The Supreme Court of South Carolina

REQUEST FOR WRITTEN COMMENTS

The South Carolina Judicial Department is conducting a review of the current Pilot Program for Electronic Filing in the Court of Common Pleas. As part of this review, the Judicial Department is seeking comments from E-Filers.

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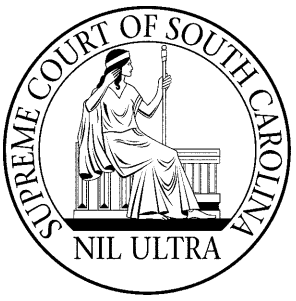
Columbia, South Carolina
May 31, 2017



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 22
May 31, 2017
Daniel E. Shearouse, Clerk
Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Magistrate Gordon Blackwell Johnson, Sr., Respondent.

Appellate Case No. 2017-000623

Opinion No. 27721
Submitted May 16, 2017 – Filed May 31, 2017

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel, and Charlie Tex Davis, Jr., Senior Assistant Disciplinary Counsel, of Columbia, both for Office of Disciplinary Counsel.

J. Steedley Bogan, of Bogan Law Firm, of Columbia, for respondent.

PER CURIAM: In this judicial disciplinary matter, respondent and the Office of Disciplinary Counsel have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21 of the Rules for Judicial Disciplinary Enforcement contained in Rule 502 of the South Carolina Appellate Court Rules (SCACR). In the Agreement, respondent admits misconduct and consents to the imposition of a private admonition, a public reprimand, or a definite suspension not to exceed ninety (90) days. We accept the Agreement and suspend respondent from office for forty-five (45) days. The facts, as set forth in the Agreement, are as follows.

Facts

On February 9, 2016, respondent attended a meeting of the Newberry Cotillion Club. At the conclusion of the meeting, respondent and another attendee engaged

in a verbal disagreement that escalated into a physical altercation. Both respondent and the other attendee suffered minor injuries during the altercation.

Law

Respondent admits that by his conduct, he has violated the following provisions of the Code of Judicial Conduct, Rule 501, SCACR: Canon 1 (judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that integrity and independence of judiciary will be preserved); Section A of Canon 2 (judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of judiciary); and Section A of Canon 4 (judge shall conduct all of judge's extra-judicial activities so that they do not demean the judicial office).

Respondent also admits he has violated the following Rules for Judicial Disciplinary Enforcement, Rule 502, SCACR: Rules 7(a)(1) (it shall be a ground for discipline for judge to violate Code of Judicial Conduct) and Rule 7(a)(9) (it shall be ground for sanction for judge to violate Judge's Oath of Office contained in Rule 502.1, SCACR).

Conclusion

We find respondent's misconduct warrants a forty-five (45) day suspension from judicial duties. We therefore accept the Agreement and suspend respondent from office for forty-five (45) days.

DEFINITE SUSPENSION.

BEATTY, C.J., KITTREDGE, HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Ricky Lee Blackwell, Appellant.

Appellate Case No. 2014-000610

Appeal from Spartanburg County
Roger L. Couch, Circuit Court Judge

Opinion No. 27722
Heard April 13, 2016 – Filed May 31, 2017

AFFIRMED

Chief Appellate Defender Robert Michael Dudek and Appellate Defender David Alexander, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Deputy Attorney General Donald J. Zelenka, and Senior Assistant Deputy Attorney General Melody J. Brown, all of Columbia, and Solicitor Barry J. Barnette, of Spartanburg, for Respondent.

Meliah Bowers Jefferson, of Wyche, P.A., of Greenville, for Amicus Curiae National Crime Victim Law Institute. Lindsey D. Jacobs and Patricia Revenhorst, both of

Greenville, for Amicus Curiae South Carolina Victim Assistance Network.

CHIEF JUSTICE BEATTY: This is a consolidated direct appeal and mandatory review from a sentence of death.[1] A jury convicted 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. Following sentencing, Blackwell appealed to this Court. In his appeal, Blackwell contends the trial court erred in: (1) finding him eligible for the death penalty despite evidence of mental retardation;[2] (2) failing to disqualify a juror for cause; (3) denying his *Batson*[3] challenge; (4) prohibiting him from cross-examining a State witness using privileged statements the witness made to a mental health counselor and declining to accept the proffer of the mental health records as an exhibit; (5) declining to admit notes of two hospital chaplains as evidence that he was remorseful; and (6) failing to correctly instruct the jury regarding a finding of mental retardation during the penalty phase of the trial. For reasons that will be discussed, we affirm Blackwell's convictions and sentence of death.

I. Factual / Procedural History

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.

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[1] S.C. Code Ann. § 16-3-25(F) (2015).

[2] Although the General Assembly has since changed this term to "intellectual disability" in other titles of the South Carolina Code, we have used the term "mental retardation" for consistency purposes as it was in effect and used during these trial proceedings. *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2015) (identifying "mental retardation" as a statutory mitigating circumstance in capital-sentencing proceedings); *cf.* S.C. Code Ann. § 44-20-30 (Supp. 2011), amended by Act No. 47, 2011 S.C. Acts 172, § 13 ("Section 13. In Sections 1 through 6 of this act, the terms 'intellectual disability' and 'person with intellectual disability' have replaced and have the same meanings as the former terms 'mental retardation' and 'mentally retarded.'").

[3] *Batson v. Kentucky*, 476 U.S. 79 (1986).

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.

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 (2002).[4] As a result, the trial court conducted a hearing pursuant to *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).[5] 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

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[4] *See Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that the Eighth Amendment's cruel and unusual punishment clause prohibits the government from imposing a death sentence on a person who is mentally retarded).

[5] *See Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003) (adopting state court procedure in compliance with *Atkins*' prohibition on executing mentally retarded defendants).

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.[6] The trial court sentenced Blackwell to death for murder, noting the kidnapping sentence was subsumed into the sentence for murder.[7]

Following the denial of his post-trial motions, Blackwell appealed his convictions and sentence to this Court.

II. Standard of Review

"In criminal cases, this Court sits to review errors of law only and is bound by factual findings of the trial court unless an abuse of discretion is shown." *State v. Laney*, 367 S.C. 639, 643, 627 S.E.2d 726, 729 (2006). An abuse of discretion occurs when the court's decision is unsupported by the evidence or controlled by an error of law. *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012).

III. Discussion

A. Pre-Trial *Atkins* Determination

Blackwell argues the trial court erred in making the pre-trial determination that he was eligible for the death penalty given the evidence "conclusively demonstrated" that he is mentally retarded. Consequently, Blackwell maintains that by proceeding as a capital case and ultimately sentencing him to death, the trial court violated his rights under the Eighth Amendment[8] as interpreted by the United States Supreme Court ("USSC") in *Atkins v. Virginia*, 536 U.S. 304 (2002) and adopted by this Court in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).[9]

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[6] S.C. Code Ann. § 16-3-20(C)(a)(1)(b), (a)(10) (2015).

[7] The judge did not impose a sentence for the kidnapping charge since Blackwell had been sentenced for the related murder. S.C. Code Ann. § 16-3-910 (2015).

[8] U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[9] As a threshold matter, we disagree with the State's claim that Blackwell's issue is procedurally barred or, alternatively, moot based on the jury's finding during the penalty phase that Blackwell is not mentally retarded. As evidenced by this Court's decision in *Franklin*, a judge's pre-trial determination and a jury's determination are

After Blackwell's counsel advised the State and the trial court that he would assert that Blackwell is mentally retarded and, thus, exempt from the death penalty, the trial court held a pre-trial hearing pursuant to *Franklin*. During this hearing, the court heard testimony from three mental health experts: (1) Dr. Kimberly Harrison, a forensic psychologist with the South Carolina Department of Mental Health ("SCDMH") who was offered by the State, testified that she had evaluated Blackwell, deemed him competent to stand trial, and did not discern any evidence of mental retardation; (2) Dr. Ginger Calloway, a forensic psychologist who was offered by the defense, opined that Blackwell met the definition of "mental retardation" because he exhibited: sub-average intellectual ability based on his I.Q. scores; significant deficits in adaptive functioning such as communication, home living, social interaction, self-direction, and functional academics; and that these deficits existed prior to the age of eighteen; and (3) Dr. Gordon Brown, a forensic psychologist employed with the SCDMH who was offered by the State to rebut Dr. Calloway's opinion, opined that Blackwell did not meet the criteria for mental retardation.

Following the hearing, the court considered the voluminous evidence that formed the basis of the experts' conclusions and reports, which included Blackwell's school records, I.Q. scores, employment records, medical and mental health records, records from Blackwell's immediate family, and interviews with several of Blackwell's family members and acquaintances.

By written order, the trial court ruled that, while there were several factors that would "raise the possibility of mental retardation," Blackwell had failed to prove by the preponderance of the evidence that he was ineligible to receive the death penalty. As will be discussed, we are unpersuaded by Blackwell's claim that the trial court committed reversible error in rendering the pre-trial *Atkins* determination.

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separate and distinct findings. *See Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (recognizing that if the trial judge makes a pre-trial determination that the defendant is not mentally retarded, the defendant may present evidence of mental retardation to the jury during the penalty phase). Thus, like other pre-trial determinations, such as the denial of a defendant's claim of immunity under the South Carolina Protection of Persons and Property Act, we find the issue is proper for our review. *Cf. State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) ("A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which this court reviews under an abuse of discretion standard of review.").

In *Atkins*, the USSC held the execution of a mentally retarded person is cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment. *Atkins*, 536 U.S. at 321. However, the USSC in "*Atkins* 'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment." *Hall v. Florida*, 134 S. Ct. 1986, 1998 (2014) (quoting *Bobby v. Bies*, 556 U.S. 825, 831 (2009)). Instead, the USSC left to the states "the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

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).

Further, this Court has outlined the procedure for the determination of whether a defendant is mentally retarded under *Atkins*. *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). In *Franklin* we explained that:

> the trial judge shall make the determination in a pre-trial hearing, if so requested by the defendant or the prosecution, after hearing evidence, including expert testimony, from both the defendant and the State. The defendant shall have the burden of proving he or she is mentally retarded by a preponderance of the evidence.
>
> If the judge finds the defendant to be mentally retarded by a preponderance of the evidence in the pre-trial hearing, the defendant will not be eligible for the death penalty. If, however, the judge finds the defendant is *not* mentally retarded and the jury finds the defendant guilty of the capital charge, the defendant may still present mitigating evidence that he or she had mental retardation at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(10) (2003). If the jury finds this mitigating circumstance, then a death sentence will not be imposed.

Franklin, 356 S.C. at 279, 588 S.E.2d at 606 (footnote and citations omitted); *see State v. Laney*, 367 S.C. 639, 649, 627 S.E.2d 726, 732 (2006) (concluding that "mental retardation is a threshold issue, decided by the trial judge as a matter of law in a pre-trial hearing, that determines whether a defendant is eligible for capital punishment at all").

Although this Court has established the procedural guidelines for a pre-trial *Atkins* determination, it has never expressly enunciated the appellate standard of review. We conclude, as have other jurisdictions, that a pre-trial *Atkins* determination is analogous to a preliminary finding of whether a defendant is competent to stand trial and, thus, should be reviewed under the same appellate standard. *See State v. Maestas*, 316 P.3d 724 (Kan. 2014) (concluding that preliminary finding that there is "reason to believe" the defendant is mentally retarded is comparable to the preliminary "reason to believe" finding of whether a defendant is competent to stand trial and determining that the same appellate standard of review should apply to both initial determinations); *see also Franklin*, 356 S.C. at 279, 588 S.E.2d at 606 (comparing defendant's burden of proving that he or she is mentally retarded with defendant's burden of proving incompetence by a preponderance of the evidence).

As a result, we hold that a trial judge's ruling regarding an *Atkins* determination will be upheld on appeal if supported by the evidence and not against its preponderance. *Cf. State v. Weik*, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) ("The defendant bears the burden of proving his lack of competence [to stand trial] by a preponderance of the evidence, and the trial judge's ruling will be upheld on appeal if supported by the evidence and not against its preponderance."); *see State v. Strode*, 232 S.W.3d 1, 8 (Tenn. 2007) ("When an accused is afforded an evidentiary hearing on the merits of a motion [to determine whether the defendant was mentally retarded at the time of the offense] in the trial court, the findings of fact made by that court are binding upon the appellate court unless the evidence contained in the record preponderates against those findings.").

Employing this standard of review, we now analyze the trial court's *Atkins* determination. 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. *See State v. Kelly*, 331 S.C. 132, 149, 502 S.E.2d 99,

108 (1998) (recognizing, in reviewing a trial judge's determination of a defendant's competency to stand trial, that the judge is the sole judge of the credibility of the witnesses and the weight to be given their testimony and is entitled to evaluate conflicting testimony).

Further, as we discern no legal error,[10] we believe Blackwell merely seeks for this Court to re-evaluate the testimony and evidence presented during the pre-trial *Atkins* proceedings. Under this Court's highly deferential standard of review, we find the trial court correctly determined that Blackwell failed to prove by a preponderance of the evidence that he is mentally retarded and, thus, ineligible to receive the death penalty.

Initially, we note 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

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[10] Blackwell does argue that the trial court's ruling conflicts with the USSC's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), which held unconstitutional a Florida statute, as interpreted by the Florida Supreme Court, foreclosing further consideration of a capital defendant's intellectual disability if his I.Q. score is more than 70. However, *Hall* does not, as Blackwell proposes, alter the methodology a state court uses to make an *Atkins* determination. In *Hall*, the USSC found that an *Atkins* determination should not be based strictly on an I.Q. score but should also take into consideration other evidence, including the opinions of medical experts. Here, the trial court complied with *Hall* as it properly followed the procedure adopted by this Court in *Franklin* and considered the medical experts' opinions in conjunction with the statutory definition of "mental retardation."

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.[11] Additionally, the court found significant the fact that Blackwell was

[11] Although the trial court did not have the benefit of the USSC's recent decision in *Moore v. Texas*, 137 S. Ct. 1039 (2017), we find the court's analysis comports with this decision. In *Moore*, the defendant was convicted of capital murder and sentenced to death for fatally shooting a store clerk during a robbery that occurred when the defendant was twenty years old. *Id.* at 1044. Subsequently, the defendant sought state habeas relief. *Id*. Pursuant to *Atkins* and *Hall*, a Texas habeas court determined that the defendant was intellectually disabled and, therefore, recommended to the Texas Court of Criminal Appeals ("CCA") that the defendant be granted relief. *Id*. at 1045-46. The CCA disagreed with the recommendation and

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.

After thoroughly reviewing the record, we conclude 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.[12]

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found the habeas court erred by not following the CCA's decision in *Ex Parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004), wherein the CCA adopted the definition of and standards for assessing intellectual disability based on a 1992 edition of the American Association on Mental Retardation manual. *Id.* at 1046. The USSC granted certiorari "to determine whether the CCA's adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment" and the Court's precedents. *Id*. at 1048. The USSC vacated the CCA's judgment, finding "[t]he CCA's consideration of [the defendant's] adaptive functioning . . . deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id*. at 1050. Further, the USSC rejected the CCA's use of the *Briseno* factors, which the Court deemed an "invention of the CCA untied to any acknowledged source." *Id*. at 1044.

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.

[12] The dissent agrees there is evidence to support the trial court's conclusion; however, it finds the decision is against the preponderance of the evidence. In reaching this conclusion, the dissent disregards our deferential standard of review and effectively acts as a trial court rather than an appellate court. Specifically, the dissent improperly makes credibility determinations and evaluates the reliability of the evidence. For example, the dissent: "find[s] most credible, Dr. Calloway"; notes that the "State's expert and the trial judge . . . rely on unreliable school records"; "discount[s] the testimony of the State's experts"; and characterizes Dr. Harrison's

B. Jury Selection

With respect to jury selection, Blackwell contends the trial court erred in qualifying a juror and denying his *Batson* challenge to the State striking two African-American male jurors.

1. Capital Juror Qualification

Blackwell asserts the trial court erred in qualifying Juror 43. Based on Juror 43's responses during *voir dire*, Blackwell claims the juror was opposed to considering all categories of mitigating evidence, particularly a defendant's background, and mistakenly believed the defense had the burden of proving Blackwell deserved a life sentence rather than the death penalty.

In reviewing an error as to the qualification of a juror, this Court engages in a three-step analysis. *State v. Green*, 301 S.C. 347, 352, 392 S.E.2d 157, 159 (1990). First, an appellant must show that he exhausted all of his peremptory challenges. *Id.* Second, if all peremptory challenges were used, this Court must determine if the juror was erroneously qualified. *Id.* at 352, 392 S.E.2d at 160. Third, if the juror was erroneously qualified, an appellant must demonstrate this error deprived him of a fair trial. *Id.*

"A prospective juror may be excluded for cause when his or her views on capital punishment would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *State v. Woods*, 382 S.C. 153, 159, 676 S.E.2d 128, 131 (2009); S.C. Code Ann. § 16-3-20(E) (2015) (providing that a juror may not be excused in a death penalty case unless the juror's beliefs or attitudes against capital punishment would render the juror unable to return a verdict according to law).

"When reviewing the trial court's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire *voir dire*." *Woods*, 382 S.C. at 159, 676 S.E.2d at 131. "The determination whether a juror is qualified to serve in a capital case is within the sole

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conclusion as "demonstrably flawed." Although the dissent may disagree with the trial court's pre-trial *Atkins* determination, it cannot supplant the role of the trial court to judge the credibility of the witnesses, to weigh their testimony, and to evaluate conflicting testimony.

discretion of the trial judge and is not reversible on appeal unless wholly unsupported by the evidence." *Id*.

After reviewing the entire *voir dire* and giving due deference to the trial court, we find Juror 43's responses do not demonstrate that she was unable to render a verdict according to law.[13] During *voir dire*, Juror 43 repeatedly acknowledged that the State always had the burden of proof in a criminal case. In terms of sentencing, she characterized herself as the type of juror who would decide between a sentence of death or life imprisonment after considering the aggravating and mitigating factors.

Though she did express her concern that "something needs to be done" about repeat offenders, she recognized the finality of a sentence of life imprisonment without the possibility of parole and that it could be an appropriate punishment. Further, even though she seemed to minimize a defendant's difficult background as a mitigating factor, stating "I know everybody's life is hard," she later clarified that in determining a sentence "you have to hear everything and work it out."

Additionally, although Juror 43's initial responses to defense counsel appear to indicate her belief that the defense had to prove why a life sentence was the appropriate penalty, she later expressed her understanding that "the defendant never has a burden of proof." Finally, as noted during the trial court's ruling, at the time Juror 43 gave her responses she had not been instructed by the court as to the correct burden of proof.

Because Juror 43 repeatedly affirmed that she would listen to and apply the law as instructed by the trial court, we conclude that certain questionable responses during *voir dire* did not disqualify her from service on a capital case or deny Blackwell a fair trial. Accordingly, we find the trial court did not abuse its discretion in denying Blackwell's motion to excuse Juror 43 for cause. *See State v. Stanko*, 402 S.C. 252, 276, 741 S.E.2d 708, 720 (2013) (holding trial judge did not err in qualifying juror in capital case, despite the juror's responses that she would always vote for the death penalty when murder and an aggravating circumstance were proven beyond a reasonable doubt, where the overall balance of her answers

[13] The State asserts Blackwell is procedurally barred from raising this issue because, at the time Juror 43 was presented as a potential juror, he had not exhausted all of his peremptory challenges. However, we need not engage in this step of the analysis as we find no error in the trial court's decision to qualify Juror 43.

