juror." R. 1278, ll. 11-14. He said he could sentence a defendant to life without parole, but "it would definitely be harder" to impose the death penalty. R. 1278, l. 22 – 1279, l. 14.

Van Der Plaat noted his fear that "we put someone innocent to death." Van Der Plaat attempted to balance that by observing: "that would bother me," but he also thought there were dangerous people that "maybe the only way to handle that would be to put them to death. " R. 1283, ll. 7-22. Juror Van Der Plaat even stated what the solicitor apparently disliked most in a juror, that life imprisonment without parole may be as bad if not worse than the death penalty. Van Der Plaat testified: "I could go either way on that I guess. I don't, I don't really see, because it's forever life in prison, you're essentially letting someone remain alive, but without a life. Whereas, in the other case, you're actually taking

the life, which, okay, depending on, on some people's beliefs, is worse than the two. *But being locked up for life with essentially no life to live anymore seems just as drastic to be honest with you.*" Van Der Plaat noted that he was "an engineer" and that he tried to be logical about such matters. R. 1300, ll. 1 – 1302, l. 13.

Further, the voir dire of jurors Cheeks and Fullenwider does not support the solicitor's position that they were "very pro-life." The state and the defense agreed that Juror Cheeks was a qualified juror. Speaking of his own criminal domestic violence conviction, Juror Cheeks said it had involved his girlfriend and noted the system had "treated me fair." R. 1644, ll. 12-22. Cheeks said he was a "number three juror" and that he could sign a verdict form sentencing a defendant to death. However, and totally inconsistent with his treatment of white Juror Van Der Plaat, the solicitor referred to comments by Cheeks which he thought expressed reservations about the death penalty, and innocent people. R. 1339, l. 15 – 1341, l. 1; 1647, ll. 14-25.

Juror Fullenwider agreed a death penalty case was a serious matter, but he added: "I mean I still feel the same way, that I mean if they, if they done it, I mean, and they deserve it, then they deserve it." Fullenwider told the solicitor he was, "positive --- I could do it" when asked if he could sentence a defendant to death. R. 1784, ll. 4-16. The solicitor agreed Fullenwider was qualified, but later struck him. R. 1785, ll. 2-5.

Discussion

Whether a Batson violation has occurred must be determined by examining the totality of the facts and circumstances in the record. State v. Shuler, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001); State v. Scott, 406 S.C. 108, 479 S.E.2d 160 (Ct. App. 2013). The purpose of Batson is not only to protect the defendant's right to a fair trial by a jury of his

peers, but also to protect each juror's right not to be excluded from jury service for discriminatory reasons, and to preserve public confidence in the fairness of our system of justice. State v. Haigler, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999.)

In this case, the defense correctly challenged the state's striking of three black men. The solicitor alleged he struck jurors Cheeks and Fullenwider because they had criminal records, and he claimed they appeared "very pro-life." The defense, at step three of the Batson process, countered that these reasons were not racially neutral given the fact that white jurors Partridge, Lowe and Estes, were not struck by the solicitor. The solicitor obviously saw the upside of juror Partridge in particular since she was beholden to the solicitor's office with her PTI application still pending at the time of appellant's trial.

The defense was out of strikes when the last juror was seated. See strike sheet. R. 3391 – 3392.

White potential Juror Estes had a conviction for criminal domestic violence and he was not struck by the state. The state also did not strike white male juror Donald Lowe despite the fact at one point he had been charged with both kidnapping and criminal domestic violence of a high and aggravated nature. R. 3393 – 3495.

Further, while the solicitor expressed alleged concern about juror Cheeks' mention of "innocent people" and the death penalty, white sitting Juror William Van Der Plaat went much further in expressing his concern that an innocent person could be executed. Indeed, Van Der Plaat thought as an engineer, and as a matter of logic, that life imprisonment without the possibility of ever being released was worse than the death penalty.

It is apparent from this record that the solicitor did not exercise his preemptory challenges in a racially neutral manner regarding these black veniremen. The disparate

treatment of white jurors Stephanie Partridge and William Van Der Plaat and the solicitor's failure to strike jurors Estes and Lowe, shows that the defense demonstrated the alleged racially race–neutral reasons of the solicitor for striking these black jurors was actually pretext.[10] See Purkett v. Elem, 514 U.S. 765 (1995); Georgia v. McCollum, 505. U.S. 42, 44 (1992).

[10] Appellant had only one black juror on his jury.

7.

The court erred by qualifying Juror #43, Donna Champion, because her position that the defense had to prove appellant deserved a life sentence rather the death penalty was burden shifting, inconsistent with the law, and her entire voir dire showed she would not consider certain categories of mitigating evidence.

