No. 17-8275
Capital Case

IN THE
SUPREME COURT OF THE UNITED STATES

BYRON LEWIS BLACK
Petitioner,

v.

TONY MAYS, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Byron Black was given four individually-administered, full-scale measures of global intelligence by four different psychologists over an eight-year period before this Court's opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002), was even decided – and all four scores consistently place his intellectual functioning in the significantly sub-average range. This case is about whether the United States Court of Appeals for the Sixth Circuit may reject those scores in favor of results from childhood group-administered tests of academic aptitude, which the clinical consensus and even the developers of the group tests themselves consider invalid for assessing intellectual disability. Respondent argues that a court may, indeed, "disregard[] established medical practice," *Hall v. Florida*, 134 S. Ct. 1986, 1995 (2014), so long as the court's opinion is tethered to the testimony of an expert who has done just that.

In this case, respondent relies on statements made by Dr. Eric Engum, a person who has never evaluated Black, administered any testing to him, or spoken to anyone who knows him. Engum based his opinion on a single sheet of Black's school records on which several group-test scores are listed, some of which are illegible and at least one of which Engum later conceded, "we have no earthly idea . . . what that test result is." App. 416. Engum cited no scientific support for his claim that Black's group test scores should be treated as equivalent to measures of full-scale, global IQ, nor for his assertion that group tests have an eight-point margin of error. That is because no such literature exists. Respondent may not bypass this Court's instruction that a lower court must "inform itself of the 'medical community's diagnostic framework,'" *Moore v. Texas*, 137 S. Ct. 1039, 1053 (quoting *Hall*, 134 S. Ct. at 2000), by pointing to unsubstantiated and unscientific claims from a single witness and then labeling the question a fact-bound dispute unworthy of this Court's review.

I. PETITIONER'S CLAIM OF INTELLECTUAL DISABILITY MAY NOT BE DEFEATED ON THE BASIS OF HIS RACE.

Respondent notes that the district court credited testimony from Engum and Dr. Susan Vaught regarding Black's status as an African-American in its decision rejecting his claim of intellectual disability and later upheld by the Sixth Circuit. Engum asserted that "[i]t is well-known that minorities do score 10 to 15 points, sometimes, below white subjects in a variety of I.Q. tests, but they function at a much higher level. . . . [They] have street smarts. They have a certain degree of savvy." App. 370. Although Vaught found that Black's IQ scores satisfied prong one, she likewise claimed "whenever there's a person, an Afro-American person who tests in the 70's, you have to be very cautious with your interpretation, especially, if you're beginning to consider mental retardation because there is a bias in the test, and we all have to take that into consideration." App. 540. Vaught stressed that minorities "routinely score lower than non-minorities on an IQ test" and referred to a category of African-American children she called "8-hour retardates," meaning they were classified as intellectually disabled at school, but "when they went home and back to their community, they functioned just fine." App. 539-40.

Apparently, respondent's position (supported by the claims made by Engum and Vaught and accepted by the district court) is that Black's individually administered, full-scale IQ scores should not be taken at face value because of his race. This offensive and backwards argument flies in the face of the clinical consensus. As this Court observed in *Brumfield v. Cain*, "[t]he diagnostic criteria for [intellectual disability] do not include an exclusion criterion." 135 S. Ct. 2269, 2280 (2015). When an individual has significantly sub-average intellectual functioning – as measured by an appropriate, individually-administered, full-scale test of intelligence – prong one is satisfied. The medical community does not search for reasons to explain *why* prong one may be satisfied and then use those reasons as a basis to reject a finding of intellectual disability. Thus, even if it

were true that minorities sometimes score lower on IQ tests, respondent and its experts may not undermine Black's objective evidence on prong one by claiming his low IQ can be attributed to his race.

II. RESPONDENT RELIES ON STEREOTYPES AND UNSCIENTIFIC ARGUMENTS REJECTED BY THE MEDICAL COMMUNITY.

Respondent claims this is not a case like *Brumfield* in which there is "little question" as to intellectual disability. Rather, respondent argues this case involves "disputed" issues and notes as evidence that "petitioner could read and write," played on his high school football team, graduated from high school, and "[h]is family never regarded him as a slow learner." Brief in Opposition 14, n.4. These facts do not support respondent's position that Black's intellectual disability is hotly disputed. Instead, these are common, unscientific stereotypes that laypeople often have about what people with intellectual disabilities can achieve, which – as this Court recently observed – the medical profession has worked diligently to refute. *Moore*, 137 S. Ct. at 1052. "Those stereotypes, much more than medical and clinical appraisals, should spark skepticism." *Id*.

