

Exhibit A

2019 WL 1499322

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Supreme Court of Alabama.

EX PARTE Taurus Jermaine CARROLL

(In re Taurus Jermaine Carroll

v.

State of Alabama)

1170575

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April 5, 2019

Synopsis

Background: Defendant was convicted in the Circuit Court, St. Clair County, No. CC-09-242, of one count of murder after having been convicted of another murder within the preceding 20 years and second count of murder made capital, and defendant was sentenced to death. The Court of Criminal Appeals, [215 So.3d 1135](#), affirmed. Following the Supreme Court's denial of defendant's petition for a writ of certiorari, defendant petitioned the United States Supreme Court of a writ of certiorari. The United States Supreme Court, [137 S.Ct. 2093](#), vacated and remanded. On remand, the Court of Criminal Appeals, [2017 WL 6398236](#), again affirmed defendant's convictions and sentence. Defendant petitioned for a writ of certiorari.

The Supreme Court, [Bolin, J.](#), held that the circuit court did not exceed its discretion in concluding that defendant did not have significant or substantial deficits in adaptive functioning as would preclude imposition of death sentence.

Affirmed.

Petition for Writ of Certiorari To the Court of Criminal Appeals (St. Clair Circuit Court, CC-09-242; Court of Criminal Appeals, CR-12-0599)

Opinion[BOLIN](#), Justice.

*1 Taurus Jermaine Carroll was convicted in the St. Clair Circuit Court of one count of murder for intentionally causing the death of Michael Turner, a fellow inmate, after having been convicted of another murder within the preceding 20 years, see § 13A-5-40(a)(13), [Ala. Code 1975](#), and a second count of murder made capital for committing murder while Carroll was under a sentence of life imprisonment, see § 13A-5-40(a)(6), [Ala. Code 1975](#).

Before he was sentenced, Carroll argued to the circuit court that he is intellectually disabled and therefore, under [Atkins v. Virginia](#), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), ineligible to be sentenced to death. The circuit court rejected that argument and, following the jury's unanimous recommendation, sentenced Carroll to death for each capital-murder conviction. The Court of Criminal Appeals affirmed Carroll's convictions and sentences. [Carroll v. State](#), 215 So.3d 1135 (Ala. Crim. App. 2016)(“[Carroll I](#)”).¹ This Court denied Carroll's petition for a writ of certiorari.

On May 1, 2017, the United States Supreme Court granted Carroll's petition for a writ of certiorari, vacated the judgment of the Court of Criminal Appeals, and remanded the cause to that court “for further consideration in light of [Moore v. Texas](#), 581 U.S. —[137 S.Ct. 1039] [197 L.Ed.2d 416] (2017).” 581 U.S. —, 137 S.Ct. 2093, 197 L.Ed.2d 893 (2017). On remand, the Court of Criminal Appeals again affirmed Carroll's convictions and sentences. [Carroll v. State](#), [Ms. CR-12-0599, Dec. 15, 2017] — So. 3d — (Ala. Crim. App. 2017)(“[Carroll II](#)”). We granted Carroll's petition for a writ of certiorari.

I. THE STANDARD

Intellectual disability must be proven by a preponderance of the evidence, and the trial court's determination is entitled to deference on appeal. [Ex parte Lane](#), [Ms. 1160984, Sept. 14, 2018] — So. 3d —, — (Ala. 2018) (citing [Ex parte Smith](#), 213 So.3d 313, 319 (Ala. 2010)). A trial judge exceeds his or her discretion when there is no evidence on which the judge could have rationally based his or her decision regarding the defendant's intellectual disability. [Ex parte Lane](#), — So. 3d at —.

II. THE LAW ON INTELLECTUAL DISABILITY

A. The Developing Law post Atkins

Carroll asserts that the Court of Criminal Appeals' decision conflicts with the United States Supreme Court decisions in [Atkins v. Virginia](#), 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); [Hall v. Florida](#), 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014); [Brumfield v. Cain](#), 576 U.S. —, —, 135 S.Ct. 2269, 2278-79, 192 L.Ed.2d 356 (2015); and [Moore v. Texas](#), 581 U.S. —, 137 S.Ct. 1039, 197 L.Ed.2d 416 (2017).

In [Moore v. Texas](#), the United States Supreme Court summarized the law on intellectual disability:

“The Eighth Amendment prohibits ‘cruel and unusual punishments,’ and ‘reaffirms the duty of the government to respect the dignity of all persons,’ [Hall v. Florida](#), 572 U.S. [701] at 708 [134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014)] (quoting [Roper v. Simmons](#), 543 U.S. 551, 560 [125 S.Ct. 1183, 161 L.Ed.2d 1] (2005)). ‘To enforce the Constitution's protection of human dignity,’ we ‘loo[k] to the evolving standards of decency that mark the progress of a maturing society,’ recognizing that ‘[t]he Eighth Amendment is not fastened to the obsolete.’ [Hall](#), 572 U.S. at 708 [134 S.Ct. 1986] (internal quotation marks omitted).

*2 “In [Atkins v. Virginia](#), [536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2006),] we held that the Constitution ‘restrict[s] ... the State's power to take the life of’ any intellectually disabled individual. 536 U.S. at 321 [122 S.Ct. 2242]. See also [Hall](#), 572 U.S. at 707-710 [134 S.Ct. 1986]; [Roper](#), 543 U.S. at 563-564 [125 S.Ct. 1183]. Executing intellectually disabled individuals, we concluded in [Atkins](#), serves no penological purpose, see 536 U.S. at 318-320 [122 S.Ct. 2242]; runs up against a national consensus against the practice, see [id.](#), at 313-317 [122 S.Ct. 2242]; and creates a ‘risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty,’ [id.](#), at 320 [122 S.Ct. 2242] (internal quotation marks omitted); see [id.](#), at 320-321 [122 S.Ct. 2242].

