Appendix A

2017 WL 6398236
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Taurus Jermaine CARROLL
v.
STATE of Alabama

CR–12–0599
|
Dec. 15, 2017

Synopsis

Background: Defendant was convicted in the Circuit Court, St. Clair County, No. CC–09–242, of two counts of capital murder and was sentenced to death for each conviction. Defendant appealed. The Court of Criminal Appeals, 215 So.3d 1135, affirmed. Defendant sought writ of certiorari from the United States Supreme Court. The United States Supreme Court, 137 S.Ct. 2093, granted petition and remanded.

On remand, the Court of Criminal Appeals, Windom, P.J., held that the circuit court did not abuse its discretion in finding that defendant did not meet the definition of intellectually disabled.

Affirmed.

Appeal from St. Clair Circuit Court (CC–09–242), Phil K. Seay, Judge.

Attorneys and Law Firms

Randall Richardson, Pell City, for appellant.

Steve Marshall, atty. gen., and Beth Jackson Hughes, asst. atty. gen., for appellee.

On Remand from the Supreme Court of the United States

WINDOM, Presiding Judge.

***1** Taurus Jermaine Carroll's cause is before this Court on remand from the Supreme Court of the United States. Carroll was convicted of two counts of capital murder for intentionally taking the life of Michael Turner after having been convicted of another murder within the preceding 20 years, see § 13A–5–40(a)(13), Ala. Code 1975, and for intentionally taking the life of Turner while Carroll was under a sentence of life in prison, see § 13A–5–40(a)(6), Ala. Code 1975. Carroll was sentenced to death for each capital-murder conviction. On August 14, 2015, a majority of this Court affirmed Carroll's capital-murder convictions and sentences of death. [1] See, Carroll v. State, 215 So.3d 1135 (Ala. Crim. App. 2015).

At trial and on appeal, Carroll argued, among other things, that he was exempt from a sentence of death under the Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), because he is intellectually disabled. [2] In Atkins, the Supreme Court of the United States held that the execution of intellectually-disabled capital offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment. The Court, however, declined to establish a national standard for determining whether a capital offender is intellectually disabled and, instead, left to the States " 'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' " Id. at 317, 122 S.Ct. 2242 (quoting Ford v. Wainwright, 477 U.S. 399, 416–17, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986)). The Alabama Legislature has not yet established a method for determining whether a capital defendant is intellectually disabled and, thus, ineligible for a sentence of death. "However, the Alabama Supreme Court, in Ex parte Perkins, 851 So.2d 453 (Ala. 2002), adopted the most liberal definition of [intellectual disability] as defined by those states that have legislation barring the execution of a[n] [intellectually disabled] individual." Byrd v. State, 78 So.3d 445, 450 (Ala. Crim. App. 2009) (citations and quotations omitted); see also Smith v. State, 213 So.3d 239, 248 (Ala. 2007) ("Until the legislature defines [intellectually disabled] for purposes of applying Atkins, this Court is obligated to continue to operate under the criteria set forth in Ex parte Perkins."). Under Ex parte Perkins, "to be considered [intellectually disabled, a capital defendant] must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior." Ex parte Perkins, 851 So.2d at 456; see also Atkins, 536 U.S. at 321 n.5, 122 S.Ct. 2242.; Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009) ("According to literature in the field, significant

or substantial deficits in adaptive behavior are defined as 'concurrent deficits or impairments in present adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.' American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 39 (4th ed. 1994)."). Further, "these [two deficits] must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)." Ex parte Perkins, 851 So.2d at 456; Brownlee v. Haley, 306 F.3d 1043, 1073 (11th Cir. 2002) (recognizing that intellectual disability generally requires a showing of an IQ of 70 or below, significant limitations in adaptive skills, and the manifestation of these 2 deficits during the developmental years). "Therefore, in order for an offender to be considered [intellectually disabled] in the Atkins context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18." Smith v. State, 213 So.3d 239, 248 (Ala. 2007); see also Byrd, 78 So.3d at 450 (same); cf. Ex parte Perkins, 851 So.2d at 456 (holding that Perkins was not intellectually disabled because, among other reasons, Perkins's full-score adult IQ was 76).

