**REL: 04/29/2016**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2015-2016**

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**CR-10-1343**

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**Anthony Lane**

**v.**

**State of Alabama**

**Appeal from Jefferson Circuit Court**
**(CC-09-3202)**

On Remand From The United States Supreme Court

BURKE, Judge.

Anthony Lane was convicted of murder made capital because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975. Following the

jury's recommendation, the trial court sentenced Lane to death. This Court ultimately affirmed Lane's conviction and sentence in Lane v. State, 169 So. 3d. 1076 (Ala. Crim. App. 2013), and the Alabama Supreme Court denied certiorari on January 30, 2015. On October 5, 2015, the United States Supreme Court granted Lane's petition for a writ of certiorari and held:

> "On petition for writ of certiorari to the Court of Criminal Appeals of Alabama. Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Court of Criminal Appeals of Alabama for further consideration in light of Hall v. Florida, 572 U.S.___, 134 S. Ct. 1986 (2014)."

Lane v. Alabama, 577 U.S. ___, ___, 136 S. Ct. 91 (2015).

Discussion

In Hall v. Florida, 572 U.S. ___, 134 S. Ct. 1986 (2014), the United States Supreme Court held unconstitutional Florida's method of determining whether a capital defendant was intellectually disabled[1] under Atkins v. Virginia, 536

[1]This Court has previously employed the term, "mental retardation," when discussing claims asserted under Atkins v. Virginia, 536 U.S. 304(2002). However, in Brumfield v. Cain, ___ U.S. ___, 135 S. Ct. 2269, 2274 n. 1 (2015), the United States Supreme Court began using the term "intellectually disabled" to describe the identical phenomenon. To avoid any

U.S. 304 (2002), and, thus, ineligible for the death penalty. Under Florida law, the definition of intellectual disability requires an IQ test score of 70 or less. "If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed." Hall, 572 U.S. at ___, 134 S. Ct. at 1990. The United States Supreme Court held that Florida's "rigid rule ... creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Id.

In reaching its conclusion that Florida's rigid cutoff rule was invalid, the Supreme Court considered "the psychiatric and professional studies that elaborate on the purpose and meaning of IQ scores to determine how the scores relate to the holding of Atkins." 572 U.S. at ___, 134 S. Ct. at 1993. The Supreme Court continued:

> "On its face, the Florida statute could be consistent with the views of the medical community noted and discussed in Atkins. Florida's statute defines intellectual disability for purposes of an Atkins proceeding as 'significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and

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confusion, this Court will do the same unless quoting or discussing earlier court decisions and documents that use the term "mental retardation."

manifested during the period from conception to age 18.' Fla. Stat. § 921.137(1) (2013). The statute further defines 'significantly subaverage general intellectual functioning' as 'performance that is two or more standard deviations from the mean score on a standardized intelligence test.' Ibid. The mean IQ test score is 100. The concept of standard deviation describes how scores are dispersed in a population. Standard deviation is distinct from standard error of measurement, a concept which describes the reliability of a test and is discussed further below. The standard deviation on an IQ test is approximately 15 points, and so two standard deviations is approximately 30 points. Thus a test taker who performs 'two or more standard deviations from the mean' will score approximately 30 points below the mean on an IQ test, i.e., a score of approximately 70 points.

"On its face this statute could be interpreted consistently with Atkins and with the conclusions this Court reaches in the instant case. Nothing in the statute precludes Florida from taking into account the IQ test's standard error of measurement, and as discussed below there is evidence that Florida's Legislature intended to include the measurement error in the calculation. But the Florida Supreme Court has interpreted the provisions more narrowly. It has held that a person whose test score is above 70, including a score within the margin for measurement error, does not have an intellectual disability and is barred from presenting other evidence that would show his faculties are limited. See Cherry v. State, 959 So. 2d 702, 712-713 (Fla. 2007)(per curiam). That strict IQ test score cutoff of 70 is the issue in this case.

"Pursuant to this mandatory cutoff, sentencing courts cannot consider even substantial and weighty evidence of intellectual disability as measured and made manifest by the defendant's failure or

inability to adapt to his social and cultural environment, including medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances. This is so even though the medical community accepts that all of this evidence can be probative of intellectual disability, including for individuals who have an IQ test score above 70. See APA Brief 15-16 ('[T]he relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist'); DSM-5, at 37 ('[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score').