“In [Hall v. Florida](#), we held that a State cannot refuse to entertain other evidence of intellectual disability when a defendant has an IQ score above 70. 572 U.S. at 721-724 [134 S.Ct. 1986]. Although [Atkins](#) and [Hall](#) left to the States ‘the task of developing appropriate

ways to enforce’ the restriction on executing the intellectually disabled, 572 U.S. at 719 [134 S.Ct. 1986] (quoting [Atkins](#), 536 U.S. at 317 [122 S.Ct. 2242], States' discretion, we cautioned, is not ‘unfettered,’ 572 U.S. at 719 [134 S.Ct. 1986]. Even if ‘the views of medical experts’ do not ‘dictate’ a court's intellectual-disability determination, [id.](#), at 721 [134 S.Ct. 1986], we clarified, the determination must be ‘informed by the medical community's diagnostic framework,’ [id.](#), at 721 [134 S.Ct. 1986]. We relied on the most recent (and still current) versions of the leading diagnostic manuals — the DSM-5 and AAIDD-11. [Id.](#), at 705, 710, 712, 722-723 [134 S.Ct. 1986]. Florida, we concluded, had violated the Eighth Amendment by ‘disregard[ing] established medical practice.’ [Id.](#), at 712 [134 S.Ct. 1986]. We further noted that Florida had parted ways with practices and trends in other States. [Id.](#), at 712-718 [134 S.Ct. 1986]. [Hall](#) indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards.”

581 U.S. at —, 137 S.Ct. at 1048-49.

Consequently, it is unconstitutional to impose a death sentence upon a defendant with an intellectual disability. [Moore](#), 581 U.S. at —, 137 S.Ct. at 1048; [Atkins](#), 536 U.S. at 321, 122 S.Ct. 2242. Therefore, in the [Atkins](#) context, when considering whether Carroll is intellectually disabled, the Court must consider whether the evidence established that: (1) Carroll has significant subaverage intellectual functioning and (2) significant or substantial deficits in adaptive functioning; and (3) these problems manifested themselves before the age of 18. See [Smith v. State](#), 213 So.3d 239 (Ala. 2007) (citing [Ex parte Perkins](#), 851 So.2d 453, 455-56 (Ala. 2002)).

It is undisputed that Carroll's IQ score of 71, adjusted for the standard of measurement, yields a range of 66 to 76. Indeed, the Court of Criminal Appeals found that lower end of Carroll's score range falls at or below 70. [Carroll II](#), — So. 3d at —. Thus, there is no dispute that Carroll has “subaverage intellectual functioning.” Rather, the dispute in this case centers around whether Carroll has significant or substantial deficits in adaptive functioning that manifested themselves before the age of 18.

B. The Specific Components of [Moore v. Texas](#)

The United States Supreme Court remanded Carroll's case to the Alabama Court of Criminal Appeals for further consideration in light of [Moore v. Texas](#), *supra*. In [Moore](#), the United States Supreme Court reversed a decision of the Texas Court of Criminal Appeals, which had determined that the defendant was not intellectually disabled for purposes of imposing the death penalty.

*3 The Supreme Court found several flaws in the Texas Court of Criminal Appeals' analysis. First, the Supreme Court found that the Texas court violated [Hall](#) by disregarding the defendant's lower IQ scores and failing to consider "the standard error of measurement." [Moore](#), 581 U.S. at —, 137 S.Ct. at 1049. Next, the Supreme Court found that the Texas court had improperly "overemphasized [the defendant's] perceived adaptive strengths." 581 U.S. at —, 137 S.Ct. at 1050. For example, the Texas court determined that facts establishing that the defendant had "lived on the streets, mowed lawns, and played pool for money" outweighed the fact that he suffered from adaptive deficits in other areas, such as a lack of understanding of the days of the week, the months of the year, and the seasons, and a limited ability to tell time, read, or do basic arithmetic. The Supreme Court held that the medical community "focuses the adaptive functioning inquiry on adaptive deficits," not strengths. 581 U.S. at —, 137 S.Ct. at 1050.

The Supreme Court also criticized the Texas court for its emphasis on Moore's improved behavior in prison.

"Clinicians ... caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is. DSM-5,^[2] at 38 ('Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers); if possible, corroborative information reflecting functioning outside those settings should be obtained.');

see AAIDD-11^[3] User's Guide 20 (counseling against reliance on 'behavior in jail or prison')."

581 U.S. at —, 137 S.Ct. at 1050.

In [Moore](#), the Supreme Court also discussed whether states may define intellectual disability in a manner that is (1) uninformed by the medical community or (2) based on outdated medical standards. First, the Supreme Court rejected the Texas court's use of the [Ex parte Briseno](#), 135 S.W.3d 1 (Tex. Crim App. 2004), factors. In [Ex parte](#)

[Briseno](#), the Texas Court of Criminal Appeals, following [Atkins](#), created a standard for determining intellectual disability, in which the court set forth several factors to determine whether the average Texas citizen would agree that an individual should be protected from execution because of an intellectual disability.⁴ The Supreme Court noted that Texas was the only state that applied the [Briseno](#) factors when assessing a defendant's intellectual disability.⁵

*4 [Moore](#) also held that a determination that a defendant is not intellectually disabled may not be based on "outdated medical standards." Specifically, [Moore](#) emphasized that, notwithstanding the Supreme Court's indication that states have discretion in defining intellectual disability, states cannot engage in practices that "diminish the force of the medical community's consensus." [Moore](#), 581 U.S. at —, 137 S.Ct. at 1044. The Supreme Court held:

"The medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, ... current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians,' DSM-5, at xii. See also [Hall v. Florida](#), 572 U.S. 701, 704, 705, 709-10, 710-14 [134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014)] (employing current clinical standards); [Atkins](#), 536 U.S. at 308, n. 3, 317, n. 22, 122 S.Ct. 2242 (relying on then-current standards)."

581 U.S. at —, 137 S.Ct. at 1053. The Supreme Court specifically found that the Texas Court of Criminal Appeals had improperly relied on an outdated medical standard, the clinical manual of the American Association on Mental Retardation ("the AAMR") in its ninth edition as published in 1992.⁶ [Moore](#), 581 U.S. at —, 137 S.Ct. at 1053. The Court recognized the AAIDD-11 and DSM-5 as "current medical diagnostic standards" and as including "generally accepted, uncontroversial intellectual-disability diagnostic definition[s]." 581 U.S. at —, 137 S.Ct. at 1045. Although [Moore](#) clearly requires states to assess intellectual disability using the most current medical standards, the Supreme Court did not specifically limit states to the definitions set forth in the AAIDD-11 and DSM-5. In sum, the Supreme Court held that states may not adopt factors that reflect "superseded medical standards" or that "substantially deviate" from

prevailing clinical standards. 581 U.S. at —, 137 S.Ct. at 1050. The Supreme Court further concluded that the Texas Court of Criminal Appeals erred “[b]y rejecting the habeas court’s application of medical guidance [including the AAIDD-11 and DSM-5] and clinging to the standard it laid out in Briseno, including the wholly nonclinical Briseno factors,” and that by doing so the court “failed to adequately inform itself of the ‘medical community’s diagnostic framework.’ Hall, 572 U.S. at 721, 134 S.Ct. 1986.” Moore, 581 U.S. at —, 137 S.Ct. at 1053.

