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 REPLY BRIEF OF APPELLANT
REDACTED

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In Davis v. Alaska, Richard Green was a witness for the prosecution in a burglary case arising from the stealing of a safe from a bar. Green made a hasty identification of Davis as the man he saw with the crowbar standing near the suspected vehicle. The defense sought to show the jury Green's bias in identifying Davis since Green was on probation by order of the juvenile court for two prior burglaries. The prosecution sought a protective order to prevent any reference to Green's juvenile record on cross-examination. The defense argued it did not want to introduce Green's juvenile record as general impeachment of his character, but rather to "show – or at least argue – that Green acted out of fear or concern of possible jeopardy to his probation." Davis v. Alaska, 415 U.S. at 311-312.

The trial court granted the motion for a protective order under the applicable Alaska statute. The United States Supreme Court noted that defense counsel for petitioner Davis did his best to expose Green's state of mind but Green was able to "hide behind" the protective order, and Green even denied that he had ever been questioned before by law enforcement. Davis v. Alaska, 415 US. At 313. The Supreme Court wrote that:

> "The tension between the right of confrontation and the State's policy of protecting the witness with a juvenile record is particularly evident in the final answer given by the witness. Since it is probable that Green underwent some questioning by police when he was arrested for the burglaries on which his juvenile adjudication of delinquency rested, the answer can be regarded as highly suspect at the very least. The witness was in effect asserting, under protection of the trial court's ruling, a right to give a questionably truthful answer to a cross-examiner pursuing a relevant line of inquiry; it is doubtful whether the bold 'No' answer would have been given by Green absent a belief that he was shielded from traditional cross-

> examination. It would be difficult to conceive of a situation more clearly illustrating the need for cross-examination. The remainder of the cross-examination was devoted to an attempt to prove that Green was making his identification at trial on the basis of what he remembered from his earlier identifications at the photographic display and lineup, and not on the basis of his February 16 confrontation with the two men on the road."

Davis v. Alaska, 415 U.S. at 314.

The Supreme Court further held that "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Davis v. Alaska, 415 U.S. at 316.

Further, "A more particular attack on the witness' credibility is affected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is 'always relevant as discrediting the witness and affecting the weight of his testimony.' 3A J. Wigmore, Evidence s 940, p. 775 (Chadbourn rev. 1970). We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Davis v. Alaska, 415 U.S. at 316-17.

The Supreme Court held that it could not accept the conclusion of the Alaska Supreme Court that the permitted cross-examination was "adequate to develop the issue

of bias properly to the jury." Davis v. Alaska, 415 U.S. at 317. "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." Davis v. Alaska, 415 U.S. at 320.

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Issue 3

This Court Should Ignore the State's Desperate "Mootness" Argument.

The desperation of the state's "mootness" argument betrays its lack of confidence in the merits of its position. The trial judge ruled that appellant is eligible for the death penalty because he is not mentally retarded. Appellant has appealed the trial judge's ruling. The state claims that this Court cannot review the trial judge's finding because the jury considered this issue. The state calls the trial judge's ruling "moot." Brief of Respondent at 67.

If the state's "mootness" argument is correct, then much of this Court's jurisprudence—and that of the United States Supreme Court—will need to be overruled. For example, because a jury ultimately decides the voluntariness of a statement, a trial judge's ruling in a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964) would be moot and unreviewable. Because a jury ultimately decides whether to credit a witness's identification of a defendant, a trial judge's ruling in a hearing pursuant to Neil v. Biggers, 409 U.S. 188 (1972) would be moot and unreviewable. Because a jury decides whether a defendant is entitled to acquittal on a theory of self-defense, a trial judge's pretrial immunity determination under the Protection of Persons and Property Act would be moot and unreviewable. State v. Isaac, 405 S.C. 177, 747 S.E.2d 677 (2013). Because a jury ultimately decides whether the state meets its burden of proof, a trial judge's decision on a defendant's motion for directed verdict would be moot and unreviewable.

