No. 19-7699

IN THE UNITED STATES SUPREME COURT

ANTHONY CARR, *Petitioner*

versus

STATE OF MISSISSIPPI, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE MISSISSIPPI SUPREME COURT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the Mississippi Supreme Court's decision regarding petitioner's intellectual disability claim is consistent with the Court's holdings in *Atkins* and its progeny.

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BRIEF IN OPPOSITION

Respondent, State of Mississippi, respectfully prays that this Court deny the Petition for Writ of Certiorari to the Mississippi Supreme Court.

OPINION BELOW

The opinion of the Mississippi Supreme Court is reported as *Carr v. State*, 283 So.3d 18 (Miss. 2019). See Pet. App. A.

JURISDICTION

The judgment of the Mississippi Supreme Court was entered on June 6, 2019.[1]

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[1] Rehearing was denied on September 12, 2019.

Pet. App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner invokes the provisions of U.S. CONST., AMEND. VIII. and XIV.

STATEMENT OF THE CASE

This case arises from the gruesome February 2, 1990, murders of Carl and Bobbie Jo Parker and their two children, twelve-year-old Gregory and nine-year-old Charlotte. On that Friday evening, Carl and Bobbie Jo Parker and their children went to Bible study at the Riverside Baptist Church in Clarksdale, Mississippi. The family left church some time between 8:45 and 9:15 p.m. that night to return to their rural Quitman County, Mississippi home.

Approximately two hours later, the Lambert Volunteer Fire Department responded to a call reporting a fire at the Parker's home. Once there, a fireman entered the home and recovered the body of Carl Parker, which was bound hand and foot. The fireman also recovered the bodies of Charlotte, with the remnants of a binding hanging from her wrist, and her brother Gregory, bound hand and foot. The body of their mother Bobbie Jo Parker, burned beyond recognition, was found the following morning after the fire was extinguished.

Autopsies showed that both Carl and Gregory had been shot twice and bled to death as a result of their wounds. Carl's fourth, or "ring" finger, had been amputated post-mortem. Gregory had suffered various bruises and contusions. Although Bobbie Jo's body had burned in the fire, the cause of her death was determined to be a gunshot wound. Her daughter Charlotte had been shot three times, with the actual

cause of her death being determined as smoke inhalation. Charlotte had suffered prior to her death as she had lacerations of the vaginal vault, a lacerated hymen, and bruises and tears to the rectum.

Investigation of these murders resulted in the discovery of the following evidence. Anthony Carr had been living with Robert and Martha Simon in Memphis for the previous three weeks. Martha saw Carr around 12:30 a.m. on February 3rd at which time Carr told her: that he and Simon had been together; that he had come in a truck; that he had parked the truck with some stuff in it; that Simon was supposed to be coming behind and that he had thrown some coveralls in a dumpster.

Carl's red pick-up truck, filled with the family's household items, furniture, appliances, and other valuables, was located close to the home of Simon's mother-in-law. A shotgun was found in the back of the truck and two revolvers were found in a pillow case near the truck. A pair of coveralls and a pair of gloves, both of which smelled of smoke, were recovered from a locked dumpster near Simon's mother-in-law's house. A man's wedding ring, a woman's wedding ring, a money clip, a pellet gun, boots, bullets for a rare caliber revolver, and a wet jogging suit were retrieved when, with Martha's permission, the Simons' Memphis apartment was searched.

Arrest warrants were issued in Marks, Mississippi, on February 3rd. Anthony Carr and Robert Simon, Jr., were arrested around 3:30 p.m. that day.

Evidence introduced at trial included the items found in and near Carl's truck and the Parker's belongings found in the Simons' Memphis apartment. A print lifted

from the shotgun found in the truck matched Carr's fingerprints. Expert testimony established that the fire at the Parker home was started by an incendiary device. The projectiles found in the bodies of Carl, Gregory, and Charlotte had been fired from the .32-20 revolver found near Carl's truck. The projectile found in Bobbie Jo's body was fired either from the .38 Colt revolver found near Carl's truck or from a revolver with the same class characteristics.