"demonstrate[d] an ability and willingness to be impartial and carry out the law as explained to her").

2. *Batson* Challenge

Blackwell argues the trial court erred in denying his *Batson* challenge to the State striking two African-American male jurors, Juror 45 and Juror 79. Specifically, Blackwell claims the State failed to present racially neutral reasons for striking these jurors given the State did not strike similarly situated Caucasian jurors, who also had criminal records and expressed "pro-life" sentiments during *voir dire*.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001) (citing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

"The United States Supreme Court has set forth a three-step inquiry for evaluating whether a party executed a peremptory challenge in a manner which violated the Equal Protection Clause." *State v. Inman*, 409 S.C. 19, 26, 760 S.E.2d 105, 108 (2014). In *Giles*, this Court outlined the steps as follows:

> First, the opponent of the peremptory challenge must make a prima facie showing that the challenge was based on race. If a sufficient showing is made, the trial court will move to the second step in the process, which requires the proponent of the challenge to provide a race neutral explanation for the challenge. If the trial court finds that burden has been met, the process will proceed to the third step, at which point the trial court must determine whether the opponent of the challenge has proved purposeful discrimination. The ultimate burden always rests with the opponent of the challenge to prove purposeful discrimination.

State v. Giles, 407 S.C. 14, 18, 754 S.E.2d 261, 263 (2014) (internal citations omitted). "Step two of the analysis is perhaps the easiest step to meet as it does not require that the race-neutral explanation be persuasive, or even plausible." *Inman*, 409 S.C. at 26, 760 S.E.2d at 108. As explained in *Giles*:

> in order for the explanation provided by the proponent of a peremptory challenge at the second stage of the *Batson* process to be legally sufficient and not deny the opponent of the challenge, as well as the

> trial court, the ability to safeguard the right to equal protection, it need not be persuasive, or even plausible, but it must be clear and reasonably specific such that the opponent of the challenge has a full and fair opportunity to demonstrate pretext in the reason given and the trial court to fulfill its duty to assess the plausibility of the reason in light of the evidence bearing on it.

Giles, 407 S.C. at 21-22, 754 S.E.2d at 265.

"In contrast, step three of the analysis requires the court to carefully evaluate whether the [opponent of the peremptory challenge] has proven racial discrimination by demonstrating that the proffered race-neutral reasons are mere pretext for discriminatory intent." *Inman*, 409 S.C. at 27, 760 S.E.2d at 108. "During step three, [the opponent of the peremptory challenge] should point to direct evidence of racial discrimination, such as showing that the [proponent of the peremptory challenge] struck a juror for a facially neutral reason but did not strike a similarly-situated juror of another race." *Id.* at 27, 760 S.E.2d at 108-09. "In doing so, the party proves that the 'original reason was pretext because it was not applied in a neutral manner.'" *Id.* at 27, 760 S.E.2d at 109 (quoting *State v. Oglesby*, 298 S.C. 279, 281, 379 S.E.2d 891, 892 (1989)).

"Whether a *Batson* violation has occurred must be determined by examining the totality of the facts and circumstances in the record." *Shuler*, 344 S.C. at 615, 545 S.E.2d at 810. "The trial court's findings regarding purposeful discrimination are accorded great deference and will be set aside on appeal only if clearly erroneous." *State v. Haigler*, 334 S.C. 623, 630, 515 S.E.2d 88, 91 (1999).

After the jury was selected, Blackwell made a *Batson* motion challenging the State's use of peremptory challenges to remove three African-American males from the jury. The jurors that were struck were Juror 45, Juror 79, and Alternate Juror 147.

The State explained that it struck: (1) Juror 45 because he "seemed very pro-life" and had a conviction for criminal domestic violence; (2) Juror 79 because "we felt that he'd be a pro-life juror" and had a criminal record; and (3) Alternate Juror 147 because he gave the impression that he would be a "pro-life juror" and he expressed that he was afraid that something would happen to his family as a result of the death penalty case.

In response, Blackwell claimed the State's reasons were pretextual and then listed five Caucasian jurors he believed were similarly situated to those struck by the State. However, on appeal, Blackwell limits his challenge to Juror 45 and Juror 79 in comparison with four Caucasian jurors: (1) Juror 70, (2) Juror 154, (3) Juror 188, and (4) Juror 266.

As noted by the State, the primary reasons for striking Juror 45 and Juror 79 were that these individuals had criminal records[14] and appeared, based on their *voir dire* responses, to be predisposed to voting for a life sentence. In contrast, of the four jurors identified by Blackwell, only Juror 70 had a criminal record as he had been convicted of criminal domestic violence. Juror 154 had no criminal record as prior charges had been dismissed, Juror 188 had minor pending charges subject to Pre-Trial Intervention, and Juror 266 had no criminal record. Thus, strictly based on this comparison, the only juror that possibly could be deemed similarly situated would have been Juror 70.

However, Juror 70 was not similarly situated to Juror 45 and Juror 79 given his *voir dire* responses revealed meaningful distinctions. *See State v. Scott*, 406 S.C. 108, 115, 749 S.E.2d 160, 164 (Ct. App. 2013) ("[I]n determining whether potential jurors are similarly situated, our courts have focused their inquiry on whether there are meaningful distinctions between the individuals compared." (citation omitted)).

During his questioning, Juror 45 expressed his disapproval of the criminal justice system and the death penalty. Notably, the State voiced concern over Juror 45's qualification even at that point. Juror 79 also gave the impression that he would not be comfortable voting for a death sentence, stating "I was just thinking about it, . . . that's a lot to have on you . . . dawning on you that you somewhat participated in someone's death." As the State claimed, these responses revealed Jurors 45 and 79 were inclined to vote for a sentence of life imprisonment even before hearing the evidence of the case.

In comparison, Juror 70 gave responses that appeared sentence neutral. For example, the juror talked about mercy, implying he could vote for a life sentence, but also indicated he was open to voting for a death sentence if the circumstances warranted. Therefore, while Juror 70 had a criminal record like the two African-American jurors struck by the State, he was not similarly situated to these jurors.

[14] Juror 45 had been convicted of criminal domestic violence and Juror 79 had been convicted of possession of a firearm, shoplifting, and several drug charges.

We find Juror 70's responses distinguished him from Jurors 45 and 79, thus, negating Blackwell's claim that the State's reasons for striking these jurors were pretextual.[15] Accordingly, in view of all of these factors, we find the trial court correctly determined that Blackwell failed to prove a *Batson* violation.

C. Right to Cross-Examine State Witness with Privileged Mental Health Records

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 argues 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.

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). This constitutional right "include[s] the right to cross-examine those witnesses." *Pointer v. Texas*, 380 U.S. 400, 401 (1965). "A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could

[15] Furthermore, even if the pending charges against Juror 188 equate to a criminal record, we find she was not similarly situated to Jurors 45 and 79 as her responses during *voir dire* revealed meaningful distinctions. Specifically, Juror 188 characterized herself as the type of juror who would reach a decision as to the appropriate punishment based on the evidence of aggravating and mitigating circumstances. Although she questioned whether certain crimes warranted the death penalty, she affirmed that she would be open minded to making a decision based on all of the evidence presented.

appropriately draw inferences relating to the reliability of the witness.'" *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986) (internal quotation marks omitted)).

This issue presents the novel question of whether a criminal defendant's constitutional right to confront a witness trumps a witness's state constitutional right to privacy[16] and statutory privilege[17] to maintain confidential mental health records.

While South Carolina appellate courts have yet to answer this specific question,[18] the majority of jurisdictions in the United States have determined that a criminal defendant's right, provided certain requirements are met, may supersede a

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[16] S.C. Const. art. I, § 10 (prohibiting unreasonable invasions of privacy); *see* S.C. Const. art. I, § 24 (outlining Victims' Bill of Rights).

[17] *See* S.C. Code Ann. § 19-11-95(B)(1), (C)(1),(2) (2014) (providing that a mental healthcare provider may not reveal confidential information unless the patient gives written authorization or the confidences are "allowed by statute or other law"); *id.* § 19-11-95(D)(1) (stating, in pertinent part, "[a] provider shall reveal confidences when required by statutory law or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding"); *id.* § 44-22-90(A)(7) (2002) (providing patient's communications with mental health professionals are privileged with limited exceptions, such as if the disclosure is "authorized or permitted to be disclosed by statute"). *See generally* 8 S.C. Jur. *Mental Health* § 39, at 152 (1991) (stating that communications between patients and mental health professionals are privileged but "exceptions are based upon a 'need-to-know,' consent, judicial necessity or an emergency situation" (footnote omitted)).

[18] To a limited extent, our appellate courts have addressed the disclosure of mental health records in criminal proceedings; however, they have never directly analyzed the precise issue presented in the instant case. *See State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000) (affirming, in a capital case, trial judge's decision to order disclosure of mental health records pertaining to defendant's hospitalization for anger management and substance abuse given the records were relevant to the jury's assessment of defendant's character during penalty phase); *State v. Parker*, 294 S.C. 465, 366 S.E.2d 10 (1988) (concluding trial judge properly denied defense motion to offer psychiatric records of third party where evidence proffered by defendant was not inconsistent with his guilt).

witness's rights or statutory privilege.[19] *See N.G. v. Superior Court*, 291 P.3d 328, 337 (Alaska Ct. App. 2012) ("This issue has, however, arisen in other jurisdictions, and a majority of those courts have concluded that, if the defendant makes a sufficient preliminary showing, the defendant is entitled to have the trial court conduct an *in camera* inspection of a government witness's mental health records– and that the witness's psychotherapist-patient privilege can be overridden if the trial court concludes that portions of those records are sufficiently relevant to the defendant's guilt or innocence, or are sufficiently relevant to the witness's credibility.").

In doing so, these jurisdictions have established some variation of a procedure by which a trial court reviews the requested records *in camera* and makes a determination of whether the defendant has established that the records are sufficiently relevant and probative. We are persuaded by the procedure enunciated by the Supreme Court of Kentucky, which provides:

> If the psychotherapy records of a crucial prosecution witness contain evidence probative of the witness's ability to recall, comprehend, and accurately relate the subject matter of the testimony, the defendant's right to compulsory process must prevail over the

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[19] *See N.G. v. Superior Court*, 291 P.3d 328 (Alaska Ct. App. 2012); *State v. Slimskey*, 779 A.2d 723 (Conn. 2001); *Burns v. State*, 968 A.2d 1012 (Del. 2009); *Bobo v. State*, 349 S.E.2d 690 (Ga. 1986); *State v. Peseti*, 65 P.3d 119 (Haw. 2003); *State v. Neiderbach*, 837 N.W.2d 180 (Iowa 2013); *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003); *State v. Johnson*, 102 A.3d 295 (Md. 2014); *Commonwealth v. Dwyer*, 859 N.E.2d 400 (Mass. 2006); *People v. Stanaway*, 521 N.W.2d 557 (Mich. 1994); *State v. Hummel*, 483 N.W.2d 68 (Minn. 1992); *State v. Duffy*, 6 P.3d 453 (Mont. 2000); *State v. King*, 34 A.3d 655 (N.H. 2011); *State v. L.J.P.*, 637 A.2d 532 (N.J. Super. Ct. App. Div. 1994); *State v. Ramos*, 858 P.2d 94 (N.M. Ct. App. 1993); *State v. Blake*, 63 P.3d 56 (Utah 2002); *State v. Green*, 646 N.W.2d 298 (Wis. 2002); *Gale v. State*, 792 P.2d 570 (Wyo. 1990); *but see People v. Hammon*, 938 P.2d 986 (Cal. 1997); *People v. Turner*, 109 P.3d 639 (Colo. 2005); *State v. Famiglietti*, 817 So. 2d 901 (Fla. Dist. Ct. App. 2002); *In re Subpoena to Crisis Connection, Inc.*, 949 N.E.2d 789 (Ind. 2011); *Commonwealth v. Wilson*, 602 A.2d 1290 (Pa. 1992). *See generally* Clifford S. Fishman, *Defense Access to a Prosecution Witness's Psychotherapy or Counseling Records*, 86 Or. L. Rev. 1 (2007) (discussing substantive and procedural implications of conflict between privileged material and constitutional rights of defendants).

> witness's psychotherapist-patient privilege. Upon a proper preliminary showing . . . the witness's psychotherapy records are subject to production for an *in camera* inspection to determine whether the records contain exculpatory evidence, including evidence relevant to the witness's credibility.

Commonwealth v. Barroso, 122 S.W.3d 554, 563 (Ky. 2003).

In contrast to the above-outlined procedure, the trial court in the instant case summarily issued an *ex parte* order granting Blackwell pre-trial access to Angela's records. The trial court's issuance of this order was not necessarily erroneous as a court is statutorily authorized to direct the disclosure of the records. Specifically, section 44-22-100(A)(2) of the South Carolina Code provides that, in the absence of the patient's consent, mental health records must be kept confidential, and must not be disclosed *unless* "a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest." S.C. Code Ann. § 44-22-100(A)(2) (Supp. 2015). However, the court's authority to order disclosure is not without limitation as any disclosure is subject to the prohibitions of applicable federal law. *See id.* § 44-22-100(B)(2) ("Nothing in this section requires the release of records which disclosure is prohibited or regulated by federal law.").

Yet, while the trial court had the authority to order disclosure of Angela's records, the court ordered disclosure prematurely as it ruled the records were "necessary to the adequate preparation of the Defense" and that the defense's request was reasonable without inquiring whether Angela waived her statutory privilege or reviewing the contents of the records *in camera*. Further, aside from the initial disclosure of the records to Blackwell's counsel, the trial court again declined to review the records at trial when offered for cross-examination purposes. Instead, the court categorically foreclosed any further consideration of these records, either at trial or on appeal, based on Angela's assertion of her statutory privilege. By doing so, the trial court discounted Blackwell's right to confrontation and erroneously found that a witness's right to privacy and statutory privilege are absolute.

Given the dearth of South Carolina case law on this issue and the lack of authority presented by the parties, it is understandable how the trial court arrived at this ruling. In order to avoid similar rulings in the future, we now adopt a procedure

that effectuates the legislative mandates of section 44-22-100 of the South Carolina Code and the constitutional protections of the Confrontation Clause.[20]

Accordingly, heretofore, trial judges, *prior to **any** disclosure of privileged mental health records*, should conduct a hearing[21] with the parties in which the judge

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[20] Justice Few effectively deems portions of our analysis inconsequential. In doing so, he removes several analytical blocks with the expectation that the result, to which he agrees, will remain structurally sound.

In contrast to Justice Few, we believe this issue requires a sequential analysis beginning with the trial court's pre-trial ruling. Further, the compulsory process issue is necessary, in other words crucial, to our analysis. A review of the record on appeal and the parties' briefs reveals that this is the precise issue for which they sought resolution from this Court. Given the significance of this novel issue, we decline to take the myopic view as that of Justice Few. Instead, we choose to analyze the issue confronted by the trial court in a manner that not only resolves this portion of Blackwell's appeal but also provides guidance for future requests for the disclosure of a witness's confidential mental health records.

Additionally, we disagree with Justice Few's assessment of *Barroso* as we believe he overstates the import of that decision to our analysis. As stated, we cite *Barroso* as *persuasive* authority, as opposed to controlling, in an effort to explain the statutory procedure mandated by our General Assembly in section 44-22-100. Clearly, we are cognizant of the legislative mandates of section 44-22-100. Consequently, in contrast to Justice Few's characterization of our analysis, we have been careful to neither expand nor limit the statute as written.

[21] This hearing should be conducted *only after* the party requesting the records has met the minimal threshold requirement of presenting evidence sufficient to establish a reasonable belief that the records contain exculpatory evidence, including, but not limited to, evidence relevant to the witness's credibility. *See State v. Johnson*, 102 A.3d 295, 309 (Md. 2014) ("We recognize how unlikely it may be that a defendant or defense counsel will *know* in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information."). We believe this preliminary showing, in contrast to a generalized assertion, is necessary to guard against a "fishing expedition" of a witness's mental health records. The mere fact that a witness has received mental

inquires whether the witness consents to the disclosure of the privileged records. S.C. Code Ann. § 44-22-100(A)(1) (Supp. 2015). If the witness does not consent, the judge alone should review the contents of the records to determine whether "disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest." *Id.* § 44-22-100(A)(2). In making this determination, the judge should assess the importance of the witness to the prosecution's case and whether the records contain exculpatory evidence, including, *but not limited to*, evidence relevant to the witness's credibility.[22]

In the event the judge orders the disclosure of the records,[23] the judge still retains wide latitude to limit the use of the records at trial. *See State v. Turner*, 373 S.C. 121, 130, 644 S.E.2d 693, 698 (2007) (recognizing that trial courts "retain wide latitude, insofar as the Confrontation Clause is concerned, to impose reasonable

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health counseling is not sufficient to warrant an *in camera* hearing as there is no evidence that receipt of counseling somehow automatically makes a witness less credible.

[22] The dissent takes issue with the procedure that we adopt because it "imposes on the trial judge an unreasonable burden." However, this "burden," as characterized by the dissent, is not only statutorily imposed by our General Assembly but generally recognized by our common law in that a trial judge is vested with the sole authority to determine the admissibility of evidence. *See, e.g.*, S.C. Code Ann. § 19-11-95(D)(1) (2014) (stating, in pertinent part, "[a] provider shall reveal confidences when required by statutory law *or by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding*" (emphasis added)); *State v. Evins*, 373 S.C. 404, 421, 645 S.E.2d 904, 912 (2007) (recognizing that the relevance, materiality, and admissibility of evidence are matters within the sound discretion of the trial court).

[23] Even though a party may seek disclosure of a witness's records in their entirety, the judge has the authority to limit the extent of disclosure. *Cf. McMakin v. Bruce Hosp. Sys.*, 318 S.C. 15, 20, 455 S.E.2d 693, 696 (1995) (analyzing procedure used by trial court for disclosure, as identified in section 44-22-100 of South Carolina Code, to determine whether it complied with state and federal law; concluding that, in patient's negligence action against drug treatment facility, identification of patients in question and not their medical records or confidential communications was "necessary to the conduct of proceedings before the court" and was in "the public interest in a judicial system functioning with full discovery powers").

limits on such cross-examination based on concerns about, among other things, prejudice, confusion of the issues, or interrogation that is only marginally relevant").

Here, the trial court erred in granting defense counsel access to Angela's mental health records prior to an *in camera* review, declining to review the records at trial, and refusing to accept the proffer of the records. However, these errors do not automatically warrant reversal as "[a] violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012). "Whether such an error is harmless in a particular case depends upon a host of factors." *Id.* (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986)). "The factors include the *importance of the witness's 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.* (emphasis in original).[24]

In conducting this analysis, we note that this Court accepted the records under seal. Thus, any challenge to the trial court's failure to admit the proffered records for purposes of appellate review is moot. *See Curtis v. State*, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001) (stating that a case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy). Moreover, 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.[25] We also question how this information was probative and how it would have helped Blackwell's case in mitigation.

