Exhibit A

2017 WL 1534453
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Dontae CALLEN
v.
STATE of Alabama

CR–13–0099
|
April 28, 2017

Synopsis

Background: Defendant was convicted in the Circuit Court, Jefferson County, No. CC–11–2047, of three counts of capital murder and was sentenced to death. Defendant appealed.

Holdings: The Court of Criminal Appeals, Welch, J., held that:

[1] defendant was not entitled to youthful offender treatment;

[2] defendant failed to establish that he was intellectually disabled and thus ineligible to be sentenced to death;

[3] defendant asserting an intellectual disability was not entitled to have counsel present at his mental examination;

[4] defendant's confession following prior invocation of his right to counsel was voluntary;

[5] search warrants were supported by probable cause;

[6] defendant failed to establish error in jury selection;

[7] trial court did not commit error in its evidentiary rulings;

[8] jury was properly instructed on the applicable law;

[9] trial court's imposition of death penalty following jury's finding of aggravating circumstances did not violate defendant's right to trial by jury; and

[10] remand was required due to trial court's failure to make specific findings of fact concerning all aggravating circumstances found by jury.

Affirmed in part and remanded with directions in part.

Appeal from Jefferson Circuit Court (CC–11–2047)

Opinion

WELCH, Judge.

***1** The appellant, Dontae Callen, [1] was convicted of murdering Bernice Kelly, Quortes Kelly, and 12–year-old Aaliyah Budgess during the course of an arson; of committing the murders by one act or pursuant to one scheme or course of conduct; and of murdering a child under the age of 14; all offenses defined as capital by §§ 13A–5–40(a)(9), (a)(10), and (a)(15), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Callen be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Callen to death. This appeal followed.

The State's evidence tended to show that around 4:00 a.m. on the morning of October 29, 2010, emergency personnel were dispatched to Bernice Kelly's apartment in response to a 911–emergency telephone call that there was a fire in her apartment. Lt. Warren Calvert, a member of the Birmingham Fire Department, testified that his unit was the first on the scene and that he observed smoke coming from one of the apartments on the lower level. He went to the apartment, he said, and tried to open the front door, but it was blocked. (R. 442.) Lt. Calvert said that he pulled an unconscious woman's body from behind the door and was then able to enter and search the apartment because, he said, people were yelling that more people were in the apartment. He found another body, a young female, in the bathroom, and he took her out of the apartment. At that time, Lt. Calvert said, another firefighter yelled at him to stop because he was covered in blood. He further testified that a third body, a male, was also recovered from the apartment. After they discovered that the victims were covered in blood, Lt. Calvert said, they called the police department. Lt. Fitzgerald Mosely, a fire investigator with the City of Birmingham, testified that he investigated the fire, that the fire was not accidental, and that it had

multiple points of origin. He further testified that when the firemen arrived Bernice's body was on fire and they had to extinguish that fire to remove her body. Bernice was still alive and was taken to a local hospital where she died later that day.

Dr. Gary Simmons, a forensic pathologist with the Jefferson County Coroner's Office, testified that Bernice Kelly had been stabbed 18 times in her upper body and died of multiple sharp-force trauma; Quortes Kelly had been stabbed 33 times in his upper body and died of multiple sharp-force trauma; and Aaliyah Budgess had been stabbed 25 times to her neck and head and died of multiple sharp-force trauma. None of the three victims had carbon monoxide in their lungs.

Lisa Brown—Bernice's daughter and Quortes's sister—testified that Bernice was Callen's great aunt and that Quortes and Aaliyah were Callen's cousins. Brown said that Aaliyah lived with Bernice so that she could go to a private school in the area and that Quortes also lived with Bernice. Faye Budgess, Bernice's sister, testified that on the evening of October 28, 2010, she was with Quortes, Callen, and Aaliyah at a neighbor's house watching television. She said that Quortes, Callen, and Aaliyah left at about 10:00 p.m. to return to Bernice's apartment. Budgess said that Callen had lived with Bernice until several months before the murders.

***2** Det. Warren Cotton, an investigator with the Birmingham Police Department, testified that he investigated the triple homicide and first came into contact with Callen at the hospital. Callen was nervous, Det. Cotton said, and had cuts on his body and a red substance in one of his ears. Det. Cotton requested that Callen be transported to the police station. At the police station, Det. Cotton said, Callen confessed that he stabbed all three victims, that he lit some clothes on fire with a lighter, and that when the fire started "getting big" he left the apartment through the back door. He said that Quortes was in a bedroom, his Aunt Bernice was near the front door, and Aaliyah was by the bathroom. Callen said that he threw the knife away down the street from the apartment.

Officer Roxanne Murry, an evidence technician with the Birmingham Police Department, testified that she collected various items from the scene and near the scene of the triple homicide. Officer Murry said that in a sewer about one block from the triple homicide she collected two knives, a sandal, red-soaked clothes, and red-stained mittens.

Nathan Rhea, a forensic scientist with the Alabama Department of Forensic Sciences, testified that he performed DNA testing on the red substance collected from one of Callen's ears and the items collected from the scene of the crime and from Callen's residence. Rhea testified that the substance in Callen's ear was blood and that it contained a mixture of Quortes's blood and Callen's blood. Rhea further testified that each of the three victims could have contributed to the blood discovered on one of the knives recovered in a sewer near the crime scene. Also, clothes taken from Callen's residence contained blood that matched Quortes's blood.

In his defense, Callen presented the testimony of Beatrice Brown, Callen's grandmother. Brown testified that several months before the triple homicide Bernice told her that she could no longer financially support Callen and Callen moved in with her, her daughter, and her daughter's children. Brown also testified that Quortes often drank and had not worked in several years before his death.

The jury convicted Callen of the three counts charged in the indictment. A separate sentencing hearing was held and the jury recommended, by a vote of 11 to 1, that Callen be sentenced to death. A presentence report was prepared, and a separate sentencing hearing was held before the circuit court. After weighing the aggravating circumstances and the mitigating circumstances, the circuit court followed the jury's recommendation and sentenced Callen to death. This appeal, which is automatic in a case involving the death penalty, followed. See § 13A–5–53, Ala. Code 1975.

Standard of Review

Because Callen has been sentenced to death, this Court must review the record for any "plain error." Rule 45A, Ala. R. App. P., provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review,

> whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

[1] **[2]** In discussing this standard of review, this Court in Hall v. State, 820 So.2d 113 (Ala. Crim. App. 1999), stated:

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See Ex parte Price, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); Burgess v. State, 723 So.2d 742 (Ala. Cr. App. 1997), aff'd, 723 So.2d 770 (Ala. 1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); Johnson v. State, 620 So.2d 679, 701 (Ala. Cr. App. 1992), rev'd on other grounds, 620 So.2d 709 (Ala. 1993), on remand, 620 So.2d 714 (Ala. Cr. App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

***3** 820 So.2d at 121–22. "We confine the operation of the plain-error rule to those cases where the error 'has or probably has adversely affected the substantial rights of the appellant.' ... We use it 'sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " Ex parte Hodges, 856 So.2d 936, 948 (Ala. 2003).

With these principles in mind, we review the issues raised by Callen.

Guilt–Phase Issues

I.

[3] Callen argues that the circuit court erred in denying his application for youthful offender ("YO") treatment. In a two-paragraph argument in his brief, Callen asserts that his background strongly supported the granting of the application and that the circuit court erred in not giving a reason for denying his request for YO treatment.

At the time of the murders, Callen was 18 years and 2 months old. The numerous Department of Human Resources ("DHR") documents contained in the record show that Callen had been neglected by his mother and father, that he frequently changed residences, and that he had no stable home environment.

The record shows that Callen moved that he be granted YO treatment. The circuit court issued an order referring the case to the county probation office so that an investigation could be made into Callen's background. (C. 34.) A hearing was held on the application. (2 Supple. R. 6–13.) At that hearing the circuit court indicated that she was in possession of a report on Callen's background. At the conclusion of the hearing, the circuit court denied Callen's application. (2 Supple. R. 13.) In the order denying the application, the circuit court stated: "After considering the report filed by the Alabama Department of Probation and Paroles, argument by counsel, comments from the victims' family, and letter sent on behalf of the defendant, Youthful Offender [status] is denied." (C. 35.)

[4] **[5]** **[6]** "The trial court has almost absolute discretion in ruling on applications for youthful offender status, and the actions of the trial judge are presumptively correct in the absence of a showing to the contrary." Carden v. State, 621 So.2d 342, 345 (Ala. Crim. App. 1992). "All that is required is that the trial court undertake an examination of the defendant sufficient to enable it to make an intelligent determination as to whether, in its discretion, the defendant is eligible for treatment as a youthful offender." Hyde v. State, 778 So.2d 199, 225 (Ala. Crim. App. 1998). "[T]he trial judge is not required to state his reason for denying youthful offender status." Garrett v. State, 440 So.2d 1151, 1152–53 (Ala. Crim. App. 1983).

> "Gamble has failed to show that the trial court abused its discretion in denying his application for youthful offender treatment. As we stated in Miller v. State, 650 So.2d 940 (Ala. Cr. App. 1993), rev'd on other grounds, 650 So.2d 947 (Ala. 1994), ' "the nature of the fact situation on which the charge is based may be a sufficient reason for denying youthful offender status."

' 650 So.2d at 945, quoting Ex parte Farrell, 591 So.2d 444, 449 (Ala. 1991) (emphasis in Farrell). 'Moreover, where the record does not support the contention that youthful offender status was denied solely on the basis of the crime charged, this court will not reverse the trial court's decision to deny youthful offender status.' Miller, 650 So.2d at 945. There is nothing in the record to support Gamble's contention that he was improperly denied youthful offender treatment solely on the basis of the crime he was charged with, and there is nothing in the record to indicate that the trial court's decision was arbitrary or was an abuse of discretion. Thus, we find no error here."

***4** Gamble v. State, 791 So.2d 409, 419–20 (Ala. Crim. App. 2000).

Here, the record shows that the circuit court conducted an investigation and chose not to grant Callen's application for YO treatment. Nothing in the record suggests that the application was denied solely on the basis of the crimes charged. The circuit court did not abuse its considerable discretion in denying Callen's application for YO treatment, and Callen is due no relief on this claim.

II.

Callen next argues that the circuit court erred in declining to find that his intellectual disabilities rendered him ineligible to be sentenced to death pursuant to the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Specifically, Callen argues that the United States Supreme Court's holding in Hall v. Florida, 572 U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), requires courts to use the standard error of measurement ("SEM") when considering an IQ score, and, he says, the circuit court failed to consider the SEM in assessing his IQ.

The record reflects that in April 2013 the circuit court ordered that Callen be evaluated to determine his competency to stand trial and his mental state at the time of the offense. (C. 56–58.) The circuit court also ordered that Callen be evaluated to determine "the presence of mental retardation for potential Atkins hearing." (C. 79–81.) In accordance with Atkins, the circuit court ordered that a hearing be held. (C. 86; R. 18–143.) After the hearing, the circuit court issued an order finding that Callen was not intellectually disabled[2] as that term had been defined by the Alabama Supreme Court in Ex parte Perkins, 851 So.2d 453 (Ala. 2002).

[7] In Ex parte Perkins, the Alabama Supreme Court adopted the most liberal definition of intellectual disability as defined by those states that had enacted legislation prohibiting the execution of an intellectually disabled defendant. To meet the definition of intellectual disability under Perkins, the defendant must: (1) have significantly subaverage intellectual functioning (an IQ of 70 or below); (2) have significant defects in adaptive behavior; and (3) those two factors must have manifested themselves before the defendant attained the age of 18.

In Smith v. State, [Ms. 1060427, May 25, 2007] —— So.3d —— (Ala. 2007), the Supreme Court further addressed its holding in Ex parte Perkins:

"In Ex parte Perkins, [851 So.2d 453 (Ala. 2002),] we concluded that the 'broadest' definition of mental retardation consists of the following three factors: (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18). 851 So.2d at 456. All three factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim. Implicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18. This conclusion finds support in examining the facts we found relevant in Ex parte Perkins and Ex parte Smith[, [Ms. 1010267, March 14, 2003] —— So.3d —— (Ala. 2003),] and finds further support in the Atkins decision itself, in which the United States Supreme Court noted: 'The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning." ' 536 U.S. at 308 n. 3, 122 S.Ct. 2242 (second emphasis added). Therefore, in 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."

***5** —— So.3d at ——.

[8] **[9]** Moreover, the defendant bears the burden in proving an Atkins claim.

> "In the context of an Atkins [v. Virginia, 536 U.S. 304 (2002),] claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty. See Morrow v. State, 928 So.2d 315, 323 (Ala. Crim. App. 2004); see also Holladay v. Campbell, 463 F.Supp.2d 1324, 1341 n. 21 (N. D. Ala. 2006) (interpreting Alabama law to require that the defendant prove mental retardation by a preponderance of the evidence)." [3]

Smith v. State, [Ms. 1060427, May 25, 2007] —— So.3d ——, —— (Ala. 2007). [4] Black's Law Dictionary defines "preponderance of the evidence" as:

> "The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Black's Law Dictionary 1373 (10th ed. 2014).

[10] At the Atkins hearing, Callen presented the testimony of Dr. Ron Meredith, a licensed psychologist. Dr. Meredith testified that he evaluated Callen, that he spent more than 10 hours with Callen, that he obtained a mental-health history, that his partner, Dr. Barry Adams, administered the Wechsler Adult Intelligence Scale IV ("WAIS IV") test to Callen, that Dr. Adams administered the Adapted Behavioral Assessment System II test to Callen, and that he reviewed various records from Callen's history. Dr. Meredith testified

***6** "The results were a verbal comprehension index of 70, which places him—places Mr. Callen below ninety-eight percent of the standardization population, and places him in a mild range of mental retardation, or the extremely low range.

"He performed seventy-five on the full scale IQ, which placed him at the fifth percentile. So, he scored lower than 95 percent of the population.

"But when you interpret that particular score, you have to also look at the standard error of measurement. Because these tests are not in any way without error, and the standard error of measurement in this case was 2.12 points. So, probably he scored about 73 on the full scale.

"Now, in the development of the Wechsler Adult Intelligence Scale IV, they have come out with a new measure of general ability. And that measure takes out two confounding facts. One is immediate memory, and the other one is perceptual reasoning or perceptual speed.

"When you take those two scores out he scored a 73 with a standard error of measurement of 2.6, which would have resulted in a score 70.4 points, which places him right on the cusp of borderline intelligence and the extremely low range of intellectual functioning."

(R. 2128–29.) In relation to the adaptive-functioning prong of the Perkins inquiry, Dr. Meredith testified that he examined Callen's school records and that an adaptive test had been performed on Callen. It was his opinion that Callen met all the "requirements of Atkins" and that he is intellectually disabled. (R. 69–70.)

Gilbert Robbins, a mental-health counselor, testified that he performed psychological tests on Callen when Callen was 16 years old and determined that Callen's full-scale IQ was 69. He also testified that based on the margin of error, Callen's IQ could be anywhere between 65 to 75. On cross-examination of Robbins, the following occurred:

"[Prosecutor]: Can you tell us about, as far as a diagnoses would be, where would mental retardation fall into? Was that an Axis II diagnosis?

"[Robbins]: Yes.

"[Prosecutor]: All right. And in this case, instead of making that diagnosis, you listed it as something that would have to be ruled out. You didn't diagnose it.

Instead you wrote: Rule out borderline intellectual functioning and mild mental retardation?

"[Robbins]: If I could, we can back up. The actual—what I put on Axis II to diagnosis deferred.

"[Prosecutor]: Okay.

"[Robbins]: Which means I was leaving it up to another mental health professional to come up with Axis II diagnosis. There wasn't enough evidence to support a diagnosis of any kind.

"[Prosecutor]: So, for that—I'm sorry. I'm interrupting you.

"[Robbins]: The rule-outs were: Borderline intellectual functioning, mild mental retardation, which basically there was some evidence to suggest, but, again, I couldn't be sure.

"[Prosecutor]: So, as far as mental retardation goes, you thought at that time that further testing would be required to say there was any mental retardation?

"[Robbins]: Further testing, as well as a review of additional records."

(R. 122–23.) The report completed by Gilbert Robbins stated in part: "Below average intelligence; however, he was also noted to have low motivation and appeared quite angry." (C. 1031.) Robbins testified that when taking the intelligence test Callen lacked motivation and enthusiasm, that he appeared to attempt his best, thus, the results were "offered with caution." (R. 121.)

***7** The record also reflects that, based on school records, Callen made mostly Cs and Ds, he attended school until the 11th grade; and he was expelled in the 11th grade for domestic violence. There are also numerous Department of Human Resources ("DHR") documents in the record. One document states: "[Callen] functions as a normal 16 year old and does not have any significant behavior problems, although his mother and father state that [Callen] does have behavioral issues." (C. 985; 987; 989.) DHR records also show that Callen frequently missed school because he "did not have the proper clothes." (C. 1001.) Another DHR document entitled "Placement Request" indicates that the individual completing the form checked that Callen was not "mentally retarded." (C. 1008.) DHR records also contain a psychological evaluation conducted on Callen when he was in the sixth grade. This evaluation showed that Callen was functioning at "about his grade level" and was in the low average range of intelligence. (C. 1025.) The clinical psychologist who conducted this evaluation did not conclude that Callen was intellectually disabled. (C. 1027.) A review of the transcript of Callen's statement to police reflects that Callen was at times articulate and appeared to fully comprehend his situation.

The circuit court found that Callen failed to prove the three prongs set out in Atkins and Perkins by a preponderance of the evidence and that Callen was eligible to receive the death penalty. (C. 92–94.) In its order, the circuit court stated:

"Dr. Ron Meredith, a Doctor of Psychology and Clinical Psychologist, who was qualified as an expert, testified that he spent at least 10 hours with [Callen] at the Jefferson County jail in preparation for the trial of this matter. His partner, Dr. Barry Adams, administered the Wechsler Adult Intelligence Scale IV test (also called the WAIS IV). [Callen's] results were a full scale IQ score of 75 and General Ability score of 73. Dr. Meredith testified that with Standard Error of Measurement and Full Scale IQ scores ranged from 71–80. These scores put [Callen] in the 'borderline' area of mental ability. Dr. Meredith further stated that taking those scores in connection with his testing of [Callen's] adaptive behavior and a thorough review of the defendant's school and DHR (Department of Human Resources) records in his opinion, Dontae Callen is mentally retarded.

"Mr. Jerome Robbins testified that at the age of 16 [Callen] was evaluated by him by request of the Alabama Department of Human Resources. (His results were reviewed and used by Dr. Meredith in arriving at his above mentioned opinion.) Mr. Robbins testified that his results showed [Callen] to have a Full Scale IQ of 69. However, Mr. Robbins on his report specified that his results were offered 'with caution.' In court, Mr. Robbins stated that he added 'with caution' because he wasn't confident with his test results due to [Callen's] attitude during the testing. Under cross-examination he testified that the results could have been higher had [Callen] been more interested.

"The three-pronged test for determining mental retardation in a criminal court as set out by Atkins[v.

Virginia, 536 U.S. 304 (2002),] and [Ex parte] Perkins[, 851 So.2d 453 (Ala. 2002),] is not such that only one of the prongs need to be proven. All of the prongs must be proven by a preponderance of the evidence. Since [Callen's] own expert scored [Callen's] Full Scale IQ as 75 this court finds that evidence fails to meet the burden of proof.

"Based on the above this court finds that the defense failed to prove by a preponderance of the evidence that [Callen] is mentally retarded. Therefore, [Callen] is eligible to proceed to trial on the capital murder charges and if convicted of that charge will face the possible punishment of either death or life imprisonment without the possibility of parole."

(C. 93–94.)

As stated above, Callen argues that the circuit court's ruling finding that Callen was not intellectually disabled violates the Supreme Court's holding in Hall v. Florida.[5] In discussing Hall, this Court in Reeves v. State, [Ms. CR–13–1504, June 10, 2016] —— So.3d —— (Ala. Crim. App. 2016), stated:

"[I]n Hall v. Florida, 572 U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), the United States Supreme Court recognized that IQ test scores, alone, are not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability because IQ testing has a margin of error or standard error of measurement ('SEM'). The Court held unconstitutional Florida's strict IQ score cutoff of 70 for establishing intellectual disability. The Florida Supreme Court had held that a person who attained an IQ score above 70 was, as a matter of law, not intellectually disabled and was prohibited from presenting any further evidence to support a claim of intellectual disability. See Hall v. State, 109 So.3d 704 (Fla. 2012), citing Cherry v. State, 959 So.2d 702, 712–13 (Fla. 2007). In holding this strict IQ score cutoff of 70 unconstitutional, the United States Supreme Court recognized that IQ test scores are 'imprecise' and have a ' "standard error of measurement" ' that 'is a statistical fact [and] a reflection of the inherent imprecision of the test itself.' Hall, 572 U.S. at ——, 134 S.Ct. at 1995. The Court noted that the SEM, which the Court recognized to be plus or minus five points on standard IQ tests, 'reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score,' Hall, 572 U.S. at ——, 134 S.Ct. at 1996, and that, therefore, IQ test scores are not 'final and conclusive evidence of a defendant's intellectual capacity,' and 'should be read not as a single fixed number but as a range.' Hall, 572 U.S. at ——, 134 S.Ct. at 1995.

