Rel: September 14, 2018

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2018

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Ex parte Anthony Lane

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Anthony Lane

v.

State of Alabama)

(Jefferson Circuit Court, CC-09-3202; Court of Criminal Appeals, CR-10-1343)

SELLERS, Justice.

Anthony Lane was convicted in the Jefferson Circuit Court 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. Although Lane initially lied to police about his involvement in the murder, he eventually told police that he had approached Frank Wright at a car wash to ask him the time, that Wright had used a degrading racial epithet to describe Lane, and that Lane had "blanked out" and shot Wright multiple times, killing him. Lane claimed that, after he shot Wright, he panicked and drove away in Wright's vehicle. A police officer testified that Wright's body, which was found at the car wash, was discovered with his pants pockets "turned out" and his wallet missing.

Lane parked Wright's vehicle in an alley next to a convenience store, paid for two dollars' worth of gasoline, put approximately one dollar's worth of gasoline in a container, and offered the remainder of the gasoline to another customer. After telling the other customer "that he had to go get rid of some evidence," Lane went to the alley, poured the gasoline in Wright's vehicle, and set it on fire. The partially burned vehicle was discovered next to the convenience store. Lane told police that he gave the gun he had used to kill Wright to a man he did not know, with the

understanding that the man would give Lane money for the gun at a later time. Wright's wallet was discovered in his vehicle. It contained his personal identification documents but no money. An investigating police officer testified that, in his opinion, Wright's vehicle had been "ransacked," although the wallet, the stereo, and other valuable items had not been taken.

Before he was sentenced, Lane argued to the trial court that he is intellectually disabled and therefore, under Atkins v. Virginia, 536 U.S. 304 (2002), ineligible to be sentenced to death.[1] The trial court rejected that argument and, following the jury's 10-2 recommendation, sentenced Lane to death. The Court of Criminal Appeals affirmed Lane's conviction and sentence. Lane v. State, 169 So. 3d 1076, 1087-94 (Ala. Crim. App. 2013) ("Lane I"). Judge Welch dissented, concluding that the evidence established that Lane is intellectually disabled. 169 So. 3d at 1145. This Court denied Lane's petition for a writ of certiorari.

[1]The Court in Atkins v. Virginia used the term "mentally retarded." That term has since been replaced with "intellectually disabled." See Brumfield v. Cain, 576 U.S. ___, __ n.1, 135 S. Ct. 2269, 2274 n.1 (2015).

On October 5, 2015, the United States Supreme Court granted Lane's petition for a writ of certiorari, vacated the judgment of the Court of Criminal Appeals, and remanded the cause "for further consideration in light of Hall v. Florida, 572 U.S. ___, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014)." Lane v. Alabama, 577 U.S. ___, ___, 136 S. Ct. 91, 91 (2015). The Court gave no further guidance as to the applicability of Hall. On remand, the Court of Criminal Appeals again affirmed Lane's conviction and sentence. Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) ("Lane II"). Judge Welch again dissented. We granted Lane's petition for a writ of certiorari. The State has now agreed with Lane's argument and conceded that the trial court should not have sentenced Lane to death.

In Atkins, the United States Supreme Court held that the Eighth Amendment to the United States Constitution prohibits the execution of mentally retarded offenders (now referred to as "intellectually disabled"). Although the Court in Atkins left "'to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences,'" 536 U.S. at 317 (quoting Ford v.

Wainwright, 477 U.S. 399, 106 (1986)), the Court also referred to definitions of "mental retardation" that had been adopted by the American Association of Mental Retardation ("the AAMR") and the American Psychiatric Association ("the APA"). Those organizations defined mental retardation as significantly subaverage intellectual functioning, accompanied by significant limitations in adaptive functioning, both of which manifest themselves before age 18. 536 U.S. at 308 n.3. See also Smith v. State, 213 So. 3d 239, 248 (Ala. 2007) ("[I]n order for an offender to be considered mentally retarded 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.").

