No. 17-6882

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2017

RICKY LEE BLACKWELL,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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

BRIEF IN OPPOSITION

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1.

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

2.

[Filed under Seal]

(Petition, ii).

RESPONDENT'S RESTATEMENT OF QUESTIONS PRESENTED

1.

Where a trial court critically examines the evidence presented by competing expert testimony on the issue of intellectually disability within the recognized clinical framework and assessing credibility based on same, does either *Hall v. Florida* or *Moore v. Texas* mandate that the capital defendant's expert be credited?

2.

Does the Confrontation Clause bestow the right to unfettered access and unconditional use of a witness's privileged mental health records for any reason? If so, did the Supreme Court of South Carolina err in establishing a procedure by which a defendant is to request the records, with notice to the individual who holds the privilege, for initial consideration by the court in order to balance the need for release with the privilege of privacy?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion challenged is a published opinion by the Supreme Court of South Carolina after direct appeal review of a capital case: *State v. Blackwell*, 420 S.C. 127, 801 S.E.2d 713 (2017). Petitioner has included a copy at Appendix A1 to the petition.

JURISDICTION

The Supreme Court of South Carolina decided the direct appeal on May 31, 2017. Petitioner did not seek rehearing. A petition to this Court had to be filed on or before August 29, 2017. On August 11, 2017, Petitioner sought and received one extension from the Chief Justice allowing a petition to be filed on or before October 28, 2017. The Court's docket reflects the petition was filed on October 27, 2017.

Thus, the action is timely filed according to the Court's records, and this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner submits the Sixth, Eighth and Fourteenth Amendments of the United States Constitutional are involved to the extent they secure the right to confrontation in a criminal trial and the prohibition against "cruel and unusual punishments" as made applicable to the states through the Fourteenth Amendment. (Petition, p. 2).

STATEMENT OF THE CASE

A. General Facts of the Crime.

The Supreme Court of South Carolina succinctly stated the basis for the convictions and sentence at issue: "A jury convicted [Petitioner] Ricky Lee Blackwell of kidnapping and killing eight-year-old Heather Brooke Center ("Brooke"), the daughter of his ex-wife's boyfriend, and recommended a sentence of death." *Blackwell*, 801 S.E.2d at 716. A more expansive summary of facts followed this introduction:

> After twenty-six years of marriage, Blackwell's wife, Angela, entered into an adulterous relationship with Bobby Center in 2008. By all accounts, Blackwell was devastated when Angela left him. Following the breakup, Blackwell attempted suicide, suffered financial problems, and was forced to turn to his parents for support.
>
> According to Angela, on July 8, 2009, Blackwell came to her parents' house to discuss insurance matters. While there, Blackwell chastised her about not visiting their grandsons and urged her to go see them that day. Angela testified she was going to take Brooke swimming at

> Center's house that day and intended to pick up her grandsons to take them along. When she arrived at her daughter's home, she did not see her daughter's car. Assuming that her daughter was not home, Angela began to drive away. As she was leaving, Blackwell flagged her down and informed her that their daughter went to the store but that their son-in-law had the children. Angela testified she got out of the car to secure a dog in order that it would not bite Brooke. When Angela turned around, she saw that Blackwell had grabbed Brooke and was holding a gun to the child. Blackwell ignored Angela's pleas for him to release Brooke. Instead, Blackwell stated that Angela had "pushed this too far," that she "did this," and that she could let him know "what Bobby thinks of this." Blackwell then fatally shot Brooke. Following the shooting, Blackwell fled into the woods behind his daughter's home. When law enforcement surrounded him, Blackwell shot himself in the stomach and was taken to the hospital. While being transported to the hospital and waiting for treatment, Blackwell gave inculpatory statements to the law enforcement officers who questioned him.

Blackwell, 801 S.E.2d at 717.

