EXHIBIT A

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Court of Criminal Appeals of Alabama.

Jessie Livell PHILLIPS.
v.
STATE of Alabama.

CR–12–0197.
|
Dec. 18, 2015.

Synopsis

Background: Defendant was convicted in the Circuit Court, Marshall County, No. CC–09–596, of capital murder for causing the death of his wife and their unborn child, and was sentenced to death.

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

[1] unborn child was a "person" for purposes of capital murder and death penalty statutes;

[2] trial court did not err in jury selection;

[3] there was no plain error in trial court's evidentiary decisions;

[4] defendant failed to establish prosecutorial misconduct in guilt phase;

[5] defendant failed to establish juror misconduct;

[6] defendant failed to establish plain error in jury instructions;

[7] transferred-intent instruction did not amend indictment;

[8] defendant failed to establish prosecutorial misconduct in penalty-phase;

[9] imposition of death penalty was not improperly disproportionate; and

[10] sentencing order was required to clearly state the court's findings regarding each mitigating circumstance presented by defendant.

Affirmed in part and remanded in part.

Welch and Kellum, JJ., concurred in result.

Appeal from Marshall Circuit Court (CC–09–596).

Opinion

JOINER, Judge.

***1** Jessie Livell Phillips was convicted of one count of capital murder for causing the death of his wife, Erica Phillips ("Erica"), and their unborn child ("Baby Doe") during "one act or pursuant to one scheme or course of conduct," *see* § 13A–5–40(a)(10), Ala.Code 1975, and the jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and after conducting a sentencing hearing, the Marshall Circuit Court ("the trial court") followed the jury's advisory recommendation and sentenced Phillips to death. This appeal, which is automatic in a case involving the death penalty, followed. *See* § 13A–5–53, Ala.Code 1975. For the reasons set forth below, we affirm Phillips's conviction and remand this case to the trial court for that court to correct deficiencies in its sentencing order.

Facts

On February 27, 2009, Phillips, Erica, and their two children met Erica's brother, Billy Droze ("Billy"), at a McDonald's restaurant in Hampton Cove. According to Billy, they all arrived at the McDonald's restaurant at the same time and Phillips and Erica were driving two separate vehicles—Erica was driving a black Ford Explorer Sport Trac truck and Phillips was driving a black Nissan Maxima car. Billy explained that, before that day, he had not seen the Nissan Maxima. Thereafter, Phillips, Billy, Erica, and the two children entered the McDonald's restaurant to eat lunch, and they stayed there for approximately 30 to 45 minutes. While at the restaurant, they decided to all drive to the car wash in Guntersville to visit Erica and Billy's brother, Lance

Droze ("Lance"), who was working at the car wash that day.

According to Billy, they left the restaurant driving three separate vehicles—Erica drove the truck, Phillips drove the car, and Billy drove his vehicle—and they all arrived at the car wash at the same time. Billy explained that they parked each of their vehicles in three separate car-wash "bays." When they arrived at the car wash, Billy saw Lance washing a boat in one of the car-wash bays; he exited his vehicle, walked over to Lance, and told him that they were there to see him. Shortly thereafter, Lance finished washing the boat and hauled it away from the car wash, and Billy walked back to his vehicle.

According to Billy, as he was walking back to his vehicle, he stopped at the car-wash bay in which Erica's truck was parked. Billy stated that Erica was sitting in the driver's seat of the truck and that Phillips was sitting in the rear-passenger seat "fiddling with" a gun. (R. 505.) Billy then spoke with Phillips and said, "You guys always need money. Why don't you let me have that gun and I'll throw it in this lake and I'll give you some money ." (R. 505.) Phillips, however, declined to give Billy the gun, and Billy walked back to his vehicle. Soon after, Billy heard Erica yell, "Help me, Bill" (R. 504), and he went back to where Erica had parked her truck. According to Billy, he "got there just in time to see [Phillips] kill her." (R. 505.)

***2** Billy explained that he saw Phillips and Erica engaged in a "struggle." According to Billy, Phillips had Erica "in a headlock, pointing [the gun] to her head." (R. 506.) Although she was able to "break free" from the headlock, within "seconds" of her doing so, Phillips fired one shot at Erica. Billy then grabbed his niece and nephew, who were both nearby when the shooting occurred, [1] and Phillips told Billy to "get out of there." (R. 506.) Billy then put his niece and nephew in his vehicle and drove to get Lance, who, Billy said, was approximately 100 yards away at the Guntersville Boat Mart returning the boat he had just washed. While putting his niece and nephew in his vehicle, Billy saw Phillips drive off in Erica's truck. Billy told Lance what had happened at the car wash, telephoned for help, and took the children away from the car wash.

Lance then ran toward the car wash and went over to Erica, who was lying on the ground. According to Lance, Erica was lying on her side with her head on her arm, her left eye was swollen, and there was a lot of blood on the ground. Lance explained that Erica could not speak and was having difficulty breathing. Lance "held her for a few minutes, and ... noticed she was choking and [then] turned her over." (R. 540.) Soon after, Doug Ware, an investigator with the Guntersville Police Department, arrived at the car wash and told Lance to move.

Investigator Ware explained that he had been dispatched to the car wash with a report that a female had been shot in the head. According to Investigator Ware, when he arrived at the car wash, he saw "three people standing to the left of the car wash on the curb and one person in the bay and someone else laying on the ground, [who] was later [determined] to be Erica. [Investigator Ware] pulled [his] car up in front of the bay that Erica was in and walked up to where [Lance] was." (R. 580.) Investigator Ware explained that, when he arrived at the crime scene, Erica was lying "pretty much face down on the right side of her face" (R. 583) and that he

> "could not really see where blood and everything was coming from, but her left eye was swollen. [Erica] was taking very short breaths, and they were far apart. There was a large amount of blood. And at that time ... [he] advised [another officer who had arrived on scene] to '10–17' the medics, which was [to] hurry them up."

(R. 584.) According to Investigator Ware, Erica had an entry wound on the right side of her head and her condition appeared to be "very grave." (R. 585.) Once emergency medical personnel arrived, they began to treat Erica, moved her to an ambulance, and transported her to the hospital. When the ambulance left, Investigator Ware began securing the crime scene.

Erica was transported to the emergency room at Marshall Medical Center North ("MMCN"). Joann Ray, the charge nurse on duty in the emergency room, explained that Erica was unresponsive, which Ray described as having "no spontaneous movement ... [and] no verbal communication." (R. 644.) Ray further explained that Erica had a very shallow respiration—"maybe three to six [breaths] a minute." (R. 645.) According to Ray, it was determined that Erica needed specialized care —specifically, treatment by a neurosurgeon. Because

MMCN did not have a neurosurgeon on duty, Erica was transported to a hospital in Huntsville.

***3** At some point shortly after the shooting, John Siggers, an agent with the Marshall County Drug Enforcement Unit, and Tim Abercrombie, a sergeant with the Albertville Police Department, were meeting about "drug unit business" at the Albertville police station. During that meeting, Sgt. Abercrombie received a telephone call from someone with the Guntersville Police Department informing him that they were searching for a homicide suspect and providing Sgt. Abercrombie with a description of both the suspect and the vehicle they believed he was driving. Sgt. Abercrombie then told Agent Siggers that they "were looking for a black Ford Explorer Sport Trac driven by [Phillips], and it was possibly headed to Willow Creek Apartments on Highway 205." (R. 549.) Thereafter, both Sgt. Abercrombie and Agent Siggers left the Albertville police station to assist in locating Phillips.

Almost immediately after leaving the parking lot of the Albertville police station, Agent Siggers saw a black Ford Explorer Sport Trac. Agent Siggers explained that he

> "pulled out behind [the vehicle] to run the tag, and as [he] pulled out behind it, [the vehicle] pulled over into the, up against the curb, a parking spot next to Albertville Police Department. At that time, Mr. Phillips step [ped] out of the vehicle."

(R. 551.) Agent Siggers explained that Phillips then walked over to the sidewalk "and stood and looked at [him]." (R. 553.) At that point, Agent Siggers got out of his vehicle with his weapon drawn and Phillips put his hands up, walked toward Agent Siggers, and said, "I did it. I don't want no trouble." (R. 553.) Agent Siggers then put Phillips "up against the hood of his vehicle to put [hand]cuffs on him," and, while doing so, Phillips told Agent Siggers that the "gun's in [his] back pocket." (R. 554.) Agent Siggers then retrieved the gun from Phillips's pocket and "cleared the weapon." (R. 555.) According to Agent Siggers, the gun had "one live round in the chamber and three live rounds in the magazine." (R. 555.)

Agent Siggers then walked Phillips to the front door of the Albertville police station and sat him down on a brick retaining wall. Thereafter, Benny Womack, the chief of the Albertville Police Department, walked out and asked Agent Siggers what was going on. Agent Siggers told Chief Womack that Phillips was a "suspect" in a homicide that had occurred in Guntersville. Phillips, however, interjected and explained to Agent Siggers and Chief Womack that he "is not a suspect. [He] did it." (R. 557.) Agent Siggers and Chief Womack then "walked [Phillips] to the jail door of the Albertville Police Department at that point. [They] sat him down on a bench. [Phillips] stayed with Chief Womack. [Agent Siggers then] went to [the] investigation division of the Albertville Police Department and called Investigator [Mike] Turner with the Guntersville Police Department." (R. 558.)

Investigator Turner responded to the car wash to assist Investigator Ware in processing the crime scene. Shortly after arriving, however, Investigator Turner "found out that [Agent Siggers] had [Phillips] in custody in Albertville." (R. 619.) Investigator Turner then left the car wash and drove to the Albertville police station. Upon arriving at the Albertville police station, Investigator Turner received from Agent Siggers the gun that had been retrieved from Phillips's pocket. Thereafter, Investigator Turner and Sgt. Abercrombie read to Phillips his *Miranda*[2] rights, which Phillips waived, and questioned him about the shooting at the car wash.

***4** During that interview,[3] Phillips explained the following: Sometime before February 27, 2009, Erica had purchased a used Lexus from a car dealership in New Hope. That car, however, did not work properly, and, on February 27, 2009, Phillips and Erica returned to the car dealership to try to get their money back. The owners of the car dealership, however, refused to give them their money back and, instead, offered to exchange the Lexus for a used Nissan Maxima. Phillips explained that, rather than losing money on the Lexus that did not work properly, he agreed to the exchange and took the Nissan Maxima. According to Phillips, Erica was not happy with the exchange and began arguing with him.

After getting the Nissan Maxima, Erica and Phillips drove to a McDonald's restaurant to meet Billy. Phillips explained that, while eating at the restaurant, Erica continued to argue with him, saying, " 'What the f* * * did you get that Maxima for?' 'You dumb-ass n* * * * *, I could have just not took nothing and just left the money there and just said f* * * it.' " (C. 172.)

Phillips explained that, after eating at the McDonald's restaurant, he, Billy, and Erica decided to go to the car wash to see Lance. Phillips stated that, before leaving the McDonald's, however, he removed a gun from the glove compartment of Erica's truck and put it in his pocket. Phillips explained that he did so because neither he nor Erica had a permit for the weapon and he did not want her to be in possession of the gun "in case she got pulled over." (C. 167.) Erica, Phillips, and Billy then drove in three separate vehicles to the car wash.

According to Phillips, after arriving at the car wash, Erica "just kept on and kept on and kept on and it just happened." (C. 168.) Phillips explained that Erica was "[s]till pissed about the Maxima. Still calling [him] 'dumb' and 'stupid.' 'You shouldn't have did that.' " (C. 177.) Then, Phillips explained, the following occurred:

> "And she's still yelling and cussing and I just said, 'Why don't you shut up for a minute and just let it all sink in and calm down and everything.' And she just kept cussing and calling me names and—
>
> "....
>
> "Well, I had the pistol in my back pocket from when we left McDonald's.
>
> "....
>
> "I got the pistol in my back pocket. And she just kept on and kept on and kept on and kept on and I just shot her, got in the car and left.
>
> "[Investigator Turner]: Where were you aiming?
>
> "[Phillips]: I wasn't really I just pointed and pulled the trigger. I don't—I still don't know where it hit her. I don't—I'm guessing it did hit her because she fell."

(C. 178–80.) Phillips explained that, before he shot her, Erica asked, " 'What you going to do Maxima. Still calling [him] 'dumb' and 'stupid.' 'You shouldn't have did that.' " (C. 180.) According to Phillips, he did not point the gun at her for a long time; rather, he maintained that he "pulled the trigger, pointed and shot. Put [the gun] back in [his] pocket, got in the truck and left." (C. 180.) Phillips also explained that he had to step over Erica's body to get in the truck and leave.

***5** Phillips stated that, after he left the car wash, he went to a Compass Bank and withdrew $160 from his bank account. Thereafter, Phillips drove to the Albertville police station and parked his car out front and turned himself in.

When asked what the shooting was about, Phillips explained:

> "Everything. I mean, you just don't know how it feel to be married to a woman for four years and for the last, I'd say, two years, every day she's bitching at you about something. She called me a n* * * * *. She called me a fa* * *t. It—I don't know, it just all just added up and I could have found a better way to end it, but—"

(C. 165.) Additionally, when asked whether he intended to kill Erica, Phillips stated:

> "Like I say, when I pulled that gun out and pointed it at her and pulled the trigger, did I want to kill her? No. Did I pull the trigger? Yes."

(C. 208–09.)

The next day—February 28, 2009—Investigator Turner conducted a second interview with Phillips. During that second interview, Phillips reiterated the events leading up to the shooting and explained that Erica

> "got out of the truck and [he] started walking around towards the end [of the truck] and that's when [he] pulled the gun out. And [Erica] said, 'What you doing with that?' And I really didn't say nothing and she turned like she was either fixing to walk off or run. I can't say for sure that she was going to do, but that's—
>
> "[Investigator Turner]: But she was fixing to do one or the other?
>
> "[Phillips]: Yeah, she was fixing to do one or the other. And I pulled the trigger and walked past her. I walk up to the front of the car wash and I put the gun to my chest, because I really didn't want to go to jail, but at the same time I couldn't pull the trigger because it's not

> in my beliefs. It's not something that I want to spend the rest of my life doing."

(C. 247–48.) Thereafter, Investigator Turner explained to Phillips that Erica had died at approximately 1:00 a.m. and that she had been approximately eight weeks pregnant. Phillips explained that he had learned of the pregnancy a couple of weeks before the shooting when Erica had gone to a doctor who had confirmed that she was pregnant.

On March 2, 2009, Dr. Emily Ward, a state medical examiner at the Huntsville Regional Laboratory of the Department of Forensic Sciences, conducted an autopsy on Erica. Dr. Ward explained that she did both an external and an internal examination of Erica's body. According to Dr. Ward, the external examination of Erica revealed that she had a "gunshot entry wound on the right side of her head above her right ear and in the scalp" and no exit wound. (R. 656.) Additionally, Dr. Ward stated that Erica's "left eye was discolored. It was red and protruding through her eyelid." (R. 658.) Dr. Ward then explained that the internal examination of Erica revealed that

> "[t]he bullet went through the right side of her head and then the right side of her brain, and it crossed over what we call the midline and went into the left side of her brain. And then at some point, the core and the jacket separated from one another. The lead piece of metal went through the base of her skull and into her left eye."
>
> ***6** "....
>
> "Well, both sides of her brain were injured. The right side, the bullet went through the part of her brain that controls movement and then it passed into the left side. But as it did, it went very close to the brain stem. And the brain stem, of course, is the center of breathing and other vital functions. So since the bullet went very close to that, she probably was almost immediately incapacitated by the bullet."

(R. 660–61.) Dr. Ward further explained that she conducted a "urine pregnancy test" that indicated that Erica was, in fact, pregnant and that she also conducted an internal examination of Erica's "reproductive organs" that confirmed that Erica was pregnant. According to Dr. Ward, Baby Doe was "growing and alive" at the time of Erica's death, and, Dr. Ward stated, that Baby Doe could not survive Erica's death.

Standard of Review

[1] [2] [3] [4] [5] On appeal from his conviction and sentence, Phillips raises numerous issues, including many that were not raised in the trial court. Because Phillips has been sentenced to death, however, this Court must review the trial-court proceedings for plain error, *see* Rule 45A, Ala. R.App. P.

> " 'Plain error is defined as error that has "adversely affected the substantial right of the appellant." 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).' "

Ex parte Brown, 11 So.3d 933, 935–36 (Ala.2008) (quoting *Hall v. State,* 820 So.2d 113, 121–22 (Ala.Crim.App.1999)). *See also Ex parte Walker,* 972 So.2d 737, 742 (Ala.2007); *Ex parte Trawick,* 698 So.2d 162, 167 (Ala.1997); *Harris v. State,* 2 So.3d 880, 896 (Ala.Crim.App.2007); and *Hyde v. State,* 778 So.2d 199, 209 (Ala.Crim.App.1998) ("To rise to the level of plain error, the claimed error must not only seriously affect a defendant's 'substantial rights,' but it must also have an unfair prejudicial impact on the jury's deliberations."). Although the failure to object in the trial court will not preclude this Court from reviewing an issue under Rule 45A, Ala. R.App. P., it will weigh against any claim of prejudice made on appeal. *See Dotch v. State,* 67 So.3d 936, 965 (Ala.Crim.App.2010) (citing *Dill v. State,* 600 So.2d 343 (Ala.Crim.App.1991)). Additionally, application of the plain-error rule

> " ' " 'is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' " ' *Whitehead v. State,* [777 So.2d 781], at 794 [(Ala.Crim.App.1999)], quoting *Burton v. State,* 651 So.2d 641, 645 (Ala.Crim.App.1993), aff'd, 651

So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995).”

***7** *Centobie v. State,* 861 So.2d 1111, 1118 (Ala.Crim.App.2001).

Discussion

Guilt–Phase Issues

I.

Phillips contends that, under both §§ 13A–5–40(a)(10) and 13A–5–49(9), Ala.Code 1975, the murder of “two or more persons” does not encompass the death of Baby Doe because, he says, an unborn child is definitionally not a “person” under the capital-murder statute. Specifically, Phillips argues:

> “In the present case, the only capital offense Mr. Phillips was charged with was the murder of ‘two or more persons,’ Alabama Code [§] 13A–5–40(a)(10), and the only aggravating circumstance found by the trial court was that Mr. Phillips ‘intentionally caused the death of two or more persons,’ [§] 13A–5–49(9). However, the sole provision of the criminal code that arguably made Mr. Phillips eligible for the death penalty was a change to the definition of the word ‘person’—outside of the capital murder statute—in [§] 13A–6–1. Without this change in definition, Mr. Phillips's act of shooting his wife, who was six to eight weeks pregnant, could not have been capital murder.”

(Phillips's brief, pp. 14–15 (some citations omitted).) Phillips's argument is premised on his belief that the definition of the word “person” in § 13A–6–1, Ala.Code 1975, which includes an unborn child, is limited to only those “victim[s] of a criminal homicide or [an] assault” committed under “Article 1 and Article 2” of Chapter 6 in Title 13A and, therefore, cannot be used to define the word “person” in the capital-murder statute because the capital-murder statute is located in Article 2 of Chapter 5 in Title 13A.

Phillips contends that defining the word “person” in both §§ 13A–5–40(a)(10) and 13A–5–49(9), Ala.Code 1975, by using the definition of the word “person” from § 13A–6–1(a)(3), Ala.Code 1975, violates “established principles of statutory construction and the rule of lenity” and creates a new class of capital offense—“murder of a pregnant woman” (Phillips's brief, p. 15)—and a new aggravating circumstance. To resolve Phillips's argument on appeal, we must construe §§ 13A–5–40, 13A–5–49, 13A–6–1, and 13A–6–2, Ala.Code 1975.

The following principles of statutory construction, as explained by the Alabama Supreme Court, guide our analysis:

> “In *[Ex parte] Bertram,* [884 So.2d 889 (Ala.2003),] this Court stated:
>
> “ ‘ “A basic rule of review in criminal cases is that *criminal statutes are to be strictly construed in favor of* those persons sought to be subjected to their operation, i.e., *defendants.*
>
> “ ‘ “Penal statutes are to reach no further in meaning than their words.
>
> “ ‘ “One who commits an act which does not come within the words of a criminal statute, according to the general and popular understanding of those words, when they are not used technically, *is not to be punished thereunder, merely because the act may contravene the policy of the statute.*
>
> “ ‘ “No person is to be made subject to penal statutes by implication and *all doubts concerning their interpretation are to predominate in favor of the accused.*’ “

***8** “884 So.2d at 891 (quoting *Clements v. State,* 370 So.2d 723, 725 (Ala.1979) (citations omitted; emphasis added in *Bertram*)).

> “In ascertaining the legislature's intent in enacting a statute, this Court will first attempt to assign plain meaning to the language used by the legislature. As the Court of Criminal Appeals explained in *Walker v. State,* 428 So.2d 139, 141 (Ala.Crim.App.1982), ‘[a]lthough penal statutes are to be strictly construed, courts are not required to abandon common sense. Absent any indication to the contrary, the words must be given their ordinary and normal meaning.’ (Citations omitted.) Similarly, this Court has held that ‘[t]he fundamental rule of statutory construction is to ascertain and give effect to the intent of the legislature in enacting the

statute. If possible, the intent of the legislature should be gathered from the language of the statute itself.' *Volkswagen of America, Inc. v. Dillard,* 579 So.2d 1301, 1305 (Ala.1991).

"We look first for that intent in the words of the statute. As this Court stated in *Ex parte Pfizer, Inc.,* 746 So.2d 960, 964 (Ala.1999):

> " ' "When the language of a statute is plain and unambiguous, as in this case, courts must enforce the statute as written by giving the words of the statute their ordinary plain meaning—they must interpret that language to mean exactly what it says and thus give effect to the apparent intent of the Legislature." *Ex parte T.B.,* 698 So.2d 127, 130 (Ala.1997). Justice Houston wrote the following for this Court in *DeKalb County LP Gas Co. v. Suburban Gas, Inc.,* 729 So.2d 270 (Ala.1998):
>
> " ' "In determining the meaning of a statute, this Court looks to the plain meaning of the words as written by the legislature. As we have said:
>
> " ' " " ' "Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.' "
>
> " ' "*Blue Cross & Blue Shield v. Nielsen,* 714 So.2d 293, 296 (Ala.1998) (quoting *IMED Corp. v. Systems Eng'g Assocs. Corp.,* 602 So.2d 344, 346 (Ala.1992)); see also *Tuscaloosa County Comm'n v. Deputy Sheriffs' Ass'n,* 589 So.2d 687, 689 (Ala.1991); *Coastal States Gas Transmission Co. v. Alabama Pub. Serv. Comm'n,* 524 So.2d 357, 360 (Ala.1988); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. City of Hartselle,* 460 So.2d 1219, 1223 (Ala.1984); *Dumas Brothers Mfg. Co. v. Southern Guar. Ins. Co. .,* 431 So.2d 534, 536 (Ala.1983); *Town of Loxley v. Rosinton Water, Sewer & Fire Protection Auth., Inc.,* 376 So.2d 705, 708 (Ala.1979). It is true that when looking at a statute we might sometimes think that the ramifications of the words are inefficient or unusual. However, it is our job to say what the law is, not to say what it should be. Therefore, only if there is no rational way to interpret the words as stated will we look beyond those words to determine legislative intent. To apply a different policy would turn this Court into a legislative body, and doing that, of course, would be utterly inconsistent with the doctrine of separation of powers. *See Ex parte T.B.,* 698 So.2d 127, 130 (1997)." '

***9** "Thus, only when language in a statute is ambiguous will this Court engage in statutory construction. As we stated in *Ex parte Pratt,* 815 So.2d 532, 535 (Ala.2001), '[p]rinciples of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous.'

"As the Court of Criminal Appeals explained in *Ankrom[v. State,* 152 So.3d 373 (Ala.Crim.App.2011)], the rule of construction referenced in *Bertram* applies only where the language of the statute in question is ambiguous...."

Ex parte Ankrom, 152 So.3d 397, 409–10 (Ala.2013). *See also Ex parte Hicks,* 153 So.3d 53, 58–59 (Ala.2014) (quoting *Ankrom* for the purpose of explaining the rules of statutory construction).

[6] In raising this claim, Phillips correctly recognizes that "the sole provision of the criminal code that arguably made [him] eligible for the death penalty was a change to the definition of the word 'person'—outside of the capital murder statute—in [§] 13A–6–1 ." (Phillips's brief, p. 15.) Phillips incorrectly argues, however, that the definition of the term "person" in § 13A–6–1(a)(3), Ala.Code 1975, is limited to only "Article 1 and Article 2" of Chapter 6 in Title 13A and "should not be applied to the separate capital-murder statute." (Phillips's brief, p. 18.)

Indeed, contrary to Phillips's assertion, a simple reading of the capital-murder statute plainly and unambiguously makes the murder of "two or more persons"—when one of the victims is an unborn child—a capital offense because the capital-murder statute expressly incorporates the intentional-murder statute codified in § 13A–6–2(a)(1), Ala.Code 1975–a statute that, in turn, uses the term "person" as defined in § 13A–6–1(a)(3), Ala.Code 1975, which includes an unborn child as a person.

As explained above, Phillips was charged with, and convicted of, causing the death of Erica and Baby Doe,

an unborn child, pursuant to § 13A–5–40(a)(10), Ala.Code 1975. That statute makes "*[m]urder* wherein two or more *persons* are *murdered by the defendant* by one act or pursuant to one scheme or course of conduct" a capital offense. (Emphasis added.)

Section 13A–5–40(b), Ala.Code 1975, explains, in relevant part, that "the terms 'murder' and 'murder by the defendant' as used in this section to define capital offenses *mean murder as defined in Section 13A–6–2(a)(1),* but not as defined in Section 13A–6–2(a)(2) and (3)." (Emphasis added.) In other words, the term "murder" as that term is used in the capital-murder statute means "intentional murder" as defined by § 13A–6–2(a)(1), Ala.Code 1975. That section provides that intentional murder occurs when the defendant, "[w]ith intent to cause the death of *another person,* ... causes the death of that *person* or of *another person.*" § 13A–6–2(a)(1), Ala.Code 1975 (emphasis added). The term "person," as that term is used in § 13A–6–2(a)(1), "when referring to the victim of a criminal homicide or assault, means a human being, *including an unborn child in utero at any stage of development, regardless of viability.*" § 13A–6–1(a)(3), Ala.Code 1975 (emphasis added).

***10** In other words, the capital-murder statute plainly and unambiguously requires the occurrence of an intentional murder, as defined in § 13A–6–2(a)(1), Ala.Code 1975, and an intentional murder occurs only when a defendant causes the death of a "person," which includes an unborn child.

Because an "unborn child" is a "person" under the intentional-murder statute and because the intentional-murder statute is expressly incorporated into the capital-murder statute to define what constitutes a "murder," an "unborn child" is definitionally a "person" under § 13A–5–40(a)(10), Ala.Code 1975. Thus, to the extent Phillips contends that § 13A–5–40(a)(10), Ala.Code 1975, excludes from its purview the death of an unborn child, that claim is without merit.

[7] Phillips also argues that the term "person" as that term is used in § 13A–5–49, Ala.Code 1975, does not include an "unborn child." That section sets out the aggravating circumstances for which the death penalty may be imposed and provides, in relevant part:

> "Aggravating circumstances shall be the following:
>
> "....
>
> "(9) The defendant intentionally caused 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 (emphasis added).

Section 13A–5–49, unlike § 13A–5–40, does not expressly incorporate the intentional-murder statute, and it also does not expressly incorporate the definition of the term "person" found in § 13A–6–1, Ala.Code 1975. Both § 13A–5–40 and § 13A–5–49, however, use nearly identical language and concern closely related subject matter—i.e., capital offenses and the aggravating circumstances for which a capital offense may be subject to the death penalty.

[8] **[9]** When "statutes 'relate to closely allied subjects [they] may be regarded in pari materia.' *State ex rel. State Board for Registration of Architects v. Jones,* 289 Ala. 353, 358, 267 So.2d 427, 431 (1972). 'Where statutes are in pari materia they should be construed together' and 'should be resolved in favor of each other to form one harmonious plan.' *League of Women Voters v. Renfro,* 292 Ala. 128, 131, 290 So.2d 167, 169 (1974)." *Henderson v. State,* 616 So.2d 406, 409 (Ala.Crim.App.1993). Thus, like § 13A–5–40(10), we construe § 13A–5–49(9) as including unborn children as "persons."

[10] Although Phillips argues that what defines a "person" in the capital-murder statute is different from what defines a "person" in the intentional-murder statute, we do not agree. Indeed, to read those statutes in the manner Phillips would have us read them, this Court would have to ignore the plain meaning of the capital-murder statute and its express incorporation of the intentional-murder statute, would have to read closely related statutes in an inconsistent manner, and would have to disregard the "clear legislative intent to protect even nonviable fetuses from homicidal acts." *Mack v. Carmack,* 79 So.3d 597, 610 (Ala.2011). Consequently, Phillips is not entitled to any relief on this claim.

II.

***11** Phillips contends that the trial court erred during the jury-selection process. Specifically, Phillips contends that

the trial court erred by death-qualifying the jury, by failing to excuse certain jurors for cause, and by removing certain jurors who, Phillips says, demonstrated that they could be fair and impartial. We address each of Phillips's issues in turn.

A.

[11] Phillips first contends that the trial court erred "by death-qualifying the jury" because, he says, doing so "produced a biased jury prone to convict [him]." (Phillips's brief, p. 98.) Phillips did not raise this issue in the trial court; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

> "In *Davis v. State,* 718 So.2d 1148 (Ala.Crim.App.1995) (opinion on return to remand), aff'd, 718 So.2d 1166 (Ala.1998), cert. denied, 525 U.S. 1179, 119 S.Ct. 1117, 143 L.Ed.2d 112 (1999), we stated:
>
> > " '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).'
>
> "718 So.2d at 1157. There was no error in allowing the State to death qualify the prospective jurors."

Brown v. State, 11 So.3d 866, 891 (Ala.Crim.App.2007).

Thus, the trial court did not commit any error—plain or otherwise—in death-qualifying the prospective jurors. Consequently, Phillips is not entitled to relief on this claim.

B.

Phillips next contends that the trial court erred when it "failed to excuse jurors for cause"—namely, prospective jurors C .A., C.G., and S.D.[4] (Phillips's brief, p. 51.) Although Phillips did not challenge these prospective jurors for cause in the trial court, Phillips argues that the trial court's failure to sua sponte remove them for cause "forced" him "to use peremptory strikes to exclude them from the jury." (Phillips's brief, p. 54.) Because Phillips did not first raise this issue in the trial court, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

[12] [13] [14] [15] [16] [17] [18] [19] [20] [21] Although Phillips contends that the trial court should have sua sponte removed these 3 prospective jurors for cause, Phillips used 3 of his allotted 31 peremptory strikes to remove prospective jurors C.A., C.G., and S.D. from the venire.

> "Accordingly, any error in failing to remove these jurors for cause was harmless beyond a reasonable doubt. '[T]he Alabama Supreme Court has held that the failure to remove a juror for cause is harmless when that juror is removed by the use of a peremptory strike. *Bethea v. Springhill Mem'l Hosp.,* 833 So.2d 1 (Ala.2002).' *Pace v. State,* 904 So.2d 331, 341 (Ala.Crim.App.2003). *Cf. Ex parte Colby,* 41 So.3d 1 (Ala.2009) (may not be harmless when multiple challenges for cause are involved).
>
> ***12** "Moreover,
>
> > " 'To justify a challenge for cause, there must be a proper statutory ground or " 'some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court.' " *Clark v. State,* 621 So.2d 309, 321 (Ala.Cr.App.1992) (quoting *Nettles v. State,* 435 So.2d 146, 149 (Ala.Cr.App.1983)). This court has held that "once a juror indicates initially that he or she is biased or prejudiced or has deepseated impressions" about a case, the juror should be removed for cause. *Knop v. McCain,* 561 So.2d 229, 234 (Ala.1989). The test to be applied in determining whether a juror should be removed for cause is whether the juror can eliminate the influence of his previous feelings and render a verdict according to the evidence and the law. *Ex parte Taylor,* 666 So.2d 73, 82 (Ala.1995). A juror "need not be excused merely because [the juror] knows something of the case to be tried or because [the juror] has formed some opinions regarding it." *Kinder v. State,* 515 So.2d 55, 61 (Ala.Cr.App.1986).'

"*Ex parte Davis,* 718 So.2d 1166, 1171–72 (Ala.1998).

> " 'The test for determining whether a strike rises to the level of a challenge for cause is "whether a juror can set aside their opinions and try the case fairly and impartially, according to the law and the evidence." *Marshall v. State,* 598 So.2d 14, 16 (Ala.Cr.App.1991). "Broad discretion is vested with the trial court in determining whether or not to sustain challenges for cause." *Ex parte Nettles,* 435 So.2d 151, 153 (Ala.1983). "The decision of the trial court 'on such questions is entitled to great weight and will not be interfered with unless clearly erroneous, equivalent to an abuse of discretion.' " *Nettles,* 435 So.2d at 153.'

"*Dunning v. State,* 659 So.2d 995, 997 (Ala.Crim.App.1994).

" 'The qualification of a juror is a matter within the discretion of the trial court. *Clark v. State,* 443 So.2d 1287, 1288 (Ala.Cr.App.1983). The trial judge is in the best position to hear a prospective juror and to observe his or her demeanor.' *Ex parte Dinkins,* 567 So.2d 1313, 1314 (Ala.1990). ' "[J]urors who give responses that would support a challenge for cause may be rehabilitated by subsequent questioning by the prosecutor or the Court." *Johnson v. State,* 820 So.2d 842, 855 (Ala.Crim.App.2000).' *Sharifi v. State,* 993 So.2d 907, 926 (Ala.Crim.App.2008).

> " 'It is well to remember that the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination techniques that frequently are employed ... [during voir dire].... Also, unlike witnesses, prospective jurors have had no briefing by lawyers prior to taking the stand. Jurors thus cannot be expected invariably to express themselves carefully or even consistently. Every trial judge understands this, and under our system it is that judge who is best situated to determine competency to serve impartially. The trial judge may properly choose to believe those statements that were the most fully articulated or that appeared to be have been least influenced by leading.'

***13** "*Patton v. Yount,* 467 U.S. 1025, 1039, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984)."

Thompson v. State, 153 So.3d 84, 115–16 (Ala.Crim.App.2012).

[22] Phillips first contends that, during voir dire, prospective juror C.A. "showed probable prejudice that could not be set aside" (Phillips's brief, p. 52) because, he says, C.A.

> "stated that a close family friend, an eleven-year-old child, was murdered several years ago. [C.A.] further said 'it's been a couple of years since the trial' and 'last night I struggled a lot with a lot of memories and emotions ... related to that.' Upon further questioning regarding her ability to be fair, [C.A.] said she would 'try to be fair,' but 'I have to honestly say I don't know. I really don't know.... I'm not sure.' "

(Phillips's brief, p. 52 (citations omitted).)

During voir dire, Phillips's counsel and C.A. had the following exchange:

> "[Phillips's counsel]: I have, based on your questionnaires, ladies and gentlemen, I have a few follow-up questions for you. And I'd like to first direct and pick on [C.A.] up there on the upper left. And I appreciate your very candid responses. You had a traumatic event in your life, didn't you, [C.A.]?
>
> "[C.A.]: Yes, involving a murder.
>
> "[Phillips's counsel]: Excuse me?
>
> "[C.A.]: Involving a murder is what you're referring to?
>
> "[Phillips's counsel]: Yes. And certainly that was a huge event in your life?
>
> "[C.A.]: Yes.
>
> "[Phillips's counsel]: A person you knew, that is, as I recall, was an 11–year–old person.
>
> "[C.A.]: Yes. A close family friend. I was very involved with the grandmother, who was their only living relative, and closely associated with the case.
>
> "[Phillips's counsel]: Got you. And certainly that—again, it comes through in your questionnaire, that was a very traumatic event for you?
>
> "[C.A.]: It was, yes.

"[Phillips's counsel]: The only follow-up question I have to that, [C.A.], is whether or not you think that that experience, that based on that experience, do you think you could still be a fair and impartial juror in this case, decide the case against Mr. Phillips based on the law and the evidence?

"[C.A.]: I've had a lot of questions in my mind since filling that out, yes, sir.

"[Phillips's counsel]: That's why I asked it.

"[C.A.]: Yes. Filling that out yesterday, it's been a couple of years since the trial, since I really thought about it. I tried to kind of push it back. And I have to say last night I struggled a lot with a lot of memories and emotions—

"[Phillips's counsel]: Sure.

"[C.A.]:—related to that. *I do realize that each case is different, you know. There's no relationship between the two cases.* But as far as the fact that I was close to that, it is somewhat emotional. *You know, I would certainly try to be fair, recognizing that they are two separate events.* But there's an emotion to it. I can't deny it.

***14** "[Phillips's counsel]: Yes. And that's—thank you for sharing. And I'm going to pick on other people in a minute.

"[C.A.]: That's okay. I expected you would have done that.

"[Phillips's counsel]: I guess at this point, [C.A.], we deal in kind of absolutes though.

"[C.A.]: Uh-huh.

"[Phillips's counsel]: I mean, if there's some question in your mind as you sit there right now—

"[C.A.]: Yeah.

"[Phillips's counsel]:—and you know you're going to be sitting on a homicide, a murder case—

"[C.A.]: Yeah. I have to honestly say I don't know. I really don't know.

"[Phillips's counsel]: All right. Not sure?

"[C.A.]: Yeah. I'm not sure."

(R. 174–77 (emphasis added).)

An examination of the record on appeal demonstrates that prospective juror C.A. was not due to be removed for cause under any of the statutory exclusions of § 12–16–150, Ala.Code 1975, "or related to a matter that imports *absolute bias* on the part of the juror. *See Tomlin v. State,* 909 So.2d 213, 235–36 (Ala.Crim.App.2002), rev'd on other grounds, 909 So.2d 283 (Ala.2003)." *Sneed v. State,* 1 So.3d 104, 137 (Ala.Crim.App.2007) (emphasis added). Indeed, although Phillips correctly points out that prospective juror C.A. recounted the murder of a close family friend, which C.A. described as "somewhat emotional," C.A. stated that she understood that "each case is different," that "[t]here's no relationship between the two cases," and that she would "try to be fair." In other words, C.A. indicated that she had no fixed opinion about Phillips's case and had no "absolute bias." Thus, the trial court did not commit error—much less plain error—when it did not sua sponte remove prospective juror C.A. for cause.

[23] Phillips also contends that the trial court should have sua sponte removed prospective juror C.G. for cause because, he says,

> "[w]hen asked in the juror questionnaire if he had an opinion on Mr. Phillips's guilt, [C.G.] chose yes and wrote, 'I think he is guilty.' During voir dire, [C.G.] confirmed that he had written this and explained that he believed Mr. Phillips was guilty 'from reading the paper and ... [hearing] the news.' "

(Phillips's brief, pp. 52–53.)

Phillips correctly notes that, during voir dire, C.G. admitted to answering on his juror questionnaire "I think he is guilty" (R. 276) and that his position was based on what he had read and heard in the news. [5] C.G. explained, however, that he understood that Phillips is "[b]y law presumed innocent" (R. 276–77), that he had not judged Phillips guilty at the time of voir dire (R. 277), and that he "would say [he] presume[s] [Phillips] was not guilty." (R. 277.) Additionally, C.G. stated that he had previously served on a jury in a capital-murder case and that the jury had acquitted the defendant. Thus, like prospective juror C.A., nothing in the record demonstrates that the trial court erred when it did not sua sponte remove prospective juror C.G. for cause.

***15 [24]** Phillips also contends that the trial court should have sua sponte removed prospective juror S.D. for cause. Specifically, Phillips argues that,

> "[i]n her questionnaire, [S.D.] wrote that she would automatically vote for the death penalty, if she was convinced of Mr. Phillips's guilt. During voir dire, [S.D.] stated that, 'if [the evidence is] beyond a reasonable doubt, then yes, I am for the death penalty.' When pressed further on whether she would automatically vote for the death penalty, [S.D.] answered vaguely that she would 'just have to listen to all the evidence' but 'I'm not going to tell you ... I don't know.' "

(Phillips's brief, p. 53 (citations and footnote omitted).) Phillips further argues that S.D.'s "vague and doubtful answer does not indicate that [S.D.] could be impartial. At no time did [S.D.] say she would set aside her opinion that the death penalty should be automatically imposed following a capital conviction and try the case fairly." (Phillips's brief, pp. 53–54.)

Contrary to Phillips's assertion, the record does not demonstrate that S.D. indicated she would "*automatically impose* the death penalty" in this case; rather, the record demonstrates that S.D. was *for* the death penalty *if* guilt were proven beyond a reasonable doubt and that she would "have to listen to all the evidence ... to make that decision." (R. 228.)

During voir dire, Phillips's counsel asked S.D. about her response to a question on the juror questionnaire about automatically imposing the death penalty. Specifically, Phillips's counsel and S.D. had the following exchange:

> "[Phillips's counsel]: ... That no matter what the evidence, that you would automatically if you were convinced of the defendant's guilt, first of all, that you would automatically vote for the imposition of the death penalty, that you would vote for death; is that correct?
>
> "[S.D.]: No matter what the evidence?
>
> "[Phillips's counsel]: No matter what the evidence. That's what the question said.
>
> "[S.D.]: I—
>
> "[Phillips's counsel]: Feel free to change it if you want to.
>
> "[S.D.]: Well, the only thing is if, you know, *if beyond a reasonable doubt, then yes, I am for the death penalty.* So I mean—
>
> "[Phillips's counsel]: The question is—
>
> "[S.D.]: I really don't know. All that whole death questionnaire thing was just real confusing and way out there, way beyond trying to answer all that.
>
> "[Phillips's counsel]: I get it.
>
> "[S.D.]: You know.
>
> "[Phillips's counsel]: And lest you feel uncomfortable, we had the same issue with panel number one."

(R. 225–26 (emphasis added).) Thereafter, Phillips's counsel explained to S.D. the penalty-phase process and asked her the following:

> "Now I think I'd like to ask it, [S.D.], this way: Can you if we get there to that penalty phase I've talked about, can you listen to both the State's case and the defendant's case, take in conjunction with that what the judge is going to tell you how to weigh the factors, and can you or could you, do you think, return to us a recommendation of life without parole or would your mind be in such a state that you would, without question and without considering the evidence, vote for the death penalty? That's really the question."

***16** (R. 228.) S.D. responded that she would "just have to listen to all the evidence ... to make that decision." (R. 228.)

[25] Although Phillips contends that "at no time did [S.D.] say she would set aside her opinion that the death penalty should be *automatically imposed* following a capital conviction and try the case fairly" (Phillips's brief, pp. 53–54 (emphasis added)), S.D. explained that she was "confused" by the juror questionnaire and clarified that she would, in fact, "listen to all the evidence ... to make that decision." (R. 228.) Moreover, Phillips's argument is premised on his belief that S.D.'s statement that she is "*for* the death penalty" is an indication that S.D. would

automatically impose the death penalty in this case. A prospective juror who is in favor of the death penalty, however, is not the equivalent of a prospective juror who would, without considering any evidence, automatically impose the death penalty. *See, e.g., Revis v. State,* 101 So.3d 247, 307–08 (Ala.Crim.App.2011) ("Here, Juror A.P. did not say that he would automatically vote in favor of the death penalty. He said that if the evidence proved that a body was dismembered then the death penalty was a proper sentence."). Thus, as with prospective jurors C.A. and C.G., nothing in the record on appeal demonstrates that the trial court erred when it did not sua sponte remove prospective juror S.D. for cause. Accordingly, Phillips is due no relief on this claim.

C.

Phillips contends that the trial court erred "by removing jurors who could be fair and impartial"—namely, prospective jurors S.S. and D.E. (Phillips's brief, p. 48.)

Specifically, with regard to prospective juror S.S., Phillips contends that S.S. "indicated during voir dire that, while she 'believe[d] the law has a right to' impose the death penalty, it would cause her some 'personal difficulty' and it would be 'hard' for her to impose the death penalty," but "she never indicated that she would be unable to follow the trial court's instructions or that she would automatically vote for life without parole." (Phillips's brief, p. 49.)

With regard to prospective juror D.E., Phillips contends that, "[w]hen questioned in group voir dire, [D.E.] simply stated that she was 'not sure' whether she could recommend the death penalty." (Phillips's brief, p. 50 (citation omitted).) Additionally, Phillips explains that D.E.'s "answers in her juror questionnaire indicated that she was neither strongly opposed to, nor strongly in favor of, the death penalty, as she circled a five on a one-to-ten scale, with one being '[s]trongly opposed' and ten being '[s]trongly in favor.' " (Phillips's brief, p. 50.) Phillips did not object to the trial court's removal of either of those prospective jurors; thus, we review Phillips's claims for plain error only. *See* Rule 45A, Ala. R.App. P.

Before addressing Phillips's claims, however, we note that, although Phillips in his brief on appeal references D.E.'s response on a juror questionnaire and the record on appeal demonstrates that juror questionnaires were completed by the jurors in this case, the record on appeal does not include the juror questionnaires used in this case.

***17** Juror questionnaires are, by rule, excluded from the clerk's portion of the record on appeal but are to be made available to this Court "[i]f any party raises an issue on appeal that relates to information contained in a questionnaire." Rule 18.2(b), Ala. R.Crim. P. Phillips, in a footnote in his brief on appeal, asks this Court to exercise its authority under Rule 18.2(b) to request that the trial court "supplement the record to include the juror questionnaires at issue in this case." (Phillips's brief, p. 50 n. 15.)

This Court, on June 18, 2015, sent a letter to the circuit clerk requesting, under Rule 18.2(b), that all juror questionnaires in this case be delivered to this Court. On June 23, 2015, however, the circuit clerk responded to our letter, stating: "Our office only keeps [juror questionnaires] for a year and destroys them. There are no Juror Questionnaires available for this case."

[26] **[27]** **[28]** The circuit clerk's policy of destroying juror questionnaires after one year is in direct contravention of Rule 18.2(b), Ala. R.Crim. P.[6] *See Saunders v. State,* 10 So.3d 53, 78 (Ala.Crim.App.2007) ("Although the record indicates that the veniremembers completed jury questionnaires, and although this Court requested that those questionnaires be forwarded to us for review, this Court has been informed by the circuit clerk's office that the questionnaires were destroyed after the jury was empaneled, in violation of Rule 18.2, Ala. R.Crim. P."). Although the circuit clerk's policy is in direct contravention of Rule 18.2(b), we hold that the destruction of the questionnaires at issue in this case does not rise to the level of plain error.[7] *See Saunders,* 10 So.3d at 78 n. 7 ("Although not argued by Saunders on appeal, we find that the error in destroying the questionnaires does not rise to the level of plain error."). Because the juror questionnaires in this case were destroyed by the circuit clerk and the destruction of those questionnaires does not rise to the level of plain error, "our review of this issue is limited to the voir dire questioning by the trial court and the parties." *Id.*

[29] **[30]** **[31]** Turning now to Phillips's specific claims, the following is well settled:

" '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, 83 L.Ed.2d 841 [(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).

" ' "In a capital case, a prospective juror may not be excluded for cause unless the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." *Drew v. Collins,* 964 F.2d 411, 416 (5th Cir.1992), cert. denied, 509 U.S. 925, 113 S.Ct. 3044, 125 L.Ed.2d 730 (1993) (quotations omitted). "[T]his standard likewise does not require that a juror's bias be proved with unmistakable clarity. This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *[Wainwright v.] Witt,* 469 U.S. [412] at 425–26, 105 S.Ct. [844] at 852–53, 83 L.Ed.2d 841 [(1985)].'

***18** "*Parr v. Thaler,* 481 Fed. App'x 872, 876 (5th Cir.2012)."

Boyle v. State, 154 So.3d 171, 196–97 (Ala.Crim.App.2013).

[32] Here, during voir dire, the State asked the venire whether they "would ... be able to recommend in a verdict the death penalty for Mr. Phillips." (R. 211.) Prospective juror D.E. responded, "I'm not sure." (R. 211.) Thereafter, Phillips's counsel had the following exchange with prospective juror D.E.:

"[Phillips's counsel]: Okay. [D.E.], when [the State] was questioning you, you gave an answer with respect to the death penalty. I think I took your answer down. You said 'I'm not sure.'

"[D.E.]: Yes, sir.

"[Phillips's counsel]: And I forget now the context in which that came up.... Is there, in your view, a set of circumstances under which you could vote to impose the death penalty?

"[D.E.]: I'm not sure.

"[Phillips's counsel]: Okay. You're just—you're absolutely not sure about that?

"[D.E.]: (Shakes head.)"

(R. 231) Thereafter, the following side-bar conversation occurred with the trial court:

"[The State]: Judge, we're going to have one challenge for cause, that being [D.E.]. Just that would be our only challenge.

"[Phillips's counsel]: *And I'll agree with it.*

"[The State]: So in that case it won't be necessary to take her back. That's all we have. Judge.

"[The Court]: Okay.

"[Phillips's counsel]: And I don't have any, Judge.

"[The Court]: All right. State's is granted."

(R. 232 (emphasis added).)

With regard to prospective juror S.S., the following occurred:

"[The Court]: Hey, [S.S.]. You had indicated you would like to speak in private about a couple of issues.

"[S.S.]: About voting for the death penalty.

"[The Court]: About voting for the death penalty.

"[S.S.]: Like if you recommended it. I may have misunderstood that because I said—I may have misunderstood what they said, but if it came down to that about voting for the death penalty, I don't have—I know that the law has a right to do that, and I know that. But *I just have a little problem with me being the one that has to vote to put somebody to death.* Just me, myself but—

"[The Court]: Okay. *Would it cause you a great deal of personal difficulty to cast a death penalty vote?*

"[S.S.]: *Yes, sir, I believe it would.* You know, I believe it would because I feel like—you know, I believe the law has a right to do it, but, you know, but that may—

"[The Court]: You think the law has a right to do it, but it would be very hard for you to do it?

"[S.S.]: Me. Just me to do that.

"[The Court]: Questions?

"[The State]: I have no questions.

"[Phillips's counsel]: Thank you, [S.S.]. I don't have any questions. Appreciate your honesty.

"[The Court]: You can just wait back out there. Was there anything you wanted to mention?

"[S.S.]: No, I think that's it.

***19** "([S.S.] exits courtroom.)

"[The State]: Judge, we challenge [S.S.] for cause.

"[Phillips's counsel]: *And I'm going to agree with their challenge.*

"[The Court]: Okay...."

(R. 379–81 (emphasis added).)

Here, both prospective jurors D.E. and S.S. expressed an inability to perform their duties as jurors-specifically, they expressed clear reservations about their ability to recommend a death sentence. Indeed, those reservations were clear enough that Phillips's counsel agreed with the State's motion to remove those jurors for cause. Thus, the trial court did not abuse its discretion in granting the State's motion to remove prospective jurors D.E. and S.S. for cause. *See, e.g., Boyle,* 154 So.3d at 197 ("The above-quoted dialogue clearly showed that juror C.S. had reservations about her ability to vote for the death penalty. The circuit court did not abuse its considerable discretion in granting the State's motion to excuse C.S. for cause. We find no error in regard to this claim."). Accordingly, no error—plain or otherwise—occurred.

III.

[33] Phillips contends that the State "exercised its peremptory strikes to exclude all racial minorities from [his] jury in violation of *Batson v. Kentucky* [, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986),] and state law" (Phillips's brief, p. 70), "engaged in nothing but desultory voir dire of these racial-minority veniremembers" (Phillips's brief, p. 72), and "engaged in disparate treatment of white veniremembers and veniremembers of color who made similar statements." (Phillips's brief, p. 73.) Phillips did not first raise these claims in the trial court; thus, we review his claims for plain error only. *See* Rule 45A, Ala. R.App. P.

> "The plain-error analysis has been applied to death-penalty cases when counsel fails to make a *Batson* objection. *Pace v. State,* 714 So.2d 316, 318 (Ala.Crim.App.1995), opinion after remand, 714 So.2d 320 (Ala.Crim.App.1996), reversed in part on other grounds, 714 So.2d 332 (Ala.1997). For plain error to exist in the *Batson* context, *the record* must raise an inference that the State engaged in 'purposeful discrimination' in the exercise of its peremptory challenges. See *Ex parte Watkins,* 509 So.2d 1074 (Ala.1987)."

Lewis v. State, 24 So.3d 480, 489 (Ala.Crim.App.2006) (emphasis added).

[34] Phillips alleges in his brief on appeal that the State used its peremptory strikes in a discriminatory manner when it struck "African American veniremember [T.B.] and ... Latina veniremember [C.F.]" from the jury and alleges that the State "engaged in disparate treatment of white veniremembers and veniremembers of color who made similar statements" (Phillips's brief, p. 73) and that the removal of those two potential jurors resulted in the "total exclusion of racial minorities from the jury in this racially charged case." (Phillips's brief, p. 74.)

The record on appeal, however, does not "raise an inference that the State engaged in 'purposeful discrimination' in the exercise of its peremptory

challenges." *Lewis, supra.* Indeed, Phillips's allegation on appeal—that prospective jurors T.B. and C.F. were racial minorities who were struck by the State—is supported only by the inclusion of six pages of handwritten notes in the record. Those notes—whose author is unknown—consist of six different grids—specifically, a separate grid for each jury panel—with each square in the grid dedicated to a single, specific juror. Inside those squares, along with the name of the prospective juror, are comments about some of those jurors. The handwritten notes for "Panel 1" indicate that prospective juror T.B. is "black," and the handwritten notes for "Panel 2" indicate that prospective juror C.F. is "Hispanic." (C. 96, 97.) No other prospective jurors' race is indicated on those handwritten notes. Additionally, neither the jury-strike list included in the record on appeal nor the transcription of voir dire or the jury-selection process indicate the race of any prospective juror.

***20 [35]** Having no indication of the race of *each* of the prospective jurors in the record on appeal, this Court is unable to engage in any meaningful plain-error review of Phillips's *Batson* claims. Indeed, without knowing the race of each individual prospective juror, this Court cannot determine whether the State's strikes of prospective jurors T.B. and C.F. resulted in the "total exclusion of racial minorities from the jury," cannot determine whether the State engaged in "nothing but desultory voir dire of these racial-minority veniremembers" (Phillips's brief, p. 72), and cannot determine whether the State engaged in "disparate treatment of white veniremembers and veniremembers of color who made similar statements." [8] (Phillips's brief, p. 73.)

Accordingly, Phillips is due no relief on this claim.

IV.

Phillips contends that the trial court erred when it allowed the State to introduce evidence, he says, was inadmissible —specifically, evidence that was introduced through his statement to Investigator Turner and evidence that was introduced through the testimony of Dr. Ward. We address each of Phillips's claims in turn.

A. *Evidence Introduced Through Phillips's Statement to Investigator Turner*

Phillips contends that the trial court erred by allowing the State to introduce what he contends was inadmissible evidence contained within his statement to Investigator Turner. Specifically, Phillips argues that his statement to Investigator Turner included "prejudicial hearsay statements of unnamed individuals" the admission of which, he says, was "in violation of [his] rights under the confrontation clause and state law." (Phillips's brief, p. 29.) He also argues that his statement also included "inadmissible evidence of [his] prior bad acts." (Phillips's brief, p. 44.) Phillips further contends that the trial court erred when it failed "to limit the jury's consideration" of the prior-bad-act evidence. (Phillips's brief, p. 44.)

Initially, we note that Phillips did not object at trial to either the introduction or admission of his statement to Investigator Turner. In fact, not only did Phillips not object to the admission of his statement, Phillips *stipulated* to the admission of his statement at trial.

Specifically, during trial, the trial court asked Phillips's counsel whether there was going to be any objection to Phillips's statement to Investigator Turner; Phillips's counsel responded:

> "There is not, Your Honor. And we have filed no motion to suppress, and we're going to not make any objection to the admission of this statement. *In fact, we are going to join in it.*"

(R. 564 (emphasis added).) Additionally, when the State moved to admit the audio recording of Phillips's statement and the transcription of that statement, Phillips informed the trial court that "we agree that it should come in." (R. 633.) Additionally, when the State asked the trial court for permission to play the audio recording of Phillips's statement for the jury, Phillips did not object. Instead, Phillips implored the trial court to ensure that each juror receive a copy of the transcripts so they could "follow along." (R. 634.)

***21 [36] [37]** Although Phillips now takes the position on appeal that it was error for the trial court to allow the State to introduce his statement to Investigator Turner,

> " ' "[a] party cannot assume inconsistent positions at trial and on appeal, and a party cannot allege as error proceedings in the trial court that were invited by him or were a natural consequence of his own actions." *Fountain v. State,* 586 So.2d 277, 282 (Ala.Cr.App.1991). "The invited error rule has been applied equally in both capital cases and noncapital cases." *Rogers v. State,* 630 So.2d 78 (Ala.Cr.App.1991), rev'd on other grounds, 630 So.2d 88 (Ala.1992). "An invited error is waived, unless it rises to the level of plain error." *Ex parte Bankhead,* 585 So.2d 112, 126 (Ala.1991).'
>
> "*Williams v. State,* 710 So.2d 1276, 1316 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998). See also *Melson v. State,* 775 So.2d 857, 874 (Ala.Cr.App.1999) (' "It would be a sad commentary upon the vitality of the judicial process if an accused could render it impotent by his own choice." *Murrell v. State,* 377 So.2d 1102, 1105, cert. denied, 377 So.2d 1108 (Ala.1979), quoting *Aldridge v. State,* 278 Ala. 470, 474, 179 So.2d 51, 54 (1965).')...."

Whitehead v. State, 777 So.2d 781, 806–07 (Ala.Crim.App.1999). Because the alleged errors as to the admission of Phillips's statement to Investigator Turner were invited by Phillips, he can obtain relief only if those complained-of errors rise to the level of plain error.

> "In *Ex parte Brown,* 11 So.3d 933 (Ala.2008), the Alabama Supreme Court explained:
>
> " ' " 'To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.' " *Ex parte Bryant,* 951 So.2d 724, 727 (Ala.2002) (quoting *Hyde v. State,* 778 So.2d 199, 209 (Ala.Crim.App.1998)). In *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the United States Supreme Court, construing the federal plain-error rule, stated:
>
> " ' "The Rule authorizes the Courts of Appeals to correct only 'particularly egregious errors,' *United States v. Frady,* 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' *United States v. Atkinson,* 297 U.S. [157], at 160, 56 S.Ct. 391, 80 L.Ed. 555 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' *United States v. Frady,* 456 U.S., at 163, n. 14."
>
> "'*See also Ex parte Hodges,* 856 So.2d 936, 947–48 (Ala.2003) (recognizing that plain error exists only if failure to recognize the error would "seriously affect the fairness or integrity of the judicial proceedings," and that the plain-error doctrine is to be "used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result" (internal quotation marks omitted)).'
>
> ***22** "11 So.3d at 938. '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.' *Hall v. State,* 820 So.2d 113, 121 (Ala.Crim.App.1999). Thus, although [Phillips's] failure to object will not bar this Court from reviewing [this] issue, it will weigh against any claim of prejudice. *See Dill v. State,* 600 So.2d 343 (Ala.Crim.App.1991)."

Turner v. State, 115 So.3d 939, 943 (Ala.Crim.App.2012). After reviewing the record on appeal and the claims Phillips raises regarding the admission of his statement, we cannot conclude that the admission of Phillips's statement to Investigator Turner affected Phillips's "substantial rights," had any "unfair prejudicial impact on the jury's deliberations," was a "particularly egregious error" that "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings," or resulted in the "miscarriage of justice."