According to the Supreme Court in Atkins, "[i]t is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." 536 U.S. at 309 n.5. As for the adaptive-functioning prong, Atkins identified 10 "adaptive skill areas" that had been recognized by the AAMR

and the APA--communication, self-care, home living, social skills, utilization of community resources, self-direction, health and safety, functional academics, leisure, and work. Id. The Court of Criminal Appeals noted in Lane I that, "[i]n order for an individual to have 'significant or substantial deficits in adaptive behavior,' he must have 'concurrent deficits or impairments in present adaptive functioning in at least two of the [adaptive] skill areas [identified in Atkins].'" 169 So. 3d at 1090 (quoting Albarran v. State, 96 So. 3d 131, 197 (Ala. Crim. App. 2011), quoting in turn Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009)).[2]

It is undisputed that Lane has an IQ of 70. The State has never seriously argued that his intellectual functioning

[2]The Court in Atkins pointed to the ninth edition of the AAMR's manual entitled Mental Retardation: Definition, Classification, and Systems of Supports, which was published in 1992, and the fourth edition of the APA's Diagnostic and Statistical Manual of Mental Disorders ("the DSM-IV"), which was published in 2000. During Lane's Atkins hearing, which took place in April 2011, the trial court heard testimony from Dr. John Goff, a clinical neuropsychologist. Dr. Goff relied on the standards set out in the DSM-IV, which was the most current edition of the DSM at the time. The Court notes that, in 2013, the APA published the fifth edition of the DSM ("the DSM-V"). See Moore v. Texas, 581 U.S. ___, ___, 137 S. Ct. 1039, 1045 (2017). There has been no discussion in the filings with this Court regarding the relevancy of differences, if any, in the standards for determining intellectual disability in the DSM-IV and the DSM-V.

is anything but significantly subaverage. Rather, the dispute has centered around whether Lane also has the requisite deficits in adaptive skills necessary to render him intellectually disabled.[3]

In Hall v. Florida, 572 U.S. ___, 134 S. Ct. 1986 (2014), upon which the United States Supreme Court relied in vacating the Court of Criminal Appeals' judgment in the present case, the Court considered a challenge to the State of Florida's practice of mandating that a defendant have an IQ score of 70 or below before he or she is allowed to present evidence of limitations in adaptive skill areas. The Court in Hall described the issue presented in that case as follows:

> "The question this case presents is how intellectual disability must be defined in order to implement these principles [weighing against imposing the death penalty on intellectually disabled criminals] and the holding of Atkins. To determine if Florida's [IQ score] cutoff rule is valid, it is proper to consider 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. This in turn leads to a better understanding of how the legislative policies of various States, and the holdings of

[3]It also has not been seriously disputed that Lane's subaverage intellectual functioning and deficits in adaptive skill areas, if present, manifested themselves before Lane turned 18 years old. The Court notes that Lane was 19 years old when the crime was committed.

> state courts, implement the Atkins rule. That understanding informs our determination whether there is a consensus that instructs how to decide the specific issue presented here. And, in conclusion, this Court must express its own independent determination reached in light of the instruction found in those sources and authorities."

572 U.S. at ___, 134 S. Ct. at 1993. The Court in Hall stressed that, "[i]n determining who qualifies as intellectually disabled, it is proper to consult the medical community's opinions." 572 U.S. at ___, 134 S. Ct. at 1993. After embracing "clinical definitions of intellectual disability," the Court held:

> "If the States were to have complete autonomy to define intellectual disability as they wished, the Court's decision in Atkins could become a nullity, and the Eighth Amendment's protection of human dignity would not become a reality. This Court thus reads Atkins to provide substantial guidance on the definition of intellectual disability."

572 U.S. at ___, 134 S. Ct. at 1999. Ultimately, the Court struck Florida's IQ score threshold because it "disregard[ed] established medical practice" in failing to take into account the "standard error of measurement" in IQ tests. 572 U.S. at ___, 134 S. Ct. at 1995. The standard error of measurement is a "reflection of the inherent imprecision of the [IQ] test itself" and "means that an individual's score is best

understood as a range of scores on either side of the recorded score." 572 U.S. at ___, 134 S. Ct. at 1995. Thus, the Court concluded, the State of Florida could not conclusively determine that a criminal defendant is not intellectually disabled based solely on the fact that his or her IQ score is higher than 70.

In addition to Florida, the United States Supreme Court in Hall identified Alabama as one of a few states that "may use a strict IQ score cutoff at 70." Hall, 572 U.S. at ___, 134 S. Ct. at 1996. The Court pointed to Smith v. State, 71 So. 3d 12, 20 (Ala. Crim. App. 2008), in which the Court of Criminal Appeals had refused to adopt a rule whereby trial courts must factor in the margin of error of an IQ test when considering a defendant's IQ score. 71 So. 3d at 20. After the United States Supreme Court remanded the cause in the present case, the Court of Criminal Appeals overruled Smith to the extent it so held and, based on Hall, adopted a rule whereby trial courts should factor in the standard error of measurement. Lane II, ___ So. 3d at ___.