B. Relevant Procedural History for the Claims Presented.

Included in the Supreme Court of South Carolina's opinion along with the recitation of the facts of the crime was the following procedural history as to Petitioner's claim of intellectual disability:

> After a Spartanburg County grand jury indicted Blackwell for kidnapping and murder, the State served Blackwell with notice that it intended to seek the death penalty. Blackwell was evaluated, at the request of defense counsel, and deemed competent to stand trial. Approximately three years later, defense counsel claimed that Blackwell is mentally retarded and, thus, ineligible to receive the death penalty pursuant to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). As a result, the trial court conducted a hearing pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588

> S.E.2d 604 (2003). The court ruled that Blackwell failed to prove he is mentally retarded and the case proceeded as a capital jury trial.
>
> The jury found Blackwell guilty of kidnapping and murder. At the conclusion of the penalty phase of the trial, the jury specifically found, via a special verdict form, that Blackwell is not mentally retarded. The jury recommended a sentence of death, finding the State proved the aggravating circumstances that the murder involved a child under the age of eleven and was committed while in the commission of kidnapping. ...

Id., at 717–18.

As to Petitioner's other claim involving access to and use of a witness's mental health records, the Supreme Court of South Carolina summarized the history and argument on appeal as follows:

> During the guilt and penalty phases, Blackwell sought to impeach his ex-wife, Angela, with statements she made after the murder during counselling sessions with a licensed mental health counselor. Blackwell claimed the statements in the mental health records revealed that Angela was "biased" and "motivated to misrepresent" what actually happened at the time of the murder. The trial court denied Blackwell's request, finding Angela had not waived her statutory privilege to release the records. Based on this ruling, the court did not review the records and declined to accept them as a proffered exhibit.
>
> On appeal, Blackwell argue[d] the trial court denied him his constitutional right to confront and cross-examine the State's "most critical witness." Alternatively, Blackwell assert[ed] he is entitled to a new trial because the trial court's refusal to accept the proffer of the mental health records denied him meaningful appellate review.

Id., at 725.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner's claims are undeniably fact-bound – a pervasive theme in the petition before the Court. Indeed, in his first issue he re-presents his factual case for intellectual disability while simultaneously holding out *Hall v. Florida*[1] and *Moore v. Texas*[2], not as shields against misuse of IQ tests scores and failure to be guided by medical diagnosis structure as the cases hold, but as cases providing complete insulation against all criticism and/or shortcomings of a defense expert's opinion on intellectual disability. Additionally, Petitioner attempts to challenge in his second issue a resolution that rests more on state procedure than federal law error, a healthy portion of which is a creation of his own making. In short, the petition undeniably seeks to have the Court act as a second trial court and second direct appeal court. It is neither. Petitioner fails to present a compelling case for review.

I.

> Petitioner's claim the Supreme Court of South Carolina "violated this Court's precedents in *Hall v. Florida* and *Moore v. Texas*" in affirming the trial court's pretrial ruling that Petitioner failed to carry his burden of proof in showing intellectual disability is as inexplicable as it is unavailing. There is neither a contest to calculation of a range of testing scores or an adoption of factors independent of medical structure. To the extent Petitioner waives the holdings of *Hall* and *Moore* as signals that a defense expert must be found credible and the opinion offered in support of a finding of intellectual disability dispositive of the claim of intellectual disability, he cannot support such an assertion in law, fact or logic.

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1 134 S.Ct. 1986 (2014).

2 137 S.Ct. 1039 (2017).

Petitioner's position makes little sense in context of the history and review of his case. He apparently urges this Court to find him intellectually disabled[3] and exempt from capital punishment because he presented evidence in support of his claim. At bottom, this is a suggestion that state courts, if faced with competing opinions from medical professionals regarding intellectual disability, should always find the capital defendant must prevail in his burden of proof. There is no passage or suggestion in either *Hall* or *Moore* that would support such a concept.

As a first point, consistent with Supreme Court Rule 15(2) that error should be pointed out at the first available instance, Respondent notes a misstatement in Petitioner's statement of the case. Petitioner indicates at the pre-trial hearing on intellectual disability, "the experts agreed that petitioner's sub-70 IQ scores (63, 68) and his adaptive deficits demonstrated he was intellectually disabled." (Petition, p. 2). He then asserts on page 5 of the petition: "No serious dispute existed among the experts that petitioner is intellectually disabled; yet the trial judge and the state supreme court bucked their opinions, invented their own ad-hoc methods, and declared petitioner eligible for the death penalty." These assertions bear little resemblance to the facts of record, the opinions rendered, and the legal review of those opinions. Throughout the petition, Petitioner continues to offer an artificial divide between the experts presented and the state courts. He is simply wrong.