III. ANALYSIS

A. Deficits in Adaptive Functioning and Current Medical Standards

Carroll argues that the Court of Criminal Appeals erred in relying on the results of the Adaptive Behavior Scale — Residential and Community Living, second edition (“ABS-RC:2”), and the assessment by Dr. Susan Ford, the director of Psychological and Behavioral Services for the Division of Developmental Disabilities with the Department of Mental Health, that that test adheres to current medical standards. Specifically, he contends that the court’s reliance on the results of the ABS-RC:2 and Dr. Ford’s opinion regarding the reliability of the test conflicts with the requirement that assessments of adaptive functioning must adhere to the “medical community’s current standards.” Moore, 581 U.S. at —, 137 S.Ct. at 1053.

*5 On May 4, 2012, the circuit court entered an order setting forth the basis of its determination that Carroll was eligible for the death penalty. With respect to whether Carroll has significant or substantial deficits in adaptive functioning, the circuit court found:

“The State psychologist, Dr. Susan Ford, conducted a forensic evaluation of the defendant to measure his adaptive functioning. Dr. Ford concluded that the defendant’s adaptive functioning lies within the borderline range, and as such he is not ‘mentally retarded.’ Dr. Ford found that the defendant did not exhibit significant deficits in any of the ten adaptive functioning ‘domains’ that were tested. Dr. Ford testified that her assessment was consistent with Dr. [Jerry] Gragg’s intellectual assessment placing the defendant in the borderline range.^[7] Dr. Ford explained that the defendant’s performance on the test

and the facts leading to her conclusion. Dr. Ford found that the defendant reads novels, self-help books, and the sports page of the newspaper. Dr. Ford found that the defendant is able to write letters. The defendant, who has served as a cook in a prison kitchen, was able to correctly describe to Dr. Ford: (1) how to bake food items such as biscuits; (2) how to use a large mixer, and (3) the ingredients that were used in some of the food items he made as a cook. The defendant has also successfully completed the high school equivalency (GED) examination, which requires the ability to read, study and learn the knowledge and skills necessary to pass a GED test.

“The defense psychologist, Dr. [Robert] Shaffer, conducted an assessment and testified that he found significant deficits in adaptive functioning. It is noted that Dr. Shaffer is the only psychologist to have evaluated the defendant to offer an opinion that the defendant is ‘mentally retarded.’

“Dr. Ford’s testimony indicates that Dr. Glen King, who conducted a forensic assessment of the defendant on competency to stand trial for this case, concluded that the defendant’s intellectual ability was ‘Average.’ Dr. Ford’s report and testimony also indicate that Dr. David Sandefer, who evaluated the defendant for the Alabama Department of Corrections in 2004, found that the defendant’s Intellectual Function was ‘Below Average.’ Dr. Ford states in her report that functioning ‘Below Average’ is just under the ‘Average’ range and just above the ‘Borderline’ range of functioning, neither of which indicates ‘mental retardation.’

“Furthermore, Bryan Griffith, a Corrections Officer at the State Prison where the defendant has been housed, testified that while performing his duties as a corrections officer for the last three to four years he spent time around the defendant, observed the defendant, and supervised the defendant in the prison kitchen where the defendant worked as a baker. Officer Griffith testified that the defendant was able to effectively and consistently do his job in the kitchen without problems and that he was actually a ‘good cook.’ Griffith further testified that Mr. Carroll was required to perform all jobs required in the kitchen and did them well. He testified that the defendant was able to follow directions, complete tasks, and never had any problems with communicating.

“Investigator M.C. Smith, with the Alabama Department of Corrections Investigation and Intelligence Division, testified that he, along with another investigator, interviewed the defendant following the incident in this case. Investigator Smith testified that the defendant had no difficulty understanding questions and providing answers to him. Investigator Smith testified that he had no difficulty understanding the defendant. Before conducting the interview, Investigator Smith had the defendant demonstrate that he was able to correctly read. Investigator Smith also testified that he conducted an unannounced inventory of the defendant's one-man cell on April 6, 2012, and located eighteen paperback books and one hardback book, of which included: (1) Jailhouse Lawyer's Handbook, (2) Oxford American Dictionary, and (3) Oxford History of American People. The defendant also had two issues of ‘Jet’ magazine in his name that had March 2012 dates, a ‘USA Today’ newspaper in another inmate's name, along with local newspaper clippings of his own capital murder case from a St. Clair County newspaper.

*6 “This Court finds particularly compelling the testimony of Officer Griffith and Investigator Smith describing their personal observations of and interactions with the defendant, along with the fact that the defendant has successfully obtained his [GED]. This Court finds compelling the description of the defendant's current level of adaptive functioning as described by Dr. Ford. This Court finds that the defendant does not exhibit significant or substantial deficits in adaptive functioning. Because Mr. Carroll does not have significant or substantial deficits in his adaptive functioning, this Court cannot find that he is ‘mentally retarded.’ ”

Thus, the circuit court rejected Dr. Robert Shaffer's opinion that Carroll suffers from significant deficits in

adaptive functioning, specifically finding that the defense expert was the only psychologist to determine that Carroll is intellectually disabled. The circuit court placed great reliance on Dr. Ford's opinion, including her reference to Dr. David Sandefer's segregation-review evaluation, as well as Dr. Glen King's opinion and the testimony of laypersons regarding their impressions of the defendant.

