

No. 16-7685
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

TAURUS CARROLL,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Supreme Court

**BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court decline to review Carroll's claim that he is intellectually disabled where the underlying basis for this claim is not worthy of this Court's review and where Carroll is not intellectually disabled?
2. Should this Court decline to review Carroll's claim that the Alabama courts refused to apply current medical standards in evaluating his intellectual disability claim where this claim is without merit?
3. Should this Court decline to review Carroll's claim that his death sentence should be vacated based on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), where this claim was not properly raised in the Alabama Court of Criminal Appeals and where the claim is without merit?

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STATEMENT OF THE CASE

A. The Proceedings Below

Taurus Carroll was convicted of convicted of capital murder for stabbing to death another inmate, Michael Turner, with a prison made knife in the St. Clair Correctional Facility because he erroneously believed Mr. Turner had stolen his contraband cell phone. Carroll was indicted by the Grand Jury of St. Clair County, Alabama, for the following capital offenses: murder by a defendant who has been convicted of another murder in the 20 years preceding the crime in violation of Ala. Code § 13A-5-40(a) (13) (1975) and murder committed while the defendant is under sentence of imprisonment in violation of Ala. Code § 13A-5-40(a) (6) (1975). The jury found Carroll guilty of both counts of the indictment. A jury sentencing was then held. After deliberating the jury unanimously recommended a death sentence for Carroll.

The trial court then conducted its own sentencing hearing. After this hearing, the trial court found that the following aggravating circumstances existed: the murder was committed by a person under sentence of imprisonment under Ala. Code § 13A-5-49(1) (1975); that 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 Ala. Code § 13A-5-49(2) (1975); and, that the capital murder was especially heinous, atrocious or cruel as compared to other capital offenses under Ala. Code § 13A-5-49(8) (1975). The trial court found that the following non-statutory mitigating circumstances existed: the circumstances of Carroll's upbringing; that Carroll has less than average intelligence (but is not intellectually disabled); Carroll's incarceration beginning at a young age; and, Carroll's request for mercy. After weighing the aggravating and mitigating circumstances, the court sentenced Carroll to death.

The Alabama Court of Criminal Appeals affirmed Carroll's capital murder convictions and his death sentence. *Carroll v. State*, CR-12-0599, 2015 WL 4876584 (Ala. Crim. App. Aug. 14, 2015). The Alabama Supreme denied Carroll's petition for writ of certiorari.

B. Statement of the Facts

1. Facts Elicited During Carroll's Trial

The Alabama Court of Criminal Appeals set forth the following facts concerning this capital murder:

In 1997, Carroll was convicted of capital murder and was sentenced to death for killing Betty Long during the course of a first-degree robbery. See § 13A-5-40(a)(2), Ala.Code 1975; *Carroll v. State*, 852 So.2d 801, 804 (Ala.Crim.App.1999). On appeal, the Alabama Supreme Court affirmed Carroll's capital-

murder conviction but reversed his sentence of death and remanded the cause with instructions that Carroll be resentenced to life in prison without the possibility of parole. *Ex parte Carroll*, 852 So.2d 833, 837 (Ala.2002).

On September 14, 2009, Carroll, who was serving his sentence of life without the possibility of parole at St. Clair Correctional Facility, mistakenly believed that Turner, another inmate at St. Clair Correctional Facility, had stolen his cellular telephone. That evening, Carroll asked Turner if Turner had taken Carroll's telephone. Turner stated that he did not take Carroll's telephone. Carroll did not believe Turner and told Turner that Turner needed to go find something to fight with because Carroll would be back to fight. Carroll then followed Turner to Turner's cell block, and the two separated.

Carroll returned twice, both times confronting Turner about the telephone. At some point, Carroll asked Turner whether Turner was going to return the telephone to Carroll. Turner stated that he did not have the telephone, and Carroll responded, "don't worry about it, I don't want it back. I'm fixing to kill your bitch ass. You need to go get you some help or get you a knife." (State's exhibit # 30.) Later, Carroll again asked Turner for the telephone. Turner again denied having the telephone and walked past Carroll. When Turner walked past Carroll, Carroll stabbed him in the back with a knife fashioned out of part of an air-conditioner vent. Turner then ran from Carroll and tried to take cover in a prison cell by shutting the door. Carroll chased Turner and pushed his way into the prison cell. Once in the cell, Carroll stabbed Turner, who was unarmed, repeatedly in the head, neck, and body. While Carroll was stabbing Turner, Turner stated he did not have the telephone and begged Carroll not to kill him. At that point, Carroll stopped stabbing Turner and said: "Man, you could have did this before it came to this point, now you want to tell me somebody else [has] got it." (State's exhibit # 30.) At that point, Carroll started stabbing

Turner again. During the attack, Carroll cut one of his own fingers.