The experts who conducted *Atkins* evaluations agreed that Petitioner's two IQ tests that were "conducted in his mid-50s" were scored at 63-68, yet scoring in

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[3] Without question, "intellectual disability" is now the preferred phrasing; however, the state statute uses the older term "mental retardation." Thus, the older term "mental retardation" is used throughout the order, transcript, and appeal.

the range of mental retardation in one's midlife does not equate to an opinion of intellectual disability. Petitioner relies on a portion of the dissent, (Petition, p. 7; see also 801 S.E.2d at738, suggesting the experts "agreed, that their I.Q. testing of Blackwell conducted in his mid-50s revealed he was mildly retarded").[4] However, the lone dissenter's inartful phrasing of the agreement as to the modern scores does not change the facts. Dr. Brown's opinion is as follows:

> Q Based on the totality of the data that you had in his life history, what is your opinion, doctor, of his mental retardation if he is mentally regarded?
>
> A It is my opinion that he does not meet the criteria.
>
> Q Okay. Thank you. That's all I have.

(R. p. 4190; BIO Attachment A2) (errors in original).

It is wholly misleading to suggest the experts agreed that Petitioner was mentally retarded and the state courts rejected the conclusion. The experts disagreed. The court resolved the conflict as courts must. See, *e.g., Moore*, 137 S.Ct. at 1060 (Roberts, C.J., dissent) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985)); see also *United States v. Candelario-Santana*, 916 F. Supp. 2d 191, 211–12 (D.P.R. 2013) ("When assessing adaptive behaviors, therefore, courts must make their own independent determinations of the clinicians' judgment and credibility. This function has long been performed by district courts when weighing the testimony of dueling experts.") (internal citations omitted). Moreover, the consideration of evidence presented was not marred by judicially created tests such

[4] The justice in dissent qualified by footnote that the IQ results would indicate the range for mental retardation. 801 S.E.2d at 738 n. 43. It is beyond dispute that an IQ score in the range for mental retardation is not dispositive of intellectual disability. *Hall, supra.*

as the Texas *Briseno* factors – factors rejected both by the majority and the dissent in *Moore*.[5] Rather, the trial court was properly guided by the statutory definition which is not in conflict with "generally accepted, uncontroversial" clinical standards. See *id.*, at 1045 (describing the state habeas court review of the claim of intellectual disability in *Moore*: "The court followed the generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits ... (2) adaptive deficits ... and (3) the onset of these deficits while still a minor").

A. The Supreme Court of South Carolina found the trial court was properly guided by the statutory definition, which is consistent with medical authority, and the record supported the factual findings that formed the basis of the ruling.

The Supreme Court of South Carolina "note[d] the trial court correctly identified and made its determination applying the statutory definition of 'mental retardation.'" *Blackwell*, 801 S.E.2d at 720. The statutory definition is compatible with and is construed in light of accepted clinical definitions:

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[5] This Court has already found: "The *Briseno* factors are an outlier, in comparison both to other States' handling of intellectual-disability pleas and to Texas' own practices in other contexts." *Moore*, 137 S. Ct. at 1052. The Supreme Court of South Carolina confirmed in an expansive footnote that such factors were not at issue:

> Here, the trial court made no reference to the impermissible *Briseno* factors. Furthermore, given the fact that Blackwell's I.Q. scores were at the lower end of the spectrum, the court correctly considered Blackwell's adaptive functioning using the current clinical standards presented by the medical experts. The court, as required by *Moore*, carefully considered and weighed Blackwell's adaptive strengths against his adaptive deficits. While the dissent may believe the trial court overemphasized Blackwell's adaptive strengths, any significance assigned to these adaptive strengths was based on the court's assessment and credibility determination of the expert testimony.

Blackwell, 801 at 721 n. 11.

> Our General Assembly has defined "mental retardation" to mean "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2015). While this Court has strictly adhered to this statutory definition, it has recognized that the USSC in *Atkins* "relied on a clinical definition of intellectual disability which required not only sub-average intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that manifested before age eighteen." *State v. Stanko*, 402 S.C. 252, 286, 741 S.E.2d 708, 726 (2013).