As for Lane, however, the Court of Criminal Appeals determined that Hall afforded him no relief. The court noted

that Lane had an IQ test score of 70 and that he had been allowed to present the trial court with evidence relating to deficits in adaptive functioning. The Court of Criminal Appeals concluded:

> "Hall is not as broad as Lane contends and does not require this Court to revisit [whether Lane has demonstrated that he was intellectually disabled]. 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."

Lane II, ___ So. 3d at ___.

Because the United States Supreme Court did not provide any guidance in remanding this case in light of Hall, we are left to presume the Court's rationale based on the record before it. Lane argues that Hall made clear that the medical community's standards for assessing intellectual disability cannot be disregarded when a defendant is facing the death penalty. See generally Bobby v. Bies, 556 U.S. 825, 831

(2009) ("Our opinion [in Atkins] did not provide definitive procedural or substantive guides for determining when a person who claims mental retardation 'will be so impaired as to fall within [Atkins' compass].'"); and Moore v. Texas, 581 U.S. ___, ___, 137 S. Ct. 1039, 1044-49 (2017) ("As we instructed in Hall, adjudications of intellectual disability should be 'informed by the views of medical experts.' 572 U.S. at ___, 134 S. Ct. at 2000. ... That instruction cannot sensibly be read to give courts leave to diminish the force of the medical community's consensus. ... Hall indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical guide. But neither does our precedent license disregard of current medical standards."). In dissenting from the Court of Criminal Appeals' judgment, Judge Welch reasoned that, because Lane had not been subjected to an IQ score cutoff or precluded from presenting additional evidence of intellectual disability, "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." ___ So. 3d at ___. We find Judge Welch's reasoning persuasive.

Intellectual disability must be proven by a preponderance of the evidence. Ex parte Smith, 213 So. 3d 313, 319 (Ala. 2010). A trial court's determination regarding that issue is entitled to deference on appeal. Id. "'A judge abuses his [or her] discretion ... where the record contains no evidence on which [the judge] rationally could have based [the] decision.'" Lane I, 169 So. 3d at 1094 (quoting Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005)).

Medical records indicate that Lane was born with a chest deformity and acute respiratory-distress syndrome, which necessitated medical providers rushing Lane to a more capable hospital immediately following his birth. Dr. John Goff, a clinical neuropsychologist, testified that acute respiratory-distress syndrome can have a substantial negative effect on the development of a person's brain and that such a condition is "a typical kind of birth history for an individual who has cognitive deficits." Members of Lane's family interviewed by Dr. Goff reported that Lane was also born with hydrocephalus, although Lane's attorneys were unable to locate medical records supporting that assertion. Lane's sister testified that, when Lane was 11 years old, his mother was murdered and

that, when he was 14 years old, his uncle hit him in the head with a shotgun, rendering him unconscious; the attack also resulted in a broken arm. See generally Moore v. Texas, 581 U.S. at ___, 137 S. Ct. at 1051 ("[T]raumatic experiences [such as childhood abuse] count in the medical community as 'risk factors' for intellectual disability." (emphasis omitted)).

Dr. Goff testified that he met with Lane and his family members and that he administered various tests to Lane that are accepted as reliable by the medical community. Among those tests were the fourth edition of the Wechsler Adult Intelligence Scale, used to measure IQ; the fourth edition of the Wide Range Achievement Test, used to measure functional academics; the second edition of the Adaptive Behavior Assessment System, used to measure deficits in adaptive-skill areas; and the Victoria Symptom Validity test, used to determine whether test subjects are exaggerating deficiencies.