Under the state's theory, the United States Supreme Court's recent mental retardation decision reversing a death sentence in Hall v. Florida, 134 S.Ct. 1986, 1990-

91 (2014), which the state inexplicably cites in its preservation argument, was wrongly decided because Hall presented "substantial and unchallenged evidence of intellectual disability" to a jury which sentenced him to death. This Court set forth our state's Atkins procedure in Franklin v. Maynard, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003). "If the judge finds the defendant to be mentally retarded in the pre-trial hearing, the defendant **will not be eligible** for the death penalty." Franklin at 279, 588 S.E.2d at 606 (emphasis added). The pre-trial eligibility ruling is separate from the jury's determination. Id. at 279, n.5, 588 S.E.2d at 606, n.5. The state's "mootness" argument is frivolous. This Court should view the state's willingness to make such an argument as a strong indicator that it has no confidence in the trial judge's ruling.

The State Urges This Court to Ignore Expert Testimony and Methodology

The state's argument invites this Court to ignore the testimony of the experts. While claiming that the trial judge's conclusion that appellant was not mentally retarded did not rest primarily on appellant's short and checkered history as a truck driver, the state invites the Court to make *exactly the same conclusion.* Brief of respondent at 78, n.25. Referring to appellant's possession of a commercial driver's license, the state argues, "The fact that it is significantly difficult to obtain the specialized license weighs in favor of finding appellant was not mentally retarded." Brief of respondent at n.25. Both the defense expert and the court's expert agreed that when assessing the adaptive functioning prong of mental retardation, work history is only one of multiple areas that must be considered. R. 3920, l. 3 – 3937, l. 16. R. 4190, ll. 2-8. Appellant's relative strength in the area of work does not make him eligible for the death penalty. This Court should reject the state's simplistic approach.

A recent unanimous summary reversal of an Alabama decision by the United States Supreme Court illustrates the folly of the state's argument. See Lane v. Alabama, 136 S.Ct. 91 (Oct. 5, 2015) (vacating and remanding for further consideration in light of Hall v. Florida, 134 S.Ct. 1986 (2014)) *opinion below:* Lane v. State, 169 So.3d 1076 (Ala. Crim. App. 2013). The Alabama trial judge and appellate court disregarded the uncontradicted expert testimony that Lane was mentally retarded. Lane, 169 So.3d at 1090-94. The United States Supreme Court's summary reversal in light of Hall demonstrates that courts are not free to disregard expert testimony regarding mental retardation and cherry-pick facts supporting a conclusion that ignores scientific standards.

A comparison of the facts of Lane with appellant's case is compelling. Lane's IQ was 70 and the trial court ruled that he met the first prong of Atkins—"subaverage intellectual functioning." Lane, 169 So.3d at 1089. The trial court concluded that Lane did not prove the adaptive functioning prong. Id. The adaptive functioning prong was the only issue before the appellate court with respect to Lane's Atkins claim. Id.

At the Atkins hearing, Lane presented two witnesses: his sister and a clinical neuropsychologist. Id. at 1089. The prosecution presented no witnesses. Id. at 1091. Lane's sister testified that he "had never been gainfully employed, had never been able to handle his own finances, and depended on family to handle his money." Id. at 1089. Lane's expert testified that he had deficits in adaptive functioning in ten areas. Id. at 1090. His findings were based on interviews with Lane and Lane's family. Id. Lane read at a third-grade level. Id. The expert had not been able to obtain Lane's school records. Id.

Ignoring the only expert testimony before it, the trial court concluded that Lane was not mentally retarded. Id. at 1090-91. The trial judge emphasized the facts of the crime—that he stalked the victim. Id. The trial judge also relied on rap lyrics written by Lane. Id. Based primarily on these facts, the trial judge concluded that the expert's testimony did not prove Lane met the adaptive functioning prong. Id. The appellate court agreed with the trial court's assessment and added that Lane's "statement to police indicated that he was able to communicate, that he was able to care for himself, and that he had a group of friends that he 'chilled' with every other day." Id. at 1092.