After repeatedly stabbing Turner, Carroll walked away, threw the knife in a trash can, and went up stairs to the second tier of the prison. Once upstairs, Carroll took his shirt off and threw it on the ground. He then washed Turner's blood off his hands and arms.

At the same time, Turner left the cell and fell to the ground at the bottom of the stairs separating the first and second tiers of the prison. Turner was bleeding and complaining that he could not breathe. He was placed on the prison ambulance—a modified golf cart—and taken to the prison infirmary. While in the infirmary, Turner continued to complain that he could not breathe. Shortly after arriving at the infirmary, Turner died as a result of his wounds.

Meanwhile, prison guards went to the cell where Turner had been stabbed to investigate the disturbance. After washing his hand and arms, Carroll came back down the stairs and indicated to prison guards that it was he who had stabbed Turner. After Carroll received medical treatment for the cut on his finger, Carroll was placed in segregation where he admitted to correctional officer Brandon Carter that he had intended to kill Turner.

Early the next morning, Carroll was interviewed by two investigators, Robert G. Holtam and Milton Charles “M.C.” Smith, with the Investigation and Intelligence Division of the Alabama Department of Corrections (“I and I Division”). Carroll was read his *Miranda* rights, indicated that he understood those rights, and stated that he wished to waive them. Carroll then gave a full confession, which was recorded. During the investigation, officers recovered the knife from the trash can where Carroll said he disposed of it. Officers also

seized the pants Carroll had been wearing during the attack. DNA testing indicated that blood recovered from the knife and Carroll's pants belonged to Turner.

The autopsy performed by Dr. Emily Ward indicated that Turner sustained 16 stab wounds to his head, neck, and body. One stab wound to his head penetrated his skull. Turner was also stabbed in the neck, penetrating the muscle and severing the right jugular vein. Additionally, Turner's right lung was punctured. According to Dr. Ward, Turner's wounds would have been extremely painful, and he would have experienced the feeling of suffocating. Dr. Ward 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." (R. 708.) Dr. Ward further testified that "Turner died as a result of multiple stab wounds and cuts." (R. 708.) (footnote omitted)

Carroll v. State, CR-12-0599, 2015 WL 4876584, at *1-2 (Ala. Crim. App. Aug. 14, 2015).

2. Facts Elicited During *Atkins* Hearing

On April 9-10, 2012, the trial court held an evidentiary hearing on Carroll's *Atkins* claim. (R. 46-234) Five witnesses testified at this hearing.

Carroll's counsel first called Susan Wardell, a mitigation specialist, 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, Ms. Wardell 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 that Carroll had obtained his GED while in prison. (R. 80-81) She also testified that Carroll was good in math in school. However, Ms. Wardell did not remember that the only special class Carroll was in was reading. (R. 84) Ms. Wardell admitted that Carroll was able to show goal-oriented behavior. (R. 82) Even though Ms. Wardell 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) Finally, Ms. Wardell admitted that she did not want Carroll to get the death penalty. (R. 83)

Next, Carroll's counsel called Dr. Robert Shaffer, a clinical psychologist, to testify. Dr. Shaffer testified that, in his opinion, Carroll is mildly mentally retarded. (R. 125-126) Dr. Shaffer did not perform an IQ test on Carroll. Instead, he relied on a test administered by a Dr. Gragg where Carroll had a full scale IQ score of 71. (R. 100-101) Dr. Shaffer testified that, after applying the Flynn effect to Carroll's IQ score, his IQ was 69.5 (R. 120-123) Dr. Shaffer also performed a neuropsychological battery of tests on Carroll. Dr. Shaffer testified that Carroll performed in the impaired range on 9 of 14 measures on these tests. (R. 110-111) Dr. Shaffer also assessed Carroll's adaptive behavior and found that Carroll was in the

impaired range. (R. 115-119) Dr. Shaffer admitted 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 malingering. (R. 129-134) 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, Dr. Shaffer testified that he was not aware that the American Psychiatric Association does not recognize the Flynn effect. (R. 134-135)