***8** "Because of the inherent imprecision in IQ testing, the Court noted, '[f]or professionals to diagnose—and for the law then to determine—whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning.' Hall, 572 U.S. at ——, 134 S.Ct. at 1996. In other words, 'an individual with an IQ test score "between 70 and 75 or lower," Atkins, [536 U.S.] at 309 n. 5 [122 S.Ct. 2242 n. 5], may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning.' 572 U.S. at ——, 134 S.Ct. at 2000. The Court concluded that

" 'when 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.

" 'It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM–5 [Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition], at 37 ("[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.").'

"572 U.S. at ——, 134 S.Ct. at 2001. See also Brumfield v. Cain, ——U.S. ——, ——, 135 S.Ct. 2269, 2278, 192 L.Ed.2d 356 (2015) (holding that the petitioner was entitled to a hearing on his intellectual-disability claim because, when accounting for the SEM, his IQ score of 75 was 'squarely in the range of potential intellectual disability')."

—— So.3d at ——.

The Reeves court further held that the definition of intellectual disability adopted in Ex parte Perkins was consistent with the United States Supreme Court's decision in Hall v. Florida. This court stated:

"The Alabama Supreme Court's definition of intellectual disability adopted in Ex parte Perkins[, 851 So.2d 453 (Ala. 2002),] comports with both Atkins [v. Virginia, 536 U.S. 304 (2002),] and Hall [v. Florida, 572 U.S. ——, 134 S.Ct. 1986 (2014)]. Although the definition references an IQ score of 70, that referenced score is not a strict cutoff for intellectual disability, and Alabama does not preclude a court's consideration of the SEM when considering a person's IQ score. See Lane v. State, [Ms. CR–10–1343, April 29, 2016] —— So.3d —— (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court). Nor does Alabama preclude a person from presenting additional evidence regarding intellectual disability merely because that person attained an IQ score above 70. Indeed, this Court, subsequent to Ex parte Perkins, twice recognized that a person may be intellectually disabled even if that person attains an IQ score above 70 on a test, see Jackson v. State, 963 So.2d 150 (Ala. Crim. App. 2006) (holding that Rule 32 petitioner was intellectually disabled even though he achieved a score above 70 on one of four IQ tests he had taken), and Tarver v. State, 940 So.2d 312, 318 (Ala. Crim. App. 2004) (remanding for a hearing to determine intellectual disability where record indicated that Rule 32 petitioner had IQ scores of 76, 72, and 61), and we three times recognized the SEM in evaluating an Atkins claim. See Smith v. State, 112 So.3d 1108 (Ala. Crim. App. 2012); Byrd v. State, 78 So.3d 445 (Ala. Crim. App. 2009); and Brown v. State, 982 So.2d 565 (Ala. Crim. App. 2006). Additionally, in Ex parte Smith, [Ms. 1010267, March 14, 2003] —— So.3d ——, —— (Ala. 2003), the Alabama Supreme Court noted that an IQ score of 72 'seriously undermines any conclusion that [a person] suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions,' but it did not hold that an IQ score of 72 precludes a finding that a person suffers from significantly subaverage intellectual functioning or precludes a finding of intellectual disability. Both this Court's and the Alabama Supreme Court's post–Atkins opinions make clear that a court should look at all relevant evidence in assessing an intellectual-disability claim and that no one piece of evidence, such as an IQ test score, is conclusive as to intellectual disability."

***9** —— So.3d at ——. In rejecting the defendant's argument that the circuit court erred in not considering the SEM, the Reeves court stated:

"Nothing in the circuit court's order indicates that the court did not consider the SEM in evaluating Reeves's claim. Although the circuit court did not specifically mention the SEM in its order, it did state that it had considered all the evidence presented at the evidentiary hearing and that evidence included testimony about the SEM.

"We further reject Reeves's argument that the circuit court was required to find that he suffered from significantly subaverage intellectual functioning because, he says, all of his IQ scores fell within the range of significantly subaverage intellectual functioning when the SEM is considered one of his IQ scores was below 70 even without consideration of the SEM. As noted above, in Hall [v. Florida, 572 U.S. ——, 134 S.Ct. 1986 (2014)], the United States Supreme Court recognized that an IQ score, alone, is not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability. The Court explained that because of the imprecision in intelligence testing, an IQ score should be considered a range, not a fixed number. Subsequently, the United States Court of Appeals for the Fifth Circuit explained:

" 'The consideration of SEM as discussed by the Supreme Court, however, is not a one-way ratchet. The imprecision of IQ testing not only provides that IQ scores above 70 but within the SEM do not conclusively establish a lack of significantly subaverage general intellectual functioning, but also that IQ scores below 70 but within the SEM do not conclusively establish the opposite. In other words, a sentencing court may find a defendant to have failed to meet the first prong of the AAMR's [American Association of Mental Retardation] definition of intellectual disability even if his IQ score is below 70 so long as 70 is within the margin of error and other evidence presented provides sufficient evidence of his intellectual functioning.'

"Mays v. Stephens, 757 F.3d 211, 218 n. 17 (5th Cir. 2014)."

—— So.3d at ——. [6]

As stated in Reeves, nothing in the circuit court's order indicates that it failed to consider the standard error of measurement ("SEM"). In fact, the circuit court's order

specifically references the SEM that was discussed in Dr. Meredith's testimony. After considering the evidence presented at the Atkins hearing and the record, this Court agrees with the circuit court that Callen failed to meet his burden of proving by a preponderance of the evidence that he was ineligible to be sentenced to death because he is intellectually disabled. See State v. Dunn, 41 So.3d 454, 472–73 (La. 2010) ("After examining all available information, including the experts' conclusions, lay testimony, anecdotal evidence, and school and work records, it is clear defendant has not met his burden to show, by a preponderance of the evidence, that he is mentally retarded. ... In this instance, it is clear defendant suffers from low intellectual functioning, but, based upon all the evidence before us, we do not find defendant has met his burden to establish the trial court erred in finding he is not mentally retarded."). Callen is due no relief on this claim.

III.

***10** **[11]** Callen next argues that the circuit court erred in denying his motion to have an attorney present during his mental examination. Callen argues that the Atkins hearing is a critical stage of the proceedings against him and that he was entitled to the assistance of counsel. He relies on a decision of the United States Court of Appeals for the Tenth Circuit in Hooks v. Workman, 689 F.3d 1148 (10th Cir. 2012), to support his argument.

The record shows that the circuit court's Atkins order directing that Callen be evaluated by Dr. Glen King was issued on May 3, 2013. (C. 84.) Dr. King evaluated Callen on May 13, 2013. It was not until May 14, 2013, that Callen moved to have an attorney present during that mental evaluation. This motion was filed one day after Callen had been examined. The circuit court denied the motion but noted that it would have denied the motion even if it had been filed before Callen had been evaluated. (C. 88.)

First, the motion to have counsel present at the mental evaluation, filed after Callen had been evaluated by Dr. King, was untimely. Moreover, the case relied on by Callen, Hooks, involved the right to counsel at an Atkins proceeding. That court held: "[T]he right to effective assistance of counsel extends to jury-based Atkins proceedings of the kind employed in Oklahoma." 689 F.3d at 1183. It is unclear from that opinion whether the Tenth Circuit would extend the right to counsel to the actual mental examination before a mental-health expert, an examination that takes places before the Atkins trial.

The Tennessee Supreme Court in State v. Martin, 950 S.W.2d 20 (Tenn. 1997), discussed the problems in extending the right to counsel to a mental-health examination:

> "Both the United States and Tennessee Constitutions require the presence of counsel to represent a defendant not only at trial but also at 'critical stages' of the proceedings 'where counsel's absence might derogate from the accused's right to a fair trial.' The purpose underlying the right is to 'preserve the defendant's basic right to a fair trial as affected by his [or her] right meaningfully to cross examine the witnesses ... and to have effective assistance of counsel at the trial itself.' United States v. Wade, 388 U.S. 218, 226–27, 87 S.Ct. 1926, 1931–32, 18 L.Ed.2d 1149 (1967).
>
> "The defendant asserts that the court-ordered mental examination was a 'critical stage' of the proceedings requiring the presence of counsel under the United States and Tennessee Constitutions. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. The State maintains that the mental examination is not a 'critical stage' of the proceedings and moreover, that counsel's presence would impair or limit the effectiveness of the examination.
>
> "In Estelle v. Smith, [451 U.S. 454 [101 S.Ct. 1866, 68 L.Ed.2d 359] (1981)], the Supreme Court held that the Sixth Amendment right to counsel was violated when the defendant 'was denied the assistance of his attorneys in making the significant decision of whether to submit to the [psychiatric] examination and to what end the psychiatrist's findings could be employed.' Although the court said that the psychiatric interview 'proved to be a "critical stage" against' the defendant, its holding was limited to the question of whether the defendant was entitled to consult with counsel prior to the examination. The court did not find a Sixth Amendment right to have counsel at the examination and, in fact, noted with apparent approval the Court of Appeals' finding that 'an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.' 451 U.S. at 470–71, 101 S.Ct. at 1877, n. 14.

***11** "In later clarifying Estelle, the court stressed that 'for a defendant charged with a capital crime, the decision whether to submit to a psychiatric examination designed to determine his future dangerousness is "literally a life and death matter" which the defendant should not be required to face without "the guiding hand of counsel." ' Satterwhite v. Texas, 486 U.S. 249, 254, 108 S.Ct. 1792, 1796, 100 L.Ed.2d 284 (1988). Similarly, the court said that '[w]hile it may be unfair to the state to permit a defendant to use psychiatric testimony without allowing the state a means to rebut that testimony, it certainly is not unfair to the state to provide counsel with notice before examining a defendant concerning future dangerousness.' Powell v. Texas, 492 U.S. 680, 685, 109 S.Ct. 3146, 3150, 106 L.Ed.2d 551 (1989); see also State v. Bush, 942 S.W.2d 489 (Tenn. 1997).

"While the United States Supreme Court has not directly addressed the issue, a substantial majority of state and federal jurisdictions have held that a defendant does not have the right to counsel during a psychiatric examination. In United States v. Byers, [740 F.2d 1104 (D.C. Cir. 1984)], for instance, the court distinguished the need for counsel before an examination, as opposed to during the examination itself, by pointing out that before examination

> " '[the defendant] was confronted by the procedural system at the point at which he had to decide whether to raise the insanity defense, a determination that would have several legal consequences, including the likelihood of a court order that he undergo a psychiatric examination....
>
> " 'But at the psychiatric interview itself, [the defendant] was not confronted by the procedural system; he had no decisions in the nature of legal strategy or tactics to make—not even, as we have seen, the decision whether to refuse, on Fifth Amendment grounds, to answer the psychiatrist's questions. The only conceivable role for counsel at the examination would have been to observe....

"740 F.2d at 1118–1119.

"Similarly, numerous courts have considered the 'pragmatic' effect that counsel's presence, instead of rendering assistance, would impede or inhibit the examination. Moreover, a number of courts have stressed that the defendant's rights to a fair trial and to confrontation are sufficiently preserved by counsel's opportunity to interview the witnesses, review the results and information generated by the examination, conduct cross-examination of the psychiatric witnesses, and introduce defense witnesses. See, e.g., State v. Schackart, [175 Ariz. 494,] 858 P.2d [639] at 646–47 [(1993)].

"Accordingly, we agree with the courts which have distinguished the 'critical stage' prior to a psychiatric examination from the examination itself. We are convinced that the examination differs in purpose and procedure from other stages of the adversarial system, and that counsel's physical presence in a strictly passive, observational capacity, is not necessary to protect the defendant's related rights to a fair trial and to confront witnesses. In particular, the defendant has access to the information and results generated by the mental examination, as well as the right to interview, subpoena, and cross-examine the experts with regard to their methodology, opinions, and results.

"Thus, we conclude that the Sixth Amendment of the U.S. Constitution and article I, § 9 of the Tennessee Constitution do not require the presence of counsel during a court-ordered mental examination. It follows that the trial court's order, which did not specifically permit counsel to attend and monitor the mental examination, did not violate the defendant's right to counsel."

***12** State v. Martin, 950 S.W.2d 20, 25–27 (Tenn. 1997).

Since the United States Supreme Court release of Atkins, one federal court has declined to extend the right to counsel to the actual mental evaluation for the reasons set out by the Tennessee Supreme Court:

> "[T]he court finds compelling the Government's representation that, according to its experts, 'the presence of third parties during examinations can be disruptive and have adverse effects on the performance and outcome of the evaluation.' (Gov't Mem. at 32.) The Second Circuit and district courts in this Circuit have repeatedly denied requests by counsel to be present at mental examinations because of these precise effects. See, e.g., Hollis [v. Smith], 571 F.2d [685] at 692 [(2nd Cir. 1978)]('It is difficult to imagine anything more stultifying to a psychiatrist, as dependent as

he is upon the cooperation of his patient, than the presence of a lawyer objecting to the psychiatrist's questions and advising his client not to answer this question and that.'); United States v. Baird, 414 F.2d 700, 711 (2d Cir. 1969) ('[T]he presence of a third party, such as counsel ..., at [a mental] examination tends to destroy the effectiveness of the interview.'); Marsch v. Rensselaer Cty., 218 F.R.D. 367, 371 (N.D.N.Y. 2003) ('In federal court, [ ] the attendance of a subject's counsel or other observer is generally prohibited unless required by unusual circumstances.'); Equal Emp't Opportunity Comm'n v. Grief Bros. Corp., 218 F.R.D. 59, 63–64 (W.D.N.Y. 2003) ('[F]ederal law generally rejects requests that a party's attorney attend a [mental] examination.'); Baba–Ali v. City of N.Y., No. 92-CV-7957 (DAB)(THK), 1995 WL 753904, at *2 (S.D.N.Y. Dec. 19, 1995) ('The weight of authority is clearly against the presence of counsel at a [mental] examination.')."

United States v. Wilson, 920 F.Supp.2d 287, 305 (E.D.N.Y. 2012).

For the above reasons, we hold that the circuit court did not err in denying Callen's motion to have counsel present at his mental examination. Callen is due no relief on this claim.

IV.

[12] Callen next argues that the circuit court erred in allowing one of his statements to police to be introduced into evidence because, he argues, he did not voluntarily reinitiate contact with police. Specifically, he asserts that the admission of the statement violated the United States Supreme Court's ruling in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He further argues that his statement was not knowing and voluntary and that he was coerced by police misconduct to confess.

The record reflects that Callen moved to suppress his statements to police and argued that the statements were obtained by "illegal and unconstitutional means, by fraud, promises or inducements, without the benefit of counsel, resulting from illegal and improper promises, representations or threats." (R. 183.) A hearing was held on the motion. (2 Supple. 5–69.) The circuit court granted the motion, in part, and excluded Callen's first statement but allowed the second statement to be admitted into evidence. (C. 97.) The circuit court found that Callen had voluntarily initiated contact with police before he made his second statement; therefore, that statement was admissible.

***13** In Callen's second statement, he confessed that he stabbed all three victims, that he lit some clothes on fire with a lighter, and that when the fire started "getting big" he left the apartment through the back door. He said that Quortes was in a bedroom, his aunt was near the front door, and Aaliyah was by the bathroom. [7]

The record shows that sometime after 7:00 a.m. on the morning of October 29, 2010, police came into contact with Callen at the hospital where Bernice had been taken. Callen was nervous and had cuts on his body and a red substance in one of his ears. He was taken to police headquarters for questioning. At around 10:00 a.m. police took Callen's clothing and shoes for forensic testing and gave him clothing to wear. Police said that they had no slippers so they put a bag on the floor for Callen to put his feet on. At around 10:15 a.m., Callen was given his Miranda [8] warnings and signed a waiver-of-rights form. (2 Supple. C. 25.) Police stopped questioning Callen after he asked to talk to someone several times and then asked for an attorney. Callen was in handcuffs, one officer said, because they did not want him to destroy possible evidence. Callen was left alone in the interrogation room. When he was alone, Callen sang to himself and muttered "Shit" and "You killed three people." About 20 minutes later, Callen threw up and was taken to get water. He asked for an attorney, and one officer told Callen that he would get counsel when he had been processed. Sometime around 4:00 p.m., Callen was given a meal. As an officer was giving him the food, he said to Callen: "You're lucky we're feeding you and not putting your head down and chopping your head off." (2 Supple. 106–07.) After this statement Callen appeared unfazed and asked for a cigarette. One officer also told Callen that a triple homicide was a capital-murder offense and that he faced either life imprisonment without parole or death. At around 4:30 p.m. Callen was taken to be examined using an alternative light source to search for the presence of blood. When Callen was returned to the interrogation room, he asked to "speak to someone." At 5:05 p.m., Callen was given his Miranda warnings for the second time and signed a waiver-of-rights form. (2 Supple. C. 26.)

At the motion-to-suppress hearing, Det. Warren Cotton, a police officer with the Birmingham Police Department, testified that at the hospital he asked Callen for basic information and whether Callen had seen the victims before the fire. He said that Callen appeared to be very nervous and had cuts on his hand and that he contacted his office and told them that "we had a person of interest at the hospital" and that he "needed somebody to come and transport" him. Two detectives, he said, came to the hospital and transported Callen to the police station. (2 Supple. R. 16.) Det. Cotton said that he next saw Callen in an interview room. He testified:

"[Det. Cotton]: Before questioning we advised [Callen] that we needed to ask him some questions about this case. We advised him that it was the law that we had to advise him of his Constitutional rights.

"He was then read these [Miranda] rights. After I read it, I asked him to read the paragraph out loud to me that's towards the bottom of the Miranda waiver.

***14** "After he read that he was asked if he understood everything? He agreed, yes. I told him if he agreed that he understood everything and he wanted to answer questions from us that we would need his signature. He signed it, dated it and noted the time, also.

"[Prosecutor]: Did you threaten or coerce him to get him to waive his Miranda rights?

"[Det. Cotton]: No, sir, I didn't.

"[Prosecutor]: Did you say things would be easier or harder on him if [he] waived his Miranda rights?

"[Det. Cotton]: No, sir.

"[Prosecutor]: Did you offer him a reward or a hope of a reward if he would waive his Miranda rights?

"[Det. Cotton]: No, sir.

"[Prosecutor]: Did he signify a waiver of his Miranda rights both orally and by signing the Miranda waiver form?

"[Det. Cotton]: Yes, sir."

(2 Supple. R. 18–19.) Det. Cotton further testified that he noticed what appeared to be blood in one of Callen's ears and he asked if police could obtain a swab of that substance. He said that Callen refused and that police then obtained a search warrant to obtain that sample. (2 Supple. R. 23.) During his first statement, Det. Cotton said, Callen told police that he did not want to talk anymore. (2 Supple. R. 26.) Det. Cotton testified that they continued to question him because Callen did not specifically ask to talk to an attorney but that when he did specifically ask, they stopped questioning Callen.

"[Prosecutor]: All right. At the moment that y'all clarified that he was requesting a lawyer, did y'all quit asking him about this case?

"[Det. Cotton]: We did, yes, sir.

"[Prosecutor]: All right. After he asked for a lawyer, after y'all quit talking to him about this case, he still remained in the interview room, right?

"[Det. Cotton]: Yes.

"[Prosecutor]: Did y'all feed him?

"[Det. Cotton]: Yes, sir, we did.

"[Prosecutor]: All right. And did y'all execute the search warrant partially in the room and partially in other parts of the building?

"[Det. Cotton]: Yes, sir.

"[Prosecutor]: Can you describe when he leaves the room, especially the couple of times you come to talk to him and you say 'let's take a walk' or 'it's time to take a walk,' where did y'all go?

"[Det. Cotton]: When we got the search warrants certain aspects of a search warrant had to be executed in our evidence tech lab.

"At that time, during the interview, we were on the 5th floor. Our evidence tech lab is the floor below us on the 4th floor where they keep all of the equipment.

"When [Callen] was escorted out, he was escorted to the evidence tech lab. During that time we—or the technicians, they did an ALS–type test on him with the —

"[Prosecutor]: Let's go back, because ALS is kind of like FBI and CIA. You know what it means, but the record needs to be clear. What's ALS?

"[Det. Cotton]: Alternate Light Source is what it stands for. Basically what it does is it detects blood and other things.

"[Prosecutor]: Bodily fluids?"

(2 Supple. R. 26–28.)

Det. Cotton then testified as to what occurred after Callen had been taken for the alternate-light test and returned to the interrogation room:

"[Prosecutor]: Tell the Judge about what took place prior to the Miranda waiver?

"[Det. Cotton]: Prior to the Miranda waiver we initially conducted the alternate light source test down in our technician's lab.

"During that whole process [Callen] got real upset and began crying. Eventually we got through with the process of the testing and we went back up to the 5th floor to the interview room.

***15** "Once we brought him upstairs and sat him down in the interview room, he was still visibly upset, nervous. His voice was cracking and he was crying.

"He asked me a question. He asked me was he going to die? I told him that was not in my control. I don't make that decision. The only thing I do is collect evidence and present it to the [district attorney's] office and to the Court.

"From that point he stated that he wanted to talk to somebody. I said well just hold up now. Clarify who you want to talk to? I said, initially when my sergeant came in you instructed him that you didn't want to talk to anybody. That you wanted a lawyer?

"I said, now you're saying you want to talk to one of the detectives in the case? He stated yes. I said okay.

"I told him, I said, I can't initiate a conversation with you because you've asked for a lawyer.

"....

"When I advised him I told him that, you now, of course he had asked for a lawyer. I couldn't initiate conversation with him. The only way that we could talk to him is that he would have to initiate and approach us in stating that he wanted to talk and he wanted to waive his rights. He agreed that he wanted to talk to us.

"From that point, me and Investigator [Cynthia] Morrow, we went back into the interview room. I told him that we had to go through the format again. I had to read him his rights and advise him, which we advised him of his rights. I signed it. He read out loud the second paragraph. I asked him if he understood everything and he stated yes.

