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STATE OF SOUTH CAROLINA
In the Supreme Court

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CAPITAL CASE
APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

SC SUPREME COURT

The State of South Carolina, Respondent,

v.

Ricky Lee Blackwell, Appellant.

Appellate Case No. 2014-000610

FINAL BRIEF OF RESPONDENT
[**REDACTED COPY**]

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1.

Whether the Court denied appellant his constitutional right to confront and cross-examine the state's most critical witness, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]?

2.

Whether, in the alternative, appellant is entitled to a new trial because the trial court denied him meaningful appellate review [REDACTED]

[REDACTED]

[REDACTED]?

3.

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

4.

Whether 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 Fifth, Eighth, and Fourteenth Amendments to the United States Constitution?

5.

Whether 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?

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?

(FBOA, pp. 7-8).

RESPONDENT'S COUNTER STATEMENT OF ISSUES ON APPEAL

1.

Whether the trial judge abused his discretion in limiting a discrete portion of cross-examination of a witness [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]?

2.

Whether the trial judge erred in declining [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]?

3.

Whether the trial judge's initial determination that appellant was not mentally retarded is moot where the jury subsequently returned a verdict that appellant had not shown mental retardation by a preponderance of the evidence?

4.

Whether the trial judge erred in charging the jury the correct standard of proof by instructing the jury that appellant must establish the existence of mental retardation by a preponderance of the evidence?

5.

Whether the trial judge abused his discretion in declining to admit notes from two hospital chaplains to the effect that appellant was “struggling” with his actions and “asked for the family” where appellant failed to present the writers of the notes; the notes were not made in the course of medical treatment; the notes for the most part constituted the writer’s opinion rather than appellant’s statements; thus, for all these reasons, were inadmissible under standard evidentiary rules?

6.

Whether the trial judge committed clear error in crediting the State’s neutral reasons for striking two African American males jurors as the reasons for the State’s strikes were absolutely non-discriminatory, were well-supported by the record, and appellant failed to show a “material in relevant aspects” potential juror of a different race that the State did not strike in an attempt to undermine the clear non-discriminatory intent expressed in the reasons for the strikes?

7.

Whether the defense failed to exercise an available peremptory strike and the issue on qualification is procedurally barred and/or waived? Alternatively, if the issue can be reached, whether the trial judge abused his discretion in qualifying Juror #43, Donna Champion, when her responses, when viewed correctly as a whole, indicated she could be a fair and impartial juror?

STATEMENT OF THE CASE

A Spartanburg County grand jury indicted appellant, Ricky Lee Blackwell, Sr., in July 2009 for the kidnapping and murder of eight-year-old Heather Brooke Center. (R. pp. 4829 - 4832 [indictments 2009-GS-42-3609 and 3610]). The State served and filed its notice of intent to seek the death penalty on August 11, 2011. The State subsequently served and filed its notice of statutory aggravating circumstances on June 8, 2012. William Sean McGuire, Esq., of the South Carolina Commission on Indigent Defense, Capital Trial Division, along with Clay T. Allen, Public Defender for the Seventh Judicial Circuit, represented appellant on the charges. The Honorable Barry J. Barnette, Solicitor of the Seventh Judicial Circuit, with Deputy Solicitor Derick B. Balsa and Assistant Solicitor Russell Ghent represented the State of South Carolina. This Court assigned the Honorable Roger L. Couch exclusive jurisdiction over the capital proceedings.

On February 19, 2014, a hearing began pursuant to *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003) on appellant's claim of intellectual disability. Judge Couch heard competing opinions and arguments over three days. After detailed questions of his own, Judge Couch resolved appellant had failed to carry his burden of proof of showing intellectual disability by a preponderance of the evidence. (Supp. R. pp. 1-14 [February 25, 2014 Order]).

After expanded capital *voir dire* proceedings, a jury was selected and a capital trial began on March 11, 2014. The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. p. 2600, lines 18-20; p. 2602, lines 1-8). Appellant waived the statutory twenty-four (24) hour break afforded between phases, and the penalty phase began at 1:30 pm on the afternoon

of March 13, 2014. (R. p. 2603, line 15 – p. 2604, line 18; p. 2606, line 21 – p. 2607, line 13). At the conclusion of penalty phase deliberations on March 16, 2014, the jury returned. The jury's first finding reflected the jury declined to find appellant was intellectual disabled. (R. p. 3257, lines 16-22). The jury's second finding reflected the State had proven beyond a reasonable doubt, the following circumstances in aggravation:

- (1) The murder of a child eleven years of age or under;
- (2) The murder was committed while in the commission of the crime of kidnapping.

(R. p. 3257, line 23 – p. 3258, line 11). (See also S.C. Code Ann. § 16-3-20 (C) (a) (1) (b) and 16-3-20 (C) (a) (10)).

The jury recommended death. (R. p. 3258, line 12-25). Judge Couch thereafter sentenced appellant to death, noting the sentence for kidnapping was subsumed by statutory provision.¹ (R. p. 3262, line 14 – p. 3263, line 5; R. pp. 4823 and 4825).

On March 20, 2014, Judge Couch denied post-trial motions. Appellant served his notice of intent to appeal on March 21, 2014. A stay of the death sentence is automatic pursuant to S.C. Code Ann. § 18-1-70.

Appellant originally filed an initial brief on January 8, 2015. The State moved to seal or strike the brief; moved to strike the designation of matter; and moved for an order

¹ Judge Couch imposed a thirty (30) year sentence, concurrent to any other sentences; however, on the sentencing sheet, by notation added March 20, 2014 without objection, he appropriately noted that the sentence is subsumed by the sentence on the murder conviction. (R. pp. 4823 and 4825). See S.C. Code Ann. § 16-3-910. The conviction, however, still stands. *State v. Perry*, 278 S.C. 490, 495-96, 299 S.E.2d 324, 327 (1983) (“The statute does not mandate a vacation of the kidnapping conviction. It merely provides that either the life imprisonment sentence or the death penalty sentence required in a murder conviction shall be sufficient punishment.”).

prohibiting [REDACTED] in the appeal and requiring an amended initial brief of appellant. On May 20, 2015, this Court granted in part and denied in part, directing appellant to file a redacted brief and a sealed copy of the [REDACTED]. On June 18, 2015, appellant filed a redacted brief. Respondent now files its brief in response.

STATEMENT OF FACTS

A Spartanburg County jury found appellant guilty of the kidnapping and murder of eight-year-old Heather Brooke Center (“Brooke”). After hearing all the evidence of the crime, and the evidence submitted in the separate sentencing proceeding, the jury recommended a sentence of death. The jury considered the following facts in guilt and sentencing:

Guilt Phase

On July 8, 2009, William Meyer, a patrol deputy with Spartanburg County Sheriff’s Office, received a call at approximately 3:00 in the afternoon. He was advised a child had been shot at a home in the Chesnee area of Spartanburg County. When he arrived just minutes later, he saw a woman frantically trying to direct him to the child. The child was lying face down on the ground near the front of a vehicle. The child was not responsive. Deputy Meyer noticed a “red spot” on her back, then a “gaping wound ... on her left leg.” While attempting to check her pulse, Officer Meyer “realized there was blood pouring out of [her] ear.” There were no signs of life. He called for assistance. (R. p. 2357, line 1-23; p. 2374, lines 4-11; p. 2376, lines 12-16). He then met the visibly shaken homeowner, Mr. Bryant, who informed Deputy Meyer that Ricky Blackwell was the shooter. (R. p. 2358, lines 1-21; p. 2363, lines 9-12). Deputy Meyer testified he was also informed of appellant’s “direction of travel” which was behind the residence and directed other responding deputies toward the area. (R. p. 2363, line 16- p. 2364, line 6).

Deputy John Smoak testified that he arrived after Deputy Meyer. He testified that he also checked Brooke for signs of life and did not find any. (R. p. 2493, line 14 – p. 2494, line 2). Armed with a description of appellant, he then searched the area and was

joined by other officers. (R. p. 2494, lines 4-23; 2498, lines 1-14). Appellant came out of the wood line toward the officers. He was still armed. (R. p. 2498, line 17 – p. 2499, line 10). He stayed behind a children's play set, out of sight of the officers. Appellant eventually placed the gun at his abdomen and shot himself. Though repeatedly instructed to drop the gun, he did not do so until the gun slipped from his hand after he shot himself. (R. p. 2500, line 4 – p. 2501, line 23). Deputy Smoak retrieved and secured the gun. (R. p. 2501, lines 19-21; p. 2502, lines 5-17).

Ms. Angela Davis witnessed the shooting. Ms. Davis was formerly married to appellant. Since their separation, Ms. Davis had been seeing Brooke's father, Bobby Center. (R. p. 2378, line 24 – p. 2379, line 2; p. 2396, line 23- p. 2397, line 16). The day of the murder, Ms. Davis testified that she had Brooke with her, and had intended to pick up her grandchildren to return to Brooke's home for them to play. (R. p. 2381, lines 14 – 24). As she arrived at her daughter Heather's home, not seeing a car, she was turning to leave. She testified "Ricky jumped out and flagged me down, and he said I thought you was picking up the boys," and she replied she was, but her daughter's car was not there. (R. p. 2382, line 25 – p. 2383, line 4). She testified appellant told her the grandchildren were with their father in the home "waiting for you." (R. p. 2383, lines 5-7). She turned back around and headed back toward the home. When stopped, she saw a small dog and turned to Brooke, saying, "Brooke, honey, don't get out of this car until I get this dog cause I don't want you to get dog bit." Brooke stayed in the car and Ms. Davis exited and grabbed the dog. As she "turned back around he had her." (R. p. 2383, lines 11-23). Appellant, still upset at the breakup of his marriage, grabbed the child, held her, and

pointed a gun at the child's head. Ms. Davis testified that she pleaded with appellant to take her instead of the child. (R. p. 2386, lines 1-11). Ms. Davis testified:

... he was walking around the car and I was screaming let her go, Ricky, please, its 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've 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. p. 2386, lines 9-15).

Ms. Davis testified she saw appellant place the child on the ground and she ran into her daughter's home to call 911. She grabbed her granddaughter, who was crying, and ran out the back of the home. She heard another shot. She ran. Appellant followed. She testified a neighbor let her in and she called 911 once again. (R. p. 2386, line 17- p. 2387, line 25). She identified not only appellant, who had asked them to go to their daughter's home that day, but also the gun he used. It was a gun she had purchased for him "earlier in our marriage" as a gift. (R. p. 2388, lines 14-15; p. 2392, lines 9-18; p. 2393, line 22 – p. 2394, line 14).

Mark Bryant, the Blackwells' son-in-law, confirmed that appellant was in the area around the home earlier that day. (R. p. 2471, line 18 – p. 2472, line 16). He also confirmed he saw Ms. Davis pull into the yard and told his sons that their grandmother has arrived. He testified by the time he turned back around and went to the door, he saw appellant with his arm around Brooke's neck/chest area and saw a gun. (R. p. 2474, line 14- p. 2475, line 25; p. 2487, line 24 – p. 2488, line 3). He tried to pull his children back into the home and heard two shots. (R. p. 2476, line 9 – p. 2477, line 8). He testified his mother-in-law went in the house as he was trying to get his children inside, and she called 911. (R. p. 2477, lines 10-24). He testified his mother-in-law ran out the back with his

daughter and he picked up the phone and spoke to the 911 operator. She told him to check on the child, which he did. Brooke was face down and not moving. (R. p. 2477, line 12- p. 2479, line 15). He confirmed that appellant ran after his mother-in-law across the back of the home. (R. p. 2478, lines 11-15; p. 2483, lines 20-25). Mr. Bryant testified that he told the responding officer that appellant had shot Brooke and described appellant. (R. p. 2480, line 17 – p. 2481, line 15). He testified that had been married to appellant's daughter for approximately fifteen (15) years at the time of trial, (R. p. 2471, lines 1-7), and knew appellant had a gun, but had only seen the gun two times – “when I first met my wife, and the day of the incident.” (R. p. 2478, lines 16-18).

Pathologist David Wren testified that he conducted the autopsy on Brooke on July 9, 2009. (R. p. 2536, lines 7-10). Dr. Wren recorded the following injuries:

... There were nine gunshot wounds to the body... some of them were through and through and the reentries. Specifically there was a gunshot wound to the right side of the head that exited in the left temple. There was a gunshot wound in the right che[e]k, a grazing gunshot wound and a deep grazing wound in the right neck that went under the skin and came back out and went in her left arm where it fractured her humerus and I recovered a bullet from that area, and then she had a gunshot wound in the back that communicated with the one on her cheek, and she had a through and through gunshot wound to the left leg.

(R. p. 2537, lines 3-15).

From tracking the injuries to the child's body, Dr. Wren opined there were four gunshots: “One to the head, one to the back, one to the leg and a grazing” wound to the cheek and neck which went into her arm. (R. p. 2540, line 13 – p. 2541, line 8). He opined:

... the immediately fatal wound was the one to the head. Any, any of those individually or collectively could of caused her death. If they're not immediately fatal, there are lots of complications that can occur. So, we actually assigned those as potentially fatal if they're not immediately fatal.

So, I put down the cause of death as gunshot wounds to the head and body.

(R. p. 2541, lines 11-17).

Suzanne Cromer of the South Carolina Law Enforcement Division (“SLED”) was qualified as expert in the field of ballistics and tool mark identification. (R. p. 2558, lines 4-7). She opined the bullet recovered from the child’s body was fired by the gun recovered from appellant. (R. p. 2559, line 16 – p. 2561, line 13). That particular gun would require “three and a quarter to 4 pounds” for single action firing, and “ten and three-four[th]s pounds to eleven and fourth pounds of pressure” for double action firing. (R. p. 2562, line 1 – p. 2563, line 11).

The State argued not just that appellant shot the child, but that he “finish[ed] off” the child shooting her four times to ensure she was dead. (R. p. 2576, lines 9-11). The defense conceded guilt, but attacked Ms. Davis’ testimony, accusing her of using appellant for money after their separation and embellishing her testimony to demonstrate her “heroic” action during the shooting. (R. p. 2578, line 10-p. 2579, line 11).

The case was sent to the jury on March 12, 2014. The jury began deliberations at 4:08 pm and returned a guilty verdict at 4:29 pm. (R. p. 2600, lines 18-20; p. 2602, lines 1-8). The jury then turned their attention to the sentencing evidence.

Penalty Phase

As noted, the jury considered the above facts and found appellant guilty of the kidnapping and murder of eight-year-old Brooke. The above evidence was also moved into the penalty phase. (R. p. 2608, lines 13-25).

In addition, the State presented a glimpse of the young victim’s life. The State presented Brooke’s baseball coach, John Sloan. Mr. Sloan testified that “Brookie” was

the only girl on the team, and was friends with Mr. Sloan's son. The eight-year-old was the son's first "girlfriend," and the two would "hold[] hands in the outfield." (R. p. 2626, line 13- p. 2627, line 12). He described her play and in particular her first run. (R. p. 2628, line 1- p. 2629, p. 14). Mr. Sloan also described the memorial for her at the sports complex. (R. p. 2630, line 7 – p. 2631, line 15).

The State also presented Ms. Elizabeth Sima, the principal at Reidville Elementary School, the elementary school eight-year-old Brooke attended. Ms. Sima testified that she had known Brooke from kindergarten through the end of second grade, after which she was listed as "withdrawn" due to her death. (R. p. 2633, lines 6-18). Ms. Sima testified that Brooke was a loving child, with "a special spark and a special light that the children felt and knew," a leader even at an early age, demonstrating "integrity ... kindness, and caring." (R. p. 2633, line 6 – p. 2635, line 24). She testified that Brooke's parents had been outstanding, "not a single bit of negativity and a whole heck of a lot of love," even when going through a hard time personally (apparently referencing separation, *i.e.* "book bag that was at one house or another" example of what could happen), and that Brooke "saw that and felt that too." (R. p. 2636, lines 5-25). Ms. Sima also testified Brooke's murder was difficult for the faculty, especially in trying to begin a new school year without her, and they honored her memory in a ceremony at their science center, and in an annual. (R. p. 2637, lines 1-19; p. 2638, lines 14-24). She testified Brooke was an outstanding and loving student. (R. p. 2639, line 9 – p. 2641, line 4).

As to appellant, the State presented evidence of appellant's indictment for breaking into a gasoline tank and petty larceny, and his 1981 guilty plea to those charges,

(R. p. 2647, lines 3-24), and two disciplinary actions in the Spartanburg County Detention Facility (possession of contraband – Clorox in a baby bottle – and possession of contraband – unauthorized medication, hoarding medication in a candy wrapper), (R. p. 2650, line 4 – p. 2651, line 21; p. 2655, lines 2-22).

As to the circumstances of the crime, in addition to the incorporated evidence, the State presented Ms. Davis' mother, Irene Blackwell. Mrs. Blackwell testified that her daughter and Brooke were with her the morning of the crime, and she had fixed breakfast for them. Mrs. Blackwell testified appellant initiated a conversation about insurance; Ms. Davis advised she intended to take a three month leave of absence and each of them would have to pay \$100.00 a month to keep the insurance active. She testified that appellant then requested Ms. Davis "go over there and see the grandbabies today," and Ms. Davis agreed to do so. Appellant left at that time stating he was "leaving to go pay some bills, and he was gonna go shopping." She testified her husband, Jerry Wayne, asked appellant to stay and play cards, but he declined citing other obligations. However, he promised to return. Mrs. Blackwell explained that her husband and appellant often played rummy together. She also testified that it was not her impression that appellant was "grieving" over the breakup of his marriage, and noted that he came over almost every day, and was "kidding with Jerry Wayne, laughing and joking and cutting up and playing cards and stuff." (R. p. 2658, lines 2-9; p.2662, line 19 – p. 2666, line 17).²

² The defense objected to Mrs. Blackwell's testimony on the basis that it corroborated Ms. Davis' testimony from the first phase. However, as the State correctly argued, the testimony went to premeditation, essentially, the extent of malice, which is a proper sentencing phase consideration. *See, e.g., State v. Shuler*, 353 S.C. 176, 184, 577 S.E.2d 438, 442 (2003) ("The purpose of the sentencing phase in a capital trial is to direct the jury's attention to the specific circumstances of the crime and the characteristics of the offender."). The State noted that the defense had essentially conceded guilt in the first

Deputy Micah Horton testified that he stood by appellant at the crime scene while EMS treated him for his self-inflicted gunshot wound. He testified appellant asserted, without questioning or prompting by anyone: "... I shouldn't have done it, not to get back at him...." (R. p. 2669, lines 2-15).