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) Dr. Ford administered the Adaptive Behavior Scale for Residential and Community Living on Carroll to assess his adaptive functioning. (R. 147-148, 150) According to Dr. Ford, 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 are 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. 153-154) 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) Carroll was not deficit 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) It was Dr. Ford's opinion that most intellectually disabled individuals could not pass the GED. (R. 170-171) 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. 173-174) Carroll had no problems understanding Dr. Ford's questions and was able to communicate his answers to her with no problem. (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. 177-178) Dr. Ford 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. 178-179)

Dr. Ford also reviewed Dr. Gragg's report and testified that Dr. Gragg's 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 mental retardation. (R. 179) Dr. Ford also testified that the Department of Corrections classified Carroll's range of functioning in the below average range. (R. 180) Finally, Dr. Ford testified that she had reviewed a report from Dr. King that placed Carroll in the average range of intelligence. (R. 181)

On redirect examination, Dr. Ford testified that the standard error of measurement runs both ways and could raise Carroll's IQ score to 75 or 76. (R. 195) She also testified that the American Psychological Association issued a statement that subtracting points from an IQ test administered by someone else is not an accepted practice. (R. 195) Finally, Dr. Ford testified that the Flynn effect is not used in social security or education cases and it is not recommended by the American Psychological Association. (R. 195-196)

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

Investigator M. C. Smith from the I & I division of the Department of Corrections investigated the murder of Michael Turner. (R. 213-214) During his investigation of this murder, Investigator Smith talked to Carroll. (R. 216) Before questioning Carroll, Investigator Smith had Carroll read his rights form. (R. 216) Investigator Smith had Carroll read one sentence from the form out loud to make sure that Carroll could read. (R. 217) 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 any questions and Investigator Smith had no problems

understanding Carroll's responses to questions. (R. 217-218) 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. 219-220) 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. Carroll received a full scale score of 85 on this IQ test. (CR. 401) Three years later a second Intelligence Scale for Children - Revised was given to Carroll. Carroll received a full scale score of 87 on this IQ test. (CR. 402)

After the evidentiary hearing, the trial court entered an extensive order finding that Carroll is not intellectually disabled. (CR. 122-127)

REASONS FOR DENYING THE PETITION

It is worth noting at the outset that Carroll has not alleged – let alone proven – any traditional ground for certiorari. He has not, for instance, argued that the decision of the Alabama Court of Criminal Appeals conflicts the decisions of other state courts, *see*, Sup. Ct. R. 10(b), or that this case presents a novel and important federal question, *see* Sup. Ct. R. 10(c). At bottom, Carroll requests that this Court engage in a fact-bound review of his particular case. This Court should deny the petition.

I. This Court should decline to grant relief on Carroll’s claim that he is intellectually disabled and cannot be executed.

Carroll contends that his case should be remanded to the Alabama Court of Criminal Appeals because the lower court imposed a strict IQ cutoff score and refused to take into account the standard error or measurement when it denied his claim that he is mentally retarded. This Court should deny certiorari on this argument for at least two reasons.

A. Certiorari should be denied because the underlying issue is not worthy of this Court’s review.

First, this Court should deny certiorari on this question because Carroll seeks only fact-bound error correction. Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. In addition, the demands on this Court’s time

mandate that it select for review only those truly important cases that will have a wide ranging impact. Carroll has not alleged compelling grounds for this Court to grant certiorari on this claim. Moreover, the instant case involves a simple application of established precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

B. The Alabama Court of Criminal Appeals properly denied relief on Carroll’s claim that he is intellectually disabled.

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. This Court, however, declined to create a national standard that lower courts should use in determining whether a capital offender is intellectually disabled¹ and, therefore, not eligible for the death penalty. *Id.*, at 317. Instead, this Court

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

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)² and the American Psychiatric Association (APA). *Atkins*, 536 U.S. at 317 n. 22.

In *Ex parte Perkins*, 851 So. 2d 453, 455-456 (Ala. 2002), the Supreme Court of Alabama 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, therefore, ineligible for the death penalty. Although the court, in *Perkins*, declined to encroach on the Alabama 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:

² The members of the American Association on Mental Retardation voted to change the name of their organization. As of January 1, 2007, the AAMR will be known as the American Association on Intellectual and Developmental Disabilities (AAIDD).