[38] Indeed, on appeal, Phillips first argues that his statement to Investigator Turner included "prejudicial hearsay statements of unnamed individuals." Specifically, Phillips takes issue with the following portion of his statement:

> "[Investigator Turner]: When you pulled it out and you pointed it at her, what, what did she say?
>
> "I mean, did she have time to see the gun?
>
> "[Phillips]: She just said, 'What are you doing with that?'

"[Investigator Turner]: And what did you say?

"[Phillips]: Nothing.

"[Investigator Turner]: Are you sure? Do you go by 'Jessie[?]' Is that what you go by?

"[Phillips]: (No audible response.)

"[Investigator Turner]: Are you sure, Jessie?

"[Phillips]: (No audible response.)

"[Investigator Turner]: The reason I ask you that is because *the people kind of next door may have heard a little bit of the argument.* And I know when this happened it's been pretty traumatic for you. Like I said, you've been as honest as honest can be with me so far. I just want you to think and make sure.

"[Phillips]: If they heard any arguing they heard her yelling at me, they heard Billy telling, telling her to shut up, and once the shot was fired they heard Billy screaming. They was screaming he was screaming for Lance. And I left.

"[Investigator Turner]: *You didn't tell her, 'Hey, I'm going to shoot you?' 'Hey, I've got a weapon?'* I mean-

"[Phillips]: No.

"[Investigator Turner]: Are you sure?

"[Phillips]: I'm just about positive.

"[Investigator Turner]: Okay. How many times did you shoot?

"[Phillips]: I just shot once." [9]

(C. 186–87 (emphasis added).)

Phillips argues that

> "[b]ecause these unnamed witnesses never testified at trial, the introduction of this inadmissible hearsay violated Mr. Phillips's right to confront the witnesses against him. The out-of-court statements of the unnamed witnesses, were offered to prove the truth of the matter asserted therein—that Mr. Phillips said to [Erica], prior to shooting, that he was going to shoot her and therefore intended to kill her."

***23** (Phillips's brief, p. 30.) In other words, Phillips reads this portion of his statement as Investigator Turner's saying that "unnamed individuals" told him that Phillips said, "Hey, I'm going to shoot you," or, "Hey, I've got a weapon," before shooting Erica, which, Phillips says, is inadmissible hearsay and violates his rights under the Confrontation Clause.

This Court has explained:

> " 'The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." ' *Crawford v. Washington,* 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Thus, 'the Sixth Amendment [prohibits the admission of] testimonial hearsay [statements offered for the truth of the matter asserted], ... and interrogations by law enforcement officers fall squarely within that class.' *Crawford,* 541 U.S. at 53; *see also id.* at 59 n. 9; (citing *Tennessee v. Street,* 471 U.S. 409, 414, 105 S.Ct. 2078, 85 L.Ed.2d 425 (1985) (explaining that the Confrontation Clause 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted')). Similarly, under the Alabama Rules of Evidence:
>
> > " ' "Hearsay is not admissible except as provided by [the Alabama Rules of Evidence], or by other rules adopted by the Supreme Court of Alabama or by statute." Rule 802, Ala. R. Evid. " 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid.'
>
> "*Hillard v. State,* 53 So.3d 165, 167 (Ala.Crim.App.2010)."

Turner, 115 So.3d at 943–44. Here, the admission of the statements of the "unnamed individuals," even if improperly admitted, was, at worst, harmless error.

> "The correct inquiry to use in determining whether the error in this case is harmless was set out by the United States Supreme Court in *Chapman v. California,* 386

U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In that case, the Supreme Court stated:

> " ' In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence or argument, though legally forbidden, finds its way into a trial in which the question of guilty or innocence is a close one.
>
> " '... We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy v. Connecticut,* 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 [(1963)]. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Id.,* at 86–87, 84 S.Ct. at 230.... Certainly error, constitutional error, in illegally admitted highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was not injury or to suffer a reversal of his erroneously obtained judgment. There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of did not contribute to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard....'

***24** "*Chapman v. California,* 386 U.S. at 23–24, 87 S.Ct. at 827–28 (footnotes omitted). This harmless error standard has been applied in hearsay cases. *United States v. Cruz,* 765 F.2d 1020, 1025 (11th Cir.1985).

"There are numerous factors which can be considered in assessing harmless error, including 'the importance of the [declarant's] testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the [declarant] on material points, ... and the overall strength of the prosecution's case.' *Delaware v. Van Arsdall,* 475 U.S. [673] at 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 [(1986)]."

James v. State, 723 So.2d 776, 781–82 (Ala.Crim.App.1998). *See also Smith v. State,* 898 So.2d 907, 917 (Ala.Crim.App.2004) ("[V]iolations of the Confrontation Clause are subject to harmless-error analysis.").

Here, examining the record on appeal, the complained-of statements made by the "unnamed individuals" had no bearing on the State's case against Phillips. Indeed, the only time the complained-of statements were mentioned during Phillips's trial was when the jury listened to Phillips's statement to Investigator Turner—an audio recording that is approximately an hour and a half in length in which Phillips admitted several times to shooting Erica at close range. Additionally, although Phillips argues that the complained-of statements helped the State establish intent, the State, at no point during its opening statement or closing argument, used the statements as a basis for establishing Phillips's intent. Rather, the State argued that Phillips's *actions* before, during, and after the shooting—specifically, Phillips's putting a loaded gun in his pocket, shooting Erica from close range, and stepping over her body without checking on her condition to get into the truck to flee the scene-established Phillips's intent to kill.

Moreover, the complained-of statements were directly contradicted by the State's witnesses, Billy and Lance, who were both nearby when the altercation occurred at the car wash. Specifically, Billy testified:

> "[Prosecutor]: And how long did you sit there [at the car wash] and talk to your brother?
>
> "[Billy]: Briefly.
>
> "[Prosecutor]: *Was there anybody else around at this point where y'all were?*
>
> "[Billy]: *No, sir.*
>
> "....

"[Prosecutor]: At some point in time while you were standing there talking to your brother, *did you hear a loud voice?*

"[Billy]: *Not at that time, no, sir.*

"....

"[Prosecutor]: Did you ever at any point in time hear loud voices?

"[Billy]: Little later."

(R. 501–02 (emphasis added).) Billy then explained that the only statement he heard was his sister yelling, "Help me, Bill." (R. 504.) Additionally, Lance testified that, although he could hear both Phillips and Erica talking loudly, he "[c]ouldn't distinguish the words." (R. 534.)

***25** Because the complained-of statements were not mentioned by the State and, in fact, were contradicted by the State's witnesses, we cannot conclude that the admission of the complained-of statements "might have contributed to [Phillips's] conviction." *James, supra.* Thus, if any error occurred, it was, at worst, harmless beyond a reasonable doubt and certainly did not rise to the level of plain error. Furthermore, error, if any, was invited by Phillips when he stipulated to the admission of his statement.

[39] Phillips also contends that his statement to Investigator Turner included inadmissible prior-bad-act evidence. Specifically, Phillips takes issue with the following portions of his statement to Investigator Turner:

"[Sergeant Abercrombie]: Do you remember (inaudible)? Did you go to jail that day?

"[Phillips]: Uh-uh.

"[Sergeant Abercrombie]: You just got into it?

"[Phillips]: Yeah.

"[Sergeant Abercrombie]: How long ago has that been?

"[Phillips]: That's been a while. At least two years or more because we had my little boy and she was pregnant with my little girl. So it's been over two years.

"[Investigator Turner]: Pretty much her arguing has been kind of constant?

"[Phillips]: Yes, sir. And I just don't understand why. Because I do everything I possibly can to make sure we're going to have a smooth day. I don't know, for the last three or four months, the only thing she do is sit upstairs and watch TV. She'll cook. But for the majority of the time she's sitting upstairs watching TV.

"....

"And I don't know—to be married to somebody and to hear them call you a n* * * * * and you won't let no other white person call you a n* * * * *, that kind of hurts. My momma got AIDS and she, she always got something to say about that. Always. Always. Always.

"....

"[Investigator Turner]: How long have y'all been together?

"[Phillips]: About four or five years.

"[Investigator Turner]: How many, how many domestic situations have y'all had in four or five years? Several?

"[Phillips]: What you mean?

"[Investigator Turner]: Like, how many times has the police been out to y'alls house or the police been out to talk to you?

"[Phillips]: I don't think none. Maybe one. Then we was outside talking. We wasn't arguing or nothing. That's when we stayed in Brookwood. I think it was Brookwood. We stayed, I think it was Brookwood. We stayed over there. And we was just outside talking and somebody called the police and said there was a lot of loud noise and everything and two people outside arguing, but we was just outside talking. I guess every now and then one of us will raise our voice, but besides that, that was it. I went to jail one night. Not because of us. It was because I had an old warrant in Gadsden."

(C. 189–92) and:

"[Investigator Turner]: How often did y'all argue?

"[Phillips]: I—me, personally, I didn't argue much. But she usually argued—it was every day.

***26** "[Investigator Turner]: And when she argued, she argued with you?

"[Phillips]: Uh-huh. Yes, sir.

"[Investigator Turner]: What would happen? I mean—

"[Phillips]: What you mean what would happen?

"[Investigator Turner]: In other words, you'd just listen to her, not say nothing back or—

"[Phillips]: Sometimes I listened to her, not to say nothing back. Sometimes I would say something back. It would just depend on what she was yelling about.

"[Investigator Turner]: Did it ever become violent between y'all two before today?

"[Phillips]: Have I ever hit her? No. Have I ever, like, pushed her down? Yeah. She said I tried to break her neck, but I didn't try to break her neck. I just tried to keep her from hitting. And I was—got behind her and just kind of held on to her so she wouldn't stop—so she would stop. She said I tried to break her neck, so I, like, 'Okay, I tried to break your neck. Just let it go. Either get over it or tell me to get out.' Because every time she ever say anything about it, that's what I would always tell her.

"[Investigator Turner]: When she said that, when you got behind her did you have her, like, in a headlock behind around her neck? How did you have her?

"[Phillips]: Kind of like a choke.

"[Investigator Turner]: A choke-hold from behind?

"[Phillips]: I guess that's why she said I tried to break her neck.

"[Investigator Turner]: Did she fight hard or—

"[Phillips]: Uh-huh. I let her go and told her to just leave and leave me the f-alone. That was when we was staying on Lombardy.

"....

"[Investigator Turner]: Okay. Did she call the police or file a report on you or anything that day?

"[Phillips]: Uh-uh. I think the only time she ever filed a report was I don't remember the date. It was one day she let me keep the kids. We was at the park. I told her I was going to Wal–Mart. She got mad, start screaming and cussing. Told me to give her the kids and do this or do that and I, like, 'I'm just going to take them to Wal–Mart.' And she said, 'Well, pull over at Fred's so I can give them a hug and a kiss and I can go on about my business. As long as you bring them back.' I pulled over. She jumped in the truck with me. She had a friend in the truck with her, because we was in two different cars.

"She had a friend in the truck with her. Her friend called the police. The police came out there. Pulled me out of the car and told her to go. And they stood there and talked to me for a minute and she filed some kind of- she said she well, I know she did because I had to go to court about it.

"[Investigator Turner]: How long ago has that been?

"[Phillips]: I want to say it was in October.

"[Investigator Turner]: Okay.

"[Phillips]: I believe it was, like, either October or November.

"[Investigator Turner]: Is she—would you classify her as a violent person?

"[Phillips]: I would classify her as a violent person toward me. Towards anybody else, no, not really. She's was just very—it was just towards me. Towards anybody else, no.

***27** "Never seen her get in any fight. Never seen her really cuss nobody out. I seen her cuss people out over the phone."

(C. 218–22.)

Addressing a nearly identical situation in *Stephens v. State,* 982 So.2d 1110 (Ala.Crim.App.2005), this Court explained:

"Evidence tending to establish motive is always admissible. *Perkins v. State,* 808 So.2d 1041, 1084 (Ala.Crim.App.1999), aff'd, 808 So.2d 1143 (Ala.2001), vacated on other ground, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002). See also 1 Charles W. Gamble, *McElroy's Alabama Evidence* § 70.01(12)(e) (5th ed.1996). In discussing motive, the Alabama Supreme Court has stated:

> " ' "Motive is an inducement, or that which leads or tempts the mind to do or commit the crime charged." *Spicer v. State,* 188 Ala. 9, 26, 65 So. 972, 977 (1914). Motive is "that state of mind which works to 'supply the reason that nudges the will and prods the mind to indulge the criminal intent.' " C. Gamble, *Character Evidence, [A Comprehensive Approach* (1987)] at 42. "Furthermore, testimony offered for the purpose of showing motive is *always admissible.* It is permissible in *every criminal case* to show that there was an influence, an inducement, operating on the accused, which may have led or tempted him to commit the offense." (Emphasis in original, citations omitted.) *Bowden v. State,* 538 So.2d 1226, 1235 (Ala.1988).'

"*Ex parte Register,* 680 So.2d 225, 227 (Ala.1994). 'If the prior bad act falls within [the motive] exception, and is relevant and reasonably necessary to the State's case, and the evidence that the accused committed that act is clear and conclusive, it is admissible.' *Boyd v. State,* 715 So.2d 825, 838 (Ala.Crim.App.1997), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998).

"*It has long been the rule in Alabama that former acts of cruelty, hostility, or violence by the accused toward the victim are admissible in order to establish a motive to commit the charged homicide.* See, e.g., *Bennefield v. State,* 281 Ala. 283, 202 So.2d 55 (1967) (evidence of husband's prior assaults on wife admissible to establish motive in prosecution for murder because acts 'tended to show ill feeling between the parties'); *Patterson v. State,* 243 Ala. 21, 8 So.2d 268 (1942) (proof that husband had previously been convicted of assaulting his wife admissible to establish motive in prosecution for murder); *Doane v. State,* 351 So.2d 648, 653 (Ala.Crim.App.1977) (testimony concerning premarital fight between defendant and victim admissible to establish motive and malice in prosecution for manslaughter). Indeed, Professor Gamble has noted:

> "'*One of the most common cases where motive is shown is that where the wife allegedly is murdered by the husband. In these cases a whole host of circumstances, existing between the two parties, are admitted for the purpose of showing that one spouse had a motive for killing the other.*

***28** " 'Former acts of hostility or cruelty by the accused upon the victim are very commonly the basis for the prosecution's proof that the accused had a motive to commit the charged homicide.'

"1 C. Gamble, *McElroy's Alabama Evidence* § 45.01(8).

"Here, evidence was admitted concerning a history of marital difficulties between Stephens and Annie. As a result, Annie and the couple's three children had moved out of the marital residence several months earlier and were living with Annie's father at the time the homicides occurred. Although Annie returned to the couple's mobile home to do laundry, she did so when Stephens was not present, most likely to avoid a confrontation. Annie's father testified that in 1992 Stephens had shot Annie following an argument, resulting in his conviction for second-degree assault. During closing argument, the State argued that the evidence demonstrated that Stephens's motive for killing Annie was in all likelihood rage. Thus, evidence of the 1992 shooting was admitted to support the State's theory that Stephens had stabbed his wife in a fit of rage, following an argument or some other type of confrontation."

982 So.2d at 1127–28 (some emphasis added), *rev'd on other grounds, Ex parte Stephens,* 982 So.2d 1148 (Ala.2006).

Here, like in *Stephens,* evidence detailing the "history of marital difficulties between" Phillips and Erica was admissible to establish motive; thus, the trial court did not commit any error—much less plain error—when it allowed the State to introduce that evidence through the admission of Phillips's statement to Investigator Turner.

[40] Moreover, to the extent that Phillips contends that the trial court erred when it failed "to limit the jury's consideration" of the prior-bad-act evidence (Phillips's brief, p. 44), that claim is without merit. As set out above, at trial, Phillips stipulated to the introduction of the prior-bad-act evidence and did not ask the trial court to read to the jury a limiting instruction regarding the State's use of that evidence. This Court has explained that "a trial court has no duty to sua sponte give a limiting instruction when the prior bad act evidence is offered as substantive evidence of guilt." *Boyle,* 154 So.3d at 211 (citing *Johnson v. State,* 120 So.3d 1119 (Ala.2006)). Because, here, the

evidence of the marital difficulties between Phillips and Erica was admissible to establish motive and could be used "as substantive evidence of guilt and not for impeachment purposes .... [,] the circuit court committed no plain error in failing to sua sponte give a limiting instruction on the use of the Rule 404(b) evidence." *Id.*

B. *Evidence Introduced Through the Testimony of Dr. Ward*

Phillips contends that the trial court erred when it allowed the State to introduce evidence, through the testimony of Dr. Ward, that, he contends, was inadmissible. Before addressing Phillips's claims, however, we note that Phillips stipulated that Dr. Ward was an expert in forensic pathology and that he raised no objections during Dr. Ward's testimony. Because the challenges to the evidence admitted through Dr. Ward's testimony were not first raised in the trial court, we review Phillips's claims for plain error only. *See* Rule 45A, Ala. R.App. P.

1.

***29 [41]** **[42]** Phillips first contends that the trial court erred when it admitted Dr. Ward's "testimony ... regarding whether [Erica] was pregnant." (Phillips's brief, p. 84.) Specifically, Phillips argues that, although he "stipulated that Dr. Ward was an expert in forensic pathology, that expertise does not extend to obstetrics" (Phillips's brief, p. 86 (citations omitted)) and, therefore, Dr. Ward's testimony "fell well outside the scope of [her] expertise." (Phillips's brief, p. 86.) In other words, Phillips contends that Dr. Ward was not qualified to express an expert opinion as to whether Erica was pregnant at the time of her death.

> "A witness may be qualified as an expert by evidence of that person's 'knowledge, skill, experience, training, or education' in the area of expertise. Rule 702, Ala. R. Evid. The determination of whether a person is qualified to testify as an expert is well within the discretion of the trial court; we will not disturb the trial court's ruling on that issue unless there has been an abuse of that discretion. *See Bailey v. State,* 574 So.2d 1001, 1003 (Ala.Crim.App.1990). Moreover, *a challenge to the qualifications of an expert go to the weight, not the admissibility, of the expert's testimony. See Smoot v. State,* 520 So.2d 182, 189 (Ala.Crim.App.1987)."

Kennedy v. State, 929 So.2d 515, 518 (Ala.Crim.App.2005) (emphasis added).

[43] At trial, Dr. Ward testified that she is a State Medical Examiner in the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences and has been in that position for 15 years. Dr. Ward testified that, as a State Medical Examiner, she is charged with conducting autopsies to determine both the cause and manner of death. According to Dr. Ward, she, on average, conducts 250 autopsies a year and has been conducting autopsies for 24 years—in other words, Dr. Ward has conducted approximately 6,000 autopsies.

Although Phillips concedes that Dr. Ward is an expert in the field of forensic pathology, Phillips argues that Dr. Ward's expertise does not extend to the field of obstetrics. Thus, Phillips argues, Dr. Ward was not qualified to express an expert opinion as to whether Erica was pregnant at the time of her death. Because Phillips's argument on appeal challenges only Dr. Ward's qualifications to express an expert opinion, his challenge goes "to the weight, not the admissibility, of [Dr. Ward's] testimony." *See Kennedy, supra.* Moreover, because Phillips raised no objection to Dr. Ward's expert opinion and, as he points out in his brief on appeal, Erica's pregnancy was "undisputed" (*see* Phillips's brief, p. 75), we cannot say that the trial court committed any error—much less plain error—by allowing Dr. Ward to provide her expert opinion as to Erica's pregnancy. Thus, Phillips is not entitled to relief on this claim.

2.

[44] Phillips also contends that the trial court erred when it allowed Dr. Ward to testify to the results of a urine pregnancy test that was conducted during Erica's autopsy. Specifically, Phillips contends (1) that the State failed to "show that Dr. Ward's methods of proving [Erica's] pregnancy were 'generally accepted in the scientific community' " (Phillips's brief, p. 87); (2) that admission of the results of the "urine pregnancy test" was improper because, he says, the State "presented no chain of custody whatsoever for the urine sample used to conduct the pregnancy test performed as part

of the autopsy" (Phillips's brief, pp. 37–38); and (3) that Dr. Ward's testimony regarding the "performance of a pregnancy test on [Erica] violated [his] rights under the confrontation clause and state law." (Phillips's brief, p. 41.) As stated above, Phillips raised no objections during Dr. Ward's trial testimony; thus, we review Phillips's claims for plain error only. *See* Rule 45A, Ala. R.App. P.

***30** Phillips first argues that the State failed to "show that Dr. Ward's methods of proving [Erica's] pregnancy were 'generally accepted in the scientific community.' " (Phillips's brief, p. 87.) Specifically, Phillips argues:

> 7F'The State presented no evidence that the methods Dr. Ward used for creating her opinion that [Erica] was pregnant were generally accepted within the scientific community as reliable. The use of a urine pregnancy hCG test is not generally considered the most reliable method of establishing pregnancy. In addition, while corpus luteum cysts may present during pregnancy, they can also occur outside of pregnancy, which makes this an unacceptable method of diagnosing pregnancy."

(Phillips's brief, pp. 87–88 (footnotes omitted).)

Even if the admission of this evidence was improper (and we do not conclude that it was), its admission was, at worst, harmless. Indeed, Dr. Ward's testimony regarding tests she performed that indicated that Erica was pregnant was cumulative to other lawfully admitted evidence indicating that Erica was, in fact, pregnant. *See, e.g., Shanklin v. State,* [Ms. CR–11–1441, Dec. 19, 2014] — So.3d ——, —— (Ala.Crim.App.2014) ("Assuming, without deciding, that the circuit court erred in allowing Chief Bobo to read those reports into the record, the admission of those reports was harmless beyond a reasonable doubt because those reports were cumulative to other lawfully admitted evidence.").

Specifically, Dr. Ward not only testified to the results of the urine pregnancy test and to the presence of a "corpus luteum cyst," she also testified that during an internal examination of Erica's uterus she saw the "products of conception" and was able to determine that "the embryo or unborn child was growing and alive at the time of [Erica's] death." Additionally, Dr. Ward testified on cross-examination that her internal examination of Erica revealed that Erica was in the first trimester of pregnancy "probably ... somewhere closer to ... around six to eight weeks.... [T]he best way to find out is to measure the embryo. And it would be better to look at an ultrasound than for [her] to make a judgment looking at [the embryo] with [her] eyes." (R. 666.) In other words, Dr. Ward testified that, in addition to the tests that confirmed Erica's pregnancy, she actually observed Baby Doe when conducting an internal examination of Erica.

Furthermore, the admission of the complained-of evidence was cumulative to Phillips's statement to Investigator Turner, in which Phillips told investigator Turner that he had "found out ... a couple of weeks ago" that Erica was pregnant. (C. 253.) Moreover, as noted above, although Phillips argues in his brief on appeal that the admission of the results of the urine pregnancy test was error, Phillips also explains in his brief on appeal that "[t]he fact of [Erica's] pregnancy was undisputed." (Phillips's brief, p. 75.) Thus, any error in allowing this testimony was, at worst, harmless.

***31** Phillips next contends that admission of the results of the urine pregnancy test was improper because, he says, the State "presented no chain of custody whatsoever for the urine sample used to conduct the pregnancy test performed as part of the autopsy." (Phillips's brief, pp. 37–38.) Specifically, Phillips contends that the State failed to establish a proper chain of custody for the urine pregnancy test because, he says,

> "[t]he State presented no evidence regarding where the urine used for testing came from, who extracted the urine, the method of extraction used, how the person who extracted the sample was able to avoid contamination, whether any policies were implemented for safekeeping of the urine sample, whether the urine sample was handled by more than one individual, whether the sample was kept in a temperature-controlled environment prior to testing, or even at what time the urine sample was extracted. Moreover, the State presented no evidence regarding who performed

> the test, whether the urine was sealed when it was received for testing, whether that person followed procedures to ensure the test was performed with accuracy, and how that person ensured that the test was not tampered with."

(Phillips's brief, p. 38.) Phillips did not raise a chain-of-custody objection to the admission of the results of the urine pregnancy test at trial; thus, this claim is reviewed for plain error only. *See* Rule 45A, Ala. R.App. P.

Regarding chain-of-custody claims, the Alabama Supreme Court has explained:

> "In *Ex parte Holton,* [590 So.2d 918 (Ala.1991),] this Court stated:
>
> " '[T]he State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence. *Ex parte Williams,* 548 So.2d 518, 520 (Ala.1989). Proof of this unbroken chain of custody is required in order to establish sufficient identification of the item and continuity of possession, so as to assure the authenticity of the item. *Id.* In order to establish a proper chain, the State must show to a "*reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.*" *McCray v. State,* 548 So.2d 573, 576 (Ala.Crim.App.1988). Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.
>
> " '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).
>
> ***32** " 'If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a "missing" link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the "link," as to one or more criteria or as to one or more links, the result is a "weak" link. When the link is "weak," a question of credibility and weight is presented, not one of admissibility.'
>
> "590 So.2d at 919–20.
>
> "In *Ex parte Cook,* [624 So.2d 511 (Ala.1993)], the defendant, who had been convicted of murder, contended that the trial court committed reversible error in admitting, over the defendant's objection, several items of physical evidence—specifically, cigarette butts, a knife scabbard, blood-soaked gauze, socks, and jeans. This Court held that the cigarette butts, scabbard, gauze, and socks should not have been admitted over the defendant's objection. 624 So.2d at 512–14. In particular, this Court stated:
>
> " 'A link was also missing in the chain of custody of the cigarette butts, scabbard, gauze, and socks. Although [Officer] Weldon testified that she directed and observed the collection, the State did not establish when these items were sealed or how they were handled or safeguarded from the time they were seized until Rowland[, a forensic serologist,] received them [and tested them]. This evidence was inadmissible under *[Ex parte] Holton* [, 590 So.2d 918 (1991)].
>
> " 'The cigarette butts were prejudicial to [the defendant], because they established that someone with her blood type was in [the victim's] house. Likewise, the socks found in [the defendant's] mobile home were prejudicial, because they were stained with blood that matched [the victim's] type. The erroneous admission of these items probably injuriously affected [the defendant's] substantial rights, and she is entitled to a new trial. See Rule 45, Ala. R.App. P.'
>
> "624 So.2d at 514.

"In *Birge[v. State],* [973 So.2d 1085 (Ala.Crim.App.2007)], the victim was thought to have died of natural causes and had been transported to Indiana for burial. 973 So.2d at 1087. However, after law enforcement began to investigate, the victim's body was exhumed, and an autopsy was performed in Indiana. At trial, there was testimony that the victim had died from an overdose of prescription drugs. That cause-of-death testimony was based on the results of testing of samples taken from the victim's body during the autopsy. 973 So.2d at 1088–89.

"Citing missing links in the chain of custody, the defendant in *Birge* objected to the introduction of the toxicology results and the cause-of-death testimony based on those results. The doctor who performed the autopsy testified at trial and stated that he had watched his assistant place the samples in a locked refrigerator. The doctor testified that the next day his assistant would have delivered the samples to a courier, who then would have delivered them to an independent lab for testing. However, neither the doctor's assistant who secured the samples, nor the courier who transported the samples to the lab, nor the analyst who tested the samples testified at trial. The doctor also testified that there may have been several people who had handled the specimens during that time. Additionally, there were significant discrepancies between the doctor's notes about the specimens in his autopsy report and the description of those specimens in the toxicology report from the independent lab that had tested them. The Court of Criminal Appeals ultimately concluded that there were numerous missing links in the chain of custody and that, because those missing links related to the crux of the case against the defendant, the trial court had committed reversible error in admitting the evidence over the defendant's objection. 973 So.2d at 1094–95, 1105.

***33** "In contrast to *Ex parte Cook* and *Birge,* however, the State here offered sufficient evidence on each link in the chain of custody of the evidence Mills complains of. Investigator Smith first discovered the evidence in the trunk. Officer McCraw recovered the evidence pursuant to a search warrant, inventoried it, bagged it, secured it, and delivered it to the custody of the DFS [Department of Forensic Sciences] employee who logged the evidence and gave McCraw a receipt for it. Bass, who examined and tested the evidence at DFS, testified generally about the protocols used to test items at DFS, and he testified specifically about the testing he performed on the evidence.

"Although the 'tall' DFS employee to whom McCraw submitted the items was never identified and did not testify at trial, McCraw's testimony was sufficient direct evidence indicating that the items were secured until they were delivered to DFS. As to whether there was sufficient circumstantial evidence indicating that the items remained secure until Bass tested them, the State cites *Lee v. State,* 898 So.2d 790, 847–48 (Ala.Crim.App.2001), in which the Court of Criminal Appeals stated:

> " ' " 'The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence.' " *Jones v. State,* 616 So.2d 949, 951 (Ala.Crim.App.1993) (quoting *Williams v. State,* 505 So.2d 1252, 1253 (Ala.Crim.App.1986), aff'd, 505 So.2d 1254 (Ala.1987)).
>
> " ' " ' " 'Tangible evidence of crime is admissible when shown to be "in substantially the same condition as when the crime was committed." *And it is to be presumed that the integrity of evidence routinely handled by governmental officials was suitably preserved "[unless the accused makes] a minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering.*" If, however, that condition is met, the Government must establish that acceptable precautions were taken to maintain the evidence in its original state.
>
> " ' " ' " 'The undertaking on that score need not rule out every conceivable chance that somehow the [identity] or character of the evidence underwent change. "[T]he possibility of misidentification and adulteration must be eliminated," we have said, "not absolutely, but as a matter of reasonable probability." So long as the court is persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded, the jury should be permitted to consider and assess it in the light of surrounding circumstances.' " '
>
> " ' "*Moorman v. State,* 574 So.2d 953, 956–7 (Ala.Cr.App.1990)."

"'*Blankenship v. State,* 589 So.2d 1321, 1324–25 (Ala.Crim.App.1991).'

"(Emphasis added.)"

Ex parte Mills, 62 So.3d 574, 595–98 (Ala.2010).

Here, although Phillips contends that the State failed to establish a proper chain of custody for the urine pregnancy test, Phillips has not established a "minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering" as to that evidence. Moreover, contrary to Phillips's assertion, the State established that Dr. Ward ordered the test to be performed and that she, as explained more thoroughly below, assisted in performing the test. Additionally, at trial, Dr. Ward identified "the little white plastic container that houses the test" (R. 662) as the urine pregnancy test that was performed during the autopsy. In other words, the State established a chain of custody that both began and ended with Dr. Ward.

***34** **[45]** Regardless, even if the State had failed to properly establish a chain of custody for the urine pregnancy test, the admission of the results of that test into evidence would be, at worst, harmless error. As explained above, the admission of the complained-of evidence was cumulative to Dr. Ward's testimony that she personally observed the "products of conception" and to Phillips's statement to Investigator Turner. Accordingly, the trial court did not commit any error—much less plain error—when it allowed the State to introduce the results of the urine pregnancy test.

[46] Finally, Phillips contends that Dr. Ward's testimony regarding the "performance of a pregnancy test on [Erica] violated [his] rights under the confrontation clause and state law." (Phillips's brief, p. 41.) Specifically, Phillips argues:

> "In order to testify, as she did at trial, that this was a pregnancy test performed on [Erica] that indicated she was pregnant (R. 661–62), [Dr. Ward] had to rely on several out-of-court statements from the individual who performed the test, including that urine was removed from [Erica's] body, that this urine was used to perform the test, and that the test was administered properly."

(Phillips's brief, p. 41.) Phillips did not raise this claim in the trial court; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

Initially, we note that Phillips's claim turns on his belief that someone other than Dr. Ward performed the urine pregnancy test and that Dr. Ward did not participate in performing the test. Phillips's beliefs, however, are refuted by the record. Indeed, although she testified that she ordered a urine pregnancy test to be performed—a statement that Phillips reads as meaning that someone other than Dr. Ward performed the pregnancy test—Dr. Ward testified that she assisted in performing the test. Specifically, Dr. Ward testified as follows:

"[Prosecutor]: Now, Dr. Ward, as you were conducting the autopsy, did you also, prior to beginning, did you have some information that Erica might also have been pregnant when she was killed?

"[Dr. Ward]: *We did.*

"[Prosecutor]: In light of that—and as you were doing the autopsy, did you have at your disposal or did you have a test or other method, diagnostic or what have you, by which you could use urine or some other bodily fluid of hers to determine whether or not she was pregnant?

"[Dr. Ward]: Yes, we did. *We did a urine pregnancy test.*

"[Prosecutor]: And is that I believe what is called an HCG test?

"[Dr. Ward]: It is, yes.

"[Prosecutor]: And could you tell the ladies and gentlemen just in brief what that is and how it works?

"[Dr. Ward]: It's a hormone, human gonadotrophic hormone, and it's secreted by the placenta and sometimes by the products of conception that were in her uterus.

"[Prosecutor]: Yes. And Dr. Ward, I'll now show you what I've got marked here as State's Exhibit 17, and I'll ask you to look at that real quickly.

***35** "[Dr. Ward]: Yes, sir.

"[Prosecutor]: Do you recognize what that is in State's Exhibit 17?

"[Dr. Ward]: Yes.

"[Prosecutor]: What is that?

"[Dr. Ward]: This is the little white plastic container that houses the test, and so *we put several drops of urine on the right side of this plastic.* And you can see two red lines. One has a C under it, and the other has a T under it. C stands for control and T stands for the test. So if the control is positive, then we know that the test is functioning properly. And if the T is positive, then we can be sure that she's pregnant.

"[Prosecutor]: And the T is showing in this case, would that be an indicator that [Erica] was, in fact, pregnant at the time of her death?

"[Dr. Ward]: Yes.

"[Prosecutor]: And is this the test that you, I guess ordered to be administered to her?

"[Dr. Ward]: Yes."

(R. 661–62 (emphasis added).) Because Dr. Ward's testimony established that she, at least, assisted in administering the urine pregnancy test and because she was subject to cross-examination, the trial court's admission of the results of the urine pregnancy test was not a violation of the Confrontation Clause. *See, e.g., Ex parte Ware,* [Ms. 1100963, Jan. 17, 2014] —— So.3d ——, —— (Ala.2014) ("The United States Supreme Court has not squarely addressed whether the Confrontation Clause requires in-court testimony from all the analysts who have participated in a set of forensic tests, but *Bullcoming[v. New Mexico,* —— U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011),] and *Williams[v. Illinois,* —— U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012),] suggest that the answer is 'no.' ").

[47] **[48]** Regardless, as noted above, "violations of the Confrontation Clause are subject to harmless-error analysis. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)." *Smith,* 898 So.2d at 917. As explained above, even if the trial court erred in admitting the results of the urine pregnancy test, that error would be, at worst, harmless because it was cumulative to Dr. Ward's testimony that she actually observed the "products of conception" and to Phillips's statement to Investigator Turner. Accordingly, Phillips is due no relief as to this claim.

3.

[49] Phillips contends that the trial court erred when it failed to exclude what he describes as "gruesome autopsy photographs"—specifically, a photograph of Erica's "mutilated uterus, ovaries, and fallopian tubes, removed from her body, carved open, and placed on a table, still dripping blood." (Phillips's brief, p. 75.) Phillips argues that the admission of that photograph "rendered his trial fundamentally unfair and violated his rights to due process, a fair trial, an impartial jury, and a reliable conviction and sentence." (Phillips's brief, p. 77.) Phillips did not object to the admission of the complained-of photograph at trial; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

***36** **[50]** **[51]** **[52]** **[53]** The following is well settled:

" 'Generally, photographs are admissible into evidence in a criminal prosecution "if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge." *Magwood v. State,* 494 So.2d 124, 141 (Ala.Cr.App.1985), *aff'd,* 494 So.2d 154 (Ala.1986), *cert. denied,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). *See also Woods v. State,* 460 So.2d 291 (Ala.Cr.App.1984); *Washington v. State,* 415 So.2d 1175 (Ala.Cr.App.1982); C. Gamble, *McElroy's Alabama Evidence* § 207.01(2) (3d ed.1977).' "

Sneed v. State, 1 So.3d 104, 131–32 (Ala.Crim.App.2007) (quoting *Bankhead v. State,* 585 So.2d 97, 109 (Ala.Crim.App.1989)). Moreover, "photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors." *Ex parte Siebert,* 555 So.2d 780, 784 (Ala.1989) (citing *Hutto v. State,* 465 So.2d 1211, 1212 (Ala.Crim.App.1984)).

"With regard to autopsy photographs, this Court has explained:

" ' "This court has held that autopsy photographs, although gruesome, are admissible to show the

extent of a victim's injuries." *Ferguson v. State,* 814 So.2d 925, 944 (Ala.Crim.App.2000), aff'd, 814 So.2d 970 (Ala.2001). " '[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter." ' *Jackson v. State,* 791 So.2d 979, 1016 (Ala.Crim.App.2000), quoting *Perkins v. State,* 808 So.2d 1041, 1108 (Ala.Crim.App.1999), aff'd, 808 So.2d 1143 (Ala.2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), on remand to, 851 So.2d 453 (Ala.2002)....'

"*Brooks v. State,* 973 So.2d 380, 393 (Ala.Crim.App.2007)."

Shanklin, —— So.3d at ——.

At trial, Dr. Ward identified the complained-of photograph—which was admitted as State's Exhibit 18—and explained that it depicted Erica's

> "uterus, which contains the products of conception. We can see the placenta within the uterus, and on either side of the uterus is one ovary and then the other and the fallopian tubes. And the ovary on the right side of the photograph—excuse me, the left side of the photograph has a cyst in it that is the corpus luteum cyst. It's what we see in the ovary of people who are pregnant, women who are pregnant."

(R. 663.)

Although Phillips argues that the complained-of photograph was gruesome, the trial court did not commit plain error in allowing the photograph to be admitted. Here, Phillips was charged with capital murder for causing the death of both his wife and an unborn child pursuant to one scheme or course of conduct. Thus, as part of its burden of proof, the State was required to establish both that Erica was pregnant and that Baby Doe died. Although Erica's pregnancy was an undisputed fact (*see* Phillips's brief, p. 75) and the complained-of photograph is gruesome, the complained-of photograph was admissible, and Phillips is due no relief on this claim. *See Shanklin, supra.*

V.

***37 [54] [55] [56] [57]** Phillips contends that the trial court erred when it "permitted the jurors to consider prejudicial victim-impact testimony at the guilt phase" of his trial. (Phillips's brief, p. 93.) Specifically, Phillips argues that it was improper for Billy "to testify that his sister had been 'murdered' and that, since the incident, he has heard [Erica] calling his name, crying for help, '[e]very day for three years.' " (Phillips's brief, p. 93 (citations omitted).) At trial, Phillips did not object to this complained-of testimony; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

> " ' "It is well settled that victim-impact statements 'are admissible during the guilt phase of a criminal trial only if the statements are relevant to a material issue of the guilt phase. Testimony that has no probative value on any material question of fact or inquiry is inadmissible.' *Ex parte Crymes,* 630 So.2d 125, 126 (Ala.1993), citing Charles W. Gamble, *McElroy's Alabama Evidence,* § 21.01 (4th ed.1991). However, 'when, after considering the record as a whole, the reviewing court is convinced that the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper victim-impact testimony, the admission of such testimony is harmless error.' *Crymes,* 630 So.2d at 126."
>
> "'*Jackson v. State,* 791 So.2d 979, 1011 (Ala.Crim.App.2000).'

"*Gissendanner v. State,* 949 So.2d 956, 965 (Ala.Crim.App.2006). '[T]he introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error if the record indicates that it probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of the defendant based on the admissible evidence and the applicable law.' *Ex parte Rieber,* 663 So.2d 999, 1006 (Ala.1995). However, 'a judgment of conviction can be upheld if the record conclusively shows that the admission of the victim impact evidence during the guilt phase of the trial did not affect the

outcome of the trial or otherwise prejudice a substantial right of the defendant.' *Id.* at 1005."

Shanklin, —— So.3d at ——.

[58] Before addressing Phillips's claim, however, we note that the complained-of testimony was not elicited by the State during the direct examination of Billy; rather, the complained-of testimony was elicited by Phillips during cross-examination. Specifically, the complained-of testimony occurred during the following exchange:

"[Phillips's counsel]: All right. Now so you know when you heard 'Help me, Bill.' All right. You remember that, your sister saying that?

"[Billy]: (Nods head.)

"[Phillips's counsel]: You have to answer out.

"[Billy]: *Every day for three years.*

"[Phillips's counsel]: I understand, [Billy]. This day?

"[Billy]: Yes, sir."

(R. 522 (emphasis added).)

***38** Assuming, without deciding, that Billy's testimony on cross-examination was inappropriate victim-impact testimony, after examining the record as a whole, we cannot conclude that Billy's testimony "probably distracted the jury and kept it from performing its duty of determining the guilt or innocence of [Phillips] based on the admissible evidence and the applicable law," *Ex parte Rieber,* 663 So.2d 999, 1006 (Ala.1995); rather, the record "conclusively shows that the admission of [Billy's testimony] during the guilt phase of the trial did not affect the outcome of the trial or otherwise prejudice a substantial right of [Phillips]." *Id.* at 1005.

Here, the complained-of testimony was brief and was in response to a question on cross-examination that addressed Billy's ability to recall Erica's request for help. Considering the brief nature of the testimony and that the testimony was in response to a question asked by Phillips, and comparing the complained-of testimony to the overwhelming evidence of Phillips's guilt—including both Billy's testimony that he saw Phillips shoot Erica and Phillips's confession to shooting Erica—we cannot conclude that the admission of that testimony "prejudiced a substantial right of [Phillips]." *Ex parte Rieber,* 663 So.2d at 1005.

Moreover, Billy's testimony, at worst, conveyed to the jury that, as her brother, hearing Erica's request for help and arriving in time to see Phillips shoot her had some impact on him.

> "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 [Phillips] did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [Erica] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on her 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, 2615, 115 L.Ed.2d 720 (1991))."

Ex parte Rieber, 663 So.2d at 1006. Accordingly, Phillips is not entitled to relief on this claim.

VI.

[59] **[60]** **[61]** **[62]** **[63]** **[64]** **[65]** Phillips contends that the State engaged in prosecutorial misconduct during the guilt phase of his trial by the prosecutors' "referr[ing] to themselves as the victims' representatives" (Phillips's brief, p. 89) and by "urging the jurors to find 'truth' rather than consider the possibility of reasonable doubt." (Phillips's brief, p. 91.) According to Phillips, the State's actions "rendered [his] trial fundamentally unfair and requires reversal." [10] (Phillips's brief, p. 88.) Phillips did not object to these complained-of comments at trial; thus, we review his claims for plain error only. *See* Rule 45A, Ala. R.App. P.

> " 'While the failure to object will not bar our review of [Phillips's] claims of prosecutorial misconduct, it will weigh against any claim of prejudice that [Phillips]

makes on appeal " ' "because of its suggestion that the defense did not consider the comments in question to be particularly harmful." ' " *Ferguson v. State,* 814 So.2d 925, 945 (Ala.Crim.App.2000), aff'd, 814 So.2d 970 (Ala.2001), cert. denied, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002), quoting *Kuenzel v. State,* 577 So.2d 474, 489 (Ala.Crim.App.1990), aff'd, 577 So.2d 531 (Ala.1991).'

***39** "*Calhoun v. State,* 932 So.2d 923, 962 (Ala.Crim.App.2005).

"Also, many of the instances involve challenges to arguments made by the prosecutor in his opening or closing statements.

> " ' "In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict." *Smith v. State,* 698 So.2d 189, 202–03 (Ala.Cr.App.1996), aff'd, 698 So.2d 219 (Ala.1997), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) (citations omitted); *Bush v. State,* 695 So.2d 70, 131(Ala.Cr.App.1995), aff'd, 695 So.2d 138 (Ala.1997), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997) (citations omitted). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. *Duren v. State,* 590 So.2d 360, 364 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). "Prosecutorial misconduct is subject to a harmless error analysis." *Bush v. State,* 695 So.2d at 131 (citations omitted); *Smith v. State,* 698 So.2d at 203 (citations omitted).'

"*Simmons v. State,* 797 So.2d 1134, 1161–62 (Ala.Crim.App.1999) (opinion on return to remand). We must view the challenged arguments in the context of the entire trial and not in the abstract. See *Duren v. State,* 590 So.2d 360 (Ala.Crim.App.1990); *Whitlow v. State,* 509 So.2d 252 (Ala.Crim.App.1987). It is proper for a prosecutor to argue any legitimate inference that may be drawn from the evidence. See *Snyder v. State,* 893 So.2d 488 (Ala.Crim.App.2003)."

Belisle v. State, 11 So.3d 256, 302–03 (Ala.Crim.App.2007). We address each alleged instance of misconduct in turn.

First, Phillips contends that the State engaged in prosecutorial misconduct by the prosecutors' "referr[ing] to themselves as the victims' representatives." (Phillips's brief, p. 89.) Specifically, Phillips takes issue with the State's opening statement, in which the prosecutor explained:

> "Ladies and gentlemen, you haven't heard from me yet. But again, my name is Steve Marshall, and I have the privilege of serving as your district attorney. You've met Everette Johnson, our chief assistant. You'll soon meet Ed Kellett. *And it is our privilege and honor to represent the State of Alabama and the family of the victims,* Erica and Baby Doe, in the presentation of this important case."

(R. 469 (emphasis added).) Phillips also takes issue with the closing remarks of the State's opening statement, in which the prosecutor explained:

> ***40** "It's from those facts that I told you, ladies and gentlemen, that we will prove to you this defendant's guilt beyond a reasonable doubt. And once you determine those facts with the law that the judge is going to tell you to apply to those facts, we are absolutely confident that you will return a verdict of guilty of capital murder. *On behalf of the State of Alabama and the family of Erica and Baby Doe, I want to thank you in advance for your service.* And I want to tell you how much we appreciate the fact that you are willing to be here today to allow us to seek justice."

(R. 478 (emphasis added).)

[66] Although the State did appear to represent to the jury during its opening statement that the prosecutors spoke on behalf of the victims' family, " '[w]e have held that it is not reversible error for a prosecutor to suggest that he is speaking on behalf of the victim's family.' *Burgess v. State,* 723 So.2d 742, 754 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998). See also *George v. State,* 717 So.2d 849 (Ala.Cr.App.1997), aff'd, 717 So.2d 858 (Ala.), cert. denied, 525 U.S. 1024, 119 S.Ct. 556, 142 L.Ed.2d 462 (1998)." *Frazier v. State,* 758 So.2d 577, 604 (Ala.Crim.App.1999). Thus, the State did not commit misconduct, and Phillips is not entitled to relief on this claim.

Phillips next contends that the State committed misconduct because, he says, the "prosecutor misstated the law by telling the jurors that their job was 'not to find doubt' but 'to find the truth,' that 'Verdict in Latin means truth,' and that 'the truth in this case is that Mr. Phillips ... intended to cause the death of Erica ... and Baby Doe.' " (Phillips's brief, pp. 90–91 (citation omitted).) Additionally, Phillips contends that "urging the jurors to find 'truth' rather than consider the possibility of reasonable doubt improperly shifted the burden of proof." (Phillips's brief, p. 91.)

The complained-of comments occurred during the State's guilt-phase closing argument and, in context, are as follows:

> "I also asked each of you during juror questioning—because you will hear the term later on in argument or you'll hear this argument later on in argument about exactly what reasonable doubt means. We talked a little bit about that.
>
> "Judge Riley's going to give you a definition of that in his instructions. And again I'll say he can define it better than I ever could. But I know one of the things he's going to tell you is that it's not beyond all doubt, and it's not proof to an absolute certainty. It's just proof beyond a reasonable doubt. If we were required to prove the guilt of the defendant beyond all doubt and to an absolute certainty, never could do that. Be never enough proof of that.
>
> "But your job in this case, folks, is not to find doubt. Your job is to find the truth, to ascertain from what you've heard here in the courtroom what the truth is about this case, about the facts.
>
> "Verdict in Latin means truth. And when you come back from your deliberations from the jury room and Judge Riley says have you reached a verdict, he's going to ask you have you reached the truth? Have you found the truth? And the truth in this case is that Mr. Phillips, with one act, with one bullet from this gun intended to cause the death of Erica Phillips and Baby Doe. And he succeeded.
>
> ***41** "I want to thank you for your, again for your service this week and for the service that you're about to do. On behalf of [the State], we appreciate your time and attention you've given to all of us in this case. Do what's right."

(R. 722–23.)

[67] Although Phillips contends that the prosecutor's comments were a misstatement of the law, the prosecutor's comment to the jury that their job "is to find the truth" is consistent with the burden-of-proof instruction included in the Alabama Pattern Jury Instructions—specifically, that "[a] reasonable doubt is a doubt of a fair-minded juror *honestly seeking the truth* after careful and impartial consideration of all the evidence in the case." *See* Alabama Pattern Jury Instructions, Instruction I.4. Moreover, we have held that a similar statement did not shift the burden of proof. *See, e.g., Revis,* 101 So.3d at 313 ("Here, the trial court was informing the jury as to its duty as a fact-finder in arriving at a true verdict. The instruction did not refer to Revis or shift the burden of proof."). Thus, there was no error—much less plain error—resulting from the complained-of comments.

VII.

Phillips contends that the trial court erred "by failing to declare a mistrial following two instances of juror misconduct and by failing to conduct a careful inquiry into the misconduct." (Phillips's brief, p. 77.) Specifically, Phillips alleges that jurors J.A. and S.M. committed misconduct, which, he says, required the trial court to grant a mistrial when juror J.A. posted a comment to

J.A.'s Facebook social-networking Web site and when juror S.M. had a conversation with "the mother of Mr. Phillips's ex-girlfriend ." (Phillips's brief, p. 80.)

Phillips contends that, before

> "the conclusion of the guilt phase of trial[,] juror [J.A.] made a public statement to his 359 friends on Facebook about Mr. Phillips's case. He said '[d]ont [sic] know why God would put me in this position. I don't [sic] want to be here. I don't [sic] want no part of this.' At least five individuals publicly responded to this statement by [J.A.] on Facebook, though the record only indicates what two of these individuals said. At least one individual also reached out to [J.A.] privately to ask if these comments were about Mr. Phillips's case and [J.A.] affirmed that they were. Defense counsel moved for a mistrial based on this misconduct and the trial court denied defense counsel's motion."

(Phillips's brief, p. 79.)

With regard to juror S.M., Phillips contends that,

> "following the jury's guilty verdict, but prior to the beginning of the penalty phase, defense counsel informed the trial court that the foreman of the jury, [S.M.], 'ha[d] been having conversations' with the mother of Mr. Phillips's ex-girlfriend about whether he could sentence Mr. Phillips to death. [S.M.'s] engagement in any contact with the mother of Mr. Phillips's ex-girlfriend was in direct violation of the trial court's order and was misconduct."

***42** (Phillips's brief, pp. 80–81 (citation and footnote omitted).)

This Court has explained:

> " ' " A mistrial is a drastic remedy that should be used sparingly and only to prevent manifest injustice." *Hammonds v. State,* 777 So.2d 750, 767 (Ala.Crim.App.1999), aff'd, 777 So.2d 777 (Ala.2000) (citing *Ex parte Thomas,* 625 So.2d 1156 (Ala.1993)). A mistrial is the appropriate remedy when a fundamental error in a trial vitiates its result. *Levett v. State,* 593 So.2d 130, 135 (Ala.Crim.App.1991). " 'The granting of a mistrial is addressed to the broad discretion of the trial judge, and his ruling will not be revised on appeal unless it clearly appears that such discretion has been abused.' " *Grimsley v. State,* 678 So.2d 1197, 1206 (Ala.Crim.App.1996) (quoting *Free v. State,* 495 So.2d 1147, 1157 (Ala.Crim.App.1986)).'

"*Baird v. State,* 849 So.2d 223, 247 (Ala.Crim.App.2002). ' "[T]he granting of a mistrial in cases of private communications between jurors and third persons is largely within the discretion of the trial judge, and his decision is subject to reversal only where that discretion has been abused." ' *Cox v. State,* 394 So.2d 103, 105 (Ala.Crim.App.1981), quoting *Woods v. State,* 367 So.2d 974, 980 (Ala.Crim.App.), rev'd on other grounds, 367 So.2d 982 (Ala.1978). 'In cases involving juror misconduct, a trial court generally will not be held to have abused its discretion "where the trial court investigates the circumstances under which the remark was made, its substance, and determines that the rights of the appellant were not prejudiced by the remark." ' *Holland v. State,* 588 So.2d 543, 546 (Ala.Crim.App.1991), quoting *Bascom v. State,* 344 So.2d 218, 222 (Ala.Crim.App.1977).

" ' " Any communication or contact outside the jury room about the matters at trial between a juror and another person is forbidden where that contact 'might have unlawfully influenced that juror.' " ' *Knox v. State,* 571 So.2d 389, 390–91 (Ala.Crim.App.1990), quoting *Ebens v. State,* 518 So.2d 1264, 1267 (Ala.Crim.App.1986), quoting in turn *Roan v. State,* 225 Ala. 428, 435, 143 So. 454, 460 (1932). However:

> " 'An unauthorized contact between the jurors and a witness [or other person] does not necessarily require the granting of a mistrial. It is within the discretion of the trial court to determine whether an improper contact between a juror and a witness [or other person] was prejudicial to the accused.'

"*Ex parte Weeks,* 456 So.2d 404, 407 (Ala.1984).

> " 'The prejudicial effect of communications between jurors and others, especially in a criminal case, determines the reversible character of the error. Whether there has been a communication with the juror and whether it has caused prejudice are fact questions to be determined by the Court in the exercise of sound discretion.'

"*Gaffney v. State,* 342 So.2d 403, 404 (Ala.Crim.App.1976).

"....

"In order to show prejudice in a case such as this one involving misconduct by a non-juror in speaking to a juror, *a defendant must establish only that the verdict might have been affected by the juror's outside contact with the other person.* See *Roan v. State,* 225 Ala. 428, 435, 143 So. 454, 460 (1932) ('The test of vitiating influence is not that it did influence a member of the jury to act without the evidence, but that it might have unlawfully influenced that juror and others with whom he deliberated, and might have unlawfully influenced its verdict rendered.'). See also *Ex parte Dobyne,* 805 So.2d 763, 771 (Ala.2001) (citing *Roan* in the context of juror misconduct, specifically the failure of a juror to properly respond to questions on voir dire). However, this might-have-influenced-the-verdict standard nevertheless requires more than a mere showing that the juror was exposed to outside influences. See *Ex parte Apicella,* 809 So.2d 865 (Ala.2001). In *Ex parte Apicella,* the Alabama Supreme Court, addressing a juror-misconduct claim (a juror spoke with an attorney not associated with the case), explained the standard as follows:

***43** " 'On its face, this standard would require nothing more than that the defendant establish that juror misconduct occurred. As Apicella argues, the word "might" encompasses the entire realm of possibility and the court cannot rule out all possible scenarios in which the jury's verdict might have been affected.

" 'However, as other Alabama cases establish, more is required of the defendant. In *Reed v. State,* 547 So.2d 596, 598 (Ala.1989), this Court addressed a similar case of juror misconduct:

" ' "We begin by noting that no single fact or circumstance will determine whether the verdict rendered in a given case might have been unlawfully influenced by a juror's [misconduct]. Rather, it is a case's own peculiar set of circumstances that will decide the issue. In this case, it is undisputed that the juror told none of the other members of the jury of her experiment until after the verdict had been reached. While the question of whether she might have been unlawfully influenced by the experiment still remains, the juror testified at the post-trial hearing on the defendant's motion for a new trial that her vote had not been affected by the [misconduct]."

" 'It is clear, then, that the question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case. In this case, as in *Reed,* the effect of the misconduct was confined to the juror who committed the misconduct. The *Reed* Court stated:

" ' "We cannot agree with the defendant that the verdict rendered might have been unlawfully influenced, where the results of the [misconduct] were known only to the one juror who [committed the misconduct] and that juror remained unaffected by the [misconduct]."

" '547 So.2d at 598. Because no evidence indicates that [the juror] shared the content of his conversation with the other members of the jury and because no evidence indicates that [the juror's] own vote was affected, we cannot say the trial court abused its discretion in finding no actual prejudice.'

"809 So.2d at 871."

Minor v. State, 914 So.2d 372, 411–14 (Ala.Crim.App.2004).

[68] Here, the trial court, after being told by Phillips of possible juror misconduct, brought both juror J.A. and juror S.M. into the courtroom to question them regarding the allegations of misconduct.[11] Juror J.A. admitted to making a statement on Facebook—specifically, J.A. explained that he posted a comment that he did not "know why God would put [him] in this position. [He didn't] want to be here. [He didn't] want no part of this." (C. 270 .) J.A. explained, however, that, other than that general comment, he made no comments about Phillips's trial, made no comments about his opinion of the trial, and made no comments on how the case was going to come out. Additionally, contrary to Phillips's allegation, although J.A. admitted that people "commented" on his statement, J .A. stated that he did not respond to anyone's comment and that no one else had attempted to contact him privately to make a comment about Phillips's case. J.A. further explained that, although he would rather not be in a position to make a decision in a death-penalty case, he had no fixed opinion as to what should be done in this case and that he could follow the trial court's instructions.

***44** With regard to the allegations of misconduct raised about juror S .M., S.M. explained that, although he had had a "few people come up and [say] are you still on jury duty, yes or no, and that's been it" (R. 817), nobody else had approached him to talk about the case or how he might vote on the case. S.M. explained that he had not told anyone how he planned to vote in the case and that his decision would be based only on the facts in the case and what the trial court told him about the law.

After J.A. and S.M. addressed the allegations of juror misconduct, Phillips moved for a mistrial based on the violation of "clear orders of [the trial] court." (R. 819.) The trial court denied Phillips's motion.

Although J.A.'s decision to post a comment to Facebook appears to be in violation of the trial court's order to refrain from commenting about the case, J.A. did not make any direct, specific comment about the case and did not directly speak with or respond to anyone about Phillips's case. Moreover, nothing indicates that either J.A.'s comment or the five individuals who responded to his comment had any impact on his vote in this case. Furthermore, although Phillips argues that S.M. engaged in misconduct by communicating with the mother of Phillips's ex-girlfriend, S.M. denied ever having had a conversation with the mother of Phillips's ex-girlfriend. Thus, the trial court did not abuse its discretion when it denied Phillips's motion for a mistrial.

Additionally, to the extent that Phillips contends that, "[e]ven if the evidence presented to the trial court was not sufficient to require the trial court to grant a mistrial, the trial court's failure to conduct a thorough inquiry into the instances of juror misconduct was erroneous" (Phillips's brief, p. 81), that claim is without merit.

