

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON KELLEY,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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November 20, 2018

QUESTION PRESENTED

Did the state court's failure to apply state-law double jeopardy protections in Petitioner Kelley's case result in a violation of Kelley's constitutional right to due process?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Brandon Kelley respectfully petitions this Court for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The order of the Alabama Supreme Court denying certiorari is unpublished and is attached as Appendix A. The order of the Alabama Court of Criminal Appeals denying rehearing is unpublished and is attached as Appendix B. The decision of the Alabama Court of Criminal Appeals affirming Kelley's conviction and sentence for sexual torture is unpublished and is attached as Appendix C. The ruling of the trial court overruling Kelley's double jeopardy objection is in the record at S. 36¹ and is attached as Appendix D.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Petitioner Kelley's conviction and sentence for sexual torture on April 20, 2018, and overruled Kelley's application for rehearing on June 22, 2018. The Alabama Supreme Court denied certiorari on August 24, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

¹ "R." refers to the transcript from Kelley's 2010 capital trial. "C." refers to the clerk's record from the trial court. "S." refers to the transcript of the motions and sentencing hearing on the sexual torture count, which was held on August 3, 2017. For purposes of Kelley's appeal of the sexual torture conviction and sentence, the Alabama Court of Criminal Appeals took judicial notice of the record of the capital proceedings in an order dated August 30, 2017.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part: “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

The Fourteenth Amendment to the United States Constitution provides, in relevant part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

STATEMENT OF THE CASE

Petitioner Kelley was found guilty of two counts of capital murder and one count of sexual torture in the Circuit Court of St. Clair County, Alabama, in 2010. (R. 933-34.) One of the capital murder counts was for murder during sexual abuse, and the sexual torture count concerned the very same alleged abuse, thus implicating double jeopardy principles.

At trial, a forensic scientist testified that blood found inside of Kelley’s Chevy Blazer matched the blood of the decedent, Emily Milling. (R. 490, 504, 693-94.) In addition, a DNA technician testified that DNA from blood stains recovered from inside of Kelley’s mobile home matched Milling’s DNA. (R. 694-95, 697-702, 707.) Testimony also revealed that law enforcement agents discovered garbage bags in a dumpster behind a business owned by Kelley’s father (R. 424-28, 570), which contained a blue sleeping bag (R. 572-73), a toilet plunger, several washcloths, and

clothing belonging to Milling and Kelley (R. 576-77). Blood stains on the sleeping bag and plunger matched Milling's blood. (R. 703-05.)

The medical examiner concluded that Milling died as a result of asphyxia due to strangulation. (R. 799.) She testified at trial that Milling had contusions, lacerations, and abrasions on her body (R. 733-50); suffered blunt trauma to the face and head (R. 739, 741-42); and sustained genital lacerations and contusions, including anal, rectal, and vaginal injuries (R. 748-50).

Following the guilty verdicts, Kelley was sentenced to death on each of the capital murder counts. (R. 984-85.) No sentence was pronounced for the sexual torture count.

Kelley then appealed his capital murder convictions. The Court of Criminal Appeals affirmed the capital murder convictions and purported to affirm the sexual torture count. *See Kelley v. State*, No. CR-10-0642, 2014 WL 4387848 (Ala. Crim. App. Sept. 5, 2014) ("*Kelley I*"). The Alabama Supreme Court granted certiorari, reversed the purported affirmance of the sexual torture count, and remanded the case, holding that the appellate court lacked jurisdiction to review the sexual torture count because Kelley had not been sentenced on it. *See Ex parte Kelley*, No. 1131451, 2015 WL 6828772, at *1 (Ala. Nov. 6, 2015) ("*Kelley II*"). On remand, the Court of Criminal Appeals dismissed the sexual torture aspect of the appeal. *See Kelley v. State*, No. CR-10-0642, 2016 WL 3148447 (Ala. Crim. App. June 3, 2016) ("*Kelley III*"). Both the Alabama Supreme Court and this Court then denied Kelley's petitions for certiorari with respect to the capital convictions. *See Kelley v.*

Alabama, No. 17-6397, Order (Jan. 22, 2018); *Ex parte Kelley*, No. 1160533, Order (May 19, 2017).

Meanwhile, the trial court heard defense motions regarding the sexual torture count and sentenced Kelley to life in prison for that offense. (S. 15.) Kelley appealed, and the Court of Criminal Appeals affirmed. *See Kelley v. State*, No. CR-16-1245 (Ala. Crim. App. Apr. 20, 2018) (“*Kelley IV*”). The Alabama Supreme Court denied certiorari, *see Ex parte Kelley*, No. 1170921, Order (Aug. 24, 2018), and this petition follows.

REASONS FOR GRANTING THE WRIT

In affirming Petitioner Kelley’s conviction for sexual torture, the Alabama Court of Criminal Appeals applied the federal test for double jeopardy claims but failed to apply the additional double jeopardy protections provided by Alabama statutory law. *See Kelley v. State*, No. CR-16-1245, at *4-8 (Ala. Crim. App. Apr. 20, 2018). Kelley had a federal due process right to those additional protections. The additional protections, if properly enforced, would invalidate Kelley’s sexual torture conviction. Therefore, this Court should grant certiorari and reverse.

I. Petitioner Kelley Has a Federal Due Process Right to Alabama’s State-Law Double Jeopardy Protections.

Where a state statute provides double jeopardy protections greater than those provided by the federal Constitution, criminal defendants in that state’s courts have a federal due process right to those protections. As this Court has explained, “[A] person’s liberty is . . . protected [by the Fourteenth Amendment],

even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government” *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *see also Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (“A state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right” (citations omitted)).

