No. 21-____

IN THE

Supreme Court of the United States

TYRONE CHRISTOPHER THOMPSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Tyrone Christopher Thompson was convicted of capital murder and sentenced to a term of life without parole.

The question presented is:

Does precluding a defendant from presenting any evidence of an affirmative defense of mental disease or defect to a jury based solely on conflicting expert testimony at a pre-trial hearing violate the Fourteenth Amendment's guarantee that an accused have a meaningful opportunity to present a complete defense.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner is Tyrone Christopher Thompson. The Respondent is the State of Alabama. Because Petitioner is not a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS, STATUTES & RULES

PETITION FOR A WRIT OF CERTIORARI

Tyrone Christopher Thompson respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals, Thompson v. State, No. CR-18-1161 (Ala. Crim. App. Jan. 29, 2021), has not yet been reported and is attached as Appendix A. The order of the Alabama Court of Criminal Appeals overruling petitioner's application for rehearing, Thompson v. State, No. CR-18-1161 (Ala. Crim. App. Mar. 12, 2021), is unreported and is attached as Appendix B. The order of the Alabama Supreme Court denying a petition for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals, Ex parte Thompson, No. 1200442 (Ala. May 14, 2021), is unreported and attached as Appendix C.

JURISDICTION

The opinion of the Alabama Court of Criminal Appeals was issued on January 29, 2021. That court overruled a timely application for rehearing on March 12, 2021. The Alabama Supreme Court denied Mr. Thompson's timely Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals on May 14, 2021. This Court's Order on March 19, 2020 extended the deadline to file any petition for writ of certiorari due on or after the date of the order by 150 days. This

Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ala. Code § 13A-3-1(a) provides in pertinent part: "It is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts."

STATEMENT OF THE CASE

This case presents important constitutional questions regarding the propriety of prohibiting the defense from presenting any evidence of an affirmative defense of mental disease or defect[1] based solely on conflicting expert testimony at a pre-trial hearing.

[1] This defense was previously referred to as the insanity defense. Accordingly, the terms are herein used interchangeably.

A. Pre-trial Proceedings

On April 20, 2011, an Anniston, Alabama teacher named Kevin Thompson went missing.[2] Three nights later, authorities found his body, stabbed to death and with serious cuts, abrasions, and bruises, off the embankment of a highway. (R. 1165:3-21; 1169:4-6.)[3] On May 13, 2011, local authorities arrested Tyrone Thompson in connection with Kevin Thompson's death. (C. 38.) That same day, Tyrone Thompson was indicted on two counts of capital murder, namely murder in the course of a kidnapping and murder in the course of a robbery. (C. 37.) Sometime later, Mr. Jovon Gaston and Mr. Nicholas Smith were arrested and similarly charged as co-defendants. (See R. 998:11-13.) On June 27, 2011, Mr. Thompson notified the trial court of "his intent to pursue a special plea of not guilty by reason of insanity." (C. 53.)

On August 14, 2014, defense counsel filed an ex parte motion for the appointment of an expert to assist in determining whether Mr. Thompson suffers from an intellectual disability, in order to prepare an Atkins[4] defense. (C. 381-403.) Over the course of the next year, on three separate occasions, the trial court

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[2] No relation to the defendant, Mr. Thompson.

[3] "C." denotes the clerk's record; "R." denotes the reporter's transcript; "S." denotes the reporter's supplemental transcript, which is a revised transcript of the July 9, 2019 pre-trial hearing and replaces pages 629 through 813 of the original reporter's transcript.

[4] Atkins v. Virginia, 536 U.S. 304 (2002) (holding that executing people with intellectual disabilities violates the Eighth Amendment's ban on cruel and unusual punishment).

denied Mr. Thompson the appointment of his own expert for psychological evaluation. Each time, Mr. Thompson filed a petition for writ of mandamus to the Alabama Court of Criminal Appeals, and each time, the Alabama Court of Criminal Appeals reversed or vacated the trial court's denial.

First, on October 20, 2014, over the defense's objections, the trial court permitted the State to attend a hearing and present evidence and argument against defense counsel's ex parte motion. (R. 165:24-167:13.) Three days later, the trial court denied Mr. Thompson motion, finding that he had failed to make a preliminary showing that he required an Atkins expert. (C. 485-93.) The defense petitioned for mandamus because the State should not have been present at the hearing. The Alabama Court of Criminal Appeals agreed and, on February 19, 2015, directed the trial court to hold an ex parte hearing. Ex parte Sealed Case, Calhoun Circuit Court No. CC-11-491, Order (Feb. 19, 2015).

Second, on March 12, 2015, the trial court held the ordered ex parte hearing (R. 346:9-16), but the trial court once again denied the defense's request for an expert, finding that Mr. Thompson had failed to make a preliminary showing that he suffered a mental disability. (See C. 535.) On April 21, 2015, the defense again petitioned for mandamus, requesting that the Alabama Court of Criminal Appeals order the trial court to grant the defense's motion for funds for a mental health expert. On July 23, 2015, the Alabama Court of Criminal Appeals ruled that Mr. Thompson had shown that expert expenses were warranted, (C. 535-36), and directed the trial court to grant the defense's motion.

Third, on October 26, 2015, the defense submitted an ex parte motion for the appointment and funding of Dr. Carol Walker as its expert, but on January 26, 2016, the trial court instead ordered that the State's expert, Dr. Glen King, perform the evaluation. (C. 550.) On April 6, 2016, the defense filed a third petition for mandamus, asking for funding for and appointment of Dr. Carol Walker. On April 11, 2016, the trial court amended its order to direct Taylor Hardin Secure Medical Facility, an Alabama State hospital and maximum security forensic facility, to perform the evaluation. (C. 551.) On the same day, the trial court granted the defense's motion to appoint and fund Dr. Carol Walker as an expert. On November 8, 2017, the Alabama Court of Criminal Appeals vacated the trial court's order that Taylor Hardin Secure Medical Facility perform the evaluation. Ex parte Sealed Case, Calhoun Circuit Court No. CC-11-491, Order (Nov. 8, 2017). Given that the trial court had "finally granted" funding for Dr. Walker, the Alabama Court of Criminal Appeals found the defense's remaining request moot. Id. at 3.

Relying on Dr. Walker's expert report, on July 20, 2018, the defense moved to prohibit the death penalty under Atkins based on Mr. Thompson's intellectual disability. (C. 638-42; see also C. 643-84.) On December 3, 2018, the State's expert Dr. King completed his expert evaluation, finding that, inter alia, Mr. Thompson's IQ is between 56 and 59, Mr. Thompson's IQ places him in "the lowest 1% with regard to intellectual ability relative to his same age peers," (C. 863-71), and Mr. Thompson suffered from an intellectual disability (C. 871). On December 21, 2018, the defense amended and renewed its motion to prohibit the death penalty in light of the findings of the State's expert.

(C. 872-77; see also C. 878-83.) On January 7, 2019, the parties stipulated to remove the death penalty as a potential punishment because Mr. Thompson suffered from a significant intellectual disability. (C. 893-98; see also (C. 957-58 (order granting motion for judicial finding of intellectual disability).)

On May 6, 2019, the State filed a motion in limine to "preclude testimony on the Defendant's intellectual disability and/or mental illness," which the defense opposed. (C. 940; C. 951-56.) The trial court heard the State's motion on May 22, 2019, and scheduled a pretrial evidentiary hearing on July 9, 2019, to determine whether the defense could present evidence of Mr. Thompson's defense of not guilty by reason of severe mental disease of defect. (See C. 950.)

Both experts testified—and agreed—that Mr. Thompson had a "mental defect" at the time of the alleged crime. (See C. 1140-42.) The State's expert also opined on the ultimate issue of mental disease or defect and whether Mr. Thompson appreciated the wrongfulness of his actions: "Q. And so that second prong is not met, and your opinion as an expert, there is no mental disease or defect defense available to him under that circumstance, correct? A. That would be my opinion, yes." (S. 702:17-21.) Mr. Thompson's expert, on the other hand, testified only as to the character of Mr. Thompson's mental disability, not whether the defense should be available to him because she believed that that question was best suited for the jury. (S. 784:5-14 ("Q. Now, I am not asking you to give an opinion, but I'm asking you, the second prong the judge is going to rule on, what are y'all taught as to that opinion? A. It is for the trier of fact

to make the decision, and while people very often render assistance to the trier of fact, there is specific areas that should be evaluated, and we're told basically if to steer clear of those kinds of situations.").) No lay witnesses testified at the hearing.

After hearing from the two experts, the Court ruled from the bench that Mr. Thompson would not be able to raise a defense of mental disease or defect to the jury. The Court credited Dr. King's testimony but did not discuss Dr. Walker's conflicting testimony or expert report.

> [T]he testimony before the Court by Dr. Glenn King was that the defendant did understand the nature of the offense, and the quality of his acts.[5] His testimony is that the offense was premeditated.[6] Dr. King's testimony was that the offense was goal directed. Dr.

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[5] Dr. Walker testified that Mr. Thompson "is very concrete in his interactions" and that "[h]e does not think abstractly." (S. 769-70.) "Concrete is a parent tells a child be good. Good is abstract." Id. "[Dr. Walker:] [O]ne of the more interesting conversations I had with him was when he could not understand why he was terminated from a job for showing up late. He thought he should have been able to just complete a shift and move on. So he didn't have that ability to think forward to how that might affect his coworkers and that sort of thing." (S. 771.)