Respondent also urges this Court to decline review because of an alleged "clear absence of proof on deficits in adaptive behavior, as recounted by the district court." Brief in Opposition 16, n.5. But the Sixth Circuit refused to analyze evidence of adaptive behavior. Instead, the court of appeals committed the same error condemned in *Hall* by ending its inquiry after concluding that the district court did not err by "relying strongly" on childhood group tests as "most probative" of Black's intellectual functioning. *Black*, 866 F.3d at 745, 750. Moreover, the district court's opinion regarding adaptive behavior relies on testimony from Engum and Vaught, who claimed Black could not meet prong two because his deficits in adaptive behavior were better explained by his mental illness or personality disorder. App. 386, 389-40, 543-44, 583. Engum argued such conditions "are separate and apart from issues related to mental retardation." App. 340. Again,

this method of reasoning is clearly contrary to the clinical guidelines. *Moore*, 137 S. Ct. at 1051 ("The existence of a personality disorder or mental-health issue, in short, is 'not evidence that a person does not also have intellectual disability.'") (quoting Brief for American Psychological Association, APA, et. al. as *Amici Curiae* 19)). Many people with intellectual disabilities have co-occurring mental disorders.

III. THE EVIDENCE OF PETITIONER'S EXPOSURE TO ALCOHOL IN UTERO WAS OVERWHELMING AND UNDISPUTED.

Finally, respondent argues evidence of petitioner's exposure to alcohol in utero was "speculative" and "minimal." That claim is clearly refuted by the record. Black's oldest sister testified their mother, Julia Mae Black, drank with her social club, did not stop her drinking during pregnancy, and died of liver cancer. App. 80-81. Julia Mae's younger sister described how they went out together and drank scotch – consuming more than one or two drinks at a time. State's Collective Exhibit 1 at 401-02. Julia Mae's brother, Finnis Black, lived with her in their parents' home when Byron Black was born. He testified Julia Mae was known as a "partier;" she drank multiple drinks of scotch on the weekends; and, she did not stop her drinking during her pregnancy with Black or when she breast fed him. *Id*. at 808-09. Interviews conducted by an investigator in 1997 confirmed this information, as Julia Mae's siblings similarly disclosed her drinking habits. App. 829-31. Byron Black's uncle, Dan Black, likewise stated that Julia Mae drank every weekend and sometimes during the week and continued to drink during her pregnancies. App. 830. Moreover, Julia Mae *herself* admitted to the investigator that she drank "a good bit" while she was pregnant, and she smoked Lucky Strike cigarettes. She stated she never saw a doctor during her pregnancy. App. 832. Dr. Auble reported a likely "pattern of alcohol consumption" during Julia Mae's pregnancy with Black, and Dr. Globus reported that Black's father stated "she drank while carrying Byron." State's Collective Exhibit 1 at 729, 922. Dr. Globus found Julia Mae's ingestion

of alcohol during her pregnancy with Black to be "strongly supported" – "[i]n short, she appeared to be alcoholic and to drink almost all the time as well as when she was pregnant with Byron." *Id*. at 922.

The record does not contain any evidence to the contrary. Respondent points to the Sixth Circuit's assertion that in order for Black to succeed, the court would have to "disregard[] evidence put on by the State to rebut Black's contention that his mother's alcohol consumption caused Black to suffer any brain damage." *Black v. Carpenter*, 866 F.3d 734, 748 (6th Cir. 2017). But the State did not offer any evidence to rebut this contention. The State called only two witness to testify – Engum and Vaught, and neither witness ever interviewed Byron Black, his mother, or any of their family members. They therefore had no knowledge or information to offer on this point.

CONCLUSION

For the reasons set forth above, and in the Petition for Writ of Certiorari, this Court should grant certiorari and reverse.

Respectfully submitted,

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May 11, 2018

CERTIFICATE OF SERVICE

I, Kelley J. Henry, counsel for petitioner, certify that on May 11, 2018, two copies of the Reply to Brief in Opposition in the above-entitled case were placed in the United States Mail, postage pre-paid to counsel for respondent, Mr. John Bledsoe, Asst. Attorney General, 425 Fifth Avenue North, Nashville, Tennessee 37243. I further certify that all parties required to be served have been served.

BY:_____
Counsel for Petitioner