Id., at 719. The trial judge's order supports that he was guided by the statutory definition and the Supreme Court of South Carolina's acknowledgment of use of a clinical definition in *Atkins*. (Supp. R. p. 4, citing *State v. Stanko*, Petition Appendix A52). In his conclusion, the trial judge considered the credibility of the experts and the weight of the evidence as related to (1) significant sub-average general intellectual functioning; (2) existing concurrently with deficits in adaptive behavior; (3) manifested during the developmental period. (Supp. R. pp. 12-14; Petition Appendix A60-62). This is the proper function of a court in determining intellectual disability. Thus, the state structure is sound, and was utilized properly in this case. In rejecting Petitioner's contrary argument, the Supreme Court of South Carolina found:

> Although Blackwell suggests the trial court committed an error of law in reaching its conclusion, he fails to identify any specific error. Instead, he expresses his disagreement with the trial court's credibility determinations and the weight afforded to the experts' opinions and then appears to argue that these decisions equate to errors of law. Because the trial court is the sole judge of the credibility

> of the witnesses and the weight to be given their testimony, we must defer to the court's determinations.

Blackwell, 801 S.E.2d at 720.

The resolution is well-supported by a plain reading of the controlling statute, case law and the trial court's order. The factual findings are likewise well-supported.

B. The Supreme Court of South Carolina also found the facts relied upon were grounded in the evidence presented at the hearing as part of the expert testimony.

In reviewing the ruling, the Court also found that all critical factual findings were properly grounded in the evidence of record. *Id.,* at 720-721. The Court resolved: "... Blackwell has not shown the trial court committed an error of law or that its decision is unsupported by the evidence or against its preponderance. Accordingly, we find the case properly proceeded as a capital trial." *Id.,* at 721–22. There is no error of federal law to review.

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. In this instance, the trial court, faced with competing expert opinions, looked critically at the facts and materials as presented by the experts, and agreed with one expert over the other. Not to be lost is the fact that both experts were credentialed experts with experience in such matters. They disagreed. The trial judge then made the decision on the weight of the evidence as trial judges are routinely tasked.

Petitioner has consistently, unfairly asserted the trial judge clung to facts offered as to adaptive behavior that are not necessarily inconsistent with a diagnosis. For example, in the direct appeal, Petitioner began his argument with a suggestion the trial court's ruling simplistically rested on one fact – that Petitioner was a truck driver. (See FBOA, pp. 35-36). He similarly makes that assertion here. (See Petition, pp. 12-13). That was unsustainable, as the Supreme Court of South Carolina found:

> ...the trial court correctly identified and made its determination applying the statutory definition of "mental retardation." Moreover, contrary to Blackwell's claim, the trial court did not base its decision solely on the fact that Blackwell was able to successfully obtain a commercial driver's license and be employed as a truck driver. The court relied on other factors, including Blackwell's school performance and full employment history. Additionally, the court explained why it gave greater weight to Dr. Brown's report, noting that the report was directed at an evaluation of Blackwell's "formative years" and was consistent with the "functional adaptions" required by the statutory definition of "mental retardation." The court also discounted some of Dr. Calloway's findings as it questioned whether "adequate information" was used and believed Dr. Calloway improperly "made subjective determinations concerning the results obtained and weighted responses of various informants differently."
>
> We also find the trial court's factual determinations are supported by evidence in the record. Admittedly, it is concerning that Blackwell, at 54 years old, scored 63 and 68 on the I.Q. tests given in preparation of the Atkins hearing. However, in terms of "significantly sub-average general intellectual functioning," the trial court readily acknowledged the recent I.Q. scores but was persuaded by evidence that: (1) Blackwell, prior to the age of 18, scored between 68 and 87 on standard school I.Q. tests; (2) Blackwell made "reasonably sufficient grades during his

school career"; (3) at the age of 18, Blackwell was found to read at the 5.8 grade level, completed arithmetic problem solving at the 6.6 level, and completed arithmetic computation at the 5.2 level; and (4) Blackwell dropped out of high school in the eleventh grade despite having earned significant credits toward graduation.

The court also recognized that Blackwell's recent I.Q. scores may have been caused by events in his adult life that adversely affected his current cognitive ability. For example, the court accurately referenced the fact that Blackwell received chemotherapy for Hodgkin's Lymphoma in 1986, had an accident in 2003 or 2004 while riding a four wheeler which rendered him unconscious for approximately 15 to 20 minutes, had several major depressive episodes that resulted in involuntary commitments in 1990 and 2008, and was taking Thorazine, an anti-psychotic medication, at the time of his *Atkins* evaluation.

