REL: December 15, 2017

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-12-0599

Taurus Jermaine Carroll

v.

State of Alabama

Appeal from St. Clair Circuit Court
(CC-09-242)

On Remand from the Supreme Court of the United States

WINDOM, Presiding Judge.

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 (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

[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, 134 S. Ct. 1986, 1990 (2014).

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 (quoting Ford v. Wainwright, 477 U.S. 399, 416-17 (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.; 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).

"'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 (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. at ___, 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), States' discretion, ... is not 'unfettered,' 572 U.S., at ___[, 134 S. Ct. at 1998]." Moore, ___ U.S. at ___ 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. at ___, 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)."

Moore, ___ U.S. at ___, 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 ___, 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. at ___, 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 ___, 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. at ___, 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

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

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.

"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.'

"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.

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.