"I told him that if he wanted to talk to us and understood his rights, we needed him to sign this form, date it and time it, which he did."

(2 Supple. R. 30–33.)

[13] **[14]** **[15]** **[16]** In evaluating a circuit court's ruling admitting into evidence a defendant's statement to law enforcement, we apply the standard articulated by the Alabama Supreme Court in McLeod v. State, 718 So.2d 727 (Ala. 1998):

"For a confession, or an inculpatory statement, to be admissible, the State must prove by a preponderance of the evidence that it was voluntary. Ex parte Singleton, 465 So.2d 443, 445 (Ala. 1985). The initial determination is made by the trial court. Singleton, 465 So.2d at 445. The trial court's determination will not be disturbed unless it is contrary to the great weight of the evidence or is manifestly wrong. Marschke v. State, 450 So.2d 177 (Ala. Crim. App. 1984)....

"The Fifth Amendment to the Constitution of the United States provides in pertinent part: 'No person ... shall be compelled in any criminal case to be a witness against himself....' Similarly, § 6 of the Alabama Constitution of 1901 provides that 'in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself.' These constitutional guarantees ensure that no involuntary confession, or other inculpatory statement, is admissible to convict the accused of a criminal offense. Culombe v. Connecticut, 367 U.S. 568, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961); Hubbard v. State, 283 Ala. 183, 215 So.2d 261 (1968).

"It has long been held that a confession, or any inculpatory statement, is involuntary if it is either coerced through force or induced through an express or implied promise of leniency. Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897). In Culombe,

367 U.S. at 602, 81 S.Ct. at 1879, the Supreme Court of the United States explained that for a confession to be voluntary, the defendant must have the capacity to exercise his own free will in choosing to confess. If his capacity has been impaired, that is, 'if his will has been overborne' by coercion or inducement, then the confession is involuntary and cannot be admitted into evidence. Id. (emphasis added).

***16** "The Supreme Court has stated that when a court is determining whether a confession was given voluntarily it must consider the 'totality of the circumstances.' Boulden v. Holman, 394 U.S. 478, 480, 89 S.Ct. 1138, 1139–40, 22 L.Ed.2d 433 (1969); Greenwald v. Wisconsin, 390 U.S. 519, 521, 88 S.Ct. 1152, 1154, 20 L.Ed.2d 77 (1968); see Beecher v. Alabama, 389 U.S. 35, 38, 88 S.Ct. 189, 191, 19 L.Ed.2d 35 (1967). Alabama courts have also held that a court must consider the totality of the circumstances to determine if the defendant's will was overborne by coercion or inducement. See Ex parte Matthews, 601 So.2d 52, 54 (Ala.) (stating that a court must analyze a confession by looking at the totality of the circumstances), cert. denied, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992); Jackson v. State, 562 So.2d 1373, 1380 (Ala. Crim. App. 1990) (stating that, to admit a confession, a court must determine that the defendant's will was not overborne by pressures and circumstances swirling around him); Eakes v. State, 387 So.2d 855, 859 (Ala. Crim. App. 1978) (stating that the true test to be employed is 'whether the defendant's will was overborne at the time he confessed') (emphasis added)."

718 So.2d at 729 (footnote omitted).

[17] **[18]** **[19]** We agree with the circuit court that the first statement was lawfully suppressed because Callen made an equivocal request for counsel and police continued to question him without clarifying Callen's request. See Thompson v. State, 97 So.3d 800, 806–07 (Ala. Crim. App. 2011). However, when considering whether the second statement was admissible we look to the United States Supreme Court's decision in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981):

> "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

451 U.S. at 484–85, 101 S.Ct. 1880.

> "Subsequent to Edwards [v. Arizona, 451 U.S. 477 (1981),] a plurality of the Court in Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983), addressed what constituted, under Edwards, 'initiation' by the accused of conversation with law enforcement. Questions by the accused regarding 'the routine incidents of the custodial relationship,' for example, asking to use the bathroom or the telephone, are not valid initiations by the accused. 462 U.S. at 1045, 103 S.Ct. 2830. Instead, the accused must 'evince [ ] a willingness and a desire for a generalized discussion about the investigation.' 462 U.S. at 1045–46, 103 S.Ct. 2830."

Ex parte Williams, 31 So.3d 670, 676 (Ala. 2009).

> "The purpose of this rule is to protect an accused in police custody from ' "badger[ing]" or "overreaching"—explicit or subtle, deliberate or unintentional—[that] might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.' Smith v. Illinois, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984), quoting Oregon v. Bradshaw, 462 U.S. 1039, 1044, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983).
>
> " 'This "rigid" prophylactic rule, Fare v. Michael C., 442 U.S. 707, 719 [99 S.Ct. 2560, 61 L.Ed.2d 197] (1979), embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. See, e.g., Edwards v. Arizona, supra, 451 U.S. [477], at 484–485 [(1981)]

> (whether accused "expressed his desire" for, or "clearly asserted" his right to, the assistance of counsel); Miranda v. Arizona, 384 U.S. [436], at 444–445 [(1966)] (whether accused "indicate[d] in any manner and at any stage of the process that he wish[ed] to consult with an attorney before speaking"). Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked. Edwards v. Arizona, supra, 451 U.S. at 485, 486, n. 9.'
>
> "Smith v. Illinois, 469 U.S. at 95, 105 S.Ct. 490 ."

Eggers v. State, 914 So.2d 883, 899–900 (Ala. Crim. App. 2004).

[20] **[21]** "The facts that the appellant was handcuffed, was not given anything to eat or drink, and did not make a telephone call, while factors to consider in the totality of the circumstances, did not render the appellant's confession involuntary." Battle v. State, 645 So.2d 344, 345 (Ala. Crim. App. 1994). A statement is not rendered involuntary because police tell a defendant that he or she faces the death penalty if convicted. See Brooks v. State, 973 So.2d 380, 392 (Ala. Crim. App. 2007). " 'The fact that a defendant may suffer from a mental impairment or low intelligence will not, without other evidence, render a confession involuntary.' " Thompson v. State, 153 So.3d 84, 110 (Ala. Crim. App. 2012), quoting Baker v. State, 557 So.2d 851, 853 (Ala. Crim. App. 1990). "The Alabama courts have recognized that subnormal tendencies of the accused are but one factor to review in the totality of the circumstances surrounding the confession." Harkey v. State, 549 So.2d 631, 633 (Ala. Crim. App. 1989).

This Court has carefully examined the videotape of Callen's statements to police and the transcript of his statement to police. There is no evidence indicating that Callen was induced or threatened to confess. In fact, it appears that Callen confessed because of remorse for his actions. Callen was given water and was fed. Callen was handcuffed because police did not want him to wipe his hands and destroy possible evidence. Callen voluntarily reinitiated contact with police after initially requesting counsel and Callen's conduct showed a "willingness and a desire for a generalized discussion about the investigation." Ex parte Williams, 31 So.3d at 676.

For the foregoing reasons, the circuit court did not err in denying Callen's motion to suppress his confession; thus, Callen is due no relief on this claim.

V.

[22] Callen argues that the circuit court erred in allowing the jury to view a videotape of Callen's statement to police because, he says, the video showed him wearing prison clothes and handcuffs and was approximately 50 minutes in length. By allowing the jury to see him in handcuffs and a prison uniform, he says, the circuit court destroyed his presumption of innocence.

This issue is raised for the first time on appeal; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

> "This Court has recognized that there is a distinction between the jury's observing a defendant wearing handcuffs in the courtroom for his or her trial and the jury's observing the defendant wearing handcuffs in a videotape that is shown to the jury during trial. We have stated:
>
> > " ' " 'The presumption of innocence, although not articulated in the Constitution, is a basic component of our system of criminal justice.' United States v. Dawson, 563 F.2d 149, 151 (5th Cir. 1977) (citations omitted). A government entity violates that presumption of innocence when it compels an accused to stand trial before a jury while dressed in identifiable prison garb.' United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985)."
>
> ***18** " 'United States v. Pryor, 483 F.3d 309, 311 (5th Cir. 2007). However, we have not extended the violation of the presumption of innocence to the viewing of the defendant on a videotape while he is in handcuffs."

Shaw v. State, 207 So.3d 79, 97 (Ala. Crim. App. 2014).

More importantly, Callen did not object. In declining to find plain error when a defendant was tried while wearing prison clothing, the United States Court of Appeals for the Tenth Circuit stated:

> "This Court, in Hernandez v. Beto, 443 F.2d 634, 636–37 (5th Cir.), cert. denied, 404 U.S. 897, 92 S.Ct. 201, 30 L.Ed.2d 174 (1971), determined that trying a defendant in prison clothing infringes his fundamental right to the presumption of innocence. That right is only infringed, however, when a state compels an accused to stand trial before a jury while dressed in identifiable prison garb. Estelle v. Williams, 425 U.S. 501, 512, 96 S.Ct. 1691, 1696, 48 L.Ed.2d 126 (1976). If, for whatever reason, the defendant fails to object to his attire, the presence of compulsion necessary to establish a constitutional violation is negated. Id. at 512–13, 96 S.Ct. at 1696–97. Accordingly, a 'defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error.' Hernandez v. Beto, 443 F.2d at 637.
>
> "...In any event, the failure to object negates the presence of compulsion and, thus, there was no plain error. See also Gray v. Estelle, 538 F.2d 1190, 1190–91 (5th Cir. 1976)."

United States v. Birdsell, 775 F.2d 645, 652 (5th Cir. 1985).

As was the case in Birdsell, Callen's failure to object "negates the presence of compulsion and, thus, there was no plain error." 775 F.2d at 652. For the reasons stated above, we find no plain error in Callen's appearance in the video in handcuffs and prison clothes. Accordingly, Callen is due no relief on this claim.

VI.

Callen argues that the circuit court erred in denying his motion to suppress biological samples taken from Callen before 1:50 p.m. on the day that he was arrested. Specifically, he argues that the samples were taken without a valid search warrant.

Callen moved to suppress "all items seized and taken from [him] prior to 1:50 on October 29, 2010, while [he] was in custody at the Birmingham Police Department Administration building." (C. 555.) He argued that the warrant had been subsequently voided and that there was no probable cause to issue the warrant. The circuit court ruled that the officer's action in taking swabs from Callen was done in good faith and that the exception to the warrant requirement applied in this case. The court also found that probable cause existed for the issuance of the warrant.

The record shows that three warrants were issued by the same judge, Judge Teresa Pulliam, within hours on October 29, 2010. The first warrant to examine Callen's person and to obtain biological samples was issued at 11:50 p.m.; the second warrant to search Callen's house was issued at 12:25 p.m.; and the third warrant to obtain biological samples was issued at 1:50 p.m. It appears that the first warrant was destroyed and is not in the record. [9] However, the record shows that the affidavit in support of the third warrant was similar to the affidavit in support of the first warrant—the warrant at issue here.

***19** The second warrant to obtain biological samples contained the following information in an affidavit executed by Det. Cynthia Morrow:

> "On October 29, 2010, the Birmingham Fire Department responded to a call at the above listed location and upon arrival discovered the residence engulfed in flames and proceeded to extinguish the fire. After extinguishing the fire, firefighters discovered three bodies. Blood samples were collected from within the residence by Birmingham technicians. Two unknown individuals were pronounced dead and one female was transported to University Hospital, Birmingham, Alabama, where she later died. While interviewing Dontae Callen he stated that he was at the location several hours prior to the incident. Also while Detective Cotton was interviewing Dontae Callen he observed what appeared to be a red liquid substance inside of his ear. Detective Cotton noticed numerous puncture wounds and scratches on the right side of his neck."

(C. 583.) At the conclusion of this warrant, Judge Pulliam made the following handwritten notation:

> "Original search warrant was sworn to and issued to Det. [Cynthia] Morrow at 11:50 a.m. on this date. This search warrant was later voided as there was information contained there, that was later proven to be unreliable. This search warrant was subsequently issued based on same information stating probable cause as first, minus this information."

(C. 587.) It appears that the reason that Judge Pulliam stated that the first warrant was void was that it contained some information that had proven to be unreliable.

[23] **[24]** **[25]** **[26]** However, an entire warrant will not be invalidated merely because it contains some unreliable information. " 'Suppression is required only when it appears that "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause." ' " Villemez v. State, 555 So.2d 342, 345 (Ala. Crim. App. 1989).

> "Probable cause must be determined by an analysis of 'the totality of the circumstances.' Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In determining whether to issue a search warrant, the issuing magistrate is to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the person supplying the information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Illinois v. Gates; Hyde v. State, 534 So.2d 1132 (Ala. Cr. App. 1988). Our duty as a reviewing court is to ensure that the magistrate had a substantial basis for concluding that probable cause existed. Illinois v. Gates; McCray v. State, 501 So.2d 532 (Ala. Cr. App. 1986); Hyde v. State."

Marks v. State, 575 So.2d 611, 614–15 (Ala. Crim. App. 1990).

[27] The information contained in the second warrant for biological samples established that three of Callen's relatives had been stabbed, that Callen was one of the last people to have been seen with the victims, that Callen had a red liquid substance in one of his ears following the stabbings, that Callen had numerous puncture wounds and scratches on his body, and that Callen's injuries were observed within hours of the murders. As the trial judge and the circuit judge who signed both warrants both noted, there was sufficient probable cause to issue the first warrant to obtain biological samples from Callen.

***20** **[28]** Moreover,

> " 'The good faith exception provides that when officers acting in good faith, that is, in objectively reasonable reliance on a warrant issued by a neutral, detached magistrate, conduct a search and the warrant is found to be invalid, the evidence need not be excluded.' Rivers v. State, 695 So.2d 260, 262 (Ala. Crim. App. 1997).
>
> "In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), a case relied on by the circuit court, the United States Supreme Court recognized four circumstances in which the good-faith exception was inapplicable: (1) when the magistrate or judge relies on information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) when the magistrate wholly abandons his judicial role and fails to act in a neutral and detached manner; (3) when the warrant is based on an affidavit so lacking an indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid."

Bailey v. State, 67 So.3d 145, 149–50 (Ala. Crim. App. 2009). There is no indication in the record that any of the four cited circumstances that would invalidate the application of the good-faith exception was present in this case.

[29] Here, the judge who signed the three warrants noted that the information contained in the last warrant, quoted above, was the same as the information provided for the issuance of the first warrant, but for the unreliable information that had been excluded from the later warrant. There was probable cause to issue the first warrant. Moreover, we agree with the circuit court that the good-faith exception would also apply in this case. Callen is due no relief on this claim.

VII.

[30] Callen next argues that the circuit court erred in allowing the introduction of evidence seized from Callen's residence as a result of a search warrant. He argues that there was no probable cause to support the issuance of the search warrant; therefore, he says, everything seized as a result of the execution of that warrant was inadmissible. Specifically, he argues that there was no information in the affidavit concerning when or where Callen had been observed near the scene of the murders.

A search was conducted of Callen's residence, and his clothes, shoes, and a pillow case were seized. Callen moved that the items seized be suppressed because, he argued, the affidavit in support of the warrant contained only broad "unsupported assertions with no probable cause to support them." (C. 556.) The circuit court denied the motion. (C. 102.)

[31] **[32]** **[33]** The record reflects that the affidavit in support of this warrant, executed by Det. Jerry Williams, reads, in part:

> "On October 29, 2010, at approximately 4:30 a.m., units from the Birmingham Fire Department responded to a fire at a residence located at 1297 44th Street North, Birmingham, Alabama 35222. The bodies of three human victims were discovered inside the residence. Investigators from the Birmingham Police Department were called to the scene. Stab wounds were observed on the bodies and a homicide investigation was initiated. Following interviews with witnesses, [Callen] was identified as a possible suspect and was seen by witnesses near the residence prior to [the] fire. Through further investigation, it was determined that Callen resided with his aunt, Natasha Brown, at ... 41st Street North, Birmingham, Alabama 35222. Investigators confirmed with Brown that Callen resides at the residence. Brown further confirmed that Callen had been home earlier that morning and had changed clothes. Callen's clothing is still at the residence and may contain possible forensic evidence which would link Callen to the crime scene.
>
> ***21** "Based on the above information, I have reason to believe, and do believe that there is evidence of the crime of arson and/or homicide at the residence location of ... 41st Street North, Birmingham, Alabama 35222."

(C. 585.)

> "The Fourth Amendment to the United States Constitution provides, in pertinent part, that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation.' Thus, '[a] search warrant may only be issued upon a showing of probable cause that evidence or instrumentalities of a crime or contraband will be found in the place to be searched.' United States v. Gettel, 474 F.3d 1081, 1086 (8th Cir. 2007)."

Ex parte Green, 15 So.3d 489, 492 (Ala. 2008).

> " 'Probable cause to search a residence exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. [213], 103 S.Ct. [2317] at 2332[, 76 L.Ed.2d 527 (1983)].' United States v. Jenkins, 901 F.2d 1075, 1080 (11th Cir.), cert. denied, 498 U.S. 901, 111 S.Ct. 259 [112 L.Ed.2d 216] (1990).... [T]here is no requirement of a 'showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.' Texas v. Brown, 460 U.S. [730] at 742, 103 S.Ct. [1535] at 1543 [75 L.Ed.2d 502] (1983)]. Additionally, '[w]here a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a common sense manner, and should resolve doubtful or marginal cases according to the preference to be accorded to warrants.' Maddox v. State, 502 So.2d 779, 785 (Ala. Cr. App. 1985), affirmed in part, remanded on other grounds, 502 So.2d 786 (Ala.), cert. denied, 479 U.S. 932 [107 S.Ct. 404, 93 L.Ed.2d 357] (1986)."

Poole v. State, 596 So.2d 632, 641 (Ala. Crim. App. 1992).

While it is true that the affidavit did not provide information concerning the name of the person or persons who had seen Callen near the residence before the murders or evidence of the time he was seen before the murders—the record clearly shows that three warrants were issued by the same judge within hours on October 29, 2010. As noted above, the first warrant is not in the record. However, the record shows that the affidavit in support of the warrant to obtain biological samples from Callen, the third warrant, was similar to the affidavit in support of the

first warrant. As stated previously, the warrant to obtain biological samples contained the following information in that affidavit: "[W]hile Detective Cotton was interviewing Dontae Callen he observed what appeared to be a red liquid substance inside of his ear. Detective Cotton noticed numerous puncture wounds and scratches on the right side of his neck." (C. 583.)

[34] **[35]** **[36]** When examining whether there is probable cause to issue a search warrant:

> " 'This court must look at the totality of the information that was supplied to the magistrate before the warrant was issued. We do not 'restrict [our] review to the "four corners" of the affidavit. United States v. Character, 568 F.2d 442 (5th Cir. 1978).' Wamble v. State, 593 So.2d 109, 110 (Ala. Cr. App. 1991)."

***22** Moore v. State, 650 So.2d 958, 965 (Ala. Crim. App. 1994).

> " '[I]f the affidavit is on its face insufficient to support a finding of probable cause, the State may then adduce testimony showing that the sufficient evidence was, in fact, before the issuing magistrate.' Mayes v. State, 47 Ala.App. 672, 673–74, 260 So.2d 403, 405 (1972). See Crittenden v. State, [476 U.S. [So.2d] 626 (Ala. Crim. App. 1983)]; Oliver v. State, 46 Ala.App. 118, 238 So.2d 916 (1970).
>
> "While an insufficient affidavit may be supplemented by oral testimony, the testimony must relate to the information actually disclosed to the issuing magistrate and not merely to information known by the affiant but undisclosed to the magistrate at the time of procuring the affidavit. Whiteley v. Warden, 401 U.S. 560, 565 n. 8, 91 S.Ct. 1031, 1035 n. 8, 28 L.Ed.2d 306 (1971); Davis v. State, 500 So.2d 472 (Ala. Cr. App. 1986). See W. LaFave, 2 Search and Seizure § 4.3 (1978)."

Swain v. State, 504 So.2d 347, 352 (Ala. Crim. App. 1986).

In a similar fact situation, the Washington Court of Appeals in State v. McReynolds, 117 Wash.App. 309, 71 P.3d 663 (2003), stated:

> "The [defendants] apparently contend the analysis of the application for Warrant 5 must be limited to the four corners of the officers' affidavit. However, CrR 2.3(c) implicitly permits consideration of facts extrinsic to the affidavit. See State v. Jansen, 15 Wash.App. 348, 350, 549 P.2d 32, review denied, 87 Wash.2d 1015 (1976); see also State v. Gonzalez, 77 Wash.App. 479, 891 P.2d 743 (1995), review denied, 128 Wash.2d 1008, 910 P.2d 481 (1996). In light of the requirement that warrant applications be evaluated in a commonsense manner, [State v.] Partin, 88 Wash.2d [899] at 904, 567 P.2d 1136 [(1988 [1977])], the court here properly considered the application for Warrant 5 in light of all of the events of the case, within the previous four days. ..."

117 Wash.App. at 331, 71 P.3d at 673.

Clearly Judge Pulliam was in possession of all the above information before signing the search warrant for Callen's residence. Cumulatively, all the evidence provided sufficient probable cause. Police knew that Callen had been the last person to see the three victims, Callen had cuts on his hands and scratches on his body, Callen had what appeared to be blood in one of his ears, police knew that the victims had been stabbed, and Callen had changed clothes. The circuit court did not err in denying Callen's motion to suppress the evidence seized as a result of the execution of the search warrant on Callen's residence, and Callen is due no relief on this claim.

VIII.