"Florida's rule disregards established medical practice in two interrelated ways. It takes an IQ score as final and conclusive evidence of a defendant's intellectual capacity, when experts in the field would consider other evidence. It also relies on a purportedly scientific measurement of the defendant's abilities, his IQ score, while refusing to recognize that the score is, on its own terms, imprecise.

"The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. See D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944) (reporting the range of error on an early IQ test). Each IQ test has a 'standard error of measurement,' ibid., often referred to by the abbreviation 'SEM.' A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. See R. Furr & V. Bacharach, Psychometrics 118 (2d ed. 2014) (identifying the SEM as 'one of the most important concepts in measurement theory'). An individual's IQ test score on any given exam may fluctuate for a

variety of reasons. These include the test-taker's health; practice from earlier tests; the environment or location of the test; the examiner's demeanor; the subjective judgment involved in scoring certain questions on the exam; and simple lucky guessing. See American Association on Intellectual and Developmental Disabilities, R. Schalock et al., User's Guide To Accompany the 11th Edition of Intellectual Disability: Definition, Classification, and Systems of Supports 22 (2012) (hereinafter AAIDD Manual); A. Kaufman, IQ Testing 101, pp. 138–139 (2009).

"The SEM reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score. For purposes of most IQ tests, the SEM means that an individual's score is best understood as a range of scores on either side of the recorded score. The SEM allows clinicians to calculate a range within which one may say an individual's true IQ score lies. See APA Brief 23 ('SEM is a unit of measurement: 1 SEM equates to a confidence of 68% that the measured score falls within a given score range, while 2 SEM provides a 95% confidence level that the measured score is within a broader range'). A score of 71, for instance, is generally considered to reflect a range between 66 and 76 with 95% confidence and a range of 68.5 and 73.5 with a 68% confidence. See DSM–5, at 37 ('Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points).... [T]his involves a score of 65–75 (70 ± 5)'); APA Brief 23 ('For example, the average SEM for the WAIS–IV is 2.16 IQ test points and the average SEM for the Stanford–Binet 5 is 2.30 IQ test points (test manuals report SEMs by different age groupings; these scores are similar, but not identical, often due to sampling error)'). Even when a person has taken multiple tests, each separate score must be assessed using the SEM, and

> the analysis of multiple IQ scores jointly is a complicated endeavor. See Schneider, Principles of Assessment of Aptitude and Achievement, in The Oxford Handbook of Child Psychological Assessment 286, 289–291, 318 (D. Saklofske, C. Reynolds, V. Schwean, eds. 2013). In addition, because the test itself may be flawed, or administered in a consistently flawed manner, multiple examinations may result in repeated similar scores, so that even a consistent score is not conclusive evidence of intellectual functioning.
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> "Despite these professional explanations, Florida law used the test score as a fixed number, thus barring further consideration of other evidence bearing on the question of intellectual disability. For professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning. These include evidence of past performance, environment, and upbringing."

Hall, 572 U.S. at ___, 134 S. Ct. at 1994-96. The Supreme Court acknowledged that the majority of States recognize the SEM when evaluating IQ test results and reject "the strict 70 cutoff." 572 U.S. at ___, 134 S. Ct. at 1998.

The Supreme Court went on to note that Kentucky and Virginia have similar statutes adopting a fixed score cutoff similar to Florida's. 572 U.S. at ___, 134 S. Ct. at 1998, citing Ky. Rev. Stat. Ann. § 532.130(2)(Supp. 2013); Bowling v. Commonwealth, 163 S.W.3d 361, 375 (Ky. 2005); Va. Code Ann.

§ 19.2-264.3:1.1 (Supp. 2013); Johnson v. Commonwealth, 267 Va. 53, 75, 591 S.E.2d 47, 59 (2004), vacated and remanded on other grounds, 544 U.S. 901, (2005). The Supreme Court also stated that "Alabama also may use a strict IQ score cutoff at 70, although not as a result of legislative action." Hall 134 S. Ct., at 1996, citing Smith v. State, 71 So. 3d 12, 20 (Ala. Crim. App. 2008).

In Smith, the petitioner sought postconviction relief pursuant to Rule 32, Ala. R. Crim. P., in part, on the ground that he was intellectually disabled under Atkins. The petitioner, whose full-scale IQ was 72, argued that he suffered from subaverage intellectual functioning. This Court held:

> "Smith urges this Court to adopt a 'margin of error' when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in [Ex parte] Perkins[, 851 So. 2d 453, 456 (Ala. 2002),] did not adopt any 'margin of error' when examining a defendant's IQ score."

Smith, 71 So. 3d at 20.

In Ex parte Perkins, 851 So. 2d 453 (Ala. 2002), the Alabama Supreme Court, noting that the legislature had yet to define mental retardation for purposes of determining whether

a defendant is eligible for the death penalty, observed that "[t]hose states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior." 851 So. 2d at 456. Although the Alabama Supreme Court made the observation that other states defined subaverage intellectual functioning as an IQ of 70 or below, nothing in Perkins expressly adopted a bright-line cutoff for IQ test scores.

In fact, in Perkins, the Court proceeded beyond the IQ score to look to evidence of the medical assessment of a licensed clinical psychologist that Perkins's intellectual functioning had probably declined due to age and alcohol abuse, that he had been diagnosed with a borderline personality disorder and alcohol dependence, and that he had earned a general equivalency diploma (GED) and had completed college courses while in prison. The Court further considered that he "did not exhibit 'significant' or 'substantial' deficits in adaptive behavior before or after age 18." 851

So. 2d at 456. Moreover, the Court took into account Perkins's ability to maintain interpersonal relationships (he had been married for 10 years), as well as his ability to keep up employment as an electrician for a while.

Because Perkins did not explicitly hold that trial courts were precluded from considering a margin of error or SEM when evaluating a defendant's IQ test score in the context of an Atkins claim, this Court's refusal, in Smith, to adopt a margin of error was too strict. To the extent that Smith v. State, precludes a trial court from considering a margin of error or SEM when evaluating a defendant's IQ test score for purposes of an Atkins claim, that ruling is hereby overruled in light of the United States Supreme Court's decision in Hall v. Florida.

Lane's Case

As noted in Lane v. State, 169 So. 3d 1076, 1089 (Ala. Crim. App. 2013), Lane had a full-scale IQ of 70. Lane was entitled to, and did receive, an opportunity to prove that he suffered from concurrent deficits in adaptive behavior that manifested before his 18th birthday. After the guilt phase of his trial, the trial court held an Atkins hearing at which

Lane called his sister as well as a clinical neuropsychologist, who both testified regarding Lane's alleged deficits in adaptive behavior. Although the State called no witnesses at the Atkins hearing, it expressly adopted all the evidence and testimony from the guilt phase of the trial to be used during the Atkins hearing. (R. 728.)

At the conclusion of the two-day hearing, the trial court found that Lane failed to prove, by a preponderance of the evidence, that he was mentally retarded under Atkins. This Court affirmed the trial court's judgment on direct appeal in Lane v. State, supra.

In his brief on remand from the United States Supreme Court, Lane urges this Court to reexamine the evidence presented at his Atkins hearing and to conclude that he is intellectually disabled and, consequently, ineligible for the death penalty. As he did on direct appeal, Lane takes issue with the trial court's determination that Lane failed to demonstrate deficiencies in two or more areas of adaptive functioning. According to Lane, the trial court's decision was "in direct opposition to the definitions used" by the medical community. (Lane's brief on remand, at 15.)

However, Hall is not as broad as Lane contends and does not require this Court to revisit that issue. The holding in Hall centered only on the medical community's interpretation of the significance of an IQ test score. The United States Supreme Court held that "[t]he Florida statute, as interpreted by its courts, misuses IQ score on its own terms; and this, in turn, bars consideration of evidence that must be considered in determining whether a defendant in a capital case has intellectual disability." Hall, 572 U.S. at ___, 134 S. Ct. at 2001. Because Lane was afforded an Atkins hearing, the trial court was not barred from considering other evidence in determining whether Lane was intellectually disabled. Accordingly, Lane is due no relief under Hall.