With respect to Blackwell's adaptive behavior, the court found "no evidence that he was unable to function at his home during the time before his eighteenth birthday." Although the court acknowledged evidence that Blackwell had difficulty living independently after the dissolution of his marriage, the court declined to find this translated into deficits in Blackwell's adaptive behavior. Rather, the court accepted the testimony of Dr. Calloway that Blackwell's major depressive episodes after the separation were the cause of Blackwell's inability to function normally. The court also found that Blackwell adapted to life well as he was able to achieve his goal of becoming a commercial truck driver, maintain employment with consistent increases in his earnings, and raise two children during his twenty-six-year marriage. Additionally, the court found significant the fact that Blackwell was never diagnosed with mental retardation until the *Atkins* issue was raised and also noted that Dr. Harrison, who evaluated Blackwell as to his competency to stand trial, reported no finding of mental retardation.

Blackwell, 801 S.E.2d at 720–21.

The detailed trial court order well-demonstrates the point made by Supreme Court of South Carolina. The trial judge considered the complexity of obtaining a commercial driver's license and successes in his career, including overall income reported, along with evidence of Petitioner's family relationships, noting his former wife, "handled the management of the household by paying all the bills and writing all the checks." (Supp. R. p. 10; Petition Appendix A58).[6] Further, the trial judge considered the evidence going to actual school performance ("made reasonably sufficient grades during his school career") and the details of that evidence such as: 1) though Petitioner ranked 113 out of 113 in his class, he had dropped out and may have received a successions of zeros; 2) Petitioner had four IQ tests before age eighteen, which reflected 68 (first grade), 87 (third grade), 86 (sixth grade), and 72 (ninth grade).[7] (Supp. R. pp. 6-7; Petition Appendix A54-55). He also considered

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[6] The defense failed to provide all of their evidence to Dr. Brown as they were ordered to do. (R. pp. 4256-4258). In fact, the record shows a routine reluctance to comply. (See also R. pp. 4478 – 4479, State seeking information on *Atkins* claim where no information had been provided in approximately 3 years since claim asserted; R. pp. 4743– 4753, 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). It seems counterintuitive that a capital defendant would not rush to turn over any and all evidence in what he argues is such a clear case of intellectual disability. Respondent further noted, in light of these repeated and clear failures, Petitioner, in argument to this Court, actually criticizes Dr. Brown for having "admitted" that he did not know all the statements or information that, if true and relevant, Petitioner would have known. (See Petition, p. 14). Petitioner does not raise that kind of argument with particularly clean hands.

[7] Petitioner essentially argues the higher scores were misused as IQ tests. (See Petition, p. 8-9). This is an incorrect assertion. The disagreement was over the value of indicators at the relevant time – the developmental period. Both experts agreed the tests could be used for that limited purpose. The defense expert, Dr. Calloway, did not discount these scores entirely; rather, both Dr. Calloway and the court appointed expert, 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

critically the evidence that after the age of eighteen Petitioner had had a head 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). (Supp. R. p. 7; Petition Appendix A55).

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; Petition Appendix A58-59). 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 engaged in "weighting some of the results of the ABAS-II." (Supp. R. p. 11; Petition Appendix A59). For this reason, the trial judge "question[ed] the credibility of that evidence." (Supp. R. p. 11; Petition Appendix A59). Moreover, the test called for a "score of 4 or below" in indication of "significant impairment." (Supp. R. p. 11; Petition Appendix A59). In further explanation of finding the testing "not determinative" as to adaptive behavior, the trial judge reasoned:

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school testing in opining family members had indicators of mental retardation. (See R. pp. 3872-3876, (Petitioner's father's IQ test from school scores; his brother school test scores indicated 73 and 74; his daughter's school scores at 57 and 71). Petitioner would have the Court agree they could be used when such indicators are not contrary to his position, (see Petition, p. 15), but not used if contrary. Petitioner cannot be right on both arguments. Even so, 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). Such scores are properly considered in that context.

> ... 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; Petition Appendix A59).

The trial judge also discounted the defense argument that Petitioner's failure to live independently after the breakup of his marriage" supported deficiency in adaptive behavior. He found that Petitioner 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; Petition Appendix A60). The judge concluded that deficiency did not relate to behavior that would have "manifested during the developmental period." (Supp. R. p. 12; Petition Appendix A60). The trial judge also noted Petitioner had never been previously diagnosed as mentally retarded, nor was there discussion by "health professions" in his medical record that expressed a concerned that he may have been mentally retarded prior to capital proceedings. (Supp. R. p. 12; Petition Appendix A60).