Callen next argues that the circuit court erred in failing to suppress Callen's statement and the evidence seized pursuant to the search warrant because, he says, there was no probable cause to arrest him and everything obtained as a result of that illegal arrest was inadmissible.

Callen did not argue at trial that his arrest was illegal for lack of probable cause; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

***23** In explaining probable cause to arrest, the Alabama Supreme Court has stated:

> "Probable cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime. United States v. Rollins, 699 F.2d 530 (11th Cir.) cert. denied, 464 U.S. 933, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983). 'In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act....' Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed.2d [L.Ed.] 1879, 1891 (1949). ' "The substance of all the definitions of probable cause is a reasonable ground for belief of guilt." ' Id. 'Probable cause to arrest is measured against an objective standard and, if the standard is met, it is unnecessary that the officer subjectively believe that he has a basis for the arrest.' Cox v. State, 489 So.2d 612 (Ala. Cr. App. 1985). The officer need not have enough evidence or information to support a conviction in order to have probable cause for arrest. Only a probability, not a prima facie showing, of criminal activity is the standard of probable cause. Stone v. State, 501 So.2d 562 (Ala. Cr. App. 1986). ' "[P]robable cause may emanate from the collective knowledge of the police...." ' Ex parte Boyd, 542 So.2d 1276, 1284 (Ala. 1989) (citations omitted)."

Dixon v. State, 588 So.2d 903, 906 (Ala. 1991)

[37] Here, Callen was seen near the scene of the murders before the fire; Callen told police that he had been with the victims prior to their deaths; Callen appeared "extremely nervous" when approached by law enforcement; Callen had what appeared to be a red substance in one of his ears; and Callen had cuts and scratches on his body. Police were aware that the victims had been stabbed and their bodies covered in blood. There was probable cause to detain Callen at the time he went to the police station for questioning. Callen is due no relief on this claim.

IX.

Callen next argues that the circuit court erred in admitting the DNA evidence because, he says, the bloodstain cards that had been collected from the three victims and used to compare the samples of blood collected at the scene were admitted without the State establishing a proper chain of custody for the cards. He relies on the Supreme Court's decision in Ex parte Holton, 590 So.2d 918 (Ala. 1991), to support his argument.

There was no objection to the admission of the bloodstain cards; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The Alabama Supreme Court in Ex parte Holton stated:

> "The chain of custody is composed of 'links.' A 'link' is anyone who handled the item. The State must identify each link from the time the item was seized. In order to show a proper chain of custody, the record must show each link and also the following with regard to each link's possession of the item: '(1) [the] receipt of the item; (2) [the] ultimate disposition of the item, i.e., transfer, destruction, or retention; and (3) [the] safeguarding and handling of the item between receipt and disposition.' Imwinklereid, The Identification of Original, Real Evidence, 61 Mil. L. Rev. 145, 159 (1973)."

***24** 590 So.2d at 920.

However, in Ex parte Mills, 62 So.3d 574 (Ala. 2010), the Alabama Supreme Court addressed the heavy burden of establishing reversible error regarding a chain-of-custody issue when there was no objection made at trial. The Supreme Court stated:

> "Mills did not challenge the chain of custody as to any of the now-challenged items at trial. Unlike Birge [v. State, 973 So.2d 1085 (Ala. Crim. App. 2007)], in which evidence indicated that several different unidentified individuals could have handled the specimens and there were discrepancies in the records about the specimens, nothing in the present case indicates that the items were tampered with or altered in any manner from the time [law enforcement] relinquished custody of them to DFS [Department of Forensic Sciences] until the time [the forensic scientist] tested them at DFS. Mills also has made no 'showing of ill will, bad faith, evil motivation, or some evidence of tampering' while the items were at DFS. Lee [v. State], 898 So.2d [790] at 847 [(Ala. Crim. App. 2001)]. Thus, this link, at worst, is a 'weak' link rather than a 'missing' link in the chain of custody."

62 So.3d at 598.

In Hosch v. State, 155 So.3d 1048 (Ala. Crim. App. 2013), this Court, relying on Ex parte Mills, stated:

> "The Alabama Supreme Court considered a case with similar circumstances and held that the absence of testimony regarding the DFS employee who received certain items of evidence and whether those items remained secure at DFS until they were tested did not rise to the level of plain error. Ex parte Mills, 62 So.3d 574 (Ala. 2010). As the Alabama Supreme Court held in Ex parte Mills, we hold that Hosch has not established that any plain error occurred as to the chain of custody, and he is not entitled to a reversal on the basis of that claim."

155 So.3d at 1117. See Phillips v. State, [Ms. CR–12–0197, December 18, 2015] —— So.3d —— (Ala. Crim. App. 2015).

[38] Dr. Gary Simmons, the forensic pathologist who performed the autopsies on all three victims, testified that he collected blood samples from all the victims, as was his normal procedure. (R. 597.) The exhibits reflect that Officer Roxanne Murry collected three bloodstain standard cards from the coroner's office. (C. 966.) Officer Murry testified that everything she collected was sealed and was taken to the Alabama Department of Forensic Sciences. Nathan Rhea testified that he received manila envelopes containing bloodstain cards from the three victims from the Birmingham Police Department. (R. 678.)

Because no objection was made to the chain of custody of the bloodstain cards Callen must show "evil motivation or some evidence of tampering regarding the cards while they were in State custody." Shaw v. State, 207 So.3d 79, 103 (Ala. Crim. App. 2015). There is no evidence of any "evil motivation" or "tampering" in this case. Samples of blood were taken from the crime scene. Nothing in the record suggests that any samples collected and analyzed were inconsistent with the bloodstain cards that had been prepared during the autopsies.

***25** **[39]** Moreover, an inadequate chain of custody may constitute harmless error. See Phillips, supra. Numerous samples of the victims' blood were collected from the crime scene. Also, the two knives found within one block of the murders were tested. The blood on one knife had blood consistent with all three victims. As stated above, nothing in the record suggests that the blood collected at the scene and the blood on the knife were inconsistent with the blood on the bloodstain cards.

For the foregoing reasons, we find no plain error in the chain of custody related to the bloodstain cards collected from the victims. Callen is due no relief on this claim.

X.

Callen also argues that the DNA evidence should not have been admitted because, he says, there was no evidence regarding its reliability. He makes the following one-paragraph argument in support of this claim:

> "In order for DNA evidence to be admissible, the State must sufficiently establish that: (1) the theory and technique on which the DNA evidence is based is reliable; and (2) the theory and technique on which the proffered DNA evidence is based is relevant to understanding the evidence or determining a fact at issue. See Daubert v. Merrell Down [Dow] Pharmaceuticals, 509 U.S. 579 (1993); Ala. Code § 36–18–30. The DNA evidence introduced by the prosecution in this case did not satisfy the first prong of this standard. Sarah M. Ruby, Checking the Math: Government Secrecy ad DNA Databases, 6 I/S: J. L. & Pol'y for Info. Soc'y 257. The introduction of this unreliable evidence violated Mr. Callen's rights to due process, a fair trial, and a reliable sentencing proceeding as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law."

(Callen's brief, at pp. 93–94.) Callen did not challenge the reliability of the DNA test results; therefore we are limited

to determining whether there was plain error. See Rule 45A, Ala. R. App. P.

Section 36–18–30, Ala. Code 1975, governs the admissibility of DNA evidence and states:

> "Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in Daubert, et. ux., et. al., v. Merrell Dow Pharmaceuticals, Inc., [509 U.S. 579 (1993),] decided on June 28, 1993."

The Alabama Supreme Court in Turner v. State, 746 So.2d 355 (Ala. 1998), set out the following two-part test regarding the admissibility of DNA evidence:

> "I. Are the theory and the technique (i.e., the principle and the methodology) on which the proffered DNA forensic evidence is based 'reliable'?
>
> "II. Are the theory and the technique (i.e., the principle and the methodology) on which the proffered DNA evidence is based 'relevant' to understanding the evidence or to determining a fact in issue?"

746 So.2d at 361 (footnotes omitted). As stated above, Callen challenges the first prong of the above-cited test.

[40] Here, the record shows that before the DNA evidence was admitted a Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), hearing was held. Nathan Rhea, a forensic scientist with the Alabama Department of Forensic Sciences ("ADFS") and chief of the DNA section of the laboratory, testified that he had conducted thousands of DNA tests. Rhea testified extensively about the DNA-testing process used at the ADFS, that the tests that it used were used throughout the country and the world, that the DNA testing done on the case was "widely accepted in the scientific community as reliable" (R. 668.), that numerous publications and studies have assessed the reliability of the DNA testing, that the DNA tests conducted by ADFS had been scientifically validated, and that the testing procedures used at the ADFS has numerous scientific controls to ensure their reliability. (R. 670.) Rhea's testimony concerning the reliability was extensive and thorough. There was more than sufficient evidence presented to satisfy the two-prong test for the admission of the DNA test results; thus, there was no plain error. See Petric v. State, 157 So.3d 176, 221 (Ala. Crim. App. 2013). Callen is due no relief on this claim.

XI.

***26** Callen next argues that the circuit court committed several errors in its rulings and actions during the voir dire examination of the prospective jurors.

[41] **[42]** " 'A trial court is vested with great discretion in determining how voir dire examination will be conducted, and that court's decision on how extensive a voir dire examination is required will not be overturned except for an abuse of that discretion.' " Whitehead v. State, 777 So.2d 781, 798 (Ala. Crim. App. 1999), quoting Ex parte Land, 678 So.2d 224, 242 (Ala. 1996). "While we have held that wide latitude should be accorded the parties in their voir dire examination of prospective jurors touching their qualifications, interest or bias, the extent of the examination is largely discretionary with the trial court." Thompson v. Havard, 285 Ala. 718, 724, 235 So.2d 853, 859 (1970).

A.

[43] Callen asserts that his constitutional rights were violated when the prospective jurors were questioned about their views concerning the death penalty. He argues:

> "Social scientific evidence shows that 1) death-qualified juries are significantly more prone to convict than ordinary juries; 2) the process of pretrial death qualifications, in which the defendant's guilt is assumed, conditions the jury towards a finding of guilt; and 3) death

> qualifications disproportionately excludes minorities and women."

(Callen's brief, at p. 98–99.) Callen moved that the State be prohibited from questioning the prospective jurors concerning their views on the death penalty and argued: "Such will be the basis for removal of jurors, and such will deny [Callen] a jury of his peers. [Callen] is entitled to such, not having person arbitrarily struck for cause merely because of their views on capital punishment." (C. 199.) The circuit court denied the motion. (C. 40.)

[44] This Court has rejected all the arguments raised by Callen in his brief to this Court.

> "A jury composed exclusively of jurors who have been death-qualified in accordance with the test established in Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), is considered to be impartial even though it may be more conviction prone than a non-death-qualified jury. Williams v. State, 710 So.2d 1276 (Ala. Cr. App. 1996). See Lockhart v. McCree, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Neither the federal nor the state constitution prohibits the state from ... death-qualifying jurors in capital cases. Id.; Williams; Haney v. State, 603 So.2d 368, 391–92 (Ala. Cr. App. 1991), aff'd, 603 So.2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993)."

Davis v. State, 718 So.2d 1148, 1157 (Ala. Crim. App. 1995) (footnote omitted).

The circuit court did not err in denying Callen's motion to prohibit the prospective jurors from being questioned regarding their views on capital punishment. Callen is due no relief on this claim.

B.

Callen next argues that the circuit court undermined defense counsel's voir dire examination when it interfered when counsel was conducting its voir examination of two prospective jurors.

1.

[45] First, Callen argues that the trial court interjected itself into the voir dire examination when a prospective juror responded that it would be difficult to sit on the case. The record shows that prospective jurors were asked: "Does that mere fact alone, that there is a 12–year-old girl that's been killed here, is that going to affect your ability to sit on this case." (R. 226.) Prospective juror R.F. [10] responded that because one of the victims was a young girl, the fact that he had two teenage daughters would affect his ability to sit on the case. The following occurred:

***27** "[Defense counsel]: So, you have two girls. Would that fact alone make it very difficult for you to sit on this jury and make a reasonable approach to it if we get to a penalty phase?

"[Prospective Juror R.F.]: I don't know. I'm just being honest. I don't know.

"[Defense counsel]: That's what we want. That's what we need. We need to know that.

"[Prospective juror R.F.]: I mean, it would bother me, yes. Would it be hard? Extremely. Beyond that, I don't know. I've never done it.

"The Court: [Defense counsel] let me interrupt just a second.

"Ladies and gentlemen, this isn't supposed to be easy. Any criminal case is not supposed to easy.

"Right now we sit with allegations. This case involves the death of three folks.

"Again, it's not supposed to be easy. The main crux of the issue here today is, can you be fair? Can you be fair to the State? Can you be fair to the defendant?

"Granted, it's going to be tough testimony for everyone. Any case is. Believe you me, any case is.

"But at the end of the day, at the end of the trial, are each of you going to be able to review the evidence with your fellow jurors, listen to the law that I instruct you

on, and use those two things, along with your common sense, in reaching a fair verdict?

"Again, it's not supposed to be easy. I don't want anybody to say, oh, it's going to be real easy, because it's not, and it shouldn't be.

"That's what it comes down to, essentially. I know that we have several hands, and I've made notes of those of you that have fixed opinions about the death penalty.

"But for everyone, if you should be chosen to sit on this jury, can I have each of your assurances that you would be able to listen to the evidence to fairly deliberate it with your fellow jurors, and apply the law that I give to you and reach a fair verdict?

"The jury: Yes.

"The Court: Everybody feel that they could?

"The jury: Yes."

(R. 226–28.)

[46] As we previously stated, the circuit court has wide discretion in its methods of conducting voir dire examination.

> "A trial court is vested with great discretion in determining how voir dire examination will be conducted, and that court's decision on how extensive a voir dire examination is required will not be overturned except for an abuse of that discretion. Fletcher v. State, 291 Ala. 67, 277 So.2d 882 (1973); Lane v. State, 644 So.2d 1318 (Ala. Cr. App. 1994); Harris v. State, 632 So.2d 503 (Ala. Cr. App. 1992), affirmed, 632 So.2d 543 (Ala. 1993), affirmed, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995)."

Ex parte Land, 678 So.2d 224, 242 (Ala. 1996).

Here, the circuit court was clearly attempting to respond to R.F.'s comments that he would have a problem with the case because one victim was a young girl. The circuit court was clarifying whether R.F. should be stricken based on his comments. In addressing a similar fact situation, the Mississippi Court of Appeals in Cagler v. State, 844 So.2d 487 (Miss.App. 2003), stated:

> "In dealing with Cagler's second and third claim, concerning the trial judge's interruptions during questioning, the Mississippi Supreme Court in Evans v. State, 725 So.2d 613, 651 (Miss. 1998), stated that trial courts have the responsibility to control voir dire, but in doing so must take care not to hinder full exploration of juror's predispositions. In addition, 'the line between a proper and improper question is not always easily drawn; it is manifestly a process in which the trial judge must be given a considerable discretion.' Harris v. State, 532 So.2d 602, 606 (Miss. 1988); Murphy v. State, 246 So.2d 920, 922 (Miss. 1971). This discretion includes passing upon the extent and propriety of questions addressed to the prospective jurors. Rigby v. State, 826 So.2d 694, (¶ 43) (Miss. 2002); Jones v. State, 381 So.2d 983, 990 (Miss. 1980).
>
> ***28** "However, this discretion is not unlimited, and an abuse will be found where 'clear prejudice to the accused results from undue constraint on the defense or undue lack of constraint on the prosecution.' Jones, 381 So.2d at 990. In conclusion, one of the purposes of voir dire examination is 'to enable counsel to ascertain whether there is ground for a challenge of a juror for cause, or for a peremptory challenge.' Jackson v. State, 791 So.2d 830, 836 (¶ 24) (Miss. 2001).
>
> "....
>
> "In regards to the interruptions in the questioning of [D.W.], the trial judge was responding to [D.W.] saying she would have a problem being impartial knowing people were out there giving drugs to children and students. The questions asked by the judge appeared to be seeking information that would allow the court and counsel to determine whether or not they should strike her as a juror. Nothing was said regarding the thoughts of the judge on whether he regarded Cagler as guilty. The record is clear that the judge was trying to ensure the defendant received a fair and impartial jury and not the other way around."

844 So.2d at 495. Cf. State v. Johnson, 112 Ohio St.3d 210, 235, 858 N.E.2d 1144, 1173 (2006) ("The interruptions 'did not pervade the trial' and 'probably left little impression on the jury.' "); Barnhill v. State, 834 So.2d 836, 846 (Fla. 2002) ("The record in this case indicates the trial court did not unreasonably limit defense

counsel's voir dire. The trial judge was trying to help defense counsel focus in on the questions defense counsel was trying to ask."); Travis v. State, 776 So.2d 819, 832 (Ala. Crim. App. 1997) ("In most of the instances cited by the appellant, the trial court appears to be attempting to clarify improper, leading or misleading questions propounded by the defense. The trial court was not attempting to unreasonably limit the scope of appellant's voir dire.").

As stated in Cagler, "[T]he record is clear that the circuit court was trying to ensure [that Callen] received a fair and impartial jury." 844 So.2d at 495. Callen is due no relief on this claim.

2.

[47] Next, Callen argues that the circuit court interfered with his voir examination when prospective juror A.P. responded that she had seen media coverage of the case. The following occurred:

"[Defense counsel]: Okay. The fact that you saw that, does that help you form an opinion about this case?

"[Prospective juror A.P.]: No, sir, because I don't know the evidence or the situation. I wasn't in court to hear nothing that went on with the case. Sometimes TV don't tell the truth.

"[Defense counsel]: Okay.

"....

"[[Defense counsel]: [A.P.], this is where I'm asking you to assume, in particular, Mr. Callen has to be found guilty for us to get to the penalty phase, knowing that, how would you feel about being asked to give it if meant the death penalty or life without parole?

"[Prospective juror A.P.]: As long as the evidence and the law go along with his case, that's how I have to judge whether he spends life in jail or the death penalty, along with what I've seen or what I know. I have to know the facts.

"[Defense counsel]: Well, let me clear something up here. We don't need a jury of just people that want to sentence him to death.

"The situation is death and life without parole, under the law of the State of Alabama, are equal punishments.

"Now, the prosecutor, it is their job to do, as far as what's called an aggravating evidence, all right? They would present that.

***29** "But there's also another part of that that's called mitigating evidence. Let me ask you, would the fact of somebody's history or their upbringing, or how they were brought up, their childhood, how they may have suffered or not suffered, would that have any indication to you that it would have something that would play into your decision?

"[Prospective juror A.P.]: No, sir.

"[Defense counsel]: Would you consider that or would you not consider it?

"[Prospective juror A.P.]: I wouldn't consider that.

"[Defense counsel]: I'm asking everybody.

"The Court: Okay, [Defense counsel]. Let me take it again.

"[Defense counsel]: Judge, I'm going to have to object. This is my chance to talk with the jury, it's voir dire. I must object.

"[The Court: [Defense counsel], your objection is noted.

"[Defense counsel]: Thank you, Your Honor.

"The Court: Ladies and gentlemen, I apologize. I did not fully describe the phases, so I apologize to [defense counsel] for interrupting him.

"The mitigation phase, if we should reach that part, if we should reach that phase of the trial, the mitigation phase is, as [defense counsel] has said, it's where the State would argue whatever they're going to argue to you as far as punishment, and they would put on what's called aggravating factors.

"Now, the law sets out what aggravating factors are, which would be factors that a jury could consider in determining proper punishment.

"Now, the defense—if we should reach that phase, the defense puts on what's called mitigating factors, and I

would tell you that mitigating factors will be whatever evidence they present in mitigation of the death penalty, and it should and must be considered by you in reaching your determination of the appropriate punishment.

"So, that is why I think it's important that I interrupt to say that you must and you should—I will tell you, you should consider whatever mitigating factors are presented to you as testimony.

"And, then, I will give you the law on how you weigh the aggravating versus the mitigating factors.

"So, that's the point that I wanted to make sure that—and I apologize for not making it clearer earlier. But I will tell you, you must consider the mitigating evidence in reaching your determination."

(R. 232–33.)

Clearly, as evidenced by the above quote the circuit court was clarifying the process involved in a capital-murder trial in an attempt to ensure that the jurors were fair and impartial. "[W]e do not find any actions on the part of the trial court that interfered with the appellant's ability to discover the beliefs and attitudes, including possible bias, of the veniremembers." Wilson v. State, 777 So.2d 856, 917 (Ala. Crim. App. 1999). "The interruptions 'did not pervade the trial' and 'probably left little impression on the jury.' " State v. Johnson, 112 Ohio St.3d 210, 235, 858 N.E.2d 1144, 1173 (2006), quoting, in part, State v. Sanders, 92 Ohio St.3d 245, 278, 750 N.E.2d 90, 128 (2001).

The circuit court did not err in its actions during the voir dire examination of juror A.P., and Callen is due no relief on this claim.

C.

[48] Callen next argues that the circuit court erred in striking several jurors for cause based on their views toward the death penalty. Specifically, Callen argues that two prospective jurors, F.B. and C.W., were struck even after they indicated that they would follow the law as it related to application of the death penalty.

***30** The record shows that all the prospective jurors were questioned as to whether they would be able to vote for the death penalty. (R. 175.) Jurors C.W. and F.B. indicated that they could not vote to impose the death penalty under any circumstances. (R. 209–10.) Juror C.W. also asked the court about her religious convictions and whether they would affect her ability to sit on the case. (R. 218.)