Finally, Carr's cell-mate, Anthony Washington, testified that Carr had talked to him about the murders, telling Washington that he "had a ball" while making a motion as though he was pulling a trigger; that Carr had asked Washington's advice as to whether "they" could tell if Carr had raped the nine-year-old little girl and that Carr's partner Simon had raped her first and then Carr raped her.

Anthony Carr was indicted during the June 1990 Term of the Circuit Court of Quitman County, Mississippi, in a multi-count indictment, returned pursuant to Miss. Code Ann. §97-3-19(2)(e) (1972, as amended), charging four separate counts of the crime of capital murder, while acting in concert with another: 1) of Charlotte Parker, while engaged in the commission of the crime of sexual penetration in violation of Miss. Code Ann. §97-3-95(a) and (c)(1972, as amended); 2) of Carl Parker, while engaged in the commission of the crime of robbery in violation of Miss. Code Ann. §97-3-73 (1972, as amended); 3) of Gregory Parker, while engaged in the commission of the crime of kidnapping in violation of Miss. Code Ann. §97-3-53 (1972, as amended); and, 4) of Bobby Jo Parker, while engaged in the commission of the crime of arson in violation

of Miss. Code Ann. §97-17-1 (1972, as amended).[2]

The case was transferred to Alcorn County, Mississippi, on a motion for change of venue. A jury was impaneled on September 10, 1990, and Carr was put to trial on all four counts of the indictment. After finding Carr guilty on all four counts on September 18, 1990, the jury heard evidence and arguments in aggravation and mitigation of the sentence to be imposed. The jury returned four sentences of death in the proper form[3] and the court set an execution date for October 31, 1990. C.P. 920-26. Carr's Motion For Judgment Of Acquittal Notwithstanding The Verdict, Or In The Alternative, For A New Trial was denied on October 12, 1990. C.P.953-54.

In his direct appeal, Carr raised thirty (30) issues before the Mississippi Supreme Court. On February 2, 1995, that court affirmed the four convictions of capital murder and sentences of death. A Petition for Rehearing was filed and subsequently denied on June 22, 1995. *Carr v. State,* 655 So.2d 824 (Miss. 1995).

Following this affirmance by the Mississippi Supreme Court, the petitioner sought relief by filing a petition for writ of certiorari with this Court. On January 16, 1996, the Court entered an order denying the petition for writ of certiorari. *Carr v. Mississippi,* 516 U.S. 1076, 116 S.Ct. 782, 133 L.Ed.2d 733 (1996). No petition for rehearing was filed.

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[2] "C.P." denotes the documents/records filed in the circuit court and found in Volumes 1 through 6; "P.T." denotes the pretrial motion hearings or other matters considered prior to trial and found in Volumes 7 through 14; and "T.R." denotes the trial record of the cause found in Volumes 15 through 21. Tr. denotes the transcript of the *Atkins* hearing.

[3] C.P.916-19.

Petitioner then filed his petition for post-conviction relief with the Mississippi Supreme Court on October 23, 2001, raising the following five (5) issues:

I. Anthony Carr's Constitutional Rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Article Three, Sections 24, 26, 28 and 29, of the Mississippi Constitution Knowingly Presented False Testimony That Anthony Washington Did Not Receive Any Favorable Treatment for Testifying Against Him and When the Prosecution Failed to Provide Trial Counsel with Critical Impeachment Evidence

II. The Execution of the Mentally Retarded Should Be Prohibited under the Eighth Amendment to the U.S. Constitution as Well as Article Three, Section 28, of the Mississippi Constitution

III. Trial Counsel for Anthony Carr Were Ineffective at the Penalty Phase of His Capital Trial, Depriving Him of His Sixth and Fourteenth Amendment Right to Competent Counsel, and His Eighth and Fourteenth Amendment Right to Have Mitigating Evidence Presented to the Jury, as Well as His Right to Counsel under Article III, Section 26, of the Mississippi Constitution

IV. Anthony Carr's Conviction for the Murder of Bobbie Jo Parker must Be Vacated Because the Evidence Presented at Trial Was Insufficient to Prove Beyond a Reasonable Doubt That the Remains of Those Were Bobbie Jo Parker

V. The Errors Taken Together are Cause for Reversal

The Mississippi Supreme Court, in a written opinion on May 20, 2004, denied relief on all claims save petitioner's *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335(2002), claim of intellectual disability. *Carr v. State*, 873 So.2d 991 (Miss. 2004).