[6] "Q. And how did he score - and you may have answered this, and I apologize for the repeat. But how did he score in the area of planning? [Dr. Walker:] Well, remember I had told you that there is not one that specifically measures planning. It is the ability to focus your attention and to solve problems. So his scores - let me go to those. His scores were overall in the range that you would expect given his IQ." (S. 782:2-11.)

> King's testimony was that the defendant avoided apprehension.[7] Dr. King testified that all of these factors indicated that Tyrone Thompson understood the wrongfulness of his conduct. So, based on all of the evidence and the law, it is clear to the Court that from the evidence, the defendants have not proven by that required burden of proof, clear and convincing evidence, that the defendant - that the mental defect cause the defendant to act so that he could not understand the wrongfulness of his conduct.
>
> So the evidence of Insanity will not go to the jury. It will not be an issue for the jury to decide, and any evidence of the moderate mental retardation or intellectual disability will not be presented to the jury in any form or fashion.

(S. 810:3-811:2.) The trial court did not address the conflicting testimony of Dr. Walker in the order following the hearing. (C. 1140-42 (neither citing to nor discussing Dr. Walker's testimony addressing the second prong).)

The next day, the trial court issued an order denying Mr. Thompson's plea of not guilty by reason of

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[7] Dr. Walker explained in her report that "[c]onsistent with the capabilities of an 8-11 year-old child, an individual with mild [intellectual disability] can hide facts when they perceive it to be to their advantage or the advantage of others." (C. 959-89 at 979.) Dr. Walker's report was entered into evidence at the hearing. (S. 776.)

mental disease or defect and prohibiting the defense from directly or indirectly presenting any issue of mental disease or defect to the jury. (Id.) The decision stated that Mr. Thompson failed to "prove" his affirmative defense by a showing of "clear and convincing evidence" before submitting any evidence of it to the jury. (Id.) Mr. Thompson filed a motion to reconsider the court's ruling, which was denied. (R. 965-967.)

B. Trial Proceedings

Mr. Thompson's nine-day jury trial began on August 19, 2019. (See R. 816:20.) Consistent with the trial court's pre-trial order, Mr. Thompson did not present any evidence regarding his mental disease or defect.

At trial, the State's evidence showed that Kevin Thompson left home or was abducted on April 20th, was robbed, was bound in duct tape, and was driven to an embankment where he was killed. Later, his car was stripped of his possessions, some of which were pawned.

On August 29, 2019, the State concluded the presentation of its case. Despite the presentation of the testimony of sixty-three witnesses and a ten-and-a-half hour video recording of Tyrone's interviews with the police, (see R. 2667:15-20, 2671:12.), the State's evidence only established that 1) Mr. Thompson introduced the co-defendants to the victim; 2) Mr. Thompson was present at the robbery; 3) Mr. Thompson remained with the co-defendants that evening; 4) Mr. Thompson did not contact the police; and 5) Mr. Thompson remained in contact with the co-defendants after that night. The State did not present any evidence suggesting that Mr. Thompson was an active

participant or derived any benefit from Kevin Thompson's murder.

After the State rested, Mr. Thompson filed a motion for acquittal, arguing, inter alia, that the trial court the decision, based on conflicting expert testimony, to preclude Mr. Thompson from putting forth any evidence of mental disease or defect, denied him of his right to a fair trial (C. 1080-88; see R. 2627:20-22, 2630.) This motion was denied. (R. 2639:15-2641:24.)

That same day, the jury convicted Tyrone Thompson of one count of murder during kidnapping in the first degree and one count of murder during a robbery in the first degree (R. 2747:3-12), and the trial court sentenced Mr. Thompson to life imprisonment without the possibility of parole, in addition to certain fines. (R. 2750:7-20.)

C. Alabama Court of Criminal Appeals Decision

On September 4, 2019, Mr. Thompson filed a motion for a new trial (C. 1158), which was denied by operation of law sixty days later (Ala. R. Crim. P. 24). Mr. Thompson timely appealed.

On appeal, Mr. Thompson argued that the decision made at the pre-trial hearing to preclude him from presenting any evidence of his affirmative defense of not guilty by reason of mental disease defect at trial violated his right to Due Process, and made the judge—rather than the jury—the finder of fact.

The Alabama Court of Criminal Appeals affirmed the conviction. The court of appeals found that the

trial court had applied the incorrect legal standard to determine if Mr. Thompson's mental defect rendered him unable to appreciate the nature and quality or wrongfulness of his actions. Pet. App. 13a (noting that "the circuit court used the 'clear and convincing' standard instead of the applicable 'some evidence' standard"). Nonetheless, the court of appeals found that the error was harmless because 1) Mr. Thompson "did not present evidence sufficient to submit a defense of not guilty by reason of mental disease or defect to the jury" and 2) "Thompson has made no specific showing of evidence that he was unable to present prior to trial." Pet. App. 15a.

On February 26, 2021, Mr. Thompson petitioned the Alabama Court of Criminal Appeals for a rehearing, which was overruled on March 12, 2021. Pet. App. 31a. On March 26, 2021, Mr. Thompson timely petitioned the Alabama Supreme Court for a writ of certiorari. On May 14, 2021, the Alabama Supreme Court denied the petition. Pet. App. 32a. This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE PETITION

I. Federal Courts Are Divided Regarding Whether Evidence Relevant to an Insanity Defense Can Be Excluded as Insufficient Before Being Presented to a Jury

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " Holmes v. South Carolina, 547

U.S. 319, 324 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). "The right to present witnesses in one's own defense in a criminal trial lies at the core of the Fifth and Fourteenth Amendments' guarantee of due process of law." Boykins v. Wainwright, 737 F.2d 1539, 1544 (11th Cir. 1984) (collecting cases), cert. denied, 470 U.S. 1059 (1985). "[V]iolation of the constitutional guarantee that an accused be able to present witnesses in his own defense is prejudicial per se." Id. at 1545 n.2 (citing United States v. Hammond, 598 F.2d 1008, 1013 (5th Cir. 1979)).

Just as critically, the availability of an insanity defense is firmly entrenched in the historical tradition and common law. As this Court recently explained, "for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime." Kahler v. Kansas, 140 S. Ct. 1021, 1030 (2020). Indeed, insanity, as a "principle of nonculpability appeared in case after case involving allegedly insane defendants, on both sides of the Atlantic." Id.

Yet, there is a split among federal courts, including at least the Eleventh Circuit and Ninth Circuit, regarding whether these principles are violated when a defendant is precluded, based on pre-trial proceedings, from presenting evidence relevant to an insanity defense to a jury.

The Eleventh Circuit has held that excluding expert testimony relevant to establishing an insanity defense renders the proceeding fundamentally unfair. Boykins, 737 F.2d at 1544. In Boykins, the trial court made an evidentiary ruling excluding expert testimony regarding the defendant's "previous history of

mental illness." Id. at 1543. The trial court ruled that the testimony was "not relevant to [defendant's] mental condition at the time of the offense." Id. at 1541. The Eleventh Circuit—while noting that it was reluctant to second-guess state court evidentiary rulings—reversed and remanded, finding that "the trial court's limitation of the scope of a key defense witness's testimony denied the petitioner the right to present witnesses in his own defense in violation of the due process clause of the Fourteenth Amendment." Id. at 1540.

The Eleventh Circuit further held that the improper exclusion of evidence relevant to the insanity defense is not subject to harmless error analysis. The trial court in Boykins had held that the exclusion of the defense's expert's testimony regarding insanity was harmless error. Id. at 1545 n.2. The Eleventh Circuit, however, held that "[w]here the substantive standard of constitutional error contains a requirement that the excluded evidence be 'crucial, critical, highly significant' the harmless error doctrine is *inapplicable*." Id. (emphasis added). The court cited United States v. Hammond, from the Fifth Circuit, for the proposition that "violation of the constitutional guarantee that an accused be able to present witnesses in his own defense is *prejudicial per se*." Id. (citing Hammond, 598 F.2d at 1013) (emphasis added). The Seventh Circuit has similarly held, in the context of an insanity defense, that "insufficiency of evidence is not a reason to exclude it. . . . Sufficiency was for the jury to decide." United States v. West, 962 F.2d 1243, 1248 (7th Cir. 1992).

In contrast to the Eleventh Circuit's ruling in Boykins, the Ninth Circuit has held that testimony

relevant to a defendant's insanity defense can be excluded pre-trial and before it is presented to the jury unless it meets a sufficiency test—in particular, a "convincing clarity" standard. In United States v. Keen, the defendant raised an insanity defense. 96 F.3d 425, 426 (9th Cir. 1996). The State filed a motion in limine to preclude evidence of the defendant's insanity defense based on a "lack of expert testimony in support of the defense." Id. The defendant relied solely on the lay testimony of himself and of his family regarding his mental health. Id. at 430. The trial court granted the state's motion after a pre-trial hearing. Id. at 426-27. The Ninth Circuit affirmed, finding that "the proffered evidence of insanity was statutorily insufficient." Id. at 430-31.