Lane's family members reported that he had been developmentally delayed since birth and had been placed in special-education classes throughout his time in school. According to Dr. Goff's reports and testimony, Lane has

deficits in verbal skills, he reads and performs mathematics at a third-grade level, he needs assistance with basic hygiene and dressing himself, he has trouble with simple financial transactions, he cannot live on his own, he has deficits in social relationships and social understanding, he does not make use of any available community services, he has deficits in overall judgment, and he has never held a job. Dr. Goff's reports cite substantial deficits in the specific adaptive skill areas of community-resource utilization, functional academics, home living, and self-direction. Dr. Goff's reports and testimony show that Lane also suffers from deficits in the remaining six adaptive-skill areas, although it is not entirely clear whether Dr. Goff considered those deficits quite as substantial. Based on standards that have been accepted by the medical community, Dr. Goff's professional opinion is that Lane is intellectually disabled. Dr. Goff testified that Lane "definitely meets" the definition of mental retardation set out in the APA's fourth edition of the Diagnostic and Statistical Manual of Mental Disorders, the version of that publication in effect at the time of Lane's Atkins hearing. The State did not present its own expert

witness to rebut Dr. Goff's opinion. Thus, the only opinion before the trial court from a member of the medical community who had formally and properly evaluated Lane for intellectual disability was that Lane is indeed intellectually disabled. We conclude that the trial court's rejection of Dr. Goff's opinion is not supported by the evidence.

Although the trial court acknowledged on the record that it considered Dr. Goff's testimony "very important," it ultimately disagreed with his conclusion. In doing so, the trial court initially referred to a "lack of medical records to substantiate some of the factors that were pertinent to the deficits in the adaptive behavior prong." The only lack of medical records that has been specifically referenced relates to the assertion of Lane's family members that he was born with hydrocephalus. There has been no demonstration that Lane's intellectual disability could not be proven in the absence of written records showing that particular abnormality. Moreover, Dr. Goff stated that the information he had obtained from Lane's family was sufficient to allow him to form his opinion. As Judge Welch stated in dissent: "The lack of medical records does not rebut Dr. Goff's opinion

regarding Lane's mental retardation." Lane I, 169 So. 3d at 1147.[4]

The trial court also found that Lane "was functioning relatively on his own, with little day-to-day supervision." Lane I suggests that such a finding could have been based on Lane's behavior during the police interrogation, which, according to the Court of Criminal Appeals, indicated that Lane was able to converse with the police, that he read and understood a waiver of his Miranda rights, that he remembered what clothing he was wearing on the day of the murder, and that he claimed he had a group of friends that he "chilled" with every other day. 169 So. 3d at 1091-92. The trial court and the Court of Criminal Appeals also relied on the fact that Lane had written some rap-music lyrics.

The trial court did not identify any specific adaptive-skill area to which its finding that Lane "was functioning relatively on his own" related. According to the Court of Criminal Appeals, however, the above-referenced evidence

[4]It is also noteworthy that the trial court judge referred to the fact that he had studied psychology in college. Lane argues that the trial court substituted its own standards for judging intellectual disability for the standards accepted by the medical community.

weighed against a finding that Lane suffers from deficits in the areas of communication, self-care, social skills, and leisure. Lane I, 169 So. 3d at 1092. Even if the Court assumes that is correct, Dr. Goff also determined that Lane has deficits in each of the other six adaptive-skill areas.

As for those six adaptive-skill areas, the Court of Criminal Appeals pointed to Lane's age and his history of substance abuse to explain any perceived deficits. 169 So. 3d at 1092-93. Lane was 19 when Dr. Goff evaluated him. Lane's sister testified that he had used marijuana, the drug "ecstacy," and alcohol, although there is no indication as to how much or how often. The only specific adaptive-skill area Dr. Goff was asked about in connection with Lane's substance abuse and age was work. Dr. Goff responded in the affirmative when asked whether substance abuse can hinder a person's ability to be gainfully employed and when asked whether "there's a lot of folks in their late teens and early 20s that don't work." Notwithstanding, Dr. Goff was steadfast in his opinion that Lane has the requisite deficits in all 10 adaptive-skill areas and that he is intellectually disabled. The evidence in this case simply does not demonstrate that

Lane's substance abuse and age affected the results of Dr. Goff's testing in any meaningful way.[5]

Finally, the trial court "place[d] a lot of weight on how this crime was committed" and "what it took to commit the crime." In Ex parte Smith, 213 So. 3d 313 (Ala. 2010), this Court, in concluding that a defendant had not established that he was intellectually disabled, found "especially persuasive [the defendant's] behavior during the commission of [the] murders." The Court in Smith noted:

> "[The defendant] arrived at [a house owned by one of the victims] armed with a sawed-off rifle that he purposefully concealed, he systematically shot three victims, and he attempted to shoot a fourth victim and made an effort to stab that victim after the rifle jammed. He made the statement after the murders had been committed that he planned to kill everyone present in [the victim's] house to eliminate witnesses. These are not the impulsive actions of a mentally retarded person who cannot understand the consequences of his actions as contemplated by the United States Supreme Court in Atkins."