According to Phillips, the trial court should have questioned J.A. about the "five individuals [who] communicated with [him] on Facebook regarding the case" (Phillips's brief, p. 81) and should have questioned "the mother of [Phillips's] ex-girlfriend, who was available to testify to the conversations between her and [S.M.]." (Phillips's brief, p. 82.) Phillips did not object to the trial court's handling of the investigation into Phillips's juror-misconduct claims, nor did he ask the trial court if he could proffer any additional testimony or present any additional evidence to support his claims; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

With regard to a trial court's duty to conduct an investigation into a juror-misconduct claim, this Court has explained:

> " '[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.' *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982). However, 'the trial judge has a duty to conduct a "*reasonable investigation* of irregularities claimed to have been committed" before he concludes that the rights of the accused have not been compromised.' *Holland v. State,* 588 So.2d 543, 546 (Ala.Crim.App.1991) (emphasis added).
>
> ***45** " 'What constitutes a "reasonable investigation of irregularities claimed to have been committed" will necessarily differ in each case. A significant part of the discretion enjoyed by the trial court in this area lies in determining the scope of the investigation that should be conducted.
>
> " ' "Th[e] discretion of the trial court to grant a mistrial includes the discretion to determine the extent and type of investigation requisite to a ruling on the motion. *United States v. Flynn,* 216 F.2d 354, 372 (2d Cir.1954)[, cert. denied, 348 U.S. 909, 75 S.Ct. 295, 99 L.Ed. 713 (1955)]; *Lewis v. United States,* 295 F. 441 (1st Cir.1924)[, cert. denied, 265 U.S. 594, 44 S.Ct. 636, 68 L.Ed. 1197 (1924)]; *Tillman [v. United States,* 406 F.2d 930 (5th Cir.), vacated on other grounds, 395 U.S. 830, 89 S.Ct. 2143, 23 L.Ed.2d 742 (1969)]; *Killilea v. United States,* 287 F.2d 212 (1st Cir.1961)[, cert. denied, 366 U.S. 969, 81 S.Ct. 1933, 6 L.Ed.2d 1259 (1961)]; *United States v. Khoury,* 539 F.2d 441 (5th Cir.1976)[, cert. denied, 429 U.S. 1040, 97 S.Ct. 739, 50 L.Ed.2d 752 (1977)]. A full evidentiary hearing at which witnesses and jurors can be examined and cross examined is not required. *Tillman,* supra, 406 F.2d [at] 938. The trial judge need not examine the juror to determine if that juror admits to being prejudiced before granting a mistrial."
>
> "'*Woods v. State,* 367 So.2d 974, 980 (Ala.Cr.App.), reversed on other grounds, 367 So.2d 982 (Ala.1978), partially quoted in *Cox v. State,* 394 So.2d 103, 105 (Ala.Cr.App.1981). As long as the court makes an

inquiry that is reasonable under the circumstances, an appellate court should not reverse simply because it might have conducted a different or a more extensive inquiry.'

"*Sistrunk v. State,* 596 So.2d 644, 648–49 (Ala.Crim.App.1992). *See also Gamble v. State,* 791 So.2d 409 (Ala.Crim.App.2000); *Price v. State,* 725 So.2d 1003 (Ala.Crim.App.1997); *Clemons v. State,* 720 So.2d 961 (Ala.Crim.App.1996); *Hamilton v. State,* 680 So.2d 987 (Ala.Crim.App.1996); *Riddle v. State,* 661 So.2d 274 (Ala.Crim.App.1994); and *Hayes v. State,* 647 So.2d 11 (Ala.Crim.App.1994).

" 'The trial court's decision as to how to proceed in response to allegations of juror misconduct or bias will not be reversed absent an abuse of discretion.' *United States v. Youts,* 229 F.3d 1312, 1320 (10th Cir.2000). '[I]t is within the trial court's discretion to determine what constitutes an "adequate inquiry" into juror misconduct.' *State v. Lamy,* 158 N.H. 511, 523, 969 A.2d 451, 462 (2009)."

Shaw v. State, [Ms. CR–10–1502, July 18, 2014] —— So.3d ——, —— (Ala.Crim.App.2014).

[69] As set out above, after being informed of possible juror misconduct, the trial court questioned both J.A. and S.M. After questioning each juror, the trial court provided both Phillips and the State the opportunity to question both jurors—Phillips questioned J.A.; he declined, however, to question S.M. Although Phillips argues on appeal that the trial court should have "conducted a different or a more extensive inquiry," the trial court's investigation of the allegations of juror misconduct was, under the circumstances of this case, reasonable and does not rise to the level of plain error. Accordingly, Phillips is due no relief on this claim.

VIII.

***46** Phillips contends that the trial court committed reversible error in its jury instructions in the guilt phase of his trial. Specifically, Phillips contends that the trial court erred (1) when it failed "to instruct [the jury] on the lesser included offense of reckless manslaughter" (Phillips's brief, p. 6); (2) when it instructed the jury that Phillips "could be convicted of murder of 'two or more persons' if the jury found he had specific intent to kill only [Erica]" (Phillips's brief, p. 24); (3) when the trial court instructed the jury on reasonable doubt, which, he says, "impermissibly eased the State's burden of proof" (Phillips's brief, p. 94); (4) when the trial court "improperly instructed the jury that to find [Phillips] had the requisite specific intent to kill, [the jury] only needed to find that [Phillips] acted knowingly" (Phillips's brief, p. 37); and (5) when the trial court's instruction on transferred intent improperly amended his indictment. (Phillips's brief, p. 82.)

[70] **[71]** **[72]** The following is well settled:

"When reviewing a trial court's jury instructions, we keep in mind the following:

" ' " 'A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. *Raper v. State,* 584 So.2d 544 (Ala.Cr.App.1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, *Stewart v. State,* 601 So. d 491 (Ala.Cr.App.1992), aff'd in relevant part, 659 So.2d 122 (Ala.1993), and we must evaluate instructions like a reasonable juror may have interpreted them. *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Stewart v. State.*' "

"'*Griffin v. State,* 790 So.2d 267, 332 (Ala.Crim.App.1999), quoting *Ingram v. State,* 779 So.2d 1225, 1258 (Ala.Crim.App.1999). "This court has consistently held that a trial court's oral charge to the jury must be viewed in its entirety and not in 'bits and pieces.' *Parks v. State,* 565 So.2d 1265 (Ala.Cr.App.1990); *Williams v. State,* 538 So.2d 1250 (Ala.Cr.App.1988); *Lambeth v. State,* 380 So.2d 923 (Ala.), on remand, 380 So.2d 925 (Ala.Cr.App.1979), writ denied, 380 So.2d 926 (Ala.1980)." *Smith v. State,* 585 So.2d 223, 225 (Ala.Crim.App.1991).'

"*Smith v. State,* 908 So.2d 273, 295 (Ala.Crim.App.2000), cert. quashed, 908 So.2d 302 (Ala.2005), cert. denied, *Smith v. Alabama,* 546 U.S. 928, 126 S.Ct. 148, 163 L.Ed.2d 277 (2005).

" ' "A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case." *Ingram v. State,* 779 So.2d 1225 (Ala.Crim.App.1999) (citing *Raper v. State,*

584 So.2d 544 (Ala.Crim.App.1991)). Moreover, this Court does not review jury instructions in isolation, instead we consider the instruction as a whole. *Stewart v. State,* 601 So.2d 491 (Ala.Crim.App.1992).'

***47** "*Living v. State,* 796 So.2d 1121, 1130–31 (Ala.Crim.App.2000)."

Whatley v. State, 146 So.3d 437, 468–69 (Ala.Crim.App.2010). With these principles in mind, we address each of Phillips's jury-instruction claims.

A.

Phillips contends that the trial court erred when it failed to instruct the jury on reckless manslaughter as a lesser-included offense of capital murder. Specifically, Phillips argues that, based on the assertions he made in his statement to Investigator Turner, the "jury could have inferred ... that he did not intend to kill [Erica], but instead 'consciously disregarded a substantial and unjustifiable risk that his conduct would cause that result.' " (Phillips's brief, p. 11 (quoting *Ex parte Weems,* 463 So.2d 170, 172 (Ala.1984)).)

During the jury-charge conference, Phillips requested that the trial court instruct the jury on reckless manslaughter pursuant to § 13A–6–3(a)(1), Ala.Code 1975, and the following exchange occurred:

"[Phillips's counsel]: Judge, I think my client's own statement warrants a charge with respect to recklessness, as we discussed before. He—his testimony was that he pulled out the gun and fired, which is reckless. And reckless being when a person is aware of and consciously disregards, the risk. And that the—and that his conduct is basically a gross deviation from the standard of care, and it can be, in my view, distinguished from intent. I think whether or not, based on my client's statement, whether his act was intentional or reckless is a question for the jury.

"[The Court]: Any other reply by the State?

"[Prosecutor]: Judge, we don't think [the] facts support it in this case, and we object to that charge.

"[The Court]: A person acts recklessly with respect to a result or to a circumstance when he is aware and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstances exist. And option B is a person acts recklessly when he is aware of or consciously disregards a substantial and unjustifiable risk, such as shooting at Erica Phillips, will occur or has exists. By his statements, how does that fit with his statement on when he said he aimed and shot at her but does not know what he intended? How does that—"

[Phillips's counsel]: Judge, his statement does not say that he aimed and shot at her.

"[The Court]: It says he pointed and shot.

"[Phillips's counsel]: He said—Mr. Turner asked him, 'Where were you aiming?' And he says, 'I wasn't really. I just pointed and pulled the trigger. I still don't know where it hit her.' Judge, that's recklessness.

"[Prosecutor]: And again, Judge, we don't think that shows any recklessness. You have an intentional act. Now whether or not it resulted in the intended consequences is a matter of argument, but it was an intentional act. Maybe it got consequences Mr. Phillips don't want, but that doesn't make it reckless, Judge.

***48** "[Phillips's counsel]: Judge, I think it's the essence of recklessness when a person says I didn't aim at that person. I took out a gun and fired. And that, under anybody's definition, would be a conscious disregard that the result, which we knew happened, might happen. I think it fits. Judge, may I?

" "[The Court]: Go ahead.

"[Phillips's counsel]: I think it would be error not to give it."

(R. 692–94.) The trial court denied Phillips's request for an instruction on reckless manslaughter as a lesser-included offense of capital murder; the trial court did, however, grant Phillips's request to charge the jury on intentional murder as a lesser-included offense of capital murder.

This Court has held:

" 'A person accused of the greater offense has a right to have the court charge on lesser included offenses when there is a reasonable theory from the evidence supporting those lesser included offenses.' *MacEwan v. State,* 701 So.2d 66, 69 (Ala.Crim.App.1997). An

> accused has the right to have the jury charged on ' "any material hypothesis which the evidence in his favor tends to establish." ' *Ex parte Stork,* 475 So.2d 623, 624 (Ala.1985). '[E]very accused is entitled to have charges given, which would not be misleading, which correctly state the law of his case, and which are supported by any evidence, however[ ] weak, insufficient, or doubtful in credibility,' *Ex parte Chavers,* 361 So.2d 1106, 1107 (Ala.1978), 'even if the evidence supporting the charge is offered by the State.' *Ex parte Myers,* 699 So.2d 1285, 1290–91 (Ala.1997), cert. denied, 522 U.S. 1054, 118 S.Ct. 706, 139 L.Ed.2d 648 (1998). However, '[t]he court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense.' § 13A–1–9(b), Ala.Code 1975. 'The basis of a charge on a lesser-included offense must be derived from the evidence presented at trial and cannot be based on speculation or conjecture.' *Broadnax v. State,* 825 So.2d 134, 200 (Ala.Crim.App.2000), aff'd, 825 So.2d 233 (Ala.2001), cert. denied, 536 U.S. 964, 122 S.Ct. 2675, 153 L.Ed.2d 847 (2002). ' "A court may properly refuse to charge on a lesser included offense only when (1) it is clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense, or (2) the requested charge would have a tendency to mislead or confuse the jury." ' *Williams v. State,* 675 So.2d 537, 540–41 (Ala.Crim.App.1996), quoting *Anderson v. State,* 507 So.2d 580, 582 (Ala.Crim.App.1987)."

Clark v. State, 896 So.2d 584, 641 (Ala.Crim.App.2000). Thus, we must determine whether, under the circumstances of this case, there exists "a rational basis for a verdict convicting" Phillips of reckless manslaughter as a lesser-included offense of capital murder.

[73] As set out above, Phillips was charged with one count of murder made capital for causing the death of Erica and Baby Doe during "one act or pursuant to one scheme or course of conduct." *See* § 13A–5–40(a)(10), Ala.Code 1975. Phillips requested, among other things, a jury instruction on reckless manslaughter as a lesser-included offense of capital murder.

***49** "A person commits the crime of manslaughter if ... [h]e recklessly causes the death of another person." § 13A–6–3(a)(1), Ala.Code 1975.

> "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

§ 13A–2–2(3), Ala.Code 1975.

[74] As Phillips correctly contends, under certain circumstances, reckless manslaughter may be a lesser-included offense of capital murder. *See, e.g., McLaughlin v. State,* 586 So.2d 267, 271 (Ala.Crim.App.1991) ("Reckless manslaughter may be a lesser included offense of intentional murder. *Gray v. State,* 574 So.2d 1010 (Ala.Cr.App.1990); *Paige v. State,* 494 So.2d 795 (Ala.Cr.App.1986)."); *but see Howard v. State,* 85 So.3d 1054 (Ala.2011) (holding that Howard was not entitled to "a manslaughter charge as a lesser-included offense to capital murder because Howard was determined to follow through on a course of action that would create a grave risk of death to a person other than himself, and thereby cause the death of another person").

The Alabama Supreme Court, in *Ex parte Weems,* 463 So.2d 170 (Ala.1984), explained:

> "Recklessly causing another's death may give rise to the lesser included offense of manslaughter. A defendant who recklessly causes another's death commits manslaughter if he 'consciously disregard[ed] a substantial and unjustifiable risk that his conduct would cause that result.' Model Penal Code and Commentaries, § 210.03, Comment 4 (1980). The difference between the circumstances which will support a murder conviction and the degree of risk contemplated by the manslaughter statute is one of degree, not kind. From a comparison of Sections 210.03 and 210.02 of the Model Code, it appears that the degree of recklessness which will support a manslaughter conviction involves a circumstance which is a 'gross deviation from the standard of

> conduct that a law-abiding person would observe in the actor's situation,' but is not so high that it cannot be 'fairly distinguished from' the mental state required in intentional homicides. Compare Comment 4 to § 210.02 with Comment 4 to § 210.03."

463 So.2d at 172.

According to Phillips, several of his assertions in his statement to Investigator Turner demonstrate that he acted "recklessly" when he shot Erica. Specifically, Phillips argues that, "despite the fact that [Investigator Turner] repeatedly pushed [him] to admit to intending to kill [Erica], [he] continually denied any such intent. [Investigator Turner] asked [him] where he was aiming and he responded 'I wasn't really—I just pointed and pulled the trigger. I don't—I still don't know where it hit her. I don't—I'm guessing it did hit her because she fell.' " (Phillips's brief, pp. 9–10.) Additionally, Phillips references the following assertions made in his statement as a basis for the trial court's giving him a lesser-included-offense instruction on reckless manslaughter: (1) "[I]t just happened." (C. 167); (2) "I just pointed and pulled the trigger." (C. 179); (3) "I don't even know if I had a thought. I don't know." (C. 185–86); (4) "I don't know what I was thinking." (C. 196); (5) "[W]hen I pulled that gun out and pointed it at her and pulled the trigger, did I want to kill her? No." (C. 208); (6) "It's not something I planned. It's not even something I wanted to do." (C. 209); (7) "I just pulled [the gun] up and she said, 'What you going to do with that?' as I was pulling it up. And she turned and I shot." (C. 261); and (8) "I'm not even clear what I was thinking." (C. 262.)

***50** To support his argument, Phillips cites *Thomas v. State,* 681 So.2d 265 (Ala.Crim.App.1996), for the proposition that pointing and shooting a gun in the direction of a person or persons but "not aiming anywhere in particular" is sufficient evidence entitling a defendant charged with capital murder to a jury instruction on the lesser-included offense of manslaughter.

> In *Thomas,* Thomas testified that he and Bernard Jones "were attempting to buy a gun that Thomas Ambers and Clifton Ambers, his brother, were selling. The transaction was taking place in an automobile. They began to argue over the price, and [Thomas] got out of the car. [Thomas] was standing on the driver's side of the car when Mr. Jones and Thomas Ambers began to 'tussle' on the passenger side of the car."

681 So.2d at 266. Thomas testified that he told Jones to run and that, because he knew there was at least one gun in the car, Thomas pulled out his own gun. Thomas testified that he "shot three times in the car," and then the following exchange occurred:

> " '[Thomas's counsel]: *Did you aim at anybody?*
>
> " '[Thomas]: No, sir, I didn't know if he had the gun or not, and I was just trying—I didn't want to get shot in the back, so I just shot so I could run.' "

Id. at 267 (emphasis added). Based on Thomas's assertions, this Court held:

> "Because evidence was presented from which the jury might have found that the acts that resulted in the shooting of Thomas Ambers were reckless rather than intentional, there was a rational basis for an instruction on reckless manslaughter, and the failure to give that instruction was not harmless.... Consequently, it was error to refuse to give the charge on reckless manslaughter."

Id. at 268.

Although Phillips argues that his statement that he was not "aiming" makes his case analogous to *Thomas,* here, unlike in *Thomas,* Phillips told Investigator Turner that he "pulled that gun out and *pointed it at [Erica]* and pulled the trigger." In other words, while Thomas was not aiming at "anybody," Phillips's statement clearly demonstrates that he pointed the gun at a specific person. Phillips's assertions to Investigator Turner do not demonstrate "recklessness"; rather, they demonstrate that Phillips acted intentionally. *See* § 13A–2–2(1), Ala.Code 1975 ("A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to cause that result or *to engage in that conduct.*" (emphasis added)); and *Hill v. State,* 507 So.2d 554 (Ala.Crim.App.1986) ("Here, the appellant admitted taking the gun from a dresser drawer, pointing it at the head of the decedent and shooting him in the head repeatedly. Her actions were not consistent with a finding of recklessness. Since there was no evidence in the present case that would support an instruction on reckless

manslaughter, the trial court did not err in denying the appellant's charge."). *See also Ferrera v. State,* 709 So.2d 507 (Ala.Crim.App.1997) (holding that, because Ferrera's conduct was intentional, Ferrera was not entitled to an instruction on reckless manslaughter as a lesser-included offense of intentional murder).

***51** In addition to his assertion that he pointed the gun at Erica, Phillips's other assertions demonstrate that his conduct was intentional—not reckless. Specifically, as set out above, Phillips told Investigator Turner that he and Erica were engaged in a prolonged, heated argument; that before he left the McDonald's restaurant he removed the gun from the glove compartment of Erica's vehicle and put it in his back pocket; that, before he shot her, Erica asked him "What are you going to do with that?"; that he "pulled the trigger pointed and shot"; that, after he shot her, he stepped over her body and, without checking on her condition, got into Erica's vehicle and left the car wash. Thus, a reckless—manslaughter instruction was not warranted under the circumstances of this case. *Compare Bunn v. State,* 581 So.2d 559, 561 (Ala.Crim.App.1991) ("We think that the unexpected nature of the confrontation, the appellant's efforts to avoid the confrontation, his lack of familiarity with the pistol, his concern for the victim after the victim was shot, coupled with his testimony that the pistol 'went off,' that he did not remember pulling the hammer back, and that he told certain persons shortly after the shooting that it was accidental, considered together, give rise to an interpretation of the evidence which would have supported a jury verdict of reckless manslaughter."). Accordingly, the trial court did not err when it denied Phillips's request for a jury instruction on reckless manslaughter as a lesser-included offense of capital murder. [12]

Moreover, even if we were to read Phillips's claim in a manner consistent with *Thomas,* Phillips would still not be entitled to a jury instruction on reckless manslaughter as a lesser-included offense of capital murder.

> "[T]he Alabama Supreme Court has recognized that, in certain situations, an accused's self-serving statement may not be sufficient, by itself, to warrant an instruction on a lesser-included offense. See *Ex parte McWhorter,* 781 So.2d 330 (Ala.2000), cert. denied, 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001). In *McWhorter,* the appellant had given a statement to the police in which he initially stated that he was so intoxicated that he did not remember the crime. As the interview with police continued, however, the appellant began to remember, in detail, how the crime was committed, and he confessed. On appeal, he argued that the trial court had erred in not instructing the jury on a number of lesser-included offenses (including felony murder, intentional murder, and manslaughter), based on his statement to the police that he had been intoxicated. In finding that the trial court had not erred in not instructing the jury on the lesser-included offenses, the Supreme Court stated:
>
> > " 'The evidence offered by McWhorter as to his alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events occurring at the crime scene. No evidence substantiated his claim to have been intoxicated at the time of the killing, and, indeed, the other evidence as to his condition at the time of the crime was totally consistent with the proposition that he was sober. *We hold that McWhorter's self-serving statements suggesting he was intoxicated at the time of the killing, statements made in his internally inconsistent interview by Detective Maze, is, as a matter of law, insufficient to satisfy the rigorous standard of showing that the intoxication relied upon to negate the specific intent required for a murder conviction amounted to insanity.*'
>
> ***52** "*Ex parte McWhorter,* 781 So.2d at 342 (emphasis added)."

Clark, 896 So.2d at 641–42.

Here, like in *McWhorter,* the only evidence supporting Phillips's request for an instruction on reckless manslaughter as a lesser-included offense of capital murder is his own self-serving statement to Investigator Turner. Phillips's statement to Investigator Turner is, at best, internally inconsistent. Indeed, even if we were to read his assertion that he "did not aim" as Phillips's engaging in reckless conduct, that assertion is inconsistent with his assertion that he pointed the gun at Erica and pulled the trigger. Thus, the trial court did not err in refusing to instruct the jury on reckless manslaughter as a lesser-included offense of capital murder.

B.

Phillips contends that the trial court erred when it instructed the jury that Phillips "could be convicted of murder of 'two or more persons' if the jury found he had specific intent to kill only [Erica]." (Phillips's brief, p. 24). Specifically, Phillips contends:

> "In the present case, the State argued that the doctrine of transferred intent applied and specifically requested two additional instructions, which the trial court gave, that diverged from the pattern instructions and eliminated the requirement of specific intent to kill each victim. The trial court improperly instructed the jury that 'the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe.' The trial court further instructed the jury that 'if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder.' The trial court then emphasized that it is sufficient if Mr. Phillips 'is proven beyond a reasonable doubt to have caused the death of an intended as well as an unintended victim by a single act.' Defense counsel objected to these instructions.
>
> "During deliberations, the jury sent out a note specifically asking if there 'ha[s] to be intent to kill 2 people for it to be capital murder' or 'is it the result of the murder the second person was killed without intent.' Following this question, the trial court re-instructed the jury on capital murder, including specifically informing the jury again that the State was only required to prove that Mr. Phillips 'intended to kill Erica Phillips and also killed an unintended victim.'
>
> "Because Alabama law requires a defendant to have the specific intent to kill each victim, the application of the doctrine of transferred intent to Mr. Phillips was erroneous as it permitted the jury to convict him of capital murder of 'two or more persons' based solely on his intent to kill [Erica]. The trial court's instruction on transferred intent improperly lowered the State's burden of proving each element of capital murder beyond a reasonable doubt. *See In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *see also Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)."

***53** (Phillips's brief, pp. 25–26 (some citations omitted).)

Although Phillips correctly contends that "Alabama law is clear that in order to be guilty of capital murder, a defendant ha[s] to have the specific intent to kill" (Phillips's brief, p. 24), Phillips incorrectly argues that "Alabama law requires a defendant to have the specific intent to kill *each victim.*" (Phillips's brief, p. 26 (emphasis added).) Indeed, our caselaw clearly holds otherwise.

This Court, in *Smith v. State,* [Ms. CR–97–1258, Dec. 22, 2000] —— So.3d —— (Ala.Crim.App.2000), *aff'd in part, rev'd in part on other grounds, and remanded, Ex parte Smith,* [Ms. 1010267, Mar. 14, 2003] —— So.3d —— (Ala.2003), addressed this issue.

[75] Specifically, in *Smith,* Smith was charged with capital murder for causing the death of two or more persons "by one act or pursuant to one scheme or course of conduct." *Id.* at —— (quoting § 13A–5–40(a)(10), Ala.Code 1975). On appeal, Smith argued that the trial court's instructions were erroneous because, he said, "the court's instructions allowed the jury to convict him of having committed the capital offense without finding intent as to *two* victims." *Id.* at ——. This Court rejected that claim, holding:

> "Section 13A–5–40(b) specifies that murder, as a component of the capital offense, means 'murder' as defined in § 13A–6–2(a)(1): 'A person commits the crime of murder if ... [w]ith intent to cause the death of another person, he causes the death of that person *or another person* ....' (Emphasis added.)
>
> " 'By its language, § 13A–6–2(a)(1) clearly invokes the doctrine of transferred intent in defining the crime of murder. For example, if Defendant fires a gun with the intent to kill Smith but instead kills Jones, then Defendant is guilty of the intentional murder of Jones.
>
> " '... Section 13A–5–40(b) refers to § 13A–6–2(a)(1) for the definition of "murder"; and § 13A–6–2(a)(1) codifies the doctrine of transferred intent in that definition.'
>
> "*Ex parte Jackson,* 614 So.2d 405, 407 (Ala.1993).
>
> "Thus, *depending on the facts of a case, it is conceivable that the offense of murder wherein two or more persons*

are murdered by one act or pursuant to one scheme or course of conduct could arise from the intent to kill one person. The court in *Living v. State,* [796 So.2d 1121] (Ala.Crim.App.2000), reckoned with such possibility. In *Living* the court stated:

> " 'On appeal, ... Living argues that the jury could have found that he intentionally killed Jennifer, but that he did not intend to kill Melissa. Therefore, according to Living, the jury could have found him guilty of murder with regard to Jennifer and guilty of reckless manslaughter with regard to Melissa.
>
> "'*Under the doctrine of transferred intent, however, if Living intended to kill Jennifer he would be criminally culpable for murder with regard to the unintended death of Melissa. See Harvey v. State,* 111 Md.App. 401, 681 A.2d 628 (1996) (the doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed; it makes no difference whether the intended victim is missed; hit and killed; or hit and only wounded). Several jurisdictions have held that the doctrine of transferred intent is applicable when a defendant kills an intended victim as well as an unintended victim. *See, e.g., State v. Fennell,* 340 S.C. 266, 531 S.E.2d 512 (2000); *Ochoa v. State,* 115 Nev. 194, 981 P.2d 1201, 1205 (1999); *Mordica v. State,* 618 So.2d 301, 303 (Fla.Dist.Ct.App.1993); and *State v. Worlock,* 117 N.J. 596, 569 A.2d 1314, 1325 (1990).
>
> ***54** " '.... If Living intended to kill Jennifer, his specific intent would transfer to the killing of Melissa.'
>
> "796 So.2d at [1131].
>
> "Accordingly, the appellant's *contention is based on the incorrect assumption that the prosecution is required to prove subjective intent to kill as to each victim: that is not required by law.*"

Smith, —— So.3d at —— (emphasis added; footnote omitted). Thus, contrary to Phillips's argument on appeal, the State is not required to demonstrate that Phillips had the specific intent to kill *both* Erica and Baby Doe. Rather, the State needed to establish only that Phillips had the specific intent to kill Erica and that Baby Doe died as a result of that one act—regardless of whether Baby Doe was an intended or unintended victim.

Because the trial court's instruction on transferred intent is consistent with Alabama law, the trial court did not err when it instructed the jury that "if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder." [13]

C.

[76] Phillips contends that the trial court improperly instructed the jury on reasonable doubt, which, he says, "impermissibly eased the State's burden of proof." (Phillips's brief, p. 94.) Specifically, Phillips contends:

"In [his] case, the trial court instructed the jury that the reasonable doubt which entitled [him] to an acquittal 'is not a mere fanciful, a vague, a conjectural or a speculative doubt.' The trial court also equated reasonable doubt with an 'abiding conviction.' Moreover, the trial court instructed the jury to '[s]earch for a consistent story.' By emphasizing that not all doubts are sufficient to require acquittal and permitting Mr. Phillips to be convicted merely on the jury's belief in his guilt rather than evidentiary proof that excluded all reasonable doubt, this instruction lessened the State's burden of proof. A reasonable likelihood exists that the jury understood the court's instructions to permit a conviction based on insufficient proof."

(Phillips's brief, p. 94 (citations omitted).) Phillips did not object to the trial court's reasonable-doubt instruction; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

This Court has explained:

> " 'The beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course. Cf. *Hopt v. Utah,* 120 U.S. 430, 440–441, 7 S.Ct. 614, 618–20, 30 L.Ed. 708 (1887). Indeed, so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, see *Jackson v. Virginia,* 443 U.S. 307, 320, n. 14, 99 S.Ct. 2781, 2789, n. 14, 61 L.Ed.2d

560 (1979), the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Cf. *Taylor v. Kentucky,* 436 U.S. 478, 485–486, 98 S.Ct. 1930, 1934–1935, 56 L.Ed.2d 468 (1978). Rather, "taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." *Holland v. United States,* 348 U.S. 121, 140, 75 S.Ct. 127, 137, 99 L.Ed. 150 (1954).'

***55** "*Victor [v. Nebraska*], 511 U.S. [1] at 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 [(1994)]."

Thompson v. State, 153 So.3d at 154.

In this case, the totality of the trial court's reasonable-doubt instruction was as follows:

"Convict the defendant if the State meets its burden of proof. If after considering all the evidence in this case you have an abiding conviction of the truth of the charges, then you are convinced beyond a reasonable doubt, and it would be then your duty to find the defendant guilty.

"Acquit or not guilty if the State fails to meet its burden. But if after considering all the evidence in this case, your minds are left in such a condition that you cannot say that you have an abiding conviction of the defendant's guilt, then you are not convinced beyond a reasonable doubt and the defendant would be entitled to be found an acquittal, to an acquittal, that is, not guilty. An acquittal is not guilty.

"What is beyond a reasonable doubt? The burden of proof is on the State of Alabama to prove the guilt of the defendant beyond a reasonable doubt. The phrase beyond a reasonable doubt is a somewhat subjective term and the efforts to define it may not always help. A reasonable doubt is sometimes said to be a reason for a doubt. Most people know intuitively what the law means when it says that the State has to prove the guilt of the defendant beyond a reasonable doubt. A reasonable doubt is a doubt for which you can assign a reason.

"A doubt arising from evidence or lack of evidence. Is there a doubt either arising from evidence or from a lack of evidence as to any element of the offense that the State has been charged or has been charged [(sic)]? Is there—if there is a doubt of that type, the defendant is entitled to be found the benefit of that doubt [(sic)].

"Defendants may rely on reasonable doubt all through the trial. An accused person has a right to rely upon the failure of the prosecution to establish such proof of beyond a reasonable doubt. If you have a reasonable doubt about the accused's guilt arising out of any part of the evidence or any lack of evidence, then you should find the accused not guilty.

"This is not a forced doubt or a capricious doubt. A reasonable doubt is not a forced or capricious doubt. It is not necessary that the State must prove the guilt of the defendant beyond all doubt, but that it prove the guilt of the defendant beyond a reasonable doubt.

"A fair doubt. A reasonable doubt is a fair doubt based upon reason and logic, not based upon mere speculation. The reasonable doubt ... which entitles an accused to an acquittal is not a mere fanciful, a vague, a conjectural or a speculative doubt. But it must be a reasonable doubt arising from the evidence or from the lack of evidence or from some part of the evidence, and it remains after careful consideration of all the evidence by you such as a fair-minded and conscientious people would entertain under all circumstances.

***56** "The State of Alabama must prove each and every element of the case. The burden is upon the State of Alabama to prove the accused's guilt beyond all reasonable doubt of every essential element of the crime charged."

(R. 749–52.)

Here, an examination of the trial court's reasonable-doubt instruction, taken as a whole, demonstrates that the instruction "correctly conve[yed] the concept of reasonable doubt to the jury." *Thompson, supra.* This Court, in *Revis,* 101 So.3d at 314, determined that a similar reasonable-doubt instruction was proper and "did not impermissibly shift the burden of proof" from the State to the defendant. Specifically, in *Revis,* the trial court instructed the jury on reasonable doubt as follows:

" 'It does not mean beyond all doubt, but simply beyond a reasonable doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common

> sense and to which you can assign a reason based on the evidence, the lack of evidence or a conflict in the evidence. A reasonable doubt is not a mere guess or surmise. It is a doubt based on reason and logic and not upon speculation, and as I said before, it is a reasonable doubt, not beyond all doubt, but a reasonable doubt is a doubt that you can assign a reason to based on the evidence, the lack of evidence or a conflict in the evidence. If after considering all the evidence in this case you have an *abiding conviction* of the truth of the charge, then you are convinced beyond a reasonable doubt, and it would be your duty to convict the defendant. *The reasonable doubt which entitles an accused to an acquittal is not a mere fanciful, vague, conjectural or speculative doubt,* but a reasonable substantial doubt arising from the evidence or from the lack of evidence that remains after a careful consideration of the testimony. As I've said before, the State's not required to convince you of the defendant's guilt beyond all doubt and to a mathematical certainty, nor beyond a shadow of a doubt, but simply beyond a doubt.' "

101 So.3d at 313–14 (emphasis added).

Moreover, the complained-of language in the trial court's reasonable-doubt instruction—that reasonable doubt "is not a mere fanciful, a vague, a conjectural or a speculative doubt"—is identical to language that appears in the Alabama Pattern Jury Instructions on "Burden of Proof." *See* Alabama Pattern Jury Instructions, Instruction I.4. This Court has explained that " '[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.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999)." *Wilson v. State,* 777 So.2d 856, 885 (Ala.Crim.App.1999). Thus, the trial court committed no error—much less plain error—in its instruction on reasonable doubt.

***57** **[77]** Moreover, in this section of his brief on appeal, Phillips contends that the trial court's instruction on the credibility of witnesses was error. Although he correctly notes that the trial court, when instructing the jury about the credibility of witnesses, instructed the jury to "[s]earch for a consistent story" (R. 769), Phillips's argument is without merit because a similar instruction has been upheld by this Court. *See, e.g., Marshall v. State,* 20 So.3d 830, 838 (Ala.Crim.App.2008) (instructing the jury that it could consider the "consistency or inconsistency of [a witness's] testimony as well as its reasonableness or unreasonableness in light of all the evidence in this case"). Thus, the trial court committed no error with regard to this complained-of instruction.

D.

[78] Phillips contends that the trial court "improperly instructed the jury that to find [Phillips] had the requisite specific intent to kill, they only needed to find that he acted knowingly." (Phillips's brief, p. 33.) Phillips did not object to this instruction at trial; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.Crim. P.

Phillips contends that the following instruction was error:

> "Intent. Going to talk about intent now. Intent, under the law, is the definition of knowingly. I charge you, members of the jury, that a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct and is aware of the nature of the circumstances that exist. The person knows something.
>
> "What a person actually does. Of course you can consider what a person actually does as being a circumstance bearing on what a person intended to do. Intent is usually established by circumstantial evidence. Intent to do something is usually a matter that has to be determined by circumstantial evidence. What you have to ascertain is whether the defendant was aware that he was carrying out a particular act. That's what I meant, and that's what I mean by intent. Was the defendant aware that they were carrying out a particular act? That's what we mean when we say intent."

(R. 752.)

Phillips, in his brief on appeal, correctly explains that this instruction "improperly conflates the definition of knowledge and intent." (Phillips's brief, pp. 33–34.) *See also* § 13A–2–2(1) and (2), Ala.Code 1975.

[79] **[80]** We have explained:

> " 'Alabama appellate courts have repeatedly held that, to be convicted of capital offense and sentenced to death, a defendant must have had a particularized intent to kill and the jury must have

been charged on the requirement of specific intent to kill. E.g., *Gamble v. State,* 791 So.2d 409, 444 (Ala.Crim.App.2000); *Flowers v. State,* 799 So.2d 966, 984 (Ala.Crim.App.1999); *Duncan v. State,* 827 So.2d 838, 848 (Ala.Crim.App.1999).'

"*Ziegler v. State,* 886 So.2d 127, 140 (Ala.Crim.App.2003) ."

Brown v. State, 72 So.3d 712, 715 (Ala.Crim.App.2010). Thus, the trial court's instruction conflating "knowingly" and "intentionally" was error. That error, however, does not rise to the level of plain error.

***58** " 'In setting forth the standard for plain error review of jury instructions, the court in *United States v. Chandler,* 996 F.2d 1073, 1085, 1097 (11th Cir.1993), cited *Boyde v. California,* 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), for the proposition that "an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner." '

"*Williams v. State,* 710 So.2d 1276, 1306 (Ala.Crim.App.1996). 'The absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the defendant's failure to object does weigh against his claim of prejudice.' *Ex parte Boyd,* 715 So.2d 852, 855 (Ala.1998)."

Thompson v. State, 153 So.3d at 152.

Although the trial court initially improperly instructed the jury on intent, "we do not review the jury instruction in isolation. Instead we consider the jury charge as a whole, and we consider the instructions like a reasonable juror may have interpreted them." *Ziegler v. State,* 886 So.2d 127, 140 (Ala.Crim.App.2003) (citing *Smith v. State,* 795 So.2d 788, 827 (Ala.Crim.App.2000)). Examining the trial court's instructions as a whole, we are convinced that the trial court fully instructed the jury on intent and that a reasonable juror would have interpreted the trial court's instructions as requiring the State to prove beyond a reasonable doubt that Phillips had the specific intent to kill.

Specifically, the trial court, after reading Phillips's indictment to the jury, instructed the jury as follows:

"Now I'm going to give you some specific information about that charge. That charges capital—that is a capital murder charge. Alabama Code Section 13A–5–40(a)(10), murder of two or more persons by a single act. The defendant is charged with capital murder. The [(sic)] states that an intentional murder of two more persons is capital murder. A person commits intentional murder of two or more persons if he causes the death of two or more people, and in performing the act that caused the death of those people, he intended to kill each of those people.

"To convict, the State must prove beyond a reasonable doubt each of the following elements of intentional murder of two or more persons: ... that in committing the act that caused the deaths of both [Erica] and Baby Doe, the defendant intended to kill the deceased or another person.

"A person acts intentionally when it is his purpose to cause the death of another person. Let me reread that. A person acts intentionally when it is his purpose to cause the death of another person. *The intent to kill must be real and specific.*"

(R. 761–62 (emphasis added).) Thereafter, the trial court instructed the jury on the State's requested jury charges as follows:

"Requested jury charge number one. The defendant, Jessie Phillips, is charged with capital murder. The law states that intentional murder of two or more persons is capital murder. A person commits the crime of an intentional murder of two or more persons, and in performing the act that caused the death of those people, he intends to kill each of those people.

***59** "To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder of two or more persons: One, Erica Phillips is dead; two, that Baby Doe is dead; three, that the defendant Jessie Phillips caused the deaths of Erica Phillips and Baby Doe by one act, by shooting them; and that in committing the act which caused the deaths of both Baby—excuse me, Erica Phillips and Baby Doe, the defendant intended to kill the deceased or another person.

"A person acts intentionally when it is his purpose to cause the death of another person. *The intent to kill another person must be real and specific.* ...

"....

> "Requested jury charge number two. In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder."

(R. 765–67 (emphasis added).)

Thus, it is clear that, although the trial court initially conflated the concepts of "knowingly" and "intentionally," the trial court fully and adequately instructed the jury on the specific-intent-to-kill requirement. Thus, although the trial court's initial instruction on intent was erroneous, it does not rise to the level of plain error.

E.

Phillips contends that the trial court "improperly amended the indictment" when it instructed the jury on transferred intent because, he says, "the indictment, as written, required a finding of individualized and specific intent to kill both [Erica] *and* [Baby Doe]." (Phillips's brief, p. 82.) Phillips did not object to the trial court's transferred-intent instruction on this basis; thus, we review this claim for plain error only. *See* Rule 45A, Ala. R.App. P.

[81] **[82]** Rule 13.5(a), Ala. R.Crim. P., provides:

> "A charge may be amended by order of the court with the consent of the defendant in all cases, except to charge the offense or to charge new offenses not contemplated by the original indictment. *The court may permit a charge to be amended without the defendant's consent, at any time before verdict or finding, if no additional or different offense is charged and if the substantial rights of the defendant are not prejudiced.*"

(Emphasis added.) The Alabama Supreme Court has explained:

> "Rule 13.5(a), Ala. R.Crim. P., forbids amending an indictment 'to change the offense or to charge a new offense not contemplated by the original indictment.' This rule preserves the implementation of Article I, § 6, Alabama Constitution of 1901, guaranteeing '[t]hat in all criminal prosecutions, the accused has a right ... to demand the nature and cause of the accusation; and to have a copy thereof ...' and Article I, § 8, as amended by Amendment 37, Alabama Constitution of 1901, guaranteeing that contested felonies will be charged by grand jury indictment, *State ex rel. Baxley v. Strawbridge,* 52 Ala.App. 685, 687, 296 So.2d 779, 781 (1974); and *Thorn v. State,* 39 Ala.App. 227, 227, 98 So.2d 859, 860 (1957); *see also Kennedy v. State,* 39 Ala.App. 676, 690, 107 So.2d 913, 926 (1958). The fundamental constitutionally guaranteed benefits of an indictment to an accused are ' "that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence." ' *Gayden v. State,* 262 Ala. 468, 477, 80 So.2d 501, 504 (1955)(quoting *United States v. Simmons,* 96 U.S. 360, 371, 24 L.Ed. 819 (1877))."

***60** *Ash v. State,* 843 So.2d 213, 216 (Ala.2002), *overruled on other grounds by Ex parte Seymour,* 946 So.2d 536 (Ala.2006). Additionally,

> "an indictment can be informally 'amended' by actions of the court or of the defendant. The trial court's act of instructing the jury on charges other than those stated in the indictment effects an 'amendment' of the indictment. *Ash v. State,* 843 So.2d at 216."

Wright v. State, 902 So.2d 738, 740 (Ala.2004). With regard to a trial court's jury instructions effectively amending an indictment, we have noted:

> " ' "[A] material variance will exist if the indictment charges an offense committed by one means and the trial court's jury charge addresses a separate *and contradictory means.*" ' *Gibson v. State,* 488 So.2d 38, 40 (Ala.Crim.App.1986)

> (emphasis added). However, '[t]he one apparent exception to this rule of variance where the statute contains alternative methods of committing the offense is where the alternative methods are not contradictory and do not contain separate and distinct elements of proof.' *Id.*"

McCray v. State, 88 So.3d 1, 84 n. 34 (Ala.Crim.App.2010).

[83] Here, Phillips's indictment charged him as follows:

> "The GRAND JURY of [Marshall] county charge that, before the finding of this INDICTMENT, JESSIE LIVELL PHILLIPS, whose name to the Grand Jury is otherwise unknown, did by one act or pursuant to one scheme or course of conduct, intentionally cause the death of ERICA CARMEN PHILLIPS, by shooting her with a pistol, and did intentionally cause the death of BABY DOE, by shooting ERICA CARMEN PHILLIPS with a pistol while the said ERICA CARMEN PHILLIPS was pregnant with BABY DOE, in violation of Section 13A–5–40(a)(10) of the Code of Alabama (1975), as last amended, against the peace and dignity of the State of Alabama."

(C. 24 (capitalization in original).) After charging the jury on the allegations in the indictment, the trial court charged the jury on transferred intent, as follows:

> "In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder."

(R. 766–67.)

Although we question whether Phillips is correct in his contention that his "indictment, as written, required a finding of individualized and specific intent to kill *both* [Erica] *and* [Baby Doe]" (Phillips's brief, p. 82), the trial court's transferred-intent instruction did not amend Phillips's capital-murder indictment because the instruction neither charged a new or different offense nor "address[ed] a separate *and* contradictory means" of proving that offense. Instead, the transferred-intent instruction charged the jury on the same offense as charged in the indictment—murder of two or more persons—and, although it addressed a *different* means of proving that offense, it did not address a *contradictory* means of proving that offense. Thus, no error—much less plain error—occurred.

Penalty–Phase Issues

IX.

***61** Phillips contends that the State engaged in prosecutorial misconduct during the penalty phase of his trial. Specifically, Phillips contends that the prosecution engaged in misconduct when (1) the district attorney "improperly vouched for the State's case by informing the jury that he was there to ensure that justice was done" and explained "that justice could only be achieved through the death penalty, a recommendation *he* did not make 'lightly,' " (Phillips's brief, pp. 88–89 (emphasis in original)); (2) the prosecution "improperly referred to themselves as the victims' representatives" (Phillips's brief, p. 89); (3) the district attorney "improperly denigrated Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance' " (Phillips's brief, p. 90); (4) the district attorney "misstated the law and attempted to shift the burden of proof ... by arguing that the defense

was 'trying to establish' extreme mental or emotional disturbance as a statutory mitigating circumstance but the evidence 'didn't come close to it' " (Phillips's brief, p. 91); (5) the district attorney "misstated the law on aggravation and mitigation, telling jurors if they 'believe the mitigators ... outweigh the aggravators ... the result then becomes life without' " the possibility of parole (Phillips's brief, p. 91 (ellipses in original)); and (6) the district attorney "misrepresented the facts in evidence by telling jurors that Mr. Phillips was 'caught red-handed' and took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell[ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).) At trial, Phillips made no objections to the above-listed statements; thus, we review his claims for plain error only. *See* Rule 45A, Ala. R.App. P.

As set out above:

> " 'While the failure to object will not bar our review of [Phillips's] claims of prosecutorial misconduct, it will weigh against any claim of prejudice that [Phillips] makes on appeal " ' " because of its suggestion that the defense did not consider the comments in question to be particularly harmful." ' " *Ferguson v. State,* 814 So.2d 925, 945 (Ala.Crim.App.2000), aff'd, 814 So.2d 970 (Ala.2001), cert. denied, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002), quoting *Kuenzel v. State,* 577 So.2d 474, 489 (Ala.Crim.App.1990), aff'd, 577 So.2d 531 (Ala.1991).'

"*Calhoun v. State,* 932 So.2d 923, 962 (Ala.Crim.App.2005).

"Also, many of the instances involve challenges to arguments made by the prosecutor in his opening or closing statements.

> " ' "In reviewing allegedly improper prosecutorial argument, we must first determine if the argument was, in fact, improper. If we determine that the argument was improper, the test for review is not whether the comments influenced the jury, but whether they might have influenced the jury in arriving at its verdict." *Smith v. State,* 698 So.2d 189, 202–03 (Ala.Cr.App.1996), aff'd, 698 So.2d 219 (Ala.1997), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997) (citations omitted); *Bush v. State,* 695 So.2d 70, 131 (Ala.Cr.App.1995), aff'd, 695 So.2d 138 (Ala.1997), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997) (citations omitted). "The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright,* 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. *Duren v. State,* 590 So.2d 360, 364 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). "Prosecutorial misconduct is subject to a harmless error analysis." *Bush v. State,* 695 So.2d at 131 (citations omitted); *Smith v. State,* 698 So.2d at 203 (citations omitted).'

***62** "*Simmons v. State,* 797 So.2d 1134, 1161–62 (Ala.Crim.App.1999) (opinion on return to remand). We must view the challenged arguments in the context of the entire trial and not in the abstract. See *Duren v. State,* 590 So.2d 360 (Ala.Crim.App.1990); *Whitlow v. State,* 509 So.2d 252 (Ala.Crim.App.1987). It is proper for a prosecutor to argue any legitimate inference that may be drawn from the evidence. See *Snyder v. State,* 893 So.2d 488 (Ala.Crim.App.2003)."

Belisle, 11 So.3d at 302–03. With these principles in mind, we turn to Phillips's specific claims of penalty-phase prosecutorial misconduct.

A.

[84] Phillips first contends that the State engaged in penalty-phase prosecutorial misconduct when, he says, the prosecutor "improperly vouched for the State's case by informing the jury that he was there to ensure that justice was done" and explained "that justice could only be achieved through the death penalty, a recommendation *he* did not make 'lightly.' " (Phillips's brief, pp. 88–89 (emphasis in original).) According to Phillips, those comments were improper because, he says, it is improper for the prosecutor to "repeatedly tell the jury that he personally believed death was the only appropriate sentence in this case." (Phillips's brief, p. 89.)

The complained-of comments, in context, are as follows:

> "May it please the Court, [and defense counsel.] I don't know about y'all, but I did not have the most restful sleep last night. On your end, you were probably partly thinking about what today is going to be about, understanding that you've already received your verdict. For me, I was kind of laying there thinking what I was going to tell you now. And as I was sort of kind of figuring out what it is that I can tell you to help you in being able to make this decision, I really thought a lot about this idea of justice and what justice is in this case. I don't think for a moment that any of y'all spend your idle time thinking about the concept of justice. I really think that's kind of why y'all have me. That's really my role and that is my function in what y'all have me do for this community.
>
> "But I will tell you that there are some that think of justice as this idea, sort of this word inscribed on some marble-coated building. It really doesn't have any meaning or very cynical about this concept of justice. I think y'all know better. Because those people that don't understand it should have sat in this courtroom over the last couple of days and seen what you've done. Y'all allowed justice to happen through your verdict. Because if you think about what you did, you spoke to find the person responsible for the deaths of Erica and Baby Doe. And that's part of justice is making sure that those who commit crimes against society are held responsible.
>
> "But I will tell you, I think that justice has to go a little bit farther. Because we're not just worried about holding people responsible. It's also about holding people accountable. In the guilt phase you found him responsible. Now I'm asking you for your recommendation to hold him accountable. We're asking you to hold him accountable by recommending death."

***63** (R. 855–56.) Thereafter, the prosecutor discussed with the jury the instructions they would receive from the trial court about weighing aggravating and mitigating factors and then stated:

> "Y'all, I don't tell you for a minute that I'm sitting here saying this is simple. We're talking about the ultimate punishment that our society can give to somebody. I don't sit here and think that you take that responsibility that you're about to do lightly. You shouldn't. And if you do, you shouldn't be sitting there. But I'll also tell you that I don't stand up here today and recommend to you death lightly either. The reason we're about to do that is because, ladies and gentlemen, the aggravator in this case far outweighs anything that you're going to hear in the nature of mitigation."

(R. 858.) The prosecutor then recounted the case to the jury and closed his argument by stating:

> "All of those combined you can consider as it relates to the gravity of the offense. And I submit to you that it's those facts that will dictate your conclusion in this case. I'm going to be quiet for a minute. I get to come back, and I'm going to respond briefly to what [Phillips's counsel] says in the nature of mitigation. We'll see whether or not they've really proven those things. He may argue to you that Mr. Phillips was a loving father who doted on his kids. I don't know. Remember, what I tell you and what he tells you isn't facts, isn't evidence. It's whether or not you believe the testimony of those that you heard testify. This case right now is about accountability. It's about weighing those factors one against one another and then making the decision about what needs to happen. Y'all, I really don't think the choice is even close. When you think about all that you've heard and all the law in this case, I don't think you have but one decision, and that is to recommend to [the trial court] death in this case."

(R. 867.)

In rebuttal to Phillips's closing argument, the prosecutor argued:

> "The factors that I agree they've proved, y'all, come nowhere close to the gravity of this offense. The weight of those aggravating factors far exceeds anything in the nature of mitigation. You are not sitting there and voting about whether or not you believe the death penalty is appropriate in this case. Your vote is whether or not the aggravator outweighs the mitigator, and that dictates what your vote should be. I submit to you that you only have one choice, and that is this group recommend death."

(R. 878.)

In *Vanpelt v. State,* 74 So.3d 32 (Ala.Crim.App.2009), we addressed similar comments, holding:

> "In our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate. *See Hall v. State,* 820 So.2d 113, 143 (Ala.Crim.App.1999). On the other hand, it is impermissible for a prosecutor to urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. *See Guthrie [v. State*], 616 So.2d [914] at 931–32 [(Ala.Crim.App.1993)] (holding that a prosecutor's statement that " '[w]hen I first became involved in this case, from the very day, the State of Alabama, the law enforcement agencies and everybody agreed that this was a death penalty case, and we still stand on that position' " improperly '[led] the jury to believe that the whole governmental establishment had already determined that the sentence should be death and [invited] the jury to adopt the conclusion of others, ostensibly more qualified to make the determination, rather than deciding on its own').
>
> ***64** "When the prosecutor's comments are viewed in context, it is clear that he was properly arguing in favor of a sentence of death and properly reminding the jury of the gravity of its penalty-phase role. For instance, in stating that, 'if this case does not call for the death penalty, what does,' the prosecutor was properly arguing that a death sentence is appropriate and appealing to the jury to do justice. *See Hall,* 820 So.2d at 143. Also, the prosecutor's comment that his office does not seek a death sentence lightly was not an improper request for the jury to ignore its penalty-phase duty. Instead, this comment merely reminded the jury of the gravity of its penalty-phase decision by informing the jury that in making its penalty phase decision it has an awesome responsibility—one that the State does not lightly ask a jury to shoulder. *Cf. Fox v. Ward,* 200 F.3d 1286, 1300 (10th Cir.2000) (holding that a 'prosecutor['s] [comment to] the jury that he did not undertake the decision to seek the death penalty lightly, and pointed to the different elements that went into making his decision[, was] a permissible line of commentary').
>
> "Because the prosecutor's comments did not urge the jury to ignore its penalty-phase role, Vanpelt has not established that these comments were improper or that they so infected the trial with unfairness that Vanpelt was denied due process. *See Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Therefore, Vanpelt has failed to show that plain error occurred and is not entitled to any relief."

74 So.3d at 91–92.

Likewise, here, the prosecutor's comments regarding "justice" and that he did not recommend the death penalty "lightly" were not, as Phillips contends, improper. Moreover, those comments did not so infect the trial with unfairness to deny Phillips due process. Thus, there was no error—much less plain error—and Phillips is due no relief on this claim.

B.

[85] Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecution "improperly referred to themselves as the victims' representatives." (Phillips's brief, p. 89.) Specifically, Phillips takes issue with the following comment during the State's penalty-phase opening statement:

> "The best thing I can do right now is actually sit down because there's a lot more for us to talk about in the end. There's no reason for me to talk about that at the moment. But I

> tell you on behalf of the prosecutors and the family and law enforcement, we thank you for what you did yesterday."

(R. 834.)

Although Phillips correctly explains that the State did appear to represent to the jury that it spoke on behalf of the victims' family, " '[w]e have held that it is not reversible error for a prosecutor to suggest that he is speaking on behalf of the victim's family.' *Burgess v. State,* 723 So.2d 742, 754 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998). See also *George v. State,* 717 So.2d 849 (Ala.Cr.App.1997), aff'd, 717 So.2d 858 (Ala.), cert. denied, 525 U.S. 1024, 119 S.Ct. 556, 142 L.Ed.2d 462 (1998)." *Frazier,* 758 So.2d at 604. Thus, there was no error—much less plain error—and Phillips is due no relief on this claim.

C.

***65 [86]** Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecutor "improperly denigrated Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance.' " (Phillips's brief, p. 90.)

The complained-of comment, in context, is as follows:

> "Mr. Phillips's mother got up there and said he was a good and loving father even though she had never met one of the children and the only other one she had seen was at a very, very young age. She wasn't around. She didn't know. She said he loved his kids? Well, he shot their mother right in front of them. That's what kind of father he was. His mother got up there and told you that he really is a loving and kindhearted man. Based upon the nature of this crime, you figure out whether or not you think that's true.
>
> "She got up there—and I don't pretend to know what she's feeling as well—and she begged you to spare his life in the nature of a recommendation of life without. I can guarantee you [Erica's mother] would have liked to have got up in front of [Phillips] when he had that gun pointed at her daughter and unborn grandchild and said the same thing to him, but she didn't get that chance. They're asking for mercy. I ask you to give him as much mercy as [he] showed Erica and Baby Doe."

(R. 877–78.)

Contrary to Phillips's assertion on appeal, the prosecutor's comment, when viewed in context, did not "denigrate[ ] Mr. Phillips's procedural rights by telling the jury that [his] mother 'begged you to spare his life' but [Erica's] mother 'didn't get that chance' " (Phillips's brief, p. 90); rather, it was nothing more than an argument that Phillips's mitigation evidence and plea for mercy should be given no weight and that the jury should sentence Phillips to death.

We have explained that

> " ' "[a] prosecutor may present an argument to the jury regarding the appropriate weight to afford the mitigating factors offered by the defendant." ' *Vanpelt v. State,* 74 So.3d 32, 90 (Ala.Crim.App.2009) (quoting *Malicoat v. Mullin,* 426 F.3d 1241, 1257 (10th Cir.2005)). That is, 'the prosecutor, as an advocate, may argue to the jury that it should give the defendant's mitigating evidence little or no weight.' *Mitchell [v. State*], 84 So.3d [968]at 1001 [(Ala.Crim.App.2010)]. *See also State v. Storey,* 40 S.W.3d 898, 910–11 (Mo.2001) (holding that no error resulted from the prosecutor's characterization of mitigation as excuses because the 'State is not required to agree with the defendant that the evidence offered during the penalty phase is sufficiently mitigating to preclude imposition of the death sentence[, and] the State is free to argue that the evidence is not mitigating at all')."

McCray, 88 So.3d at 49. Thus, no error occurred, and Phillips is not entitled to relief on this claim.

D.

[87] Phillips contends that the State engaged in prosecutorial misconduct when, he says, the prosecutor misstated both the law and the facts in this case. Specifically, Phillips argues that the prosecutor "misstated the law and attempted to shift the burden of proof ... by arguing that the defense was 'trying to establish' extreme mental or emotional disturbance as a statutory mitigating circumstance but the evidence 'didn't come close to it' " (Phillips's brief, p. 91); "misstated the law on aggravation and mitigation, telling jurors if they

'believe the mitigators ... outweigh the aggravators ... the result then becomes life without' " the possibility of parole (Phillips's brief, p. 91 (ellipses in original)); and "misrepresented the facts in evidence by telling jurors that Mr. Phillips was 'caught red-handed' and took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell [ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).)

***66 [88] [89]** We first address Phillips's contention that the State engaged in misconduct by misstating the law in its penalty-phase argument. Even assuming that the State did, in fact, misstate the law during its penalty-phase argument, Phillips is not entitled to relief on his claims. Indeed, this Court has explained that no plain error occurs if a prosecutor misstates the law and, thereafter, the trial court properly advises the jury that its sentencing determination should be based on the law provided to it by the trial court and the trial court provides complete instructions to the jury as to the complained-of misstatements of law. *See, e.g., Taylor v. State,* 808 So.2d 1148, 1187 (Ala.Crim.App.2000) ("We note that the trial court properly advised the jury that the arguments of counsel were not to be considered as evidence and instructed the jury to disregard any argument not supported by the court's instructions on the law, and subsequently gave complete instructions on the law of corroboration of an accomplice's testimony. (R. 1389–92; 1482–83.) The jury is presumed to abide by the trial court's instructions. Thus, we cannot say that the prosecutor's argument concerning corroboration 'so infected the trial with unfairness ... that the appellant was denied due process.' *Jenkins v. State,* 627 So.2d 1034, 1050 (Ala.Cr.App.1992), aff'd, 627 So.2d 1054 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1388, 128 L.Ed.2d 63 (1994). There is no plain error here.").

Here, the trial court instructed the jury that its sentencing "determination should be based solely on the evidence presented and the law as [it] ha[s] explained it to you." (R. 886.) Additionally, the trial court properly instructed the jury regarding the penalty-phase burden of proof as to mitigation. Specifically, the trial court instructed the jury:

> "The defendant is allowed to offer any evidence in mitigation; that is, the evidence that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without eligibility for parole instead of death. The defendant does not bear a burden of proof in this regard. All the defendant must do is simply present the evidence in mitigation.
>
> "....
>
> "If the factual existence of any evidence offered by the defendant is in dispute, the State shall have the burden of proving or disproving the factual existence of the disputed mitigation evidence by a preponderance of the evidence."

(R. 883–85.) Additionally, the trial court properly instructed the jury regarding the weighing of aggravating and mitigating circumstances as follows:

> "The law also provides that the punishment that should be imposed upon the defendant depends on whether any aggravating circumstances exist beyond a reasonable doubt; and if so, whether the aggravating circumstances outweigh the mitigating circumstances."

