No. 19-7456
CAPITAL CASE

In the
Supreme Court of the United States

TAURUS CARROLL,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari to the
Alabama Supreme Court

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. In assessing Taurus Carroll's *Atkins* claim, the trial court applied the broadest definition of intellectual disability that courts apply to such claims. The State psychologist concluded that Carroll did not suffer from significant adaptive deficits, while Carroll's expert concluded that Carroll did. The trial court then assessed their testimony, the testimony of other witnesses, and other evidence—including the prior assessments of two other psychologists—before rejecting the opinion of Carroll's expert. Two appellate courts have affirmed that factual finding. Was it clearly erroneous?

PARTIES

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A. Statement of the Facts

1. Facts Elicited During Carroll's Trial

Carroll was convicted and sentenced to death in 1997 for the robbery-murder of Betty Long. *Carroll v. State*, 215 So. 3d 1135, 1144 (Ala. Crim. App. 2015). The Alabama Supreme Court affirmed his capital conviction but reversed the death sentence and ordered that Carroll be resentenced to life without parole. *Id.*

While Carroll was serving this sentence at the St. Clair Correctional Facility, he mistakenly believed that another inmate, Michael Turner, had stolen his cell phone. *Id.* Turner told Carroll that he had not taken the cell phone. *Id.* Carroll confronted Turner several times about the cell phone, and each time, Turner denied having the phone. *Id.* After once again confronting Turner about the cell phone, Carroll stabbed Turner in the back with a knife fashioned out of part of an air-conditioner vent. *Id.* Turner ran from Carroll and tried to take cover in a prison cell by shutting the door, but Carroll pushed his way into the cell. *Id.* at 1145. Carroll then stabbed Turner repeatedly in the head, neck, and body. *Id.*

Then, Carroll walked away, threw the knife in a trash can, and went upstairs to the second tier of the prison. *Id.* He took off his shirt and washed Turner's blood off his hands and arms. *Id.* Meanwhile, Turner managed to make his way out of the cell. He was bleeding and complained that he could

not breathe. He was immediately transported to the prison infirmary, where he died. *Id.* As this was happening, Carroll told the prison guard that he had stabbed Turner. After being treated for a cut on his finger, Carroll was placed in administrative segregation, where he admitted to correctional officer Brandon Carter that he had intended to kill Turner. The next morning, Carroll was interviewed by two investigators from the Investigation and Intelligence ("I&I") Division of the Alabama Department of Corrections, and after being read his *Miranda* rights, he gave a full confession. *Id.*

Dr. Emily Ward performed the autopsy on Turner's body. Turner had sixteen stab wounds on his head, neck, and body. One stab wound to his head penetrated his skull, another stab wound to his neck penetrated the muscle and severed the right jugular vein, and his right lung was punctured. *Id.* Dr. Ward testified that the wounds to Turner's body would have been "extremely painful" and that he would have felt like he was suffocating. She also testified that Turner "would have been suffering a combination of fear and panic, not being able to breathe and also the pain associated with the injuries." *Id.* (quoting R. 708). It was Dr. Woods's opinion that Turner died as a result of multiple stab wounds. *Id.* at 1146.

2. Facts Elicited During *Atkins* Hearing

The following facts were elicited during the evidentiary hearing on Carroll's *Atkins* claim:

Susan Wardell, a mitigation specialist, was the first witness called by

Carroll to testify at the hearing. (R. 49.) It was Ms. Wardell's opinion that Carroll has significant deficits in his adaptive behavior. (R. 70.) However, she was not sure how many areas of adaptive skills there are and was not able to name all of these areas. (R. 61.) While Ms. Wardell believed that Carroll has significant deficits in his adaptive functioning, she was not aware that he was a cook in prison and had obtained his GED while in prison. (R. 80–81.) She also testified that Carroll was good at math in school, and failed to recall that, when he was in school, Carroll had only been placed in one learning disability class, reading. (R. 84.) Ms. Wardell admitted that Carroll was able to show goal-oriented behavior. (R. 82.) Even though she was assessing Carroll's adaptive behavior, she did not read Carroll's statement to the correctional officers about this offense, did not look into the facts of the case, and did not discuss the offense with him. (R. 82.)