Although due process was not raised on appeal in Keen, the Ninth Circuit applied a sufficiency test, articulating the following standard for determining whether there is a sufficient quantum of evidence to justify a jury instruction on the insanity defense:

> [W]here the issue of insanity has otherwise been properly raised, a federal criminal defendant is due a jury instruction on insanity when the evidence would allow a reasonable jury to find that insanity has been shown with convincing clarity.... [T]he trial judge must construe the evidence most favorably to the defendant.

Id. at 430 (quoting United-States v. Whitehead, 896 F.2d 432, 435 (9th Cir.)).[8] Thus, in the Ninth Circuit,

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[8] This standard was borrowed from the Eleventh Circuit's decision in United States v. Owens. See Whitehead, 896 F.2d at 435 (citing United States v. Owens, 854 F.2d 432, 434 (11th Cir.

evidence can be excluded pre-trial if it fails to meet the "convincing clarity" standard. Id. By contrast, the Eleventh Circuit does not examine the sufficiency of evidence of mental defect before allowing it to be presented to the jury. Boykins, 737 F.2d at 1540.

In this case, the Alabama Court of Criminal Appeals deepened the conflict reaching a conclusion consistent with Keen but inconsistent with Boykins. The court of appeals endorsed a pre-trial weighing of the sufficiency of the evidence relevant to the insanity defense before deciding whether any of it could be presented to the jury. In particular, the court affirmed the trial court's order excluding not only Dr. Walker's testimony, but *any* evidence relating to mental defect, on the grounds that Mr. Thompson "did not present evidence sufficient to submit a defense of not guilty by reason of mental disease or defect to the jury." Pet. App. 15a. Under Boykins, Dr. Walker's testimony—along with relevant lay testimony—would have been permitted to be presented to the jury as a matter of Due Process.

This Court should grant certiorari to resolve this division in the law.

1988)). In Owens, the Eleventh Circuit articulated the "convincing clarity" standard in a case in which the trial court declined to instruct the jury on insanity at the end of trial after all evidence had been presented. Owens, 854 F.2d at 435. That ruling is not inconsistent with the Eleventh Circuit's ruling in Boykins. In Keen, however, the Ninth Circuit excluded evidence relevant to an insanity defense at the pre-trial stage on a motion in limine, which is inconsistent with Boykins.

II. Mr. Thompson's Case Presents an Important Question of Federal Law

The question of whether a criminal defendant may be precluded from presenting any evidence of an affirmative defense of mental disease or defect based solely on conflicting expert testimony at a pre-trial hearing is of critical importance to a fair judicial process.

It is a fundamental tenet of our legal system that a criminal defendant is guaranteed "a meaningful opportunity to present a complete defense." Holmes, 547 U.S. at 324 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)). Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Permitting a court to preclude any evidence of an affirmative defense of mental disease or defect at the pre-trial stage, based solely on conflicting expert testimony, risks undermining this crucial right. Although this Court has not addressed the validity of a pre-trial finding, it has repeatedly recognized that the defendant has right to present evidence in his own defense. See e.g., Rock v. Arkansas, 483 U.S. 44, 62 (1987) (state statute barring testimony by witness with memory refreshed by hypnosis could not be applied to keep defendant from testifying); Holmes, 547 U.S. at 330-31 (defendant had constitutional right to offer evidence that third party may have been perpetrator of crime for which defendant was charged).

It is particularly important in the context of an insanity defense that all relevant evidence be permitted

to come in before a ruling is made. As this Court noted in Kahler, "[d]efining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time." 140 S. Ct. at 1037. To that end, the Eleventh Circuit has held that "[i]n resolving the complex issue of criminal responsibility it is of *critical importance* that the defendant's entire relevant symptomatology be brought before the jury *and explained*. . . . This Court has frequently stressed the importance of permitting introduction of all evidence relating to the issue of insanity." Boykins v. Wainwright, 737 F.2d at 1545 (emphasis in original).

Evidence of a defendant's symptomatology is not limited to expert testimony. Indeed, Alabama courts have welcomed both expert and lay testimony on the issues of "mental competency or sanity." E.g., Lewis v. State, 380 So. 2d 970, 977 (Ala. Crim. App. 1979). Family members, for example, can speak to a defendant's past behavior. Bowen v. State, 386 So. 2d 489, 490 (Ala. Crim. App.) (in which defendant's father testified regarding his son describing hallucinations to him and being out of touch with reality).

Moreover, excluding evidence of an insanity defense based solely on conflicting testimony at a pretrial hearing risks interfering with the jury's constitutional role as the trier of fact. As this Court has recognized, "the right to trial by jury [is considered] 'the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must

become arbitrary.'" United States v. Haymond, 139 S. Ct. 2369, 2375 (2019).

Indeed that is what happened here. The trial court's decision to weigh the evidence and allow the presentation of Mr. Thompson's affirmative defense only if he "proved" the defense at the pre-trial hearing improperly invaded the jury's fact-finding role. By choosing which expert to credit, and denying the defendant the ability to present lay witnesses regarding his mental capacity, the court exceeded its gatekeeping function, and instead usurped the role of the jury.

This Court should thus grant certiorari to resolve this important question.

III. Mr. Thompson Was Deprived of Due Process by Being Precluded from Raising an Affirmative Defense of Mental Disease or Defect Based Solely on Conflicting Expert Testimony at a Pre-trial Hearing

The Alabama Court of Criminal Appeal's decision was wrong: Denying Mr. Thompson the right to present relevant witness testimony—including lay witness testimony—to the jury in his defense denied him his Constitutional right to due process and rendered the proceeding fundamentally unfair.

In Alabama, "[i]t is an affirmative defense to a prosecution for any crime that, at the time of the commission of the acts constituting the offense, the defendant, as a result of severe mental disease or defect, was unable to appreciate the nature and quality or wrongfulness of his acts." Ala. Code § 13A-3-1(a). Thus, there are two prongs to this affirmative defense:

(i) the defendant must have had a mental disease or defect at the time of the commission of the alleged acts; and (ii) the mental disease or defect must have rendered the defendant unable to appreciate the nature and quality or wrongfulness of his acts.

It is undisputed that Mr. Thompson had a "mental defect" at the time of the alleged crime, i.e., that the first prong of his defense was satisfied. (C. 1141-42 ("[B]oth experts . . . indicated the Defendant had a mental defect. The mental defect was moderate intellectual disability, which was formerly called moderate mental retardation.").) The parties disputed, however, whether Mr. Thompson could have appreciated the criminality of his conduct, i.e., whether the second prong of his defense was satisfied.

As explained above, the state filed a motion in limine to preclude all evidence of Mr. Thompson's mental disability, on the basis that the defense's evidence was insufficient. (C. 940.) After a pre-trial hearing limited to expert testimony, the trial court granted the State's motion and effectively issued a directed verdict against Mr. Thompson's mental disease or defect defense. Notably, the trial court did not rule that Mr. Thompson had presented *no* evidence of his affirmative defense but that he had "not proven by . . . clear and convincing evidence" that the mental defect caused Mr. Thompson not to understand the wrongfulness of his conduct.

Even the Alabama Court of Appeal found this was wrong. Forcing a defendant to prove his affirmative defense at a pre-trial hearing by clear and convincing evidence as a *prerequisite* to presenting the issue to a

jury is, of course, improper. The Alabama Criminal Court of Appeals conceded this was the incorrect standard. (Pet. App. 13a). Nonetheless, the court found that the error was harmless, and endorsed the trial court's use of a pre-trial proceeding to exclude the mental health evidence from the jury all together. Pet. App. 13a.

The Alabama Court of Criminal Appeal's conclusion was erroneous in several ways that violated Mr. Thompson's due process guarantee to present evidence in his defense. First, the court held that there was "no evidence" to support the defense. This was itself an improper weighing of the evidence that was presented during the pre-trial proceeding.

The limited evidentiary record that was developed unquestionably demonstrates that there was indeed "some evidence" from which a reasonable jury could infer that Mr. Thompson's intellectual disability inhibited his understanding of the wrongfulness of his conduct. Specifically, beyond agreement from both experts that Mr. Thompson suffered from an intellectual disability, Dr. Walker's report, which was entered into evidence at the pre-trial hearing, detailed that Mr. Thompson had impaired social skills, which include "interpersonal skills, social responsibility, self-esteem, gullibility, naivete (wariness), and ability to follow rules/obey laws and to avoid victimization, and social problem solving." (C. 914.) Dr. Walker testified that Mr. Thompson's social skill deficits impede his ability to think abstractly, including thought that requires "a level of inference" and his understanding of

what it means to "be good." (S. 769:19–770:20.)[9] Dr. Walker also testified that Mr. Thompson "could not understand why he was terminated from a job for showing up late" because "he didn't have that ability to think forward to how [his actions] might affect his coworkers and that sort of thing." (S. 771.)

To be sure, Dr. Walker expressly did not render a conclusion on the ultimate issue—whether Mr. Thompson met the second prong of the Alabama insanity test—believing that an issue for the jury to decide.[10] But the court of appeals confused Dr. Walker's reticence to opine on the ultimate issue for a lack of *evidence*. That was wrong: for the reasons just discussed, Dr. Walker's testimony about the factual components of Mr. Thompson's condition certainly constituted some evidence that he was unable to appreciate the wrongfulness of his conduct. Ultimately, the court's conclusion of "no evidence" relied on resolving particular conflicts in the evidence presented at the pre-trial hearing. That is improper.