(R. 881.) The trial court also instructed the jury as follows:

> "The process of weighing aggravating circumstances and mitigating circumstances against each other is not a mathematical process. In other words, you do not merely count the total number of aggravating circumstances and compare that to the total number of mitigating circumstances. The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might outweigh a large number of mitigating circumstances. The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might not outweigh one or even a few mitigating circumstances."

***67** (R. 886.)

Because the trial court properly and completely instructed the jury as to burden of proof and the weighing of aggravating and mitigating circumstances, and because "[t]he jury is presumed to abide by the trial court's instructions [ ] ..., we cannot say that the prosecutor's argument concerning [burden of proof and the weighing of aggravating and mitigating circumstances] 'so infected the trial with unfairness ... that [Phillips] was denied due process.' *Jenkins v. State,* 627 So.2d 1034, 1050 (Ala.Cr.App.1992), aff'd, 627 So.2d 1054 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1388, 128 L.Ed.2d 63 (1994)." *Taylor,* 808 So.2d at 1187. Thus, no plain error occurred.

Phillips also contends that the State engaged in misconduct during its penalty-phase closing argument when it "misrepresented the facts in evidence by telling jurors that Mr. Phillips was 'caught red-handed' and took 'two hours' to give a statement" and "argued that Mr. Phillips 'left the McDonald's,' went to his truck by himself, and got the weapon without 'tell[ing] anybody else what he was doing,' implying that he was forming the specific intent to kill." (Phillips's brief, p. 92 (citation omitted).)

[90] This Court has explained that, " ' "[d]uring closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' " *Reeves v. State,* 807 So.2d 18, 45 (Ala.Crim.App.2000), cert. denied, *Reeves v. Alabama,* 534 U.S. 1026, 122 S.Ct. 558, 151 L.Ed.2d 433 (2001), quoting *Rutledge v. State,* 523 So.2d 1087, 1100 (Ala.Crim.App.1987), reversed on other grounds, *Ex parte Rutledge,* 523 So.2d 1118 (Ala.1988)." *Whatley,* 146 So.3d at 491–92.

[91] Here, the State's argument that Phillips was "caught red-handed" and that Phillips, before he " 'left the McDonald's,' went to his truck by himself and got the weapon without 'tell[ing] anybody else what he was doing,' " are legitimate inferences based on the facts presented at trial. Indeed, the State's evidence demonstrated that Billy watched Phillips shoot Erica-in other words, he was caught in the act. Further, according to Phillips's own statement, before he left the McDonald's restaurant he removed the gun from the glove compartment of Erica's vehicle and put it in his back pocket; nothing in his statement indicated that anyone saw him do so. Thus, the State's arguments in this regard were appropriate, and no error—plain or otherwise—occurred.

With regard to the State's argument that Phillips "took 'two hours' to give a statement" (Phillips's brief, p. 92), that argument occurred during the State's penalty-phase closing argument and, in context, was as follows:

> "What about the crime? We've heard, and I guess [Phillips's counsel] acknowledges this, that there is no justification for what happened, and I submit to you there ain't no explanation either. I'll be curious to see what he says, and maybe I'll talk about that in a minute. But there is no explanation. What it was, is excuses. Got caught red-handed, and then two hours later is giving a statement. What is he doing? Trying to make himself look as good as he can. Y'all heard that statement. Did you ever hear remorse? [Phillips's counsel's] going to say he said it. I want you to ask him where it is, because I didn't hear it, and I sure didn't hear him say I'm sorry. And I never once heard him accept responsibility and say, yeah, that's what I intended to do. He just said I fired the gun. I don't know what I was doing. That ain't accepting responsibility. We already had witnesses, and we knew he did that."

***68** (R. 866.)

Phillips contends that the prosecutor's characterization that "two hours later" Phillips gave a statement is incorrect because, he says, the evidence presented at trial established that "Mr. Phillips drove to the police department [and] *turned himself in* within 15 minutes of the incident." (Phillips's brief, p. 92 (emphasis added).) Contrary to Phillips's argument on appeal, however, the prosecutor's argument was not a reference to how long it took Phillips to turn himself in; rather, it was a reference to how much time had elapsed between the incident and when Phillips gave his statement to Investigator Turner. Examining the prosecutor's comment through the lens of

what he was referencing—that is, the time that had elapsed between the incident and the statement—it appears that the comment may have indeed been incorrect.

[92] Here, the evidence presented at trial did not affirmatively establish the time of day that Erica was shot by Phillips; rather, the evidence established that Phillips, Erica, and Billy drove to the car wash after they ate lunch and that Phillips shot Erica sometime after arriving at the car wash. The evidence presented at trial did, however, establish that Investigator Ware received a telephone call about the shooting at 2:06 p.m. (R. 579) and that Phillips gave his statement to Investigator Turner at 3:06 p.m. (C. 160.)

Although it appears that the prosecutor's argument may have been incorrect, given the uncertainty of when the incident occurred, we cannot say that the prosecutor's comment was improper. In other words, we cannot say that, examining the complained-of argument in the context of the proceedings, "the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *See Belisle, supra.* Indeed, it was undisputed that Phillips turned himself in to law enforcement shortly after the shooting had occurred and that Phillips gave a statement to Investigator Turner in which he confessed to shooting Erica.

Moreover, the prosecutor's argument, when viewed in context, was not an attempt to argue to the jury that it should impose the death penalty because Phillips took two hours to make a statement; rather, the prosecutor was arguing that the jury should disregard Phillips's "cooperation" with law enforcement because Phillips showed no remorse in his statement. Thus, Phillips is not entitled to relief on this claim.

X.

Phillips contends that "the application of the 'two or more persons' capital offense and aggravating circumstance to [him] for shooting [Erica] fails to 'genuinely narrow' the class of death-eligible offenses." (Phillips's brief, p. 65.) Specifically, Phillips argues that he "was eligible for the death penalty and sentenced to death solely because the jury found that he intentionally shot his wife who was six to eight weeks pregnant" and that applying the " 'two or more persons' capital offense and aggravating circumstance to [him] because he intentionally killed *one individual* in the early stages of pregnancy fails to 'genuinely narrow the class of persons eligible for the death penalty' " because, he says, the "intentional killing of a *single individual,* without any other aggravating circumstance, is broader than any of the aggravating circumstances previously created by the legislature and approved by this Court." (Phillips's brief, pp. 65–66 (emphasis added).) Additionally, Phillips argues that he

> ***69** "is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy. The rarity of such sentences indicates that this is not the type of offense that society's evolving standards of decency permit to be punished with death."

(Phillips's brief, p. 66–67.) Because Phillips did not raise these arguments in the trial court, we review his claims for plain error only. *See* Rule 45A, Ala. R.App. P.

[93] **[94]** It is well settled that, "[t]o pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); cf. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)." *Lowenfield v. Phelps,* 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). "[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses ... so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase." *Id.* at 246.

Although it is not clear, it appears that Phillips's argument is premised on his belief that his death sentence was imposed based on an aggravating circumstance that does not exist—namely, "intentionally kill[ing] *one individual* in the early stages of pregnancy." (Phillips's brief, p.

66 (emphasis added).) As explained above, however, Phillips's death sentence was based on the statutory aggravating circumstance of causing the death of *two* persons—Erica and Baby Doe—"by one act or pursuant to one scheme or course of conduct." *See* § 13A–5–49(9), Ala.Code 1975.

Although Phillips correctly explains that one of the persons he killed was an unborn child, as explained in Part I of this opinion, an unborn child is a "person" who, "regardless of viability," can be a "victim of a criminal homicide," *see* § 13A–6–1(a)(3), Ala.Code 1975, and is, therefore, also a "person" under the capital-murder statute. Thus, contrary to Phillips's assertion, his death sentence was imposed under the statutory aggravating circumstance of causing "the death of two or more persons by one act or pursuant to one scheme or course of conduct," *see* § 13A–5–49(9), Ala.Code 1975, which aggravating circumstance the jury unanimously found to exist beyond a reasonable doubt. Thus, Phillips is not entitled to relief on this claim.

Additionally, Phillips argues that he "is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy," which, he says, demonstrates "that this is not the type of offense that society's evolving standards of decency permit to be punished with death." (Phillips's brief, pp. 66–67.) This claim is without merit.

***70** Although Phillips's assertion that he is the only person on death row for intentionally killing a pregnant woman may be correct, [14] as stated above, Phillips's death sentence was imposed not because he intentionally killed a pregnant woman, but because he killed two people pursuant to one act. Even if a death sentence for killing a pregnant woman is rare, a death sentence for killing two or more persons pursuant to one act is not. *See, e.g., Stephens,* 982 So.2d at 1147–48, *rev'd on other grounds, Ex parte Stephens,* 982 So.2d 1148 (Ala.2006). *See also Shaw,* —— So.3d at ——; *Reynolds v. State,* 114 So.3d 61 (Ala.Crim.App.2010); and *Hyde v. State,* 13 So.3d 997 (Ala.Crim.App.2007). Thus, Phillips is not entitled to relief on this claim.

XI.

Phillips contends that "the jury considered non-statutory aggravation in sentencing [him] to death" (Phillips's brief, p. 67) because, he says, the trial court "failed to instruct the jury that it 'may not consider any aggravating circumstances other than the [two or more persons] aggravating circumstance[ ] on which I have instructed you.' " (Phillips's brief, p. 68.) Additionally, Phillips contends that the State "exacerbated this error by arguing non-statutory aggravation to the jury during closing arguments, including that the jury should sentence ... Phillips to death to help deter crime and to protect domestic violence victims." (Phillips's brief, p. 68.)

Phillips did not object to the trial court's penalty-phase instructions or to the State's comments during its penalty-phase closing argument; consequently, we review Phillips's argument for plain error. *See* Rule 45A, Ala. R.App. P.

[95] First, with regard to the trial court's instruction on aggravating circumstances, although Phillips correctly explains that the trial court "failed to instruct the jury that it 'may not consider any aggravating circumstances other than the [two or more persons] aggravating circumstance [ ] on which I have instructed you,' " the trial court's instruction on aggravating circumstances was not improper. Moreover, that instruction did not allow the jury to consider nonstatutory aggravating circumstances.

Specifically, during its penalty-phase instructions the trial court explained to the jury the following:

> "An aggravating circumstance is a circumstance specified by law that indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment with parole. The issue at this sentencing hearing considers the existence of aggravating and mitigating circumstances which you should weigh against each other to determine the punishment that you recommend.
>
> "Your verdict recommending a sentence should be based upon the evidence that you have heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings. The trial judge must consider your verdict recommending a sentence in making a final decision regarding the defendant's sentence. In other words, I

will consider your recommendation in making my final sentence that I will have to impose.

***71** "The defendant has been convicted of capital murder, namely, the murder of two or more persons by one act or pursuant to one scheme or course of conduct. This offense necessarily includes as an element the following aggravating circumstance as proved by the law of this State. The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

"By law, your verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting, by law, you to consider death as an available punishment. This aggravating circumstance therefore should be considered by you in deciding whether to recommend a sentence of life imprisonment without eligibility for parole or death."

(R. 881–82.) Thereafter, the trial court instructed the jury on statutory and nonstatutory mitigating circumstances.

The trial court's instruction on aggravating circumstances, when viewed in its entirety, properly conveyed to the jury that aggravating circumstances are "specified by law" and that they jury had only one aggravating circumstance to consider when arriving at its sentencing recommendation.

Additionally, this instruction "would not have led to any confusion by the jury as was the case in *Ex parte Stewart,* 659 So.2d [122] at 125–26 [(Ala.1993)], where the Alabama Supreme Court pointed out numerous comments by the trial court referencing other aggravating circumstances for the jury's consideration. Cf. *George v. State,* 717 So.2d 849, 855–56 (Ala.Crim.App.1997) ... (holding that by itself the instruction did not pose any potential confusion to the jury as was the case in *Ex parte Stewart*)." *Johnson v. State,* 120 So.3d 1130, 1186 (Ala.Crim.App.2009). Thus, no error—plain or otherwise —occurred.

[96] Moreover, Phillips's argument that the State "exacerbated this error by arguing non-statutory aggravation to the jury during closing arguments, including that the jury should sentence ... Phillips to death to help deter crime and to protect domestic violence victims" (Phillips's brief, p. 68), is without merit. Indeed, we have recognized that such an argument does not impermissibly urge the jury to consider a nonstatutory aggravating circumstance. Specifically, we have explained:

"The Alabama Supreme Court has stated: '[U]rging the jury to render a verdict in such a manner as to punish the crime, protect the public from similar offenses, and deter others from committing similar offenses is not improper argument.' *Ex parte Walker,* 972 So.2d 737, 747 (Ala.2007), quoting *Sockwell v. State,* 675 So.2d 4, 36 (Ala.Crim.App.1993). We are bound by precedent established by the Alabama Supreme Court and find no error in the prosecution's comment."

Woodward v. State, 123 So.3d 989, 1047 (Ala.Crim.App.2011). Thus, no error—plain or otherwise —occurred.

XII.

***72** Phillips contends that the "jury was incorrectly informed that its penalty phase verdict was merely a recommendation" in violation of *Darden v. Wainwright,* 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); and *Ex parte McGriff,* 908 So.2d 1024 (Ala.2004). (Phillips's brief, p., 95.) Specifically, Phillips argues:

"In the present case, the prosecutor emphasized in closing argument that the jury's verdict was simply a recommendation and that jurors were not 'the executioner.' (*See* R. 857; *see also* R. 831, 860–62, 867, 878.) In addition, the trial court repeatedly informed the jury that its verdict was merely advisory or referred to it as a recommendation. (*See* R. 880, 881, 882, 886, 887, 888, 889.) These comments by the prosecutor and trial court were erroneous, as they 'misle[ ]d the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.' "

(Phillips's brief, p. 95 (some citations omitted).) Phillips neither objected to the State's comments during its opening statement or closing argument, nor did he object to the trial court's penalty-phase instructions. Thus, we review this claim only for plain error. *See* Rule 45A, Ala. R.App. P.

[97] Although Phillips correctly recognizes that both the State and the trial court informed the jury that its penalty-phase verdict was a "recommendation," this Court has consistently held that informing a jury that its penalty-phase role is "advisory" or to provide a "recommendation" is not error.

> "In *Albarran v. State,* 96 So.3d 131 (Ala.Crim.App.2011), this Court wrote:
>
> > " '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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (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 1236 (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.'
>
> ***73** "96 So.3d at 210. Because " '[t]he prosecutor's comments and the trial court's instructions 'accurately informed the jury of its sentencing authority and in no way minimized the jury's role and responsibility in sentencing,' " ' *Hagood v. State,* 777 So.2d 162, 203 (Ala.Crim.App.1998) (quoting *Weaver v. State,* 678 So.2d 260, 283 (Ala.Crim.App.1995)), aff'd in part, rev'd in part on unrelated grounds, *Ex parte Hagood,* 777 So.2d 214 (Ala.1999), Riley is not entitled to any relief as to this claim."

Riley v. State, 166 So.3d 705, 764–65 (Ala.Crim.App.2013). Thus, neither the State nor the trial court misinformed the jury when explaining that its penalty-phase verdict was a recommendation.

[98] Additionally, the State's comment during its penalty-phase opening statements that the jury was not "the executioner" was not a comment that "minimize[d] the jury's role and responsibility in sentencing and [did] not violate the United States Supreme Court's holding in *Caldwell.*" *See Riley,* 166 So.3d at 765. We addressed a similar comment in *Taylor v. State,* 666 So.2d 36 (Ala.Crim.App.1994), as follows:

> "We condemn the prosecutor's comment during his opening remarks at the penalty phase that the jury should not 'personally feel like that [they are] making a decision on someone's life' because that particular comment tends to encourage irresponsibility on the part of the jury in reaching its sentencing recommendation. However, the condemnation in *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), is that '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.' 472 U.S. at 328–29, 105 S.Ct. at 2639. We fully support that principle, yet under Alabama law, the trial judge—not the jury—is the 'sentencer.' '[W]e reaffirm the principle that, in Alabama, the "judge, and not the jury, is the final sentencing authority in criminal proceedings." *Ex parte Hays,* 518 So.2d 768, 774 (Ala.1986); *Beck v. State,* 396 So.2d [645] at 659 [(Ala.1980)]; *Jacobs v. State,* 361 So.2d 640, 644 (Ala.1978), cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979).' *Ex parte Giles,* 632 So.2d 577, 583 (Ala.1993), cert. denied, 512 U.S. 1213, 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994). 'The jury's

verdict whether to sentence a defendant to death or to life without parole is advisory only.' *Bush v. State,* 431 So.2d 555, 559 (Ala.Crim.App.1982), aff'd, 431 So.2d 563 (Ala.1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983). See also *Sockwell v. State,* [675] So.2d [4] (Ala.Cr.App.1993). 'We have previously held that the trial court does not diminish the jury's role or commit error when it states during the jury charge in the penalty phase of a death case that the jury's verdict is a recommendation or an "advisory verdict." *White v. State,* 587 So.2d 1218 (Ala.Cr.App.1990), aff'd, 587 So.2d 1236 (Ala.1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992).' *Burton v. State,* 651 So.2d 641 (Ala.Cr.App.1993).

***74** "Considering the prosecutor's statements in the context of the entire trial, in the context in which those statements were made, and in connection with the other statements of the prosecutor and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard."

Taylor, 666 So.2d at 50–51 (footnote omitted).

Likewise, here, examining the State's comment in this case "in the context of the entire trial, in the context in which [that] statement[ ][was] made, and in connection with the other statements of the [State] and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard." *Id.* at 51. Thus, Phillips is not entitled to relief on this claim.

XIII.

[99] Phillips contends that "double-counting murder of 'two or more persons' at both the guilt phase and the penalty phase violated state and federal law." (Phillips's brief, p. 96.) Phillips's claim has been consistently rejected by both this Court and the Alabama Supreme Court.

Specifically, in *Ex parte Windsor,* 683 So.2d 1042 (Ala.1996), the Alabama Supreme Court explained:

" '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. *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *Ritter v. Thigpen,* 828 F.2d 662 (11th Cir.1987); *Ex parte Ford,* 515 So.2d 48 (Ala.1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988); *Kuenzel v. State,* 577 So.2d 474 (Ala.Cr.App.), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

" 'Moreover, our statutes allow "double-counting" or "overlap" and provide that the jury, by its verdict of guilty of the capital offense, finds the aggravating circumstance encompassed in the indictment to exist beyond a reasonable doubt. See §§ 13A–5–45(e) and –50. "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." § 13A–5–50.'

"*Coral v. State,* 628 So.2d 954, 965–66 (Ala.Cr.App.1992). See also *Burton v. State,* 651 So.2d 641 (Ala.Cr.App.1993). The trial court correctly considered the robbery as an aggravating circumstance."

683 So.2d at 1060. *See also Ex parte Woodard,* 631 So.2d 1065, 1069–70 (Ala.1993); *Ex parte Trawick,* 698 So.2d at 178; *Shanklin,* —— So.3d at ——; *McCray,* 88 So.3d at 74; *McMillan v. State,* 139 So.3d 184, 265–66 (Ala.Crim.App.2010); *Reynolds v. State,* 114 So.3d 61, 157 (Ala.Crim.App.2010); *Morris v. State,* 60 So.3d 326, 380 (Ala.Crim.App.2010); *Vanpelt,* 74 So.3d at 89; *Newton v. State,* 78 So.3d 458 (Ala.Crim.App.2009); *Brown v. State,* 11 So.3d 866, 929 (Ala.Crim.App.2007); *Mashburn v. State,* 7 So.3d 453 (Ala.Crim.App.2007); *Harris,* 2 So.3d at 926–27; *Jones v. State,* 946 So.2d 903, 928 (Ala.Crim.App.2006); *Barber v. State,* 952 So.2d 393, 458–59 (Ala.Crim.App.2005); and *McGowan v. State,* 990 So.2d 931, 996 (Ala.Crim.App.2003). Because "double-counting" is constitutionally permitted and statutorily required, Phillips is not entitled to relief on this claim. *See* § 13A–5–45(e), Ala.Code 1975.

***75** Additionally, to the extent that Phillips argues that "double-counting" fails "to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty," that claim has also been consistently rejected. *See, e.g., McMillan,* 139 So.3d at

266 ("Although McMillan argues that the use of robbery as an aggravating circumstance at sentencing and as aggravation at the guilt phase resulted in the arbitrary imposition of the death penalty because it failed to narrow the class of cases eligible for the death penalty, this issue has also been determined adversely to McMillan."); and *McGowan,* 990 So.2d at 996 (finding that the argument that "double-counting fail[s] to narrow the class of cases eligible for the death penalty" has "been repeatedly rejected" and citing *Lee v. State,* 898 So.2d 790, 871–72 (Ala.Crim.App.2003); *Smith v. State,* 838 So.2d 413, 469 (Ala.Crim.App.), *cert. denied,* 537 U.S. 1090, 123 S.Ct. 695, 154 L.Ed.2d 635 (2002); *Broadnax v. State,* 825 So.2d 134, 208–09 (Ala.Crim.App.2000), *aff'd,* 825 So.2d 233 (Ala.2001), *cert. denied,* 536 U.S. 964, 122 S.Ct. 2675, 153 L.Ed.2d 847 (2002); *Ferguson v. State,* 814 So.2d 925, 956–57 (Ala.Crim.App.2000), *aff'd,* 814 So.2d 970 (Ala.2001), *cert. denied,* 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002); *Taylor,* 808 So.2d at 1199, *aff'd,* 808 So.2d 1215 (Ala.2001); *Jackson v. State,* 836 So.2d 915, 958–59 (Ala.Crim.App.1999), *remanded on other grounds,* 836 So.2d 973 (Ala.2001), *aff'd,* 836 So.2d 979 (Ala.2002); and *Maples v. State,* 758 So.2d 1, 70–71 (Ala.Crim.App.1999), *aff'd,* 758 So.2d 81 (Ala.1999)). Accordingly, Phillips is not entitled to relief on this claim.

XIV.

[100] Phillips contends that his death sentence "violates state and federal law" because, he says, "it is grossly disproportionate in comparison to similar cases involving murders of pregnant women." (Phillips's brief, p. 97.) To support his position, Phillips cites *Taylor v. State,* 574 So.2d 885 (Ala.Crim.App.1990); *Sanders v. State,* 426 So.2d 497 (Ala.Crim.App.1982); *Shorts v. State,* 412 So.2d 830 (Ala.Crim.App.1981); and *Woods v. State,* 346 So.2d 9 (Ala.Crim.App.1977).

Although Phillips correctly recognizes that, in *Taylor, Sanders, Shorts,* and *Woods,* the "murders of pregnant women" did not result in the imposition of the death penalty, those cases predate the 2006 amendment to § 13A–6–1, Ala.Code 1975.[15] As explained in Part I of this opinion, § 13A–6–1(a)(3), Ala.Code 1975, defines the word "person" for the purpose of determining the "victim[s] of a criminal homicide" to mean a "human being including an unborn child in utero at any stage of development, regardless of viability." *See* § 13A–6–1(a)(3), Ala.Code 1975.

Thus, contrary to Phillips's position, it is not the "murder of a pregnant woman" that subjects him to the imposition of the death penalty; rather, it is the murder of "two or more *persons* " that subjects him to the death penalty. *See* § 13A–5–49(9), Ala.Code 1975. Sentences of death have been imposed for similar crimes in Alabama, and, therefore, his sentence is not "grossly disproportionate" in comparison to similar cases. Indeed, this Court has recognized:

> ***76** "Similar crimes have been punished by death on numerous occasions. See, e.g., *Pilley v. State,* 930 So.2d 550 (Ala.Crim.App.2005) (five deaths); *Miller v. State,* 913 So.2d 1148 (Ala.Crim.App.), opinion on return to remand 913 So.2d 1154 (Ala.Crim.App.2004) (three deaths); *Apicella v. State,* 809 So.2d 841 (Ala.Crim.App.2000), aff'd, 809 So.2d 865 (Ala.2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 706 (2002) (five deaths); *Samra v. State,* 771 So.2d 1108 (Ala.Crim.App.1999), aff'd, 771 So.2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000) (four deaths); *Williams v. State,* 710 So.2d 1276 (Ala.Crim.App.), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998) (four deaths); *Taylor v. State,* 666 So.2d 36 (Ala.Crim.App.), on remand, 666 So.2d 71 (Ala.Crim.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996) (two deaths); *Siebert v. State,* 555 So.2d 772 (Ala.Crim.App.), aff'd, 555 So.2d 780 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990) (three deaths); *Holladay v. State,* 549 So.2d 122 (Ala.Crim.App.1988), aff'd, 549 So.2d 135 (Ala.), cert. denied, 493

> U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (three deaths); *Fortenberry v. State,* 545 So.2d 129 (Ala.Crim.App.1988), aff'd, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990) (four deaths); *Hill v. State,* 455 So.2d 930 (Ala.Crim.App.), aff'd, 455 So.2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984) (three deaths)."

Stephens, 982 So.2d at 1147–48, *rev'd on other grounds, Ex parte Stephens* 982 So.2d 1148 (Ala.2006). *See also Reynolds v. State,* 114 So.3d 61 (Ala.Crim.App.2010); and *Hyde v. State,* 13 So.3d 997 (Ala.Crim.App.2007). Accordingly, Phillips is due no relief on this claim.

XV.

Phillips contends that "evolving standards of decency have rendered unconstitutional Alabama's method of execution under state and federal law." (Phillips's brief, p. 99.) The totality of Phillips's argument on appeal is as follows:

> "Although the Supreme Court in *Baze[v. Rees,* 553 U.S. 35, 51–53, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008)], on the record in that case, upheld Kentucky's lethal injection protocol, Alabama's protocol is not 'substantially similar' to Kentucky's. *Id.* at 61. Instead, Alabama's unreported and undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain and therefore violate evolving standards of decency. *See Arthur v. Thomas,* 674 F.3d 1257 (11th Cir.2012). Mr. Phillips's death sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution."

(Phillips's brief, pp. 99–100 (footnote omitted).) This Court recently rejected an identical argument in *Shanklin,* —— So.3d at ——.

***77** In *Shanklin,* Shanklin argued that,

> " '[a]lthough the Supreme Court upheld Kentucky's lethal injection protocol in *Baze[v. Rees,* 553 U.S. 35, 51–53, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008),] based on the record in that case, Alabama's protocol is not "substantially similar" to Kentucky's. *Id.* at 1537. Alabama's undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain and violate evolving standards of decency.'

"(Shanklin's brief, p. 45.) This claim, however, has been decided adversely to Shanklin.

"In *Gobble v. State,* 104 So.3d 920 (Ala.Crim.App.2010), this Court explained:

> " 'Alabama's method of performing lethal injection, a three-drug protocol, is substantially similar to the one considered by the United States Supreme Court in *Baze v. Rees.*
>
> " 'The Alabama Supreme Court in *Ex parte Belisle,* 11 So.3d 323 (Ala.2008), held that Alabama's method of performing lethal injection does not constitute cruel and unusual punishment. The Court stated:
>
> " ' " '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.' 'Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, —something more than the mere extinguishment of life.' *In re Kemmler,* 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed. 519 (1890). However, as the Supreme Court of the United States recently stated in *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008):
>
> " ' " 'Our cases recognize that subjecting individuals to a risk of future harm—not simply actually inflicting pain—can qualify as cruel and unusual punishment. To establish that such exposure violates

the Eighth Amendment, however, the conditions presenting the risk must be "*sure or very likely* to cause serious illness and needless suffering," and give rise to "sufficiently *imminent* dangers." *Helling v. McKinney,* 509 U.S. 25, 33, 34–35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) (emphasis added). We have explained that to prevail on such a claim there must be a "substantial risk of serious harm," an "objectively intolerable risk of harm" that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Farmer v. Brennan,* 511 U.S. 825, 842, 846, and n. 9, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994).'

" ' "553 U.S. at 49–50, 128 S.Ct. at 1530–31.

" ' "In *Baze,* two death-row inmates challenged Kentucky's use of the three-drug protocol, arguing 'that there is a significant risk that the procedures will not be properly followed—in particular, that the sodium thiopental will not be properly administered to achieve its intended effect—resulting in severe pain when the other chemicals are administered.' 553 U.S. at 49, 128 S.Ct. at 1530. Belisle's claim, like the claims made by the inmates in *Baze,* 'hinges on the improper administration of the first drug, sodium thiopental.' *Baze,* 553 U.S. at 53, 128 S.Ct. at 1533.

***78** " ' "The Supreme Court upheld the constitutionality of Kentucky's method of execution, *Baze,* 553 U.S. at 62–64, 128 S.Ct. at 1538, 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).

" ' "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 338–39. Alabama's method of performing lethal injection is not cruel and unusual.'

"104 So.3d at 977–79."

Shanklin, —— So.3d at ——. Thus, Phillips is not entitled to relief on this claim.

Moreover, Phillips's argument on appeal consists of only a bare allegation that "Alabama's unreported and undeveloped procedures for administering lethal injection pose a substantial risk of inflicting unnecessary pain." (Phillips's brief, pp. 99–100.) Thus,

"[Phillips's] argument fails to take into account the fact that he bears the burden to establish that the State's method of execution constitutes cruel and unusual punishment. *See Harris v. Wright,* 93 F.3d 581, 583 (9th Cir.1996) (recognizing that the appellant bears a heavy burden to establish that his sentence is cruel and unusual); *cf. United States v. Johnson,* 451 F.3d 1239, 1243 (11th Cir.2006) (explaining that the appellant bears the burden to establish that his sentence in disproportionate); *Cole v. State,* 721 So.2d 255, 260 (Ala.Crim.App.1998) (recognizing that the appellant has the burden to establish that a State statute is unconstitutional); *Holmes v. Concord Fire Dist.,* 625 So.2d 811, 812 (Ala.Civ.App.1993) ('The party mounting a constitutional challenge to a statute bears the burden of overcoming a presumption of constitutionality.'). Because [Phillips] bears the burden to establish that lethal injection is unconstitutional and because he has failed to argue why lethal injection is unconstitutional, his argument is without merit.

***79** "Moreover, this Court, in *Saunders v. State,* held that 'lethal injection does not constitute per se cruel and unusual punishment. *See e.g., McNabb v. State,* 991 So.2d 313 (Ala.Crim.App.2007), and cases cited therein.' 10 So.3d 53, 111 (Ala.Crim.App.2007). Further, both the Supreme Court of the United States and the Alabama Supreme Court have held that lethal injection does not constitute cruel and unusual punishment. *Glossip v. Gross,* [No. 14–7955, June 29, 2015] —— U.S. ——, —— (2015) (holding that lethal injection does not violate the Eighth Amendment); *Baze v. Rees,* 553 U.S. 35, 54–56, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (holding that lethal injection does not violate the Eighth Amendment); *Ex parte Belisle,* 11 So.3d 323, 339 (Ala.2008) (holding that lethal injection is not unconstitutional). [Phillips] has not offered this Court any basis upon which to hold that lethal injection is unconstitutional."

Carroll v. State, [Ms. CR–12–0599, Aug. 14, 2015] —— So.3d ——, —— (Ala.Crim.App.2015). Accordingly, Phillips is due no relief on this claim.

Trial Court's Sentencing Order

XVI.

Phillips, in his brief on appeal, contends that the trial court's sentencing order is deficient in several respects. Specifically, Phillips contends that the trial court (1) improperly required a "causal connection between the mitigating circumstances and the offense" (Phillips's brief, p. 54); (2) "repeatedly made erroneous findings of fact" (Phillips's brief, p. 57); (3) "refus[ed] to find and consider uncontested mitigating circumstances surrounding the offense" (Phillips's brief, p. 58); (4) failed "to make specific findings regarding each statutory aggravating and mitigating circumstance" (Phillips's brief, p. 61); (5) "erroneously based [Phillips's] death sentence on a finding that the mitigating circumstances failed to outweigh the aggravating circumstances" (Phillips's brief, p. 63); and (6) "considered non-statutory aggravation in sentencing [him] to death." (Phillips's brief, p. 67.) Phillips did not first raise these objections in the trial court; thus, we review these claims for plain error only. *See* Rule 45A, Ala. R.App. P.

[101] After examining the trial court's sentencing order and Phillips's specific allegations on appeal, we are of the opinion that none of the complained-of deficiencies rise to the level of plain error. We do, however, find that the trial court's sentencing order is flawed in one respect.

Specifically, the trial court's sentencing order does not comply with § 13A–5–47(d), Ala.Code 1975, which provides, in relevant part:

> "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.*"

***80** (Emphasis added.)

[102] **[103]** **[104]** Although Phillips correctly argues that the trial court failed "to make specific findings regarding each statutory aggravating and mitigating circumstance" (Phillips's brief, p. 61), a trial court is not required to do so. *See Scott v. State,* 937 So.2d 1065, 1087 (Ala.Crim.App.2005) ("[T]he trial court need not list and make findings as to each item of alleged nonstatutory mitigation evidence offered by a defendant [.] *Reeves v. State,* 807 So.2d 18, 48 (Ala.Crim.App.2000)."). *See also Morrow v. State,* 928 So.2d 315, 326–27 (Ala.Crim.App.2004). The trial court is required, however, under § 13A–5–47(d), "to 'enter specific written findings concerning the existence or nonexistence of' the statutory and nonstatutory mitigating circumstances contributing to the trial court's determination of the sentence." *Ex parte Mitchell,* 84 So.3d 1013, 1015 (Ala.Crim.App.2011). When a trial court's sentencing order does not clearly articulate the existence or nonexistence of the aggravating and mitigating circumstances, this Court cannot properly perform its duty under § 13A–5–53(b), Ala.Code 1975.

"As this Court stated in *Roberts v. State,* 735 So.2d 1244 (Ala.Crim.App.1997), aff'd, 735 So.2d 1270 (Ala.1999):

" 'In capital cases, it is the duty of this court to independently determine whether the sentence of death is appropriate in a particular case. In order to reach this conclusion, we must reweigh the aggravating circumstances and the mitigating circumstances *as found by the trial court.*'

"735 So.2d at 1269 (emphasis added). See also *Guthrie v. State,* 689 So.2d 935 (Ala.Crim.App.1996), aff'd, 689 So.2d 951 (Ala.1997)."

Morrow, 928 So.2d at 326–27. Thus, "in order for this Court to conduct its review of the death sentence, the trial court must specifically identify in its sentencing order those [statutory and] nonstatutory mitigating circumstances that it did find to exist." *Id.*

Here, the trial court's sentencing order addressed the aggravating and mitigating circumstances as follows: [16]

"*Aggravating Factors:*

"1. CAPITAL MURDER. Intentionally causing the death of Erica Carmen Phillips by shooting her with a pistol, and did intentionally cause the death of Baby Doe, by shooting Erica Carmen Phillips with a pistol while said Erica Carmen Phillips was pregnant with Baby Doe, in violation of Section 13A–5–40(a)(10) of the Code of Alabama 1975.

"This aggravating factor was proven by overwhelming evidence. The Court found this beyond a reasonable doubt to be proven.

"The Court further finds that the policy of this State has recognized an unborn baby to be a life worthy of respect and protection. The founding fathers of this nation recognize all life as worthy of respect and due process of law.

"Jesse Phillips has been provided by the State of Alabama due process of law by *Miranda* warnings, criminal procedure, criminal evidence laws, criminal sentencing guidelines and numerous statutes and outstanding legal representation at all critical stages of this trial.

***81** "The only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court at all stages of this case.

"*Mitigating Factors:*

"1. Jesse Phillips had no significant criminal history. The State did not put on any evidence before the jury or the Court about this factor. Jesse Phillips did have misdemeanor and traffic cases reported in Officer Colvin's report, but these would not be legally admissible in this case. Ala.Code Section 13A–5–51(1).

"2. Jesse Phillips was laboring with emotional disturbance. The only evidence on this issue came from Jesse Phillips'[s] confession to the Guntersville police that he killed Erica 'because he lost it,' that Erica belittled him and at times called him racial names. This evidence was before the jury and the jury gave it what value it may have held. The Court notes that none of the name calling would prove persuasive as to prove extreme or mental disturbance as required by law. Ala.Code Section 13A–5–51(2).

"3. Jesse Phillips lived his early life in a culture of violence, horrible drug addiction of his mother and as a result was removed from his mother by the Alabama Department of Human Resources (DHR). The jury heard this evidence as gave it what weight they desired. This Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result as a factor from a bad childhood.

"4. Jesse Phillips['s] value as a person. Jesse Phillips helped his drug-addicted mother overcome her drug addiction. This is admirable, but not a mitigating factor that negates the actions he took in this case. There is a possibility he might help other inmates in prison with addiction problems as argued by [his counsel], but that still does not balance out against the crime proven here. That Jesse Phillips also has shown love for his children is a noted factor, but he also murdered their mother and unborn sibling while these children were present.

"5. Mercy as a factor. Although not expressly covered by this statute, there is always an issue as to mercy since the beginning of criminal laws as transplanted to the original 13 colonies from the British Isles and Biblical doctrine. The Court and jury were able to recognize the

mercy factor, and the Court notes this factor is always an issue as a non-statutory mitigating factor.

"6. There were no other non-statutory mitigating factors offered or presented for the Court's consideration."

(R. 287–89.)

Although the trial court's sentencing order clearly made a specific finding that one aggravating circumstance exists and that one nonstatutory mitigating circumstance does not "negate the actions [Phillips] took in this case"—i.e., that Phillips helped his mother overcome drug addiction—the trial court's order does not clearly articulate whether the other listed mitigating circumstances were found to exist. Instead, the trial court's order indicates that Phillips presented evidence as to certain other mitigating circumstances, and the trial court determined that those circumstances were either "not admissible in this case," that the jury gave the factor whatever "value" it chose, or that the evidence was simply a "noted factor." Thus, the trial court's order is unclear as to whether the court found the existence or nonexistence of each statutory and nonstatutory mitigating circumstance presented by Phillips. To clarify these ambiguities, we must remand this case to the trial court to enter a new sentencing order that complies with § 13A–5–47(d), Ala.Code 1975. *See Stanley,* 143 So.3d at 315.

***82** Because we must remand this case to the trial court, we also address Phillips's other sentencing-order claims in order to provide the trial court with additional guidance on remand.

Phillips first contends that the trial court's order "repeatedly made erroneous findings of fact." (Phillips's brief, p. 57.) Specifically, Phillips contends that there were three factual errors in the trial court's sentencing order: (1) that Phillips "surrendered himself to the Albertville Police Department about two hours after shooting Erica in the head and leaving the scene of the shooting" (C. 287); (2) that Billy "pleaded with [Phillips] to put down the gun" (C. 286); and (3) that, in his second statement to Investigator Turner, Phillips "stated he knew [Erica] was about three months pregnant with their third child." (C. 287.)

The State, in its brief on appeal, concedes that those statements in the sentencing order were erroneous. Specifically, the State explains:

> "The record at trial indicates that Phillips believed his wife to be approximately eight weeks pregnant; the record indicates that [Billy] tried to buy the gun from Phillips when he saw Phillips with it and that Billy was screaming and running towards them just before Phillips shot [Erica]; and, the State agrees that the record does not clearly show how much time elapsed between the shooting and Phillips surrendering to police."

(State's brief, p. 65.)

[105] Although the above-listed findings of fact in the trial court's sentencing order were erroneous, they did not appear to have, in any way, contributed to the trial court's imposition of the death sentence; thus, those erroneous findings do not rise to the level of plain error. *See, e.g., Luong v. State,* [Ms. CR–08–1219, April 17, 2015] —— So.3d ——, —— (Ala.Crim.App.2015) (opinion on remand from the Alabama Supreme Court) ("It is clear after reading this portion of the circuit court's sentencing order that its reference to a nonexistent report was clearly merely a misstatement that in no way contributed to Luong's sentence of death. 'Factual errors in a sentencing order are subject to harmless error analysis.' *Merck v. State,* 975 So.2d 1054, 1066 n. 5 (Fla.2007). We find no plain error in regard to this claim, and Luong is due no relief on this claim."). Because we must remand this case to the trial court to enter a new sentencing order in compliance with § 13A–5–47(d), however, we also instruct the trial court to correct the above-listed factual errors. *See Daniel v. State,* 906 So.2d 991, 1002 (Ala.Crim.App.2004) (after determining that the trial court's sentencing order was not in compliance with § 13A–5–47(d), this Court also instructed the trial court to correct certain factual errors in its sentencing order).

Phillips also contends that the trial court's finding that "[t]he mitigating factors do not outweigh the aggravating circumstances of killing two or more innocent persons during one course of conduct" (C. 289) was error. (Phillips's brief, p. 63.)

***83 [106]** Section 13A–5–47(e), Ala.Code 1975, explains, in part, that, "[i]n deciding upon the

sentence, the trial court shall determine whether the *aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist.*" (Emphasis added.) Thus, here, the trial court's finding that the mitigating circumstances do not outweigh the aggravating circumstances is incorrect.

This Court has held, however, that, although such a finding is "defective," it is subject to harmless-error analysis. *See Melson v. State,* 775 So.2d 857 (Ala.Crim.App.1999), *aff'd, Ex parte Melson,* 775 So.2d 904 (Ala.2000). *See also Weaver v. State,* 678 So.2d 260, 283 (Ala.Crim.App.1995), *rev'd on other grounds, Ex parte Weaver,* 678 So.2d 284 (Ala.1996). Because we must remand this case to the trial court to enter a new sentencing order in compliance with § 13A–5–47(d), however, we also instruct the trial court to correct this error and to properly weigh the aggravating circumstances and mitigating circumstances in compliance with § 13A–5–47(e), Ala.Code 1975.

[107] Phillips next contends that the sentencing order is deficient because, he says, the trial court improperly required a "causal connection between the mitigating circumstances and the offense." (Phillips's brief, p. 54.) Specifically, Phillips argues:

> "In this case, however, the trial court rejected the mitigating circumstances of the repeated violence and neglect in Mr. Phillips's childhood, solely because Mr. Phillips had not established a causal relationship to the offense. Specifically, the trial court found '[t]his Court has heard hundreds if not thousands of cases of drug abuse, neglect, and domestic violence over the last 20 years, but Capital Murder does not naturally result as a factor from a bad childhood.' (C. 288.) Nowhere in the sentencing order did the trial court consider whether this powerful mitigation offered by Mr. Phillips 'might serve as a basis for a sentence less than death,' *Tennard [v. Dretke],* 542 U.S. [274] at 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 [(2004)]; rather, the court dismissed this evidence outright because the mitigating factors did not 'naturally result' in or cause the offense (C. 285–89)."

(Phillips's brief, p. 55.)

This Court rejected a similar claim in *Stanley v. State,* 143 So.3d 230, 331–32 (Ala.Crim.App.2011) (opinion on remand from the Alabama Supreme Court). Specifically, in *Stanley,* we explained:

"Stanley argues that the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley] committed' (RTR C. 218) conflicts with *Tennard v. Dretke,* 542 U.S. 274, 287, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and *Smith v. Texas,* 543 U.S. 37, 45, 125 S.Ct. 400, 160 L.Ed.2d 303 (2004). We disagree.

"In *Tennard,* the United States Supreme Court addressed a 'threshold "screening test" ' applied by the United States Court of Appeals for the Fifth Circuit to a claim alleging that a particular capital-sentencing scheme provided an inadequate vehicle to consider mitigating evidence under *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (a *'Penry* claim'). Under the Fifth Circuit's test, the court initially determined whether the particular evidence was 'constitutionally relevant'; if the evidence was not 'constitutionally relevant,' the court would not review a *Penry* claim. The United States Supreme Court held that the Fifth Circuit's 'screening test' was unconstitutional. [6]

***84** "In Stanley's case, the trial court's statement that there was 'no credible evidence that any of these factors influenced the commission of the crime [Stanley] committed' is not in conflict with *Tennard* or *Smith.* The trial court's amended sentencing order makes clear that it considered all the evidence offered by Stanley, including his family circumstances, his background, and his behavior since being incarcerated. As discussed above, however, the trial court concluded that this evidence, under the particular circumstances, was not mitigating because (1) Stanley's sisters faced the same difficult family background but went on to live successful lives, and (2) as the mitigation specialist testified, many individuals come from bad family backgrounds but do not commit capital murder. (RTR C. 215.) With that context in mind-i.e., having already determined that those facts were not mitigating in Stanley's case-the trial court later noted that Stanley had not offered any 'credible evidence that any of these factors influenced the commission of the crime [Stanley] committed.' Thus, the trial court's statement, even assuming Stanley's reading of *Tennard* and *Smith* is correct, does not indicate that the trial court applied a 'relevance' test in conflict with *Tennard* or *Smith.*

"

" [6]Specifically, the United States Supreme Court stated:

" 'Despite paying lipservice to the principles guiding issuance of a [certificate of appealability] ..., the Fifth Circuit's analysis proceeded along a distinctly different track. Rather than examining the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on [*Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("*Penry I* ")]:

" ' "In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury.... To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, ... and (2) that the criminal act was attributable to this severe permanent condition.' " [*Tennard v. Cockrell,* 284 F.3d 591, 595 (5th Cir.2002)] (quoting *Davis v. Scott,* 51 F.3d 457, 460–461 (C.A.5 1995)).

" 'This test for "constitutional relevance," characterized by the State at oral argument as a threshold "screening test," ... appears to be applied uniformly in the Fifth Circuit to *Penry* claims.... Only after the court finds that certain mitigating evidence is "constitutionally relevant" will it consider whether that evidence was within " 'the "effective reach" of the jur [y].' " .... In *Tennard v. Cockrell,* [284 F.3d 591 (5th Cir.2002),] the Fifth Circuit concluded that Tennard was "precluded from establishing a *Penry* claim" because his low IQ evidence bore no nexus to the crime, and so did not move on to the "effective reach" question. 284 F.3d at 597.

***85** " 'The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment.'

"542 U.S. at 283–84 (citations omitted). In *Smith,* the United States Supreme Court rejected a similar 'constitutional relevance' test because it 'did not provide the jury with an adequate vehicle for expressing a "reasoned moral response" to all of the evidence relevant to the defendant's culpability.' 543 U.S. at 46 (quoting *Penry v. Johnson,* 532 U.S. 782, 796, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001))."

Stanley, 143 So.3d at 331–32.

Likewise, here, the trial court's finding that "Capital Murder does not naturally result as a factor from a bad childhood" is not error.

[108] Phillips also contends that the trial court erred because, he says, the trial court "refus[ed] to find and consider uncontested mitigating circumstances surrounding the offense." (Phillips's brief, p. 58.) This Court has previously rejected this claim.

Specifically, we have held:

"In *Thompson v. State,* 153 So.3d 84, 189 (Ala.Crim.App.2012), this Court stated:

" ' " 'While *Lockett [v. Ohio,* 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." '

"'*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.").'

***86** "(Emphasis added.)

"....

"Stanley's argument is that a trial court's failure to *find* a mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not *consider* that mitigating evidence. Stanley thus conflates the concept of *considering* mitigating evidence with *finding* that a mitigating circumstance actually exists in a particular case. This argument has been rejected. *See, e.g., Ex parte Hart,* 612 So.2d 536, 542 (Ala.1992) ('*Lockett* does not require that all evidence offered as mitigating evidence be found to be mitigating. *Lockett* provides that a state may not exclude evidence that the defendant claims is mitigating. *This does not mean that all evidence offered by the defendant as mitigating must be found to be mitigating and considered as such in the sentencing process.*' (emphasis added)); *Ex parte Ferguson,* 814 So.2d 970, 976 (Ala.2001); *Ex parte Trawick,* 698 So.2d 162, 177 (Ala.1997); *Ex parte Slaton,* 680 So.2d 909, 924 (Ala.1996); *Spencer,* 58 So.3d at 257."

Stanley, 143 So.3d at 330–31. Thus, Phillips's argument that the trial court must both consider mitigating evidence *and* find that the evidence established a mitigating circumstance is incorrect.

Finally, Phillips contends that the trial court improperly "considered non-statutory aggravation in sentencing [him] to death ." (Phillips's brief, p. 67.) Specifically, Phillips contends that,

"[i]n the 'Aggravating Factors' section of the sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) 'an unborn baby [is] a life worthy of respect and protection' 2) '[t]he founding fathers of this nation recognize[d] all life as worthy of respect and due process of law' and 3) '[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court,' implying that the death penalty would provide 'due process' to the victims."

(Phillips's brief, p. 69.)

[109] Here, contrary to Phillips's assertion, the trial court did not consider nonstatutory aggravating circumstances when it imposed his sentence. Rather, the trial court recognized that there was only one aggravating circumstance—murder of two or more persons by one act—and, thereafter, weighed that aggravating circumstance by commenting on the "clear legislative intent to protect even nonviable fetuses from homicidal acts," *Mack,* 79 So.3d at 610, and the severity of the crime. Such commentary does not amount to the trial court's considering a nonstatutory aggravating factor. *See, e.g., Scott v. State,* 163 So.3d 389, 469 (Ala.Crim.App.2012) ("It is clear that the above comment was a reference to the severity of the murder and was not the improper application of a nonstatutory aggravating circumstance.").

Conclusion

Accordingly, we affirm Phillips's capital-murder conviction. Because, however, "we do not believe the deficiencies in the sentencing order will withstand the rigorous appellate review process," *Hagood v. State,* 777 So.2d 221, 222 (Ala.Crim.App.2000), we remand this case to the trial court for that court to enter a new sentencing order that complies with § 13A–5–47(d), Ala.Code 1975, by making " 'specific written findings concerning the existence or nonexistence of' the statutory and nonstatutory mitigating circumstances and the aggravating circumstances contributing to the trial court's determination of the sentence." *Ex parte Mitchell,* 84 So.3d at 1014. Additionally, on remand, the trial court should address the other issues in its sentencing order we have identified above-specifically, (1) its findings of fact and (2) the weighing of aggravating and mitigating

circumstances. In correcting those deficiencies on remand, no new hearing is required, and the trial court shall take all necessary action to ensure that its new sentencing order be returned to this Court within 42 days from the date of this opinion.

***87** AFFIRMED AS TO CONVICTION; REMANDED WITH INSTRUCTIONS AS TO SENTENCING.

WINDOM, P.J., concurs. WELCH and KELLUM, JJ., concur in the result.

BURKE, J., recuses.

All Citations

--- So.3d ----, 2015 WL 9263812

Footnotes

1 According to Billy, when the "struggle" was going on, his niece was "around" Erica's feet and his nephew was with him.

2 2 *Miranda v. Arizona,* 384 U.S. 486 (1966).

3 3 Investigator Turner conducted two interviews with Phillips. Those interviews were recorded and later transcribed. Both the audio recordings and the transcriptions of those recordings were admitted into evidence at trial as State's Exhibit 19 and 20, respectively; Phillips stipulated to their admission.

4 To protect the anonymity of the jurors in this case, we identify them by their initials.

5 As explained more thoroughly below, the juror questionnaires used in this case could not be provided to this Court by the circuit clerk. Our inability to review these questionnaires, however, does not impact our analysis of this claim.

6 In this case, Phillips was sentenced and gave his notice of appeal on September 6, 2012. On May, 7, 2013, Phillips filed his initial brief on appeal. The State filed its brief on appeal on September 25, 2013. Thus, given the circuit clerk's policy of destroying juror questionnaires after a year, the circuit clerk destroyed the juror questionnaires at issue in this case before the State filed its brief on appeal.

7 Although the circuit clerk's policy does not rise to the level of plain error in this case, under certain circumstances such a policy could rise to the level of plain error. To avoid the possibility of such an error, circuit clerks should create retention policies in compliance with Rule 18.2, Ala. R.Crim. P.

8 To support his disparate-treatment claim, Phillips cites and quotes the juror questionnaires of prospective jurors T.B. and C.F. and compares those questionnaires to "white jurors ... not struck by the State" (Phillips's brief, p. 73); there is no indication in the record on appeal, however, that those comparator jurors were, in fact, white. Moreover, although Phillips cites and quotes the juror questionnaires to support his claim, as explained above, the record on appeal does not include any juror questionnaires in this case, and "this court may not presume a fact not shown by the record and make it a ground for reversal." *Carden v. State,* 621 So.2d 342, 345 (Ala.Crim.App.1992).

9 As explained above, the State introduced, as State's Exhibit 20, transcripts of Phillips's two statements to Investigator Turner. The above-quoted portion of Phillips's statement is taken from those transcripts.

10 In raising this issue in his brief, Phillips also includes allegations of penalty-phase prosecutorial misconduct. We address Phillips's penalty-phase misconduct claims in Part IX of this opinion.

11 The trial court brought J.A. and S.M. into the courtroom and questioned them at separate times. Additionally, these proceedings were conducted outside the presence of the other jurors.

12 Phillips's assertions, at most, demonstrate that he did not have the specific intent to kill Erica. In other words, Phillips's assertions, at most, entitled him to a jury instruction of intentional murder as a lesser—included offense of capital murder —an instruction the trial court did, in fact, give.

13 Notably, although the State requested an instruction on transferred intent, the State consistently argued to the jury that Phillips specifically intended to kill both Erica and Baby Doe. Additionally, the evidence presented by the State was sufficient to establish that Phillips had the specific intent to kill both Erica and Baby Doe. Moreover, it is unclear whether the jury convicted Phillips based on a theory of Phillips's specific intent to kill both Erica and Baby Doe or whether it relied on a theory of transferred intent. Indeed, the jury-verdict form signed by the jury foreperson indicates only that the jury "find[s] the defendant guilty of Capital Murder, the murder of two or more persons by a single act." (C. 134.)

14 Because Phillips's claim is premised on his mistaken belief that his death sentence was imposed for killing "one individual," the accuracy of this statement need not be addressed.

15 "Before its amendment in 2006, this article defined the term 'person' as 'a human being who had been born and was alive at the time of the homicidal act.' § 13A–6–1(2), Ala.Code 1975." *Mack v. Carmack,* 79 So.3d 597, 600 (Ala.2011).

16 Although the indictment in this case identifies Phillips as "*Jessie* Livell Phillips" (*see* C. 24 (emphasis added)), the trial court refers to Phillips as "*Jesse* Phillips" throughout its sentencing order.

EXHIBIT B

2016 WL 6135443
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Jessie Livell Phillips
v.
State of Alabama

CR-12-0197
|
Oct. 21, 2016

Synopsis

Background: Defendant was convicted in the Marshall Circuit Court, No. CC-09-596, capital murder for causing the death of his wife and their unborn child, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 2015 WL 9263812, affirmed conviction but remanded for correction of certain defects in sentencing order. On remand, the Circuit Court conducted new sentencing hearing following which it reimposed death sentence and made new return to Court of Criminal Appeals. Defendant was granted permission for leave to file brief on return to remand.

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

[1] jury's finding that defendant was guilty of capital murder for causing death of his wife and unborn child in same criminal act was jury finding, beyond reasonable doubt, of that aggravating circumstance that made defendant eligible for death penalty;

[2] trial court did not impermissibly require showing of causal connection between mitigating circumstances and killing;

[3] trial court had discretion to determine existence of mitigating circumstances from evidence presented by defendant;

[4] trial court complied with statutory mandate to consider evidence offered in support of nonstatutory mitigating circumstances;

[5] record did not demonstrate that trial court impermissibly found nonstatutory aggravating circumstances;

[6] prosecutor did not urge jury to abdicate its fact-finding role regarding aggravating circumstances that would make defendant eligible for death penalty;

[7] prosecutor was not prohibited from informing jury that its role in determining defendant's eligibility for death penalty was advisory; and

[8] sentence of death was appropriate.

Affirmed.

Appeal from Marshall Circuit Court (CC-09-596)

On Return to Remand

JOINER, Judge.

***1** Jessie Livell Phillips appeals his conviction for one count of capital murder for causing the death of his wife, Erica Phillips ("Erica"), and their unborn child ("Baby Doe") during "one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975. The jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's advisory recommendation and sentenced Phillips to death.

On December 18, 2015, this Court issued an opinion affirming Phillips's conviction but remanding the case to the trial court for that court to address certain defects in its sentencing order. Specifically, we instructed the trial court "to enter a new sentencing order that complies with § 13A–5–47(d), Ala. Code 1975, by making ' "specific written findings concerning the existence or nonexistence of" the statutory and nonstatutory mitigating circumstances and the aggravating circumstances contributing to the trial court's determination of the sentence.' Ex parte Mitchell, 84 So.3d [1013,] 1014 [(Ala. 2011)]." Phillips v. State, [Ms. CR–12–0197, Dec. 18, 2015] ––So.3d ––––, –– (Ala. Crim. App. 2015). Because we remanded this case

to the trial court to issue a new sentencing order, we also instructed that court to address other issues in its order--namely, correcting minor factual errors and setting out the proper standard for weighing the aggravating circumstances and the mitigating circumstances. [1] Id. The trial court made return to this Court on March 9, 2016.

On remand, the trial court conducted another judicial sentencing hearing, at which Phillips, Phillips's counsel, and the State were present. During that hearing the parties addressed, among other things, the scope of this Court's remand instructions and what impact, if any, the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), has on Phillips's case.

Thereafter, on February 12, 2016, the trial court read to Phillips its amended sentencing order. In its amended sentencing order, the trial court explained that the jury, by virtue of its guilt-phase verdict, found that the State had proved one aggravating circumstance beyond a reasonable doubt--specifically, that Phillips had caused the death of two or more persons by one act or pursuant to one scheme or course of conduct--and set out the statutory and nonstatutory mitigating circumstances it found to exist and what weight it applied to each of those mitigating circumstances. Additionally, the trial court explained to Phillips that it had concluded that the aggravating circumstance of intentionally causing the death of two or more persons pursuant to one act "outweigh[ed] any mitigating circumstances determined to exist and considered in this case" (Record on Return to Remand, R. 44), adjudicated Phillips guilty of capital murder, and pronounced in open court that Phillips be sentenced to death.

***2** After the trial court made return to this Court, Phillips, on March 15, 2016, filed in this Court a "motion for leave to file brief on return to remand," which we granted. [2] In his brief on return to remand, Phillips contends: (1) that Phillips's "death sentence must be vacated in light of Ring v. Arizona[, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002),] and Hurst v. Florida"; (2) that the "trial court's requirement of a causal connection between the mitigating circumstances and the offense violates state and federal law"; (3) that the "trial court's refusal to find and consider uncontested mitigating circumstances violated state and federal law"; (4) that the "trial court considered non-statutory aggravation in sentencing [Phillips] to death in violation of state and federal law"; (5) that the "prosecutor improperly asserted that, based on his expertise, this case was a death penalty case, in violation of state and federal law"; and (6) that the "jury was incorrectly informed that its penalty phase verdict was merely a recommendation, in violation state and federal law." We address each of Phillips's issues in turn.

I.