***2** " 'In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is [intellectually disabled].' " Byrd, 78 So.3d at 450 (quoting Smith, 213 So.3d at 252). "The question of [whether a capital defendant is intellectually disabled] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue." Byrd, 78 So.3d at 450 (citations and quotations omitted). As the Alabama Supreme Court has explained, questions regarding the weight and credibility of evidence are better left to the circuit courts, " 'which [have] the opportunity to personally observe the witnesses and assess their credibility.' " Smith v. State, 213 So.3d at 253 (quoting Smith v. State, 213 So.3d 226, 239 (Ala. Crim. App. 2003) (Shaw, J., dissenting) (opinion on return to third remand)). "This court reviews the circuit court's findings of fact for an abuse of discretion." Byrd, 78 So.3d at 450 (citing Snowden v. State, 968 So.2d 1004, 1012 (Ala. Crim. App. 2006)). " ' " ' " 'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision." ' " ' " Byrd, 78 So.3d at 450–51 (quoting Hodges v. State, 926 So.2d 1060, 1072 (Ala. Crim. App. 2005), quoting in turn State v. Jude, 686 So.2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So.2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975)).

On August 14, 2015, this Court applied these principles and held that the circuit court did not abuse its discretion by rejecting Carroll's assertion that he was intellectually disabled. Carroll v. State, 215 So.3d 1135, 1147–53 (Ala. Crim. App. 2015). On March 28, 2017, well after this Court had decided Carroll, the Supreme Court of the United States issued its opinion in Moore v. Texas, —— U.S. ——, 137 S.Ct. 1039, 1044, 197 L.Ed.2d 416 (2017), which held that the Texas Court of Appeals had erroneously ignored prevailing medical standards and applied its own definition of intellectually disabled to determine that a death-row inmate was not exempt from the death penalty under Atkins. On May 1, 2017, the Supreme Court of the United States vacated this Court's decision in Carroll and remanded the cause for further consideration in light of Moore.

In Moore, the Supreme Court reiterated that the

> "generally accepted, uncontroversial intellectual-disability diagnostic definition, ... identifies three core elements: (1) intellectual-functioning deficits (indicated by an IQ score 'approximately two standard deviations below the mean'—i.e., a score of roughly 70—adjusted for 'the standard error of measurement,' AAIDD–11, at 27); (2) adaptive deficits ('the inability to learn basic skills and adjust behavior to changing circumstances,' Hall v. Florida, 572 U.S. ——, ——, [134 S.Ct. 1986, 1994, 188 L.Ed. 2d 1007] (2014)); and (3) the onset of these deficits while still a minor. See App. to Pet. for Cert. 150a (citing AAIDD–11, at 1). See also Hall, 572 U.S. at ——[, 134 S.Ct. at 1993–1994].

Moore, —— U.S. ——, 137 S.Ct. at 1045. The Court went on to explain that, "[a]lthough [it] left to the States 'the task of developing appropriate ways to enforce' the restriction on executing the intellectually disabled, 572 U.S. at ——[, 134 S.Ct. at 1998] (quoting Atkins, 536 U.S. at 317, 122 S.Ct. 2242), States' discretion, ... is not 'unfettered,' 572 U.S. at ——[, 134 S.Ct. at 1998]." Moore, —— U.S. ——, 137 S.Ct. at 1048. Rather, "the determination must be 'informed by the medical community's diagnostic framework.' " Id. (quoting Hall, 572 U.S. ——, 134 S.Ct. at 2000).