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 *Atkins* – 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 that the Supreme Court of Alabama 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.

This Court visited its holding in *Atkins* in *Hall v. Florida*, 134 S. Ct. 1986 (2014). In *Hall*, this Court concluded that the Florida Supreme Court had too narrowly interpreted its intellectual disability law. Specifically, this Court explained:

On its face this statute could be interpreted consistently with 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.

The Eleventh Circuit Court of Appeals noted that this Court concluded in *Hall* that “a State cannot execute a person whose IQ test score falls within the test’s margin of error unless he has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.” *In re Henry*, 757 F.3d 1151, at 1154 (11th Cir. 2014).

This Court’s holding in *Hall* has no application to this case because Alabama courts have not interpreted Alabama’s intellectual disability law to preclude consideration of other evidence of intellectual disability, including testimony regarding adaptive deficits when a person has an IQ over 70. In fact, the Alabama Court of Criminal Appeals addressed the application of *Hall* to Alabama capital cases in *Lane v. State*, CR-12-1343, 2016 WL 1728753 (Ala. Crim. App. Apr. 29, 2016)(case remanded from this Court for

further consideration in light of *Hall* – No. 14-10065). The Alabama Court of Criminal Appeals examined the Alabama Supreme Court’s holding in *Perkins* and found that the Alabama Supreme Court did not expressly adopt a bright-line cutoff for IQ scores in *Perkins*. *Land*, 2016 WL 1728753, at *4. The Alabama Court of Criminal Appeals also noted that the Alabama Supreme Court considered other factors in examining Perkins’s intellectual functioning – that Perkins’s intellectual functioning had probably declined due to age and alcohol abuse, that he had earned a GED and had completed college courses while in prison, and, that Perkins did not exhibit “significant” or “substantial” deficits in his adaptive functioning. *Id.* The Alabama Court of Criminal Appeals completed its review of Alabama’s intellectual disability cases with the following:

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*.

Id. The Alabama Court of Criminal Appeals then concluded in *Lane* that Lane was due no relief under *Hall* because the trial court was not

barred from considering other evidence when it determined whether Lane was intellectually disabled. *Id.* at 5.

In the instant case, Carroll argued in his application for rehearing that his case should be remanded for a new hearing to determine whether he was intellectually disabled based on this Court's decision in *Hall*. The Alabama Court of Criminal Appeals overruled Carroll's application for rehearing. The Alabama Court of Criminal Appeals thus resolved Carroll's claim that he was entitled to a further *Atkins* hearing against him. Moreover, as set forth below, the trial court and the Alabama Court of Criminal Appeals did not limit its determination of whether Carroll is intellectually disabled to his IQ score. Instead, the Alabama courts considered both Carroll's IQ score and his adaptive functioning before finding that Carroll is not intellectually disabled.

1. The trial court did not abuse its discretion when it found that Carroll does not suffer from significantly sub-average intellectual functioning.

The trial court did not abuse its discretion when it found that Carroll does not exhibit sub-average intellectual functioning. As the trial court noted: "The Intelligence Quotient (IQ) examination administered by Dr. Jerry Gragg was adopted by both the State and Defense. That test found that the defendant's intellectual functioning falls in the Borderline range with a

score of 71, a score that places him outside the Alabama Supreme Court's definition of mental retardation." (CR. 123)

In addition, and contrary to Carroll's argument, the trial court did not abuse its discretion when it refused to apply the Flynn effect to Carroll's IQ score. The trial court stated the following when it refused to apply the Flynn effect to Carroll's IQ score:

The defense psychologist, Dr. Robert Shaffer, did not conduct a separate IQ examination that refutes Dr. Gragg's findings. However, Dr. Shaffer used Dr. Gragg's test as a baseline and suggested that the Court should apply the "Flynn Effect" to lower the results of the test. The "Flynn Effect" surmises that individuals who take IQ tests in the years following its initial standardization will score higher and therefore the score should be adjusted downward to compensate for artificially higher scores. Testimony indicated there is no uniform consensus regarding the application of the "Flynn Effect." The psychologist called as a witness by the State, Dr. Susan Ford, the Director of Psychological and Behavioral Services for the Alabama Department of Mental Health, testified that it is not an accepted practice of the American Psychological Association to subtract points from an IQ test administered by another psychologist. This Court declines to apply the "Flynn Effect" to lower results of an IQ test. Albarran v. State, (2011 WL 3211525 (Ala.Crim.App.))