[1] Phillips contends that his "death sentence must be vacated in light of Ring v. Arizona and Hurst v. Florida." (Phillips's brief on return to remand, p. 4.) According to Phillips, "[u]nder the holding in Hurst, Alabama's death penalty scheme is unconstitutional and [his] sentence of death must be vacated" because, he says, (1) "the ultimate decision to sentence a defendant to death is made by a court and not a jury"; (2) "[t]he ultimate determination of whether aggravating circumstances outweigh mitigating circumstances is made by a court and not a jury"; (3) "[f]indings about aggravating circumstances that are necessary to impose death are independently made by a court and not a jury"; and (4) "Hurst overruled precedent previously used to find Alabama's death penalty statute constitutional"-- namely, Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

In State v. Billups, [Ms. CR–15–0619, June 17, 2016] —— So.3d —— (Ala. Crim. App. 2016), this Court addressed the constitutionality of Alabama's capital-punishment scheme in light of Hurst and, in doing so, rejected the arguments Phillips raises in his brief on return to remand. Specifically, in Billups we summarized Hurst as follows:

> "In Hurst, the United States Supreme Court held Florida's capital-sentencing scheme unconstitutional. The Court noted that '[t]he analysis the Ring Court applied to Arizona's sentencing scheme applies equally to Florida's.' Hurst, 577 U.S. at ——, 136 S.Ct. at 621–22. Florida's capital-sentencing scheme as it then existed was similar to Arizona's in that the maximum sentence authorized by a jury verdict finding a defendant guilty of first-degree murder was life imprisonment without the possibility of parole; the defendant became eligible for the death penalty only if the trial court found the

existence of an aggravating circumstance and found that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Although Florida's procedure, unlike Arizona's, included an advisory verdict by a jury recommending a sentence, the Court found this distinction 'immaterial' because a Florida jury ' "does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge [; therefore, a] Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." ' Hurst, 577 U.S. at ——, 136 S.Ct. at 622 (quoting Walton [v. Arizona], 497 U.S. [639] at 648, 110 S.Ct. 3047, 111 L.Ed.2d 511 [(1990)]). The Court reiterated that 'any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" ... must be submitted to a jury,' Hurst, 577 U.S. at ——, 136 S.Ct. at 621 (emphasis added), and concluded that Florida's procedure was unconstitutional because 'the Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death," " Hurst, 577 U.S. at ——, 136 S.Ct. at 622 (quoting former Fla. Stat. § 785.082(1)(a)); '[t]he trial court alone must find "the facts ... [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.' " Hurst, 577 U.S. at ——, 136 S.Ct. at 622 (quoting former Fla. Stat. § 921.141(3).) As in Ring, in which the Court overruled its previous decision in Walton upholding Arizona's capital-sentencing scheme, the Court in Hurst overruled its previous decisions in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), and Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), upholding as constitutional Florida's capital-sentencing scheme 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, 577 U.S. at ——, 136 S.Ct. at 624 (emphasis added).

***3** Billups, —— So.3d at —— (footnote omitted). We further explained:

"Hurst did not ... hold unconstitutional the broad overall structure of Florida's capital-sentencing scheme--a hybrid scheme beginning with a bifurcated capital trial during which the jury first determines whether the defendant is guilty of the capital offense and then recommends a sentence, followed by the trial court making the ultimate decision as to the appropriate sentence. Rather, the Court held that Florida's capital-sentencing scheme was unconstitutional to the extent that it specifically conditioned a capital defendant's eligibility for the death penalty on findings made by the trial court and not on findings made by the jury, which contravened the holding in Ring. The Court emphasized several times in its opinion that Florida's capital-sentencing statutes did not make a capital defendant eligible for the death penalty until the trial court made certain findings. See Former Fla. Stat. § 775.082(1)(a) (2010) ('[A] person who has been convicted of a capital felony shall be punished by death' only 'if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in findings by the court that such person shall be punished by death, otherwise such person shall be punished by life imprisonment and shall be ineligible for parole.' (emphasis added)). And the Court held only that 'Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.' Hurst, 577 U.S. at ——, 136 S.Ct. at 624.

"The Court in Hurst did nothing more than apply its previous holdings in Apprendi[v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),] and Ring to Florida's capital-sentencing scheme. The Court did not announce a new rule of constitutional law, nor did it expand its holdings in Apprendi and Ring. As the State correctly argues, 'Hurst did not add anything of substance to Ring.' (Petitions, p. 6.) The Alabama Supreme Court has repeatedly construed Alabama's capital-sentencing scheme as constitutional under Ring. See, e.g., Ex parte Waldrop, 859 So.2d 1181 (Ala. 2002); Ex parte Hodges, 856 So.2d 936 (Ala. 2003); Ex parte Martin, 931 So.2d 759 (Ala. 2004); Ex parte McNabb, 887 So.2d 998 (Ala. 2004); and Ex parte McGriff, 908 So.2d 1024 (Ala. 2004)...."

Billups, —— So.3d at ——. Thereafter, we analyzed Alabama's capital-sentencing scheme and summarized Hurst's impact on Alabama's capital-sentencing scheme:

"In sum, under Alabama's capital-sentencing scheme, a capital defendant is not eligible for the death penalty unless the jury unanimously finds beyond a

reasonable doubt, either during the guilt phase or during the penalty phase of the trial, that at least one of the aggravating circumstances in § 13A–5–49 exists. Unlike both Arizona and Florida, which conditioned a first-degree-murder defendant's eligibility for the death penalty on a finding by the trial court that an aggravating circumstance existed, Alabama law conditions a capital defendant's eligibility for the death penalty on a finding by the jury that at least one aggravating circumstance exists. If the jury does not unanimously find the existence of at least one aggravating circumstance, the trial court is foreclosed from sentencing a capital defendant to death. If the jury unanimously finds that at least one aggravating circumstance does exist, then the trial court must proceed to determine the appropriate sentence. Although the trial court in Alabama must also make findings of fact regarding the existence or nonexistence of aggravating circumstances, the trial court's findings are not the findings that render a capital defendant eligible for the death penalty, as was the case in Ring and Hurst. Under Alabama law, only a jury's finding that an aggravating circumstance exists will expose a capital defendant to the death penalty.

***4** "Alabama's capital-sentencing scheme, unlike the schemes held unconstitutional in Ring and Hurst, does not '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; accord Ring, 536 U.S. at 609, 122 S.Ct. 2428. Because in Alabama it is the jury, not the trial court, that makes the critical finding necessary for imposition of the death penalty, Alabama's capital-sentencing scheme is constitutional under Apprendi, Ring, and Hurst."

Billups, —— So.3d at ——.

Here, as explained above, the jury found Phillips guilty of one count of capital murder for causing the death of Erica and Baby Doe during "one act or pursuant to one scheme or course of conduct." See § 13A-5-40(a)(10), Ala. Code 1975. That capital offense includes as an element of the offense the aggravating circumstance of "intentionally caus[ing] the death of two or more persons by one act or pursuant to one scheme or course of conduct." See § 13A-5-49(9), Ala. Code 1975. As we explained in Billups:

" 'Many capital offenses listed in Ala. Code 1975, § 13A–5–40, include conduct that clearly corresponds to certain aggravating circumstances found in § 13A–5–49.' Ex parte Waldrop, 859 So.2d at 1188. As noted above, 'any 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.' § 13A–5–45(e). When the capital offense itself includes as an element one of the aggravating circumstances in § 13A–5–49 (often referred to as 'overlap'), the jury will make the finding that an aggravating circumstance necessary for imposition of the death penalty exists during the guilt phase of the trial. In those cases, the maximum sentence a defendant convicted of a capital offense may receive based on the jury's guilty verdict alone is death, and Apprendi, Ring, and Hurst are satisfied because the jury's guilt-phase verdict necessarily includes the finding of an aggravating circumstance necessary for imposition of the death penalty."

—— So.3d at ——.

Thus, in this case, the jury's guilt-phase verdict also established that an aggravating circumstance was proved beyond a reasonable doubt, and the maximum sentence Phillips could receive based on the jury's guilt-phase verdict alone was death. Accordingly, "the jury, not the trial court, ... [made] the critical finding necessary for imposition of the death penalty," and Phillips is not entitled to relief on this claim. See also Ex parte Bohannon, [Ms. 1150640, Sept. 30, 2016] —— So.3d —— (Ala. 2016) (holding that Alabama's capital-sentencing scheme "is consistent with Apprendi, Ring, and Hurst and does not violate the Sixth Amendment" and rejecting the "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").

II.

[2] Phillips contends the trial court's amended sentencing order "improperly required a causal connection between the mitigating circumstances presented by Mr. Phillips and the offense." (Phillips's brief on return to remand, p. 17.) Specifically, Phillips argues:

> ***5** "In the trial court's amended sentencing order ... the trial court rejected the mitigating circumstances of the repeated violence and neglect in Mr. Phillips's childhood, solely because Mr. Phillips had not established a causal relationship to the offense. Specifically, the trial court found '[t]he Court has heard hundreds if not thousands, of cases of drug abuse, neglect, and domestic violence over the last twenty years, but capital murder does not naturally result as a factor from a bad childhood.' (CR. 98.) Nowhere in the amended sentencing order did the trial court consider whether this powerful mitigation offered by Mr. Phillips 'might serve as a basis for a sentence less than death,' Tennard[v. Dretke], 542 U.S. [274] at 288 [124 S.Ct. 2562, 159 L.Ed.2d 384] [(2004)]; rather, the court dismissed this evidence outright because the mitigating factors did not 'naturally result' in or cause the offense. (CR. 98)."

(Phillips's brief on return to remand, pp. 17-18 (footnote omitted; emphasis added).)

This Court in its opinion on original submission rejected Phillips's argument regarding identical language in the trial court's original sentencing order, see Phillips v. State, —— So.3d at —— ("[H]ere, the trial court's finding that 'Capital Murder does not naturally result as a factor from a bad childhood' is not error."). Phillips's reiteration of the claim in his brief on return to remand--that the trial court, in its amended sentencing order, "rejected the mitigating circumstances of the repeated violence and neglect in [his] childhood, solely because [he] had not established a causal relationship to the offense"--is clearly refuted by the record.

Indeed, although Phillips quotes the portion of the trial court's amended sentencing order in which it explained that "capital murder does not naturally result as a factor from a bad childhood," Phillips omits from his argument the sentence that immediately follows the trial court's "naturally results" statement--specifically, the trial court explained that it "finds these mitigating circumstances to exist, and gives this terrible background some weight." (Record on Return to Remand, C. 98 (emphasis added).) Thus, contrary to Phillips's assertion in his brief on return to remand, the trial court did not either "reject" or "dismiss" this mitigating circumstance; it found it to exist and gave it "some weight." Accordingly, Phillips is not entitled to any relief on this claim.

III.

[3] Phillips contends that the trial court, in its amended sentencing order, "improperly refused to find and consider uncontested mitigating circumstances." (Phillips's brief on return to remand, p. 19.) Specifically, Phillips explains:

> "In this case, it was uncontested that the incident occurred during a heated argument (R. 543-44); that, coupled with evidence of Mr. and Mrs. Phillips's emotionally turbulent relationship (C. 190-91), established the statutory mitigating circumstance of 'extreme mental or emotional disturbance.' Ala. Code § 13A-5-51(2). Mr. Phillips said that he and Mrs. Phillips were arguing for most of the day and that their fight became heated when Mrs. Phillips, a white woman, used racial slurs against Mr. Phillips, an African American man. (C. 163, 165-66, 171-72, 177, 178-79.) Mr. Phillips also said that the incident happened quickly and impulsively. (C. 179-80, 185-88.) The State offered nothing to rebut this evidence of Mr. Phillips's emotional distress during the incident. (R. 838.) However, in the trial court's amended sentencing order, the court found that this mitigating circumstance did not exist and refused to consider it. (CR. 96.)"

(Phillips's brief on return to remand, p. 21 (emphasis added).) According to Phillips, "Alabama law ... requires the trial court to consider all relevant mitigating evidence, Ala. Code § 13A-5-52, and provides that once the defendant interjects a mitigating circumstance, if the State does not disprove its factual existence by a

preponderance of the evidence, the sentencer must find it exists." (Phillips's brief on return to remand, p. 20.)

***6** In other words, Phillips contends that, under Alabama law, the trial court was required both (1) to consider the evidence he presented to demonstrate the statutory mitigating circumstance that he killed Erica and Baby Doe while he "was under the influence of extreme mental or emotional disturbance," see § 13A-5-51(2), Ala. Code 1975, and (2) to find that statutory mitigating circumstance to exist.

[4] We rejected this argument in our opinion on original submission and explained that Phillips's argument " 'is that a trial court's failure to find a mitigating circumstance based on certain mitigating evidence necessarily means that the trial court did not consider that mitigating evidence. [Phillips] thus conflates the concept of considering mitigating evidence with finding that a mitigating circumstance actually exists in a particular case. This argument has been rejected.' " Phillips, —— So.3d at —— (quoting Stanley v. State, 143 So.3d 230, 331 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court)).

> "In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the United States Supreme Court held that in a capital case, the sentencer-the trial court in this case--may not 'be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' 438 U.S. at 604, 98 S.Ct. 2954. See also Eddings v. Oklahoma, 455 U.S. 104, 113–14, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that 'the State may not by statute preclude the sentencer from considering any mitigating factor').
>
> "In Thompson v. State, [153] So.3d [84], [189] (Ala. Crim. App. 2012), this Court stated:
>
> > " ' " 'While Lockett [v. Ohio, 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).' "

Stanley v. State, 143 So.3d 230, 330 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court). In other words, under Alabama law, although a trial court is required to consider all evidence proffered as mitigation, a trial court is not required to find that a mitigating circumstance exists simply because evidence is proffered to the trial court in support of that circumstance.

[5] Although Phillips correctly contends that the trial court did not find the statutory mitigating circumstance of "extreme mental or emotional disturbance" to exist, Phillips's assertion that the trial court refused to consider the evidence he presented to establish the statutory mitigating circumstance that he killed Erica while he "was under the influence of extreme mental or emotional disturbance" is clearly refuted by the record.

Here, the trial court, in the section of its amended sentencing order addressing the statutory mitigating circumstances, found:

> "(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. Phillips claims that he was laboring with emotional disturbance. The only evidence on this issue came from his confession to the Guntersville police that he killed Erica 'because he lost it,' and that Erica belittled him and at time called him racial names. The Court notes that none of the name-calling would prove extreme or mental disturbance as required by law. As such, while emotional disturbance was alleged, the Court deems that a mitigating factor for 'extreme mental or emotional disturbance' does not exist and gives this circumstance no weight."

***7** (Record on Return to Remand, C. 96 (emphasis in original).) Thus, contrary to Phillips's assertion in his brief on return to remand, the trial court did, in fact, consider the evidence Phillips proffered to establish the

statutory mitigating circumstance of "extreme mental or emotional disturbance." Although the trial court did not find that statutory mitigating circumstance to exist, it was not required to do so. Thus, Phillips is not entitled to relief on this claim.

[6] Additionally, Phillips contends that, "[e]ven if this evidence [of extreme mental or emotional disturbance] did not rise to the level of a statutory mitigating circumstance, the court was required, under state and federal law, to find and consider the circumstances surrounding the offense as nonstatutory mitigating circumstances." (Phillips's brief on return to remand, pp. 21-22.) In making this argument, Phillips again "conflates the concept of considering mitigating evidence with finding that a mitigating circumstance actually exists in a particular case." Additionally, Phillips incorrectly asserts that, if a trial court does not find evidence offered in mitigation to fall under the purview of one of the enumerated statutory mitigating circumstances, the trial court is required to find that the mitigating evidence is a nonstatutory mitigating circumstance. No such requirement exists.

As explained above, the trial court is required only to consider evidence presented as mitigation and has the discretion to decide whether a particular mitigating circumstance exists and what weight, if any, is to be given to that mitigating circumstance. See Stanley, 143 So.3d at 329 (" 'It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case, the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. Cochran v. State, 500 So.2d 1161 (Ala. Crim. App. 1984), aff'd in pertinent part, remanded on other part, 500 So.2d 1179 (Ala. 1985), aff'd on return to remand, 500 So.2d 1188 (Ala. Cr. App.), aff'd 500 So.2d 1064 (Ala. 1986), cert. denied, 481 U.S. 1033, 107 S.Ct. 1965, 95 L.Ed.2d 537 (1987).' ") (quoting Spencer v. State, 58 So.3d 215, 255 (Ala. Crim. App. 2008) (opinion on return to second remand)).

Here, as explained above, the trial court clearly considered Phillips's proffered mitigation evidence that he killed Erica and Baby Doe "during a heated argument and that Mr. Phillips was in a heightened emotional state triggered by [Erica's] use of racial slurs." (Phillips's brief on return to remand, p. 22.) Indeed, the trial court detailed this evidence when it concluded that it was not a statutory mitigating circumstance. (Record on Return to Remand, C. 96.) Although the trial court did not mention this proffered evidence in the portion of its amended sentencing order addressing Phillips's nonstatutory mitigating circumstances, the trial court was not required to do so.

> "In Ex parte Lewis, 24 So.3d 540 (Ala. 2009), the Alabama Supreme Court stated:
>
> " 'In Clark v. State, 896 So.2d 584 (Ala. Crim. App. 2000), the Court of Criminal Appeals conducted a proper review of a trial court's failure to find that proffered evidence constituted a mitigating circumstance, stating, in pertinent part:
>
> " ' "The sentencing order shows that the trial court considered all of the mitigating evidence offered by Clark. The trial court did not limit or restrict Clark in any way as to the evidence he presented or the arguments he made regarding mitigating circumstances. In its sentencing order, the trial court addressed each statutory mitigating circumstance listed in § 13A–5–51, Ala. Code 1975, and it determined that none of those circumstances existed under the evidence presented. Although the trial court did not list and make findings as to the existence or nonexistence of each nonstatutory mitigating circumstance offered by Clark, as noted above, such a listing is not required, and the trial court's not making such findings indicates only that the trial court found the offered evidence not to be mitigating, not that the trial court did not consider this evidence. Clearly, the trial court considered Clark's proffered evidence of mitigation but concluded that the evidence did not rise to the level of a mitigating circumstance. The trial court's findings in this regard are supported by the record.
>
> ***8** " ' "Because it is clear from a review of the entire record that the trial court understood its duty to consider all the mitigating evidence presented by Clark, that the trial court did in fact consider all such evidence, and that the trial court's findings are supported by the evidence, we find no error, plain or otherwise, in the trial court's findings regarding the statutory and nonstatutory mitigating circumstances."

"896 So.2d at 652–53 (emphasis added).'

"Ex parte Lewis, 24 So.3d at 545. As Lewis and Clark establish, a trial court is not required to make an itemized list of the evidence it finds does not rise to the level of nonstatutory mitigating circumstances."

Stanley, 143 So.3d at 328–29 (Ala. Crim. App. 2011) (opinion on remand from the Alabama Supreme Court).

Here, the trial court was clearly aware of its duty to consider all the mitigating evidence presented by Phillips. Additionally, the trial court, in its amended sentencing order, listed each statutory mitigating circumstance and found only one to exist--that Phillips had no significant criminal history. Although the trial court did not mention all of Phillips's proffered nonstatutory mitigating circumstances in the portion of its amended sentencing order addressing those nonstatutory mitigating circumstances it found to exist, the trial court's "not making such findings indicates only that [the trial court] found the offered evidence not to be mitigating, not that [the trial court] did not consider this evidence." Stanley, 143 So.3d at 329 (internal quotation marks omitted).

[7] Phillips also contends that the trial court "failed to consider additional uncontested" nonstatutory mitigating circumstances, including: (1) that Phillips "turned himself in and fully cooperated with police"; (2) that Phillips "was at the police station no more than fifteen minutes after the incident occurred to turn himself in"; (3) that Phillips "gave two separate statements to the police, the first one less than an hour after the incident occurred, in which he accepted responsibility and answered all of the investigator's questions"; and (4) that Phillips "was exposed to sexual abuse of his sisters when he was a child." (Phillips's brief on return to remand, p. 22.) According to Phillips, "the trial court failed to find, consider, or even list these facts in the amended sentencing order." (Phillips's brief on return to remand, p. 23.)

Although the trial court did not "list" this mitigating evidence in the section of its amended sentencing order addressing nonstatutory mitigating evidence, as set out above, the trial court is not required to do so. Additionally, as explained above, the trial court was not required to "find" this evidence to be mitigating; rather, the trial court was required only to "consider" the evidence.

[8] Here, the record on return to remand clearly demonstrates that the trial court "considered" the above-listed evidence as mitigation. Indeed, at the judicial sentencing hearing conducted on January 13, 2016, Phillips's counsel explained to the trial court what evidence he believed was proffered as mitigation. Specifically, Phillips's counsel explained:

"Phillips had no significant criminal history prior to this point, had a history of gainful employment, and [his] mother also testified that she achieved sobriety in her life because of his support. "Also mitigating that, following this tragic crime, Mr. Phillips turned himself in to police, fully cooperated with the investigation, gave two full statements. He accepted responsibility. That in and of itself is also mitigating."

***9** (Supplemental Record on Return to Remand, R. 19.) Additionally, Phillips's counsel explained that Phillips's "childhood was plagued with repeated neglect; exposure to domestic violence, sexual abuse, and drugs; multiple placements in foster care as young as 12. His mother struggled with substance abuse." (Supplemental Record on Return to Remand, R. 18.) According to Phillips's counsel, although no evidence of sexual abuse was presented to the jury, it was mentioned in the pre-sentence investigation report completed by Jeremy Colvin.

The trial court, in its amended sentencing order, detailed Phillips's cooperation with law enforcement; how quickly Phillips turned himself in to law enforcement; and the facts that Phillips gave statements to law enforcement and took responsibility for the offense. Additionally, the trial court acknowledged that Phillips presented testimony from his mother "who talked of Phillips and his sister being removed from her and her drug problems. Phillips spent a large part of his life in foster care, and, as an adult, he helped his mother get off drugs." (Record on Return to Remand, C. 93.) Furthermore, the trial court explained that neither Phillips nor the State "objected or requested to submit additions to the sentencing investigation report done by Jeremy Colvin, Adult Probation Officer" (Record on Return to Remand, C. 93), which report included a statement that Phillips "was placed in foster care several times due to investigations of sexual abuse [by various family members and non-family members] towards his sisters." (C. 284.)

Before reweighing the aggravating circumstances and the mitigating circumstances in its amended sentencing order, the trial court determined that Phillips's lack of significant criminal history was a statutory mitigating circumstance and gave it "weight"; that Phillips's "terrible background" was a nonstatutory mitigating circumstance and gave it "some weight"; that Phillips helping his mother overcome a drug addiction was a nonstatutory mitigating circumstance and gave it "some weight"; and that it considered "mercy" to be a nonstatutory mitigating circumstance and gave it "weight." Thus, in determining the existence or nonexistence of both statutory and nonstatutory mitigating circumstances, the trial court clearly considered all the evidence presented by Phillips. Accordingly, Phillips is not entitled to any relief on this claim. See Stanley, supra.

IV.

[9] Phillips contends that the trial court, in its amended sentencing order, "improperly considered non-statutory aggravation when sentencing [him] to death." (Phillips's brief, p. 23.) Specifically, Phillips contends that the trial court considered "nonstatutory" aggravating circumstances because, he says,

> "[i]n the 'Aggravating Circumstances' section of the amended sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) 'an unborn baby [is] a life worthy of respect and protection' 2) '[t]he Founding Fathers of this nation recognized all life as worthy of respect and due process of law' and 3) '[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court,' implying that the death penalty would provide 'due process' to the victims. (CR. 95.) None of these facts are listed as permissible aggravating circumstances in Section 13A-5-49[, Ala. Code 1975.]"

(Phillips's brief on return to remand, pp. 24-25.)

Phillips made this precise argument in his brief on original submission, which challenged language in the trial court's original sentencing order that is identical to language in its amended sentencing order. This Court rejected Phillips's claim on original submission. We noted:

***10** "Phillips contends that,

> " '[i]n the "Aggravating Factors" section of the sentencing order, the trial court found that Mr. Phillips deserved the death penalty because: 1) "an unborn baby [is] a life worthy of respect and protection" 2) "[t]he founding fathers of this nation recognize[d] all life as worthy of respect and due process of law" and 3) "[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court," implying that the death penalty would provide "due process" to the victims.'

"(Phillips's brief, p. 69.)

> "Here, contrary to Phillips's assertion, the trial court did not consider nonstatutory aggravating circumstances when it imposed his sentence. Rather, the trial court recognized that there was only one aggravating circumstance-- murder of two or more persons by one act--and, thereafter, weighed that aggravating circumstance by commenting on the 'clear legislative intent to protect even nonviable fetuses from homicidal acts,' Mack[v. Carmack], 79 So.3d [597] at 610 [(Ala. 2011)], and the severity of the crime. Such commentary does not amount to the trial court's considering a nonstatutory aggravating factor. See, e.g., Scott v. State, 163 So.3d 389, 469 (Ala. Crim. App. 2012) ('It is clear that the above comment was a reference to the severity of the murder and was not the improper application of a nonstatutory aggravating circumstance.')."

Phillips, —— So.3d at ——.

Based on the reasons set forth in our opinion on original submission, we again reject Phillips's claim that the trial court considered nonstatutory aggravating circumstances when it sentenced Phillips to death. Accordingly, Phillips is not entitled to any relief on this claim.

V.

[10] Phillips contends that, during the judicial sentencing hearing conducted on remand, "the prosecutor improperly asserted [to the trial court] that, based on his expertise, this case was a death penalty case, in violation of state and federal law." (Phillips's brief on return to remand, p. 25.)

To support his position, Phillips cites Guthrie v. State, 616 So.2d 914 (Ala. Crim. App. 1993), Arthur v. State, 575 So.2d 1165 (Ala. Crim. App. 1990), Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985), United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), and Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Those cases, however, do not stand for the proposition that it is improper for a prosecutor to argue to the trial court that, "based on his expertise," a certain case warrants the death penalty. Those cases, instead, stand for the proposition that

> "[i]n our adversarial system of criminal justice, a prosecutor seeking a sentence of death may properly argue to the jury that a death sentence is appropriate. See Hall v. State, 820 So.2d 113, 143 (Ala. Crim. App. 1999). On the other hand, it is impermissible for a prosecutor to urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. See Guthrie [v. State], 616 So.2d [914] at 931–32 [(Ala. Crim. App. 1993)] (holding that a prosecutor's statement that ' "[w]hen I first became involved in this case, from the very day, the State of Alabama, the law enforcement agencies and everybody agreed that this was a death penalty case, and we still stand on that position" ' improperly '[led] the jury to believe that the whole governmental establishment had already determined that the sentence should be death and [invited] the jury to adopt the conclusion of others, ostensibly more qualified to make the determination, rather than deciding on its own')."

***11** Vanpelt v. State, 74 So.3d 32, 91 (Ala. Crim. App. 2009) (emphasis added). Because the cases Phillips relies on to support his argument prohibit the prosecutor from making certain arguments to the jury and the comments Phillips now contends were inappropriate were made to the trial court, the cases Phillips relies on are inapposite.

[11] Regardless, even if we were to hold that those cases also prohibit a prosecutor from making certain arguments to the trial court (and we do not so hold), Phillips would still not be entitled to any relief on this claim. Indeed, as explained above, those cases hold that, although a prosecutor may argue that a death sentence is appropriate, a prosecutor cannot urge the jury to ignore its penalty-phase role and simply rely on the fact that the State has already determined that death is the appropriate sentence. Here, during the judicial sentencing hearing conducted on January 13, 2016, Phillips's counsel set out for the trial court the mitigating circumstances he alleged would warrant the imposition of a sentence of life imprisonment without the possibility of parole. Thereafter, the following exchange occurred:

> "The Court: Why would this not be--out of the U.S. Supreme Court case Gregg[v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976),] it says capital punishment basically says it should be reserved for the most heinous of capital--of murder cases, basically. Is that not right?
>
> "[Phillips's counsel]: Yes, sir.
>
> "The Court: The worst of the worst, I believe they use the wording in the Supreme Court. Why doesn't this case fit? You said this is not the worst of the worst, this is not that type of case. Tell me why.
>
> "[Phillips's counsel]: There's no question. Your Honor, that in every case where there's murder there's tragedy, and murder is tragic and violent, and that is always true. But the Constitution requires this Court to distinguish between the few cases where the sentence of death is appropriate and the many cases where it's not. And while the shooting death of Mrs. Phillips and her unborn child are undoubtedly tragic, it's simply not one of the most aggravated cases. Even looking solely at Capital Murder cases from Marshall County, this case is not as aggravated as other cases from this county. In Casey McWhorter's case out of Marshall County that defendant conspired to rob an individual. He waited in his house for hours for him to arrive. He crafted a murder weapon out of a rifle, created a homemade silencer, and then him and his co-defendant shot the victim 11 times.
>
> "In Larry Whitehead's case out of Marshall County he sought out a witness who was going to testify against him at an upcoming trial on theft, and he killed him to prevent him from testifying against him at his theft trial.
>
> "In Rick Belisle's case he hid in a store until it closed, and then he beat the store owner to death with a can of peas and a metal pipe. The Court of Criminal Appeals note that she was caused extreme pain in that. Those cases are much more aggravated, and while there's no question that this is a tragic case--it's always a tragic case when murder happens--but you still have to distinguish

between the more heinous crimes and the less, and certainly Mr. Phillips's category is not one of the most heinous crimes deserving death."

***12** (Supplemental Record on Return to Remand, R. 25-28.) In response, the prosecutor argued:

"Judge, I want to go back if I can and deal a little bit with I think in some ways the irony of defendant's counsel argument on whether or not death is appropriate, and especially in comparison to other Marshall County capital cases, some of which this Court sat as a prosecutor and was aware of the factual allegations in those. They draw facts and comparisons from Belisle. They draw facts and comparisons from Whitehead. What I think is interesting, Your Honor, is I don't think they're also telling you that those cases are ones that are appropriate ... for the death penalty. Whitehead is still being litigated. Belisle is still being litigated. And I don't know the [Equal Justice Initiative] and the defendant and appellate counsel in those cases, but in each of those it is being argued that those cases are not appropriate for death. And so to the extent that they are offered in comparison, if that's an admission that those cases should be subject to the death penalty, I'm sure the others would like to know that. But Your Honor, that is not the legal position that they are taking on appeal in those particular cases.

"And as it relates to the gravity of this crime itself. Your Honor, I can think of no more heinous act than to take the life of an unborn child through a bullet to a pregnant mother. It obviously is a result of a circumstance that happened in this case. The Alabama Legislature believed that for capital purposes--or excuse me, for murder purposes that the unborn were due protection. That is obviously an issue that is part of the appeal in this case, and the Alabama Court of Criminal Appeals agreed with this Court that that is appropriately the death of two people, as well as appropriately considered for capital consideration.

"Your Honor, I cannot imagine that you could find a more egregious set of facts than to take the life of a child that never had an opportunity to live. That is the very argument that we presented to the Court at the time we argued it in front of the jury for their advisory verdict. That's the very argument we presented to the Court at the time of sentencing, and that is an argument that I believe this Court weighed heavily in its consideration of the aggravators and mitigators in this case.

"And while I recognize--and this Court has seen the practice of this office-- just because a case is charged capital does not mean we've taken the position that death is appropriate in every one of those cases. This is one that is one of those unique circumstances. In my 14 years plus as District Attorney, this is the first death verdict that we have obtained. Part of the reason for that, your Honor, is the unique circumstances, the egregious circumstances in which these two deaths occurred. This Court is not one that sits idly in its consideration of the gravity of the offense that was imposed. Having practiced before this Court now for close to 20 years, I am well aware that this Court considers its role as a jurist of one of greatest importance, that this Court bends over backwards to make sure that the constitutional protections that apply to a defendant are given even to the point of exceeding those, as you did in your discussion of mercy, as you did even in the nature of having this hearing today. Your Honor, I think that you have fully considered all factors, that you have taken all the testimony that we have offered in this case, both from the State and the defense, that you have independently and prior to this weighed those factors and believe that the aggravating factor, the sole aggravating factor in this case, outweighed the mitigators. And Judge, that is the decision that we're asking you to make today."

***13** (Supplemental Record on Return to Remand, R. 37-41.)

Although Phillips contends that the prosecutor, in the above-quoted argument, "ask[ed] the trial court to consider 'the practice of [the district attorney's] office' and not[ed] that this is the 'first death verdict' that the office ha [d] obtained," and further argued "that Mr. Phillips's case is the one 'unique' case where the prosecutor sought and obtained the death verdict" (Phillips's brief on return to remand, pp. 26-27), the complained-of comments, when viewed in context, are merely arguments as to why the prosecutor believed the death penalty was appropriate in this case and did nothing to urge the trial court to "ignore its penalty-phase role" or to "rely on the fact that [the prosecutor] already determine that death is the appropriate sentence." Accordingly, Phillips is not entitled to any relief on this claim.

VI.

[12] Phillips contends that the State "incorrectly informed [the jury] that its penalty phase verdict was merely a recommendation, in violation of state and federal law." (Phillips's brief on return to remand, p. 27.)

Although this Court has repeatedly rejected such a claim, see, e.g., Albarran v. State, 96 So.3d 131, 210 (Ala. Crim. App. 2011) ("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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (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 1236 (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)."), Phillips contends that the United States Supreme Court's decision in Hurst "makes clear that the jury should not have been informed that its verdict was merely advisory and that Mr. Phillips's death sentence cannot rest on this recommendation from the jury." (Phillips's brief on return to remand, p. 29.) As explained in Part I of this opinion, however, Hurst did not invalidate Alabama's capital-sentencing scheme, including the jury's "advisory verdict." Thus, Phillips is not entitled any relief on this claim.

VII.

[13] Pursuant to § 13A–5–53, Ala. Code 1975, this Court is required to address the propriety of Phillips's capital-murder conviction and sentence of death.

As set out above, Phillips was convicted of one count of capital murder for causing the death of his wife, Erica, and their unborn child during "one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975, and the jury unanimously recommended that Phillips be sentenced to death. After receiving a presentence-investigation report and conducting a judicial sentencing hearing, the trial court followed the jury's advisory recommendation and sentenced Phillips to death. On December 18, 2015, however, this Court issued an opinion affirming Phillips's conviction but remanded the case to the trial court for that court to cure certain defects in its sentencing order. In doing so, the trial court conducted a second judicial sentencing hearing during which the trial court read, in open court, its amended sentencing order and explained to Phillips that, after reweighing the aggravating circumstances and the mitigating circumstances, it was sentencing Phillips to death.

***14** The record does not demonstrate that Phillips's death sentence was imposed as the result of the influence of passion, prejudice, or any other arbitrary factor. See § 13A–5–53(b)(1), Ala. Code 1975.

Additionally, the trial court correctly found that the aggravating circumstance outweighed the mitigating circumstances. The trial court, in its amended sentencing order, found one aggravating circumstance to exist--that Phillips caused the death of two or more persons by one act or pursuant to one scheme or course of conduct, see § 13A-5-49(9), Ala. Code 1975--and gave that aggravating circumstance "great weight." (Record on Return to Remand, C. 95.) The trial court then considered each of the statutory mitigating circumstances and found one to exist--that Phillips had no significant history of prior criminal activity, see § 13A-5-51(1), Ala. Code 1975--and gave that statutory mitigating circumstance "weight." (Record on Return to Remand, C. 96.) The trial court also considered the nonstatutory mitigating evidence Phillips presented during the penalty phase of his trial, finding:

> "Jessie Phillips lived his early life in a culture of violence and in the shadow of his mother's horrible drug addiction. As a result, he was removed from his mother by the Alabama Department of Human Resources (DHR). The jury heard this evidence and gave it what weight they desired. The Court has heard hundreds, If not thousands, of cases of drug abuse, neglect, and domestic violence over the last twenty years, but capital murder does not naturally result as a factor from a bad childhood. The Court finds these mitigating circumstances to exist, and gives this terrible background some weight.

> "Phillips also helped his drug-addicted mother overcome her drug addiction. This is admirable, but it is not a mitigating factor that negates the actions he took in this case. There is a possibility he might help other inmates in prison with addiction problems, as trial counsel argued. But that still does not balance the crime proven here. That Phillips has shown love for his children is also a noted factor, but on the other hand, he murdered their mother and unborn sibling while these children were present. The Court finds these mitigating circumstances to exist, and does give this background some weight.
>
> "Finally, although not required, the Court has considered mercy as a nonstatutory mitigating factor. Although not expressly covered by this statute, mercy has always been a consideration of American criminal law, as seen in our jurisprudence's roots in British law and Biblical doctrine. The Court and jury were able to recognize the mercy factor, and the Court notes that this factor is always an issue as a nonstatutory mitigating factor. The Court considers mercy as a nonstatutory mitigating circumstance to exist and has given it weight."

(Record on Return to Remand, 98 (emphasis added).) Thereafter, the trial court weighed the statutory aggravating circumstance and the statutory and nonstatutory mitigating circumstances and concluded that "[t]he aggravating circumstance of killing two or more innocent persons during one course of conduct outweighs any statutory and nonstatutory mitigating circumstance determined to exist and considered in this case." (Record on Return to Remand, C. 99.) Thus, the trial court's amended sentencing order shows that it properly weighed the aggravating circumstances and the mitigating circumstances and that it correctly sentenced Phillips to death. The record supports the trial court's findings.

***15** Additionally, § 13A–5–53(b)(2), Ala. Code 1975, requires this Court to reweigh the aggravating and mitigating circumstances in order to determine whether Phillips's sentence of death is appropriate.

"Section 13A–5–48, Ala. Code 1975, provides:

> " 'The process described in Sections 13A–5–46(e)(2), 13A–5–46(e)(3) and Section 13A–5–47(e) of weighing the aggravating and mitigating circumstances to determine the sentence shall not be defined to mean a mere tallying of aggravating and mitigating circumstances for the purpose of numerical comparison. Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death.'
>
> " '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.' Ex parte Clisby, 456 So.2d 105, 108–09 (Ala. 1984). '[W]hile the existence of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative weight of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party.' Lawhorn v. State, 581 So.2d 1159, 1171 (Ala. Crim. App. 1990).... 'The weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority.' Smith v. State, 908 So.2d 273, 298 (Ala. Crim. App. 2000)."

Stanley, 143 So.3d at 333. As explained above, the trial court gave very little weight to the statutory and nonstatutory mitigating circumstances it found to exist, in light of the aggravating circumstance. We agree with the trial court's findings and, after independently weighing the aggravating circumstances and the mitigating circumstances, this Court holds that Phillips's sentence of death is, in fact, appropriate.

As required by § 13A–5–53(b)(3), Ala. Code 1975, this Court must now determine whether Phillips's sentence is excessive or disproportionate when compared to the penalty imposed in similar cases. In this case, Phillips was convicted of capital murder for causing the death of his wife, Erica, and their unborn child during "one act or pursuant to one scheme or course of conduct," see § 13A-5-40(a)(10), Ala. Code 1975.

> "Similar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So.2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So.2d

1148 (Ala. Crim. App.), opinion on return to remand 913 So. 2d at 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So.2d 841 (Ala. Crim. App. 2000), aff'd, 809 So.2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 706 (2002) (five deaths); Samra v. State, 771 So.2d 1108 (Ala. Crim. App. 1999), aff'd, 771 So.2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000) (four deaths); Williams v. State, 710 So.2d 1276 (Ala. Crim. App.), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998) (four deaths); Taylor v. State, 666 So.2d 36 (Ala. Crim. App.), on remand, 666 So.2d 71 (Ala. Crim. App. 1994), aff'd, 666 So.2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996) (two deaths); Siebert v. State, 555 So.2d 772 (Ala. Crim. App.), aff'd, 555 So.2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990) (three deaths); Holladay v. State, 549 So.2d 122 (Ala. Crim. App. 1988), aff'd, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (three deaths); Fortenberry v. State, 545 So.2d 129 (Ala. Crim. App. 1988), aff'd, 545 So.2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990) (four deaths); Hill v. State, 455 So.2d 930 (Ala. Crim. App.), aff'd, 455 So.2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984) (three deaths)."

***16** Stephens v. State, 982 So.2d 1110, 1147–48 (Ala. Crim. App. 2005), rev'd on other grounds, Ex parte Stephens, 982 So.2d 1148 (Ala. 2006). See also Reynolds v. State, 114 So.3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So.3d 997 (Ala. Crim. App. 2007). Therefore, this Court holds that Phillips's death sentence is neither excessive nor disproportionate.

Lastly, this Court has searched the entire record for any error that may have adversely affected Phillips's substantial rights and has found none. See Rule 45A, Ala. R. App. P.

Accordingly, Phillips's conviction and sentence of death are due to be affirmed.

AFFIRMED AS TO SENTENCING.

Windom, P.J., and Welch, J., concur. Burke, J., recuses himself. Kellum, J., not sitting.

All Citations

--- So.3d ----, 2016 WL 6135443

Footnotes

1 The trial court, in its original sentencing order, found that "[t]he mitigating factors do not outweigh the aggravating circumstances of killing two or more innocent person during one course of conduct." (C. 289.) Section 13A-5-47(e), Ala. Code 1975, explains, however, that "[i]n deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist." (Emphasis added.) Although the trial court's finding was "defective" and subject to harmless-error analysis, this Court, out of an abundance of caution, instructed the trial court to correct this error when it issued its new sentencing order.

2 At the time this case was resubmitted to this Court on return to remand, there existed no mechanism in the Alabama Rules of Appellate Procedure for filing a brief on return to remand. On September 20, 2016, the Alabama Supreme Court adopted Rule 28A, Ala. R. App. P., effective January 1, 2017. The Committee Comments to that rule explain:

"Rule 28A provides a mechanism for the parties to file supplemental briefs when the case has been remanded to the trial court with instructions for the trial court to make findings and to make a return to the appellate court. In an appropriate case, the appellate court may direct that the parties not be permitted to file supplemental briefs.

> "Supplemental briefing is not required in all cases when there has been a remand to the trial court. Unless otherwise directed by the court, the parties need not file supplemental briefs on return to remand if the issues presented by the remand proceedings are adequately covered by the original briefs. It is recommended that, if no supplemental brief (or responsive brief) is to be filed, the party who would be filing the brief notify the appellate court in writing of that fact as soon as possible."

End of Document

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
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February 10, 2017

CR-12-0197 **Death Penalty**

Jessie Livell Phillips v. State of Alabama (Appeal from Marshall Circuit Court: CC09-596)

NOTICE

You are hereby notified that on February 10, 2017, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Tim Riley, Circuit Judge
Hon. Cheryl Pierce, Circuit Clerk
John William Dalton, Attorney
Bryan A. Stevenson, Attorney
Randall S. Susskind, Attorney
Robin Carter Wolfe, Attorney
James Clayton Crenshaw, Asst. Atty. Gen.
Kristi Deason Hagood, Dep. Atty. General

EXHIBIT D

IN THE SUPREME COURT OF ALABAMA

May 18, 2017

1160403

Ex parte Jessie Livell Phillips. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jessie Livell Phillips v. State of Alabama) (Marshall Circuit Court: CC-09-596; Criminal Appeals: CR-12-0197).

ORDER

The Petition for Writ of Certiorari filed by Jessie Livell Phillips on March 27, 2017, having been submitted to this Court,

IT IS ORDERED that the Petition for Writ of Certiorari is GRANTED as to Grounds I, II, V, VI, VII, XIV, XV, XVII, XVIII, XX, XXV, XXVI, and XXVII, and denied as to all other grounds.

The Petitioner may file a brief within fourteen (14) days from the date of this Order. Thereafter, the Respondent may file a brief in accordance with subsection (g)(2) of Rule 39. If the Petitioner or the Respondent chooses not to file a brief, that party must file a waiver of the right to file the brief within the time the brief is due under the appellate rules. See Rule 39(g)(1) and (2), Ala. R. App. P.

The Petitioner may file a reply brief in response to the Respondent's brief within fourteen (14) days of the filing of the Respondent's brief, in accordance with subsection (g)(3) of Rule 39, Ala. R. App. P.

See Rule 39(h), Ala. R. App. P., with regard to oral argument.

PER CURIAM Stuart, C.J., and Bolin, Parker, Murdock, Shaw, Main, Wise, and Bryan, JJ., concur.

IN THE SUPREME COURT OF ALABAMA

May 18, 2017

I, Julia Jordan 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 18th day of May, 2017.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

cc: D. Scott Mitchell
John William Dalton
Steven Marshall
James Clayton Crenshaw
Kristi Deason Hagood

EXHIBIT E

2018 WL 5095002
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

EX PARTE Jessie Livell PHILLIPS
(In re Jessie Livell Phillips
v.
State of Alabama)

1160403
|
October 19, 2018

Synopsis

Background: Defendant was convicted in the Circuit Court, Marshall County, No. CC-09-596, F. Timothy Riley, J., of the capital offense of murder of two or more persons for the intentional killing of his wife and their unborn child by one act or pursuant to one scheme or course of conduct, and defendant was sentenced to death. Defendant appealed. The Court of Criminal Appeals, 2015 WL 9263812, affirmed the conviction and, on return to remand, affirmed the death sentence. Defendant petitioned for writ of certiorari.

Holdings: The Supreme Court, Bolin, J., held that:

as a matter of apparent first impression, defendant could be convicted of the capital offense of murder of two or more persons, despite argument that defendant only intended to kill wife;

as a matter of first impression, the definition of "person" as used in statute defining terms for the homicide statutes, which is a definition that includes unborn children in utero at any stage of development, regardless of viability, is applicable to the capital offense of murder of two or more persons;

state sufficiently established a chain of custody for the urine sample used to conduct the pregnancy test performed as part of wife's autopsy;

admission of testimony by a state medical examiner that the post-killing pregnancy test done on wife returned a positive result did not violate defendant's rights under the Confrontation Clause;

record did not support finding, on plain-error review, a prima facie case of discrimination warranting a remand for a *Batson* hearing;

as a matter of first impression, probative value of an autopsy photograph of dissection of wife's reproductive organs outweighed any inflammatory or prejudicial effect; and

death sentence was not excessive and disproportionate.

Affirmed.

Stuart, C.J., concurred specially and filed opinion, which Main and Wise, JJ., joined.

Parker, J., concurred specially and filed opinion.

Sellers, J., concurred specially and filed opinion.

Petition for Writ of Certiorari to the Court of Criminal Appeals (Marshall Circuit Court, CC-09-596; Court of Criminal Appeals, CR-12-0197)

Opinion

BOLIN, Justice. [1]

***1** Jessie Livell Phillips was convicted in the Marshall Circuit Court of the capital offense of murder of "two or more persons" for the intentional killing of his wife, Erica Phillips, [2] and their unborn child ("Baby Doe") "by one act or pursuant to one scheme or course of conduct." § 13A-5-40(a)(10), Ala. Code 1975. The jury unanimously recommended that he be sentenced to death. Following a sentencing hearing, the trial court accepted the jury's recommendation and sentenced Phillips to death. The Court of Criminal Appeals affirmed Phillips's conviction but remanded the case for the trial court to address certain defects and errors in its sentencing order. Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] —— So.3d —— (Ala. Crim. App. 2015) ("Phillips I").

On remand, the trial court conducted another sentencing hearing during which the parties addressed, among other things, the scope of the Court of Criminal Appeals' remand instructions and what impact, if any, the United States Supreme Court's decision in Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), had on Phillips's case. On return to remand, the Court of Criminal Appeals affirmed Phillips's sentence of death. Phillips v. State, [Ms. CR-12-0197, Oct. 21, 2016] —— So.3d ——, 2015 WL 9263812 (Ala. Crim. App. 2015)(opinion on return to remand) ("Phillips II").

We granted certiorari review as to 13 issues raised in Phillips's petition related to jury instructions on transferred intent and intent and knowledge; the application of § 13A-1-6, Ala. Code 1975, known as "the Brody Act," to the facts of this case; the chain of custody of a urine sample taken during Erica's autopsy and used to conduct a pregnancy test and the requirements of the Confrontation Clause in regard to the sample; the trial court's consideration of nonstatutory aggravating circumstances; the use of peremptory strikes under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); the admission into evidence of an autopsy photograph; the amendment of or material variance from the indictment; the comments that the jury's sentencing verdict was advisory; the "double counting" of capital offenses; and the disparate nature of Phillips's sentencing.

The facts set out in Phillips I are as follows:

> "On February 27, 2009, Phillips, Erica, and their two children met Erica's brother, Billy Droze ('Billy'), at a McDonald's restaurant in Hampton Cove. According to Billy, they all arrived at the McDonald's restaurant at the same time and Phillips and Erica were driving two separate vehicles--Erica was driving a black Ford Explorer Sport Trac truck and Phillips was driving a black Nissan Maxima car. Billy explained that, before that day, he had not seen the Nissan Maxima. Thereafter, Phillips, Billy, Erica, and the two children entered the McDonald's restaurant to eat lunch, and they stayed there for approximately 30 to 45 minutes. While at the restaurant, they decided to all drive to the car wash in Guntersville to visit Erica and Billy's brother, Lance Droze ('Lance'), who was working at the car wash that day.
>
> ***2** "According to Billy, they left the restaurant driving three separate vehicles--Erica drove the truck, Phillips drove the car, and Billy drove his vehicle--and they all arrived at the car wash at the same time. Billy explained that they parked each of their vehicles in three separate car-wash 'bays.' When they arrived at the car wash, Billy saw Lance washing a boat in one of the car-wash bays; he exited his vehicle, walked over to Lance, and told him that they were there to see him. Shortly thereafter, Lance finished washing the boat and hauled it away from the car wash, and Billy walked back to his vehicle.
>
> "According to Billy, as he was walking back to his vehicle, he stopped at the car-wash bay in which Erica's truck was parked. Billy stated that Erica was sitting in the driver's seat of the truck and that Phillips was sitting in the rear-passenger seat 'fiddling with' a gun. (R. 505.) ... Soon after, Billy heard Erica yell, 'Help me, Bill' (R. 504), and he went back to where Erica had parked her truck. According to Billy, he 'got there just in time to see [Phillips] kill her.' (R. 505.)
>
> "Billy explained that he saw Phillips and Erica engaged in a 'struggle.' According to Billy, Phillips had Erica 'in a headlock, pointing [the gun] to her head.' (R. 506.) Although she was able to 'break free' from the headlock, within 'seconds' of her doing so, Phillips fired one shot at Erica. Billy then grabbed his niece and nephew, who were both nearby when the shooting occurred, and Phillips told Billy to 'get out of there.' (R. 506.) Billy then put his niece and nephew in his vehicle and drove to get Lance, who, Billy said, was approximately 100 yards away at the Guntersville Boat Mart returning the boat he had just washed. While putting his niece and nephew in his vehicle, Billy saw Phillips drive off in Erica's truck. Billy told Lance what had happened at the car wash, telephoned for help, and took the children away from the car wash.
>
> "Lance then ran toward the car wash and went over to Erica, who was lying on the ground. According to Lance, Erica was lying on her side with her head on her arm, her left eye was swollen, and there was a lot of blood on the ground. Lance explained that Erica could not speak and was having difficulty breathing. Lance 'held her for a few minutes, and ... noticed she was choking and [then] turned her over.' (R. 540.) Soon after, Doug Ware, an investigator with the Guntersville Police Department, arrived at the car wash and told Lance to move.

"....

"Erica was transported to the emergency room at Marshall Medical Center North ('MMCN'). Joann Ray, the charge nurse on duty in the emergency room, explained that Erica was unresponsive, which Ray described as having 'no spontaneous movement ... [and] no verbal communication.' (R. 644.) Ray further explained that Erica had a very shallow respiration –- 'maybe three to six [breaths] a minute.' (R. 645.) According to Ray, it was determined that Erica needed specialized care-specifically, treatment by a neurosurgeon. Because MMCN did not have a neurosurgeon on duty, Erica was transported to a hospital in Huntsville.

"At some point shortly after the shooting, John Siggers, an agent with the Marshall County Drug Enforcement Unit, and Tim Abercrombie, a sergeant with the Albertville Police Department, were meeting about 'drug unit business' at the Albertville police station. During that meeting, Sgt. Abercrombie received a telephone call from someone with the Guntersville Police Department informing him that they were searching for a homicide suspect and providing Sgt. Abercrombie with a description of both the suspect and the vehicle they believed he was driving. Sgt. Abercrombie then told Agent Siggers that they 'were looking for a black Ford Explorer Sport Trac driven by [Phillips], and it was possibly headed to Willow Creek Apartments on Highway 205.' (R. 549.) Thereafter, both Sgt. Abercrombie and Agent Siggers left the Albertville police station to assist in locating Phillips.

***3** "Almost immediately after leaving the parking lot of the Albertville police station, Agent Siggers saw a black Ford Explorer Sport Trac. Agent Siggers explained that he

> " 'pulled out behind [the vehicle] to run the tag, and as [he] pulled out behind it, [the vehicle] pulled over into the, up against the curb, a parking spot next to Albertville Police Department. At that time, Mr. Phillips step[ped] out of the vehicle.'

"(R. 551.) Agent Siggers explained that Phillips then walked over to the sidewalk 'and stood and looked at [him].' (R. 553.) At that point, Agent Siggers got out of his vehicle with his weapon drawn and Phillips put his hands up, walked toward Agent Siggers, and said, 'I did it. I don't want no trouble.' (R. 553.) Agent Siggers then put Phillips 'up against the hood of his vehicle to put [hand]cuffs on him,' and, while doing so, Phillips told Agent Siggers that the 'gun's in [his] back pocket.' (R. 554.) Agent Siggers then retrieved the gun from Phillips's pocket and 'cleared the weapon.' (R. 555.) According to Agent Siggers, the gun had 'one live round in the chamber and three live rounds in the magazine.' (R. 555.)

"Agent Siggers then walked Phillips to the front door of the Albertville police station and sat him down on a brick retaining wall. Thereafter, Benny Womack, the chief of the Albertville Police Department, walked out and asked Agent Siggers what was going on. Agent Siggers told Chief Womack that Phillips was a 'suspect' in a homicide that had occurred in Guntersville. Phillips, however, interjected and explained to Agent Siggers and Chief Womack that he 'is not a suspect. [He] did it.' (R. 557.) ...

"Investigator [Mike] Turner responded to the car wash to assist Investigator Ware in processing the crime scene. Shortly after arriving, however, Investigator Turner 'found out that [Agent Siggers] had [Phillips] in custody in Albertville.' (R. 619.) Investigator Turner then left the car wash and drove to the Albertville police station. Upon arriving at the Albertville police station, Investigator Turner received from Agent Siggers the gun that had been retrieved from Phillips's pocket. Thereafter, Investigator Turner and Sgt. Abercrombie read to Phillips his Miranda[2] rights, which Phillips waived, and questioned him about the shooting at the car wash.

"During that interview, Phillips explained the following: Sometime before February 27, 2009, Erica had purchased a used Lexus from a car dealership in New Hope. That car, however, did not work properly, and, on February 27, 2009, Phillips and Erica returned to the car dealership to try to get their money back. The owners of the car dealership, however, refused to give them their money back and, instead, offered to exchange the Lexus for a used Nissan Maxima. Phillips explained that, rather than losing money on the Lexus that did not work properly, he agreed to the exchange and took the Nissan Maxima. According to Phillips, Erica was not happy with the exchange and began arguing with him.

"After getting the Nissan Maxima, Erica and Phillips drove to a McDonald's restaurant to meet Billy. Phillips explained that, while eating at the restaurant, Erica continued to argue with him, saying, ' "What the f*** did you get that Maxima for?" "You dumb-ass n*****, I could have just not took nothing and just left the money there and just said f*** it." ' (C. 172.)

***4** "Phillips explained that, after eating at the McDonald's restaurant, he, Billy, and Erica decided to go to the car wash to see Lance. Phillips stated that, before leaving the McDonald's, however, he removed a gun from the glove compartment of Erica's truck and put it in his pocket. Phillips explained that he did so because neither he nor Erica had a permit for the weapon and he did not want her to be in possession of the gun 'in case she got pulled over.' (C. 167.) ...

"According to Phillips, after arriving at the car wash, Erica 'just kept on and kept on and kept on and it just happened.' (C. 168.) Phillips explained that Erica was '[s]till pissed about the Maxima. Still calling [him] "dumb" and "stupid." "You shouldn't have did that." ' (C. 177.) Then, Phillips explained, the following occurred:

> " 'And she's still yelling and cussing and I just said, "Why don't you shut up for a minute and just let it all sink in and calm down and everything." And she just kept cussing and calling me names and--
>
> " '....
>
> " 'Well, I had the pistol in my back pocket from when we left McDonald's.
>
> " '....
>
> " 'I got the pistol in my back pocket. And she just kept on and kept on and kept on and kept on and I just shot her, got in the car and left.
>
> " '[Investigator Turner]: Where were you aiming?
>
> " '[Phillips]: I wasn't really I just pointed and pulled the trigger. I don't--I still don't know where it hit her. I don't --I'm guessing it did hit her because she fell.'

"(C. 178-80.) Phillips explained that, before he shot her, Erica asked, ' "What you going to do with that?" ' (C. 180.) According to Phillips, he did not point the gun at her for a long time; rather, he maintained that he 'pulled the trigger, pointed and shot. Put [the gun] back in [his] pocket, got in the truck and left.' (C. 180.) Phillips also explained that he had to step over Erica's body to get in the truck and leave.

"....

"When asked what the shooting was about, Phillips explained:

> " 'Everything. I mean, you just don't know how it feel to be married to a woman for four years and for the last, I'd say, two years, every day she's bitching at you about something. She called me a n*****. She called me a fa***t. It--I don't know, it just all just added up and I could have found a better way to end it, but--'

"(C. 165.) Additionally, when asked whether he intended to kill Erica, Phillips stated:

> " 'Like I say, when I pulled that gun out and pointed it at her and pulled the trigger, did I want to kill her? No. Did I pull the trigger? Yes.'

"(C. 208-09.)

"The next day--February 28, 2009--Investigator Turner conducted a second interview with Phillips.... Investigator Turner explained to Phillips that Erica had died at approximately 1:00 a.m. and that she had been approximately eight weeks pregnant. Phillips explained that he had learned of the pregnancy a couple of weeks before the shooting when Erica had gone to a doctor who had confirmed that she was pregnant.

"

" [2] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)." Phillips I, —— So.3d at —— (some footnotes omitted).

I. Standard of Review

"This Court reviews pure questions of law in criminal cases de novo." Ex parte Key, 890 So.2d 1056, 1059 (Ala. 2003). Further, " '[u]nder the ore tenus standard of review, we must assume the trial court's factual finding ... was correct, and thus we must uphold the order based on that finding unless the court had before it no credible evidence

to support that finding.' W.D. Williams, Inc. v. Ivey, 777 So.2d 94, 98 (Ala. 2000)." Ex parte Wilding, 41 So.3d 75, 77 (Ala. 2009).

II. Analysis

A. Instruction on Transferred Intent

***5** Phillips argues that the trial court's instruction that he could be convicted of capital murder of "two or more persons" if the jury found he had the specific intent to kill only Erica violates his right to present a defense, to be presumed innocent, to due process, to fair warning, to a fair trial, and to a reliable conviction and sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. Specifically, he contends that the trial court's instruction on "transferred intent" improperly lowered the State's burden of proving each element of capital murder of Baby Doe beyond a reasonable doubt. Phillips asserts that, despite language in the indictment charging that he "intentionally cause[d] the death of Erica Carmen Phillips, by shooting her with a pistol, and did intentionally cause the death of Baby Doe, by shooting Erica Carmen Phillips with a pistol while the said Erica Carmen Phillips was pregnant with Baby Doe," the State requested jury charges that eliminated the requirement that he have the specific intent to kill each victim. " ' "Generally speaking, the standard of review for jury instructions is abuse of discretion." ' " Chambers v. State, 181 So.3d 429, 443 (Ala. Crim. App. 2015)(quoting Arthur v. Bolen, 41 So.3d 745, 749 (Ala. 2010), quoting in turn Pollock v. CCC Invs. I, LLC, 933 So.2d 572, 574 (Fla. Dist Ct. App. 2006)).

The trial court instructed the jury that "the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe." The court also instructed the jury that, "if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder." In addition, the court instructed the jury that it is sufficient if the defendant "is proven beyond a reasonable doubt to have caused the death of an intended victim as well as an unintended victim by a single act." Defense counsel objected to those instructions.