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[9] Dr. Walker testified that Mr. Thompson's "deficits in conceptual skills, social skills, as well as practical skills" mean that Mr. Thompson "is very concrete in his interactions. He does not think abstractly." (S. 769:19–770:20.) Dr. Walker further explained the meanings of concrete and abstract thinking: "a parent tells a child be good. Good is abstract. Concrete is don't kick the dog. So it is that level of – it is making a level of inference." (S. 770:17–20.)

[10] Dr. Walker correctly stated at the hearing that the ultimate question of the second prong, i.e., whether Mr. Thompson was unable to appreciate the wrongfulness of his conduct, "is for the trier of fact" to answer. (S. 784:5-14.)

Second, and more importantly, the court's decision to exclude all evidence after the pre-trial expert hearing necessarily limited Mr. Thompson's ability to develop the record that would have supported his defense. The Alabama Criminal Court of Appeals found that Mr. Thompson "has made no specific showing of evidence that he was unable to present prior to trial" and thus "has not shown how he has been prejudiced by a pre-trial determination." (Pet. App. 15a.) But there can be no "specific showing" where Mr. Thompson's case is nipped in the bud before all evidence has been put in. Only the two experts testified at the pre-trial hearing. The trial court invited no lay witness testimony despite the fact that Dr. Walker based her opinion and testimony in part on three different interviews with Mr. Thompson's mother. (S. 734 ("[Dr. Walker:] I also interviewed his mother on three different occasions."); 750-51 ("Q. Did you find in your testing there that he had adaptive deficits? A. Yes, I did. Q. Can you talk about that please? A. He had deficits in essentially all domains. The interview that I did with his mother, we looked at receptive, expressive, and written language. All of those scores were low.").)

In Alabama, lay witness testimony—including from family members—is admissible in support of an insanity defense. Lewis v. State, 380 So. 2d 970, 977 (Ala. Crim. App. 1979) ("We greatly appreciate the value of the testimony of lay witnesses, as well as testimony of expert witnesses, on an issue as to mental competency or sanity. The weight of each kind of evidence as compared with the other is variable. By reason of the variety of circumstances, lay testimony is weightier at times than expert testimony, and at other times the reverse is true."); Bowen v. State, 386 So. 2d 489, 491 (Ala. Crim. App. 1980) ("The defense also put

on the non-expert, or lay testimony, of the appellant's father in support of the defense of insanity."); Lewis v. State, 27 So. 3d 600, 608 (Ala. Crim. App. 2008) ("[L]ay opinions have been admitted as to insanity, value, and handwriting, despite the fact that these often either constitute or coincide with the ultimate issue in the given litigation.") (quoting C. Gamble, McElroy's Alabama Evidence § 127.01(6) (5th ed. 1996)). Wilson v. State, 387 So. 2d 226, 229 (Ala. Crim. App.), ("Defendant presented considerable lay testimony of members of her family and others as to defendant's mental as well as physical condition, some of it constituted strong evidence of insanity; some of it fell short of an establishment thereof.").

In Alabama, a jury can even credit lay testimony over that of even undisputed expert testimony in certain circumstances. "Even undisputed medical testimony concerning insanity is not conclusive on the jury." Foust v. State, 414 So. 2d 485, 487 (Ala. Crim. App. 1982). Dunaway v. State, 746 So. 2d 1021, 1033 (Ala. Crim. App. 1998) (finding that, under certain circumstances, a jury may disregard an expert's opinion rebutted only by lay testimony), aff'd sub nom. Ex parte Dunaway, 746 So. 2d 1042 (Ala. 1999); see also Dusky v. United States, 295 F.2d 743, 754 (8th Cir. 1961) ("This and other courts have said that expert opinion as to insanity rises no higher than the reasons upon which it is based, that it is not binding upon the trier of the facts, and that lay testimony can be sufficient to satisfy the prosecution's burden even though there is expert testimony to the contrary.").

Mr. Thompson had a Constitutional right to present witnesses, including lay witnesses such as his

family or himself, in his own defense. If, at the conclusion of the trial, Mr. Thompson had not met his burden to raise "some evidence" in support of his defense, the trial court could have issued a directed verdict and taken the issue of mental disease or defect from the jury. As the Alabama Court of Criminal Appeals conceded, a trial court "generally determines *during trial* whether a defendant has met both prongs of the test required for presentation to the jury." Pet. App. 15a (emphasis added).[11]

Finally, under the circumstances of the underlying trial in this matter, the prejudice to Mr. Thompson of not being able to present witnesses in his defense is heightened. On three separate occasions, the trial court denied Mr. Thompson access to a mental health expert to support his defense. Each time, Mr. Thompson was forced to petition for a writ of habeas corpus to compel the trial judge to comply with binding precedent and permit Mr. Thompson an expert to support his defense. On the eve of trial, the trial court denied Mr. Thompson his right to a mental health expert a fourth time, and although the court had again applied the wrong legal standard,[12] the fourth denial stuck.

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[11] Indeed, the court of appeals did not cite—and counsel has not located—a singled published case in any Alabama court in which evidence supporting the affirmative defense of not guilty by reason of insanity or severe mental disease or defect was precluded wholesale from trial. Instead, in all Alabama cases where the defense was asserted, the trial court permitted the evidence that tended to prove the affirmative defense to be presented to the jury.

[12] As noted above, the trial court applied a "clear and convincing" standard instead of a "some evidence" standard to present the issue to a jury. Pet. App. 13a.

Then, at trial, the evidence against Mr. Thompson for the intentional murder of Kevin Thompson was far from conclusive. See supra Statement of the Case. In Alabama, conviction for intentional murder requires the state to prove, beyond a reasonable doubt, that the defendant had a "particularized intent to kill," Ala. Code § 13A-6-2(a)(1), "and that intent to kill *cannot* be supplied by the felony-murder doctrine." Pet. App. 28a (quoting Ex parte Woodall, 730 So. 2d 652, 657 (Ala. 1998)) (emphasis added).

There was no physical evidence tying Mr. Thompson to the murder weapon, or the victim's injuries. Instead, the State relied on circumstantial evidence of Mr. Thompson's inaction. That evidence was exceedingly weak. As the Alabama Court of Criminal Appeals itself summarized it:

- "Mr. Thompson called Kevin with whom he was acquainted and then went to his apartment" along with the co-defendants.
- The co-defendants presence "made Kevin uncomfortable."
- "Thompson was shown to be present at one of the ATMs when Kevin's debit card was used while Kevin was being held at gunpoint in his vehicle."
- "Thompson remained with the men as the men drove Kevin out of town" and did not "render aid to Kevin."
- Thompson "never contacted the police."

Pet. App. 29-30a.

In short, the evidence showed that Mr. Thompson did not call the police and remained with the co-defendants throughout the night (R. 2661-62, 67.) That was the sum of the evidence supposedly establishing that Mr. Thompson "had a particularized intent to kill." Pet. App. 28a; Ala. Code § 13A-6-2(a)(1). Disarmed of his principal defense, Mr. Thompson was convicted of murder on this thin circumstantial evidence and sentenced to life in prison without the possibility of parole.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals.

Respectfully submitted.

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OCTOBER 12, 2021

APPENDIX

APPENDICES

A. Alabama Court of Criminal Appeals, Opinion affirming conviction and sentence, Thompson v. State, No. CR-18-1161 (Ala. Crim. App. Jan. 29, 2021).

B. Alabama Court of Criminal Appeals, denying petitioner's application for rehearing, Thompson v. State, No. CR-18-1161 (Ala. Crim. App. Mar. 12, 2021).

C. Alabama Supreme Court, Order denying a petition for a writ of certiorari, Ex. Parte Thompson, No. 1200442 (Ala. May 14, 2021).

APPENDIX A

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

ALABAMA COURT OF CRIMINAL APPEALS

REL: January 29, 2021

CR-18-1161

TYRONE CHRISTOPHER THOMPSON

v.

STATE OF ALABAMA

Appeal from Calhoun Circuit Court CC-11-491

MEMORANDUM DECISION

WINDOM, Presiding Judge.

Tyrone Christopher Thompson appeals his capital-murder convictions and sentences of life in prison without the possibility of parole.[1] Thompson was con-

[1] Before trial, the trial court determined that Thompson was intellectually disabled and, therefore, not eligible for the death penalty. See Atkins v. Virginia, 536 U.S. 304 (2002).

victed of murder made capital for intentionally killing Kevin Thompson during a kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975, and for intentionally killing Kevin Thompson during a robbery, see § 13A-5-40 (a)(2), Ala. Code 1975.[2]

On the night of April 20, 2011, Thompson and Javon Gaston were at a friend's house in Anniston with Gaston's brother, Patrick Watkins, and Tyrone's girlfriend, Cheryl Bush. After leaving their friend's house that night, Thompson and Gaston took Bush and Watkins to their homes. Thompson then telephoned Kevin Thompson at 9:34 p.m., 9:35 p.m., and 9:52 p.m. According to Kevin's sister, Rena Curry, Kevin had known Thompson for several years and had often helped Thompson; however, Rena did not consider the relationship to be a particularly close one. Cell-phone records indicated that Thompson's and Gaston's phones were located in Jacksonville, Alabama, during these telephone calls. Shortly thereafter, Thompson, Gaston, and Nicholas Smith arrived at Kevin's apartment in Jacksonville.