This Court’s test for whether two convictions violate federal double jeopardy protections is articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The test is “whether each [offense] requires proof of a fact which the other does not.” *Id.* However, states are free to provide criminal defendants with statutory double jeopardy protections that are greater than those provided by *Blockburger*. When they do, defendants have a due process right to those protections because they have a significant liberty interest in being free from unauthorized convictions. *See Wolff*, 418 U.S. at 558; *see also Dist. Attorney’s Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 67 (2009) (recognizing that the Fourteenth Amendment “imposes procedural limitations on a State’s power to take away protected entitlements”).

Under Alabama law, any double jeopardy analysis requires a two-step inquiry. *See Ex parte State (In re Heard)*, 999 So. 2d 992, 1007-10 (Ala. 2007). First, are the two offenses the same under the federal *Blockburger* test? *Id.* If not, does Alabama statutory law nonetheless prohibit conviction of the two offenses? *Id.*; *see* Ala. Code § 13A-1-9(a); § 13A-1-8(b)(4). In this case, the courts below failed to engage in the second step of the inquiry. As the decision of the Court of Criminal

Appeals shows, the court analyzed only the *Blockburger* test; it did not engage in an analysis of the additional state-law protections. *Kelley*, No. CR-16-1245, at *4-8.

That was error under Alabama law and deprived Kelley of federal due process.

II. Petitioner Kelley’s Conviction for Sexual Torture Violates Alabama Law and Due Process.

Two separate provisions of Alabama statutory law—Alabama Code §§ 13A-1-8(b)(4) and 13A-1-9(a)—preclude Kelley’s conviction for sexual torture in this case. Therefore, the Due Process Clause of the Fourteenth Amendment requires reversal of the conviction.

A. Alabama Code § 13A-1-8(b)(4) Prohibits Kelley from Being Convicted of Both Sexual Abuse Capital Murder and Sexual Torture.

Alabama Code § 13A-1-8(b)(4) prohibits conviction for two offenses if they “differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.”

To obtain Kelley’s conviction for sexual abuse capital murder, the prosecution had to prove that Kelley committed murder and “subject[ed] another person to *sexual contact* by forcible compulsion.” Ala. Code § 13A-6-66(a)(1) (emphasis added); *see also* Ala. Code § 13A-5-40(a)(8) (the applicable capital murder statute). “Sexual contact” is defined broadly as “[a]ny touching of the sexual or other intimate parts of a person,” Ala. Code § 13A-6-60(3), “whether directly or using an inanimate object,” *Gunter v. State*, 665 So. 2d 1008, 1013 (Ala. Crim. App. 1995).

A conviction for sexual torture, meanwhile, requires proof that Kelley specifically “penetrated the vagina or anus or mouth of another person with an

inanimate object by forcible compulsion with the intent to sexually torture or sexually abuse.” Ala. Code § 13A-6-65.1(a)(1). Thus, sexual torture “incorporates sexual abuse by reference by using the phrase ‘with the intent to sexually torture or *sexually abuse.*’” *Gunter*, 665 So. 2d at 1012 (quoting Ala. Code § 13A-6-65.1(a)(1)) (emphasis in original).

Reading the statutes together, then, sexual torture is sexual abuse with the use of an inanimate object. Stated differently, sexual torture is a specific instance of the more general conduct prohibited by the sexual abuse statute.

Because (1) sexual abuse is, by definition, a lesser included offense of murder during sexual abuse, *Whalen v. United States*, 445 U.S. 684, 693-94 (1980); *Lewis v. State*, 57 So. 3d 807, 818-20 (Ala. Crim. App. 2009); and because (2) sexual torture is a specific instance of sexual abuse; then (3) sexual torture is a lesser included offense of murder during sexual abuse. Accordingly, Kelley cannot be convicted of both sexual torture and murder during sexual abuse, without being deprived of his right to be free from double jeopardy.

B. Alabama Code § 13A-1-9(a) Prohibits Kelley from Being Convicted of Both Sexual Abuse Capital Murder and Sexual Torture.

Under Alabama law, if one offense of conviction is included in another, “the conviction for the lesser-included cannot stand.” *In re Heard*, 999 So. 2d at 1009. “An offense is an included one if: (1) It is established by proof of the same or fewer than all the *facts* required to establish the commission of the offense charged” Ala. Code. § 13A-1-9(a) (emphasis added). Whereas the *Blockburger* test requires

an inquiry into the *elements* of the crime, this Alabama statutory test requires an inquiry into the *facts* that were used to prove the crime.

The facts establishing Kelley's sexual torture conviction are included in those establishing his conviction of capital murder during the commission of sexual abuse. To convict Kelley of sexual abuse capital murder, Ala. Code § 13A-5-40(a)(8), the prosecution had to prove that Kelley committed or attempted to commit sexual abuse in the first degree, in addition to murder. Sexual abuse in the first degree requires proof that Kelley subjected the decedent to "sexual contact by forcible compulsion." Ala. Code § 13A-6-66(a)(1).

To convict Kelley of the lesser offense of sexual torture, meanwhile, the prosecution had to prove that Kelley "penetrat[ed] the vagina or anus or mouth of another person with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse." Ala. Code § 13A-6-65.1(a)(1).

Kelley's use of a toilet plunger was the fact requisite to both the sexual abuse capital murder conviction and the sexual torture conviction. Without proof of that fact, the "inanimate object" element of sexual torture and the "forcible compulsion" element of sexual abuse capital murder were not proven. Since in Alabama a lesser offense is included in a greater offense if established *by proof of the same facts*, Ala. Code. § 13A-1-9(a), the sexual torture count is included in the sexual abuse capital murder offense in this case, so Kelley's conviction and sentence for sexual torture violates Alabama's double jeopardy law.

