

No. 18-9214

In the
Supreme Court of the United States

JESSIE PHILLIPS,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

STEVE MARSHALL

Alabama Attorney General

EDMUND G. LACOUR JR.*

Solicitor General

JOHN A. SELDEN

Assistant Attorney General

OFFICE OF ALA. ATT'Y GENERAL

501 Washington Avenue

Montgomery, AL 36130

(334) 242-7300

elacour@ago.state.al.us

*Counsel of Record

Counsel for State of Alabama

CAPITAL CASE
QUESTION PRESENTED (REPHRASED)

Jessie Phillips killed his wife, Erica Phillips, and their unborn child, Baby Doe.¹ For these killings, Phillips was charged with capital murder for the murder of two or more persons. To prove that offense, the State was required to establish beyond a reasonable doubt that Erica was pregnant when Phillips killed her and that Baby Doe died.

To carry its burden, the State relied on testimony of the medical examiner who performed Erica’s autopsy and a photograph from the autopsy to illustrate and corroborate the examiner’s testimony. Phillips did not object to the admission of the gruesome photograph. Both state appellate courts to review this case concluded that the photograph was admissible under state evidentiary rules.

The question presented is whether the admission of the photograph rendered Phillips’s trial fundamentally unfair.

¹ For clarity, the State will refer to Jessie Phillips as “Phillips” and Erica Phillips as “Erica.”

RELATED CASES

State v. Phillips, No. CC-2009-596, Circuit Court of Marshall County, Alabama. Judgment entered September 6, 2012.

Phillips v. State, No. CR-12-0197, Alabama Court of Criminal Appeals. Judgment entered December 18, 2015.

State v. Phillips, No. CC-2009-596, Circuit Court of Marshall County, Alabama. Judgment entered February 12, 2016.

Phillips v. State, No. CR-12-0197, Alabama Court of Criminal Appeals. Judgment entered October 21, 2016.

Ex parte Phillips, No. 1160403, Alabama Supreme Court. Judgment entered October 19, 2018.

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

QUESTION PRESENTED (REPHRASED)	i
RELATED CASES	ii
PARTIES	iii
TABLE OF CONTENTS.....	iv
TABLE OF AUTHORITIES	v
STATEMENT	1
REASONS FOR DENYING THE WRIT	6
I. This Court should not grant review to scrutinize state-court findings that the autopsy photograph was probative and that it did not so infect Phillips’s trial with unfairness as to deny him due process.....	7
A. The autopsy photograph illustrated and corroborated Dr. Emily Ward’s testimony, and its admission did not render Phillips’s trial fundamentally unfair.	7
B. The Alabama Supreme Court’s decision is consistent with the treatment of autopsy photographs by other jurisdictions.	13
CONCLUSION	18

TABLE OF AUTHORITIES

Cases

<i>Barefoot v. Estelle</i> , 463 U.S. 880 (1983)	11
<i>Bonds v. State</i> , 138 So. 3d 914 (Miss. 2014).....	15
<i>Campbell v. State</i> , No. SC17-1725, 2018 WL 6214569 (Fla. Nov. 29, 2018)	16
<i>Cavazos v. Smith</i> , 565 U.S. 1 (2011)	6, 12
<i>Corbett v. State</i> , 764 N.E.2d 622 (Ind. 2002)	16
<i>Cowart v. State</i> , 178 So. 3d 651 (Miss. 2015).....	15
<i>Cox v. State</i> , 183 So. 3d 36 (Miss. 2015).....	15
<i>Davis v. State</i> , 313 S.W.3d 317 (Tex. Crim. App. 2010)	16
<i>Dickerson v. State</i> , 175 So. 3d 8 (Miss. 2015).....	15
<i>Dowling v. United States</i> , 493 U.S. 342 (1990)	8
<i>Estelle v. McGuire</i> , 502 U.S. 62 (1991)	9
<i>Ex parte Phillips</i> , No. 1160403, 2018 WL 5095002 (Ala. Oct. 19, 2018)	9, 10