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[24] Rather than conduct a harmless-error analysis, as we are permitted to do, the dissent believes "we must reverse and remand in order to permit the trial judge to exercise his discretion." Interestingly, it appears the dissent vacillates between acting as an appellate court and a trial court depending on the desired result.

[25] Blackwell emphasizes the fact that Angela was the only eyewitness to the murder. Yet, Blackwell's claim is not entirely accurate because Blackwell's son-in-law, Mark Bryant, testified that he saw Blackwell grab Brooke and hold a gun to the child. Although Blackwell's son-in-law did not witness the shooting because he brought the other children to safety inside the home, he did testify that he heard the shots shortly after entering the home.

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.

D. Exclusion of Hospital Chaplains' Notes

During Blackwell's mitigation case, he attempted to introduce notes from two hospital chaplains who spoke with Blackwell while he was receiving medical treatment after the shooting. The notes stated that Blackwell was "struggling with guilt," was "struggling with his actions," was "sad," "had some prayers in his heart," and "asked for prayers for the family." Blackwell claimed the notes, which he attempted to introduce through a records custodian from the Spartanburg Regional Healthcare System, were being offered to rebut evidence introduced by the State indicating Blackwell's apparent lack of remorse. Specifically, Blackwell referenced the testimony of Spartanburg County Sheriff Deputy Lorin Williams, the officer who questioned him at the hospital after the shooting, stating that Blackwell told him: (1) he had "been having sour thoughts about how to get back at [Bobby Center] for breaking up his marriage"; and (2) "the only thing that I'm sorry about is that I didn't do a better job on myself."

The State objected on hearsay grounds, arguing the information contained in the notes was not in the nature of a medical diagnosis, the chaplains were available as witnesses, and the notes were more prejudicial than probative. The trial court granted the State's motion, finding the notes constituted inadmissible hearsay as they

were not necessary to medical treatment or diagnosis[26] and were in the form of an opinion.

Blackwell contends the notes were admissible pursuant to the business records exception to the rule against hearsay. Alternatively, Blackwell asserts that, even if the evidence violated the South Carolina Rules of Evidence, it was nevertheless admissible under his Eighth Amendment right to present mitigating evidence in a capital case.

"Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *State v. Brockmeyer*, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting *In re Care & Treatment of Harvey*, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *Id.*; Rule 802, SCRE.

Rule 803(6) of the South Carolina Rules of Evidence, which is identified as the business records exception, provides:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or *diagnoses*, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that *subjective opinions and judgments found in business records are not admissible.* The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

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[26] In support of this ruling, the court cited *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408 (Ct. App. 1997), wherein the Court of Appeals found inadmissible a sexual assault victim's statement to a treating nurse that her assailant asked for a hug before the assault. The Court of Appeals determined the statement was not "reasonably pertinent" to the victim's medical diagnosis or treatment and, thus, did not fall within the exception to the rule against hearsay found in Rule 803(4) of the South Carolina Rules of Evidence. *Id.* at 501-02, 492 S.E.2d at 414.

Rule 803(6), SCRE (first and third emphasis added); *see* S.C. Code Ann. § 19-5-510 (2014) ("A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.").

As identified in Rule 803(6), SCRE, the term "diagnoses" is described as:

> Statements made for purposes of *medical diagnosis or treatment* and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as *reasonably pertinent to diagnosis or treatment*; provided, however, that the admissibility of statements made after commencement of the litigation is left to the court's discretion.

Rule 803(4), SCRE (emphasis added).

Business records are admissible under Rule 803(6), SCRE and section 19-5-510 of the South Carolina Code:

> as long[] as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court.

Ex parte Dep't of Health & Envtl. Control, 350 S.C. 243, 249-50, 565 S.E.2d 293, 297 (2002).

Here, during the proffer to the trial court, the records custodian verified that the document containing the hospital chaplains' notes was kept in the regular course of business at Spartanburg Regional Healthcare System and that the document was prepared near the time of the event that was recorded. Although this testimony established the foundational requirements for the admissibility of the business

record,[27] we find the trial court correctly excluded the document as it contained inadmissible subjective opinions and judgments, in particular the notations that Blackwell was "struggling with guilt" and "struggling with his actions."

Nonetheless, even if the trial court erred in excluding the chaplains' notes, we find the error harmless as the evidence was cumulative to other evidence in the record of Blackwell's remorse. *See State v. Northcutt*, 372 S.C. 207, 221, 641 S.E.2d 873, 881 (2007) ("Although it was error to exclude the letter written from Appellant to Ms. Northcutt expressing remorse, the error was harmless. The record contains evidence of Appellant's remorse. Appellant was not prejudiced, nor was the outcome of the trial affected.").

Specifically, as mitigation evidence, Blackwell presented: (1) Dr. Donna Schwartz-Watts, a psychiatrist who evaluated Blackwell, who testified that "[i]t's very hard for [Blackwell] to accept what happened and what he's done," and "he's very sad about it"; (2) Heather Bryant, his daughter, who testified that "he regrets what he has done" and "suffers from that every day"; and (3) Ken Rice, his pastor, who testified that Blackwell told him "God's forgiven me but I can't forgive myself."

Finally, we disagree with Blackwell's claim that because the death penalty is involved the Eighth Amendment bestows upon a defendant the unfettered ability to introduce mitigating evidence. In support of this assertion, Blackwell relies on *Green v. Georgia*, 442 U.S. 95 (1979) and its progeny.[28]

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[27] We disagree with the State's argument that the document did not qualify as a business record because the chaplains' notes were not made for the purpose of medical diagnosis or treatment. Contrary to the State's assertion, the notes were in fact "reasonably pertinent" to Blackwell's medical treatment. The document entitled "Flow Sheet" chronicled Blackwell's healthcare between July 13, 2009 and July 15, 2009 and indicates that it is a record from Spartanburg Regional's "Interdisciplinary Plan of Care." Significantly, this document includes nurses' notes regarding Blackwell's care as well as notes for "Pastoral Assess" and "Pastoral Care."

[28] *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (stating that once the low threshold for relevant evidence is met, "the Eighth Amendment requires that the jury be able to consider and give effect to a capital defendant's mitigating evidence" (internal quotation marks and citation omitted)); *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (holding that "state courts must consider all relevant mitigating evidence and weigh it against the evidence of aggravating circumstances").

Blackwell's reliance on *Green* is misplaced as he overstates the import of that decision. In *Green*, the USSC found mitigating evidence that violated hearsay rules was nonetheless admissible. *Green*, 442 U.S. at 97. However, the USSC expressly limited its decision to the specific facts of the case, which included the admission of an exculpatory confession of a third-party offered through hearsay. *Id.* ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, *under the facts of this case* its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." (emphasis added)). The USSC found that this mitigating evidence, despite its violation of the rules against hearsay, was reliable and highly relevant to a critical issue. *Id.* Because the holding in *Green* was limited to the specific facts of the case, we do not interpret the USSC's decision to require trial courts to disregard evidentiary rules in every instance and, in turn, admit all evidence offered in mitigation.

Moreover, the trial court's exclusion of the hospital chaplains' notes did not impermissibly exclude an entire category of mitigating evidence. Rather, the excluded evidence was cumulative to other properly admitted evidence of mitigation. *See Sheppard v. Bagley*, 657 F.3d 338, 345-46 (6th Cir. 2011) (discussing *Green*, *Eddings*, and *Tennard* and concluding that "these cases concerned the exclusion of an entire *category* of relevant mitigating evidence. They do not impose on state courts a constitutional imperative to admit cumulative or irrelevant evidence").[29]

E. Evidence of Mental Retardation Presented During Penalty Phase

Blackwell raises two challenges to the jury instructions given by the trial court during the penalty phase. First, Blackwell claims the court erred in refusing to charge the jury that the State had the burden of proving beyond a reasonable doubt that Blackwell is not mentally retarded. Second, Blackwell avers the court erred in charging the jury that it was required to find by a preponderance of the evidence that Blackwell is mentally retarded. Blackwell maintains the court's charge effectively

[29] The dissent "would reverse and remand the sentence on this ground alone," apparently finding the exclusion of this evidence was the result of a "rote" application of our state's hearsay rules. While the exclusion of this evidence was based on the trial court's application of Rules 803(4) and (6), SCRE it was not rote given the trial court exercised its discretion as to the admissibility of the evidence. Further, "the after-the-fact evidence of remorse" referred to by the dissent is a proper consideration for harmless-error analysis.

and impermissibly placed upon him the burden of proving the existence of a mitigating circumstance.

As an initial matter, we find Blackwell's first argument to be without merit. This Court has definitively held, and Blackwell readily conceded at trial, "[t]he fact a defendant is not mentally retarded is not an aggravating circumstance that increases a defendant's punishment; rather, the issue is one of eligibility for the sentence imposed by a jury." *State v. Laney*, 367 S.C. 639, 648, 627 S.E.2d 726, 731 (2006). Consequently, because the absence of mental retardation is neither an element of the offense of capital murder nor a statutory aggravating circumstance, the State has no burden of proof. *See id.* (rejecting argument that the prosecution is required to prove the absence of mental retardation in the sentencing phase of a capital murder trial).

Blackwell's second issue, however, presents more difficult questions. Specifically, we must determine, in the penalty phase, (1) the allocation of the burden of proof when a defendant claims mental retardation as an exemption from the death penalty, and (2) the applicable standard of proof for that burden.

In the instant case, the trial court held a charge conference during the penalty phase and considered Blackwell's proposed instructions and verdict form regarding a finding of mental retardation. Throughout the charge conference, Blackwell's counsel repeatedly expressed concern with any instruction that placed the burden of proof on the defense to prove by the preponderance of the evidence that Blackwell is mentally retarded. Counsel further appeared to advocate for a charge that the jury's decision had to be unanimous either in finding mental retardation or rejecting mental retardation.

Ultimately, the court instructed the jury that the "burden of proof is upon the State" and that the State had to prove the existence of one of the aggravating circumstances by proof beyond a reasonable doubt. With respect to mental retardation, the court noted that this was a "threshold matter" on which the defense had presented evidence. The court then instructed:

> Now, in order to establish that the defendant suffered from mental retardation at the time of the crime, that fact must be found by you, the jury, by evidence that you find to be the preponderance of the evidence or the greater weight of the evidence. This is a different standard of proof th[a]n I've discussed with you in the past in this case. Normally, in a criminal proceeding, facts are to be proven beyond a reasonable doubt. That's not the standard as to this particular question

> or issue. The level of proof as to this question is lower than proof beyond a reasonable doubt.
>
> Again, for a finding by you . . . on this matter, the level of proof must be by the great weight or preponderance of the evidence.

As to this finding, the court instructed the jury to consider the separate verdict form, which stated:

> We, the jury, unanimously find by the preponderance of the evidence that the Defendant was mentally retarded as defined as, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period at the time of the commission of the crime of murder in this case.

The form had blanks for the jury to indicate either "Yes," "No," or that they were unable to make a unanimous finding. The form instructed that: (1) if the jury answered "Yes" it was to stop its deliberations; and (2) if the jury answered "No" or was unable to make a unanimous finding it was to proceed with further deliberations. The trial court explained this verdict form and further instructed that if the jury answered "No" or was unable to make a unanimous determination that the jury could still consider the factor of mental retardation as a mitigating factor. The court explained that:

> [S]hould the jury find that the defendant was not mentally retarded or should, after a full and thorough deliberations, the jury not be able to make a unanimous finding as to this question, the factor of mental retardation can - - is still a mitigating factor that the jury can consider along with other mitigating factors in this case.

With respect to mitigating factors, the court identified five statutory mitigating circumstances.[30] The court explained that, if the jury had "gotten past [the] threshold

[30] The judge instructed the jury on the following statutory mitigating circumstances: (1) the defendant had no significant history of prior criminal conviction involving the use of violence against another person; (2) the murder was committed while the defendant was under the influence of mental or emotional disturbance; (3) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired; (4) the age or mentality of the defendant at the time of the crime; and (5) the defendant had mental

issue" of mental retardation, it could still consider evidence of mental retardation to be a mitigating factor in reaching a verdict. The court further instructed that:

> While there must be some evidence which supports a finding by you that a statutory or nonstatutory mitigating circumstance exist[s], you need not find the existence of such a circumstance by proof beyond a reasonable doubt or any other level of proof. You may consider any mitigating circumstance supported by the evidence submitted to you, and you must determine whether the evidence exists and the significance to be given to that evidence.

At the conclusion of deliberations, the jury answered "No" on the separate verdict form as to a finding of mental retardation. The jury then recommended a sentence of death, determining 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.

While we find no error in the trial court's instructions, we take this opportunity to refine the *Atkins* procedure enunciated in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003), particularly the allocation of the burden of proof and appropriate standard of proof in presenting a claim of mental retardation during the penalty phase of a capital trial.

> As established in *Franklin*, the defendant, in the pre-trial *Atkins* proceeding, has the burden of proving he or she is mentally retarded by a preponderance of the evidence. *Franklin*, 356 S.C. at 279, 588 S.E.2d at 606. The rationale for the defendant bearing this burden is that a finding of mental retardation constitutes an absolute bar to the imposition of the death penalty and, thus, is an affirmative defense. *See Winston v. Commonwealth*, 604 S.E.2d 21, 50 (Va. 2004) ("In the context of capital crimes, the issue of retardation is not an element of the offense; rather, it is an affirmative defense to the imposition of the death penalty.").

Therefore, as with most affirmative defenses in this state save for self-defense,[31] we discern no reason to depart from placing the burden on the defendant

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retardation at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(1), (2), (6), (7), (10) (2015).

[31] *See State v. Bixby*, 388 S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (recognizing that self-defense consists of four elements, and when a defendant raises

to prove, in capital-sentencing proceedings, that he or she is mentally retarded by a preponderance of the evidence. *See State v. Attardo*, 263 S.C. 546, 551, 211 S.E.2d 868, 870 (1975) ("[A]ffirmative defenses must be established by the party interposing them and by a preponderance of the evidence."); *cf.* S.C. Code Ann. § 17-24-10 (2014) (providing that the defense of insanity is an affirmative defense that must be proven by the defendant by a preponderance of the evidence).[32]

Even though this procedure may be perceived as affording a defendant the opportunity to re-litigate the denial of a pre-trial *Atkins* determination, we believe the pre-trial and penalty phase presentations effectuate the procedure identified in *Franklin*. In the pre-trial determination, the trial judge decides whether the case will proceed as a capital trial. At that early stage, the evidence may be limited and, thus, lends itself to simply a threshold determination of whether the defendant is eligible for the death penalty. If the trial judge finds the defendant has met his or her burden of proving mental retardation, then a lengthy, expensive capital trial will be avoided. However, if the case proceeds as a capital trial, the jury will have before it more

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that defense, the State bears the burden of disproving at least one of the elements beyond a reasonable doubt).

[32] We note the statutorily or judicially adopted procedures implementing *Atkins* vary by state; however, the majority of state jurisdictions allocate the burden of proof to the defendant and assign a preponderance of the evidence standard of proof to this burden. *See Bowling v. Commonwealth*, 163 S.W.3d 361, 382 (Ky. 2005) (discussing state approaches to providing mental retardation exemption from death penalty; recognizing that nearly every court that has addressed this issue places the burden on the defendant to prove that he is mentally retarded and noting that sixteen state statutes require proof by a preponderance of the evidence and "[a]ll courts that have considered this issue in the absence of a statute have held that the defendant is required to prove entitlement to the *Atkins* exemption by a preponderance of the evidence"). *See generally* Nava Feldman, Annotation, *Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes "Cruel and Unusual Punishment" in Violation of Eighth Amendment*, 122 A.L.R.5th 145 (2004 & Supp. 2016) (identifying standard and burden of proof for *Atkins* determination in state and federal jurisdictions), *superseded in part by*, George L. Blum, Annotation, *Adequacy Under Strickland Standard of Defense Counsel's Representation of Client in Sentencing Phase of State Court Death Penalty Case—Investigation of, and Presentation of Evidence Regarding Client's Low Intelligence or Mental Retardation*, 5 A.L.R.7th Art. 6 (2015).

information about the defendant. As a result, the jury will be able to thoroughly assess whether the defendant is mentally retarded and exempt from the death penalty. Given the gravity of a capital sentence, we believe the presentation to the jury operates as an additional safeguard against the risk of executing an individual who is mentally retarded.

Yet, as demonstrated by the facts of this case, the question remains how the jury should review evidence of mental retardation in the event it finds the defendant is not mentally retarded. While such a finding eliminates the absolute bar on the imposition of the death penalty under *Atkins*, it does not negate the existence of evidence that may establish a mitigating circumstance as provided by our General Assembly. *See State v. Laney*, 367 S.C. 639, 649, 627 S.E.2d 726, 732 (2006) ("In *Atkins*, the Supreme Court determined that mental retardation should be considered apart from mitigating circumstances."). Because there are different levels of intellectual functioning, not all of which meet the diagnostic criteria for mental retardation to satisfy the *Atkins*' prohibition,[33] we find the evidence should be considered to determine the existence of statutory mitigating circumstances, in particular those involving the mental health and mentality of the defendant at the time of the crime. *See* S.C. Code Ann. § 16-3-20(C)(b)(2), (6), (7) (2015); *Laney*, 367 S.C. at 651, 627 S.E.2d at 732-33 (Pleicones, J., concurring) (distinguishing between capital jury's determination of mental retardation under *Atkins* and consideration of the defendant's mental health as a mitigating circumstance).

Thus, unlike the preponderance of the evidence burden required for the *Atkins*' exemption, the capital defendant bears no burden of proof with regard to this evidence of mitigation. *See State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998) ("There is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances."); *State v. Bell*, 293 S.C. 391, 405, 360 S.E.2d 706, 713 (1987) ("There is no burden of proof on a capital defendant with regard to evidence of mitigating circumstances. Rather, the jury is to consider the evidence presented and determine whether the mitigating factors exist and, if so, the significance to be accorded them.").

Here, we find the trial court correctly instructed the jury and, thus, expressly adopt this procedure. Specifically, when a capital defendant raises an *Atkins* claim during the penalty phase, the trial judge should instruct the jury that: (1) the

[33] *See Atkins*, 536 U.S. at 317 ("Not 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.").

defendant has the burden of proving he or she is mentally retarded by the preponderance of the evidence; (2) a determination that the defendant is mentally retarded eliminates further deliberation regarding the imposition of the death penalty; (3) a finding that the defendant is not mentally retarded permits the jury to consider evidence of mental retardation in order to determine the existence of other statutory mitigating circumstances, in particular those involving the mental health and mentality of the defendant at the time of the crime; and (4) it should determine the existence of evidence of a mitigating circumstance without concern for a standard of proof. We find this procedure harmonizes the mandates of the USSC in *Atkins* with the capital-sentencing procedures identified by our General Assembly.[34]

F. Proportionality Review

Finally, we have conducted the requisite proportionality review pursuant to section 16-3-25 of the South Carolina Code. S.C. Code Ann. § 16-3-25(C) (2015); *see State v. Wise*, 359 S.C. 14, 28, 596 S.E.2d 475, 482 (2004) ("The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant."). In conducting this review, we searched for similar cases in which the sentence of death has been upheld. *See* S.C. Code Ann. § 16-3-25(E) (2015) (providing that in conducting a sentence review the Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration").