Because Kelley has a due process right to the additional double jeopardy protections provided by Alabama law and those protections prohibit his sexual torture conviction, this Court should grant certiorari and reverse pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Petitioner Michael Brandon Kelley respectfully requests that this Court grant certiorari and reverse the judgment of the Alabama Court of Criminal Appeals.

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APPENDIX A

IN THE SUPREME COURT OF ALABAMA



August 24, 2018

1170921

Ex parte Michael Brandon Kelley. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael Brandon Kelley v. State of Alabama) (Pell City Circuit Court: CC-09-73; Criminal Appeals : CR-16-1245).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on August 24, 2018:

Writ Denied. No Opinion. Sellers, J. - Stuart, C.J., and Bolin, Parker, Shaw, Main, Wise, Bryan, and Mendheim, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 24th day of August, 2018.

A handwritten signature in cursive script that reads "Julia Jordan Weller".

Clerk, Supreme Court of Alabama

APPENDIX B

**COURT OF CRIMINAL APPEALS
STATE OF ALABAMA**

D. Scott Mitchell
Clerk
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June 22, 2018

CR-16-1245 Death Penalty

Michael Brandon Kelley v. State of Alabama (Appeal from Pell City Division, St. Clair
Circuit Court: CC09-73)

NOTICE

You are hereby notified that on June 22, 2018, the following action was taken in the above
referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Bill Weathington, Circuit Judge
Hon. Annette Manning, Circuit Clerk
Mark Loudon-Brown, Attorney
Patrick Mulvaney, Attorney
Stephen Matthew Frisby, Asst. Attorney General

APPENDIX C

Rel: 04/20/2018

Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

State of Alabama

Judicial Building, 300 Dexter Avenue

P. O. Box 301555

Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
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MEMORANDUM

CR-16-1245 St. Clair Circuit Court (Pell City Division)
CC-09-73

Michael Brandon Kelley v. State of Alabama

WELCH, Judge.

The appellant, Michael Brandon Kelley, appeals his conviction for sexual torture, a violation of § 13A-6-65.1(a), Ala. Code 1975, and his sentence of life imprisonment.

In 2010, Kelley was convicted of two counts of capital-murder and one count of sexual torture for the killing of Emily Milling. Kelley was sentenced to death for his capital-murder convictions and to life imprisonment for his conviction for sexual torture. This Court affirmed Kelley's convictions on direct appeal. See Kelley v. State, [Ms. CR-10-0642,

September 5, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014) ("Kelley I"). On certiorari review, the Alabama Supreme Court affirmed Kelley's capital-murder convictions but reversed this Court's affirmance of Kelley's sexual torture conviction. See Ex parte Kelley, [Ms. 1131451, November 6, 2015] ___ So. 3d ___ (Ala. 2015) ("Kelley II"). Specifically, the Supreme Court held that this Court did not have jurisdiction to consider the appeal of Kelley's sexual torture conviction because, it said, no sentence had been "pronounced" for that conviction. On remand from the Alabama Supreme Court, this Court dismissed that aspect of our direct appeal that addressed Kelley's sexual torture conviction. See Kelley v. State, [Ms. CR-10-0642, June 3, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) ("Kelley III").

On remand to the St. Clair Circuit Court, that court held a sentencing hearing for Kelley's sexual torture conviction and sentenced him to life imprisonment. Kelley filed a notice of appeal. This appeal addresses only Kelley's conviction for sexual torture.

The facts surrounding Kelley's convictions were set out in detail in this Court's original opinion on direct appeal. See Kelley I, supra. The State's evidence tended to show that on Friday, November 14, 2008, Milling and three friends went to the Central Club, a nightclub in Leeds. Surveillance footage from the Club showed Milling leaving the Club with Kelley but not returning. When Milling's family could not reach her two days later, her father and brother filed a missing-person's report. After an extensive search, Milling's body was found in a wooded area off Markeeta Road in Leeds.

"After processing the scene where the body was found, the forensic team went to Murray's Garage to search and to process Kelley's Blazer. In the cargo area of the Blazer, [forensic scientist Charlie] Pearce found red/brown stains that tested positive for blood. DNA from the bloodstain in the Blazer matched samples taken from [Milling]. When the forensic team finished processing the Blazer, they went to Kelley's mobile home. In the mobile home, the team located numerous red/brown stains. The stains were found in the hallway, the east wall, the bathroom, near the back door, the front door, the

master bedroom, and the west wall. Of the samples of the stains that were tested for DNA, all were found to match [Milling's] blood samples. Also, on the west wall was a mixture bloodstain. The DNA testing of the mixture stain revealed that [Milling] was the donor of the major component and that Kelley was included as a possible donor of the minor component.

"In addition to collecting samples of the visible stains, the forensic team sprayed luminal in the mobile home. Pearce testified that luminal is a product that reacts to blood and allows them to detect blood that has been diluted or that is on surfaces that have been cleaned. The luminal showed the outline of a body in the shower and drag marks from the shower to the front door.

"On Tuesday morning, [Curtis] Gomer[, Kelley's cousin,] picked up [David Alan] Heath[, Kelley's cousin,] and they went to work at Mike's Fabricating. When they arrived at work, Gomer and Heath went through the dumpster where Gomer had seen Kelley throwing trash bags. Inside one of the trash bags that Kelley had thrown away, Gomer found a woman's shirt and a boot. At that point, Gomer telephoned emergency 911.