Juror F.B. was questioned outside the presence of the other prospective jurors. (R. 291.) F.B. said: "I can be fair, but if they say the death penalty, I just don't believe I can say yes." (R. 291.) She further indicated that she is a minister and did not think there were any set of circumstances under which she could consider the death penalty. (R. 292.) The State then moved that prospective juror F.B. be struck for cause. Callen objected. The circuit court granted the State's motion and removed F.B. for cause. (R. 293.)

[49] **[50]** **[51]** **[52]** **[53]** Juror C.W. was likewise questioned outside the presence of the other jurors and indicated that there was absolutely no set of circumstances under which she could vote to impose the death penalty because of her strong religious convictions against taking a life. (R. 326.) After further questioning C.W. did state: "Based on the law and the circumstances and the evidence presented, I could follow that, but I still, in good conscience, could not make that decision. I just couldn't. I don't know how to make you understand that any more than me saying it." (R. 327–28.) The State moved that juror C.W. be removed for cause. Callen objected. The circuit court granted the State's motion to remove C.W. for cause. (R. 328.)

"A trial judge's finding on whether or not a particular juror is biased 'is based upon determination of demeanor and credibility that are peculiarly within a trial judge's province.' [Wainwright v.] Witt, 469 U.S. [412,] 429, 105 S.Ct. [844,] 855 [(1985)]. That finding must be accorded proper deference on appeal. Id. 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' Nobis v. State, 401 So.2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So.2d 204 (Ala. 1981)."

Martin v. State, 548 So.2d 488, 490–91 (Ala. Crim. App. 1988).

" 'The proper standard for determining whether a prospective juror may be excluded for cause because

of his or her views on capital punishment is "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " Wainwright v. Witt, 469 U.S. 412, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); Gray v. Mississippi, 481 U.S. 648, 107 S.Ct. 2045, 2051, 95 L.Ed.2d 622 (1987). "The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath, notwithstanding his views on capital punishment." Dutton v. Brown, 812 F.2d 593, 595 (10th Cir.), cert. denied, Dutton v. Maynard, 484 U.S. 836, 108 S.Ct. 116, 98 L.Ed.2d 74 (1987). A juror's bias need not be proved with "unmistakable clarity" because "juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id.

" 'A trial judge's finding on whether or not a particular juror is biased "is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Witt, 469 U.S. at 429, 105 S.Ct. at 855. That finding must be accorded proper deference on appeal. Id. "A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion." Nobis v. State, 401 So.2d 191, 198 (Ala. Cr. App.), cert. denied, Ex parte Nobis, 401 So.2d 204 (Ala. 1981).'

***31** "Martin v. State, 548 So.2d 488, 490–91 (Ala. Cr. App. 1988), affirmed, 548 So.2d 496 (Ala. 1989), cert. denied, 493 U.S. 970, 110 S.Ct. 419, 107 L.Ed.2d 383 (1989). '[A] blanket declaration of support of or opposition to the death penalty is not necessary for a trial judge to disqualify a juror.' Ex parte Whisenhant, 555 So.2d 235, 241 (Ala. 1989), cert. denied, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990)."

Taylor v. State, 666 So.2d 36, 46–47 (Ala. Crim. App. 1994).

Clearly, prospective jurors C.W. and F.B. would have great difficulties in recommending a sentence of death. The circuit court committed no error in granting the State's motion to remove prospective jurors C.W. and F.B. for cause based on their views concerning the death penalty. Callen is due no relief on this claim.

XII.

[54] Callen argues that the circuit court erred in allowing the admission of crime-scene and autopsy photographs that, he argues, were not relevant and were highly prejudicial.

[55] **[56]** **[57]** **[58]** **[59]** **[60]** The record shows that Callen moved in limine that the State be barred from introducing what he says were prejudicial photographs. He argued, in part, that the photographs were gruesome and prejudicial and would inflame the sensibilities of the jurors. (C. 551–54.) At the hearing at which this motion was discussed, defense counsel argued that photographs numbered State's 40, 41, 42, and 43 showed the bodies of the three victims on the grass outside the crime scene and had no probative value. (R. 483.) After hearing arguments from both sides, the circuit court excluded photograph no. 41—a photograph that showed a closeup of 12–year-old Aaliyah's face—and allowed the other photographs to be admitted into evidence. (R. 486.)

> "Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence. Chunn v. State, 339 So.2d 1100, 1102 (Ala. Cr. App. 1976). To be admissible, the photographic material must be a true and accurate representation of the subject that it purports to represent. Mitchell v. State, 450 So.2d 181, 184 (Ala. Cr. App. 1984). The admission of such evidence lies within the sound discretion of the trial court. Fletcher v. State, 291 Ala. 67, 277 So.2d 882, 883 (1973); Donahoo v. State, 505 So.2d 1067, 1071 (Ala. Cr. App. 1986) (videotape evidence)."

Ex parte Siebert, 555 So.2d 780, 783–84 (Ala. 1989).

> "The fact that a photograph has very little probative value does not prevent its admission in evidence where the photograph will tend to shed light on, strengthen or illustrate the truth of other testimony, or where the photograph has reasonable tendency to prove or disprove some material fact or issue in the case, or is used to identify the deceased or to illustrate the location, nature or extent of a wound. Gilmore v. State, 346 So.2d 1193 (Ala. Cr. App. 1977). The evidentiary rule in this state favors the admission of photographs and affords the trial court a wide and liberal latitude in the admission of photographs illustrative of a criminal transaction and the surrounding circumstances. Arnold v. State, 348 So.2d 1092 (Ala. Cr. App. 1977), cert. denied, Ex parte Arnold, 348 So.2d 1097 ([Ala.] 1977); Lewis v. State, 339 So.2d 1035 (Ala. Cr. App. 1976), cert. denied, 339 So.2d 1038 (Ala. 1976)."

***32** Lawrence v. State, 409 So.2d 987, 990 (Ala. Crim. App. 1982).

[61] **[62]** **[63]** Moreover,

> "The history of the admission of autopsy photographs is extensive:
>
> > " 'With regard to photographs of the victim, ... even though they are cumulative and pertain to undisputed matters, generally photographs that depict the external wounds on the body of the victim are admissible. Bankhead [v. State], 585 So.2d [97, 109 (Ala. Crim. App. 1989)]. As we held in Jenkins v. State, 627 So.2d 1034 (Ala. Crim. App. 1992), aff'd, 627 So.2d 1054 (Ala. 1993), "[t]he state [has] the burden of proving that the victim [is] dead, and [photographs are] direct evidence on that point...." ' "
>
> "Sockwell v. State, 675 So.2d 4, 21 (Ala. Cr. App. 1993), aff'd, 675 So.2d 38 (Ala. 1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996) .... Moreover, autopsy photographs depicting the internal views of wounds are likewise admissible. In Dabbs v. State, 518 So.2d 825, 829 (Ala. Cr. App. 1987), we stated that even though autopsy photographs of a victim's head injuries, as viewed internally, may be gruesome, admission of such photos is sometimes necessary to demonstrate the extent of the victim's injuries. See Dabbs, supra."

Broadnax v. State, 825 So.2d 134, 159 (Ala. Crim. App. 2000). Also, the use of probes in autopsy photographs to highlight injuries is not error. McMillan v. State, 139 So.3d 184, 254 (Ala. Crim. App. 2010).

The circuit court committed no error in admitting the crime-scene and autopsy photographs into evidence. Callen is due no relief on this claim.

XIII.

[64] Callen next argues that the prosecutor erred in introducing hearsay statements during the testimony of Det. Cotton. Specifically, he argues that it was error to allow Det. Cotton to testify that he went to the hospital after the victims were discovered and was told that Callen may have been the last person to see the victims before they were murdered. He argues that this testimony was offered for the truth of the matter asserted, was classic hearsay, and was thus inadmissible.

There was no objection to Det. Cotton's testimony; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

Clearly, this testimony was offered to show the progression of the investigation and why the investigation focused on Callen.

> "We have considered cases presenting similar circumstances and have found no error in the admission of the testimony. For example, in Smith v. State, 795 So.2d 788 (Ala. Crim. App. 2000), a police officer testified that, during a search of the house belonging to the defendant's mother, she told him that the defendant had put some clothes in the washing machine; Smith argued that the testimony was prejudicial hearsay. We held:

> " '[T]his statement was elicited to establish the reasons for the officer's action and the reasons the officers searched certain areas of the trailer. It was not offered for the truth of the matter asserted and was not hearsay. "The fact of the conversations in this case was offered to explain the officer's actions and presence at the scene—not for the truth of the matter asserted. Accordingly, it was not hearsay. Clark v. City of Montgomery, 497 So.2d 1140, 1142 (Ala. Cr. App. 1986)." Thomas v. State, 520 So.2d 223 (Ala. Cr. App. 1987).'
>
> ***33** "795 So.2d at 814.
>
> "In D.R.H. v. State, 615 So.2d 1327 (Ala. Crim. App. 1993), the appellant argued that hearsay had erroneously been admitted when the officers were permitted to testify about what the confidential informant had told them. We disagreed, found that the evidence was not hearsay, and stated, '[The officers'] testimony was received to show the reasons for the officers' actions and how their investigation focused on a suspect. Sawyer v. State, 598 So.2d 1035 (Ala. Cr. App. 1992).' 615 So.2d at 1330. In accord, Miller v. State, 687 So.2d 1281, 1285 (Ala. Crim. App. 1996)."

Deardorff v. State, 6 So.3d 1205, 1217–18 (Ala. Crim. App. 2004).

There was no error in allowing Det. Cotton to testify concerning the evolution of his investigation and how that investigation came to focus on Callen. Det. Cotton's testimony was not hearsay, and Callen is due no relief on this claim.

XIV.

[65] Callen next argues that the circuit court erred in allowing victim-impact evidence to be admitted during the guilt phase of Callen's trial. Specifically, Callen argues that the State's first witness, Lisa Brown—Bernice Kelly's daughter and Quortes Kelly's sister—testified concerning "the family structure and the day-to-day lives of the three victims," testimony, he says, that should not have been admitted at the guilt phase. (Callen's brief, at p. 71.)

During Brown's testimony the only objections were objections to the admission of photographs and one hearsay objection. Counsel did not argue that any of Brown's testimony constituted unlawful victim-impact evidence. Accordingly, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The record shows that Brown identified photographs of the three victims, that she discussed her relationship with the three victims and who was living with her mother at the time of her death, that she gave the jurors the layout of her mother's apartment, and that she spoke of her last meeting with her mother.

The Alabama Supreme Court in Ex parte Rieber, 663 So.2d 999 (Ala. 1995), upheld the admission of similar victim-impact evidence at the guilt phase of a capital-murder trial. The court stated:

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that Rieber did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991))."

663 So.2d at 1006.

> "Many other courts have likewise found no reversible error in the admission of limited victim impact evidence in the guilt phase of a capital murder trial. See Commonwealth v. Jordan, [619 Pa. 513] 65 A.3d 318 (Pa. 2013); State v. Jackson, 410 S.W.3d 204 (Mo. Ct. App. 2013); Moore v. Mitchell, 708 F.3d 760, 805 (6th Cir. 2013); Schreibvogel v. State, 228 P.3d 874

(Wy. 2010); State v. Ott, 247 P.3d 344 (Utah 2010); Goff v. State, 14 So.3d 625 (Miss. 2009); State v. Hale, 119 Ohio St.3d 118, 892 N.E.2d 864 (2008); Coulthard v. Commonwealth, 230 S.W.3d 572 (Ky. 2007); Dodd v. State, 100 P.3d 1017 (Okla. Crim. App. 2004)."

***34** Wiggins v. State, 193 So.3d 765, 794 (Ala. Crim. App. 2014).

There was no reversible error in the admission of Brown's testimony during the guilt phase of Callen's trial. Callen is due no relief on this claim.

XV.

[66] Callen next argues that the circuit court erred in refusing to declare a mistrial after Det. Cotton stated during his testimony that Callen invoked his right to counsel during questioning. Specifically, Callen argues that the reference to Callen's invoking his right to counsel violated his constitutional rights and resulted in reversible error.

The record shows that the following occurred:

"[Prosecutor]: Can you describe to us, say the five minutes before that, how you came into contact with [Callen]?

"[Det. Cotton]: Yes, sir. Initially, [Callen] requested an attorney. And, of course—

"[Defense counsel]: Objection, Your Honor.

"The Court: Sustained.

"[Defense counsel]: May we have a sidebar?

"....

"[Defense counsel]: We are going to have to ask for a mistrial at this juncture. For whatever reason, the first statement has been mentioned that was suppressed. I think it may very well prejudice the jury. The other thing is, is I had filed a motion as far as improper arguments regarding the prosecution's office. I would submit that that would be—that motion is to cover things like this. So—

"The Court: Well, his is not an argument. This is a statement made by an—

"....

"The Court: Well, he didn't reference a statement, he referenced, although I wish he hadn't, he did reference that Mr. Callen requested an attorney. I will deny your motion for a mistrial, but I will instruct Det. Cotton not to mention that again. My question to you now is, do you want me to say something to the jury to have them disregard that, or do you want to leave it be?

"[Defense counsel]: Your honor, you know, obviously, a bell has been rung. As far as—you can't unring the bell. You know, the defendant's right to, at that time, exercise his Fifth Amendment rights are clear and there should be no reference to that. I don't know any way that that can be undone, even all due respect to whatever corrective instructions this Court may give. It's a bell that's been rung, and it's such a bell that I don't think that any such instructions would be sufficient.

"The Court: Well, since Mr. Callen subsequently initiated contact or re-initiated contact, I don't see it as harmful, shall we say, as had he not. There's been no comment, no testimony about the previous statement that has been suppressed."

(R. 827–30.)

[67] **[68]** Initially, we note that defense counsel refused the circuit court's offer to give a curative instruction regarding the admission of Det. Cotton's testimony. "[W]here, as here, the defendant specifically requests that no curative instruction be given, or expressly refuses the offer of a curative instruction, any error in clearly invited." Whitehead v. State, 777 So.2d 781, 829 (Ala. Crim. App. 1999). "The doctrine of invited error applies to death-penalty cases and operates to waive any error unless the error rises to the level of plain error." Snyder v. State, 893 So.2d 488, 518 (Ala. Crim. App. 2003).

***35** **[69]** It is true that

"[t]he receipt into evidence of testimony concerning an accused's post–Miranda exercise of the

> constitutional right to remain silent is itself a violation of the accused's constitutional right to remain silent. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); Houston v. State, 354 So.2d 825 (Ala. Cr. App. 1977), cert. denied, 354 So.2d 829 (Ala. 1978)."

Harris v. State, 611 So.2d 1159, 1160–61 (Ala. Crim. App. 1992). Not every instance, however, will constitute reversible error.

> "[T]he United States Supreme Court in Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), held that a Doyle [v. Ohio, 426 U.S. 610 (1976),] violation is subject to a harmless-error analysis under Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)."

Bohannon v. State, [Ms. CR–13–0498, October 23, 2015] ––So.3d ––––, –––– (Ala. Crim. App. 2015).

This case is similar to the circumstances presented to the Oregon Court of Appeals in State v. Dupree, 164 Or.App. 413, 992 P.2d 472 (1999). That court stated:

> "We agree that it is improper to admit evidence that a defendant invoked his or her constitutional rights. State v. Larson, 325 Or. 15, 23, 933 P.2d 958 (1997). However, such an impropriety rises to the level of reversible error only if the context in which the evidence is offered makes it likely that the jury will draw a prejudicial inference. Id. at 24, 933 P.2d 958. 'It is our duty to inquire whether it was likely' that the jury would draw such an inference. Id. at 23, 933 P.2d 958; State v. Smallwood, 277 Or. 503, 506, 561 P.2d 600, cert. den. sub. nom. Smallwood v. Oregon, 434 U.S. 849, 98 S.Ct. 160, 54 L.Ed.2d 118 (1977). If the impermissible inference is unlikely, the error is harmless. State v. Williams, 49 Or.App. 893, 896–97, 621 P.2d 621 (1980) (state's reference to defendant's invocation of constitutional rights was harmless in the course of relating conversation between defendant and police officer, in which officer said, '[Y]ou said that you wanted to talk to your attorney first and I don't want to talk to you about the incident.') (emphasis omitted).
>
> "Under the circumstances presented here, we conclude that a prejudicial inference was highly unlikely and that any error was harmless. The information was disclosed incidentally to Brumfield's testimony about defendant's offer to incriminate other escort services and explained why he did not pursue her offer to cooperate at that time. There was a single reference that was not responsive to the question asked. The state did not deliberately engineer a situation in which the jury was told that defendant invoked her rights after being asked a question about the crime. See State v. White, 303 Or. 333, 736 P.2d 552 (1987) (mistrial required where state deliberately drew attention to defendant's refusal to testify at codefendant's trial). At worst, the jury might have inferred that defendant was unwise to volunteer incriminating information to Brumfield despite her previous invocation. We agree with the state that the context of the reference made it highly unlikely that the testimony created any adverse inference about defendant's invocation in the jury's deliberations. See Smallwood, 277 Or. at 505–06, 561 P.2d 600 (a contemporary jury is sufficiently aware of the value of legal counsel not to draw tenuous adverse inferences from a reference to invocation). After full consideration of the record, we conclude that the trial court acted within its discretion when it denied defendant's motion for mistrial."

***36** 164 Or.App. at 417–18, 992 P.2d at 475–76.

The circuit court committed no error in denying Callen's motion for a mistrial after Det. Cotton stated that Callen had requested counsel—an unsolicited answer to the prosecutor's innocuous question. For the reasons stated in State v. Dupree, we find no error, much less plain error; thus, Callen is due no relief on this claim.

XVI.

[70] **[71]** **[72]** Callen next challenges several of the circuit court's jury instructions in the guilt phase of his capital-murder trial.

> "A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So.2d 1119, 1123 (Ala. Cr. App. 1992). When reviewing a trial court's instructions, ' "the court's charge must be taken as a whole, and the portions challenged are not to be

isolated therefrom or taken out of context, but rather considered together." ' Self v. State, 620 So.2d 110, 113 (Ala. Cr. App. 1992) (quoting Porter v. State, 520 So.2d 235, 237 (Ala. Cr. App. 1987)); see also Beard v. State, 612 So.2d 1335 (Ala. Cr. App. 1992); Alexander v. State, 601 So.2d 1130 (Ala. Cr. App. 1992)."

Williams v. State, 795 So.2d 753, 780 (Ala. Crim. App. 1999). We review the challenged instruction "as a reasonable juror would have interpreted [it]." Johnson v. State, 820 So.2d 842, 874 (Ala. Crim. App. 2000).

> "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting."

Boyde v. California, 494 U.S. 370, 380–81, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990).

A.

[73] First, Callen argues that the circuit court's instructions on murder during the course of an arson were erroneous. Specifically, he argues that the court's definition of "during" was overly broad and was not consistent with Alabama law.

The record shows that at the charge conference defense counsel argued that there was no evidence indicating that the murders were committed during the arson. The prosecutor argued that Callen's statement clearly showed that the instruction on what constituted "during" was warranted based on the evidence. In Callen's statement he said that he used a lighter to set items on fire inside the apartment. (R. 876.) The following then occurred:

> "[Prosecutor]: And the final [instruction] is what we would want for in the course of an arson. We pulled the language from several cases that are, obviously cited to below.
>
> "It explains what ... was mentioned earlier about the two offenses being inextricable interwoven. If the jury finds that they are inextricably interwoven, then they can assume that they are part of the same set of circumstances.
>
> "The jury instruction goes on to state—and this is pulled directly from the cases that are—it's reworded a little bit, but it references the cites below.
>
> "That in the cases that are mentioned by the Alabama Supreme Court and the Alabama Criminal Appeals Court where the defendant sets the arson in an attempt to cover up the murders, that can be considered by the jury as something that occurred during the course of an arson. A murder that occurred during the course of an arson.
>
> ***37** "Additionally, we included in here that, as case law states. The State doesn't have to establish that the arson occurred prior to the murder as long as it's clear that the murder and the arson were a part of a continuous chain of events."

(R. 904–05.) Defense counsel objected, arguing that an instruction concerning committing the arson as a coverup was a direct comment on the evidence. The circuit court then stated that it would reword the instruction to read: "And similarly where a defendant commits a crime of arson in an attempt to cover up evidence of other crimes." (R. 906.) Both the prosecutor and defense counsel indicated that they agreed with that instruction. (R. 906.)

The circuit court gave the following instruction on murder during the course of an arson:

> "To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder during arson in the first degree:
>
> "One, that Quortes Kelly and/or Bernice Kelly and/or Aaliyah Budgess is dead.
>
> "Two, that the defendant, Dontae Callen, caused the deaths of Quortes Kelly and/or Bernice Kelly and/or Aaliyah Budgess stabbing them with a knife, and that in committing the acts which caused the deaths of Quortes Kelly, Bernice Kelly and Aaliyah Budgess, the defendant, Dontae Callen, intended to kill the deceased,

and he acted—a person acts intentionally when it is his purpose to cause the death of another person.

"Remember, the intent to kill must be real and specific with respect to each victim.

"The fourth element, that the defendant damaged a building by either starting or maintaining a fire, and that he did that—he had started or maintained that fire intentionally. And that at the time another person was present in the building. And that either the defendant knew of the other person's presence, or the circumstances were such that he should have known there was another person present during the arson, and that the murder took place during the arson.

"....

"During means in the course of a commission of, or in connection with, or in the immediate flight from the commission of the arson.

"....