After reviewing the entire record, we conclude the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of two statutory aggravating circumstances for the murder is supported by the evidence. Furthermore, a review of prior cases establishes that the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *See State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) (concluding death sentence was warranted where defendant was convicted of murder, kidnapping, and first-degree criminal sexual conduct with a minor); *State v. Rogers*, 338 S.C. 435, 527 S.E.2d 101 (2000) (affirming sentence of death for defendant convicted of murdering a nine-year-old child).

[34] The dissent would adopt a procedure statutorily created in North Carolina. Unlike the dissent, we decline to look outside of our jurisdiction as we need only to refine the procedure established by this Court and our General Assembly.

IV. Conclusion

Based on the foregoing, we affirm Blackwell's convictions and sentence of death.

AFFIRMED.

KITTREDGE and HEARN, JJ., concur. FEW, J., concurring in a separate opinion. Acting Justice Costa M. Pleicones, dissenting in a separate opinion.

JUSTICE FEW: I concur with the majority opinion except for subsection III.C. I would analyze the issues addressed in that subsection differently, but reach the same result—affirm.

First, the majority finds error in the trial court's pretrial ruling requiring disclosure of Angela's records to Blackwell's counsel. I do not believe we should address this point because Angela has not appealed the ruling and Blackwell was not aggrieved by it. *See* Rule 201(b), SCACR ("Only a party aggrieved by an order, judgment, sentence or decision may appeal."). Blackwell actually benefitted from the ruling because it allowed his counsel access to Angela's records.

Second, because Blackwell had the records and had ample time to review them prior to trial, it is not necessary for us to address compulsory process issues in order to reach a decision in this case. Therefore, it is not appropriate in this case for us to delineate a procedure trial courts must follow to resolve future requests for disclosure of records under subsection 44-22-100(A)(2) of the South Carolina Code (Supp. 2016). In any event, subsection 44-22-100(A) itself contains a procedure for compulsory process. It provides that the records to which it applies "must be kept confidential, and must not be disclosed unless . . . (2) a court directs that disclosure is necessary for the conduct of proceedings before the court and that failure to make the disclosure is contrary to public interest." This subsection already requires the court to balance the privilege and a patient's right to privacy against the rights of a litigant and the public interest. In future cases, our courts will address issues that require us to further define how that balance should be struck, but because the records were disclosed to Blackwell, it is not necessary to do so in this case.

I am particularly concerned about the majority's reliance on *Commonwealth v. Barroso*, 122 S.W.3d 554 (Ky. 2003). In *Barroso*, the Supreme Court of Kentucky considered an appeal from a trial court's factual ruling that "the records contained no exculpatory evidence or information otherwise pertinent to J.H.'s credibility as a witness." 122 S.W.3d at 557. The *Barroso* court "reviewed the records and determined that the trial judge correctly determined that they contain no exculpatory information." 122 S.W.3d at 564. Thus, the *Barroso* court's analysis regarding compulsory process procedures was not necessary to its decision and is not authoritative even under Kentucky law. *See Cawood v. Hensley*, 247 S.W.2d 27, 29 (Ky. 1952) ("A statement in an opinion not necessary to the decision of the case is obiter dictum. It is not authoritative . . . .").

In addition, the *Barroso* court analyzed a rule of evidence that is materially different from the South Carolina statute applicable in this case. The court explained that Kentucky Rule of Evidence 507(b)[35] sets forth a psychotherapist-patient privilege against disclosure of confidential communications, but includes only three exceptions, "none of which applies" when a court is asked to require disclosure for purposes of impeaching a state's witness in a criminal trial. 122 S.W.3d at 557-58. The court summarized, "Other than the three specified exceptions, . . . the psychotherapist-patient privilege is an 'absolute' privilege, *i.e.*, one that is not subject to avoidance because of a 'need' for the evidence." 122 S.W.3d at 558.

In this context of two significant distinctions between *Barroso* and this case, we confront the word "crucial." While I do not know what the Supreme Court of Kentucky intended by limiting disclosure of privileged communications to "a crucial prosecution witness," I do not believe the limitation is consistent with the standard our Legislature set in subsection 44-22-100(A)(2)—"necessary" and in the "public interest."

I do agree with the majority that the trial court erred in refusing to consider whether to admit the records into evidence on Blackwell's cross-examination of Angela. While I have doubts as to whether this refusal violated the confrontation clause, *see Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986) (finding a confrontation clause violation when "the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased" (emphasis in original)), I have no doubt the trial court erred by refusing to consider admitting the evidence under state evidence law, *see* Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness . . . ."); *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) (stating "generally, 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony'").

I also agree with the majority's harmless error analysis.

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[35] The Kentucky Rules of Evidence were enacted as statutes by the Kentucky General Assembly. *See* 1990 Ky. Acts ch. 88; 1992 Ky. Acts ch. 324.

ACTING JUSTICE PLEICONES: I respectfully dissent. As explained below, I would find that Blackwell is mentally retarded[36] and ineligible for the death penalty. Moreover, I would find the trial court's error of law in refusing to consider whether Angela could be cross-examined based upon her mental health records requires a new trial on the issue of guilt. If there is to be a resentencing proceeding, then I would require the intellectual disability issue be (re) determined by the jury prior to hearing the aggravation/mitigation evidence. Should the jury determine he remains eligible, I would find the chaplains' notes should have been admitted, and would permit the trial judge to rule on the use of mental health records at this stage of the proceedings.

A. Pre-trial *Atkins*[37] Determination

I agree with the majority that there is evidence in the record to support the trial judge's conclusion, but find his decision is against the preponderance of the evidence. I would hold that Blackwell is ineligible for a death sentence because he is mentally retarded within the meaning of S.C. Code Ann. § 16-3-20(C)(b)(10) (2016), and would therefore vacate his death sentence.

At the pre-trial *Atkins* hearing, Blackwell had the burden of proving by a preponderance of the evidence that he was mentally retarded, that is, that he had "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." § 16-3-20(C)(b)(10); *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). I agree with the majority that we should review the trial judge's pre-trial *Atkins* determination using the same standard we employ when reviewing a trial court's competency decision, that is, we should affirm that decision if it is "supported by the evidence and not against its preponderance." *State v. Weik*, 356 S.C. 76, 81, 587 S.E.2d 683, 685 (2002) (internal citation omitted). In other words, our scope of review allows us to consider the weight of the evidence, as well as its existence. *Id.*; *see also State v. Nance*, 320 S.C. 501, 506, 466 S.E.2d 349, 352 (1996) (subsequent history omitted) (reviewing evidence of competency and indicating agreement with one doctor's view).

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[36] As the applicable statute employs this term, I use it here as well. *Cf.*, *State v. Stanko*, 402 S.C. 252, 741 S.E.2d 708 (2013) (finding the applicable definition is that in S.C. Code Ann. § 44-20-30 (Supp. 2015), which uses the term "intellectual disability," defined identically to "mental retardation" in death penalty statute).

[37] *Atkins v. Virginia*, 536 U.S. 304 (2002).

Our statute requires that the defendant claiming to be ineligible for execution establish (1) significantly subaverage general intelligence and (2) defects in adaptive behavior such as communication, self-care, and self-direction that (3) manifest themselves during the developmental period, i.e., before the age of 18. *State v. Stanko*, *supra*. This case points out the special difficulties in making such a showing when the defendant committed the predicate offense at the age of 50,[38] was first evaluated for mental retardation at age 53[39]/55,[40] and whose alleged intellectual disability places him in the mildly disabled range. In my view, we must keep in mind, as the State's expert Dr. Brown recognized, "The absence of records indicating a diagnosis of intellectual disability prior to the age of eighteen cannot suffice to rule out such a diagnosis."

In my opinion, the absence of contemporaneous I.Q. records from Blackwell's youth led one of the State's experts and the trial judge to rely on unreliable school records. Further, the dearth of information related to Blackwell's early adaptive behavior led the experts and the trial judge to rely on Blackwell's adult behavior, in violation of the statutory mandate that requires that the relevant period is the "developmental period." While I agree that a focus on the defendant's general intellectual functioning and adaptive behavior at the time he commits the offense more perfectly meets the Eighth Amendment concerns that underlie the *Atkins* bar,[41] our statute mandates that the decision whether the defendant is mentally retarded and therefore ineligible for execution be based upon the defendant's pre-majority status. *State v. Stanko*, *supra*; *compare Hall*, *supra* at 2001, remanding to allow the defendant to present evidence of "defects in adaptive functioning over his

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[38] Blackwell's date of birth is November 18, 1958, and the offense was committed in July 2009.

[39] Dr. Calloway's evaluation.

[40] Dr. Brown's evaluation.

[41] Those concerns are that intellectually disabled persons, while frequently aware of the difference between right and wrong and competent to stand trial are, nonetheless, "likely unable to make the calculated judgments that are the premise for the deterrence rationale," that their intellectual disability "lessens moral culpability and hence the retributive value of the punishment;" and the concern for " the integrity of the trial process." *Hall v. Florida*, 132 S.Ct. 1986, 1993 (2014).

lifetime" as permitted under Florida law.[42] As required by statute, I have focused my review on the scant evidence of Blackwell's adaptive behavior before the age of 18 and upon the opinion of the expert I find most credible, Dr. Calloway, who testified on behalf of Blackwell.

Before reviewing the evidence, I explain why I discount the testimony of the State's experts. Blackwell relied upon the testimony of Dr. Calloway, a psychologist who was qualified as an expert in mental retardation/intellectual disability assessment, and who conducted an *Atkins* exam. The State presented testimony from two experts, Dr. Brown and Dr. Harrison. Dr. Brown, who conducted an *Atkins* evaluation, was qualified as an expert in the field of clinical forensic psychology, and had, while primarily employed by the Department of Disabilities and Special Needs, conducted five *Atkins* evaluations. The State's other expert witness, Dr. Harrison, also an expert in clinical forensic psychology, did not conduct an *Atkins* evaluation but instead examined Blackwell for competency pursuant to a court order.

While the trial judge discounted Dr. Calloway's testimony in part because she "was required to issue a supplemental report to correct glaring errors in her initial report," I am much more concerned by Dr. Brown's reliance on Dr. Harrison's demonstrably flawed conclusion. I accord little, if any, weight to Dr. Harrison's opinion on the *Atkins* issue, especially since she was not asked to make such a finding, and conducted no investigation. Instead, Dr. Harrison testified that she determined during the course of her assessment of Blackwell's competence to stand trial, including an hour and twenty-minute interview which she testified "was solely focused on his competency to stand trial," that there was not "enough indication that would suggest referring the case to the DDSN" for an *Atkins* evaluation. Dr. Brown, the State's *Atkins* expert, testified that while in Dr. Harrison's report she "points out that there may be a strong possibility of mental retardation" she ultimately determined that Blackwell did not meet the criteria. My confidence in Dr. Brown's analysis and *Atkins* opinion is seriously weakened by his admission that he gave "a great deal of significance" to Dr. Harrison's opinion. As noted above, Dr. Harrison was not tasked with making a mental retardation assessment, and admittedly conducted no testing to arrive at her conclusion but rather relied upon what she perceived to be valid school I.Q. scores, and her competency interaction with Blackwell. However, both of the *Atkins* examiners, Dr. Brown and Dr. Calloway, testified that these school I.Q. scores were not reliable in that they were not true I.Q. tests but rather scores "derived" from other

[42] *See*, *e.g.*, *Jones v. State*, 966 So.3d 319 (Fla. 2002).

generalized testing. For these reasons, I find Dr. Harrison's opinion that Blackwell is not mentally retarded to be of no value, and Dr. Brown's *Atkins* conclusion to be substantially weakened by his admission that he was strongly influenced by that opinion.

Turning to the first mental retardation consideration, general subaverage intellectual functioning, defense expert Dr. Calloway testified, and the State's expert Dr. Brown agreed, that their I.Q. testing of Blackwell conducted in his mid-50s revealed he was mildly retarded.[43] While Dr. Brown speculated that perhaps Blackwell's chemotherapy, a four-wheeler accident, and alcohol and drug use after the age of 18 may have affected his I.Q. score, he agreed there was "absolutely no evidence of that." Despite Dr. Brown's candid testimony that there was no evidence that any of these post-developmental period events had impacted Blackwell's I.Q., the trial judge found Blackwell's current low I.Q. scores "carry with them the possibility that they may have been adversely affected by events occurring in his adult life."

The trial judge found "the most reliable measures of Blackwell's I.Q. prior to age 18" are found in school "I.Q." scores and held he could not rule out the possibility that Blackwell's I.Q. had deteriorated during his adult years, concluding Blackwell had not met his burden of proving that he had "general subaverage intellectual functioning that manifested itself during the developmental period." I disagree. I would find the weight of the evidence preponderates in favor of a finding that Blackwell exhibited "significantly subaverage general intellectual functioning . . . during the developmental period" within the meaning of § 16-3-20(C)(b)(10). In making this finding, I rely not only on the *Atkins* experts' opinions but also on Blackwell's academic performance, which is probative of both his general intellectual functioning and his adaptive behavior.

The question whether the evidence preponderates in favor of a finding that Blackwell had deficits in adaptive behavior before the age of 18 is closer, in large part because it requires hindsight and necessarily relies on the memories and recollections of persons who knew Blackwell more than 35 years ago. Before looking at the evidence here, I note that in *Stanko* we spoke of adaptive behavior as evidenced by significant limitations in skills such as communication, self-care, and self-direction, citing *Atkins*. *State v. Stanko*, 402 S.C. at 286, 741 S.E.2d at 726. As I read the United States Supreme Court's more recent discussion of adaptive

[43] Dr. Calloway obtained a score of 63 or 65 and Dr. Brown of 68. Dr. Brown agreed Blackwell's score "clearly puts" him in the mentally retarded range.

behavior in *Hall v. Florida*, we should also look broadly at the individual's ability to learn basic skills and to adjust his behavior to changing circumstances.

Here, the school records demonstrate that in elementary school standardized achievement testing Blackwell received only a single score which placed him above the 50% average score. By high school, Blackwell was placed in classes for children who were achieving at a lower level. These "adjunct classes" were offered in lieu of special education classes, and, as in those classes, the course work was geared to the individual's ability. The classes were not on the regular academic track but were more of a vocational nature. Despite being placed in these adjunct classes, Blackwell failed the ninth grade, and then dropped out during the 11th grade at which point his class standing was 113th in a class of 113.[44] A high school teacher reported he was not a troublemaker, blended in, and would speak if spoken to.

A number of individuals were administered the Adaptive Behavior System (ABAS-II) scale by Dr. Calloway. While the State's *Atkins* expert Dr. Brown discounted the usefulness of ABAS testing, he acknowledged it was "the best that we have" especially to measure the *Stanko*/*Atkins* adaptive behavior factors. Four of these individuals, Blackwell's parents, a teacher (Scruggs), and a neighbor (White), knew Blackwell as a child. The average of these four individuals' scores on "Communication" was 4, which is considered a significantly low score (the average score is 10). On the "Self-Care" scale, the average of these four individuals was 6, while on the self-direction scale (only three persons participating), the average score was 5.3, again well below average. Dr. Calloway, the defense expert, found the ABAS-II results, other records, and additional information, demonstrated that Blackwell had adaptive behavior deficits which manifested themselves before the age of 18. Dr. Brown, the State's expert, merely opined that while Blackwell arguably demonstrates significant adaptive deficits at age 55, it is "not clear" whether he met the criteria before age 18. Dr. Brown also testified he was troubled by the use of ABAS-II to relate back to Blackwell's functioning before the age of 18, and that he relied instead on Blackwell's vocational history after the age of 18, his ability as an adult to obtain a Commercial Driver's license, and the fact that Blackwell was "on track" to graduate when he dropped out of high school. In my opinion, while imperfect, the ABAS-II relates to Blackwell's developmental period which is the appropriate evaluation period.

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[44] The trial judge was impressed by Blackwell's grade of "90" for the first semester of "Family Living." I am not so very impressed given in another adjunct class he was given credit for mowing the athletic fields.

To the extent he relied on post-18 conduct, Dr. Brown's opinion is flawed, leaving standing only his opinion that it is "not clear" whether Blackwell's pre-18 adaptive behavior was deficient. Finally, as the United States Supreme Court instructed in *Hall v. Florida*, I look at the test results of basic academic skills administered to Blackwell at age 17. The results indicate he was reading at a grade level of 5.8, while his arithmetic scores tested at grade level 5.6. In my opinion, Blackwell met his burden of showing his deficits in adaptive behavior during the developmental period.

The trial judge, however, found no evidence that Blackwell was "unable to function at his home before his eighteenth birthday," that he attended school regularly and did not fail a grade until high school, and that he was able to earn high school credits before dropping out. In my opinion, these findings are supported by the record but do not properly focus on specific conduct which demonstrates adaptive behavior. Further, while the trial court found Blackwell's achievement scores at the age of 18, which show him functioning like an average mid-year fifth grader, was evidence of "average general intellectual functioning," I find them consistent with mild mental retardation. Finally, the trial court relied upon Blackwell's post-majority employment history and his twenty-six year marriage, which included raising two children, to conclude that while there were factors which raised the possibility of mental retardation, Blackwell did not meet his burden of proof. In my opinion, it is improper to use post-developmental adaptive behavior to determine statutory mental retardation. In addition, I note these broad outlines of Blackwell's post-18 life ignore the details which demonstrate Blackwell's significant limitations, such as an inability to manage a household and live alone, to pay bills, etc. This "broad view" error is also reflected in the trial judge's finding that Blackwell was "on track to graduate" when he left high school in 11th grade, which does not focus on Blackwell's largely marginal functioning in adjunct classes.[45]

As explained above, while there is evidence that would support the trial judge's decision, I find Dr. Calloway to be the most credible *Atkins* examiner, and I find that her opinion and the other evidence in the record preponderates in favor of a

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[45] I fear that the trial judge's reliance on Blackwell's "perceived adaptive strengths" will be found to have unconstitutionally skewed his view of the evidence since, as the United States Supreme Court recently explained, "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." *Moore v. Texas,* 581 U.S. ___, ____ (2017)(emphasis in original).

finding that Blackwell is mildly mentally retarded within the meaning of § 16-3-20(C)(b)(10) and therefore ineligible for the death penalty.

B. Cross-Examination with Privileged Mental Health Records

I agree with the majority that a criminal defendant's Sixth Amendment right to confrontation may trump a witness' state constitutional right to privacy and/or statutory privilege in her confidential mental health records. In my opinion, having decided this novel issue of law in Blackwell's favor and determined that the trial court committed an error of law in refusing to consider whether Blackwell could use these records in cross-examining or impeaching Angela during the guilt phase or in the penalty phase, we must reverse and remand in order to permit the trial judge to exercise his discretion. It is not within our appellate scope of review to make these rulings for the first time on appeal. *State v. Hewins*, 409 S.C. 93, 102-103, 760 S.E.2d 814, 819 (2014) (in criminal case appellate court reviews errors of law only; exclusion of evidence based on error of law is abuse of discretion requiring reversal). I therefore dissent from the majority's decision to supplant the trial judge's discretion and rule on a factual issue on appeal. *See State v. Hewins*, *supra* at 118-119, 760 S.E.2d at 827 (2014) (Pleicones, C.J., dissenting from majority's decision to rule on merits of a suppression motion on appeal).