Reserve Officer Tim Timmons testified that he was instructed to ride in the ambulance with appellant. He testified that he consulted with the EMT to determine if appellant was in jeopardy of dying and wanted to give him the opportunity to give a statement. He did so and Officer Timmons read appellant his Miranda rights which appellant acknowledged and waived. Officer Timmons asked what had happened and appellant responded: "... my ex-wife drove up and I grabbed her boyfriend's little girl..." The office asked appellant to identify the little girl, to which he replied, "... I called her Brooke." (R. p. 2676, line 6 – p. 2677, line 10).

Investigator Lorin Williams testified he went directly to the hospital after receiving information appellant was being transported. He testified, after checking with medical personal to ensure appellant was stable and not heavily medicated, that he read appellant his Miranda rights which appellant acknowledged. (R. p. 2682, line 8 – p. 2684, line 17). He then asked appellant what happened and why. Appellant responded:

... he and his wife had been having problems, and that he was trying to get her to reconcile their marriage. Basically that, that she was continuously

phase and it was unnecessary to call all available witnesses at that time. The defense conceded the evidence was otherwise admissible, but objected at this point only because it had not been submitted previously. The judge rejected the argument and allowed the testimony. (R. p. 2659, line 9- p. 2662, line 6). The defense also attempted to keep the photographs of Brooke away from the jury determining sentencing, arguing "all these photographs ... depicting these wounds on this very young child, they all invoke the Fourteenth Amendment, due process clause, because they're so prejudicial and it renders the, the penalty phase fundamentally unfair" and, given "the concession of guilt," they were "not necessary to prove anything at all." (R. p. 2701, line 19 – p. 2703, line 17).

throwing up her boyfriend to him, and he said that, that he had been having sour thoughts about how to get back at this man for breaking up his marriage.

...

... he went on and I asked him about the sour thoughts. ... I told him, I said, well, you know, can you - - is there something that you can tell me, is there, is there a reason that you can give me to help me understand you know, how this could happened to a child of this age ... I need some help in helping me understand what, what would make you do this ... why this would happen. And he just basically said, again, you know, that ... it was his way of getting back at, at her dad for breaking up the marriage, and I said ... is there something you can tell me, tell me it was an accident, tell, tell me you were 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. p. 2684, line 19 – p. 2685, line 25). The investigator testified that appellant never asked about Brooke, “if Brooke was okay, what her condition was, had, had no concern and showed no concern whatsoever for anything but, but his condition at that point.” (R. p. 2686, lines 1-6).

The State also called Dr. Wren to further discuss the injuries to Brooke.³ Dr. Wren discussed the nature of the wounds reflecting the details of the shots, including closeness of the shots and angles. (R. p. 2711, lines 15 – p. 2720, line 17). Dr. Wren opined the shot to Brooke's head was inflicted “probably very close, but not tight contact and most probably not loose contact.” (R. p. 2713, lines 3-8). Dr. Wren testified the shot to the back had abrasion characteristics that indicated consistency with being shot while bent over and falling down. (R. p. 2715, line 20 – p. 2716, line 22). The shot to the neck

³ The State carefully selected the additional photographs to be used in this phase in camera with the trial judge and defense counsel. (See R. p. 2692, line 13 – p. 2693, line 8). The trial judge placed on the record: “I'll note, in making the ruling, that the State has shown restraint in presenting the photographs that they have presented by offering black and white photographs of the appropriate situations, and also not a seeking to introduce a rather large number of similar photographs in the case. The Court does note that in making its ruling.” (R. p. 2707, lines 15-21).

area indicated charring which comes from a contact wound, "... the barrel gets immediately hot and it burns the skin where it goes in." (R. p. 2717, line 5 – p. 2718, line 14). The remaining shot was to Brooke's leg hitting "solid tissues" and exiting near her knee. (R. p. 2720, lines 8-19). Dr. Wren opined that given the nature of the wounds, Brooke would have been moving during some of the shots, with the inability to move after infliction of the head shot. (R. p. 2720, line 24; p. 2721, line 6). He confirmed that "these are not all exactly at the same time." (R. p. 2721, lines 10-11).

As further evidence of the details of the crime and how appellant left Brooke, Sergeant David Hogsed identified and explained the pictures from the crime scene reflecting that (before being moved by EMS), Brooke was face down on the ground. He identified another photograph that showed "basically the mid section to the top of her knees" reflecting injuries and that the child had "urinated on herself at the incident...." (R. p. 2728, line 3 – p. 2729, line 20).

Returning to Brooke, the State presented several other witnesses from the elementary school she attended. Amy Nunnary was the school nurse who administered Brooke's asthma medication and would sooth the child as she struggled to breath. Ms. Nunnary testified to Brooke's smile, her beauty, maturity and love of flowers. She also testified that "her mom and dad were, were always available ... [v]ery protective, very caring, very loving towards Brooke. Always, always there as soon as I needed them." (R. p. 2731, line 4 – p. 2732, line 23). Ms. Nunnary testified she could not "make it to the funeral. It was just really too hard for me," but she was able to go to the grave site and retrieve one of the flowers which she pressed and kept. (R. p. 2733, lines 13-20). She testified that Brooke's "dad painted [Brooke's] house bright yellow because that was

her favorite color” and that “every morning [she would] pass Brooke’s house going to work and I pass it in the afternoon and there’s the bright yellow house,” that “brings a smile to [her] face,” reminding her of being “happy and cheerful,” the “kind of child she was.” (R. p. 2733, lines 21-25).

Ms. Debbie Alton, Brooke’s second grade teacher, testified to her recollection of “just a precious, sweet, kind, loving little girl,” and read a story that Brooke had written, a story with emphasis on family fun and inspiration. Ms. Alton testified that Brooke’s own parents, Bobby and Kelly, “were very supportive, very loving,” and she would see them not just at school but also at Brooke’s baseball games. She testified Brook greatly enjoyed baseball, and she recalled seeing the memorial to Brooke at the field. (R. p. 2736, line 9 – p. 2743, line 2). Ms. Alton also shared a letter Brooke wrote to a soldier to express thanks to the soldier as part of a class project. She testified she kept Brooke’s letter to help other students the following year. She testified Brooke “wanted everybody to be friends and she was a peacemaker,” and that “she holds a special place in [her] heart.” (R. p. 2744, line 6 – p. 2745, line 23). She noted, “... I feel like people that didn’t know her were really robbed of a chance to get to know of a wonderful girl.” (R. p. 2746, lines 3-5).

Defense Mitigation

The defense called Ms. Gail Shook who testified she had been a work supervisor for both appellant and his wife, Angie Davis. (R. p. 2757, line 18 – p. 2758, line 21). Ms. Shook described appellant as “gentle, humble,” “very tender hearted,” “compassionate,” and a reliable compliant worker. (R. p. 2759, line 11 – p. 2760, line 2; p. 2770, lines 1-4). She described his “anguish” at the breakup of his marriage. (R. p. 2768, lines 12-24).

The defense also called Dr. Ginger Calloway to again make a presentation about intellectual disability. (R. p. 2810, lines 21-22). Dr. Calloway opined appellant “fell into a mildly retarded range,” and “this disability was manifested before the age of 18....” (R. p. 2915, lines 2-6). She testified in her opinion, appellant was intellectually disabled. (R. p. 2916, lines 1-5).

Also for the defense, Dr. Donna Schwartz-Watts, an expert in forensic psychiatry, testified that she “treated [appellant’s] depression and his anxiety and helped to manage that in the detention center.” (R. p. 2985, lines 7-10). She reviewed prior medical records treated appellant at the Spartanburg County Detention Center, which included two psychiatric hospitalizations and a prior diagnosis of depression, testified:

... in my opinion, he’s had a history of major depression before. He’s had two episodes before when he was hospitalized, and it’s clear, from looking at Doctor Jackson’s records, that he remained depressed before this incident, and it’s very clear that, since I treated him at the jail, he had had symptoms of depression as well.

(R. p. 2985, lines 10-18). She noted when asked about his thoughts about the murder:

...the words that he usually uses with me are he can’t believe he’s done this. It’s very hard for him to accept what happened and what he’s done, and he, he has a lot of anxiety. He has nightmares about it. He has a difficult time dealing with what he’s done and he’s very sad about it.

(R. p. 2987, lines 5-16).

The defense also presented appellant’s cousin, Sherry Wofford, who testified appellant was “like a brother” and was “loving,” “gentle,” and “always trying to help people.” (R. p. 2990, line 17-23). She recounted kind gestures and family moments. She testified “we love him with all our hearts and need him. So, just understand he is a good man.” (R. p. 2994, lines 1-3). Ms. Wofford described her reaction to having heard appellant had murder the eight-year-old child: “It wasn’t Ricky. They wasn’t our Ricky.

It was no way that was our Ricky. Something went wrong. It was not our Ricky that did that.” (R. p. 2994, lines 6-10).

The defense also called Heather Bryant, appellant’s daughter. She described her father as “a kind caring man” to her and the family, even taking in his son’s “baby mama” when needed. (R. p. 3000, line 9- p. 3001, line 6). She testified appellant loved his wife and treated her well, and that he loved and played with his grandchildren. (R. p. 3002, lines 3-24). She testified that as her mother began to see Brooke’s father, Bobby, her mother began to change: “... she started drinking, she started smoking, she started dressing more inappropriately....” (R. p. 3004, lines 5-15). She testified that Bobby had a Harley Davidson motorcycle, and her mother got a tattoo on her lower back with “a Harley Davidson logo that said Harley in the middle of it.” (R. p. 3004, line 20 – p. 3005, line 2). Ms. Bryant testified they had had a loving household before, and provided “a little clip” from home movies, which she then explained. (R. p. 3007, line 2 – p. 3009, line 17). She testified her father remains a religious man and has studied the Bible, even while incarcerated at the county jail. (R. p. 3009, line 19 – p. 3010, line 13). She also reviewed multiple family pictures, explaining the events and people. (R. p. 3011, line 20 – p. 3015, line 11). Ms. Bryant testified her father still loves her mother and would accept her back if he could. (R. p. 3015, lines 18-22). She recalled when appellant found out her mother was intimate with Bobby, appellant left only to return minutes later with a “bottle of pills in his hand....” Both Ms. Bryant and her mother attempted to ensure he would not harm himself. (R. p. 3017, lines 1-9). She described her mother as “mean” to him, having “bragged about having sex with Bobby,” and Ms. Bryant would sympathize with appellant. (R. p. 3017, line 22 – p. 3018, line 21). Ms. Bryant testified she had

advised her mother to call before coming to Ms. Bryant's house, and not to bring "Brooke or Dustin ... because it hurts daddy ... and she told me she would not do that." (R. p. 3019, lines 3-8). When asked if it hurt appellant to see her mother "paying so much attention to Bobby's family and not you," she responded, "Yes, sir, it did." (R. p. 3019, lines 12-14). Ms. Bryant testified her mother would call Brooke her "new daughter," her "perfect daughter," and "angel." (R. p. 3019, lines 15-21). She testified that her mother was not seeing her own grandchildren at that time. (R. p. 3019, lines 22-24). She previously testified her daughter has special needs. (R. p. 3003, lines 2-7). She concluded with telling the jury that appellant:

... was always a kind, gentle, caring man. He was not the man that they're trying to make him out to be today. My daddy would of never done that. My daddy was pushed to the extinct (sic) to do what he did, and he regrets what he had done. He suffers from that every day.

(R. p. 3020, lines 7-11).

When asked if he cries about what he has done, Ms. Bryant responded, "Yes, sir." (R. p. 3020, lines 12-13).

On cross-examination, Ms. Bryant admitted her two sons witnessed the murder, the "oldest one witnessed it a little bit more," but they both had to receive counseling, and that it still affects them. (R. p. 3021, lines 8-22). She also admitted upon questioning that he played pool very well, having won several tournaments. (R. p. 3022, lines 1-6).

Brittany Fowler testified for appellant, as well. She was the "baby mama" appellant took in and helped. She testified appellant helped with the baby "did everything for him ... changed diapers, fed him, whatever there was to be done." (R. p. 3025, lines 17-p. 3026, line 13). She testified that she loves appellant and described him as: "Amazing... great. Very kind hearted ... give the shirt off his back" kind of man. (R.

p. 3026, lines 16-20). Ms. Fowler left to live with Irene Blackwell (Angie Davis's mother). Ms. Fowler testified that appellant would come by to play cards with Jerry Wayne Blackwell and would express that he missed his wife and wanted her back. He was sad, and would plead with her to return. (R. p. 3027, line 9- p. 3028, line 13). She testified his wife would speak harshly to him in response. (R. p. 3028, lines 14-15). Ms. Fowler testified appellant was heartbroken over her leaving. (R. p. 3028, lines 16-20). She testified Ms. Davis changed her appearance after leaving, "dressing more like she was a teenager with some short clothes, low cut shirts." (R. p. 3028, lines 21 – p. 3029, line 2). She testified Ms. Davis "started drinking and things like that, going to the bars." (R. p. 3029, lines 3-4). She would "flirt" with appellant, but it only "hurt him a lot because she ... gave him hope" she would return. (R. p. 3029, lines 7-12). She testified appellant had "been there" for her, that he was great, and "very kind hearted." Ms. Fowler testified she was shocked and could not believe that he murdered eight-year-old Brooke. She had "never heard him argue with Angie...." (R. p. 3029, lines 15-25).

Norm Uber, a fellow church member with appellant, testified appellant was "a good friend, kind of easy going, laid back, but deliberate in his speech." He testified he "never knew him to be other than easy to get along with," and a gentle man. (R. p. 3031, lines 1-19). Mr. Uber testified appellant loved his wife and treated her well. (R. p. 3031, line 20 – p. 3032, line 2). He recalled how appellant "wept" in the parking lot while telling Mr. Uber about the breakup of his marriage, and Mr. Uber testified, "it jerked at my heart strings." (R. p. 3032, lines 7-10). Mr. Uber testified as to appellant's religion, he "would say he was a good Christian believer in our midst." (R. p. 3033, lines 4-7). He, too, testified that he could not believe appellant had murdered eight-year-old Brooke.

He stated he did not think appellant could be stirred to anger. (R. p. 3033, lines 10-15).

He stated appellant was in “anguish” over the breakup. (R. p. 3035, lines 11-14).

Appellant’s father, Cletus Blackwell, testified that appellant was a “good boy when he was a kid ... never give us any trouble....” (R. p. 3037, lines 23-25). He was humble ... good ... never did bother nobody.” (R. p. 3038, lines 2-7). He testified appellant loved his wife, his children and grandchild, and treated them well. He played with his grandchildren. (R. p. 3038, line 18 – p. 3039, line 6). Mr. Blackwell testified appellant was “real depressed” and spent days crying when his wife left. Mr. Blackwell testified “he wasn’t Ricky,” agreeing with defense counsel that “he just wasn’t the same man anymore.” (R. p. 3039, lines 9-16). Mr. Blackwell testified that when Ms. Davis would come around, “it would tear him up.” (R. p. 3039, lines 23-24). It would give him hope then cause despair. (R. p. 3040, lines 2-8). He testified that when he learned appellant had murdered the child, “it tore me up” and he “just couldn’t believe it.” (R. p. 3040, line 12). Mr. Blackwell also went through several photographs and explained family and events. (R. p. 3041, lines 6 – p. 3046, line 20). Mr. Blackwell asked the jury to spare his son’s life, that he “was always a good boy” and “Ricky wasn’t Ricky when this happened. Ricky wouldn’t hurt nobody if he’s, if he was in his right mind.” He testified “Ricky wants to live till the Lord calls him home. I know it won’t be no pleasant life, but he wants to live, and my sympathy goes out for the little girl’s family.” (R. p. 3047, lines 13-22). On cross-examination, Mr. Blackwell admitted the gun appellant used to murder Brooke had been locked in a gun case at Mr. Blackwell’s home. Appellant had to go to Mr. Blackwell’s home to retrieve the gun before he could use it in the murder. (R. p. 3048, line 16 – p. 3052, line 4; p. 3054, lines 1-20).

The defense also presented James Hamrick, appellant's brother-in-law. Mr. Hamrick is married to Ms. Davis's sister. He testified that appellant was "always a really good person. Kind, gentle, like everybody said." (R. p. 3057, lines 9-11). After Ms. Davis left appellant, appellant would go by Mr. Hamrick's salvage yard and garage business. He would help out, and no one had a "mean word" to say about him, nor did he have a "mean word" to say about anyone else. (R. p. 3057, line 17 – p. 3059). However, appellant was so distraught over the breakup of his marriage that he became a distraction to the work. Mr. Hamrick's son expressed that he considered not allowing appellant to help in a later car sale event as appellant's crying was a distraction. (R. p. 3059, line 4 – p. 3060, line 3). Mr. Hamrick testified he could not believe appellant had shot an eight-year-old child, indicating "I don't know what happened, and I mean he done a bad thing ... it just wasn't ... Ricky...." (R. p. 3060, lines 8-23).

