Rel: October 19, 2018

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

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; Court of Criminal Appeals, CR-12-0197)

BOLIN, Justice.[1]

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[1]Although Justice Bolin was not present at oral argument in this case, he has listened to the audiotape of the oral argument.

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. ___,

[2]At places in the record Erica is referred to as both "Erica Carmen Phillips" and "Erica Droze Phillips."

136 S.Ct. 616 (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 ___ (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 (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.

"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.

"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.)

"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 (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

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:
>
> > "'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.

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.

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, 936 N.E.2d 588, 344 Ill. Dec. 59 (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, 936 N.E.2d at 600, 344 Ill. Dec. at 71. 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, 936 N.E.2d at 600, 344 Ill. Dec. at 71.

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

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.

"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."

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 (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 (1931).' Leary v. United States, 395 U.S. 6, 31-32 (1969); see also Bachellar v. Maryland, 397 U.S. 564, 571 (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, 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 (1931).

> 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 (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 85, 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.

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

[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."

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.

"....

"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."

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

[4]See Tuilaepa v. California, 512 U.S. 967, 972 (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).

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)].
>
> "'"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:

> "'"'"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

s u r r o u n d i n g
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.

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

[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.

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.

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[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.

E. Medical Examiner's Testimony

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 (2011),] and Williams[v. Illinois, 567 U.S. 50, 132 S. Ct. 2221 (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 (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 (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:

> (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 (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. 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 (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. 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.'" 507 U.S. at 311, 317 (quoting Crawford, 541 U.S. at 61).

In Bullcoming v. New Mexico, 564 U.S. 647 (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. 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.

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. 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

[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.

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.

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."

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.
>
> "'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.

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 ___.

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.
>
> "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 (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.

"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 (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. As the Supreme Court explained in Miller-El v. Cockrell, 537 U.S. 322 (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 [(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. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98."

537 U.S. at 328-29.

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.
>
> "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; 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

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 (1986); see also Holbrook v. Flynn, 475 U.S. 560, 567-68 (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

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[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.

> 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."

___ 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

[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).

> 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).

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) (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 (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.

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.'
>
> "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 (1989)(citing Ex parte Bain, 121 U.S. 1, 10 (1887); Stirone v. United States, 361 U.S. 212, 215-17 (1960); and United States v. Miller, 471 U.S. 130, 140 (1985)).

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 (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 (1986); see also Caldwell v. Mississippi, 472 U.S. 320, 328-29 (1985); Ring v. Arizona, 536 U.S. 584, 589 (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 (2016)."

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 (2000)], Ring [v. Arizona, 536 U.S. 584 (2002)], and Hurst [v. Florida, 577 U.S. ___, 136 S.Ct. 616 (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 ___.

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 (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 [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."

Phillips II, ___ So. 3d at ___.

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 (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 (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. 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 [(1976)] (plurality opinion)." Caldwell, 472 U.S. at 330. 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.

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.
>
> "'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 (1985)].' Kuenzel v. State, 577 So. 2d 474, 502 (Ala. Crim. App. 1990) (quoting Martin v. State, 548 So. 2d 488, 494 (Ala. Crim. App. 1988)). See also Ex parte Hays, 518 So. 2d 768, 777 (Ala. 1986); White v. State, 587 So. 2d [1218] (Ala. Crim. App. 1991); Williams v. State, 601 So. 2d 1062, 1082 (Ala. Crim. App. 1991); Deardorff v. State,

> 6 So. 3d 1205, 1233 (Ala. Crim. App. 2004); Brown v. State, 11 So. 3d 866 (Ala. Crim. App. 2007); Harris v. State, 2 So. 3d 880 (Ala. Crim. App. 2007). Such comments, without more, do not minimize the jury's role and responsibility in sentencing and do not violate the United States Supreme Court's holding in Caldwell. Therefore, the circuit court did not err by informing the jury that its penalty-phase verdict was a recommendation."

> "'96 So. 3d at 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:

> "'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 (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 (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

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 (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.
>
> "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. 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 (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 (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 (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:

> "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 (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.
>
> "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.

> "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 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (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 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (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 ('[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. 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 (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. 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. 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:

> "'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 (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, 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

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 (1972)(White, J., concurring), for the proposition that the United States Supreme Court requires

[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, 212 (Ala. Crim. App. 1999) (noting that de novo review applies to issues regarding the constitutionality of a state law).