The United States Supreme Court summarily reversed in light of Hall. Lane, 136 S.Ct. at 91. The errors committed by the Alabama courts are analytically the same as the error committed by the trial judge and urged upon this Court by the state: ignoring expert methodology. The Alabama courts cast aside the only expert testimony regarding adaptive functioning and fashioned their own measurement of this prong of Atkins.

A similar state court error was reversed by the United States Supreme Court even under the strict review of federal habeas. Brumfield v. Cain, 135 S.Ct. 2269 (2015). In Brumfield, Louisiana denied the defendant funds for experts and an evidentiary hearing on his Atkins claim. The district court concluded the state court decision was unreasonable, but the Fifth Circuit reversed. Brumfield, 135 S.Ct. at 2275-76. The Supreme Court reversed the Fifth Circuit, noting evidence the defendant had been in special education classes and could "barely read at a fourth-grade level" demonstrated a likelihood of deficits in adaptive functioning. Id. at 2280. The district court, after concluding the state court's decision was unreasonable, held its own evidentiary hearing

and held the defendant was mentally retarded. Brumfield v. Cain, 854 F.Supp2d 366, 384-406 (M.D. La. 2012).

The Fifth Circuit recently affirmed the district judge's finding of mental retardation after remand from the Supreme Court. Brumfield v. Cain, ___ F.3d ___, No. 12-30256 (5th Cir. Dec. 16, 2015). Much like appellant's case, the state's experts performed little or no investigation of adaptive functioning while the defense expert used the ABAS to interview people who knew the defendant. Id. at 17-18. Following the dictates of Hall, the Fifth Circuit stated that the question of mental retardation "is heavily informed by clinical standards and guidelines." Id. at 27. As commanded by Hall, the courts in Lane and Brumfield followed the experts' methodology and concluded those defendants were mentally retarded.

The trial court in appellant's case erred in deviating from the methodology of the experts. Here, the trial court gave more credence to its own method for scoring the ABAS than that of both Dr. Calloway and Dr. Brown. R. 4131, l. 5 – 4133, l. 10. R. 4172, l. 25 – 4173, l. 5. See State v. Agee, ___ P.3d ___, 2015 WL 7774300 at *14-16 (Ore. Dec. 3, 2015) (vacating death sentence because trial court failed to use current standards for assessing adaptive functioning which require the use of a clinician's judgment). The trial court's crediting of Dr. Brown's report as opposed to Dr. Calloway's report cannot be based on Dr. Calloway's use of the ABAS—because it is the exact same test used by Dr. Brown. Dr. Brown admitted he did no independent investigation because he lacked the time and resources. 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. The trial judge contradicted himself by

questioning Dr. Calloway's results because she did not give the ABAS to enough people when Dr. Brown only gave the ABAS to one person—appellant. Supp. R. 10, ¶ 20. R. 4145, ll. 14-17. The trial court's ruling that appellant did not meet the adaptive functioning prong of Atkins is without evidentiary support.

On appeal, the state does not seriously contest that appellant met the intellectual functioning prong. Brief of respondent at 80, n.29. The experts measured appellant's IQ at 63 (Calloway) and 68 (Brown). R. 4245, l. 25 – 4246, l. 4. R. 4192, ll. 9-12. While couching its argument in terms that appear to contest this part of the Atkins inquiry, upon closer inspection the state's contentions all relate to the age of onset prong. Brief of respondent at 80, n.29.

The state's arguments concerning depression or a head injury amount to speculation. No dispute existed that appellant took special education classes. R. 4205, l. 24 – 4206, l. 2. No dispute existed that appellant was at a sixth grade level in math and reading at the age of eighteen. R. 4221, ll. 10-18. No dispute existed that appellant's family had a history of mental retardation. R. 4210, ll. 17-23. Dr. Brown agreed that IQ remains presumptively constant through life. R. 4194 ll. 1-15. See Brumfield, ___ F.3d ___, at 41 (finding that the defendant met the age of onset prong because it credited the experts' testimony that IQ scores remain stable over time, there was no evidence of any physical problem later in life, and "the family history of intellectual disability."); Branham v. Heckler, 775 F.2d 1271, 1274 (4th Cir. 1985) ("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 on October 24,