Appellant also presented Mary Youmans, who had worked with appellant and had grown close to both appellant and Ms. Davis. (R. p. 3062, lines 3-23). Ms. Youmans testified appellant was distraught over the breakup.⁴ (R. p. 3064, lines 15-18). Ms. Youmans testified that, on the day of the shooting, "Angie" stopped by her house with Brooke. She introduced Brooke as her daughter, and insisted Ms. Youmans knew Brooke's father, Bobby, though Ms. Youmans could not recall Bobby. (R. p. 3064, line 19 – p. 3067, line 7). She recalled that Ms. Davis's appearance changed after she left appellant. She testified Ms. Davis lost weight and began wearing short "Daisy Dukes" and bared her midriff. She also changed her hair color. (R. p. 3067, line 12 – p. 3068,

⁴ She would later testify in cross-examination that she did not know the cause of the breakup. (R. p. 3070, lines 15-20).

line 17).⁵ Ms. Youmans then returned to describing appellant's character. She noted that appellant had been very good to her husband as he was dying from cancer. (R. p. 3069, lines 2-13). She expressed that she "didn't believe it," when she heard appellant had shot a child. (R. p. 3069, lines 18-21). She testified she "struggled" with the news as the "Ricky [she] knew" would not have hurt a little girl. (R. p. 3073, lines 1-5).

Ken Rice, appellant's pastor, also testified for the defense. Mr. Rice testified that appellant had attended his church while his children were same, then began attending again when "Angie" left him. (R. p. 3072, line 7 – p. 3073, line 12). (See also R. p. 3085, line 14 – p. 3086, line 10; p. 3088, lines 9-22). Mr. Rice testified appellant cried to him over the breakup and his emotional state began to deteriorate. Appellant lost weight and reported sleeping on the floor in his home. (R. p. 3073, line 15 – p. 3074, line 3). Mr. Rice testified that he advised appellant:

... if this is what she wants to do you're not gonna win her back by chasing after her. She wanted money for rent, for an apartment that she had rented. He gave her money for food. I said you're just helping the matter along. I mean she's not gonna come back as long as you're paying her way, and he finally went to his mom and dad's to spend the night....

(R. p. 3074, lines 6-12). He also identified several pamphlets that the church would provide so its members could use it in study at home which had belonged to appellant. He recalled that he once took material to appellant's home, and saw appellant with a family Bible, and appellant's wife with a dictionary and pad of paper. He testified "she was looking up words they didn't understand." (R. p. 3081, line 9 – p. 3083, line 7). After appellant was incarcerated, Mr. Rice sent appellant a children's Bible so he could

⁵ This testimony was allowed over the objection of the State. (R. p. 3067, line 24 – p. 3068, line 2). The State argued the testimony "has nothing to do with mitigation. It's just poor mouthing Angie." (R. p. 3067, lines 24 – p. 3068, line 1).

better understand the scripture. (R. p. 3083, line10-23). Mr. Rice testified he spoke with appellant at the jail:

... the first time I went to the jail to talk with him, he honestly said, he said I did it, but I don't remember doing it. Said I only - - the first I remember of what happened I was in the hospital, and I talked to him about forgiveness. I told him that God forgave David for murder, and God can forgive him, and I took him down the road of repenting, and prayed with him, and he said he'd - - the burden of guilt was gone. The next time I went to see him he said I've - - God's forgiven me, but I can't forgive myself.

(R. p. 3084, lines 3-12). He testified that he was "surprised" to hear about the shooting. Mr. Rice testified: "I knew he was emotionally disturbed. He wasn't the man that I first met and - - but I couldn't believe he did it. I just couldn't believe it." (R. p. 3086, line 24 - p. 3087, line 1).

Lastly, appellant called his mother, Mildred Blackwell who identified and presented more family photographs. (R. p. 3101, line 9 - p. 3104, line 18). She also testified that appellant receives a multitude of letters and cards at the jail, and demonstrated a box full of items representing those items as a portion of the mail received. (R. p. 3105, lines 1-22). Further, she identified appellant's voice on a telephone recording from the jail, and testified the conversation was between appellant and "Angie's" father, Jerry Wayne Blackwell wherein he expressed concern over Mr. Blackwell's failing health. (R. p. 3106, lines 2-6; p. 3192, lines 9-17). She asked for mercy for her son:

He's a wonderful son ... if you only knew my son like I have for 55 years that he's been here with me you would say he's a wonderful son. I couldn't of asked for a better son than what I've got, and ... I just love to ask you to spare his life because I know that something happened to him that day, and he would of never did that to that child cause he loved children too good and children love him too good, and I'd love for y'all to spare his life.

(R. p. 3110, line 22 – p. 3111, line 5).

Before the defense officially rested,

State's Reply

In reply, the State recalled Cletus Blackwell to clarify that he knew an individual by the name of Reggie Frye, though he denied knowing such an individual earlier believing his name to be Ritchie Frye. (R. p. 3121, lines 10-22). He did not recall telling Mr. Frye that he had taken possession of appellant's guns because he was afraid appellant would hurt someone, or that appellant had broken into the gun cabinet to obtain a gun. (R. p. 3122, lines 11-20).

Mr. Frye testified that worked in trucking with Mr. Cetus Blackwell and went on many trips with him. He testified he was "very fond" of Mr. Blackwell and it was "extremely hard" to testify at the trial. (R. p. 3126, lines 14-25). Even so, Mr. Frye testified concerning a conversation with Mr. Blackwell on one trip approximately three weeks after the murder:

Cletus and I had many discussions about Ricky, Ricky being in jail, his wife, you know, not sleeping, being upset. One occasion he told me that - - we were discussing what happened, how, and he said that Ricky had broke in and broke into his gun case, that they had got the guns from Ricky because he was afraid he was gonna hurt hisself or someone, and said that Ricky had broke into the gun case, got the gun, and bang, you know, the next day or so it happened.

(R. p. 3127, lines 9-17). On cross-examination, he noted the surety of his recollection though he underscored the difficulty in testifying: "... when something happens to a child, I didn't want to say anything. It's eat on me for five years, and I know exactly because I went home and discussed it with my wife ... that day." (R. p. 3129, lines 10-17). He further testified *in camera* that Mr. Blackwell had talked about appellant's relationship with Angie:

... that he was very possessive over her. He couldn't handle her leaving for another man, about how she brought that child to torment Ricky to go swimming that day, and it was her fault that the child was killed because she was getting back at Ricky. That's mainly what he discussed with me on many occasions.

(R. p. 3133, line 20 – p. 3134, line 1). Also *in camera*, defense asked if Mr. Blackwell had said appellant, "Ricky carried the gun because he was afraid of Bobby Center?" to which Mr. Frye responded, "he never talked about Ricky being afraid of anyone." (R. p. 3134, lines 13-15). Defense counsel also asked if Mr. Cletus Blackwell said anything about being afraid "his house was gonna burn down?" to which Mr. Frye answered, "No.... Never heard that." (R. p. 3134, lines 13-20). The State objected and no further questions were asked by defense counsel given the trial court's ruling that Mr. Frye was offered for "impeachment purposes because Cletus did not admit that he made a prior statement." (R. p. 3135, lines 12-16).

Charge on Aggravating Circumstances and Mitigating Circumstances

The judge instructed the jury that aggravating circumstances must be proven by the State beyond a reasonable doubt. Further, the judge instructed the jury it could consider only two circumstances: (1) murder of a child under eleven years of age; and (2) murder during the commission of the crime or act of kidnapping. (R. p. 3226, line 10- p.

3227, line 14). The judge instructed that only if one or both of the aggravating circumstances are found could the jury consider sentencing. (R. p. 3227, line 15- p. 3229, line 23). However, he also instructed that even if the jury found one or more statutory aggravating circumstances, they were not required to recommend death. (R. p. 3230, line 23 – p. 3231, line 19; p. 3239, lines 14-25; p. 3240, lines 12-18). The judge also instructed the jury could consider any statutory mitigating circumstance supported by the evidence and charged the jury on five (5) such circumstances to consider: (1) no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; (4) the age or mentality of the defendant at the time of the crime; and (5) evidence of mental retardation. (R. p. 3237, lines 5-24). The judge also instructed the jury it may consider any nonstatutory mitigator supported by the evidence, but that it “need not find the existence of such a circumstance by proof beyond a reasonable doubt or any other level of proof.” (R. p. 3239, line 13). The judge also instructed that apart from statutory or nonstatutory mitigating circumstances, the jury could also return a life sentence as an act of mercy. (R. p. 3240, lines 1-18). (See also R. p. 3241, line 23- p. 3243, line 3243, line 4). The judge cautioned, however, that the decision must be made “without bias and without prejudice to any party” and may not “be governed by sympathy, prejudice, passion, public opinion, or any other arbitrary factor.” (R. p. 3243, lines 5-12). He instructed that “[b]oth the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the

evidence in the case, and that you will follow the law as ... explained” (R. p. 3243, lines 12-15).

Sentencing

The jury considered and rejected, as Judge Couch had independently done before the trial, appellant’s suggestion he was intellectually disabled. Next, the jury reported that it found, beyond a reasonable doubt, both of the submitted circumstances in aggravation – (1) murder of a child under eleven years of age; and (2) murder during the course of kidnapping – and recommended death.⁶ (R. p. 3257, line 23 – p. 3258, line 25). As noted, Judge Couch imposed a sentence of death. (R. p. 3262, line 19 – p. 3263, line 5).

⁶ The jury was clearly instructed its recommendation will be followed by the sentencing court. (R. p. 3223, lines 20-22; p. 3250, lines 7-10).

ARGUMENT

I.

The trial judge did not abuse his discretion in limiting a discrete portion of cross-examination of a witness [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Lastly, if error could be found in the limitation, any such error was harmless beyond a reasonable doubt.

Relevant Facts:

During a pre-trial hearing on November 6, 2013, defense counsel moved for an order to show cause why the sheriff's office should not produce its file "on the fire bombing of my client's family member's house, houses." (R. p. 4563, lines 15-23). He referenced a "continuing threat" to appellant's family, and asserted:

... Mr. Center belongs to a biker gang or a motorcycle club, whatever you want to call it, that, at the funeral, hundreds of bikers showed up. On the memorial of her death, more bikers showed up for fundraiser to help pay for the funeral from the previous year, and even in some of my motions, I've provided information to the Court that sort of like Harley Davidson type bikers have ridden by my client's family member's houses sort of at a low speed and kind of throwing glances over at the house.

(R. p. 4564, line 15 – p. 4565, line 6).

Defense counsel admitted, "[t]his is a collateral matter," and that it would not be a matter of ordinary discovery. (R. p. 4565, lines 12-19; p. 4570, lines 9-10). The State moved to quash the subpoena as improper (the defense opted out of state discovery rules); the evidence appears to suggest speculative third party guilt; but, critically, the defense "keeps referring to a biker gang in pointing the finger at the victim's father, that somehow this is a biker gang retaliation" when no such link has been established.⁷ (R. p.

⁷ The State also correctly noted that "as victims of what they contend was an arson, they [*i.e.* the Appellant's family members] were entitled to ... request" the reports. (R. p. 4568, lines 11-14). Defense counsel asserted he did not represent the family, and asserted a "right" to use the subpoena process even in light of opting out of discovery – a tactical decision to prevent fair disclosure under established rules. (R. p. 4571, line 10 – p. 4574, line 12). He also contended the State had no standing to seek to quash the subpoena as the solicitor did not represent the sheriff. (R. p. 4574, lines 13-21). Discovery issues were rampant due in large part to the defense opting out of recognized discovery rules only to attempt to force discovery in other ways. (See, for example, FOIA

4566, line 6 – p. 4569, line 3). The State argued “the defense is trying to ... bring this biker element into the trial, at some point, to either get an acquittal or, more importantly, to avoid a death sentence,” but the collateral matter was not relevant to the trial and sentencing. (R. p. 4568, lines 3-8). The trial judge found “this is extremely collateral to the issues,” and defense counsel again agreed. (R. p. 4570, lines 11-25). Defense counsel also admitted to arguing “both ways,” that it was a collateral matter, but he needed it for litigation. (R. p. 4571, lines 2-9).⁸

Objections; Motion for protective or Modifying Order Under SCRCrP 5(d)(1), and For Remedies, R. pp. 3286 - 3385; State’s Return to Defendant’s Motion to Preserve Notes, Et.Al., p. 3710).

⁸ Appellant also inconsistently argued a motion not to sequester the jury for fear “that a hundred bikers might show up the morning we try to pick a jury in some sort of show of solidarity with Mr. Bobby Center,” and have “a hundred motorcyclist circling the courthouse,” and noted “the most significant amount of retaliatory conduct directed toward the victim’s family [in a matter] that I’ve been involved in.” (R. p. 4605, line 19 – p. 4608, line 14).

Appellant also inconsistently argued a motion to “prevent introduction of evidence of attempted murder of defendant’s family members,” unless it became relevant to “sully the character of Mr. Bobby Center.” (R. p. 4610, lines 17-22). It appears appellant argued the post-murder threats and violence against the family members would be admissible to show the impact of appellant’s *crimes on his family* (and simply inferentially sully the character of the victim’s father) or to attack the sufficiency of the police investigation by proof of collateral acts where the defense perceived the victim’s father was given preferential treatment. (R. p. 4610, line 17 – p. 4611, line 18). *But see State v. Dickerson*, 395 S.C. 101, 122, 716 S.E.2d 895, 906 (2011) (Supreme Court precedent “does not limit a court’s ability to exclude evidence not bearing on the defendant’s character, his prior record, or the circumstances of the crime as being irrelevant”); Rule 608 (b), SCRE (“Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ credibility, other than a conviction of a crime ... may not be proved by extrinsic evidence.”). (See also State’s Return to Defendant’s Motion in Limine (Defendant’s Pleadings #23 &25), R. p. 3390, asserting the defense “request to admit evidence as to a fire of unknown origin is an attempt to attack the family of the victims and should be denied”).

A summary of the defense’s position is reflected not only in the transcripts, but in pleadings referencing same. (See Motion for Change of Venue Based on the Retaliatory

Again in response, the State argued the eight-year-old child victim had nothing to do with biker gangs, and all the information the defense sought “had nothing to do with this day” of the murder, and was all, in fact, well after the murder. Further, if it could possibly be relevant, “the prejudicial effect is just unbelievable,” when the focus should be on the murder of an eight-year-old child. (R. p. 4575, line 5 – p. 4576, line 10). The State also noticed the court and defense counsel it had a *motion in limine* to be heard to prevent such reference at trial. (R. p. 4575, lines 13-15). (See Notice of Motion and Motion in Limine (to Exclude Any Reference to Any Matters Involving Incidents or Investigations in the Neighborhood of the Defendant that Occurred After the Date of the Murder of the Victim Concerning Non-Related Incidents or Crimes, and Any Further Attacks on the Character of the Victim’s Father under South Carolina Case Law and Rules 401, 402, 403, 801, 802, and 804 of the South Carolina Rules of Evidence), R. pp. 3387 - 3389).

Later in the same hearing, defense counsel made a pre-trial motion for

Attempted Murder of the Defendant’s Family Members and the Potential Threats of Violence and Intimidation from Others, Including Local Biker Gangs (R. pp. 3266 - 3274); and Motion for Change of Venue Based on Pre-Trial Publicity and Potential Presence of Biker Gangs Which Will Influence Jurors and Deny the Defendant’s Right to a Fair and Impartial Jury, R. pp. 3275 - 3284). Further, though these requests for change of venue were made, the defense could show no issue with selection of a fair and impartial jury and there is no issue raised in this appeal concerning venue.

In recognition of the civic and moral duty of victims of and witnesses to a crime to cooperate fully and voluntarily with law enforcement and prosecution agencies, and in further recognition of the continuing importance of this citizen cooperation to state and local law enforcement efforts and to the general effectiveness and the well-being of the criminal and juvenile justice systems of this State, and to implement the rights guaranteed to victims in the Constitution of this State, the General Assembly *declares its intent, in this article, to ensure that **all victims of and witnesses to a crime are treated with dignity, respect, courtesy, and sensitivity**; that the rights and services extended in this article to victims of and witnesses to a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants...*

S.C. Code Ann. § 16-3-1505 (emphasis added).

Ms. Davis testified in the guilt phase that at the time of the murder, she and appellant has been separated “[a]bout a year and nine months or maybe a little longer.” (R. p. 2379, lines 16-18). On the day of the murder, she testified she was at her parents’ home with Brooke when appellant came by the home and discussed insurance with her. At the conclusion of the discussion, appellant directed her to go to their grandchildren’s home. Brooke excitedly told appellant they were going to go swimming. Appellant “looked back” toward Ms. Davis and directed, “you make sure and you go over there and get them boys.” He left thereafter. (R. p. 2379, line 19 – p. 2381, line 9). Ms. Davis testified she drove to her daughter’s home but did not see a car and attempted to leave. However, appellant “flagged” her to pull over and said to return, that her son-in-law and

grandchildren were there. (R. p. 2382, line 25 – p. 2383, line 9). She returned and exited the car to corral a lively little dog so Brooke would not be bitten. (R. p. 2383, lines 17-19). As she turned, she saw appellant had Brooke. Ms. Davis pleading with him, but appellant stated “you’ve pushed this too far. You did this. You tell me what Bobby thinks of this,” and he shot the child. (R. p. 2386, lines 2-15).