The Court held that, consistent with the "medical community's diagnostic framework," courts tasked with

determining whether a defendant exhibits intellectual-functioning deficits must consider the "standard error or measurement." Moore, —— U.S. ——, 137 S.Ct. at 1049. To that end, the Court,

> "instructs that, where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.' See [Hall], at 134 S.Ct. at 1995, 2001. See also Brumfield v. Cain, 576 U.S. ——, ——[, 135 S.Ct. 2269, 2278, 192 L.Ed. 2d 356] (2015) (relying on Hall to find unreasonable a state court's conclusion that a score of 75 precluded an intellectual-disability finding). As we explained in Hall, the standard error of measurement is 'a statistical fact, a reflection of the inherent imprecision of the test itself.' 572 U.S. at ——[, 134 S.Ct. at 1995]. 'For purposes of most IQ tests,' this imprecision in the testing instrument 'means that an individual's score is best understood as a range of scores on either side of the recorded score ... within which one may say an individual's true IQ score lies.' Id., at ——[, 134 S.Ct. at 1995]. A test's standard error of measurement 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score.' Ibid. See also id., at —— – ——[, 134 S.Ct. at 1995]; DSM–5, at 37; AAIDD, User's Guide: Intellectual Disability: Definition, Classification, and Systems of Supports 22–23 (11th ed. 2012) (hereinafter AAIDD–11 User's Guide)."

***3** Moore, —— U.S. ——, 137 S.Ct. at 1049. Thus, with a standard error of measurement of 5, an IQ "score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79." Moore, 137 S.Ct. at 1049. "Because the lower end of [the] score range falls at or below 70, [courts must] move on to consider ... adaptive functioning." Id.

Regarding adaptive functioning, the Court held that States may not adopt factors that reflect "superseded medical standards" or that substantially deviate from prevailing clinical standards. See Id. at ——, at 137 S.Ct. at 1050. For instance, courts should not use adaptive strengths to negate adaptive deficits. Rather,

> "the medical community focuses the adaptive-functioning inquiry on adaptive deficits. E.g., AAIDD–11, at 47 ('significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills'); DSM–5, at 33, 38 (inquiry should focus on '[d]eficits in adaptive functioning'; deficits in only one of the three adaptive-skills domains suffice to show adaptive deficits); see Brumfield, 576 U.S. at ——[, 135 S.Ct. at 2281] ('[I]ntellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." ' (quoting AAMR, Mental Retardation: Definition, Classification, and Systems of Supports 8 (10th ed. 2002)))."

Moore, —— U.S. ——, 137 S.Ct. at 1050. Further, the Court held that States may not create their own factors for accessing adaptive deficits if those factors deviate from clinical standards and, instead, rely on "lay perceptions of intellectual disability." Id. at ——, 137 S.Ct. at 1051.

In conclusion, the Supreme Court explained that:

> "States have some flexibility, but not 'unfettered discretion,' in enforcing Atkins' holding. Hall, 572 U.S. at ——[, 134 S.Ct. at 1998]. 'If the States were to have complete autonomy to define intellectual disability as they wished,' we have observed, 'Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality.' Id., at —— – ——[, 134 S.Ct. at 1999].
>
> "The medical community's current standards supply one constraint on States' leeway in this area. Reflecting improved understanding over time, see DSM–5, at 7; AAIDD–11, at xiv-xv, current manuals offer 'the best available description of how mental disorders are expressed and can be recognized by trained clinicians,' DSM–5, at xli. See also Hall, 572 U.S. at ——, ——, ——, —— – ——, —— – ——[, 134 S.Ct. at 1990, 1991, 1993–1994, 1994–1996] (employing current clinical standards); Atkins, 536 U.S., at 308, n. 3, 317, n. 22[, 122 S.Ct. 2242] (relying on then-current standards)."

Moore, —— U.S. ——, 137 S.Ct. at 1052–53.