"The Court charges the jury that if you believe the defendant did intentionally cause the death of Quortes Kelly and/or Bernice Kelly and/or Aaliyah Budgess, but his acts of intentionally damaging a building by starting or maintaining a fire in a building where the above were present, and the defendant knew or had a reasonable possibility that the above person or persons were present with (sic) a mere afterthought and not a part of the intentional killing, then you cannot convict the defendant of capital murder during this count, but may consider the lesser included offenses of reckless murder and arson.

"Where two offenses are inextricably interwoven, they are said to be part of the res gestae or, that is, the same set of circumstances.

"If you find that the defendant committed the murders in the course of or in the connection with the commission of or in the flight from the commission of an arson, that is sufficient evidence that the murder and the arson were part of a continuous chain of events.

"Similarly, where a defendant commits the crime of arson in an attempt to cover up evidence of other crimes, you may consider that the other crimes occurred during the course of an arson. It is not necessary that the State establish that the arson occurred before the other crimes, as long as it is clear that the other crimes and arson were part of a continuous chain of events."

***38** (R. 986–96.) At the conclusion of the court's instructions, the only objection made by defense counsel was that the circuit court did not give an instruction on reckless murder. (R. 999.) Counsel further stated that it objected to "all other exceptions to the court's refusals to give requested charges." (R. 1000.)

[74] The circuit court's instructions on the capital offense of arson-murder were consistent with Alabama law. As this Court stated in Bell v. State, 31 So.3d 159 (Ala. Crim. App. 2009):

"[W]e likewise conclude that, to establish the capital offense of arson-murder, it is not necessary that the State establish that the arson occurred before the murder as long as it is clear that the murder and the arson were part of a continuous chain of events. See Roberts v. State, 735 So.2d 1244, 1264 (Ala. Crim. App. 1997) (holding that '[t]he jury could easily have found beyond a reasonable doubt that the arson and the murder were part of a continuous chain of events, and that the arson was not a mere afterthought'), aff'd, Ex parte Roberts, 735 So.2d 1270, 1278 (Ala. 1999) (holding that, '[w]here two offenses are inextricably interwoven, they are said to be part of the res gestae.... The jury could have found that the murder and the arson were part of a continuous chain of events and that Roberts committed the murder "in the course of or in connection with the commission of, or in immediate flight from the commission of," arson.'). See also Way v. State, 496 So.2d 126, 128 (Fla. 1986) ('We agree with the state that the other committed felony, arson, need not be the cause of death to support this aggravating circumstance. Rather, it is sufficient that the capital murder occur during the same criminal episode as the enumerated felony, which was certainly the case in this instance.'); People v. Thomas, 137 Ill.2d 500, 534, 561 N.E.2d 57, 71, 148 Ill.Dec. 751, 765 (1990) ('So too, here, defendant committed both murder and arson, and aggravated arson and burglary, and these crimes occurred "essentially simultaneously." It is not imperative that the State prove beyond a reasonable doubt that defendant formed the criminal intent to commit arson or aggravated arson before committing murder. It is sufficient that the State proved the elements of the crimes and the accompanying felonies were part of the same criminal episode.'). But see State

v. Hacheney, 160 Wash.2d 503, 518, 158 P.3d 1152, 1160 (2007) ('The legislature adopted the "in the course of" language after this court ... defined "in the course of" as requiring a causal connection such that the death was a probable consequence of the felony. ... Moreover, for a killing to have occurred "in the course of" arson, logic dictates that the arson must have begun before the killing.')."

31 So.3d at 169–70.

The circuit court's jury instructions on the capital offense of murder during an arson were not erroneous and were consistent with Alabama law. Callen is due no relief on this claim.

B.

[75] Callen next argues that the circuit court's instructions on intoxication were erroneous. Specifically, Callen argues that the circuit court's instructions concerning the level of intoxication necessary to negate the intent necessary to convict for murder were erroneous.

The record shows that Callen requested an instruction on intoxication. The prosecution requested that the court charge that, to negate the intent necessary to convict intoxication must amount to mania. (R. 897–98.) The circuit court gave the more detailed instruction:

***39** "Ladies and gentlemen, you heard the term intoxication mentioned. Let me give to you the definition of intoxication in this state as to how it pertains to these charges.

"I'm going to read this, and then the lesser included charge of manslaughter, which comes after this, with respect to each charge of the indictment, each of the three counts, because it pertains to each of the three counts.

"In order for intoxication to be such that it could satisfy you that it prevented the defendant from forming mentally, entertaining the intent, which the law says he must have held, then that intoxication must be of such character and extent as to render him incapable of a consciousness that he is committing a crime.

"Mere drunkenness voluntarily produced is not a defense to a criminal charge, and will not prevent a finding of guilt of an offense or reduce the grade of an offense unless it is so extreme as to render impossible some mental condition, which is an essential element of the criminal act.

"Intoxication must be so excessive as to paralyze the mental facilities and render the accused incapable of forming or entertaining the intent required by law as an element of the offense.

"The degree of intoxication necessary to negate specific intent, and does prevent the intent element of an offense from being proved must amount to insanity."

(R. 976–77.)

> "This Court has repeatedly upheld jury instructions on intoxication that charge the jury that the degree of intoxication necessary to negate the 'specific intent' to kill must amount to insanity. See Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011); Whatley v. State, 146 So.3d 437 (Ala. Crim. App. 2010); Simmons v. State, 797 So.2d 1134 (Ala. Crim. App. 1999); Woods v. State, 789 So.2d 896 (Ala. Crim. App. 1999); Williams v. State, 710 So.2d 1276 (Ala. Crim. App. 1996); Wesson v. State, 644 So.2d 1302 (Ala. Crim. App. 1994)."

Luong v. State, 199 So.3d 173, 200 (Ala. Crim. App. 2015).

The circuit court's instructions on intoxication were thorough and were consistent with Alabama law. Callen is due no relief on this claim.

C.

[76] Callen next argues that the circuit court violated his rights to due process, a fair trial, and a reliable sentence, when it declined to instruct the jury on heat-of-passion manslaughter. Specifically, he argues: "The combination of Mr. [Quortes] Kelly's heavy drinking, his prior violence, and the nature of the charged offense supported the giving

of a heat of passion instruction"; therefore, the court should have given defense's requested charge no. 3.[11] (Callen's brief, at p. 87.)

***40** At the charge conference, the following occurred:

> "The Court: Charge three. This is a provocation, which you haven't asked for. So, I'm going to refuse that. Correct? I don't believe there's any testimony of any provocation?
>
> "[Defense counsel]: That's fine, Judge."

(R. 893.) Defense counsel agreed with the circuit court's observation that it would not give an instruction on heat-of-passion manslaughter because such an instruction was not warranted by the evidence; therefore, if error did occur it was invited by defense counsel.

> " ' " ' Invited error has been applied to death penalty cases. "An invited error is waived, unless it rises to the level of plain error." Ex parte Bankhead, 585 So.2d 112, 126 (Ala. 1991).' " ' See Saunders v. State, 10 So.3d 53, 88 (Ala. Crim. App. 2007), quoting Scott v. State, 937 So.2d 1065, 1075 (Ala. Crim. App. 2005), quoting in turn Adams v. State, 955 So.2d 1037, 1050–51 (Ala. Crim. App. 2003), rev'd on other grounds, 955 So.2d 1106 (Ala. 2005)."

Doster v. State, 72 So.3d 50, 84 (Ala. Crim. App. 2010).

[77] "Even in a capital case a defendant is not entitled to instructions on a lesser included offense unless there is a rational theory from the evidence presented supporting such an instruction. Roberts v. State, 735 So.2d 1244 (Ala. Cr. App. 1997)." Hall v. State, 820 So.2d 113, 138–39 (Ala. Crim. App. 1999).

> "Alabama courts have, in fact, recognized three legal provocations sufficient to reduce murder to manslaughter: (1) when the accused witnesses his or her spouse in the act of adultery; (2) when the accused is assaulted or faced with an imminent assault on himself; and (3) when the accused witnesses an assault on a family member or close relative."

Rogers v. State, 819 So.2d 643, 662 (Ala. Crim. App. 2001).

In Living v. State, 796 So.2d 1121 (Ala. Crim. App. 2000), this Court found that the circuit court did not err in refusing to give a jury instruction on heat-of-passion manslaughter. We stated:

> " '[A]n extreme emotional or mental disturbance, without legally recognized provocation, will not reduce murder to manslaughter.' MacEwan v. State, 701 So.2d [66] at 70 [(Ala. Crim. App. 1997)]. (quoting Gray v. State, 482 So.2d 1318, 1319 (Ala. Crim. App. 1985)). Moreover, [the victim] shoving [the appellant] during an argument does not constitute legal provocation for heat-of-passion manslaughter. 'A minor technical assault which did not endanger life or inflict serious physical injury or inflict substantial and considerable pain would not amount to sufficient provocation.' Shultz v. State, 480 So.2d 73, 76 (Ala. Crim. App. 1985). Because no evidence of adequate legal provocation was presented at trial, the trial court did not err in refusing to instruct the jury on heat-of-passion manslaughter."

796 So.2d at 1130.

Here, there was absolutely no evidence presented that the murders fit within the definition of heat-of-passion manslaughter. Therefore, the circuit court committed no error in refusing to give this instruction. Callen is due no relief on this claim.

D.

[78] Callen next argues that the circuit court erred in its jury instruction on reasonable doubt in the guilt phase. Specifically, he argues that the court's use of the term "abiding conviction" suggested a higher degree of doubt than the beyond a reasonable doubt necessary to acquit; therefore, he says, the instruction violated Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

***41** Callen did not object to the circuit court's instructions on reasonable doubt; therefore, we review this claim for plain error. See Rule 45A, Ala. R. App. P.

The circuit court gave the following instruction on reasonable doubt:

"Let me define reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all of the evidence in this case.

"While the State's burden of proof is a strict and heavy burden, it is necessary that the defendant's guilt be proved beyond all possible doubt. It is required that the State's proof exclude any reasonable doubt concerning his guilt.

"Reasonable doubt is not a mere possible doubt because everything relating to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all of the evidence in this case.

"It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but it is a doubt based on the evidence, the lack of evidence, a conflict in the evidence, or a combination thereof. It is a doubt that remains after going over in your minds the entire case and giving consideration to all of the testimony. It is distinguished from a doubt arising from mere possibility, from bare imagination or from fanciful conjecture.

"Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

"If after considering all of the evidence in this case you are convinced of the defendant's guilt beyond a reasonable doubt, then it would be your duty to convict him.

"However, if you have reasonable doubt of his guilt, then you should find the defendant not guilty.

"The best way that I know of putting it is this. If after a full and fair consideration of all of the evidence in this case, if there remains in your minds an abiding conviction that the defendant is guilty as charged, then you would be convinced beyond a reasonable doubt. In that event, the defendant should be convicted.

"On the other hand, if after that same full and fair consideration of all of the evidence in this case there does not remain in your minds an abiding conviction that the defendant is guilty as charged, then you would not be convinced beyond a reasonable doubt. In that event, the defendant should be found not guilty."

(R. 961–63)(emphasis added).

In Cage v. Louisiana, the United States Supreme Court held that the court's use of the terms "grave uncertainty, actual substantial doubt, and moral certainty" when defining reasonable doubt allowed a juror to find guilt "based on a degree of proof below that required by the Due Process Clause." 498 U.S. at 41, 111 S.Ct. 328. "[I]t was not the use of any one of these terms, but rather the combination of all three, that rendered the charge unconstitutional in Cage." Haney v. State, 603 So.2d 368, 411 (Ala. Crim. App. 1991).

In discussing the evolution of the law subsequent to Cage, the Alabama Supreme Court has stated:

"In Estelle v. McGuire, 502 U.S. 62, 72 and n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), the United States Supreme Court made clear that the proper inquiry was whether there is a reasonable likelihood that the jury did apply the instruction in an unconstitutional manner, not whether it could have applied it in an unconstitutional manner. In Victor [v. Nebraska, 511 U.S. 1 [114 S.Ct. 1239, 127 L.Ed.2d 583] (1994)], the United States Supreme Court emphasized that '[t]he constitutional question ... is whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the [In re] Winship[, 397 U.S. 358 [90 S.Ct. 1068, 25 L.Ed.2d 368] (1970),] standard.' 511 U.S. at 6. In discussing one of the jury instructions challenged in Victor, the United States Supreme Court recognized that it had stated that ' "[p]roof to a 'moral certainty' is an equivalent phrase with 'beyond a reasonable doubt.' " Fidelity Mut. Life Ass'n v. Mettler, 185 U.S. 308, 317, 22 S.Ct. 662, 46 L.Ed. 922 (1902) (approving reasonable doubt instruction cast in terms of moral certainty).' 511 U.S. at 12. The United States Supreme Court acknowledged that historically the phrase 'moral certainty' in a jury instruction meant 'the highest degree of certitude based on [the] evidence' but that the term may have lost its historical meaning over time. 511 U.S. at 11. The United States Supreme Court, however, concluded that when an instruction equated moral certainty with proof beyond a reasonable doubt the instruction satisfied the requirements of the

Due Process Clause and was constitutionally sufficient. The United States Supreme Court emphasized that, although it did not condone the use of the phrase 'moral certainty,' if the jury was instructed that its decision was to be based on the evidence in the case, then the jury understood that moral certainty was associated with the evidence of the case and no constitutional error occurred. Additionally, the United States Supreme Court addressed the use of the phrase 'substantial doubt' and emphasized that when that phrase was used in context to convey the existence rather than the magnitude of doubt there was no likelihood that jury applied the charge unconstitutionally."

***42** Ex parte Brown, 74 So.3d 1039, 1052–53 (Ala. 2011).

"[T]his court has upheld instructions informing the jury that if it had an 'abiding conviction of the truth of the charge then it was convinced beyond a reasonable doubt,' determining that such language did not violate Cage." Harris v. State, 2 So.3d 880, 913–14 (Ala. Crim. App. 2007). See Stallworth v. State, 868 So.2d 1128, 1164 (Ala. Crim. App. 2001). The circuit committed no error, much less plain error, in its instructions on reasonable doubt. Callen is due no relief on this claim.

Penalty–Phase Issues

XVII.

[79] Callen argues that the circuit court erred in several of its jury instructions in the penalty phase of his trial.

"A trial court has broad discretion when formulating its jury instructions. See Williams v. State, 611 So.2d 1119, 1123 (Ala. Cr. App. 1992). When reviewing a trial court's instructions, ' "the court's charge must be taken as a whole, and the portions challenged are not to be isolated therefrom or taken out of context, but rather considered together." ' Self v. State, 620 So.2d 110, 113 (Ala. Cr. App. 1992) (quoting Porter v. State, 520 So.2d 235, 237 (Ala. Cr. App. 1987)); see also Beard v. State, 612 So.2d 1335 (Ala. Cr. App. 1992); Alexander v. State, 601 So.2d 1130 (Ala. Cr. App. 1992)."

Williams v. State, 795 So.2d 753, 780 (Ala. Crim. App. 1999).

"No party may assign as error the court's giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge, unless the party objects thereto before the jury retires to consider its verdict, stating the matter to which he or she objects and the grounds of the objection."

Rule 21.3, Ala. R. Crim. P. "A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error." Price v. State, 725 So.2d 1003, 1058 (Ala. Crim. App. 1997).

A.

[80] First, Callen argues that the circuit court erred in refusing to give two requested jury instructions on Callen's age as being a statutory mitigating circumstance. Callen requested the following instructions:

"Defendant's Requested Jury Charge # 1

"The Court charges the jury that adolescents everywhere are more vulnerable, more impulsive, and have less self-discipline than adults. A crime committed by youths may be just as harmful to victims as those committed by older person but adolescents may deserve less punishment because adolescents may have less capability to control their conduct and to think in long range terms than do adults. Moreover, youth crime is such that it is not exclusively the offender's fault. Offenses by the young represent a failure of the family, school, and the social system that share responsibility for the development of America's youth."

(C. 627.)

"Defendant's Requested Jury Charge # 23

"The Court charges the jury that the youth of the Defendant at the time of the offense must be considered a mitigating factor in more than one respect. Youth is more than a chronological fact. It is a time and condition of life when a person may be more susceptible to influence. Our history is replete with laws and judicial

recognition that youths generally are less mature and responsible than older adults."

***43** (C. 649.)

At the charge conference, the following occurred:

"The Court: Charge number one, about adolescents everywhere are more vulnerable and more impulsive. What says the State?

"[Prosecutor]: Judge, I certainly, think that is a proper comment in argument. I do not believe that is proper for the Judge to instruct them as to that. I would think that is a source of general knowledge, and that the jury would be able to make whatever deductions they want to after hearing the defense argue that topic.

"The Court: [Defense counsel], I would have to agree. I don't feel like this is a statement of the law. It's a statement of, as the [prosecutor] said, basically, a sociological statement that y'all are more than welcome to comment on, but I don't see this as a legal ruling or a legal definition that should be given as a Court's charge."

(R. 1127.) The circuit court stated that it was refusing the requested charges. (R. 1140.)

Callen argues that the requested instructions "are long-standing legal principles espoused by the United States Supreme Court. See Thompson v. Oklahoma, 487 U.S. 815, 834 [108 S.Ct. 2687, 101 L.Ed.2d 702] (1988) ... Eddings v. Oklahoma, 455 U.S. 104, 115–16 n. 11 [102 S.Ct. 869, 71 L.Ed.2d 1] (1982)." (Callen's brief, at p. 84.)

The circuit court gave the following instruction:

"The seventh statutory mitigation is the age of the defendant at the time of the crime.

"Mitigating circumstances shall also include any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, such as those that were offered by the defendant."

(R. 1222–23.) This jury instruction is identical to the Pattern Jury Instructions—Criminal Proceedings adopted by the Alabama Supreme Court on November 9, 2007. There is no Alabama law defining the age for application of the statutory mitigating circumstance, and Alabama has not adopted the definition that Callen urged the court to give in its requested instructions on age. Cf. State v. Gregory, 340 N.C. 365, 423, 459 S.E.2d 638 (N.C. 1995) ("In this case, the jury was instructed that '[t]he mitigating effect[ ] of the age of the defendant is for you to determine from all the facts and circumstances which you find from the evidence.' We conclude that this language did not limit the consideration of this mitigating circumstance solely to chronological age, but specifically instructed the jurors to consider all the facts and circumstances related to age that they found from the evidence. There is no error, much less plain error, in this instruction.").

In this case, the circuit court instructed the jury:

> "[T]he laws of this state further provide that mitigating circumstances shall not be limited to those listed by statute, but shall also include any aspect of the defendant's character or background, any circumstances surrounding the offense, and any other relevant mitigating evidence that the defendant offers as support for a sentence of life imprisonment without parole."

***44** (R. 1223–24.) The circuit court's instructions did not limit the mitigating circumstance of the defendant's "age" merely to chronological age. The circuit court's instructions on this mitigating circumstance did not constitute error. Callen is due no relief on this claim.

B.

[81] Callen next argues that the circuit court erred in refusing to give its requested jury instruction on life imprisonment without the possibility of parole.

"Defendant's requested Jury Instruction # 21

"The Court charges the jury that even if you find one or more aggravating circumstances beyond a reasonable doubt you may impose a sentence of life imprisonment without the possibility of parole for any reason. You need not find a mitigating circumstance in order to impose a sentence of life imprisonment without parole. Nothing in the law forbids you from extending mercy out of compassion or belief that life imprisonment is sufficient punishment under all the circumstances of this case."

(C. 647.) At the charge conference, the circuit court refused to give an instruction that the jury could sentence Callen to life imprisonment without the possibility of parole without first finding the existence of a mitigation circumstance. (R. 1139.)

In Rieber v. State, 663 So.2d 985 (Ala. Crim. App. 1994), we held that an almost identical instruction was properly refused by the trial court because it was an incorrect statement of Alabama law. We stated:

"In Whisenhant v. State, 482 So.2d 1225 (Ala. Crim. App. 1982), aff'd. in part, 482 So.2d 1241 (1983), the court refused to give a similar charge. In Whisenhant, the defendant asked the court to tell the jury that it could recommend mercy for the defendant regardless of whether any evidence of mitigating circumstances was preserved. In finding that the defendant's requested instruction was an erroneous statement of law, this court held:

" 'The correct principle underlying this issue is stated in [Beck v. State, 396 So.2d 645, 663 (Ala. 1992 [1980]),] as follows:

" ' "The court shall instruct the jury that in determining whether to fix a punishment of death, the jury must weigh the aggravating and mitigating circumstances in determining whether to fix the punishment at death. The trial court shall instruct the jury to avoid any influence of passion, prejudice or other arbitrary factor while deliberating and fixing the sentence.'

" 'Clearly, it is the duty of the jury to weigh mitigating and aggravating circumstances in its decision. The jury is not free, as appellant's charge suggests, to arbitrarily ignore any factor, positive or negative, in arriving at the correct sentence.

" 'As well, we view Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), to have tacitly held that the availability of such a mercy option to the sentencing authority is not a constitutional requirement. As Mr. Justice White's concurring opinion in Proffitt points out, the sentencing authority in Florida is required to impose the death penalty on all first degree murderers as to whom the statutory aggravating circumstances outweigh the mitigating circumstances. Proffitt at 260 [96 S.Ct. at 2970]. This required imposition of the death penalty, regardless of mercy, passed constitutional muster in Proffitt, and is in keeping with the concern that arbitrary and capricious imposition of the death penalty be avoided. Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982).'

***45** "Whisenhant, 482 So.2d at 1236. See also Morrison v. State, 500 So.2d 36 (Ala. Crim. App. 1985), aff'd, 500 So.2d 57 ([Ala.] 1986), cert. denied, 481 U.S. 1007, 107 S.Ct. 1634, 95 L.Ed.2d 207 (1987)."