The trial judge 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; Petition Appendix A62). He

concluded Petitioner had failed in his burden of proof. (Supp. R. p. 14; Petition Appendix A62).

Of particular note, this was not a summary judgment procedure. Petitioner had the burden of proof. *Blackwell,* 801 S.E.2d at 719 (citing *Franklin v. Maynard,* 356 S.C. 276, 588 S.E.2d 604 (2003)). There is no legal principle that bestows on Petitioner a benefit of having all reasonable inferences drawn in his favor. Nor is there is some presumption of intellectual disability that must be disproven such that a draw is a win. While Petitioner argues strenuously that Dr. Brown "speculated" as to impact of known facts (besides being just plainly inconsistent with the allowed parameters of expert testimony), he fails to comprehend that does not help him to prove his case for intellectual disability. Petitioner failed to carry his burden of proof. The trial judge ruled against him. That ruling reflects a well-reasoned, well-supported determination that Petitioner was not mentally retarded.

Further, Petitioner has utterly failed to show *Hall* or *Moore* error. To the contrary, the record reflects adherence to *Hall* and *Moore,* in particular in considering all the evidence when the range of intelligence testing suggests further inquiry: "... in line with *Hall,* we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." *Moore v. Texas,* 137 S. Ct. 1039, 1050 (2017).

Even so, the basis Petitioner's request for review fails to show cause to grant certiorari review – Petitioner boldly asks this Court to reweigh the evidence. It is a

particularly strained basis on this record where the evidence was presented to and weighed by the trial judge; then presented to and weighed by the jury; and also reviewed on the record a third time by the Supreme Court of South Carolina. The fact that his case for intellectual disability has been twice-rejected at trial is an incredible hurdle for Petitioner to surpass to ask for another factual determination by this Court. But, nevertheless, his assertions of legal error are unsustainable in the record and no stretching of the case law will cover the stark deficiencies in his legal argument. Petitioner's disagreement with the state trial court is evident – any legal infirmity is not. The petition for writ of certiorari should be denied.

II.

> Petitioner's argument that the right to confrontation grants a right to unfettered access to a witness's privileged mental health records and use of those records without limitation is contrary to settled law.

In the direct appeal, Petitioner presented an issue based on his desire "to impeach his ex-wife, Angela, with statements she made after the murder during counselling sessions with a license mental health counselor," claiming her privileged counselling records reflected "Angela was 'biased' and 'motivated to misrepresent' what had actually happened at the time of the murder." *Blackwell,* 801 S.E.2d at 725. The trial court denied his request to use the privileged records, "finding Angela had not waived her statutory privilege to release the records" and accordingly "did not review the records and declined to accept them as a proffered exhibit." *Id.* The Supreme Court summarized Petitioner's argument on appeal as alleging:

> ... the trial court denied him his constitutional right to confront and cross-examine the State's "most critical witness." Alternatively, Blackwell asserts he is entitled to a new trial because the trial court's refusal to accept the proffer of the mental health records denied him meaningful appellate review.

Id.

In his petition to this Court, Petitioner attached another copy of the privileged mental health records and asked they be accepted under seal. (See Motion for Leave to File Petition for Certiorari and Appendix Under Seal). Respondent State of South Carolina has not reviewed those records either at trial or on appeal. Respondent has consistently maintained that would be a violation of the privilege that has been continually upheld. However, the legal issue is clearly before the Court and may be easily considered by reliance on the facts and summaries contained in the direct appeal opinion which Petitioner did not challenge by way of a petition for rehearing. Thus, the uncontested summary is adequate and provides the essential facts. It is those facts which Respondent relies upon without further damage to the privilege.[8]

Further, as it neither discusses nor quotes from the privileged documents, Respondent does not file a separate document under seal. Petitioner's suggestion of

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[8] The witness was never given notice that her records were being sought and were to be released. The record shows there was no opportunity for the witness to contest the request or release prior to trial. Since the State of South Carolina held no privilege over the records and could not assert privilege for, or otherwise represent, the witness, on appeal, that position has still not been fully heard. The National Crime Victim Law Institute and the South Carolina Victim Assistance Network filed an amicus brief in the Supreme Court of South Carolina. Amici asserted criminal defendants do not have an unfettered right to forced, unnoticed disclosure, and encouraged the acceptance of procedures to avoid unnecessary harm to the privilege holder.

an entitlement to access and use of all the witness's privileged mental health records is unsustainable.