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[5]The trial court also noted that Dr. Goff had been unable to obtain Lane's school records. According to the Court of Criminal Appeals, the lack of such records weighed against Dr. Goff's conclusion that Lane suffered from deficits in the area of functional academics. Lane I, 169 So. 3d at 1093. Dr. Goff, however, testified that he had administered a specific test relevant to functional academics and that the results of that test demonstrated that Lane has significant deficits in that adaptive-skill area.

213 So. 3d at 320. Lane asserts in his brief to this Court that the United States Supreme Court, in the recent case of Moore v. Texas, 581 U.S. ___, 137 S. Ct. 1039 (2017), "specifically disapproved of a lower court's reliance on the defendant's 'commission of the crime in a sophisticated way and then fleeing,' [581 U.S. at ___, 137 S. Ct. at 1047,] as grounds on which to dismiss evidence of adaptive deficits." We need not consider that argument, however, because, although the crime Lane committed was violent and despicable, there is nothing particularly "sophisticated" about the manner in which he committed it. There was no evidence of detailed planning, thoughtful premeditation, or sophisticated advanced preparation. The means Lane employed to commit the crime are not sufficient to refute the evidence that he has the requisite deficits in at least two adaptive-skill areas and is intellectually disabled.

After the United States Supreme Court remanded this cause to the Court of Criminal Appeals and the Court of Criminal Appeals directed the parties to file briefs, the State filed a brief acknowledging that the trial court had failed to make findings regarding the relevant adaptive-skill areas and

conceding that the trial court "did not apply the correct legal definition of intellectual disability in reviewing Lane's Atkins claim." The State invited the Court of Criminal Appeals to remand the matter to the trial court for a new Atkins hearing. The Court of Criminal Appeals affirmed. Lane II. After this Court granted Lane's petition for a writ of certiorari, the State went further in its concessions, joining Lane in requesting that we remand the matter so that the trial court can sentence Lane to life imprisonment without the possibility of parole. In a subsequent joint filing, the State expressly conceded that "death is not the proper sentence for Lane." Thus, the State has indicated that it concedes that the evidence established that Lane is intellectually disabled and that the trial court simply substituted its own standards for intellectual disability for those accepted by the medical community.

Based on Atkins, Hall, and the apparent reasons behind the United States Supreme Court's vacation of the Court of Criminal Appeals' judgment, we must reverse the judgment of the Court of Criminal Appeals and remand the cause to that court with directions to remand the matter to the trial court

to sentence Lane to life imprisonment without the possibility of parole.[6]

REVERSED AND REMANDED WITH DIRECTIONS.

Stuart, C.J., and Bolin, Main, and Mendheim, JJ., concur.

Parker, Shaw, Wise, and Bryan, JJ., dissent.

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[6]Lane and the State have asked this Court to remand the matter directly to the trial court and to direct that court to implement a "settlement agreement" that Lane and the State have entered into. Pursuant to that agreement, Lane promises that, "if his conviction or sentence of life without the possibility of parole is ever set aside, or if he challenges either, the death sentence that was originally imposed upon him will be reinstated with full force and effect, the same as if it had never been set aside." Lane and the State, however, have not persuasively demonstrated that this Court has the power to direct the trial court to accept such an agreement. Accordingly, we decline to do so. We express no opinion on the effect of the agreement.

SHAW, Justice (dissenting).

I believe that, in the posture of this case, we are acting prematurely in vacating the death sentence of the petitioner, Anthony Lane.

The Supreme Court held in Atkins v. Virginia, 536 U.S. 304 (2002), that individuals who are intellectually disabled are ineligible for the death penalty; Lane contends that Atkins applies in his case. Stated very generally, to determine whether Lane is intellectually disabled, Atkins requires that we look at whether Lane exhibits subaverage intellectual functioning and whether he exhibits deficits in adaptive behavior, which problems manifested themselves before the age of 18.