¹¹ The meeting at her parents’ home and appellant’s direction to Ms. Davis to go to the daughter’s home while she had the victim was confirmed in the penalty phase by the witness’s mother. (See R. p. 2662, lines 22 – p. 2663, line 14). The defense conceded the testimony was consistent and attempted to prevent Ms. Davis’ mother’s from testifying to the premeditation and malice, apparently arguing all the State’s evidence on same should have been presented in the guilt phase (though he admitted guilt and the sentencing proceeding was separate). (R. p. 2659, line 9 – p. 2662, line 4). The trial judge correctly overruled the attempt to limit the proper evidence for the sentencing phase. (R. p. 2662, lines 5-6). There is no challenge to that ruling on appeal.

¹² Defense counsel in addressing the jury candidly advised that he “hate[s]” the death penalty and everything about it, and admitted another instance of error, that he “lost [his] temper with an officer and that was wrong.” (R. p. 3188, lines 3-6). The State

acknowledges that personal opinions about the most severe penalty that the law allows varies and recognizes that some individuals have vehement views against its imposition; however, every lawyer has the duty to respect the participants and act within the rules of court. See Rule 407, SCACR, Rules of Professional Conduct; Preamble, para. [5]; Rule 4.4 (Respect for Rights of Third Persons).

Discussion:

Appellant's argument to the contrary should be rejected.

II.

The trial judge did not err in declining

Relevant facts:

Appellant has

Discussion:

An “appellant is not in position to assert error when he was the author of such and his own conduct induced the situation of which he now complains.” *State v. Worthy*, 239 S.C. 449, 465, 123 S.E.2d 835, 843 (1962), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). *See also Gordon v. Busbee*, 397 S.C. 119,

130, 723 S.E.2d 822, 828 (Ct.App. 2012) (“An appellant cannot cause or invite the trial court to err and then complain about the court’s actions on appeal.”).

III.

The trial judge's initial determination that appellant was not mentally retarded is moot where the jury subsequently returned a verdict that appellant had not shown mental retardation by a preponderance of the evidence.

Relevant Facts:

Appellant advised the State and the trial judge that he would assert that he was mentally retarded.²⁰ This prompted a pre-trial hearing pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), to determine if appellant's capital trial could continue. At a pre-trial hearing held February 19-21, 2014, the trial court received evidence from three mental health experts and multiple exhibits. On February 25, 2014, the trial judge issued an Order that carefully detailed the multi-faceted review effected to make his determination. He concluded that appellant had failed to carry his burden of proof. (Supp. R. pp. 1-14). The capital trial proceedings were allowed to continue and began the following Monday, March 3, 2014.

At sentencing, the jury was asked to determine whether appellant had carried his burden of proof in establishing, by a preponderance of the evidence, that he was mentally retarded. The jury indicated it did not find by a preponderance of the evidence that the defendant was mentally retarded. (R. p. 3257, lines 16-22).

On appeal, appellant asks this Court only to review the pre-trial determination by the trial judge. He does not challenge the subsequent finding by the sentencing jury.

²⁰ Respondent acknowledges this specific condition is now referenced as "intellectual disability." *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013). As the term "mental retardation" was used throughout the trial and throughout appellant's brief, Respondent continues to use the term "mental retardation" in this particular case for continuity.

Discussion:

Appellant's argument for error is moot as appellant submitted the matter to the jury which found that he failed to carry his burden of proof. As the jury's determination is final and controlling, the trial judge's initial ruling is moot. *See Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (if pre-trial hearing results in a finding of not mentally retarded, then the evidence is submitted at sentencing, and "[i]f the jury finds this mitigating circumstance, then a death sentence will not be imposed."). Even so, his argument for error in the initial ruling is not supported by the record.

In his brief, appellant begins his discussion of this issue with a criticism of the sufficiency of the trial judge's focus in the pre-trial ruling. He describes that ruling as simplistically resting on one fact – that appellant was a truck driver. (FBOA, pp. 35-36). That is wholly unsupported by the record in this matter. The trial judge's ruling was detailed and reflected a thoughtful and thorough consideration of the evidence. (Supp. R. pp. 1-14). Further, appellant asserts that his crime may only be explained by a finding that he is mentally retarded. (FBOA, pp. 37-38). However, the trial judge's determination was simply one of eligibility. The facts of the murder were not before the trial judge at that point. When both eligibility and the facts of the case were before the fact-finder, the jury, appellant's assertion he was mentally retarded was rejected. To the extent appellant argues that the facts of the crime support the diagnosis (regardless of whether this position is accepted or not accepted in the medical or legal communities addressing a diagnosis, which is not addressed here), he failed to make such an argument below. It is barred from review on appeal. *Dunbar, supra*. Further, the jury then determined his moral culpability in light of the individually sentencing proceedings. They

found death – “the law’s most severe sentence,” *Hall v. Florida*, ___ U.S. ___, 134 S.Ct. 1986, 1993 (2014) – was appropriate. In short, appellant mixes concepts in this area. A finding of mental retardation bears on eligibility to receive the “law’s most severe punishment.” It does not prevent punishment. *Id.* Moreover, this record shows appellant’s assertion was twice rejected. Appellant has not shown, by a preponderance of the evidence, that he in fact was mentally retarded and exempt from capital punishment.

Determination of Atkins Claims

In *Atkins v. Virginia*, 536 U.S. 304, 318, 122 S. Ct. 2242 (2002), the Supreme Court of the United States determined that “the mentally retarded should be categorically excluded from execution.” The Court cautioned that “[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus,” and allowed the States to set the process by which such offenders may be identified. 536 U.S. at 317.

In *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), this Court implemented a two-step process to ensure compliance with the prohibition in *Atkins*. First, to determine if a defendant’s capital trial may be held, upon notice of a claim of mental retardation, the trial judge will hold a pre-trial hearing to determine eligibility. 356 S.C. at 276, 588 S.E.2d at 606. If the defendant carries his burden of proof to show that he is mentally retarded by a preponderance of the evidence, the capital trial will not continue. *Id.* If the trial judge finds the capital defendant has not carried his burden of proof, the capital trial will continue. If convicted, the issue of eligibility for the sentence is once again put to the jury as an issue of mitigation. *Id.* See also *State v. Laney*, 367 S.C. 639, 646-49, 627 S.E.2d 726, 730-32 (2006) (finding that, pursuant to *Franklin*, the

“determination is a two-step process” where “mental retardation is a threshold issue, decided by the trial judge as a matter of law in a pretrial hearing, that determines whether a defendant is eligible for capital punishment at all, and if not found as a threshold issue, mental retardation continues to be a mitigating circumstance under statutory law.”). However, though considered “mitigation,” it is still an eligibility finding because “[i]f the jury *finds* this mitigating circumstance, then a death sentence will not be imposed.” *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (emphasis added). There is no burden of proof for purely mitigating evidence, nor a report of findings as each juror is free to consider the evidence. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 384, 108 S. Ct. 1860, 1870 (1988) (finding unconstitutional a limitation that would indicate the jury was “precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance”). In *Laney*, this Court rejected a call to “modify the procedure” in *Franklin*, and require the determination be made by the jury alone. Instead, the Court affirmed the two-step process which included a jury finding. *Laney*, 367 S.C. at 648-49, 627 S.E.2d at 731.

In this case, the jury was instructed that, as “a threshold matter,” that it must consider whether appellant had proven mental retardation by a preponderance of the evidence, and a finding that appellant carried his burden of proof required a unanimous vote. (R. p. 3219, lines 3-25; p. 3222, lines 4-7; p. 3241, lines 2-25). The trial judge also instructed that a finding of “yes” “would be the end of our discussion because the defendant would not be death penalty eligible.” (R. p. 3241, lines 5-7). After this finding, the jury was further instructed as to its consideration of the separate aggravating and mitigating circumstances. (R. p. 3223, line 3-p. 3243, line 17). Thus, not only do *Franklin*

and *Laney* establish and acknowledge this two-step process, the treatment of the issue below shows that an independent fact-finder, the jury, made the ultimate determination. In short, the trial judge's initial determination is now moot.²¹ Alternatively, any error in consideration of any portion of the evidence in the pre-trial ruling is harmless as appellant was allowed to seek another ruling from the jury. *See Hurst v. State*, 147 So. 3d 435, 442 (Fla. 2014), *reh'g denied* (Sept. 4, 2014), *cert. granted in part*, 135 S. Ct. 1531, 191 L. Ed. 2d 558 (2015) ("any error in denying the pretrial evidentiary hearing on mental retardation was harmless because Hurst was allowed to present all his mental retardation evidence at the penalty phase, after which the trial court ruled that he failed to establish that he is mentally retarded"). Of note, the State did not even present at sentencing the testimony from the DDSN²² doctor who had opined that appellant was not mentally retarded at the pre-trial hearing. However, the jury still rejected appellant's evidence of mental retardation.

There is no requirement that appellant be allowed two opportunities to present his case for mental retardation. Other states have found that determinations are made by the

²¹ Also, this issue should be barred by the two-issue rule as appellant has failed to challenge the jury's findings. *See Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a trial court's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case"). *See also Atl. Coast Builders & Contractors, L.L.C. v. Lewis*, 398 S.C. 323, 328, 730 S.E.2d 282, 285 (2012) (applying two issue rule). Even in a matter of disqualifying condition, a defendant may not circumvent established rules. *See generally Prieto v. Zook*, 791 F.3d 465, 472-73 (4th Cir.) *cert. denied sub nom. Prieto v. David Zook*, ___ U.S. ___, 136 S. Ct. 28 (2015) (finding *Atkins* claim procedurally defaulted).

²² The Department of Disability and Special Needs. This state agency specializes in the identification of intellectual disability. (Feb. 2014 R. p. 4139, lines 16- p. 4140, line 7). The evaluator from DDSN, Dr. Brown, was the Court's expert in this matter. (Feb. 2014 R. p. 4140, line 20 – p. 4141, line 9).

trial judge in a separate hearing and the matter is not re-litigated. *See, e.g., Maldonado v. Thaler*, 662 F.Supp.2d 684, 705–07 (S.D.Tex.2009) (rejecting argument a jury must determine mental retardation); *State v. Grell*, 212 Ariz. 516, 135 P.3d 696, 706 (2006) (same); *Pruitt v. State*, 834 N.E.2d 90, 112–13 (Ind. 2005) (same); *Bowling v. Commonwealth*, 163 S.W.3d 361, 378–81 (Ky.2005) (noting no precedent for mental retardation determination being converted to “constitutional right to jury trial” on finding); *State v. Were*, 890 N.E.2d 263, 294 (Ohio 2008) (rejecting argument for jury determination). In *Hurst v. State*, the Florida Supreme court strongly stated its position that there is no right to a jury determination: “We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded.” 147 So. 3d at 445. In the federal system, such determinations are by a trial judge only.

In *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 193 (D.P.R. 2013), the federal district court reasoned:

We agree that deciding this issue before trial is logical, but we have found no case that demonstrates it must be so as a matter of law. A case might arise in which this issue is deferred to the penalty phase. We also note that there is no consensus as to whether the issue is foreclosed once decided by the judge. We note that it would make no sense for the issue to remain open, other than on appeal.

Other jurisdictions, however, have allowed a jury to be empaneled for purposes of the determination, *Blonner v. State*, 127 P.3d 1135 (Ct.Crim.App. 2006), or will allow (much like our State) a defendant to have a judge decide pre-trial and to submit the issue to the jury in sentencing, *State v. Bell*, 53 So.3d 437 (La. 2011) (noting statutory provision providing jury “shall” determine, but allowing a pre-trial determination by the judge upon agree which does not prohibit raising the issue at sentencing). *See also Com.*

v. Sanchez, 36 A.3d 24, 61 (Pa. 2011) (observing Missouri and North Carolina also have this approach).

In a slightly different approach, the Utah Supreme Court, while upholding their Exemption Statute that allowed only for a trial court determination of eligibility, noted that “the jury was the ultimate finder of fact in imposing the death penalty,” that capital defendants could submit “evidence of any mental deficiency as a mitigating circumstance during sentencing,” and that “the State would have had to persuade the jury that, even considering such evidence, the totality of the aggravating circumstances outweighed the totality of the mitigating circumstances such that death was the appropriate penalty.” *State v. Maestas*, 299 P.3d 892, 954 (Utah), *cert. denied*, 133 S.Ct. 1634 (2013). Unlike the process in our procedure under *Franklin*, though, the jury cannot revisit the eligibility. Thus, our State’s procedure is decidedly to the defendant’s benefit.

Here, appellant seeks only to challenge the initial ruling. As the intervening, and final ruling, of the jury was controlling as to whether the jury would consider death, the initial ruling was rendered moot. At any rate, the trial judge’s ruling is well-supported by the facts of records and controlling precedent.

Standard of Review

This Court has not specifically set out the appropriate standard of review in a direct appeal of the lower court’s determination of mental retardation. However, this Court indicated in *Franklin* that sufficient review of pre-*Atkins* cases could be made through post-conviction relief. *See Franklin*, 356 S.C. at 280 (noting procedure for review of *Atkins* claim where defendant already sentenced would be found in PCR proceedings as a freestanding claim with the defendant bearing the burden of proof to

show the condition by a preponderance of the evidence). Thus, review of a finding regarding mental retardation would be review under the deferential standard of “any evidence of probative value.” See e.g., *Vasquez v. State*, 388 S.C. 447, 456, 698 S.E.2d 561, 565 (2010) (“This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them, and will reverse the decision of the PCR judge when it is controlled by an error of law.”).

Appellant suggests a standard of review consistent with a pre-trial determination of competency to stand trial; however, this would focus specifically on the first ruling which is inconsistent with the *Franklin* structure. The PCR standard of review fits most comfortably with the two-step process at issue here and brings consistency with review either by direct appeal or collateral litigation. This standard of review was just recently applied in *Kenneth Simmons v. State*, Appellate Case No.: 2014-000387. It would be inconsistent to apply a different review to a matter in direct appeal where the Court specifically stated sufficient review existed by way of collateral proceedings.

Moreover, allowing review of an initial determination will invalidate a jury ruling, though each is separate, distinct, and valid. In fact: “Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses.” *Patton v. United States*, 281 U.S. 276, 312, 50 S. Ct. 253 (1930). Where the Court specifically allows this fact finding by a jury, it is the jury’s fact finding that should be reviewed if any at all. Further, these findings should be afforded great deference. Other courts favor a similarly deferential standard in reviewing jury determinations.

Intensive scrutiny is against the weight of historical deference to jury verdicts, a product of the closed deliberative process. For example, in Oklahoma, if a jury decided the matter, the standard of review is treated as a review of fact. Oklahoma will “give great deference to the jury’s finding. We will not disturb the jury verdict where there is any competent evidence reasonably tending to support it.” *Myers v. State*, 130 P.3d 262, 266-67 (Ct.Crim.App. 2005).

In Louisiana, “[t]he jury’s unanimous decision that defendant is not mentally retarded” is upheld if it “is neither irrational nor arbitrary.” *State v. Lee*, 976 So. 2d 109, 147 (La. 2008).

In Georgia, “[t]he appropriate standard of appellate review is whether, after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that [the defendant] failed to meet the burden of proving his mental illness or mental retardation at the time of the crime.” *Pittman v. State*, 269 Ga. 419, 419, 499 S.E.2d 62, 63 (1998).²³

However, where the trial judge alone rules on the issue, courts are divided as to the correct standard of review. See *Ybarra v. State*, 247 P.3d 269, 276 (Nev. 2011) (“While some courts have reviewed such decisions for an abuse of discretion, or clear error, others have treated it as a mixed question of fact and law...” (internal citations omitted)). In *Ybarra*, the Supreme Court of Nevada resolved: “...we will give deference to the district court’s factual findings so long as those findings are supported by substantial evidence and are not clearly erroneous, but we will review the legal

²³ Georgia was actually the leader in determining that the intellectually disabled should not be subject to the death penalty. It abolished capital punishment for such offenders in 1988. *In re Hill*, 715 F.3d 284 (11th Cir. 2013). It also retains the highest burden of proof – beyond a reasonable doubt. *In re Hill*, 777 F.3d 1214 (2014).

consequences of those factual findings de novo. Matters of credibility in this area remain, however, within the district court's discretion." 247 P.3d at 276. *See also Hodges v. State*, 55 So. 3d 515, 527 (Fla. 2010) ("we must decide whether competent, substantial evidence supports the trial court's findings" and review *de novo* questions of law); *Com. v. Crawley*, 924 A.2d 612, 616 (Pa. 2007) ("A question involving whether a petitioner fits the definition of mental retardation is fact intensive as it will primarily be based upon the testimony of experts and involve multiple credibility determinations. Accordingly, our standard of review is whether the factual findings are supported by substantial evidence and whether the legal conclusion drawn therefrom is clearly erroneous.").

Respondent submits that the correct standard of review should be in line with the deferential review of jury determinations as noted above, and the jury determination considered dispositive. However, since the issue here contests only the judge's determination, and if this Court allows the review given the subsequent jury determination, the Court should give deference to the trial judge's ruling on credibility and affirm if there is any probative evidence supporting the decision. This would be consistent with the standard for review in collateral free-standing claims.