An *Atkins* hearing was conducted in the Circuit Court of Quitman County on February 6, 2013, wherein the trial court considered evidence and heard both expert and lay testimony. The trial court subsequently denied relief in a written opinion on

June 19, 2013. Pet. App. E. The petitioner then appealed to the Mississippi Supreme Court arguing the trial court committed error in its analysis of petitioner's *Atkins* claim of intellectual disability. The Mississippi Supreme Court remanded the case for the trial court to "consider whether Carr's adaptive functioning deficits–which the circuit judge found to exist–are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his I.Q. scores" and for the trial court to review its findings regarding the age of onset of this alleged intellectual disability. Pet. App. D.

On September 20, 2017, the trial court entered a revised opinion and in so doing, again denied petitioner's claim of intellectual disability. Pet. App. B. Aggrieved, the petitioner once again sought relief in the Mississippi Supreme Court filing his brief on May 7, 2018. The State responded in due course and in a written opinion on June 6, 2019, the Mississippi Supreme Court affirmed the decision of the trial court. Pet. App. A.

From that decision, the petitioner filed the present petition in which he avers that the decision of the Mississippi Supreme Court "establish[ed] an erroneous legal standard when it held that proof of intellectual disability in *Atkins* cases requires a showing of 'adaptive functioning deficits. . . so severe that [the petitioner] should be ruled intellectually disabled,' when the term 'so severe' does not appear in the diagnostic criteria, and in light of this Court's holding that *Atkins* decisions must be 'informed by the work of medical experts." Pet. at ii. The petitioner also, for the first time, offers the claim that the Mississippi Supreme Court's use of the word significant

in describing adaptive deficits constitutes error. Pet. at 15. Finally, the petitioner assigns error to the trial court's use of the words "sliding scale" and "interplay" when discussing the relationship between I.Q. and adaptive functioning. Pet. at 17-18. He is mistaken.

The respondent respectfully submits the decision of the Mississippi Supreme Court is consistent with the Court's precedent concerning the adjudication of claims of intellectual disability. The Mississippi Supreme Court committed no error in affirming the trial court's order denying petitioner's claim of intellectual disability. Rather, the Mississippi Supreme Court's holding is consistent with the Court's holdings in *Atkins* and its progeny.

REASONS FOR DENYING THE WRIT

Petitioner presents no cognizable claim under the Constitution or statutes of the United States upon which relief can be granted, therefore certiorari should be denied.

ARGUMENT

I. The Mississippi Supreme Court's decision related to petitioner's intellectual disability claim is consistent with the Court's holdings in *Atkins* and its progeny.

The petitioner asks the Court to agree with his contention that the Mississippi Supreme Court "establish[ed] an erroneous legal standard when it held that proof of intellectual disability in *Atkins* cases requires a showing of 'adaptive functioning deficits. . .so severe that [the petitioner] should be ruled intellectually disabled,' when the term "so severe" does not appear in the diagnostic criteria, and in light of the

Court's holding that *Atkins* decisions must be 'informed by the work of medical experts.'" Pet. at 11. The gravamen of petitioner's claim then, is that the Mississippi Supreme Court erred by creating an "erroneous legal standard for evaluating adaptive functioning deficits (known as prong 2 of the three-prong test) in *Atkins* cases." Pet. at 11. He is mistaken.

The petitioner raised this issue with the Mississippi Supreme Court in the context of an argument for a new evidentiary hearing following the trial court's denial of his *Atkins* or intellectual disability claim:

> Carr also argues that the *Carr III* Court created a new *Atkins* standard. Carr argues that, by remanding the case in 2016 "to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores," the Court created a new standard for determining whether a defendant has an intellectual disability. *Id*. at 943 (emphasis added).
>
> In *Hall*, the United States Supreme Court approvingly cited [the] DSM-5 and quoted the following language: "[A] person with an IQ score above 70 may have such severe adaptive behavior problems... that the person's actual functioning is comparable to that of individuals with a lower IQ score." *Hall*, 572 U.S. at 712, 134 S.Ct. 1986 (alteration in original) (emphasis added) (quoting Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013)). The remand order from *Carr III* does not conflict with the language cited approvingly in *Hall*. Further, no material difference exists between *Hall's* instruction to determine whether a defendant has "such severe" adaptive-functioning deficits as to render him or her intellectually disabled through an interrelated analysis and *Carr III's* instruction to determine whether a defendant's adaptive-functioning deficits are "so severe" to support a finding of intellectual disability. *Hall* and *Carr III* therefore provide the same or substantially similar instruction. We see no reason for a new evidentiary hearing at this juncture.