During jury deliberations, the jury sent a note asking specifically if there "ha[s] to be intent to kill 2 people for it to be capital murder" or "is it the result of the murder that the second person was killed without intent." The judge reinstructed the jury that the State was required to prove that Phillips "intended to kill Erica Phillips and also killed an unintended victim." Phillips argues that the instruction on transferred intent diverged from the indictment, the pattern jury instructions, and the law and that it improperly lowered the State's burden to prove each element of the charged offense beyond a reasonable doubt. This Court has not addressed the issue whether the doctrine of transferred intent applies to convict a defendant of capital murder of two or more persons under § 13A-5-40(10), Ala. Code 1975, when the defendant took a single action with intent to harm a single individual but killed both that individual and her unborn child.

This Court agrees with the reasoning of the Alabama Court of Criminal Appeals on this issue. In Phillips I, that court held:

> "Although Phillips correctly contends that 'Alabama law is clear that in order to be guilty of capital murder, a defendant ha[s] to have the specific intent to kill' (Phillips's brief, p. 24), Phillips incorrectly argues that 'Alabama law requires a defendant to have the specific intent to kill each victim.' (Phillips's brief, p. 26 (emphasis added).) Indeed, our caselaw clearly holds otherwise.
>
> "This Court, in Smith v. State, 213 So.3d 108 (Ala. Crim. App. 2000), aff'd in part, rev'd in part on other grounds, and remanded, Ex parte Smith, 213 So.3d 214 (Ala. 2003), addressed this issue.
>
> "Specifically, in Smith, Smith was charged with capital murder for causing the death of two or more persons 'by one act or pursuant to one scheme or course of conduct.' Id. at 124 (quoting § 13A-5-40(a)(10), Ala. Code 1975). On appeal, Smith argued that the trial court's instructions were erroneous because, he said, 'the court's instructions allowed the jury to convict him of having committed the capital offense without finding intent as to two victims.' Id. at 181. This Court rejected that claim, holding:

***6** " 'Section 13A–5–40(b) specifies that murder, as a component of the capital offense, means "murder" as defined in § 13A–6–2(a)(1): "A person commits the crime of murder if ... [w]ith intent to cause the death of another person, he causes the death of that person or another person ...." (Emphasis added.)

" ' "By its language, § 13A–6–2(a)(1) clearly invokes the doctrine of transferred intent in defining the crime of murder. For example, if Defendant fires a gun with the intent to kill Smith but instead kills Jones, then Defendant is guilty of the intentional murder of Jones.

" ' "... Section 13A–5–40(b) refers to § 13A–6–2(a)(1) for the definition of 'murder'; and § 13A–6–2(a)(1) codifies the doctrine of transferred intent in that definition."

" 'Ex parte Jackson, 614 So.2d 405, 407 (Ala. 1993).

"Thus, depending on the facts of a case, it is conceivable that the offense of murder wherein two or more persons are murdered by one act or pursuant to one scheme or course of conduct could arise from the intent to kill one person. The court in Living v. State, 796 So.2d 1121 (Ala. Crim. App. 2000), reckoned with such possibility. In Living the court stated:

" ' "On appeal, ... Living argues that the jury could have found that he intentionally killed Jennifer, but that he did not intend to kill Melissa. Therefore, according to Living, the jury could have found him guilty of murder with regard to Jennifer and guilty of reckless manslaughter with regard to Melissa.

" ' "Under the doctrine of transferred intent, however, if Living intended to kill Jennifer he would be criminally culpable for murder with regard to the unintended death of Melissa. See Harvey v. State, 111 Md. App. 401, 681 A.2d 628 (1996) (the doctrine of transferred intent operates with full force whenever the unintended victim is hit and killed; it makes no difference whether the intended victim is missed; hit and killed; or hit and only wounded). Several jurisdictions have held that the doctrine of transferred intent is applicable when a defendant kills an intended victim as well as an unintended victim. See, e.g., State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000); Ochoa v. State, 115 Nev. 194, 981 P.2d 1201, 1205 (1999); Mordica v. State, 618 So.2d 301, 303 (Fla. Dist. Ct. App. 1993); and State v. Worlock, 117 N.J. 596, 569 A.2d 1314, 1325 (1990).

" ' " "... If Living intended to kill Jennifer, his specific intent would transfer to the killing of Melissa."

" '796 So. 2d at [1131].

" 'Accordingly, the appellant's contention is based on the incorrect assumption that the prosecution is required to prove subjective intent to kill as to each victim: that is not required by law.'

> "Smith, 213 So.3d at 182 (emphasis added; footnote omitted). Thus, contrary to Phillips's argument on appeal, the State is not required to demonstrate that Phillips had the specific intent to kill both Erica and Baby Doe. Rather, the State needed to establish only that Phillips had the specific intent to kill Erica and that Baby Doe died as a result of that one act--regardless of whether Baby Doe was an intended or unintended victim."

Phillips I, ––– So.3d at ––– (final emphasis added).

Phillips argues that the holding in the Alabama Court of Criminal Appeals' opinion on transferred intent conflicts with Ex parte Jackson, 614 So.2d 405 (Ala. 1993). In Jackson, the defendant was indicted for murder made capital because he fired a weapon from outside a motor vehicle in an attempt to kill a person inside the vehicle and caused the death of the unintended victim, who was outside the vehicle. This Court held that the intended victim's location in the vehicle could not be "transferred" to the actual victim's location outside the vehicle so as to elevate the crime to capital murder.

***7** The decision in Jackson, however, concerned the application of the doctrine of transferred intent to § 13A-5-40(a)(17), Ala. Code 1975, which makes capital the offense of murder committed by or through the use of a deadly weapon while the victim is in a vehicle. The Jackson Court reasoned:

"Under the facts alleged in the indictment, Jackson's intent to kill Prickett can certainly be 'transferred' to the conduct that actually resulted in the death of Roberts. However, Prickett's location (in a motor vehicle) cannot be 'transferred' to Roberts so as to elevate the crime to capital murder.

"First, the clear statutory language of § 13A-5-40(a)(17), considered together with § 13A-5-40(b) and § 13A-6-2(a)(1), [Ala. Code 1975,] does not yield that result. Section 13A-5-40(b)[, Ala. Code 1975,] refers to § 13A-6-2(a)(1) for the definition of 'murder'; and § 13A-6-2(a)(1) codifies the doctrine of transferred intent in that definition. However, § 13A-5-40(a)(17) makes a 'murder' capital only when 'the victim is killed in a motor vehicle.' That is, that section defines a factual circumstance rather than merely a state of mind; and that factual circumstance is not present in this case. Prickett was not 'killed' and Roberts was not 'in a motor vehicle.'

"Second, we presume that the Legislature knows the meaning of the words it uses in enacting legislation. Moreover, we are convinced that the Legislature, if it intended § 13A-5-40(a)(17) to apply in this case, knew how to draft a statute to reach that end. In the 1975 death penalty statute, the Legislature made capital a '[m]urder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.' Ala. Code 1975, § 13-11-2(a)(14)(emphasis added). The analogue to that section in the 1981 death penalty statute does not retain that transferred intent provision, and therefore the section would apply only to the murder of the witness intended to be killed. § 13A-5-40(a)(14), Ala. Code 1975. See Joseph A. Colquitt, The Death Penalty Laws of Alabama, 33 Ala. L. Rev. 213, 247 (1982). We conclude, therefore, that had the Legislature intended § 13A-5-40(a)(17) to apply to the facts of Jackson's case, it would have included a transferred intent provision similar to that included in the 1975 act. The judiciary will not add that which the Legislature chose to omit."

Jackson, 614 So.2d at 407.

Phillips, however, is charged, not under § 13A-5-40(a)(17), but under § 13A-5-40(a)(10), Ala. Code 1975, which makes capital the offense of murder of two or more persons without any factual specification about the location of the victim. Thus, the statutes at issue and the facts in Jackson and this case are significantly different. The factual circumstance that makes a murder capital in § 13A-5-40(a)(10) is the murder of two persons. Jackson involved the charge of murder made capital under § 13A-5-40(a)(17), shooting a victim who is inside a vehicle from outside the vehicle, and the death of an unintended victim who was standing outside the vehicle. In this case, Phillips killed both the intended victim and the unborn victim. Thus, Phillips's argument that the reasoning of Jackson is applicable to this case is unavailing.

***8** Phillips also cites a capital case decided by the Texas Court of Criminal Appeals, Roberts v. State, 273 S.W.3d 322, 330-31 (Tex. Crim. App. 2008), in support of his argument that an instruction on transferred intent is not applicable when the charge is the murder of a woman and her unborn child. In Roberts, the court held that transferred intent may be applied to support a charge of capital murder for the death of more than one individual during the same criminal transaction only if there is proof of the intent to kill the same number of persons who actually died. 273 S.W.3d at 329. The Texas court concluded that the evidence was insufficient to show that the defendant specifically intended to kill the unborn child during the same criminal transaction because the defendant did not know the mother was pregnant. 273 S.W.3d at 331. There was no such mistake of fact in Phillips's case. Phillips fired a pistol directly at his pregnant wife knowing that she was pregnant with their child. Under the specific factual circumstances of this case, the evidence demonstrates that Phillips had the specific intent to kill his wife and that this intent transferred to the unborn child.

Phillips's case actually is more analogous to the decision of the Appellate Court of Illinois in People v. Alvarez-Garcia, 395 Ill. App. 3d 719, 344 Ill.Dec. 59, 936 N.E.2d 588 (2009). In Alvarez-Garcia, the defendant murdered a pregnant woman. The baby was delivered posthumously and died a few months later. The State prosecuted the defendant for both murders under a theory of transferred intent. The Illinois appellate court affirmed the conviction, reasoning that the principle that the death of the unintended victim was a natural and

possible consequence of the deliberate shooting of the intended victim under the doctrine of transferred intent "is unaffected by the fact that both the intended victim and the unintended victim are killed." 395 Ill. App. 3d at 732, 344 Ill.Dec. at 71, 936 N.E.2d at 600. The court held that the defendant was properly charged with murder of the infant "because it was a natural and probable consequence of his act of intentionally shooting her mother multiple times while she was in utero." 395 Ill. App. 3d at 733, 344 Ill.Dec. at 71, 936 N.E.2d at 600.

In Cockrell v. State, 890 So.2d 174 (Ala. 2004), this Court discussed intent as set forth in Alabama's murder statute, § 13A-6-2(a), Ala. Code 1975, as follows:

> "[Section] 13A-6-2(a), Ala. Code 1975, provides that '[a] person commits the crime of murder if ... [w]ith the intent to cause the death of another person, he causes the death of that person or of another person.' The phrase 'another person' appears twice in the foregoing quote from § 13A-6-2(a). The only reference to intent in § 13A-6-2(a) is tied directly to the first reference to 'another person' providing '[w]ith the intent to cause the death of another person.' This first reference to 'another person' clearly applies to the intended victim. The second reference to the death of 'another person,' clearly applies to a person other than the intended victim. Section 13A-6-2(a) does not link the reference to 'another person' with intent in the context of the unintended victim because, indeed, it could not possibly be so linked. Any 'intent' as to the innocent victim is nonexistent; the death of the innocent victim is an unintended result. Intent is imputed as the result of a legal fiction adopted to prevent wrongdoers from escaping the consequences of killing without specific intent by the fluke of bad aim."

890 So.2d at 180.

It is clear that transferred intent is included within § 13A-6-2(a), Ala. Code 1975, and that Alabama's murder statute is incorporated into § 13A-5-40(a)(10), which criminalizes the murder of two or more persons. Thus, under § 13A-5-40(a)(10), " 'it is conceivable that the offense of murder wherein two or more persons are murdered by one act or pursuant to one scheme or course of conduct could arise from the intent to kill one person.' " Phillips I, ___ So.3d at ___ (quoting Smith, 213 So.3d at 182, citing in turn Living v. State, 796 So.2d at 1131). This Court therefore cannot conclude that the trial court's instruction on transferred intent violated Phillips's constitutional rights or Alabama law. Consequently, we agree with the Court of Criminal Appeals' determination that the trial court did not exceed its discretion in its instruction on transferred intent.

B. Instructions on Knowledge and Intent

***9** Phillips argues that the trial court improperly conflated "knowledge" and "intent" in the following instruction:

> "Intent, under the law, is the definition of knowingly. I charge you, members of the jury, that a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct and is aware of the nature and that the circumstances exist.... What you have to ascertain is whether the defendant was aware that he was carrying out a particular act. That's what I meant, and that's what I mean by intent. Was the defendant aware that they were carrying out a particular act? That's what we mean when we say intent."

Phillips argues that the trial court's instruction improperly lowered the State's burden of proving each element of the charged capital murder beyond a reasonable doubt. He contends that the court erred in instructing the jury that mere "knowledge," rather than "specific intent," was sufficient to convict him of capital murder. Phillips further argues that the trial court never acknowledged that its original instruction was improper or corrected its prior incorrect instruction.

On direct appeal, the Court of Criminal Appeals, reviewing the claim for plain error, recognized that the trial court's initial instruction, quoted above, on knowledge and intent was incorrect:

> "Phillips, in his brief on appeal, correctly explains that this instruction 'improperly conflates the definition of knowledge and intent.' (Phillips's brief, pp. 33-34.) See also § 13A-2-2(1) and (2), Ala. Code 1975.
>
> "We have explained:
>
> > " ' "Alabama appellate courts have repeatedly held that, to be convicted of [a] capital offense and sentenced to death, a defendant must have had a

particularized intent to kill and the jury must have been charged on the requirement of specific intent to kill. E.g., Gamble v. State, 791 So.2d 409, 444 (Ala. Crim. App. 2000); Flowers v. State, 799 So.2d 966, 984 (Ala. Crim. App. 1999); Duncan v. State, 827 So.2d 838, 848 (Ala. Crim. App. 1999)."

" 'Ziegler v. State, 886 So.2d 127, 140 (Ala. Crim. App. 2003).'

"Brown v. State, 72 So.3d 712, 715 (Ala. Crim. App. 2010). Thus, the trial court's instruction conflating 'knowingly' and 'intentionally' was error. That error, however, does not rise to the level of plain error.

" ' "In setting forth the standard for plain error review of jury instructions, the court in United States v. Chandler, 996 F.2d 1073, 1085, 1097 (11th Cir. 1993), cited Boyde v. California, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), for the proposition that 'an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner.' "

" 'Williams v. State, 710 So.2d 1276, 1306 (Ala. Crim. App. 1996). "The absence of an objection in a case involving the death penalty does not preclude review of the issue; however, the defendant's failure to object does weigh against his claim of prejudice." Ex parte Boyd, 715 So.2d 852, 855 (Ala. 1998).'

"Thompson v. State, 153 So.3d [84,] 152 [(Ala. Crim. App. 2012)].

"Although the trial court initially improperly instructed the jury on intent, 'we do not review the jury instruction in isolation. Instead we consider the jury charge as a whole, and we consider the instructions like a reasonable juror may have interpreted them.' Ziegler v. State, 886 So.2d 127, 140 (Ala. Crim. App. 2003) (citing Smith v. State, 795 So.2d 788, 827 (Ala. Crim. App. 2000)). Examining the trial court's instructions as a whole, we are convinced that the trial court fully instructed the jury on intent and that a reasonable juror would have interpreted the trial court's instructions as requiring the State to prove beyond a reasonable doubt that Phillips had the specific intent to kill.

***10** "Specifically, the trial court, after reading Phillips's indictment to the jury, instructed the jury as follows:

" 'Now I'm going to give you some specific information about that charge. That charges capital--that is a capital murder charge. Alabama Code Section 13A-5-40(a)(10), murder of two or more persons by a single act. The defendant is charged with capital murder. The [sic] states that an intentional murder of two more persons is capital murder. A person commits intentional murder of two or more persons if he causes the death of two or more people, and in performing the act that caused the death of those people, he intended to kill each of those people.

" 'To convict, the State must prove beyond a reasonable doubt each of the following elements of intentional murder of two or more persons: ... that in committing the act that caused the deaths of both [Erica] and Baby Doe, the defendant intended to kill the deceased or another person.

" 'A person acts intentionally when it is his purpose to cause the death of another person. Let me reread that. A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill must be real and specific.'

"(R. 761-62 (emphasis added).) Thereafter, the trial court instructed the jury on the State's requested jury charges as follows:

" 'Requested jury charge number one. The defendant, Jessie Phillips, is charged with capital murder. The law states that intentional murder of two or more persons is capital murder. A person commits the crime of an intentional murder of two or more persons, and in performing the act that caused the death of those people, he intends to kill each of those people.

" 'To convict, the State must prove beyond a reasonable doubt each of the following elements of an intentional murder of two or more persons: One, [that] Erica Phillips is dead; two, that Baby Doe is dead; three, that the defendant Jessie Phillips caused the deaths of Erica Phillips and Baby Doe by one act, by shooting them; and that in committing the act which caused the deaths of both Baby--excuse me, Erica Phillips and Baby Doe, the defendant intended to kill the deceased or another person.

> " 'A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill another person must be real and specific....
>
> " '....
>
> " 'Requested jury charge number two. In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder.'
>
> "(R. 765-67 (emphasis added).)
>
> > "Thus, it is clear that, although the trial court initially conflated the concepts of 'knowingly' and 'intentionally,' the trial court fully and adequately instructed the jury on the specific-intent-to-kill requirement. Thus, although the trial court's initial instruction on intent was erroneous, it does not rise to the level of plain error."

***11** Phillips I, —— So.3d at ——.

This Court agrees that the trial court's initial instruction improperly conflated the definitions of "intent" and "knowingly." In Alabama, the culpable mental states of acting "intentionally" and acting "knowingly" are separately defined. Section 13A-2-2(1) provides: "A person acts intentionally with respect to a result or to conduct described by a statute defining an offense, when his purpose is to cause that result or to engage in that conduct." Section 13A-2-2(2) provides: "A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of that nature or that the circumstance exists."

Section 13A-5-40(b) provides that the definition of "murder" as set forth in § 13A-6-2(a)(1) applies to § 13A-5-40(a)(10). Section 13A-6-2(a)(1) provides that a person commits murder if, "with intent to cause the death of another person, he or she causes the death of that person or of another person." Thus, "knowledge" is not a culpable mental state for the offense of murder. Consequently, the Court of Criminal Appeals correctly held that the trial court's initial instruction conflating the definitions of knowledge and intent was in error.

The question, however, is whether the erroneous segment of the trial court's initial instruction rises to the level of plain error. Phillips argues that a conviction based upon an erroneous instruction on knowledge rests on unconstitutional ground and must be set aside. Specifically, he contends that the holdings in Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), and Ex parte Stewart, 659 So.2d 122, 128 (Ala. 1993), establish that, although it is possible that the jury's guilty verdict may have had a proper basis, it is equally likely that the verdict was based on the erroneous instruction and that, therefore, the verdict should be set aside.

In Boyde, the United States Supreme Court set forth the standards to be applied to a "concededly erroneous" instruction and an "ambiguous" instruction as follows:

> "Our cases, understandably, do not provide a single standard for determining whether various claimed errors in instructing a jury require reversal of a conviction. In some instances, we have held that 'when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).' Leary v. United States, 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); see also Bachellar v. Maryland, 397 U.S. 564, 571, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970). In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, 'it is equally likely that the verdict ... rested on an unconstitutional ground,'

> Bachellar, supra, at 571, 90 S.Ct. 1312, and we have declined to choose between two such likely possibilities.
>
> "In this case we are presented with a single jury instruction. The instruction is not concededly erroneous, nor found so by a court, as was the case in Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).
>
> ***12** The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think therefore the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This 'reasonable likelihood' standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. 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."

494 U.S. at 379-81, 110 S.Ct. 1190 (footnote omitted).

In Phillips's case, the Court of Criminal Appeals held that, although the trial court's initial instruction was erroneous, the error did not rise to the level of plain error, the standard that court was applying. Phillips I, ––– So.3d at ––––. The Court of Criminal Appeals cited both Thompson v. State, 153 So.3d 84, 152 (Ala. Crim. App. 2012), and Boyde for the proposition that " ' " 'an error only occurs when there is a reasonable likelihood that the jury applied the instruction in an improper manner.' " ' " Phillips I, ––– So.3d at –––– (quoting Thompson, 153 So.3d at 152, quoting in turn Williams v. State, 710 So.2d 1276, 1306 (Ala. Crim. App. 1996)). The Court of Criminal Appeals concluded that the error did not rise to the level of plain error because the trial court's subsequent instructions on intent were proper and a reasonable juror would have interpreted the trial court's instructions as requiring the State to prove beyond a reasonable doubt that Phillips had the specific intent to kill. Phillips argues that the Court of Criminal Appeals applied the incorrect standard because, he says, the holding in Boyde establishes that the "reasonable likelihood" test is applicable only to an "ambiguous" instruction, not to a concededly erroneous instruction given in conjunction with a correct instruction.

Phillips contends that the Court of Criminal Appeals should have applied the standard for an "impermissible legal theory" set forth in Boyde, supra, and set aside his conviction. The Court notes that the instructions in Boyde related to an erroneous charge on sentencing factors and are therefore significantly different from those given in Phillips's case. In Boyde, the Supreme Court held that mandatory language in a jury instruction listing factors that the jury "shall consider, take into account and be guided by" in assessing whether to impose a death sentence did not violate the Eighth Amendment's prohibition against cruel and unusual punishment, because the instruction did not preclude the jury from considering non-criminal factors, such as the defendant's background and character, as mitigating evidence. Thus, Boyde involved an ambiguous sentencing-factor instruction. In Phillips's case, however, the instruction at issue is not related to sentencing.

Phillips also cites this Court's decision in Ex parte Stewart, another sentencing case, in which we held that an inadvertent erroneous instruction was plain error and reversed the defendant's death sentence. Phillips specifically relies on this Court's determination that, "[a]lthough the court correctly instructed the jury in other portions of the charge, the inadvertent erroneous statements directly contradicted the correct ones, and we cannot tell which portion of the charge the jury may have followed," 659 So.2d at 128, for the proposition that the instruction was plain error. The facts in Ex parte Stewart, however, are distinguishable from those in Phillips's case. In Ex parte Stewart, the trial court failed to give the applicable pattern jury instruction regarding how to weigh the aggravating circumstances and the mitigating

circumstances. Although the trial court did instruct the jury concerning how it was to determine the existence of any aggravating and mitigating circumstances, the trial court provided no direction as to how to apply those circumstances once they were proven because the judge omitted the charge stating that to impose the death penalty the aggravating circumstances must be shown to outweigh the mitigating circumstances. Unlike Ex parte Stewart, the instructions at issue in Phillips's case do not charge an erroneous sentencing theory or omit a sentencing theory.

***13** It is well settled law that this Court reviews the jury instructions in their entirety before determining whether a reversal is warranted. See, e.g., Ex parte Wood, 715 So.2d 819, 822 (Ala. 1998) (reviewing the charges in their entirety); Ex parte Cothren, 705 So.2d 861, 871 (Ala. 1997) (holding that the "instructions, taken as a whole" were sufficient); Ex parte Windsor, 683 So.2d 1042, 1058 (Ala. 1996) (reviewing jury instructions as a whole); and Gosa v. State, 273 Ala. 346, 350, 139 So.2d 321, 324 (1961) ("The rule is well established that where a portion of the oral charge is erroneous, the whole charge may be looked to and the entire charge must be construed together to see if there be reversible error.").

Despite its initial misstatement, the trial court repeatedly provided detailed instructions on specific intent in relation to the capital-murder charge. Thus, the court rectified any misunderstanding that may have occurred initially. Consequently, when reviewing the instructions in their entirety, as this Court must do, we cannot conclude that the trial court's instructions were plainly erroneous. We therefore find no error in the Court of Criminal Appeals' determination that the trial court's instructions did not rise to the level of plain error.

C. Applicability of the Brody Act

Phillips argues that the definition of "person" set forth in the Brody Act, § 13A-6-1(a)(3), Ala. Code 1975,[3] does not apply to the capital offense of murder of two or more persons set forth in § 13A-5-40(a)(10) or the aggravating circumstance of multiple murders set forth in § 13A-5-49, Ala. Code 1975. Specifically, Phillips contends that the Brody Act is limited to Chapter 6 of the Alabama Criminal Code. Whether the Brody Act applies to the capital-murder statute is an issue of first impression for this Court. On this issue, the Court of Criminal Appeals held:

> "Phillips contends that defining the word 'person' in both §§ 13A-5-40(a)(10) and 13A-5-49(9), Ala. Code 1975, by using the definition of the word 'person' from § 13A-6-1(a)(3), Ala. Code 1975, violates 'established principles of statutory construction and the rule of lenity' and creates a new class of capital offense –- 'murder of a pregnant woman' (Phillips's brief, p. 15) -– and a new aggravating circumstance. To resolve Phillips's argument on appeal, we must construe §§ 13A-5-40, 13A-5-49, 13A-6-1, and 13A-6-2, Ala. Code 1975.
>
> "....
>
> "In raising this claim, Phillips correctly recognizes that 'the sole provision of the criminal code that arguably made [him] eligible for the death penalty was a change to the definition of the word "person"--outside of the capital murder statute--in [§] 13A-6-1.' (Phillips's brief, p. 15.) Phillips incorrectly argues, however, that the definition of the term 'person' in § 13A-6-1(a)(3), Ala. Code 1975, is limited to only 'Article 1 and Article 2' of Chapter 6 in Title 13A and 'should not be applied to the separate capital-murder statute.' (Phillips's brief, p. 18.)
>
> "Indeed, contrary to Phillips's assertion, a simple reading of the capital-murder statute plainly and unambiguously makes the murder of 'two or more persons'--when one of the victims is an unborn child--a capital offense because the capital-murder statute expressly incorporates the intentional-murder statute codified in § 13A-6-2(a)(1), Ala. Code 1975--a statute that, in turn, uses the term 'person' as defined in § 13A-6-1(a)(3), Ala. Code 1975, which includes an unborn child as a person.
>
> ***14** "....
>
> "In other words, the capital-murder statute plainly and unambiguously requires the occurrence of an intentional murder, as defined in § 13A-6-2(a)(1), Ala. Code 1975, and an intentional murder occurs only when a defendant causes the death of a 'person,' which includes an unborn child.
>
> "Because an 'unborn child' is a 'person' under the intentional-murder statute and because the intentional-murder statute is expressly incorporated into the capital-murder statute to define what constitutes a

'murder,' an 'unborn child' is definitionally a 'person' under § 13A-5-40(a)(10), Ala. Code 1975. Thus, to the extent Phillips contends that § 13A-5-40(a)(10), Ala. Code 1975, excludes from its purview the death of an unborn child, that claim is without merit.

"Phillips also argues that the term 'person' as that term is used in § 13A-5-49, Ala. Code 1975, does not include an 'unborn child.' That section sets out the aggravating circumstances for which the death penalty may be imposed and provides, in relevant part:

> " 'Aggravating circumstances shall be the following:
>
> " '....
>
> " '(9) The defendant intentionally caused 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 (emphasis added).

"Section 13A-5-49, unlike § 13A-5-40, does not expressly incorporate the intentional-murder statute, and it also does not expressly incorporate the definition of the term 'person' found in § 13A-6-1, Ala. Code 1975. Both § 13A-5-40 and § 13A-5-49, however, use nearly identical language and concern closely related subject matter--i.e., capital offenses and the aggravating circumstances for which a capital offense may be subject to the death penalty.

"When 'statutes "relate to closely allied subjects [they] may be regarded in pari materia." State ex rel. State Board for Registration of Architects v. Jones, 289 Ala. 353, 358, 267 So.2d 427, 431 (1972). "Where statutes are in pari materia they should be construed together" and "should be resolved in favor of each other to form one harmonious plan." League of Women Voters v. Renfro, 292 Ala. 128, 131, 290 So.2d 167, 169 (1974).' Henderson v. State, 616 So.2d 406, 409 (Ala. Crim. App. 1993). Thus, like § 13A-5-40(10), we construe § 13A-5-49(9) as including unborn children as 'persons.'

"Although Phillips argues that what defines a 'person' in the capital-murder statute is different from what defines a 'person' in the intentional-murder statute, we do not agree. Indeed, to read those statutes in the manner Phillips would have us read them, this Court would have to ignore the plain meaning of the capital-murder statute and its express incorporation of the intentional-murder statute, would have to read closely related statutes in an inconsistent manner, and would have to disregard the 'clear legislative intent to protect even nonviable fetuses from homicidal acts.' Mack v. Carmack, 79 So.3d 597, 610 (Ala. 2011). Consequently, Phillips is not entitled to any relief on this claim."

***15** Phillips I, —— So.3d at ——.

This Court agrees with the reasoning of the Court of Criminal Appeals. Section 13A-6-1 provides, in pertinent part:

> "(a) As used in Article 1 and Article 2, the following terms shall have the meanings ascribed to them by this section:
>
> "....
>
> "(3) PERSON. The term, when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability."

Article 1 of Chapter 6 sets forth the crimes of homicide, including murder. Section 13A-6-2(a)(1) specifies that a person commits the crime of murder if, "[w]ith intent to cause the death of another person, he or she causes the death of that person or of another person."

It is obvious from a reading of § 13A-5-39(5), Ala. Code 1975, and § 13A-5-40(b), Ala. Code 1975, that the definition of "person" as set forth in § 13A-6-1(a)(3) is applicable to § 13A-5-40(a)(10). We begin this analysis with § 13A-5-39(5), which provides that "murder and murder by the defendant" "[s]hall be defined as provided in Section 13A-5-40(b)." Section 13A-5-40(b), in turn, provides:

> "Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms 'murder' and 'murder by the defendant' as used in this section to define capital offenses mean murder as defined in Section 13A-6-2(a)(1), but not as defined in Section 13A-6-2(a)(2) and (3). Subject to

> the provisions of Section 13A-5-41, [Ala. Code 1975,] murder as defined in Section 13A-6-2(a)(2) and (3), as well as murder defined in Section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section."

As previously discussed, the crime of murder as set forth in § 13A-6-2(a)(1) is included within the capital offense of the murder of two or more persons set forth in § 13A-5-40(a)(10). Thus, the definition of "person" as defined in § 13A-6-1(a)(3) is applicable to the capital offense of murder of two or more persons under § 13A-5-40(a)(10).

It is likewise clear that the definition of "person" set forth in § 13A-6-1(a)(3) is applicable to the aggravating circumstance of the murder of two or more persons. Section 13A-5-49(9) specifies that that aggravating circumstance is applied to support the death penalty when "[t]he defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct." Thus, the wording of § 13A-5-49(9) parallels § 13A-5-40(10), which includes the offense of murder as set forth in § 13A-6-2(a)(1). [4] Consequently, the definition of a person as including an unborn child in utero is applicable to both § 13A-5-40(10) and § 13A-5-49(9), and we find no error in the trial court's application of the Brody Act to the facts of this case. [5]

D. Chain of Custody

***16** Phillips asserts that the State failed to establish a chain of custody for the urine sample used to conduct the pregnancy test performed as part of Erica's autopsy. He contends that the State presented no links in the chain. Because Phillips failed to raise this issue at trial, the Court of Criminal Appeals reviewed it for plain error. See Rule 45A, Ala. R. App. P.

A summary of the law applicable to chain-of-custody issues is set forth in Ex parte Mills, 62 So.3d 574, 595-98 (Ala. 2010), and quoted by the Court of Criminal Appeals in Phillips I:

> " 'In Ex parte Holton, [590 So.2d 918 (Ala. 1991),] this Court stated:
>
> > " ' "The State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence. Ex parte Williams, 548 So.2d 518, 520 (Ala. 1989). Proof of this unbroken chain of custody is required in order to establish sufficient identification of the item and continuity of possession, so as to assure the authenticity of the item. Id. In order to establish a proper chain, the State must show to a 'reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.' McCray v. State, 548 So.2d 573, 576 (Ala. Crim. App. 1988). Because the proponent of the item of demonstrative evidence has the burden of showing this reasonable probability, we require that the proof be shown on the record with regard to the various elements discussed below.
> >
> > " ' "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.' Imwinkelried, The Identification of Original, Real Evidence, 61 Mil. L. Rev. 145, 159 (1973).
> >
> > " ' "If the State, or any other proponent of demonstrative evidence, fails to identify a link or fails to show for the record any one of the three criteria as to each link, the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link and has shown all three criteria as to each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' a question of credibility and weight is presented, not one of admissibility."
>
> " '590 So. 2d at 919–20.
>
> " 'In Ex parte Cook, [624 So.2d 511 (Ala. 1993)], the defendant, who had been convicted of murder, contended that the trial court committed reversible error in admitting, over the defendant's objection, several items of physical evidence-specifically, cigarette butts, a knife scabbard, blood-soaked gauze, socks, and

jeans. This Court held that the cigarette butts, scabbard, gauze, and socks should not have been admitted over the defendant's objection. 624 So.2d at 512–14. In particular, this Court stated:

> " ' "A link was also missing in the chain of custody of the cigarette butts, scabbard, gauze, and socks. Although [Officer] Weldon testified that she directed and observed the collection, the State did not establish when these items were sealed or how they were handled or safeguarded from the time they were seized until Rowland[, a forensic serologist,] received them [and tested them]. This evidence was inadmissible under [Ex parte] Holton[, 590 So.2d 918 (1991)].
>
> ***17** " ' "The cigarette butts were prejudicial to [the defendant], because they established that someone with her blood type was in [the victim's] house. Likewise, the socks found in [the defendant's] mobile home were prejudicial, because they were stained with blood that matched [the victim's] type. The erroneous admission of these items probably injuriously affected [the defendant's] substantial rights, and she is entitled to a new trial. See Rule 45, Ala. R. App. P."

" '624 So. 2d at 514.

" 'In Birge [v. State], [973 So.2d 1085 (Ala. Crim. App. 2007)], the victim was thought to have died of natural causes and had been transported to Indiana for burial. 973 So.2d at 1087. However, after law enforcement began to investigate, the victim's body was exhumed, and an autopsy was performed in Indiana. At trial, there was testimony that the victim had died from an overdose of prescription drugs. That cause-of-death testimony was based on the results of testing of samples taken from the victim's body during the autopsy. 973 So.2d at 1088–89.

" 'Citing missing links in the chain of custody, the defendant in Birge objected to the introduction of the toxicology results and the cause-of-death testimony based on those results. The doctor who performed the autopsy testified at trial and stated that he had watched his assistant place the samples in a locked refrigerator. The doctor testified that the next day his assistant would have delivered the samples to a courier, who then would have delivered them to an independent lab for testing. However, neither the doctor's assistant who secured the samples, nor the courier who transported the samples to the lab, nor the analyst who tested the samples testified at trial. The doctor also testified that there may have been several people who had handled the specimens during that time. Additionally, there were significant discrepancies between the doctor's notes about the specimens in his autopsy report and the description of those specimens in the toxicology report from the independent lab that had tested them. The Court of Criminal Appeals ultimately concluded that there were numerous missing links in the chain of custody and that, because those missing links related to the crux of the case against the defendant, the trial court had committed reversible error in admitting the evidence over the defendant's objection. 973 So.2d at 1094–95, 1105.

" 'In contrast to Ex parte Cook and Birge, however, the State here offered sufficient evidence on each link in the chain of custody of the evidence Mills complains of. Investigator Smith first discovered the evidence in the trunk. Officer McCraw recovered the evidence pursuant to a search warrant, inventoried it, bagged it, secured it, and delivered it to the custody of the DFS [Department of Forensic Sciences] employee who logged the evidence and gave McCraw a receipt for it. Bass, who examined and tested the evidence at DFS, testified generally about the protocols used to test items at DFS, and he testified specifically about the testing he performed on the evidence.

" 'Although the "tall" DFS employee to whom McCraw submitted the items was never identified and did not testify at trial, McCraw's testimony was sufficient direct evidence indicating that the items were secured until they were delivered to DFS. As to whether there was sufficient circumstantial evidence indicating that the items remained secure until Bass tested them, the State cites Lee v. State, 898 So.2d 790, 847–48 (Ala. Crim. App. 2001), in which the Court of Criminal Appeals stated:

> ***18** " ' " ' "The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence." ' Jones v. State, 616 So.2d 949, 951 (Ala. Crim. App. 1993) (quoting Williams v. State, 505 So.2d 1252, 1253 (Ala. Crim. App. 1986), aff'd, 505 So.2d 1254 (Ala. 1987)).

> " ' " ' " ' "Tangible evidence of crime is admissible when shown to be 'in substantially the same condition as when the crime was committed.' And it is to be presumed that the integrity of evidence routinely handled by governmental officials was suitably preserved '[unless the accused makes] a minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering.' If, however, that condition is met, the Government must establish that acceptable precautions were taken to maintain the evidence in its original state.
>
> " ' " ' " ' "The undertaking on that score need not rule out every conceivable chance that somehow the [identity] or character of the evidence underwent change. '[T]he possibility of misidentification and adulteration must be eliminated,' we have said, 'not absolutely, but as a matter of reasonable probability.' So long as the court is persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded, the jury should be permitted to consider and assess it in the light of surrounding circumstances." ' "
>
> " ' " 'Moorman v. State, 574 So.2d 953, 956–7 (Ala. Cr. App. 1990).'
>
> " ' "Blankenship v. State, 589 So.2d 1321, 1324–25 (Ala. Crim. App. 1991)."
>
> " '(Emphasis added.)' "

Phillips I, —— So.3d at —— (quoting Mills, 62 So.3d at 595-98 (footnotes omitted)).

Upon quoting this Court's holding in Ex parte Mills, the Court of Criminal Appeals determined:

> "Here, although Phillips contends that the State failed to establish a proper chain of custody for the urine pregnancy test, Phillips has not established a 'minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering' as to that evidence. Moreover, contrary to Phillips's assertion, the State established that Dr. [Emily] Ward[, a State medical examiner,] ordered the test to be performed and that she, as explained more thoroughly below, assisted in performing the test. Additionally, at trial, Dr. Ward identified 'the little white plastic container that houses the test' (R. 662) as the urine pregnancy test that was performed during the autopsy. In other words, the State established a chain of custody that both began and ended with Dr. Ward.
>
> "Regardless, even if the State had failed to properly establish a chain of custody for the urine pregnancy test, the admission of the results of that test into evidence would be, at worst, harmless error. As explained above, the admission of the complained-of evidence was cumulative to Dr. Ward's testimony that she personally observed the 'products of conception' and to Phillips's statement to Investigator Turner. Accordingly, the trial court did not commit any error--much less plain error-when it allowed the State to introduce the results of the urine pregnancy test."

Phillips I, —— So.3d at ——.

Phillips argues that the Court of Criminal Appeals' application of Ex parte Mills to his case when determining that he "ha[d] not established a 'minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering,' " —— So.3d at ——, is incorrect. Specifically, he argues that Ex parte Mills establishes that a defendant is required to make the aforementioned showing when there is a "weak link" in the chain of custody but not when there is a "missing link." He argues that there are missing links in the chain of custody of the urine sample and that, therefore, the evidence was not admissible.

***19** Phillips maintains that the evidentiary problem is similar to that in Birge v. State, 973 So.2d 1085 (Ala. Crim. App. 2007), a case cited by this Court in Ex parte Mills, supra, except, he says, the chain of custody of the sample in his case is even more deficient. He asserts that the State failed to present the first stage of the chain of custody regarding the extraction of urine from the body, much less any further evidence regarding other links in the chain. Specifically, he argues that the following links are missing:

> "The State presented no evidence regarding where the urine used for testing came from, who extracted the urine, the method of extraction used, how the person who extracted the sample was able to avoid contamination, whether any policies were implemented for safekeeping of the urine sample, whether the urine sample was handled by more than one individual, whether the sample was kept in a temperature-controlled environment prior to testing, or even at what time the urine sample was extracted. Moreover, the State presented no evidence regarding who performed the test, whether the urine was sealed when it was received for testing, whether that person followed procedures to ensure the test was performed with accuracy, and how that person ensured that the test was not tampered with."

Phillips's brief, pp. 40-41.

This Court agrees with the Court of Criminal Appeals' determination that the links in the chain of custody of the urine sample are not "missing." A State medical examiner, Dr. Emily Ward, testified that she conducted an autopsy on Erica Phillips on March 2, 2009, in the Huntsville Regional Laboratory of the Alabama Department of Forensic Sciences, that a urine sample for a pregnancy test was obtained during the autopsy, that she ordered the human gonadotrophic hormone test, i.e., pregnancy test, be conducted, and that the test was conducted during the same autopsy. She identified the white plastic container that houses the test and stated that "we put several drops of urine on the right side of this plastic." She explained that there are two red lines with a "C" for "control" and a "T" for "test," and that the test has functioned properly if the "C" is positive.[6] Thus, Dr. Ward's testimony establishes that the urine sample was taken during the autopsy at which she was present and that control measures were in place to ensure the accuracy of the urine pregnancy test. Consequently, this Court cannot agree with Phillips's assertion that the urine sample is missing all the links in the chain of custody. Indeed, we are "persuaded that as a matter of normal likelihood the evidence has been adequately safeguarded." Mills, 62 So.3d at 598. We conclude that the Court of Criminal Appeals' reliance on the standard set forth in Ex parte Mills when determining that Phillips "has not established a 'minimal showing of ill will, bad faith, evil motivation, or some evidence of tampering' " was appropriate. Thus, no error, plain or otherwise, occurred.

We likewise agree with the Court of Criminal Appeals' determination that, even if this Court were to assume that the State had failed to establish a proper chain of custody for the urine sample, the admission of the results of the urine test into evidence would be, at worst, harmless error. The record indicates that Dr. Ward confirmed the results of the pregnancy test by conducting an internal examination. She testified that her examination of the victim's reproductive organs indicated the presence of the "products of conception," including a placenta within the uterus and a corpus luteum cyst on an ovary, which, she said, occurs during pregnancy.[7] Consequently, the results of the pregnancy test derived from the urine sample were cumulative to other evidence in the record.

E. Medical Examiner's Testimony

***20** Phillips asserts that the introduction of Dr. Ward's testimony regarding the results of a pregnancy test that were conducted by another individual during the autopsy violated his right to confront witnesses, to due process, to a fair trial, and to a reliable conviction and sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. Because Phillips did not raise this issue in the trial court, the Court of Criminal Appeals reviewed it for plain error. See Rule 45A, Ala. R. App. P.

The Court of Criminal Appeals determined:

> "Because Dr. Ward's testimony established that she, at least, assisted in administering the urine pregnancy test and because she was subject to cross-examination, the trial court's admission of the results of the urine pregnancy test was not a violation of the Confrontation Clause. See, e.g., Ex parte Ware, 181 So.3d 409, 416 (Ala. 2014) ('The United States Supreme Court has not squarely addressed whether the Confrontation Clause requires in-court testimony from all the analysts who have participated in a set of forensic tests, but Bullcoming[v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011),] and Williams[v. Illinois, 567 U.S. 50, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012),] suggest that the answer is "no." ')."

Phillips I, —— So.3d at ——.

At trial, Dr. Ward acknowledged that, "as [she was] doing the autopsy," she "[had] a test or other method, diagnostic or what have you," to determine whether Erica was pregnant. She testified that, during the autopsy, "[w]e did a urine pregnancy test." She also acknowledged that she "ordered [the test] to be administered to [Erica]" and that, "after having done the test" in which the results were positive, she "look[ed] at [the] reproductive organs to ... confirm what the test had told [her] about [the] pregnancy." She also identified the pregnancy test used during the autopsy. Thus, it is clear that, during the autopsy, Dr. Ward ordered the pregnancy test and that she was present when the results were obtained.

Phillips argues that Dr. Ward's testimony that she ordered the test indicates that Dr. Ward did not personally perform the test. He maintains that, in order to testify about the positive results of the pregnancy test, Dr. Ward had to rely on the out-of-court statement from the individual who actually performed the test. He contends that the admission of the testimonial evidence from Dr. Ward violated his rights under the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Under Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the United States Supreme Court held that out-of-court statements could be introduced into evidence without violating the Confrontation Clause if the declarant was unavailable and the statement bore an "indicia of reliability." Roberts closely linked the Confrontation Clause with the rules of evidence governing hearsay by holding that, if an out-of-court statement was admissible under a "firmly rooted hearsay exception," the Confrontation Clause was likewise satisfied. Id.

In Crawford v. Washington, 541 U.S. 36, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), however, the United States Supreme Court significantly restricted the Roberts analysis by holding that the Confrontation Clause bars the use of out-of-court "testimonial" statements in criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. Crawford set forth three classes of "testimonial" statements:

> ***21** (1) " 'ex parte in-court testimony or its functional equivalent -- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially' ";
>
> (2) " 'extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' White v. Illinois, 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment)"; and
>
> (3) " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' "

541 U.S. at 51-52, 124 S.Ct. 1354. The Supreme Court, however, did not specify how the new Confrontation Clause analysis applies to laboratory-test results.

Phillips maintains that Crawford v. Washington is applicable to statements regarding the positive pregnancy test and that, therefore, the Confrontation Clause is implicated. Specifically, he argues that the out-of-court statement from the individual who performed the pregnancy test indicating a positive result is a statement made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. In other words, Phillips argues that the test results, and any statements related thereto, are testimonial because the primary purpose of the pregnancy test was to prove that the victim was pregnant, which was an essential fact necessary to prove the murder charge lodged against him.

In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), the United States Supreme Court discussed the application of Crawford to scientific reports. During Melendez-Diaz's trial, the court admitted into evidence three "certificates of analysis" from a state forensic laboratory stating that bags of a white powdery substance had been "examined with the following results: The substance was found to contain: Cocaine." 557 U.S. at 308, 129 S.Ct. 2527. The Supreme Court held that the admission of the certificates was for the sole purpose of providing evidence against the defendant and that their admission violated the Sixth Amendment. The Supreme Court held that it was clear that the certificates were "testimonial" statements that

could not be introduced unless their drafters were subjected to the " 'crucible of cross-examination.' " 557 U.S. at 311, 317, 129 S.Ct. 2527 (quoting Crawford, 541 U.S. at 61, 124 S.Ct. 1354).

In Bullcoming v. New Mexico, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), a 5-4 decision, the United States Supreme Court held that a scientific report could not be used as substantive evidence against a defendant. Phillips argues that his case is similar. In Bullcoming, the defendant was charged with driving under the influence based on the results of a blood-alcohol test. The analyst who performed the test was on leave from work at the time of trial, and another analyst testified in his place. The unsworn forensic-laboratory report certifying the defendant's blood-alcohol level was entered into evidence. The Supreme Court determined that the analyst who performed the test was more than a "mere scrivener" of the report, because he had "certified that he received [the] sample intact with the seal unbroken, that he checked to make sure that the forensic report number and the sample number 'correspond[ed],' and that he performed on [the] sample a particular test, adhering to precise protocol." 564 U.S. at 659-60, 131 S.Ct. 2705. The Supreme Court concluded that the report amounted to the analyst's testimony and that therefore the lab report was a testimonial statement subject to Crawford. Id. at 661, 131 S.Ct. 2705.

***22** In this case, we question whether Dr. Ward's testimony included any out-of-court testimonial statement from a declarant. Nothing in the record indicates that another individual prepared a formal certification regarding the results of the pregnancy test or otherwise informed Dr. Ware that the pregnancy test was positive; rather, the testimony indicates that Dr. Ware was present during the autopsy as a part of which the test was conducted. Thus, it is strongly arguable that, even though Dr. Ware may not have performed the test herself, she had personal knowledge of both the manner in which the test was conducted and its results because she was present when the test was performed.

As Justice Sotomayor noted in her concurrence in Bullcoming, "this is not a case in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue," and "[i]t would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results." 564 U.S. at 672-73, 131 S.Ct. 2705. In Phillips's case, the person testifying did have a personal connection to the test at issue. Thus, it is clear that Phillips's case is distinguishable from Bullcoming.

Phillips also argues that Dr. Ward's testimony regarding the test results is inadmissible hearsay because, he says, the results are offered to prove the truth of the matter asserted. Rule 801(c), Ala. R. Evid.[8] It is clear that Dr. Ward was present when the test was administered. Thus, the factual assertion regarding the positive results of the urine pregnancy test was not hearsay because it was based upon Dr. Ward's personal knowledge. See Stephens v. First Commercial Bank, 45 So.3d 735, 738 (Ala. 2010) ("[I]f [the witness] is testifying based upon his personal knowledge and not merely repeating the contents of documents, his statements are by definition not hearsay."); Yeomans v. State, 641 So.2d 1269, 1271 (Ala. Crim. App. 1993) (determining witness's testimony that appellant carried a weapon in his pocket was based on his personal knowledge and was not hearsay).

Phillips also argues that the Court of Criminal Appeals' determination that any error in the admission of the pregnancy-test results is harmless is incorrect because, he says, the introduction of the statements regarding the pregnancy test was extremely prejudicial in that the results of the test were admitted to establish the corpus delicti of the offense, i.e., the second murder. Citing Melendez-Diaz, he argues that the inability to question the individual who performed the test prejudiced his case because confrontation is a "means of assuring accurate forensic analysis." 557 U.S. at 318, 129 S.Ct. 2527.

The Court of Criminal Appeals determined that any error in admitting the results of the pregnancy test was harmless based on the following:

> "Regardless, as noted above, 'violations of the Confrontation Clause are subject to harmless-error analysis. Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).' Smith [v. State], 898 So.2d [907] at 917 [(Ala. Crim. App. 2004)]. As explained above, even if the trial court erred in admitting the results of the urine pregnancy test, that error would be, at worst, harmless because it was cumulative to Dr. Ward's testimony that she actually observed the 'products of conception' and to Phillips's

statement to Investigator Turner. Accordingly, Phillips is due no relief as to this claim."

***23** Phillips I, —— So.3d at ——. We agree. Even assuming for the sake of argument that the results of the pregnancy test should not have been admitted, the results are cumulative to other evidence in the record, including Dr. Ward's testimony that she observed during the autopsy a placenta and an ovarian cyst, which suggest a pregnancy, and Phillips's statement that Erica told him that she was pregnant. Based on the foregoing, this Court cannot conclude that the Court of Criminal Appeals erred in determining that the admission of the medical examiner's testimony regarding the results of the pregnancy test did not rise to the level of plain error.

F. The Application Vel Non of Nonstatutory Aggravating Circumstances

Phillips presents three arguments related to nonstatutory aggravating circumstances. He first argues that the trial court failed to provide a limiting instruction regarding the jury's consideration of nonstatutory aggravating circumstances. Phillips argues that the instruction was especially necessary because the trial court repeatedly referred to "aggravating circumstances" in the plural and mentioned a "list of enumerated statutory aggravating circumstances," despite there being only one relevant circumstance -– the murder of two persons pursuant to one act. His second argument is that the prosecution exacerbated this error by presenting argument about nonstatutory aggravating circumstances to the jury during closing argument. Finally, he argues that the trial court itself improperly considered nonstatutory aggravating circumstances when imposing the death penalty. Phillips maintains that the trial court's omission of a limiting instruction combined with the prosecutor's improper argument and the trial court's own consideration of nonstatutory aggravating circumstances at the sentencing phase violated his rights to fair warning, due process, a fair trial, and a reliable sentence in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. Phillips did not raise these issues at trial; the Court of Criminal Appeals, therefore, reviewed them for plain error.

With respect to Phillips's first and second arguments, the Court of Criminal Appeals specifically held:

"First, with regard to the trial court's instruction on aggravating circumstances, although Phillips correctly explains that the trial court 'failed to instruct the jury that it "may not consider any aggravating circumstances other than the [two-or-more-persons] aggravating circumstance[ ] on which I have instructed you," ' the trial court's instruction on aggravating circumstances was not improper. Moreover, that instruction did not allow the jury to consider nonstatutory aggravating circumstances.

"Specifically, during its penalty-phase instructions the trial court explained to the jury the following:

" 'An aggravating circumstance is a circumstance specified by law that indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole. The issue at this sentencing hearing considers the existence of aggravating and mitigating circumstances which you should weigh against each other to determine the punishment that you recommend.

" 'Your verdict recommending a sentence should be based upon the evidence that you have heard while deciding the guilt or innocence of the defendant and the evidence that has been presented to you in these proceedings. The trial judge must consider your verdict recommending a sentence in making a final decision regarding the defendant's sentence. In other words, I will consider your recommendation in making my final sentence that I will have to impose.

***24** " 'The defendant has been convicted of capital murder, namely, the murder of two or more persons by one act or pursuant to one scheme or course of conduct. This offense necessarily includes as an element the following aggravating circumstance as proved by the law of this State. The defendant intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct.

" 'By law, your verdict in the guilt phase finding the defendant guilty of this capital offense established the existence of this aggravating circumstance beyond a reasonable doubt. This aggravating circumstance

> is included in the list of enumerated statutory aggravating circumstances permitting, by law, you to consider death as an available punishment. This aggravating circumstance therefore should be considered by you in deciding whether to recommend a sentence of life imprisonment without eligibility for parole or death.'

"(R. 881-82.) Thereafter, the trial court instructed the jury on statutory and nonstatutory mitigating circumstances.

"The trial court's instruction on aggravating circumstances, when viewed in its entirety, properly conveyed to the jury that aggravating circumstances are 'specified by law' and that the jury had only one aggravating circumstance to consider when arriving at its sentencing recommendation.

"Additionally, this instruction 'would not have led to any confusion by the jury as was the case in Ex parte Stewart, 659 So.2d [122] at 125–26 [(Ala. 1993)], where the Alabama Supreme Court pointed out numerous comments by the trial court referencing other aggravating circumstances for the jury's consideration. Cf. George v. State, 717 So.2d 849, 855–56 (Ala. Crim. App. 1997) ... (holding that by itself the instruction did not pose any potential confusion to the jury as was the case in Ex parte Stewart).' Johnson v. State, 120 So.3d 1130, 1186 (Ala. Crim. App. 2009). Thus, no error--plain or otherwise--occurred.

"Moreover, Phillips's argument that the State 'exacerbated this error by arguing non-statutory aggravation to the jury during closing arguments, including that the jury should sentence ... Phillips to death to help deter crime and to protect domestic violence victims' (Phillips's brief, p. 68), is without merit. Indeed, we have recognized that such an argument does not impermissibly urge the jury to consider a nonstatutory aggravating circumstance. Specifically, we have explained:

> " 'The Alabama Supreme Court has stated: "[U]rging the jury to render a verdict in such a manner as to punish the crime, protect the public from similar offenses, and deter others from committing similar offenses is not improper argument." Ex parte Walker, 972 So.2d 737, 747 (Ala. 2007), quoting Sockwell v. State, 675 So.2d 4, 36 (Ala. Crim. App. 1993). We are bound by precedent established by the Alabama Supreme Court and find no error in the prosecution's comment.'
>
> "Woodward v. State, 123 So.3d 989, 1047 (Ala. Crim. App. 2011). Thus, no error--plain or otherwise-occurred."

Phillip I, —— So.3d at ——.

This Court agrees with the Court of Criminal Appeals' determination that the prosecutor's comments during closing argument and the trial court's omission of a limiting instruction do not constitute plain error.

The prosecutor's comment that the jury should recommend death in an effort to deter crime and protect domestic-violence victims was not improper argument. In Ex parte Walker, 972 So.2d 737, 747 (Ala. 2007), this Court considered the issue whether a prosecutor's comments, including the comment that the jury should convict the defendant of capital murder because "[c]hildren, elderly people need protection" and that the jurors should send a "message" to the community, established prosecutorial misconduct. The Court determined that the comments were not improper and found no plain error. Thus, this Court cannot conclude that the Court of Criminal Appeals erred in holding that the prosecutor's argument to deter crime and protect victims, by itself, is not plainly erroneous.

***25** More importantly, the trial court did not at any time direct the jury to consider more than one aggravating circumstance. The trial judge specifically instructed the jury to consider the aggravating circumstance that two or more persons were killed pursuant to one scheme or course of conduct. The court did not instruct the jury to consider any other statutory or nonstatutory aggravating circumstances. Thus, this Court cannot conclude that the Court of Criminal Appeals erred in holding that the trial court's failure to give a limiting instruction preventing the jury from considering nonstatutory aggravating circumstances was not plain error.

Finally, Phillips argues that the trial court at the sentencing phase of the trial improperly considered illegal nonstatutory aggravating circumstances when imposing

the death penalty. Specifically, Phillips argues that the trial court erroneously considered three nonstatutory aggravating circumstances: (1) "an unborn baby [is] a life worthy of respect and protection," (2) "[t]he founding fathers of this nation recognize[d] all life as worthy of respect and due process of law," and (3) "[t]he only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court."

On return to remand, the Court of Criminal Appeals, citing its previous opinion, held:

> " 'Here, contrary to Phillips's assertion, the trial court did not consider nonstatutory aggravating circumstances when it imposed his sentence. Rather, the trial court recognized that there was only one aggravating circumstance -- murder of two or more persons by one act -- and, thereafter, weighed that aggravating circumstance by commenting on the "clear legislative intent to protect even nonviable fetuses from homicidal acts," Mack [v. Carmack], 79 So.3d [597] at 610 [(Ala. 2011)], and the severity of the crime. Such commentary does not amount to the trial court's considering a nonstatutory aggravating factor. See, e.g., Scott v. State, 163 So.3d 389, 469 (Ala. Crim. App. 2012) ("It is clear that the above comment was a reference to the severity of the murder and was not the improper application of a nonstatutory aggravating circumstance.").'
>
> "Phillips [I], —— So.3d at ——.
>
> > "Based on the reasons set forth in our opinion on original submission, we again reject Phillips's claim that the trial court considered nonstatutory aggravating circumstances when it sentenced Phillips to death. Accordingly, Phillips is not entitled to any relief on this claim."

Phillips II, —— So.3d at ——, 2015 WL 9263812.

Upon reviewing the trial court's amended sentencing order, we agree with the Court of Criminal Appeals. In the amended sentencing order, the trial court found the following aggravating circumstances:

> "1. CAPITAL MURDER. Intentionally caused the death of Erica Carmen Phillips by shooting her with a pistol, and did intentionally cause the death of Baby Doe, by shooting Erica Carmen Phillips with a pistol while said Erica Carmen Phillips was pregnant with Baby Doe, in violation of Section 13A-5-40(a)(10) of the Code of Alabama 1975.
>
> "This aggravating factor was proven by overwhelming evidence. The Court found this beyond a reasonable doubt to be proven.
>
> "The Court further finds that the policy of this State has recognized an unborn baby to be a life worthy of respect and protection. The founding fathers of this nation recognize all life as worthy of respect and due process of law.
>
> "Jesse Phillips has been provided by the State of Alabama due process of law by Miranda warnings, criminal procedure, criminal evidence laws, criminal sentencing guidelines and numerous statutes and outstanding legal representation at all critical stages of this trial.
>
> ***26** "The only due process that can be given to Erica Droze Phillips and Baby Doe is by the prosecution, jury, and Court at all stages of this case."

When reading the trial court's analysis in the context of its entire order, it is clear that the court found that the sole aggravating circumstance applicable to Phillips's sentencing was the murder of two or more persons. Given that this case is the first in the State of Alabama in which one of the capital-murder victims is an unborn child, it was appropriate for the sentencing court to expound on its reasons for designating an unborn child as a "person" and a murder victim as set forth in § 13A-5-40(a)(10). The court correctly stated that Alabama recognizes an unborn baby as a life worthy of respect and protection, see the Brody Act, § 4 of Act No. 2006-419 and § 13A-6-1(3), Ala. Code 1975. In other words, under the criminal laws of the State of Alabama, the value of the life of an unborn child is no less than the value of the lives of other persons. The trial court's additional commentary that this country is founded upon equal protection and due process for all of its persons is also based upon constitutional law. Thus, this Court concludes that the

trial court's explanation indicating that it would not assign the aggravating circumstance less weight because Baby Doe was an unborn person at the time of the murder was not erroneous. See Scott v. State, 163 So.3d 389 (Ala. Crim. App. 2012).