Appellant's Argument for Error is Rebutted by the Record

The trial judge carefully reviewed the evidence presented and made detailed credibility assessments as evidenced in his fourteen (14) page order issued on February 25, 2014. (Supp. R. pp. 1-14). Credibility determinations concerning mental retardation evidence and opinions is particular crucial. It is well-recognized that "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." *Atkins*, 536 U.S.

at 317. “[T]he determination of mental retardation in the *Atkins* context is always complicated by the problems associated with retrospective assessment and the well-known consequence of a diagnosis of mental retardation-exemption from the death penalty. Both experts and those answering questions about a person’s adaptive functioning may exhibit significant conscious or unconscious bias in addressing this issue.” *Ex parte Cathey*, 451 S.W.3d 1, 19 (Tex. Crim. App. 2014) *cert. denied sub nom. Cathey v. Texas*, ___ U.S. ___ 135 S. Ct. 2857 (2015). As the *Cathey* court critically noted when considering the claim in the circumstance of the matter before it: “It is difficult to credit that a developmental intellectual disability can lie dormant and undiscovered for thirty-seven years and then spring full-grown, like Minerva from Zeus’s forehead, only when that person would be exempted from the death penalty if found so disabled.” *Id.*, 451 S.W.3d at 20. *See also Com. v. Hackett*, 99 A.3d 11, 33 (Pa. 2014) (“As there may be a powerful incentive to malingering and to slant evidence in cases where a petitioner has not been clinically diagnosed with intellectual disability and the record before the factfinder was created to seek relief under *Atkins*, this Court has found a petitioner’s motivation to slant evidence of intellectual disability is a relevant consideration for *Atkins* factfinders in assessing not only the validity of results of post-*Atkins* intelligence testing, but in analyzing the entire *Atkins* petition.”).²⁴

²⁴ Appellant suggest that the Supreme Court had deferred such decisions to mental health experts by accepting certain diagnostic factors. (See FBOA, p. 72). To the contrary, the Supreme Court made clear that the legal decisions are informed by the medical community, but the medical community does not control the legal conclusion. *Hall v. Florida*, ___ U.S. ___, 134 S. Ct. 1986, 2000 (2014) (medical expert “views do not dictate the Court’s decision, yet the Court does not disregard these informed assessments. *See Kansas v. Crane*, 534 U.S. 407, 413, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002) (“[T]he science of psychiatry ... informs but does not control ultimate legal determinations ...”). Curiously, his suggestion that his expert’s decision must be honored

Contrary to appellant's lengthy recitation of simplicity in preface to his argument, the trial judge considered much more than the simple fact appellant was a truck driver. In fact, appellant's work history was not even mentioned until page 8 of the 14 page report. (Supp. R. pp. 1-14). That reference was not simply to driving a truck, but appellant's stated goal of becoming a truck driver and his accomplishment:

... Within five years of leaving school he had achieved his vocational goal of getting his commercial driver's license and gotten a job driving trucks. He seems to have realized that goal in the early 1980's. In doing so, Blackwell was required to take and pass the exam for a Commercial Driver's License. Also, he took and passed the additional exam to obtain his license to drive tankers of hazardous materials. Those exams require extensive reading writing and practical skills. A commercial driver must be able to not only operate a truck, but is responsible for being able to perform inspections of his vehicle and recognize defects in the vehicle for safety purposes.

14. Mr. Blackwell drove trucks for KNS Trucking, Hess Corporation, and Belue Trucking. The record related by Dr. Brown indicates that Blackwell was cited for such work related problems as

in a court decision is contrary to medical authority. The DSM 5 at p. 25 acknowledges the "imperfect fit between the questions of ultimate concern to the law and the information contained in clinical diagnosis" and, in matters of intellectual disability specifically, states such a diagnosis "does not imply that an individual with such a condition meets ... a specific legal standard...." The trial judge also correctly noted the defense expert fused several definitions for different organizations. Though the ultimate goal in these methods was to identify mental retardation, organizations modify clinical methodology. *See, for example, United States v. Williams*, 1 F.Supp.3d 1124, 1146 (D. Hawai'i 2014) (discussing guidance from APA as "deficient in at least two of eleven relatively specific areas" and the AAIDD's more "global" approach which "shift[s] from the former 1992 approach of "at least 2 of the 10 specific skill areas").

Further, Appellant's reliance on *Van Tran v. Colson*, 764 F.3d 594 (6th Cir. 2014) for a forced fit of methodology under *Atkins*, (see FBOA, p. 80), is misplaced where relief was granted only on proper application of Tennessee law in making such a decision in a Tennessee case. *See also Chase v. State*, 171 So. 3d 463, 483 (Miss. 2015) ("We reject Chase's invitation to enact a rule that a circuit court must blindly accept a psychologist's interpretation of witnesses' answers to interview questions as dispositive of the adaptive functioning prong of the test for intellectual disability. We hold that the circuit court was entitled to evaluate the scientific validity and credibility of Dr. Reschly's opinions and to reject them if it found them not credible.").

failing to keep proper logs, letting family members ride in a leased truck and failing to come to work on one occasion. Also, it appears that he may have been terminated by Hess and Belue for accidents, but it was not shown to this Court that they were at-fault accidents of Mr. Blackwell. Also, those employers later rehired Blackwell. Blackwell reported that he traveled while driving a commercial truck as far west as El Paso, Texas and as far north as Canada. In a job application, Blackwell wrote that he had experience in driving semi-tractor-trailers, and tanker trucks in several other states which included Texas, Oklahoma, New York and New Jersey.

15. His work history was interrupted by a diagnosis of cancer. As a result of the disease and its treatment he was out of work from 1987 to 1997.

16. Blackwell returned to work in 1998 with Springs Industries as a fork lift driver.

(Supp. R. pp. 8-9).²⁵

The trial judge went on to describe income reported during appellant's work history, and his family relationships, noting his former wife, Angie Davis,²⁶ "handled the

²⁵ These facts are without doubt supported by the record as appellant concedes so by recitation of same in his brief. (See FBOA, pp. 54-56). In regard to obtaining a commercial driver's license, he admits that Dr. Brown noted in his report that it would be very difficult for a mentally retarded individual to obtain that license. Appellant simply offers "he did not say that it would be impossible." (FBOA, p. 55). However, he fails to mention that Dr. Harrison also opined it would be "unlikely" that a mentally retarded individual could obtain a commercial driver's license given it requires a written test that is complex and an "understanding of rather technical machinery." (R. p. 3786, lines 20-25). The fact that it is significantly difficult to obtain the specialized license weighs in favor of finding appellant was not mentally retarded. See *Com. v. Hackett*, 99 A.3d 11, 34-35 (Pa. 2014) (criticizing evaluation failing to consider work skills); *United States v. Williams*, 1 F.Supp.3d 1124, 1164-67 (D. Hawai'i 2014) (finding credible an expert's testimony crediting defendant's work and accomplishments, including being able to drive long distances, as evidence of adaptive functioning not consistent with mental retardation and criticizing another expert's failure to consider "real world" functioning").

²⁶ Ms. Davis declined to speak with defendant's expert, (see R. p. 4051, lines 13-22), and the Court's expert considered contact with Ms. Davis but cited concern over "ethical issues" of reaching out to her, (R. p. 4218, line 16 – p. 4219, lines 3). At any rate, neither expert spoke to Ms. Davis as a person who possibly could have "provided some really useful information." (R. p. 4218, lines 10-22).

management of the household by paying all the bills and writing all the checks.” (Supp. R. p. 10).²⁷ Again, this is far more than relying on the simple fact that appellant drove a truck.

Moreover, the trial judge considered evidence of school performance (“made reasonably sufficient grades during his school career”)²⁸; though ranked 113 out of 113 in his class, appellant had dropped out and may have received a successions of zeros; had four IQ tests before age eighteen, which reflected 68 (first grade); 87 (third grade); 86 (sixth grade); and 72 (ninth grade)²⁹; and, that after the age of eighteen he had had a head

²⁷ The defense had to admit that they failed to turn over all evidence to Dr. Brown as they were ordered to do. (R. p. 4256, line 6 – p. 4258, line 11). (See also R. p. 4478, line 10 – p. 4479, line 4, State seeking information on *Atkins* claim where no information had been provided in approximately 3 years since claim asserted; R. p. 4743, line 1 – p. 4753, line, State seeking medical records in compliance with HIPPA requirements and other materials for preparation of the hearing, upon failure to receive materials from the defense pursuant to the consent order; State’s Return to Defendant’s Discovery Motion to Deny Meaningful Access to *Atkins* Sentencing Information, R. pp. 3746 - 3759; State’s Return to Defendant’s Motion to Exclude Evidence of Evaluation by Dr. Brown, pp. 3760 - 3762; Motion to Exclude Testimony of Dr. Ginger Calloway, pp. 3736 - 3739). Part of the information on home finances was disallowed as a result of their failure to abide by the trial court’s order. (R. p. 4258, lines 13-16). This highlights the necessity of placing the burden of proof of the capital defendant: “Counsel for the capital defendant is better positioned than the [State] to ... gather the evidence and witnesses relevant to an *Atkins* determination.” *Com. v. Sanchez*, 36 A.3d 24, 68 (Pa. 2011).

²⁸ See R. p. 4244, lines 3-14, Dr. Brown’s testimony that appellant had the required unit numbers needed to be on track for graduation.

²⁹ Though the witnesses and the parties referred to these as IQ tests, there was some question as to whether they were more general scholastic tests. Dr. Calloway did not discount these scores entirely as appellant would argue should be done; rather, both Dr. Calloway and Dr. Brown indicated they could be considered as broad indicators. (See R. p. 3874, lines 12-18; p. 4183, lines 10-17). In fact, Dr. Calloway depended on school testing in opining family members had indicators of mental retardation. (See R. p. 3872, line 1 – p. 3873, line 9, appellant’s father’s IQ test from school scores indicated as 60; p. 3874, lines 12-18, appellant’s brother school test scores indicated 73 and 74; p. 3875, line 11 – p. 3876, line 5, appellant’s daughter’s school scores at 57 and 71). Additionally, Dr. Harrison also considered the school testing scores though she acknowledged that any score could have been incorrect. (R. p. 3797, lines 15-21; p. 3800, lines 4-20; p. 3809,

injury from an accident and had been treated for cancer and depression with strong drugs which may have impacted intellectual functioning (later testing near time of trial showing 63 and 68).³⁰ (Supp. R. pp. 6-7).

As far as the defense expert's testing for adaptability, while the trial judge acknowledged that the defense doctor reported using a formal test – "Adaptive Behavior Assessment System (ABAS-II) – the doctor had "indicated that a matrix of 10-20 individuals was necessary to obtain the best result" yet had used only 6, and with incomplete results. Moreover, the doctor "substituted her subject opinions for the responses of the informants." (Supp. R. pp. 10-11). She had, in fact, admitted to the trial court, upon questioning by the trial judge, that she was more than just there to report information and score the test, she considered that her evaluation considered "weighing

lines 5-11; p. 3821, line 13 – p. 3822, line 13). In regard specifically to appellant's testing, Dr. Harrison noted that it would not be unusual to begin school with a depressed ID if not intellectually stimulated at home, and the following year have a significant leap, which is indicated in appellant's record, and is not indicative of mental retardation. (R. p. 3786, lines 1-10).

Appellant's attempt to cast the testimony as an agreement of evidence for "prong one" is incorrect, (see FBOA, p. 44), as the relevant determination is not present day, but that manifested before the age of eighteen. Appellant must continually admit that he focuses only on current evidence not conducive to finding agreement in the relevant developmental period. (See, for example, FBOA pp. 44, 49, 64 and 75). As Dr. Brown testified, the age of onset has to be prior to the age of 18 or in the developmental period," therefore, "we have to go back and look at what records are available, and for most people, it's going to be school records when we can get them. That's going to give us the most useful information in that regard." (R. p. 4189, lines 10-22).

³⁰ Both Dr. Brown and Dr. Calloway agreed that certain of these factors could negatively affect intellectually functioning and it was not sheer speculation. (R. p. 4195, lines 3-13; p. 3853, lines 5-21). The issue was objective proof which was lacking. However, as Dr. Calloway testified, it is not "inappropriate to say that it may have affected his cognitive functioning" as, for example the four wheeler accident, could not be "ruled out" as having affected functioning. (R. p. 3853, lines 10-21). Further, she candidly conceded that depression would result in "disturbances in thinking" independent of any difficulties in intellectual deficits. (R. p. 4284, line 5 – p. 4288, line 14).

some of the results of the ABAS-II.” (Supp. R. p. 11). For this reason, the trial judge “question[ed] the credibility of that evidence.” (Supp. R. p. 11). Moreover, the test called for a “score of 4 or below” in indication of “significant impairment.” (Supp. R. p. 11). In further explanation of finding the testing “not determinative” as to adaptive behavior, the trial judge reasoned:

... On the ABAS-II a score of 4 or below indicates significant impairment. An example of the subjectivity of Dr. Calloway’s interpretation of the results was in the area of Home Living. The average score of the informants in that area was 5.6. This was 1.6 points above the level of a 4. Yet, in that area, Dr. Calloway found Blackwell to “exhibit(s) a significant deficit in the adaptive functioning area of Home Living.” The Court determined that she failed to reach the same conclusion as the average of her informants in the following areas of adaptive living that she reported: Communication, Home Living, Health and Safety, and Self-Direction.

(Supp. R. p. 11).³¹

³¹ Appellant apparently argues that it is perfectly acceptable for Dr. Calloway to exercise clinical judgment in claiming that she is merely reporting collected information. (FBOA p. 79). That is not precisely what is meant by clinical judgment. Clinical judgment by definition refers to *evaluation* of facts and does not support a substitution of facts collected. *United States v. Williams*, 1 F.Supp. 3d 1124, 1146 (D. Hawai’i 2014) (citing AAIDD Manual, p. 29 for definition: “a special type of judgment rooted in a high level of clinical expertise and experience ... to enhance the quality, validity, and precision of the clinician’s decision”) (emphasis added). Clinical judgment is no doubt a part of the second prong analysis. *Id.* However, employing standardized measures in data collection brings more reliability to the eventual exercise of clinical judgment. *See id.* at 1163-64 (noting doctor found the ABAS scored “underestimated” the capability and explained the factors in his exercise of clinical judgment in concluding same). According to her responses to the trial judge, Dr. Calloway’s information was assessed and was not the mere report of information. (R. p. 4123, line 16 – p. 4129, line 5, Dr. Calloway’s responses to the Court’s questioning confirming tinkering with the report of facts based on her perceptions and mathematical inaccuracies in ratings). This included interviewing people and using the information in scoring, but not including their information in the raw data. (R. p. 4124, line 8 – p. 4125, line 8). The subjective determination of the truthfulness of reported events is cause to challenge the credibility of the use of an otherwise objective, scientific approach to reasoned clinical judgment. *Chase v. State*, 171 So.3d 463, 483-84 (Miss. 2015). Further, the doctor’s presentation at the pre-trial *Atkins* hearing here was admittedly meant to convey a standard methodology that “could be replicated by another forensic examiner and the conclusions should be the same

The trial judge also discounted the defense argument that appellant's "failure to live independently after the breakup of his marriage" in support of deficiency in adaptive behavior. He found that appellant did have issues after his wife left, but his wife had previously managed the household, and he lapsed into another major depression episode "which can result in confused thinking and an inability to handle the pressures of daily living." (Supp. R. p. 12).³² The judge concluded that deficiency did not relate to behavior that would have "manifested during the developmental period." (Supp. R. p. 12).

Lastly, the trial judge noted appellant had never been previously diagnosed as mentally retarded, or a discussion by "health professions" in his medical record that expressed a concern that he may have been mentally retarded prior to capital proceedings. (Supp. R. p. 12).³³

because it's the data that leads one to the conclusion. It's not my personal opinion" rather she was "merely reporting." (R. p. 3923, lines 16-25; p. 4128, line 21 – p. 4129, line 5). This is one of many issues going to credibility, including the use of a limited pool of information from admittedly biased individuals.

³² It is well-recognized that depression can affect IQ presentation. *See Bowling v. Com.*, 163 S.W.3d 361, 376 (Ky. 2005), *as modified* (Apr. 22, 2005) (noting "If the relevant time frame were the time of execution, there would exist the possibility that the IQ test would be 'significantly skewed by potential depression, tension, and anxiety on the part of [the] defendant'" (quoting *United States v. Beckford*, 962 F.Supp. 748, 762 n. 13 (E.D.Va. 1997))).

³³ Dr. Brown found significant that DMH evaluated appellant for competency to stand trial and saw no indication of mental retardation. (Dr. Brown's Report, R. p. 4447; R. p. 4165, line 14 – p. 4166, line 17). Dr. Kimberly Harrison, Chief Psychologist with Forensic Evaluation Service at the Department of Mental Health testified that she was tasked with evaluating appellant for competency to stand trial. She testified at the February 2014 hearing that she had a social worker gather information on appellant's background, and she personally evaluated appellant in addition to review the social worker's information. (R. p. 3780, line 19 – p. 3785, line 7). (See also Dr. Harrison's Report, R. pp. 4421-4428). She concluded that there was not "enough indication" of

The trial judge after finding these facts critically weighed the facts to reject a finding of below average intellectual functioning during the developmental period, with additional explanation of his credibility rulings. (Supp. R. p. 14). He concluded appellant had failed in his burden of proof. (Supp. R. p. 14).

The ruling reflects a well-reasoned, well-supported determination that appellant was not mentally retarded. Appellant cannot show reversible error if the Court should review the trial judge's findings. However, the trial judge's findings are moot given that the issue of whether appellant was mentally retarded was submitted to the jury. The jury's finding that appellant failed in his burden of proof rendered the trial judge's ruling moot. As appellant had not challenged this separate factual finding, the jury's fact finding stands uncontested on appeal.

Appellant is not entitled to any relief.

mental retardation to support "referring the case over the DDSN or to request for a joint evaluation...." (R. p. 3785, lines 8-24; p. 3806, lines 1-3).

IV.

The trial judge did not err in charging the jury the correct standard for appellant's burden of showing mental retardation separately and distinctly from all other references for mitigating and aggravating evidence.

