No. 17-6882

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

RICKY LEE BLACKWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

SEALED REPLY OF PETITIONER

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Reply on Question One – Petitioner is Intellectually Disabled

In its rush to use the buzzword "fact-bound," the state commits the same error as the lower courts—ignoring the reasoning of *Hall v. Florida*[1] and *Moore v. Texas*.[2] Br. Opp. at 5. Eschewing expert methodology in favor of an ad-hoc, totality of the circumstances approach to intellectual disability is a legal error, not a factual one. Tellingly, the state can only find a response from its expert, Dr. Brown, to a totality of the circumstances question asked by the prosecutor after Dr. Brown's testimony helped petitioner's case. Br. Opp. at 7 ("Q. Based on the totality of the data...."); State's Appendix at A1-A2.

The state provided this Court with the last two pages of Dr. Brown's direct-examination at the *Atkins v. Virginia*, 536 U.S. 304 (2002), hearing in its Appendix. State's Appendix at A1-A2. On the first page, Dr. Brown refutes the trial court and the state supreme court's determination that school screening measures can satisfy the intellectual functioning prong. State's Appendix at A1. Dr. Brown testifies that he would like to have "some school psychological evaluation including a test of intelligence" but that none existed. State's Appendix at A1. This testimony that no sufficient test existed directly contradicts the lower courts' substitution of these screening measures (some of which indicate intellectual disability) for what both experts agreed were standardized measures of petitioner's intellectual functioning that placed his IQ in the 60s.

The second page provided by the state in its appendix shows the prosecutor grasping at straws and urging an erroneous methodology on his own expert. State's Appendix at A2. Attempting to get Dr. Brown to say petitioner does not meet the adaptive functioning prong, the prosecutor asks, "I mean he's held numerous jobs. He's had a family life. Raised children. Isn't

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[1] 134 S.Ct. 1986 (2014).
[2] 137 S.Ct. 1039 (2017).

that—can't we extrapolate backwards and say he had no adaptive function disability?" State's Appendix at A2, ll. 2 – 5. Dr. Brown rejects the prosecutor's ad-hoc approach, telling him, "that's one thing we look at, and that's part of what we do, **but I don't think this, in itself, is sufficient.**" State's Appendix at A2, ll. 6 – 8 (emphasis added). The prosecutor then gives up, asks the totality of the circumstances question quoted by the state in its brief, and tenders the witness for cross-examination. State's Appendix at A2, ll. 9 – 13.

Again, this line of questioning is **the best the State can provide** this Court in its attempt to camouflage a legal error as a factual dispute. The weakness of this attempt should speak volumes to this Court. The lower courts erred by using an ad-hoc, totality approach that ignored the experts' opinions and overemphasized petitioner's strengths over his admitted weaknesses. The state's choice of a line of questioning containing the erroneous legal reasoning below demonstrates its failure to understand the concepts behind *Hall* and *Moore*.

This Court should also note the complete lack of analysis of the three prongs of the definition of intellectual disability. The closest the state comes to addressing the legal errors on each prong results in a concession in footnote seven of its brief. Br. Opp. at 13-14, n.7. In this footnote, the state convolutedly tries to explain the lower courts' persistence in using school screening measures against the warnings of both experts on the intellectual functioning prong as instead bearing on the age-of-onset prong. Br. Opp. at 13-14, n.7. Dr. Brown wrote in his report, "There is no doubt that Mr. Blackwell currently demonstrates significant deficits in intellectual functioning...." R. 4447. Dr. Brown also warned the trial judge not to rely upon the school "IQ" scores, writing, "School records do include references to 'IQ' scores, but the scores are on screening measures and cannot be considered equivalent to scores obtained on more comprehensive tests such as the Wechsler." R. 4445.