663 So.2d at 995–96.

In rejecting a similar instruction, the Oregon Supreme Court in State v. McAnulty, 356 Or. 432, 338 P.3d 653 (2014), stated:

"In [State v.] Washington, [355 Or. 612, 653, 330 P.3d 596 (2014),] this court reviewed and rejected essentially the same challenge to a proposed mercy instruction. The defendant's proposed instruction in that case would have instructed the jury that it could base its decision whether to impose the death penalty 'on mercy "alone" and "for any reason whatsoever." ' Washington, 355 Or. at 655, 330 P.3d 596. We explained that this court has generally rejected that form of instruction because it fails to inform jurors that their decision must be based on the evidence before them. Id. at 654, 330 P.3d 596; see also [State v.] Moore, 324 Or. 396 at 428, 927 P.2d 1073 [(1996)] (explaining that 'any instruction that appeals to the jurors' sympathies also must instruct the jurors that such sympathy must be based upon the mitigating evidence before them'); State v. Moen, 309 Or. 45, 92, 786 P.2d 111 (1990) (affirming instruction that correctly conveyed that 'general sympathy, or any emotionalism, has no place in a capital sentencing decision, just as it has no place in the jury's deliberations during the guilt phase')."

356 Or. at 482–83, 338 P.3d at 683.

Clearly, the circuit court did not err in refusing to give an instruction that was inconsistent with Alabama law and that, in fact, would have encouraged the jury to disregard the law. Callen is due no relief on this claim.

XVIII.

[82] **[83]** Callen argues that the prosecutor improperly characterized the death penalty as mandatory during closing arguments in the penalty phase. The prosecutor made the following argument:

> "There is nothing that they can present from Dr. [Ron] Meredith, from family members, there is nothing that outweighs what he did over and over and over.
>
> "I don't have to ask you to do something. The law demands it. His actions demand it. When the family —both sides of the family come in, your job is not to answer to them. Your job is to take the law to determine the weight of those aggravating circumstances and then weigh them and ask yourself if the scales can survive the weight of what he did."

(R. 1212.) Callen did not object to the prosecutor's argument; therefore, we review this claim for plain error. See Rule 45(A), Ala. R. App. P.

> "In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. Whitlow v. State, 509 So.2d 252, 256 (Ala. Cr. App. 1987); Wysinger v. State, 448 So.2d 435, 438 (Ala. Cr. App. 1983); Carpenter v. State, 404 So.2d 89, 97 (Ala. Cr. App. 1980), cert. denied, 404 So.2d 100 (Ala. 1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict. Orr v. State, 462 So.2d 1013, 1016 (Ala. Cr. App. 1984); Sanders v. State, 426 So.2d 497, 509 (Ala. Cr. App. 1982)."

***46** Bankhead v. State, 585 So.2d 97, 106–07 (Ala. Crim. App. 1989).

Here, the trial court instructed the jury that arguments of counsel were not evidence. The prosecutor was clearly arguing that the evidence did not support a verdict of life imprisonment without the possibility of parole. There was no error, much less plain error, in the prosecutor's closing argument. Callen is due no relief on this claim.

XIX.

[84] Callen argues that the circuit court improperly characterized the jury's verdict in the penalty phase as an advisory recommendation. The United States Supreme Court in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), held: " 'It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.' "

In Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011), this Court addressed this issue and stated:

> "First, the circuit court did not misinform the jury that its penalty phase verdict is a recommendation. Under § 13A–5–46, Ala. Code 1975, the jury's role in the penalty phase of a capital case is to render an advisory verdict recommending a sentence to the circuit judge. It is the circuit judge who ultimately decides the capital defendant's sentence, and, '[w]hile the jury's recommendation concerning sentencing shall be given consideration, it is not binding upon the courts.' § 13A–5–47, Ala. Code 1975. Accordingly, the circuit court did not misinform the jury regarding its role in the penalty phase.
>
> "Further, Alabama courts have repeatedly held that 'the comments of the prosecutor and the instructions of the trial court accurately informing a jury of the extent

of its sentencing authority and that its sentence verdict was "advisory" and a "recommendation" and that the trial court would make the final decision as to sentence does not violate Caldwell v. Mississippi[, 472 U.S. 320 (1985)].' Kuenzel v. State, 577 So.2d 474, 502 (Ala. Crim. App. 1990) (quoting Martin v. State, 548 So.2d 488, 494 (Ala. Crim. App. 1988)). See also Ex parte Hays, 518 So.2d 768, 777 (Ala. 1986); White v. State, 587 So.2d [1218] (Ala. Crim. App. 1991); Williams v. State, 601 So.2d 1062, 1082 (Ala. Crim. App. 1991); Deardorff v. State, 6 So.3d 1205, 1233 (Ala. Crim. App. 2004); Brown v. State, 11 So.3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So.3d 880 (Ala. Crim. App. 2007). Such comments, without more, do not minimize the jury's role and responsibility in sentencing and do not violate the United States Supreme Court's holding in Caldwell. Therefore, the circuit court did not err by informing the jury that its penalty-phase verdict was a recommendation."

96 So.3d at 209.

The circuit court's characterization of the jury's advisory verdict in the penalty phase as a recommendation did not result in error, much less plain error. Callen is due no relief on this claim.

XX.

[85] Callen next argues that the circuit court erred in failing to consider mitigation evidence, he says, that Callen had been sexually abused by Quortes Kelly. Specifically, Callen argues that the circuit court erred in refusing to consider a presentence memorandum report prepared by defense counsel. Callen asserts that the memorandum was admissible under § 13A–5–45(d), Ala. Code 1975. [12]

***47** The record reflects that immediately before Callen's sentencing hearing before the judge, Callen sought to introduce a sentencing memorandum that defense counsel had prepared. This memorandum included hearsay statements made by Dr. Ronald Meredith, a clinical psychologist. The memorandum Callen sought to introduce contained statements that Callen told Dr. Meredith that he had been sexually abused by Quortes Kelly and that on the morning of the murder he awoke to find that Kelly was sexually molesting him. Defense counsel argued:

"There are some things in there that were not brought out at trial, because we couldn't bring them out at trial. For the simple reason, Mr. Callen never expressed to me some things that occurred to him, but he did to the mitigation expert and twice to the psychologist. But, then, he backed off. He never has gone there again."

(R. 1266.) The prosecutor objected to the introduction of the sentencing memorandum:

"We would respond that the sentencing memorandum that was filed today, it contains a number of things that were never placed in evidence.

"We talked about some things that he supposedly told this mitigation expert who was never qualified as an expert, never offered any testimony.

"Apparently, the defendant recanted what he told her to start with. I trust Your Honor to take it and give it the proper weight.

"However, for future proceedings, I want it very clear on the record that the things in this memorandum that we received this morning, the day of the sentencing hearing, the things that are not supported by the evidence and not supported by testimony, we want the appellate courts to know we're not saying that the things in here are correct, because we certainly do not think they are."

(C. 1270–71.) The circuit court then indicated that it would not consider the sentencing memorandum.

Dr. Meredith testified to the following at the sentencing hearing before the jury:

"I asked Mr. Callen on the first occasion I saw him if he had ever been sexually abused, and he was very reluctant to answer that question.

"Then, he went ahead and told me that he had been sexually abused by a close member of his family, and that the only person who knew anything about that was the little boy who was watching.

> "The second time that I interviewed him I, again, went over the same material. I asked him the same questions. I said, 'Tell me about the little boy.' And he said, 'What little boy?'
>
> "....
>
> "To me that indicates that Mr. Callen had a disassociative episode. He was not fully conscious of what he was doing. He was in what we call a twilight state. The only entity or persons, if you will, that saw the whole thing was a little piece of a little boy who had been terribly abused."

(R. 1106–07.)

[86] **[87]** While it is true that hearsay is admissible at a sentencing hearing, there are limits to its admissibility.

> "The trial court may properly consider hearsay at the penalty phase of the trial if the defendant has an opportunity to rebut the evidence.'
>
> " ' "Courts are permitted to consider hearsay testimony at sentencing.... While hearsay evidence may be considered in sentencing, due process requires both that the defendant be given an opportunity to refute it and that it bear minimal indicia of reliability...." ' "

Ex parte McGahee, 632 So.2d 981, 982–83 (Ala. 1993), quoting, in part, Kuenzel v. State, 577 So.2d 474, 526 (Ala. Crim. App. 1990). The same should apply to evidence the defense seeks to introduce at sentencing. Cf. Mendoza v. State, 700 So.2d 670, 675 (Fla. 1997) ("We have recognized that hearsay evidence may be admissible in a penalty-phase proceeding if there is an opportunity to rebut.").

***48** **[88]** Not only was the evidence in this case hearsay, but it was also "double hearsay."

> "Merely because testimony contains hearsay does not render it per se inadmissible at a sentencing hearing. [People v.] Harris, 375 Ill.App.3d [398] at 409, 313 Ill.Dec. 960, 873 N.E.2d 584 [(2007)]. If the evidence is 'double hearsay[, it] should be corroborated, at least in part, by other evidence.' People v. Spears, 221 Ill.App.3d 430, 437, 164 Ill.Dec. 19, 582 N.E.2d 227 (1991)."

People v. Varghese, 391 Ill.App.3d 866, 330 Ill.Dec. 917, 909 N.E.2d 939 (2009). "In [State v.] Johnson, [856 P.2d 1064 (Utah 1993),] the supreme court held that a report prepared for a sentencing hearing that consisted of double and triple hearsay was unreliable and speculative ...." State v. Simonette, 881 P.2d 963, 964 n. 2 (Utah Ct. App. 1994).

Indeed, defense counsel noted the unreliability of the statements. (R. 1266.) Given that the sentencing memorandum was filed within minutes of the judicial sentencing hearing, that the State had no opportunity to rebut the allegations, and that there was absolutely nothing to indicate the reliability of the statements purportedly made by Dr. Meredith, we agree with the circuit court that the sentencing memorandum was properly excluded from its consideration. Callen is due no relief on this claim.

XXI.

Callen next argues that the circuit court erred in failing to consider a presentence investigation ("PSI") report before sentencing him. Specifically, he argues that the circuit court erred in relying on the youthful-offender report and not the official PSI report that had been prepared by the Alabama Board of Pardons and Paroles after his conviction. He asserts that the youthful offender report had been completed more than two years before Callen was sentenced. Also, he argues that the youthful offender report does not contain any victim-impact statements and no "updated information on this health, psychological status, or adjustment to incarceration." (Callen's brief, at p. 52.)

However, Callen's argument is not supported by the record. As the State asserts in its brief, the circuit court's sentencing order clearly states that it considered the PSI report prepared by the Board of Pardons and Paroles. In fact, the PSI report is contained in the third supplemental record filed with this Court. (3 Supple. 60–64.) This report contains all the information Callen states was not included in the youthful-offender report. Callen's argument is not supported by the record, and he is due no relief on this claim.

XXII.

[89] Callen argues that the circuit court erred in counting the aggravating circumstance—multiple homicides—as both an element of the offense and an aggravating circumstance. This practice is known as "double-counting."

In addressing this issue in a Louisiana case, the United States Supreme Court has stated:

> "Here, the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that 'the offender has a specific intent to kill or to inflict great bodily harm upon more than one person.' The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion. The Constitution requires no more."

***49** Lowenfield v. Phelps, 484 U.S. 231, 246, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

Alabama has consistently upheld the practice of double-counting.

> "Brown argues that the court erred in double counting robbery and burglary as both elements of the capital offenses and aggravating circumstances that would support a death sentence.
>
> > " ' "The practice of permitting the use of an element of the underlying crime as an aggravating circumstance is referred to as "double-counting" or "overlap" and is constitutionally permissible.' Coral v. State, 628 So.2d 954, 965 (Ala. Cr. App.), aff'd on return to remand, 628 So.2d 988 (Ala. Cr. App. 1992), aff'd, 628 So.2d 1004 (Ala. 1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); see also Ex parte Trawick, 698 So.2d 162 (Ala.), cert. denied, 522 U.S. 1000, 118 S.Ct. 568, 139 L.Ed.2d 408 (1997); and Hart v. State, 612 So.2d 520 (Ala. Cr. App.), aff'd, 612 So.2d 536 (Ala. 1992), cert. denied, 508 U.S. 953, 113 S.Ct. 2450, 124 L.Ed.2d 666 (1993). Section 13A–5–50, Ala. Code 1975, contemplates that certain aggravating circumstances will be considered established for purposes of sentencing when a verdict of guilty of capital murder is returned. That section specifically provides:
> >
> > " ' "The fact that a particular capital offense as defined in Section 13A–5–40(a) necessarily includes one or more aggravating circumstances as specified in Section 13A–5–49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence. By way of illustration and not limitation, the aggravating circumstance specified in Section 13A–5–49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivisions (1) through (4) of subsection (a) of Section 13A–5–40." ' "
>
> "Whitehead v. State, 777 So.2d 781, 850 (Ala. Crim. App. 1999), aff'd, 777 So.2d 854 (Ala. 2000). There was no error here."

Brown v. State, 11 So.3d 866, 929 (Ala. Crim. App. 2007).

There was no error in counting an element of the capital-murder offense as an aggravating circumstance. Callen is due no relief on this claim.

XXIII.

[90] Callen argues that evolving standards of decency have rendered Alabama's method of execution—lethal injection—unconstitutional. He argues that there is a substantial risk of serious harm to Callen based on Alabama's three-drug protocol.

> "The constitutionality of Alabama's method of execution has been addressed by the United States Supreme Court and the Alabama Supreme Court. In Ex parte Belisle, 11 So.3d 323 (Ala. 2008), the Alabama Supreme Court stated:

> " 'The Supreme Court upheld the constitutionality of Kentucky's method of execution, Baze [v. Rees, 553 U.S. 35, 62,] 128 S.Ct. [1520] 1538 [170 L.Ed.2d 420 (2008)], and noted that "[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard." Baze, [553 U.S. at 61], 128 S.Ct. at 1537. Justice Ginsburg and Justice Souter dissented from the main opinion, arguing that "Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs." Baze, [553 U.S. at 114], 128 S.Ct. at 1567 (Ginsburg, J., dissenting). The dissenting Justices recognized, however, that Alabama's procedures, along with procedures used in Missouri, California, and Indiana "provide a degree of assurance—missing from Kentucky's protocol—that the first drug had been properly administered." Baze, [553 U.S. at 121], 128 S.Ct. at 1571 (Ginsburg, J., dissenting).
>
> ***50** " 'The State argues, and we agree, that Belisle, like the inmates in Baze, cannot meet his burden of demonstrating that Alabama's lethal-injection protocol poses a substantial risk of harm by asserting the mere possibility that something may go wrong. "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." Baze, [553 U.S. at 50], 128 S.Ct. at 1531. Thus, we conclude that Alabama's use of lethal injection as a method of execution does not violate the Eighth Amendment to the United States Constitution.'
>
> "11 So.3d at 339."

Thompson v. State, 153 So.3d 84, 180 (Ala. Crim. App. 2012).

This Court is bound by the decisions of the Alabama Supreme Court. See § 12–3–16. Ala. Code 1975. Callen's execution by lethal injection does not constitute cruel and unusual punishment, and he is due no relief on this claim.

XXIV.

[91] Callen argues that his death sentence is cruel and unusual punishment because, he says, he was only 18 years old at the time of the murders and because he is "intellectually delayed." (Callen's brief, at p. 91.)

First,

> "[t]he United States Supreme Court in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), held that it was unconstitutional to execute a defendant who was under the age of 18 when he committed murder. See also Adams v. State, 955 So.2d 1037 (Ala. Crim. App. 2003), rev'd in part, 955 So.2d 1106 (Ala. 2005). The United States Supreme Court stated:
>
> > " 'Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. The plurality opinion in Thompson [v. Oklahoma, 487 U.S. 815 (1988)], drew the line at 16. In the intervening years the Thompson plurality's conclusion that offenders under 16 may not be executed has not been challenged. The logic of Thompson extends to those who are under 18. The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.'
>
> "543 U.S. at 574.
>
> "The Alabama appellate courts have applied the holding in Roper to those individuals who were under the age of 18 when they committed murder. See Ex parte Adams, 955 So.2d 1106 (Ala. 2005) (Supreme Court remanded case, in which defendant was 17 years of age at the time of the murder, for reconsideration of sentence in light of Roper); Hyde v. State, 950 So.2d 344 (Ala. Crim. App. 2006) (remanded case for Hyde, who was 17 years old at the time of the offense, to be resentenced to life imprisonment without parole); Wimberly v. State, 931 So.2d 60 (Ala. Crim. App. 2005) (death sentence set aside because Wimberly was 17 years old at the time of the murder); Duke v. State, 922 So.2d 179 (Ala. Crim. App. 2005) (Duke's death

sentence was vacated because Roper was released while case was pending on appeal and Duke was 17 years old at the time of the murders); Duncan v. State, 925 So.2d 245 (Ala. Crim. App. 2005) (death sentence set aside because Duncan was 17 years old at the time of the murder).

"Thompson was 18 years of age at the time of the murders. Thus, his death sentence is consistent with Roper and the Eighth Amendment."

Thompson, 153 So.3d at 176–77. Like Thompson, Callen was 18 years and 2 months old at the time of the murders; therefore, his sentence of death does not offend the Eighth Amendment according to Roper v. Simmons.

***51** Second, the circuit court found that Callen was not intellectually disabled, as that term is defined in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and Ex parte Perkins, 920 So.2d 599 (Ala. Crim. App. 2005). (See this Court's discussion in Part II of this opinion.) Accordingly, Callen's death sentence does not offend Atkins or Perkins, and Callen is due no relief on this claim.

XXV.

[92] Callen argues that the circuit court erred in rejecting the two statutory mitigating circumstances relating to the defendant's mental health. Specifically, he argues that the circuit court erred in failing to apply § 13A–5–51(2) and (6), Ala. Code 1975, as mitigating circumstances.

Section 13A–5–51(2), Ala. Code 1975, provides that one mitigating circumstance is when "The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." Section 13A–5–51(6), Ala. Code 1975, also provides as a mitigating circumstance that "[A] capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" during the commission of the capital offense.

> "When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence."

Section 13A–5–45(g), Ala. Code 1975.

[93] **[94]** **[95]** **[96]** **[97]** **[98]** However,

> " ' "merely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that [circumstance]." Mikenas [v. State, 407 So.2d 892, 893 (Fla. 1981)]; Smith [v. State, 407 So.2d 894 (Fla. 1981)].' Harrell v. State, 470 So.2d 1303, 1308 (Ala. Cr. App. 1984), aff'd, 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985)."

Perkins v. State, 808 So.2d 1041 (Ala. Crim. App. 1999).

> " ' "While Lockett [v. Ohio, 455 U.S. 104 (1982) [438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)]] and its progeny require consideration of all evidence submitted as mitigation, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority." ' Ex parte Slaton, 680 So.2d 909, 924 (Ala. 1996) (quoting Bankhead v. State, 585 So.2d 97, 108 (Ala. Crim. App. 1989)). 'The weight to be attached to the ... mitigating evidence is strictly within the discretion of the sentencing authority.' Smith v. State, 908 So.2d 273, 298 (Ala. Crim. App. 2000).
>
> > " ' "[T]he sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. Murry v. State, 455 So.2d 53 (Ala. Cr. App. 1983), rev'd on other grounds, 455 So.2d 72 (Ala. 1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. Moore v. Balkcom, 716 F.2d 1511 (11th Cir. 1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation." '

***52** "Bush v. State, 695 So.2d 70, 94 (Ala. Crim. App. 1995) (quoting Clisby v. State, 456 So.2d 99, 102 (Ala. Crim. App. 1983)). See also Douglas v. State, 878 So.2d 1246, 1260 (Fla. 2004) ('We conclude that the trial court did not abuse its discretion in giving little weight to the mitigating facts relating to [the defendant's] abusive childhood.'); Hines v. State, 856 N.E.2d 1275, 1282–83 (Ind. App. 2006) ('The trial court is not obliged to weigh or credit mitigating factors the way a defendant suggests.... [or] to afford any weight to [the defendant's] childhood history as a mitigating factor in that [the defendant] never established why his past victimization led to his current behavior.')."

Thompson v. State, 153 So.3d 84, 189 (Ala. Crim. App. 2012).

[99] "[A] circuit court is not required to find that a capital defendant's evidence supports a mitigating circumstance; rather, 'whether the evidence ... actually [supports a] mitigating [circumstance] is in the discretion of the sentencing authority.' " Carroll v. State, [Ms. CR–12–0599, August 14, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

The circuit court acted within its discretion in declining to apply the above two statutory mitigating circumstances. Callen is due no relief on this claim.

XXVI.

While Callen's appeal was pending in this Court, the United States Supreme Court released its decision in Hurst v. Florida, —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). Callen moved that this Court grant him leave to supplement his brief so that he might argue the possible implications of Hurst to his case. The Hurst Court held that the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." —— U.S. ——, 136 S.Ct. at 619.

[100] Callen argues in his supplemental brief that the decision in Hurst renders his death sentence unconstitutional because, he says, the ultimate decision to impose a sentence of death was made by the court and not by the jury, the weighing of the aggravating and the mitigating circumstances was made by the court, and the aggravating circumstances necessary to impose the death penalty were found to exist by the court and not by the jury. Thus, he argues, the United States Supreme Court in Hurst rendered Alabama's death-penalty statute unconstitutional.