In addition, as the Court of Criminal Appeals noted on direct appeal, Ms. Wardell admitted during cross-examination that she is a member of the National Alliance of Sentencing Advocates and Mitigation Specialists, a group opposed to the death penalty. *Carroll*, 215 So. 3d at 1149. That court also noted that Ms. Wardell admitted that the Alabama Department of Human Resources had determined that some of the abuse allegations she testified about were unfounded. *Id.* Finally, the Court of Criminal Appeals noted that, regarding Ms. Wardell's testimony that Carroll had been sexually abused at age seven, Ms. Wardell admitted that Carroll had actually contacted gonorrhea from a

girl his age. *Id.*

Next, Carroll's counsel called Dr. Robert Shaffer, a clinical psychologist, to testify. It was Dr. Shaffer's opinion that Carroll is mildly intellectually disabled. (R. 125–26.) Dr. Shaffer did not perform an IQ test on Carroll, instead relying on a test administered by a Dr. Gragg on which Carroll scored a full-scale IQ of 71. (R. 100–01.) Dr. Shaffer testified that after applying the Flynn effect to Carroll's IQ score, Carroll's IQ was 69.5 (R. 120–23.) He also performed a neuropsychological battery of tests on Carroll and testified that Carroll performed in the impaired range on 9 of 14 measures on these tests. (R. 110–11.) Dr. Shaffer then assessed Carroll's adaptive behavior during the developmental period and found that Carroll was in the impaired range. (R. 115–19.) He admitted, however, that he had to rely on Carroll's uncles to tell the truth when he was assessing Carroll's adaptive functioning and that someone on death row would have a reason to malinger. (R. 129–34.) Dr. Shaffer testified that his hourly rate was $200 and that his bill for his assessment of Carroll would be approximately $14,000. (R. 128.) Finally, he testified that he was not aware that the American Psychiatric Association does not recognize the Flynn effect. (R. 134–35.)

The prosecution called Dr. Susan K. Ford, the director of Psychological and Behavioral Services for the Division of Developmental Disabilities with the Alabama Department of Mental Health, to testify at the *Atkins* hearing. (R. 143.) As part of her assessment of Carroll's adaptive functioning, Dr. Ford

administered the Adaptive Behavior Scale for Residential and Community Living ("ABS-RC:2"). (R. 147–48, 150.) Dr. Ford testified that this test is recognized in the field of psychology as an appropriate and reliable means of measuring adaptive functioning. (R. 150.) It took Dr. Ford two hours to administer this test to Carroll. (R. 150.) The comparison group for this test is intellectually disabled persons. (R. 152.) Because Dr. Ford could not verify the information given to her by Carroll from other sources, she had Carroll explain what he meant when he gave certain answers. (R. 153–54.) Carroll tested in at least the above average range in all of the test domains and in the superior range in five of the domains. (R. 156.) He was not deficient in any of the adaptive functioning domains on this test. (R. 156.) It was Dr. Ford's opinion that Carroll falls in the borderline range of adaptive functioning, which is a higher level of functioning than intellectual disability. (R. 156.)

While interviewing Carroll, Dr. Ford learned that he had only gone through the eighth grade in school because of his incarceration at a young age but that he had obtained a GED while in prison. (R. 170.) She opined that most intellectually disabled individuals could not pass the GED. (R. 170–71.) Dr. Ford testified that Carroll told her that he was in learning disability classes for reading but was in regular classes for math. (R. 172.) According to Dr. Ford, there was nothing in Carroll's records indicating that he was ever classified as "educably mentally retarded." (R. 173–74.) Carroll had no problems understanding Dr. Ford's questions or communicating his answers to her. (R.

175) Dr. Ford testified that Carroll's behavior during this crime was not the behavior of someone with intellectual disability because of the planning aspect of the crime. (R. 177–78.) She also testified that Carroll's actions after the crime—leaving the scene when he learned that the officers were coming, discarding the knife in the trash can, and washing the blood off of his hands—indicated that Carroll understood the consequences of his actions. (R. 178.) It was Dr. Ford's opinion that the results of the adaptive functioning tests and her interview with Carroll were consistent with her general impression of Carroll's adaptive functioning range. (R. 178–79.)

Dr. Ford reviewed Dr. Gragg's report and testified that his testing of Carroll revealed that he had a full-scale IQ score of 71. According to Dr. Ford, this IQ score falls in the borderline range of intellectual disability. (R. 179.)

Dr. Ford also indicated that Dr. Glen King had conducted a forensic assessment of Carroll on his competency to stand trial and concluded that his intellectual capacity was "average." *Ex parte Carroll*, No. 1170575, 2019 1499322, at *5 (Ala. Apr. 5, 2019). Dr. Ford also indicated in her report and testimony that Carroll was evaluated by Dr. David Sandifer for the Alabama Department of Corrections, who concluded that Carroll's intellectual functioning was "below average." *Id*. Dr. Ford finally indicated in her report that "below average," for testing purposes, is just under average and just above the borderline range of functioning, neither of which indicates intellectual disability. *Id*.

The State also called Officer Brian Griffith, a correctional officer at St. Clair Correctional Facility, to testify at the *Atkins* hearing. Officer Griffith had known Carroll for five and a half years. (R. 198.) He supervised Carroll as Carroll worked in the kitchen. (R. 199.) According to Officer Griffith, Carroll was one of the better kitchen workers. Carroll was able to do his job effectively and completed his tasks in the kitchen without a problem. (R. 200–01.) Officer Griffith had no problem communicating with Carroll. (R. 200–01.) Carroll was able to follow his directions and the directions from other correctional officers. (R. 201.) Officer Griffith testified that Carroll was able to make decisions and to follow through on the decisions he made. (R. 201.)