In its original opinion, this Court detailed the evidence relevant to Carroll's Atkins claim as follows:

> "Susan Wardell, a lawyer, mitigation specialist, and clinical social worker, testified at length regarding Carroll's background. She opined that Carroll has significant deficits in adaptive functioning and that those deficits manifested themselves before the age of 18.[3] In reaching her conclusion, Wardell reviewed files given to her by defense counsel, interviewed Carroll, and spoke with nine of his

relatives. She stated that Carroll was in special-education classes and had trouble learning. She stated that Carroll twice failed the first grade and eighth grade, which indicates that he was mentally retarded. She stated that Carroll's mother abused drugs and alcohol while pregnant with him, which is an indication of adaptive deficits. She testified that Carroll's father was absent from his life, which is 'one of the biggest risk factors' for adaptive deficits. (R. 57.) She further testified that Carroll's mother was abusive and that Carroll had suffered some head injuries. Wardell testified that another risk factor was sexual abuse. According to Wardell, Carroll had been sexually abused at age two. She testified that Carroll was again sexually abused at age seven and contracted gonorrhea. According to Wardell, Carroll's family members indicated that he was quiet, withdrawn, and did poorly in school.

***4** "On cross-examination, Wardell stated that she is a member of the National Alliance of Sentencing Advocates and Mitigation Specialists, a group opposed to the death penalty. When asked whether Carroll's motivation to avoid the death penalty may have played a factor in the answers he gave to Wardell, Wardell stated that she did not know. Wardell admitted that some of the allegations of abuse were determined by the Alabama Department of Human Resources to be unfounded. Regarding the sexual abuse at age seven, Wardell admitted that Carroll actually contracted gonorrhea from a seven-year-old girl. Wardell was unaware of the jobs Carroll had held while in prison. She was also unaware of whether he was in special education classes for all classes or just reading. Wardell also testified that Carroll passed the General Education Development ('GED') exam while in prison.

"Carroll next called Dr. Robert Shaffer, a clinical psychologist, with an independent practice in neuropsychology and forensic psychology. Dr. Shaffer interviewed Carroll, reviewed previous psychological reports, reviewed material from the Alabama Department of Corrections ('DOC'), and examined Carroll's social history. Dr. Shaffer testified that he reviewed a court-ordered report prepared by Dr. Jerry Gragg. Dr. Gragg administered the Wechsler Adult Intelligence Scale, 4th Edition, to Carroll, which indicated that Carroll's full-scale IQ score was 71. Dr. Shaffer testified that there is a standard error of measurement of plus or minus five points. Dr. Shaffer also testified that when the 'Flynn effect' is applied to Dr. Gragg's results, Carroll's IQ is actually 69.5.

"Dr. Shaffer administered the Halstead Reitan Neuropsychological Test battery to determine whether Carroll's brain functioned normally, and Carroll scored in the impaired range. Dr. Shaffer stated that Carroll also scored in the impaired range on the Stroop Neuropsychological Screening test, the Boston Naming test, and the Animal Naming test, and the Key Auditory Verbal Learning test. Dr. Shaffer testified that he administered the test of memory malingering, which indicated that Carroll was not malingering. Dr. Shaffer also gave Carroll the Wechsler Individual Achievement test, a standard test of academic learning proficiency, and Carroll scored in the lower range. Dr. Shaffer administered the Vineland test and the Adaptive Behavior Assessment System test for adaptive functioning, and Carroll did poorly in multiple areas. Dr. Shaffer then testified that it was his opinion that Carroll is mildly mentally retarded.

"The State called Dr. Susan K. Ford, a psychologist and the director of Psychological and Behavioral Services for the Division of Developmental Disabilities with the Alabama Department of Mental Health. 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 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 mental retardation.

"Dr. Ford also testified that Carroll informed her that he liked to read novels and self-help books. She testified that Carroll had passed his GED exam and that 'most individuals with mental retardation would not be able to pass the GED.' (R. 171.) Carroll indicated to Dr. Ford that, in school, he was in a learning-disability class for reading but regular class for math. Dr. Ford stated that there was nothing in Carroll's records to indicate that he

was mentally retarded and that Dr. David Sandefer, who evaluated Carroll in 2004 for the DOC, found Carroll to be within the borderline range of intellectual functioning. Dr. Ford also testified that Carroll understood her questions and answered those questions without any difficulty. She also testified that the American Psychological Association does not recommend subtracting points from an IQ score and does not recommend applying the 'Flynn effect.'