Relevant Facts

The trial judge explained to Juror Champion how the penalty phase trial was conducted so the jury could determine the "appropriate sentence." R. 691, l. 12 – 692, l. 7. The judge explained that aggravating circumstances "tend to make the crime of murder to be considered more severe. In other words, deserving a higher punishment." R. 692, ll. 15-25.

Conversely, the judge told Champion that mitigating circumstances lessened either the crime or the culpability of the person involved such that the jurors might tend to give a lesser sentence. Champion acknowledged she understood these concepts. R. 693, ll. 1-22.

Juror Champion considered herself in the third category of jurors. R. 696, ll. 5-7. Defense counsel asked Champion what she meant in her questionnaire that there were "many things . . . wrong with the criminal justice system, people are doing bad things, and the next thing you know they're back out doing it again." R. 699, ll. 13-20. R. 3501.

Champion explained that a lot of people were arrested, and she cited to one particular person she saw on the news who was arrested and "he got out that day or something and went and did it again. So, I mean yeah, it needs to be fixed. Something needs to be done. People are -- just keep doing the same thing over and over and over, you know. They'll go to jail or county lockup and . . . make bail and out doing it again." R. 699, l. 13 – 700, l. 6.

Champion said she understood that a person sentenced to life without parole would die in prison. R. 700, ll. 7-24. Champion described her feelings on the death penalty as being "if the crime is so severe I am not against it . . . if it fits the crime or, you know, the crime was so severe, I don't - - I'm not against it." R. 700, l. 25 – 701, l. 7.

Defense counsel then questioned Champion about mitigating circumstances. She was asked the type of things she wanted to know about the person before deciding whether he should be sentenced to death or life imprisonment without parole. "I don't know if it's so much about the person. I just want to know about the facts about the trial, what happened, the facts that led up to being here . . . I don't really consider - - I don't know. I guess I shouldn't say I don't consider the person, but I need to know all the facts." R. 706, ll. 11-24.

Champion was also asked if she would consider how the person was raised "what their walk in life" if matters such as those would be important to her. She responded: "Somewhat. I mean somewhat. That makes you who you are, but, on the other hand, you have responsibility. I mean [you've made a choice] . . . And I know everybody's life is hard, and every - - you know... I mean you do have to take that into account, but, on the other hand, nobody told you to do these - - things. So, I mean I guess everything - - you have to hear everything and work it out." R. 707, l. 20 – 708, l. 18.

Champion testified that a defendant would have to prove to her why he should get a life sentence rather than the death penalty. "I think it'd have to be proved I mean or shown what happened." Champion reiterated on a follow-up question that the defense would have

to prove to her why a life sentence should be imposed rather than death for the murder. R. 708, l. 22 – 709, l. 7; 710, ll. 17-20.[11]

Champion acknowledged she understood while a person's background or how they grew up might *not* be important to her that it could be important to other jurors. She said she would respect their opinion. R. 711, l. 17 – 714, l. 21.

When questioned by the solicitor Juror Champion responded she knew the burden of proof was always on the state and not on the defendant. R. 715, ll. 17-21. She said she understood the state had to prove aggravating circumstances, and she said she would listen to mitigating circumstances and take them into account. R. 716, l. 18 – 717, l. 16.

Champion said "if enough aggravation was brought into the case" she did not "have a problem imposing the death penalty." The solicitor also asked "*if their mitigation* or the evidence or something in the, in the sentencing phase *would point to life without parole*, you wouldn't have any problem voting life without parole either, would you?" Champion said she could give a life without parole sentence under these circumstances. R. 717, ll. 17-25.

The defense moved to disqualify Juror Champion for cause. Counsel noted that she would require the defense to prove why life was a proper punishment, which was contrary to the law. She was a "burden-shifting juror." R. 719, ll. 5-14.

Juror Champion also "rejected certain categories of mitigation such as growing up hard and background are not relevant to her in her penalty decision making process." The defense noted the state tried to rehabilitate her, but these remained her positions. R. 719, ll.

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[11] Q. But would, would I have to prove to you as to why a life sentence was the appropriate penalty?
A. Yes. R. 709, ll. 5-7.

5-14. See Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008); Nance v. Ozmint, 367 S.C. 547, 557, 626 S.E.2d 878, 883 (2006).

The solicitor responded that Juror Champion was asked leading questions. The trial judge interjected that both sides asked leading questions, and he did not have a problem with that procedure. The solicitor added that Juror Champion's answers showed she took the matter seriously, and he asserted Juror Champion was exactly the kind of juror that should sit in judgment in this case. R. 719, l. 22 – 720, l. 12.