Pet. App. A. at 6-7.

The Mississippi Supreme Court then elaborated on the appropriate diagnostic standard for assessing a claim of intellectual disability, a diagnostic standard which was utilized by the trial court. In acknowledging that "mild intellectual disability 'may, under certain conditions, be present in an individual with an IQ of up to 75'"[4] the court embraced the mandate of *Hall* which requires "the medical community's evolving understanding of intellectual disability and its diagnosis" must be considered."[5] The Mississippi Supreme Court had previously "adopted the 2010 [American Association on Intellectual and Developmental Disability (AAIDD)] and 2013 [American Psychiatric Association (APA)] definitions of intellectual disability as appropriate for use to determine intellectual disability in the courts of this state in addition to the definitions promulgated in *Atkins* and *Chase*." Pet. App. A. at 6-7. (citing to *Chase V*, 171 So. 3d at 471; *see also Hall*, 572 U.S. at 710, 134 S.Ct. 1986). The court then articulated the proper manner in which adaptive functioning is evaluated, holding that the "conceptual", "social" and "practical" skill domains must be considered and that there are different skills to be considered under each domain. Pet. App. A. at 6-8. This diagnostic approach is consistent with the Court's holdings in *Atkins*, *Hall* and *Moore*.

The Mississippi Supreme Court agreed with the trial court that "[t]here is some amount of interplay between two of the criteria: (a) significantly sub-average

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[4]Pet. App. A. at 24. (citing to *Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015) ("Chase V") (quoting *Chase III*, 873 So. 2d at 1028 n.18).

[5]*Id*.

intellectual function, and (b) significant deficits in adaptive behavior." Pet. App. A. at 8. This procedure is consistent with *Atkins* and *Hall* and is additionally, reflective of that endorsed by the Court in *Moore v. Texas*, ___ U.S. ___, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017). There, the Court embraced the very same "diagnostic standards" and definitions relied upon by the Mississippi Supreme Court. *Moore*, 137 S.Ct. at 1045. Clearly then, the court below followed the same "generally accepted, uncontroversial intellectual-disability diagnostic definition, which identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean'—i.e., a score of roughly 70—adjusted for 'the standard error of measurement,' . . .(2) adaptive deficits. . . ; and (3) the onset of these deficits while still a minor." *Id.* (citing to *Hall*, 134 S.Ct. 1986, 1994).

Both the trial court and the Mississippi Supreme Court followed the very same diagnostic procedure and utilized the same definitions in evaluating the petitioner's *Atkins* claim, all in a manner consistent with the Court's holdings in *Atkins*, *Hall* and *Moore*. Accordingly, the court below committed no error in affirming the trial court's analysis of the petitioner's *Atkins* claim.

The Mississippi Supreme Court's opinion correctly reflects the Court's "generally accepted" "uncontroversial intellectual-disability diagnostic definition." *Hall*, 134 S.Ct. at 1994. In consideration of this proper diagnostic approach, the court below conducted a painstaking analysis of the evidence introduced at the petitioner's *Atkins* hearing. Pet. App. A. at 8-10. This analysis is also consistent with the Court's holdings in

Atkins and its progeny. Thus, the Mississippi Supreme Court's adjudication of the petitioner's *Atkins* claim in no way offends either the Eighth Amendment or the Court's line of *Atkins* cases. Rather, the Mississippi Supreme Court's holding complies in every aspect with this Court's precedent and in no way represents a departure, significant or otherwise, from *Atkins*, *Moore* or *Hall*.