At the same time the group arrived, Kevin, who was in his apartment, was on the phone with his friend Chris Wilkerson. Wilkerson heard someone knock on Kevin's door and then heard Kevin say, "I didn't know all these people were coming." (R. 1046.) Kevin told Wilkerson that he would call Wilkerson back; however, Wilkerson never heard from Kevin again.

The following morning, Kevin failed to report to work at Wellborn Elementary School. His colleagues became worried, and a school resource officer went to Kevin's apartment to check on him. The officer contacted Kevin's sister, Rena, who in turn contacted

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[2] Kevin Thompson is not related to Tyrone Thompson.

their mother, Frances Curry. Rena and her mother drove to Kevin's apartment. The front door was unlocked and the lights were on. Kevin was not home, and his car, a silver, Honda Civic vehicle, was not in the parking lot. One of Kevin's shoes was discovered outside on the ground, and the matching shoe was found inside Kevin's apartment by the front door. Kevin's mother telephoned the police department.

Law-enforcement officials responded to the apartment complex and spoke with Kevin's family. Concerned that law-enforcement officials were not doing enough to locate her son, Frances continued her own search for Kevin. She contacted Kevin's bank and learned that several withdrawals had been made from Kevin's account the previous night at various automatic-teller machines ("ATM"). Frances contacted the local police department to inform them of the unusual bank-account activity.

Law-enforcement officers obtained surveillance footage from the credit unions and banks located in the Anniston and Jacksonville areas where the withdrawals had been made from Kevin's account. Kevin's debit card was first used at 10:19 p.m. on April 20, 2011, at a drive-up ATM in Jacksonville. The surveillance footage revealed men in Kevin's vehicle at the ATM. The driver, later identified as Nicholas Smith, wore a baseball cap with the letter "A," and the passenger, later identified as Javon Gaston, was holding a rifle pointed toward the backseat at an individual thought to be Kevin. Smith made several attempts to withdraw money before he succeeded. Smith was eventually able to make four successive $100 withdrawals, leaving a balance of approximately $80 in Kevin's account. The footage showed Smith passing money to Gaston, who passed it to someone in the backseat.

After leaving the bank, Smith drove to the drive-up ATM at the Fort McClellan Credit Union. Photographs from the credit union showed that a silver vehicle and a dark-colored sport-utility vehicle arrived shortly after midnight on April 21, 2011. Smith and a second individual were shown at the ATM. Rena was shown the photographs from the credit-union ATM and asked if she recognized anyone in the photographs. Rena identified Thompson as the second man in the footage. Law-enforcement officials interviewed Thompson, who initially denied any knowledge of Kevin's disappearance and admitted only that he met Smith at the credit union after Smith called to ask him how to use a debit card at the ATM.

Meanwhile, law-enforcement officers continued to search for Kevin and his vehicle. They located Kevin's vehicle when the mother of Smith's girlfriend contacted law enforcement after finding in her garage a silver vehicle she believed had been stolen. Smith had taken Kevin's vehicle to her house the night before and had two men removing parts from it. Smith's girlfriend, Jessica Foster, and her friend Whitney Ledlow searched the interior of the vehicle for anything of value. They found a credit card, a gold diamond ring, and a camera. Ledlow later pawned the ring for $200. When Foster's mother saw the vehicle, she told everyone to leave.

Smith, Foster, and Ledlow left and picked up Smith's Ford Explorer sport-utility vehicle they had taken to a nearby detail shop to have the interior cleaned. John Robinson, the owner of the detail shop, testified that, as he was cleaning the vehicle, he noticed several red spots that may have been blood. He, too, contacted law enforcement. After Smith, Ledlow, and Foster picked up Smith's Explorer, they

attempted to return to Foster's mother's house; however, when they arrived, police were at the house. The group did not stop and decided to leave Smith's Explorer in the parking lot of a nearby hospital. Then, the group traveled to Georgia in a borrowed Yukon Denali sport-utility vehicle. Smith bought a plane ticket for a flight that would leave the next day.

The next morning, they drove to the airport where a federal marshal, who had been on the lookout for the group, spotted the Yukon. After following the Yukon for a while, the federal marshal stopped the vehicle, and Smith, Foster, and Ledlow were taken into custody. Ledlow told law-enforcement officials that she had heard Smith talking on the phone to Thompson while they were in the vehicle and that she believed that the victim could be located in the woods off a particular road where he had been thrown over a guardrail.

Based on the information Ledlow provided, law-enforcement officers searched for Kevin along a road in Cherokee County. On the evening of April 22, 2011, they located Kevin's body down a steep embankment. He was not wearing shoes and he had sustained a deep laceration to his throat. Kevin also had suffered four stab wounds to his chest, a hip fracture, and extensive bruising on his face and body; duct tape was around his chin, mouth, and hands. The autopsy performed on Kevin's body confirmed that Kevin died as a result of multiple stab wounds.

Investigators who had responded to Foster's mother's house to retrieve and process Kevin's vehicle found a 1987 Dodge Ram truck in the yard. The truck did not have a motor and appeared to have been there for an extended period of time. One of the investigators noticed a trash bag sitting on a trash pile in the bed of

the truck. Inside the trash bag was an empty brown wallet and various identification cards and credit cards belonging to Kevin. Also inside the trash bag was a plastic bag from Hibbett Sporting Goods, on which Thompson's fingerprint was found.

Smith's Explorer was located nearby in a parking lot. The vehicle was processed, and three areas inside the Explorer tested positive for the presumptive presence of blood. Blood stains from the front side of the rear passenger's seat and the interior panel of the rear passenger's door on the driver's side contained a mixture of DNA, with the major component being that of the victim. A search of the house where Ledlow lived, and at which Smith routinely spent the night, revealed a pair of men's black, Coogi jeans that had dried mud on them. The left and right rear leg of the jeans had Kevin's DNA on them. A pair of white men's boxers containing Smith's DNA was found near the jeans. Inside a trash can, investigators found a steak knife wrapped in a shirt that had blood on it and the victim's DNA. A pair of Air Jordan shoes was inside the trash can, and one of the shoes had the victim's DNA on the outstep of the shoe. A roll of duct tape was also found, which was later determined to share consistent similarities in the manufacturing details of the duct tape found on Kevin's body. The investigation indicated that Smith had stopped at a gas station the night of Kevin's abduction and purchased a roll of duct tape.

After law-enforcement officials connected Smith and Gaston to the crime, Smith and Gaston admitted their involvement in Kevin's abduction; however, both men attempted to marginalize their roles in Kevin's

murder.[3] Thompson was initially arrested for the fraudulent use of Kevin's credit card. During his first interview, Thompson denied any involvement in Kevin's abduction and subsequent murder. While in jail, Thompson indicated that he wanted to speak with Officer Allen George with whom he was acquainted. During interviews with Officer George, Thompson admitted being present during Kevin's abduction and murder but claimed that he was an unwilling participant and placed the blame on Smith and Gaston.

During trial, Cheryl Bush, Thompson's girlfriend, testified that while she was sleeping the night of April 21, 2011, Thompson called her and mentioned "something about a debit card or a credit card." (R. 1670.) Cheryl thought it was odd for Thompson to ask about a card because Thompson did not possess one as far as she knew. Cell-phone records revealed that during the night of April 21, 2011, numerous calls and texts were made among Smith, Thompson, and Gaston. During the attempted withdrawals, Thompson sent the following text messages to Smith: "Have you tried the card yet?" and "Cool, get what you can and we go from there." (R. 1862, 1864.) Cell-phone data indicated that the men appeared to be at the same location during many of these exchanges and that they appeared to be in separate vehicles during

[3] Smith and Gaston were both convicted of two counts of capital murder and sentenced to death. On appeal from their convictions, finding that improper victim-impact testimony was erroneously admitted during the penalty phase, this Court reversed the death sentences and ordered the circuit court to conduct new penalty proceedings. Smith v. State, 246 So. 3d 1086 (Ala. Crim. App. 2017); Gaston v. State, 265 So. 3d 387 (Ala. Crim. App. 2018).

others. From 1:02 a.m. to 5:08 a.m., however, there was no activity on the men's cell phones.

After Thompson's arrest, Bush, Thompson's girlfriend, disposed of Thompson's personal items in a trash can. On April 25, 2011, a law-enforcement official went to Bush's residence and searched the residence, including the trash can. Inside the trash can were several items of clothing, envelopes bearing Thompson's name, citations issued to Thompson by the Anniston Police Department, packaging from a cell phone purchased in February, a receipt from the purchase of a pistol Thompson had purchased two months prior, and bullets. A pair of undershorts containing Thompson's blood was also found in the trash can.

I.

Thompson argues that the circuit court erred when it held a pretrial hearing requiring him to prove his affirmative defense of not guilty by reason of mental disease or defect. Thompson contends that he should have been allowed to present evidence in support of his defense at trial and then have the issue submitted to the jury. Thompson further argues, in the alternative, that the circuit court used the incorrect standard and that he met his burden under the correct standard by presenting some evidence that his mental defect affected his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. This Court, however, disagrees.

> " 'The question of whether there is any evidence to substantiate a plea of insanity is a question of law for the court. Knight v. State, 273 Ala. 480, 489, 142 So.2d 899 (1962); McKinnon v. State, 405 So. 2d 78, 80 (Ala.