In [Carroll II](#), the Court of Criminal Appeals held:

“Regarding adaptive functioning, Carroll and the State presented competing opinions of mental-health experts. The circuit court credited Dr. Ford's opinion. Dr. Ford administered the Adaptive Behavior Scale for Residential and Community Living-2 (‘ABSRC’) to Carroll. According to Dr. Ford, the ABSRC is recognized in the field of psychology as an appropriate and reliable means by which to measure adaptive functioning. Dr. Ford testified that the ABSRC tests the following 10 domains: ‘independent functioning, physical development, language development, numbers and time, domestic activity, economic activity, prevocational and vocational activity, self-direction, responsibility, and socialization.’ (R. 151.) Regarding the scoring of the ABSRC, Dr. Ford explained that ‘[e]ach domain has a range, and it could be extremely low, below average, average, above average, superior, and very superior.’ (R. 152.) Dr. Ford testified that Carroll's scores in ‘[a]ll of the domains were at least in the above average range, and there were five domains that were in the superior range.’ (R. 156.) Dr. Ford opined that Carroll's adaptive functioning does not fall within the definition of intellectually disabled.

“Dr. Shaffer disagreed with Dr. Ford's findings and testified that the ABSRC is not the proper test by which to measure adaptive functioning. Dr. Shaffer's disagreement, however, raises an issue of credibility. The Alabama Supreme Court has explained: ‘When evidence is presented ore tenus, it is the duty of the trial court, which had the opportunity to observe the witnesses and their demeanors, and not the appellate court, to make credibility determinations and to weigh the evidence presented.’ [Ex parte Hayes](#), 70 So.3d 1211, 1215 (Ala. 2011) (citing [Blackman v. Gray Rider Truck Lines, Inc.](#), 716 So.2d 698, 700 (Ala. Civ. App. 1998)). Thus, it is not this Court's role to second-guess the circuit court's credibility determination relating to two competing psychologists' opinions.

“Based on Dr. Ford's testimony, the circuit court did not abuse its discretion in finding that Carroll had failed to prove that he currently exhibits deficits in his adaptive functioning. Further, the circuit court did not exceed the restrictions established in [Moore](#) on the states' ability to define intellectual disability. Rather, Dr. Ford testified that the test she had Carroll perform was recognized in the field of psychology as an appropriate and reliable means to measure adaptive functioning. Thus, there is evidence in the record indicating that Dr. Ford's opinion complied with the ‘medical community's current standards’ and the Supreme Court's opinion in [Moore](#), [581 U.S. at —,] 137 S.Ct. at 1053.”

*7 — So. 3d at —.

The circuit court's primary reason for rejecting the defense expert's opinion was that Dr. Shaffer was the only psychologist to conclude that Carroll suffered from significant adaptive deficits. The record indicates that Dr. Shaffer, a neuropsychologist and forensic psychologist, holds a bachelor's degree in psychology from Guilford College and both a master's degree and a doctorate in clinical psychology from Georgia State University.⁸ The circuit court admitted Dr. Shaffer as an expert in the field of clinical psychology. Dr. Shaffer personally met with Carroll for a total of 13.5 hours on May 16, 2011, and February 8, 2012. He also conducted 50 hours of data compilation, including interviewing 2 of Carroll's uncles and reviewing Department of Corrections records, tests, and evaluations, as well as interview notes of Dr. Susan Wardell, a mitigation specialist.

Dr. Shaffer testified regarding his disagreement with Dr. Ford's reliance on the ABS-RC:2 as follows:

“Q. And what was your interpretation of Dr. Ford's adaptive functioning assessment?”

“A. Well, there was a problem with the instrument that she used to perform the assessment.

“Q. In what way?”

“A. The AAMD [sic] ABS-2, which is an instrument that she used, there are two problems with the process. One was that it was administered directly to Taurus Carroll, which meant that Taurus Carroll answered the questions about his own abilities. That's typically not advisable because people do tend to inflate their own perceptions of themselves in that format.

“But, even more important than that, the test itself typically is used for a different purpose. It's used to compare mentally retarded people in a mentally retarded program with other mentally retarded individuals. The test itself is standardized on 400 mentally retarded citizens.

“Let me take ... a discourse on the meaning of standardization. Anything in science has to be compared to something else. That's the whole point of science. For example, we do a test, and we get a number. That number only means something if we know exactly who else has numbers that are similar to that or different from that. So every test that's developed has a standardized group of people. It's always compared to a group.

“The IQ tests are standardized on the entire U.S. population in what's called a representative sample. That means you get an equivalent number of elderly people, middle-aged people, and young people that are present in the U.S. demographic statistics.

“You get a representative sample of the entire population, so that you are getting a true average. Then you take your individual person's score, and you can tell how much higher or lower it is than the average person in the United States.

“... [I]t's my understanding that [Atkins](#) comparison is to the average person, the average U.S. individual, because just like when making a diagnosis, tests are recommended that are standardized on the entire U.S. population. So to standardize a test, you get a

representative sample of the entire U.S. population. You give all of them the test, and you set up a bell curve based on their scores. You take -- then you take your individual that you want to know something about, and you place him somewhere on that bell curve. Is he in the middle? Is he in the upper quartile, lower quartile, or wherever. That tells you something about that person.

*8 “[Atkins](#) specifically is referring to that process when it is making determinations, just like the diagnostic criteria does in the DSM-IV, the Statistical Manual of Mental Disorders. Susan Ford's test, on the other hand, the standardization sample that set up the data tables was not the U.S. population. It was a group of mentally retarded people, 400 of them.

“Now, the test is usually used to say are we going to put this person in with the mild MR people, the severe MR people, or the moderate MR people? Where are we going to put this person to train them? That test that she used -- that Susan Ford used is also useful in determining the outcome of the program. I'm going to give them the test today before I put them in the training program. Then I'm going to follow up and give them the same test at the end of the training program and see what kind of progress that we've made.

“The problem with using it to diagnose is that you're comparing with an easy group of people. So the scores are going to be -- going to be thrown off. Not to say that somebody scores above average in that group, really all you're saying is that they are above half of the mentally retarded people. You're not saying that they are above the average person in the United States.

“Unfortunately, there's no data to make a comparison to average people in the United States using this test. It would be fairly easy for test developers to develop that. All they would have to do is give it to 400 average people that are a representative sample of the entire population. Only 2 percent of them would be mentally retarded. And, obviously, they are going to score a lot better on the test. So then, when you take Taurus Carroll's designation from this test, we don't know where he'd appear. Unfortunately, that information is just not available because it's never been done.