For the foregoing reasons, as well as the reasons stated by this Court in Lane v. State, 169 So. 3d. 1076 (Ala. Crim. App. 2013), the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Joiner, J., concur. Kellum, J., concurs in part; dissents in part, with opinion. Welch, J., dissents, with opinion.

KELLUM, Judge, concurring in part and dissenting in part.

I concur to affirm Anthony Lane's capital-murder conviction. I also agree with the majority's conclusion that Lane is entitled to no relief on his claim of intellectual disability under Atkins v. Virginia, 536 U.S. 304 (2002), in light of the United States Supreme Court's opinion in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014). However, I must respectfully dissent from the affirmance of Lane's death sentence without this Court's first addressing the impact, if any, of the United States Supreme Court's recent opinion in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016), on Alabama's capital-sentencing scheme.

WELCH, Judge, dissenting.

As the majority states, this case is on remand from the United States Supreme Court, which remanded the case "for further consideration in light of Hall v. Florida, 572 U.S. ___ [134 S. Ct. 1986,] (2014)." Lane v. Alabama, 577 U.S. ___, 136 S. Ct. 91 (2015).

In Atkins v. Virginia, 536 U.S. 304 (2002), the United States Supreme Court held that the Eighth and Fourteenth Amendments to the Constitution forbid the execution of persons with intellectual disability. The Supreme Court stated, however, "[a]s was our approach in Ford v. Wainwright, 477 U.S. 399 (1986), with regard to insanity, 'we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.' Id., at 405." Atkins, 536 U.S. at 317 (footnote omitted). In Hall, the United States Supreme Court stated that the Florida statute defined intellectual disability so as to require an IQ test score of 70 or less and, if a defendant has an IQ above 70, he is considered free from intellectual disability and is barred from presenting any evidence as to his deficits in adaptive functioning. "This rigid rule, the

Court now holds, creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." 572 U.S. at ___, 134 S. Ct. at 1990. The Court further stated: "It is true that Atkins 'did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation' falls within the protection of the Eighth Amendment," 572 U.S. at ___, 134 S. Ct. at 1998, "[b]ut Atkins did not give the States unfettered discretion to define the full scope of the constitutional protection [against executing the intellectually disabled]." 572 U.S. at ___, 134 S. Ct. at 1998. Finally, the Court also stated:

> "It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework. Atkins itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession."

572 U.S. at ___, 134 S. Ct. at 2000.

It is in the foregoing context that the United States Supreme Court remanded this case for further consideration in light of Hall. There was no dispute at trial, and the trial court found, that Lane's IQ score was 70. Lane's psychological expert, Dr. John Goff, testified that Lane suffered from serious deficiencies in adaptive functioning. The trial court stated that, even though it "was impressed with the direct examination of Dr. Goff and how it was presented by the defense," it was not convinced by a preponderance of the evidence that Lane was intellectually disabled. (R. 825-26.) The trial court stated that its determination was based in large part on its review of the trial testimony and that it "place[d] a lot of weight on how [the] crime was committed." (R. 825.) The judge also stated:

> "I wish I could say more with what I have. But -- I can say, for example, that, you know, it appears that the Defendant was functioning relatively on his own, with little day-to-day supervision. That he was able to write and read and put words together in a coherent matter, consistent with the prevailing rap tunes that are out there today in this world."

(R. 826.)

Lane argues that this Court should consider Dr. Goff's uncontradicted testimony at the Atkins hearing and conclude

that, under the definitions and principles announced in Hall and Atkins, he is intellectually disabled and ineligible for the death penalty. He correctly states that Dr. Goff testified without contradiction that Lane has deficits in each of the areas of adaptive functioning identified by the American Psychiatric Association and recognized in Atkins, 536 U.S. at 308 n.3 -- communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. He argues that the trial court rejected Dr. Goff's testimony and created its own analytical framework for judging whether Lane had proved by a preponderance of the evidence that he was intellectually impaired, and that, as a result, it erred in failing to find that Lane had demonstrated deficiencies in two or more areas of adaptive functioning and was intellectually impaired.[2]