Cr. App. 1981). Where there is no evidence to establish the plea of insanity, the trial judge may instruct the jury that there is no evidence which would justify a finding of not guilty by reason of insanity and remove that issue from their consideration. Griffin v. State, 284 Ala. 472, 475, 225 So. 2d 875 (1969); Walker v. State, 269 Ala. 555, 114 So. 2d 402 (1959). "The trial court should not submit the issue of insanity to the jury unless there is evidence to sustain the plea." Darrington v. State, 389 So. 2d 189, 190 (Ala. Cr. App. 1980). Requested charges submitting the defense of insanity to the jury are properly refused where there is no evidence tending to show that the accused was insane. Snead v. State, 251 Ala. 624, 628, 38 So. 2d 576 (1949); Pilley v. State, 247 Ala. 523, 528, 25 So. 2d 57 (1946); Johnson v. State, 247 Ala. 271, 275, 24 So. 2d 17 (194[5]); Johnson v. State, 169 Ala. 10, 12, 53 So. 769 (1910); Connell v. State, 56 Ala. App. 43, 51-52, 318 So. 2d 782, reversed on other grounds, 294 Ala. 477, 318 So. 2d 710 (1974); Smith v. State, 32 Ala. App. 209, 211, 23 So. 2d 615, cert. denied, 247 Ala. 225, 23 So. 2d 617 (1945).

" 'In determining whether there was sufficient evidence of insanity to warrant the submission of that issue to the jury the trial judge must decide if there was any evidence of legal insanity. That is, was there any evidence that the defendant, at the time of the crime, lacked the substantial capacity as a result of mental disease or defect to appreciate the criminality of his conduct or to con-

> form his conduct to the requirements of law. Alabama Code 1975, Section 13A-3-1.[4]'
>
> "Young [v. State], 428 So. 2d [155] at 160 [(Ala. Crim. App. 1982)]."

Flowers v. State, 922 So. 2d 938, 955-56 (Ala. Crim. App. 2005).

Prior to trial, Thompson was evaluated by Dr. Glen King, a clinical psychologist, and Dr. Carol Walker, a neuropsychologist, regarding Thompson's diminished capacity. After a pretrial hearing, the circuit court found that Thompson suffered from an intellectual disability rendering him ineligible for the death penalty. At a later date, the State sought to prevent Thompson from presenting evidence of his intellectual disability to the jury. The State contended that the fact that Thompson had an intellectual disability did not also establish that he was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The State also argued that the defense of diminished capacity to negate an offense's intent was not recognized as a defense in Alabama.

On July 9, 2019, the circuit court held a pretrial hearing to determine whether Thompson would be allowed to present his affirmative defense of not guilty by severe mental disease or defect to the jury. At the hearing, Dr. King testified that Thompson was intellectually disabled but that, in his opinion, at the time of the offense, Thompson "understood the nature and quality of . . . his actions and the wrongfulness of his acts." (S.R. 700-01.) Dr. King testified that he came to this conclusion

> "because of the nature of the offense. It [wa]s premeditated. It was goal directed. It was

> pecuniary interest. The attempt to avoid apprehension and detection. All of those are for me indications of understanding of what you're doing wrong at the time and trying to avoid apprehension and detection."

(S.R. 702.) Dr. King also stated that an individual claiming to be not guilty by reason of mental disease or defect has to admit the conduct and assert that it was mentally defective; Thompson told King that he did not commit the offenses.

Dr. Walker testified that Thompson had an intellectual disability, which is considered a mental defect; however, Dr. Walker would not give an opinion regarding whether Thompson's mental defect prevented him from appreciating the wrongfulness of his action or to conform his actions to the law.

The circuit court disallowed Thompson's mental-defect defense to be presented by the jury. In its order, the circuit court stated, in pertinent part:

> "The testimony of both experts . . . indicated [Thompson] had a mental defect. The mental defect was moderate intellectual disability, which was formerly called mental retardation.
>
> "This Court previously accepted the reports and opinions of the experts and accordingly ruled that [Thompson] had a moderate intellectual disability. The significance of that ruling was that, under the current death penalty law, the death penalty cannot be imposed as a punishment if [Thompson] were to be convicted by a jury.
>
> ". . . .

"Intellectual disability does not equate to insanity under the law. An intellectual disability standing alone is not a defense to criminal conduct. The law requires that the intellectual disability is so severe that it prevents the person from appreciating the nature and quality or wrongfulness of his conduct. [Thompson] has failed to prove by clear and convincing evidence that the jury should consider his insanity defense. Section 13A-3-1 (Code of Ala. 1975).

"Any evidence of mental disability that does not rise to the level of legal insanity does not go to the jury for consideration. This is a matter of law to be decided by the Court. Young v. State, 428 So. 2d 155 (Ala. Crim. App. 1982). 'In determining whether there is sufficient evidence of insanity to warrant the submission of that issue to the jury, the trial judge must decide if there is evidence of legal insanity.' Anderson v. State, 507 So. 2d 580, 1987. There is a two prong test the trial court must use to make this determination: 1) Whether there is any evidence that the Defendant, at the time of the crime, lacked the substantial capacity as a result of mental disease or defect; and 2) Whether the Defendant's mental disease or defect resulted in his lack of ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The Defendant has the burden of proving that the insanity defense should be presented to the jury by clear and convincing evidence. Ware v. State, 584 So. 2d 939, 1991 (Ala. Crim. App.). [Thompson] has failed to prove

> by clear and convincing evidence that the [he] suffers from serious mental disease or defect that prevented him from appreciating the nature and quality or wrongfulness of his acts."

(C. 1141-42.)[4]

Even when the evidence presented is viewed in the light most favorable to Thompson, there is no indication that Thompson's intellectual disability prevented him from understanding the wrongfulness of his conduct. Because there is no evidence to support the defense of not guilty by mental disease or defect, the circuit court did not abuse its discretion in refusing to allow evidence of Thompson's intellectual disability to be presented at trial or in refusing to submit the defense to the jury. Although the circuit court used the "clear and convincing" standard instead of the applicable "some evidence" standard, any error in applying that standard was harmless because, again, there was no evidence to support Thompson's defense of not guilty by reason of mental disease or defect.

Further, to the extent that Thompson sought to use his intellectual disability to negate any intent to commit the offenses, as the State correctly argued at the pretrial hearing, a defense of diminished capacity is not permitted by Alabama law. In Williams v. State, 710 So. 2d 1276 (Ala. Crim. App. 1996), aff'd, 710 So. 2d 1350 (Ala. 1997), this Court stated:

> "The doctrine of diminished capacity provides that evidence of an abnormal mental

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[4] Section 13A-3-1, Ala. Code 1975, provides that the defendant has the burden of proving the defense of insanity by clear and convincing evidence.

> condition not amounting to legal insanity but tending to prove that the defendant could not or did not entertain the specific intent or state of mind essential to the offense should be considered in determining whether the offense charged or one of a lesser degree was committed. 22 C.J.S., Criminal Law § 97 (1989). See also W. LaFave and A. Scott, Substantive Criminal Laws, § 4.7 (1986) (noting that the doctrine of diminished capacity is recognized in some jurisdictions). Alabama has expressly rejected this doctrine. Barnett v. State, 540 So.2d 810 (Ala. Cr. App. 1988); Hill v. State, 507 So. 2d 554 (Ala. Cr. App. 1986), cert. denied, 507 So. 2d 558 (Ala. 1987); Neelley v. State, 494 So.2d 669 (Ala. Cr. App. 1985), aff'd, 494 So. 2d 697 (Ala. 1986), cert. denied, 480 U.S. 926, 107 S. Ct. 1389, 94 L. Ed. 2d 702 (1987). A state is not constitutionally compelled to recognize the diminished capacity doctrine. Campbell v. Wainwright, 738 F.2d 1573 (11th Cir. 1984); Muench v. Israel, 715 F. 2d 1124 (7th Cir. 1983), cert. denied, Worthing v. Israel, 467 U.S. 1228, 104 S. Ct. 2682, 81 L. Ed. 2d 878 (1984); Chestnut v. State, 538 So.2d 820 (Fla. 1989)."

710 So. 2d at 1309. See also Jones v. State, 946 So. 2d 903, 927 (Ala. Crim. App. 2006). In Barnett v. State, 540 So. 2d 810 (Ala. Crim. App. 1988), this Court stated:

> " 'The rule applied in this jurisdiction is sometimes referred to as the "all-or-nothing" approach." Hill [v. State], 507 So. 2d [554,] 556 [(Ala. Crim. App. 1986)]. Under this approach, a 'defendant must either establish

> his insanity as a complete defense to or excuse for the crime, or he must be held to full responsibility for the crime charged.' Annot., 22 A.L.R.3d 1228, § 4 at 1236 (1968)."

540 So. 2d at 812.

Because Thompson did not present evidence sufficient to submit a defense of not guilty by reason of mental disease or defect to the jury and because the doctrine of diminished capacity is a defense not recognized in Alabama, evidence of Thompson's intellectual disability was not relevant to any issue at trial. See Rule 401, Ala. R. Evid. Thus, the circuit court properly refused to allow the admission of this evidence at trial. See Rule 402, Ala. R. Evid. The fact that the circuit court held a pretrial hearing to determine whether the jury would consider the issue is of no consequence. Although a circuit court generally determines during trial whether a defendant has met both prongs of the test required for presentation to the jury, this Court knows of no authority that prevents a circuit court from addressing this matter prior to trial. Further, Thompson has made no specific showing of evidence that he was unable to present prior to trial; therefore, he has not shown how he has been prejudiced by a pretrial determination on the matter. Accordingly, Thompson is not entitled to any relief on this issue.