“Q. All right. So as I understand your answer, even though Dr. Ford's examination includes administering a test called AAMR Adaptive Behavior Scale, that's not an appropriate test for an [Atkins](#) level evaluation; is that correct?

“A. Correct, yes.

“Q. And the reason that it's not an appropriate test for an [Atkins](#) level evaluation is because the sample that you are using is all retarded people?

“A. Exactly. Here's an analogy. My church basketball team scores at the top of its league this year. They scored more points than anybody in the league. They fall under the designation of above average and superior. But I don't know, if we put them up against the Chicago Bulls, how they would do. There's no way to compare it because they have never played them. It's the same thing.

“Q. The test called AAMR Adaptive Behavior Scale is used to place people?

“A. Primarily, that is the function, and you can characterize somebody with how they compare to other mentally retarded people using that test.

“Q. All right. We talked a lot about social history and events prior to the age of 18 years. Was there any type of analysis in Dr. Ford's report relative to developmental issues prior to the age of 18?

“A. You couldn't without referring to another expert's work, perhaps, or another psychologist's research.

“Q. Are you aware of any professional clinical psychologist that would conduct an [Atkins](#) level evaluation using the AAMR Adaptive Behavior Scale as their only means of assessing adaptive behavior?

“A. No. That would not meet the standards of an evaluation.”

*9 Dr. Shaffer further testified that he performed a series of [neurocognitive tests](#) on Carroll, including the Halstead Reitan Neurological Test battery, the Wechsler

Individual Achievement test (“the WIAT”), and a test for memory malingering. The results indicated that Carroll was not malingering, and several of his scores fell within the “impaired” range. To determine adaptive functioning, Dr. Shaffer also administered the Vineland-2 and the Adaptive Behavior Assessment System to relatives who had spent a significant time with Carroll before his imprisonment at age 15. The results indicated that Carroll falls within the first percentile of individuals, i.e., “[m]ore than 99 out of 100 individuals from the U.S. population exceeded Mr. Carroll in adaptive behavior.” Dr. Shaffer opined that, when considering the neurocognitive battery of tests administered to Carroll and the adaptive results from interviewing Carroll's family members, the scores “consistently [fell] in that range of mild [mental retardation](#).”

Dr. Ford was qualified by the circuit court as the State's expert on mental retardation. She holds a doctorate in developmental psychology from the University of New Orleans and a master's degree in psychology from Alabama A & M University and is board-certified in behavioral analysis. Dr. Ford admitted that, although she had administered adaptive-functioning tests “many times” and “[i]n a variety of circumstances,” such as evaluations conducted in juvenile cases, Carroll's case was the first in which she provided testimony during an [Atkins](#) hearing.

During the hearing, Dr. Ford testified that she conducted adaptive-functioning testing on Carroll on January 24, 2012, at St. Clair Correctional Facility. She administered one test, the ABS-RC:2 test, which consists of an evaluation of the domains of independent functioning, physical development, language development, numbers and time, domestic activity, economic activity, prevocational and vocational activity, self-direction, responsibility, and socialization. She explained:

“On this particular adaptive measure, the comparison group is people who have already been identified as having mental retardation. So average — an average score on this test does not mean that the person is not mentally retarded. Average scores on this one mean that their scores compare with other people who have mental retardation. So, if we're talking average about the general population, it's going to be a score of average or better.”

Later in her testimony, Dr. Ford explained that “[t]he comparison group was people with developmental disabilities, not the entire population, but people with developmental disabilities.”

Dr. Ford testified that the ABS-RC:2 is an oral test in which she questions the defendant. Her interview with Carroll about his adaptive functioning lasted approximately two hours. She testified that, in order to verify that the information provided by the person being tested is accurate, “the ideal” is to interview “other people that may know this person well and be very familiar with what they are able to do.” Dr. Ford testified that she did not interview Carroll's sister because, although Carroll reported that his sister visits him in prison, he was unable to recall her telephone number or her address. Dr. Ford also did not interview Carroll's other family members or individuals who may have spent time around Carroll. Dr. Ford explained that, because she was not provided any other contact information, she did not interview anyone else.⁹ Dr. Ford noted that the ABS-RC:2 results indicated that Carroll's scores in all the domains were at least in the above-average range, including five domains in the superior range. Based on those results, she opined that the test results indicated that Carroll was “in the borderline range of adaptive functioning currently.”

*10 The Court of Criminal Appeals correctly pointed out that Dr. Ford's and Dr. Shaffer's opinions regarding the reliability of the ABS-RC:2 were conflicting. The Court of Criminal Appeals determined that Dr. Shaffer's testimony that the ASB-RC:2 is not the proper test by which to measure adaptive functioning “raises an issue of credibility” and that “it is not this Court's role to second-guess the circuit court's credibility determination relating to two competing psychologists' opinions.” [Carroll II](#), — So. 3d at —. In addition, the Court of Criminal Appeals held that evidence in the record indicates that Dr. Ford's opinion complied with the “medical community's current standards” as required by [Moore](#) because Dr. Ford testified that the test is recognized in the field of psychology as an appropriate and reliable means to measure adaptive functioning.

Given the conflicting testimony between Dr. Ford and Dr. Shaffer regarding the reliability of the ABS-RC:2 as a tool for measuring the adaptive functioning of a criminal defendant for [Atkins](#) purposes, it was necessary for the

circuit court to resolve the conflict before entering its decision. See [Reeves v. State](#), 226 So.3d 711, 743 (Ala. Crim. App. 2016) (holding, in a case with conflicting expert opinions, that “[i]t was for the circuit court to resolve the conflicting evidence and the conflicting expert testimony”).