Relevant Facts:

The trial judge held a charge conference after receipt of all the sentencing phase evidence. The defense had no objection to the trial court's proposed verdict form for the finding as to mental retardation; however, the defense, though acknowledging precedent to the contrary, submitted that the State must prove the absence of mental retardation beyond a reasonable doubt. (R. p. 3150, line 11 – p. 3151, line 13; p. 3152, line 23 – p. 3153, line 19). The defense also explored a charge that the decision had to be unanimous either in finding mental retardation or rejecting mental retardation. (R. p. 3157, lines 2-20). The judge rejected both the suggestion on burden of proof, and that the jury had to unanimously reject mental retardation. (R. p. 3156, lines 4-7; p. 3158, line 8 – p. 3159, line 15; p. 3160, lines 6-11).

The trial judge carefully explained the verdict process to the jury and properly explained before considering anything further, the jury must determine if the defendant had shown by a preponderance of the evidence that the defendant was mentally retarded. As noted above, the trial judge carefully instructed that, as "a threshold matter," appellant must prove mental retardation by a preponderance of the evidence. (R. p. 3219, lines 3-25; p. 3241, line 23 – 25). After this finding, the jury was further instructed as to the separate consideration of aggravating and mitigating circumstances. (R. p. 3223, line 3-p. 3243, line 17). The finding returned indicated the jury did not find by a preponderance of the evidence that the defendant was mentally retarded. (R. p. 3257, lines 16-22).

In his motion for a new trial heard March 20, 2014, appellant argued he was entitled to a new trial based on the court's denial to instruct "the jury that it be proven beyond a reasonable doubt that the defendant was not mentally retarded" and that it was burden shifting to place any burden on the defendant at sentencing. (R. p. 4819, lines 10-15; p. 4820, lines 12-18).

On appeal, appellant argues this Court has not stated that the burden of proof continues in the sentencing phase. (FBOA, p. 87). He also contends, while expressing a preference for a jury determination, that he should have no burden of proof in regard to a mitigating circumstance. (FBOA, pp. 87-88). He argues the trial judge's charge was "burden shifting." (FBOA, p. 89).

Discussion:

As a first matter, this issue was not squarely before the trial judge and should be considered procedurally barred. *See, e.g., State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("A party may not argue one ground at trial and an alternate ground on appeal."). At trial, defense counsel argued that the jury should be charged that the State must prove the absence of mental retardation beyond a reasonable doubt. (R. p. 3150, line 11 – p. 3151, line 13; p. 3152, line 23 – p. 3153, line 19). An argument as to burden of proof where mental retardation is raised *only as a mitigating circumstance* was not raised. Thus, this issue is not available for review the merits. However, even if it could be reviewed, the issue would not afford relief.

This Court has provided that "the trial judge shall make the determination in a pre-trial hearing," upon assertion of mental retardation as a bar to the death sentence. *Franklin v. Maynard*, 356 S.C. 276, 279, 588 S.E.2d 604, 606 (2003). The defendant

shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Id.* If the judge finds a defendant has failed to carry his burden of proof, the defendant may still submit the evidence to the jury in mitigation. *Id.* “If the jury *finds* this mitigating circumstance, then a death sentence will not be imposed.” *Id.* (emphasis added). Thus, this Court has provided that both a trial judge and the jury may consider the evidence and the defendant has two opportunities to present his case for mental retardation. Nothing in this Court’s decision of *Franklin v. Maynard* suggests that between the initial determination and sentencing proceedings, there is a presumption that mental retardation exists, and the State must show beyond a reasonable doubt that it does not exist. The absence of mental retardation is not an element of the offense of murder or a statutory aggravating circumstance to be proven. *State v. Laney*, 367 S.C. 639, 648, 627 S.E.2d 726, 731 (2006) (“The fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant’s punishment; rather, the issue is one of eligibility for the sentence imposed by a jury.”).

Moreover, courts have specifically rejected the concept that the prosecuting agency is charged, at any point, with proving the absence of mental retardation. *See, for example, United States v. Umana*, 750 F.3d 320, 359 (4th Cir. 2014) *cert. denied*, 135 S. Ct. 2856 (2015) (“We accordingly reject Umaña’s argument that the government had the burden of proving the absence of mental retardation in order for him to receive the death penalty”); *Com. v. Sanchez*, 36 A.3d at 71 (where jury unanimously finds mental retardation, capital defendant may not be sentenced to death; “Any other jury decision equates to a finding in favor of the Commonwealth ... A jury finding, much less a unanimous jury finding, that the defendant is **not** mentally retarded is unnecessary; as

with all preponderance determinations, if the jury believes the evidence to be equivocal, the party with the burden cannot prevail.”). See also *United States v. Nelson*, 419 F. Supp. 2d 891, 893 (E.D. La. 2006) (citing *State v. Williams*, 831 So.2d 835, 860 (La. 2002) (“*Atkins* established mental retardation as an exemption from capital punishment, not a fact whose absence results in an enhancement.”); Jeffrey Usman, *Capital Punishment, Cultural Competency, and Litigating Intellectual Disability*, 42 U. Mem. L. Rev. 855, 884 (2012) (“As is oft noted, ‘although every state that has considered the issue has allocated the burden of proof to the defendant to establish that he or she is intellectually disabled, states have varied with regard to what level of proof is required. Georgia imposes the highest burden and is the only state that requires a defendant to prove his or her intellectual disability beyond a reasonable doubt. A number of other states require a defendant to prove that he or she is intellectually disabled by clear and convincing evidence. Most states, however, require defendants to prove that they are intellectually disabled by only a preponderance of the evidence.’”).

Further, the argument presented is contrary to the stated policy of having the defendant bear the burden of proof both before a judge and before a jury. Appellant is essentially urging this Court to modify *Franklin* so that mental retardation may be considered only as mitigation after the pre-trial ruling. However, there is no error in the *Franklin* structure in light of the express decision to leave the method of determining same in the province of the individual states. *Atkins, supra*.

For all the reasons above, if appellant’s argument to the contrary could be heard, it should be rejected.

V.

The trial judge did not abuse his discretion in declining to admit notes from two hospital chaplains to the effect that appellant was “struggling” with his actions and “asked for the family” when appellant failed to present the writers of the notes, the notes were not made in the course of medical treatment, and the notes for the most part constituted the writer’s opinion rather than appellant’s statements. Further, there was no prejudice in exclusion where the notes were vague and undefined, and there was other, direct and clear evidence of remorse submitted through other witnesses presented.

Relevant Facts:

Before the witness was called, defense counsel advised the Court of the State’s objection to the substance of the testimony regarding the notes. The trial judge held a hearing on the objection outside the presence of the jury. (R. p. 2960, lines 18-25). Defense counsel advised that he would present Ms. Gracie Williams, a record custodian from the Spartanburg Regional Hospital. (R. p. 2961, lines 4-5). He sought to introduce the notes of two hospital chaplains who spoke with appellant after his self-inflicted wound, and relied upon the business records exception for admissibility. (R. p. 2962, lines 11-18; p. 2965, lines 3-5). The substance of the notes were described as follows:

... the patient was struggling with guilt, and wanted to tell his grandchildren he loved them...

...

... He was struggling with his actions and what had been done, and then the second indicates - - second statement ... was sad, had some prayers in his heart, asked for prayers for the family. We prayed ... the Lord’s Prayer together.

(R. p. 2961, line 25 – p. 2962, line 2; p. 2963, line 24 – p. 2964, line 6).

The State objected noting the information was not in the nature of a diagnosis; the witnesses were available; and, lastly, the notes were more prejudicial than probative. (R. p. 2962, line 20 – p. 2963, line 4; p. 2964, lines 14-23). The State relied upon *State v. Burroughs*, 328 S.C. 489, 501, 492 S.E.2d 408, 414 (Ct.App. 1997), which found

statements not necessary to medical treatment or diagnosis were inadmissible hearsay. Defense counsel offered that “we interviewed the chaplains and ... [t]hey didn’t have much memory actually of this event. So, their notes are actually the best evidence of it....” (R. p. 2963, lines 17-19). The trial judge found that the chaplain’s notes were not admissible:

... 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.

The case cited by Mr. Barnette does appear to be on point. Also the exception to the hearsay rule for regularly kept business records states that matters which are in the nature of an opinion will not be admitted as an exception to the hearsay rule from a regularly kept business record.

It appears that the quotes in here that describe the defendant would be in the form of opinions given by the individuals involved, and therefore, I’ll grant the State’s motion.

(R. p. 2965, line 15 – p. 2966, line 6).

Defense counsel presented Ms. Williams’s testimony in a proffer of the evidence. She testified the records were records kept in the regular course of business. (R. p. 2967, lines 5-21). Counsel also argued admissibility was warranted pursuant to “all United States Supreme Court cases where they indicated the rules of evidence, particularly hearsay, would necessarily fold in, in the face of presenting mitigation evidence” and specifically referenced *Georgia v. Green*. (R. p. 2970, lines 4-9).

On appeal, appellant argues the judge erred in not allowing him to present his evidence of remorse. He contends the trial court erred in not allowing the evidence in under the business records, and, even if the records contained impermissible opinion

evidence, he has an absolute right under the Eighth Amendment to offer any evidence in mitigation. (FBOA, p. 93).

Discussion:

Evidentiary rulings in the penalty phase of a capital trial are reviewed for abuse of discretion. *State v. Owens*, 378 S.C. 636, 640, 664 S.E.2d 80, 82 (2008). As appellant has shown no improper application of law on the facts, he fails to show an abuse of discretion. This issue cannot afford relief.

Out of court statements offered for the truth of the matter are hearsay. Rule 801, SCRE. Hearsay is not allowed except pursuant to an established exception. Rule 802, SCRE. Business records are afforded an exception; however, the records that fall under the exception are records “of acts, events, conditions, or diagnoses ... if kept in the course of a regularly conducted business activity” that are not “subject opinions and judgments....” Rule 803(6), SCRE. *See also* S.C. Code § 19-5-510 (Uniform Business Records as Evidence Act) (in order to qualify as a business record, the proponent must show the record was “made in the regular course of business”). Business is liberally construed but is not without boundaries. In short, “[n]ot everything contained in a ‘business record’ is automatically admissible under s 19-5-510” and “subjective opinions and judgments” are not a part of the contemplated business record exception. *Kershaw County Dep’t of Soc. Servs. v. McCaskill*, 276 S.C. 360, 362, 278 S.E.2d 771, 773 (1981).

The trial judge found the proffered evidence did not meet the exception for two reasons. First, the judge found persuasive the argument that the records were not medical records subject to the exception. Second, the judge found the notes reflected opinion

evidence which is not admissible under the exception. The record supports both of these findings.

As to the first basis, the notes are clearly not notes for medical diagnosis and treatment. Therefore, they do not fall under the business record exception as part and parcel of the medical records. The business at issue would be health care. Chaplain notes, while maintained by the hospital, do not follow the business of health care. See generally Danny R. Collins, *South Carolina Evidence*, p. 609 (2nd Ed. 2000) (giving examples of regular course of business: “Banks are in the business to make loans; hence, office memoranda made in connection with a bank loan are made in the regular course of the bank’s business”; “SLED is in the business of fighting crime and enforcing the law; hence law enforcement fingerprint records prepared and maintained by SLED are prepared in the regular course of SLED’s business”). Appellant fails to note any difference between the chaplain notes and actual medical records, though the distinction is great. See generally *Ex parte Dep’t of Health & Env’tl. Control*, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) (“Medical records are admitted routinely as business records. The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment.”) (internal citations omitted). However, “[i]f the person who provides the information is an outsider to the business who is not under a business duty to provide accurate information, then the reliability rationale that underlies the business records exception ordinarily does not apply.” *United States v. Blechman*, 657 F.3d 1052, 1065 (10th Cir. 2011). Here, there was no indication that the chaplains were under such a duty to report accurately for a purpose. Certainly, the statements were not made for the purpose of diagnosis or treatment. See generally *State v. Burroughs*, 328 S.C. 489, 492

S.E.2d 408 (Ct.App. 1997); Rule 803(4), SCRE. As there was no connection to the business of the hospital, *i.e.* treatment, diagnosis or medical care, the notes were not business records to be admitted under this particular exception. *See also Com. v. Irene*, 970 N.E.2d 291, 304 (Mass. 2012) (“without testimony or additional evidence to establish that the statement was germane to the defendant’s treatment or medical history, the defendant’s statement contained in his medical records was not admissible under the exception to the hearsay rule”) (internal citation omitted); *People v. Bailey*, 252 A.D.2d 815, 815 (N.Y. Appellate Division, Third Department (1998)) (“In order for a statement contained in a hospital record to be admissible under this exception, it must be germane to the medical diagnosis or treatment of the patient...”).

As to the second basis, the notes reflect comments appellant was “struggling” and was “sad.” (R. p. 2961, line 25 – p. 2962, line 2; p. 2963, line 24 – p. 2964, line 6). This is clearly opinion evidence which is, by the text of the exception, not admissible. Rule 803(6), SCRE. *See also Kershaw County Dep’t of Soc. Servs. v. McCaskill*, 276 S.C. at 362, 278 S.E.2d at 773 (“subjective opinions and judgments” are not a part of the contemplated business record exception under the statute). The remainder that they said a prayer together, and he “asked for prayers for the family” does not particularly go to directly to remorse for the crime. “The family” is undefined and could have been his own given that he had inquired as to his grandchildren (especially when those children had also been traumatized by his killing the child, see R. p. 3021, lines 8-22). Further, appellant had previously asserted his intent to “get back at” the little girl’s father, not the child’s family in general. (R. p. 2669, lines 2-15; p. 2684, line 19 – p. 2685, line 25). Even so, the point is, without further explanation of the cryptic note, this phrase means

little to nothing in regard to remorse. At any rate, any conceivable error would be harmless. Appellant was allowed to present clear evidence of remorse through other witnesses. Dr. Donna Schwartz-Watts testified:

...the words that he usually uses with me are he can't believe he's done this. It's very hard for him to accept what happened and what he's done, and he, he has a lot of anxiety. He has nightmares about it. He has a difficult time dealing with what he's done and he's very sad about it.

(R. p. 2987, lines 5-16). Further, Heather Bryant, his daughter, testified: "...he regrets what he had done. He suffers from that every day." (R. p. 3020, lines 7-11). Appellant's pastor, Ken Rice, testified appellant sought forgiveness, and told him, "God's forgiven me, but I can't forgive myself." (R. p. 3084, lines 3-12). Thus, the slight value the vague recorded comments would have, if any, would be at most be cumulative to properly admitted clear evidence. *Compare Jones v. Polk*, 401 F.3d 257, 264 (4th Cir. 2005) ("we think that the state supreme court did rule unreasonably that the exclusion of the evidence was harmless beyond a reasonable doubt. By erroneously excluding Jasper Jones' evidence of remorse, the trial court removed from the jury's consideration *all evidence of remorse*, an important mitigating factor.") (emphasis added), *with State v. Sapp*, 366 S.C. 283, 293-94, 621 S.E.2d 883, 888 (2005) (though witness "should have been permitted to answer the question as to whether she would like to see Sapp put to death," defendant could not show prejudice where mother pleading for life and nephew "testified that if Sapp were gone from him, it would be the worst thing ever" as "exclusion of testimony is harmless where it is cumulative to other testimony in the record"). Consequently, there was no reversible error if any error may be found. *See State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007) ("Although it was error for the trial judge to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was

harmless. The record contains evidence of Appellant's remorse. Appellant was not prejudiced, nor was the outcome of the trial affected."').³⁴ Cf. *Fullwood v. Lee*, 290 F.3d 663, 693 (4th Cir. 2002) ("It is permissible to exclude on hearsay grounds mitigating evidence which is " 'only [of] cumulative probative value.' ") (quoting *Buchanan v. Angelone*, 103 F.3d 344, 348–49 (4th Cir.1996), *aff'd*, 522 U.S. 269, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998)); *People v. Pearson*, 56 Cal. 4th 393, 470, 297 P.3d 793, 853 *cert. denied sub nom. Pearson v. California*, 134 S. Ct. 198, 187 L. Ed. 2d 134 (2013) ("we have held that if the exculpatory value of the excluded evidence is tangential, or cumulative of other evidence admitted at trial, exclusion of the evidence does not deny the accused due process of law").

Lastly, appellant appears to argue that even if the judge correctly and fairly ruled the evidence was not admissible under the rule, he had an Eighth Amendment right to submit the evidence. His reliance on *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150 (1979), is misplaced. First, "the principles developed in *Lockett*³⁵ and *Eddings*³⁶ do not eviscerate all state evidentiary rules with respect to mitigating evidence offered in capital sentencing proceedings." *Fullwood v. Lee*, 290 F.3d at 693. Second, the exception in *Green* dealt with a fact specific exception. See *Green v. Georgia*, 442 U.S. at 97 ("In these unique circumstances, 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' "). The Court found a critical relevancy to the accomplice Moore's confession to another, Pasby (who had testified as to the statement in Moore's

³⁴ It is worthy to note that this Court also found that the letter was "subject to redaction because portions are inadmissible hearsay." *State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 880 (2007).

³⁵ *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954 (1978).