<i>Halliburton v. State</i> , 1 N.E.3d 670 (Ind. 2013)	16
<i>Hutto v. State</i> , 227 So. 3d 963 (Miss. 2017).....	15
<i>Kaley v. United States</i> , 571 U.S. 320 (2014)	7
<i>Kennedy v. Bremerton Sch. Dist.</i> , 139 S. Ct. 634 (2019)	17
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983)	7, 10, 11
<i>McCoy v. Louisiana</i> , 138 S. Ct. 1500 (2018)	7, 17
<i>McCullough v. State</i> , 341 S.E.2d 706 (Ga. 1986).....	14
<i>Medina v. California</i> , 505 U.S. 437 (1992)	8
<i>Met v. State</i> , 388 P.3d 447 (Utah 2016).....	15
<i>Mitchell v. State</i> , 235 P.3d 640 (Okla. Crim. App. 2010).....	16
<i>Payne v. Tennessee</i> , 501 U.S. 808 (1991)	8, 11
<i>People v. Unger</i> , 749 N.W.2d 272 (Mich. Ct. App. 2008).....	16
<i>Perry v. New Hampshire</i> , 565 U.S. 228 (2012)	8

<i>Phillips v. State</i> , No. CR-12-0197, 2015 WL 9263812 (Ala. Crim. App. Dec. 18, 2015)	4
<i>Pruitt v. State</i> , 834 N.E.2d 90 (Ind. 2005)	16
<i>Puckett v. United States</i> , 556 U.S. 129 (2009)	12
<i>Romano v. Oklahoma</i> , 512 U.S. 1 (1994)	8
<i>Salazar-Limon v. Houston</i> , 137 S. Ct. 1277 (2017)	6
<i>Spencer v. Texas</i> , 385 U.S. 554 (1967)	7
<i>State v. Adam</i> , 896 P.2d 1022 (Kan. 1995)	14
<i>State v. Allen</i> , 839 P.2d 291 (Utah 1992).....	15
<i>State v. Bluff</i> , 52 P.3d 1210 (Utah 2002).....	15
<i>State v. Holder</i> , 676 S.E.2d 690 (S.C. 2009).....	16
<i>State v. Love</i> , 387 P.3d 820 (Kan. 2017)	14
<i>State v. Magee</i> , 103 So. 3d 285 (La. 2012)	14
<i>State v. Morris</i> , 157 So. 2d 728 (La. 1963)	15

<i>State v. Poe</i> , 441 P.2d 512 (Utah 1968).....	15
<i>State v. Robinson</i> , 874 So. 2d 66 (La. 2004).....	15
<i>State v. Seba</i> , 380 P.3d 209 (Kan. 2016)	14
<i>State v. Vargas</i> , 20 P.3d 271 (Utah 2001).....	15
<i>State v. Williams</i> , 429 P.3d 201 (Kan. 2018)	14
<i>State v. Willis</i> , 496 S.W.3d 653 (Tenn. 2016)	16
<i>United States v. Scheffer</i> , 523 U.S. 303 (1998)	11
<i>United States v. Young</i> , 470 U.S. 1 (1985)	12
<i>Venturino v. State</i> , No. S19A0166, 2019 WL 2570977 (Ga. June 24, 2019).....	14
<i>Ward v. State</i> , 903 N.E.2d 946 (Ind. 2009)	16
<u>Statutes</u>	
ALA. CODE § 13A-5-40(a)(10)	4
ALA. CODE § 13A-5-45	13
ALA. CODE § 13A-5-49(9).....	5
<u>Rules</u>	
ALA. R. APP. P. 45A	12
FED. R. CRIM. P. 52(b)	12

STATEMENT

This case presents a single issue: whether the admission of an autopsy photograph to help prove an essential element of a crime rendered Jessie Phillips's trial fundamentally unfair. This narrow, fact-bound issue does not merit this Court's review.

The evidence adduced at trial showed that on February 27, 2009, Phillips killed his wife, Erica, and their unborn child, Baby Doe, when he shot Erica in the head in front of their two other children and Erica's brother.

Earlier that day, Phillips, Erica, and their two children (Ymari and Duante) met Erica's brother, Billy Droze, at the McDonald's restaurant in Hampton Cove, Alabama. R. 491–93.² While eating, they made plans to drive to the car wash next to the Guntersville Boat Mart so they could visit Lance Droze, Billy and Erica's other brother, who was washing boats there that day. R. 494–95. They took three vehicles. Duante rode with Billy, Ymari rode with Erica, and Phillips drove his own car. R. 494–95, 531. When they arrived, Lance was washing a boat in the far left bay of a four-bay car wash. R. 496–98, 530. Erica parked in the inside left bay, Billy parked in the inside right bay, and Phillips parked in the outside right bay. R. 498, 532.

² “R.” refers to the trial transcript. “C.” refers to the clerk's record.

Billy went to tell Lance that they had arrived. R. 501, 533. Lance could hear Phillips and Erica arguing loudly, but he could not discern what they were discussing. R. 534, 541. Shortly thereafter, Lance finished washing the boat he was working on and hauled it back to the Guntersville Boat Mart. R. 535.

Billy then walked toward his vehicle, passing by the bay where Erica was parked. He saw Erica sitting in the driver's seat and Phillips sitting in the rear-passenger seat, holding a handgun. Ymari, a toddler at the time, was in the car with them. R. 504, 519. Phillips was "fiddling with" the handgun, and he did not respond when Billy asked him why he had it. R. 505, 521–22. Citing Phillips and Erica's frequent financial problems, Billy offered to buy the gun and throw it in the lake, but Phillips shook his head "no." R. 505, 519.

Billy returned to his vehicle, but soon after, he heard Erica shout, "Help me, Bill." R. 504, 520. Billy ran to the bay where Erica was parked to see Phillips holding her in a headlock and pointing a gun at her head. R. 504–06. Erica managed to break free and got a few yards away, but within seconds, Phillips fired a single shot, hitting her in the head. R. 506.

Billy had arrived "just in time to see [Phillips] kill her." R. 505. Ymari and Duante were also present to witness their mother's fatal wound. R. 504–06.

Phillips told Billy "to get out of there." R. 506. Worried for the children's safety, Billy put them in his car and drove to the Guntersville Boat Mart to

find Lance. R. 506–08. While Billy gathered the children, Phillips sped away in Erica’s vehicle. R. 507, 537.

Billy told Lance what had happened and called for help. R. 508. Meanwhile, Lance rushed to his sister’s side. When he arrived, Erica was coughing and having trouble breathing. There was a lot of blood, and her left eye was swollen. R. 539. The bullet had travelled from the right side of her head through the left side of her brain and had become lodged in her left eye. R. 660. Lance held her until the police came. R. 540.

Erica was transported to a hospital near Guntersville. She was unresponsive when she arrived and was sent to a larger facility in Huntsville. R. 644, 648. She died at 1:00 a.m. the following morning. C. 253.

As officers were preparing to search for Phillips, he drove up to the Albertville Police Department and turned himself in. R. 551. Phillips waived his *Miranda* rights, and the police conducted a lengthy interview. C. 153, 160–265. According to Phillips, Erica had berated him for years, including the day of the murder: “She called me a n****r. She called me a f****t. I don’t know, it just all just added up and I could have found a better way to end it, but—” C. 165. Phillips said that “she just kept on and kept on and kept on and kept on and I just shot her, got in the car and left.” C. 179. He had been aware that Erica was pregnant. C. 253.

On March 2, 2009, the Marshall County Grand Jury indicted Phillips for one count of capital murder for the deaths of Erica and Baby Doe pursuant to ALA. CODE § 13A-5-40(a)(10). C. 8. On June 14, 2012, the jury was empaneled, and the trial began. R. 425.

At trial, the State relied in part on the testimony of Dr. Emily Ward, a state medical examiner at the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences, who had performed an autopsy on Erica. In addition to explaining the gunshot wound, Dr. Ward testified that she conducted “a urine pregnancy test,” which indicated that Erica was pregnant at the time she was killed. R. 661. Dr. Ward also conducted an internal examination of Erica’s “reproductive organs” that confirmed the pregnancy. R. 663. According to Dr. Ward, Baby Doe “was growing and was alive” when Erica died and could not survive her death. R. 664. During that testimony, the State introduced the autopsy photograph at issue. C. 158. Phillips did not object to the admission of the photograph. *Phillips v. State*, No. CR-12-0197, 2015 WL 9263812, at *35 (Ala. Crim. App. Dec. 18, 2015).

The jury returned a verdict finding Phillips guilty of capital murder. C. 134; R. 791.

The case then proceeded to the penalty phase, during which the State submitted to the jury one aggravating circumstance: that Phillips had caused

the death of two or more persons by one act. R. 828; *see also* ALA. CODE § 13A-5-49(9).

In a pro forma manner, the State “incorporate[d] all evidence that was offered during the guilt phase” and rested. R. 838. At no point during the penalty-phase opening or closing arguments did the State draw the jury’s attention to or even mention the autopsy photograph. R. 829–35, 855–67, 875–78.

As reflected in a special verdict form, the jury unanimously recommended that Phillips be sentenced to death. C. 135; R. 890–91.

The trial court conducted a sentencing hearing on August 27, 2012. R. 896. After weighing the statutory and non-statutory mitigating circumstances against the statutory aggravating circumstance, the court followed the jury’s recommendation and sentenced Phillips to death. C. 289; R. 917.

REASONS FOR DENYING THE WRIT

This is a heavily fact-bound case that presents no novel questions for this Court to answer and involves no circuit split in need of resolution. Rather, Phillips takes issue with the routine application of this Court's precedents involving the Due Process Clause to a single individual evidentiary ruling. But Phillips never objected to the admission of the evidence in question; the two state appellate courts correctly concluded that there was no plain error; and even if those courts erred, this Court does not sit to correct narrow evidentiary rulings.

There is no question that the Alabama Supreme Court understood the issue to be one of fundamental fairness implicating the Due Process Clause, and it recited appropriate case law from this Court. Thus, the asserted error could only consist of "erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. Rule 10. This Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon v. Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., concurring in denial of certiorari). "Error correction is outside the mainstream of the Court's functions." *Cavazos v. Smith*, 565 U.S. 1, 11 (2011) (Ginsburg, J., dissenting) (cleaned up). And "because the present case is so unique, it is hard to see how it meets [this

Court’s] stated criteria for granting review.” *McCoy v. Louisiana*, 138 S. Ct. 1500, 1515 (2018) (Alito, J., dissenting).

Phillips’s claim deals with the admissibility of evidence, a state-law issue. Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court found that the autopsy photograph was admissible. Applying settled law regarding fundamental fairness, both courts held that the admission of the photograph did not deny Phillips his due process rights. This Court should not disturb those rulings, and the petition should be denied.

I. This Court should not grant review to scrutinize state-court findings that the autopsy photograph was probative and that it did not so infect Phillips’s trial with unfairness as to deny him due process.

A. The autopsy photograph illustrated and corroborated Dr. Emily Ward’s testimony, and its admission did not render Phillips’s trial fundamentally unfair.

The Constitution “has never been thought [to] establish this Court as a rule-making organ for the promulgation of state rules of criminal procedure.” *Spencer v. Texas*, 385 U.S. 554, 564 (1967). “[B]ecause the Bill of Rights speaks in explicit terms to many aspects of criminal procedure, the Due Process Clause has limited operation in the field.” *Kaley v. United States*, 571 U.S. 320, 334 (2014) (cleaned up). “[T]he Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules.” *Marshall v. Lonberger*, 459 U.S. 422, 438 n.6 (1983).

With that in mind, state-court evidentiary rulings implicate the Due Process Clause only when “the admission of evidence . . . so infected the [trial] with unfairness as to render the jury’s imposition of the death penalty a denial of due process.” *Romano v. Oklahoma*, 512 U.S. 1, 12 (1994).³ Stated differently, the relevant question is whether the “evidence is so extremely unfair that its admission violates fundamental conceptions of justice.” *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (cleaned up).

This Court has “defined the category of infractions that violate ‘fundamental fairness’ very narrowly.” *Dowling v. United States*, 493 U.S. 342, 352 (1990). Expanding “constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order.” *Medina v. California*, 505 U.S. 437, 443 (1992).

Here, the admission of the autopsy photograph did not violate any fundamental conceptions of justice or render Phillips’s trial fundamentally unfair.

Phillips was charged with capital murder for the murder of two or more persons. To prove that offense, the State was required to establish beyond a

³ *Cf. Payne v. Tennessee*, 501 U.S. 808, 825 (1991) (“In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief.”).

reasonable doubt that Erica was pregnant and that her unborn child died. To carry its burden, the State relied on testimony by Dr. Emily Ward and an autopsy photograph to illustrate and corroborate her testimony. Though gruesome, the photograph was relevant and probative of Erica's pregnancy and Baby Doe's death, and the Alabama Supreme Court reasonably held that it was admissible under state evidentiary rules.

As Phillips points out, he conceded at trial that Erica "was pregnant with an unborn child, who died as a consequence of her death." Pet. 7. However, "the prosecution's burden to prove every element of the crime is not relieved by a defendant's tactical decision not to contest an essential element of the offense." *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). The autopsy photograph was relevant to help prove Erica's pregnancy and Baby Doe's death, "and nothing in the Due Process Clause of the Fourteenth Amendment requires the State to refrain from introducing relevant evidence simply because the defense chooses not to contest the point." *Id.* at 70.

The Alabama Supreme Court recognized that the autopsy photograph was gruesome but explained that the "gruesomeness" of an otherwise relevant photograph becomes objectionable only in certain circumstances under Alabama law. *Ex parte Phillips*, No. 1160403, 2018 WL 5095002, at *31 (Ala. Oct. 19, 2018). The autopsy photograph here did not fall into those objectionable categories. This Court should decline "to engage in a finely-tuned review of the

wisdom of state evidentiary rules” about the level of gruesomeness that causes evidence to be objectionable. *Lonberger*, 459 U.S. at 438 n.6.

Phillips argues that the autopsy photograph “was also completely unnecessary and had no probative value because it added nothing new to the state medical examiner’s verbal testimony.” Pet. 9. However, the Alabama Supreme Court noted that, even when cumulative, autopsy photographs are frequently admissible under state law “upon the basis that they tend to illustrate, elucidate, or corroborate some relevant material inquiry or corroborate testimony.” *Ex parte Phillips*, 2018 WL 5095002, at *30 (quoting Charles W. Gamble, *McElroy’s Alabama Evidence* § 207.01(2), at 1285 (6th ed. 2009)). Here, the autopsy photograph corroborated and illustrated Dr. Ward’s testimony and was not “needless[ly] cumulative.” ALA. R. EVID. 403.

Moreover, Phillips’s strategy in this case shows precisely why the State was prudent not to rest solely on the urine pregnancy test and testimony of Dr. Ward. *See* Pet. 9. For the first time on appeal, Phillips argued (unsuccessfully) that the results of the pregnancy test should have been excluded because the State purportedly “failed to establish a chain of custody for the urine sample used to conduct the pregnancy test.” *Ex parte Phillips*, 2018 WL 5095002, at *16. And before this Court, Phillips discounts Dr. Ward’s testimony about observing a “corpus luteum cyst on Mrs. Phillips’s ovary” when Phillips contends that such a cyst is “not determinative of pregnancy.” Pet. 10. The photograph

provided critical corroboration for establishing one of the elements of the crime, and this Court should decline “to engage in a finely-tuned review of the wisdom of state evidentiary rules” about when such photographic evidence is needlessly cumulative. *Lonberger*, 459 U.S. at 438 n.6.

Phillips next argues that the autopsy photograph would have been “meaningless to any layperson who observe[d] it” and that the features of the photograph described by Dr. Ward “are not determinative of pregnancy.” Pet. 10. However, those criticisms “go to the weight of the evidence and not [its] admissibility.” *Barefoot v. Estelle*, 463 U.S. 880, 902 (1983).⁴

Expert witnesses often testify “about factual matters outside the jurors’ knowledge.” *United States v. Scheffer*, 523 U.S. 303, 313 (1998). Even when the testimony is of a highly scientific or technical nature, “it is the responsibility of the jury . . . to decide what conclusions should be drawn from evidence

⁴ See also, e.g., *Payne*, 501 U.S. at 823 (1991) (“[R]elevant, unprivileged evidence should be admitted and its weight left to the factfinder.”) (cleaned up); *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003) (“Nonconclusive evidence should still be admitted if it makes a proposition more probable than not; factors which make evidence less than conclusive affect only weight, not admissibility.”); *United States v. Golb*, 69 F.3d 1417, 1428 (9th Cir. 1995) (“[I]t was within the jury’s province to resolve these competing opinions and determine what weight to accord the government’s evidence.”); *United States v. Scaife*, 749 F.2d 338, 347 (6th Cir. 1984) (“The defendants expend much effort attacking the credibility and consistency of [the] testimony. The credibility and consistency of testimony are relevant to its weight and not to its admissibility.”).

admitted at trial.” *Cavazos v. Smith*, 565 U.S. 1, 2 (2011) (per curiam). Phillips could have, but did not, attack Dr. Ward’s credibility or the science underpinning her conclusions. Nor did he argue at trial that the evidence was so abstruse that it would have merely served to confuse or mislead the jury.

Indeed, Phillips did not object to the admission of the autopsy photograph on *any* grounds, and the state courts reviewed the issue for plain error only. The Alabama plain-error rule is analogous to the federal plain-error rule.⁵ The rule only applies to “particularly egregious errors” that “seriously affect the fairness, integrity or public reputation of judicial proceedings.” *United States v. Young*, 470 U.S. 1, 15, (1985) (cleaned up).⁶ As discussed above, the admission of the photograph was not error at all, but Phillips undoubtedly cannot meet the heightened plain-error standard.

Finally, Phillips faults the State for incorporating all guilt-phase evidence into the penalty phase. That practice is common and permissible under Alabama law. During the penalty phase, “[e]vidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and

⁵ Compare FED. R. CRIM. P. 52(b) (“A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”) with ALA. R. APP. P. 45A (“[T]he Court of Criminal Appeals shall notice any plain error [whenever it] has or probably has adversely affected the substantial right of the appellant.”).

⁶ See also *Puckett v. United States*, 556 U.S. 129, 135 (2009).

mitigating circumstances without the necessity of re-introducing that evidence.” ALA. CODE § 13A-5-45. Here, the sole aggravating circumstance was the same as the underlying crime, and all evidence relevant during the guilt phase would necessarily have been relevant to the penalty phase. Moreover, the State did not emphasize or even mention the autopsy photograph during the penalty phase. To the extent that penalty-phase conduct deserves more scrutiny, simply incorporating the evidence did not violate any fundamental conceptions of justice or render the trial fundamentally unfair.

B. The Alabama Supreme Court’s decision is consistent with the treatment of autopsy photographs by other jurisdictions.

Phillips contends that “multiple other jurisdictions have determined that the introduction of photographs depicting the graphic results of autopsies and other post-crime alteration of a victim’s body is exceedingly prejudicial and erroneous.” Pet. 13. He is mistaken. Although various state courts have made individual rulings that certain autopsy photographs were inadmissible, no state has any sort of *per se* rule against their introduction. Rather, each piece of evidence is assessed on a case-by-case basis. Also, each of the states referenced by Phillips have more recently permitted the introduction of autopsy photographs, depending on a fact-specific analysis of the circumstances of the case.

For example, Phillips cites an exclusionary rule for autopsy photographs used by Georgia in *McCullough v. State*, 341 S.E.2d 706 (Ga. 1986). However, the Georgia Supreme Court has since unanimously noted the “abrogat[ion]” of and “disavow[ed] the application of th[at] rule.” *Venturino v. State*, No. S19A0166, 2019 WL 2570977, at *4 (Ga. June 24, 2019). The court explained that the rule “was the type of judge-made, categorical evidentiary rule we disapproved.” *Id.* Instead, the Georgia courts now engage in a fact-specific inquiry regarding the relevance of and possible prejudice from an individual piece of evidence, “look[ing] to federal case law for guidance.” *Id.* In *Venturino*, although gruesome, “the photograph was relevant,” and “its probative value was not substantially outweighed by the danger of unfair prejudice.” *Id.*

Likewise, the Kansas case that Phillips cites, *State v. Adam*, 896 P.2d 1022 (Kan. 1995), is not representative of cases from that state addressing this issue. Rather, the Kansas Supreme Court has frequently held autopsy photographs to be admissible—again, based on a highly fact-specific inquiry.⁷

The same goes for Louisiana. In fact, *State v. Morris*, 157 So. 2d 728 (La. 1963), is the *only* case reversed by the Louisiana Supreme Court “on grounds of the improper introduction of gruesome photographs.” *State v. Magee*, 103 So.

⁷ See, e.g., *State v. Williams*, 429 P.3d 201, 210–12 (Kan. 2018); *State v. Love*, 387 P.3d 820, 826–27 (Kan. 2017); *State v. Seba*, 380 P.3d 209, 228–29 (Kan. 2016).

3d 285, 323 (La. 2012). Otherwise, relevant autopsy photographs are admissible unless “the prejudicial effect of the photographs substantially outweighs their probative value.” *State v. Robinson*, 874 So. 2d 66, 85–86 (La. 2004).

Utah, too, articulates a similar balancing test. Relevant autopsy photographs are admissible unless “the probative value of [the] photograph is *substantially outweighed* by a danger of unfair prejudice.” *Met v. State*, 388 P.3d 447, 469 (Utah 2016). In the case cited by Phillips, the Utah Supreme Court held that the “probative value” of the images did not outweigh their “inflammatory nature.” *State v. Poe*, 441 P.2d 512, 515 (Utah 1968). In other fact-specific scenarios, the court has come to the opposite conclusion.⁸

In Mississippi, despite one case holding a gruesome photograph to be inadmissible, *Bonds v. State*, 138 So. 3d 914 (Miss. 2014), autopsy photographs have been held admissible in many other cases.⁹ In fact, the Mississippi Supreme Court has made clear that “[r]eversal based on the admission of cumulative and/or gruesome photographs is rare.” *Cowart v. State*, 178 So. 3d 651, 663 (Miss. 2015). Like the other states, Mississippi conducts a balancing test.

⁸ See, e.g., *Met*, 388 P.3d at 468–71; *State v. Bluff*, 52 P.3d 1210, 1223–26 (Utah 2002); *State v. Vargas*, 20 P.3d 271, 283–85 (Utah 2001); *State v. Allen*, 839 P.2d 291, 302–03 (Utah 1992).

⁹ See, e.g., *Hutto v. State*, 227 So. 3d 963, 981–82 (Miss. 2017); *Cox v. State*, 183 So. 3d 36, 49–50 (Miss. 2015); *Dickerson v. State*, 175 So. 3d 8, 21 (Miss. 2015).

The Indiana Supreme Court, in the case cited by Phillips, held that “[a]utopsy photographs are generally inadmissible if they show the body in an altered condition.” *Corbett v. State*, 764 N.E.2d 622, 627 (Ind. 2002). However, it more recently clarified that “there are situations where some alteration of the body is allowed where necessary to demonstrate the testimony being given.” *Halliburton v. State*, 1 N.E.3d 670, 677 (Ind. 2013) (cleaned up). Photographs are addressed on a case-by-case basis, and Indiana has frequently held them to be admissible.¹⁰

The remaining states cited by Phillips—Florida, Tennessee, Oklahoma, Texas, South Carolina, and Michigan—have each often held gruesome autopsy photographs to be admissible depending on the facts and circumstances of the particular case.¹¹

Phillips contends that “[i]n each of those jurisdictions, the admission of the gruesome photograph in the present case would have been excluded.” Pet.

¹⁰ See, e.g., *Halliburton*, 1 N.E.3d 670, 675–78; *Ward v. State*, 903 N.E.2d 946, 957–59 (Ind. 2009); *Pruitt v. State*, 834 N.E.2d 90, 117–18 (Ind. 2005).

¹¹ See, e.g., *Campbell v. State*, No. SC17-1725, 2018 WL 6214569, at *15 (Fla. Nov. 29, 2018); *State v. Willis*, 496 S.W.3d 653, 729 (Tenn. 2016); *Mitchell v. State*, 235 P.3d 640, 655–56 (Okla. Crim. App. 2010); *Davis v. State*, 313 S.W.3d 317, 330–31 (Tex. Crim. App. 2010); *State v. Holder*, 676 S.E.2d 690, 697 (S.C. 2009); *People v. Unger*, 749 N.W.2d 272, 303–04 (Mich. Ct. App. 2008).

15. Aside from being unprovable speculation, that assertion is belied by case law from the relevant states.

All of these states use some version of a balancing test weighing probative value against possible unfair prejudice. The Alabama Supreme Court used a similar balancing test in Phillips’s case. Rather than being out of step, Alabama’s inquiry into the admissibility of gruesome photographic evidence is entirely consistent with other jurisdictions.

All of the states also focus on the relevance of the evidence at issue. In Phillips’s case, the State was required to prove Erica’s pregnancy to secure the capital murder conviction. The autopsy photograph helped support a necessary element of the crime—the death of two persons. None of the state cases that Phillips cites involve a comparable factual scenario.

The dearth of analogous cases illustrates why this Court should deny certiorari. Assessing the admissibility of a piece of photographic evidence and weighing its probative value against the danger of unfair prejudice is a highly fact-specific inquiry, taking into account innumerable circumstances unique to individual cases. This Court “generally do[es] not grant such review to decide highly fact-specific questions.” *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 636 (2019) (Alito, J., statement respecting the denial of certiorari). “[B]ecause the present case is so unique, it is hard to see how it meets [this Court’s] stated criteria for granting review.” *McCoy*, 138 S. Ct. at 1515 (Alito, J., dissenting).

The Alabama Supreme Court held that the probative value of the autopsy photograph outweighed any prejudicial effect. Its analysis is consistent with that of other jurisdictions and should not be disturbed.

CONCLUSION

The Alabama Supreme Court made a reasonable decision in light of the specific facts of Phillips's case and case law from other jurisdictions addressing the admission of gruesome photographs. The court recognized the appropriate rule regarding fundamental fairness and the Due Process Clause, as articulated by this Court. At its heart, Phillips's claim is that the Alabama Supreme Court misapplied settled law to the facts of his case, and he asks this Court to engage in a finely-tuned review of an individual state-court evidentiary ruling. For the foregoing reasons, this Court should decline to do so.

Respectfully submitted,

STEVE MARSHALL

Alabama Attorney General

/s/Edmund G. LaCour Jr._____

EDMUND G. LACOUR JR.

Solicitor General

JOHN A. SELDEN

Assistant Attorney General

OFFICE OF THE ALA. ATT'Y GENERAL

501 Washington Avenue

Montgomery, AL 36130

(334) 242-7300

elacour@ago.state.al.us