To be clear, the Mississippi Supreme Court remanded the case to the trial court a second time, "to provide the circuit judge an opportunity to consider whether Carr's adaptive functioning deficits—which the circuit judge found to exist—are so severe that Carr should be ruled intellectually disabled through an interrelated analysis with his IQ scores, which the circuit judge found to be between 70 and 75"[6] and for the judge to determine the third prong, whether his deficiencies manifested prior to age eighteen (18).[7]

The petitioner argues that the decision of the Mississippi Supreme Court "conflicts" with the Court's holdings in *Atkins*, *Hall* and *Moore*. Pet. at 11. Specifically, Carr assigns error to the Mississippi Supreme Court's use of the words "so severe" in regard to adaptive functioning deficits. Pet. at 11. The petitioner argues the court's holding "incorrectly" states that "the medical community's diagnostic framework recognizes that Carr's IQ between 70 and 75, coupled with '**severe** adaptive behavior problems' could support a diagnosis of intellectual disability. . . . ." Pet. at 13. To the

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[6] *Carr v. State*, 196 So.3d 926, 947 (Miss. 2016).

[7] *Id*. at footnote 10.

contrary, the Mississippi Supreme Court's use of the words "so severe" did not alter the "generally accepted, uncontroversial intellectual-disability diagnostic definition"[8] and accepted framework required for the adjudication of *Atkins* claims. Indeed, the word "severe" was used by Justice Kennedy in the majority opinion in *Hall*. There, as previously referenced, the Court held that "a person with an IQ score above 70 may have such **severe adaptive behavior problems**. . .that the person's actual functioning is comparable to that of individuals with a lower IQ score."[9] Thus, the Mississippi Supreme Court's use of the word "severe"cannot constitute a departure from this Court's clearly established precedent and is not indicative of a standard that is constitutionally infirm. It is difficult to imagine a scenario where the use of the very word utilized by the Court and the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) would be considered error when used by the Mississippi Supreme Court.[10]

The diagnostic standard for evaluating adaptive functioning embraced by the Mississippi Supreme Court does not stand in contrast to the Court's holding in *Hall*, nor does it create a new or otherwise elevated requirement for the demonstration of

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[8] 134 S.Ct. at 1994-95.

[9] Other states reference this same language in adjudicating *Atkins* claims. *See Glover v. State*, 226 So.3d 795, 809 (Fla. 2017); *Callen v. State*, 2017 WL 1534453 *8 (Ala. Crim. App.2017);

[10] The court below cited the Court's language in *Hall* noting the ". . .Court approvingly cited to the DSM-5 and quoted the following language: '[A] person with an IQ score above 70 may have such **severe adaptive behavior problems** ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.' *Hall*, 572 U.S. at 712, 134 S.Ct. 1986 (alteration in original) (quoting Diagnostic and Statistical Manual of Mental Disorders 37 (5th ed. 2013))." Pet. App. A. at 24 [emphasis added].

adaptive functioning deficits. Rather, it is consistent with *Atkins*, *Hall* and *Moore* in every respect. Contrary to the claims of the petitioner, the Mississippi Supreme Court's use of the word "severe" did not and does not contravene *Atkins* or its progeny. Additionally, unlike *Hall*, here evidence of adaptive functioning was presented by the petitioner and considered by the trial court.

The petitioner's *Atkins* claim was properly adjudicated both in the trial court and on appellate review. The Mississippi Supreme Court's use of the term "severe" did not alter or otherwise augment the generally accepted and uncontroversial diagnostic framework announced in *Atkins*, *Hall* and *Moore*. The petitioner is entitled to no relief on this assignment of error.

II. The petitioner's claim related to the Mississippi Supreme Court's use of the word "significant" as to adaptive deficits is barred from consideration and alternatively, lacks merit.

The petitioner argues in passing that the Mississippi Supreme Court somehow committed error by not defining the term "significant" as it relates to adaptive deficits. Pet. at 15. This claim was not presented to the court below and is therefore not properly before this Court. As a consequence, it is barred from consideration. *See Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398(1969). The petitioner fails to direct the Court to that part of the record wherein he challenged the Mississippi Supreme Court's use of the word "significant" in its second remand opinion.[11] He cannot do so because failed to raise the issue with the court below. Thus,

[11] Pet. App. A. at 9.

it is barred from consideration. Additionally, any return to state court at this juncture would prove futile in light of the adequate and independent state law procedural bar found in Miss. Code Ann. § 99-39-21(1). Alternatively and without waiving the bar to consideration, the claim lacks legal merit.