"Law-enforcement officers and the forensic team responded to the 911 call. The forensic team found the five trash bags with blue ties that Gomer had seen Kelley throw in the dumpster. Inside the bags, they found, among other things, the clothes [Milling] had been wearing at the club, her sunglasses, her necklace, and her driver's license. They also found various other male and female clothes and wash cloths. Many of these items had red/brown stains on them. The officers also found a sleeping bag with red/brown stains and a toilet plunger with red/brown stains on the handle. DNA testing revealed that the stains on the sleeping bag and toilet plunger consisted of [Milling's] blood.

"The autopsy performed on [Milling's] body by

Dr. Valerie Green indicated that she had been tortured prior to her death. She had a bruise and skin tears around her right eye consistent with being punched. She had cuts on her head and ear, a bruised lip, and multiple brain hemorrhages. Her neck was scratched and bruised and she had multiple bruises on her chest and back. Her legs and arms, including her wrists, were bruised. [Milling] had multiple cuts and bruises in her vagina. She also had multiple cuts around and in her anus and rectum, including a cut in the rectal lining located five to five and a quarter inches from the anal opening. Dr. Green testified that the injuries to [Millings's] genital area were consistent with being caused by the toilet plunger that Kelley had thrown away. She further determined that [Milling] was alive when her injuries were sustained and that her injuries would have been extremely painful."

Kelley I, ___ So. 3d at ___.¹

Though Kelley's convictions for capital-murder and sexual torture arose from one trial proceeding, this Court does not apply a plain-error standard of review to non-capital convictions. The Alabama Supreme Court in Ex parte Woodall, 730 So. 2d 652 (Ala. 1998), "held that a defendant who is convicted of both a capital offense and a noncapital offense, in the same proceeding, should not be entitled to benefit from the plain-error rule in regard to the noncapital conviction." Boyle v. State, 154 So. 3d 171, 186 (Ala. Crim. App. 2013). Accordingly, we will only consider issues that were raised and objected to in the circuit court and issues that have been properly raised in Kelley's brief to this Court.

I.

Kelley first argues that his convictions for both sexual

¹The Circuit Clerk for St. Clair County requested that this Court take judicial notice of our records for Kelley's direct appeal for his capital-murder convictions. We granted that request. Therefore, we have taken judicial notice of our records in Kelley v. State, (CR-10-0642).

torture and the capital offense of murder during the course of committing sexual abuse violates § 13A-1-9(a)(1), Ala. Code 1975,² and his constitutional right to be free from double jeopardy. Specifically, Kelley argues that the facts supporting his conviction for sexual torture were included in the facts establishing his conviction for murder/sexual abuse.

In this Court's previous opinion, we specifically addressed this issue. Though the Supreme Court directed this Court to set aside that aspect of our opinion, we now adopt our previous holding.

"The Supreme Court of the United States has held that the Double Jeopardy Clause of the Fifth Amendment contains three protections: 'It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) (footnotes omitted), overruled on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). See Schiro v. Farley, 510 U.S. 222, 229, 114 S.Ct. 783, 127 L.Ed.2d 47 (1994) (reaffirming the three protections of the Double Jeopardy Clause). 'These protections stem from the underlying premise that a defendant should not be twice tried or punished for the same offense.' Schiro, 510 U.S. at 229, 114 S.Ct. 783 (citing United States v. Wilson, 420 U.S. 332, 339, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975)). The Alabama Supreme Court has held that the Double Jeopardy Clause of Art. I, § 9, of the Alabama Constitution of 1901, applies to protect only those three areas enumerated in Pearce. See Ex parte Wright, 477 So. 2d 492, 493 (Ala. 1985); Adams v. State, 955 So. 2d 1037, 1098

²Section 13A-1-9(a)(1), Ala. Code 1975, states: "A defendant may be convicted of an offense included in an offense charged. An offense is included if ... [i]t is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged."

(Ala. Crim. App. 2003), reversed on other grounds, Ex parte Adams, 955 So. 2d 1106 (Ala. 2005).

"In Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), the Supreme Court of the United States enumerated the 'same elements' test for determining whether two charges constitute the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. Under the Blockburger test, 'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.' Id. The Supreme Court of the United States has also held 'that a lesser included and a greater offense are the same under Blockburger....' Brown v. Ohio, 432 U.S. 161, 166 n. 6, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977). See also Perkinson v. State, 273 Ga. 491, 494, 542 S.E.2d 92, 95 (2001) ('For double jeopardy purposes, a lesser-included and a greater offense are the "same offense" under the Fifth Amendment because the lesser offense requires no proof beyond that which is required for the conviction of the greater offense.' (citations omitted)). 'In reviewing double jeopardy claims, this court must look to the identity of the offenses, not the act out of which the offenses arose.' Wright v. City of Montgomery, 477 So. 2d 489, 490 (Ala. Crim. App. 1985) (emphasis omitted). In other words, '[t]he Blockburger test turns on the statutory elements of the two offenses, not on the actual evidence that may be used by the state in proving the crimes.' Childers v. State, 899 So. 2d 1025, 1028 (Ala. 2004) (quoting Ex parte Wright, 477 So. 2d 492, 493 (Ala. 1985)). See also United States v. Ibarquen-Mosquera, 634 F.3d 1370, 1382 (11th Cir. 2011) (holding that 'the court must only look to the elements of each crime to determine whether there are two offenses or one').