***5** "Officer Brian Griffith of the DOC testified that he had known Carroll for three or four years. Officer Griffith testified that he had supervised Carroll, who worked in the prison kitchen as a baker. According to Officer Griffith, Carroll was one on the better kitchen workers and able to do his job effectively and consistently without any problems. Officer Griffith testified that he had no difficulty communicating with Carroll, and that Carroll was able to follow directions and complete his tasks.

"M.C. Smith, with the I and I division, investigated Carroll's involvement in Turner's murder and interviewed Carroll. Smith testified that, during the interview, Carroll read his Miranda rights. He was coherent and able to respond to questions. According to Smith, Carroll had no problem understanding any of the questions posed to him. Smith also went into Carroll's prison cell. In his cell, Carroll had the eight or nine paperback books, including, but not limited to, Zen Lessons, The Holy Bible, Oxford History of the American People Volume 1, Oxford American Dictionary, The Meaning of the Holy Quran, and Jailhouse Lawyer's Handbook. He also had the hardback book The Brotherhood. Carroll also had two Jet magazines, a Today magazine, and newspaper articles about his case.

"Dr. Glen D. King, a clinical and forensic psychologist, evaluated Carroll prior to trial. Dr. King reported the following regarding Carroll:

> " 'The defendant had good cogitative 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% accurately after 10 minutes. He had good remote memory. He was oriented 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 [of] 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.'
>
> "(C. 81–82.) The record also contains two IQ scores from Carroll's school records. In 1984, Carroll was given the Wechsler Intelligence Scale for Children—revised and achieved a full-scale score of 85. In 1987, Carroll was retested with the Wechsler Intelligence Scale for Children—revised, achieved a full-scale score of 87, and was classified as having low-average intelligence."

Carroll v. State, 215 So.3d at 1148–52.

Applying the restrictions on states' ability to define intellectual disability established in Moore, this Court holds that Carroll has failed to establish that the circuit court abused its discretion in finding that he was eligible for a sentence of death under Atkins. 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. Carroll presented evidence indicating that the standard error of measurement for that test is 5. Thus, his IQ "score of 7[1], adjusted for the standard error of measurement, yields a range of 6[6] to 7[6]." Moore, 137 S.Ct. at 1049. "Because the lower end of [the] score range falls at or below 70, [this Court will] move on to consider ... adaptive functioning." Id.

***6** 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, 137 S.Ct. at 1053.

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, 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.

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, Burke, and Joiner, JJ., concur.

All Citations

--- So.3d ----, 2017 WL 6398236

Footnotes

1 Four judges of this Court affirmed Carroll's capital-murder convictions and death sentences. Judge Kellum concurred with the majority's decision to affirm Carroll's convictions but would have remanded the cause with instructions for the circuit court to issue a new sentencing order.

2 The condition referred to as "intellectually disabled" was formerly known as "mentally retarded." Hall v. Florida, —— U.S. ——, 134 S.Ct. 1986, 1990, 188 L.Ed.2d 1007 (2014).

3 The State did not object on the ground that Wardell was unqualified to render her opinion regarding Carroll's adaptive functioning.

COURT OF CRIMINAL APPEALS
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March 9, 2018

CR-12-0599 **Death Penalty**

Taurus Jermaine Carroll v. State of Alabama (Appeal from Ashville Division, St. Clair Circuit Court: CC09-242)

NOTICE

You are hereby notified that on March 9, 2018, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Phil K. Seay, Circuit Judge
Hon. Annette Manning, Circuit Clerk
Randall Richardson, Attorney
Beth Jackson Hughes, Asst. Atty. Gen.

Appendix B

2019 WL 1499322
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

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% accura[cy] 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.

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.

Julia Jordan Weller

Clerk, Supreme Court of Alabama