The petitioner takes issue with the Mississippi Supreme Court's use of the word "significant" in its 2019 remand opinion wherein the court held that:

> . . . while the trial court did originally find that "Carr has demonstrated adaptive skill deficits in at least two (2) of the adaptive skill areas," the trial court did not find **significant** adaptive-skill deficits.
>
> Pet. App. A. at 27. [emphasis added]

The petitioner argues the court below never "define[d] 'signficant' in this context." Pet. at 15. Such a contention is specious as the Mississippi Supreme Court specifically defined what "significant" meant with regard to adaptive deficits immediately following the complained of reference:

> Under *Chase V*, adaptive-skill deficits require a showing of "significant limitations in adaptive behavior" that "should be established through the use of standardized measures normed on the general population, including people with disabilities and people without disabilities." *Chase V*, 171 So. 3d at 486 (quoting Intellectual Disability: Definition, Classification, and Systems of Support 43 (11th ed. 2010)). **Specifically, *Chase V* provided that the "significant limitations in adaptive behavior are operationally defined as performance that is approximately two standard deviations below the mean** ...." *Id.* (quoting Intellectual Disability: Definition, Classification, and Systems of Support 43 (11th ed. 2010)).6
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> Pet. App. A. at 9 [emphasis added].

As this excerpt clearly shows, the court below specifically defined its use of the word "significant" in regard to adaptive functioning deficits, those being "defined as

performance that is approximately two standard deviations below the mean." *Id.* This is reflective of the Court's holding in *Moore*, wherein the Court held that, "[i]n determining the significance of adaptive deficits, clinicians look to whether an individual's adaptive performance falls two or more standard deviations below the mean in any of the three adaptive skill sets (conceptual, social, and practical). See AAIDD–11, at 43." *Moore* at 1046. The petitioner's claim, while barred, also lacks merit. Carr is entitled to no relief on this assignment of error.

III. The petitioner's claim of error related to the trial court's use of the term "sliding scale" and the phrase "some amount of interplay" lacks merit.

The petitioner continues his previous argument regarding the Mississippi Supreme Court's use of the term "so severe"[12] and then takes issue with the trial court's use of the term "sliding scale"[13] and the statement that the diagnostic criteria have "some amount of interplay."[14] The claim regarding the Mississippi Supreme Court's use of the term "so severe" is devoid of legal merit, as previously discussed in the respondent's opening argument, the arguments of which are respectfully incorporated herein by reference. Likewise, the petitioner's remaining two claims concerning the trial court's use of the term "sliding scale" and phrase "some amount of interplay" also, lack merit.

[12]Pet. at 17.

[13]Id.

[14]Id. at 18.

The precise language of the trial court for which the petitioner ascribes error is found in the trial court's revised opinion and is as follows:

> In an effort to be clear, it is this court's understanding that, to make a finding of intellectual disability, each of the above three criteria ["[s]ignificantly sub-average intellectual function," "[s]ignificant deficits in adaptive behavior," and "[m]anifestation prior to age 18"] must be met. There is **some amount of interplay** between two of the criteria: (a) significantly sub-average intellectual function, and (b) significant deficits in adaptive behavior. These two factors can act as a **"sliding scale"** or require a "balancing," i.e., although an individual may possess an IQ above what is normally considered appropriate for a finding of intellectual disability, the deficits in such an individual's adaptive behavior might be so severe that a finding [of] intellectual disability may still be made or even compelled, or an individual may possess[] an IQ sufficiently low that a finding of intellectual disability would normally be considered appropriate, however such individual's adaptive behavior might be of such a high or higher order that a finding of intellectual disability might be inappropriate.
>
> Pet. App. B. at 2. [emphasis added]

The use of the terms "sliding scale" and the phrase "some amount interplay" relate to the trial court's consideration of the first two prongs of the *Atkins* analysis, those being significantly sub-average intellectual functioning and significant deficits in adaptive behavior.