"Here, Kelley was convicted of murder made capital because it was committed during the course of first-degree sexual abuse, and he was convicted

of sexual torture. Section 13A-5-40(a)(8), Ala. Code 1975, provides that it is a capital offense to commit '[m]urder during sexual abuse in the first or second degree....' Section 13A-6-2(a)(1), Ala. Code 1975, provides, in relevant part, that '[a] person commits the crime of murder if he or she ... [w]ith intent to cause the death of another person, ... causes the death of that person....' Section 13A-6-66(a)(1), Ala. Code 1975, provides, in relevant part, that '[a] person commits the crime of sexual abuse in the first degree if ... [h]e subjects another person to sexual contact by forcible compulsion....' Section 13A-6-65.1(a)(1), Ala. Code 1975, provides that, '[a] person commits the crime of sexual torture ... [b]y penetrating the vagina or anus or mouth of another person with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse.'

"To convict a person of capital murder under § 13A-5-40(a)(8), Ala. Code 1975, the State must prove that the defendant: 1) intentionally murdered the victim; 2) during the course of subjecting the victim to forcible sexual contact. The State is not required to prove that the defendant 'penetrat[ed] the vagina or anus or mouth of another person with an inanimate object....' § 13A-6-65.1(a)(1), Ala. Code 1975; therefore, a conviction for sexual torture under 13A-6-65.1(a)(1), Ala. Code 1975, requires proof of an element not required for a conviction for capital murder under § 13A-5-40(a)(8), Ala. Code 1975.

"To convict a person of sexual torture under § 13A-6-65.1(a)(1), Ala. Code 1975, the State must prove that the defendant: 1) penetrated the vagina or anus or mouth of another person; 2) did so by forcible compulsion; and 3) did so with the intent to sexually torture or sexually abuse. The State is not required to prove that the defendant intentionally murdered the victim; therefore, a conviction of capital murder under § 13A-5-40(8), Ala. Code 1975, requires proof of an element not required under § 13A-6-65.1(a)(1), Ala. Code 1975.

Finally, although there is some overlap between sexual abuse and sexual torture, a conviction of capital murder under § 13A-5-40(8), Ala. Code 1975, does not, like sexual torture, require proof that the defendant 'penetrat[ed] the vagina or anus or mouth of another person with an inanimate object....' § 13A-6-65.1(a)(1), Ala. Code 1975; therefore, sexual torture under § 13A-6-65.1(a)(1), Ala. Code 1975, is not a lesser-included offense of murder made capital because it was committed during the course of a sexual abuse. § 13A-5-40(8), Ala. Code 1975. See Doster v. State, 72 So. 3d 50, 91 (Ala. Crim. App. 2010).

"Because capital murder/sexual abuse and sexual torture each require proof of an element that the other does not, Kelley's convictions for both crimes does not offend the Double Jeopardy Clause of the Fifth Amendment. Consequently, this issue does not entitle Kelley to any relief."

Kelley I, ___ So. 3d at ___.

Kelley's convictions for murder/sexual abuse and sexual torture do not violate Kelley's constitutional rights. Sexual torture is not a lesser-included-offense of murder/sexual abuse. Kelley is due no relief on this claim.

II.

Kelley next argues that his sexual torture sentence, a sentence that was imposed seven years after his conviction, violates his state and federal constitutional rights. Kelley cites several different grounds in support of this argument.

The record shows that these issues were raised in Kelley's motion to dismiss his sexual torture conviction. (C. 20-35.) The circuit court denied that motion. (C. 36.)

A.

First, Kelley argues that the sentence violates his constitutional right to a speedy trial because, he says, it was not pronounced until seven years after he was convicted.

The State argues that based on the United States Supreme Court's recent decision in Betterman v. Montana, ___ U.S. ___, 136 S.Ct. 1609 (2016), Kelley is not entitled to relief on this claim.

The United States Supreme Court in Betterman v. Montana, stated:

"Criminal proceedings generally unfold in three discrete phases. First, the State investigates to determine whether to arrest and charge a suspect. Once charged, the suspect stands accused but is presumed innocent until conviction upon trial or guilty plea. After conviction, the court imposes sentence. There are checks against delay throughout this progression, each geared to its particular phase.

"In the first stage -- before arrest or indictment, when the suspect remains at liberty -- statutes of limitations provide the primary protection against delay, with the Due Process Clause as a safeguard against fundamentally unfair prosecutorial conduct. United States v. Lovasco, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); see id., at 795, n. 17, 97 S.Ct. 2044 (Due Process Clause may be violated, for instance, by prosecutorial delay that is 'tactical' or 'reckless' (internal quotation marks omitted)).

"The Sixth Amendment's Speedy Trial Clause comes in on the second period: from arrest or indictment through conviction. The constitutional right, our precedent holds, does not attach until this phase begins, that is, when a defendant is arrested or formally accused. United States v. Marion, 404 U.S. 307, 320-321, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). Today we hold that the right detaches upon conviction, when this second stage ends.

". . . .

"As we have explained, at the third phase of the criminal-justice process, i.e., between conviction

and sentencing, the Constitution's presumption-of-innocence-protective speedy trial right is not engaged. That does not mean, however, that defendants lack any protection against undue delay at this stage. The primary safeguard comes from statutes and rules. The federal rule on point directs the court to 'impose sentence without unnecessary delay.' Fed. Rule Crim. Proc. 32(b)(1). Many States have provisions to the same effect, and some States prescribe numerical time limits. Further, as at the prearrest stage, due process serves as a backstop against exorbitant delay. See *supra*, at 1613. After conviction, a defendant's due process right to liberty, while diminished, is still present. He retains an interest in a sentencing proceeding that is fundamentally fair. But because *Betterman* advanced no due process claim here, see *supra*, at 1612, we express no opinion on how he might fare under that more pliable standard. See, e.g., *United States v. \$8,850*, 461 U.S. 555, 562-565, 103 S.Ct. 2005, 76 L.Ed.2d 143 (1983)."