II.

Thompson argues that the circuit court "deprived [him] of his right to confront witness testimony against him by denying him his right to cross-examine Dr. Ward, the doctor [who] performed and authored the autopsy of Kevin Thompson." (Thompson's brief, at 46.) At the time of trial, Dr. Emily Ward, who

performed the autopsy, had retired and could not be located. The circuit court allowed Dr. Steven Frank Dunton, a medical examiner who had reviewed the report and autopsy photographs, to testify as an expert regarding his independent conclusions as to the cause and manner of death. According to Thompson, he objected to the introduction of the autopsy report without the opportunity to cross examine the doctor who performed the autopsy. Thompson claims that the circuit court should not have allowed Dr. Dunton, who had not performed the autopsy and had not been present during the autopsy, to testify about the report. By allowing Dr. Dunton to testify about the autopsy report, Thompson argues, the circuit court violated the Confrontation Clause.

> "In Perkins v. State, 897 So. 2d 457 (Ala. Crim. App. 2004), we held that it was not a violation of the Confrontation Clause to admit an autopsy report without the medical examiner's testimony or testimony indicating that he or she was not available. We stated:
>
> > " 'In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that the admission of a wife's out-of-court statements to police officers, regarding an incident in which the defendant, her husband, allegedly stabbed the victim, violated the Confrontation Clause. The Supreme Court stated that an out-of-court statement by a witness that is testimonial is barred under the Confrontation Clause, unless the witness is unavailable

and the defendant had a prior opportunity to cross-examine the witness, regardless of whether such statement is deemed reliable by the trial court, abrogating its previous holding in Ohio v. Roberts [, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980)]. While the Supreme Court applied a stricter standard to the admission of testimonial hearsay, however, it did not do so with regard to nontestimonial hearsay, noting:

> " ' "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law — as does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether."

" '541 U.S. at 68, 124 S. Ct. at 1374, 158 L. Ed. 2d at 203.

" 'Unlike the hearsay in Crawford v. Washington, the hearsay at issue in this case is nontestimonial in nature — an autopsy report on the victim, Wysteria Mathews. As the Court noted in White [v. Illinois, 502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848 (1992)]: "[w]here [the] proffered hearsay has sufficient guarantees of reliability to come within a

> firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." 502 U.S. at 356.
>
> " 'Both Alabama and federal caselaw have recognized that the business records exception is a firmly rooted exception to the hearsay rule. See, e.g., McNabb v. State, 887 So. 2d 929, 969 (Ala. Crim. App. 2001); Ohio v. Roberts, 448 U.S. at 66 n. 8, 100 S. Ct. 2531. Moreover, under Alabama law, "An autopsy report made in the regular course of business is admissible under the business records exception.' 2 Charles W. Gamble, McElroy's Alabama Evidence § 254.01(18) (5th ed. 1996) (footnote omitted). See also Adams v. State, 955 So. 2d 1037, 1072-73 (Ala. Crim. App. 2003); Baker v. State, 473 So. 2d 1127, 1129 (Ala. Crim. App. 1984). The results of Dr. Embry's autopsy and the supporting materials are business records, which bear the earmark of reliability or probability of trustworthiness and further the "'integrity of the fact-finding process,' "see Coy v. Iowa, 487 U.S. 1012, 1020, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988) (quoting Kentucky v. Stincer, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987)) . . . ."

"897 So. 2d at 463-65. See Gobble v. State, 104 So. 3d 920 (Ala. Crim. App. 2010); Sharifi

> v. State, 993 So. 2d 907 (Ala. Crim. App. 2008). See also Annot., Evidence — Confrontation Clause — Second Circuit Holds that Autopsy Reports are not Testimonial Evidence — United States v. Feliz, 467 F.3d 227 (2d Cir. 2006), 120 Harv. L. Rev. 1707, 1714 (2007). In Thompson's case, the admission of the autopsy reports, which were nontestimonial in nature, did not implicate the Confrontation Clause or Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Thompson v. State, 153 So. 3d 84, 128-29 (Ala. Crim. App. 2012).

Thompson relies on this Court's holding in Smith v. State, 898 So. 2d 907 (Ala. Crim. App. 2004), in support of his argument that the autopsy report in this case was testimonial. Indeed, in Smith this Court held that the admission of an autopsy report without the testimony of the medical examiner who performed the autopsy was a violation of the Confrontation Clause when the report proved an essential element of the crime charged. Specifically, this Court explained:

> "The cause of death in this case [Smith v. State] was a crucial element of the charge against Smith. Without presentation of testimony from the autopsy regarding the cause of death, the prosecution would have failed to establish an element alleged in the indictment. By introducing the records of the autopsy without providing Smith with the opportunity to cross-examine the one forensic pathologist who had observed the body and its wounds and who had conducted the tests on the body, the prosecution was permitted to

> prove an essential element of the crime without providing Smith with an opportunity to cross-examine the pathologist who originally reached the conclusion that Stumler died of asphyxiation. Under the facts of this case, the Confrontation Clause precluded the prosecution from proving an essential element of its case by hearsay evidence alone."

Smith v. State, 898 So. 2d 907, 917 (Ala. Crim. App. 2004).

Yet, even if an autopsy report is deemed testimonial, the Confrontation Clause may still be satisfied. For example, in Ex parte Ware, 181 So. 3d 409 (Ala. 2014), the State presented testimony of the supervising doctor who reviewed and participated in the testing and analysis of a DNA-profile report. The supervising doctor signed the DNA-profile report and initialed each page for the case file "taking responsibility for the work that resulted in the report and that he had reviewed each of the analyses undertaken." Ware at 417. In Ware, the Supreme Court held that the Confrontation Clause was satisfied, reasoning that the doctor's testimony provided Ware with the opportunity to cross-examine "any potential errors or defects in the testing and analysis, including errors committed by other analysts who had worked on the case." Id.

Initially, this Court notes that the autopsy report was already in evidence before Dr. Dunton's testimony. The autopsy report was admitted, without objection, through the testimony of Gerald Howard, a pathology supervisor who assisted Dr. Ward during the autopsy.

Moreover, there was no violation of the Confrontation Clause. Although another medical examiner

performed Kevin's autopsy and drafted the report, Howard was present and participated in Kevin's autopsy. Additionally, as the supervisor, he reviewed the work and autopsy report before it was released. As in Ware, Thompson had the opportunity to cross examine Howard for "any potential errors or defects in the testing and analysis, including errors committed by other [doctors] who had worked on the case." Thus, the confrontation clause was satisfied, and the circuit court did not err in allowing the admission of the autopsy report. Furthermore, Dr. Dunton testified that, based on his review of the physical evidence documented at the autopsy, he independently determined that Kevin died of multiple stab wounds. Finally, Kevin's cause of death was not in dispute. Thus, even if the circuit court had erred in admitting the autopsy report, the error would have been harmless. See, e.g., Sharifi v. State, 993 So. 2d 907 (Ala. Crim. App. 2008) (holding that the admission of autopsy report, even if error, was harmless where defendant never contested the cause of death, but presented alibi defense); Smith v. State, supra. Thompson is not entitled to any relief on this claim.

III.

Thompson contends that the State was improperly allowed to introduce victim-impact evidence during the guilt phase of the trial. Specifically, Thompson refers to testimony given by Joycelyn Palmore-Haynes, a friend of the victim's mother, in which she described the effect Kevin's disappearance and subsequent death had on Curry, who had since passed away. Palmore-Haynes testified that she was with Curry during much of the time Kevin was missing, and when the prosecutor asked her what effect Kevin's death had on Curry, she testified, over Thompson's objection,

that she "watched [her] friend die [from] the loss of her son." (R. 1076-78.) Thompson argues on appeal that the testimony was not relevant to any material question before the jury and was more prejudicial than probative.

> " ' "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 94th 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 v. State, 187 So. 3d 734, 781 (Ala. Crim. App. 2014).

"This Court has repeatedly refused to find reversible error in the admission of limited victim-impact evidence in the guilt phase of a capital-murder trial." Bohannon v. State, 222 So. 3d 457, 499 (Ala. Crim. App. 2015) (citations omitted). Given the evidence presented at trial and the circuit court's instructions to the jury, this Court concludes that the introduction of Palmore-Haynes's testimony, even if error, did not affect the outcome of the trial or otherwise prejudice a substantial right of Thompson. Thus, any error in the admission of the evidence was harmless. See Shanklin, supra.

IV.

Thompson contends that the circuit court erred when it admitted items[5] found inside a trash can outside the house of Thompson's girlfriend. Thompson argues, as he did at trial, that the items were not relevant to the case and that, even if the items were relevant, their probative value was substantially outweighed by the danger of unfair prejudice.

Rule 401 Ala. R. Evid., defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Although relevant evidence is admissible, Rule 403, Ala. R. Evid., states it "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." "Questions of materiality and relevance of the evidence lie within the sound discretion of the trial court." Smith v. State, 698 So. 2d 189, 206 (Ala. Crim. App. 1996) (citing McMahon v. State, 560 So. 2d 1094, 96 (Ala. Crim. App. 1989)).