³⁶ *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869 (1982).

death penalty trial), indicating that Moore alone shot the victim while Green was absent. 442 U.S. at 96. Cumulative evidence of remorse cannot logically be equated with such a limited exception. Further, such evidence lacks the critical relevance and noted reliability of spontaneous statements against interest as that in *Green*. Other courts considering hearsay rulings in sentencing have carefully analyzed the proffered evidence for critical relevance and “substantial reasons” to assume reliability as referenced in *Green*, or simply “limited *Green* to its facts.” *McLaughlin v. State*, 378 S.W.3d 328, 347 (Mo. 2012) (“statements, although self-incriminatory, lack considerable indicia of reliability to be admissible” in penalty phase pursuant to exception in *Green*); *Com. v. Spotz*, 47 A.3d 63, 124 (Pa. 2012) (noting the “unique circumstances” in *Green*, and “high relevance of the testimony to a critical issue,” finding in review of the trial ruling at issue that “the trial court did not mechanistically apply the hearsay rule to defeat the ends of justice, but rather acted well within its discretion in sustaining the Commonwealth’s hearsay objections”); *People v. Eubanks*, 266 P.3d 301, 332 (Cal. 2011) (“we conclude the proffered mitigating evidence ‘bore no special indicia of reliability, so the rule [set forth in *Green v. Georgia*] did not require the trial court to dispense with the hearsay rule.’”) (quoting *People v. Weaver*, 29 P.3d 103 (Cal. 2001)); *State v. Langley*, 711 So. 2d 651, 661-62 (La. 1998) (“The Supreme Court’s per curiam opinion in *Green v. Georgia*, is so easily distinguished from this case that it hurts Langley’s cause ... Langley’s statements ... possessed no indicia of reliability that would justify admitting them.”); *McGinnis v. Johnson*, 181 F.3d 686, 693 (5th Cir. 1999) (recognizing circuit precedent limiting *Green* to its unique facts); *Jordan v. Epps*, 740 F. Supp. 2d 802, 878 (S.D. Miss. 2010) (same). Appellant’s stark argument for admissibility under *Green*

simply does not afford relief. *Spotz*, 47 A.3d at 123 (“Contrary to Appellant’s undeveloped averment, none of the cited cases [*Green v. Georgia* included], or any other precedent of which we are aware, can be interpreted in such a broad, all-encompassing manner [*i.e.* due process compels finding relevant evidence admissible in sentencing phase even if not admissible under state rules]”). In short, to invoke the due process protection of *Green*, the evidence must be critical and reliable. While arguments may be made both for and against reliability,³⁷ it is inescapable that the vague notes could not be critical where there was direct testimony from multiple other witnesses clearly reflecting evidence of remorse.

Thus, for all the foregoing reasons, the trial judge did not abuse his discretion in these discrete circumstances. However, if the Court should find an abuse of discretion, and that the notes should have been allowed as evidence of remorse, the error could only be harmless in light of the cumulative nature of such evidence. Appellant’s argument to the contrary should be rejected.

³⁷ While defense counsel stated as to the availability of the writers to be called, that “they’re gonna say I don’t have a recollection of this,” (R. p. 2970, lines 16-17), there was no indication whether the recollection could be refreshed. There was certainly no indication on the record that a subpoena would not have been honored. If such information was indeed critical, logic dictates that there would have been an attempt to call such witnesses.

VI.

The trial judge did not commit clear error in crediting the State's neutral reasons for striking two African American males jurors as the reasons for the State's strikes were absolutely non-discriminatory, were well-supported by the record, and appellant failed to show a "material in relevant aspects" potential juror of a different race that the State did not strike in an attempt to undermine the clear non-discriminatory intent expressed in the reasons for the strikes.

Relevant Facts:

The trial judge, with the agreement of the parties, had a list generated of prospective jurors in order of qualification. (R. p. 2304, lines 5-17). The following selection process is included in the record:

Called	Strike by State	Strike by Defense	Seated
134 Martin Kimmons		X [1]	
237 Lonny Smith		X [2]	
70 Michael Estes		X [3]	
264 Ronald Unger	X [1]		
162 Robert Martin		X [4]	
165 Eric McCraw			X (1)
290 Tommy Williams		X [5]	
154 Donald Lowe		X [6]	
192 Donald Patterson			X (2)
43 Don[nna] Champion			X (3)
160 Diane Marcotte	X [2]		
188 Stephanie Partridge			X (4)
140 George Lamb, Jr.			X (5)
29 Angela Bradley			X (6)
69 Andrea Dendy			X (7)
78 Caroline Fritch		X [7]	
3 Richard Anderson		X [8]	
69 Ferrall Erickson			X (8)
266 Willem Van Der Platt			X (9)
241 Robert Stephens			X (10)
168 Michael McIntyre		X [9]	
50 Barbara Collins			X (11)
215 Terrance Richardson		X [10]	
88 Laura Matherly	X [3]		
45 Cory Cheeks	X [4]		
60 Todd Danielson			X (12)

Alternates

79	Stacy Fullenwinder	X[1]	
219	Ray Rothenburg	X[1]	
261	Karen Trejo	X[2]	
224	Keith Sanders		X (A1)
92	Edward Grabarkiewicz	X[3]	
147	John Lindsey	X[2]	
98	Christopher Guenther	X[4]	
208	Pamela Pruitt		X(A2)

The defense made two separate motions contesting the State's use of strikes. The first motion was made challenging the strikes of two female jurors. The defense argued:

... they only used four of their five, but half of which they used to exclude women. The defense would challenge their strikes on that basis.

(R. p. 2309, lines 19-23).

The State made the following responses. The State struck Ms. Marcotte she was in the Michigan Department of Corrections; she stated that she thought life without parole was "a very serious thing," said she would impose same for "pedophiles" but treated murders differently. (R. p. 2310, lines 7-12).

The State struck Ms. Matherly as she had stated she could consider the death penalty if it was her child or family member, but didn't think she could recommend that sentence otherwise. The State noted there had been an argument over her qualification. (R. p. 2310, lines 18-24).

The defense offered there were two other jurors connected to corrections but conceded that the individual in corrections was his wife, not the juror. The other juror was actually a correctional officer at Perry Correctional. (R. p. 2311, lines 1-14). However, the State noted the clear distinction:

Well, very easy, Your Honor. [Ms. Marcotte] was in the Department of Corrections for 12 years in Michigan, which had never had the death penalty. She believes that pedophiles is the only thing she can put to death. She treated murders totally different from that standpoint, and obviously we felt like that she would argue that life without parole would be a more severe penalty than death. So, that's the reason...

(R. p. 2311, lines 15-23).

While defense counsel attempted to separate the modifiers in the reason to a bare "corrections involvement only" in order to show a stronger comparative analysis, the defense conceded there were no arguments when considering the entirety of the response. (R. p. 2312, line 1- p. 2313, line 11). The trial judge found "the reasons given by the State are not pretextual, and I'll allow that ... strike to stand." (R. p. 2313, lines 12-14). The trial judge asked the defense if he wished to "talk about the Matherly case" and he responded, "No, Your Honor." (R. p. 2313, lines 15-16). Even so, the trial judge requested the State placed the reason for the strike on the record again, and the State underscored her hesitation, the qualification battle, and the fact she would limit the sentence to if someone in her family was the victim. (R. p. 2313, line 17 – p. 2314, line 5). Again, defense counsel stated he had no argument. (R. p. 2314, lines 8-9). A short break was taken after which defense counsel sought to make another argument on another basis:

Your Honor, I apologize to the court and to the solicitor.

Upon further review of the State's strikes, it appears they used six strikes in total if you include alternate strikes. Three of those strikes were to exclude African-Americans from the jury. The defense would challenge those strikes as well. Those strikes being Juror Number 45, Mr. Cheeks, Juror Number 79, Mr. Fullenwinder, and Juror Number 147, Mr. Lindsey.

(R. p. 2314, line 18 – p. 2315, line 1).

The State responded as follows:

Number 45, Mr. Cheeks -

“he said a doubt, a doubt in my mind I would not sign it period from there. Seemed very pro-life juror from that stand point. He also had a previous CDV conviction....” (R. p. 2315, lines 12-22).

Number 79, Mr. Stacy Fullenwinder -

“also has a criminal record, Your Honor. He said you have a lot on you when asked about the law and talking to him about the death penalty. He just gave the impression that he would not sign the death warrant in that situation. We felt like he’d be a pro-life juror from that standpoint...”³⁸ (R. p. 2315, line 23 – p. 2316, line 3).

Number 147, Mr. John Linsey -

“indicated that he had a hard time signing the document and so forth. And another thing, he was the one that was afraid for his family. He was scared to death that something would happened to his family, one way or there other, since it’s a death penalty case. Just gives the impression that he was a pro-life juror, and that’s the reason we struck him from that standpoint...” (R. p. 2316, lines 4-22).

The defense argued:

Mr. Estes [*Juror 70, Michael Estes that the defense struck*], had a CDV conviction, and is a white male, (R. p. 2316, lines 24-2); and,

Mr. Lowe [*Juror 154, Donald Lowe that the defense also struck*] had a CDVHAN charge and kidnapping charge that were dismissed, (R. p. 2317, lines 11-14); and,³⁹

³⁸ The State noted after the hearing that according to their notes that his conviction came up in the main qualification session and made the records an exhibit. (R. p. 2327, line 19 – p. 2327, line 23).

³⁹ The defense admitted after the hearing that their court records were incorrect as to Mr. Lowe. (R. p. 2327, lines 8-16). In defense of their mistake, defense counsel offered they were denied access to the rap sheets, suggested there may be even more arguments to make against the State’s strikes, and asked that the rap sheets for the 35 qualified jurors be made a part of the record. The judge accepted the records, but pointed out “they were not argued to me during the Batson hearing.” (R. p. 2328, line 24 – p. 2329, line 4). This Court has expressly ruled juror criminal histories as run by the prosecution are not a

Ms. Partridge [Juror Number 188, who was seated] has a pending breach of trust charge; and,

Juror Number 215, [*Terrance Richardson that the defense struck*] has a breach of peace conviction, (R. p. 2317, lines 21-24).⁴⁰

The State noted that the reasons were not to be parsed as the convictions were simply one fact; however, the answers in qualification formed the major basis for the strikes. He argued the defense response “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 the answers were the deciding cause. (R. p. 2318, line 19 – p. 2319, line 13). When asked if there was anything further from the defense, the defense replied, “No, Your Honor.” (R. p. 2319, lines 14-15).

The trial judge ruled the reasons offered were not pretextual, found no pattern to support a finding of discrimination in either case, and denied the motion. (R. p. 2319, lines 18-21; p. 2321, lines 4-7). The State requested the questionnaires for the jurors be made a part of the record as some of the jurors’ answers also reflected responses the State

discoverable item. *State v. Childs*, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (affirming denial of request for “criminal records checks or records of arrest” of “prospective jurors,” as “no statute or court rule requir[es] a disclosure of this information”). However, SLEDCatch, which is also a criminal history program, is available to the defense or any private person. Respondent notes no issue on the denial of access to the State’s criminal history run for jurors – which carries restricted use for access to the database – has been raised in this appeal. Respondent also notes that the State had previously offered that their materials for jury selection could be taken under seal if the defense would agree to do the same so that any and all justifications for any strikes could be reviewed by the trial judge for compliance, given that the *Batson* mandate applies to both parties. (See State’s Return to Defendant’s Motion to Preserve Voir Dire Analysis for Defendant’s Use in Future Proceedings, R. pp. 3708 - 3709).

⁴⁰ The defense noted an exhibit for Mr. Richardson, but did not clearly concede error in the offered criminal history. (R. p. 2327, lines 8-11). However, appellant has not argued a conviction in the record for Mr. Richardson in the issue on appeal.

relied upon. (R. p. 2320, lines 3-8). The defense joined in the State's request. (R. p. 2320, lines 9). Both the defense and State said there was nothing further. However, the defense later asked to re-open and/or supplement the prior argument. The trial judge admonished "there was a time for making the motion," and stated that he had "allowed [the defense] to make another one after I'd gone out to consider the first ... Now, we're making a third one ... it needs to be done in timely fashion." (R. p. 2322, lines 3-8). However, he allowed the defense to make the suggestion that "Juror Number 266, Mr. Van Der Plaat [who was seated] also gave similarly life leaning or pro-life comments in his voir dire, and he's a white male similarly situated to the ones challenged - - in our last motion." (R. p. 2322, lines 1-17).

The State disagreed with the attempt to "keep dissecting every juror" but would do that if necessary. As to the new argument, the State noted that it disagreed with the defense characterization of the *voir dire* as Mr. Van Der Plaat stated "that he would weigh and balance" and "could sign it in the situations he felt like it was warranted ... and I totally disagree with their findings ... cause he said he could definitely" impose death. (R. p. 2322, line 21 – p. 2323, line 3).

The trial judge found the defense argument unpersuasive and not indicative of any clear material difference to raise a suggestion of discriminatory intent:

... I think we're getting into subjective, your subjective weighing of their statements. Those, obviously, are, are, I guess to a certain degree, those are all in the eye of the attorney, can be taken different ways.

Again, I don't find those to, to exhibit any purposeful racial discrimination. It seems to me that you're weighing the factors concerning their positions on the death penalty. I find that to be race neutral.

(R. p. 2323, lines 4-13).

The judge again denied the motion. (R. p. 2323, line 15).

After the seated jurors were dismissed to settle into the local hotel, and instructed not to discuss, or have exposure to media, the trial judge turned to setting a time have the jurors return and be sworn. The defense admitted that the records they had for Mr. Richardson were “incorrect” as noted above.

Appellant abandoned his initial motion based on gender. (FBOA, p. 95 n. 9). Appellant has also abandoned his arguments as to Juror Number 147, Mr. John Linsey being improperly struck, and abandoned his argument that Juror Richardson was similarly situation. Rather, he argues only that two jurors, Mr. Cheek and Mr. Fullenwider should have been challenged, (FBOA, p. 95), and only in comparison to Jurors Partridge, Lowe, Estes and Van Der Plaat, (FBOA, p. 95).

Discussion:

As a first matter, and what could be considered a new and fourth attempt at a different *Batson* motion argument, appellant argues that Juror Partridge was then currently seeking PTI and the solicitor sought to seat her as an advantage after hearing her answers on *voir dire*. (FBOA, pp. 97-100; p. 102). That suggestion is neither relevant to the striking of another juror, evidence of a pattern of race discrimination, nor an argument made at the hearing. (FBOA, pp. 97-100). The argument on appeal is procedurally barred. *Dunbar, supra*. Further, it is wholly without merit. Defense counsel lobbied to keep her from being disqualified arguing the pending charge “cuts both ways” as she could “harbor a grudge” or “try to deliver a verdict that they would like.” (R. p. 796, lines 2-18). The defense argued, “I just want to see who we have and if she can be fair and follow the law.” (R. p. 796, lines 11-19). The defense, after hearing

all answers in the *voir dire* – which included responses that she could and would consider both penalties, a response she could stay firm in her decision while respecting discourse, and a response that she would report bullying or other bad behavior – the defense stated, “She’s qualified, judge,” while the State thereafter agreed, (R. p. 832, lines 12-15). But again, it is procedurally barred as it was not presented to the judge at trial.

Next, appellant’s argument the “defense correctly challenged the state’s striking of three black men,” is inconsistent with his own issue presented which only challenges the strikes of Jurors Cheeks and Fullenwider. (FBOA, p. 102). While defense counsel at trial originally included Mr. Linsey, who was struck based on his responses just like the other two challenged jurors, the appellant has not included that strike challenge in his issue on appeal. (FBOA, p. 95). His argument on same has been abandoned. At any rate, the allegation of error is without merit. The trial judge afforded trial counsel ample opportunity to make their arguments, opening the argument after ruling not once but twice. The defense, however, could not carry their burden of showing discriminatory intent as there was none.

Analysis

In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986), the Supreme Court of the United States found that the Equal Protection Clause prohibits a prosecutor from striking a juror on the basis of race. In *Georgia v. McCollum*, 505 U.S. 42, 59, 112 S.Ct. 2348 (1992), the Supreme Court extended that prohibition to defendants. In *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 143, 114 S.Ct. 1419 (1994), the Court again extended *Batson* protections to gender discrimination.

“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). A reviewing court must afford “the trial judge’s finding great deference on appeal” and will reverse only where “clearly erroneous.” *Id.* “A finding is clearly erroneous if it is not supported by the record.” *Id.*, at 620, 545 S.E.2d at 813.

The structure for pursuing a *Batson* challenge is well-settled and contains a three-step process. First, upon a *prima facie* showing of an improper strike, the trial court will require the opponent of the challenge to state his or her reason for the strike. *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769 (1995). The Supreme Court described a *prima facie* case as showing a pattern of striking specific jurors, or statements indicating discriminatory intent, or other circumstance that may similarly reflect same. *Batson*, 476 U.S. at 97. In this jurisdiction, “the trial judge must hold a *Batson* hearing when members of a cognizable racial group or gender are struck and the opposing party requests a hearing.” *State v. Haigler*, 334 S.C. 623, 629, 515 S.E.2d 88, 90 (1999). If this *prima facie* case is shown, the process moves to step two.

Here, two members of the same cognizable racial group were struck. Thus, the trial judge held a hearing on the matter, prompting the next step.

In step two, the party’s against whom the motion is made must offer his reasons for the strikes. *Purkett v. Elem*, *supra*. The reason “need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of all the

evidence with a bearing on it.” *State v. Giles*, 407 S.C. 14, 21-22, 754 S.E.2d 261, 265 (2014).

The State, however, presented clear and specific reasons showing that the strikes were proper. Consequently, since the reasons pass constitutional muster, *i.e.* are not plainly indicative of strikes based upon an improper, discriminatory reason, the trial judge proceeding to the third and final step of the *Batson* structure.