Lane was given the opportunity to prove at trial that he was intellectually disabled under Atkins. The trial court ruled that he failed to prove that he exhibited significant or substantial deficits in adaptive behavior--the second part of the Atkins analysis described above. On direct appeal the Court of Criminal Appeals considered all the evidence Lane presented and affirmed the trial court's judgment. Lane v. State, 169 So. 3d 1076, 1087-94 (Ala. Crim. App. 2013) ("Lane

I"). This Court subsequently denied Lane's request for certiorari review. Ex parte Lane (No. 1131373, Jan. 30, 2015). However, the Supreme Court of the United States vacated the judgment in Lane I and remanded the matter "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, 91 (2015).

The decision in Hall addressed Florida law defining an intellectual disability as having an IQ score of 70 or less. This "mandatory cutoff" foreclosed further review of evidence the medical community accepted as probative of intellectual disability, including evidence as to individuals who have an IQ score above 70. 572 U.S. at ___, ___, 134 S. Ct. at 1990, 1994. The Supreme Court faulted Florida's rule as taking imprecise IQ scores as conclusive evidence of intellectual capacity, when medical experts would consider additional evidence. 572 U.S. at ___, 134 S. Ct. at 1995. The Court held: "[W]hen a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of

intellectual disability, including testimony regarding adaptive deficits." 572 U.S. at ___, 134 S. Ct. at 2001.

On remand, the Court of Criminal Appeals explained that Alabama law does not impose the type of "bright-line cutoff" deemed unconstitutional in Hall, Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___, ___ (Ala. Crim. App. 2016) ("Lane II"); noted that Lane had been provided the ability to present evidence of intellectual disability, including evidence of adaptive-behavior deficiencies at trial; and held that he thus was entitled to no relief. Lane II, ___ So. 3d at ___.

I agree that no strict IQ score cutoff was used in this case and that Lane was afforded the full opportunity to present exactly the type of adaptive-skills evidence that was denied the defendant in Hall. I do not believe that Hall requires a reversal in this case.

I disagree that the United States Supreme Court's decision called for a reevaluation of Lane's adaptive-behavior deficiencies, which is the issue he raises before this Court and that the main opinion addresses. That part of the Atkins analysis was not at issue in Hall. Further, if the Supreme

Court had accepted Lane's allegations regarding his adaptive-behavior deficits, then it presumably would have simply granted certiorari and addressed the issue. Instead, the Supreme Court remanded Lane's case for "further consideration in light of Hall." 577 U.S. at ___, 136 S. Ct. at 91. I believe that it did so because the Court had stated in Hall that Alabama's law might have the same problem it found with Florida's law: "Alabama also may use a strict IQ score cutoff at 70." 572 U.S. at ___, 134 S. Ct. at 1996.

Nevertheless, after this Court granted certiorari review, the State and Lane filed a "joint motion" indicating that they had "reached an agreement" and asking this Court to remand the case to the trial court with instructions to resentence Lane to life imprisonment without the possibility of parole. Because it did not appear to this Court that such a remand request was proper under any of our appellate rules, statutory law, or caselaw, we issued an order directing the parties to provide authority for this Court's granting such a motion. In their joint reply, the parties state that they are in agreement "that death is not the proper sentence" in this case and that "[t]his agreement was reached after a thorough review

of the existing record and an examination of additional evidence that is outside the record." They further cite Jackson v. State, 963 So. 2d 150 (Ala. Crim. App. 2006), in which a death sentence was vacated when the State "stipulated" that the defendant met the Atkins definition of intellectual disability and the evidence "overwhelmingly" supported such a finding. Jackson, 963 So. 2d at 157.

There is no stipulation in this case by the State that Lane is intellectually disabled; instead, there is an unexplained "agreement" that death is not the "proper sentence" in this case. Further, given the analysis in Lane I, I disagree that there is "overwhelming" evidence that Atkins bars a death sentence here.

If the State wishes to expressly concede that, under Atkins, Lane is ineligible for the death penalty, then it should do so in its brief, which has yet to be filed. The State should make clear how the trial court's and Court of Criminal Appeals' analysis of the evidence is wrong and how the adaptive-behavior-deficits issue is properly before us so that we can vacate the sentence, as was done in Jackson.

Further, I would not reverse a death sentence based on innuendo regarding "evidence that is outside the record."

The State may have very good reasons to concede the issue. Lane may very well be entitled to a judgment in his favor. But there is a better, more procedurally proper way to do this; I thus respectfully dissent.

Wise, J., concurs.