(CR. 123-124)

The Eleventh Circuit recently reviewed what it and other circuits have done concerning the Flynn effect. *Ledford v. Warden, Georgia Diagnostic and Classification Prison*, 818 F.3d 600, 635-637 (11th Cir. 2016). The Eleventh Circuit noted that the Fifth Circuit does not recognize the Flynn

effect and that the Seventh Circuit has found that “lower courts have ‘no obligation to accept and apply the Flynn effect in the face of conflicting expert testimony about its acceptability and reliability.’” *Id.* at 636. The Eleventh Circuit also noted that the Tenth and Fourth Circuits have looked on the Flynn effect with disfavor. *Id.* at 635-636.

The Eleventh Circuit then discussed its treatment of the Flynn effect in *Thomas v. Allen*, 607 F.3d 749, 757-758 (11th Cir. 2010). The Eleventh Circuit noted that it had observed that the Flynn effect was recognized in some courts but not in others, that there was no uniform consensus concerning the application of the Flynn effect, and that the district court did not err in applying the Flynn effect in that case. *Id.* at 636. The Eleventh Circuit determined the following in *Ledford*:

To be clear, nothing in *Thomas* requires a district court, when presented with conflicting expert testimony, to accept and apply the Flynn effect. All of our post-*Thomas* decisions mentioning the Flynn effect cite *Thomas* for the proposition that mental health evaluators *may* consider the Flynn effect, or that expert Flynn effect testimony is subject to a credibility determination by the district court. (emphasis in original)

Id. The Eleventh Circuit concluded its discussion of the Flynn effect in *Ledford* with the following:

In sum, our Circuit, like a few others, leaves it to the fact-finder court to hear and consider the Flynn effect evidence and to make its own fact-findings about the credibility and weight of the expert evidence regarding the Flynn effect. That is exactly

what the district court did here. Given the evidence in the record, the district court was not required to adjust for the Flynn effect or to accept IQ scores that had been adjusted for the Flynn effect.

In the instant case, the trial court declined to apply the Flynn effect to lower Carroll's IQ score after hearing the testimony of the experts. Contrary to Carroll's argument, the trial court's refusal to apply the Flynn effect in this case was not inconsistent with current medical standards.³ As the Eleventh Circuit indicated in *Ledford*, there is no uniform consensus concerning the application of the Flynn effect. *Id.* The trial court, therefore, did not err when it refused to apply the Flynn effect to Carroll's IQ scores.

Carroll also argues that the trial court erred when it refused to apply the standard error of measurement to Carroll's IQ score. Contrary to Carroll's argument, the trial court did not refuse to apply the standard error of measurement, however, it did refuse to find that Carroll's score lay at the low end of the standard error of measurement. The trial court stated the following concerning the standard error of measurement:

³ Carroll argues under his second issue that the lower court refused to apply current medical standards when it refused to apply the Flynn effect to his IQ scores and when it refused to apply the lower end of the standard error of measurement to his IQ scores. Respondent has addressed this argument in its first issue. Respondent will only address Carroll's argument that this Court's grant of certiorari in *Moore v. Texas*, No. 15-797, 2015 WL 9252271 (Dec. 15, 2015), requires a grant of certiorari in the instant case in its second argument.

In addition, this Court will not presume that the defendant's score lies at the low end of the "standard error of measurement." Byrd v. State, 78 So.3d 445 (Ala. Crim. App. 2009); Albarran v. State, (2011 WL 3211525 (Ala.Crim.App.)) "Standard error of measurement" is a two-way street. Dr. Ford indicated that Taurus Carroll's IQ score using "standard error of measurement" for the test administered could be as high as 76.

(CR. 124) As the trial court noted, Carroll did not meet his burden to establish that it is more likely than not that his IQ score is 70 or below based on the mere possibility that his true IQ falls at the low end of the standard error of measurement. Carroll, therefore, is not entitled to relief on this argument.

2. The trial court did not abuse its discretion when it found that Carroll does not currently exhibit significant deficits in adaptive functioning.