1979 as he did at the time of his 1982 test."). Dr. Brown agreed that the notion that a four-wheeler accident, cancer, or alcohol use affected appellant's IQ was pure speculation. R. 4195, l. 8 – 4196, l. 15. R. 4246, ll. 11-22. See also Williams v. Mitchell, 792 F.3d 606, 621 (6th Cir. 2015). ("[The Ohio Court of Appeals] also ignored the medical community's determination, as adopted by the Supreme Court, that intellectual disability manifests itself before eighteen and remains consistent throughout a person's life.").

The state also urges the Court to adopt the trial court's legal error in heavily weighting the lack of a diagnosis of mental retardation before the hearing. Supp. R. 12, ¶ 25. Brief of Respondent at 82. The Florida Supreme Court recently reversed a trial judge for using this as a determining factor in concluding that a defendant was not mentally retarded. Oats v. Florida, ___ So.3d ___, No. SC12-749, at 25-27 (Fla. Dec. 17, 2015). The Florida trial court ruled that the defendant had not met the age of onset prong because there was a "'lack of diagnosis before 18.'" Id. at 25. The Florida Supreme Court reversed. Id. at 25-27. The court said, "Accepting the position that 'manifested' equates to 'diagnosed' would render the first two prongs of the statutory test for an intellectual disability moot, as the only way to find an intellectual disability would be if the diagnosis already existed by the age of 18." Id. at 26-27. Much like appellant, the defendant in Oats could only read at a grade-school level, always lived with family who took care of him, and was in special education classes in school Id. at 7, 13.

When all three prongs of the test for mental retardation are considered, appellant's case is strikingly similar to the Pennsylvania Supreme Court's recently decided PCR case of Commonwealth v. Vandivner, ___ A.3d ___, Op. No. 696 CAP (Pa. Dec. 29, 2015).

In Vandivner, the prosecution relied on evidence that the defendant was a truck driver and had a CDL. Vandivner at 14. The trial court ultimately ruled that appellant did not prove the age of onset prong and that finding was upheld on appeal. Id. at 16-17. At PCR, the defendant presented additional evidence regarding the special education classes he took as a child. Id. at 17-20. The defendant also demonstrated that his siblings had IQs of 72, 63, 74, and 74. Id. at 20-21. The PCR court denied relief, but the Pennsylvania Supreme Court reversed, holding that the defendant proved the age of onset prong. Id. at 32. Like the defendant in Vandiver, appellant's short career as a truck driver does not rebut the substantial evidence that he was mentally retarded.

The trial court reached its conclusion that appellant was not mentally retarded only by disregarding the complexity of the issue and the experts' testimony.[1] Hall instructs that courts may not use this approach. The Supreme Court's summary reversal of Lane and the Brumfield decisions demonstrate that Hall's instructions are in full force and are required by the Eighth Amendment. The trial court's methodology is rife with legal and factual errors. This Court should reverse and find appellant ineligible for the death penalty.

[1] The state's brief continually makes reference to Dr. Harrison's opinion that appellant was not mentally retarded, even though she admitted she: (1) did no testing, (2) performed no investigation, and (3) her testimony was not mentioned by the trial court. R. 3806, ll. 17-25. R. 3819, l. 21 – 3820, l. 1. R. 3820, ll. 2-3. R. 4238, ll. 3-5. Just as Judge Couch did, this Court should ignore Dr. Harrison's unsupported, conclusory opinion.

Issue 5

The Chaplains' Notes Were Admissible Under Both the Hearsay Exception for Business Records and as Mitigation Evidence under the Eighth Amendment.