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[2]Lane also correctly argues that the trial court failed to make required findings as to the existence or nonexistence of adaptive deficits in each individual skill area. The trial court, after conducting an Atkins hearing, is required to issue specific written findings of fact regarding the a defendant's claim for relief. E.g., Morrow v. State, 928 So. 2d 315, 323-24 (Ala. Crim. App. 2004)(stating that, until the Alabama Legislature provides a specific procedure for implementing Atkins, this Court will use the procedure

The majority states that "Hall is not as broad as Lane contends and does not require this Court to revisit that issue." ___ So. 3d at ___. I disagree. The United States Supreme Court remanded the case to this Court for the singular purpose of giving this case "further consideration in light of Hall v. Florida." Because Lane's IQ was 70, consideration or application of the SEM was not required in this case. Therefore, the only reason the United States Supreme Court could have had for remanding this case is for additional consideration of the ample evidence of Lane's adaptive deficiencies. Because the majority has found that consideration to be unnecessary, I believe that the majority has failed to follow the directions issued to this Court by the United States Supreme Court.

Furthermore, I continue to adhere to my belief, as I set out in my dissent to the Court's original opinion, that Lane established deficiencies in more than two skill areas of adaptive functioning and, thus, that he is exempt from the

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provided in Rule 32 for determining whether a capital defendant is mentally retarded, and directing the trial court to "consider, and issue specific written findings of fact regarding, the definition of mental retardation set forth in Atkins and Ex parte Perkins[, 851 So. 2d 453 (Ala. 2002)]").

imposition of a death sentence. See Lane v. State, 169 So.3d 1076 (Ala. Crim. App. 2013) (Welch, J., dissenting). Specifically, as I stated there:

> "It appears to me that the trial court determined that Lane was not mentally retarded based on the following evidence submitted during the guilt phase: that Lane was functioning relatively on his own with little day-to-day supervision and that he could read and write and put words together in a coherent manner 'consistent with the prevailing rap tunes that are out there today in this world.' (R. 826.) The trial court further considered the lack of evidence presented on cross-examination of Dr. John Goff, a clinical neuropsychologist, during the post-guilt phase Atkins v. Virginia, 536 U.S. 304 (2002), hearing. However, the trial court did not specifically evaluate the specific 'skill areas' associated with adaptive functioning to determine whether adaptive deficiencies were present. This, in my opinion, ... is not the evaluation Atkins intended when fact-finders are deciding questions of mental retardation. Moreover, it is clear to me that the court included in its weighing process evidence adverse to Lane that was not pertinent to any skill area associated with adaptive functioning."

Id. at 1145-46 (footnote omitted).

I further explained:

> "The trial court in this case did find that Lane was functioning relatively on his own, with little day-to-day supervision. I presume that this finding was intended to establish that Lane had adapted in the skill area of self-care. However, it is equally possible that this evidence suggested a deficit in the skill area of home living. The trial court also found that Lane was able to write and read and put

> words together in a coherent manner, consistent with the prevailing rap tunes. I presume that this finding was intended to establish that Lane had adapted in the skill areas of communication, self-direction, and leisure. Even with these presumptions in favor of the trial court's ruling, the trial court made no findings at all as to functional academic skills, work, or health and safety. Dr. Goff testified that Lane was deficient in each of those areas, and his testimony was undisputed.
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> "Thus, it appears to me that Lane established adaptive deficiencies in more than two skill areas of adaptive functioning. Therefore, I do not believe that Lane's sentence was properly imposed following a correct consideration of the evidence regarding mental retardation. Lane proved the three components necessary to establish that he is mentally retarded. Therefore, in my opinion, Lane is exempt from the imposition of a death sentence."

Id. at 1149.

Considering the case in light of Hall, as the United States Supreme Court has directed this Court to do, I continue to believe that the trial court's rejection of all expert testimony about Lane's substantial deficits in adaptive functioning constituted an abuse of discretion. Based on the parameters the United States Supreme Court has established for determining intellectual disability, it is my opinion that Lane is ineligible for the death penalty.

Accordingly, I respectfully dissent.