The items referenced at trial were part of an inventory of items collected from the trash can during a search for evidence connecting Thompson to the offenses. As Thompson argues, the evidence was not connected to Kevin's murder; however, the evidence was mentioned to show that law-enforcement officers had conducted a search of items belonging to Thompson

[5] The trash can contained, among other things, a pair of boxer shorts with a blood stain, a receipt from the purchase of a handgun, and bullets.

and what items were found. As such, evidence of the search was relevant to demonstrate the thoroughness of the investigation of the crime. Further, Thompson has failed to establish that the evidence's probative value was substantially outweighed by the danger of unfair prejudice. This Court holds that the circuit court did not abuse its discretion in admitting the evidence found in the trash can. Therefore, Thompson is not entitled to any relief on this claim.

V.

Thompson argues that the evidence was insufficient to sustain his convictions. Specifically, Thompson contends that the State failed to prove that he shared Smith and Gaston's intent to murder Thompson.

> "With respect to the sufficiency-of-the-evidence claim, it is well settled that ' "[i]n determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution." ' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). "The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt." ' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). ' "When there is legal

> evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision." ' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990). 'The role of appellate courts is not to say what the facts are. Our role . . . is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Bankston v. State, 358 So. 2d 1040, 1042 (Ala. 1978)."

Williams v. State, 10 So. 3d 1083, 1086 (Ala. Crim. App. 2008).

> "'Circumstantial evidence is not inferior evidence, and it will be given the same weight as direct evidence, if it, along with the other evidence, is susceptible of a reasonable inference pointing unequivocally to the defendant's guilt. Ward v. State, 557 So. 2d 848 (Ala. Cr. App. 1990). In reviewing a conviction based in whole or in part on circumstantial evidence, the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except that of guilt; not whether such evidence excludes every reasonable hypothesis but guilt, but whether a jury might reasonably so conclude. Cumbo v. State, 368 So. 2d 871 (Ala. Cr. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979).'

> "Ward [v. State], 610 So. 2d [1190] at 1191-92 [(Ala. Crim. App. 1992)]."

Lockhart v. State, 715 So. 2d 895, 899 (Ala. Crim. App. 1997).

Thompson was indicted for capital murder committed during the course of a kidnapping, see § 13A-5-40(a)(1), Ala. Code 1975, and capital murder during the course of a robbery, see § 13A-5-40(a)(2), Ala. Code 1975. To sustain convictions for both of those capital offenses under § 13A-5-40(a), Ala. Code 1975, the State was required to prove beyond a reasonable doubt that Thompson committed an "intentional murder," as that term is defined by § 13A-6-2, Ala. Code 1975, during the course of a kidnapping in the first degree, as defined by § 13A-6-43(a), Ala. Code 1975, and during the course of a robbery in the first degree, as defined by § 13A-8-41, Ala. Code 1975. See §§ 13A-5-40(a)(1) and (a)(2), Ala. Code 1975.

Thompson does not dispute that he was with Smith and Gaston on the evening of Kevin's abduction and murder. He claims, however, that he was an unwilling participant to the events. Thus, Thompson does not appear to dispute that Kevin was murdered during the course of a kidnapping and robbery. Thompson contends only that he did not intend for Kevin to be murdered.

Under § 13A-6-2(a)(1), Ala. Code 1975, a person commits an intentional murder if, "with [the] intent to cause the death of another person, he or she causes the death of that person or of another person." When considering whether the State provided sufficient evidence demonstrating the defendant had the requisite specific intent to kill, this Court has stated:

> "'No defendant can be found guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony-murder doctrine.' Ex parte Woodall, 730 So. 2d 652, 657 (Ala. 1998). However, ' "[i]ntent, . . . being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence." ' Seaton v. State, 645 So. 2d 341, 343 (Ala. Crim. App. 1994) (quoting McCord v. State, 501 So. 2d 520, 528-29 (Ala. Crim. App. 1986)). Intent ' " 'may be inferred from the character of the assault, the use of a deadly weapon and other attendant circumstances.' " ' Farrior v. State, 728 So. 2d 691, 695 (Ala. Crim. App. 1998) (quoting Jones v. State, 591 So. 2d 569, 574 (Ala. Crim. App. 1991), quoting in turn Johnson v. State, 390 So. 2d 1160, 1167 (Ala. Crim. App. 1980)). ' "The intent of a defendant at the time of the offense is a jury question." ' C.G. v. State, 841 So. 2d 281, 291 (Ala. Crim. App. 2001), aff'd, 841 So. 2d 292 (Ala .2002) (quoting Downing v. State, 620 So. 2d 983, 985 (Ala. Crim. App. 1993)). Indeed, '[w]hether the accused possesses the intent to cause the death of another person is a matter to be determined by the jury.' Paige v. State, 494 So. 2d 795, 796 (Ala. Crim. App. 1986)."

Morton v. State, 154 So. 3d 1065, 1080 (Ala. Crim. App. 2013). "To affirm a finding of a 'particularized intent to kill,' the jury must be properly charged on the intent to kill issue, and there must be sufficient evidence from which a rational jury could conclude

that the defendant possessed the intent to kill." Gamble v. State, 791 So. 2d 409, 444 (Ala. Crim. App. 2000).

A person may be held legally accountable for the behavior of another which constitutes a criminal offense if, with the intent to promote or assist the commission of the offense, he aids or abets the other person in committing the offense. § 13A-2-23, Ala. Code 1975. "Aid and abet comprehend all assistance rendered by acts or words of encouragement or support or presence, actual or constructive, to render assistance should it become necessary." Turner v. State, 674 So. 2d 1371, 1376 (Ala. Crim. App. 1995) (citations omitted). A defendant's complicity is a question for the jury. Wright v. State, 494 So. 2d 936, 937 (Ala. Crim. App. 1986). In Wigfall v. State, 710 So. 2d 931 (Ala. Crim. App. 1997), this Court stated:

> "An accused's participation can be resolved by the jury through inferences from facts regarding the accused's companionship with the other actors, and the accused's conduct before, during, and after the commission of the act. Watkins [v. State], 551 So. 2d [421] at 423-24 [(Ala. Crim. App. 1988)]. Once a prima facie case is established, the jury's decision concerning the extent of the accused's participation cannot be disturbed on appeal. See Nguyen v. State, 547 So.2d 582, 592 (Ala. Cr.App.1988)."

Wigfall, 710 So. 2d at 938.

Evidence was presented at trial that on April 20, 2011, Thompson called Kevin with whom he was acquainted and then went to his apartment. Thompson brought Smith and Gaston with him, whom Kevin

did not know and did not expect. Apparently, the men's presence made Kevin uncomfortable as his demeanor changed when they arrived at his apartment. Thompson was shown to be present at one of the ATMs when Kevin's debit card was used while Kevin was being held at gunpoint in his vehicle. At one point Thompson drove Smith's Explorer, separate from the others who were in Kevin's vehicle. Thompson remained with the men as the men drove Kevin out of town. During the hours between Kevin's abduction and his murder, Thompson remained with Gaston and Smith and never once attempted to render aid to Kevin. Finally, any contention that Thompson was forced to participate or that he was a victim is made weaker by the fact that Thompson never contacted the police and initially denied any involvement in the crime. Further, Thompson drove Gaston home after the murder and continued to contact Smith. Cellphone records indicated that during one of his interviews with law-enforcement officials, Thompson sent a text message Smith about going to a restaurant later that day.

In viewing the above evidence in the light most favorable to the State, this Court concludes that the evidence was sufficient for the jury to find that Thompson shared a particularized intent to kill Kevin. Therefore, the circuit court properly denied Thompson's motion for a judgment of acquittal.

Accordingly, the circuit court's judgment is affirmed.

AFFIRMED..

Kellum, McCool, Cole, and Minor, JJ., concur.

APPENDIX B

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk

Gerri Robinson
Assistant Clerk

[SEAL]

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March 12, 2021

CR-18-1161

Tyrone Christopher Thompson v. State of Alabama (Appeal from Calhoun Circuit Court: CC11-491)

NOTICE

You are hereby notified that on March 12, 2021, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D. Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Debra H. Jones, Circuit Judge
Hon. Kim McCarson, Circuit Clerk
Adam Banks, Attorney - Pro Hac
Irisa Chen, Attorney - Pro Hac
Jennifer Lau, Attorney - Pro Hac
Benjamin Woodforde Maxymuk, Attorney
Ian Moore, Attorney - Pro Hac
Beth Slate Poe, Asst. Atty. Gen.
Sara Delene Rogan, Asst. Attorney General

APPENDIX C

IN THE SUPREME COURT OF ALABAMA

[SEAL]

May 14, 2021

1200442

Ex parte Tyrone Christopher Thompson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Tyrone Christopher Thompson v. State of Alabama) (Calhoun Circuit Court: CC-11-491; Criminal Appeals : CR-18-1161).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on May 14, 2021:

Writ Denied. No Opinion. Sellers, J. - Parker, C.J., and Bolin, Wise, and Stewart, JJ., concur.

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

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

Witness my hand this 14th day of May, 2021.

/s/ Julia Jordan Weller
Clerk, Supreme Court of Alabama