In step three, the movant under *Batson* must offer some cause to challenge the strike. Often, this is done by a comparative juror analysis. If the party can show a similarly situated juror of another race (or gender) was seated, the party may be able to show discriminatory intent. *See Miller–El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317 (2005) (“If a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.”). However, the potential jurors compared need not be “identical in all respects.” *Id.*, 545 U.S. at 247 n. 6, 125 S.Ct. 2317. Rather, the compared potential jurors must be similar “in all relevant aspects.” *State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct.App. 2013). Stated differently, the trial judge must determine if “there are meaningful distinctions between the individuals compared.” *Id.* Further, inconsistency may be explained by other non-discriminatory reasons. *Id.*, 406 S.C. at 116-17, 749 S.E.2d at 165. “The burden of persuading the court that a *Batson* violation has occurred remains at all times on the opponent of the strike.” *Haigler*, 334 S.C. at 629, 515 S.E.2d at 91.

Lastly, credibility is essential in evaluating the reasons offered by both the movant and the responding party. The Supreme Court has recently noted once again the

tremendous deference due the trial judge, especially in a capital case where “it is not surprising for prospective jurors to express varying degrees of hesitancy about voting for a death verdict” and both parties “may be required to make fine judgment calls about which jurors are more or less willing to vote for the ultimate punishment.” *Davis v. Ayala*, ___ U.S. ___, 135 S. Ct. 2187, 2201, 192 L. Ed. 2d 323 (2015). Decisions to strike “may involve a comparison of responses that differ in only nuanced respects, as well as a sensitive assessment of jurors’ demeanor.” *Id.* “A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercised those strikes.” *Id.*

The trial judge here noted that the real issue was a subjective impression of each party in the evaluation of the answers the jurors gave in the extended *voir dire*. As the solicitor clearly argued, he considered the jurors as a whole and the critical factor in any of his strikes was his perception of the responses. Appellant’s selective view of the juror’s background, and intent to paint the solicitor in any negative light, is obvious in the argument on appeal, but lacks persuasion for those same reasons. For instance, appellant makes strong assertions that the State wanted Ms. Partridge on the jury so she would be beholden to the State in an effort to obtain PTI, yet there was much more to her background and testimony.

The State informed the court and defense counsel before questioning that she had admitted guilt, and was attempting to enter PTI on a charge in the county. (R. p. 795, lines 3-13). As noted before, the State had attempted to have Ms. Partridge disqualified based on the yet resolved charge, but the defense requested she stay. (R. p. 795, line 23 – p. 797, line 15). Ms. Partridge testified during *voir dire* that she had both been a victim

of fraud and had a pending charge being prosecuted. (R. p. 828, line 22 – p. 830, line 17). Ms. Partridge testified that she knew Heather's principle, Ms. Sima, who would later testify in sentencing, and that Ms. Sima had been a complainant. (R. p. 831, lines 6-14). She firmly stated, however, that she had the "utmost respect" for her and she considered her difficulties with separate. (R. p. 831, lines 16-24). Even though there was a legitimate concern that the juror could be anti-prosecution, the State took the answers as a whole and agreed with the defense she was qualified. Rather than supporting appellant's conjecture of evil intent, this particular juror's treatment shows the State's balanced and fair treatment of jurors, and also shows the relative subjectivity referenced by the trial judge.

As far as convictions comparisons alone, if one would separate the analysis of the juror's presentation as a whole, there are still some substantial and material differences.

Ms. Partridge's offense was a charge and was minor enough to qualify for PTI. (R. p. 795, lines 3-13).

Mr. Lowe, who was originally thought to have charges that were dismissed (which is different on its own, see R. p. 2317, lines 11-14), actually didn't have any charges at all, as the defense later admitted. Their records were for an individual with a different date of birth. (R. p. 2327, lines 8-16).

Mr. Estes had a CDV conviction, (R. p. 2316, lines 24-2), but Mr. Fullenwinder had a gun charge, shoplifting, and several drug charges, (R. p. 2327, line 19 – p. 2328, line 10), and Mr. Cheeks was not struck for his CDV conviction. The solicitor plainly stated he was struck for his responses indicated he had a doubt, he would not sign a form returning a death sentence. (R. p. 2315, lines 12-14). Though the solicitor would note

that Mr. Cheeks had a CDV conviction as well, that was not the reason for the strike and to parse it out is not a fair reading of the response. (R. p. 2315, lines 12-16).

Further, appellant apparently argues that judge clearly erred in accepting the “pro-life” assessment. However, appellant’s argument is wholly rebutted by the record.

As to Mr. Cheeks, the solicitor noted he responded if he *a* doubt, he would not sign. Mr. Cheeks responded in *voir dire*: “It it’s a doubt in my mind that he don’t deserve it, I’m not gonna say he deserves it. ... I’m gonna say he don’t deserve it.” (R. p. 1649, lines 16-20). He later stated, “I would not sign it. If there’s any doubt in my mind, I would not sign it.” (R. p. 1650, lines 7-8). That testimony directly supports the solicitor’s stated reason for the strike. Additionally, the remaining testimony similarly shows a tendency to favor a life sentence instead of a balance approached to either sentence depending on the circumstances.⁴¹ (See, for example, R. p. 1651, lines 2-4, considered a

⁴¹ Appellant’s offered criticism that all solicitors “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,” (FBOA, p. 97, n.10), is simply a wholesale generalization that fails to account for any difference of opinion as what actually constitutes the “worse” sentence. Further, appellant misses two critical points, 1) that striking an individual for his perception on the “worse” sentence is a race and gender neutral reasons to exercise a strike; and 2) the victim, the victim’s family, and the State deserve a fair trial. If it is indicated, in the solicitor’s judgment, that an individual is pre-disposed to favor a sentence, that is a clear and proper reason to exercise a strike in an effort to secure a fair jury – just as defense counsel would surely strike an individual who leans toward death as a general rule or as the worse sentence. As Justice O’Connor wrote:

Peremptory challenges are limited in number. Each party, the prosecutor, and the defense counsel, must balance a host of considerations in deciding which jurors should be peremptorily excused. Permitting prosecutors to take into account the concerns expressed about capital punishment by prospective jurors, or any other factor, in exercising peremptory challenges simply does not implicate the concerns expressed in *Witherspoon*.

life sentence “severe enough punishment sometimes for murder”). Further, the juror considered the justice system “sometimes fair, sometimes not,” and specifically, “like with the death penalty, I read stories or heard stories of some people being killed and really didn’t deserve to be killed.” (R. p. 1643, lines 10-17). The State agreed, however, that he was qualified on the whole, but the solicitor – before any mention of selection or *Batson* or a comparative juror analysis – placed on the record, “I agree, even though I don’t like his view of the death penalty about the innocence and stuff.” (R. p. 1654, lines 17-19). There could be little credible argument that solicitor made this statement *just in case* he later hoped to discriminate on the basis of race or gender if an opportunity should arise.

Additionally, appellant’s argument fails to appreciate the clear differences in the testimony in *voir dire* by attempting to equate Mr. Van Der Plaat’s responses on “innocents” in the system with Mr. Cheeks. Mr. Cheeks related his belief, from stories that he had read, that some people have been killed who didn’t deserve it – not clearly a statement on innocence, but clearly a statement of what is true, in his opinion. (R. p. 1643, lines 10-19). Mr. Van Der Plaat indicated that he had a *fear* that an individual who “is indeed innocent, but somehow, through misfortune or whatever else ... they can’t prove that and we put someone innocent to death. ... that would bother me if I ever found out” however, he asserted “there are people in this society that really could pose a threat, and maybe the only way, you know, to deal with them is to put them to death.” (R. p. 1283, lines 10-22). There was no belief that someone had not deserved their sentence,

Brown v. N. Carolina, 479 U.S. 940, 107 S. Ct. 423, 424 (1986) (J. O’Connor, concurring). See also *State v. Johnson*, 306 S.C. 119, 123-24, 410 S.E.2d 547, 550 (1991) (citing Justice O’Connor’s concurrence in *Brown v. North Carolina*).

but a healthy critical thought of what if he was wrong in a given case. The two jurors' presentation of their thought processes simply cannot be fairly equated.

In sum, the record fully and fairly supports the race neutral reasons for striking the jurors. Appellant has shown no error, much less clear error by the trial judge in crediting the solicitor's responses in light of the record.

Appellant's argument to the contrary should be rejected.

VII.

The defense failed to exercise a peremptory strike and is procedurally barred and/or has waived the issue of qualification. Even so, the record supports that the trial judge did not abuse his discretion in qualifying Juror #43, Donna Champion, where her responses, when viewed correctly as a whole, indicated she could be a fair and impartial juror.

Relevant Facts:

The trial judge questioned Juror #43, Ms. Champion, who confirmed that she would follow the law as given to her. (R. p. 686, line 10 – p. 687, line 4). The juror confirmed to the trial judge that she understood that the only burden was on the State to prove the allegations. (R. p. 687, lines 17-23). The juror's answers evidenced some difficulty in understanding the questions posed, but the trial judge repeated the questions until each understood the other. (R. p. 687, line 24- p. 691, line 11). The juror indicated that she would make up her mind only on the evidence, and could consider either a life sentence or a sentence of death. (R. p. 696, lines 5-24). Further she acknowledged that in sentencing, you have to "take into account" mitigating factors, "but, on the other hand, nobody told you to do these ... things." She concluded, "So, I mean I guess ... you have to hear everything and work it out." (R. p. 708, lines 10-14).

Within the defense question, defense counsel asked if a defendant would have to prove he should receive a life sentence, and questioned if the juror understood the burden of proof as instructed by the trial judge; however, the state objected and the trial judge asserted he had not charged anything about the burdens in sentencing. (R. p. 708, line 19 – p. 710, line 11). When asked next if she would "start at death and require the defense to show a reason" for life, the juror answered "it would have to be proved either way." (R. p. 710, lines 17-20).

The solicitor told the juror that the State had to prove aggravating circumstances beyond a reasonable doubt, but the defense did not have to prove mitigation. He asked if she would listen to those mitigating circumstances. She replied, "Yes, sir, I would listen to everything and take everything into account." (R. p. 716, lines 18-24). He confirmed with the juror whether she understood the defense did not have to prove anything mitigating, and she replied she did. (R. p. 716, line 25 – p. 717, line 3). Further, she stated, "... I would have to take everything into account I mean before I can sentence somebody to death. I mean I would have to hear everything, you know," and said she confirmed that she was not "predisposed to death just because it's a death penalty case." (R. p. 717, lines 11-13). She indicated she could consider either sentence. (R. p. 717, lines 17-25).

The defense argued she was a "burden shifter" who would reject certain categories of information and should not be found qualified. (R. p. 719, lines 5-11). However, the trial judge, while noting that she did at times have answers indicating "she may require someone to prove something to avoid death," in fairness, she had not yet been instructed on sentencing burden, and she indicated she would follow the law as given to her. (R. p. 720, lines 13-21). The judge was also persuaded that the juror "made it clear, on several - - on many occasions, that she would have an open mind on the, during the sentencing and - - proceeding and would consider both aggravating and mitigating circumstances." (R. p. 720, line 22 – p. 721, line 3). Further, the trial judge considered the juror's demeanor while testifying. (R. p. 721, line 5). The solicitor had noted the juror took all the questioning very seriously, giving the proper "weight" to the capital proceedings. (R. p. 720, lines 7-11). (See also R. p. 714, line 25- p. 715, line 2,

answering question as to how she would feel on making an individual decision as to “whether or not a person lives or dies,” she responded, “It’s really hard. It’s nerve racking to have somebody’s life in your hands, and you hope you can only make the best decision for the case.”). The trial judge concluded based on her responses and her demeanor during *voir dire*, that she was qualified. (R. p. 721, lines 4-7).

At the time Ms. Champion was called, the defense still had four of their ten strikes available. They did not seek to use a peremptory strike. (R. p. 4804, lines 12-17).

Appellant argues the trial judge erred when he considered instruction on the law “could transform an unqualified juror into a proper one....” (FBOA, p. 10).

Discussion:

As a first matter, this issue should be considered either procedurally barred and/or waived. While case law requires that all strikes be exhausted before an argument may be made against a seated juror, *see State v. Tucker*, 324 S.C. 155, 162, 478 S.E.2d 260, 264 (1996), this juror was not seated because of exhausted strikes. Rather, the defense still had not one, not two, not three, but four more of their ten strikes available when Ms. Champion was called. (R. p. 4804, lines 12-17). If not procedurally barred, the issue should be subjected to a waiver analysis in these discrete circumstances where counsel exercises professional judgment in using his strikes but determines not to strike the juror at issue. *Cf. State v. Torrence*, 305 S.C. 45, 65, 406 S.E.2d 315, 326 (1991) (discouraging structure that allows counsel to hold back an issue for appeal). At bottom, the fault if any lies in his decision not to use one of his strikes, not with qualification. At any rate, the record supports the trial judge’s exercise of discretion.

“[A] prospective juror may be excluded for cause when his views on capital punishment are such as would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *State v. Sapp*, 366 S.C. 283, 290-291, 621 S.E.2d 883, 886 (2005) (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct 844 (1985)). “The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him.” *Sapp*, 366 S.C. at 291, 621 S.E.2d at 887.

“The determination whether a juror is qualified to serve in a capital case is within the sole discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence.” *State v. Evins*, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007). *See also State v. Longworth*, 313 S.C. 360, 365, 438 S.E.2d 219, 222 (1993); *State v. Bell*, 302 S.C.18, 23, 393 S.E.2d 364, 367 (1990). “Deference must be paid to the trial court who sees and hears the juror.” *Evins*, 373 S.C. at 418, 645 S.E.2d at 911 (citing *State v. Green*, 301 S.C. 347, 392 S.E.2d 157(1990)).

Appellant’s argument rests on parsed statements taken out of context which is contrary to settled law and unsupportive of error. The instant passage from *State v. Gilbert* is instructive:

This Court will not consider only isolated statements made during voir dire but will examine the entire colloquy with the venireman in order to review his qualifications. Having done this, it is clear that the challenged juror was properly qualified. When questioned by the trial judge subsequent to confusing inquiries made by appellants’ trial counsel, the juror stated that she would give due consideration to any mitigating factor that the court instructed her to consider.

277 S.C. 53, 56-57, 283 S.E.2d 179, 108-81 (1981).

Like the issue in *Gilbert*, when the whole of the answers are reviewed in the instant matter, the record supports the juror would abide by the judge's instructions on the law, and would make a sincere judgment on whether the sentence should be life or death. The trial judge properly considered this juror's responses as a whole and the seriousness of her demeanor.

In capital *voir dire* proceeding, the parties and the prospective jurors will naturally engage in dialogue. Most all prospective jurors are being requested to answer broad questions about concepts and procedures that they know little or nothing about. It should be expect that many of the answers will demonstrate that disadvantage. *See, for example, State v. Bell*, 302 S.C. at 25, 393 S.E.2d at 368 ("The other two jurors initially misunderstood the bifurcation of the trial, but later, after clarification, responded that they could impose either the death penalty or a life sentence. The trial judge, therefore, did not abuse his discretion in qualifying the challenged jurors."); *State v. Green*, 301 S.C. at 354-55, 392 S.E.2d at 161 ("With regard to Mr. Brown, we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision."). The *voir dire* process should be used to uncover real issues with juror qualification. A juror should not be disqualified just because a party may simply point to a few missteps in the dialogue. *Id.*

In short, a juror's answers should be considered in light of their lack of training in the law, and the lack of instruction by the court, when considering qualification. The trial judge is in the best position to determine if the suspect answer is disqualifying or whether the jury can be fair. *See State v. Dickerson*, 395 S.C. 101, 116, 716 S.E.2d 895, 903 (2011) ("The circuit judge was more persuaded by the juror's consistent affirmation he

would follow the law and wait to hear all of the evidence than by his apparent confusion over the State's burden, and we believe his ultimate determination of Juror 370's qualification to serve is supported by the record."); *Green*, 301 S.C. at 354, 392 S.E.2d at 161 ("we find that while his responses indicated some confusion on his part, he demonstrated the ability to consider all evidence before reaching a decision").

Appellant is mistaken that the juror's response ultimately indicated she would hold appellant to a burden of proof. When read as a whole, the responses show a juror who was attempting to be as fair as possible in answer the specific questions posed to her. The only misstep was when the juror was asked a specific question, by the defense, suggesting a burden of proof. The defense then relied on a response to their own questioning which may be read (or heard) to suggest the incorrect answer. When directly questioned, the juror had no issue with following the correct law. Further, no one has challenged the juror's sincerity and her noted very serious consideration of the questions posed. Again, any simple, and understandable, missteps in the dialogue should not render her unqualified.

Appellant has failed to show an abuse of discretion. His argument to the contrary should be rejected.

CONCLUSION

For all the foregoing reasons, Respondent, the State, submits that the rulings, convictions and judgment of the lower court should be affirmed. However, if the Court should find issues 1 and/or 2 are not procedurally deficient on this record or simply without merit, this Court should remand to the trial judge to allow for development of factual findings, specific conclusions of law, fair litigation of the witness's assertion of privilege, and a ruling on the appropriate treatment of the records.

Respectfully submitted,

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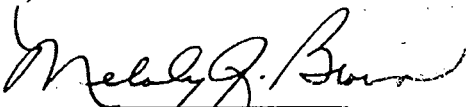
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STATE OF SOUTH CAROLINA
In the Supreme Court

CAPITAL CASE
APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Roger L. Couch, Circuit Court Judge

The State of South Carolina, Respondent,

v.

Ricky Lee Blackwell, Appellant

Appellate Case No. 2014-000610

CERTIFICATE OF COMPLIANCE

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

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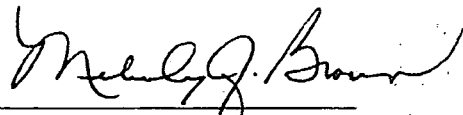
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Appellant.

I, Melody J. Brown, certify that I have served the *Final Brief of Respondent* on Appellant by depositing two copies of same in the United States mail, postage prepaid, addressed to his attorney of record:

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