Carroll has also not shown that he suffers from substantial or significant deficits in adaptive functioning. Carroll argues that the trial court mistakenly focused on his perceived strengths rather than the adaptive deficits that were established during the *Atkins* hearing. However, a review of the testimony presented by Carroll at the *Atkins* hearing reveals that this testimony mainly concerns Carroll's adaptive functioning during the developmental problem and not his current adaptive functioning. In addition, Carroll improperly relied on a neuropsychological test battery to show that he has deficits in adaptive functioning.

The State presented the following facts which establish that Carroll cannot prove the second prong of the mental retardation definition: (1) that 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 on an adaptive functioning test (the Adaptive Behavior Scale for Residential and Community Living) which places him in the borderline range of adaptive functioning (R. 147-156); (2) that Carroll obtained his GED in prison (R. 170-171); (3) that Carroll has no problem communicating with others and has no problems following directions (R. 174, 200-201); (4) that Carroll's behavior before the crime is not consistent with intellectual disability because of the planning aspect of the crime and because his actions after the crime are not consistent with mental retardation (where he attempted to avoid detection by leaving the scene when he learned that officers were coming, by discarding the knife he used in the trash can, by washing the blood off of his hands, and by attempting to return to his cell block) (R. 177-178); (5) that Carroll is able to perform his kitchen duties effectively and completes his tasks (R. 200-201); and (6) that Carroll is able to make decisions and to follow through on the decisions he makes (R. 201). This evidence reveals that Carroll does not have deficits, much less significant deficits, in his adaptive functioning.

Carroll relies on the testimony of Susan Wardell and Dr. Robert Shaffer to argue that he has significant deficits in his adaptive functioning. Ms. Wardell's testimony should not be utilized when considering Carroll's current adaptive functioning because her investigation concerned Carroll's adaptive functioning during the developmental period – not his current adaptive functioning. Dr. Shaffer did attempt to assess Carroll's current adaptive functioning, however, his methods are questionable. First, Dr. Shaffer used a neuropsychological battery of tests to measure Carroll's current adaptive functioning. This battery of tests is used to detect brain injury and brain functioning, not adaptive functioning. Next, 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. 129-134) Finally, the trial 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) Based on the above, the trial

court correctly discounted Dr. Shaffer's testimony concerning Carroll's adaptive functioning.

3. The record establishes that Carroll was not intellectually disabled during his developmental period.

Carroll also failed to prove that he exhibited deficiencies in adaptive functioning during the developmental period of his life. While it is true that Carroll presented Dr. Shaffer's testimony that he had administered a Vineland assessment on one of Carroll's uncles that showed that Carroll suffered from significant deficits in adaptive functioning during the developmental period, the trial court found that it 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) The trial court, therefore, found that Carroll failed to sustain his burden of proving this element of the intellectual disability definition.

Moreover, Carroll completely fails to mention, or prove, that he suffered from significantly sub-average intellectual functioning during his developmental period. In fact, the record clearly proves that Carroll 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, Carroll was given a Wechsler Intelligence Scale for Children - Revised IQ test. He received a full scale score of 85 on this IQ test. (CR. 401) Three years later a second Intelligence Scale for Children – Revised was given to Carroll. He received a full scale score of 87 on this IQ test. (CR. 402) These scores place Carroll well above the intellectually disabled range during his developmental period.

Carroll failed to prove that he was intellectually disabled in the lower courts. This Court should, therefore, deny his petition for writ of certiorari.

II. This Court should decline to review Carroll’s claim that the lower courts refused to apply current medical standards in evaluating his intellectual disability claim.

Carroll contends that this Court should grant certiorari to review his claim that the Alabama courts refused to apply current medical standards when evaluating his intellectual disability claim. Carroll asserts that the Alabama Court of Criminal Appeals and the trial court relied on the now-outdated fourth edition of the DSM-IV to determine whether he is intellectually disabled. Carroll relies on this Court’s grant of certiorari in *Moore v. Texas*, No. 15-797, 2015 WL 9252271 (Dec. 15, 2015), to support his claim.