In addition, I do not believe the majority proposes a workable procedure to deal with the disclosure issue going forward. By holding that the judge alone reviews the mental health records and, without benefit of input from the advocates and prior to hearing any evidence, both weighs the witness' "importance" to the case and determines whether the records contain impeaching or exculpatory evidence, the majority imposes on the trial judge an unreasonable burden. The unworkable nature of this procedure is demonstrated by the majority's own analysis, which relies on the record first to understand the defense's strategy and then to weigh the State's evidence of malice, before citing cumulative evidence as the reason to deny Blackwell the opportunity to have the trial judge review his request. In addition, the majority relies on Blackwell's admission that he killed the victim as admission of guilt precluding any prejudice finding, and in so doing discounts the potential relevance of the evidence in the mental health records to Blackwell's mental duress mitigation claim in the sentencing phase.

I respectfully dissent and would reverse and remand, with instructions that attorneys may have access to the mental health records prior to an *in camera* hearing on their use in the cross-examination of a witness, and that any pre-

testimony ruling may be revisited during the trial, depending on the actual testimony of the witness.

C. Chaplains' Notes

During the penalty phase, Blackwell sought to introduce the notes made by two hospital chaplains to rebut the State's evidence that immediately after the killing Blackwell exhibited no remorse. The chaplains' records were proffered by the hospital's records custodian under the "business records" exception to the hearsay rule, Rule 803(6), SCRE, and not, as the majority suggests, as "Medical Diagnosis or Treatment" statements under Rule 803(4), SCRE. To the extent the notes record Blackwell's contemporaneous expressions of remorse,[46] they cannot be, as the majority states "inadmissible subjective opinions and judgments" under Rule 803(6). Further, the refusal to admit the chaplains' contemporaneous impressions of Blackwell's regret and remorse, while perhaps subjective (even though made by professionals uniquely prepared to make exactly these types of judgments) denied Blackwell's jury the right to consider this mitigation evidence. The United States Supreme Court has repeatedly cautioned "that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule." *Sears v. Upton*, 561 U.S. 945 (2010) fn. 6 citing *Green v. Georgia*, 442 U.S. 95 (1979); and *Chambers v. Mississippi*, 410 U.S. 284 (1973); *cf. State v. Mercer*, 381 S.C. 149, 161, 672 S.E.2d 556, 562 (2009) (Rule 403, SCRE, "should be cautiously invoked against a capital defendant in the penalty phase, especially in light of the due process implications at stake when a capital defendant seeks to introduce mitigation evidence"). In my opinion, the trial court erred in refusing to admit these records.

Finally, I disagree that the after-the-fact evidence of remorse testified to by Blackwell's daughter and minister, as well as the testimony of Dr. Schwartz-Watts, is cumulative to Blackwell's contemporaneous expressions of remorse reflected in the chaplains' notes. I would reverse and remand the sentence on this ground alone.

[46] *E.g.*, that Blackwell was sad, wanted to tell his grandchildren he loved them, asked for prayers for the family, and prayed the Lord's Prayer with the chaplain.

D. Mental Retardation During Penalty Phase

I agree with the majority that a capital jury must find, as a prerequisite to proceeding to decide the appropriate sentence, that the defendant is not mentally retarded. Further, I agree that where the issue of mental retardation is raised by the evidence, the burden is on the defendant to prove this disqualifying factor by a preponderance of the evidence and the jury should be so instructed. In my opinion, however, mental retardation is not an "affirmative defense" as the majority states, but rather a condition whose absence is a necessary predicate to the State's right to seek the death penalty.

I would borrow our sister state of North Carolina's statutory procedure[47] whereby if the defendant asserts intellectual disability as a disqualifying fact during the sentencing phase, all evidence relevant to that issue should be presented first, and the jury instructed on this issue alone prior to the introduction of any mitigating or aggravating evidence. If the jury determines by special interrogatory following the presentation of the evidence that the defendant is mentally retarded, then the defendant should be sentenced by the judge. In my opinion, a jury that is permitted to consider the mental retardation issue in isolation, prior to the evidence of aggravation and mitigation, is more likely to be able to fairly consider the question than one whose view of the defendant has been shaped by the sentencing phase evidence that is both irrelevant and prejudicial to the claim of intellectual disability. I would reverse and remand Blackwell's sentence on this ground as well.

E. Conclusion

In my opinion, we should set aside Blackwell's capital sentence because he proved, by a preponderance of the evidence that he is (mildly) mentally retarded within the meaning of § 16-3-20(C)(b)(10). I would reverse and remand for a new trial based upon the trial judge's error of law in refusing to consider whether Blackwell should have been permitted to utilize the witness' confidential mental health records in cross-examination. Finally, I would hold that if a new sentencing proceeding is held, the trial judge should again consider the use of the witness' records, should permit the use of the chaplains' notes, and that the two-step procedure should be

[47] *See* N.C.G.S. § 15A-2005(e) (2007).

used to allow the sentencing jury to decide the mental retardation issue before hearing any other evidence.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Eric Terrell Spears, Appellant.

Appellate Case No. 2015-000390

Appeal From Richland County
Robert E. Hood, Circuit Court Judge

Opinion No. 5489
Heard February 13, 2017 – Filed May 31, 2017

REVERSED

Appellate Defender LaNelle Cantey DuRant, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Assistant Deputy Attorney General David A. Spencer, and Solicitor Daniel Edward Johnson, all of Columbia, for Respondent.

KONDUROS, J.: Eric Terrell Spears appeals his conviction and sentence for trafficking crack cocaine between ten and twenty-eight grams. He argues the trial court erred by denying his motion to suppress drug evidence because he was seized within the meaning of the Fourth Amendment and law enforcement lacked a reasonable suspicion he was involved in criminal activity. We reverse.

FACTS/PROCEDURAL BACKGROUND

On March 29, 2012, agents of the Drug Enforcement Agency (DEA) working with the Lexington County Sheriff's Office received a tip that one or two black males being investigated by the DEA were traveling from New York City to South Carolina on the "Chinese bus lines." These bus lines depart from Chinatown and are owned and operated by Chinese Americans and Chinese Canadians. According to the DEA agents, the buses are often patronized by wanted subjects and people trafficking in narcotics and counterfeit goods because the bus lines are inexpensive, do not require identification, and have no security measures. On that day, two of these buses were scheduled to arrive at different locations in Richland County. Agents Dennis Tracy, Briton Lorenzen, and Frank Finch were dispatched to one of the bus stops. They were dressed in plain clothes, and Lorenzen's and Finch's badges and guns were visible. The agents arrived at the bus stop as passengers were exiting the bus.

Amongst the passengers disembarking, the agents observed Spears and Traci Williams, a female, exit the bus and retrieve four large bags. Unlike the other passengers, Spears and Williams appeared nervous and kept looking at the agents and talking amongst themselves. Spears and Williams left the bus stop on foot, and the agents followed them. As they walked, Spears and Williams continued to look back at the agents, and Williams appeared to hand something to Spears. After following Spears and Williams for several hundred feet, the agents walked at a fast pace to catch up with them. The agents identified themselves and asked to speak with Spears and Williams. Solely based on Williams and Spears's activity, not the tip, the agents made contact with Spears and Williams to identify them and ascertain whether they were involved in criminal activity. The agents asked to speak with Spears and Williams and asked them questions such as where they had traveled from and where they were going. Agent Tracy then told Spears and Williams there had been problems in the past with wanted subjects, drugs, and counterfeit merchandise on the bus line and asked them for their identification. After Spears gave Agent Tracy his identification, Agent Tracy asked Spears if he had any illegal weapons or items on him or in his property. Spears hesitated before saying "no," making Agent Tracy suspicious because until that point, Spears had been very forthcoming.

Around the time Agent Tracy asked Spears about illegal items, Spears began to put his hands underneath his shirt and make what Agent Tracy described as a "puffing" motion, pushing the shirt away from his waistband and body. Agent Tracy asked Spears not to do this because he needed to see Spears's hands for safety purposes. Spears stopped momentarily but then repeated the motion. After asking Spears not to do this three times, Agent Tracy told Spears he was going to search him for weapons. While patting Spears down, Agent Tracy felt a rocky, ball-like object that felt consistent with crack cocaine. After completing the search, Agent Tracy removed the object from Spears's waistband. The object was wrapped in a napkin and inside a plastic bag. Agent Tracy removed the object from the plastic bag and the napkin, saw it was consistent with crack cocaine, and arrested Spears.

Prior to trial, Spears moved to suppress the drug evidence, arguing he was seized by the agents because a reasonable person would not have felt free to leave and the agents did not have reasonable suspicion to stop Spears and Williams.[1] The State contended the encounter between Spears, Williams, and the agents was consensual and therefore, the agents did not need reasonable suspicion.

The trial court denied Spears's motion to suppress the drugs. The trial court concluded the agents engaged Spears in a consensual encounter, finding Spears and Williams willingly stopped and talked with the agents, the agents told Spears and Williams they were law enforcement, and the agents did not tell Spears he was not free to leave.[2] At trial, Spears was convicted of trafficking cocaine between ten and twenty-eight grams and received a thirty-year sentence.

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[1] Spears also argued the agents did not have reasonable suspicion he was armed, the plain-feel doctrine did not apply, and Agent Tracy exceeded the scope of the frisk. On appeal, Spears only challenges the search.

[2] During the hearing on Spears's motion to suppress, the trial court heard arguments on whether Spears was seized or engaged by the agents in a consensual encounter. The trial court asked, "[W]hat's the evidence that criminal activity is afoot? [F]or a Terry stop one issue is [an] officer's safety, but the other issue is the officer has to believe that criminal activity is afoot." When denying Spears's motion to suppress, the trial court did not explicitly rule the agents engaged Spears in a consensual encounter, finding only that the agents "pointed to specific and articulable facts [that] warranted a search of [Spears]'s person." However, when listing the facts it found warranted the search, the trial court stated the agents "initiated a conversation with [Spears] and [he] and [Williams] willingly stopped

STANDARD OF REVIEW

"On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error." *State v. Adams*, 409 S.C. 641, 647, 763 S.E.2d 341, 344 (2014) (quoting *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010)). "The 'clear error' standard means that an appellate court will not reverse a trial court's finding of fact simply because it would have decided the case differently." *State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). "Rather, appellate courts must affirm if there is any evidence to support the trial court's ruling." *State v. Moore*, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016), *cert. denied*, 136 S. Ct. 2473 (2016).

LAW/ANALYSIS

I. Seizure

Spears argues the trial court erred by denying his motion to suppress because he was seized under the Fourth Amendment. We agree.

"The Fourth Amendment prohibits unreasonable searches and seizures." *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016) (citing U.S. Const. amend. IV). "The security and protection of persons and property provided by the Fourth Amendment are fundamental values." *State v. Gamble*, 405 S.C. 409, 420, 747 S.E.2d 784, 789 (2013). "A person has been seized within the meaning of the Fourth Amendment at the point in time when, in light of all the circumstances surrounding an incident, a reasonable person would have believed that he was not free to leave." *Robinson v. State*, 407 S.C. 169, 181, 754 S.E.2d 862, 868 (2014) (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)); *see also United*

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and spoke with law enforcement. The agents notified [Spears] that they were law enforcement. [The agents] never told [Spears] he was not free to leave." Thus, based on the record, we conclude the trial court implicitly ruled this was a consensual encounter. *See State v. McLaughlin*, 307 S.C. 19, 23, 413 S.E.2d 819, 821 (1992) (finding the record supported the trial court's implicit ruling that appellant's rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), were voluntarily waived).

States v. Sullivan, 138 F.3d 126, 132 (4th Cir. 1998) ("The test . . . [to] determin[e] whether a person has been seized for purposes of the Fourth Amendment is whether, under the totality of the circumstances surrounding the encounter, a reasonable person in the suspect's position 'would have felt free to decline the officers' requests or otherwise terminate the encounter.'" (quoting *Florida v. Bostick*, 501 U.S. 429, 438 (1991))).

"[T]he nature of the reasonableness inquiry is highly fact-specific." *State v. Brannon*, 379 S.C. 487, 499, 666 S.E.2d 272, 278 (Ct. App. 2008).

> Although no single factor dictates whether a seizure has occurred, courts have identified certain probative factors, including the time and place of the encounter, the number of officers present and whether they were uniformed, the length of the detention, whether the officer moved the person to a different location or isolated him from others, whether the officer informed the person he was free to leave, whether the officer indicated to the person that he was suspected of a crime, and whether the officer retained the person's documents or exhibited threatening behavior or physical contact.

State v. Williams, 351 S.C. 591, 600, 571 S.E.2d 703, 708 (Ct. App. 2002). "Not all personal encounters between police officers and citizens implicate the Fourth Amendment." *State v. Blassingame*, 338 S.C. 240, 249, 525 S.E.2d 535, 540 (Ct. App. 1999). "So long as the person approached and questioned remains free to disregard the officer's questions and walk away, no intrusion upon the person's liberty or privacy has taken place and, therefore, no constitutional justification for the encounter is necessary." *State v. Rodriquez*, 323 S.C. 484, 491, 476 S.E.2d 161, 165 (Ct. App. 1996).

"Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when [the agents] 'seized'" Spears. *Terry v. Ohio*, 392 U.S. 1, 16 (1968). Here, the trial court identified the following factors as evidence Spears and the agents were engaged in a consensual encounter: Spears and Williams willingly stopped and talked with the agents, the agents told Spears and Williams they were law enforcement, and the agents did not tell Spears he was not free to leave. But, this is not the totality of the

circumstances. Several of the factors identified in *Williams* as probative of whether a seizure has occurred are present in this case: Spears and Williams were approached by three agents, two of whom had their guns visible; the agents waited to engage Spears and Williams until they were alone; the agents did not inform Spears and Williams they were free to leave; Agent Tracy indicated Spears was suspected of a crime by following Spears, telling him the bus lines were known for illegal activity, and asking him if he had any illegal weapons or items on his person or in his property; and the agents exhibited threatening behavior by following Spears and Williams for several hundred feet before the agents increased their pace to catch up with Spears and Williams.

All but one of the *Williams* factors present in this case were manifest at the time the agents increased their speed to make contact with Spears and request to question him. However, the final *Williams* factor occurred when Agent Tracy asked Spears if he possessed any illegal weapons or items on him or in his property. Although Spears was arguably seized the moment the agents made contact with him, at the latest, Spears was seized when Agent Tracy asked Spears if he had any illegal weapons or items on him or in his property. *See Blassingame*, 338 S.C. at 249, 525 S.E.2d at 540 (finding a stop occurred for *Terry* purposes when the officer questioned appellant about a carjacking in the area and the place from which appellant was walking).

The fact the agents increased their speed to catch up with Spears and Williams after following them for several hundred feet is particularly significant. A consensual encounter between a law enforcement officer and a person is predicated on the person being able to "disregard the officer's questions and *walk away*." *Rodriguez*, 323 S.C. at 491, 476 S.E.2d at 165 (emphasis added). Before the agents made contact with Spears, he had walked several hundred feet without the agents engaging him, indicating he was free to continue walking. By increasing their speed to catch up with Spears, the agents indicated to Spears he was no longer free to continue walking away. This is especially true considering that when the agents stopped Spears, they asked for his identification and whether he was engaged in illegal activity. Thus, in light of all the circumstances surrounding this incident, we conclude a reasonable person in Spears's position would not have felt free to walk away, and Spears was seized within the meaning of the Fourth Amendment.

II. Reasonable Suspicion

Spears argues the agents lacked reasonable suspicion to stop him. We agree.[3]

Because Spears was seized within the meaning of the Fourth Amendment, we must determine whether the agents had reasonable suspicion, or "an objective, specific basis for suspecting [Spears] of criminal activity." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868-69 (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

"Pursuant to *Terry*, a police officer with a reasonable suspicion based on articulable facts that a person is involved in criminal activity may stop, briefly detain, and question that person for investigative purposes, without treading upon his Fourth Amendment rights." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54.

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[3] The trial court did not determine whether the agents had reasonable suspicion to stop Spears because it concluded Spears and the agents were involved in a consensual encounter. "Given our standard of review, the normal procedural course would be to remand this case to the [trial] court" to determine whether the agents had reasonable suspicion to stop Spears. *State v. Hewins*, 409 S.C. 93, 113, 760 S.E.2d 814, 824 (2014) (citing *State v. Tindall*, 388 S.C. 518, 521, 698 S.E.2d 203, 205 (2010) ("On appeals from a motion to suppress based on Fourth Amendment grounds, this [c]ourt applies a deferential standard of review and will reverse if there is clear error. However, this deference does not bar this [c]ourt from conducting its own review of the record to determine whether the trial [court]'s decision is supported by the evidence." (citation omitted)). However, like in *Hewins*, in the interest of judicial economy, we have decided to address the merits of this issue as the parties fully argued it during the suppression hearing, in their briefs, and at oral argument. *See Hewins*, 409 S.C. at 113, 760 S.E.2d at 824 (addressing the merits of Hewins's motion to suppress in the interest of judicial economy instead of remanding to the circuit court for a hearing); *see also State v. Moore*, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("Given our finding that the show-up used in this case was unduly suggestive, we must determine whether a remand is necessary or whether, under the unique facts of this case, the matter of reliability may be determined by this Court. We find a remand unnecessary. . . . [U]nder the facts of this case, the identification is unreliable as a matter of law and therefore a remand would serve no useful purpose.").

"[L]ooking at the totality of the circumstances, reasonable suspicion requires there be an objective, specific basis for suspecting the person stopped of criminal activity." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868.

"Reasonable suspicion 'is not readily, or even usefully, reduced to a neat set of legal rules, but, rather, entails common sense, nontechnical conceptions that deal with factual and practical considerations of everyday life on which reasonable and prudent persons, not legal technicians, act." *State v. Provet*, 391 S.C. 494, 500, 706 S.E.2d 513, 516 (Ct. App. 2011) (quoting *United States v. Foreman*, 369 F.3d 776, 781 (4th Cir. 2004)). "Reasonable suspicion is more than a general hunch but less than what is required for probable cause." *State v. Willard*, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007); *see also Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). It is "a particularized and objective basis for suspecting legal wrongdoing." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54 (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). "Reasonableness is measured in objective terms by examining the totality of the circumstances. As a result, the nature of the reasonableness inquiry is highly fact-specific." *State v. Pichardo*, 367 S.C. 84, 101, 623 S.E.2d 840, 849 (Ct. App. 2005).

"Although never dispositive . . . being in a high crime area can be a consideration in our analysis of the totality of the circumstances." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 55. Moreover, "[w]hile nervous behavior is a pertinent factor in determining reasonable suspicion . . . the single element of nervousness [should not be parlayed by law enforcement] into a myriad of factors supporting reasonable suspicion." *Moore*, 415 S.C. at 254-55, 781 S.E.2d at 902 (footnote omitted). "The police officer may make reasonable inferences regarding the criminality of a situation in light of his experience, but he must be able to point to articulable facts that, in conjunction with his inferences, 'reasonably warrant' the intrusion." *Robinson*, 401 S.C. at 182, 754 S.E.2d at 869 (quoting *Terry*, 392 U.S. at 21, 27).