The judge stated that Champion said "she may require someone to prove something to avoid the death penalty, I'm not sure she had been instructed on the law. She made clear that she would be willing to follow the Court's instructions even if she disagreed with the Court's instructions - - with the law as stated by the Court." The judge ruled that Champion was qualified to be a juror. R. 720, l. 13 – 721, l. 7.

Champion was one of eleven white jurors who served on appellant's jury, and the defense used all ten of its peremptory challenges in this case. R. 3391 – 3392.

Discussion

In reviewing an error as to the qualification of a juror, this court engages in a three step analysis. First, the appellant must show that he has exhausted all of his peremptory challenges. Here, it is clear appellant used all ten of his peremptory challenges. R. 3391 – 3392.

Second, if all peremptory challenges were used, this court must determine if the juror was erroneously qualified. As will be seen infra, Juror Champion was erroneously qualified.

Third, the appellant must demonstrate this error denied him of a fair trial. Juror Champion, an unqualified juror, served on appellant's jury that sentenced him to death. Prejudice has been demonstrated. See State v. Council, 335 S.C. 1, 10, 515 S.E.2d 508, 512 (1999); State v. Green, 301 S.C. 347, 392 S.E.2d 157 (1990).[12]

In a capital case, the proper standard for determining the qualification of a prospective juror is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Wainwright v. Witt, 469 U.S. 412, 424 (1995); Uttecht v. Brown, 551 U.S. 1 (2007).

In this case Juror Champion unequivocally stated that the defense would have to prove to her that the defendant deserved a life sentence. Juror Champion also stated that all people live "hard lives," but that people are responsible for their actions.

Her focus was on the circumstances of the crime, and defense counsel correctly argued her positions were contrary to the law, burden shifting, and that she could not give meaningful consideration to important categories of mitigation. A review of the voir dire of Champion as a whole reveals she was not a qualified juror.

A jury in a capital sentencing phase may recommend a life sentence for any reason or no reason at all, including as an act of mercy. Rosemond v. Catoe, 383 S.C. 320, 330, 680 S.E.2d 5, 10-11 (2009).[13] Further, there is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances. E.g. State v. Hicks, 330 S.C. 207, 215, 499 S.E.2d 209, 218 (1998). Moreover, a defendant is entitled to have a jury consider during the sentencing phase of his capital trial any mitigating factor related

[12] Certiorari denied. Green v. South Carolina, 498 U.S. 881 (1990).

[13] Overruling in part State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000).

to his character or background. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982).

Juror Champion's voir dire, considered as a whole, discloses that the defense would have to prove to her that appellant was entitled to a life sentence rather than a death sentence. Her voir dire also disclosed that circumstances of the crime virtually subsumed her consideration of relevant mitigating evidence, and that she would not give serious consideration to certain categories of evidence. Her view the "*everybody*" lived a "hard life" but that they were responsible for their actions was very revealing about her view of mitigating evidence.

Sentencing juries -- and therefore individual jurors -- must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis to not impose the death penalty on a particular individual, notwithstanding the severity of his crime or his future dangerousness. Abdul-Cabir v. Quarterman, 550 U.S. 233 (2007); Smith v. Texas, 550 U.S. 297 (2007). Juror Champion's position that the defense had to convince her why a life sentence was deserved was the antithesis of this bedrock principle of modern death penalty jurisprudence.

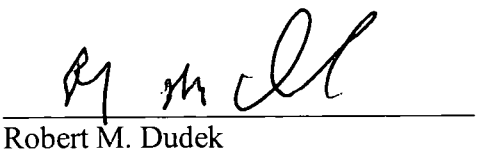
In State v. Bennett, 328 S.C. 251, 257-258 493 S.E.2d 845, 848 (1997), this Court held that a juror's generalized statements that he would be fair and impartial, and that he would follow the law did not make him a qualified juror where he also stated he "would have to go with the majority" if the other eleven jurors wanted to impose a death sentence. The juror's position was contrary to the law that every juror has the right to his own opinion, and that verdict he agreed to must also be his own verdict. State v. Williams, 386 S.C. 503, 514-515, 690 S.E.2d 62, 67-68 (2010).

The judge here erred by refusing to strike Juror Champion for cause. The judge's view that a jury charge could transform an unqualified juror into a proper one is confounding. She was not a qualified juror and she sat on appellant's jury that imposed the death sentence upon him. Appellant must be granted a new trial.

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed and this case remanded to the Spartanburg County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,



Robert M. Dudek
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ATTORNEYS FOR APPELLANT

This 7th day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 7th, 2016

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RICKY LEE BLACKWELL,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Redacted Final Brief of Appellant in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of March, 2016.

Robert M. Dudek
Chief Appellate Defender

David Alexander
Appellate Defender

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 7th day of March, 2016.

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