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)).

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.

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.), 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 ___.

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 (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.

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. 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 (2008).

> "Evaluation of a Batson [v. Kentucky, 476 U.S. 79 (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 [(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. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination. Id., at 98."'
>
> "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

[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 (1991). The denial of counsel, see Gideon v. Wainwright, 372 U.S. 335 (1963); the denial of the right of self-representation, see McKaskle v. Wiggins, 465 U.S. 168, 177-78 n. 8 (1984); the

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 (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

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denial of the right to public trial, see Waller v. Georgia, 467 U.S. 39, 49 n. 9 (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; and the erroneous deprivation of the right to counsel of choice, see United States v. Gonzalez-Lopez, 548 U.S. 140 (2006), are the types of constitutional errors that qualify as structural defects. See also Ex parte McCombs, 24 So. 2d 1175 (Ala. Crim. App. 2009).

reasons for the strikes. Ex parte Jackson, 516 So. 2d 768, 771 (Ala. 1986).

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 (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, 493 U.S. 400 (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).

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 (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 (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 [(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. 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 (footnote omitted)."

(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

[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.

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.

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."'

"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) (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."

(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,

[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.

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 (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. 2d 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 (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.

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 (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 effects 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 (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 (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

[15]See Hamilton v. Scott, 97 So. 3d 728, 737-47 (Ala. 2012) (Parker, J., concurring specially).

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).

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[16]See Washington v. Glucksberg, 521 U.S. 702, 714 (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'").

I. Baby Doe is a Person Under the Brody Act, § 13A-6-1(a)(3), Ala. Code 1975

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.

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,

[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,

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

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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

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.

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

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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.

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."

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

[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.

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

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[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.

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

[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).

> injuries occur after viability, but have not determined whether an action may be brought for injuries occurring before viability.
>
> "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."

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[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").

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

[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).

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

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."

[25]Connecticut repealed its statute, Conn. Gen. Stat. § 19a-574. See 2018 Conn. Legis. Serv. P.A. 18-11 (2018).

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

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[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, 56 N.Y.S.3d 848, 854, 57 Misc. 3d 362, 369 (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)).

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

[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, 263 N.Y.S.2d 366, 179 Misc. 2d 1 (Fam. Ct. 1998); In re Fathima Ashanti K.J., 558 N.Y.S.2d 447, 449, 147 Misc. 2d 551, 555 (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., 476 N.Y.S.2d 991, 998, 124 Misc. 2d 313, 325 (Fam. Ct. 1984); Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson, 42 N.J. 421 (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. Supp. 517 (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).

unborn child.[30] Five states have considered unborn children "victims of abuse or neglect."[31] As one New York court put it decades ago:

> "Interpreting our child abuse and neglect statutes to include the unborn would be consistent

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[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., 476 N.Y.S.2d 991, 998, 124 Misc. 2d 313, 325 (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, 683 N.Y.S.2d 366, 370, 179 Misc. 2d 1, 8 (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., 558 N.Y.S.2d 447, 449, 147 Misc. 2d 551, 555 (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).

> 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., 558 N.Y.S.2d 447, 449, 147 Misc. 2d 551, 555 (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)).

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 (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, and a 'substantial state interest in potential life throughout pregnancy.' 505 U.S. at 876." 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, 975 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

[32]See Gonzales v. Carhart, 550 U.S. 124, 169 (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 (1992),] and Roe v. Wade, 410 U.S. 113 (1973), has no basis in the Constitution.").

by the 'law of the judges.'"[33] In re Winship, 397 U.S. 358, 384 (1970).

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:

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[33]See West Alabama Women's Ctr. v. Williamson, 900 F.3d 1310, 1314 n. 1 (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.')").

> "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 (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

[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 (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. 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 [(2002)]."

543 U.S. at 568. But see id. at 607, 616 (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 (1958) (plurality opinion)." Roper, 543 U.S. at 561.

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

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

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.

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law to unborn children in considering the isolated Roe exception?

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 the main opinion's discussion of the Batson v. Kentucky, 476 U.S. 79 (1986), issue, which aligns our jurisprudence with the majority of federal courts. A Batson claim is a unique type of constitutional claim that, for the reasons set out in the main 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.