Our supreme court's recent consideration of reasonable suspicion during a street encounter in *Anderson* is instructive. In *Anderson*, officers were executing a search warrant at a home where they had observed drug activity. 415 S.C. at 444, 783 S.E.2d at 53. During previous surveillance of the home, the police department learned the footpath outside the home was also used to transport drugs. *Id.* However, the footpath was not included in the warrant. *Id.* While executing the

warrant, officers were stationed at both ends of the footpath with instructions to "secure and detain any person found on the footpath." *Id.* During the execution of the warrant, Donald Anderson and a woman were on the footpath but stepped off the path "in a quick manner" after observing the officers. *Id.* at 444-45, 783 S.E.2d at 53. One of the officers ran towards Anderson with his gun drawn, telling Anderson to stop and get on the ground. *Id.* Anderson cooperated and was handcuffed and searched. *Id.* The officer found crack cocaine in one of Anderson's front pockets. *Id.* The supreme court held the drugs should have been suppressed "because the officer did not have reasonable suspicion that Anderson was involved in criminal activity to justify an investigative stop." *Id.* at 446-47, 449, 783 S.E.2d at 54. The court found Anderson's presence in a high crime area carried little weight because the police were in the area for the express purpose of executing a search warrant that did not include the footpath. *Id.* at 448, 783 S.E.2d at 55. The court also noted Anderson did not flee the property involved nor did the police recognize Anderson as a suspect related to the drug crimes the police were investigating. *Id.* The court stated,

> Certainly being in a high crime area does not provide police officers carte blanche to stop any person they meet on the street. We acknowledge we are dealing with the totality of the circumstances. Nevertheless, even considering the situs with the fact that Anderson stepped off the footpath after seeing the police, we find the circumstances here fail to support the finding of reasonable suspicion.

Id.

At the time Spears was seized, the agents had observed Spears and Williams, get off a bus known by the agents to be patronized by criminals, retrieve four large bags, and appear nervous while paying close attention to the agents.[4] This

[4] All of the agents testified they were too far behind Spears and Williams to see what Williams handed to Spears or even if she handed something to Spears. Agent Tracy testified he did not include this in his report because he could not identify the object and stated that "for all he knew," Williams and Spears had "shaken hands," which he did not consider a fact. Therefore, neither will we consider this as an articulable fact.

evidence is insufficient to support a conclusion the agents had a "particularized and objective basis for suspecting legal wrongdoing." *Anderson*, 415 S.C. at 447, 783 S.E.2d at 54 (quoting *Arvizu*, 534 U.S. at 273).

Indisputably, Spears was a passenger on a bus sometimes patronized by criminals, which is an articulable fact. *See Anderson*, 415 S.C. at 447, 783 S.E.2d at 55 ("Although never dispositive . . . being in a high crime area can be a consideration in our analysis of the totality of the circumstances."). But, like in *Anderson*, this fact carries little weight here. First, like the appellant in *Anderson*, Spears did not flee from the bus or the agents, not even when they increased their speed to stop him. Second, Spears and Williams's possession of four large bags is unparticularized given they were travelers from New York and presumably amongst many other passengers with luggage. Furthermore, luggage size is of no consequence here when the agents were interested in all types of illegal items, which are of varying size and do not all require luggage to transport. Finally, "[w]hile nervousness is a pertinent factor in determining reasonable suspicion," *Moore*, 415 S.C. at 254, 781 S.E.2d at 902, Spears was pursued by three agents—two of whom had their guns visible—for several hundred feet before those agents increased their speed to catch up with him. In this situation, some nervousness is to be expected. *Compare with Moore*, 415 S.C. at 254, 781 S.E.2d at 902 ("General nervousness will almost invariably be present in a traffic stop."). Also, unlike in *Anderson*, Spears at no point exhibited evasive conduct and was forthcoming with the agents until they questioned him about illegal items, but by that point, Spears had already been seized.

We recognize the agents were entitled to "make reasonable inferences regarding the criminality of [the] situation in light of [their] experience." *Robinson*, 407 S.C. at 182, 754 S.E.2d at 868. Still, reasonable suspicion requires more than a hunch. *Willard*, 374 S.C. at 134, 647 S.E.2d at 255 ("Reasonable suspicion is more than a general hunch but less than what is required for probable cause."); *see also Robinson*, 407 S.C. at 182, 754 S.E.2d at 868 ("Reasonable suspicion is something more than an 'inchoate and unparticularized suspicion' or hunch." (quoting *Terry*, 392 U.S. at 27)). Here, the agents suspected Spears of criminal activity for getting off a bus used by criminals, having four large bags, and acting nervous. Based on the totality of the circumstances, we cannot conclude the agents' belief Spears was involved in criminal activity amounted to anything more than a hunch, which is insufficient under the Fourth Amendment. Thus, the agents seized Spears without

reasonable suspicion in violation of the Fourth Amendment. Therefore, the trial court erred by denying Spears's motion to suppress.

CONCLUSION

The trial court erred by finding the agents engaged Spears in a consensual encounter because under the totality of the circumstances, a reasonable person in Spears's position would not have felt free to leave. The trial court further erred by denying Spears's motion to suppress the drug evidence because under the totality of the circumstances, the agents did not have a reasonable suspicion Spears was involved in criminal activity. Accordingly, Spears's conviction and sentence are

REVERSED.

SHORT, J., concurs.

WILLIAMS, J., dissenting.

WILLIAMS, J.: I respectfully dissent. One of the guiding principles shaping our state's Fourth Amendment jurisprudence is that, in a fact-based Fourth Amendment challenge, an appellate court is restricted by the "any evidence" standard of review. "A [circuit] court's Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error." *State v. Taylor*, 401 S.C. 104, 108, 736 S.E.2d 663, 665 (2013). Importantly, "clear error" means that the appellate court may not reverse the circuit court's findings of fact merely because it would have decided the case differently than the circuit court. *See State v. Pichardo*, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005). In my view, a faithful adherence to the "any evidence" standard of review will prevent any misconception that we have substituted our own findings in place of those of the circuit court. Therefore, in light of the evidence presented at trial and the circuit court's findings, I believe our standard of review requires an affirmance.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anderson County, Appellant,

v.

Joey Preston and the South Carolina Retirement System, Respondents.

Appellate Case No. 2013-002499

Appeal From Anderson County
Roger L. Couch, Circuit Court Judge

Opinion No. 5490
Heard June 11, 2015 – Filed May 31, 2017

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

James Theodore Gentry, Troy A. Tessier, and Wade Stackhouse Kolb, III, of Greenville, and Alice Witherspoon Parham Casey, of Columbia, all of Wyche Law Firm, for Appellant.

Candy M. Kern-Fuller, of Upstate Law Group, LLC, of Easley, and Lane Whittaker Davis, of Nelson Mullins Riley & Scarborough, LLP, of Greenville, for Respondent Joey Preston.

Justin Richard Werner, of Columbia, for Respondent South Carolina Retirement System.

WILLIAMS, J.: On November 18, 2008, the Anderson County Council (the 2008 Council) voted to approve a severance agreement (the Severance Agreement) for outgoing county administrator Joey Preston. Anderson County (the County) filed the instant action against Preston seeking rescission of that agreement. Following a nonjury trial, the circuit court entered judgment in favor of Preston on all causes of action as well as his counterclaim against the County. The County appeals the circuit court's decision, raising numerous issues on appeal. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

FACTS/PROCEDURAL HISTORY

Prior to the vote on Preston's Severance Agreement, the political environment in Anderson County was "toxic."[1] Throughout his tenure, Preston was involved in constant litigation—both individually and in his capacity as county administrator—with members of the council he served.

The 2008 Council was comprised of Chairman Michael Thompson and Council members Larry Greer, Ron Wilson, Gracie Floyd, Robert Waldrep, Cindy Wilson, and Bill McAbee. In June 2008, primary challengers ousted three incumbent members of the 2008 Council: Tommy Dunn defeated Thompson, Tom Allen defeated McAbee, and Eddie Moore defeated Greer. Some of the primary victors, as well as Waldrep and Cindy Wilson, ran on platforms calling for examination into and possible reform of the financial and governance practices of the Preston administration.

From June to December 2008, Waldrep and Cindy Wilson held a series of meetings with Moore, Dunn, and Allen at Waldrep's office. During these meetings, the participants laid out an agenda for the incoming Council (the 2009 Council) that included firing the law firm for the County and hiring a new one; hiring a financial investigator or auditor; designating Moore as chairman; drafting

[1] While the circuit court cited numerous examples of troublesome behavior that reflected the "leadership wasteland" existing in Anderson County, we focus only on the events relevant to resolving the issues on appeal.

resolutions for the first meeting; implementing a hiring freeze; and addressing the position of county administrator and various other personnel matters.

After the primary elections, Preston retained Robert Hoskins as his attorney. On September 25, 2008, Hoskins notified the 2008 Council of Preston's anticipatory breach of contract claim, stating the following:

> [I]t has come to Mr. Preston's attention that certain existing Council members have made statements that they and certain newly elected Council Members intend, after January 2009, to prevent him from carrying out his duties as County Administrator. . . . Preston considers the intent of certain members of Council and their allies to prevent him from performing his job as an anticipatory breach of his employment contract. . . . [T]he political and personal agenda of the obstructionists has rendered his ability to serve the people of Anderson County beyond January 1, 2009 impossible.

In response, the 2008 Council referred Preston's claim to its personnel committee—chaired by Ron Wilson—and hired Tom Bright, an employment attorney, to advise the County on the matter. Bright then interviewed all seven members of the 2008 Council, as well as the county attorney, to receive their input.

On October 23, 2008, Preston's attorney delivered a letter to Bright, in which he alluded to a number of causes of action and tort claims Preston planned to assert against current and incoming Council members. In the letter, however, he offered to settle Preston's anticipatory breach claim and "all claims against the County and the two individual Council [m]embers [he] previously mentioned." Under this proposed settlement, Preston would resign and execute a complete release of all claims against the County, Waldrep, and Cindy Wilson in exchange for the County paying $1,276,081 in damages: $827,222 for the total amount of pay and benefits due under his employment agreement[2] (the Employment Agreement); $356,087 to the South Carolina Retirement System (SCRS) to purchase seven years, seven months, and twenty-three days of service credits to allow him to retire immediately

[2] In July 1998, Preston—who had served as county administrator since 1996—entered into an Employment Agreement with the County that granted him an initial three-year term and allowed for one-year renewals at the end of each contract year.

with a full pension; and $92,772 to his health reimbursement account for retiree health benefits.

After receiving the letter, Bright met with the personnel committee to discuss how the County should address the matter. In his notes outlining Preston's claims and the County's options, Bright stated Preston had no anticipatory breach or constructive discharge claim. Bright also advised the committee that, under our supreme court's ruling in *Piedmont Public Service District v. Cowart* (*Cowart II*), 324 S.C. 239, 478 S.E.2d 836 (1996), the County had a good argument that Preston's Employment Agreement was voidable—and therefore, had no value—because it purported to extend his employment beyond the term of the Council that approved it. Nevertheless, Bright also told the committee if the County were to lose, then it could face up to $2 million in litigation costs going forward. Thus, Bright advised the 2008 Council it could (1) do nothing, (2) leave the issue for the 2009 Council to decide, (3) terminate Preston and pay him nothing, or (4) settle with Preston and pay out his contract. As to the fourth option, Bright cautioned that "[c]itizens may go after Preston and former Council members for giving away their [money] without good reason" if the 2008 Council chose to settle. After considering the options, the personnel committee directed Bright "to go and talk to Mr. Hoskins and try and get the best deal you can."

Following several weeks of negotiations, Bright emailed Hoskins a copy of a proposed severance agreement and release of all claims on November 18, 2008. That evening, the 2008 Council voted to amend the agenda to consider the Severance Agreement, voted for its approval, voted to approve budget transfers to fund it, and then voted to reapprove it on reconsideration. The 2008 Council approved the Severance Agreement, and the budget transfers to fund it, by a 5–2 vote. After the votes, the 2008 Council voted to hire Michael Cunningham as the new county administrator and adjourned without conducting any further business.

Pursuant to the terms of the Severance Agreement, Preston agreed to resign as county administrator on November 30, 2008, and release all claims against the County and any of its Council members regarding his employment. In exchange, Preston received $1,139,833—less state and federal withholdings—from the County. The County also contributed $359,258 to the SCRS "to pay for retirement service credits," paid Preston $780,575 "in the form of a severance benefit," and gave Preston title to the 2006 GMC Yukon he was using as a County vehicle.

The newly constituted 2009 Council held its first meeting on January 6, 2009, during which it voted to hire a new law firm and a financial investigator to review Cunningham's employment contract, investigate the manner in which he was hired, and review the actions taken by the 2008 Council on November 18, 2008.[3]

Thereafter, the County sued Preston, alleging causes of action for (1) violation of the State Ethics Act,[4] section 2-37(g) of the Anderson County Code of Ordinances (the County Code), and the common law; (2) violation of public policy; (3) breach of fiduciary duty; (4) fraud; (5) constructive fraud; (6) negligent misrepresentation; (7) capriciousness, unreasonableness, and fraud; (8) fundamental and substantial breach of the Severance Agreement; (9) breach of fiduciary duties relating to back-dated documents; (10) constructive trust; and (11) unjust enrichment. The County later amended its complaint to include additional factual allegations. Preston filed his answer to the amended complaint, asserting counterclaims against the County and SCRS.[5] The County then filed a reply to Preston's counterclaims.

On December 12, 2011, the case was designated as complex and assigned for all purposes to the Honorable Roger L. Couch. After hearing arguments, the circuit court denied the parties' cross-motions for summary judgment in all respects on

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[3] In *Bradshaw v. Anderson County*, our supreme court held South Carolina Code section 4-9-660 (1986) of the Home Rule Act expressly authorized the 2009 Council—operating under a council–administrator form of government—to directly engage professionals "for the purpose of inquiries and investigations." 388 S.C. 257, 263, 695 S.E.2d 842, 845 (2010). The court found the 2009 Council had the authority to investigate the 2008 Council's business and financial practices, "especially concerning contracts related to the former and current County Administrators." *Id.* at 258, 695 S.E.2d at 842. According to the court, it would be absurd to require the county administrator, "who is answerable to the council and not the electorate, to investigate himself." *Id.* at 263, 695 S.E.2d at 845.

[4] S.C. Code Ann. §§ 8-13-100 through -1520 (Supp. 2016).

[5] SCRS asserted cross-claims against Preston in its answer to the County's amended complaint. While the circuit court retained SCRS as a party—finding the extent of its liability was a question of fact—the court excused SCRS from appearing with the parties' consent. The parties also settled Preston's false arrest and abuse of process counterclaims and stipulated to their dismissal prior to trial.

October 23, 2012. As to Preston and the County, the court found summary judgment was inappropriate because genuine issues of material fact existed regarding the claims and counterclaims asserted. The matter was tried without a jury from October 29, 2012, to November 5, 2012. In its May 3, 2013 order (the Final Order), the court granted judgment in favor of Preston on all causes of action as well as his counterclaim against the County.

In the Final Order, the circuit court disqualified four 2008 Council members for improperly participating in the votes approving the Severance Agreement. The court found Thompson voted in violation of section 2-37(g)(4)(e) of the County Code because he was seeking future employment from the County through Preston at the time of the vote. The court likewise found Ron Wilson's vote violated subsections 2-37(g)(4)(a) and (e) because Ron Wilson's daughter had recently received a substantial financial benefit from Preston after he extended her personal services contract with the County. Although Waldrep and Cindy Wilson voted against the Severance Agreement, the court found their votes violated section 2-37(g) because both had a "financial interest greater than that of the general Anderson County public" and their participation created "a substantial appearance of impropriety." Given that "Preston agreed not to pursue any further claims against any County Council member," the court found Waldrep and Cindy Wilson "had a direct economic interest"—regardless of the vote's outcome—and should not have participated while he maintained a lawsuit against them individually.

After disqualifying four of the seven members, the court—relying upon *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), and section 2-37(g)(3) of the County Code—nevertheless found "a majority of those present and properly voting approved Preston's Severance Agreement." The court also held, *inter alia*, (1) public policy neither rendered the Severance Agreement nor the vote adopting it void; (2) Preston did not breach a fiduciary duty because he owed no duty to disclose Council members' personal conflicts of interest; (3) the County failed to prove its claims for fraud, constructive fraud, and negligent misrepresentation; (4) the 2008 Council's approval of the Severance Agreement was neither unreasonable or capricious nor was it a product of fraud and abuse of power; (5) the County's constructive trust claim no longer remained viable; (6) rescission was unavailable as a remedy; (7) the County had unclean hands; (8) adequate remedies at law barred the County from invoking the court's equitable jurisdiction; (9) the County breached the covenant not to sue in the Severance Agreement by bringing this

lawsuit; and (10) the issue concerning the award of attorney's fees should be held in abeyance pending the final disposition and the filing of a petition.

In light of the circuit court's Final Order, the County filed a motion to alter or amend the judgment as well as a motion to amend its complaint. Preston filed an answer, and the County submitted a reply. Richard Freemantle, a third party, filed a post-trial motion to intervene. The circuit court, however, denied all of the parties' post-trial motions in an order (the Post-Trial Order) dated November 8, 2013. This appeal followed.

ISSUES ON APPEAL

I. Did the circuit court err in concluding Preston owed no fiduciary duty to inform the County of improper votes and finding his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation?

II. Did the circuit court err in finding a single tainted vote did not require invalidation of the Severance Agreement's approval or mandate its rescission?

III. Did the circuit court err in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum?

IV. Did the circuit court err in holding future payments from SCRS to Preston were not available in fashioning a remedy?

V. Did the circuit court err in holding rescission was an unavailable remedy?

VI. Did the circuit court err in finding the County acted with unclean hands?

VII. Did the circuit court err in concluding the County could not invoke its equitable powers because an adequate remedy at law existed?

VIII. Did the circuit court err in holding the County breached the terms of the Severance Agreement by bringing the instant lawsuit?

STANDARD OF REVIEW

Because the County's main purpose in bringing the instant lawsuit was to rescind the Severance Agreement, this action is equitable in nature. *See ZAN, LLC v. Ripley Cove, LLC*, 406 S.C. 404, 412, 751 S.E.2d 664, 669 (Ct. App. 2013) (per curiam). In an equitable action, this court reviews factual findings and legal conclusions de novo. *Regions Bank v. Wingard Props., Inc.*, 394 S.C. 241, 248, 715 S.E.2d 348, 352 (Ct. App. 2011). "Therefore, we may find facts according to our own view of the preponderance of the evidence." *Ballard v. Roberson*, 399 S.C. 588, 593, 733 S.E.2d 107, 109 (2012). Moreover, we are free to decide "question[s] of law with no particular deference to the circuit court." *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). Our de novo review, however, does not require this court to disregard the circuit court's findings or "ignore the fact that the [circuit] court is in the better position to assess the credibility of the witnesses." *Ripley Cove*, 406 S.C. at 412, 751 S.E.2d at 669 (quoting *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011)). Further, this broad scope of review does not relieve the appellant of the burden of demonstrating the circuit court erred in its findings. *Ballard*, 399 S.C. at 593, 733 S.E.2d at 109.