Investigator M.C. Smith from the I&I Division of the Department of Corrections investigated the murder of Michael Turner. (R. 213–14.) During his investigation, Investigator Smith talked to Carroll. (R. 216.) He had Carroll read one sentence from the form out loud to make sure that Carroll could read. (R. 216–17.) During the interrogation, Carroll was able to respond to questions from the rights form, and his speech was coherent. (R. 217.) Carroll had no problem understanding Investigator Smith's questions, and Investigator Smith had no problems understanding Carroll's responses. (R. 217–18.) After the murder, Investigator Smith entered Carroll's cell in the segregation unit. Carroll had eight or nine paperback books in his cell, two *Jet* magazines, and a *USA Today* magazine. (R. 219–20.) Carroll also had newspaper articles about his case in his cell, including one concerning his mental evaluation hearing. (R.

220.) The fact that Carroll cooperated with the Department of Corrections official did not make Investigator Smith believe that Carroll is intellectually disabled. (R. 232.)

The record also contains two IQ scores from Carroll's education records. In 1984, Carroll was given a Wechsler Intelligence Scale for Children–Revised IQ test, and he received a full-scale score of 85. (CR. 401.) Three years later, a second Intelligence Scale for Children–Revised was given to Carroll, and he received a full-scale score of 87. (CR. 402.) "[B]oth the 1984 and 1987 IQ tests were administered in the summer at the Birmingham Public Schools Guidance Center and … , 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." *Ex parte Carroll*, No. 1170575, 2019 WL 1499322, at *14.

B. The Proceedings Below

A grand jury indicted Carroll for the following capital offenses: murder by a defendant who has been convicted of another murder in the twenty years preceding the crime, in violation of section 13A-5-40(a)(13) of the Code of Alabama, and murder committed while the defendant is under sentence of imprisonment, in violation of section 13A-5-40(a)(6). The jury found Carroll guilty of both counts. A jury sentencing hearing was then held, and the jury unanimously recommended a death sentence for Carroll.

The trial court then conducted its own sentencing hearing and found that the following aggravating circumstances existed: the murder was

committed by a person under sentence of imprisonment under section 13A-5-49(1) of the Code of Alabama; Carroll had previously been convicted of another capital offense or a felony involving the use or threat of violence to the person (Carroll had a previous capital murder conviction) under section 13A-5-49(2); and the capital murder was especially heinous, atrocious, or cruel as compared to other capital offenses under section 13A-5-49(8). The trial court found that the following non-statutory circumstances existed: the circumstances of Carroll's upbringing; that Carroll has less than average intelligence (but is not intellectually disabled); Carroll's incarceration at a young age; and Carroll's request for mercy. After weighing the aggravating and mitigating circumstances, the court followed the jury's recommendation and sentenced Carroll to death.

The Alabama Court of Criminal Appeals affirmed Carroll's capital murder convictions and his death sentence. *Carroll v. State*, 215 So. 3d 1135 (Ala. Crim. App. 2015). The Alabama Supreme Court denied Carroll's petition for writ of certiorari. *Id*. Carroll then filed a cert petition in this Court, which granted certiorari, vacated the judgment of the Court of Criminal Appeals' decision regarding Carroll's claim that he is intellectually disabled, and remanded the case for further consideration in light of *Moore v. Texas*, 137 S. Ct. 1039 (2017).

On remand, the Court of Criminal Appeals, "[a]pplying the restrictions on states' ability to define intellectual disability established in *Moore*," held

that Carroll had failed to "establish that the circuit court abused its discretion in finding that he was eligible for a sentence of death under *Atkins*." Pet. App. A at *5.

The Alabama Supreme Court granted Carroll's cert petition to consider this holding of the Court of Criminal Appeals. Pet. App. B. The Alabama Supreme Court extensively examined this Court's opinion in *Moore*. Pet. App. B at *1–4. After noting that there is no dispute that Carroll has "subaverage intellectual functioning," the court found that "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." Pet. App. B at *2. The court then examined the specific components of this Court's opinion in *Moore* and analyzed Carroll's claim in the light of this Court's holding in *Moore*. Pet. App. B at *2–14.

The Alabama Supreme Court first examined the evidence presented during the *Atkins* hearing. Pet. App. B at *4–10. The court noted that "[b]ecause the experts' opinion regarding Carroll's level of adaptive functioning, as well as their testimony concerning the reliability of the ABS-RC:2 (administered by Dr. Ford), 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." Pet. App. B at *11 (citations omitted). The court found that the circuit court looked to the following evidence of Carroll's adaptive abilities to reconcile the conflict:

(1) that Carroll had passed the GED while in prison; (2) that when assessing Carroll's competence to stand trial, Dr. Glen King noted that Carroll had good cognitive skills, had adequate judgment, and had average intelligence; (3) that a mental health specialist in the Department of Corrections in a 30/90-day segregation review found that Carroll's intellectual ability and memory were "below average," which is one step above borderline and is not indicative of intellectual disability; (4) that a corrections officer for the Department of Corrections was a supervisor in the kitchen where Carroll worked and stated that Carroll followed directions, was a good kitchen worker, and had no difficulties communicating with him; and (5) that the investigator who interviewed Carroll after Turner's murder stated that Carroll was able to read a sentence of his *Miranda* rights before he interviewed him, that Carroll appeared to understand his questions, and that he had eight or nine books in his prison cell, two copies of *Jet*, and a newspaper clipping about his prior conviction. Pet. App. B at *11–12.

Noting that the circuit court (1) "found Dr. Ford's testimony regarding her interview with Carroll and her review of his health records to be persuasive" and (2) discredited the testimony of Dr. Shaffer, the Alabama Supreme Court stated:

> 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. 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. (Footnote omitted).

Pet. App. B at *12. The Alabama Supreme Court then held, "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." Pet. App. B at *12.

Finally, the Alabama Supreme Court examined whether Carroll proved that his intellectual disability occurred during the developmental period. Pet. App. B at *12–14. Based on school records showing, among other things, that Carroll had achieved IQ scores of 85 and 87, the circuit court had found that Carroll failed to meet his burden on this prong, and the Court of Criminal Appeals affirmed. *Carroll*, 2017 WL 6398236, at *6. While the Alabama Supreme Court did not reach a decision on this claim because it found 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 his adaptive functioning, the court noted, "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." Pet. App. B at *13.

REASONS FOR DENYING THE PETITION

"Alabama courts apply the … broadest definition of" intellectual disability of any court when assessing a defendant's *Atkins* claim. *Carroll*, 2019 WL 1499322, at *3 n.5 (cleaned up). In this case, the state trial court applied that broad standard when assessing Carroll's claim. In the face of conflicting expert opinions, the court assessed the witnesses and evidence in front of it to conclude that Carroll had failed to establish that he suffered from significant adaptive deficits. Two state appellate courts, both applying this Court's holding in *Moore v. Texas*, 137 S. Ct. 1039 (2017), affirmed that finding.

Carroll asserts that the trial court's finding was erroneous or the appellate courts' holding misapplied *Moore*. But "[w]here an intermediate court reviews, and affirms, a trial court's factual findings, this Court will not 'lightly over-turn' the concurrent findings of the two lower courts," *Glossip v. Gross*, 135 S. Ct. 2726, 2740 (2015), much less three. Moreover, *Moore* did not remove a trial court's ability to assess a witness's credibility nor did the appellate courts' holdings misapply this Court's teaching. In any event, this Court "rarely grant[s]" petitions where "the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. That is all Carroll's petition presents, and it should be denied. *See United States v. Johnson*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

The petition should also be denied because it is unlikely to affect the

outcome of Carroll's case. As the trial court found, Carroll has also failed to prove that he meets the third prong of the intellectual disability definition—that he suffered from significant or substantial deficits and significantly sub-average intelligence during the developmental period. The Alabama Court of Criminal Appeals affirmed that finding, and while the Alabama Supreme Court did not rule on the issue, it noted that the IQ scores of 85 and 87 that Carroll obtained as a child were "sufficiently rigorous to preclude definitively the possibility that [Carroll] possessed subaverage intelligence." *Ex parte Carroll*, 2019 WL 1499322, at *14 (quoting *Brumfield v. Cain*, 135 S. Ct. 2269, 2279 (2015)) (alteration by *Carroll* court). Thus, Carroll's case is a poor vehicle for the fact-bound issue he raises, and his petition should be denied.

I. The circuit court's determination that Carroll is not intellectually disabled does not violate this Court's holding in *Moore v. Texas*.

A. The legal standard for evaluating *Atkins* claims.

In *Atkins v. Virginia*, 536 U.S. 304 (2002), this Court held that the execution of capital offenders who are intellectually disabled violates the Eighth Amendment's prohibition against cruel and unusual punishment. In reaching that result, this Court observed that "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills. *Id.* at 318. The Court, however, declined to create a national standard that lower courts should use in

determining whether a capital offender is intellectually disabled,[1] and therefore, ineligible for the death penalty. *Id.* at 317. Instead, the Court left to the individual states "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.*

Even though the various statutory definitions that were in effect when *Atkins* was decided are not identical, the states that had enacted statutes to prohibit the execution of intellectually disabled criminals had reached a consensus on the general aspects of intellectual disability. The statutes that were enacted in those states "generally conform to the clinical definitions" of the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA). *Atkins*, 536 U.S. at 317 n.22.

In *Ex parte Perkins,* 851 So. 2d 453, 455–56 (Ala. 2002), the Alabama Supreme Court noted that the Alabama Legislature has not enacted a statute to instruct courts in Alabama how to determine whether a capital offender is intellectually disabled and ineligible for the death penalty. Although the court declined to encroach on the legislature's prerogative of making that policy decision, the court addressed the petitioner's intellectual disability claim. *Id.* To frame its analysis of the petitioner's claim, the court set forth the following standard for reviewing an intellectual disability claim:

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1. This Court began using the term "intellectually disability" rather than "mental retardation" in *Hall v. Florida,* 134 S. Ct. 1986, 1990 (2014). In keeping with this decision, the State will also use the term "intellectual disability" rather than "mental retardation" in its brief.

> Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e. before the defendant reached age 18).

Id. at 456.

Thus, the court applied the broad definitions of intellectual disability highlighted in *Atkin*s—significantly sub-average general intellectual functioning accompanied by significant deficits in adaptive functioning, both of which must have manifested before the age of eighteen—in reviewing Perkins's *Atkins* claim. *Id.* In Alabama, a capital offender must prove that he or she satisfies all three elements of the definition of intellectual disability announced in *Perkins* to establish that he or she is intellectually disabled. It is of no legal consequence that an offender can prove that he or she satisfies some of the elements of the intellectual disability definition if he or she cannot satisfy all of them. In addition, a capital defendant cannot be deemed intellectually disabled unless the defendant exhibits sub-average intellectual functioning and deficits in his or her adaptive functioning at the time of the crime. *Ex parte Smith*, 213 So. 3d 238, 248 (Ala. 2007).

In *Moore v. Texas*, Moore challenged his death sentence on the ground that he was intellectually disabled and could not be executed. 137 S. Ct. at 1044. The state habeas court held an evidentiary hearing on Moore's claim and found that he was intellectually disabled. *Id*. The Texas Court of Criminal

Appeals declined to adopt the judgment of the state habeas court.[2] In refusing to adopt the state habeas court's judgment, the Texas Court of Criminal Appeals, relying on the evidentiary factors set forth in *Ex parte Briseno*, 135 S.W.3d 1 (2004), discounted the lower end of the standard error of measurement and found that Moore failed to prove that he suffered from significantly sub-average intellectual functioning. *Moore*, 137 S. Ct. at 1047. The Texas appellate court also found that Moore failed to prove that he suffered from significant limitations in adaptive functioning. *Id*. The court credited Moore's adaptive strengths as more illustrative of his intellectual functioning than his adaptive weaknesses and found that the *Briseno* factors "weighed heavily" against finding that Moore's adaptive deficits were related to his intellectual functioning deficits. *Id*.; *see also Ex Parte Moore*, 470 S.W.3d 481, 525 (Tex. Crim. App. 2015) (faulting "each of applicant's experts who testified at the evidentiary hearing" for "appear[ing] to have applied a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes") (citing *See Ex parte Cathey*, 451 S.W.3d 1, 26–27 (Tex. Crim. App. 2014).

This Court granted Moore's petition for writ of certiorari and found that the Texas Court of Criminal Appeals' adherence to superseded medical

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2. Under Texas law, the Texas Court of Criminal Appeals is the "ultimate factfinder" in habeas proceedings, not the habeas court. *Moore*, 137 S. Ct. at 1044 n.2.

standards and its reliance on *Briseno* did not comply with the Eighth Amendment. *Moore*, 137 S. Ct. at 1053. Specifically, this Court held that the appellate court's conclusion that Moore's IQ scores established that he is not intellectually disabled "is irreconcilable with *Hall.*" *Id.* at 1049. *Hall* instructs that where an IQ score is close to but above 70, courts must account for the test's standard error of measurement, which the Texas court failed to do. This Court also faulted the Texas court for overemphasizing Moore's adaptive strengths and criticized the court for stressing the defendant's improved behavior in prison. *Id.* at 1050. This Court also noted, relying on the AAIDD-11 user's guide, that if possible, corroborative information reflecting functioning outside controlled settings should be obtained. *Id.*

Finally, this Court condemned the use of the *Briseno* factors because those factors "creat[e] an unacceptable risk that persons with intellectual disability will be executed." *Id.* at 1051–52 (*citing Hall*, 134 S. Ct. at 1990). This Court explained that the *Briseno* court "defined its objective as identifying the 'consensus of Texas citizens' on who 'should be exempted from the death penalty.'" *Id.* The Court then noted that "[m]ild levels of intellectual disability, although they may fall outside of Texas citizens' consensus nevertheless remain intellectual disabilities, and States may not execute anyone in 'the *entire category* of [intellectually disabled] offenders." *Id.* (citations omitted) (emphasis in original). This Court also noted that no other state legislature has approved the use of the *Briseno* factors and that Texas does not follow *Briseno*

in contexts other than in death cases. *Id* at 1052. This Court then held:

> By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno,* including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the "medical community's diagnostic framework," *Hall,* 572 U.S., at ——— – ———, 134 S. Ct., at 2000. Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand.

Id. at 1053.

In contrast to pre-*Moore* Texas courts, "the *Briseno* factors are not applied in Alabama." *Ex parte Carroll*, 2019 WL 1499322, at *3 n.5. Alabama courts do not refuse to be informed by the medical community's current medical standards when assessing intellectual disability claims. Rather, "Alabama courts 'apply 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." *Id.* (quoting *Smith v. State*, 213 So.3d 239, 248 (Ala. 2007)). And, as set forth below, the state courts' application of that standard in this case did not violate *Moore*.

B. The circuit court did not abuse its discretion when it found that Carroll does not currently exhibit significant or substantial deficits in his adaptive functioning.

During Carroll's *Atkins* hearing, the circuit court heard from numerous witnesses, including lay witnesses and two psychologists—Dr. Ford, who testified for the State, and Dr. Shaffer, who testified for Carroll. Dr. Ford's opinion was that Carroll did not exhibit significant deficits in his adaptive

functioning, an opinion based on "her interview with Carroll and her review of his health records," as well as a diagnostic test, the ABS-RC:2, that she administered to Carroll. *Ex parte Carroll*, 2019 WL 1499322, at *12. Dr. Shaffer too interviewed Carroll, as well as two of his uncles, and administered tests to Carroll. Dr. Shaffer disagreed with Dr. Ford's ultimate conclusion regarding Carroll's adaptive functioning, as well as Dr. Ford's decision to use the ABS-RC:2. *Id*. at *11. It thus fell to "the circuit court to look to other evidence of Carroll's adaptive functioning to reconcile the experts' competing opinions regarding his abilities." *Id.* And the circuit court reasonably found that Dr. Shaffer's testimony was not credible.

The following facts supported that finding:

(1) Carroll passed the GED exam while in prison, even though he had only gone through the eighth grade in school because of his incarceration at a young age. Dr. Ford testified that most individuals who are intellectually disabled would not be able to pass the GED and also noted that none of the intellectually disabled people she had worked with would have been able to pass the GED. (R. 170–71, 188.)

(2) Dr. Glen King, the certified forensic examiner who assessed Carroll's competence to stand trial and mental state at the time of the offense, found that Carroll had good cognitive skills, intact memory, adequate judgment, and average intelligence. (CR. 81–82.)

(3) Carroll was evaluated by Dr. David Sandifer for the Alabama

Department of Corrections, who concluded that his intellectual functioning was "below average," which is under average and just above the borderline range of functioning, neither of which indicates intellectual disability. *Carroll*, 2019 WL 1499322 at *11.

(4) Carroll has no problem communicating with others and has no problems following directions. (R. 174, 200–01, 217–18.)

(5) The planning aspect of this crime is not the behavior of a person with intellectual disability.

(6) Carroll's actions after the crime indicated that he understood what the consequences of his actions were—i.e., attempting to avoid detection when he learned that correctional officers were coming, discarding the knife in the trash can, washing the blood off his hands, and attempting to return to his cell block. (R. 177–78.)

(7) Carroll was never classified as educably mentally retarded while in school. (R. 173–74.)

(8) While Carroll was diagnosed with a learning disability in reading, there is a difference in being learning disabled and intellectually disabled. (R. 172–73.)

Carroll argues that none of this is relevant after *Moore* because Dr. Ford used the ABS-RC:2 when forming her conclusion and the courts below noted that her "testimony is consistent with the lay witnesses' testimony regarding their interactions with Carroll." *Carroll*, 2019 WL 1499322, at *12. But *Moore*

did not rule out altogether the observations of laypersons, and the courts below did not "disregard … current medical standards." *Moore*, 137 S. Ct. at 1049. Rather, after setting forth the conflicting testimony of the experts and their disagreement about the use of the ABS-RC:2, the Alabama Supreme recognized that some courts have questioned the application of the ABS-RC:2 for assessing intellectual ability in criminal cases. *Carroll*, 2019 WL 1499322 at *7–10. The Alabama Supreme Court then noted that "[b]ecause the experts' opinions concerning [1] Carroll's level of adaptive functioning, as well as [2] 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." *Id*. at *11. No court resolved the issue below by simply deferring to the ABS-RC.2, and nothing in *Moore* required the trial court to accept the results of Dr. Shaffer's test at face value. That is why it was reasonable for the circuit court to look at other evidence of Carroll's adaptive functioning to reconcile the experts' competing opinions concerning his adaptive functioning. *Id*.

Carroll argues that the Alabama Supreme Court's treatment of the conflicting expert testimony violates *Moore* because it was not based on the medical community's medical standards. However, *Moore* did not impose a specific requirement that courts identify the clinical medical standard that they apply—it simply requires that a court's determination must be "informed

by the medical community's diagnostic framework." *Moore*, 137 S. Ct. at 1048, 1053. In this case, the Alabama Supreme Court held that the circuit court properly "found Dr. Ford's testimony regarding her interview with Carroll and her review of his health records to be persuasive." *Carroll*, 2019 WL 1499322 at *12. The Alabama Supreme Court then noted:

> 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. 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. (Footnote omitted)

Id. Nothing in this holding contradicts this Court's requirement that courts "be informed by the medical community's diagnostic framework." *Moore*, 137 S. Ct. at 1048. In fact, the Alabama Supreme Court did just that in holding that the circuit court properly found Dr. Ford's testimony to be persuasive.

Carroll also attacks the Alabama Supreme Court's decision because it cites (1) adaptive strengths, (2) the testimony of two prison employees, and (3) observations from two psychologists concerning his intellectual functioning. But *Moore* does not stand for the proposition that such evidence can never be even considered by a court. Although this Court faulted the Texas Court of

Criminal Appeals for "overemphasiz[ing] Moore's perceived adaptive strengths," this Court did not hold that the lower court erred in considering his adaptive strengths. *Moore*, 137 S. Ct. at 1050. The problem in *Moore* was that the Texas Court of Criminal Appeals found that Moore's adaptive strengths "constituted evidence adequate to *overcome* the considerable objective evidence of Moore's adaptive deficits." *Id*. (emphasis added). In other words, the Texas court agreed with Moore's experts that Moore suffered from significant adaptive deficits, but found that Moore's "strengths … undercut the significance of Moore's adaptive limitations." *Id.* at 1047; *see also Ex Parte Moore*, 470 S.W.3d at 525 (faulting Moore's experts for "appl[ying] a more demanding standard to the issue of adaptive behavior than we have contemplated for Eighth Amendment purposes").

In this case, the circuit court did not overemphasize Carroll's adaptive strengths to outweigh clear deficits, but rather found that Carroll failed to prove substantial adaptive deficits at all. Dr. Ford based her assessment of Carroll's adaptive functioning on her interview with Carroll, her review of his education records, a review of reports from other professionals who had evaluated Carroll, his actions during and after the murder of Turner, and his performance on the ABS-RC:2. *Ex parte Carroll*, 2019 WL 1499322, at *11–12. And the court considered this testimony and other evidence before "discredit[ing] the opinion of Dr. Shaffer." *Id.* at *12.

Nor did the circuit court err when it considered the testimony of a

correctional officer and an investigator for the Alabama Department of Corrections in assessing Carroll's adaptive functioning. This Court noted in *Moore* that "clinicians … caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore*, 137 S. Ct. at 1050. In the instant case, there was no evidence that Carroll's abilities in the prison kitchen were developed in the prison. Moreover, the testimony of the correctional officer was used to corroborate Carroll's description of his duties in the prison kitchen to Dr. Ford. The investigator's testimony had nothing to do with any abilities Carroll developed in prison but corroborated Dr. Ford's finding that Carroll had no problems communicating with her. Investigator Smith testified that Carroll was able to read a sentence from his *Miranda* warnings, was able to respond to questions from his rights form, and exhibited coherent speech. Carroll had no problems understanding Investigator Smith's questions, and Investigator Smith had no problems understanding Carroll's responses. (R. 217–18.) The circuit court, therefore, did not err when it relied on the testimony of these witnesses when it considered Carroll's adaptive functioning.

Finally, Dr. Ford did not err when she relied on the opinions of two other experts to assess Carroll's adaptive functioning. Again, this was just one other consideration in Dr. Ford's assessment of Carroll's adaptive functioning. While Dr. King did not conduct an IQ test on Carroll, he observed that Carroll had good cognitive skills, that his memory was intact, that he was able to engage

in abstract reasoning and gave an interpretation of a proverb, that he knew the names of the current and immediate past presidents of the United States, that his judgment was adequate, and that his intellectual ability is average.

Carroll now argues that Dr. Ford's reliance on the opinions of these two experts was inadequate in the light of Dr. Shaffer's[3] comprehensive evaluation of Carroll. While it is true that Dr. Shaffer attempted to assess Carroll's current adaptive functioning, his methods are questionable. First, Dr. Shaffer used a neuropsychological battery of tests to measure Carroll's current adaptive functioning. Second, Dr. Shaffer performed a Vineland adaptive functioning test on one of Carroll's uncles, who spent time with Carroll before he was incarcerated and during his developmental period, not when he was an adult. Dr. Shaffer admitted that he had to rely on this uncle to tell the truth about Carroll's adaptive functioning. (R. 129–34.) Third, the circuit court noted the following concerning Dr. Shaffer's testimony: "The defense psychologist, Dr. Shaffer, conducted an assessment and testified that he found significant deficits in the defendant's adaptive functioning. It is noted that Dr. Shaf[f]er is the only psychologist to have evaluated the defendant to offer an opinion that the defendant is 'mentally retarded.'" (R. 125.) The Alabama Supreme

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[3] Carroll also argues in footnote 3 of his petition that the circuit court and the Alabama Supreme Court failed to mention the testimony of Susan Wardell when those courts assessed his current adaptive functioning. Ms. Wardell's investigation, however, concerned Carroll's adaptive functioning during his developmental period, not his current adaptive functioning.

Court stated the following concerning this determination by the circuit court: "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." *Ex parte Carroll*, 2019 WL 1499322, at *12. Carroll's argument that Dr. Ford's reliance on Dr. King's and Dr. Sandifer's opinions was inappropriate and that the lower courts should have instead relied on Dr. Shaffer's testimony is questionable where Dr. Shaffer's testimony was discredited.

The evidence thus amply supports the circuit court's finding, since affirmed by two appellate courts applying *Moore*, that Carroll does not currently have substantial or significant deficits in his adaptive functioning. This Court should, therefore, refuse to grant Carroll's cert petition.

C. The record establishes that Carroll did not suffer from significantly sub-average intellectual functioning or substantial deficits in his adaptive functioning during his developmental period.

Although the Alabama Supreme Court declined to address the third prong of the intellectual disability diagnosis because it determined that Carroll did not have significant or substantial deficits in his adaptive functioning, it did note, "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." *Carroll*, 2019 WL 1499322 at *13. The circuit court's decision was not only rationally based, it was correct.

Carroll does not address the third prong of the intellectual disability

diagnosis, but the record proves that he did not suffer from significantly sub-average intellectual functioning during his developmental period. The record contains two IQ scores from Carroll's developmental period: in 1984 and 1985, he received full-scale scores of 85 and 87, respectively, on the Wechsler Intelligence Scale for Children–Revised. (CR. 401–02.) These scores place Carroll well above the intellectual disability range during his developmental period.

Carroll argued below that the only evidence in the record regarding the validity of these IQ tests indicates that the tests were administered in a group setting and might be invalid. He also argued that there is nothing in the record indicating that these IQ scores were reliable. The Alabama Supreme Court rejected both of these arguments, 2019 WL 1499322 at *14, and Carroll does not dispute these findings in his cert petition.

Carroll failed to prove by a preponderance of the evidence that he suffered from both significantly sub-average intellectual functioning and also had substantial deficits in his adaptive functioning during the developmental period. He also failed to prove that he suffered from significantly sub-average intellectual functioning during this time period. In fact, his school records indicate that his IQ scores of 85 and 87 placed him in the low average range of intellectual functioning. (CR. 404, 411, 422.) Moreover, Dr. Ford testified that there is no indication in the record that Carroll was ever classified as "educable mentally retarded" in the school system. (R. 173–74.) In fact, Carroll told her

that he was in learning disability classes for reading but was in regular classes for math, and the education records confirm that Carroll was placed in learning disability classes. (R. 172; CR. 418–19.) The circuit court found, based on Dr. Ford's testimony, that "having a learning disability is entirely different from being 'mentally retarded' and that those who have a learning disability will often times score lower on standardized tests, such as IQ tests, than they are capable of scoring due to the disability." (CR. 124.)

While Carroll presented evidence that Dr. Shaffer had performed a retrospective Vineland assessment on one of Carroll's uncles to support his claim that he suffered from deficits in his adaptive functioning during the developmental period, the circuit court was "not convinced that the Defendant presented credible evidence to show that he suffered from 'mental retardation' before or after the developmental period (before 18 years of age)." (CR. 127.) In fact, the circuit court completely discounted Dr. Shaffer's testimony, finding, "The defense psychologist, Dr. Shaffer, conducted an assessment and testified that he found significant deficits in the defendant's adaptive functioning. It is noted that Dr. Shaf[f]er is the only psychologist to offer an opinion that the defendant is 'mentally retarded.'" (CR. 125.)

Alabama law requires a capital offender to prove that he or she satisfies all three elements of the definition of intellectual disability that the Supreme Court of Alabama announced in *Perkins*. In the instant case, Carroll completely fails to argue that he meets the third prong of the intellectual

disability definition, and the record establishes that he cannot prove this prong. Therefore, this Court should refuse to grant Carroll's cert petition on his claim that he is intellectually disabled.

CONCLUSION

For the reasons set forth above, the circuit court properly determined that Carroll is not intellectually disabled. Carroll has not shown that this determination violates *Moore*, and so this Court should decline to grant Carroll's petition for writ of certiorari.

Respectfully submitted,

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