A. The Supreme Court of South Carolina found the trial judge erred in issuing an *ex parte* order without notice to the witness, and without an *in camera* review.

As to his issues regarding the privileged records, the Supreme Court of South Carolina accepted the privileged records under seal and reviewed them *de novo in camera*. Respondent, the State of South Carolina, argued that at most, the Court should remand to the judge for consideration of the records under state procedure. (Brief of Respondent, Direct Appeal, p. 60). Petitioner did not join, and actually continued to argue for first review in the state supreme court.

On appeal, the Supreme Court of South Carolina carefully shielded the records – even closing the court at oral argument for this issue – and conducted its own review finding. Moreover, as noted, Petitioner shunned Respondent's suggestion of 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).[9] He has failed to present a well-developed vehicle for this Court to consider the claim presented. In general, courts do not address errors of a party's own making. At any rate, the Supreme Court of South Carolina did not abridge any federal right by its ruling on the issue raised in the direct appeal.

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[9] Petitioner continues to leave out the privilege holder as he has again failed to notice the witness her records were presented anew to this Court. He did not notice the privilege holder in moving in the Supreme Court of South Carolina to unseal the records for purposes of this action. (Brief in Opposition Appendix A13 at n. 1).

B. The Supreme Court of South Carolina found any potential for prejudice in the erroneous rulings regarding the failure to accept and review the records for disclosure was extinguished and disproved by the appellate court's acceptance of the privileged records under seal and its review of the records.

Petitioner contested on appeal the fact that the trial court would not accept and did not review the privileged records prior to ruling the records could not be used in cross-examination. However, the Court found no prejudice to Petitioner as it had "accepted the records under seal" during the direct appeal, and conducted a detailed review of the records. *Blackwell*, 801 S.E.2d at 728. The state supreme court concluded:

> ...having thoroughly reviewed the contents of the records, we do not believe Blackwell established the necessity of these records as they were neither material nor exculpatory, particularly since Blackwell conceded guilt. We also question how this information was probative and how it would have helped Blackwell's case in mitigation.

Id.

Further, Court gave detailed and compelling reasons supporting its conclusion:

> As we understand Blackwell's strategy, he sought to show that Angela created the "toxic" environment that precipitated the shooting and, as a result, Blackwell did not lure Angela to their daughter's home with the intention of committing the murder but, rather, "snapped" in response to "taunting" by Angela. However, there is in fact strong evidence of malice aforethought in the record given: (1) Blackwell's father testified that after Blackwell and Angela separated he took Blackwell's guns and locked them in a box because he feared what Blackwell might do; (2) Blackwell had to retrieve the gun used to shoot Brooke from his father's locked case; (3) earlier on the day of the murder Angela and Blackwell discussed that Angela

> would take her grandsons swimming; and (4) Blackwell was present at the daughter's home when Angela arrived to pick up her grandsons.
>
> Further, while Angela was a key witness for the State, Blackwell's counsel was able to thoroughly cross-examine her and attack her credibility by comparing her written statement with her trial testimony. Additionally, we conclude that the targeted statements in the records were cumulative to the testimony of other witnesses at trial. Taking these factors into consideration, we find the trial court's decision not to review the records *in camera* was harmless error.

Id., at 728–29.

This Court has long recognized both allowable restrictions and harmless error in regard to issues arising under the Confrontation Clause:

> It does not follow, of course, that the Confrontation Clause of the Sixth Amendment prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness. On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant. And as we observed earlier this Term, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295, 88 L.Ed.2d 15 (1985) (per curiam) (emphasis in original).

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986).

In determining whether the error is harmless, appellate courts must look to the witness in context of the case, considering:

> ... a host of factors, all readily accessible to reviewing courts. These factors include the importance of the

> witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Id., 475 U.S. at 684.