LAW/ANALYSIS

I. Preston's Knowledge of Conflicts of Interest

First, the County contends the circuit court erred in finding Preston's failure to inform the 2008 Council of Thompson and Ron Wilson's conflicts of interest prior to the Severance Agreement's approval did not constitute a breach of fiduciary duty, fraud, constructive fraud, or negligent misrepresentation.

A. Breach of Fiduciary Duty

The County argues Preston—in his capacity as county administrator—owed the highest duty of loyalty and breached this duty by knowingly allowing Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes in favor of his Severance Agreement. According to the County, Preston had a duty to make these conflicts of interest known because he was still employed as county administrator when he attended the vote affecting his own interest. We disagree.

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the

defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams LLP*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

"A fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). "To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing." *Id.* at 251, 599 S.E.2d at 472. "The evidence must show the entrusted party actually accepted or induced the confidence placed in [it]." *Id.*

In the instant case, the circuit court held Preston owed no fiduciary duty to disclose information about his employment claims to the 2008 Council because Preston and the County had assumed adverse positions by October and November of 2008.

Although Preston owed the County a fiduciary duty throughout his employment as county administrator,[6] in this particular context, the County had no foundation for believing Preston would not act in his own interest to achieve the best possible settlement of his claims against the County. *See generally Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (explaining that, for a plaintiff "[t]o establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will not act in [its] own behalf but in the interest of the party so reposing"). The parties clearly had opposing interests throughout settlement negotiations and remained adverse to one another during the 2008 Council's vote on the Severance Agreement. Moreover, in preparation of litigation, the County and Preston each retained attorneys to represent their respective interests. In light of these facts and circumstances, we are unable to find any basis upon which the County could have reasonably believed Preston would act on its behalf—instead of representing his

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[6] *See, e.g.*, *Young v. McKelvey*, 286 S.C. 119, 122, 333 S.E.2d 566, 567 (1985) ("It is implicit in any contract for employment that the employee shall remain faithful to the employer's interest throughout the term of employment. An employee has a duty of fidelity to his employer." (quoting *Berry v. Goodyear Tire & Rubber Co.*, 270 S.C. 489, 491, 242 S.E.2d 551, 552 (1978))).

own interests—while trying to settle his employment claims against the County. Because the parties were directly adverse to one another, we hold Preston owed no duty to disclose Thompson and Ron Wilson's conflicts of interest during the vote on his Severance Agreement. *See id.*; *see also Boaz v. Boaz*, 221 S.W.3d 126, 133 (Tex. App. 2006) ("[A]dverse parties who have retained professional counsel . . . do not owe fiduciary duties to one another.").

Our holding is further supported by the State Ethics Act[7] and the County Code,[8] neither of which give Preston a legal duty to disclose Council members' conflicts

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[7] *See, e.g.*, Act No. 248, 1991 S.C. Acts 1616–17 ("No public official, public member, or public employee may make, participate in making, or in any way attempt to use his office, membership, or employment to influence a governmental decision in which he, a member of his immediate family, an individual with whom he is associated, or a business with which he is associated has an economic interest." (current version at S.C. Code Ann. § 8-13-700(B) (Supp. 2016)).

[8] *See, e.g.*, Anderson County, S.C., Code of Ordinances § 2-288(a)(6) (2000) ("A councilmember who has a financial or other private interest in any legislation shall disclose on the records of the county council the nature and extent of such interest. . . . A councilmember shall disqualify himself from voting if the matter under consideration involves his personal or financial interest to the extent such interest conflicts with his official duties and would impair his independence or judgment."); § 2-37(g)(4) ("No member [of Council] shall vote on any matter in which he/she has a personal or financial interest greater than that of the general Anderson County public, or in which he/she is otherwise disqualified by any state or county law or regulation. Each member shall make known, in the manner required by law, any such disqualifying interest and refrain from voting upon or otherwise participating, in his capacity as a county officer, in matters related thereto."). Subsection 2-37(g)(4) further provides, in relevant part, that a "member shall be deemed to have a personal or financial interest" in the following situations: the member "has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or direct descendant) has such an interest;" the member "has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter;" the member "is so deemed by any state law or regulation;" or the member "cannot, for any other reason, render a

of interest. To the contrary, the relevant provisions imposed only a positive legal duty on Council members—not the county administrator—to disclose their own personal conflicts and abstain from voting if necessary. Further, when questions on conflicts of interests did arise, the County Code instructed members to seek guidance from the county attorney, not the county administrator. *See* Anderson County, S.C., Code of Ordinances § 2-289 (2000) (providing when an official "has doubt as to the applicability of a provision of [the ethics] division to a specific situation or definition of terms used in the Code, he shall apply to the county attorney for an advisory opinion and be guided by that opinion when given").

Based on the foregoing, we affirm the circuit court's finding that Preston owed no fiduciary duty to disclose Thompson and Ron Wilson's conflicts of interest during the 2008 Council's vote on his Severance Agreement.

B. Fraud, Constructive Fraud, and Negligent Misrepresentation

The County further contends Preston's failure to disclose the facts that rendered Thompson and Ron Wilson's votes improper amounted to fraud, constructive fraud, and negligent misrepresentation. We disagree.

"Fraud is an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to [that person] or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003). To establish fraud, a plaintiff must prove the following elements by clear, cogent, and convincing evidence:

> (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.

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fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety."

Moseley v. All Things Possible, Inc., 388 S.C. 31, 35–36, 694 S.E.2d 43, 45 (Ct. App. 2010) (quoting *Schmauch*, 354 S.C. at 672, 582 S.E.2d at 444–45). "Failure to prove any element of fraud is fatal to the action." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002).

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Moore*, 360 S.C. at 251, 599 S.E.2d at 472 (quoting *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 101, 594 S.E.2d 485, 497 (Ct. App. 2004)). Nondisclosure is fraudulent when a party has a duty to speak. *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445.

> The duty to disclose may be reduced to three distinct classes: (1) whe[n] it arises from a preexisting definite fiduciary relation between the parties; (2) whe[n] one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; [and] (3) whe[n] the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties.

Id. at 673–74, 582 S.E.2d at 445–46 (quoting *Jacobson v. Yaschik*, 249 S.C. 577, 585, 155 S.E.2d 601, 605 (1967)).

"Constructive fraud is a breach of legal or equitable duty which, irrespective of the moral guilt of the fraud feasor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993) (quoting *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 288, 328 S.E.2d 916, 918 (Ct. App. 1985)). "To establish constructive fraud[,] all elements of actual fraud except the element of intent must be established." *Id.* at 506, 431 S.E.2d at 263. "Neither actual dishonesty of purpose nor intent to deceive is an essential element of constructive fraud." *Id.* at 505, 431 S.E.2d at 263 (quoting *Giles*, 285 S.C. at 288, 328 S.E.2d at 918).

When no confidential or fiduciary relationship exists, "and an arm's length transaction between mature, educated people is involved," a party has no right to rely on the other's representations. *Ardis v. Cox*, 314 S.C. 512, 516, 431 S.E.2d 267, 270 (Ct. App. 1993). "This is especially true in circumstances whe[n] one should have utilized precaution and protection to safeguard his interests." *Id.* at 516–17, 431 S.E.2d at 270.

In a negligent misrepresentation action, a plaintiff must prove six elements:

> (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation.

Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001). "Thus, a key difference between fraud and negligent misrepresentation is that fraud requires the conveyance of a known falsity, while negligent misrepresentation is predicated upon transmission of a negligently made false statement." *Id.* at 42, 557 S.E.2d at 681.

In the instant case, we find the circuit court properly determined the County failed to meet its burden of proving the claims for fraud, constructive fraud, and negligent representation. Because the Severance Agreement's negotiation constituted "an arm's length transaction between mature, educated people"—all of whom were represented by counsel—we hold the County had no right to rely upon any false representations allegedly made by Preston. *See Ardis*, 314 S.C. at 516, 431 S.E.2d at 270. Preston also had no fiduciary duty to disclose Council members' conflicts of interest, and thus, his silence did not constitute fraud. *Cf. Moore*, 360 S.C. at 251, 599 S.E.2d at 472; *Schmauch*, 354 S.C. at 673, 582 S.E.2d at 445. As noted above, the elected officials—not Preston—owed positive legal duties to disclose their own personal conflicts of interest and disqualify themselves from voting under both the County Code and the State Ethics Act. Moreover, our courts have repeatedly recognized the general rule that fraud cannot be predicated on misrepresentations as to matters of law, much less mere mistakes of law. *See First*

Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 30, 35 S.E.2d 47, 59 (1945); *Barber v. Barber*, 291 S.C. 399, 400, 353 S.E.2d 882, 883 (Ct. App. 1987). Given that the parties were clearly in adversarial positions at the time of the vote, the County had no basis for believing Preston owed it a legal duty to disclose information adverse to his claim, nor did it have a right to rely upon Preston's representations.

Based on the foregoing, we affirm the circuit court's finding that Preston's silence during the November 18, 2008 meeting did not constitute fraud, constructive fraud, or negligent misrepresentation. *See Robertson*, 350 S.C. at 348, 565 S.E.2d at 314 (noting that "[f]ailure to prove any element of fraud is fatal to the action"); *Woods*, 314 S.C. at 506, 431 S.E.2d at 263 (noting that, to prove constructive fraud, "all elements of actual fraud except the element of intent must be established"); *Stewart*, 348 S.C. at 42, 557 S.E.2d at 680–81 (requiring that, to establish negligent misrepresentation, a plaintiff must have "justifiably relied on the representation").

II. Tainted Votes

The County further contends the circuit court erred in finding a single tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission. We disagree.

The County does not advocate for a general rule that would require South Carolina courts to overturn legislation due to a single tainted vote; rather, the County argues courts should apply the single tainted vote rule in rare cases involving egregious circumstances. Specifically, the County contends Ron Wilson and Thompson's tainted votes required invalidation of the 2008 Council's approval of the Severance Agreement in the instant case because the following extraordinary factors were present: (1) the agreement conferred a private benefit on one individual and was not a law of general application; (2) the agreement was passed by a "simple motion," rather than in the form of an ordinance that would require public notice and three readings; (3) the process by which the agreement was passed involved procedural irregularities; (4) members failed to disclose conflicts of interest; (5) the motion was presented by a member with a conflict of interest; and (6) approval of the agreement was not subject to the normal process of political redress.

The County relies upon several cases from other jurisdictions to support its proposed application of the single tainted vote rule. *See, e.g.*, *Dowling Realty v. City of Shawnee*, 85 P.3d 716, 721–22 (Kan. Ct. App. 2004) (remanding the case to

the trial court with directions to send it back to the city planning commission because a local government officer, who advocated approval of his project to "the governmental body of which he . . . [was] a member without identifying himself . . . as having a substantial interest in the project," acted in violation of Kansas ethics rules); *Appeal of City of Keene*, 693 A.2d 412, 415–16 (N.H. 1997) (voiding the county commissioners' denial of the city's request for a determination of public necessity on the grounds that a judicial action by a tribunal is voidable when a member is disqualified but still participates, regardless of whether the disqualified member's vote produces the outcome); *Thompson v. City of Atlantic City*, 921 A.2d 427, 430–43 (N.J. 2007) (voiding a settlement agreement between the mayor and the city as contrary to public policy based upon the involvement of several parties with conflicts of interest).

While we recognize courts in other jurisdictions have invalidated governmental actions based upon a single tainted vote, we are unable to find any South Carolina authority to support this court taking such an extraordinary action. In fact, our precedent suggests South Carolina does not follow the single tainted vote rule. In *Baird*, our supreme court considered whether a court has jurisdiction to invalidate an ordinance based upon tainted votes. 333 S.C. at 535, 511 S.E.2d at 77–78. There, a group of doctors sued Charleston County, arguing a bond ordinance was invalid because a county council member with a conflict of interest voted on the matter in violation of the State Ethics Act. *Id.* at 535, 511 S.E.2d at 77. In determining whether invalidating the bond ordinance was an appropriate remedy for a State Ethics Act violation, the court found the following:

> [T]he vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining the necessary majority for valid action. Therefore, a court has jurisdiction to invalidate an ordinance if the requisite number of votes to pass the ordinance would not exist but for the improper vote.

Id. at 535, 511 S.E.2d at 77–78 (citation omitted).

We read the second sentence in the above quote from *Baird* to also stand for the proposition that a court does *not* have jurisdiction to invalidate an ordinance if, after excluding the improper vote, the requisite number of votes to pass the ordinance still exists. Because *Baird* indicates we do not follow the single tainted

vote rule in South Carolina, we find the circuit court properly declined the County's invitation to apply it in the instant case. Accordingly, we affirm the court's finding that one tainted vote did not require invalidation of the 2008 Council's approval of the Severance Agreement or mandate its rescission.

III. Absence of a Quorum

Next, the County argues the circuit court erred in finding its quorum argument was not preserved, and in addressing the merits of the claim, ruling a quorum existed—despite the invalidation of four votes—because the Severance Agreement was passed by a majority of those Council members present and voting. We agree.

As a preliminary matter, we must determine whether the County properly raised the quorum argument below such that it is preserved for appellate review.

"A post-trial motion must be made when the [circuit] court either grants relief not requested or rules on an issue not raised at trial." *Fryer v. S.C. Law Enf't Div.*, 369 S.C. 395, 399, 631 S.E.2d 918, 920 (Ct. App. 2006); *see also* J. TOAL, S. VAFAI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA 189 (3d ed. 2016) ("Post-trial motions are . . . utilized to raise issues that could not have been raised at trial.").

After entry of the Final Order, the County filed a motion to reconsider, arguing the circuit court's "invalidation of four total votes mean[t] there was no quorum for the vote on [the Severance Agreement], rendering the vote void." In the Post-Trial Order, the court found the quorum issue was not preserved because the County failed to present the issue to the court, despite having ample opportunity to raise it.

Unlike the circuit court, we find the prospect of a quorum being destructed did not exist until the court invalidated four Council members' votes in the Final Order, and in doing so, granted relief that was not requested by either party. Neither the County nor Preston presented an argument prior to or during trial that would have resulted in four votes being invalidated. The County repeatedly argued in favor of invalidating the votes of Thompson, Ron Wilson, and McAbee. Nevertheless, invalidating three votes would not have destroyed the quorum.

At trial, the circuit court noted the issue of whether Cindy Wilson and Waldrep had conflicts of interest "has come up as an allegation" and stated as follows:

> I didn't remember this being alleged or discussed during our pretrial motion period, that the two votes I want to say that weren't in favor because one time it was an abstention and one time it was a vote against, should also not count because they had a dog in the fight. I don't know whether that's ple[aded]. I don't know if it[] just wasn't argued. It's come up as an argument now, and I . . . went over the pleadings before we started, and I started off with hearings going over those, and I don't recall that being something that was ple[aded], but maybe it has been. I don't know. So, I'm [going to] ask you about that, and I'll give you a chance to tell me about your side of it in just a minute, Mr. Davis.

The court, however, never ruled at trial on whether Cindy Wilson or Waldrep's votes were invalid based upon their conflicts of interest. The court did not find Cindy Wilson and Waldrep were disqualified from voting due to conflicts of interest until it issued the Final Order. Therefore, once the court decided to invalidate Thompson and Ron Wilson's votes, along with Cindy Wilson and Waldrep's votes, the quorum issue arose.

Because the argument regarding Cindy Wilson and Waldrep's votes was not raised prior to trial or ruled upon during trial—and the County argued only for the disqualification of Thompson, Ron Wilson, and McAbee—we find the question of whether a quorum existed first arose when the circuit court invalidated the votes of four Council members due to conflicts of interest in the Final Order. Accordingly, we hold the County's Rule 59(e) motion was the proper means by which to raise the argument that the Severance Agreement should be invalidated because the 2008 Council passed it in the absence of a quorum. *See Fryer*, 369 S.C. at 399, 631 S.E.2d at 920; TOAL ET AL., *supra*, at 189. Further, while the circuit court initially found the quorum issue was not preserved, we note the court also addressed the merits of the parties' quorum arguments in the alternative. Based on the foregoing, we find the County's argument is preserved for appellate review because it was properly raised to and ruled upon by the circuit court.

Turning to the merits, the County argues the circuit court erred in finding the 2008 Council's approval of the Severance Agreement was valid because—contrary to the court's findings—the disqualification of four Council members destroyed the quorum necessary for conducting valid business. We agree.

In the Post-Trial Order, the circuit court found a quorum was present and the vote was valid for the following reasons: (1) a quorum is determined based on a person's presence at the meeting, not on voting ability; (2) "the County's Code did not require a majority of Council to vote on an issue to be a valid vote, but rather a majority of those present and voting to carry the question"; (3) "the County's prior interpretation and usage under its own Code . . . allowed votes to be taken despite the disqualification of certain members, so long as present at the meeting site"; and (4) "the County Code expressly incorporated [the Freedom of Information Act[9]] and the State Ethics Act—both of which define quorum without reference to voting disqualifications—into County meeting procedures."

Section 2-37(g)(3) of the County Code provides, "Except where otherwise specified in these rules, a majority vote of those members present and voting shall decide all questions, motions, and other votes." Section 2-37(d) defines a quorum as follows:

> A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

In the instant case, the circuit court invalidated four of the Council member's votes. The County Code, however, provides no guidance for situations in which a vote is invalidated due to a member's conflict of interest. For issues of parliamentary procedure not addressed in the County Code, it provides as follows:

> In all particulars not determined by these rules, or by law, the chairperson or other presiding officer shall be guided by the previous usage of county council or by

[9] S.C. Code Ann. §§ 30-4-10 through -165 (2007 & Supp. 2016).

> parliamentary law and procedure as it may be collected from Roberts [sic] Rules of Order, latest edition.

Anderson County, S.C., Code of Ordinances § 2-37(g)(12) (2000).

The County Code states the Council may not take a vote during the temporary absence of a quorum, but it does not specifically address what happens when such a vote is taken. Therefore, we look to *Robert's Rules of Order*, which provides, "In the absence of a quorum, any business transacted . . . is null and void." HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER § 40, at 347 (11th ed. 2013).

Although *Robert's Rules of Order* renders any business transacted in the absence of a quorum null and void, it does not address the effect of an invalidated vote on the calculation of a quorum. Nevertheless, South Carolina courts have repeatedly addressed this issue as it relates to various governing bodies. In *Garris v. Governing Board of South Carolina Reinsurance Facility*, for example, our supreme court considered the effect of a disqualified vote in a corporate context and stated the following:

> In the absence of any statutory or other controlling provision, the common-law rule that a majority of a whole board is necessary to constitute a quorum applies, and the board may do no valid act in the absence of a quorum. A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.

333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) (citations omitted).