G. The Batson Challenge

Phillips argues that the record establishes a prima facie case of discrimination because, he says, the State exercised its peremptory strikes to remove every non-white veniremember from the venire in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Ex parte Branch, 526 So.2d 609 (Ala. 1987), and Ex parte Jackson, 516 So.2d 768 (Ala. 1986). Phillips alleges the State used its peremptory strikes in a discriminatory manner when it struck African-American veniremember T.B. and Hispanic veniremember C.F. from the jury. He argues that, because of the State's actions, Phillips, an African-American, was tried by an all-white jury for killing his wife, who was white. He argues that the trial of this interracial crime was further racially charged because there was evidence indicating that Erica had directed racial slurs at Phillips just before the shooting.

In addressing this issue, the Court of Criminal Appeals acknowledged that, because Phillips did not contemporaneously object to the prosecutor's use of peremptory challenges, the plain-error rule applied, citing Lewis v. State, 24 So.3d 480, 489 (Ala. Crim. App. 2006)(applying plain-error analysis to death-penalty cases when counsel fails to make a Batson objection). The Court of Criminal Appeals acknowledged that for plain error to exist in the Batson context, the record must raise an inference that the State engaged in purposeful discrimination in the exercise of its peremptory challenges.

The Court of Criminal Appeals went on to hold:

> "The record on appeal, however, does not 'raise an inference that the State engaged in "purposeful discrimination" in the exercise of its peremptory challenges.' Lewis, supra. Indeed, Phillips's allegation on appeal--that prospective jurors T.B. and C.F. were racial minorities who were struck by the State--is supported only by the inclusion of six pages of handwritten notes in the record. Those notes--whose author is unknown--consist of six different grids--specifically, a separate grid for each jury panel--with each square in the grid dedicated to a single, specific juror. Inside those squares, along with the name of the prospective juror, are comments about some of those jurors. The handwritten notes for 'Panel 1' indicate that prospective juror T.B. is 'black,' and the handwritten notes for 'Panel 2' indicate that prospective juror C.F. is 'Hispanic.' (C. 96, 97.) No other prospective jurors' race is indicated on those handwritten notes. Additionally, neither the jury-strike list included in the record on appeal nor the transcription of voir dire or the jury-selection process indicates the race of any prospective juror.
>
> ***27** "Having no indication of the race of each of the prospective jurors in the record on appeal, this Court is unable to engage in any meaningful plain-error review of Phillips's Batson claims. Indeed, without knowing the race of each individual prospective juror, this Court cannot determine whether the State's strikes of prospective jurors T.B. and C.F. resulted in the 'total exclusion of racial minorities from the jury,' cannot determine whether the State engaged in 'nothing but desultory voir dire of these racial-minority veniremembers' (Phillips's brief, p. 72), and cannot determine whether the State engaged in 'disparate treatment of white veniremembers and veniremembers of color who made similar statements.'[8] (Phillips's brief, p. 73.)
>
> "Accordingly, Phillips is due no relief on this claim.
>
> "

"[8]To support his disparate-treatment claim, Phillips cites and quotes the juror questionnaires of prospective jurors T.B. and C.F. and compares those questionnaires to 'white jurors ... not struck by the State' (Phillips's brief, p. 73); there is no indication in the record on appeal, however, that those comparator jurors were, in fact, white. Moreover, although Phillips cites and quotes the juror questionnaires to support his claim, as explained above, the record on appeal does not include any juror questionnaires in this case, and 'this court may not presume a fact not shown by the record and make it a ground for reversal.' Carden v. State, 621 So.2d 342, 345 (Ala. Crim. App. 1992)."

Phillips I, ––– So.3d at ––––.

It is undisputed that Phillips did not contemporaneously object to the prosecutor's use of peremptory challenges at the time of trial. It is also undisputed that this Court has, on plain-error review, initiated a Batson inquiry on appeal of a death-penalty case when the defendant did not object at trial to the State's use of peremptory challenges. See, e.g., Ex parte Adkins, 600 So.2d 1067 (Ala. 1992)(remanding for a Batson hearing where the defendant's lawyers never objected to the State's removal of blacks from the jury); Ex parte Bankhead, 585 So.2d 112 (Ala. 1991), aff'd on remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So.2d 1146 (Ala. 1993)(remanding for a Batson hearing even though no objection was made at trial where the defendant, who was white, had standing based on Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), to challenge the prosecutor's allegedly racially motivated use of peremptory challenges where the prosecutor challenged 8 of 10 black jurors on the venire in a capital case).

1.

In discussing the application of plain error to Phillips's Batson claim, it is important to emphasize that in Batson the United States Supreme Court reaffirmed the long-standing principle that the Equal Protection Clause prohibits a prosecutor from using a peremptory challenge to strike a prospective juror solely on account of race. 476 U.S. at 88, 106 S.Ct. 1712. As the Supreme Court explained in Miller–El v. Cockrell, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003):

> " 'First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson v. Kentucky,] 476 U.S. [79,] 96–97 [106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97–98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98, 106 S.Ct. 1712."

537 U.S. at 328–29, 123 S.Ct. 1029.

The Supreme Court in Batson discussed the requirements for a prima facie case in the following terms:

> "To establish such a case, the defendant first must show that he is a member of a cognizable racial group ... and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'... Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination.
>
> ***28** "In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors."

Batson, 476 U.S. at 96-97, 106 S.Ct. 1712; see also Ex parte Branch, 526 So.2d at 622-23 (illustrating the types of evidence that can be used to raise an inference of discrimination).

In Ex parte Bell, 535 So.2d 210, 212 (Ala. 1988), this Court stated that, "in order to preserve the issue for appellate review, a Batson objection, in a case in which the death penalty has not been imposed, must be made prior to the jury's being sworn." Where the trial court's practice is to swear the entire jury venire after qualifying the venire, excusing those who need to be excused, and does not swear individual juror panels again before the trial, then the defendant has no opportunity to make a Batson objection after the exercise of peremptory challenges but before the jury is sworn. "[S]ince there is no opportunity to object before the jury is sworn under these circumstances, a Batson objection will be deemed timely made if it is 'made early enough to give the trial court sufficient time to take corrective action without causing delay if it deemed action necessary.' " White v. State, 549 So.2d 524, 525 (Ala. Crim. App. 1989)(opinion on return to remand)(quoting Williams v. State, 530 So.2d 881, 884 (Ala. Crim. App. 1988)).

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."

Plain error is

> "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings. Ex parte Taylor, 666 So.2d 73 (Ala. 1995). The plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. Taylor."

Ex parte Trawick, 698 So.2d 162, 167 (Ala. 1997). Additionally, as we stated in Ex parte Walker, 972 So.2d 737, 742 (Ala. 2007):

> " ' " 'For plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See Ex parte Watkins, 509 So.2d 1074 (Ala.), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).' " '
>
> "Smith v. State, 756 So.2d 892, 915 (Ala. Crim. App. 1998), aff'd, 756 So.2d 957 (Ala. 2000)(quoting Rieber v. State, 663 So.2d 985, 991 (Ala. Crim. App. 1994), quoting in turn other cases)."

2.

In support of his argument that the record supports a prima facie case of discrimination warranting a remand for a Batson hearing despite the fact that he made no contemporaneous objection, Phillips cites parts of the record containing handwritten notes regarding prospective jurors. The notes indicate that C.F. is "Hispanic" and that T.B. is "black." Although the notes were included in the record along with the juror-strike list, it is unclear who wrote the notes. The juror-strike list does not contain any of the prospective jurors' races, and nothing in the reporter's transcript contains the race of the jurors. Phillips cannot successfully argue that error is plain in the record when there is no indication in the record that the act upon which error is predicated ever occurred (i.e., the State's use of its peremptory challenges to exclude people of color). Accordingly, Phillips is not entitled to relief on this issue.

H. Autopsy Photograph

***29** Phillips argues that the prosecution introduced "a series of gruesome autopsy photographs, culminating in the introduction of a photograph of Mrs. Phillips's mutilated uterus, ovaries, and fallopian tubes, removed from her body, carved open, and placed on a table, still dripping blood." He contends that the admission of that autopsy photograph was "so inflammatory and prejudicial that it 'infected the trial with unfairness as to make [Phillips's] conviction a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); see also Holbrook v. Flynn, 475 U.S. 560, 567-68, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986)." Because Phillips's counsel did not object to the admission of the autopsy photograph on this basis, the Court of Criminal Appeals reviewed the matter for plain error. Rule 45A, Ala. R. App. P.

The Court of Criminal Appeals determined that the admission of the autopsy photograph was not erroneous. Specifically, that court stated:

> "The following is well settled:
>
> " ' " "Generally, photographs are admissible into evidence in a criminal prosecution 'if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered, and their admission is within the sound discretion of the trial judge.' Magwood v. State, 494 So.2d 124, 141 (Ala. Cr. App. 1985), aff'd, 494 So.2d 154 (Ala. 1986), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). See also Woods v. State, 460 So.2d 291 (Ala. Cr. App. 1984); Washington v. State, 415 So.2d 1175 (Ala. Cr. App. 1982); C. Gamble, McElroy's Alabama Evidence § 207.01(2) (3d ed. 1977)." '
>
> "Sneed v. State, 1 So.3d 104, 131-32 (Ala. Crim. App. 2007) (quoting Bankhead v. State, 585 So.2d 97, 109 (Ala. Crim. App. 1989))..... Moreover, 'photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.' Ex parte Siebert, 555 So.2d 780, 784 (Ala. 1989) (citing Hutto v. State, 465 So.2d 1211, 1212 (Ala. Crim. App. 1984)). [9]
>
> " 'With regard to autopsy photographs, this Court has explained:
>
> " ' " 'This court has held that autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries.' Ferguson v. State, 814 So.2d 925, 944 (Ala. Crim. App. 2000), aff'd, 814 So.2d 970 (Ala. 2001). ' "[A]utopsy photographs depicting the character and location of wounds on a victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter." ' Jackson v. State, 791 So.2d 979, 1016 (Ala. Crim. App. 2000), quoting Perkins v. State, 808 So.2d 1041, 1108 (Ala. Crim. App. 1999), aff'd, 808 So.2d 1143 (Ala. 2001), judgment vacated on other grounds, 536 U.S. 953, 122 S.Ct. 2653, 153 L.Ed.2d 830 (2002), on remand to, 851 So.2d 453 (Ala. 2002)...."
>
> " 'Brooks v. State, 973 So.2d 380, 393 (Ala. Crim. App. 2007).'
>
> "Shanklin [v. State], 187 So.3d [734] at 774 [(Ala. Crim. App. 2014)].
>
> "At trial, Dr. Ward identified the complained-of photograph--which was admitted as State's Exhibit 18--and explained that it depicted Erica's
>
> " 'uterus, which contains the products of conception. We can see the placenta within the uterus, and on either side of the uterus is one ovary and then the other and the fallopian tubes. And the ovary on the right side of the photograph--excuse me, the left side of the photograph has a cyst in it that is the corpus luteum cyst. It's what we see in the ovary of people who are pregnant, women who are pregnant.'
>
> "(R. 663.)
>
> "Although Phillips argues that the complained-of photograph was gruesome, the trial court did not commit plain error in allowing the photograph to be admitted. Here, Phillips was charged with capital murder for causing the death of both his wife and an unborn child pursuant to one scheme or course of conduct. Thus, as part of its burden of proof, the State was required to establish both that Erica was pregnant and that Baby Doe died. Although Erica's pregnancy was an undisputed fact (see Phillips's brief, p. 75) and the complained-of photograph is gruesome, the complained-of photograph was admissible, and Phillips is due no relief on this claim. See Shanklin, supra."

***30** —— So.3d at ——.

Whether graphic autopsy photographs depicting a dissection in a criminal-homicide case are admissible is an issue of first impression before this Court. [10] We have, however, addressed the admissibility of photographs of a

victim's wounds and other gruesome photographs. In Ex parte Siebert, 555 So.2d 780, 783-84 (Ala. 1989), we held:

> "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 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). Photographs illustrating crime scenes have been admitted into evidence, as have photographs of victims and their wounds. E.g., Hill v. State, 516 So.2d 876 (Ala. Cr. App. 1987). Furthermore, photographs that show the external wounds of a deceased victim are admissible even though the evidence is gruesome and cumulative and relates to undisputed matters. E.g., Burton v. State, 521 So.2d 91 (Ala. Cr. App. 1987)."

Thus, photographs of a victim taken after a homicide or assault are "usually admitted upon the basis that they tend to illustrate, elucidate, or corroborate some relevant material inquiry or corroborate testimony." Charles W. Gamble, McElroy's Alabama Evidence § 207.01(2), at 1285 (6th ed. 2009).

***31** This Court has reviewed the autopsy photographs and acknowledges that the photograph of the products of conception is gruesome. The "gruesomeness" of a photograph becomes objectionable where there is distortion of two kinds:

> " ' "[F]irst, distortion of the subject matter as where necroptic or other surgery caused exposure of nonprobative views, e.g., 'massive mutilation,' McKee v. State, 33 Ala. App. 171, 31 So.2d 656 [(1947)]; or second, focal or prismatic distortion where the position of the camera vis-á-vis the scene or object to be shown gives an incongruous result, e.g., a magnification of a wound to eight times its true size, Wesley v. State, 32 Ala. App. 383, 26 So.2d 413 [(1946)]."
>
> " 'Braswell v. State, 51 Ala. App. 698, 701, 288 So.2d 757 (1974).' "

Stallworth v. State, 868 So.2d 1128, 1151 (Ala. Crim. App. 2001) (quoting Acklin v. State, 790 So.2d 975, 997-98 (Ala. Crim. App. 2000)). See Brown v. State, 11 So.3d 866 (Ala. Crim. App. 2007) (holding autopsy photographs depicting the internal views of wounds admissible); Gamble, § 207.01(2), at 1285-86 (collecting cases). See also Taylor v. Culliver, (No. 4:09-cv-00251-KOB-TMP), 2012 WL 4479151 (N.D. Ala. Sept. 26, 2012) (not selected for publication in F.Supp)(holding, in review of an action seeking habeas corpus relief with respect to a petitioner's capital-murder conviction and death sentence, that the introduction of numerous autopsy photographs, including a photograph depicting the sawing and removal of the skull cap and brain, as well as the medical examiner's trial testimony referencing the photographs and the prosecutor's remarks about the gruesome nature of the photographs, "did not render [the petitioner's] trial fundamentally unfair" nor deprive him of due process).

This Court's review of the record indicates that Dr. Ward used the photograph depicting the products of conception when testifying about the presence of a placenta and a corpus luteum cyst, present in some pregnant women. The State had the burden of proving beyond a reasonable doubt that Erica was pregnant and that Baby Doe did not survive to prove that Phillips killed two persons. Thus, the photograph was used as probative evidence to establish that Erica was pregnant at the time Phillips shot her. Because the probative value outweighs any inflammatory or prejudicial effect, this Court cannot conclude that the photograph so "infected the trial with unfairness as to make [Phillips's] conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). Consequently, we cannot conclude that the Court of Criminal Appeals erred in determining that the trial court's admission of the autopsy photograph into evidence was not plainly erroneous.

I. The Indictment

Phillips argues that the trial court improperly amended the indictment by instructing the jury that it could convict him of capital murder if it found that he intended to

kill only Erica and that the unborn child died as an unintended result. Phillips contends that the indictment as written required a finding of individualized and specific intent to kill both Erica and Baby Doe but that the trial court wrongfully amended the indictment by instructing the jury on transferred intent. He asserts that the improper amendment violated Alabama law, including Rule 13.5, Ala.R.Crim.P., as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

***32** Phillips asserts that his counsel first received notice of the prosecution's theory of transferred intent during oral argument when the prosecution objected to the following statement by defense counsel:

> "[I]t's important, ladies and gentlemen, to know or for you to know that it is not enough to prove capital murder and that Baby Doe also died. As tragic as any such taking of life can be, the State must prove to you by the evidence, ladies and gentlemen, that at the time of the act, that's what Jessie's purpose was."

The State argued that the doctrine of transferred intent was applicable to the case and that defense counsel's statement regarding Phillips's intent at the time of the offense was not an appropriate statement under the facts of the case. Defense counsel, however, argued that generalized intent cannot be transferred to an unintended victim in a capital-murder case. The trial court acknowledged that the indictment set forth an intent to kill Erica as well as an intent to kill Baby Doe. The trial court, however, reserved ruling on the matter until hearing all the facts and the evidence. Phillips contends that the variation in the indictment was highly prejudicial because, he says, the addition of transferred intent as an element of the charge limited his counsel's "ability to modify his defense strategy, which he had planned based on the language in the indictment."

After a jury-charge conference, the trial court granted the State's requests for instructions on transferred intent. The trial court instructed the jury, in pertinent part, as follows:

> "Requested jury charge number two. In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder.
>
> "Jury charge number three. I charge you that the law of Alabama allows the defendant Jessie Phillips to be convicted of a capital offense for the intentional murder of two or more persons when the defendant, Jessie Phillips, is proven beyond a reasonable doubt to have caused the death of an intended victim as well as an unintended victim by a single act."

Although Phillips objected to the trial court's instructions on transferred intent, he did not object on the basis that they created a material variance or a constructive amendment of the indictment or otherwise argue that the court improperly amended the indictment. Thus, the Court of Criminal Appeals reviewed his assertion that the trial court's instructions improperly amended the indictment for plain error. The Court of Criminal Appeals held:

> "With regard to a trial court's jury instructions effectively amending an indictment, we have noted:
>
> " ' " '[A] material variance will exist if the indictment charges an offense committed by one means and the trial court's jury charge addresses a separate and contradictory means.' " Gibson v. State, 488 So.2d 38, 40 (Ala. Crim. App. 1986) (emphasis added). However, "[t]he one apparent exception to this rule of variance where the statute contains alternative methods of committing the offense is where the alternative methods are not contradictory and do not contain separate and distinct elements of proof." Id.'

***33** "McCray v. State, 88 So.3d 1, 84 n.34 (Ala. Crim. App. 2010).

"Here, Phillips's indictment charged him as follows:

> " 'The GRAND JURY of [Marshall C]ounty charge that, before the finding of this INDICTMENT, JESSIE LIVELL PHILLIPS, whose name to the Grand Jury is otherwise unknown, did by one act or pursuant to one scheme or course of conduct, intentionally cause the death of ERICA CARMEN PHILLIPS, by shooting her with a pistol, and did intentionally cause the death of BABY DOE, by shooting ERICA CARMEN PHILLIPS with a pistol while the said ERICA CARMEN PHILLIPS was pregnant with BABY DOE, in violation of Section 13A-5-40(a)(10) of the Code of Alabama (1975), as last amended, against the peace and dignity of the State of Alabama.'

"(C. 24 (capitalization in original).) After charging the jury on the allegations in the indictment, the trial court charged the jury on transferred intent, as follows:

> " 'In order to convict the defendant Jessie Phillips of a capital offense for the intentional murder of two or more persons, I charge you that the State of Alabama is not required to prove to you beyond a reasonable doubt that the defendant Jessie Phillips had a specific intent to kill both Erica Phillips and Baby Doe by one single act. Under the facts of this case, if the State of Alabama proves to you beyond a reasonable doubt that the defendant Jessie Phillips intended to kill Erica Phillips and also killed an unintended victim, Baby Doe, by a single act, the defendant can be convicted of capital murder.'

"(R. 766-67.)

"Although we question whether Phillips is correct in his contention that his 'indictment, as written, required a finding of individualized and specific intent to kill both [Erica] and [Baby Doe]' (Phillips's brief, p. 82), the trial court's transferred-intent instruction did not amend Phillips's capital-murder indictment because the instruction neither charged a new or different offense nor 'address[ed] a separate and contradictory means' of proving that offense. Instead, the transferred-intent instruction charged the jury on the same offense as charged in the indictment--murder of two or more persons--and, although it addressed a different means of proving that offense, it did not address a contradictory means of proving that offense. Thus, no error--much less plain error--occurred."

Phillips I, —— So.3d at ——.

This Court agrees that the trial court's instruction on transferred intent was not a material variance from, or otherwise did not improperly amend, the indictment. The Court notes that, although Phillips argues that the indictment was "improperly amended," the Court of Criminal Appeals applied law related to a "material variance" from the indictment. A "material variance" from an indictment is different from a "constructive amendment" of an indictment.

There are three general categories of variances between the allegations of an indictment and the evidence presented at trial to support a charge: "(1) a variance involving statutory language that defines the offense; (2) a variance involving a nonstatutory allegation that describes an allowable unit of prosecution element of an offense; and (3) other types of variances involving immaterial nonstatutory allegations." 41 Am. Jur. 2d Indictments and Informations § 242 (2015). "Unlike an amendment to an indictment, a variance does not undercut the charging terms of an indictment but merely permits the proof of facts to establish a criminal charge materially different from the facts contained in the indictment ...." Id. A material variance infringes upon the Sixth Amendment requirement that in all criminal prosecutions the accused has the right to be informed of the nature and cause of the accusation. Id. "It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him." Schmuck v. United States, 489 U.S. 705, 717, 109 S.Ct. 1443, 103 L.Ed.2d 734 (1989)(citing Ex parte Bain, 121 U.S. 1, 10, 7 S.Ct. 781, 30 L.Ed. 849 (1887); Stirone v. United States, 361 U.S. 212, 215-17, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); and United States v. Miller, 471 U.S. 130, 140, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985)).

***34** A constructive amendment of an indictment occurs when the terms of the indictment are altered by evidence or jury instructions that modify the essential elements of the charged offense, thereby establishing a substantial likelihood that the defendant was convicted of an offense other than the offense charged in the indictment. See, e.g., United States v. Miller, 471 U.S. 130, 137-38, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985)(holding that the Fifth Amendment grand-jury guarantee is not violated where an indictment alleges more crimes or other means of committing the same crime, so long as the crime and the

elements that sustain the conviction are fully and clearly set forth in the indictment). Thus, "[j]ury instructions altering the form and not the substance of an indictment are permissible since they usually eliminate surplusage and do not change the nature of the charged offense." 41 Am. Jur. 2d Indictments and Informations § 249. "The distinction is not always clear, however, and a constructive amendment has been conceived of as something between an actual amendment and a variance." Indictments and Informations § 247 (Observation).

In Wright v. State, 902 So.2d 738, 740 (Ala. 2004), this Court discussed the "improper amendment" of an indictment:

> "Rule 13.5, Ala. R. Crim. P., allows the State to amend an indictment if the defendant consents, with two exceptions. First, the State may not 'change' the charged offense, and second, the State may not charge a 'new' offense not contemplated by the original indictment. Rule 13.2, Ala. R. Crim. P., however provides that all lesser offenses included within the charged offense are contemplated by the indictment. A lesser-included offense is defined as, but not limited to, an offense 'established by proof of the same or fewer than all the facts required to establish the commission of the offense charged.' Ala. Code 1975, § 13A-1-9.
>
> "In addition to a formal amendment, an indictment can be informally 'amended' by actions of the court or of the defendant. The trial court's act of instructing the jury on charges other than those stated in the indictment effects an 'amendment' of the indictment. Ash v. State, 843 So.2d [213,] 216 [(Ala. 2002)]."

This Court agrees with the Court of Criminal Appeals that neither a material variance nor an improper amendment exists. The trial court read the charge in the indictment to the jury and gave further instructions on the capital offense of murder of two or more persons pursuant to one act that were consistent with the wording in the indictment and in the Alabama Pattern Jury Instructions. In addition to instructing on intent as to each victim as set forth in the indictment, the trial court provided additional instructions on transferred intent. The instruction on transferred intent did not set forth a different offense or a contradictory means of proving capital murder. This Court therefore cannot conclude that the trial court's instruction on transferred intent improperly amended the indictment. Thus, we agree with the Court of Criminal Appeals' opinion that no error, plain or otherwise, occurred.

J. The Jury's Verdict

Phillips argues that the prosecutor's statement to the jurors that their verdict was a recommendation and that they were not "the executioner," as well as the trial court's repeated instructions that the jury's verdict was merely advisory and/or a recommendation, misled the jury as to its role in the sentencing process in violation of his rights to due process, a fair trial, and a reliable sentence and jury determination as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Alabama law. Specifically, he contends: (1) that the prosecutor's comments and the trial court's instructions "allow[ed] the jury to feel less responsible than it should for its sentencing decision. Darden v. Wainwright, 477 U.S. 168, 183 n. 15, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986); see also Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985); Ring v. Arizona, 536 U.S. 584, 589, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)"; and, therefore, (2) that the jury's verdict is not "sufficiently reliable to support a sentence of death, see Hurst v. Florida, 577 U.S. ——, 136 S.Ct. 616, 622, 193 L.Ed.2d 504 (2016)."

***35** On return to remand, the Court of Criminal Appeals summarized the effect of Hurst on the sentencing scheme in Phillips's case as follows:

> "[I]n this case, the jury's guilt-phase verdict also established that an aggravating circumstance was proved beyond a reasonable doubt, and the maximum sentence Phillips could receive based on the jury's guilt-phase verdict alone was death. Accordingly, 'the jury, not the trial court, ... [made] the critical finding necessary for imposition of the death penalty,' and Phillips is not entitled to relief on this claim. See also Ex parte Bohannon, 222 So.3d 525 (Ala. 2016) (holding that Alabama's capital-sentencing scheme 'is consistent with 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 [v. Florida, 577 U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016),] and does not violate the Sixth Amendment' and rejecting the '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')."

Phillips II, —— So.3d at ——, 2015 WL 9263812.

The Court of Criminal Appeals further discussed the effect of comments and instructions regarding the advisory nature of the jury's verdict:

"Phillips contends that the State 'incorrectly informed [the jury] that its penalty phase verdict was merely a recommendation, in violation of state and federal law.' (Phillips's brief on return to remand, p. 27.)

"Although this Court has repeatedly rejected such a claim, see, e.g., Albarran v. State, 96 So.3d 131, 210 (Ala. Crim. App. 2011) ('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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (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 1236 (Ala. 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).'), Phillips contends that the United States Supreme Court's decision in Hurst 'makes clear that the jury should not have been informed that its verdict was merely advisory and that Mr. Phillips's death sentence cannot rest on this recommendation from the jury.' (Phillips's brief on return to remand, p. 29.) As explained in Part I of this opinion [which cites Ex parte Bohannon, 222 So.3d 525 (Ala. 2016)], however, Hurst did not invalidate Alabama's capital-sentencing scheme, including the jury's 'advisory verdict.' Thus, Phillips is not entitled any relief on this claim."

***36** Phillips II, —— So.3d at ——, 2015 WL 9263812.

Phillips argues that the prosecutor's comments and the trial court's instructions that the jury's verdict was "advisory" or a "recommendation" led the jury to believe its verdict was not a "critical finding necessary for imposition of the death penalty." State v. Billups, 223 So.3d 954, 970 (Ala. Crim. App. 2016). As the Court of Criminal Appeals correctly held, the issues raised by Phillips in the present case were previously considered by this Court in Ex parte Bohannon, 222 So.3d 525 (Ala. 2016), cert. denied, —— U.S. ——, 137 S.Ct. 831, 197 L.Ed.2d 72 (2017). In Bohannon, this Court held:

"Bohannon contends that an instruction to the jury that its sentence is merely advisory conflicts with Hurst because, he says, Hurst establishes that an 'advisory recommendation' by the jury is insufficient as the 'necessary factual finding that Ring requires.' Hurst, 577 U.S. ——, 136 S.Ct. at 622 (holding that the 'advisory' recommendation by the jury in Florida's capital-sentencing scheme was inadequate as the 'necessary factual finding that Ring requires'). Bohannon ignores the fact that the finding required by Hurst to be made by the jury, i.e., the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama. Nothing in Apprendi, Ring, or Hurst suggests that, once the jury finds the existence of the aggravating circumstance that establishes the range of punishment to include death, the jury cannot make a recommendation for the judge to consider in determining the appropriate sentence or that the judge cannot evaluate the jury's sentencing recommendation to determine the appropriate sentence within the statutory range. Therefore, the making of a sentencing recommendation by the jury and the judge's use of the jury's recommendation to determine the appropriate sentence does not conflict with Hurst."

222 So.3d at 534. Likewise, in Phillips's case, the sentencing recommendation by the jury and the judge's use of that recommendation to determine the appropriate sentence does not conflict with Hurst.

Phillips's reliance on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), as support for his argument that "[the jury's] sense of responsibility for the sentence was undermined" because the jury in the present case was informed that its sentencing verdict would be advisory or a recommendation is also unavailing. In

Caldwell, the United States Supreme Court vacated a death sentence because, in closing argument during the penalty phase, the prosecutor impermissibly urged the jury not to view itself as finally determining whether the defendant would die, because a death sentence, if imposed, would be reviewed for correctness by the Mississippi Supreme Court. The United States Supreme Court concluded that "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." Caldwell, 472 U.S. at 328-29, 105 S.Ct. 2633. The Supreme Court further stated: "Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with –- and indeed as indispensable to –- the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' Woodson v. North Carolina, supra, 428 U.S. [280], at 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 [(1976)] (plurality opinion)." Caldwell, 472 U.S. at 330, 105 S.Ct. 2633. The Supreme Court set forth a list of "specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." Id.

***37** In this case, before remanding the case for resentencing in light of Hurst, the Court of Criminal Appeals discussed the application of Caldwell to Phillips's case:

> "Although Phillips correctly recognizes that both the State and the trial court informed the jury that its penalty-phase verdict was a 'recommendation,' this Court has consistently held that informing a jury that its penalty-phase role is 'advisory' or to provide a 'recommendation' is not error.
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> " 'In Albarran v. State, 96 So.3d 131 (Ala. Crim. App. 2011), this Court wrote:
>
> " ' " 'First, the circuit court did not misinform the jury that its penalty phase verdict is are commendation. 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, 105 S.Ct. 2633, 86 L.Ed.2d 231 (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 [1990]); 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."
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> " '96 So. 3d at 210. Because " '[t]he prosecutor's comments and the trial court's instructions "accurately informed the jury of its sentencing authority and in no way minimized the jury's role and responsibility in sentencing," ' " Hagood v. State, 777 So.2d 162, 203 (Ala. Crim. App. 1998) (quoting Weaver v. State, 678 So.2d 260, 283 (Ala. Crim. App. 1995)), aff'd in part, rev'd in part on unrelated grounds, Ex parte Hagood, 777 So.2d 214 (Ala. 1999), Riley is not entitled to any relief as to this claim.'
>
> "Riley v. State, 166 So.3d 705, 764-65 (Ala. Crim. App. 2013). Thus, neither the State nor the trial court misinformed the jury when explaining that its penalty-phase verdict was a recommendation.

"Additionally, the State's comment during its penalty-phase opening statements that the jury was not 'the executioner' was not a comment that 'minimize[d] the jury's role and responsibility in sentencing and [did] not violate the United States Supreme Court's holding in Caldwell.' See Riley, 166 So.3d at 765. We addressed a similar comment in Taylor v. State, 666 So.2d 36 (Ala. Crim. App. 1994), as follows:

***38** " 'We condemn the prosecutor's comment during his opening remarks at the penalty phase that the jur[ors] should not "personally feel like that [they are] making a decision on someone's life" because that particular comment tends to encourage irresponsibility on the part of the jury in reaching its sentencing recommendation. However, the condemnation in Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), is that "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." 472 U.S. at 328–29, 105 S.Ct. at 2639. We fully support that principle, yet under Alabama law, the trial judge--not the jury--is the "sentencer." "[W]e reaffirm the principle that, in Alabama, the 'judge, and not the jury, is the final sentencing authority in criminal proceedings.' Ex parte Hays, 518 So.2d 768, 774 (Ala. 1986); Beck v. State, 396 So.2d [645] at 659 [(Ala. 1980)]; Jacobs v. State, 361 So.2d 640, 644 (Ala. 1978), cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979)." Ex parte Giles, 632 So.2d 577, 583 (Ala. 1993), cert. denied, 512 U.S. 1213, 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994). "The jury's verdict whether to sentence a defendant to death or to life without parole is advisory only." Bush v. State, 431 So.2d 555, 559 (Ala. Crim. App. 1982), aff'd, 431 So.2d 563 (Ala. 1983), cert. denied, 464 U.S. 865, 104 S.Ct. 200, 78 L.Ed.2d 175 (1983). See also Sockwell v. State, [675] So.2d [4] (Ala. Cr. App. 1993). "We have previously held that the trial court does not diminish the jury's role or commit error when it states during the jury charge in the penalty phase of a death case that the jury's verdict is a recommendation or an 'advisory verdict.' White v. State, 587 So.2d 1218 (Ala. Cr. App. 1990), aff'd, 587 So.2d 1236 (Ala. 1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992)." Burton v. State, 651 So.2d 641 (Ala. Cr. App. 1993).

" 'Considering the prosecutor's statements in the context of the entire trial, in the context in which those statements were made, and in connection with the other statements of the prosecutor and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard.'

"Taylor, 666 So.2d at 50-51 (footnote omitted).

"Likewise, here, examining the State's comment in this case 'in the context of the entire trial, in the context in which [that] statement[ ] [was] made, and in connection with the other statements of the [State] and of the trial court, which correctly informed the jury of the advisory function of its verdict, we find no reversible error in the record in this regard.' Id. at 51. Thus, Phillips is not entitled to relief on this claim."

Phillips I, —— So. 3d at ——.

We agree with the Court of Criminal Appeals' reasoning. Neither the prosecutor's statement nor the trial court's instructions improperly described the role assigned to the jury. See Romano v. Oklahoma, 512 U.S. 1, 9, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994)(" '[T]o establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.' " (quoting Dugger v. Adams, 489 U.S. 401, 407, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989))); see also Bohannon v. State, 222 So.3d 457, 519 (Ala. Crim. App. 2015)(citing Harich v. Wainwright, 813 F.2d 1082, 1101 (11th Cir. 1987) and Martin v. State, 548 So.2d 488 (Ala. Crim. App.1988), aff'd, 548 So.2d 496 (Ala. 1989), for the proposition that comments that accurately explain the respective functions of the judge and jury are permissible under Caldwell so long as the significance of the jury's recommendation is adequately stressed). In Phillips's case, neither the prosecutor nor the trial court misrepresented the effect of the jury's sentencing recommendation. Their remarks clearly defined the jury's role, were not misleading or confusing, and were correct statements of the law. Consequently, we find no merit to Phillips's argument that the United States Supreme Court's decision in Hurst, taken together with its prior holding in Caldwell, establishes that his jury should not have been informed that its verdict was merely advisory

and that, therefore, the death sentence cannot rest on its recommendation. Thus, Phillips is entitled to no relief with respect to this contention.

K. "Double Counting" of Murder

***39** Phillips argues that the application of the "two-or-more-persons" aggravating circumstance to justify his sentence of death violates the Eighth Amendment's prohibition on cruel and unusual punishment. Specifically, he argues that he is the only individual in the United States on death row as to whom the sole basis of the capital offense is that he killed a woman whose unborn child was in the first trimester of gestational development. He argues that evolving standards of decency do not consider the killing to be so aggravated as to be punishable by death. He contends that applying the two-or-more-persons aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

Elsewhere in his brief, Phillips raises a similar argument couched in different terms. Phillips contends that "double counting" the capital offense with the aggravating circumstance of murder of two or more persons violates his "rights to due process, equal protection, a fair trial, and a reliable sentencing under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law." Specifically, he asserts that, because the jury found him guilty beyond a reasonable doubt at the guilt phase of murder of "two or more persons," the State was able to argue at the sentencing phase that the jury had already found the only aggravating circumstance that existed in the case. Phillips also argues that the trial court improperly strengthened the relative weight of the aggravating circumstance by instructing the jurors to weigh any mitigating circumstances against the two-or-more-persons aggravating circumstance already established. In addition, he argues that using the charge of killing "two or more persons" to establish both a capital offense and the sole aggravator fails to narrow the class of cases eligible for the death penalty, thereby resulting in an arbitrary imposition of death in violation of the Eighth Amendment and subjects him to two punishments as a result of being convicted for a single criminal charge, in violation of the Fifth Amendment. Given the similarities of the issues and arguments, as well as the duplicative law, this Court will discuss the two arguments under one heading. The Court of Criminal Appeals reviewed the claims for plain error because Phillips did not raise the specific issues at trial. See Rule 45A, Ala. R. App. P.

Under one heading, the Court of Criminal Appeals rejected both of Phillips's claims regarding the "double counting" of an element at both the guilt and the sentencing phases:

> "Phillips contends that 'double-counting murder of "two or more persons" at both the guilt phase and the penalty phase violated state and federal law.' (Phillips's brief, p. 96.) Phillips's claim has been consistently rejected by both this Court and the Alabama Supreme Court.
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> "Specifically, in Ex parte Windsor, 683 So.2d 1042 (Ala. 1996), the Alabama Supreme Court explained:
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> > " ' "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. Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); Ritter v. Thigpen, 828 F.2d 662 (11th Cir. 1987); Ex parte Ford, 515 So.2d 48 (Ala. 1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988); Kuenzel v. State, 577 So.2d 474 (Ala. Cr. App. [1990]), aff'd, 577 So.2d 531 (Ala.), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).
>
> > " ' "Moreover, our statutes allow 'double-counting' or 'overlap' and provide that the jury, by its verdict of guilty of the capital offense, finds the aggravating circumstance encompassed in the indictment to exist beyond a reasonable doubt. See §§ 13A–5–45(e) and –50. '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.' § 13A–5–50."
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> ***40** " 'Coral v. State, 628 So.2d 954, 965–66 (Ala. Cr. App. 1992). See also Burton v. State, 651 So.2d 641 (Ala. Cr. App. 1993). The trial court

> correctly considered the robbery as an aggravating circumstance.'

"683 So.2d at 1060. See also Ex parte Woodard, 631 So.2d 1065, 1069–70 (Ala. Crim. App. 1993); Ex parte Trawick, 698 So.2d [162] at 178 [(Ala. 1997)]; Shanklin [v. State], 187 So.3d [734] at 804 [(Ala. Crim. App. 2014)]; McCray [v. State], 88 So.3d [1] at 74 [(Ala. Crim. App. 2010)]; McMillan v. State, 139 So.3d 184, 265-66 (Ala. Crim. App. 2010); Reynolds v. State, 114 So.3d 61, 157 (Ala. Crim. App. 2010); Morris v. State, 60 So.3d 326, 380 (Ala. Crim. App. 2010); Vanpelt [v. State], 74 So.3d [32] at 89 [(Ala. Crim. App. 2009)]; Newton v. State, 78 So.3d 458 (Ala. Crim. App. 2009); Brown v. State, 11 So.3d 866, 929 (Ala. Crim. App. 2007); Mashburn v. State, 7 So.3d 453 (Ala. Crim. App. 2007); Harris [v. State], 2 So.3d [880] at 926–27 [(Ala. Crim. App. 2007)]; Jones v. State, 946 So.2d 903, 928 (Ala. Crim. App. 2006); Barber v. State, 952 So.2d 393, 458–59 (Ala. Crim. App. 2005); and McGowan v. State, 990 So.2d 931, 996 (Ala. Crim. App. 2003). Because 'double-counting' is constitutionally permitted and statutorily required, Phillips is not entitled to relief on this claim. See § 13A–5–45(e), Ala. Code 1975.

"Additionally, to the extent that Phillips argues that 'double-counting' fails 'to narrow the class of cases eligible for the death penalty, resulting in the arbitrary imposition of the death penalty,' that claim has also been consistently rejected. See, e.g., McMillan, 139 So.3d at 266 ('Although McMillan argues that the use of robbery as an aggravating circumstance at sentencing and as aggravation at the guilt phase resulted in the arbitrary imposition of the death penalty because it failed to narrow the class of cases eligible for the death penalty, this issue has also been determined adversely to McMillan.'); and McGowan, 990 So.2d at 996 (finding that the argument that 'double-counting fail[s] to narrow the class of cases eligible for the death penalty' has 'been repeatedly rejected' and citing Lee v. State, 898 So.2d 790, 871–72 (Ala. Crim. App. 2003); Smith v. State, 838 So.2d 413, 469 (Ala. Crim. App.), cert. denied, 537 U.S. 1090, 123 S.Ct. 695, 154 L.Ed.2d 635 (2002); Broadnax v. State, 825 So.2d 134, 208–09 (Ala. Crim. App. 2000), aff'd, 825 So.2d 233 (Ala. 2001), cert. denied, 536 U.S. 964, 122 S.Ct. 2675, 153 L.Ed.2d 847 (2002); Ferguson v. State, 814 So.2d 925, 956–57 (Ala. Crim. App. 2000), aff'd, 814 So.2d 970 (Ala. 2001), cert. denied, 535 U.S. 907, 122 S.Ct. 1208, 152 L.Ed.2d 145 (2002); Taylor [v. State], 808 So.2d [1148] at 1199 [(Ala. Crim. App. 2000)], aff'd, 808 So.2d 1215 (Ala. 2001); Jackson v. State, 836 So.2d 915, 958–59 (Ala. Crim. App. 1999), remanded on other grounds, 836 So.2d 973 (Ala. 2001), aff'd, 836 So.2d 979 (Ala. 2002); and Maples v. State, 758 So.2d 1, 70–71 (Ala. Crim. App. 1999), aff'd, 758 So.2d 81 (Ala. 1999)). Accordingly, Phillips is not entitled to relief on this claim."

Phillips I, —— So.3d at ——.

With respect to Phillips's contention that the application of the two-or-more-persons element both to the capital offense and as an aggravating circumstance for shooting his wife, who was in the early stage of pregnancy, fails to "genuinely narrow" the class of death-eligible offenses and violated his constitutional rights, the Court of Criminal Appeals determined:

> ***41** "Phillips contends that 'the application of the "two or more persons" capital offense and aggravating circumstance to [him] for shooting [Erica] fails to "genuinely narrow" the class of death-eligible offenses.' (Phillips's brief, p. 65.) Specifically, Phillips argues that he 'was eligible for the death penalty and sentenced to death solely because the jury found that he intentionally shot his wife who was six to eight weeks pregnant' and that applying the ' "two or more persons" capital offense and aggravating circumstance to [him] because he intentionally killed one individual in the early stages of pregnancy fails to "genuinely narrow the class of persons eligible for the death penalty" ' because, he says, the 'intentional killing of a single individual, without any other aggravating circumstance, is broader than any of the aggravating circumstances previously created by the legislature and approved by this Court.' (Phillips's brief, pp. 65-66 (emphasis added).) Additionally, Phillips argues that he
>
> > " 'is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy. The rarity of such sentences indicates that this is not the type of offense that society's evolving standards of decency permit to be punished with death.'
>
> "(Phillips's brief, p. 66-67.) Because Phillips did not raise these arguments in the trial court, we review his

claims for plain error only. See Rule 45A, Ala. R. App. P.

"It is well settled that, '[t]o pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983); cf. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).' Lowenfield v. Phelps, 484 U.S. 231, 244, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). '[T]he narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses ... so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.' Id. at 246, 108 S.Ct. 546.

"Although it is not clear, it appears that Phillips's argument is premised on his belief that his death sentence was imposed based on an aggravating circumstance that does not exist-namely, 'intentionally kill[ing] one individual in the early stages of pregnancy.' (Phillips's brief, p. 66 (emphasis added).) As explained above, however, Phillips's death sentence was based on the statutory aggravating circumstance of causing the death of two persons--Erica and Baby Doe–'by one act or pursuant to one scheme or course of conduct.' See § 13A-5-49(9), Ala. Code 1975.

"Although Phillips correctly explains that one of the persons he killed was an unborn child, as explained in Part I of this opinion, an unborn child is a 'person' who, 'regardless of viability,' can be a 'victim of a criminal homicide,' see § 13A-6-1(a)(3), Ala. Code 1975, and is, therefore, also a 'person' under the capital-murder statute. Thus, contrary to Phillips's assertion, his death sentence was imposed under the statutory aggravating circumstance of causing 'the death of two or more persons by one act or pursuant to one scheme or course of conduct,' see § 13A-5-49(9), Ala. Code 1975, which aggravating circumstance the jury unanimously found to exist beyond a reasonable doubt. Thus, Phillips is not entitled to relief on this claim.

"Additionally, Phillips argues that he 'is the only individual in the United States on death row where the sole reason that his case was made capital was that he killed a woman in her first trimester of pregnancy,' which, he says, demonstrates 'that this is not the type of offense that society's evolving standards of decency permit to be punished with death.' (Phillips's brief, pp. 66-67.) This claim is without merit.

> ***42** "Although Phillips's assertion that he is the only person on death row for intentionally killing a pregnant woman may be correct, as stated above, Phillips's death sentence was imposed not because he intentionally killed a pregnant woman, but because he killed two people pursuant to one act. Even if a death sentence for killing a pregnant woman is rare, a death sentence for killing two or more persons pursuant to one act is not. See, e.g., Stephens, 982 So.2d at 1147-48, rev'd on other grounds, Ex parte Stephens, 982 So.2d 1148 (Ala. 2006). See also Shaw [v. State], 207 So.3d [79] at 130 [(Ala. Crim App. 2004)]; Reynolds v. State, 114 So.3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So.3d 997 (Ala. Crim. App. 2007). Thus, Phillips is not entitled to relief on this claim."

Phillips I, —— So.3d at —— (footnote omitted).

This Court agrees. It is well settled law that a sentence of death is not invalid on the ground that the sole aggravating circumstance found by the jury at the sentencing phase is also an element of the capital crime of which a defendant is convicted at the guilt phase. See Lowenfield, 484 U.S. at 246, 108 S.Ct. 546.

> "Petitioner's argument that the parallel nature of these provisions requires that his sentences be set aside rests on a mistaken premise as to the necessary role of aggravating circumstances.

"To pass constitutional muster, a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.' Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); cf. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164, 96 S.Ct. 2909 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, 462 U.S. at 878, 103 S.Ct. 2733 ('[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty').

"In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which 'the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty.' Id., at 874, 103 S.Ct. 2733, 2742. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

"The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269, 96 S.Ct. 2950. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274, 96 S.Ct. 2950. But the opinion announcing the judgment noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> ***43** " 'While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose.... In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances.... Thus, in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas.' 428 U.S. at 270-271, 96 S.Ct. 2950 (citations omitted).

"It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, 462 U.S. at 876, n. 13, 103 S.Ct. 2733, discussing Jurek and concluding: '[I]n Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution.'

> "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."

Lowenfield, 484 U.S. at 244–46, 108 S.Ct. 546

Consequently, the State's reliance at sentencing on one aggravating circumstance, specifically the murder of two or more persons pursuant to one act, which includes the murders of a mother and her unborn child, does not make Phillips's conviction and sentence constitutionally infirm. This Court therefore agrees with the Court of Criminal Appeals' determination that no error, plain or otherwise, occurred. [11]

L. Disproportionality of Sentence

Phillips contends that his sentence of death is excessive and disproportionate and that it therefore violates his constitutional rights to due process, equal protection, a fair trial, and reliable sentencing in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. An appellate court reviews de novo the trial court's conclusions of law. Howard v. State, 85 So.3d 1054, 1060 (Ala. 2011).

As support for his argument, Phillips cites Furman v. Georgia, 408 U.S. 238, 313, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)(White, J., concurring), for the proposition that the United States Supreme Court requires courts to use a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Specifically, he asserts that his sentence of death is disproportionate to the sentences imposed in four other Alabama cases involving the murders of women and their unborn children. See Phillips's brief, p. 79 (citing Taylor v. State, 574 So.2d 885 (Ala. Crim. App. 1990); Sanders v. State, 426 So.2d 497 (Ala. Crim. App. 1982); Shorts v. State, 412 So.2d 830 (Ala. Crim. App. 1981); and Woods v. State, 346 So.2d 9 (Ala. Crim. App. 1977)).

***44** The Court of Criminal Appeals held:

> "Phillips contends that his death sentence 'violates state and federal law' because, he says, 'it is grossly disproportionate in comparison to similar cases involving murders of pregnant women.' (Phillips's brief, p. 97.) To support his position, Phillips cites Taylor v. State, 574 So.2d 885 (Ala. Crim. App. 1990); Sanders v. State, 426 So.2d 497 (Ala. Crim. App. 1982); Shorts v. State, 412 So.2d 830 (Ala. Crim. App. 1981); and Woods v. State, 346 So.2d 9 (Ala. Crim. App. 1977).
>
> "Although Phillips correctly recognizes that, in Taylor, Sanders, Shorts, and Woods, the 'murders of pregnant women' did not result in the imposition of the death penalty, those cases predate the 2006 amendment to § 13A-6-1, Ala. Code 1975. As explained in Part I of this opinion, § 13A-6-1(a)(3), Ala. Code 1975, defines the word 'person' for the purpose of determining the 'victim[s] of a criminal homicide' to mean a 'human being including an unborn child in utero at any stage of development, regardless of viability.' See § 13A-6-1(a)(3), Ala. Code 1975.
>
> "Thus, contrary to Phillips's position, it is not the 'murder of a pregnant woman' that subjects him to the imposition of the death penalty; rather, it is the murder of 'two or more persons' that subjects him to the death penalty. See § 13A-5-49(9), Ala. Code 1975. Sentences of death have been imposed for similar crimes in Alabama, and, therefore, his sentence is not 'grossly disproportionate' in comparison to similar cases ...."

Phillips I, —— So.3d at —— (footnote omitted).

Phillips's argument that his sentence is disproportionate to sentences imposed in other cases involving the murders of women and their unborn children on the basis of four homicide cases involving pregnant women that occurred before the statutory definition of "person" as set forth for criminal homicide was modified to include an unborn child in Alabama is unavailing. Before 2006, § 13A-6-1(2), Ala. Code 1975, defined a "person" as "a human being

who had been born and was alive at the time of the homicidal act." Mack v. Carmack, 79 So.3d 597, 600 (Ala. 2011). Recognizing the personhood of an unborn child, the legislature amended the definition of person as set forth in § 13A-6-1(a)(3), to define a "person" as "a human being, including an unborn child in utero at any stage of development, regardless of viability." Thus, Taylor, Sanders, Shorts, and Woods do not support Phillips's position that his sentence is disproportionate to the sentences imposed in other cases involving pregnant women.

Phillips also asserts that his death sentence is disproportionate to sentences imposed in "even more aggravated" cases involving the death of two or more people. See Phillips's brief, p. 79 (citing Smith v. State, 157 So.3d 994, 995 (Ala. Crim.App. 2014) (upholding sentence of life imprisonment without the possibility of parole for shooting two men in the head); Living v. State, 796 So.2d 1121, 1128 (Ala. Crim. App. 2000) (upholding sentence of life imprisonment without the possibility of parole for shooting death of two women); and Falconer v. State, 624 So.2d 1103, 1104 (Ala. Crim. App. 1993) (upholding sentence of life imprisonment without the possibility of parole for shooting death of married couple). The Court notes that on appeal to the Court of Criminal Appeals Phillips did not present the specific argument that his sentence was disproportionate in comparison to those imposed in "more aggravated cases" involving the death of two or more people, nor did he cite the aforementioned cases as support for this particular contention.

***45** Nonetheless, during the sentencing hearing on remand, defense counsel argued Phillips's case was "not the worst of the worst" and that this case is "not as aggravated as other cases from [Marshall County]" and "is not one of the most heinous crimes deserving death." Additionally, on return to remand, when determining whether Phillips's sentence was excessive or disproportionate when compared to the penalty imposed in similar cases as required by § 13A-5-563(b)(3), the Court of Criminal Appeals held:

> "In this case, Phillips was convicted of capital murder for causing the death of his wife, Erica, and their unborn child during 'one act or pursuant to one scheme or course of conduct,' see § 13A-5-40(a)(10), Ala. Code 1975.
>
> " 'Similar crimes have been punished by death on numerous occasions. See, e.g., Pilley v. State, 930 So.2d 550 (Ala. Crim. App. 2005) (five deaths); Miller v. State, 913 So.2d 1148 (Ala. Crim. App.), opinion on return to remand 913 So.2d 1154 (Ala. Crim. App. 2004) (three deaths); Apicella v. State, 809 So.2d 841 (Ala. Crim. App. 2000), aff'd, 809 So.2d 865 (Ala. 2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 706 (2002) (five deaths); Samra v. State, 771 So.2d 1108 (Ala. Crim. App. 1999), aff'd, 771 So.2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000) (four deaths); Williams v. State, 710 So.2d 1276 (Ala. Crim. App. 1996), aff'd, 710 So.2d 1350 (Ala. 1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998) (four deaths); Taylor v. State, 666 So.2d 36 (Ala. Crim. App.), on remand, 666 So.2d 71 (Ala. Crim. App. 1994), aff'd, 666 So.2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996) (two deaths); Siebert v. State, 555 So.2d 772 (Ala. Crim. App.), aff'd, 555 So.2d 780 (Ala. 1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990) (three deaths); Holladay v. State, 549 So.2d 122 (Ala. Crim. App. 1988), aff'd, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989) (three deaths); Fortenberry v. State, 545 So.2d 129 (Ala. Crim. App. 1988), aff'd, 545 So.2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990) (four deaths); Hill v. State, 455 So.2d 930 (Ala. Crim. App.), aff'd, 455 So.2d 938 (Ala.), cert. denied, 469 U.S. 1098, 105 S.Ct. 607, 83 L.Ed.2d 716 (1984) (three deaths).'
>
> "Stephens v. State, 982 So.2d 1110, 1147–48 (Ala. Crim. App. 2005), rev'd on other grounds, Ex parte Stephens, 982 So.2d 1148 (Ala. 2006). See also Reynolds v. State, 114 So.3d 61 (Ala. Crim. App. 2010); and Hyde v. State, 13 So.3d 997 (Ala. Crim. App. 2007). Therefore, this Court holds that Phillips's death sentence is neither excessive nor disproportionate."

Phillips II, —— So.3d at ——, 2015 WL 9263812.

This Court agrees that Phillips's sentence is not disproportionate to those imposed in similar or "more aggravated" cases involving the death of two or more people. The Court of Criminal Appeals thoroughly addressed this issue by including numerous citations to other similar capital cases indicating Phillips's sentence is not disproportionate.

III. Conclusion

Based on the foregoing, the judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

Shaw and Bryan, JJ., concur.

Stuart, C.J., and Parker, Main, Wise, and Sellers, JJ., concur specially.

STUART, Justice (concurring specially).
I concur with the main opinion's holding that Jessie Livell Phillips's Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), claim is due to be denied. I write specially because I believe this case presents this Court with an opportunity to address the propriety of the application of plain-error review to initiate a Batson inquiry in a death-penalty case in which the defendant made no objection at trial to the State's use of its peremptory challenges.

***46** As a former practicing attorney, a former trial judge, and a current Justice, I recognize the importance and value of stare decisis. This Court

> "previously [has] observed that stare decisis ' "is a golden rule, not an iron rule." ' Goldome Credit Corp. v. Burke, 923 So.2d 282, 292 (Ala. 2005)(quoting Ex parte Nice, 407 So.2d 874, 883 (Ala. 1981) (Jones, J., dissenting)). In those rare cases where, in retrospect, a rule announced in a previous case is not plausible, the doctrine of stare decisis does not prevent this Court's reexamination of it.
>
> > " 'Although we have a healthy respect for the principle of stare decisis, we should not blindly continue to apply a rule of law that does not accord with what is right and just. In other words, while we accord "due regard to the principle of stare decisis," it is also this Court's duty "to overrule prior decisions when we are convinced beyond ... doubt that such decisions were wrong when decided or that time has [effected] such change as to require a change in the law." Beasley v. Bozeman, 294 Ala. 288, 291, 315 So.2d 570, 572 (1975) (Jones, J., concurring specially).'
>
> "Ex parte State Farm Fire & Cas. Co., 764 So.2d 543, 545–46 (Ala. 2000)(footnote omitted). 'As strongly as we believe in the stability of the law, we also recognize that there is merit, if not honor, in admitting prior mistakes and correcting them.' Jackson v. City of Florence, 294 Ala. 592, 598, 320 So.2d 68, 73 (1975)."

Ex parte Vanderwall, 201 So.3d 525, 536 (Ala. 2015)(footnote omitted). Stare decisis provides continuity and stability in the law. I have realized, however, that, with the passage of time, as the wisdom of most decisions becomes apparent so does the imprudence of others. I maintain that this Court has erred in its application of plain error when no Batson objection is made at trial and it is time to correct the error.

"Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 476 U.S. at 86, 106 S.Ct. 1712. Additionally, the Equal Protection Clause of the Fourteenth Amendment is violated with the exclusion of even a sole prospective juror based on race, ethnicity, or gender. Snyder v. Louisiana, 552 U.S. 472, 478, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008).

> "Evaluation of a Batson [v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986),] claim involves the following three steps:
>
> > " ' "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. [Batson v. Kentucky,] 476 U.S. [79,] 96–97, 106 S.Ct. 1712, 90 L.Ed.2d 69 [(1986)]. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Id., at 97–98, 106 S.Ct. 1712. Third, in light of the parties' submissions, the trial court must determine whether the defendant has

shown purposeful discrimination. Id., at 98, 106 S.Ct. 1712." '

"McCray v. State, 88 So.3d 1, 17 (Ala. Crim. App. 2010) (quoting Miller–El v. Cockrell, 537 U.S. 322, 328–29, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003))."

Sharp v. State, 151 So.3d 342, 358 (Ala. Crim. App. 2010).

The decisions of neither the United States Supreme Court nor the Alabama appellate courts have held that the framework of a trial requires a party to explain its use of its peremptory challenges, i.e., that structural error [12] occurs when the reasons for the peremptory strikes are not explained. Rather, the law requires that a trial court intervene with regard to a party's use of its peremptory challenges only after a timely Batson objection is made. Ford v. Georgia, 498 U.S. 411, 422, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)(stating that a "requirement that any Batson claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule"); Bell v. State, 535 So.2d 210, 212 (Ala. 1988)("[I]n order to preserve the issue for appellate review, a Batson objection, in a case in which the death penalty has not been imposed, must be made prior to the jury's being sworn."). Indeed, it is the "defendant's burden of making a prima facie case of racial discrimination in the prosecution's use of peremptory strikes" before Batson requires the prosecutor to provide the reasons for the strikes. Ex parte Jackson, 516 So.2d 768, 771 (Ala. 1986).

***47** An example of an erroneous decision made by a trial court in the Batson context occurred in Foster v. Chatman, —— U.S. ——, 136 S.Ct. 1737, 195 L.Ed.2d 1 (2016). In the late 1980s, a Georgia state court sentenced Timothy Foster to death. Before trial, the State used peremptory strikes to strike the four black jurors who had not been removed for cause. Foster entered a Batson objection; the State proffered its reasons, and the trial court rejected Foster's claim that the State's use of its strikes violated Batson. The Georgia Supreme Court affirmed. More than a decade later, Foster acquired through an open-records request a number of documents from the prosecutor's file that supported his assertion that the strikes had been racially motivated. Foster sought habeas relief based on the new evidence. The state court denied relief, holding that the new evidence was insufficient to overcome the effect of the doctrine of res judicata. The Georgia Supreme Court denied review. The United States Supreme Court reversed. All parties agreed that Foster had made a prima facie showing that peremptory challenges had been exercised on the basis of race and that the prosecution had offered a race-neutral basis for the strikes, leaving the third step of the Batson analysis –- whether Foster had shown purposeful discrimination –- at issue. The Supreme Court analyzed the prosecution's justifications for its strikes, concluding that there was compelling evidence that the prosecution's rationales for striking the jurors applied equally to similar non-black panelists permitted to serve. Additionally, the Supreme Court noted that significant testimony from the prosecution misrepresented the record with regard to voir dire and that there was a persistent focus on race in the prosecution's file. The Supreme Court held that Foster had shown purposeful discrimination with regard to two jurors.

Foster is instructional because the Batson error was found in evidence from the trial proceeding itself, not from evidence produced at a subsequent proceeding conducted years later. The evidence of the error was available when Foster made his Batson objection and indicated that the prosecutor's proffered reasons for exercising his peremptory strikes at trial were not credible and that, consequently, the trial court erred in determining that the State did not engage in purposeful discrimination in the jury-selection process. Error was found because the trial court had evaluated a Batson claim and had issued a decision that was not supported by the record.

The first time this Court applied plain-error review to initiate a Batson inquiry on appeal when the defendant did not make an objection at trial to the State's use of peremptory challenges was in Ex parte Bankhead, 585 So.2d 112 (Ala. 1991), aff'd on remand, 625 So.2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So.2d 1146 (Ala. 1993). In Ex parte Bankhead, Grady Archie Bankhead, who was white, did not object at trial to the prosecutor's use of peremptory challenges to remove black prospective jurors from the venire. However, Bankhead raised the issue on appeal. This Court addressed the issue under the plain-error rule and held that Bankhead did not have standing. While the appeal was pending, the United States Supreme Court issued Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), which held that a criminal defendant may object to rase-based exclusions of jurors regardless of whether the defendant and the excluded jurors share the same race, and this

Court remanded the case to allow Bankhead to challenge the prosecutor's allegedly racially motivated use of 8 of 10 strikes to remove black jurors on the venire. This Court did not address whether a contemporaneous objection was necessary to preserve the issue for review; rather, it remanded the case under the principles of plain error. See § 13A-5-53, Ala. Code 1975, Rule 45A, Ala. R. App. P., and Rule 39(a)(2)(D) and 39(k), Ala. R. App. P.

This Court and the Court of Criminal Appeals have continued to follow Ex parte Bankhead. We have stated repeatedly that

> " ' " '[f]or plain error to exist in the Batson context, the record must raise an inference that the state [or the defendant] engaged in "purposeful discrimination" in the exercise of its peremptory challenges. See Ex parte Watkins, 509 So.2d 1074 (Ala.), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).' " '
>
> > "Smith v. State, 756 So.2d 892, 915 (Ala. Crim. App. 1998), aff'd, 756 So.2d 957 (Ala. 2000)(quoting Rieber v. State, 663 So.2d 985, 991 (Ala. Crim. App. 1994), quoting in turn other cases)."

Ex parte Walker, 972 So.2d 737, 742 (Ala. 2007). See, e.g., Ex parte Adkins, 600 So.2d 1067 (Ala. 1992)(remanding for a Batson hearing where the defendant's lawyers never objected to the State's removal of blacks from the jury, yet the record created an inference that the prosecutor had engaged in purposeful discrimination in the use of his peremptory challenges).

***48** Unlike the record in Foster, which reflected that a Batson inquiry occurred at trial, and where evidence from Foster's trial, although not discovered until after the trial, indicated that the trial court had erred in not finding that the prosecutor engaged in purposeful discrimination in the use of his peremptory challenges, a record that provides an inference of purposeful discrimination in the use of peremptory strikes without an objection by the defendant to allow development of the evidence during the trial cannot reflect an obvious Batson error.

The holding in Ex parte Bankhead and its progeny that an inference in an appellate record that the prosecutor engaged in purposeful discrimination is an obvious error that should have been recognized by the trial court and that probably substantially prejudiced the defendant is problematic for several reasons. Perhaps most significantly, the determination of error in those appellate records is not a finding of plain error, but a determination of possible error, and possible error does not satisfy the requirements of the plain-error standard.

> " ' " 'Plain error' only arises if the error is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings." ' Ex parte Womack, 435 So.2d 766, 769 (Ala.), cert. denied, Womack v. Alabama, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983), quoting United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir. 1981). The plain-error standard applies only where a particularly egregious error occurs at trial. Ex parte Harrell, 470 So.2d 1309, 1313 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985). When the error 'has or probably has' substantially prejudiced the defendant, this Court may take appropriate action. Rule 39(a)(2)(D) and (k), Ala. R. App. P.; Ex parte Henderson, 583 So.2d 305, 306 (Ala. 1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992)."

Ex parte Minor, 780 So.2d 796, 799-800 (Ala. 2000). Plain error requires that the appellate record demonstrate (1) an error, (2) that is egregious, (3) that should have been obvious to the trial court, and (4) that probably affected the substantial rights of the defendant. To support a conclusion that a trial court committed plain error, the error must be so clear on the record that the trial court's failure to notice it at a minimum probably has substantially prejudiced the defendant. The purpose of plain error is to allow appellate courts to remedy forfeited errors. However, the plain-error standard applies only where an obvious, egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant. As the Supreme Court explained in United States v. Young, 470 U.S. 1, 15-16, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985):

> "The plain-error doctrine of Federal Rule of Criminal Procedure 52(b) tempers the blow of a rigid application of the contemporaneous-objection requirement. The Rule authorizes the Courts of Appeals to correct only 'particularly egregious errors,' United States v. Frady,

> 456 U.S. 152, 163, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), those errors that 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' United States v. Atkinson, 297 U.S. [157], at 160, 56 S.Ct. 391, 80 L.Ed. 555 [(1936)]. In other words, the plain-error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.' United States v. Frady, 456 U.S. at 163, n. 14, 102 S.Ct. 1584. Any unwarranted extension of this exacting definition of plain error would skew the Rule's 'careful balancing of our need to encourage all trial participants to seek a fair and accurate trial the first time around against our insistence that obvious injustice be promptly redressed.' Id., at 163, 102 S.Ct. 1584 (footnote omitted)."

***49** (Footnote omitted.) [13]

For example, this Court held that plain error occurred in Ex parte Minor, supra, when the trial court failed to instruct sua sponte the jury that evidence of the defendant's prior convictions could be used only for impeachment purposes and not as substantive evidence of guilt. In Ex parte Minor, Willie Dorrell Minor testified on direct examination that he had had prior convictions for second-degree assault, second-degree rape, and possession of cocaine. He did not request the trial court to instruct the jury that the evidence of his prior convictions could be used only for impeachment purposes and not as substantive evidence of guilt of the crime charged, nor did he object to the trial court's failure to issue such an instruction. Recognizing well established law regarding the inherently prejudicial nature of evidence of a defendant's prior convictions, the limited admissibility of such evidence, and the almost irreversible impact of evidence of prior offenses upon the minds of the jurors, this Court concluded that the trial court erred by not sua sponte instructing the jury on the proper use of the evidence because the error should have been obvious to the trial court and the error had substantially prejudiced the defendant. We stated:

> "The failure to instruct a jury in a capital-murder case as to the proper use of evidence of prior convictions is error, and that error meets the definition of 'plain error.' That failure is 'so obvious that [an appellate court's] failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' "

780 So.2d at 803 (quoting Ex parte Womack, 435 So.2d 766, 769 (Ala. 1983)). Because the record demonstrated that during the trial an obvious, egregious error occurred that the trial court should have recognized, and the error had probably substantially affected Minor's rights, this Court concluded that plain error had occurred and reversed the trial court's judgment.

Unlike the failure of the trial court in Ex parte Minor to instruct the jury sua sponte on well established law, which created obvious error on the appellate record that probably had substantially affected the defendant's rights, a trial court's failure to recognize during the jury-selection process that a prosecutor may have engaged in discrimination in the use of his or her peremptory challenges when the defendant does not find the jury-selection process objectionable does not meet the requirements for plain error. Simply, the inference of purposeful discrimination in the prosecutor's use of peremptory challenges in an appellate record, without more, does not constitute error. Although an inference in an appellate record that the prosecutor engaged in purposeful discrimination may indicate that the defendant may have been substantially prejudiced in the jury-selection process, the record does not reflect an obvious error the trial court should have recognized.

***50** Application of the plain-error rule in situations where the record reflects possible error is not proper. Application in such a case is fundamentally flawed because it ignores both the "error" and the "plain" limitations on an appellate court's review powers, focusing instead of the "substantial-rights" limitation. The plain-error rule, however, cannot operate as a general "savings clause" preserving for review all errors affecting substantial rights; it preserves only error that is obvious and egregious.

Because our holdings in this regard have been based on the possibility of error, cases have been remanded years after the trial for prosecutors to explain the reasons for striking jurors. By remanding, an appellate court analyzed the issue as though it has been raised, argued, and preserved at the trial-court level and substituted its judgment as to whether a prima facie showing of discrimination has been made for the trial court's. However, an appellate record is insufficient to reach such conclusions. Therefore, this Court has improperly expanded the scope of plain error in those cases from a finding of obvious error on the record

to a finding of possible error before a determination is even made by the trial court.

Additionally, a finding of plain error where the defendant makes no Batson objection at trial and then argues on appeal that the trial court erred in not sua sponte requiring the prosecutor to explain his or her peremptory challenges implies that the nature of a Batson error constitutes fundamental error. If this implication is true, then, any time a record created an inference of purposeful discrimination, an inquiry into the prosecutor's motivation for using his or her peremptory challenges, regardless of whether the defendant objected, must be conducted. But even a timely Batson objection requires only that a trial court consider whether a prima facie showing of discrimination has been made and that an inquiry into the reasons behind the prosecutor's use of peremptory challenges is required. Indeed, simply making a Batson objection does not demonstrate the impropriety of the prosecutor's use of a peremptory challenge; it raises a question about the prosecutor's motivation. However, by remanding for the inquiry when no objection is made by the defendant as Ex parte Bankhead and its progeny require, we hold that the trial court had a duty to conduct sua sponte a Batson hearing because it was so evident, obvious, and clear that the State engaged in the discriminatory use of its peremptory challenges. And, yet, Batson requires an inquiry only when the trial court agrees with the defendant that the prosecutor may have used of his peremptory challenges in a discriminatory fashion.

As Justice Murdock explained in his special writing in Ex parte Floyd, 190 So.3d 972, 982-84 (Ala. 2012):

> "A third -— and perhaps the most fundamental —- reason for the proposition that plain-error review not be available to initiate a Batson inquiry on appeal, is the fact that the failure of the trial court to initiate a Batson inquiry simply is not an 'error,' plain or otherwise, by the trial court. 'Error' (that in turn might be deemed 'plain error' in an appropriate case) contemplates a mistake by the court. Specifically, it necessitates a decision by the court that deviates from a legal rule.
>
> > " 'The first limitation on appellate authority under [the federal plain-error rule] is that there indeed be an "error." Deviation from a legal rule is "error" unless the rule has been waived. For example, a defendant who knowingly and voluntarily pleads guilty in conformity with the requirements of Rule 11[, Fed. R. Civ. P.,] cannot have his conviction vacated by court of appeals on the grounds that he ought to have had a trial. Because the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not "error." '

***51** "United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).

"The decision whether to take advantage of the right to generate evidence for consideration by the trial court pursuant to the Batson procedure is a decision for the defendant, not for the trial court. It is a voluntary decision as to whether to invoke a procedural device that has been made available to defendants in the trial context. In this respect, it is not unlike a request for a jury trial itself or a request that the trial judge poll the jurors after a verdict is rendered, or even more analogous, a failure to conduct voir dire of a prospective juror. Not requesting it may be a strategic 'mistake' by defense counsel, but counsel's mistake is not the trial court's 'error.'

"The lack of a request by defense counsel for a Batson review might well occur in the context of circumstances more than sufficient to create an inference of discrimination by the prosecution, yet the law allows for the possibility that defense counsel might have reasons for believing that a particular juror or the jury as a whole is acceptable or even that the jury as selected might be more favorable to his or her client than some entirely new jury chosen from an unknown venire. The fact that counsel intentionally or by oversight fails to use all the procedural devices available to him or her in the trial context does not somehow translate into some sort of error, plain or otherwise, on the part of the trial court.

"Put differently, the mere existence of the condition that warrants the initiation of a Batson inquiry —- a prima facie case of purposeful discrimination —- is not the condition that constitutes a reversible error. No criminal conviction has ever been discarded merely because this first step is satisfied, i.e., merely because an inference of discrimination can reasonably be drawn from the circumstances presented; actual, purposeful discrimination must exist. This first step and, indeed, the entirety of 'the three-step Batson inquiry' has been described as merely 'a tool for producing the

evidence necessary to the difficult task of "ferreting out discrimination in selections discretionary by nature." ' United States v. Guerrero, 595 F.3d 1059, 1064 (9th Cir. 2010)(Gould, J., dissenting)(emphasis added); see also United States v. McAllister, (No. 10–6280, Aug. 1, 2012), 491 Fed.Appx. 569 (6th Cir. 2012)(to same effect) (not published in the Federal Reporter). As this Court has said, a Batson review 'shall not be restricted by the mutable and often overlapping boundaries inherent within a Batson-analysis framework, but, rather, shall focus solely upon the "propriety of the ultimate finding of discrimination vel non." ' Huntley v. State, 627 So.2d 1013, 1016 (Ala. 1992)(emphasis added).

> "Thus, the 'error' that must exist to warrant disturbing the prosecutor's peremptory strikes is actual, purposeful discrimination in the selection of the jury. It is this actual, purposeful discrimination then, rather than merely a prima facie case for such discrimination, that must be 'plain' in the trial-court record if we are to provide a defendant who fails to object timely to a prosecutor's strikes relief from those strikes on a posttrial basis."

***52** (Footnotes omitted.)

I also find persuasive Judge Tjoflat's dissent in Adkins v. Warden, Holman CF, 710 F.3d 1241 (2013), [14] expressing his disagreement with conducting a plain-error review of an alleged Batson violation. In Adkins, Ricky Adkins, an Alabama death-row prisoner, petitioned for a writ of habeas corpus, arguing, among other things, that the State had unconstitutionally removed black jurors from his jury in violation of Batson. At the time of Adkins's trial in 1988, the rule in Alabama was that a white defendant, like Adkins, lacked standing to challenge the State's exercise of peremptory strikes to remove black jurors from the panel. For this reason, there was neither an objection by the defense nor a proffer of reasons by the prosecutor for striking 9 of the 11 black prospective jurors. While Adkins's direct appeal was pending, the United States Supreme Court issued Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). In light of Powers, this Court remanded Adkins's case and the trial court held a Batson hearing. While Adkins's habeas petition was pending, the State raised the argument that, because he did not contemporaneously object to the prosecutor's peremptory strikes at the time of trial, Adkins could not raise a Batson claim now.

In his dissent, Judge Tjoflat opined:

> "An obvious reason for abandoning this plain error practice in cases like [Ex parte] Adkins[, 600 So.2d 1067 (Ala. 1992),] and [Ex parte] Floyd[, 190 So.3d 972 (Ala. 2012),] is the effect it must have on trial judges in capital cases. Nothing is more onerous for trial judges than having to try a criminal case twice, especially a capital case in which the State is seeking the death penalty. Because the holdings in Batson, Powers, and J.E.B.[v. Alabama, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994)], condemn the discriminatory exercise of peremptory challenges based on race and gender, a trial judge, to ensure that the case will not be remanded for a Batson hearing, will be tempted to require the prosecutor to provide race- or gender-neutral reasons for many if not all of the State's strikes. The practical effect of the possibility of a later Batson hearing would be to eliminate the peremptory challenge in death cases. Nothing in Batson, Powers, or J.E.B. requires the Alabama courts to go to that extreme."

Adkins, 710 F.3d at 1265 (Tjoflat, J., dissenting)(footnotes omitted).

It is time to limit the scope of plain-error review with regard to Batson claims to errors that are truly obvious on the record. The purpose of the plain-error rule is to protect and preserve the integrity and reputation of the judicial process. However, in a misguided effort to satisfy this mandate, the Bankhead Court and subsequent courts have overlooked the requirement that the error must be obvious. The integrity and the reputation of the judicial process is impugned equally when plain error is employed to attempt to remedy possible error.

***53** Moreover, in keeping with the principles of Batson and its progeny, an unobjected-to inference of purposeful discrimination on the record creates a claim of ineffective assistance of counsel for failure to make a Batson objection, not an error by the trial court. In cases such as this one, where the record creates an inference of discrimination in the jury selection and yet there is no

objection by defense counsel, the only obvious error an appellate record reflects is one made by counsel. Considering these claims under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), allows an evaluation of the effect of a forgone challenge on the outcome of the event to which it properly applies: the jury-selection process. Applying Strickland to the jury-selection process, a defendant would have to prove that if a Batson objection had been made there was a "reasonable probability" it would have been heard and that the trial court would have taken curative action before the trial began. This evaluation of the error and its prejudicial effect promotes the requirement of Batson that the jury-selection process not be infected and the requirement of Strickland that prejudice determines the outcome.

For the reasons set forth above, I would overrule Ex parte Bankhead and its progeny in this regard and now hold that failure to make a timely objection forfeits consideration under a plain-error standard of a Batson objection raised for the first time on appeal. Simply, (1) plain error should not be available for a Batson issue raised for the first time on appeal because the failure to timely make a Batson inquiry is not an error of the trial court; (2) the defendant should be required to timely request a Batson hearing to determine whether there was purposeful discrimination because, under the plain-error rule, the circumstances giving rise to purposeful discrimination must be so obvious that failure to notice them seriously affects the integrity of the judicial proceeding; and (3) trying a criminal case twice is so burdensome that, to avoid such a result, trial courts may be tempted to require the prosecutor to provide reasons for most or all of his or her peremptory challenges, effectively eliminating the peremptory challenge in death-penalty cases. I maintain that for plain-error review to provide relief in the Batson context, the appellate record must clearly demonstrate that the trial court erred because evidence in the record, not evidence developed at a hearing conducted after the trial, supports a finding that the prosecutor's proffered reasons were not credible and the trial court's findings are not supported by the record.

Main and Wise, JJ., concur.

PARKER, Justice (concurring specially).

I concur fully with the Court's rationale that unborn children are persons entitled to the full and equal protection of the law. I write specially to expound upon the principles presented in the main opinion and to note the continued legal anomaly and logical fallacy that is Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); I urge the United States Supreme Court to overrule this increasingly isolated exception to the rights of unborn children.

A national survey of the laws of the states demonstrates that unborn children have numerous rights that all people enjoy. As I stated in Ex parte Ankrom, 152 So.3d 397, 429 (Ala. 2013) (Parker, J., concurring specially): "[T]he only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of Roe [v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973)]." In Roe, the United States Supreme Court, without historical or constitutional support, [15] carved out an exception to the rights of unborn children and prohibited states from recognizing an unborn child's inalienable right to life [16] when that right conflicts with a woman's "right" to abortion. The judicially created exception of Roe is an aberration to the natural law and the positive and common law of the states. Of the numerous rights recognized in unborn children, an unborn child's fundamental, inalienable, God-given right to life is the only right the states are prohibited from ensuring for the unborn child; the isolated Roe exception, which is increasingly in conflict with the numerous laws of the states recognizing the rights of unborn children, must be overruled. As states like Alabama continue to provide greater and more consistent protection for the dignity of the lives of unborn children, the Roe exception is a stark legal and logical contrast that grows ever more alienated from and adverse to the legal fabric of America. See Hicks v. State, 153 So.3d 53, 72-84 (Ala. 2014) (Parker, J., concurring specially) (noting that abortion jurisprudence violates logic's law of noncontradiction).

I. Baby Doe is a Person Under the Brody Act, § 13A-6-1(a)(3), Ala. Code 1975

***54** The main opinion is this Court's most recent declaration of the obvious truth that unborn children are people and thus entitled to the full protection of the law. In 2006 the Alabama Legislature passed the Brody Act to expressly require that the term "PERSON ... when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero

at any stage of development, regardless of viability." § 13A-6-1(a)(3), Ala. Code 1975 (emphasis added). Today the Court duly rejects Jessie Livell Phillips's arguments that the unborn child he murdered, Baby Doe, was not a "person" under Alabama law.

As a matter of first impression, Phillips argues to this Court that his unborn child was not a "person" within the meaning of the capital-murder statute and, thus, that his sentence of death is contrary to the Eighth Amendment to the United States Constitution. The Legislature passed the Brody Act 12 years ago with the expressed intent of addressing just the sort of double-murder of which Phillips was convicted: namely, "[t]o amend Section 13A–6–1 of the Code of Alabama 1975, relating to the definition of person for the purpose of criminal homicide or assaults; to define person to include an unborn child; ... [and] to name the bill the 'Brody Act' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant ...." Act No. 2006-419, Ala. Acts 2006 (emphasis added). This Court has repeatedly held that the Brody Act " 'constitutes clear legislative intent to protect even nonviable fetuses from homicidal acts.' " Stinnett v. Kennedy, 232 So.3d 202, 212 (Ala. 2016) (quoting Mack v. Carmack, 79 So.3d 597, 610 (Ala. 2011)). In Mack v. Carmack, we rejected the viability standard of Roe and cited the Brody Act's protection of unborn children, "regardless of viability, as a justification for our holding that the Wrongful Death Act ... permits a cause of action for the death of a previable fetus." 232 So.3d at 214. We reaffirmed Mack one year later in Hamilton v. Scott, 97 So.3d 728 (Ala. 2012), and again in Stinnett, supra, in 2016.

Nevertheless, Phillips argues that, despite the Brody Act, Baby Doe did not qualify as a "person" for purposes of the capital-murder statute. The main opinion quotes approvingly from the opinion of the Court of Criminal Appeals, which relied in part on the Brody Act:

> "Indeed, contrary to Phillips's assertion, a simple reading of the capital-murder statute plainly and unambiguously makes the murder of 'two or more persons' –- when one of the victims is an unborn child –- a capital offense because the capital-murder statute expressly incorporates the intentional-murder statute codified in § 13A-6-2(a)(1), Ala. Code 1975 -– a statute that, in turn, uses the term 'person' as defined in § 13A-6-1(a)(3), Ala. Code 1975, which includes an unborn child as a person.
>
> "....
>
> "Because an 'unborn child' is a 'person' under the intentional-murder statute and because the intentional-murder statute is expressly incorporated into the capital-murder statute to define what constitutes a 'murder,' an 'unborn child' is definitionally a 'person' under § 13A-5-40(a)(10), Ala. Code 1975...."

Phillips v. State, [Ms. CR-12-0197, Dec. 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015) (emphasis added). The Court today, as did the Court of Criminal Appeals, holds that an unborn child is a "person" for purposes of intentional murder and capital murder -- declining Phillips's invitation to ignore the plain meaning of the Brody Act, which was enacted by the Legislature to protect unborn children.

***55** Phillips also argues that the trial court erred in commenting in its amended sentencing order that "the policy of this State has recognized an unborn baby to be a life worthy of respect and protection." Again citing the Brody Act, the main opinion states that the trial court was correct in stating that unborn babies are worthy of respect and protection: "[U]nder the criminal laws of the State of Alabama, the value of the life of an unborn child is no less than the value of the lives of other persons." —— So.3d at —— (emphasis added). Indeed, in another criminal-law context, we have repeatedly held that, "by its plain meaning, the word 'child' in the chemical-endangerment statute[, § 26–15–3.2(a)(1), Ala. Code 1975,] includes an unborn child, and, therefore, the statute furthers the State's interest in protecting the life of children from the earliest stages of their development." Hicks, 153 So.3d at 66. See also Ankrom, supra. In the present case, the trial court was merely echoing what the Legislature has made express: "The public policy of the State of Alabama is to protect life, born, and unborn." § 26–22–1(a), Ala. Code 1975.

Phillips challenges his sentence under the Eighth Amendment to the United States Constitution because,

he claims, he is the only person in the United States on death row where the basis of the capital offense is that he killed a woman who was in the first trimester of pregnancy and the unborn child also died. The main opinion astutely notes that Phillips's crimes were capital not because he killed a pregnant woman but because he killed two persons. In addressing Phillips's argument that his sentence is disproportionate to sentences in similar cases, citing several cases decided before the Legislature adopted the Brody Act, the main opinion states that the significance of the Brody Act's amendment of the Criminal Code was in "[r]ecognizing the personhood of an unborn child ... '... at any stage of development, regardless of viability.' " —— So.3d at —— (quoting § 13A-6-1(a)(3), Ala. Code 1975). I further note that, to the extent Phillips's argument implies that the young age of his unborn child (six to eight weeks) somehow lessens the child's value as a person, such an assertion is entirely unconvincing in light of the natural law, Alabama law, and this Court's numerous recent decisions "consistently recognizing that an unborn child is a human being from the earliest stage of development and thus possesses the same right to life as a born person." Hicks, 153 So.3d at 73-74 (Parker, J., concurring specially). Over and over, this Court has acknowledged the equal personhood of unborn life, regardless of gestational age, from Mack and Hamilton and Stinnett in the civil-law context to Ankrom and Hicks in the criminal-law context. Over and over, this Court has rightly rejected "the arbitrary and illogical nature of the viability rule."[17] Mack, 79 So.3d at 610. Simply put, the viability rule is no longer viable; Alabama no longer relies on it in any context other than when required to do so in the abortion context.[18] Phillips's apparent attempt to cynically reanimate the viability standard (or some other arbitrary gestational-age standard) to his benefit and to the detriment of Baby Doe's personhood is justly denied.

***56** A person is a person, regardless of age, physical development, or location. Baby Doe had just as much a right to life as did Erica Phillips. Phillips was sentenced to death for the murder of two persons; Erica and Baby Doe were equally persons.

II. State Laws Increasingly Protect the Rights of Unborn Children

The Court's decision today is the latest example of a state affording the protections of the law to unborn children. However, Alabama is not the only state that recognizes rights in unborn children or affords unborn children the protections of the law. I have written before that "[u]nborn children, whether they have reached the ability to survive outside their mother's womb or not, are human beings and thus persons entitled to the protections of the law -- both civil and criminal." Stinnett, 232 So.3d at 224 (Parker, J., concurring specially). In Ankrom, a decision released more than five years ago, I wrote specially to, in part, summarize five areas of the law that "recognize unborn children as persons with legally enforceable rights": criminal law, tort law, guardianship law, health-care law, and property law. Ankrom, 152 So.3d at 421 (Parker, J., concurring specially). Today, I provide a review and an updated survey of those areas of the law, and I also include a new survey concerning family law.

A. Criminal Law

In my special concurrence in Ankrom, I discussed "three aspects of criminal law where the states have increasingly protected fetal life":

> "[F]irst, criminalizing fetal homicide; second, making the pregnancy of a homicide victim an aggravating factor that can lead to the imposition of the death penalty; and, third, prohibiting the execution of pregnant criminals.
>
> "A. Fetal-Homicide Statutes
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> "In a strong majority of states, killing an unborn child is criminal homicide unless it occurs as the result of a medical abortion. The majority of states prohibit any killing of an unborn child, other than a medical abortion at the mother's request, regardless of gestational age. However, some states limit the applicability of homicide statutes based on the gestational age of the fetus. The most common age requirements are viability, which is that portion of the pregnancy where the unborn child is capable of surviving birth and living outside the womb, and quickening, which is the point during the pregnancy when the pregnant woman first notices the movements of her unborn child. A few states have created other age requirements.

"B. Penalty-Enhancement Statutes

"Seven states specifically provide that the murder of a pregnant woman is an aggravating factor that may justify the imposition of the death penalty. In nine other states, the murder of a pregnant woman and her unborn child can lead to the application of the death penalty under statutes that allow for imposing the death penalty where a defendant murders more than one person in a single incident. And in Florida, a killing that would be capital murder if the pregnant woman died is capital murder if the mother survives but her unborn child dies.

"C. Restrictions on Imposition of the Death Penalty

> "Of the 33 states in which the death penalty is authorized by law, at least 23 states have statutes prohibiting the execution of a pregnant woman. If a pregnant woman is sentenced to death, the woman's sentence is suspended, permitting the unborn child to develop and be born, thus protecting that unborn child's life."

***57** Ankrom, 152 So.3d at 423-25 (Parker, J., concurring specially) (footnotes omitted).[19] Criminal-law statutes like Alabama's Brody Act, penalty-enhancement statutes, and restrictions on capital punishment for pregnant women continue to protect unborn children in a strong majority of states. Since Ankrom was released, three states have amended their fetal-homicide statutes to remove any post-viability or gestational-age limitation, broadening their protection to all unborn children at any stage of development.[20] Penalty enhancements for killing a pregnant woman and restrictions on the imposition of the death penalty on pregnant women remain largely unchanged.[21]

One new area developing in the law is that states are affording unborn children protection by allowing others to defend them through the use of force in order to neutralize a threat against the unborn child. Currently, three states allow the use of force to defend an unborn child; two of those states have recognized that greater force may be necessary to protect the unborn child than is necessary to protect the mother.[22]

B. Tort Law

In two primary areas, "[t]ort law recognizes the humanity of unborn children by permitting actions to recover damages for prenatal injury and for prenatal wrongful death." Ankrom, 152 So.3d at 425 (Parker, J., concurring specially).

"A. Prenatal Injuries

"Thirty states permit recovery of damages for nonfatal prenatal injuries, regardless of the gestational age of the unborn child at the time the child suffered those injuries. Seventeen other states and the District of Columbia permit an action to recover damages for prenatal injuries when those injuries occur after viability, but have not determined whether an action may be brought for injuries occurring before viability.

***58** "B. Wrongful Death

> "Forty states and the District of Columbia permit recovery of damages for the wrongful death of an unborn child when post-viability injuries to that child cause its death before birth. See Hamilton v. Scott, 97 So.3d at 737 (Parker, J., concurring specially, joined by Stuart, Bolin, and Wise, JJ.). Of these states, 2 also allow recovery in any case where the child dies after quickening even if it is not yet viable, and 11 states allow recovery regardless of the stage of pregnancy when the injury and death occur."

Ankrom, 152 So.3d at 425-28 (Parker, J., concurring specially) (footnotes omitted). Since Ankrom was released, Arkansas has joined those states that allow a wrongful-death action regardless of gestational age,[23] increasing the overall number of states to 12.

C. Guardianship Law

> "All states -- by statute, rule, or precedent -- permit a court to appoint a guardian ad litem to represent the interests of an unborn child in various matters including estates and trusts."

Ankrom, 152 So.3d at 428 (Parker, J., concurring specially) (footnote omitted). Every state continues to permit courts to appoint guardians ad litem for unborn children. [24]

D. Health-Care Law

> "Every state permits competent adults to execute advance directives, including living wills and durable powers of attorney for health care. These documents describe the types of health care the author wishes to receive or not receive if he or she is unable to make decisions concerning his or her health care. With a few limited exceptions, however, most states prohibit the withdrawal or withholding of life-sustaining treatment from a pregnant woman, regardless of her advance directive. Similarly, those states generally prohibit an agent acting under a health-care power of attorney from authorizing an abortion."

Ankrom, 152 So.3d at 429 (Parker, J., concurring specially) (footnotes omitted). As when Ankrom was released, the majority of states do not allow the withdrawal or withholding of life-sustaining treatment from a pregnant woman, even if contrary to her advance directive. [25] The number of states that prohibit an agent from authorizing an abortion while acting under a heath-care power of attorney has remained constant.

E. Property Law

***59** As I explained in Ankrom, "[f]or centuries, the law of property has recognized that unborn children are persons with rights." 152 So.3d at 422 (Parker, J., concurring specially).

> "For example, if a father (or, in some states, a close relative) died before his child was born, that child would inherit from the father as if he or she had already been born at the time the father died. Similarly, if a will failed to provide for the possibility of a child born after the execution of the will and a child was born, the omitted child could, in many cases, receive a share in the estate equal in value to what he or she would have received if the testator had died intestate or a share equal in value to that provided to children named in the will. Some states apply a similar rule to ownership of future interests in land, as well."

Ankrom, 152 So.3d at 422-23 (Parker, J., concurring specially) (footnotes omitted). Since Ankrom was released, at least three states have repealed and replaced provisions for posthumous children, continuing to ensure that children in utero at the time of the death of a father (or other relative) receive an inheritance or a share along with the children named in the will. [26] In a similar context, one state court found that an unborn great-grandchild was "living" at the time of the grantor's death and was entitled to take under a living trust. [27] Recognizing property rights for children conceived through nontraditional methods, at least four states have amended their statutes to provide protection for children posthumously conceived by assisted-reproductive technology. [28]

F. Family Law

One area of the law that I did not address in my special concurrence in Ankrom was family law. Eight states have extended to unborn children various aspects of family law designed to protect children, [29] two of which have allowed protective orders to be issued for the protection of an unborn child. [30] Five states have considered unborn children "victims of abuse or neglect." [31] As one New York court put it decades ago:

> ***60** "Interpreting our child abuse and neglect statutes to include the unborn would be consistent with medical and scientific advances to treat the fetus while still in the mother's womb.
>
> "It has been articulated that the unborn child's most vital sources of protection are tort and child abuse laws so that 'when parents fail to protect their unborn child the state may employ these substantive provision[s] ... to intervene on behalf of the fetus.... Thus the unborn child possesses a right to a gestation undisturbed by wrongful injury and the right to be born with a sound mind and body free from parentally inflicted abuse or neglect.' "

In re Fathima Ashanti K.J., 147 Misc. 2d 551, 555, 558 N.Y.S.2d 447, 449 (Fam. Ct. 1990) (quoting John E.B. Myers, Abuse and Neglect of the Unborn: Can the State Intervene?, 23 Duq. L. Rev. 1, 60 (1984)).

***61** Based on the national survey I conducted for my special writing in Ankrom and that I update today, it is apparent that the laws of this nation increasingly recognize unborn children as persons entitled to the protections of the law, except where prohibited by the Roe exception.

III. Roe v. Wade is Contrary to the Laws of the States

Yet, in spite of voluminous state laws recognizing that the lives of unborn children are increasingly entitled to full legal protection, the isolated Roe exception stubbornly endures. Based on the Roe exception, "the states are forbidden to protect unborn children only in ways that conflict with a woman's 'right' " to abortion. Hamilton v. Scott, 97 So.3d at 740 (Parker, J., concurring specially) (emphasis added). However, "Roe does not prohibit states from protecting unborn human lives." Id. In fact, "in [Planned Parenthood v.] Casey[, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992)], the Supreme Court acknowledged that 'the State has legitimate interests from the outset of the pregnancy' in protecting the unborn child, 505 U.S. at 846, 112 S.Ct. 2791, and a 'substantial state interest in potential life throughout pregnancy.' 505 U.S. at 876, 112 S.Ct. 2791." 97 So.3d at 740 (Parker, J., concurring specially). The United States Supreme Court's declaration in Roe that, in the abortion context, unborn children are not "persons" within the meaning of the Fourteenth Amendment to the United States Constitution stands in stark contrast to numerous determinations by the states that unborn children are, in fact, "persons" in virtually all other contexts.

However, some liberal Justices on the United States Supreme Court adamantly defend the isolated Roe exception. I have written extensively explaining why the Roe exception lacks legal foundation and is patently illogical. See Stinnett v. Kennedy, 232 So.3d at 220 (Parker, J., concurring specially); Hicks v. State, 153 So.3d at 72 (Parker, J., concurring specially); and Hamilton, 97 So.3d at 737 (Parker, J., concurring specially). The Roe exception is treated as impervious to reason and unassailable by legal authority. A "right" created not from the language of the Constitution of the United States, [32] but one abstracted from its supposed "emanations" and "penumbras," the Roe exception stands as an indictment against the United States Supreme Court that "our Nation ceases to be governed according to the 'law of the land' and instead becomes one governed ultimately by the 'law of the judges.' " [33] In re Winship, 397 U.S. 358, 384, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

***62** Of course, based on the following language in Roe, it is apparent that liberal judicial activists will do all they can to keep the people of America from recognizing the personhood of an unborn child:

> "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, [Roe]'s case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment. [Roe] conceded as much on reargument."

410 U.S. at 156-57, 93 S.Ct. 705 (emphasis added; footnote omitted). In Roe, the United States Supreme Court specifically stated that, if unborn children are persons, then they have the right to life. The Roe Court concluded that unborn children are not persons; this is the main foundation of the Roe exception. As demonstrated by the groundswell of state laws recognizing the personhood of unborn children, the foundation of the Roe exception is crumbling. In order for the outdated, isolated, and crumbling Roe exception to endure, liberal Justices must insist, against all scientific evidence and reason, that unborn children are not human. Judicial activism created the Roe exception; blind adherence to Roe's judicially imposed dogma allows it to linger.

It is my hope and prayer that the United States Supreme Court will take note of the crescendoing chorus of the laws of the states in which unborn children are given full legal protection [34] and allow the states to recognize and defend the inalienable right to life possessed by every unborn child, even when that right must trump the "right" of a woman to obtain an abortion.

IV. Conclusion

***63** Today, this Court adds Alabama's capital-murder statutes to the growing list of Alabama's, and other states', broad legal protections for unborn children. In so doing, we affirm once again that unborn children are persons with value and dignity equal to that of all persons. The Roe exception is the last remaining obstacle to the states' ability to protect the God-given respect and dignity of unborn human life. I urge the Supreme Court of the United States to reconsider the Roe exception and to overrule this constitutional aberration. Return the power to the states to fully protect the most vulnerable among us.

SELLERS, Justice (concurring specially).

Act No. 2006-419, Ala. Acts 2006, was named "the Brody Act" in memory of Brandy Parker's unborn son, who died when Parker was eight and one-half months pregnant. The act amended § 13A-6-1, Ala. Code 1975, to define "person," with respect to the victim of homicide and assault, as including an unborn child in utero (except as expressly limited to exclude the deaths of unborn children caused by medical care or abortion). This case presents an issue of first impression, namely, whether the referenced definition in § 13A-6-1 of "person" applies to § 13A-5-40(a)(10), Ala. Code 1975, which makes a capital offense the murder of two or more persons by one act or pursuant to one scheme or course of conduct, and to § 13A-5-49(9), Ala. Code 1975, which makes the intentional killing of two or more persons by one act or pursuant to one scheme or course of conduct an aggravating circumstance for purposes of imposing the death penalty. As the main opinion holds, the plain language of the relevant statutes makes clear that the definition of "person" in § 13A-6-1 applies to § 13A-5-40(a)(10). I also agree that the definition applies to § 13A-5-49(9).

When interpreting a statute, courts presume that the legislature intended a rational result that furthers the legislative purpose and that is consistent with related statutory provisions. John Deere Co. v. Gamble, 523 So.2d 95, 100 (Ala. 1988). As the State notes in its brief, this Court has held that a conviction for murder made capital because two or more persons were killed by one act or pursuant to one scheme or course of conduct establishes that the jury also found beyond a reasonable doubt the existence of the corresponding aggravating circumstance set out in § 13A-5-49(9). See Ex parte Bohannon, 222 So.3d 525, 534 (Ala. 2016). It would be illogical to construe the relevant statutes as calling for application of one definition of "person" in considering whether a defendant is guilty of capital murder for the killing of multiple persons and another definition of "person" in considering whether the corresponding aggravating circumstance exists. Moreover, as this Court noted in Mack v. Carmack, 79 So.3d 597, 610 (Ala. 2011), the definition of "person" set out in § 13A-6-1 shows a "clear legislative intent to protect even nonviable fetuses from homicidal acts." The application of that definition to § 13A-5-49(9) clearly furthers that legislative purpose.

I also concur with Justice Stuart's discussion of the Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), issue, which aligns our jurisprudence with what I believe is persuasive jurisprudence from federal courts. A Batson claim is a unique type of constitutional claim that, for the reasons set out in Justice Stuart's opinion, should be deemed waived even in capital cases if not timely made. Batson claims are forfeited if there is no objection to the composition of the jury before the commencement of a trial. It would be fundamentally unfair for a prosecutor to be directed to explain his or her reasons for striking jurors years after the trial even though he or she may have had valid, nonracial reasons at the time.

All Citations

--- So.3d ----, 2018 WL 5095002

Footnotes

1 Although Justice Bolin was not present at oral argument in this case, he has listened to the audiotape of the oral argument.

2 At places in the record Erica is referred to as both "Erica Carmen Phillips" and "Erica Droze Phillips."

3 Section 4 of Act No. 2006-419, which amended § 13A-6-1, states: "This act shall be known as the 'Brody Act,' in memory of the unborn son of Brandy Parker, whose death occurred when she was eight and one-half months pregnant."

4 See Tuilaepa v. California, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both).").

5 See Howard v. State, 85 So.3d 1054, 1060 (Ala. 2011) (noting that an appellate court reviews de novo a trial court's conclusion of law and its application of the law to the facts).

6 The "Sure-Vue hCG STAT" pregnancy test, indicating positive lines above the "C" and the "T," was submitted into evidence as State's Exhibit 17.

7 In its brief to this Court, the State asserts that any error in the admission into evidence of the pregnancy test is harmless because Dr. Ward confirmed "the presence of an embryo" and testified that she "examined Erica and saw the baby inside her." State's brief, p. 40. The Court does not read Dr. Ward's testimony as including any acknowledgment that she actually observed an embryo during the autopsy or at any other time. Nonetheless, Dr. Ward did state that she found a placenta and a corpus luteum cyst.

8 The Court notes that, although the Court of Criminal Appeals did not specifically discuss Rule 801(c), Ala. R. Evid., Phillips raised this hearsay argument in his brief before that court.

9 This Court "do[es] not necessarily agree" with the broad language that "photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors." Phillips I, —— So.3d at ——. See Ex parte Loggins, 771 So.2d 1093, 1105 n.3 (Ala. 2000). Rule 403, Ala. R. Evid., provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.) It is therefore clear that, although photographic evidence may be relevant in a homicide case, a gruesome photograph is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice or the tendency to mislead the jury.

10 But see Justice Johnstone's opinion concurring in the result in Ex parte Perkins, 808 So.2d 1143, 1146 (Ala. 2001)(stating that the admission of a graphic photograph that did not "depict incisions made during the autopsy itself" did not amount to plain error).

11 To the extent Phillips challenges the trial court's conclusions of law, we conclude that Phillips's contention is without merit and that, therefore, no reversible error occurred. See Howard v. State, 85 So.3d 1054, 1060 (Ala. 2011) (noting that an appellate court reviews de novo a trial court's conclusions of law); State v. C.M., 746 So.2d 410, 412 (Ala. Crim. App. 1999) (noting that de novo review applies to issues regarding the constitutionality of a state law).

12 Structural error is not an error in the trial but an error that "affec[ts] the framework within which the trial proceeds." Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). The denial of counsel, see Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); the denial of the right of self-representation, see McKaskle v. Wiggins, 465 U.S. 168, 177-78 n. 8, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); the denial of the right to public trial, see Waller v. Georgia, 467 U.S. 39, 49 n. 9, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984); the issuance of a defective reasonable-doubt instruction creating a denial of the right to trial by jury, see Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); and the erroneous deprivation of the right to counsel of choice, see United States v. Gonzalez-Lopez, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006), are the types of constitutional errors that qualify as structural defects. See also Ex parte McCombs, 24 So.3d 1175 (Ala. Crim. App. 2009).

13 I recognize that application of the federal plain-error rule is permissive and that application of Alabama's plain-error rule, see Rule 45A, Ala. R. App. P., is mandatory. But, like the federal plain-error rule, Rule 45A authorizes the court to remedy egregious errors that result in a miscarriage of justice.

14 Again, I recognize that application of the federal plain-error rule by a federal court is permissive and that application of our plain-error rule is mandatory. However, this difference between the federal plain-error rule and the State plain-error rule does not negate the merit in Judge Tjoflat's writing.

15 See Hamilton v. Scott, 97 So.3d 728, 737-47 (Ala. 2012) (Parker, J., concurring specially).

16 See Washington v. Glucksberg, 521 U.S. 702, 714, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (quoting Martin v. Commonwealth, 184 Va. 1009, 1018–19, 37 S.E.2d 43, 47 (1946)) (recognizing that " '[t]he right to life and to personal security is not only sacred in the estimation of the common law, but it is inalienable' ").

17 The viability rule was baseless, incoherent, and arbitrary when Roe was decided and has aged poorly:

> "Since Roe was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life. The development of ultrasound technology has enhanced medical and public understanding, allowing us to watch the growth and development of the unborn child in a way previous generations could never have imagined. Similarly, advances in genetics

> and related fields make clear that a new and unique human being is formed at the moment of conception, when two cells, incapable of independent life, merge to form a single, individual human entity. Of course, that new life is not yet mature -- growth and development are necessary before that life can survive independently -- but it is nonetheless human life. And there has been a broad legal consensus in America, even before Roe, that the life of a human being begins at conception. An unborn child is a unique and individual human being from conception, and, therefore, he or she is entitled to the full protection of law at every stage of development."

Hamilton, 97 So.3d at 746–47 (Parker, J., concurring specially) (footnotes omitted; emphasis added).

18 In Mack in 2012, this Court overruled two previous cases, Lollar v. Tankersley, 613 So.2d 1249 (Ala. 1993), and Gentry v. Gilmore, 613 So.2d 1241 (Ala. 1993), that held that no cause of action for wrongful death existed for the death of a previable fetus. The Mack opinion thoroughly demonstrated that, even at the time Lollar and Gentry were decided, "the viability rule already had been undermined in this State by this Court's reasoning in its earlier decisions in Wolfe [v. Isbell, 291 Ala. 327, 280 So.2d 758 (1973),] and Eich [v. Town of Gulf Shores, 293 Ala. 95, 300 So.2d 354 (1974),]" by commentators who "had heavily criticized the viability rule," and by changes in the nationwide legal landscape, including "some jurisdictions [that] have recognized the arbitrary and illogical nature of the viability rule." 79 So.3d at 610. We conceded in Mack, however, that, "at the time Lollar and Gentry were decided, there remained one significant factor that provided some support for the viability rule: Alabama's homicide statutes applied only to persons 'who had been born and [were] alive at the time of the homicidal act.' § 13A–6–1(2), Ala. Code 1975." Id. The Brody Act's change of that law to protect all unborn children "at any stage of development, regardless of viability," § 13A–6–1(a)(3), Ala. Code 1975, removed the last vestige of legal support for the viability rule in Alabama. "After Mack and Hamilton, this Court continued to reject the use of the viability standard in contexts beyond wrongful death" in both civil and criminal cases. Stinnett, 232 So.3d at 222 (Parker, J., concurring specially). In Ankrom in 2013 (reaffirmed in Hicks in 2014), we held that all unborn children have the protection of the chemical-endangerment statute and rejected any limitation of the statute to only viable unborn children as "inconsistent with the plain meaning of the word 'child' and with the laws of this State." 152 So.3d at 419. In Stinnett in 2016, we rejected the argument that a plaintiff in a wrongful-death action had to prove "future viability [of an unborn child] in order to establish the element of proximate cause" because such a rule "would effectively reimpose the viability rule." 232 So.3d at 218. Such a proximate-cause inquiry was inapplicable "[i]n light of the legislative recognition that a 'person' includes an 'unborn child in utero at any stage of development, regardless of viability.' " Id. (quoting the Brody Act). Today, this Court, by applying Alabama's capital-murder statutes to protect equally the unborn and the born, yet again reaffirms that the Brody Act meant what it said in recognizing the personhood of the unborn "at any stage of development" or gestation. If after Mack there remained any life for the viability rule in Alabama law outside the abortion context, the Court's opinion today should confirm that the viability rule is dead and buried.

19 The omitted footnotes include citations to authority from states throughout the nation demonstrating the extensive protections afforded unborn children. I have omitted those footnotes here simply for the ease of the reader. I have also omitted similar footnotes from other quoted portions of my special concurrence in Ankrom.

20 Florida and Indiana have each abandoned the viability standard as a threshold for criminal liability, while Arkansas has abandoned the 12-week gestation standard as a threshold for criminal liability. See Ark. Code Ann. § 5–1–102(13)(B)(i)(a) and (b) (2018) (cross-referencing homicide offenses); Fla. Stat. § 775.021(5)(e) (2018) (defining "unborn child" as "a member of the species Homo sapiens, at any stage of development, who is carried in the womb"), § 782.09 (2018) (killing of unborn child by injury to mother), and § 782.071 (2018) (vehicular homicide); and Ind. Code § 35–42–1–6 (2018) (feticide) (see also Ind. Code § 35–42–1–1(4) (2018) (murder), § 35–42–1–3(a)(2) (2018) (voluntary manslaughter), and § 35–42–1–4 (2018) (involuntary manslaughter)).

21 Since Ankrom was released, Delaware's death-penalty statute has been ruled unconstitutional, Rauf v. State, 145 A.3d 430, 433 (Del. 2016), and Maryland has abolished its death penalty altogether. Md. Code Ann., Art. 27, §§ 71-79 (repealed). Because Maryland had protected pregnant women from being executed, the total number of states that prohibit execution of a pregnant woman has dropped to 22.

22 See Mo. Rev. Stat. § 563.031(2)(1) (2018) (use of force in defense of persons); Holland v. State, 481 S.W.3d 706, 711 (Tex. App. 2015) (concluding that the lack of instruction was prejudicial because "the matters of provocation and a duty to retreat that may have been attributed to the pregnant mother would not be attributable to the unborn child. Furthermore, the jury might have determined that greater force was necessary to protect the unborn child than was necessary to protect the pregnant mother"); People v. Kurr, 253 Mich. App. 317, 323, 328, 654 N.W.2d 651, 655, 657 (2002) (holding that a mother may use deadly force to protect her unborn child, viable or nonviable, even if she does not fear for her own life).

23 Ark. Code Ann. § 16-62-102(a)(1) (2018) (adopting the criminal-law definition of "unborn child in § 5-1-102," which is "offspring of human beings from conception until birth").

24 In addition to the sources cited in footnote 27 of my special concurrence in Ankrom, 152 So.3d at 428, see Alaska Stat. § 13.06.120(a)(5) (2017); Mass. Gen. Laws ch. 203E § 305(a) (2018); Minn. Stat. §§ 501C.0303-501C.0305 (2018) (trust representative for unborn), § 524.1-403(4) (2018) (guardian ad litem in probate matters); Mont. Code Ann. § 72-38-305 (2017) (appointment of representative); N.M. Stat. Ann. §§ 45-1-403.5 (2018) (appointment-of-representative provision in the Probate Code) and 46A-3-305 (2018) (appointment-of-representative provision in the Uniform Trust Code); N.C. Gen. Stat. § 36C-3-305 (2018); Pennsylvania: Rule 5.5(a), Orphans' Court Rules; 33 R.I. Gen. Laws § 33-22-17 (2018); S.D. Codified Laws §§ 55-18-9 and 55-18-19 (2018); and Va. Code Ann. § 64.2-718 (2018).

25 Connecticut repealed its statute, Conn. Gen. Stat. § 19a-574. See 2018 Conn. Legis. Serv. P.A. 18-11 (2018).

26 See Or. Rev. Stat. § 112.077(3) (2018) ("A person conceived before the death of the decedent and born alive thereafter inherits as though the person was a child of the decedent and alive at the time of the death of the decedent.") (repealing Or. Rev. Stat. § 112.075); Tex. Est. Code §§ 255.051 to 255.056 (2017) (relating to succession by a pretermitted child). See also Me. Rev. Stat. Ann. tit. 18-A, § 2-302 (2018) (repeal effective July 1, 2019, pursuant to adoption of Uniform Probate Code in Maine Laws 2017, c. 402, § A-1).

27 See In re David Wolfenson 1999 Trust, 57 Misc. 3d 362, 369, 56 N.Y.S.3d 848, 854 (Sur. 2017) (concluding that the great-grandchild in utero was "a great-grandchild who was 'living' at the time of David's death within the meaning of the statute(s) and case law, and within the intendment of the provisions of Articles THREE and FOUR of the Trust, and that she is entitled to take under those provisions" (capitalization in original)).

28 See 755 Ill. Comp. Stat. § 5/2-3 (2018); Iowa Code § 633.267 (2018); Or. Rev. Stat. § 112.405 (2018); and Va. Code Ann. § 64.2-204 (2018).

29 Wis. Stat. § 48.981 (2018) (Abused or Neglected Children and Abused Unborn Children); In re A.L.C.M., 239 W. Va. 382, 392, 801 S.E.2d 260, 270 (2017); Sciascia v. Sciascia, No. 11FD1867 (Tex. Dist. Ct. 2011); In re Benjamin M., 310 S.W.3d 844, 850-51 (Tenn. Ct. App. 2009); In re Unborn Child, 179 Misc. 2d 1, 683 N.Y.S.2d 366 (Fam. Ct. 1998); In re Fathima Ashanti K.J., 147 Misc. 2d 551, 555, 558 N.Y.S.2d 447, 449 (Fam. Ct. 1990); In re Ruiz, 27 Ohio Misc. 2d 31, 34-35, 500 N.E.2d 935, 937-39 (Ct. Com. Pl. 1986); Gloria C. v. William C., 124 Misc. 2d 313, 325, 476 N.Y.S.2d 991, 998 (Fam. Ct. 1984); Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964) (compelling a woman, over her religious objection, to have a blood transfusion to save her unborn child's life); Hoener v. Bertinato, 67 N.J. Super. 517, 171 A.2d 140 (Juv. Ct. 1961) (same); and Kyne v. Kyne, 38 Cal. App. 2d 122, 127, 100 P.2d 806, 809 (1940) (unborn child was entitled to his father's support).

30 See Sciascia v. Sciascia, No. 11FD1867 (Tex. Dist. Ct. 2011) (issuing a protective order for a mother, unborn child, and born children); Gloria C. v. William C., 124 Misc. 2d 313, 325, 476 N.Y.S.2d 991, 998 (Fam. Ct. 1984) ("This court finds that birth of the child is not a condition precedent to enforcement of an order of protection issued on behalf of the fetus.").

31 See Wis. Stat. § 48.981 (Abused or Neglected Children and Abused Unborn Children); In re A.L.C.M., 239 W. Va. 382, 392, 801 S.E.2d 260, 270 (2017) (holding that a child born with illegal drugs in his or her system was abused and/or neglected under the West Virginia Child Welfare Act); In re Benjamin M., 310 S.W.3d 844, 850 (Tenn. Ct. App. 2009) ("[W]e hold that the statutory language defining severe child abuse clearly reflects an intent that actions before a child is born can constitute abuse to a child that is born injured by those actions."); In re Unborn Child, 179 Misc. 2d 1, 8, 683 N.Y.S.2d 366, 370 (Fam. Ct. 1998) ("In the case at bar, it would be incongruous to imagine the Family Court Act's clear purpose being anything other than to protect children, including unborn children, from harm."); In re Fathima Ashanti K.J., 147 Misc. 2d 551, 555, 558 N.Y.S.2d 447, 449 (Fam. Ct. 1990) (interpreting child-abuse and neglect statutes to include unborn infant born with a positive toxicology report); In re Ruiz, 27 Ohio Misc. 2d 31, 35, 500 N.E.2d 935, 939 (Ct. Com. Pl. 1986) (in finding that a viable unborn child had been abused based on the mother's prenatal conduct, the court stated: "[T]his court is in agreement with its sister courts in holding that a child does have a right to begin life with a sound mind and body ...."); and Kyne v. Kyne, 38 Cal. App. 2d 122, 127, 100 P.2d 806, 809 (1940).

32 See Gonzales v. Carhart, 550 U.S. 124, 169, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007)(Thomas, J., concurring)("I write separately to reiterate my view that the Court's abortion jurisprudence, including [Planned Parenthood of Southeastern Pa. v.] Casey[, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992),] and Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), has no basis in the Constitution.").

33 See West Alabama Women's Ctr. v. Williamson, 900 F.3d 1310, 1314 n. 1 (11th Cir. 2018) (noting that "there is constitutional law and then there is the aberration of constitutional law relating to abortion" and citing the following authority in support: "Whole Woman's Health v. Hellerstedt, 579 U.S. ——, 136 S.Ct. 2292, 2321, 195 L.Ed.2d 665 (2016) (Thomas, J., dissenting) (referring to 'the Court's habit of applying different rules to different constitutional rights

— especially the putative right to abortion'); Stenberg v. Carhart, 530 U.S. 914, 954, 120 S.Ct. 2597, 2621, 147 L.Ed.2d 743 (2000) (Scalia, J., dissenting) (stating that the 'jurisprudential novelty' in that case 'must be chalked up to the Court's inclination to bend the rules when any effort to limit abortion, or even to speak in opposition to abortion, is at issue'); Hill v. Colorado, 530 U.S. 703, 742, 120 S.Ct. 2480, 2503, 147 L.Ed.2d 597 (2000) (Scalia, J., dissenting) ('Because, like the rest of our abortion jurisprudence, today's decision is in stark contradiction of the constitutional principles we apply in all other contexts, I dissent.'); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 814, 106 S.Ct. 2169, 2206, 90 L.Ed.2d 779 (1986) (O'Connor, J., dissenting) ('This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence.'); id. ('Today's decision ... makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion.').").

34 It is not entirely uncommon for the United States Supreme Court to look to the direction the laws of the states are trending in analyzing a legal issue before it. For instance, in Roper v. Simmons, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), a decision with which I adamantly disagree, a liberal majority of the Supreme Court, in determining that it is cruel and unusual punishment violative of the Eighth Amendment to the United States Constitution to sentence juvenile criminal offenders to death, took into account "[t]he evidence of national consensus against the death penalty for juveniles." 543 U.S. at 564, 125 S.Ct. 1183. The Supreme Court stated:

> "[T]he objective indicia of consensus in this case -- the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice -- provide sufficient evidence that today our society views juveniles ... as 'categorically less culpable than the average criminal.' [Atkins v. Virginia,] 536 U.S. [304,] 316, 122 S.Ct. 2242, 153 L.Ed.2d 335 [(2002)]."

543 U.S. at 568, 125 S.Ct. 1183. But see id. at 607, 616, 125 S.Ct. 1183 (Scalia, J., dissenting) (stating that the Roper majority's finding of a national consensus is "on the flimsiest of grounds" and that the Court's preference for its "own judgment" above the states' self-anoints it as "the authoritative conscience of the Nation"). Also in Roper, the Supreme Court "affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual. Trop v. Dulles, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)." Roper, 543 U.S. at 561, 125 S.Ct. 1183.

If the Supreme Court will consider national trends in state law to determine that the evolving standards of decency in our society have "progressed" to the point that it is now cruel and unusual punishment to sentence a juvenile criminal offender to death, why does it ignore the national trend of the laws of the states to extend the full protection of the law to unborn children in considering the isolated Roe exception?

EXHIBIT F

IN THE SUPREME COURT OF ALABAMA

January 4, 2019

1160403 Ex parte Jessie Livell Phillips. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Jessie Livell Phillips v. State of Alabama) (Marshall Circuit Court: CC-09-596; Criminal Appeals : CR-12-0197).

CERTIFICATE OF JUDGMENT

WHEREAS, the ruling on the application for rehearing filed in this case and indicated below was entered in this cause on January 4, 2019:

Application Overruled. No Opinion. Bolin, J. - Parker, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur. Stuart, C.J., dissents.

WHEREAS, the appeal 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 October 19, 2018:

Affirmed. Bolin, J. - Shaw and Bryan, JJ., concur. Stuart, C.J., and Parker, Main, Wise, and Sellers, JJ., concur specially.

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 4th day of January, 2019.

Julia Jordan Weller

Clerk, Supreme Court of Alabama