The Supreme Court of South Carolina precisely followed this Court's direction. The importance of the testimony Petitioner shot and killed the victim is not disputed, but, then again, neither was its truthfulness. The defense conceded guilt, but attacked Ms. Davis, accusing her of using appellant for money after their separation and embellishing her testimony to demonstrate her "heroic" action during the shooting. (R. pp. 2578-2579, Brief in Opposition Appendix at A10). In short, he argued he was guilty, but Ms. Davis was bad. It is little defense to the killing of a child. But, as to cross-examination, there was ample opportunity to cross-examine the witness during the guilt phase, (R. p. 2394, line 25 – p. 2404, line 21; p. 2440, line 5 – p. 2445, line 2; p. 2448, line 19 – p. 2449, line 21).

However, Petitioner apparently abandons his position the information was critical to the guilt phase – the phase in which the witness testified.[10] In his Petition to this Court, he asks only for "a new sentencing trial...." (Petition, p. 36). He presents even less cause for relief. And, critically, Petitioner fails to show the necessity of the records to the sentencing proceeding where it is a *defendant's character and crime* which is the consideration. See, *e.g., Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (jury may consider "any aspect of a defendant's character or record

[10] Ms. Davis did not re-take the stand in the sentencing phase. Petitioner's argument was simply that the records should be admitted. (R. p. 3113).

and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). While a capital defendant's right to present evidence in sentencing is expansive, it is not without limits. *Lockett*, 438 U.S. at 604 n. 12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.").

Moreover, this Court has not specifically expanded the Confrontation Clause protections to sentencing. See *Williams v. New York*, 337 U.S. 241 (1949). Federal Courts of Appeal continue to find an absence of Supreme Court authority for applying the protections to sentencing. See, for example, *Carter v. Bigelow*, 787 F.3d 1269, 1294 (10th Cir. 2015) ("The Supreme Court has never held that the Confrontation Clause applies at capital sentencing.") (collecting cases). Thus, without benefit of a ruling, this Court would first have to make a decision on that point before considering the matter in context.

Even so, the sentencing phase reflects any testimony as to the meeting at his wife's parent's home before the shooting was corroborated by her mother. (See R. pp. 2662–2663). That testimony was not challenged on appeal. Consequently, any questions not posed to Ms. Davis on the timing or content of the meeting were harmlessly omitted.

Additionally, fear or bias could be inquired into without resort to the privileged documents. This does not dilute the presence of the fear from an evidentiary standpoint, but it protects from invidious introduction of unfairly

prejudicial or distracting allegations. See generally *State v. Garcia*, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999) (considering evidence under Rule 803(3), SCRE, finding "while the present state of the declarant's mind is admissible as an exception to hearsay, the reason for the declarant's state of mind is not").

It is not without merit to consider Petitioner was allowed to repeatedly assert that Ms. Davis had teased and tormented him with facts of her new relationship, that he was emotionally distraught over same, and even that Ms. Davis began to dress in a suggestive manner after she left Petitioner. (See R. pp. 3017-3018; pp. 3028–3029; pp. 3067-3068). Petitioner was allowed incredible leeway to argue that Ms. Davis bore great responsibility for the crime and the burden of having her daughter blame her for her father's crime.[11] (See R. pp. 2578 – 2579; pp. 3193-3198). This even though the horrible crime was his and his alone. Error, if any, of limiting one proffered aspect of cross-examination could only be harmless. The Supreme Court of South Carolina did not err in its conclusion. The petition for writ of certiorari should be denied.

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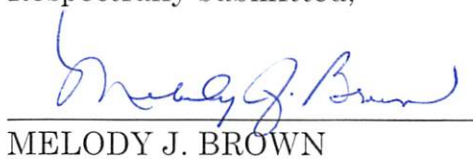
[11] Respondent includes a portion of the Redacted Brief of Respondent which catalogues a few of the motions made in regard to this witness and the child victim's father. (Brief in Opposition, Appendix at A3). Petitioner clearly tried to sully the child victim's father and his former wife, attempting to introduce the specter of biker gang violence toward Petitioner's family after the murder. There were repeated attempts to introduce the concept of biker gangs though wholly irrelevant to the murder.

CONCLUSION

Petitioner makes little disguise of the fact he simply asks this court to review *de novo* the fact intensive issues resolved by the Supreme Court of South Carolina. Though he requests a remand, the only direction on remand could be to accept his position on what the facts show, *i.e,* to direct the state court to accept his suggested weight of the evidence on intellectual disability, and to find he may use any and all portions of the witness's privileged mental health records in any way he sees fit. There is no error of law to correct. The petition should be denied.

Respectfully submitted,



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