Prior to *Garris*, our supreme court repeatedly stated the general rule that a corporation's director or board member with a personal interest in a corporate matter may not be "counted to make a quorum at a meeting where the matter is acted upon." *See Talbot v. James*, 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 186, 64 S.E.2d 524, 529 (1951); *Fid. Fire Ins. Co. v. Harby*, 156 S.C. 238, 246–47, 153 S.E. 141, 144 (1930); *Peurifoy v. Loyal*, 154 S.C. 267, 288, 151 S.E. 579, 586 (1930).

Likewise, in *Baird*, our supreme court addressed the effect of a disqualified vote in the context of a county council vote. 333 S.C. at 535, 511 S.E.2d at 77–78. Specifically, the *Baird* court considered the issue of "whether invalidation of a bond ordinance [was] a proper remedy for a violation of the State Ethics Act." *Id.* at 535, 511 S.E.2d at 77. As previously noted, the court stated "the vote of a council member who is disqualified because of interest or bias in regard to the subject matter being considered may not be counted in determining *the necessary majority for valid action*." *Id.* (emphasis added). *Robert's Rules of Order* defines a quorum as "[t]he minimum number of members who must be present at the meetings of a deliberative assembly *for business to be validly transacted*." ROBERT ET AL., *supra*, § 3, at 21 (emphasis added). When read in conjunction with the definition of a quorum in *Robert's Rules of Order*, we interpret the court's language in *Baird* to mean a council member who is disqualified due to a conflict of interest may not be counted toward a quorum.

Based upon our review of the relevant authority, we find a council member who has a personal interest in a matter—and votes on the matter—is disqualified from the vote and may not be counted toward the quorum. Our position is supported by South Carolina precedent relating to both corporate boards and county councils. *See Baird*, 333 S.C. at 535, 511 S.E.2d at 77–78; *Talbot*, 259 S.C. at 82, 190 S.E.2d at 764; *Gilbert*, 219 S.C. at 186, 64 S.E.2d at 529; *Fid. Fire Ins. Co.*, 156 S.C. at 246–47, 153 S.E. at 144; *Peurifoy*, 154 S.C. at 288, 151 S.E. at 586.

Applying the rule to the facts of this case, we find the disqualification of Thompson, Ron Wilson, Waldrep, and Cindy Wilson—based upon their individual conflicts—required the court to remove them from its calculation of the quorum. Under the County Code and *Robert's Rules of Order*, a quorum—a majority of those members present and voting—was required for the Council to validly transact business. *See* Anderson County, S.C., Code of Ordinances § 2-37(d), (g)(3); ROBERT ET AL., *supra*, § 3, at 21; *see also Gaskin v. Jones*, 198 S.C. 508, 513, 18 S.E.2d 454, 456 (1942) ("[A] majority of a whole body is necessary to constitute a quorum . . . , and no valid act can be done in the absence of a quorum."). After removing the improper votes, however, only three of the seven Council members could be counted toward the quorum. Given that four members must be present and voting to constitute a quorum, we find the Severance Agreement is null and void because the 2008 Council approved the agreement, as well as the motion to transfer monies to fund it, without the quorum necessary for

taking valid action. Accordingly, we hold the circuit court erred in failing to remove the four disqualified members' votes from its quorum calculation.

Although some may argue this creates an impracticable framework, we note the 2008 Council had several procedural options at its disposal through which it could have passed the Severance Agreement in spite of a majority of Council having personal conflicts. For instance, members with conflicts could have *abstained* from voting, and their abstentions would have allowed them to be counted toward the quorum without tainting the entire vote. Unlike in the case of a recusal—in which a member physically leaves the room to avoid participation—when a member properly abstains, it does not have the effect of defeating a quorum because the member is still physically present. *See generally Gaskin*, 198 S.C. at 513–14, 18 S.E.2d at 456 ("If a quorum is present, a majority of a quorum is sufficient to act and bind the entire body. The members *who are present at a meeting cannot by a mere refusal to vote* defeat the action of the majority of those voting." (emphasis added) (citation omitted)). In this case, because four Council members were *disqualified*, those members are not counted for purposes of the quorum, and therefore, are treated as if they were not present at the meeting. *See Garris*, 333 S.C. at 453, 511 S.E.2d at 59 ("A member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter.").

Based on the foregoing, we hold all votes relating to the adoption and funding of the Severance Agreement are null and void because the 2008 Council passed these motions in the absence of a quorum. Therefore, we reverse the circuit court's holding regarding the quorum issue and remand the case for further proceedings consistent with this opinion.

IV. Availability of Future Payments from SCRS

The County contends the circuit court erred in declining to have Preston's monthly retirement benefit from SCRS placed in a constructive trust and redirected to the County. The circuit court did not reach the merits of this issue in the Final Order. Instead, the court held that, given its previous findings, the County's "cause of action for constructive trust no longer remain[ed] viable." In light of our holding in Part III, *supra*, we reverse and remand with instructions for the circuit court to specifically determine whether placing Preston's future retirement benefits in a

constructive trust and redirecting monthly payments to the County would be an appropriate remedy in this case.

V. Rescission

The County contends the circuit court erred in finding rescission was unavailable because the parties cannot be returned to their status quo ante. We disagree.

"Rescission is an equitable remedy that attempts to undo a contract from the beginning as if the contract had never existed." *Ripley Cove, LLC*, 406 S.C. at 413, 751 S.E.2d at 669 (quoting *Mortg. Elec. Sys., Inc. v. White*, 384 S.C. 606, 615, 682 S.E.2d 498, 502 (Ct. App. 2009)).

> A contract may be rescinded for mistake, if justice so requires, in the following circumstances: (1) whe[n] the mistake is mutual and is in reference to the facts or supposed facts upon which the contract is based; (2) whe[n] the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of the contract, inconsistent with the true agreement of the parties; (3) whe[n] the mistake is unilateral and has been induced by the fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission, without negligence on the part of the party claiming rescission; or (4) whe[n] the mistake is unilateral and is accompanied by very strong and extraordinary circumstances which would make it a wrong to enforce the agreement, sustained by competent evidence of the clearest kind.

King v. Oxford, 282 S.C. 307, 313, 318 S.E.2d 125, 128 (Ct. App. 1984). Nevertheless, as our supreme court has noted, "there can be no rescission of a nonexistent contract." *Davis v. Cordell*, 237 S.C. 88, 98, 115 S.E.2d 649, 654 (1960). A cause of action seeking rescission and damages assumes a valid contract, whereas one attacking the contract as void assumes no contract existed. *Id.* at 98, 115 S.E.2d at 653–54.

"In the absence of fraud[,] which would justify shifting the loss to the party who opposes rescission, rescission is appropriate only if both parties can be returned to the status quo prior to the contract." *King*, 282 S.C. at 313, 318 S.E.2d at 129. "When a party elects and is granted rescission as a remedy, [the party] is entitled to be returned to status quo ante." *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. "Rescission entitles the party to a return of the consideration paid as well as any additional sums necessary to restore [the party] to the position occupied prior to the making of the contract." *First Equity Inv. Corp. v. United Serv. Corp. of Anderson*, 299 S.C. 491, 496, 386 S.E.2d 245, 248 (1989). Because rescission returns the parties to the status quo ante, this necessarily requires any party damaged to be compensated. *Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494.

In *Griggs v. E.I. DuPont de Nemours & Co.*, the U.S. Court of Appeals for the Fourth Circuit stated "the inability to compel full restoration of benefits received under the instrument to be rescinded does not automatically preclude the granting of equitable rescission." 385 F.3d 440, 452 (4th Cir. 2004). The court considered various authorities to determine whether a rescissionary remedy could be fashioned that would eliminate the prejudice stemming from one party's delay in seeking rescission. *Id.* at 452; *see also, e.g.*, *Henson v. James M. Barker Co.*, 555 So. 2d 901, 909 (Fla. Dist. Ct. App. 1990) ("In the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief."); 24 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 69:51 (4th ed. 2002) ("Where circumstances permit, some courts also have allowed as a substitute for restoration of the consideration a deduction of the amount of it from the recovery against the wrongdoer. This is the most practicable and satisfactory disposition of many cases."). After reviewing these authorities, the Fourth Circuit granted rescission based on the following reasoning:

> Because Griggs's delay in seeking rescission has lessened the likelihood that he will be able to recover the tax payments made on the lump-sum distribution, our remedy properly forces Griggs, not DuPont, to bear the risk that the tax payments will not be fully recovered. Under these circumstances, Griggs's delay in seeking rescission works no prejudice on DuPont, thus making it proper and equitable to grant rescission without requiring Griggs to make complete restoration of the benefits he

> received in connection with his initial lump-sum election. At the same time, because the relief we describe allows Griggs to rescind his lump-sum election and instead receive a monthly payment for life (albeit in a lesser amount), DuPont's breach of fiduciary duty does not go unremedied.

Griggs, 385 F.3d at 452–53 (footnote omitted).

In light of our invalidation of the Severance Agreement, we find rescission is an unavailable remedy because the contract never existed. *See Cordell*, 237 S.C. at 98, 115 S.E.2d at 654 (noting "there can be no rescission of a nonexistent contract"). We further find rescission inappropriate because the parties cannot be returned to their status quo ante. *See Miccichi*, 358 S.C. at 95, 594 S.E.2d at 494. Although the County would benefit from a return of the monies improperly allocated to fund the void Severance Agreement, Preston cannot be returned to the county administrator position and—at this stage—it is unclear what remedies, if any, he would be entitled to under his Employment Agreement because the circuit court has not ruled upon its validity.

The County relies upon *Griggs* and cites cases from other jurisdictions—as well as secondary sources—in support of its argument that "equity is not as straight-jacketed" as the circuit court suggested. *See, e.g.*, *East Derry Fire Precinct v. Nadeau*, 924 A.2d 390, 393–94 (N.H. 2007) (finding that, when a party was "an active participant in the scheme" to create a fraudulent severance agreement approved by commissioners at a meeting, rescission was appropriate even though it deprived the party of a severance he would have received anyway, based on later events, had he stayed on the job); 17B C.J.S. *Contracts* § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault."). We find these authorities distinguishable, however, because the record in the instant case does not support a finding that Preston engaged in fraudulent conduct, *see Nadeau*, 924 A.2d at 393–94, breached a fiduciary duty, *see Griggs*, 385 F.3d at 453, or was at fault, *see* 17B C.J.S. *Contracts* § 652. Accordingly, we find the County failed to demonstrate why the facts and circumstances of this case justify this court employing an exception to fashion a remedy that does not fully return the parties to their status quo ante.

Based on the foregoing, we affirm the circuit court's finding that rescission is unavailable as a remedy in this case because the parties cannot be returned to their

status quo ante. Nevertheless, consistent with our previous findings, we remand for the circuit court to fashion an appropriate remedy for the parties.

VI. Unclean Hands

The County further argues the circuit court erred in finding it acted with unclean hands in this matter and could not invoke the court's equitable powers to rescind the Severance Agreement. We agree.

A party with unclean hands is precluded from recovering in equity. *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 756 (Ct. App. 2005). "A party will have unclean hands whe[n] the party behaves unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Id.* (quoting *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000)). "The expression 'clean hands' means a clean record with respect to the transaction with the defendants themselves and not with respect to others." *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943). "[T]he rule must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a [c]ourt of equity." *Id.*

In the Final Order, the circuit court found the record was "replete with evidence of the County's unclean hands" and proceeded to list the conduct it believed supported this finding. After providing a lengthy list of actions, the court concluded:

> [W]hen taken in its totality, the evidence of record firmly establishes that the County, by and through certain of its sitting Council members acting with members of the Council-elect, engaged in a pattern of conduct intended to harass and interfere with Preston's ability to execute his duties as [c]ounty [a]dministrator.

We hold the circuit court erred in finding the County had unclean hands for two reasons. First, the listed actions taken by incoming members of the 2009 Council are irrelevant to the analysis of this issue because those individuals had not been sworn into office yet, and therefore, had no authority to act on behalf of the County. While the court acknowledged these individuals' conduct could not be attributable to the County, it nevertheless included their conduct in the list and used such conduct as a basis for finding the County had unclean hands. To the

extent the circuit court relied upon the actions of the incoming Council members, we agree with the County's contention that it "confused the political rhetoric of primary winners with actual County conduct."

Most of the remaining conduct the circuit court cited concerns actions taken by Waldrep and Cindy Wilson toward Preston during his tenure as county administrator, for which he sued both of them in their *individual capacities*, not their capacities as Council members. We find the conduct of two Council members acting in their individual capacities may not, however, be imputed to the County. Accordingly, we hold the circuit court erred in considering the conduct of "others" in reaching its conclusion. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738 (noting "[t]he expression 'clean hands' means a clean record with respect to the transaction with *the defendants themselves* and *not with respect to others*" (emphasis added)); *see also* 30A C.J.S. *Equity* § 118 (2015) ("An innocent party is, of course, not barred from relief because of the misconduct of others for which he or she is not responsible . . . .").

Second, we find the listed conduct had nothing to do with the subject matter of this litigation. In the Final Order, the circuit court primarily focused its analysis upon the actions of two individual Council members, Waldrep and Cindy Wilson, dating back to 2005. In concluding the County had unclean hands, the court specifically found the behavior of Waldrep and Cindy Wilson—along with incoming members of the 2009 Council—"prejudiced Preston in the execution of his duties, prompting his assertion of the anticipatory breach claim and tort claims in the first instance."

As noted above, the County was not responsible for the conduct of its incoming Council members, and thus, their conduct prior to taking office is irrelevant here. We find the court's reliance upon meetings that took place between incoming Council members in 2009 misplaced because the instant matter concerns actions leading up and relating to the November 18, 2008 meeting of the 2008 Council. What occurred after this meeting among individuals not yet sworn into office simply has no bearing upon the resolution of this issue. More importantly, much of the conduct referenced by the circuit court was already litigated in separate matters not before the court.

For these reasons, we hold the circuit court erred in considering conduct that—although indicative of "the atmosphere that surrounded the actors in this case"—was irrelevant to the subject matter of the instant litigation. *See Arnold*, 201 S.C. at 532, 23 S.E.2d at 738; *Anderson*, 365 S.C. at 493, 617 S.E.2d at 756. We find

the court ignored the requirements of *Arnold* and *Anderson* in concluding such conduct prejudiced Preston in the execution of his duties as county administrator because, simply put, Preston's ability to execute his duties as county administrator has nothing to do with this case. The instant litigation focuses on whether improper conduct at the November 18, 2008 meeting of the 2008 Council requires this court to invalidate the approval of Preston's Severance Agreement and rescind the agreement itself. Furthermore, Preston had already relinquished his position as county administrator before the 2009 Council decided to bring this action.

Based on the foregoing, we hold the circuit court erred in finding the County could not invoke its equitable powers to rescind the Severance Agreement because the County had unclean hands. Although we agree rescission is unavailable as a remedy in this case, we reverse the circuit court's finding that the County had unclean hands.

VII. Adequate Remedy at Law

The County contends the circuit court further erred in finding equitable relief was unavailable in this case because an adequate remedy at law existed. We agree.

Generally, equitable relief is available only when no adequate remedy at law exists. *Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989). "An 'adequate' remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity." *Id.* Our supreme court has consistently held that "[a] suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 593, 748 S.E.2d 781, 785 (2013) (quoting *Felts v. Richland Cty.*, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991)). "Whether an action for declaratory relief is legal or equitable in nature depends on the plaintiff's main purpose in bringing the action." *Williams v. Wilson*, 349 S.C. 336, 340, 563 S.E.2d 320, 322 (2002).

In the Final Order, the circuit court concluded if the County "wished to question the legality of the Severance Agreement," then it could have accomplished this goal by bringing a declaratory judgment action challenging the legality of the 2008 Council's actions "without suing Mr. Preston directly for rescission."

Contrary to the circuit court's findings, the County argues it could not have received the complete relief sought—the return of all monies appropriated to fund the Severance Agreement—without the court invalidating the vote, rescinding the contract, and imposing a constructive trust on Preston's monthly retirement benefits. The County's main purpose in bringing this action was to seek the above equitable relief, not merely to question the legality of the Severance Agreement. Because the anti-alienation provision in section 9-1-1680 of the South Carolina Code (Supp. 2016), only allows a party to reach a retiree's benefits in a constructive trust case, we find no adequate remedy at law existed as to this equitable claim. Regardless of whether rescission was available, the County could not have received complete relief without the court invoking its equitable powers to place Preston's retirement benefits in a constructive trust. Thus, we find a declaratory judgment action would not have afforded the complete relief sought in this action. *See Santee Cooper*, 298 S.C. at 185, 379 S.E.2d at 123 (noting "[a]n adequate remedy at law is one which is as certain, practical, complete[,] and efficient to attain the ends of justice and its administration as the remedy in equity" (citation omitted)). Further, as noted above, a declaratory judgment action can be equitable in nature—and indeed, would have been given the relief sought in this case.

Accordingly, given that no adequate remedy at law existed, we reverse the circuit court's finding that the County could not invoke its equitable powers because the County could have challenged the Severance Agreement's legality via a declaratory judgment action instead of directly suing Preston.

VIII. Breach of the Severance Agreement

In light of our previous holding that the Severance Agreement is invalid because it was approved during an absence of a quorum, we find Preston can no longer succeed on his breach of contract counterclaim. Accordingly, we reverse the circuit court's finding that the County breached the covenant not to sue provision in the Severance Agreement by bringing the instant action. We decline to address whether attorney's fees are appropriate because the circuit court found this issue "should be held in abeyance pending the final disposition of this case and the filing of any petition as required by law."

IX. Remaining Issues

Finally, because our resolution of prior issues is dispositive in this appeal, we decline to rule upon whether the circuit court erred in finding the Severance Agreement was not unreasonable and capricious; a product of fraud and abuse of power; or void as against public policy. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

Like the circuit court, we are mindful of the separation of powers concerns attendant to the judicial branch of government overturning the action of a duly elected county council, and therefore, take this opportunity to clarify that nothing in this opinion shall be construed as passing judgment on the merits or propriety of the 2008 Council's decision. Our decision hinges on the narrow question of whether the 2008 Council had legal authority to approve the Severance Agreement when four of the seven members, despite having clear conflicts of interest, improperly cast their votes on the matter. We hold the 2008 Council had no such authority because it could not legally act in the absence of a quorum. As a result, the Severance Agreement is null and void.

We affirm the circuit court's finding that Preston owed no fiduciary duty to inform the 2008 Council of improper votes and his conduct did not constitute fraud, constructive fraud, or negligent misrepresentation. The circuit court also properly declined the County's invitation to apply the single tainted vote rule because *Baird* demonstrates South Carolina does not follow such rule. We hold the court erred, however, in refusing to invalidate the 2008 Council's approval of the Severance Agreement based upon the absence of a quorum. Accordingly, we reverse and remand with instructions for the court to determine the rights and remedies of the parties in light of this opinion. On remand, the court should specifically address whether the future payments from SCRS to Preston are available in fashioning a remedy. Although we agree with the circuit court that rescission is not an available remedy because the parties cannot be returned to their status quo ante, we reverse the court's finding of unclean hands. We further reverse the court's finding that the County could not invoke its equitable powers because an adequate remedy at law

existed. Lastly, we reverse the court's holding that the County breached the terms of the Severance Agreement by bringing the instant action.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

HUFF, J., concurs. FEW, A.J., not participating.