This criminal case is not the first in which the reliability of the ABS-RC:2 has been questioned. For example, in [Reeves, supra](#), the State's expert, a clinical and forensic psychologist, testified that the ABS-RC:2 is “normed” against those who are in the borderline range of intellectual functioning and those who are intellectually disabled. The expert “conceded that the [Mental Retardation](#) Definition Classification and Systems of Support, 10th edition, a text published by the American Association on Intellectual and Developmental Disabilities, states: ‘For diagnosis, significant limitations in adaptive behaviors should be established through the use of standardized measures normed on the general population including people with disabilities and people without disabilities.’ ” 226 So.3d at 735. The circuit court looked to evidence other than expert testimony regarding the results of the ABS-RC:2 when determining that the petitioner did not have substantial deficits of adaptive functioning. [Id.](#)

Several other courts have also questioned whether the application of the ABS-RC:2 for the purpose of determining the adaptive functioning of a criminal defendant is based on established diagnostic methods for assessing adaptive behavior and/or meets the medical community's standards. See, e.g., [Martinez Ramirez v. Ryan](#) (No. CV-97-1331-PHX-JAT, Sept. 28, 2010) (D. Ariz. 2010) (not reported in F.Supp. 2d) (noting that the trial court did not err in discounting the opinion of a clinical psychologist in part, specifically finding that the expert improperly used the ASB-RC:2, which was not specifically designed to assess mental retardation); [Ohio v. Lawson](#) (No. CA2007-12-116, Nov. 24, 2008) (Ohio Ct. App. 2008) (not reported in Ohio Appellate Reports or North Eastern Reporter) (refusing to rely on expert's use of the ABS-RC:2 because it “does not comport with the criteria proposed in the 2002 AAMR manual for the [diagnosis of mental retardation](#), and is normed against the mentally retarded population only”); and [Pruitt v. State](#), 834 N.E.2d 90, 109-110 (Ind. 2005) (determining psychologist's application of the ABS-RC:2 to determine criminal defendant's adaptive

functioning, which “embraces only those in the bottom ten to twenty-five percent of those meeting the clinical standards,” was “too stringent a test” under both [Atkins](#) and Indiana's statute). See also [Simpson v. Quarterman](#), 593 F.Supp.2d 922, 943-44 (E.D. Tex. 2009) (listing in an appendix the tests for assessing adaptive behavior and noting that “[t]he ABS-RC:2 was developed to be appropriate for older individuals, but does not fit within the 2002 AAMR criteria for a [diagnosis of mental retardation](#)” and that the ABS-RC:2 “has historically provided relevant information for assessing changes in individual functioning over time. AAMR 88-89 (10th ed. 2002)”).

*11 Because the experts' opinions regarding Carroll's level of adaptive functioning, as well as their testimony concerning the reliability of the ABS-RC:2, were conflicting, it was reasonable for the circuit court to look to other evidence of Carroll's adaptive functioning to reconcile the experts' competing opinions regarding his abilities. See [Smith v. Dunn](#) (No. 2:13-cv-00557-RDP, July 21, 2017) (M.D. Ala. 2017) (not published in F.Supp.) (determining that, when the state court was presented conflicting test scores regarding adaptive functioning, “it was reasonable for the Alabama Court of Criminal Appeals to look to Petitioner's demonstrated adaptive abilities (or lack thereof) to reconcile the test scores and determine which ones were credible” and that “[s]uch a determination does not run afoul of [Moore](#)”).

In this case, the circuit court looked to evidence of Carroll's adaptive abilities to reconcile the opinions of the experts regarding his functional limitations. For example, the circuit court placed great emphasis on the fact that Carroll had passed the GED examination while in prison. In addition, the circuit court looked to the reports of other mental-health experts, such as the forensic evaluation of Dr. King, a clinical and forensic psychologist, who determined that Carroll was competent to stand trial. On August 30, 2010, Dr. King noted that, according to Carroll's social history, as reported by him, Carroll had passed the GED examination while in prison. In addition, the mental-status evaluation conducted by Dr. King indicated the following:

“Taurus Carroll is a 33 year old single African American male who presents for examination with motor activity level normal. He demonstrated normal eye contact and showed no unusual mannerisms, gestures, nor facial expressions. His

thought productivity was normal and the structure of his thoughts were logical and relevant. His speech productivity was normal with normal flow and he had expressive tone. He was coherent and comprehensible throughout the evaluation.

“The defendant had normal quality of affect. He had normal range of affective response and showed appropriate control of both his feelings and behaviors.

“The defendant had good cognitive skills. His memory was intact. He was able to immediately recall a color, object, and number, and could recall these same three items with 100% accuracy after 10 minutes. He had good remote memory. He was oriented as to person, place, and time. He knew his birth date, Social Security number, and AIS number without referral to written information. He knew the place of the evaluation as well as the day of the week, the date, and the time of day accurately. He had good concentration with no distractibility. He was able to engage in abstract reasoning and he gave an abstract interpretation to a proverb. He knew the names accurately of the current and immediate past presidents of the United States. His judgment is adequate and his intellectual ability is average....”

The circuit court also considered Dr. Ford's reference to Dr. Sandefer's report in a 30/90-day-segregation-review form, in which the mental-health specialist found that Carroll's intellectual functioning and memory were “below average.” In her notes, Dr. Ford indicated that functioning “below average” is one step above the “borderline” range of functioning and is therefore not indicative of [mental disability](#).

Additionally, the circuit court found the testimony of two witnesses who had contact with Carroll during his imprisonment to be compelling. For example, Bryan Griffith, a corrections officer for the Department of Corrections, testified that he was a supervisor in the prison kitchen where Carroll worked. He stated that Carroll followed directions and was a good kitchen worker and that he did not have problems communicating with Carroll.

*12 In addition, the circuit court relied on the testimony of Investigator Milton Smith. Smith testified that he ensured that Carroll was able to read his [Miranda](#)¹⁰ rights before questioning him. He stated that Carroll read a

sentence on the form out loud to him and that, during questioning, he appeared to understand his questions. Smith also testified that Carroll had eight or nine books in his prison cell, as well as a newspaper clipping about his prior conviction and two [Jet](#) magazines.

The circuit court also found Dr. Ford's testimony regarding her interview with Carroll and her review of his health records to be persuasive. It is clear that Dr. Ford relied on other mental-health records and data, as well as her own discussion with Carroll, when assessing his adaptive functioning. In addition, Dr. Ford's testimony is consistent with the lay witnesses' testimony regarding their interactions with Carroll. For example, Dr. Ford testified that Carroll told her that he used a large mixer in the prison kitchen to make biscuits and that he read self-help books and novels. He also told her that, although he had never owned an automatic-teller-machine (“ATM”) card, he understood how a card worked because, on one occasion, he was disciplined for using an ATM card number in violation of prison rules.¹¹ In addition, Carroll reported to her that he had completed the eighth grade and that he had passed the GED examination while in prison. She also indicated that her general impression was that Carroll functioned in the borderline level of adaptive functioning.

Upon observing the witnesses, considering their testimony, and weighing the evidence presented, the circuit court discredited the opinion of Dr. Shaffer, which was within its discretion to do. “When evidence is presented ore tenus, it is the duty of the trial court, which had the opportunity to observe the witnesses and their demeanors, and not the appellate court, to make credibility determinations and to weigh the evidence presented.” See [Ex parte Hayes](#), 70 So.3d 1211, 1215 (Ala. 2011). This Court, therefore, will not question the circuit court's discounting of Dr. Shaffer's opinion.

Based on the foregoing, we cannot conclude that the circuit court exceeded its discretion in concluding that Carroll did not have significant or substantial deficits in adaptive functioning.

B. Intellectual Disability and the Developmental Period

Carroll asserts that the Court of Criminal Appeals erred in relying upon school records containing IQ scores

when determining whether his intellectual disability arose before the age of 18. Specifically, he argues that the IQ tests administered during his childhood were not “sufficiently rigorous” and there was no showing of the reliability or validity of the tests as required by [Brumfield](#), 576 U.S. at —, 135 S.Ct. at 2278-79. In addition, he argues that the Court of Criminal Appeals' primary reliance on a select few school records conflicts with the requirement of both [Moore](#) and [Hall](#) that assessments of intellectual functioning be based on current medical standards. [Moore](#), 581 U.S. at —, 137 S.Ct. at 1053; [Hall](#), 572 U.S. at 721-24, 134 S.Ct. 1986.

***13** It is strongly arguable that the circuit court's decision that Carroll failed to prove that the onset of his current intellectual deficits arose during the developmental period is rationally based.

In [Carroll II](#), the Court of Criminal Appeals held:

“Further, as this Court detailed in its original opinion, ‘the circuit court correctly determined that Carroll failed to prove that he suffered from subaverage intellectual functioning and deficits in his adaptive behavior before the age of 18.’ [Carroll \[I\]](#), 215 So.3d at 1153. While in school, Carroll was extensively tested for mental-health issues. His school records indicate that Carroll was given the Wechsler Intelligence Scale for Children twice, once in 1984 and again in 1987. On those tests, Carroll achieved full-scale scores of 85 and 87, respectively. Carroll's school records also indicate that he was classified as having low-average intelligence coupled with a learning disability. Based on Carroll's school records, this Court cannot say that the circuit court abused its discretion by finding that he does not meet the definition of intellectually disabled.”

— So. 3d at —.

The record includes the results of two IQ tests from Carroll's childhood.¹² A Birmingham Public School Guidance Department form indicates that, on August 8, 1984, examiner Helen Puckett administered the Wechsler Intelligence Scale for Children–Revised IQ test to Carroll, who was entering the second grade. The professional qualifications of the examiner, however, are not specified. The form indicates that Carroll received a full-scale IQ score of 85.

A Birmingham Public School Department of Student Services form indicates that, on August 13, 1987, “examiner Beard” administered the Wechsler Intelligence Scale for Children–Revised IQ test to Carroll, then a third grader. Although the examiner's qualifications are not specified, the form does indicate that the test was administered in “Testing Room C” of “Student Services,” that the facilities were “adequate,” and that the conditions during testing were “satisfactory.” The examiner checked boxes indicating that Carroll was “comfortable with the examiner,” that he “put forth good effort,” that he had “good concentration,” and that he “follow[ed] direction well.” Carroll received a full-scale IQ score of 87. The examiner concluded that Carroll was a “slow learner” who “appear[ed] to be ... in the most appropriate Special Education Program at this time.”

Carroll asserts that the Court Criminal Appeals erred in relying solely on the results of IQ tests obtained when he was 7 and 10 years old. He argues that current medical standards require that the court consider a “comprehensive evaluation” of childhood functioning before determining that a defendant is intellectually disabled. Carroll maintains that the defense experts' comprehensive evaluation of his childhood functioning establishes that he was intellectually disabled during his developmental period, i.e., before he was 18 years old. Specifically, he argues that the evidence indicates that circumstances occurred after the IQ tests were administered, but before he reached the age of 18, that affected his functional abilities and intelligence level. For example, evidentiary materials indicate that Carroll suffered [head trauma](#) at the age of 14. The school records also indicate that, by fifth grade, school officials recommended that Carroll be moved from regular classes with special-education services to partial-day special-education classes for reading, spelling, and English. In addition, Carroll argues that Dr. Shaffer's evaluations, which included interviews of his relatives, indicated that he had significant deficits in 7 of the 10 areas of adaptive functioning as a child. He also argues the Court should have considered the findings of Dr. Wardell, a mitigation specialist, whose interviews with family members indicated that, as a child, Carroll was unable to do very simple things and that he was easily influenced.

***14** Although the Alabama Court of Criminal Appeals specifically referred to results of IQ tests administered to Carroll while he was in elementary school, it is clear

that the circuit court did not rely on those particular results when it entered its order finding Carroll eligible for the death penalty on the charged offenses of capital murder. The transcript indicates that the elementary-school records were introduced for the first time as mitigation evidence during the penalty phase of trial.

During the [Atkins](#) hearing, which occurred prior to trial, however, Dr. Ford did testify that Carroll had reported to her that he had a learning disability in reading while in school. In its order, the circuit court specifically relied on Dr. Ford's testimony that "having a learning disability is entirely different from being [intellectually disabled]." Although Carroll presented evidence indicating that Dr. Shaffer had performed a Vineland assessment by interviewing one of Carroll's uncles to assess any deficits in adaptive functioning during the developmental period, the circuit court was "not convinced that [Carroll] presented credible evidence to show that he suffered from [intellectual disability] before or after the developmental period (before 18 years of age)." It is clear that the circuit court, as well as the Court of Criminal Appeals, comprehensively reviewed all the available evidence before entering its decision.

Carroll also argues that the Court of Criminal Appeals erred in considering the childhood IQ scores because, he says, there is no showing that they were reliable or valid. During the penalty phase, a defense expert speculated that the IQ tests were taken in a group classroom setting. It is clear, however, that both the 1984 and 1987 IQ tests were administered in the summer at the Birmingham Public Schools Guidance Center and that, at least with respect to the 1987 test, the examiner indicated that Carroll had put forth good effort and that the testing conditions were adequate. In addition, both tests scores

consistently fell within the 85-87 range. Under these circumstances, the IQ tests were "sufficiently rigorous to preclude definitively the possibility that [Carroll] possessed subaverage intelligence." [Brumfield](#), 576 U.S. at —, 135 S.Ct. at 2279. Nonetheless, because we conclude that the circuit court did not err in determining that Carroll failed to prove by a preponderance of the evidence that he suffered from significant or substantial deficits in adaptive functioning -- the second step of the [Atkins](#) analysis -- it is unnecessary to further consider whether Carroll's condition arose prior to the developmental period.

IV. CONCLUSION

The circuit court did not exceed its discretion in determining that Carroll failed to establish by a preponderance of the evidence that he suffered from significant or substantial deficits in adaptive functioning as an adult and that his current intellectual deficits arose during the developmental period. This Court further concludes that the circuit court's final determination that Carroll was eligible for the death penalty does not violate [Atkins](#), *supra*, [Moore](#), *supra*, [Hall](#), *supra*, or [Brumfield](#), *supra*.

AFFIRMED.

[Parker](#), C.J., and [Shaw](#), [Wise](#), [Bryan](#), [Sellers](#), [Mendheim](#), [Stewart](#), and [Mitchell](#), JJ., concur.

All Citations

--- So.3d ----, 2019 WL 1499322

Footnotes

- 1 Judge Kellum concurred with that portion of the Court of Criminal Appeals' opinion affirming the capital-murder convictions and dissented from that portion affirming Carroll's death sentences, concluding that the case should be remanded for the circuit court to make further findings of fact regarding the aggravating circumstances. [Carroll I](#), 215 So.3d at 1188.
- 2 The DSM-5 is [Diagnostic and Statistical Manual of Mental Disorders](#), American Psychiatric Association (5th ed. 2013).
- 3 The AAIDD-11 is the 11th edition of the clinical manual published in 2010 by the American Association on Intellectual and Developmental Disabilities.
- 4 The factors set forth by the Texas court are as follows:
"Did those who knew the person best during the developmental stage -- his family, friends, teachers, employers, authorities -- think he was mentally retarded at that time, and, if so, act in accordance with that determination?"
"Has the person formulated plans and carried them through or is his conduct impulsive?"
"Does his conduct show leadership or does it show that he is led around by others?"

“Is his conduct in response to external stimuli rational and appropriate, regardless of whether it is socially acceptable?
“Does he respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?
“Can the person hide facts or lie effectively in his own or others' interests?”

“Putting aside any heinousness or gruesomeness surrounding the capital offense, did the commission of that offense require forethought, planning, and complex execution of purpose?”

[Ex parte Briseno](#), 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004).

- 5 We note that the [Briseno](#) factors are not applied in Alabama. The Alabama Legislature has not adopted specific legislation for the purposes of applying [Atkins](#). Consequently, the Alabama courts “appl[y] the ‘most common’ or ‘broadest’ definition of mental retardation, as represented by the clinical definitions considered in [Atkins](#) and the definitions set forth in the statutes of other states that prohibit the imposition of the death sentence when the defendant is mentally retarded. See, e.g., [Ex parte Perkins](#), 851 So.2d 453, 455-56 (Ala. 2002).” [Smith v. State](#), 213 So.3d 239, 248 (Ala. 2007).
- 6 The AAMR changed its name to the American Association on Intellectual and Developmental Disabilities (“AAIDD”) and published the 11th edition of its most recent clinical manual in 2010. See Alexander H. Updegrove et al., [Intellectual Disability in Capital Cases: Adjusting State Statutes after Moore v. Texas](#), 32 Notre Dame Journal of Law, Ethics & Public Policy 2018 (citing Robert L. Schalock et al., [Intellectual Disability: Definition, Classification, and Systems of Support](#) (11th ed. 2010)).
- 7 Before trial, Dr. Jerry Gragg administered the Wechsler Adult Intelligence Scale, 4th edition, to Carroll, which indicated that Carroll's full-scale IQ score was 71.
- 8 Dr. Shaffer also testified that he had six years' experience with the United States Department of Justice in the Bureau of Prisons, in which he managed the mental-health services for the mental-health cellblock in the federal penitentiary in Atlanta.
- 9 In her own report, Dr. Ford pointed out a weakness in her evaluation. Specifically, when discussing Carroll's adaptive functioning, she states:

“The AAMR ABS-RC:2 was administered to Mr. Carroll himself. Because the examiner did not have information about how to contact family members who might know Mr. Carroll well, the instrument was not administered to another person in addition to him. Administration of the instrument to another person would provide an opportunity for comparison of results for the purpose of gaining insight regarding whether Mr. Carroll might have answered in ways that tended to portray himself as having higher abilities than he actually has. However, the examiner did attempt to ask follow-up kinds of questions”

(Emphasis added.)

- 10 [Miranda v. Arizona](#), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
- 11 During the [Atkins](#) hearing, the prosecution referred to an Alabama Department of Corrections disciplinary record indicating that Carroll was disciplined for being found in possession of a letter that “describ[ed] an attempt to get IRS income tax information from a web site and another piece of paper containing a Wal-Mart money card number and direct deposit and routing numbers to an account” and for using a cellular telephone to complete those transactions.
- 12 We note that, although the Court of Criminal Appeals relied on the scores in its opinion, the test results were not introduced during the [Atkins](#) hearing; the results were, however, presented by the State during the penalty phase of the trial.

Exhibit B

IN THE SUPREME COURT OF ALABAMA



September 20, 2019

1170575 Ex parte Taurus Jermaine Carroll. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Taurus Jermaine Carroll v. State of Alabama) (St. Clair Circuit Court: CC-09-242; Criminal Appeals : CR-12-0599).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on September 20, 2019:

Application Overruled. No Opinion. Bolin, J. - Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur. Parker, C.J., dissents.

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 5, 2019:

Affirmed. Bolin, J. - Parker, C.J., and Shaw, Wise, Bryan, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 20th day of September, 2019.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama