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# ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2010-2011

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CR-97-1258

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Jerry Jerome Smith

v.

State of Alabama

Appeal from Houston Circuit Court  
(CC-97-270)

On Remand from the Alabama Supreme Court

WINDOM, Judge.

In 1998, Jerry Jerome Smith was convicted of capital murder for killing Willie Flournoy, Theresa Helms, and David Bennett by one act or pursuant to one scheme or course of

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conduct, see § 13A-5-40(a)(10), Ala. Code 1975. The jury recommended, by a vote of 11 - 1, that Smith be sentenced to death. In accordance with the jury's recommendation, the circuit court sentenced Smith to death.

On appeal, this Court affirmed Smith's capital-murder conviction, but remanded the cause for the circuit court to correct its sentencing order. See Smith v. State, [Ms. CR-97-1258, December 22, 2000] \_\_\_ So.3d \_\_\_ (Ala. Crim. App. 2000). After remanding the cause a second time for the circuit court to correct its sentencing order, this Court affirmed Smith's death sentence. See Smith v. State, [Ms. CR-97-1258, August 31, 2001] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2000) (opinion on return to second remand). Thereafter, the Alabama Supreme Court reversed Smith's death sentence and ordered a new penalty-phase hearing. See Ex parte Smith, [Ms. 1010267, March 14, 2003] \_\_\_ So. 3d \_\_\_ (Ala. 2003).

After a second penalty-phase hearing, the jury recommended by a vote of 10-2 that Smith be sentenced to death. The circuit court followed the jury's recommendation and again sentenced Smith to death. On return to remand, this Court "concluded that Smith is mentally retarded and,

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therefore, ... ineligible for the death penalty and directed the trial court to set aside Smith's death sentence and to sentence him to life imprisonment without the possibility of parole." Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2010) (citing Smith v. State, [Ms. CR-97-1258, September 29, 2006] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. Crim. App. 2006) (opinion on return to third remand)). The Alabama Supreme Court reversed this Court's judgment and remanded the cause for the circuit court to conduct an Atkins<sup>1</sup> hearing to determine whether Smith is mentally retarded and to make specific findings of fact pursuant to Ex parte Perkins, 851 So. 2d 453 (Ala. 2002). Smith v. State, [Ms. 1060427, May 25, 2007] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2007). After conducting the Atkins hearing, the circuit court concluded that Smith is not mentally retarded. This Court affirmed the circuit court's determination, and the Alabama Supreme Court granted certiorari review.

On October 22, 2010, the Alabama Supreme Court again reversed Smith's sentence of death and remanded the cause for the circuit court to conduct a new penalty-phase proceeding

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<sup>1</sup>Atkins v. Virginia, 536 U.S. 304 (2002).

before a jury. Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d \_\_\_, \_\_\_ (Ala. 2010). Specifically, after detailing why the circuit court correctly determined that Smith is not mentally retarded, the Alabama Supreme Court held that improper, prejudicial contact between the victim's mother and the jury venire entitled Smith to a new penalty phase-proceeding. Id. at \_\_\_.

In accordance with the Alabama Supreme Court's opinion in Ex parte Smith, [Ms. 1080973, October 22, 2010] \_\_\_ So. 3d at \_\_\_, this cause is remanded to the circuit court with instructions for that court to conduct a third penalty-phase hearing. On remand, the circuit court shall take all necessary action to see that the circuit clerk makes due return to this Court at the earliest possible time and within 180 days from the date of this opinion.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Welch, P.J., and Kellum, J., concur.