The lower courts wholly ignored these warnings by the experts and used these tests, instead of the Wechsler, to find Blackwell did not meet the intellectual functioning prong. *Blackwell*, 801 S.E.2d at 721 (crediting "standard school I.Q. tests," omitting the experts' warnings not to use these scores, but noting that Blackwell's scores on the Wechsler of 63 and 68 were "concerning"). The state's argument in footnote seven that the school screening tests were only used on the age of onset prong is ultimately a concession of error on the intellectual functioning prong. Again, this is the best the state can do.

And perhaps the state's confusing attempt to focus the Court on the age-of-onset prong is not wholly unsound because at least on this prong, Dr. Brown waited until the *Atkins* hearing to concede. He conceded the first two prongs in his written report before the hearing. On prong one, Dr. Brown wrote in his report that petitioner demonstrated "significant deficits in intellectual functioning" based on two administrations of the Wechsler with scores of 63 and 68. R. 4447. On prong two, Dr. Brown conceded in his report that "an argument can be made that [petitioner] also currently demonstrates significant deficits in adaptive functioning." R. 4447.

But on the age-of-onset prong, Dr. Brown summoned some resistance—at least in his written report. R. 4447. He wrote, "The third diagnostic criterion requires that those deficits be present prior to the age of 18, establishing intellectual disability as a developmental disability. It is not clear that Mr. Blackwell met the criteria prior to the age of 18." R. 4447. Dr. Brown then identified "[t]hree significant risk factors" from petitioner's adulthood: (1) cancer; (2) head injury; and (3) depression and/or anxiety. R. 4447.

Dr. Brown abandoned this feeble resistance at the *Atkins* hearing and conceded that it would be "pure speculation" to rely on these so-called risk factors. R. 4246, ll. 11-22. He admitted he had no evidence to support such a conclusion. R. 4195, l. 8 – 4196, l. 15. The dissent at the

state supreme court had no trouble finding legal error in the trial judge's reliance on pure speculation, writing, "While Dr. Brown speculated that perhaps Blackwell's chemotherapy, a four-wheeler accident, and alcohol and drug use after the age of 18 may have affected his I.Q. score, he agreed there was 'absolutely no evidence of that.'" *Blackwell*, 801 S.E.2d at 738 (Pleicones, A.J., dissenting).

The state's portrayal of petitioner's case as "fact-bound" necessarily ignores the concessions of the state's expert and the opinion of petitioner's expert. A state court cannot evade *Hall* and *Moore* by ignoring concessions, overriding expert opinions, and omitting facts. This kind of error—whitewashing the facts in *Atkins* cases with an ad-hoc approach unsupported by expert opinion—resulted in reversals in *Hall* and *Moore* and summary reversals in their wake. *Wright v. Florida*, 138 S.Ct. 360 (2017), *Martinez v. Davis*, 137 S.Ct. 1432 (2017), *Henderson v. Davis*, 137 S.Ct. 1450 (2017), *Carroll v. Alabama*, 137 S.Ct. 2093 (2017); *Lane v. Alabama*, 136 S.Ct. 91 (2015), *Halliburton v. Florida*, 135 S.Ct. 178 (2014). Petitioner's case is no different and begs certiorari or summary reversal from this Court.

Reply on Question Two – The Confrontation Clause Error Prevented the Jury from Hearing Critical Evidence in Mitigation

The state, hopefully, feigns its not understanding of the fact that the cross-examination of petitioner's ex-wife during the guilt phase with her mental health records was going to be used during the penalty phase. The evidence from the guilt phase was incorporated into the penalty phase, and petitioner never contested his guilt. This was impeachment of the ex-wife to show she was afraid her prior taunting of petitioner with her new boyfriend's decedent child caused petitioner -- who should have been found intellectually disabled -- to "snap." Br. Opp. at 22-23. The jury could have spared petitioner's life on this proposed evidence alone.

As the State Supreme Court observed in *State v. Huggins*, 336 S.C. 200, 203, 519 S.E.2d 574, 575 (1999), the sentencing jury "is required to consider all the evidence received at the guilt determination stage regarding the circumstances of the crime and the characteristics of the individual defendant together with additional evidence, if any, in extenuation, mitigation, or aggravation of punishment." *citing State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979).

The state, in jury argument fashion, asserts that petitioner's attempt to introduce evidence, from the mental health records, that petitioner's ex-wife feared retaliation from biker gangs if it was discovered she taunted petitioner with her biker boyfriend's child was "clearly trying to sully the child victim's father and his former wife, attempting to introduce the specter of biker gang violence towards petitioner's family after the murder. There were repeated attempts to introduce the concept of biker gangs, though wholly irrelevant to the murder." Br. Opp. at 24, n. 11. The biker gang evidence petitioner was not allowed to introduce was designed to show that petitioner's ex-wife was not honest and forthcoming during her testimony where she earlier had truthfully revealed to her mental health counselor her fear of biker gangs because she strongly contributed to the child's death by taunting petitioner.

The state also makes an assertion that petitioner was not interested in a remand to the trial court "to have the facts determined as to the necessity of release and/or use of the individual records (with the input of the individual who actually holds the privilege)." That assertion is simply not true. Petitioner's ex-wife was asked by the trial judge during defense counsel's cross-examination with the medical records whether she would waive the privilege. Petitioner's ex-wife said she would not waive the privilege. That ship has sailed. The state's mention of a possible remand in its brief before the State Supreme Court was simply a throwaway line that if the State Supreme Court granted relief on this confrontation clause issue that it should be limited to a remand.

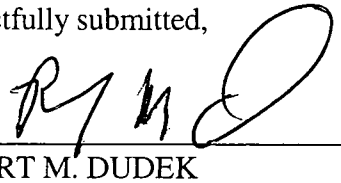
Finally, the error cannot be harmless in petitioner's case. As this Court has recognized on numerous occasions, a capital defendant is entitled to have the sentencing jury consider "any relevant circumstance that could cause it to decline to impose" the death penalty. *Payne v. Tennessee*, 501 U.S. 808, 824 (1991) (internal quotations omitted). The Eighth Amendment's command includes "the circumstances of the particular offense." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Whether the crime was premeditated or the result of petitioner reacting to his ex-wife's taunts was a crucial circumstance of the offense. Had petitioner been able to impeach his ex-wife with her motivation to reduce her own responsibility for the crime, a reasonable juror could have disbelieved the state's claim of premeditated murder and refused to impose a death sentence. As the South Carolina Supreme Court has recognized, "A capital jury can recommend a life sentence for any reason or no reason at all." *State v. McClure*, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000). The lower court's view that evidence of premeditation might have appeared strong should not have affected the analysis of petitioner's right to present this counter evidence that his ex-wife caused him to snap through her taunting. *See Holmes v. South Carolina*, 547 U.S.

319, 331 (2006). Petitioner respectfully requests that this Court grant certiorari or summary reversal on this issue as well.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari or summary reversal for the reasons stated in the Petition for Writ of Certiorari and in the present reply.

Respectfully submitted,



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January 11, 2018

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CERTIFICATE OF SERVICE

I certify that copies of the sealed and redacted reply of petitioner in this case have been served upon opposing counsel, Melody J. Brown, Esquire, by mailing copies in envelopes properly addressed with postage prepaid via U.S. mail to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 11th day of January, 2018.

ROBERT M. DUDEK
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2018

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027

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CERTIFICATE OF FILING BY OVERNIGHT MAIL

I hereby certify that I am a member of the Bar of this Court and that on January 11, 2018, I filed the sealed and redacted reply of petitioner in the above-referenced case, by causing the originals and ten copies of the same to be deposited in the United States Mail, postage prepaid, and properly addressed to the Clerk of this Court.

Robert M. Dudek
Chief Appellate Defender

SUBSCRIBED AND SWORN TO before me
this 11th day of January, 2018.

(L.S.)
Notary Public for South Carolina
My Commission Expires: May 12, 2027