Carroll’s argument is without merit. The trial court and the Alabama Court of Criminal Appeals relied on the Alabama Supreme Court’s decision

in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002), to determine that Carroll is not intellectually disabled. In *Perkins*, the Alabama Supreme Court applied the broad definitions of intellectual disability highlighted in *Atkins* – significantly sub-average general intellectual functioning accompanied by significant or substantial deficits in adaptive behavior, both of which must have manifested themselves before the age of eighteen. *Perkins*, 851 So. 2d at 456. The trial court and the Alabama Court of Criminal Appeals considered Carroll’s claim under this definition and found that Carroll is not intellectually disabled. Because the Alabama Supreme Court’s decision in *Perkins* is based on this Court’s definition of intellectual disability in *Atkins*, the Alabama court’s decision does not contravene *Atkins* or *Hall*.⁴

Carroll’s argument that the trial court and the Alabama Court of Criminal Appeals refused to apply current medical standards because they relied on the now-outdated fourth edition of the DSM-IV to determine whether he is intellectually disabled also does not entitle him to certiorari review. As set forth above, the Alabama courts relied on the broad definition of intellectual disability highlighted in *Atkins*, therefore, Carroll’s

⁴ As set forth in Issue I, above, this Court’s decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), does not apply to Alabama cases because the Alabama courts have not interpreted Alabama’s intellectual disability law to preclude consideration of other evidence of intellectual disability, including testimony regarding adaptive deficits when a person has an IQ over 70.

claim does not entitle him to review. Moreover, as the Eleventh Circuit found in *Ledford*, 818 F.3d at 637-638:

... [C]ourts do not need to revisit rulings every time the APA publishes a revised DSM or the AAIDD publishes a new article. *Hall* tells us that “[t]he legal determination of intellectual disability is distinct from a medical diagnosis,” though that legal determination “is informed by the medical community's diagnostic framework.” *Hall*, 572 U.S. at —, 134 S.Ct. at 2000. While medical literature informs a court's legal analysis, it does not control it. *See id.* (concluding that the views of medical experts inform, but “do not dictate,” a court's decision).

Finally, Carroll is not entitled to relief on his argument that this Court's grant of certiorari in *Moore v. Texas*, No. 15-797, 2015 WL 9252271 (Dec. 15, 2015), entitles him to certiorari review of his claim. This case is distinguishable from *Moore* because the Alabama courts do not require a consideration of the seven evidentiary factors developed by the Texas Court of Criminal Appeals in *Ex parte Briseno*, 135 S.W. 3d 1, 8-9 (Tex. Crim. App. 2004). *Ex parte Moore*, 470 S.W. 3d. 481, 489 (Tex. Crim. App. 2015). In addition, as set forth above, the Alabama courts followed this Court's holding in *Atkins* and properly determined that Carroll is not intellectually disabled. Certiorari, therefore, should be denied on Carroll's argument.

III. This Court should decline to review Carroll's claim that his death sentence should be vacated based on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016).

There are at least two reasons this Court should deny certiorari on Carroll's claim that his death sentence should be vacated based on this Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Those reasons are set forth below.

A. Certiorari should be denied because Carroll's claim was not properly raised in the Alabama Court of Criminal Appeals.

Most critically, this Court should deny cert on this claim because Carroll did not raise and present the claim to the Alabama Court of Criminal Appeals. While *Hurst* had not been decided when this case was pending in the lower court, *Hurst* is merely an extension of this Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), and could have been raised on direct appeal. See *Ex parte Bohannon*, ___ So. 3d ___, 2016 WL 5817692 (Ala. Sept. 30, 2016) ("The United States Supreme Court in its recent decision in *Hurst* applied its holding in *Ring* to Florida's capital sentencing scheme. ..."). This Court has long held that it will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. See, e.g., *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reasons to deviate from

that rule. Because Carroll's claim was not preserved below, it should not be considered by this Court.

B. Carroll's claim is without merit.

This Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring*, and *Hurst*, do not apply in Carroll's case because two of the aggravating circumstances found in this case fall within the *Almendarez-Torres* exception to these decisions. *Almemdarez-Torres v. United States*, 523 U.S. 224, 243-245 (1988).

In *Almendarez-Torres*, this Court held that prior convictions do not have to be proven to a jury beyond a reasonable doubt, even where the finding of a prior conviction increases a defendant's sentence beyond that authorized by the jury's verdict. In reaching that result, this Court reasoned, in pertinent part, as follows:

First, the sentencing factor at issue here – recidivism – is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence. Consistent with this tradition, the Court said long ago that a State need *not* allege a defendant's prior conviction in the indictment or information which alleges the elements of an underlying crime, even though the conviction was necessary to bring the case within the statute. That conclusion follow[s] ... from *the distinct nature of the issue*, and the fact that recidivism does not relate to the commission of the offense, *but goes to the punishment only*, and therefore ... may be subsequently decided. The Court has not deviated from this view.