The state incorrectly asserts that appellant's statements to the chaplains do not fall under the business record exception because they were not made for the purpose of medical diagnosis and treatment. Nothing about the note itself supports the state's assertion. R. 3386. The box at the top right corner states that it is a record from Spartanburg Regional's "Interdisciplinary Plan of Care." R. 3386. In addition to the chaplains' notes, the page also contains nurses' notes from Danielle Ward and Amy Knight. R. 3386. It contains assessments of precautions taken to prevent appellant from falling. R. 3386. It contains chronological notes of appellant's care. R. 3386. The chaplains' assessments were clearly available to appellant's doctors. R. 3386. Appellant's doctors not only needed to know his physical condition, but also his mental condition to assess him for depression and suicide potential.

Medical records such as these are admissible. See Todd v. Joyner, 385 S.C. 421, 425-26, 585 S.E.2d 595, 597-98 (2009). In Todd, an expert was allowed to read from notes in the medical records that, for example, contained hearsay that the plaintiff complained of headaches. Id. at 426 n.2, 685 S.E.2d at 597 n.2. This Court ruled that admission of the hearsay contained in the records was proper under 803(4), Statements for Purposes of Medical Diagnosis or Treatment. Id. Furthermore, under the business records rule, it is not only a diagnosis that is admissible, but acts, events, and conditions. Rule 803(6), SCRE. Appellant's statements to the chaplains that he "was struggling with

guilt" and "struggling with his actions" fall under acts, events, and conditions as well as information necessary for a diagnosis. Nothing about the preparation of the chaplains' notes indicates a "lack of trustworthiness" under the rule. Rule 803(6), SCRE.

The inability of the state to show that the records have a "lack of trustworthiness" is precisely why the Eighth Amendment also compels their admission. Reliable hearsay is admissible in a capital sentencing proceeding. See Sears v. Upton, 561 U.S. 945, 950 n.6 (2010). ("[W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule.") To the extent any question about admissibility exists, the Eighth Amendment requires that it be resolved in appellant's favor during the sentencing phase.

The state also ignores that hearsay of a similar nature—appellant's statements concerning lack of remorse made to a police officer at the hospital—was admitted; however, appellant's statements showing remorse made to a chaplain at the hospital were excluded. Both are hearsay statements against interest. A statement made to a chaplain is no less reliable than a statement made to a police officer. Even business records compiled by prison guards concerning a defendant's behavior have been held admissible by this Court in a capital sentencing proceeding. State v. Owens, 378 S.C. 636, 639-40, 664 S.E.2d 80, 81-82 (2008). The fact that the best evidence of the statement was made in a business record a chaplain made contemporaneously with her duties at the hospital is not sufficient to cause its exclusion, especially where the hearsay statement to the police officer was admitted. The Eighth Amendment further compels the result that appellant should have been allowed to rebut Detective Williams' testimony. Under Rule 803(6), the availability of the declarant is immaterial as long as a records custodian can lay a

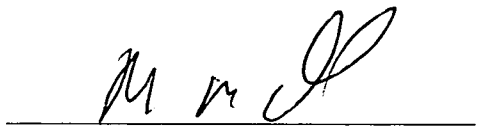
proper foundation for the records. Rule 803(6), SCRE. Appellant's proffer met the foundational requirements for this exception.

The state's harmless error argument also fails because the evidence of remorse from the chaplains would have been viewed as coming from a neutral observer lacking any motive to aid appellant. The evidence of remorse which the state claims makes the chaplains' notes cumulative came from an expert witness and appellant's family—people more likely to be perceived as biased by the jury. Furthermore, appellant's expression of remorse to the chaplains was made near the time of the statements allegedly made to Detective Williams. The error 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). This evidence was absolutely necessary to rebut Detective Williams' testimony and the Eighth and Fourteenth Amendments required its admission.

CONCLUSION

By reason of the arguments in appellant's brief, and in this reply brief, 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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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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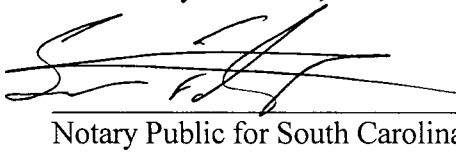
CERTIFICATE OF SERVICE

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

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT.

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



(L.S.)
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