The Alabama Supreme Court recently addressed all of Callen's issues and stated:

> "Bohannon contends that, in light of Hurst [v. Florida, —— U.S. ——, 136 S.Ct. 616 (2016)], Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make 'the critical findings necessary to impose the death penalty.' —— U.S. ——, 136 S.Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death sentence is unconstitutional. We disagree.
>
> "Our reading of Apprendi [v. New Jersey, 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (2000)], Ring [v. Arizona, 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] (2002)], and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585, 122 S.Ct. 2428. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty—the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the

critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

***53** "Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, [859 So.2d 1181 (2002),] holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So.2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481, 120 S.Ct. 2348. Hurst does not disturb this holding.

"Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: 'The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, —— U.S. ——, 136 S.Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis.

"Bohannon's death sentence is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment. The jury, by its verdict finding Bohannon guilty of murder made capital because 'two or more persons [we]re murdered by the defendant by one act or pursuant to one scheme or course of conduct,' see § 13A–5–40(a)(10), Ala. Code 1975, also found the existence of the aggravating circumstance, provided in § 13A–5–49(9), Ala. Code 1975, that '[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme of course of conduct,' which made Bohannon eligible for a sentence of death. See also § 13A–5–45(e), Ala. Code 1975 ('[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.'). Because the jury, not the judge, unanimously found the existence of an aggravating factor—the intentional causing of the death of two or more persons by one act or pursuant to one scheme or course of conduct—making Bohannon death-eligible, Bohannon's Sixth Amendment rights were not violated."

Ex parte Bohannon, [Ms. 1150640, September 30, 2016] —— So.3d ——, —— (Ala. 2016).

Here, in the guilt phase, the jury found beyond a reasonable doubt that the three murders were committed by one act or pursuant to one scheme or course of conduct, an aggravating circumstance, as defined by § 13A–5–49(9), Ala. Code 1975. The finding of this aggravating circumstance by the jury beyond a reasonable doubt made Callen eligible for the death penalty. Based on the Supreme Court's decision in Ex parte Bohannon, Callen's death sentence does not violate the United States Supreme Court's holding in Hurst, and he is due no relief on this claim.

XXVII.

***54** Pursuant to § 13A–5–53, Ala. Code 1975, this Court must address the propriety of Callen's capital-murder conviction and his sentence of death. It is premature for this Court to attempt to fulfill our objection under § 13A–5–53 because the circuit court failed to make specific findings of fact concerning two of the aggravating circumstances it found to exist in Callen's case.

[101] **[102]** The circuit court found three aggravating circumstances: (1) that the commission of the act that "comprised the capital offense did create a great risk of death to many persons during its commission," § 13A–5–49(3), Ala. Code 1975; (2) that the murders were especially heinous, atrocious, or cruel when compared to other capital murders, § 13A–5–49(8), Ala. Code 1975; and (3) that Callen did intentionally cause the death of two or more persons by one act or pursuant to one scheme or course of conduct, § 13A–5–49(9), Ala. Code 1975. However, the circuit court failed to make specific findings of facts concerning § 13A–5–49(3), Ala. Code 1975, and § 13A–5–49(8), Ala. Code 1975. Section 13A–5–47(d), Ala. Code 1975, specifically provides:

> "Based upon the evidence presented at trial, the evidence presented during the sentence hearing, and the pre-sentence investigation report and any evidence submitted in connection with it, the trial court shall enter specific written findings concerning the existence or nonexistence of each aggravating circumstance enumerated in Section 13A–5–49, each mitigating circumstance enumerated in Section 13A–5–51, and any additional mitigating circumstances offered pursuant to Section 13A–5–52. The trial court shall also enter written findings of facts summarizing the crime and the defendant's participation in it."

When applying these aggravating circumstances the circuit court merely stated:

> "Aggravating circumstance number 3 Section 13A–5–49(3) does apply as the act which comprised the capital offense did create a great risk of death to many persons during its commission.
>
> "....
>
> "Aggravating circumstance number 8 Section 13A–5–49(8) does apply in that the capital offense was especially, heinous, atrocious or cruel when compared to other capital offenses." (C. 121.)

Clearly, the circuit court's order fails to comply with § 13A–5–47(d), Ala. Code 1975.

By remanding this case this Court does not mean to imply that the aggravating circumstance that the defendant "created a great risk of death to many" does not apply in this case. This Court has found this aggravating circumstance was properly applied when the capital offense was committed by the defendant firing a gun in an occupied dwelling and killing four people, Wilson v. State, 777 So.2d 856 (Ala. Crim. App. 1999), and shooting a shotgun on a residential street and killing two people, Edwards v. State, 515 So.2d 86 (Ala. Crim. App. 1987), abrogated on other grounds, Ex parte Stephens, 982 So.2d 1148 (Ala. 2006).

In regard to the aggravating circumstance that the murders were especially heinous, atrocious or cruel, this Court explained in Miller v. State, 913 So.2d 1148 (Ala. Crim. App. 2004):

> "The court's order fails to comply with Ex parte Kyzer, [399 So.2d 330 (Ala. 1981),] because the trial court failed to make specific findings of fact as to why it believed that this aggravating circumstance existed. Although the circuit court made findings of fact in another part of its three-part sentencing order, those facts do not establish specific findings addressing the standard set forth in Ex parte Kyzer. See, e.g., Stallworth v. State, 868 So.2d 1128, 1168 (Ala. Crim. App. 2001).
>
> ***55** "This Court has approved the application of this aggravating circumstance when the testimony has established that the victims were stabbed multiple times and that they suffered before they died. See Price v. State, 725 So.2d [1003,] 1062 [(Ala. Crim. App. 1997)]; Barbour v. State, 673 So.2d 461, 471 (Ala. Crim. App. 1994), aff'd, 673 So.2d 473 (Ala. 1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); Hallford v. State, 548 So.2d 526, 546 (Ala. Crim. App. 1988), aff'd, 548 So.2d 547 (Ala. 1989), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989).

> "However, when a circuit court has found this aggravating circumstance to exist, this Court has required the court to make specific findings of fact explaining why this aggravating circumstance was applicable."

913 So.2d at 1152. Again, "[b]y remanding this case to the circuit court, we do not wish to be understood as implying that [the murders were] not especially heinous, atrocious, or cruel when compared to other capital murders." Gobble v. State, 104 So.3d 920, 983 (Ala. Crim. App. 2010). "This Court has approved the application of this aggravating circumstance when the testimony has established that the victims were stabbed multiple times and that they suffered before they died." Miller v. State, 913 So.2d at 1152. See Price v. State, 725 So.2d 1003 (Ala. Crim. App. 1997).

Accordingly, this case is hereby remanded to the Jefferson Circuit Court for that court to amend its sentencing order to make specific findings of fact concerning the aggravating circumstances set out in § 13A–5–49(3) and § 13A–5–49(8), Ala. Code 1975. Due return should be filed in this Court within 60 days from the date of this opinion.

AFFIRMED AS TO CONVICTION; REMANDED WITH DIRECTIONS AS TO SENTENCING.

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

All Citations

--- So.3d ----, 2017 WL 1534453

Footnotes

1 Callen's first name is spelled both "Dantae" and "Dontae" in various parts of the record. We have used the spelling used in the indictment. (C. 131.)

2 In Hall v. Florida, the United States Supreme Court used the term "intellectual disability" instead of "mental retardation."

3 "Simply put, the Constitution does not require that the State bear the burden of proof in intellectual disability cases. United States v. Webster, 421 F.3d 308, 311 (5th Cir. 2005)." Carr v. State, 196 So.3d 926, 932 (Miss. 2016).

4 Not all states apply the same standard of proof when considering an Atkins claim. "Georgia requires the defendant to prove his mental retardation beyond a reasonable doubt. Ga. Code § 17–7–131 (1998). In addition to Indiana, Arizona, Colorado, and Florida require the defendant to prove he is mentally retarded by clear and convincing evidence. Ariz. Rev. Stat. Ann. § 13–703.02 (2003); Colo. Rev. Stat. Ann. § 18–1.3–1102 (West 2002); Fla. Stat. Ann. § 921.137 (West Supp. 2004). Arkansas, Maryland, Missouri, Nebraska, New Mexico, and Tennessee require proof by the preponderance of the evidence. Ark. Code Ann. § 5–4–618 (Michie 1997); Md. Code Ann., Crim. Law § 2–202 (2002); Mo. Ann. Stat. § 565.030 (Supp. 2004); Neb. Rev. Stat. § 28–105.01 (Supp. 2004); N.M. Stat. Ann. § 31–20A–2.1 (Mitchie 2000); Tenn. Code Ann. § 39–13–203 (2003). The federal government, Connecticut, Kansas, and Kentucky do not set a standard of proof. 18 U.S.C.S. § 3596 (West 2002 & Supp. 2005); Conn. Gen. Stat. Ann. § 53a–46a (West 2001); Kan. Stat. Ann. § 21–4623 (1995); Ky. Rev. Stat. Ann. § 532.135 (Mitchie 1999)." Pruitt v. State, 834 N.E.2d 90, 102 n. 1 (Ind. 2005).

5 The Atkins hearing in this case was held more than one year before the release of Hall v. Florida.

6 In Moore v. Texas, —— U.S. ——, 137 S.Ct. 1039, ——L.Ed.2d —— (2017), the United States Supreme Court further clarified its holding in Hall v. Florida, —— U.S. ——, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), and reversed the judgment of the Texas Court of Appeals after finding that that court had applied the incorrect definition of intellectual disability. The Supreme Court held that the lower court erroneously applied decades-old standards and failed to consider the "standard error of measurement" and "current medical standards" when determining whether Moore's IQ of 74 warranted a finding that he was intellectually disabled. The Court further stated that, "in line with Hall, we require that courts continue the inquiry and consider other evidence of intellectual disability where an individual's IQ score, adjusted for the test's standard error, falls within the clinically established range for intellectual-functioning deficits." Id. at ——, 134 S.Ct. 1986.

7 The details of Callen's confession were consistent with the physical evidence presented at trial.

8 Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

9 "Other States have permitted secondary evidence to establish both the existence and material terms of lost or misplaced warrants. See, e.g., Thomas v. State, 37 Ala.App. 118, 120, 66 So.2d 103 (1953) (secondary evidence becomes primary evidence by proof of destruction or loss of original primary document); State v. Hall, 342 So.2d 616, 622 (La. 1977) (parol evidence used to prove existence of misplaced warrant); Anderson v. State, 9 Md.App. 532, 538–539, 267 A.2d 296 (1970) (where original document not intentionally lost or destroyed, prosecution entitled to offer secondary evidence); Boyd v. State, 164 Miss. 610, 613, 145 So. 618 (1933) ('If the affidavit and search warrant have been lost, the proof must

show not only the loss but also substantially their contents')." Commonwealth v. Ocasio, 434 Mass. 1, 8, 746 N.E.2d 469, 475 (2001).

10 To protect the anonymity of the jurors, we are using their initials.

11 This charge read: "The Court charges the jury that embraced or included in the indictment under which the defendant is being tried, is the offense of manslaughter where all the essential elements of murder are present, except the defendant was moved to do the act which caused the death of the victim by a sudden heat-of-passion caused by lawful provocation recognized by the law and before there had been a reasonable time for the passion to cool and for reason to reassert itself and, if you believe from the evidence beyond a reasonable doubt that the defendant is guilty of manslaughter as a result of lawful provocation as the Court has instructed you the jury and, if you convict the defendant of this offense, the form of your verdict should be, we, the jury find the defendant guilty of manslaughter." (C. 612.)

12 Section 13A–5–45(d), states:

> "Any evidence which has probative value and is relevant to sentence shall be received at the sentencing hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is afforded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama."

Exhibit B

2017 WL 3446533
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Dontae CALLEN
v.
STATE of Alabama

CR–13–0099
|
Aug. 11, 2017

Synopsis

Background: Defendant was convicted of capital murder and sentenced to death. Defendant appealed. The Court of Criminal Appeals, 2017 WL 1534453, affirmed in part and remanded. The Jefferson Circuit Court, CC-11-2047, made specific facts concerning death penalty aggravating circumstances.

Holdings: On return to remand, the Court of Criminal Appeals, Welch, J., held that:

[1] application of death penalty aggravator of the creation of great risk of death to many persons was warranted, and

[2] murders were especially heinous, atrocious, or cruel, warranting application of death penalty aggravator.

Affirmed.

Appeal from Jefferson Circuit Court (CC–11–2047)

On Return to Remand

WELCH, Judge.

***1** This case is before this Court on return to remand after we affirmed Dontae Callen's three capital-murder convictions for the murders of Bernice Kelly, Quortes Kelly, and Aaliyah Budgess and remanded the case to the circuit court for that court to amend its sentencing order to make specific findings of facts concerning the aggravating circumstances set out in § 13A–5–49(3), Ala. Code 1975, and § 13A–5–49(8), Ala. Code 1975. See Callen v. State, [Ms. CR–13–0099, April 28, 2017] —— So.3d —— (Ala. Crim. App. 2017). The circuit court has complied with our instructions on remand, and we now address the propriety of Callen's sentences of death.

Application of § 13A–5–53, Ala. Code 1975

Callen was indicted for, and convicted of, three counts of capital murder for murdering Bernice Kelly, Quortes Kelly, and Aaliyah Budgess pursuant to one act or course of conduct, for murdering the three victims during the course of an arson, and for murdering a victim who was under 14 years of age; offenses defined as capital by § 13A–5–40(a)(9); 13A–5–40(a)(10); and 13A–5–40(a)(15). The jury, by a vote of 11 to 1, recommended that Callen be sentenced to death. The circuit court followed the jury's recommendation and sentenced Callen to death. The record reflects that Callen's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A–5–53(b)(1), Ala. Code 1975.

The circuit court found the existence of three aggravating circumstances: (1) that the act that constituted the capital offense did create "a great risk of death to many persons" during its commission, § 13A–5–49(3), Ala. Code 1975; (2) that the murders were especially heinous, atrocious, or cruel as compared to other capital murders, § 13A–5–49(8), Ala. Code 1975; and (3) that Callen did intentionally cause the death of two or more persons by one act or pursuant to one scheme or course of conduct, § 13A–5–49(9), Ala. Code 1975. [1]

[1] In applying § 13A–5–49(3), Ala. Code 1975, the circuit court made the following findings of fact on remand:

> "Aggravating circumstance number 3—§ 13A–5–49(3)—does apply as the act which comprised the capital offense did create a great risk of death to many persons during its commission. The evidence and testimony presented at trial and during the sentencing phase of the trial was that the location of the incident was an apartment house.

> The building wherein [Callen] set fire to the victim's murdered bodies and then walked away was home to several people. The fire was set in one apartment but could have easily spread throughout the building, per the evidence, where several other people were sleeping as it was the night time/early morning hours. Had it not been for a vigilant neighbor, Jerreli Williams, who smelled the smoke of the fire from the victims' apartment more people would very likely have died from smoke inhalation, while they slept or been burned to death. Williams was able to wake his family and other building residents to get them up and out of the building. But for his actions there may have been more than three deaths as a result of Callen's criminal conduct."

***2** (Remand record, C. 39.)

Our neighboring State of Florida has a similar aggravating circumstance. [2] In applying this aggravating circumstance to a defendant setting a fire at the scene of a murder, the Florida Supreme Court stated:

> "We agree with the trial court's finding that defendant created a great risk of death to many persons when he set fire to the victim's bed. Setting the fire was clearly conduct surrounding the capital felony for which he is being sentenced. Mines v. State[, 390 So.2d 332 (Fla. 1980)]. There were six elderly people asleep in the building in which the victim's condominium was located. This can be classified as many persons. Cf. Kampff v. State, 371 So.2d 1007 (Fla. 1979). In King v. State, 390 So.2d 315 (Fla. 1980), we held that by setting fire to the house in which the murder victim resided and in which no other person was present, the defendant had knowingly created a great risk of death to many persons because he should have reasonably foreseen that the blaze would pose a great risk to the neighbors as well as the firefighters and the police who responded to the call. In the present case, the fire posed a direct threat of death to those six elderly persons residing in the building as well as the neighbors, firefighters, and police responding to the call."

Welty v. State, 402 So.2d 1159, 1164 (Fla. 1981). This aggravating circumstance was properly applied in this case.

[2] The circuit court made the following findings of fact when applying the aggravating circumstance that the murders were especially heinous, atrocious, or cruel when compared to other capital murders:

> "Aggravating circumstance number 8—§ 13A–5–49(8)—does apply in that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. The testimony at trial concerning each victim's death was as follows: Dr. Gary Simmons with the Jefferson County Coroner/Medical Examiner's Office testified that Bernice Kelly had a total of 18 stab wounds. All of the wounds were above the chest area and on the front and back areas of her body. Dr. Simmons testified that none of these wounds would have been rapidly fatal but all would have resulted in significant blood loss. Ms. Kelly also had superficial burn areas. Dr. Simmons could not testify as to whether the burns occurred before or after her death. However, he found no carbon monoxide levels in her lungs and blood, which tends to indicate she dies before the fire was started. Bernice Kelly's cause of death was multiple sharp-force trauma.
>
> "Dr. Simmons testified that Quortes Kelly had more burned areas on his skin than his mother although the burn areas were superficial. His blood alcohol level was .22. His body showed evidence of soot and he was fully dressed. His hands showed no evidence of any 'defensive' wounds or sharp-force trauma. Mr. Kelly had 33 sharp force trauma wounds on the front and back areas of his body and all above his upper chest regions. Many of Mr. Kelly's wounds were deep: one went through to his voice box, another to his backbone

and yet another down into his lung. Dr. Simmons testified that while these injuries, which included several arteries, would have caused rapid death none would have caused instantaneous death. Quortes Kelly's cause of death was multiple sharp force trauma.

***3** "Dr. Simmons testified that Aaliyah Budgess had 25 stab wounds to her neck and head areas, both front and back. She had no defensive wounds on her hands. Several of the wounds went all the way to her skull but none penetrated her skull. One such wound did cause skull fracture, which then caused her brain to swell. Two wounds cut through her jugular veins and another went all the way to her spinal chord and caused bruising there. Dr. Simmons further testified that one of her injuries would have been instantaneously fatal. Aaliyah Budgess's cause of death was multiple sharp force trauma. None of the victims had evidence of carbon monoxide or soot in their lungs indicating that their deaths were as a result of the vicious stab wounds suffered at the hands of the defendant. There is little doubt but that each of these victims died a horrific and painful death."

(Remand record, C. 40.) "We have approved the application of this aggravating circumstance when the testimony established that the victims were stabbed multiple times and that they had suffered before their death." Stallworth v. State, 868 So.2d 1128, 1175 (Ala. Crim. App. 2001). This aggravating circumstance was properly applied in this case.

The circuit court found as statutory mitigating circumstances: (1) that Callen did not have a history of prior criminal activity, § 13A–5–51(1), Ala. Code 1975 and (2) that Callen was 18 years of age at the time of the murders, § 13A–5–51(7), Ala. Code 1975. As nonstatutory mitigating circumstances the circuit court indicated that it considered the following: that Callen had been abandoned by his mother; that Callen had been moved from household to household for most of his life; that Callen had been in the Department of Human Resources' system for most of his life; that Callen had a low IQ; that Callen had been "diagnosed by Dr. Ron Meredith in preparation for the mitigating phase of the trial with mild or borderline mental retardation, borderline personality disorder, disassociative;" and that "Callen was from a low socio-economic status." (C. 122.)

We have independently weighed the aggravating circumstances and the mitigating circumstances as required by § 13A–5–53(b)(2), Ala. Code 1975, and are convinced, as was the circuit court, that death was the appropriate sentence for the vicious triple homicide Callen committed.

Neither is Callen's sentence disproportionate or excessive when compared to penalties imposed in similar multiple-homicide capital cases. See § 13A–5–53(b)(3), Ala. Code 1975. See also Bohannon v. State, [Ms. CR–13–0498, October 23, 2015] —— So.3d —— (Ala. Crim. App. 2015); Mitchell v. State, 84 So.3d 968 (Ala. Crim. App. 2010).

Last, as required by Rule 45A, Ala. R. App. P., we have searched the record for any error that may have adversely affected Callen's substantial rights and have found none.

Callen's convictions for three counts of capital-murder are due to be, and are hereby, affirmed.

AFFIRMED.

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

All Citations

--- So.3d ----, 2017 WL 3446533

Footnotes

1 No findings of facts were necessary on this aggravating circumstance because the jury's verdict in the guilt phase established this aggravating circumstance beyond a reasonable doubt.

2 In Florida, the aggravating circumstance reads: "The defendant knowingly created a great risk of death to many persons." § 921.141(6)(c) F.S.A.

Exhibit C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

December 8, 2017

CR-13-0099 **Death Penalty**

Dontae Callen v. State of Alabama (Appeal from Jefferson Circuit Court: CC11-2047)

NOTICE

You are hereby notified that on December 8, 2017, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Laura Petro, Circuit Judge
Hon. Anne-Marie Adams, Circuit Clerk
Alicia A. D'Addario, Attorney
Benjamin Schaefer, Attorney
Bryan A. Stevenson, Attorney
Lauren A. Simpson, Asst. Attorney General

Exhibit D

IN THE SUPREME COURT OF ALABAMA

November 16, 2018

1170219

Ex parte Dontae Callen. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Dontae Callen v. State of Alabama) (Jefferson Circuit Court: CC-11-2047; Criminal Appeals : CR-13-0099).

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 November 16, 2018:

Writ Denied. No Opinion. Shaw, J. - Stuart, C.J., and Bolin, Parker, Main, Wise, Bryan, Sellers, 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 16th day of November, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama