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IN THE SUPREME COURT OF THE UNITED STATES

JESSIE PHILLIPS, Petitioner,

v.

STATE OF ALABAMA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE ALABAMA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Jessie Phillips was convicted of capital murder of two or more persons for killing his wife, Erica Phillips, who was six-to-eight weeks pregnant at the time of the offense. Both the jury and the trial court found the existence of only one aggravating circumstance – the death of two or more persons – and the trial court sentenced Mr. Phillips to death. During the trial, defense counsel conceded that Mrs. Phillips was pregnant at the time of the offense and presented no evidence to the contrary. The State also admitted a pregnancy test, as well as testimony from the medical examiner, to establish pregnancy. Despite this concession and the undisputed evidence of pregnancy, the State sought admission of an incredibly gruesome autopsy photograph of Mrs. Phillips's mutilated uterus, ovaries, and fallopian tubes, removed from her body, carved open by the medical examiner, and placed on a table, still dripping blood. The trial court admitted this photograph and both the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed. The question presented is thus:

In a capital case, does the admission of a gruesome and completely unnecessary internal autopsy photograph, lacking any probative value, and showing the post-crime mutilation by the medical examiner, violate a defendant's Eighth and Fourteenth Amendment rights to due process, a fair trial, and a reliable conviction and sentence?

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PETITION FOR WRIT OF CERTIORARI

Jessie Phillips respectfully petitions for a writ of certiorari to review the judgment of the Alabama Supreme Court.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming Mr. Phillips's conviction and remanding for the trial court to correct its sentencing order, *Phillips v. State*, No. CR-12-0197, 2015 WL 9263812 (Ala. Crim. App. Dec. 18, 2015), is attached as Appendix A. The opinion of the Alabama Court of Criminal Appeals affirming Mr. Phillips's sentence, *Phillips v. State*, No. CR-12-0197, 2016 WL 6135443 (Ala. Crim. App. Oct. 21, 2016), is attached as Appendix B, and that court's order denying Mr. Phillips's application for rehearing on February 10, 2017, is attached as Appendix C. The order of the Alabama Supreme Court granting Mr. Phillips's petition for writ of certiorari, *Ex parte Phillips*, No. 1160403 (Ala. May 18, 2017), is attached as Appendix D. The Alabama Supreme Court's opinion affirming Mr. Phillips conviction and death sentence, *Ex parte Phillips*, No. 1160403, 2018 WL 5095002 (Ala. Oct. 19, 2018), is attached as Appendix E, and that court's order denying the State's application for rehearing on January 4, 2019, is attached as Appendix F.

JURISDICTION

On December 18, 2015, the Alabama Court of Criminal Appeals affirmed Mr. Phillips's conviction, *Phillips v. State*, No. CR-12-0197, 2015 WL 9263812 (Ala. Crim. App. Dec. 18, 2015), and on October 21, 2016, the same court affirmed Mr. Phillips's sentence, *Phillips v. State*, No. CR-12-0197, 2016 WL 6135443 (Ala. Crim. App. Oct. 21, 2016). On February 10, 2017, the Alabama Court of Criminal Appeals denied Mr. Phillips's application for rehearing. On May 18, 2017, the Alabama Supreme Court granted Mr. Phillips's petition for writ of certiorari. On October 19, 2018, the Alabama Supreme Court affirmed Mr. Phillips's conviction and death sentence, *Ex parte Phillips*, No. 1160403, 2018 WL 5095002 (Ala. Oct. 19, 2018), and on January 4, 2019, that same court denied the State's application for rehearing. On March 27, 2019, Justice Thomas extended the time for filing this petition for writ of certiorari to May 6, 2019. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

On the morning of February 27, 2009, Jessie Phillips, his wife Erica Phillips, and their two children drove to New Hope, Alabama to return a defective car that was purchased by Mrs. Phillips. (C. 169-73.)¹ Mrs. Phillips wanted to get a full refund, but the car dealer refused, so Mr. Phillips agreed to take another car in exchange for the defective car. (C. 172-73.) Mrs. Phillips was unhappy with this decision and began an argument with Mr. Phillips, berating him, cursing at him, and calling him names. (C. 171-72.) After they picked up the car, they met Mrs. Phillips's brother Billy Droze at a McDonald's for lunch. (C. 174.)

After eating lunch, while the entire party was leaving McDonald's and Mr. Phillips was putting his daughter into his truck, he took the handgun that he kept in his truck and put it in his back pocket because he was worried Mrs.

¹"C." refers to the clerk's record from trial. "R." refers to the reporter's transcript from trial. "CR." refers to the clerk's record on return to remand. "SH1." refers to the reporter's transcript of the sentencing hearing held on January 13, 2016. "SH2." refers to the reporter's transcript of the sentencing hearing held on February 12, 2016.

Phillips would be pulled over without a permit to carry it. (C. 167, 240.) Everyone then drove in separate cars to a carwash in Guntersville where Mrs. Phillips's brother worked. (C. 169-76; R. 495.) While at the carwash, Mrs. Phillips continued to fight with Mr. Phillips, curse at him, and even called him "a sorry ass n****r." (C. 163, 177-79.) In the midst of this heated argument, Mr. Phillips reached into his back pocket, pulled out the gun, fired it one time in the direction of Mrs. Phillips, and left the carwash. (R. 196.)

Immediately following the shooting, Mr. Phillips drove himself to the police station to turn himself in. (C. 204-06.) Mr. Phillips looked in the front door of the police station but didn't see anyone and then surrendered to a police officer outside the police station. (C. 205-06.) He informed the officer that he had a gun in his pocket and confessed to shooting Mrs. Phillips. (C. 206-07.) Mr. Phillips fully cooperated with police officers and gave a detailed statement where he admitted to shooting Mrs. Phillips. (C. 160-265; R. 639.) However, while Mr. Phillips admitted that he pointed the gun generally at Mrs. Phillips and pulled the trigger, he repeatedly denied that he intended to kill Mrs. Phillips. (C. 185-86, 208-09.) Mr. Phillips also informed the police officers that Mrs. Phillips had told him that she was in the early stages of pregnancy. (C. 253-54.)

B. PROCEEDINGS BELOW

At trial, the medical examiner testified that Mrs. Phillips died of a single

gunshot wound to the head. (R. 665.) The medical examiner also testified that a urine pregnancy test was performed and that she observed a corpus luteum cyst - two facts that she claimed established pregnancy. (R. 661-64.) The medical examiner testified that she believed Mrs. Phillips was six to eight weeks pregnant. (R. 666.) Defense counsel openly conceded to the jury that Mrs. Phillips was pregnant with an unborn child, and neither presented evidence, nor made argument, to the contrary. (R. 726.) Despite this concession, the State introduced, through the medical examiner, a photograph of Mrs. Phillips's reproductive organs, removed from her body, cut open, and placed on a table, covered in blood. (C. 158, R. 663.) The jury found Mr. Phillips guilty of capital murder of two or more persons – the death of Mrs. Phillips and her six to eight week unborn child. (C. 134.)

At the penalty phase, Mr. Phillips presented testimony from his mother that he grew up in poverty and was exposed to drugs and violence at a young age because she was a crack addict. (R. 841-45.) As a result, Mr. Phillips was placed in foster care when he was twelve years old. (R. 842.) Despite this difficult upbringing, Mr. Phillips had no significant criminal history. (C. 281; R. 845.) Mr. Phillips's mother also testified that the only reason she was sober today was because of the support of Mr. Phillips (R. 842-43), and that Mr. Phillips was a good father and loved his children (R. 847). The jury returned a verdict of death

by a vote of 12-0. (C. 135; R. 890-91.) The trial court subsequently sentenced Mr. Phillips to death. (C. 289.) Following a remand directing the trial court to correct errors in its sentencing order, *Phillips v. State*, CR-12-0197, 2015 WL 9263812 (Ala. Crim. App. Dec. 18, 2015), the trial court again imposed a sentence of death (CR. 89-100; SH2 44-45).

On appeal, Mr. Phillips argued that the State's introduction of an internal autopsy photograph showing Mrs. Phillips's uterus had no probative value, went to an undisputed issue, violated his rights under the Eighth Amendment, and was so inflammatory and prejudicial that it "infected the trial with unfairness as to make [Mr. Phillips's] conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *see also Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986). The Alabama Court of Criminal Appeals held that "[a]lthough Erica's pregnancy was an undisputed fact and the complained-of photograph is gruesome, the complained-of photograph was admissible." *Phillips*, 2015 WL 9263812, at *36 (internal citations omitted). The Alabama Supreme Court acknowledged that the admissibility of autopsy photographs depicting a dissection of the victim was a question of first impression for that court and that the photograph at issue was "gruesome," but held that the photograph was probative and admissible. *Ex parte Phillips*, No. 1160403, 2018 WL 5095002, at *30-31 (Ala. Oct. 19, 2018).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO DETERMINE WHETHER THE INTRODUCTION OF GRUESOME INTERNAL AUTOPSY PHOTOGRAPHS, SHOWING POST-CRIME MUTILATION BY THE MEDICAL EXAMINER AND COMPLETELY LACKING IN PROBATIVE VALUE, VIOLATE DUE PROCESS AND THE EIGHTH AMENDMENT.

A. The Admission of This Photograph Infected the Trial with Unfairness, Resulted in the Denial of Due Process, and an Unfair Sentence.

This Court should grant certiorari to establish that the introduction into evidence at a capital trial of an internal autopsy photograph, depicting post-crime mutilation by the medical examiner and lacking in probative value, is so prejudicial that it violates a defendant's right to due process, as well as his right to receive a sentence that is neither arbitrary nor capricious. To allow a capital conviction and sentence of death to stand when such an incredibly gruesome and unnecessary photograph was introduced at trial, would violate Mr. Phillips's right to due process, as well as his rights under the Eighth Amendment.

During Mr. Phillips's trial, defense counsel openly conceded to the jury that Mrs. Phillips was pregnant with an unborn child, who died as a consequence of her death. (R. 274, 484, 726.) Defense counsel neither presented evidence, nor made argument, disputing the existence of the unborn child, but, instead, argued that Mr. Phillips lacked the necessary specific intent to kill. *See*,

e.g., (R. 174, 274, 483-84, 726.) Despite this concession, the State introduced, through the medical examiner's testimony, a series of horrifically gruesome autopsy photographs in color, culminating in the introduction of a photograph of Mrs. Phillips's mutilated uterus, ovaries, and fallopian tubes, removed from her body, carved open by the medical examiner, and placed on a table, still dripping blood. (C. 158, R. 663.)

Both the Alabama Supreme Court and the Alabama Court of Criminal Appeals acknowledged the "gruesome" nature of this photograph, but affirmed its introduction by noting that the photograph had some probative value in establishing Mrs. Phillips's pregnancy. *Ex parte Phillips*, No. 1160403, 2018 WL 5095002, at *30-31 (Ala. Oct. 19, 2018); *Phillips v. State*, CR-12-0197, 2015 WL 9263812, at *36 (Ala. Crim. App. Dec. 18, 2015). However, the Due Process Clause guarantees a criminal defendant the right to a fair trial and an impartial jury. *Estelle v. Williams*, 425 U.S. 501, 503 (1976) ("The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."); *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("The failure to accord an accused a fair hearing violates even the minimal standards of due process."). The Due Process Clause requires a minimum level of reliability for convictions and prohibits the use of highly inflammatory evidence to obtain a conviction. *See Estelle*, 425 U.S. at 503 ("[C]ourts must be alert to factors that may undermine the fairness of the

fact-finding process.”). Even assuming that this photograph had some minimally probative purpose beyond inflaming the jury against Mr. Phillips, this bloody image, created not by the actions of Mr. Phillips, but instead by the post-crime dissection of the medical examiner, was so incredibly inflammatory and prejudicial that it “infected the trial with unfairness as to make [Mr. Phillips’s] conviction a denial of due process.” *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (internal quotation marks omitted). Allowing for the introduction of this photograph, regardless of its probative value, created an “unacceptable risk” that the jurors would consider “impermissible factors” in its guilt/innocence and penalty phase deliberations. *See Holbrook v. Flynn*, 475 U.S. 560, 567-71 (1986).

Importantly, however, this photograph of Mrs. Phillips’s mutilated reproductive organs was also completely unnecessary and had no probative value because it added nothing new to the state medical examiner’s verbal testimony. Just before the photograph was introduced, the state medical examiner, Dr. Emily Ward, testified to the results of her examination into Mrs. Phillips’s pregnancy. After first explaining the results of the urine pregnancy test, Dr. Ward described her evaluation of Mrs. Phillips’s reproductive organs, including her uterus, placenta, fallopian tubes, and ovaries. (R. 662-64.) Her testimony culminated in the identification of a corpus luteum cyst on Mrs. Phillips’s left ovary, which she stated was “what we see in the ovary of people

who are pregnant.” (R. 663.) By the time the photograph at issue was introduced, the fact that there was a placenta and that a corpus luteum cyst was present on one of Mrs. Phillips’s ovaries had already been well-established through Dr. Ward’s testimony. The grisly photograph of Mrs. Phillips’s uterus added nothing new to this testimony.

Moreover, the photograph of Mrs. Phillips’s bloody reproductive organs is meaningless to any layperson who observes it. Without specialized medical knowledge, it is impossible to distinguish between the bloodied organs presented in the picture or to identify the placenta, much less determine whether or not a specific type of cyst was present on one of the ovaries. Lacking the capacity to draw their own conclusions from the photograph, the jury was simply presented with incomprehensible gory imagery that added nothing to Dr. Ward’s testimonial descriptions of the autopsy.

Further, even assuming that this photograph clearly depicted the presence of the placenta and the corpus luteum cyst on Mrs. Phillips’s ovary, it is widely accepted that these features are not determinative of pregnancy. *See, e.g., Manual of Outpatient Gynecology* 191 (Carol S. Havens & Nancy D. Sullivan eds., 2002) (noting that corpus luteum cysts can exist in non-pregnant women); *Robboy’s Pathology of the Female Reproductive Tract* 575 (Stanley J. Robboy ed., 2009) (same); *see also* American Pregnancy Association, *Blighted Ovum*:

Symptoms, Causes and Prevention, available at <http://americanpregnancy.org/pregnancy-complications/blighted-ovum/> (noting placenta may form even with blighted ovum which is cause of fifty percent of first-trimester miscarriages and occurs when no embryo forms). Since the photograph of Mrs. Phillips's bloodied reproductive organs did not itself illustrate any material facts, it should never have been presented to the jury. The introduction of this gruesome internal autopsy photograph, which had minimal probative value at best, directly violated Mr. Phillips's rights to due process and requires reversal of his conviction. *Darden*, 477 U.S. at 181.

In addition, at the penalty phase, the State introduced no additional evidence and, instead, incorporated and relied on the evidence from the guilt phase, including this photograph. (R. 838 (prosecutor noting the State will introduce no further evidence and that the State "would adopt and incorporate all evidence that was offered during the guilt phase, including all exhibits").) This Court "has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California v. Ramos*, 463 U.S. 992, 998-99 (1983). "[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Caldwell v.*

Mississippi, 472 U.S. 320, 329 (1985); *see also Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”). This Court has explained that “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.” *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The introduction of this exceedingly prejudicial photograph at the penalty phase for the jury’s consideration undermined the reliability of Mr. Phillips’s death sentence and unconstitutionally permitted “the arbitrary and capricious infliction of the death penalty.” *Godfrey v. Georgia*, 446 U.S. 420, 427–428 (1980); *see also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (holding capital statute must be narrowly tailored by legislature to “suitably direct[] and limit[] [the sentencer’s discretion] so as to minimize the risk of wholly arbitrary and capricious” imposition of death penalty as required by Eighth and Fourteenth Amendments); *Furman v. Georgia*, 408 U.S. 238 (1972).

B. The Decision by Alabama's Highest Court That This Photograph Was Admissible Is Out of Step with Multiple Other Jurisdictions.

Unlike Alabama, 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. The highest courts in Georgia, Kansas, Louisiana, Mississippi, and Utah, have all reversed convictions in criminal cases where the State has introduced graphic internal autopsy photographs showing post-crime mutilation like the one introduced here. *See McCullough v. State*, 341 S.E.2d 706, 707 (Ga. 1986) (photograph of crushed larynx of victim and of victim's scalp should have been excluded as unnecessary to prove guilt); *State v. Adam*, 896 P.2d 1022, 1032 (Kan. 1995) (reversing because, *inter alia*, trial court admitted "extremely gruesome" photograph of victim's heart cut open with minimal probative value, as medical examiner's testimony could have established same facts); *State v. Morris*, 157 So. 2d 728, 730-32 (La. 1963) (reversing capital conviction and death sentence where State introduced "grotesque and revolting" autopsy photographs, showing victim's body carved open and various bloodied organs of victim); *State v. Poe*, 441 P.2d 512, 514-15 (Utah. 1968) (finding plain error due to admission of gruesome color photographs depicting victim's "empty brain cavity," as any potential probative fact from those photographs "had been established by

uncontradicted lay and medical testimony” and the “only purpose served was to inflame and arouse the jury”); *cf. Bonds v. State*, 138 So. 3d 914, 917-20 (Miss. 2014) (holding that introduction of photograph depicting “decaying flesh and maggot-infested eye sockets” was “gruesome in the extreme” and resulted in reversible error because its introduction “infringe[d] upon an accused’s right to a fair trial”).² In addition, Indiana has also found that the State acted in error by introducing internal autopsy photographs showing post-crime mutilation by the medical examiner, like the one at issue in the present case. *Corbett v. State*, 764 N.E.2d 622, 627-28 (Ind. 2002) (holding that “[a]utopsy photographs are generally inadmissible if they show the body in an altered condition” and that photographs showing the “hollow shell” of the victim’s body, though relevant,

²*See also State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978) (explaining that photographic evidence should be excluded when it “does not add anything to the testimonial descriptions of the injuries,” and acknowledging that photos collected “during or after an autopsy are most often condemned”); *State v. Collins*, 986 S.W.2d 13, 21-22 (Tenn. Ct. Crim. App. 1998) (“color photographs of a bruised, bloodied, nude, infant victim” should have been excluded); *Hoffert v. State*, 559 So. 2d 1246, 1249 (Fla. Dist. Ct. App. 1990) (holding that photograph depicting post-crime mutilation of victim’s scalp by medical examiner, intended to show bruise on victim’s head, should have been excluded); *People v. Turner*, 169 N.W.2d 330, 334-35 (Mich. Ct. App. 1969) (holding that autopsy photographs with post-crime mutilation that exposed skull and showed carved open chest were “totally irrelevant and highly inflammatory” and their admission was reversible error); *McCarty v. State*, 41 P.3d 981, 985 (Okla. Ct. Crim. App. 2002) (holding that photograph showing unborn fetus “extracted from its mother’s body post-mortem” was irrelevant, “highly inflammatory and prejudicial,” and should have been excluded).

should have been excluded).

In each of those jurisdictions, the admission of the gruesome photograph in the present case would have been excluded. As discussed above, the photograph had no probative value and its admission served only to inflame the passions of the jury against Mr. Phillips. The admission of this incredibly prejudicial photograph violated Mr. Phillips's right to due process and a fair trial, and the Alabama Supreme Court's decision to the contrary should be reversed.

Moreover, the highest courts in South Carolina, Texas, and Utah have specifically emphasized the harm that the admission of prejudicial photographs like this have at the penalty phase of a trial, and reversed accordingly. *See State v. Haselden*, 577 S.E.2d 445, 450-51 (S.C. 2003) (holding that admission of photograph showing dilated anus during penalty phase of capital trial was "extremely prejudicial" and required reversal); *Reese v. State*, 33 S.W.3d 238, 239-44 (Tex. Crim. App. 2000) (reversing death sentence where photograph of fetus in casket was introduced at penalty phase); *Poe*, 441 P.2d at 515 (holding that gruesome color photographs "could very well have tipped the scales in favor of the death penalty" and "with the defendant's life at stake, this court should not hazard a guess"). Given the need for reliability and the Eighth Amendment concerns that exist when a man's life is at stake, the admission of a grotesque

internal autopsy photograph showing post-crime mutilation by the medical examiner cannot be permitted.

C. Conclusion.

Ignoring the concessions of defense counsel and the availability of other available evidence to establish that Mrs. Phillips was pregnant, the State introduced a highly inflammatory and minimally probative color photograph of Mrs. Phillips's mutilated and bloodied reproductive organs. The introduction of this photograph showing a gory mass of internal organs rendered Mr. Phillips's trial fundamentally unfair, greatly prejudiced the outcome of Mr. Phillips's trial at both the guilt/innocence and penalty phases, and violated his constitutional rights to due process, a fair trial, and a reliable sentence under the Eighth and Fourteenth Amendments to the United States Constitution. This Court should grant certiorari to address this important federal issue.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Supreme Court.

Respectfully submitted,

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