Id. at 243-244 (emphasis in original) (internal quotation marks and citations omitted). Thus, this Court emphasized that questions related to recidivism traditionally have been decided by the sentencing court rather than the jury in holding that a trial court can elevate a defendant's sentence based solely on its finding that he has a prior conviction. *Id.*

This Court did not deviate from that rule in its decision in *Apprendi v. New Jersey*. In *Apprendi*, this Court held that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Id.* at 490 (emphasis added). In so ruling, this Court stated that it was not overruling *Almendarez-Torres*. *Id.* at 488. Indeed, this Court again held that a trial court has the authority to increase a defendant's sentence above that which is authorized by the jury's verdict based on a finding that the defendant has a prior conviction, reasoning:

Both the certainty that procedural safeguards attached to any “fact” of prior conviction, and the reality that *Almendarez-Torres* did not challenge the accuracy of that “fact” in his case, mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a “fact” increasing punishment beyond the maximum of the statutory range.

Id. According to this Court, that is all the more true where the defendant has “admitted” that he has a prior conviction. *Id.*

In *Ring*, 536 U.S. at 609, this Court once again refused to eliminate the prior-conviction exception enunciated in *Almendarez-Torres*. Critically, this Court stated the following with regard to the petitioner’s claim:

Ring’s claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; *Ring* therefore does not challenge *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 140 L.Ed.2d 350 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence.

Id. at 597, n.4. Thus, *Ring* has no application to cases in which the only aggravating circumstances that led to the imposition of a death sentence are based on the defendant’s prior conviction. Because *Hurst* is merely an extension of *Ring*, that same analysis applies to Carroll’s case.

The following statutory aggravating circumstances existed at the penalty phase of Carroll’s trial: (1) the capital offense was committed by a person under sentence of imprisonment, pursuant to Ala. Code § 13A-5-49(1); and, (2) the defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person, pursuant to Ala. Code § 13A-5-49(2). The aggravating circumstances were based on his prior capital murder conviction. (CR. 162) Not surprisingly,

the trial court, in its sentencing order, found that the State satisfied its burden of proving the existence of those aggravating circumstances. (CR. 162) Thus, Carroll's prior capital murder conviction, standing alone, rendered him death-eligible. And, for that reason, Carroll's death sentence does not implicate *Ring* or *Hurst*.

In addition, the jury's unanimous death recommendation proves that it unanimously found that at least one aggravating circumstance existed in Carroll's case. Alabama law provides that at least one aggravating circumstance has to exist in order for a defendant to be sentenced to death. *See* Ala. Code § 13A-5-45(f) ("Unless at least one aggravating circumstance as defined in Section 13A-5-49 exists, the sentence shall be life imprisonment without parole."); Ala. Code § 13A-5-46(e) (1) ("After deliberation, the jury shall return an advisory verdict as follows: (1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole;"). The trial court charged the jury in this case that they had to find at least one aggravating circumstance to recommend a sentence of death for Carroll. (R. 983-984) When the jury unanimously recommended a death sentence for Carroll, it had to unanimously find the existence of at least one of the aggravating

circumstances in this case. Therefore, there was no *Ring* or *Hurst* violation in this case. Because there was no *Ring* or *Hurst* violation in this case, this Court should refuse to grant Carroll's petition for writ of certiorari.

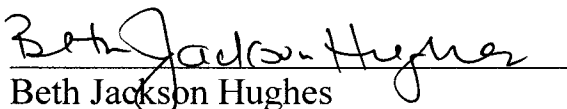
CONCLUSION

For the reasons set forth above, this Court should deny Carroll's petition for writ of certiorari.

Respectfully submitted,

Steven T. Marshall
Alabama Attorney General

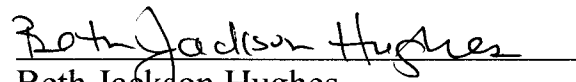
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2017, I did serve a copy of the foregoing on the attorney for the Petitioner, by electronic mail addressed as follows:

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