As the Mississippi Supreme Court correctly held in regard to *Atkins* determinations, the trial court specifically noted the factors "to be considered when making such a determination" [which] were "(a) Significantly sub-average intellectual function; (b) Significant deficits in adaptive behavior; and (c) Manifestation prior to age

18."[15] The second remand decision[16] of the Mississippi Supreme Court correctly stated the requirement from *Hall* and *Moore*, that there is to be considered some amount of interplay between two of the criteria: (a) significantly sub-average intellectual function, and (b) significant deficits in adaptive behavior"[17] when an individual's I.Q. score falls within a certain range of scores, typically 70-75. Thus, the trial court committed no error through the use of this language.

The decision of the Mississippi Supreme Court clearly accounted for this balancing or interplay and properly articulated the accepted diagnostic standard for the adjudication of claims of intellectual disability[18], a standard which is consistent with the mandates of this Court. The petitioner misapprehends the language in *Hall* and *Moore* which he claims supports his assertions of error concerning the trial court's use of the terms "sliding scale" and "interplay" as it relates to I.Q. and adaptive functioning.

This interrelated analysis simply means that if the individual's I.Q. score falls within the 70-75 range, consideration of adaptive functioning deficits in concert with consideration of whether those deficits, if present, are of such a degree that the person should be determined to be intellectually disabled, must be considered. Mississippi's

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[15] Pet. App. B. at 1-2.

[16] Pet. App. A.

[17] Pet App. A. at 2.

[18] Pet. App. A. at 7-8.

Atkins framework requires that be done in every intellectual disability determination case. *See Chase v. State*, 171 So. 3d 463, 471 (Miss. 2015).[19]

The trial court's use of the terms "sliding scale" and "interplay" do not warrant reversal. The record reflects that both the trial court and the Mississippi Supreme Court evaluated and adjudicated the petitioner's *Atkins* claim in a manner entirely consistent with the precedent of this Court. The petitioner's reliance on *Hall* and *Moore* as support for his contention that the Mississippi Supreme Court's decision regarding his adaptive functioning constitutes reversible error is misplaced.

Neither *Hall* nor *Moore* altered the depth of investigation into adaptive functioning deficits. Such is not the import of either of those cases. *Hall* involved Florida's bright line cut-off I.Q. of 70 which prevented adaptive functioning from being considered, a construct not present in Mississippi's *Atkins* scheme. Here, evidence of adaptive functioning behavior was presented by both the petitioner and the State. Accordingly, *Hall* does not apply. Again, *Hall* concerned Florida's specific interpretation of its definition of intellectual disability in which the Court held that Florida's "strict IQ test score cutoff of 70 is the issue," and that, "[i]f, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed." *Hall*, 572 U.S. at 704, 712. Conversely, in this case, the petitioner was in no way prevented from offering evidence of adaptive functioning, or any other evidence, in support his claim of intellectual disability. This is evident from

[19] The petitioner fails to cite to any Mississippi case in which an individual's right to present evidence of adaptive functioning deficits was foreclosed nor does he make such a claim in his own case.

the record. As Mississippi's *Atkins* framework does not foreclose the presentment of evidence of adaptive functioning based on IQ scores of 70 or above, as was the case in *Hall*, the Mississippi Supreme Court's holding is entirely consistent with *Atkins*, *Hall and Moore*. *See Chase v. State*, 171 So.3d 463 (Miss. 2015). As the court below aptly noted, "a legal standard that views a full-scale IQ score as dispositive of intellectual disability without performing and balancing an interrelated analysis of adaptive functioning, runs afoul of the Eighth Amendment." Pet. App. D. at 37. Pursuant to *Moore*, the inquiry into adaptive deficits requires the court to, "in line with *Hall*, . . . 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," typically 70-75. *Moore*, 137 S. Ct. at 1050. This same procedure was followed in the petitioner's case.

Mississippi's *Atkins* jurisprudence has always included the requirement "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,* 137 S. Ct. at 1050. Thus, neither *Hall* nor *Moore* changed the *Atkins* scheme in this state. Rather, both cases merely reinforced the existing procedure by which *Atkins* cases are adjudicated in Mississippi courts.

The Mississippi Supreme Court's adjudication of petitioner's *Atkins* claim is entirely consistent with the Court's precedent with *Atkins*, *Hall* and *Moore*.

CONCLUSION

For the above and foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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