____ U.S. at _____, 136 S.Ct. at 1613. (Footnotes omitted; emphasis added.) The United States Supreme Court declined to apply the *Barker v. Wingo*, 407 U.S. 514 (1982),³ factors when analyzing a delay between conviction and sentence.⁴

Even if this Court applied the *Barker* factors, Kelley would be due no relief. As the State correctly argues, on direct appeal this Court noted that Kelley had been sentenced for his conviction for sexual torture because the case action summary sheet reflected that the circuit court imposed a sentence of life imprisonment. It was not until Kelley's application for rehearing was filed in this Court, in July

³The *Barker v. Wingo* factors include: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) any prejudice to the defendant.

⁴Neither this Court or the Alabama Supreme Court has had occasion to consider *Betterman v. Montana* as that holding relates to a speedy trial claim.

2014, that Kelley raised this issue. Indeed, it was not until the Alabama Supreme Court reversed that aspect of this Court's opinion dealing with the sexual torture conviction that any court had found that Kelley had not been properly sentenced for his conviction for sexual torture. Moreover, the Supreme Court's opinion was issued in November 2015 and Kelley was sentenced for his conviction on August 3, 2017. Under any analysis, Kelley is due no relief on this claim.

B.

Kelley next argues that the State waived its right to have his sentence pronounced for his sexual torture conviction because of the extensive delay. Kelley argues in brief: "[I]f the prosecution fails to ensure that sentence is imposed in a timely fashion, it ought to forfeit the right to have sentence imposed." (Kelley's brief at p. 25.) He asserts that he is entitled to finality in the sentence that he received in 2010.

However, Kelley's argument is inconsistent with his previous arguments. In both his application for rehearing before this Court and his petition for certiorari with the Alabama Supreme Court, Kelley argued that he had not been sentenced for his conviction for sexual torture. Kelley also ignores the fact that the Alabama Supreme Court held that he had not been sentenced for this conviction in 2010. Generally, "[a] defendant cannot invite error by his conduct and then later profit from the error." Butler v. State, 781 So. 2d 994, 1006 (Ala. Crim. App. 2000).

Nonetheless, a party cannot waive a jurisdictional defect. Here, Kelley had been convicted of sexual torture. The circuit court was obliged to enter a judgment of conviction for that crime. Rule 26.2(b)(1), Ala. R. Crim. P., states: "Upon a determination of guilt on any charge, or on any count of any charge, judgment pertaining to that count or to that charge shall be pronounced and entered together with the sentence." (Emphasis added.) Kelley is due no relief on this claim.

C.

Kelley next argues that having two different judges

sentence him for counts in the same indictment violated his constitutional rights. Specifically, Kelley argues in brief:

"In this case, Judge [James] Hill sentenced Kelley to death, but has since retired. Thus, a new judge presided over the sentencing on the sexual torture count. Because the sexual torture count was the new sentencing judge's only opportunity to impose a sentence in this case, there was an incentive for the judge to impose a harsh sentence as to that count, lest the judge be seen as taking a very serious case lightly. That incentive would not have existed if the prosecution had requested full sentencing in 2010."

(Kelley's brief at p. 28-29.)

However, Kelley has no constitutional right to have his conviction and sentence entered and pronounced by the same judge. As this Court has stated:

"In Jacobs v. State, 465 So. 2d 466 (Ala. Cr. App. 1984), this court addressed this issue and stated:

"'The ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 5.1 (1st ed.) suggests that it is the better practice for the trial judge who presided at defendant's trial to impose sentence on that defendant. However, § 5.1 also states that there will be times when it will be impossible for the judge who presided at the trial to impose sentence and another judge will necessarily have to act and impose sentence. In those instances, the judge who will impose the sentence should fully acquaint himself with all of the aspects of the defendant's case. See also Rule 25(b) Fed. Rules Crim. Proc. 18 U.S.C.A.'"

"Generally, "it is not error for a judge other than the one who tried the accused to pronounce judgment and sentence." Annot., 83 A.L.R.2d 1032 (1962);

Hill v. State, 455 So. 2d 930, 935 (Ala. Cr. App.),
aff'd, 455 So. 2d 938 (Ala. 1984); Duren v. State,
507 So. 2d 111, 116 (Ala. Cr. App. 1986), aff'd, 507
So. 2d 121 (Ala. 1987)."

Dover v. State, 570 So. 2d 784, 787-88 (Ala. Crim. App. 1990).
See also Callahan v. State, 644 So. 2d 1329, 1331 (Ala. Crim.
App. 1994). Kelley is due no relief on this claim.

D.

Kelley next argues that the circuit court had no jurisdiction to sentence him for his conviction for sexual torture because, he says, his case was pending before the United States Supreme Court on certiorari review.

As the State correctly asserts in brief, Kelley's sexual torture case was not pending before the United States Supreme Court. The Alabama Supreme Court held that that conviction was not ripe for appellate review because Kelley had not been sentenced. Indeed, the Supreme Court specifically chose to not apply the holding in United States v. Wilson, 440 F.2d 1103 (5th Cir. 1971), i.e., that there was no final judgment when sentence had been pronounced on several but not all of the counts in an indictment. Also, the Supreme Court upheld Kelley's convictions for capital-murder. The Supreme Court's opinion clearly reflects that it treated the sexual torture conviction as a separate appeal and a separate case. Thus, the circuit court had jurisdiction to sentence Kelley on his conviction for sexual torture as that case was not pending before the United States Supreme Court. (The United States Supreme Court denied certiorari review on Kelley's capital-murder convictions on January 22, 2018.)

Moreover, in Alabama, Rule 41, Ala. R. App. P., provides that a case is final when a certificate of judgment is issued for that case. When a certificate of judgment is issued by an appellate court jurisdiction is returned to the lower court for resolution of issues for which the case had been reversed. See Taylor v. State, 741 So. 2d 458, 461 (Ala. Crim. App. 1999). This Rule further provides that issuance of the certificate is stayed pending application for rehearing in this Court and pending application for a petition for a writ of certiorari in the Alabama Supreme Court. However, this

Rule does not provide that the certificate is stayed pending resolution of a petition for a writ of certiorari filed in the United States Supreme Court. Kelley is due no relief on this claim.

E.

Kelley next argues that the cumulative effect of the errors that pervaded his sentence requires that his conviction for sexual torture be set aside.

"'The correct rule is that, while, under the facts of a particular case, no single error among multiple errors may be sufficiently prejudicial to require reversal under Rule 45, if the accumulated errors have "probably injuriously affected substantial rights of the parties," then the cumulative effect of the errors may require reversal.' Id. (citing Rule 45, Ala. R. App. P.; Ex parte Tomlin, 540 So. 2d 668, 672 (Ala. 1988); Blue v. State, 246 Ala. 73, 80, 19 So. 2d 11, 16-17 (1944); Jetton v. State, 435 So. 2d 167 (Ala. Crim. App. 1983); McGriff v. State, 908 So. 2d 961, 989 (Ala. Crim. App. 2000); United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990); and United States v. Canales, 744 F.2d 413, 430 (5th Cir. 1984) (parenthetical quotes omitted))."

Ex parte Bryant, 951 So. 2d 724, 731 (Ala. 2002). We likewise find no error that affected Kelley's substantial rights in this case under the standard set out in Ex parte Bryant. Kelley is due no relief on this claim.

III.

Kelley next argues that the State did not present sufficient evidence to support his conviction for sexual torture. The record shows that Kelley filed a motion for a judgment of acquittal in which he made the arguments that he now makes on appeal. (C. 10-18.) The circuit court denied the motion. (C. 36.)

Sexual torture is defined in § 13A-6-65.1(a), Ala. Code 1975. This section provides:

"(a) A person commits the crime of sexual torture:

"(1) By penetrating the vagina or anus or mouth of another person with an inanimate object by forcible compulsion with the intent to sexually torture or to sexually abuse."

Count III of the indictment charged that Kelley

"[d]id, with the intent to sexually torture or sexually abuse Emily Milling, penetrate the vagina or anus or mouth of Emily Milling with an inanimate object, to-wit: a toilet plunger, by forcible compulsion...."

(Direct appeal record, C. 62.) On appeal, Kelley argues that there was no evidence that he used a toilet plunger on Milling nor was there any evidence that Milling was conscious at the time that any act of violence was perpetrated against her.

"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution. Faircloth v. State, 471 So. 2d 485 (Ala. Cr. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985).' Powe v. State, 597 So. 2d 721, 724 (Ala. 1991). It is not the function of this Court to decide whether the evidence is believable beyond a reasonable doubt, Pennington v. State, 421 So. 2d 1361 (Ala. Cr. App. 1982); rather, the function of this Court is to determine whether there is legal evidence from which a rational finder of fact could have, by fair inference, found the defendant guilty beyond a reasonable doubt. Davis v. State, 598 So. 2d 1054 (Ala. Cr. App. 1992). Thus, '[t]he role of appellate courts is not to say what the facts are. [Their role] is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978) (emphasis original)."

Ex parte Woodall, 730 So. 2d 652, 658 (Ala. 1998).

"[T]he evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Cr. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Cr. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr. App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State. A verdict of conviction will not be set aside on the ground of insufficiency of the evidence unless, allowing all reasonable presumptions for its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince this court that it was wrong and unjust. Duncan v. State, 436 So. 2d 883 (Ala. Cr. App. 1983), cert. denied, 464 U.S. 1047, 104 S.Ct. 720, 79 L.Ed.2d 182 (1984); Johnson v. State, 378 So. 2d 1164 (Ala. Cr. App.), cert. quashed, 378 So. 2d 1173 (Ala. 1979)."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993).

"Whenever the sufficiency of evidence is in question, the evidence must be reviewed in the light most favorable to the State. Any conflicting evidence presents a jury question that is not subject to review on appeal so long as the State's evidence establishes a prima facie case, an appellate court must accept as true the evidence introduced by the State, accord the State all legitimate inferences from that evidence, and consider the evidence in the light most favorable to the State. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979)."

Carden v. State, 621 So. 2d 342, 347 (Ala. Crim. App. 1992).

"Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' White v. State, 294 Ala. 265, 272, 314 So. 2d 857, cert. denied, 423 U.S. 951, 96 S.Ct. 373, 46 L.Ed.2d 288 (1975). 'Circumstantial evidence is in no way considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' Cochran v. State, 500 So. 2d 1161, 1177 (Ala. Cr. App. 1984), affirmed in pertinent part, reversed in part on other grounds, Ex parte Cochran, 500 So. 2d 1179 (Ala. 1985)."

White v. State, 546 So. 2d 1014, 1017 (Ala. Crim. App. 1989).

"[I]ntent is a question for the jury.... 'Intent, ... being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.' Pumphrey v. State, 156 Ala. 103, 47 So. 156, 157 (1908)."

McCord v. State, 501 So. 2d 520, 528-29 (Ala. Crim. App. 1986).

The evidence showed that Milling had extensive bruising on her body and had injuries to her vagina and anus that the coroner testified were consistent with having been made by a toilet plunger. The coroner also testified that Milling was alive when she sustained her injuries. A trash bag that Kelley threw away contained a toilet plunger and Milling's possessions. Blood on the plunger matched Milling's blood. Also, "[t]he condition of the body showed that the victim was not a willing participant to the events that ultimately led to her death. There was 'sufficient evidence to permit the question of "forcible compulsion" to be submitted to the jury.'" Turner v. State, 924 So. 2d 737, 779 (Ala. Crim. App. 2002). Clearly, there was sufficient evidence to present the case to the jury for its consideration. There is no reason to disturb that verdict. Kelley is due no relief on this claim.

IV.

Last, Kelley also makes the following arguments in his brief by referencing arguments that were made in Kelley's original brief to this Court that was filed in Kelley I, (CR-10-0642):

"Claim I: The trial court admitted evidence obtained during an unconstitutional search of Kelley's home (pp. 14-30);

"Claim II: The prosecution cross-examined and commented on Kelley's post-arrest silence in violation of Doyle v. Ohio[, 426 U.S. 610 (1976)] (pp. 30-43);

"Claim IV: The trial court abdicated its judicial role and admitted unfairly prejudicial photographs and testimony regarding postmortem animal and insect activity (pp. 55-63);

"Claim V: The trial court erred in admitting testimony that Kelley was 'included as a possible donor' to a DNA sample without population-frequency statistics (pp. 64-71);

"Claim VI: The record raises an inference that the prosecution engaged in racial discrimination in jury

selection, and Kelley is entitled to a remand for a Batson [v. Kentucky, 476 U.S. 79 (1986)] hearing (pp. 72-82);

"Claim XI: The cumulative effect of all the above-explained errors entitles Kelley to a new trial (pp. 99-100)."

(Kelley's brief at pp. 44-45.)

First, this argument in Kelley's brief fails to comply with the briefing requirements of Rule 28(a)(10), Ala. R. App. P. Rule 28(a)(10) states, in part, that the brief shall contain:

"An argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on."

"Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011). Thus, Kelley has waived these issues.

Second, when the Alabama Supreme Court reversed part of Kelley's appeal that court stated:

"The Court of Criminal Appeals lacked jurisdiction to review Kelley's sexual-torture conviction. However, Kelley's argument that lack of jurisdiction rendered the entirety of the Court of Criminal Appeals' opinion merely advisory is unpersuasive. Accordingly, we reverse the Court of Criminal Appeals' judgment insofar as it affirms Kelley's sexual-torture conviction...."

Kelley II, ___ So. 3d at ___.

In Kelley's appeal from his capital-murder convictions, this Court specifically addressed all of the issues now raised by Kelley above. The capital-murder cases and the sexual torture case were tried together. Thus, this Court's

consideration and resolution of the issues raised in Kelley's original brief are the law of the case.

"[U]nder the "law of the case" doctrine, whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case.' Walden v. ES Capital, LLC, 89 So. 3d 90, 107 (Ala. 2011) (internal citations and quotations omitted). 'The law-of-the-case doctrine provides that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the same case, thereby hastening an end to litigation by foreclosing the possibility of repeatedly litigating an issue already decided.' Id. (internal citations and quotations omitted)."

Clemons v. State, 123 So. 3d 1, 6 (Ala. Crim. App. 2012). Cf. Ex parte Williams, 838 So. 2d 1028, 1031 (Ala. 2002) ("Because obiter dictum is, by definition, not essential to the judgment of the court which states the dictum, it is not the law of the case established by that judgment.") "In the words of Justice Holmes, the doctrine of the law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided...." Messinger v. Anderson, 225 U.S. 426, 444 (1912).'" Bagley ex rel. Bagley v. Creekside Motors, Inc., 913 So. 2d 441, 445 (Ala. 2005). Thus, we will not reconsider those issues again in this appeal.

For the forgoing reasons, we affirm Kelley's conviction for sexual torture and his sentence to life imprisonment.

AFFIRMED.

Windom, P.J., and Kellum, Burke, and Joiner, JJ., concur.

APPENDIX D

**IN THE CIRCUIT COURT OF ST. CLAIR COUNTY, ALABAMA
PELL CITY DIVISION**

STATE OF ALABAMA)	
)	
V.)	Case No.: CC-2009-000073.00
)	
KELLEY MICHAEL BRANDON)	
Defendant.)	

ORDER

This case came before the Court on this date upon the Motion to Dismiss Sexual Torture Count and Motion for Judgment of Acquittal. The Honorable Mark Loudon-Brown and the Honorable Patrick Mulvaney appeared for the Defendant. The Honorable Richard Minor and the Honorable Carol Boone appeared for the State of Alabama. Upon consideration of the said motions and arguments of counsel, it is **ORDERED, ADJUDGED** and **DECREED** that the said motions are due to be, and are hereby, **DENIED**.

DONE this 3rd day of August, 2017.

/s/ BILLY R. WEATHINGTON JR.
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I certify that on November 20, 2018, I served a copy of the attached petition for writ of certiorari on the State of Alabama by sending the petition by e-mail and by first-class mail, addressed as follows:

Stephen Frisby
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/s/ Mark Loudon-Brown
Mark Loudon-Brown